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February 23, 1981

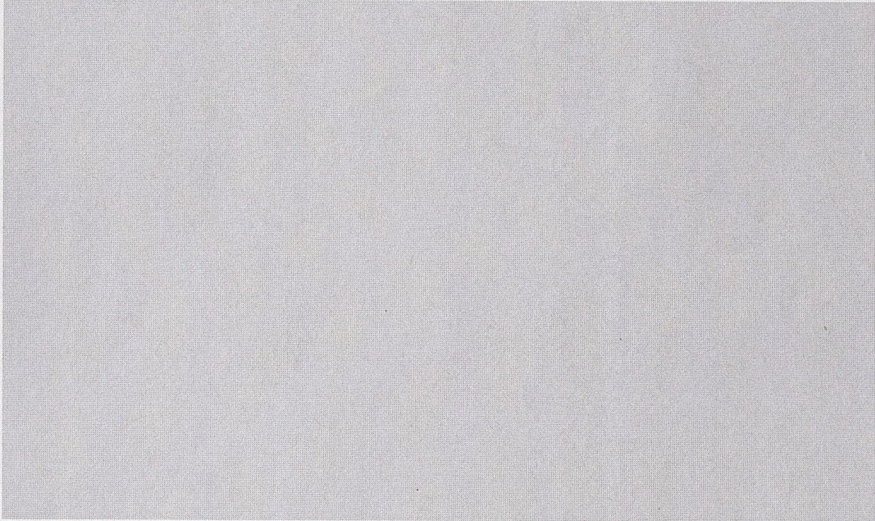
MEMORANDUM FOR THE PRIME MINISTER

Follow-Up to Last Week's Memorandum on
Constitutional Options

Last week's memorandum raised several questions to which answers are needed, and outlined the importance of accurately estimating the probability of certain events occurring, before a final decision is made on which constitutional option will be chosen. The purpose of this memorandum is to provide the required information.

No one other than Jim Coutts has been given a copy of this memorandum.

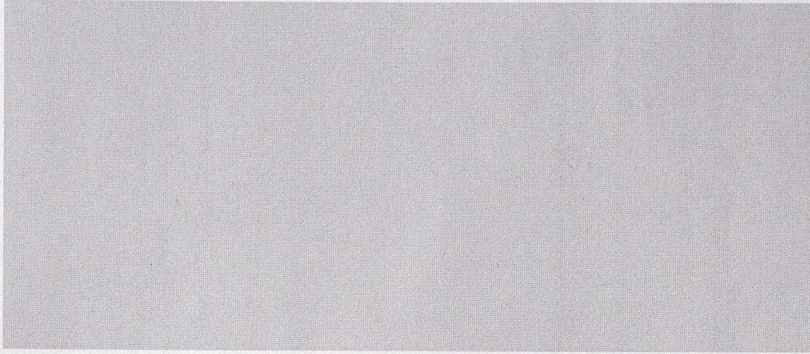
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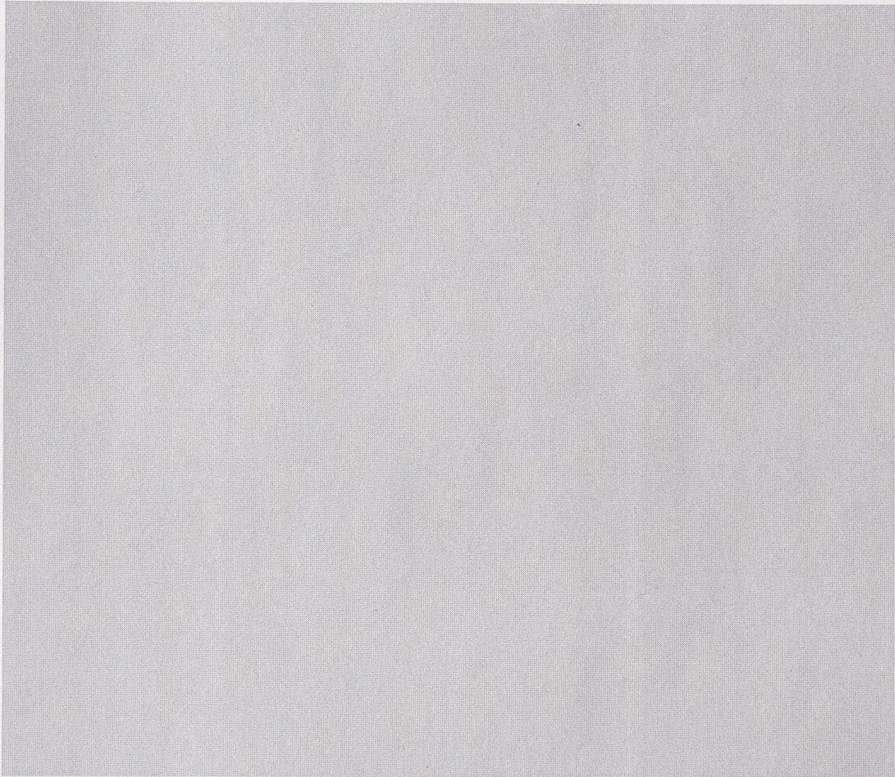


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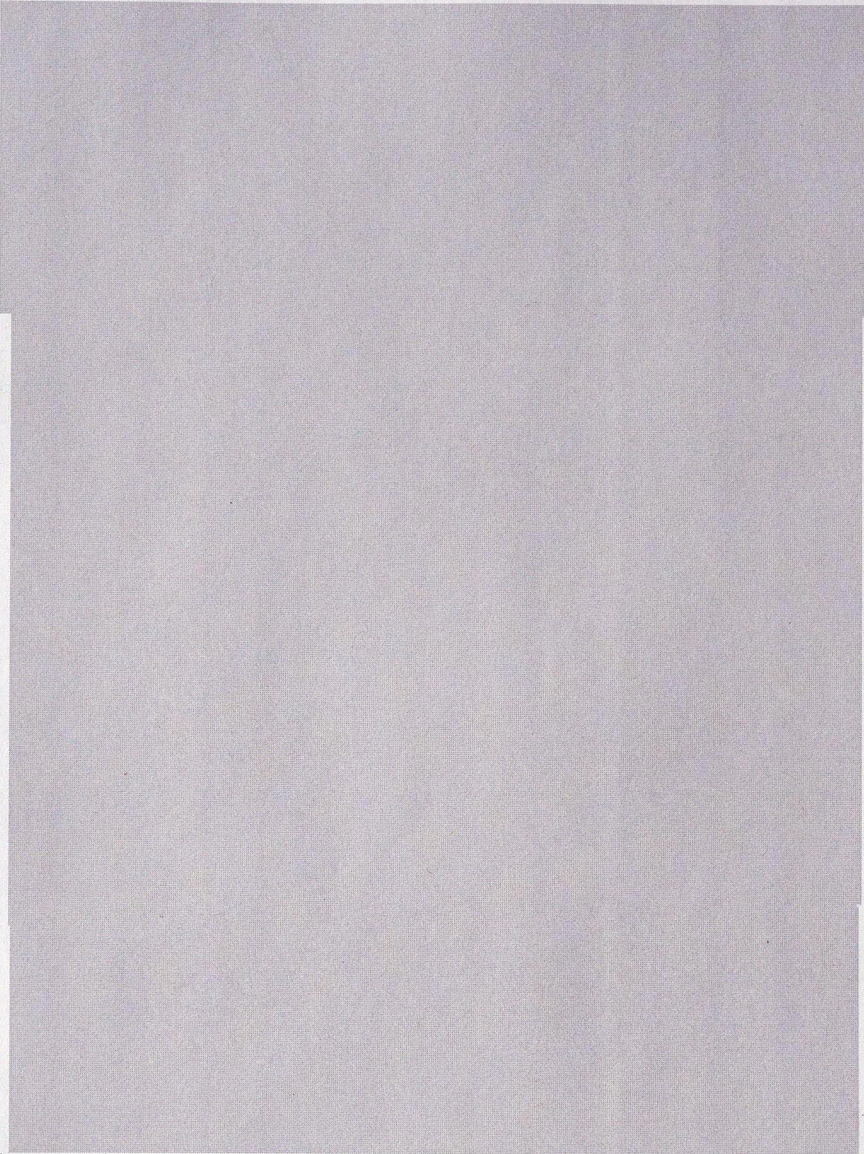
2. Assessment of the U.K. Situation



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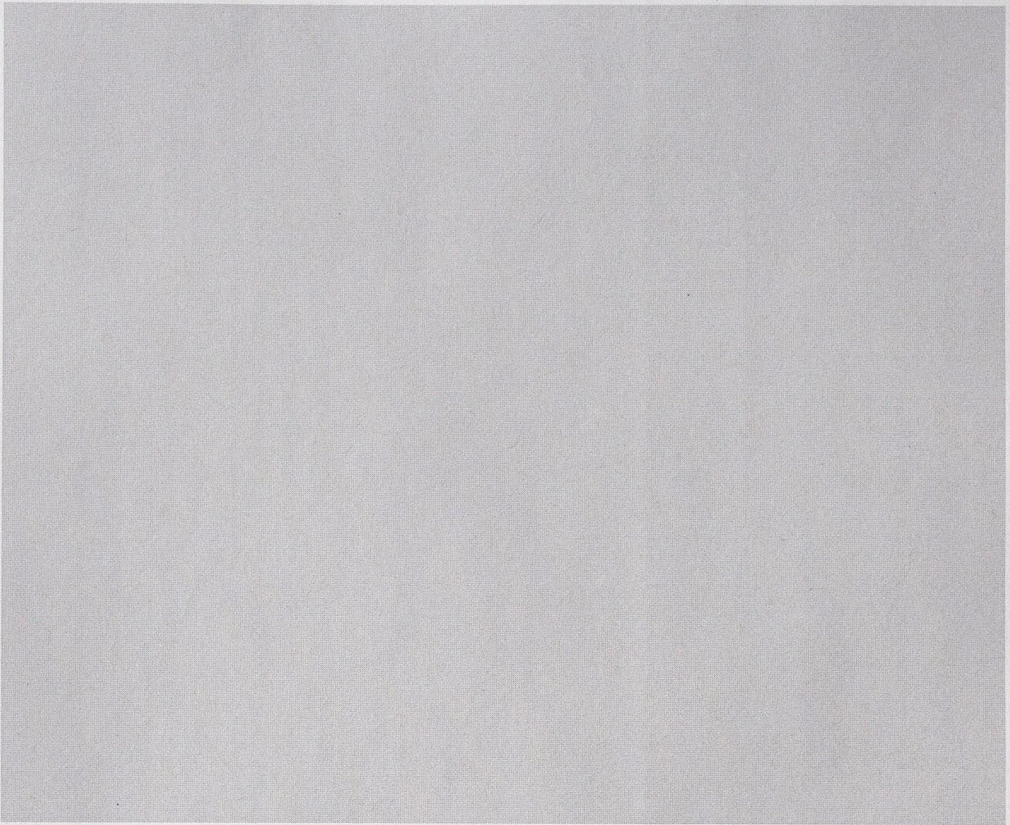
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3. Assessment of the Situation in the House and Senate

The debate in both chambers is being managed by a group of officials, MPs and Senators, chaired by Mr. Chrétien, who meet daily to review strategy, outline speeches and check progress in the debate. This work is going well.

-- Fred Gibson, who is the senior official on this group, has written you a separate note (attached) which seeks your advice on one or two issues and which also outlines the process which would have to be followed if we were to decide to adopt option 2A or option 3, since either of these options would require Parliament agreeing to an amendment to the resolution. (Gibson's note does not deal with the options themselves, but with how to make amendments to the resolution now that it is in Parliament.)

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The only other facts you should be aware of
in relation to the Parliamentary debate are:

- Negotiations are underway among parties in the Senate to have all votes on amendments, and the vote on the resolution itself, deferred until the same date on which the House votes on the resolution. In this way the measure would clear both Houses simultaneously.

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This would mean that the earliest day we could introduce the closure motion would be Friday, March 20, with the closure vote being held on Monday, March 23. This would mean that there had been a five-week debate. My view is that it need not go any longer than this, but a decision on the final length of the debate should not be made until Cabinet on March 19, at which time the mood of the House, and the NDP caucus, can be taken into account before deciding to proceed with closure.

4. Assessment of the Political Situation

Over the weekend I again reviewed the details of our latest survey results on the constitution. In point form they reveal:

- Concern about the process we are using (54% nationally, including over 60% in Saskatchewan, Alberta and among Quebec francophones, say that unilateral action was not necessary).
- Very strong support for the substance of the Charter when people are told what is in it, but in general appalling ignorance about its details and even its existence.

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- The support for the substance of the Charter shows very little regional variation and has not changed during the past four months.
- 63% support the use of a national referendum to break a deadlock between the federal and provincial governments over a proposed constitutional amendment. This is down from 71% in September, but the slippage has gone to an "undecided" answer as opposed to rejection of the idea.
- Canadians are essentially equally divided on whether a referendum should have to pass in all ten provinces (favoured in Alberta, Saskatchewan, Quebec and Newfoundland) or only by a national majority (favoured in Ontario and New Brunswick).
- Canadians (particularly those in Alberta and Saskatchewan) are concerned about the degree of federal-provincial conflict and they largely blame the federal government. However, 73% want both the federal and the provincial governments to give a little in order to rectify the current situation.

All these factors suggest some version of Option 3 would have strong public support and, combined with the assessments of the legal and U.K. situations given above, would ensure patriation with an amending formula by July 24. The problem with Option 3, and it is a major problem, is its public perception as a major "retreat" by the government. The question is can this "retreat" be turned to advantage by:

- selling it as an act of statesmanship to ease current federal-provincial conflict: we have given a little to rectify the current situation, now the provinces must do likewise. We have softened our hard-line stand on the process because we know that the people want the substance and that, in the end, they will support us over the Premiers.
- calling on the Official Opposition to now support the package in light of the statement in their minority report that "rights originate with human beings; they are not conferred on people by their governments. Any Charter of Rights should reflect this great principle". Thus the Opposition must support the imposition of a Charter on provincial governments if it is supported by the people in a national referendum.

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The "act of statesmanship" argument could be very powerful to those Canadians who like what we are doing but not how we are doing it. We could say that, as we have been asked to do by several Premiers and the Leader of the Opposition, we are prepared to sit down with the Premiers and try to reach agreement on a Charter as part of the FMC's which the Resolution requires we hold each year for the next two years. We want to produce a Charter of which Canadians can be justly proud and if this takes a little more time, a little more discussion, then we have the patience to wait and do it right. We are prepared to be flexible. But, of course, if we fail to get unanimous provincial agreement to any proposed change in the Charter, and if the appropriate number of legislatures vote to opt-out of the Charter, then under Option 3 of the Charter to be passed by Parliament next month will be put to the people in a national referendum.

This stance would not be an act of retreat. It would be demonstrating the same kind of flexibility we showed when we agreed to extend the Committee hearings by two months -- a decision which, in retrospect, was the right decision. It is clear that during the two month extension we produced a much better Charter, which will have much greater public support, than if we had closed off Committee hearings in December. Similar benefits may well result from being flexible again now.

The remaining political advantage of Option 3 is that it might enable the Liberal Party to rebuild its constituency covering all the special interest groups which want the Charter entrenched: ethnic organizations, native groups, women's groups, handicapped organizations, etc. They represent precisely the slightly left-of-center portion of the population that Jim Coumts wants to appeal to, particularly in western Canada. Moreover, in a referendum campaign the issue would not be how to improve the Charter, as it was before the Joint Committee; the issue would be: do you want this Charter or none at all.

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Faced with this choice, we could run an offensive selling campaign and would not be on the defensive as we were before the Joint Committee. Indeed, the Charter just might make a good platform for the next election campaign.

Thus, it seems to me that there may be political advantages to Option 3 which do not exist with any of the other options. I say this even though I recognize that there may be great political disadvantages if the prevailing public perception of Option 3 is that we have really retreated. However, Option 3 at least avoids the worst possible outcome, one which would be truly disastrous for you, the government and the country, namely the defeat of the Resolution in the Supreme Court or in Westminster.

We should be careful not to underestimate the enormous negative consequences such a defeat would have. Defeat would not only ruin your reputation and to a large extent that of the Liberal Party, it would also set back federal-provincial relations for years, for henceforth the provinces would assume that they can always defeat the federal government if they try hard enough and fight strongly enough. In other words, my major concern is that the defeat of the measure will inordinately strengthen the role of the provinces, not only in terms of future constitutional change, but in terms of the way the Canadian federation is managed and that this would be disastrous for the country.

Recommendation

On the basis of the above analysis, I recommend that we proceed immediately to do two things:

- (a) Find out definitively whether the U.K. government will pass the measure this session and before the Supreme Court has ruled on its constitutionality. As suggested above, this can best be done by having you speak to Mrs. Thatcher directly while she is in the United States, but if you think this is inadvisable then we should agree on another method of getting this information this week.

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(b) In view of the importance the political analysis above attaches to two factors:

- the cost to the government of a defeat in the Supreme Court; and
- the cost in terms of public support for the government if it backs off on its commitment to the Charter by adopting Option 3,

I recommend that we conduct a survey in Quebec and Ontario only (because this is where the government's political strength lies and by limiting a survey to two provinces we can get the results by next weekend) to assess the relative importance of the above two factors. The purpose of the survey would be to give us a good feel for the true costs which should be attached to the above two factors and hence to the relative merits of Option 2 versus Option 3. That is, the survey will tell us how people will react if we lose in the Supreme Court and what they will think if we adopt a position of imposition of the Charter only after a national referendum.

If these two recommendations are carried out this week, we could make a final decision next Monday when, in addition to knowing the results of the Conservative convention (if this is a relevant factor), we will have Mr. Pitfield's counsel available to us as he will be back by then.

