Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers Conference and Beyond

Note: This paper has been prepared by officials involved in the constitutional negotiations, under the direction of FFRO and the Department of Justice.

Introduction

This paper is intended to provide Ministers with a review and assessment of the summer’s constitutional discussions, to propose positions and a strategy for the forthcoming First Ministers Conference (FMC) on the Constitution, and to consider various courses of action for handling a constitutional resolution in Parliament this fall and other related matters.

For this purpose, the memorandum is divided into six main sections:

- An overview and general assessment of the mood of the constitutional talks at their conclusion,

- A status report of each of the twelve items on the constitutional agenda, including a proposed federal position at the FMC and a proposed strategy for the FMC,

- A review of the possible packages of constitutional reform which the government might place before Parliament this fall,

- An outline of strategic considerations in the post FMC period,

- A discussion of the continuing information program in support of constitutional renewal, and

- A concluding section.
I. MOOD

As the CCMC entered its final week-long session of the summer, the mood began to shift perceptibly. The impending FMC, the Gallup Poll indicating strong public support in all regions for the People's Package, increasingly unsympathetic press coverage of provincial positions and the leaked Pitfield memorandum which convinced the provinces of the federal government's resolve to act -- all these factors have forced the provinces to recognize the importance of reaching a consensus and the consequences of a failure to agree.

Thus the stakes increased, producing two cross-currents of provincial behaviour. One impulse was to move towards broad interprovincial consensus positions. The other was to re-think certain earlier positions, occasionally undermining a consensus which had been earlier achieved.

The defensive reaction of the provinces in July to the federal government proposals respecting the economic union was replaced in August by an uneasy search for common ground. This is due in part to the eagerness of the provinces to demonstrate to the public that they can reach full agreement -- at least amongst themselves. It is also motivated by the conviction of a number of provinces that if they fail to reach full agreement on a "package" in which there is something of interest for each province, the federal government will act on a limited measure (patriation with an amending formula and a Charter of Rights in areas of federal jurisdiction and possibly in areas of provincial jurisdiction) and the opportunity of securing fundamental change in the Constitution will be lost. There is also a belief that a new opportunity for major constitutional change will not soon be forthcoming after patriation because the federal government will have obtained what the provinces believe it most wants.

This new situation led to a number of developments. There was, it would appear, an over-hasty agreement to ask officials to prepare a legal draft of the Alberta proposal for an amending formula; there are now signs that that consensus may dissolve at the FMC. British Columbia cut the cloth of its Senate reform expectations in the hope of salvaging an element of provincial participation at the centre. Throughout the week, Ontario among others tried to rally provinces around a "package" of proposals in which there was something for everyone and in which, if a province lost on one front (e.g., Alberta on resources), it would gain on another (e.g., the Alberta amending formula). Ontario also sought to bring the provinces around to agreement on the content of the Charter. At the same time, Ontario tried to "distance" itself from the federal government; it announced in plenary session that it had received a legal opinion to the effect that federal action on patriation without provincial consent would be unconstitutional (although it refused to state that it would challenge such action in the courts). In some areas, such as the offshore and communications, all provinces now are of one mind and there is growing resentment at the reluctance of the federal government to accept the majority view.
The role of Quebec remains ambiguous. While Quebec has participated in discussions on all items, it has not on balance been an effective defender of the interests of Quebec; it has not, for example, been aggressive in advocating a veto or special protection for Quebec in the amending formula. There appears to be an assumption that the federal government would not opt for a measure unacceptable to the people of Quebec and that, in the event of unilateral action, the burden of proof that it has not acted contrary to the interests of Quebec would be on the Government of Canada. What this augurs for Premier Lévesque’s approach to the FMC or a provincial election is not clear.

In summary, the federal strategy adopted by Cabinet continued to operate effectively. The provinces are seeking to position Premiers in preparation for the FMC. On balance, it can be concluded that the pressures militating in favour of reaching a consensus are mounting rather than decreasing. However, it is by no means certain that consensus on a significant number of items will, in the end, emerge and there is a possibility that where the provinces do reach full agreement on certain items (e.g., communications), the federal government may not be party to it. The FMC is now generally perceived, at least by the media and the public, to be the culminating point in the negotiating process. The challenge now lies with the federal government to try to bring out the agreement on a package which appears to be within reach and, failing this, to show that disagreement leading to unilateral federal action is the result of an impossibly cumbersome process or of the insensitivity of the provincial governments, and not the fault of the federal government.

II. THE ISSUE.

This section summarizes federal and provincial positions on the twelve items under negotiation as at the end of the August 26th to 29th CCMC meetings, highlights significant outstanding issues and sets out positions that the Prime Minister might adopt at the First Ministers Conference. It then outlines a proposed strategy for the FMC based upon the mood of the August CCMC, the positions on the twelve items at the end of those meetings and the overall strategy for the negotiations developed earlier in the summer. It concludes with an estimate of the position in which the federal government might find itself at the conclusion of the FMC.

The twelve items are not dealt with in the order in which they were originally identified for consideration by the CCMC, but rather in the order proposed for their consideration at the FMC in the Prime Minister’s communication to the Premiers. In order to keep this part as brief as possible, the official report from the CCMC to the FMC is provided for reference (see Annex 3). That report deals with each of the items in greater detail and includes any “Best Efforts Drafts” “Federal Drafts” and “Provincial Drafts”.
1. Charter of Rights

(1) Federal and Provincial Positions

At the direction of CCMC Ministers, a sub-committee of officials met during the week of August 25 to consider:

(a) a revised federal discussion draft Charter dated August 22, 1980, which was prepared in light of concerns raised by provincial officials during the Vancouver meetings;

(b) a provincial draft Charter dated August 28, 1980;

(c) an override (non-obstante) clause in an entrenched Charter;

(d) the possibility of strengthening the Canadian Bill of Rights as an alternative to an entrenched Charter.

Officials discussed these items without prejudice to any province's position on the principle of entrenchment.

The Federal Discussion Draft dated August 22, 1980

Most provinces continued to have some concerns about the federal draft even though a number of significant concessions had been included (revised limitation clause, modification of legal rights, deletion of property rights and delays for Ontario and Manitoba on implementation of provincial language rights).

The Provincial Discussion Draft dated August 28, 1980

Provincial officials met and prepared a joint provincial proposal for a Charter in the event one was to be entrenched. Provincial officials did not consider language rights feeling that further discussion on these rights was required at the Ministers' level.

There was general agreement from all provinces with the federal proposals with respect to the general limitation clause, fundamental freedoms, democratic rights and some legal rights.

The principal changes proposed by provincial officials were:

- deletion of the legal rights and qualification of others by a "lawful grounds and prescribed procedures" test rather than a "reasonable or non-arbitrary" test.

- deletion of non-discrimination rights, the remedies section for breach of rights and mobility rights (provincial officials suggested if the latter category was included in the Constitution it should not be in the Charter).

- qualification of the paramountcy of Charter rights to ensure that admissibility of evidence rules would not be superseded.
The provincial draft was subsequently reviewed with federal officials. Federal officials indicated that a number of changes would be given consideration. However, serious doubts were expressed about the acceptability of some changes proposed in the legal rights category and about the deletions of non-discrimination and mobility rights.

**Legislative Override Clause**

Some doubt was voiced about the desirability of including such a provision, i.e., a provision that would allow Parliament or a legislature to enact a law contrary to the Charter by specifically declaring the intention to override. Many provinces felt they could not respond to this question until they knew what categories of rights would be included in the Charter. There was general agreement that further consideration should be given to this matter. Federal officials raised doubts respecting the necessity for an override clause but suggested that if there should be one, it should be restricted by requirements that any law enacted under an override provision be adopted by a 60% majority of the legislative body and expire after a specified time (e.g., 5 years).

**Strengthening the Canadian Bill of Rights**

In discussion of this matter, federal officials noted that, even if the Bill of Rights was made into a clear statement of effective rights rather than an interpretive statute, these rights would continue to apply only at the federal level, would not cover the range of rights contemplated in the draft Charter and would not guarantee basic rights to persons across Canada.

**Ministers' Discussions**

Ministers agreed to refer the report of the sub-committee of officials to First Ministers.

Ministers also indicated their position with respect to entrenchment of a Charter. Canada, New Brunswick, Newfoundland and Ontario indicated agreement with entrenchment, Ontario specifying they agreed with a limited Charter, and other provinces indicated they opposed an entrenched Charter.

Language rights, mainly minority education language rights, were briefly discussed. The principal participants were Canada, Quebec and Ontario. Quebec held to its current position, Ontario indicated willingness to entrench minority education rights. Other provinces remained silent and likely hold to the positions they put forward at earlier meetings. Some provinces, notably New Brunswick, Ontario, Prince Edward Island and Newfoundland favour entrenchment, but nearly all others feel the Pepin-Robarts approach of provincial legislation is the only acceptable route.
**Significant Issues**

While progress at the August 26th to 29th meetings was significant, there remain areas of fundamental difference between the federal position and that of some or all of the provinces. One of these is highlighted by the position from the provincial draft of any reference to non-discrimination rights. The provincial proposal to deal with mobility rights in the context of the economic union is undoubtedly motivated by their view that the federal government is much more likely to proceed this autumn on a Charter of Rights than it is on an economic union provision. Finally, undoubtedly the most significant issues remain the concept of entrenchment and the question of language rights.

**FMC Position**

At the FMC the following adjustments in the federal position are recommended:

(a) Legal Rights: modifications to the language of some legal rights in light of the provincial concerns, development of a provision to preclude courts from adopting American jurisprudence excluding illegally obtained evidence in all cases, withdrawal of the invasion of privacy right and the right of a witness to consult counsel.

Possible further modifications to certain legal rights - replacing the test of "unreasonable" or "arbitrary" with a "lawful grounds and prescribed procedures" test so that the "right against arbitrary detention or imprisonment" would be changed to a "right not to be detained or imprisoned except on lawful grounds and in accordance with prescribed procedures".

Possible withdrawal of the "right to be tried within a reasonable time";

(b) Non-discrimination Rights: re-definition of this category of rights and possible withdrawal in face of continued provincial opposition;

(c) Provincial Language Rights: in order to meet concerns of Ontario, possible further concessions to Quebec, New Brunswick, Manitoba and Ontario in implementation of language rights in courts, e.g., possible implementation on a regional basis where numbers warrant. This offer would only be made if Ontario did not feel that the offer of a ten-year delay was sufficient. Ontario did not give a firm answer on the ten-year delay at the CCMC meeting.

(d) Minority Language Education Rights: possible offer to Quebec of a delay period of up to ten years to give effect to minority language education rights.
(e) Override Clause: possible inclusion of an override clause whereby a legislative body could expressly provide that a law would operate notwithstanding certain Charter Rights. Fundamental freedoms, democratic rights and language rights would not be subject to this override clause. In the event that it is decided to include an override clause, it could be made subject to such requirements as a 60% majority vote of the legislative body and an automatic expiry of any law enacted after a specified time period, e.g., five years.

2. Equalization

(1) Federal and Provincial Positions

All governments support a constitutional statement of the principle of equalization, and all but British Columbia agree to the entrenchment of a system of equalization payments to needy provincial governments.

(2) Significant Issues

During the brief Ministerial review of this item at the CCMC, B.C. made a substantive move to resolve the equalization payments issue by proposing an alternative formulation of this provision. B.C.'s formulation would commit the federal government to "taking such measures as are appropriate" to ensure the provinces are able to provide essential public services without imposing an undue burden of provincial taxation, but would not specify any such measures. Perhaps due to some extent to the limited time available for consideration of the B.C. text, the other governments continued to split their support between the previous proposals by Quebec and by Manitoba and Saskatchewan, with the federal government expressing a preference for the Quebec version.

(3) FMC Position

Closer examination of the B.C. proposal reveals that it would be acceptable to the federal government as well. Indeed, it might be desirable to be accommodating to B.C. on this item to soften somewhat the sense of isolation that province will be feeling as a result of the lack of support for the "fifth region" principle. Accordingly, the federal government can demonstrate flexibility on this item at the FMC, indicating that it is prepared to support any of the formulations now on the table which captures broad support among provinces.
3. **Powers Over the Economy**

(1) **Federal and Provincial Positions**

On this item, which centres around the issue of Canada as an economic union, the federal government has made good progress over the summer. Ministers and officials have insisted that the constitutional safeguarding of the economic union is a fundamental aspect of constitutional reform. There is no question that the federal position on economic union has captured public support and has thereby put the provinces on the defensive.

The federal government's initial proposal had three elements:

(i) inclusion of mobility rights in the Charter of Rights (see item 1 in this section);

(ii) strengthening section 121 to prohibit discrimination in law or practice based on province of residence of persons and province of origin or destination of goods, services and capital subject to limited derogations;

(iii) making explicit federal jurisdiction under subsection 91(2) to regulate trade and commerce in services and capital as well as goods, to regulate competition, and to set product standards.

The first weeks of negotiations were devoted to heated debate not only about the federal proposal tabled in Montreal but also about the propriety of the federal government's introducing the subject matter at all. During the August week, the debate had shifted - at least at the officials' level - to the best mechanism to enforce the principle of non-discrimination to be incorporated in section 121. The principle now appears to have been accepted by all governments. While discussions on subsection 91(2) were more cursory, the provinces - at least at the officials' level - expressed some sympathy for the federal position on competition and product standards, while expressing concern about the effects of the changes proposed on existing provincial jurisdiction. The provinces were more suspicious of federal intentions re the explicit extension of the trade and commerce power to services and capital.

The federal government has maintained at the August meeting its position that the new section 121 which would entrench the economic union principle should be enforced by the courts. At the same time discussions have been steered toward finding a combined judicial and political mechanism which would permit some flexibility in dealing with derogations from the principle. It should be noted that provisions to that effect contained in the two enforceable new
drafts of section 121 included in the report to First Ministers were devised by provincial officials and put in at their suggestion. The federal government also tabled during the August meeting new legislative texts regarding competition, product standards and the regulation of trade and commerce in services and capital to meet some provincial concerns, but discussions of these new drafts have remained inconclusive.

(2) Significant Issues

Regarding section 121, the main area of contention is now clearly the manner of review of derogations from the economic union principle. It became apparent toward the end of the final week of CCMC negotiations that there is a strong possibility of agreement by most if not all provinces if the review mechanism is largely political rather than judicial, thus allowing what is regarded as greater flexibility in application of the principle.

As for proposals relating to subsection 91(2), the provinces very much remain to be persuaded that they should be entertained at this time. Chances of doing this appear somewhat better for product standards and competition than for the extension of the trade and commerce power to services and capital. At the same time, the possibility emerged during the August week that provincial accommodation on competition could make the federal position more flexible on communications.

(3) FMC Position

At the FMC, the federal position on section 121 could be modified to accept a form of political review of derogations. The connection between this item and the proposal relating to an interim intergovernmental council that is developing on the Senate/Second Chamber item, is obvious. If an intergovernmental council is not established, the form of political review might be left to agreement expressed by individual governments within a limited timeframe.

On other elements, the federal FMC position could be to stand firm on product standards, to establish a link (at least initially) between competition and communications, and to reluctantly agree, under pressure from the provinces, to postpone consideration of the extension of the trade and commerce power to services and capital.

4. Resources and Interprovincial Trade

(1) Federal and Provincial Positions

Over the first three weeks of the constitutional negotiations, the federal government succeeded in linking the issues of natural resources and powers over the economy (referred to as "economic union"). From the beginning of the negotiations it was made very clear to the provinces that progress on resources was completely dependent upon progress on constitutional entrenchment of an operative provision to safeguard the economic union.
The initial federal position on resources was to withdraw any indication of support for the February 1979 "Best Efforts Draft". The federal government offered instead to confirm provincial ownership and management of resources and to extend to the provinces the power of indirect taxation on resources, but disassociated itself from sections of the "Best Efforts Draft" which would give the provinces concurrency in interprovincial and international trade with qualified federal paramountcy, and restrict the federal declaratory power.

During the fourth week of negotiations in Ottawa, the federal government made a new offer on resources which, in addition to confirmation of ownership and management of resources and power over indirect resource taxation, would also give the provinces concurrency with unrestricted federal paramountcy over the export of resources to another province, contingent, again, on progress on powers over the economy. It should be noted here that the offer is less than concurrency over all of interprovincial trade as it is restricted to the "export" from a province and does not include imports into a province.

This offer was well received by the provinces but there was a lot of pressure to extend the concurrent jurisdiction to certain aspects of international trade, but not including international trade agreements.

(2) **Significant Issues**

In general, the strongest opposition to the federal position is coming from the western provinces. As noted above, the major issue on this item continues to be the linkage with powers over the economy. As well, some provinces are pressing for concurrent jurisdiction in respect of certain aspects of international trade. In addition, Alberta will continue to seek limitations on federal paramountcy over interprovincial trade, a position that was on the table in February 1979. Alberta may find itself isolated on this position if the issue surrounding international trade can be resolved.

(3) **FMC Position**

It is clear that no agreement with the western provinces or this item will be possible at the First Ministers Conference without extending concurrency with federal paramountcy to certain aspects of international trade in resources. Acceptance of this principle will most probably mean an agreement with almost all provinces and will still be very much less than what was contemplated in February 1979.
5. Senate/Second Chamber

(1) Federal and Provincial Positions

During the July meetings of the CCMC when significant movement towards a consensus among the provinces was achieved on this subject, two basic roles for a renewed federal second chamber were identified: (a) the ratifying of federal action on a limited list of specified matters of joint federal-provincial concern and (b) a general parliamentary review function involving a suspensive veto.

During the August 26-29 meetings of the CCMC substantial further progress was made towards a general consensus. Recognizing that there was insufficient time prior to the First Ministers' Conference to work out all the details concerning definition of powers, membership, voting and procedures for both sets of functions, the Ministers agreed to concentrate upon working out the institutional framework appropriate for the first role, the ratifying function. By the end of the meeting they had agreed upon the submission to the First Ministers' Conference of a preliminary draft proposal for a council to perform this role. The proposal was to be submitted as an interim institutional framework for dealing with the ratifying function. The general support for an interim solution of this limited nature to be included in the initial package of constitutional revision was conditional, however, upon a commitment that this would be recognized as only a first step towards the broader and urgent question of second chamber reform.

The essential character of the proposal is the establishment of a council, which might be called the Council of the Provinces, composed of 30 members, 3 for each province, appointed at the pleasure of the provincial governments, but with each province casting a single block vote, whose powers would be limited to ratifying the following federal actions in matters affecting the provinces:

(a) the exercise of the declaratory power;

(b) the spending power in areas of exclusive provincial jurisdiction;

(c) the exercise of the emergency power;

(d) federal legislation administered by the provinces;

(e) approval of appointments to certain federal boards, agencies or commissions;

(f) any additional matters which might subsequently emerge as appropriate during the course of the overall process of constitutional review.
The precise definition of the ratifying powers proposed is set forth in Annex 1. Because the role of the proposed Council is solely that of ratifying federal initiatives, and the federal government would thus control the agenda, voting representation for the federal government was considered inappropriate. Provision is included, however, for non-voting participation by federal Cabinet Ministers as spokesmen. Ratification would normally require two-thirds of those voting, except that where a matter coming before the Council is related to the French language or the French culture, the two-thirds majority would have to include the affirmative vote of Quebec. The proposal would not require any modification at this time to the existing Senate.

This proposal indicated the general support of the CCMC without all its members subscribing to every detail. Among the provinces the most notable shift in position was that of B.C., which began the week presenting new proposals. It abandoned its insistence upon a five-region basis of representation and concluded the week by supporting the CCMC proposal for an interim solution. This support was, however, conditional upon a commitment that the proposed council would represent merely a first step towards a broader second chamber reform. Furthermore, B.C. left no ambiguity that without this minimum first step on second chamber revision, at the First Ministers Conference, it would withhold approval on all the other eleven items under discussion. Saskatchewan supports the proposal strongly because it meets their basic objectives. Ontario also supports it strongly, not only because it meets some of their objectives, but also from a desire to ensure B.C. support for a negotiated solution at the First Ministers Conference. Manitoba and the Atlantic provinces, except New Brunswick, support the proposal, but their support is tempered by a strong concern that the broader second chamber reform left to a subsequent stage may never come to fruition. Alberta has taken a non-committal position on the proposal. While Quebec has participated fully and co-operatively in the discussions, indications were given that in their view, action in this area is not appropriate until the distribution of powers issues have been resolved. Premier Hatfield representing New Brunswick feared that the new council might become a body within which provinces would squabble with each other rather than with Ottawa and disliked the requirement of only Quebec being included within the two-thirds majority vote on issues related to French language or culture on grounds that New Brunswick also had a large French-speaking population.

(2) Significant Issues

It should be noted that many of the provincial delegations, and particularly B.C., Ontario and Prince Edward Island, were extremely critical and indeed resentful of the failure of the federal government to bring forward concrete proposals or responses on this subject during the CCMC meetings. A number emphasized the importance of a clear federal position on this subject at the FMC meeting in September if the good faith of the federal government in the negotiations was not to be disputed.
(3) FMC Position

The position arrived at in the CCMC proposals provides a good setting for the Prime Minister to agree at the First Ministers Conference to an "interim solution" and to bring forward his own proposal. This proposal could be a modified version of the CCMC one with the following possible modifications:

(a) Modifications to the wording of the ratifying powers (as listed in Annex 1) where appropriate, following careful study by federal government lawyers. For example, the definition of the emergency power, and the scope of federal legislation "administered" by the provinces will need special attention. As presently defined in the proposal, the federal spending power in areas of provincial jurisdiction is defined in very narrow terms, but some premiers will no doubt attempt to expand it to apply in areas of concurrent jurisdiction (footnote 1 of Annex 1) or to payments to individuals or institutions (footnote 3 of Annex 1).

(b) The addition to the council's role of the function of approving federal or provincial derogations from s.121, and with this consequent appropriate modification in membership and voting procedures of the council. If this function is added to meet Saskatchewan's desire for a political mechanism for s.121, it would be appropriate to propose a voting federal membership. The voting requirement might be (following the Australian Loan Council precedent) a majority, with each province having one vote and the federal government 2 votes plus a casting vote (so that the federal government supported by 4 provinces would have a majority or 7 provinces would have a majority). (Alternatively, this function might be met by requiring the assent of the federal government plus a majority of provinces containing a majority of the Canadian population.) In view of the changes involving the inclusion of voting federal representatives, the title of the council might be changes to Federal Council.

(c) If the special voting requirement in instances relating to "French culture" is to be retained, a more precise legal definition will need to be offered.

(d) The inclusion of a provision that this council would lapse after five years might be suggested. This would make clear its interim character and would put pressure upon governments to reach agreement on a more permanent arrangement for the broader issue of second chamber reform within a fixed period.

The offer of an "interim solution" in this form would indicate the good faith of the federal government in proceeding with action in this area, while retaining wide freedom to manoeuvre on the broader issue of Senate reform during later constitutional discussions. The major public criticism is likely to centre upon it as a "third" institution, but this might be reduced by emphasizing its role as a formal extension of, but not a substitute for, First Ministers Conferences.
6. Fisheries

(1) Federal and Provincial Positions

(a) Federal

During the CCMC negotiations, the federal government's position was:

(i) for marine fisheries a specific proposal was introduced providing for a constitutional provision for mandatory consultation, to be accompanied by federal-provincial agreements setting out the procedures for such consultations;

(ii) to agree to transfer to the provinces jurisdiction over inland fisheries, subject to protection of the rights of the native peoples and of federal capacity to make laws for the protection and enhancement of fish habitat in interprovincial and international waters and in respect of "anadromous" species such as salmon;

(iii) to agree to transfer to the provinces jurisdiction over "fish farming" (aquaculture) and over immobile coastal species such as oysters;

(iv) to reject the idea of shared jurisdiction over marine fisheries or over anadromous species such as salmon.

At the end of the August CCMC session, federal Ministers tabled a legislative "discussion draft" illustrating the direction of federal thinking on these issues. Ministers agreed that this draft could go forward for the consideration of First Ministers, but that the federal government would not consider itself bound by the fine details of the draft.

(b) Provincial

(i) Marine Fisheries

Nova Scotia supports the federal position which favours the interests of the far-ranging fleet of that province. The other provinces support the Newfoundland proposal for concurrent jurisdiction, with federal paramountcy over conservation, enforcement and international relations and provincial paramountcy over matters of primarily local impact; although B.C. in principle continues to favour exclusive provincial jurisdiction.

The federal proposal for mandatory consultation received some support, although a number of provinces made it clear that consultation could not be accepted as a substitute for a transfer
of jurisdiction. At the Plenary session, the Ministers of Newfoundland and B.C. spoke against the inclusion of a consultation clause in the Constitution.

(ii) Inland Fisheries

While the provinces generally welcome the federal willingness to transfer jurisdiction, a number of problems remain. There is strong resistance to the federal proposal to retain jurisdiction over "fish habitat" in trans-boundary waters and salmon streams, on the ground that environmental and resource management should be an exclusive provincial responsibility. On the politically sensitive question of Indian food fishery rights, the federal representatives have suggested a constitutional guarantee along the lines of the 1930 Natural Resource Transfer Agreements, but with provision for a reasonable degree of provincial regulation in the interests of conservation. The provinces have reserved their position on this issue. We expect, however, that there may eventually be some objections to the federal proposal, both because some provinces may consider that it gives an undue priority to native people and because a clause of this kind could be regarded as an interference with provincial "property" rights in the resource.

It should be noted that during the July talks, some provinces expressed concern about the continuation of federal research efforts in the area of inland fisheries, since federal representatives indicated that this research could not be taken for granted in the event of a transfer of jurisdiction. Finally, it is possible that some of the smaller Atlantic provinces might wish the federal government to continue its administrative and enforcement responsibilities, and this matter has not been resolved.

(iii) Immobile Coastal Species ("Sedentary" Species)

The provinces welcome the federal willingness to transfer exclusive jurisdiction over these species, although the question of the precise areas to which provincial jurisdiction would extend has not yet been resolved. A problem, however, has emerged with respect to jurisdiction over marine plants which are commercially harvested. During the July discussions, the federal representatives agreed to examine the possibility of a transfer of jurisdiction over marine plants but concluded, on further consideration, that this would be unwise because of the impact of this resource on other aspects of fisheries management. B.C. appears to attach some importance to this issue.
(iv) Anadromous Species (Salmon)

The majority of the provinces, again with the important exception of Nova Scotia, oppose the federal position of retaining exclusive jurisdiction over these species in inland waters, and seek a form of shared jurisdiction with a very limited federal role.

(2) Significant Issues

The key issues at this point are:

(a) Marine fisheries where we understand that the areas most central to the aspirations of many of the coastal provinces are jurisdiction over licensing and, to a lesser degree, the allocation of catches within each province's fishing fleet;

(b) The native rights question which cannot be assessed adequately at this time because of the inconclusive reaction of the provinces;

(c) the "fish habitat" and salmon issues.

(3) FMC Position

With respect to marine fisheries and salmon, in view of Nova Scotia's strong opposition to a transfer of jurisdiction to the provinces, it does not appear that any change in the federal position of refusing to consider a transfer of jurisdiction should be considered at this time. The mandatory consultation proposal that has been offered should perhaps be reconsidered and withdrawn if B.C. and Newfoundland continue to oppose its inclusion in the Constitution.

At the very end of the negotiations, B.C. floated a new proposal: that where more than one province is involved in a fishery, a transfer of concurrent jurisdiction would be effected upon a petition by all provinces involved to the Parliament of Canada. This was clearly an effort to find a formula to allow B.C. to acquire jurisdiction despite the opposition of Nova Scotia to a change on the east coast. It is conceivable that the proposal could be utilized at the First Ministers Conference to soften Nova Scotia's position. This is not recommended since Newfoundland indicated it would not be acceptable.

The federal proposal on "fish habitat" jurisdiction in interprovincial and international bodies of water is strongly opposed by the provinces. A possible fallback position would be to restrict federal jurisdiction to cases of "urgent national necessity" where provincial action has proved ineffective.

On the Indian food fisheries question, the provinces may contend that this should be deferred to a later stage in the constitutional negotiations; or alternatively that there should be a simple "non-projudice" clause instead of a guarantee. Such proposals should be resisted since they would leave the Indians with little protection and the federal government with little leverage on the issue.
7. Offshore Resources

(1) Federal and Provincial Positions

Background

Throughout the three weeks of discussions in July, all provinces supported the principle that "offshore resources should be treated in a manner consistent with constitutional provisions for resources onshore". Most provinces interpreted this principle as including the transfer of ownership. Mr. Chrétien rejected both the principle of "consistent treatment" and the idea of transferring ownership. He argued in favour of administrative arrangements, but no specific proposal was put forward, at that time.

(a) Federal

At the August 26th to 29th meeting of the CCME, the federal government tabled a proposal on administrative arrangements, which would be confirmed in the Constitution. Its main features can be summarized as follows:

(i) Revenue Sharing: a coastal province would receive 100% of "provincial-type" offshore resource revenues such as royalties, fees, rentals and payments for exploration or development rights, until it became a "have" province; beyond that point, a province would receive a decreasing proportion of these revenues. The federal proposal includes a principle under which the offshore revenue raising system would be designed to capture a high proportion of the economic rent, comparable to the approach of the western provinces.

(ii) Management: bilateral joint bodies would be responsible for overall management of the offshore, including day-to-day administration and would be composed of three provincial and three federal representatives, and a neutral chairman; in particular on the important question of pace of development, the joint bodies would be required to respond to provincial concerns, up to the point where the national interest would be affected, in which case it would prevail.

(iii) Legislation: the joint bodies would be responsible for administering the federal legislation setting out the national energy policy.

(iv) Constitutional Confirmation: a way would be found to provide constitutional confirmation of the proposal.

(b) Provincial

Essentially, the provinces rejected the federal proposal on the grounds that it violated their "consistent treatment" principle, with regard to both the revenue sharing proposal and the extent of provincial control.
(2) **Significant Issues**

The provinces are continuing to exhibit a unanimous front on this item, although some press the "consistent treatment" concept with much more vigour than others. Since the provincial position will continue to be unacceptable to the federal government, the challenge remains to be to find some middle ground that will be attractive enough to some coastal provinces to break the provincial front.

(3) **FMC Position**

At the FMC, it is proposed that the federal position remain the same on the question of revenue sharing and on the question of management. Concerning constitutional confirmation, it is suggested that the federal government continue to avoid putting forward a precise idea on how to achieve it, until such time as agreement has been reached on administrative arrangements.

On the other main element of the proposal, i.e., legislation, it would seem essential, if there is to be any possibility of reaching agreement with the coastal provinces, that the federal proposal be modified to give greater recognition to provincial desires for a significant voice in managing the offshore. It is recommended that the federal government, at the FMC, state its recognition of this provincial interest and its own desire to find a reasonable solution. It would note, however, that it is not possible at the conference to work out all the details of the legislation and regulations which will be necessary. It would offer, therefore, to add a new principle to its proposal on the table to the effect that:

"The legislation and regulations to govern the offshore (and to be administered by the joint bodies) should as far as possible be agreed upon by the federal government and the province concerned, bearing in mind that they would have to incorporate the national energy policy and other important provisions of national interest."

It is expected that, initially, the provinces will continue to reject the federal proposal. But towards the end of the conference, there is some likelihood that the three Maritime provinces will accept it, and a distant possibility that Newfoundland might go along. If Newfoundland did accept, all other provinces would follow.

It is also suggested that the chances of agreement could be somewhat enhanced, and the apparent generosity of the federal proposal before the public considerably enhanced, if the federal government were to offer the coastal provinces ownership (or full control in some other form) of the offshore resources lying inshore of the 12-mile limit. This proposal would be of very special interest to British Columbia.
8. **Communications**

(1) **Federal and Provincial Positions**

(a) **Federal**

At the beginning of the CCNC meeting of August 26-29, the Honourable Jean Chrétien tabled a proposal which integrates the four sectors on which the discussions on communications have centred, i.e., the frequency spectrum, telecommunications carriers, cable and broadcasting.

The following are the main features of the federal position:

**Frequency Spectrum**

The frequency spectrum would remain federal. Federal officials expressed the intention that this jurisdiction would not be used in such a way as to frustrate provincial jurisdiction over telecommunications undertakings but the intention was not effectively made explicit in the draft.

**Telecommunications Carriers**

Federal jurisdiction over interprovincial and international activities of telecommunications carriers would remain and be made more explicit. (Some provincial officials argue that it would be expanded.) The technical aspects of carriers would be federal. The provinces would regulate generally the undertakings within the province of telephone companies.

**Cable**

Cable undertakings, whether receiving broadcasting or closed circuit, would be under exclusive provincial jurisdiction subject to exclusive federal jurisdiction over non-Canadian programming. Priority of access would be ensured for national program services as defined from time to time by Parliament.

**Broadcasting**

No changes in jurisdiction would be envisaged on broadcasting, i.e., it would remain under federal jurisdiction.

In addition, federal officials proposed a joint federal-provincial mechanism to regulate interprovincial telecommunications services. They indicated a willingness to recommend that such a new mechanism be confirmed in the Constitution.

(b) **Provincial**

The Honourable G. Mercier of Manitoba also tabled an integrated proposal at the opening of the August CCNC session which he indicated was supported by all provincial governments.
With respect to the original four headings examined by officials, the provincial proposal would have the following effects:

**Frequency Spectrum**

It would provide for concurrent jurisdiction in an area which is now exclusively federal.

**Telecommunications Carriers**

It would provide for concurrent jurisdiction with provincial paramountcy, including provincial paramountcy over federal carriers (CNCP, Telesat and Teleglobe) and interprovincial and international rates and services.

**Cable**

It would transfer almost all jurisdiction to the provinces, except over reception of CBC and foreign broadcast signals.

**Broadcasting**

It would provide for concurrent jurisdiction with provincial paramountcy, except over CBC and CTV where there would be federal paramountcy.

The provincial proposal also provides for unimpeded "free flow of information" with a federal role to resolve conflicts only upon a province's request.

(2) **Significant Issues**

The basic philosophic approaches of the two levels of government are in opposition to each other.

The federal position is based on the view that there is a national dimension to telecommunications which requires that the regulation of its interprovincial aspects be subject to exclusive federal jurisdiction, and that broadcasting should be regulated as a single integrated system and be subject to exclusive federal jurisdiction.

The provinces' position is based on their perception of telecommunications including broadcasting as being primarily local or regional in nature, serving communities of interest, with local and provincial cultural and economic goals being directly affected by the nature of these services. In the areas of interprovincial and international telecommunications, their proposal is for concurrent jurisdiction with provincial paramountcy, except for federal paramountcy in certain limited areas of national concern.

Because of these fundamental differences, it is doubtful if the two positions can be reconciled unless there is a significant change by either or both levels of government.
(3) *FMC Position*

Ministerial guidance is requested with respect to whether or not the federal government wishes to reconfirm the federal offer as stated, which would almost certainly lead to an impasse, or whether Ministers are prepared to consider further changes to the offer expressed, in the hope that agreement can be reached on this item.

Ministers are requested to decide on the following:

**Interprovincial Rates and Services**

The federal proposal confirms exclusive federal jurisdiction over interprovincial services of telecommunications carriers. Should this be modified by proposing that the provinces have jurisdiction in this area (including interprovincial and/or international rates) and the federal role be exercised only in situations where it is necessary in order to safeguard essential national concerns? These could be identified as the orderly development of communications, the economic union or the national interest. The answer to this is of vital concern to all provinces.

**Broadcasting**

Should constitutional jurisdiction over some elements of broadcasting be offered, e.g., educational broadcasting (of interest to several provinces) either commercial or non-commercial or both, or local commercial broadcasting (of interest only to a few provinces)?

**Non-Canadian Programming**

Should the federal proposal for exclusive federal jurisdiction over non-Canadian programming be reasserted or limited to foreign broadcast signals (as suggested by the provinces)?

**Free Flow of Information**

The binding principle of free flow of information was introduced in the provincial draft. Should this or a similar concept be introduced in the federal draft or elsewhere in the Constitution? The principle is, of course, inherent in the federal "national dimension" and "single system" concepts.

**Spectrum**

With respect to the frequency spectrum, officials are currently seeking appropriate words to frame the exclusive federal jurisdiction in a manner such that it will not frustrate the exercise of provincial jurisdiction over telecommunications works and undertakings.
9. Family Law

(1) Federal and Provincial Positions

The family law proposals agreed to at the February 1979 Conference were as follows:

(i) legislative jurisdiction over marriage should be transferred to the provinces;

(ii) legislative jurisdiction over divorce grounds should be concurrent with provincial paramountcy, but the provinces would have exclusive jurisdiction in relation to alimony, maintenance, custody, and other relief ancillary to divorce;

(iii) Parliament should have exclusive legislative jurisdiction over recognition of divorce decrees and the jurisdictional basis upon which the courts grant decrees;

(iv) provinces should be given power to confer upon provincially-appointed judges jurisdiction in all family law matters.

As a result of the July-August CCMC meetings two changes have been made in the family law proposals, both at the request of the federal government. One relates to the enforcement of maintenance and custody orders and the other to the recognition of nullity decrees and the jurisdictional basis upon which they are granted.

Many groups across the country have forcefully expressed concern that giving exclusive jurisdiction to the provinces over maintenance and custody orders would worsen an already unsatisfactory state of enforcement of those orders. In an effort to meet that concern two main options were discussed with the provinces;

(i) giving to Parliament total power over enforcement, and

(ii) a constitutional provision that would require enforcement of those orders across the country.

Manitoba proposed at the Toronto CCMC meeting that federal jurisdiction be expanded to cover all maintenance and custody orders. P.E.I. supported the position but the other nine jurisdictions opposed it. The reluctance of provinces to increase federal power in the area turned the discussions to the development of a constitutional provision. Quebec and Ontario, preferring to have enforcement exclusively provincial, initially resisted, but eventually joined a broad consensus on a draft that embodies the following principles:

(i) Maintenance and custody orders made anywhere in Canada have legal effect throughout Canada:
(ii) These orders may be enforced throughout Canada by the simple expedient of registration.

(iii) Provision be made for the provinces to make laws providing for the variation and non-enforcement of orders by reason of a change in circumstances and for the non-enforcement of orders on the grounds of public policy or lack of due process of law.

Nine jurisdictions are in favour of the enforcement provision. Manitoba and P.E.I. support the first two principles but reject the variation and non-enforcement clause as being too broad a derogation from the enforcement principle.

The second change retained for Parliament exclusive authority with respect to the recognition of nullity decrees and the jurisdictional basis upon which they are granted. This parallels for nullity what is done with respect to divorce in the February 1979 "best efforts draft" and is made for the same reasons i.e. to prevent "limping" marriages where parties are considered to be married in one province and not in another, and to prevent "forum shopping" by parties. The purpose is to ensure to the greatest extent possible that, where a court of a province with which the parties are connected pronounces on the status of the parties, the pronouncement will be recognized by other provinces and therefore have full effect throughout Canada.

All governments supported the change although Manitoba and P.E.I., being opposed to the transfer of marriage and divorce to the provincial jurisdiction, did so partly because it would retain a certain portion of that jurisdiction for the federal government.

The other components of the family law proposals remain the same.

- All governments continue to express support for the unified family court proposal;

- Manitoba continues to oppose the transfer of divorce grounds to the provinces and it proposed at the Toronto CCME meeting that exclusive federal jurisdiction over divorce be retained. Prince Edward Island supported Manitoba but the other nine jurisdictions voted for the February 1979 proposal. However, at the August CCME Alberta reserved on the proposed transfer.

(2) Significant Issues

In summary eight jurisdictions support the current draft proposal. Manitoba and P.E.I. support the enforcement and registration principles and the unified family court proposal and reject the balance of the proposals. Alberta reserves on the transfer of divorce grounds.

(3) FMC Position

In an attempt to overcome Manitoba's reluctance to accept the constitutional enforcement provision the federal government might give some indication that it would be willing to explore with the provinces the concept of a joint federal-provincial agency to facilitate enforcement.
10. Supreme Court

(1) Federal and Provincial Positions

(a) Role and Composition of the Court

The federal position adopted on July 7th was to support the Best Efforts Draft of February 1979 - but to agree to consider any alternatives which gained substantial support among the provinces. The February draft had received in 1979 the support of all but three provinces (Quebec, British Columbia, Alberta). This support was reiterated by Ministers in Montreal, on July 8th, with Alberta indicating that its fall-back position would be the Best Efforts Draft. Quebec has always been opposed to the Best Efforts Draft because of its deeply-held view that a constitutional court should be established. British Columbia wished to see an eleven-man court, five region representatives, and the appointment of judges ratified by a reformed Upper House.

(i) The Quebec Proposal

At the beginning of the summer discussions (July 7-25) Quebec put forward a new proposal, its essential feature being that a five-judge panel of the current Court would hear all constitutional issues. This panel would consist of two civil law judges, two common law judges and the Chief Justice. The proposal also provided that Chief Justices would be chosen alternately from among the civil law judges and the common law judges on the Court. This proposal is similar to that of the Quebec Liberal Party set out in the Beige Paper.

(ii) The "Manitoba Compromise"

In response to Quebec's proposal, Manitoba proposed that the present Court be increased to eleven members, five being civil law judges. All provinces, except three, initially supported this; British Columbia and Nova Scotia did not, and Alberta reserved its position.

However, during the meetings of August 26-29 Manitoba withdrew its support for the proposal. Saskatchewan added its opposition to that of British Columbia and Nova Scotia; Alberta continued to reserve. (Privately, however, Saskatchewan's position is to reserve rather than to oppose the option.)

(iii) Other Proposals

In response to what appeared to be a weakening of the consensus position around the "Manitoba Compromise", British Columbia tabled a new proposal. It provides for an eleven-man court, composed of seven common law and four civil law judges. The four civil law appointees would be a minimum rather than a fixed number.
Under the British Columbia proposal a Council of Canadian Attorneys-General and the Attorney General of the province from which a judge is to be chosen would control the appointment of judges. (Only the Council would recommend judges for appointment and only the Attorney General of the appropriate province or provinces could make nominations.) In response to criticism at the officials level, British Columbia proposed an amendment which would see the Council selecting the region from which the judge would come and a requirement that the federal and provincial Attorney General agree on the appointment, any deadlock between the two to be resolved by the Council.

Nova Scotia also proposed an eleven-man court, with seven common law and four civil law judges, as well as a thirteen-man court, eight common law and five civil law judges. There was little time for meaningful discussion of these alternatives since they were brought forward at such a late stage of the discussions.

(iv) Consensus?

Most of the governments that continue to support the "Manitoba Compromise" do so on the express understanding that it is done for the purpose of meeting Quebec's traditional interests. Their preferred position in almost all cases is for a nine-man court, having three common law judges (i.e., the status quo), but they expressed a willingness to forgo their preferred position as noted above. The provinces are New Brunswick, Prince Edward Island, Newfoundland and Ontario (somewhat ambivalently). The support of Quebec for the "Manitoba Compromise", and of the federal government since its policy has been to support the consensus position, leads to a "majority consensus".

(b) Alternating Chief Justiceship

An element related to the acceptance of dualism in the provisions of the Supreme Court is the entrenchment in the Constitution of alternate appointment of civil law and common law judges as Chief Justice. At Vancouver, only Manitoba opposed the entrenchment; Saskatchewan and Alberta reserved. There has been no meaningful discussion at the ministerial level in the CCMC of this issue.

(c) Appointment Procedure

The procedure upon which there is general agreement requires that when the Minister of Justice is considering a vacancy on the Court he first consult with all provincial Attorneys General to get their views. Then, as a second step, he is required to reach agreement with the Attorney General of the province from which the appointee comes. If the Minister of Justice and the provincial Attorney General cannot reach agreement, it is proposed that such deadlock be broken by inviting the Chief Justice of Canada to join with the Minister of Justice and the provincial Attorney General concerned
to make the decision. Indeed, it is unlikely that such a deadlock-breaking mechanism would ever be used since the federal and provincial Ministers would likely prefer to agree between themselves. This deadlock-breaking mechanism has received the approval of eight of the eleven governments. Ontario and New Brunswick do not support it; British Columbia has reserved.

(d) Section 96 of the BNA Act

The question of section 96 of the BNA Act was raised by the provinces at the Vancouver CCMC meeting and discussed by the Sub-Committee of Officials on the Supreme Court there, in Toronto on August 11, and at the August CCMC in Ottawa. Simply stated, all jurisdictions agree that court interpretations of section 96 (which empowers the Governor General to appoint provincial superior, district and county court judges) have created serious restrictions on the ability of provinces to confer effective powers on administrative tribunals and provincially appointed judges in a number of areas where such jurisdiction would be desirable. In addition, several provinces view federal appointment of section 96 judges as anachronism and inconsistent with responsibility for administration of Justice in the province.

At the Ottawa CCMC meeting nine provinces agreed that any province that wishes to do so should have the power to appoint the judges of its superior, district and county courts and the provisions of section 96 would not be applicable to that province. At the same time they agreed that the constitution:

(i) guarantee the existence of a superior court of general jurisdiction in each province;

(ii) guarantee the independence of the members of such courts;

(iii) enable a province to establish bodies to administer the application of its laws;

(iv) enshrine the power of judicial review in the superior court of general jurisdiction;

(v) provide that there shall not be a dual system of courts.

The representative of Manitoba, while in favour of the entrenchment of the five principles, favoured the retention of the federal appointing power.

The federal Minister of Justice was sympathetic to provincial concerns over the difficulties caused by the judicial interpretation of section 96. He took the position that it was not necessary to change the whole judicial system in Canada in order to enable provinces to create effective administrative bodies, and that the question required further consideration before a workable solution could be found.
(2) **Significant Issues**

Obviously the outstanding issue with respect to the Supreme Court is whether governments are willing to move some distance to meet Quebec's position and accept an equal or near equal number of civil law and common law judges on that court. The other outstanding issues are matters of detail in comparison.

The deadlock-breaking mechanism is an unsettled part of the proposal. While Quebec and Saskatchewan support the consensus position, Quebec does not think such a mechanism is necessary, and Saskatchewan would prefer a mechanism similar to that set out in the Victoria Charter. New Brunswick does not think a deadlock-breaking mechanism is necessary, and Ontario wishes to keep the appointment process a strictly political one, i.e., not involving the Chief Justice. A suggestion made in this regard is to require the Minister of Justice and the appropriate Attorney General to agree upon a third person to join with them to break the deadlock and if they cannot agree, to empower the Chief Justice to choose such third person. However, at present, only two provinces seem to support this alternative and there has been no discussion of the issue at the ministerial level.

(3) **FMC Position**

On the main issue, the Supreme Court, it is recommended that the federal position at the First Ministers Conference continue to be to support the proposal which receives most provincial support.

The provinces have insisted that the CCMC report to the FMC include the question of section 96. However, discussions on this and the related question of section 101 are at a preliminary stage and considerably more work would have to be done before agreement could be reached. It could be proposed as a subject for future constitutional discussions.

11. **Patriation, including Amending Formula**

(1) **Federal and Provincial Positions**

(a) **Patriation**

At the August 26th to 29th meetings, provinces challenged the federal government on the constitutionality of patriating the Constitution with an amending formula without provincial consent. The government was firm in asserting that it was completely confident that it would be legal for the two Houses of the Canadian Parliament to adopt a Joint Address to the Queen and for the U.K. Parliament to act upon it whether or not there had been prior provincial consent.

Saskatchewan agreed that such action would be legal, but Ontario announced that it had a legal opinion to the contrary. A few provinces have indicated that they would challenge the constitutionality of such action.

(b) **The Amending Formula**

All of the provinces agreed in principle that they would be willing to adopt the Alberta proposal for an amending formula, subject to examination of a legal draft. The Alberta proposal provides for general amendments to be made with the assent of Parliament and 2/3 of the provinces with at least 50% of the population. However, if the amendment so approved by seven provinces is one affecting -
(i) the powers of the legislature of a province to make laws,

(ii) the rights and privileges granted or secured by the Constitution to the legislature or government of a province,

(iii) the assets or property of a province, or

(iv) the natural resources of a province,

it would not apply to any other province that had expressly dissented from it. (This procedure has been termed "opting-out"). However, the general CCHC view was that opting-out would not be available on matters of universal applicability such as those affecting the Supreme Court, the Upper House, a Charter of Rights or the use of English and French.

The advantages, from the federal viewpoint, of agreeing to the Alberta proposal would be:

- there is a possibility of full agreement on a formula which could be included in the patriation action;

- it would be an important "victory" for Alberta and for the West in general since it would not provide a general veto for Ontario and Quebec;

- no amendment could be made without the consent of Parliament, so there would be a federal check on any checkerboard effect that might be brought about by "opting-out": that is Parliament or the government could decline to proceed with an amendment where the provinces did not all agree.

The disadvantages of the Alberta proposal would be:

- if Parliament were to be opposed at all times to "opting-out" by any one province, the formula could in practice require unanimous consent for amendments;

- there would be no special protection for Quebec on matters of special concern to it (proportion of civil law judges on the Supreme Court, the use of English and French at the federal level);

- the possibility of "opting-out" would remove the pressure on provinces to reach agreement on matters of constitutional change after patriation - each could argue that it was not holding up agreement on changes which could occur if only seven other provinces agreed;

- if an amendment were adopted involving new federal expenditures, an "opting-out" province could press for financial compensation.

Ministers agreed to submit the report on the Alberta formula to the FMC.

(c) Delegation of Legislative Authority

All governments have agreed in principle to a draft proposal respecting the delegation of legislative authority in relation to any matter or class of subjects from Ottawa to a province or vice versa.
(2) **Significant Issues**

(a) **Patriation**

It appears likely that one or more provinces would challenge the constitutionality of the federal government proceeding to patriate the Constitution with an amending formula without provincial consent.

(b) **The Amending Formula**

Respecting the Alberta formula, the CCMC will draw two matters to the attention of First Ministers:

- how to deal with amendments of universal applicability which cannot be subject to "opting-out";
- whether constitutional provision should be made for the financial implications of opting-out of amendments.

(c) **Delegation of Legislative Authority**

Respecting the draft upon which governments are agreed in principle, the CCMC will draw to the attention of First Ministers the concern of British Columbia and Newfoundland that the draft does not oblige Parliament to delegate to any other province what it has agreed to delegate to one of them.

(3) **FMC Position**

(a) **Patriation**

The federal position has been clearly enunciated: Parliament may adopt a Joint Address to the Queen with or without the consent of the provinces. This should be maintained and articulated again.

(b) **The Amending Formula**

(i) If the provincial consensus on the Alberta amending formula holds, the federal government could consider joining the majority position. In those circumstances, however, the government would presumably wish to propose a limited change in the formula for matters of universal applicability with no opting-out (Parliament and 2/3 of the legislatures representing at least 50% of the population). Amendments to matters such as the Supreme Court and the use of English and French are demonstrably of particular concern to Quebec.

The government might propose, for this limited range of matters, that the Victoria formula, the "Toronto consensus" or 2/3 of the provinces including Quebec and representing 50% of the population of Canada be the amending procedure.

For other matters of universal applicability the government would resist any attempt to make the formula more rigid (i.e., the government would not support P.E.I.'s desire to make amendments to the Senate subject to unanimity or the consent of each province whose representation in the Senate might be affected).
The government would also wish to resist any attempt to include provisions respecting the financial implications in the event that a province "opts out".

(ii) If the current provincial consensus begins to dissolve at the PMC, and this seems more likely than not, the federal government could ask the PMC to re-examine the Victoria formula which had been acceptable to all governments in 1971, the Toronto consensus formula or a formula that would treat all provinces the same way, with no "opting-out" but that would provide special protection for Quebec with respect at least to the Supreme Court and the use of English and French (e.g., Parliament and 2/3 of the provinces representing 50% of the population would have to approve all matters except those respecting the Supreme Court and languages where the consent of Parliament and 2/3 of the provinces including Quebec or the consent of Parliament, Quebec and 2/3 of the remaining provinces would be required).

Whether a consensus forms around the Alberta proposal or another, the federal government may wish to raise the possibility of citizens being able to initiate referenda in the event of negative action or lack of action by Parliament or legislatures on an amendment proposal. This would support the view that sovereignty ultimately resides in the people.

For example, if seven provinces approved an amendment and Parliament did not, 3% of the federal electorate could initiate a national referendum; if a majority of electors voting approved, the result would be binding on Canada.

On the other hand, if Parliament approved an amendment and no province or an insufficient number of provinces approved it, 3% of the provincial electorate in each province that had not acted affirmatively could initiate a provincial referendum. If referenda were carried in a sufficient number of provinces to bring the total of assenting provinces to seven, the amendment would be adopted.

(c) Delegation of Legislative Authority

The government should continue to support the current agreed draft legislative text.

12. Preamble

(1) Federal and Provincial Positions

The item was considered in detail by the CCMC in August. (A preliminary discussion in July had narrowed the range of subjects to be covered in the preamble.) The federal government tabled a narrative proposal on August 26, and this became the basis for a draft which was further revised by the Conference. A "best efforts" draft was adopted.

All governments support inclusion of a preamble. There are, however, problems with handling or incorporating a few of the concepts that might be covered in a preamble.
(2) Significant Issues

a) Whether "governments" and, if so, whether the federal government should be explicitly referred to in the opening passages (lines 2 and 3) of the Preamble.

Comment: No province is seeking a reference to governments, though most want "provinces" mentioned in some way. No province objects to a reference to the Government of Canada, but it has been very difficult to find a satisfactory form of words. The problem can, of course, be avoided if there is no mention of governments - federal or provincial. (See FMC Position - A.)

b) Whether "the provinces" should be referred to as "choosing freely" to maintain the federal union.

Comment: This problem can be resolved if the provinces will accept a formulation which, without referring to "provinces" (or "governments") indicates that the federation is freely maintained. (See FMC Position - A.)

c) What words to use to represent Quebec as the major element in the distinct French-speaking society in Canada.

Comment: Some provinces with Francophone minorities object to this idea because they say their people do not agree that Quebec is, in effect, the key to their survival.

(3) FMC Position

We would recommend the following stance:

A. Federal negotiating position on opening sentence of Preamble:

1. The primary objective of the Government of Canada will be to secure, to the clearest extent possible, recognition that the sovereign will of the Canadian people is the ultimate basis for Canadian unity (i.e. of Canada's continued existence, as a federation).

2. The second objective will be prevent acceptance of any new formulation that can reasonably be interpreted to suggest that the continued existence of Canada is exclusively dependent upon -- or that the will of Canadians in this regard is exclusively expressed through -- the governments of the provinces.
3. As long as these two requirements are met, the Government of Canada would not seek to have governments mentioned in the opening sentence, i.e. it would not seek, per se, to obtain any new, explicit recognition of the Government of Canada in the opening sentence. In the "best efforts" draft preamble, the Government of Canada is adequately covered in such phrases as:

"federation"
"sovereign and independent country"
"Crown of Canada"
"with a Constitution similar in principle to that which has been in effect in Canada"

B. Federal negotiating position on reference to Quebec (lines 17 and 18)

1. The objective will be to secure constitutional recognition of the distinct French-speaking society in Canada, and the fact that it is centered in Quebec.

2. The Prime Minister would attempt first to obtain agreement on the first version of the draft preamble (or some variation thereof). However, mindful of the concerns of provinces with Francophone minorities, he could agree to the second version (or some variation) if he regards it as acceptable in light of the objective set out above.

Conclusions - Proposed First Ministers Conference Strategy

The strategy which is proposed below is predicated on the assumption that the preferred outcome of the Conference is an agreement on the greatest possible number of issues. Such an agreement as far as the federal government is concerned must include as a minimum the elements of the People's Package. As far as the provinces are concerned, it is very clear that without agreement on issues of particular concern to them within the Package on Government Powers and Institutions, there will be no agreement on the People's Package alone. Therefore, any agreement can only be on a very large number of items.

While the federal government must maintain its position that elements in one package cannot be bargained against elements in the other, it must also understand in terms of its own strategy that the more it is possible to reach agreement in the area of Powers and Institutions, the easier it will be at the end of the day for the provinces to accept the People's Package.

There is a genuine fear amongst the provinces that the federal government is not interested in the Powers and Institutions Package. Much of the resistance to the People's Package has been to try to force the federal government to bargain within the Institutions and Powers Package.
The federal strategy from the beginning has been, and must continue to be, to demonstrate very clearly its interest in both packages and its intention to bargain within the Powers and Institutions Package. The federal government must make very clear that it understands that an agreement means that no one will be entirely happy on every item, but that everyone should be able to claim victory on something.

The strategy on the People's Package is really very simple. The federal positions on the issues within the package are clearly very popular with the Canadian public and should be presented on television in the most favourable light possible. The Premiers who are opposed should be put on the defensive very quickly and should be made to appear that they prefer to trust politicians rather than impartial and non-partisan courts in the protection of the basic rights of citizens in a democratic society. It is evident that the Canadian people prefer their rights protected by judges rather than by politicians. As far as patriation is concerned, the issue can very easily be developed to make those provinces who oppose it look as though they believe that they are happy with Canada's problems being debated in the Parliament of another country.

In private, the provinces must be told that there is absolutely no question but that the federal government will proceed very quickly with at least all the elements of the People's Package and that it would therefore be to their advantage to bargain in good faith on the other issues so that they too will be relatively satisfied after the Conference. It should be made abundantly clear that on Powers and Institutions, the federal government expects give from the provinces as well as take.

The CCAC meetings have probably laid the groundwork for a deal on Powers and Institutions. The federal strategy was to take the initiative and to put the provinces on the defensive. Yet the federal government demonstrated at the required moment enough flexibility to allow the provinces to save some face. The same strategy must be followed at the FMC.

A deal must include something for everyone. And this is now distinctly possible because the federal government has been able to maintain the initiative and has used extremely affectively its principal weapon which is the economic union item.

To achieve a deal on as many elements as possible within Powers and Institutions, the federal government must understand what is fundamental to each of the provinces or at least to each of the regions of Canada. And the provinces must understand what is fundamental to the federal government. This makes it easy to develop a strategy.

British Columbia has made some movement on a reformed Upper Chamber, a sine qua non of its being part of any deal. As well, it would also require what is essential for Saskatchewan and Alberta, that is, increased provincial powers over resources. Manitoba does not have any one particular item of importance to it, but it identifies with the demands of the other Western provinces. Ontario has been very much a supporter of the federal government, especially in the area of economic union. Quebec is in a very special situation; if Quebec is ready to sign anything, it needs at a minimum, something on the Supreme Court, some acceptable wording in the Preamble, and possibly something on Communications. As well, an interim solution on a proposed intergovernmental council as outlined earlier in this paper would represent a substantial incentive to agreement with Quebec. As far as the Atlantic provinces are concerned, the two most important items to them are offshore resources and fisheries, with offshore resources being the most important of the two.
A balanced package acceptable to the provinces— even if not accepted by every province—must include elements considered essential to Western Canada, to Quebec and to Atlantic Canada. So as to maintain the initiative, the Prime Minister should consider in his opening statement expressing the view of the federal government that it wants changes to the status quo so as to meet the legitimate needs and wishes of the West, of Quebec, and of Atlantic Canada.

The federal government must make it very clear to the provinces that the key to success in negotiating changes in powers is acceptance of a constitutionally entrenched economic union with a mechanism—be it political or judicial—to make it operative and enforceable. By making the principle of economic union the center-piece of the CCMC meetings, the federal government put the provinces very much on the defensive in two ways. First, the concept of economic union and mobility rights is very popular with the Canadian public and this is recognized by the provinces. Second, the linking of progress on economic union to progress on resources has forced the Western provinces to have to choose between the status quo on resources which they know is good for the federal government and agreeing to make a concession to the federal government on economic union.

If this linkage between resources and economic union is maintained—and it must be—the elements of a deal are possible. This is so simply because the Western provinces want economic security on resources and they see that they can only achieve that goal by agreeing to the federal position on economic union. It may be that the deal will be with Manitoba, Saskatchewan and British Columbia as Alberta may not want to sign anything. But at least, the whole of the West will not be isolated.

As for other items, the CCMC has set the stage for agreement on an interim solution for the Upper Chamber and this will be good for British Columbia and for an agreement on a reformed Supreme Court which will be saleable in Quebec. These items should be proceeded with quickly to demonstrate federal flexibility and good faith. As well, family law and equalization are basically settled and do not require any discussion in terms of strategy.

As far as offshore resources are concerned, what is important is to have some of Atlantic Canada in agreement. As it is probably impossible to conclude an agreement with Newfoundland, it is crucial to attempt to work out an acceptable solution with the other three provinces and especially Nova Scotia. The negotiating position described earlier in this document should permit such an accommodation and we have been told this in private by Nova Scotia. But it cannot be over-stressed that the legitimacy of the Conference requires something for Atlantic Canada because of its economically disadvantaged status. With respect to fisheries, it is unlikely that any progress can be reached as the provinces, particularly Newfoundland and Nova Scotia, cannot agree amongst themselves.

Communications is a difficult issue. As indicated above, at the end of the CCMC, the provinces were united on a position that, philosophically, is dramatically different from the federal position. Although agreement on communications is not likely critical to the support of any province on an acceptable package, it is important that the federal government not be portrayed as isolated and inflexible on this or any other issue. The portion of this Section dealing with communications suggests several areas for consideration by Ministers where significant new positions could be proposed at the FMC. A new proposal in some or all of the areas mentioned would not likely be sufficient at this stage to produce agreement, but it would demonstrate, publicly, flexibility, and further, it might be sufficient to break or bend the unanimous provincial front.
In summary, the elements of a deal with almost all provinces on Powers and Institutions are present. Such a deal would include matters of importance to the provinces and yet would not mean any unpleasant concessions by the federal government. A deal on Powers and Institutions would, at the same time, make it very easy for the provinces to accept the People's Package and avert the threat of unilateral action.

A strategy aimed at demonstrating flexibility and good-will should achieve such a deal. If it does not, it will at least create the conditions appropriate for unilateral action for the federal government will have demonstrated that a failure can only be blamed on the provinces.

III. WHAT PACKAGE OF CONSTITUTIONAL REFORMS SHOULD THE GOVERNMENT PLACE BEFORE PARLIAMENT THIS AUTUMN?

A. Background

There are in reality two broad possibilities here:

- A package might be defined which would receive the general approval of the governments at the September First Ministers Conference.
- A unilateral package might have to be defined by the Government of Canada with which it can proceed in the absence of broad intergovernmental consensus.

Should the first possibility occur, the actual content of the package will in effect “define itself” as intergovernmental accord is reached. For this reason, and because we have already briefly considered the possible outlines of a consensus package in the previous section of this discussion paper, we will concentrate in this section on the second possibility and, more specifically, on the possible contents of the unilateral package of constitutional reforms, should the Government of Canada be forced to act on its own.

As the CCNC constitutional negotiations continued, it became more and more apparent that the provinces, the media, and that part of the public which is following the debate are expecting the federal government to take some kind of unilateral action if the present round of talks does not produce an agreed upon package.

Earlier in the summer, the prospect of unilateral action gave rise to what can be described as pro forma criticism; now, just prior to the FNC, it is beginning to provoke serious opposition and this can be expected to continue in the autumn if unilateral action is taken by the federal government.

It can be expected that the criticism will be more over the concept of unilateral action itself than over the content of such action unless, of course, the content is perceived to be a clear power grab by the federal government. The concept of acting unilaterally can give rise to accusations of arrogance, contempt and bad faith bargaining. It will be easier for the provinces to campaign against arrogance than to campaign against detailed constitutional changes.
For this reason, any type of unilateral action -- large or small -- is likely to give rise at the outset to much the same type of criticism. Because of the symbolism of partition, especially as fostered by successive Quebec governments, much of the debate there may center on patriation rather than on the rest of the package.

It is possible, however, that the focus of controversy will shift as the debate proceeds. At the beginning, one can expect that the provincial governments and the opposition in Parliament will concentrate their fire on the fact of unilateral action. But once Parliament begins to study the Resolution itself, it is likely that the content of the measures contained therein will provide the focus of attention and opposition. All of this could, of course, be complicated by a reference to the courts, an issue which is discussed in the final section of this paper.

In considering what package of constitutional reforms would be most appropriate, should unilateral action be necessary, there are several factors that need to be assessed:

- The reform needs to be more than symbolic; it should be perceived as genuine in order to satisfy the undertakings made by the Prime Minister and the Premiers during the Quebec referendum campaign. What will be regarded as genuine and significant constitutional change, both in Quebec and in Canada as a whole, is a matter of judgment. It is clear, however, that proceeding with a very limited package, containing an amending formula that did not adequately protect Quebec, would be almost certain to produce the most bitter political and popular opposition in that province. On the other hand, if Quebec is given greater protection than any other provinces, this could create opposition elsewhere.

- Given that unilateral action will be undertaken in the face of widespread provincial government and parliamentary opposition, it will be important to ensure that the particular package is popular among the citizens of all regions of the country. A solid front of provincial government and parliamentary opposition from the West could pose real difficulties for the Government of Canada. The problem would be markedly increased if Ottawa was locked in combat with the western governments over energy at the same time.

- The impact of the package on the balance of federal and provincial power will be a critical factor in shaping the kind and quality of opposition the Government might experience. The package should be examined carefully from this point of view.
The previous point needs to be set against another, namely, that this may be a once-in-a-lifetime opportunity to effect comprehensive constitutional change (and perhaps unblock the process), and, as such, should not be lost.

It is a given of federal constitutional policy that the People's Package (proamble, patriation and amendment, and Charter of Rights) will compose the core of any package on which action is taken. That, however, leaves two large questions unanswered:

i) What precise form will the items forming the People's Package take — e.g., will the Charter bind the provinces, and what will the Charter contain?

ii) What other items might be added to the package on which action is taken, and on what basis?

B. Packages

In order to assist the Cabinet in assessing the broad alternatives which lie before it, we describe four alternative packages, together with one sub-package.

Each of the four alternative packages contains a preamble, a Charter of Rights (including mobility and minority-language education rights), patriation and some type of amending formula, be it temporary or permanent. Each is broader than that which precedes it.

So far as the powers of governments are concerned:

- the first package limits certain federal but not provincial powers;
- the second package limits certain federal and provincial powers;
- the third package limits certain federal and provincial powers, but also gives certain additional powers to the provinces;
- the fourth package limits certain federal and provincial powers, but also gives certain additional powers to both levels of government.

The four packages and the sub-package are summarized below:

Package I

- preamble
- patriation and amendment
- Charter of Rights, binding only on the federal government, with provincial opting-in
- equalization
Package II

- all of Package I, but with the Charter of Rights, binding on both federal and provincial governments

Package III

- all of Package II, plus the following:
  -- those items on which there is virtual agreement or reasonable consensus (e.g., family law)
  -- those items which have been rejected by provinces as not going far enough, but which are "in their favour", that is, which transfer power from the federal government to the provinces (e.g., aspects of communications, possibly something on resources and offshore resources).
  -- revised Section 121

Package III A

- all of Package II, plus those items on which there is virtual agreement or reasonable consensus (e.g., Supreme Court, family law). (That is, all of Package III, minus 121 and "provincial" division-of-powers items above.)

Package IV

- all of Package III, plus strengthened Section 91(2) involving a transfer of powers to the federal government.

The preferred outcome of the September First Ministers Conference is clearly to achieve as broad a consensus as possible on as many of the twelve items as possible in order to permit the federal government to proceed to Westminster with the consent of the provinces. If the FMC does not seem to be unfolding in this direction, then it will be important for the Prime Minister to guide the discussions in a way which will make both the government's unilateral package and the consequent parliamentary procedure appear to be a reasonable outcome of the meeting. It is for this reason that it is important for the Cabinet to settle generally on its preferred package, should unilateral action be necessary, prior to the First Ministers Conference. Obviously, this issue will have to be reviewed after the FMC.

2. The Selection of a Package

What are the advantages and disadvantages of each of the four packages? We discuss each package below, and would suggest that they be assessed in the light of general points made in the first part of this section (A. Background).
Package I

Essentially what this approach would do would be to patriate the Constitution with a preamble, an amending formula, and the principle of equalization, and enshrine a Charter of Rights (with mobility rights and minority language rights), applicable only to the federal government and to whatever provincial governments decide to opt in. As far as minority language education rights are concerned, it might be that they would only become effective after a certain number of provinces with a certain percentage of the population adopt the Charter although it would be preferable to include them as one of the rights to which provinces can opt in.

The advantage of this approach is that the Constitution will have been patriated and there will be some form of Charter of Rights even though it will apply only in areas of federal jurisdiction and in those provinces which voluntarily adopt it. No province will be able to argue that any of its rights or powers had in any way been affected by unilateral federal action.

The disadvantage of this approach is that, while patriation, a symbolically important act, will have been achieved, rights will not be fully entrenched, and, so far as provincial jurisdiction is concerned, will be dependent on place of residence. This is contradictory to the concept of a right as something which is so important that it should apply to all Canadians.

More importantly, the question which will be asked about this package is: why was all this intensive intergovernmental negotiation necessary to produce such a meagre result, namely, one in which the federal government is amending the Constitution to affect only federal powers? This will be seen as something less than the renewed federalism which has been promised to the people of Quebec. It will also be a wasted opportunity since it is highly unlikely that the climate for constitutional change will be as positive as it is now for a long time to come.

Also, the fact that there will be the perception of no significant change will give both Mr. Lévesque and Mr. Ryan the chance to continue over the next few years to pursue alternatives which are likely not to be acceptable to Ottawa. In addition, patriation by itself will be controversial and will provoke criticism by certain circles in Quebec, including both Lévesque and Ryan. It would be unfortunate to have to fight this criticism without in the end having a great deal to show for it.

Thus, to move solely on Package I would be to take no real advantage of the present favourable circumstances to achieve more. Patriation with an amending formula plus a Charter of Rights applying only to the federal jurisdiction would be a genuine accomplishment but it would not fulfill public expectations nor would it in any sense meet the potential for reform which currently exists.

We know, from both our surveys and the recent Gallup poll, that there is overwhelming public support not only for patriation but for rights, including mobility of labour rights and the right of the free movement of goods, services and capital. The overwhelming public support on all the rights
issues, including a highly controversial one like minority language education rights, is based, we feel certain, on an assumption of universal applicability, not on an assumption of jurisdictional limitation.

Package II

This package would include patriation, amendment, equalization, plus a Charter of Rights binding upon both levels of government. The imposition of the Charter on the provincial governments is the only thing which differentiates this Package from Package I, and carries with it both advantages and disadvantages.

The advantage is that the government would be meeting the expectations of Canadians so far as human rights are concerned by enshrining them fully in the Constitution, thus constitutionally guaranteeing rights for all Canadians wherever they live. While such a step would limit the powers of both levels of government, it could not be construed as a federal power grab.

The disadvantage of this approach is precisely that it removes rights and powers of provinces without their consent even if such rights are transferred to the people (or, Saskatchewan would argue, to the courts) instead of to the central government. The provinces can make a plausible case, in response to Packages II-IV, that the federal government is unilaterally affecting federal-provincial relations, and the balance of power in the federation.

In addition, just as the degree of protection afforded Quebec in any amending formula which is chosen needs to be carefully considered, so must the political and public impact of imposing minority-language education rights on Quebec. The question is whether in the minds of Quebeckers the protection for French outside of Quebec will fully counterbalance the protection of English within Quebec, and the degree to which the Charter will come into direct conflict with Bill 101. The Government of Quebec is adamantly opposed to the entrenchment of minority-language education rights.

Package III

This package includes all of Package II, plus three important additions: those items (such as family law) on which there is virtual agreement; the revised Section 121; and those items which transfer power from Ottawa to the provinces but which the provinces have rejected as insufficient (aspects of communications, resources and offshore resources). The second and third categories are in our view inextricably linked in the sense that it is not feasible to proceed with 121 without at the same time proceeding with resources and perhaps offshore resources.

The advantage of this approach is that while certain powers now exercised by the provinces have been restricted under the new Section 121, the only change in jurisdiction is from the federal government to the provinces. The inclusion of 121 would be very popular in the public mind - and difficult for the provinces to attack effectively.
The package is substantially larger than Package II and thereby provides for more "renewal". It gives some things to the provinces which they do not get in Package II and so would possibly make a stronger economic union under Section 121 easier for them to swallow.

The disadvantages of this approach are that there will be accusations that the federal government has acted arbitrarily on 121 and that Ottawa has not given up enough powers or has not given up those powers which are contained within the "traditional" demands of Quebec or demanded by the West. However, it will not be difficult to argue in response that half a loaf is better than no bread at all and, of course, there will always be the possibility of further change in the future.

On the other hand, it may be argued that no federal powers should be given up without a corresponding transfer of power from the provinces to the federal government. While this is a good argument, it may well be that a revised Section 121 is sufficiently important to the federal government -- that it is a sufficient "gain" for us -- that we might be prepared to give some additional powers to the provinces in order to make the package saleable.

Package III A

This package includes all of the items composing Package II, plus those items on which there is virtual agreement or reasonable consensus (e.g., family law). The package assumes that mobility rights for persons would be included in the Charter binding on both orders of government, thus protecting the free movement of citizens, and goods (i.e., only to the limited extent that internal tariffs on goods are prohibited by the existing Section 121), if not of capital and services.

In our negotiation strategy, we have linked 121 very closely to the resources item. Thus sub-package III A would be a fall-back alternative from Package III if it proves impossible to work out a deal on 121 plus resources, and if there is a solid western bloc of opposition to the federal government which makes giving the western provinces what the federal government is prepared to give them on resources, even though they say it is not enough, an inadvisable course of action.

Given the Government's lack of western representation, it would probably be more difficult to defend unilateral federal action on such a regionally sensitive issue as resources than it would be to withstand a ferocious attack by the Government of Quebec over the entrenchment of minority language education rights, given the federal government's strong representation from Quebec. Breaking up a solid western provinces bloc of opposition is a pre-requisite to our being in a position to take action on Package III rather than on Package III A. Saskatchewan may prove to be the key. The argument has been put to the provinces that they would do well to make a deal on resources now, because the chances to do so in the future may not come around for a long time, in which case they will have to live with the status quo because they wanted too much.
Package III A assumes that there is no justification for not including those items upon which there is a clear intergovernmental consensus, such as family law. In order to defend leaving them aside, the Government would have to say it is not prepared to move on any items in the package of government powers and institutions until all items in that package have been settled. While this could be said, it might very well lead to charges of negotiating in bad faith which would be difficult to counter since First Ministers publicly agreed at the conclusion of the June 9 meeting that the two packages proposed to them (the People's Package and the Government's Package) would be combined into a single list of twelve items. (It might be noted parenthetically that the distinction between the two packages has strengthened our strategy and negotiating position considerably.) A respectable case can be made, then, that we should include in the package on which action is taken those items from the package of government powers and institutions on which there is virtual agreement, or even a reasonable consensus, at the conclusion of the FMC.

Package IV

This option is similar to the third alternative except that it would provide as well for a transfer of power to the federal government probably under a new Section 91(2). While the draft of this new section has been received with great suspicion (but not overt opposition) by the provinces, it should be noted that even here we may be able to sell a new Section 91(2) if the existing federal proposal is modified to protect current provincial jurisdiction subject to unrestricted federal paramountcy in interprovincial movement of goods, services and capital.

The federal position received some unexpected support recently from Mr. Parizeau, the Quebec Finance Minister, who stated that the federal government was quite justified in its view that the federal trade and commerce power should extend to services as well as goods. He also acknowledged the need to increase the federal power to regulate competition.

The advantage of Package IV is that it would mean all encompassing constitutional reform and would provide the federal government with most of the additional powers it needs in the economic area.

The disadvantage is that it would transfer powers from the provinces to the federal government without the consent of the provinces. It would be seen as an arbitrary act unprecedented in the history of Canadian federalism and could give rise to grave criticism. This option would be much harder to sell than any of the other packages.
IV. STRATEGY IN THE POST FHC PERIOD

This section contains five parts:

- Background
- Possible Outcomes of the First Ministers Conference and Responses to Them
- Strategic Considerations in Parliament
- Possible Legal Challenges to the Implementation Process
- Strategic Considerations vis-à-vis the Public

1. BACKGROUND

A number of underlying factors might be mentioned at the outset:

- Whether they are in favour of or opposed to unilateral action, people expect substantial constitutional change in the near future, based on the Prime Minister's commitments and the statements made by the Premiers during the referendum campaign.

- The government's popularity is high currently, and constitutional reform is still alive in the public mind. These conditions may not prevail indefinitely.

- The government has successfully retained the initiative in the constitutional debate so far, and should take care that this advantage is preserved.

- General elections in several provinces are possible this autumn, and the results could materially alter the political environment within which constitutional discussion is carried on.

- The House of Commons will be seriously over-loaded during the upcoming session, making the establishment of a satisfactory legislative timetable for the implementation of constitutional reform difficult and complex.

- The political climate in Canada is likely to be poisoned by a major energy conflict throughout the fall of this year and at least the early months of next year. In these circumstances, the government cannot expect any of the normal courtesies and accommodations on the part of the Opposition, but rather that they will seize every opportunity to obstruct passage of a resolution concerning constitutional reform.
This section makes an important assumption which it is as well to state explicitly at the outset, namely, that the Government of Canada ought to avoid mixing the negotiation and the implementation phases of any given items of constitutional reform. As long as a subject is under active negotiation with the provinces, that subject should not be included in the package on which action is being taken.

Once the process of implementation has begun, the government should not permit the item to be re-opened for negotiation. This would not rule out beginning a second round of constitutional talks on a new set of items while the government was in the process of bringing an earlier set of reforms into effect, but it would mean that once the government enters the House with a proposal on a subject, that subject would not continue to be negotiated with the provinces. It is clear, however, that if the government is proceeding by means of unilateral action rather than with federal-provincial agreement, it would be difficult to avoid having subjects covered by the Resolution come up implicitly in the second round of negotiations.

2. POSSIBLE OUTCOMES OF THE FIRST MINISTERS CONFERENCE

The First Ministers Conference will not be presented with a deal to be ratified. Rather, it will be a hard negotiating session where a deal may or may not be hammered out. The Prime Minister will have final fall-back positions to offer, as set out in Section II of this paper, and will clearly be seen to be striving for an agreement as defined below. An all-out effort to achieve agreement is of first importance as we move into the implementation phase, since it provides the basic justification and political legitimacy for unilateral implementation in the absence of the necessary degree of agreement.

A. Agreement

Whether or not there is agreement at the Conference is very much a matter of definition. From the government's point of view there are two essential elements:

(i) agreement on a range of items must include agreement that the government can table a Resolution containing these items;

(ii) the range of items must include the People's Package.

An agreement including these necessary elements is not likely to be achieved, but if it were to happen the government need not anticipate any great difficulty in any of the stages of the constitutional process. The House could hardly accuse the government of arrogance, unseemly haste or of acting unconstitutionally. Criticism might rather be expected to centre upon the adequacy or inadequacy of the range of items contained in the Resolution. This criticism would be minor and relatively unimportant.
Should agreement, in this sense, be reached the implementation process should begin with a minimum of delay, since such an agreement would be unlikely to hold for very long.

B. Deadlock

Deadlock, from the government's point of view would occur if there were:

- no agreement on one or more of the items in the People's Package; and/or

- a strong challenge of the government's right to proceed with the People's Package.

Agreement on other items such as equalization, the Supreme Court or one of the economic items would not avoid deadlock from the government's point of view if these two conditions were not met.

The Premiers, however, cannot afford to admit that deadlock has been reached since

- their interest is to keep the government at the bargaining table until they get what they want on the economic items and in so doing to prevent the government from taking action on the People's Package.

- Alberta, Saskatchewan and British Columbia will want to temporize until they see what is in the budget on energy; and,

- Premiers contemplating full elections may see advantages in delay, although it might suit M. Lévesque to run against "Ottawa" on the basis of a Resolution tabled in the House.

C. A Near Miss

The logic of the Premiers' position will lead them to claim that there is a near miss, asserting that a great deal of progress has been made in the course of the summer and that a further round of negotiations would have every possibility of ending in agreement. Their argument will be - why not wait?

A claim of near miss by the provinces could raise the question of the government's credibility with the public if it were to proceed unilaterally without further ado.

The Prime Minister might therefore wish to call the Premiers' bluff by putting to them one or both of the following options:

1. Extended First Ministers Conference

He could express his readiness to continue the First Ministers Conference, sitting through the weekend and through the following week if necessary. There is at least a chance that, if the Premiers take up this offer,
agreement, as defined above, might be reached since the Premiers would find themselves in a very exposed position. This agreement might be less than total but the time would be well spent if they were to concede that we could proceed on agreed items, reserving specific items for a second round. In any event, it is difficult to see how the government could lose by offering to extend the Conference.

2. An Immediate Second Round of Negotiations While the Government Proceeds on Agreed Items

The Premiers could be offered an immediate second round of negotiations on the outstanding items. The intention would be that items agreed in the second round would be incorporated into the Constitution after action on the first set of items had been completed, i.e., after patriation.

This proposal has the advantage of refuting any assertion by the Premiers that, having achieved the government's essential objective — the People's Package — we would delay negotiation of the economic items of most immediate interest to the provinces.

The agenda for the second round could include, in addition to items held over, any other items that the government and the provinces together consider suitable for inclusion.

While it might be possible to add to the Resolution items on which federal-provincial agreement is reached in the second round while it is still in the House, this probably should not be offered to the Premiers as a carrot. For one thing, adding items to the Resolution would require leave of the House and, more importantly, the Opposition could claim that they did not know what Resolution they were debating if they knew, when the debate started, that items might be added as the debate progressed. It would be preferable to include items agreed to in the second round in a second Resolution, which could be introduced while debate on the first Resolution continued.

3. STRATEGIC CONSIDERATIONS IN PARLIAMENT

A. Procedure

Unlike a bill, there are no mandatory stages in the discussion of a Resolution. The only procedural choice to be made is whether to keep the Resolution in the House or send it to committee.

B. Timetable

From the point at which the budget is brought down, sometime after October 15, the House will be fully occupied with the budget debate, budget legislation, energy legislation and other essential legislation until the Christmas recess, and probably into the New Year.
The constitutional resolution when tabled should be debated for a reasonable period, not less than two weeks. This means, in effect, that there are two windows for tabling the Resolution this year:

- in time to commence debate upon early recall of the House September 29;

- upon adjournment of the House for the Christmas recess, assumed, for the purpose of these notes, to be December 23.

The December 23 window may not, in fact, be a useful alternative. As noted in the introduction, the climate in the House is likely to worsen as the budget and energy debates develop, there is the risk of a number of provincial elections with the possibility of new governments repudiating positions taken by their predecessors. Public interest and political will may erode with the passage of time, particularly if the press and public become increasingly concerned about the inflation and unemployment rates. However, to keep the option open the second window is discussed further in this memorandum.

Should the December 23 window be chosen, and considering that agreement has not been reached, it would probably be impossible to avoid continuing the negotiating process until sometime in December, since we could not justify stopping the negotiating process on September 29 and then waiting three months before tabling a resolution in Parliament. In any event, since public interest cannot be allowed to diminish, some form of constitutional renewal activity would be necessary in the interim.

If the September 29 date is chosen, the order paper containing the exact wording of the Resolution must be made public September 25 in order to table the Resolution (by filing it with the Clerk of the House) and to give the required notice to the members.

C. Parliamentary Options

There are three possible options in Parliament:

- to start the debate September 29, keeping the Resolution in the House until it is voted upon;

- to start the debate September 29, referring the Resolution to committee when the budget is introduced, on or soon after October 19;

- to table the Resolution just before the Christmas recess, start the debate when the House resumes in the New Year, keeping the Resolution in the House until it is voted upon.

Each of these options is discussed below.

Consideration might also be given to the advisability when the Resolution is tabbed in the House, of having the Leader of the Government in the Senate introduce a motion that the Senate consider the subject matter of the Resolution before the House. This might be expected to save a considerable amount of time. Under this procedure, while amendments could be proposed, the Resolution could not actually be amended until it reached the Senate.
1. Start the Debate September 29, keeping the Resolution in the House until it is voted upon

Since the House must turn its attention to the budget, energy, and the Bank Act on or soon after October 15, and since the Resolution Debate cannot be contained within the span of 12-15 days, the following schedule is suggested.

When the debate opens the government proposes that, since the Resolution is of extraordinary consequences, and since it is essential that every member who wishes to, should have an opportunity to speak, the full time of the House, save for Questions, will be devoted to the debate until the budget is brought down. After October 15, the House should sit with extended hours so that other essential business will be accorded the normal hours of sitting, and the Resolution debate will be continued in the mornings from 9:30 a.m. till 12:30 p.m. and in the evenings from 10:00 p.m. till midnight. Such a proposal would call for unanimous consent, or if consent were denied, a motion that would be debated and voted upon. There is no time limit for such a debate.

After the budget has been brought down, there would be no meetings of House Committees in the mornings until the Resolution is approved.

In assessing the advisability of proceeding in this fashion, the following are some of the considerations that would have to be taken into account:

- The government would demonstrate the importance of the debate from the point of view of the public by having all the proceedings in public and on television.

- It might prove to be an effective if exhausting way to ensure that the government is not forced to cut short the debate unreasonably, while at the same time permitting it to meet its timetable for implementation. It is almost certainly the quickest route to follow.

- It would provide maximum public exposure and concentrate public attention on the Resolution. All proceedings would be televised, and this, on balance should favour the government, which would be taking a positive position, rather than the Opposition, whose positions would tend to be negative.

- Opposition members would be very aware that everything said would be directly and immediately available to the public and would weigh their words rather more carefully than they might in committee.

- The government could proceed in this fashion, but agree to refer the Resolution to a Committee in the course of the debate, should that prove to be necessary, as a fallback position.

- The Opposition could question the necessity of proceeding with such haste. It could argue that a measure of such complexity and high importance should follow a conventional route at a conventional pace in order to permit a thorough and judicious scrutiny of the measure.
2. **Start the Debate September 29, Sending the Resolution to Committee when the Budget is Presented on or Soon After October 15**

This option pre-supposes one of two circumstances:

- that there is a decision on the merits of the case that there should be a Committee stage;

- that, by prolonged and determined obstruction, the House makes the proposed extended sittings impossible, and hence a committee is forced on the government.

It is proposed that if there is reference to Committee there would be identical references in the House and Senate to a Special Joint Committee of the Senate and the House. It is to be expected that the House would not welcome (but would accept) a Joint Committee. It would probably please the Senate.

Whether or not there is reference to Committee, there should be no mention of such a reference in the Resolution when it is tabled. The debate should open on the assumption that there is only one objective, to bring the matter to a vote. From a tactical point of view, reference to Committee would best be made in response to Opposition demands.

**Advantages**

- If the Resolution is tabled September 29, the "dead time" between October 15 and January 15 would be avoided because the Committee would be sitting during this period.

- A highly contentious measure may be best contained in a Committee where it is more readily managed by the House Leader and his officers, and where easier and more effective relations can be maintained with the Press Gallery, since relatively few reporters will follow the proceedings.

- Interested individuals and groups can participate directly in constitutional renewal.

**Disadvantages**

- The reference debate (in the House at least) might be prolonged and difficult. Assuming a very hostile climate the Opposition would filibuster, knowing the budget will have to be introduced around October 15, and force the government to accept wide terms of reference, to permit the Committee to travel to all major centres in Canada, to hear all comers, and to set no time limitation. The situation would be eased if, as might be expected, the Opposition claim in the debate that the Resolution is extremely complex. The Committee route could then be put to the Opposition as a suitable means of dealing with a complex issue. It would still be likely that the Opposition would insist on an all-embracing reference, provision for travel, etc.
- A committee, however set up, might come to see itself as a committee of inquiry, or a Royal Commission, labour for many months and produce a voluminous report that could be very difficult to cope with. Certainly some elements in the public would push the Committee in this direction.

- In Committee the government's position is likely to suffer. Attackers would be louder and more numerous than defenders. Careful choice of government members would be essential, and careful orchestration of hearings would be needed to ensure effective presentation of the government's position.

3. Table the Resolution December 23, Start the Debate January 15, keeping the Resolution in the House Until it is Voted Upon

Since it is unlikely that a clear run at the debate would be possible starting January 15, the impact of other essential business, necessitating discontinuity, must be considered. The proceedings would have to be carefully orchestrated so that other business would, from time to time, interrupt a continuing constitutional debate, rather than having the constitutional debate crop up in fits and starts while the House is preoccupied with other matters.

4. POSSIBLE LEGAL CHALLENGES TO A UNILATERAL IMPLEMENTATION PROCESS

1. The Legal Position

As soon as the contents of a unilateral patriation package become known, upon introduction in Parliament, it can be assumed that opposition both inside and outside Parliament will focus more on the validity of the procedure than on the contents of the package and most likely will demand that a reference be taken to the Supreme Court before the resolution proceeds further in Parliament. It will be necessary to have a position on this matter at that time.

As to the question of validity, it is the view of the Department of Justice that a law passed by the U.K. Parliament to patriate the Constitution, with an amendment formula and other changes, could not be successfully attacked in the courts. It seems abundantly clear that the legal power remains for the U.K. Parliament to enact such a law for Canada, and it also seems clear that they will do so whenever so requested by the Parliament and Government of Canada.
The more troublesome question is that of the requirements of the conventions (i.e., practices) of the Canadian Constitution with respect to constitutional amendment. While the British convention is that the U.K. Parliament will act when requested to do so, by the Canadian Parliament, there is a potential problem with the Canadian convention concerning the role of the provinces prior to such a request being made. An argument is already being advanced by Ontario that patriation with an amendment formula would involve a change of a fundamental nature affecting the provinces and that on the basis of past practices there is now a clear convention in Canada that such action requires consultation with, and the consent of, all provinces. This is based on the premise that the "unilateral" adoption of an amending formula would affect existing rights of the provinces, at least their "right" of veto over amendments. (Unilateral patriation combined only with an amending formula requiring unanimity would, on this basis, not be assailable.) Further, it is argued that this convention would be enforced as a rule of law by the courts.

The main lines of argument against this case are:

(1) there is no convention clearly applicable to patriation by itself, and the relevance of conventions to the rest of the package would very much depend on its contents (the strength of our argument here would therefore vary with the contents);

(2) even if the unanimity convention applies, it has proven to be impossible to follow and therefore is no longer relevant (demonstrable after 53 years of seeking an agreed amending formula) (this is a stronger argument);

(3) even if there is such a convention, it is a Canadian convention only and cannot affect action by the U.K. Parliament (also a stronger argument); and

(4) in any event, conventions are not legally enforceable by the courts and do not limit the legal powers of Parliament (this is a very strong argument that is supported by the overwhelming weight of authority).

It may therefore be fairly safely assumed that if the question somehow came before a Canadian court, it would uphold the legal validity of the U.K. legislation effecting patriation. The court might very well, however, make a pronouncement, not necessary for the decision, that the patriation process was in violation of established conventions and therefore in one sense was "unconstitutional" even though legally valid.

Obviously, the foregoing suggests that while unilateral action can legally be accomplished, it involves the risk of prolonged dispute through the courts and the possibility of adverse judicial comment that could undermine the political legitimacy, though not the legal validity, of the patriation package. This points up the desirability of achieving agreement with the provinces on a patriation package.
2. Legal Strategy

In considering options for a strategy to deal with the situation as it would appear upon public announcement of unilateral patriation, the following factors should be kept in mind:

Factors

(1) It would probably be open to a province or a private individual to seek a declaration in the Canadian courts on the validity of such action. This conceivably could happen as soon as a resolution is introduced in Parliament with the attack being focussed on the right of the Parliament of Canada even to request such action without provincial approval. It is unlikely that this procedure would be chosen.

(2) It would also be open to a province to refer the question of the validity of federal and U.K. action to its Court of Appeal whose decision could then be appealed to the Supreme Court of Canada. This is very likely if the federal government is not willing to refer the matter directly to the Supreme Court.

(3) There would be an advantage in the federal government taking the initiative in framing a reference, rather than leaving it to a province to draft the question to its own advantage: once the federal government undertook to make a reference it could, within reason, also control the timing by the process of drafting (in consultation with the provinces) and adoption of the questions.

(4) It would probably take about a year to get a decision of the Supreme Court after a reference is made to it.

(5) A provincial reference to a Court of Appeal would probably take 1½-2 years from the time of initiation until it was finally disposed of on appeal to the Supreme Court. While there could be advantages in such a delay there would be some potential disadvantages: the province could frame the reference question without our agreement and e.g., could focus solely on whether the procedure is in accordance with the Canadian conventions rather than whether the patriation measure adopted is legal. Also, while the ultimate Supreme Court pronouncement would be postponed by this process, there would be the additional risk of an earlier, possibly critical, provincial court judgment.

(6) There would be a strong strategic advantage in having the joint resolution passed and the U.K. legislation enacted before a Canadian court had occasion to pronounce on the validity of the measure and the procedure employed to achieve it. This would suggest the desirability of swift passage of the resolution and U.K. legislation.
(7) On the other hand, it will be difficult to explain, if the matter is before the courts or is to be referred to them, why the Canadian Parliament and the U.K. Parliament are being asked to act prior to a judicial pronouncement on the validity of this procedure. This would be easier to explain if the government did not initiate a court review and instead took the position that the procedure was legally correct and that there was no need to delay action pending the disposition of legal attacks initiated by others for the purpose of delay, embarrassment, and obstruction. After all, there would be infinite possibilities for actions and provincial references to be launched over a prolonged period of time that could delay patriation indefinitely if we were to wait for their disposition.

(8) One basis of proceeding through the two Parliaments in the face of court action would be a commitment that the patriation legislation would not be proclaimed until after the Supreme Court pronounced on its validity. This would also be difficult to explain, however, as in theory it could result in the law never being proclaimed and the two Parliaments having to go through another process in future for patriation. This would also require careful explanation to the British government, which might otherwise take the position that it would not submit the matter to its Parliament until the Supreme Court of Canada had pronounced.

(9) In any situation where the government was proceeding as planned with patriation but simultaneously taking a reference to the Court, it would be essential that the rationale for doing so be explained: that, having no doubts about its legal right to proceed with patriation it proposes to do so, but is taking a reference to reassure those who have doubts and to avoid any criticism that it is trying to avoid the legal issue.

(10) Any reference to the Supreme Court would put that Court in a very difficult position, and the Government of Canada would be seen to be responsible. The major issue involved would be more of a political than of a legal nature, since the debatable area is essentially that of the conventions. Conventions are rules of political conduct which are usually imprecise, unwritten, and changeable by time and circumstance. The request for their definition by the court would come in the midst of a widespread political controversy which the Court would be obliged to help solve.

(11) The attitude of the Supreme Court to the patriation package could be affected by its contents, and particularly by the degree to which those contents would affect provincial powers and institutions of importance to the provinces such as the Senate and the Supreme Court itself. Patriation with nothing more might cause no problems. Patriation with an amending formula providing for unanimity for amendments might not either. Patriation with any other formula would be potentially more difficult, and the concerns of the Court could well increase with other additions, particularly in the field of distribution of powers.
No matter what other procedures follow, it would be extremely important that the government state its view of its legal position from the outset, starting with the Prime Minister's speech introducing the resolution. Demands for copies of legal opinions will no doubt follow, and while these would not, in accordance with established practice, be disclosed, it would be important that the Prime Minister or the Minister of Justice make a full statement on the subject at an appropriate time.

Options in the face of strong attack

The following options all relate to the possible situation where the government is faced with a strong and sustained attack on the validity of a unilateral patriation process. In such a situation the government could:

(1) take the position that it is confident of its legal position, that there is no need to refer what is essentially a political question to the court, and that it sees no reason to delay patriation action while provinces try to obstruct through references and other legal techniques: this would be a more consistent position, but it involves (a) a risk of a provincial reference, and (b) a political risk of appearing to be afraid to submit to the Court a legal issue on which it says it is confident;

(2) proceed with patriation action through both Parliaments, but make a commitment that a reference will be made to the Supreme Court and that the patriation measure, enacted in the meantime, will not be brought into effect until after the Supreme Court decision: this has the advantage of avoiding delay in patriation and would strengthen our position before the Court if the U.K. had already acted. It could, however, make the British reluctant to act;

(3) refer the question to the Supreme Court and delay action in either Parliament until after a Supreme Court decision: this has the advantage of demonstrating a complete willingness to have our legal position tested, it has the obvious disadvantages of delay, loss of momentum, and the appearance of the government backing down on patriation and saving face by throwing the issue into the Court; it would also mean that the Supreme Court could pronounce in the abstract, as it did in the Senate Reference, without a law before it already enacted by the U.K.;

(4) proceed with the resolution through adoption by both Houses but initiate a reference concurrently and delay forwarding the Joint Address to London until the Court has pronounced: this could also have the advantage of appearing completely open to judicial review of the legal question; it would still have the disadvantage that Members of the Canadian Parliament could object to being asked to make a decision on a matter whose validity is still before the courts; it would delay the process almost as much as option (3), and momentum would be lost; and we would also, as in (3) be before the Court without a scheme already enacted.
5. STRATEGIC CONSIDERATIONS VIS-A-VIS THE PUBLIC

To secure a maximum of public understanding and support, action to be taken after the First Ministers Conference should appear to be a natural consequence of what has happened at that conference, not an abrupt change of direction nor a new start.

This places an admittedly heavy burden on the Prime Minister. It suggests that, while he strives for agreement, he must also shape and lead the deliberations toward action.

In other words, the public should expect implementation at the end of the conference.

This underlines the importance of the Prime Minister's closing speech which, in addition to making clear the outcome of the negotiations, should pave the way for the implementation phase.

Should the Prime Minister give a press conference after the FMC, both in his statement and in his answers to questions he may wish to continue to point the way toward implementation, stressing the future rather than the past.

Consideration should also be given to a major address to the nation on television and radio. The historic consequence of constitutional renewal is justification enough. The timing of such an address could be crucial. A possible date would be just before the House meets to debate the Resolution. (i.e., Sunday, September 28).
The purpose of this section is to facilitate discussion on the alternatives for providing the public with additional information on the constitutional renewal process, following the First Ministers' Conference.

It should be noted at the outset that federal government advertising and information initiatives to date have aroused considerable public interest in the issues being discussed, and have created a demand for more specific information. Thus it is essential to continue the process of communication to maintain the momentum and the climate for acceptance of change.

This section is designed to help Ministers decide:

(a) whether they want to continue an advertising campaign after the FMC; and if they do

(b) whether it will be a "hard sell" campaign aimed at promoting federal government initiatives, or a continuation of the "soft sell" used during July and August;

(c) whether the continuing communication program will be limited to standard information and public relations techniques (i.e. no paid advertising).

The fundamental question to be addressed concerns the legitimacy of spending taxpayers' dollars to promote what will be deemed by many to be a politically partisan position. Ministers may want to note that selling federal constitutional proposals is quite different from the Quebec referendum campaign, when all federal parties basically supported the government's position and hence did not object strongly to federal advertising.

Moreover, Ministers should recognize the important distinction between the use of advertising as a negotiating tactic and its use as a tool to sell the government's programs or policies over the head of the Opposition. During the summer, government advertising played a significant tactical role in two ways. First, it helped to keep the issue of constitutional reform before the public at a time when there was no other means for doing so since Parliament was not sitting. Second, it helped to persuade the provinces that the federal government was not bluffing; that it really did intend to take action this fall - unilaterally if necessary; and that to achieve this goal it was prepared to treat this round of constitutional negotiations more like a street-fight than a diplomatic negotiation.

But once the government has decided what action it intends to take, and Parliament has been reconvened to debate that proposed action, the role of advertising changes. At that point, public funds are being used to sell the governing party's position, yet such funds are
not made available to Opposition parties. Thus, the Opposition has no effective way to respond, in contrast to the provinces which can (and did during the summer) respond by running their own advertising programs. Under these circumstances, Ministers need to decide if advertising is politically legitimate.

Moreover, even if a decision is made to proceed with advertising, there are several advertising strategies which are possible.

Keeping in mind that the shape and extent of future communications initiatives will be determined by the outcome of the PNC and the general strategy adopted by Cabinet to advance constitutional renewal, three alternatives are outlined below, along with an analysis of the advantages and disadvantages of each.

(Please note that the three alternatives are not mutually exclusive. This document assumes that Alternative C, the standard information and public relations activities, such as public speeches, news conferences, news releases, and distribution of publications, will proceed regardless of what decisions are taken concerning advertising. Either of the first two alternatives will reinforce and complement these traditional information techniques).

A. Advertising -- hard sell

Advantages

(1) An aggressive advertising campaign, using all media, is the most effective way of communicating the government's point of view to the majority of Canadians.

(2) Advertising is the only reliable way of countering provincial advertising (i.e., the hard sell campaign already started by the Government of Quebec, the threat by some Western provinces to do the same) and of most effectively correcting provincial and media misrepresentations of the federal position.

(3) Feedback from advertising done to date indicates that Canadians have received and accepted a rather soft message; they want something more concrete, they want more information. Advertising is the most effective way to meet this demand.

Disadvantages

(1) An aggressive advertising campaign will inevitably cause the government to incur considerable political cost in terms of strident criticism from Opposition parties in Parliament, from provinces and from the media.
(2) There is the moral dilemma, as noted previously, about committing large sums of the taxpayers' dollars to a campaign that many will see as being politically partisan.

(3) While there has been no discernible public outcry to date over federal constitutional advertising, it is quite possible that unfavourable public opinion could be stirred up when Parliament resumes and the Opposition parties step up their criticism.

B. Advertising -- soft sell

Advantages

(1) Continuation of a "gentle" campaign would provide the Opposition parties and some of the provinces with fewer grounds for strong criticism and it would continue to maintain a level of broad public interest in constitutional renewal.

Disadvantages

(1) The federal government would not be aggressively promoting its own constitutional initiatives.

(2) The government could be accused of spending a lot of money on vague generalities.

C. Traditional information and PR practice

This alternative would involve the Prime Minister, Ministers and MPs making public speeches, holding news conferences, issuing news releases, distribution of published material.

Advantages

(1) It would offer no grounds for harsh criticism from the Opposition parties or the provinces.

(2) It would not represent a significant and highly visible investment of public funds.

Disadvantages

(1) This is the least effective way of promoting whatever initiatives the Cabinet decides to take, in terms of reaching the majority of Canadians.

(2) While offering free factual publications is an important element of any information program, it reaches at best only a fraction of the population.

Attached, as Annex 2, for the information of Ministers, are scripts for two television advertisements. One is an example of the "soft sell" approach used in Phase I of the constitutional advertising campaign. The other, which is more aggressive, was prepared for Phase II.
VI. CONCLUSION

The summer of CCMC negotiations has created circumstances in which there is now a possibility of reaching agreement on a package of constitutional amendments. This possibility has developed largely because of the three key elements of the federal negotiating strategy:

- the statements that the federal government was going to take action this fall and would do so unilaterally if necessary. While this was initially not believed by most of the provinces, events of the last week (Mr. Chrétien's two speeches, the leaked Pitfield memo, etc.) have finally convinced them that the federal government is deadly serious this time. This conviction will cause several provinces to come to the FMC wanting an agreement, but for political reasons, needing in that agreement at least one item which they regard as being of political significance in their own province;

- the distinction between the People's Package and the Package of Government Powers and Institutions and, most importantly, the refusal of federal negotiators to bargain elements in one package against elements in the other. This, combined with the Gallup poll showing the popularity of the People's Package, and the insistence by federal negotiators that unilateral action would be on the whole package has led to closer agreement on a Charter of Rights than there has been before. The task at the FMC will be to broaden agreement on the Charter, in particular to get it to include language rights and mobility rights;

- the direct linking of Powers over the Economy (a new Section 121) with the resources item and the federal position that there would be no agreement on resources without agreement on Section 121.

Within the confines of maintaining these three key strategic principles, the challenge of the FMC will be to try to move the provinces toward an agreement recognizing that:

a) agreement will necessarily mean a large package since the provinces will not accept the People's Package on its own, and the federal government will not be part of an agreement that does not include the People's Package; in the light of these facts, an agreement on a broader package is clearly preferable to unilateral action on a smaller package provided that the larger package includes the elements of the People's Package;
b) the federal government must be seen to be negotiating in good faith, and to be trying hard to reach a negotiated solution, so that unilateral action is publicly acceptable if it becomes necessary;

c) the offer of an extension of FMC and/or a second round of negotiations on a new list of agenda items, is a key element in (b) but it ought not be offered until the very end of the conference when its purpose is to show the public that the federal government is prepared to walk the extra kilometre. Offering the second round too early would remove the pressure to reach an agreement because at the present time a key element in the dynamics of the negotiations is the fear provinces have that they will be stuck with the status quo on the economic items since, if the federal government is forced to move unilaterally on the People's Package, it might refuse to discuss key provincial issues for years to come;

d) an agreement is likelier to be reached if each Premier can return home and be able to say that he won something in the negotiations, even if what he won was very modest, or at the very least to be able to justify why he did not get all he wanted (which probably explains why some of the provinces significantly moderated their positions in some of their key issues this week).

The probability of an agreement is not high. Unilateral action is therefore a distinct possibility. In the event unilateral action becomes necessary, Ministers should understand that the fight in Parliament and the country will be very, very rough. For as Machiavelli said: "It should be borne in mind that there is nothing more difficult to arrange, more doubtful of success, and more dangerous to carry through than initiating changes in a state's constitution."
POWERS OF THE FEDERAL COUNCIL
(see pages 11 - 13)

10. Matters coming within the following classes shall be referred to the Council for its consideration, debate and disposition according to Section 9, namely

(a) The exercise by the Parliament of Canada of the declaratory power pursuant to Section 97 (12) c.

(i) Laws of the Parliament of Canada initiating general conditional grants to the provinces in relation to matters within exclusive provincial jurisdiction.\(^2\)

(ii) 3

(b) (i) Laws of the Parliament of Canada made pursuant to the opening words of Section 91 or actions of the Government of Canada pursuant thereto, which have the effect of suspending in whole or in part the normal distribution of legislative powers between the Parliament of Canada and the legislatures of one or more of the provinces, except in cases where there is a state of real or apprehended war, invasion or insurrection.

(ii) Any measure taken to deal with real or apprehended insurrection will become inoperative fifteen days after having been proclaimed unless it is ratified by the Council.

(c) Laws of the Parliament of Canada, or sections thereof, which are to be administered by provincial governments.

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1 Ministers were unable to conclude whether this provision should be limited to areas of exclusive provincial jurisdiction or made broader.

2 Ministers recognize the necessity, at some stage, of further ministerial or First Ministerial determination of what if any fiscal equivalent should be available to non-participating provincial governments.

3 At the request of Quebec the following clause was also considered, but Ministers did not reach a conclusion:

"Laws of the Parliament of Canada initiating payments to classes of individuals or institutions in relation to matters within exclusive provincial jurisdiction."
(d) Approval of appointments to the managing bodies of such federal boards, commissions or agencies, as are determined from time to time by the Conference of First Ministers, to have significant interest to all or some of the provinces.4

(e) Other matters which have emerged or might emerge in the overall process of constitutional review which Ministers or First Ministers deem appropriate.

4 There was some discussion as to whether, as an alternative, a list of specific subject areas such as energy, communications, tariffs, monetary policy and transportation should be specified.
OPEN ON LONG SHOT OF
RECREATION OF FAMOUS 'THE
LAST SPIKE' B & W PHOTOGRAPH,

DONALD SMITH RAISES HAMMER...

... AND COMPLETED ACTION,
'FROZEN' IN POSE.

ALL LOOK UP WITH A STARTLED
LOOK ON THEIR FACES.

CUT TO FULL COLOUR AND A
TELEPHOTO VIEW OF A GIANT
AIR CANADA 747 RACING DOWN
THE RUNWAY, TOWARDS US AND
LIFTING OFF

747 ROARS OVERHEAD AND SCREEN
Goes black with Graphic: OUR
WAY AND

GRAPHIC: CANADA LOGO

ANNCR. VO. When Donald Smith
drove that famous Last Spike
one chilly November day in 1885,
it was more than a symbol.

For the railroad built the reality
of Canada -- the nation proclaimed
by our Constitution of 1867.

What a change Donald Smith
would see today!

SFX: ROAR OF ENGINE, GROWING
LOUDER.

ANNCR: In fact -- about the
only thing in Canada that hasn't
changed much -- is the
Constitution.

Now's our chance to make it right.
Make it work. Make it ours.

MUSIC: CLEAR, BELL-LIKE FIRST
FOUR NOTES OF 'O CANADA'.

Brought to you by the Government
of Canada.
COMMERCIAL TAKES PLACE IN A PERSONNEL OFFICE AS A PROSPECTIVE EMPLOYEE IS BEING INTERVIEWED.

ANNCR (VO): The freedom of any Canadian to work anywhere in Canada is not guaranteed under the present Constitution.

INTERVIEWER: Six years' experience in New Brunswick?

APPLICANT: That's where I'm from.

INTERVIEWER: Oh, well, sorry. We have to give preference to local applicants. Nothing personal.

ANNCR (VO): But the freedom to work anywhere in Canada is an important one. A new Constitution can give back the freedom to work where you choose.

APPLICANT: Nothing personal, my foot.

ANNCR (VO): Let's get it in writing. Let's guarantee it.

Brought to you by the Government of Canada.