



CONFIDENTIAL

File number - numéro de dossier

Date

August 5, 1980

MEMORANDUM/NOTE DE SERVICE

Sorry I have missed the deadline. But I am in general agreement with all your proposals. I believe in some concessions now, and more later, to increase the scope of its consensus.

TO/A: THE PRIME MINISTER

FROM/DE: DEPUTY MINISTER OF JUSTICE

SUBJECT/OBJET: CHARTER OF RIGHTS

Comments/Remarques

-- The purpose of this memorandum is to provide you with a revised discussion draft of the Charter of Rights (dated August 5) with a view to seeking your instructions on a number of key issues relating to its scope and contents. This will enable us to know the position to be taken in our discussions with the provinces between now and the First Ministers Conference in September.

-- This revised discussion draft has been prepared in light of comments that we received from provincial officials on our July 4 draft during the constitutional meetings in July. The provinces had many concerns about that draft, both as to specific wording and as to its scope of coverage. The revised draft attempts to accommodate a number of these concerns but, as indicated below, it by no means meets all of them, particularly in relation to the scope of the Charter.

Set forth below is a commentary on the revised draft raising the principal issues on which your instructions would be appreciated.

1. Limitations on Rights and Freedoms (Section 1)

In the July 4 draft specific circumstances were spelled out in which limitations could be imposed on certain categories of rights. For example, fundamental freedoms and mobility rights could be limited for reasons of national security, public safety, order, health, etc., and certain legal rights in times of national emergency. Although these limitations were more refined than in C-60, they still drew considerable adverse public reaction as being too broad and repressive.

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We raised briefly with the provinces the possible alternative of removing the various limitation clauses and casting the introductory clause in a form that would indicate that the rights and freedoms are not unlimited but subject to the principles of a free and democratic society under the rule of law. The provinces were not generally in favour of this approach, fearing that it would leave even more power to the courts.

W/S

It is our present view that such a clause as now provided in section 1 would be sufficient to ensure that the courts would read into the Charter all the long recognized limits on rights. In the United States, the Supreme Court has done this without any such directive in their Bill of Rights, as has the Canadian Supreme Court under our present Bill of Rights. We also feel that the Charter would be more attractive to the public (although perhaps not to provincial governments) without a series of limitation clauses.

W/S

If you feel that the proposed section is not sufficient in terms of what it implies, you may wish to consider the following alternative wording for Section 1.

I much prefer this

"The Canadian Charter of Rights and Freedoms recognizes the following fundamental rights and freedoms of everyone subject only to such reasonable limits as are generally accepted in a free and democratic society."

This would make it clear that limits exist without seeking to spell them out, but it tends to introduce the Charter in a rather negative fashion.

2. Fundamental Freedoms and Democratic Rights
(Sections 2-5)

There have been only minor drafting changes in these categories of rights except for deletion of the limitation clause relating to fundamental freedoms. The provinces are generally supportive of including both ~~these categories of rights~~ in the Charter and we do not anticipate any problems in maintaining this support, subject to our earlier comments on limitation clauses.

.../3

3. Legal Rights (Sections 6-15)

Substantial changes have been made in the structural presentation of this category of rights, and a number of modifications appear in the wording of specific rights. In addition, the right to a fair hearing for determination of a person's right and obligations has been eliminated along with the limitation clauses.

These changes have been made both to clarify and improve the specification of the legal rights and to meet some of the provincial concerns over the earlier draft. Three principal concerns of the provinces are that:

- (a) including certain rights (e.g., respecting search and seizure, privacy, counsel and self-crimination) could result in Canadian courts adopting undesirable American jurisprudence relating to exclusion of all illegally obtained evidence and non-compellability of witnesses;
- (b) including rights where the law is still in an uncertain state of evolution (e.g., privacy, fair hearings) could lead to court decisions which are unacceptable but unchangeable; and,
- (c) applying rights beyond criminal and penal proceedings to include civil and administrative proceedings would extend legal protections to areas where the provinces feel such protections are not now applicable and, in some cases, would be unwarranted.

On the first point, we share some of the provincial concern, but rather than eliminating the rights in question, we believe that any tendency by Canadian courts to adopt the extreme American rules can be effectively curbed by limiting the range of remedies the courts may invoke for a breach of rights. Consequently, we have proposed amendments to the remedy sections (26 and 27) to achieve that result.

On the second point, we also share the provincial concern to some extent and therefore propose in the draft to delete reference to the right to a fair hearing (outside the criminal and penal area) for determination of one's rights and obligations since the law respecting the "fairness" doctrine is in an

Comments/Remarques:

uncertain state. We have, however, left in the invasion of privacy right on the view that we should make one more effort to convince the provinces that it is too important to be omitted. At the same time, we have enough concern with the uncertainty of its meaning that we would not want to press too strenuously for its inclusion. On a related point, we have continued to include the right of an accused to be tried within a reasonable time although we recognize that rigorous interpretation by the courts could cause serious problems given the delays that continue to persist in criminal trials in some parts of the country.

If any or all of the three legal rights mentioned above (and perhaps other categories to be mentioned later) are to be excluded from the Charter, consideration could be given to a two-tiered approach to protecting rights: a Charter entrenching those rights included in it and a Bill of Rights legislated by Parliament covering those rights not in the Charter. As the latter rights become more clearly defined or accepted, they could be transferred by amendment to the Charter.

On the final point raised by the provinces, we do not share the view that all the legal rights should be confined to criminal and penal matters. Some of them, especially those relating to an accused in Section 11, are so limited by definition. However, we see no reason why a seizure of property in a civil proceeding, a detention under a mental health or child protection law or civil proceeding where a party does not understand the language should not be subject to the legal rights provided. We would thus propose to press the provinces for a broad application of these rights.

As for elimination of the limitation clauses, I refer you back to the comments on Section 1.

4. Mobility Rights (Section 16)

These provisions remain essentially the same as in the July 4 draft, except for the deletion of the general limitation clause and the inclusion in subsection (3) of a possible further qualification on the nature of the discrimination (undue or unreasonable) permitted in laws.

While a number of provinces appear receptive to including the right to move and take up residence, virtually all are opposed to the right to pursue a livelihood, and particularly to permitting the acquisition and holding of property. In general, they feel that provinces should be free in the areas of economic and social policy to implement policies controlling access to jobs, land and other benefits by non-residents.

Discussions on this category of rights is now connected closely with the subject of "Powers over the Economy" and thus any decisions on possible modification or deletion of the category will have to be assessed in light of any changes in the broader policy issue. It is our intention to retain this category in the new draft for further discussions with the provinces, subject to such decisions as may be taken on the draft respecting "Powers over the Economy".

5. Non-discrimination Rights (Section 17)

This category of rights has posed serious problems from the outset and continues to pose difficulties which may prove insoluble even as the section is redrafted. In this draft we have reverted to the approach of specifying the grounds for non-discrimination rather than leaving to the courts the determination of what constitutes improper grounds of discrimination. While this narrows the scope of judicial power, it does not really meet the concern of the provinces (shared by us) that non-discrimination is a developing area of the law where new grounds are being developed (in federal and provincial human rights legislation) and where certain grounds (sex, age, marital status) still require exceptions or limitations.

These are legitimate concerns which are difficult to meet in a Charter where one cannot begin to spell out all the qualifications. Nevertheless, it will be equally difficult to have a Charter which does not attempt to make some provision for non-discrimination. Consequently, we would propose an approach as suggested in Section 17 where we may be able to find some consensus on a "core" group of accepted grounds. We are not optimistic, however, that even this can be achieved and it may ultimately be necessary to consider omitting this category from the Charter, to continue dealing with it exclusively through legislation as is now the case under the Canadian Human Rights Act and similar provincial laws.

Comments/Remarques:

6. Property Rights (no section)

In the July 4 draft this category provided for the deprivation of property rights only in accordance with law and for reasonable compensation, although it permitted the application of zoning rules and other restrictions on the use of property. Most provinces were strongly opposed to this approach viewing the requirement for reasonable compensation as a matter for legislative determination. We had earlier attempted the approach of "due process of law" without any specific provision for compensation, but this was also rejected by the provinces given its broad interpretation by the U.S. courts. The only other alternative of simply providing for deprivation "in accordance with law" seems inadequate for a Charter since it really guarantees nothing.

yes

In the circumstances, we have tentatively concluded that the better approach may be to drop any reference to property rights and ~~leave these to be dealt with~~ in a legislative Bill of Rights along with other matters not picked up in the Charter.

7. Official Languages (Section 18)

This section has been modified to incorporate the principle of Section 2 of the Official Languages Act giving both languages equal status and rights in all federal institutions. This is a matter on which the Commissioner of Official Languages has been pressing for some years and it was, as you may recall, a subject considered by Cabinet in 1978 in the context of amendments to the Official Languages Act. It is our view that it would be appropriate to incorporate this principle in the Charter, and we are satisfied that it would not (despite the judgment of Chief Justice Deschênes in the Air Canada case) give rise to any unreasonable limits on the authority of the government to designate the language of work for positions in the public service.

*how can you be
so sure?*

As noted in the footnote to this section, New Brunswick officials have indicated that Premier Hatfield may wish to have included a provision declaring French and English to be the official languages of that province.

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8. Language Rights (Sections 19-24)

It should be noted at the outset that during discussions by officials on this part of the Charter, officials from Quebec and Manitoba stated that they were abstaining from the discussions. This was in light of the position taken earlier by their Ministers that there should be no entrenchment of language rights at the provincial level.

(a) Language in Debates and Statutes (Sections 19 and 20)

No changes have been made in these provisions. Ontario remains opposed for practical reasons to having to print and publish all statutes in both languages. While it is a concession that may not change that province's opposition, it is recommended that the federal delegation be authorized to propose a delay provision of three to five years for Ontario and perhaps Manitoba to implement fully the obligation respecting statutes.

(b) Language in Courts (Section 21)

The only change in this section is the deletion of the provision permitting a witness to give evidence in either language in criminal and serious penal proceedings. This provision gave rise to considerable debate and confusion as to its meaning and scope, particularly as to its inter-relationship with the Criminal Code provisions for an accused to choose the language of trial. Consequently, it was felt that the better course would be to leave this matter to be dealt with by ordinary law and by the provision for an interpreter under "Legal Rights".

A second matter on which direction is required is whether, in order to attempt to bring Ontario aboard on language rights in the courts, the federal delegation should be authorized to propose a delay provision of seven to ten years to that province (and perhaps Manitoba as well) for the full implementation of its obligations. As with

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statutes, so with courts, Ontario is strongly resistant to being placed on the same footing as Quebec, Manitoba and New Brunswick. It believes that as a practical matter it cannot provide court services in both languages for many years to come.

(c) Language in Services to Public (Section 22)

The only real change here is a drafting one with respect to provincial services to the public, to make it clear that it is up to the provincial legislature to determine the extent of the services. Most provinces were opposed to the earlier draft, believing it imposed a legal obligation to act.

Again, in this section New Brunswick's representative indicated that Premier Hatfield may wish to have included a provision which assures to the public of that province the right to have government services in either language.

(d) Minority Language Education (Section 24)

This section is the same as that in the July 4 draft. Both we and officials of the provinces continue to have a number of problems with the approach taken in the draft, and given the fundamental importance of this subject, we will be sending you a separate memorandum on it shortly, presenting some alternative approaches for your consideration.

9. Enforcement of Charter (Sections 26 and 27)

These provisions have been modified somewhat both to overcome some of the problems noted under "Legal Rights" and to provide greater clarity as to the purposes of the two sections. Section 26 as now drafted is clearly directed to invalidating any law or subsidiary instrument that is found to conflict with any right declared by the Charter. Striking down a law, however, may not be sufficient remedy for a person whose rights have been infringed, and there may be cases where no legal recourse exists. In such instances, Section 27 would enable the victim to seek specific forms of relief from a court.

Comments/Remarques:

The remedies are considerably narrower than in the earlier draft, but we believe they are sufficiently broad to be effective, while at the same time assuring the provinces that the courts will not have unlimited powers under an entrenched Charter.

10. General

A number of sections of the new draft have not been mentioned. This is because they have not been significantly changed from the July 4 draft and because they do not raise issues on which we feel your instructions are required at this time.

There remains, however, one further important issue which is not raised by the draft, but which will likely be discussed further at the federal-provincial meetings later this month. One of the matters referred by Ministers to the committee of officials was the possibility of including a "notwithstanding" clause in the Charter thereby permitting a legislative body to enact a law overriding one or more rights by an express provision in the enactment to that effect. This approach, you may recall, was considered in some detail during the 1978-79 negotiations, but most provinces finally had considerable doubts about its political acceptability. It is, however, an approach that could alleviate to some extent provincial concerns about the rigidity of the Charter in the face of "bad" court decisions. On the other hand, it is a provision that could seriously undermine the efficacy of the Charter if it were invoked too frequently.

On the basis of preliminary discussions with provincial officials, it would appear that a "notwithstanding" clause has some appeal to the provinces. We, however, continue to have considerable reservations about its desirability and, indeed, its necessity, particularly if the legal rights are more clearly defined. Thus we propose at this point to continue to press for a Charter without a "notwithstanding" clause, while at the same time not foreclosing the possibility of a decision being taken at an appropriate time to include such a provision if this would bring a substantial number of provinces into the Charter.

Lingee

11. Summary

Subject to your comments and instructions, we would propose to deal with the principal issues respecting the Charter as follows:

- (a) To pursue with the provinces the possibility of removing the various limitation clauses in the Charter by inserting a revised introductory section that would implicitly or explicitly indicate that rights are not without reasonable limits.
- (b) To discuss with the provinces the category of "Legal Rights" as set forth in the revised draft, dealing in particular with question of retaining or deleting the rights to a fair hearing, to protection against arbitrary invasion of privacy and to a trial within a reasonable time. We would also press for a broad application of the legal rights.
- (c) To continue to press the provinces for inclusion of "Mobility Rights" in the context of the package relating to "Powers over the Economy".
- (d) To continue to press the provinces, at this time, for inclusion of "Non-discrimination Rights" as set forth in the revised draft.
- (e) To propose to the provinces that "Property Rights" be deleted from the Charter provisions.
- (f) To incorporate in the Charter the principles of section 2 of the Official Languages Act and to include equivalent provisions for New Brunswick if that province so desires.
- (g) To offer to Ontario (and probably to Manitoba) specific delays (three to five years for statutes and seven to ten years for courts) in implementing language obligations in those provinces.
- (h) To omit the provision assuring to witnesses in criminal and penal proceedings the right to give evidence in English or French, as they may choose, leaving this matter to be covered by the right to an interpreter under "Legal Rights".

CONFIDENTIAL

Comments/Remarques:

- 11 -

- (i) To continue to indicate to the provinces the undesirability of including a "notwithstanding" clause, while at the same time not foreclosing the possibility of a later decision to accept such a clause.

If it were possible for you to let us have your comments and instructions on these matters by Friday, this would enable us to discuss a revised draft of the Charter with provincial officials during meetings scheduled for Toronto next Monday and Tuesday, August 11 and 12.

RS

Roger Tassé

Atts. (2)