L

TALKING POINTS - CONSTITUTIONAL CONFERENCES

SECTION 35

Constitutional Conferences

a) Why are constitutional conferences provided for during the interim period?

Section 35 is part of the interim arrangements until Part VI of the Constitution Act, 1981 comes into effect. It is designed to ensure that governments will indeed meet during the interim period to seek agreement on an amending formula, as well as to discuss other matters related to constitutional change.

There should be no doubt respecting the commitment of the government of Canada to pursue with the provinces, among other things, the search for an amending formula during the interim period. Until agreement has been reached among all governments or until seven provinces representing 80% of the population have reached agreement on a formula to put to the people in a referendum or until the interim period has elapsed, there will clearly be a need for at least one constitutional conference a year.

b) Why are annual First Ministers' Constitutional Conferences not a permanent feature of our constitutional arrangements?

While there might well be a number of constitutional conferences immediately following the coming into effect of Part VI, it would be inappropriate to write into the Constitution a permanent obligation for First Ministers to meet in annual constitutional conferences over the next hundred years when there may be extended periods when there would be no need for them. First Ministers would be free to determine the frequency of constitutional conferences in the future as they have been in the past.

c) Who will participate in the Constitutional Conferences?

Only the First Ministers, representing the Parliament of Canada and the legislative assemblies of the provinces -- the only bodies that exercise legislative authority under the terms of the British North America Act, will be full participants in the Constitutional Conferences.

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However Conferences convened during the interim period shall have an item respecting constitutional matters directly affecting the aboriginal peoples of Canada included on the agenda. The Prime Minister shall invite representatives of those peoples to participate in the discussions on that item.

The government of Canada is formally committed to consultation with aboriginal peoples on constitutional changes affecting them. In September, 1978, the federal government proposed that aboriginal groups be invited to make presentations to the FMC, but the provinces did not at that time unanimously concur. Aboriginal groups have, however, been invited to attend all FMC's on the constitution as observers since October, 1978, and a sub-committee of the CCMC has met with representatives of aboriginal peoples on one occasion (August, 1980). We are all aware of the concerns of aboriginal peoples respecting constitutional matters directly affecting them and, in order to remove any doubt about the obligation of governments to address these matters, it would be appropriate to require that they be included on the agenda as a specific item and that representatives of aboriginal peoples be invited to participate in discussions on that item.

Furthermore, the Prime Minister shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda that, in his opinion, directly affects the territories. This will enable elected representatives of the Territories to express directly to First Ministers, their interests and concerns about constitutional matters affecting them.

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M

TALKING POINTS: THE AMENDING FORMULA

SECTIONS 36 - 55

1. The Interim Amending Procedure and the Rules for its Replacement (Part V, sections 36-44)

The government of Canada does not intend to impose forthwith an amending procedure of its own devising. Rather, a two stages approach to the adoption of an amending formula is proposed that will provide ample opportunity for governments to work out a formula together.

a) Unanimous consent during interim period

During the first two years following the Proclamation of the Constitution Act, 1981, the general amending formula will require the unanimous consent of Parliament and of the provinces. First Ministers will meet at least once a year during the interim period in a Constitutional Conference (sec. 35). A key item on the agenda of those Conferences will be the search for a general amending formula. If unanimous consent on a general amending formula is secured, Part VI, as amended by Parliament and the provinces, will come into force.

b) A Referendum on the amending formula

If unanimous consent is not possible during the interim period, but if seven or more provinces representing at least 80% of the population can agree on a provincial alternative for the general amending formula, a referendum will be held. The people of Canada will be called upon to choose between the provincial alternative and either the Victoria formula or another alternative approved by the Senate and House of Commons.

The government of Canada will approach the negotiations with an open mind and would not wish to be locked into a prior commitment to the Victoria formula. It is possible, for example, that the federal government (and perhaps three provinces) might be in agreement with seven provinces with 80% of the population on the basic thrust of a new approach to the amending formula, but they might disagree strongly about one or two of its specific provisions.

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c) The Referendum Rules Commission

In the event of such a referendum, a Referendum Rules Commission will be established to propose rules for the holding of a referendum. The Commission will be composed of the Chief Electoral Officer of Canada, a person nominated by the federal government and a person nominated by the majority of the provinces. If a majority of provinces cannot agree on the nomination of a third person, the Chief Justice of Canada will nominate the third person.

d) The ultimate authority of Parliament to make rules

There has been criticism by many, and in particular by Premier Blakeney that leaving the rule-making procedure to Parliament alone invites abuse, since Parliament could frame rules respecting expenses, time limits, etc., that might be seen as "loading the dice" in favour of the federal option. While this is really highly unlikely, the Referendum Rules Commission responds to these criticisms because the government believes that the process provided in the constitution should not only be fair but should also "be seen" to be fair. The government's proposal follows in large measure a draft suggested to the Joint Committee by Premier Blakeney.

There is, of course, a significant difference. Premier Blakeney's proposal would have left ultimate constitutional authority for rule-making in the hands of an appointed body. The Referendum Rules Commission will undoubtedly do its work conscientiously. However, the government is of the view that, ultimately, if Parliament feels that any of the proposed rules offends the best interest of Canadians, Parliament, representing all Canadians, should have the power under the Constitution to enact laws respecting the rules for a referendum rather than leaving final authority to make laws on the exercise of fundamental democratic rights to a commission of 3 appointed persons making decisions privately.

If Parliament were to reject any rules proposed by the Commission, it would have to do so in a public debate in the full glare of publicity. In other words, it could not act arbitrarily.

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e) The final amending formula

The general amending formula that will come into place at the end of the interim period will be:

- the formula unanimously agreed to by Parliament and the provinces; or

- the one chosen by the people in the event of a referendum; or

- if neither of the above produces an amending formula, the Victoria amending formula.

The Victoria formula has been included in the procedure because, if no agreement can be reached on an alternative, it has the advantage of being a fully developed amending procedure that was agreed to by all provinces in 1971. It provides for a "national consensus" based on the consent of Parliament and at least six provincial legislatures distributed over the four regions of Canada and which would, in practice, represent over 80% of the population.

2. Was there agreement on the Vancouver formula?

Premier Hatfield made it clear before the Joint Committee that there was not agreement on the Vancouver formula.

The Honourable Thomas L. Wells, the Ontario Minister of Intergovernmental Affairs, in a letter dated January 5, informed Mr. William Yurko, M.P., of unresolved matters arising out of the Vancouver formula related to double taxation and amendments where opting-out would be inappropriate. With respect to the opting-out provision itself, he noted:

"I have the impression that all First Ministers might have been willing to overcome their doubts on this matter if it was the only outstanding issue in an agreed upon broad package of constitutional reform".

However, such an agreement did not transpire. In the words of Mr. Wells:

"In sum, our discussions held out the potential for consensus, but it was not achieved in fact. The explanation lies not in the ill will of any of the participants, but in defects inherent in the formula itself".

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3. If there is an emerging consensus on the Vancouver formula, why force the issue now?

The Conservatives would have called upon Parliament to seek the immediate patriation of the Constitution of Canada with the imposition of a Conservative Party version of the alleged Vancouver consensus formula for constitutional amendment. The proposal of the government of Canada, on the other hand, would provide for unanimity as the amending formula during a two year period during which constitutional conferences involving the federal and provincial governments would be held aimed at seeking an amending formula:

- if all governments were able to agree to an amending formula along the lines of the Vancouver formula, or any other formula, it would come into effect;

- if seven provinces representing 80% of the population of Canada were to agree upon a formula along the lines of the Vancouver formula or upon any other formula, it could be put to the people for ratification or rejection;

- if neither of the above procedures were to produce an amending formula, and only in such an event, the Victoria amending formula would come into effect.

The government of Canada is convinced that its proposal is more democratic. It provides a reasonable time-frame of two years during which governments can come to agreement, failing which seven provinces representing 80% of the population of Canada could appeal to the people.

Which approach provides greater respect for the provinces and the people of Canada? The immediate imposition of the Conservative Party's version of the Vancouver formula or the conciliatory approach of the federal government which permits seven provinces, if unanimity is not possible, to call upon the people of Canada to decide?

4. The Referendum Procedure (section 46)

The government of Canada is firmly of the view that sovereignty ultimately resides in the people. If a deadlock exists between the view expressed by Parliament, representing all of Canada, and that expressed by one or more provinces whose

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consent would be necessary for approval of an amendment under section 45, Parliament should have the possibility of asking the people of Canada who, after all, elect both the government of Canada and the governments of the provinces, to arbitrate. However, the people would have to express not only a national majority for the amendment to pass, but also a majority in the necessary number of provinces for agreement under section 45(1)(b). For example, if the Victoria formula were to come into effect, the consent of Canadians in at least six provinces distributed among four regions and representing, at the present time, over 80% of the total population of Canada would be required as well as a national majority.

Section 46 has been clarified to make it clear that it can only be used to break a deadlock. There is much evidence that for reasons which are often narrow or partisan, governments do fail to reach agreement. In such circumstances, the people of Canada can decide which view should prevail.

Section 50 provides for a Referendum Rules Commission along the lines proposed by Premier Blakeney to ensure that any referendum will be fair.

5. Should the provinces be able to trigger a referendum without the support of Parliament?

The government and probably the vast majority of MP's on both sides of the House and of the Senators would not consider the possibility of an amending procedure that did not provide a positive role for the Parliament of Canada which is the only legislative body that speaks for all Canadians. All Canadians are represented in Parliament, on the basis of population in the House of Commons and on the basis of region and province in the Senate.

Canada is more than the sum of its parts. Parliament must be involved in any amending procedure and the possibility of a number of provinces forcing a referendum over the objections of Parliament is unacceptable.

6. Should Parliament be required to have the support of four provinces before authorizing a referendum?

Any attempt to define the number of provinces that would have to support a resolution by Parliament before a referendum could be held is vain. Should it be three provinces? Or four? Or five? Should there be one province from each region? Should the provinces represent at least a third of the population? Half the population? 60%?

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In short, an attempt to define the number of provinces that would have to support a resolution by Parliament raises all of the problems of defining a near-miss amending formula.

In practical terms, the question will resolve itself through the proper exercise of political judgment by Parliament. The Australian experience is illuminating. Australia, where the Constitution can only be amended by a referendum initiated by Parliament, the record indicates:

- where Parliament ordains a referendum in the face of substantial opposition from the States, it almost invariably fails to gain the necessary consents;

- where Parliament ordains a referendum with the substantial support of the States, the chances for adoption are quite good.

In short, Parliament would be unlikely to call a referendum without substantial support by the provinces. If Parliament authorized a referendum in the face of substantial provincial opposition, the chances for adopting the amendment with both a national majority and a specially weighted set of provincial majorities would be nil or almost non-existent.

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Talking Points: The Victoria formula as a last resort rather than a preferred option

(Section 45)

The Victoria amending formula has not been included in Part VI of the Resolution because it is the best that could ever be devised or because the government of Canada is wedded to it. Rather, it is included because there must be a reasonable formula that strikes a balance between elements of protection or stability and elements of flexibility that would come into effect if there were no agreement on an alternative formula during the interim period.

During the interim period, if there were unanimous consent on an alternative amending formula, it could be brought into place. Furthermore, if seven provinces representing at least eighty per cent of the population of Canada were to agree upon a provincial alternative, it could be put to the people in a referendum along with the option preferred by the government and Parliament of Canada, which might be the Victoria formula or some other proposal.

The Victoria formula does have the advantage, at present, of being a fully developed formula that was accepted in principle by all governments in 1971. It was developed on the basis of the concept of a "national consensus" requiring the consent of Parliament and of at least six legislatures distributed over four regions and representing, at present, over eighty per cent of the population of Canada.

The formula is not without flaws. One of these is that two regions are coterminous with two provinces, which gives the impression that not all provinces are being treated in the same way. Two major alternative proposals have been given serious study by governments over the past two years: the "Toronto consensus" of December 1978 and the "Vancouver formula" of 1980.

During the interim period, governments will have ample opportunity to pursue alternative amending formulae. If Victoria is unacceptable, there will be pressure to come to agreement on an alternative before the expiry of the interim period. The Victoria formula is not being imposed forthwith. The government of Canada is well aware that a better method of amending the Constitution may be devised. However, there will be a strong incentive for all governments to concentrate their efforts and to resolve this question in the best interests of all Canadians over the two years following patriation.

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SUMMARY OF

CONSTITUTIONAL AMENDMENTS AFFECTING PROVINCIAL INTERESTS

(Source: Factum of Attorney-General of Canada in Manitoba, et al v. Canada, Manitoba Court of Appeal, November 1980).

1. The British North America Act, 1871 affected federal-provincial relationships and the powers and rights of provincial governments. It empowered Parliament alone to create new provinces without the consent of the existing provinces and thereby alter significantly the balance between province and province and between province and the federa government. It allowed Parliament alone to add new Senate seats for such provinces. It prescribed an amending formula for making changes to provincial borders. No provincial consent was sought or given.

2. The question of provincial consent was raised in a series of resolutions in the Canadian House of Commons by the Honourable Mr. Mills. They were not accepted. The last of these resolutions was as follows:

> "That the representative Legislatures of the Provinces now embraced by the Union have agreed to the same on a Federal basis, which has been sanctioned by the Imperial Parliament. This House is of opinion that any alteration by Imperial Legislation of the principle of representation in the House of Commons, recognized and fixed by the 51st and 52nd Sections of the British North America Act, without the consent of the several provinces that were parties to the compact, would be a violation of the fundamental principle in our Constitution, and destructive of the independence and security of the Provincial Governments and Legislatures."
>
> (Can. House of Commons Journals, 1871, pp. 253-54.)

3. The British North America Act, 1886 affected federal-provincial relationships and the powers and rights of provincial governments. It empowered Parliament alone to provide for territorial representation in Parliament, including the Senate. Any additional Senate members would, of course, affect the relative voice of the other Senators. No provincial consent was sought or given.

4. The British North America Act, 1907 affected federal-provincial relationships and the rights of provincial governments. It increased the amount of subsidies paid to the provincial governments under the original terms of the B.N.A. Act, 1867. It was sought by Parliament and granted by the United Kingdom Parliament despite the objection of British Columbia. The other provinces agreed. British Columbia claimed it was entitled to additional subsidies because of its peculiar needs arising out of a mountainous terrain, scattered population and geographical isolation. On March 25, 1907, the Legislative Assembly of British Columbia passed a resolution protesting against the federal proposal. British Columbia submitted a memorandum to the British Colonial Office protesting the inadequacy of the amount. British Columbia's objection did not prevent the passage of the Act although the British Government did accept one drafting change. They deleted the words "final and unalterable" from the Act, apparently on the advice of the Parliamentary draftsman that such words were not appropriate in a statutory enactment. The substance of the amendment was enacted in spite of the provincial objection.

5. The British North America Act, 1915 affected federal-provincial relationships and altered provincial rights. It increased the number of Senators and altered the senatorial divisions. It also added what is the present section 51A which guarantees that provinces would never have fewer members in the House of Commons than they have in the Senate. There was no consultation with the provinces, although the Province of British Columbia had requested a change in representation and this was embodied in the Resolution. The Premier and Attorney General of Prince Edward Island appeared before the Committee of the House of Commons considering the Resolution. Their representation for change was not accepted. This amendment affected all provinces by affecting the provincial allocation of Senators and by establishing a floor for House of Commons representation.

6. The question of provincial consent was raised by Mr. O. Turgeon (Gloucester):

> "... I am perfectly willing to accept this proposal as a very moderate one, but, in order to secure its acceptance by the Imperial Parliament, would it not be better first to submit it to an interprovincial conference: for it is scarcely two years ago that a conference of the provinces denied this right to the maritime provinces. I believe that if the Prime Minister referred this proposal to the judgment of the Provincial Legislatures and secured their assent or, at least, their favourable comment, the proposal would be sanctioned by the Imperial Parliament. I join with my hon. friend from Prince Edward Island in suggesting that this proposal be separated

> from the other, in order that it may be submitted to the Provincial Legislatures for their assent ... ."
>
> (Can. House of Commons Debates, 1915, vol. II, pp. 1465-66.)

The address, however, was accepted without any further reference to the provinces.

7. In the Senate it was noted that the subject of the amendment had been discussed at a provincial Premiers' meeting but that the Premiers had reached no decision on the matter.

(Can. Senate Debates, 1914, p. 880.)

In the Senate, it was moved in amendment that the section providing for a minimum representation of each province in the House of Commons should not take effect until the consent of the legislatures of the provinces had been obtained. This proposal was rejected on division.

(Can. Senate Debates, 1914, p. 902.

See also Can. Senate Debates, 1914, pp. 885-86; 888-92; 896-97.)

8. The British North America Act, 1930 affected federal-provincial relationships and altered provincial rights. By

that amendment the federal government transferred ownership of lands and resources to the four Western provinces. (Less extensively to British Columbia than to the other three provinces since only the Railway Belt lands were transferred in that province.) All four provinces agreed. The consent of the other provinces was not sought although the subject had been discussed at a Federal-Provincial Conference in 1927 where Ontario and Quebec, at least, had indicated agreement in principle.

9. In the debates in the House of Commons it was argued by Mr. MacLaren:

> " ... amendments to the British North America Act, especially those of the importance of the one we have before us, should be submitted not in an informal but in a very official way to all provinces in order to obtain their concurrence therein, or to give them an opportunity of expressing objections. The procedure now suggested is contrary to both Confederation and the British North America Act. It is not following out the spirit in which that Act was framed; it is not giving to the provinces the opportunity of expressing objection or acquiescence. I do not see how it can be considered that the simple passage by this House of this petition represents the will of the provinces. Therefore, Mr. Speaker, I enter my protest that a petition of this character should be forwarded without consulting all the provinces of the Dominion with a view of obtaining their assent thereto or their objections."

(Can. House of Commons Debates, 1930, p. 2628.

The issue was also raised in the Senate Debates, 1930, pp. 335-39, 348-9.)

10. The government members took the view that the amendment affected only the four Western provinces and, therefore, the consent of all provinces was not necessary. Also, it was pointed out that no province was objecting, although the proposed amendment was common knowledge.

11. The Statute of Westminster, 1931 substantially increased both federal and provincial rights and powers. It provided that Parliament and all provincial legislatures could legislate free of the limitations previously imposed by the Colonial Laws Validity Act. Section 7(1) retained full United Kingdom legislative authority over the British North America Acts, and section 7(3) provided that neither Parlimaent nor the provincial legislatures were authorized by virtue of the powers conferred to legislate on matters other than those within their legislative competence.

12. Although provincial governments were consulted on this amendment and their consent given, it is clear from the surrounding circumstances that this was not intended to acknowledge or create a convention that the provinces must consent to constitutional amendments before they would be enacted by Westminster.

(a) The Imperial Conference of 1930 considered the provinces as being given only the right to consultation. In the Summary

Proceedings of that Conference, at p. 3717, the following is found:

> "... it appeared that representations had been received from certain of the Provinces of Canada subsequent to the passing of the Resolution, protesting against action on the Report until an opportunity had been given to the Provinces to determine whether their rights would be adversely affected by such action. Accordingly, it appeared necessary to provide for two things. In the first place it was necessary to provide an opportunity for His Majesty's Government in Canada to take such action as might be appropriate to enable the provinces to present their views. In the second place, it was necessary to provide for the extension of the sections of the proposed Statute to Canada, or for the exclusion of Canada from their operation after the Provinces had been consulted." (Emphasis added.)

(b) The Minutes of the Federal-Provincial Conference of 1931 (at p. 10) states:

> "Two provinces had felt (he /Mr. Bennett/ did not consider wrongly) that they should be consulted in this particular matter

of the Statute of Westminster, as they were directly affected by it. The Conference therefore had been called for that particular purpose" (Emphasis added)

(c) In response to provincial concerns that the present section 4 and the preamble of the Statute of Westminster would add to federal powers it was proposed by Mr. Geoffrion that a section be added to exempt the British North America Acts from the application of the Statute. This proposal became the present section 7(1). This proposal is described in the Minutes as follows at p. 16:

> "Mr. Geoffrion then explained that his suggestion was an effort to meet the difficulty of the implied recognition in the Statute of the Dominions' power to request amendments. He merely wished to insure that the position of the Provinces would not be any weaker after the Statute then it had been before. His suggestion would, he thought, reserve the provincial position until the whole question of amendment could be discussed in the future ... ." (Emphasis added.)

and after Mr. Geoffrion's proposal had been put into a formal textual form, at p. 20:

> "Mr. Guthrie followed Mr. Bennett by stating that it was the purpose behind the new draft to make absolutely clear that the statute made no change in the British North America Act and gave the Dominion no new power to alter it. It was definitely designed to maintain the status quo." (Emphasis added.)

and at p. 20:

> "Mr. Cahan then emphasized that the sole purpose of the committee last night in suggesting alterations to Section 7 was to preserve absolutely the status quo as to relations inter se."
>
> (Emphasis added.)

(d) The practice followed after the passage of the Statute of Westminster was not invariably one of requiring consultation with or the consent of the provinces before a constitutional amendment would be enacted by Westminster. For example, that in 1949 admitting Newfoundland into Confederation, statutorily confirmed Quebec's border with Labrador, without Quebec's consent. The 1949(2) amendment conferred on

Parliament powers to amend the Constitution in certain respects.

13. Despite the contrary conclusion of Gérin-Lajoie in his text, Constitutional Amendment in Canada, pp. 196-97, the wording of the 1930 Imperial Conference Report does not indicate an intention that thereafter amendments to the Constitution of Canada, even including amendments which affect federal-provincial relationships or alter provincial rights and powers, would be made only with the consent of provincial legislatures or provincial governments. It is clear the wording was intended to be neutral. The argument of Mr. Ralston in Debate on the Resolution requesting Westminster to pass the Statute of Westminster, following the Federal-Provincial Conference of 1931, illustrates this:

> " ... the report of the conference of 1930 is very careful not to provide for the consent of the provinces but only to give the provinces an opportunity to present their views. At page 18 the following appears:
>
> > Accordingly, it appeared necessary to provide for two things. In the first place it was necessary to provide an opportunity for His Majesty's government in Canada to take such action as might be appropriate to enable the provinces to present their views. In the second place it was necessary to provide for the extension of the sections of the proposed statute to Canada or for the exclusion of Canada from their operation after the provinces had been consulted.
>
> But while this is the preamble - so to speak - when we come to the legal conditions which are to be complied with we find that the

consent of the provinces is not mentioned nor are they necessarily to be consulted but that it is to be sufficient if the formalities required for amendments to the British North America Act are carried out. Note how the report proceeds:

> To this end it seemed desirable to place on record the view that the sections of the statute relating to the Colonial Laws Validity Act should be so drafted as not to extend to Canada unless the statute was enacted in response to such requests as are appropriate to an amendment of the British North America Act. It also seemed desirable to place on record the view that the sections should not subsequently be extended to Canada except by an act of the parliament of the United Kingdom enacted in response to such requests as are appropriate to an amendment of the British North America Act.

Any idea which the provinces might have had, that their consent might be required, vanishes when we read the last sentence to the effect that the only procedure required to be followed is such procedure as is necessary and appropriate to an amendment of the British North America Act. And that procedure provides only for an address by both houses of parliament, without reference at all to the provinces."

(Can. House of Commons Debates, 1931, p. 3208.)

14. The British North America Act, 1940 affected federal-provincial relationships and altered provincial rights and powers. It transferred authority to legislate on unemployment insurance from provincial to federal jurisdiction. The consent of all provinces was sought and obtained. (Correspondence with the provinces printed as an appendix to Votes and Proceedings of the House of Commons, June 25, 1940.)

15. In speaking to the Resolution the Prime Minister stated:

> " ... not having received the consent of all nine provinces until this year, we could not possibly before this particular session have introduced in a manner which would avoid all questions a measure for the amendment of the British North America Act."

(Can. House of Commons Debates, 1940, p. 1118.)

16. It is clear, however, from the exchange recorded on page 1122 that consent of the provinces was considered desirable but not necessary.

> Mr. Thorson: ... But I would not wish this debate to conclude with an acceptance, either direct or implied, of the doctrine that it is necessary to obtain the consent of the provinces before an application is made to amend the British North America Act. Fortunately, this is an academic question at this time.
>
> Mr. Lapointe: May I tell my hon. friend that neither the Prime Minister nor I have said that it is necessary, but it may be desirable.

> Mr. Thorson: The Prime Minister has made it perfectly clear that the question does not enter into this discussion, in view of the fact that all the provinces have signified their willingness that this amendment should be requested.
>
> (Can. House of Commons Debates, 1940, p. 1122.)

17. The British North America Act, 1943 affected federal-provincial relationships and arguably provincial rights. It postponed until after the war the redistribution of the representation of the provinces in the House of Commons, required after the 1941 decennial census by virtue of section 51 of the British North America Act, 1867. No provincial consent was sought or obtained. The Legislative Assembly of Quebec requested the federal government to modify its proposal. Mr. Adélard Godbout forwarded to the Prime Minister an official note along these lines. (Can. House of Commons Debates, 1943, p. 4353-54.) Quebec's objections were ignored.

18. During debate the Resolution was opposed on the ground that provincial consents had not been obtained. (Can. House of Commons Debates, 1943, pp. 4356, 4364.) The Prime Minister, Mr. St. Laurent, argued that the amendment did not alter the allocation of federal and provincial powers. At the

same time he stated that if such allocation was changed "it could not properly be done without the consent of the organism /sic/" that was given the constitutional powers in question. (Can. House of Commons Debates, 1943, pp. 4365-66.)

Mr. St. Laurent did not say that such amendments could not be passed by Parliament alone but merely that it was "proper", that is, desirable, to have provincial consent. In the same debate, Mr. Coldwell stated:

> "I know, of course, that at present the real power of amendment of our Constitution, which is in the British North America Act, is in reality in the hands of this Parliament. As I have just indicated, anything we may ask regarding amendment will be granted by the Imperial Parliament at Westminster."

(Can. House of Commons Debates, 1943, p. 4345.)

19. There was also discussion in the Senate regretting the lack of provincial consent: (Can. Senate Debates, 1943, pp. 288-9.)

20. The British North America Act, 1946 affected federal-provincial relationships and altered provincial rights. This amendment replaced the original section 51 of the British North America Act, 1867 with a new one providing for the representation of the provinces on a strictly proportional basis. Provincial consents were neither sought

nor obtained. Quebec objected (letter of May 30, 1946 from Duplessis to St. Laurent). Opposition members said provincial consent should have been obtained (Can. House of Commons Debates, 1946, pp. 2228-35)
and Mr. Diefenbaker moved an amendment to the effect that the Government be required to consult the provinces; this was defeated. (Can. House of Commons Journals, 1946, vol. 87, pp. 373-374) The government took the position that the amendment did not deal with provincial powers. Mr. St. Laurent indicated that in his view, matters given to the provincial legislatures and governments could not be dealt with without provincial consent (pp. 1936-37;) other members indicated such could not be dealt with without provincial consultation, (pp. 2255-56, 2461, 2601, 2626)
Mr. St. Laurent stated, however, that in his view Parliament alone could request changes respecting minority language rights under section 133 (p. 2621)

41. The British North America Act, 1949 affected federal-provincial relationships and altered the rights of the provinces. It added Newfoundland to Confederation. The addition of a province alters significantly the balance between province and province, and province and the federal government. This amendment confirmed by statute the boundary between Quebec and Labrador - without Quebec's consent. Provincial consents were neither sought nor

obtained. There was opposition to the bill in the House of Commons on the ground that the provinces should have been consulted. During the debate on the Resolution the same point was made. (Can. House of Commons Debates, 1949, p. 345. Can. Senate Debates, 1949, pp. 71, 79.)

22. The Leader of the Opposition moved an amendment that the resolution be amended in the following terms:

> "And whereas it is desirable that the Government of Canada should consult with the governments of the several provinces in respect to the said matter.
>
> Now therefore it be resolved, that the Government of Canada be required to consult at once the governments of the several provinces and that upon a satisfactory conclusion of such consultation a humble address be presented to His Majesty in the following words ... "

(Canada House of Commons Journal, 1949 p. 69.

Can. House of Commons Debates, 1949, pp. 498-501.)

The amendment was defeated.

(Can. House of Commons Journals, 1949, pp. 73-75.)

23. The Premiers of Quebec and Nova Scotia stated publicly that consultation should have taken place (Gérin-Lajoie, p. 129).

24. Since Confederation the original four provinces have been increased to ten by action of the federal Parliament (and, on occasion, the United Kingdom Parliament or government) without any consultation with or consent by the original four provinces. It is, therefore, obvious that the contention that there is a convention that provincial consent is required for amendments to the Constitution of Canada affecting federal provincial relationships or provincial rights and powers is untenable.

25. The British North America Act, 1949(2) at the time was thought by the provinces to have affected significantly federal-provincial relations and the rights of the provinces. This amendment added section 91(1) to the British North America Act giving Parliament authority to amend "the Constitution of Canada" except with respect to five listed categories. There was no provincial consent sought or obtained. The government took the position that the amendment dealt with matters entirely under federal jurisdiction.

26. The Opposition moved an amendment to the resolution that would have required the convoking of a federal-provincial conference to "devise a method of amending within Canada

the Constitution of Canada, and of safeguarding minority rights". The method so devised would then become the subject of the resolution. (Can. House of Commons Debates, 1949, p. 841) The amendment was defeated.

27. The British North America Act, 1951 affected federal-provincial relationships and altered provincial rights. It transferred to Parliament jurisdiction over pensions. Provincial legislatures retained concurrent authority. The consent of all provinces was obtained.

28. The British North America Act, 1960 affected federal-provincial relationships and affected provincial rights. It imposed a compulsory retirement age of 75 on Superior Court judges. The amendment would have ramifications for provincial governments because of their jurisdiction over the administration of justice derived from section 92(14) of the British North America Act. Initial consent from all provinces was obtained for an amendment which would have applied to District and County Court judges, as well as to Superior Court Judges (Correspondence exchanged with provincial governments is printed as an Appendix to the Votes and Proceedings of February 16th, 1960). In addition to establishing in the constitution the retirement age for County and District Court judges the amendment would have extended the existing section 99

of the British North America Act to them so that their security of tenure would thereafter have been constitutionally entrenched as is the case for Superior Court judges. The Senate, however, objected to this amendment and deleted the reference to District and County Court judges. The resolution changed in this significant way was adopted by Parliament and thus the final text of the amendment was not that originally approved by the provinces. (Can. House of Commons Debates, 1960, pp. 7199-201; Can. Senate Debates, 1960, p. 997; Can. House of Commons Journals, 1960, pp. 854-56.)

29. The British North America Act, 1964 affected federal-provincial relationships and altered provincial rights. It extended Parliament's concurrent jurisdiction over pensions to include supplementary benefits thereto. All provinces consented to the amendment. (Sessional Papers No. 202-J, June 10, 1964.)

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NATURAL RESOURCES

Material to come.

February 23, 1981

NATURAL RESOURCES

SECTIONS 56 and 57

Summary of Provisions

The Government's Motion respecting the Constitution, tabled February 13, 1981, included sections 56 and 57 of the proposed Constitution Act regarding natural resources. These sections are set out below together with summary explanatory notes.

Extract from Motion	Explanatory Note
PART VII **AMENDMENT TO THE CONSTITUTION ACT, 1867**	
Amendment to Constitution Act 1867 **56.** The *Constitution Act, 1867* (formerly named the *British North America Act, 1867*) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:	56. New. This section would amend the Constitution Act, 1867 to add provisions relating to non-renewable natural resources, forestry resources and electrical energy.
"Non-Renewable Natural Resources, Forestry Resources and Electrical Energy	
Laws respecting non-renewable natural resources, forestry resources and electrical energy "92A. (1) In each province, the legislature may exclusively make laws in relation to (*a*) exploration for non-renewable natural resources in the province; (*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and (*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.	92A. (1) This subsection would confirm the exclusive authority of the provinces to make laws in relation to certain aspects of non-renewable natural resources, forestry resources and electrical energy.
Export from provinces of resources (2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.	(2) This subsection would give to the provinces a new power to make laws in respect of the export from the province to another part of Canada of certain production from resources if such laws do not discriminate as to prices or supplies.
Authority of Parliament (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.	(3) Laws made by Parliament would prevail over laws made under subsection (2) to the extent of any conflict.
Taxation of resources (4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of (*a*) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and (*b*) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.	(4) This subsection would give to the provinces a new power to raise revenues through indirect taxation in respect of certain resources if the taxes do not differentiate between production retained in the province and production exported to another part of Canada.

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Extract from Motion

"Primary production"

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section."

Idem

57. The said Act is further amended by adding thereto the following Schedule:

"THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,

(a) production from a non-renewable natural resource is primary production therefrom if

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(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood."

Explanatory Note

(5) This subsection explains that the definition of "primary production" may be found in the Sixth Schedule to the Constitution Act, 1867.

(6) This subsection would preserve existing provincial powers.

57. This section would add a Sixth Schedule to the Constitution Act, 1867. The Schedule would, for the purposes of the new section 92A of that Act, set out in detail what production constitutes "primary production".

In addition, the renumbered item 17 of Schedule I was changed so as not to delete references to Newfoundland in the Statute of Westminster, 1931. (This latter change was made in response to the request of spokesmen for Newfoundland such as Mr. M. McGrath, M.P., who feared Newfoundland's legal claims to offshore resources might be jeopardized by the deletion of this section. Although the Government considered this concern to be unfounded, the change was made to reassure Newfoundlanders.)

Background

Shortly after the Proposed Resolution was tabled in Parliament on October 6, the Prime Minister indicated to Mr. Broadbent that he would be agreeable to including in the Resolution an amendment, to be proposed by the NDP, respecting provincial jurisdiction over non-renewable natural resources, forestry resources and electrical energy.

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Specifically, such an amendment was to embody the following principles:

(1) Exclusive provincial jurisdiction would be confirmed with respect to exploration, development, conservation and management of these resources, including the rate of primary production;

(2) Concurrent provincial jurisdiction over interprovincial trade of these resources, subject to a prohibition against discrimination in respect of prices for or supplies of production moving in intraprovincial and interprovincial trade;

(3) Retention of paramount federal jurisdiction over interprovincial trade in such resources, and continued exclusive federal jurisdiction over international trade; and

(4) Concurrent provincial legislative authority to levy indirect taxation on the sale of such resources, provided that there is no discrimination in such taxes as between resources moving interprovincially and intraprovincially.

These principles were agreed upon between the Prime Minister and Mr. Broadbent.

Over the course of the hearings before the Special Joint Committee on the Constitution, other representations respecting natural resources were made. Most noted was Mr. Blakeney's proposal. He sought a provision, similar in substance to the one agreed upon by Mr. Broadbent, except that he also sought concurrent jurisdiction, with federal paramountcy, over international trade of natural resources. There were also representations seeking extension of the provisions of the proposed amendment to offshore resources and to fisheries. Organizations such as the Canadian Chamber of Commerce and the Canadian Polish Congress, while agreeing with provincial jurisdiction and control over resource development generally, also noted the importance of developing resources to Canada's benefit, and acknowledged the need for a federal role in resources under certain circumstances. The territorial governments sought assurances that future provinces would also be given control over their resources.

During the Special Joint Committee's clause-by-clause consideration of the proposed resolution, Mr. Broadbent proposed amendments respecting natural resources, along the lines previously agreed to, but also incorporating changes sought by Mr. Blakeney respecting international trade. A Government sub-amendment proposed the deletion of the 'Blakeney elements', but otherwise, the NDP proposal was approved by the Committee. This change is now included in the Government's Motion tabled February 13, 1981. Amendments were also proposed in Committee by Mr. J. McGrath (P.C.) to extend ownership of offshore resources to adjacent provinces, and by Mr. J. Fraser (P.C.) to extend the natural resources provisions to fisheries. Both amendments were defeated.

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Quotes

"After the Constitution is patriated.....the following constitutional amendments be given priority:

Resource Ownership - There should be a re-affirmation, strengthening and clarification of all aspects of the provinces' control over natural resources.

Resource Taxation - Provincial control over natural resources should be clarified so as to ensure the provinces' exclusive right to tax and collect royalties from the management and sale of these resources."

Alberta Chamber of Commerce
before the Special Joint
Committee on December 16, 1980

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"...the Lougheed government's approach to constitutional reform has strikingly omitted any mention of a positive role for a federal government. At times, it almost appears to be an element of Alberta provincial policy to deny the existence of the national interests of Albertans. Amazing though it may seem, the constitutional position paper adopted by the Lougheed government, Harmony in Diversity, has nothing to say concerning the role of a federal government.

It is therefore essential that the people of Canada realize that the Lougheed position is not the position of all Albertans who see themselves as Canadians first and Albertans second."

and

"A revised constitution must clarify the division of legislative powers as they pertain to the management of resources. The following principles must be respected.

First, the provinces should have the exclusive powers to legislate in relation to the exploration, development, conservation and management of natural resources in the province, including the right to control the rate of production.

Second, the provinces should be given concurrent legislative powers to legislate in relation to the export from the province of the primary production of resources; but, federal powers must prevail over provincial powers in the area of international trade.

Third, the use of the federal trade and commerce power must be restricted so that it cannot be used to abridge provincial powers over resources except in emergency situations of compelling national interest (such exceptions requiring approval by both Parliament and the Council of the Provinces).

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Fourth, the provinces should be given the power to raise money by any mode or system of taxation in respect of resources, provided that such taxation does not discriminate between production used in the province and production exported to another part of Canada.

Fifth, provinces should be prohibited from instituting price discrimination between resources used in the province and resources exported to other parts of Canada."

Alberta New Democratic Party in a statement issued on December 17, 1980.

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Regarding the agreement on natural resources reached between Mr. Broadbent and Mr. Trudeau:

"...we are strongly in favour of the granting and confirming to the Provinces the power to manage and control their own resources including hydro, to indirect taxation and to concurrent jurisdiction in interprovincial trade subject to Federal paramountcy and so long as such rights do not unreasonably discriminate between the Province and other parts of Canada. We laud the efforts to accomplish this result for its economic impact on this Province will be significant."

The Newfoundland Branch of the Canadian Bar Association before the Special Joint Committee on November 20, 1980.

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"The Canadian Chamber of Commerce acknowledges that jurisdiction over natural resources should continue to be in the hands of the provinces which have responsibility for conserving and pricing such resources within, and for, the benefit of Canada. Conditions of export of critical natural resources should be subject to control by a national agency and, under special circumstances of national emergency, the federal government be empowered to assume temporarily provincial responsibilities in this field."

The Canadian Chamber of Commerce before the Special Joint Committee on November 20, 1980.

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"Each province should be entitled to benefit from its resources without pursuing measures detrimental to the nation as a whole."

Canadian Polish Congress
before the Special Joint
Committee on November 20,
1980.

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"Throughout the federal-provincial constitutional talks, resources have been the number one issue for Saskatchewan and for Western Canada generally. And for good reason. In Saskatchewan, for example, resources provide more than one quarter of provincial government revenues, revenues that are used to finance a broad range of social and economic benefits for Saskatchewan residents. Resources represent our best hope of providing long-term economic stability and diversity, of ironing out the booms and busts of our economy. Resources are the key to Saskatchewan's continued growth and prosperity.

Our concern has been to clarify and confirm provincial powers to manage and tax resources. Powers which we thought we had, but which have been called into question by two recent judgments of the Supreme Court of Canada."

The Honourable Allan Blakeney
Premier of Saskatchewan
before the Special Joint
Committee on December 19, 1980.

and, subsequently, on February 19, 1981, Premier Blakeney stated:

"In the Committee, the Liberal majority accepted some amendments which went part way toward meeting Saskatchewan's concerns. Most importantly:

- the equalization section was strengthened to Saskatchewan's satisfaction;

- a new resources provision was added which made clear a province's right to levy indirect resource taxes and regulate the way a resource is produced within a province even though that resource might subsequently enter interprovincial (but not international) trade.

These changes were important to Saskatchewan, and to other provinces. I welcomed them."

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"Before moving to the energy issue, I want to refer to the important question of the Canadian Constitution. I believe most of you are well aware that the constitutional proposals of the Ottawa government are interrelated to the energy resource matters. I believe that you are also well aware that the amending formula proposed in the Ottawa position would allow a further dilution of the resource rights of Alberta and other provinces. Also, you will be aware that the proposals from the Parliamentary Committee in Ottawa to the Federal House of Commons and Senate with regard to resources are insignificant for Alberta - particularly with regard to indirect taxation because of the small freehold position of our resources. Even more important - the advice we are receiving on the wording of resources, rather than strengthening the ownership rights of the provinces, will in fact weaken them by judicial interpretation thereafter."

Premier Peter Lougheed
in an Address to the Calgary
Chamber of Commerce on
February 13, 1981.

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Extracts from the Proceedings of the Special Joint Committee during consideration of the Natural Resource Amendments (February 4, 1981):

Mr. Broadbent: "Each province will benefit from this amendment because all provinces in our country have some resources, whether they be oil and gas in Alberta, potash in Saskatchewan and New Brunswick, electricity in Ontario, asbestos in Quebec, iron and coal in the Atlantic region, or forestry in Manitoba and British Columbia.

These new rights are key blocks from which to create steady, diversified economic growth in the future, while at the same (time) produce revenue through which essential public services can be delivered to the people today in those provinces.....

In principle, Section 92 and Section 109 of the existing British North America Act give the provinces the right to own and control their resources. However, as provinces have attempted to assert this control, they have encountered judicial decisions which have allowed a variety of federal powers to have precedence over the province's resource power.....

If the amendment I am proposing today had been in place, ... desirable provincial programs would have been upheld.....

A constitutionally entrenched affirmation confirming and clarifying provincial ownership and management of resources is therefore a key element of a fair confederation package at this historical moment of constitutional renewal in our country.

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Mr. Broadbent: (cont'd)

This amendment will help to ease the apprehension many people in resource producing provinces feel about their ability to use their resources to help build their economic future and ease their uncertainty about the equity of the Confederation bargain.

I note, in passing, Mr. Chairman, that the cash value of this to the province of Alberta alone is worth somewhere in excess of $600 million.

Our amendment gives the provinces the right to control the level and nature of exploration of nonrenewable resources. It offers them the right to regulate the way and the rate at which forestry, nonrenewable and electrical resources are exploited.....

Provinces would have the right to set resource prices, levy indirect as well as direct taxes on the resources sold in Canada, as long as the provinces do not discriminate in the prices charged or on the availability of the resources to Canadians who happen to live in other provinces.

These rights, Mr. Chairman, would apply fully to nonrenewable resources, resources generating electricity, and forest resources.

We in the New Democratic Party believe that this amendment would help to allay the fear, particularly of Western Canadians, that when they seek to regulate their resources....."

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Mr. Epp:

"Under Section 92 and Section 109 of the British North America Act, do you feel that other than the indirect taxation, that any further affirmation of provincial ownership or resources is needed?"

Mr. Chretien:

"Of course it was the big request in February 1979 by the Alberta government that reaffirmation of ownership of resources was needed.

Some argued it was not needed; but the provinces argued that it was needed. So we go along to reaffirm the ownership of the resources of the provinces, because some people have led some Canadians to believe that we want to take away ownership of resources from the provinces, and we are reaffirming here what existed in a different form in the constitution before, that the ownership of resources is provincial."

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Mr. Broadbent: "Mr. Chairman, Mr. Epp, it is very clear, has not done his homework at all when he talks about the Cigol case not being covered by the amendments that we are proposing and in fact the part that the government of Canada has accepted.

The Cigol case is in fact covered by the indirect taxation issue and I suspect that he does not want to recognize that reality for the same reason the Conservative Party of Canada does not want to recognize that the same provision, this amendment would bring a minimum of some $600 million which we will document later, to the province of Alberta, and will provide a lot of additional resource wealth to Western Canada, it would go a long way to dealing with what the Conservatives have attempted to promote as western alienation."

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Extracts from the Constitution Debate in the House of Commons, February 17, 1981:

Mr. Chretien: "In short, Madam Speaker, what we are proposing to the people of Canada, through their elected representatives from all across the country in this chamber, is very simple. It consists of.....the recognition of the ownership of the resources by the provinces in a very clear test, coupled with the power given to the provinces to tax the resources and to pass laws in interprovincial trade, within, of course, federal parameters.....

I should like to tell you, Madam Speaker, that when you look at the distribution of powers, as mentioned in the project in front of us, the only changes you will find are in favour of the provinces in matters of resource ownership, indirect taxation and interprovincial trade."

Mr. Epp: "What, then, Madam Speaker, was the constructive approach of the NDP? I want to say there were constructive measures that they took. For one, they did move on the matter of indirect taxation respecting resources."

Mr. Broadbent: "I give credit to the government because we insisted on the change and they went along with it. What has not been so widely recognized is that the government did show flexibility.....Demonstrating the flexibility required in constitutional building.....

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Mr. Broadbent: (cont'd)

What have we obtained in terms of addressing a provincial concern of particular relevance to the west is that the provinces now have ownership of their nonrenewable natural resources clarified in the constitution. They can participate in interprovincial trade with federal paramountcy. For the first time they can levy indirect taxes on those resources. I say to the Conservative members that this means in revenue potential for the province of Alberta in excess of an additional $600 million. Even for Alberta, that ain't hay. It counts for something.

We wanted this resource change because those who grew up in central Canada in particular, and received their livelihood on the basis of industry protected by tariffs and other arrangements, know full well that western Canadians had a certain grievance about that. We know full well they wanted to use their resource potential to provide themselves with wealth for the future as the industrial structure provided did for us in the past."

B. Darling
996-3535

TALKING POINTS: LEGITIMACY OF THE PROCESS

1. There are two issues, one legal and one political.

2. Legal Issue

The legal issue is as to whether the two Houses of the Parliament of Canada have the legal power to make this request to Westminster, and whether the United Kingdom Parliament has the legal power to enact the legislation we are proposing. In our view the position is as follows:

(a) The Senate and House of Commons can legally pass a resolution on any subject. Such resolutions are not laws and have no legal effect as such.

(b) The United Kingdom Parliament has been recognized as having the legal power to legislate constitutions for Canada ever since 1774 (the Quebec Act). It enacted the B.N.A. Act in 1867 and has amended it several times. The Statute of Westminster of 1931 specifically preserved the power of the United Kingdom Parliament to amend the B.N.A. Act. Only last year the Supreme Court of Canada held that fundamental amendments to the Constitution of Canada had to be made by the United Kingdom Parliament.

3. Political Issue

Some provinces contend that on the basis of past practices in connection with the amendment of the constitution, there should be unanimous consent of the provinces before the Senate and House of Commons request the amendments set out in this proposed resolution. Some have argued that in the absence of such unanimous agreement our procedure not only is inconsistent with constitutional conventions but also, for that reason, is illegal.

We do not accept that position for the following reasons:

(a) Past practices are not consistent and none dealt with patriation, an amending formula, or the entrenchment of a Charter of Rights:

- there have been 16 significant amendments to the B.N.A. Act by Westminster

- of these, 13 affected provincial interests

- of these 13, there was consultation with the provinces in respect of only 6

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- of the 6 cases where there was consultation, all provinces or the provinces affected consented in respect of 5: in 1 case (1907) an amendment was made over B.C.'s objections.

Reliance on the Government of Canada's 1965 publication, The Amendment of the Constitution of Canada, to support a constitutional requirement of provincial consent is puzzling, because in fact the publication establishes the contrary proposition. It is true that it refers to a general principle concerning a degree of provincial consultation and agreement with respect to amendment requests "directly affecting federal-provincial relationships", but it points out the uncertainty surrounding the appropriate nature and degree of provincial participation, and, moreover, expressly provides that the principle in question is "not constitutionally binding in any strict sense". Inasmuch as the publication received the tacit approval of all provincial governments before it was released, it offers compelling authority for the proposition that provincial consultation and consent is not a constitutionally binding requirement of the existing amendment process.

(b) Conventions of the Constitution change with circumstances. Even if there were a convention requiring unanimous provincial agreement, all attempts to get such agreement over the last 54 years have failed.

Starting in 1927 there have been

- 13 first ministers' conferences
- 17 conferences of federal and provincial ministers
- countless officials meetings

to discuss patriation and an amending formula. The objective of unanimity has proven to be impossible to achieve.

(c) Conventions are not rules of law, but rules of politics - This principle is generally recognized by the courts and by legal authors. Conventions guide governments in the use of their legal powers - they do not create or abolish those powers. Conventions develop and change, because different practices are acceptable to the public at different times depending on the circumstances. It is for this reason that courts must surely have difficulty

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in giving an opinion on what the conventions are - because in the final analysis conventions are only politically acceptable rules for the exercise of legal powers.

In any event, doubts as to the constitutional propriety of an amendment request by the Senate and House of Commons of Canada without provincial consent were removed by the Manitoba Court of Appeal. Even the dissenting judges agreed that there is no historical evidence of a convention requiring provincial consultation and consent.

J. Hurley
995-2553

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February 23, 1981

Canadian Charter of Rights and Freedoms

THE ENTRENCHMENT OF RIGHTS AND FREEDOMS

SUMMARY OF PRINCIPAL REPRESENTATIONS TO THE SPECIAL JOINT COMMITTEE

The majority of witnesses supported the principle of entrenchment of rights although a number did not agree with entrenching the proposed Charter until changes had been made to certain sections.

Groups of Witnesses Supporting Entrenchment

The entrenchment of rights was advocated by the ethnic groups, many of the civil liberties and human rights representatives, native groups as well as the Canadian Bar Association, the Commissioner of Official Languages and the Canadian Advisory Council on the Status of Women.

Most native groups favoured entrenchment but also wished to have collective rights entrenched. Ethnic groups such as the Ukrainian Canadian Committee were in favour of entrenchment as they felt this would protect minority groups from abuse. Human rights groups not only supported entrenchment, but for the most part recommended that the Charter protections be extended. The Commissioner of Official Languages and other groups of witnesses concerned with language rights felt that entrenchment was the only way language minorities could be protected. Many of these groups advocated the entrenchment of further language rights.

Groups of Witnesses Opposing Entrenchment

The majority of the groups of witnesses opposing entrenchment felt that rights could be better protected through ordinary statute law because legislatures can respond more quickly to social changes than courts. The Canada West Foundation opposed entrenchment on these grounds. The Canadian Association of Chiefs of Police felt that rights should be Parliament's responsibility and should not be entrenched in the Constitution. The Alberta Chamber of Commerce felt that the Charter

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was unnecessary as adequate protection already exists in federal provincial laws. Canadians for one Canada represented by the Honourable J. Richardson felt that rights should be given through the democratic process, through legislation which can be amended, changed and improved and not locked up in a constitution with a rigid amending procedure.

The Provincial Premiers

Four provincial premiers appeared before the Committee. Premier Hatfield gave unqualified support to entrenchment while Premier MacLean was opposed as he sees entrenchment weakening parliamentary democracy and giving too much power to the courts.

Premier Buchanan's position was not as clear. During discussions with Committee members he made the following statement: "We have no objection to the entrenchment in our Constitution of matters which are totally federal in nature, and which do not infringe upon the rights and privileges and powers of provinces". Later on he said: "If we are to have a so-called Charter of Rights - and we have not agreed that it should be entrenched in the Constitution, but again we are flexible ..., we believe that if we are to have an entrenched Charter of Rights embodying all of the fundamental freedoms ..., that it should be done here in Canada by Canadians".

Premier Blakeney offered support for the entrenchment of some rights (language rights and political rights) which he labelled "Canadian rights". He felt other human rights should only be entrenched with a non-obstante clause so that legislatures can override courts if required. He stated "I thought the resolution before this Committee was not bad in that regard, because it has Section 1 which is a kind of non obstante clause in advance ... the suggestions of deleting Section 1 raise all my apprehensions ...".

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Expert Witnesses

Archbishop Scott said he believed in entrenchment. Moreover, he thought we should not entrench too many rights, but those that are entrenched should be entrenched more securely than in the current proposal.

Professor Russell indicated he had personal doubts about the advisability of entrenching a Charter. He argued that this decision should be taken by Canadians after patriation. Professor Russell felt entrenchment shifted the burden of protection of rights from the legislatures to the courts. Courts would end up setting the rules.

Professor Cohen gave unqualified support to the principle of entrenchment although he did question certain provisions of the proposed Charter. He felt entrenchment "is the appropriate remedy, almost the only way to bring about that proper protection".

Dividing the Resolution

The Conservative Party proposed during the proceedings of the Special Joint Committee that the resolution be split into a "Patriation Package" which would be sent to Westminster, and a "Canadian Package" (the Charter) which would be approved by Parliament and referred to the provinces and their legislatures for section by section approval according to the rules of the amending formula then in place.

G. Barnett
995-2908

F. Jordan
Department of Justice
992-2320

TALKING POINTS

1. Need for Entrenched Charter of Rights

There are those who contend that entrenchment of rights is unnecessary and undesirable in Canada. The justifications for this position are said to be the following. First, rights are already sufficiently well protected by our common law traditions. Second, entrenchment is foreign to a parliamentary system of responsible government. Third, legislators, not judges should ultimately determine the scope of basic rights. And, fourth, entrenchment will tend to freeze rights at a particular point, not allowing for evolving social values.

It is true that, in comparison to a number of other countries, many basic rights in Canada are by and large respected by our laws and traditions. But we have seen in the past and continue to see even today instances where unacceptable restraints are imposed on individual and minority rights. Out of the past one can readily recall laws denying the franchise (to Chinese in B.C.), abolishing the use of French (in Manitoba), denying access to occupations (to Chinese in B.C.), denationalizing Canadian citizens (Japanese Canadians) and suppressing freedom of religion and expression of political belief. (Roncarelli, Chaput and Saumur cases in Québec). More recently, laws have been adopted restricting residents of one province from seeking employment in another province (Québec and Newfoundland), restraining public assemblies (Montreal street bylaw), limiting the use of English (in Québec) and restricting freedom of speech and association (Québec referendum). Beyond these laws, we have also witnessed illustrations of police practices that call into question how effectively some of our legal rights are protected. In light of the foregoing, it seems too facile to assert that our inherited traditions are a sufficient bulwark against infringement of rights and freedoms.

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The argument that entrenching rights is foreign to our parliamentary system perhaps had some validity when it was being expounded by Dicey a century ago, but times have changed since then. In that era the principle of supremacy of Parliament had greater significance when Parliament was in fact making all the laws. Today, as we well know, much of our law is not made by Parliament but by Ministers and officials through regulations, orders, rules, directives and the like. These do not always receive effective public debate and consequently there is serious danger that laws will be made that infringe on basic rights without the public even knowing until some regulation is applied to an individual. In this context, it is difficult to contend that entrenchment runs counter to the concept of supremacy of Parliament. It would be more accurate to suggest that entrenchment would place restraints on the "supremacy of government" -- and hopefully no one would be opposed to this. Indeed, viewed from this perspective, entrenching rights would enhance the supremacy of Parliament since legislators would become more conscious of specifying the conditions under which delegated powers were granted and administered -- to ensure that they accorded with the rights guaranteed by the constitution.

The third concern, that entrenchment of rights would make the judiciary rather than legislators the final arbiters of what basic rights mean, seems based upon particular perceptions of what has happened in the United States under its Bill of Rights and the assumption that the same thing will occur in Canada. In the first place, it is easy for detractors to point to a United States Supreme Court decision of the past that held property rights to mean that slavery was acceptable or to decisions of the 1930's which thwarted some social legislation of the "New Deal", and ask "Do we want our courts making these kinds of judgments?" What is overlooked are other significant judgments of that same Court which have advanced the cause of civil liberties immensely and well before the legis-

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lators were ready to move. One has only to refer to the landmark decision of 1954 where the Court held that segregated schools violated the principle of equal protection of the law, more than ten years before Congress enacted laws designed to counter racial discrimination. Was this a bad decision? Should the courts not have had the power to make this judgment to protect minority rights?

Beyond this point, one also has to note that under the congressional system of government in the United States the courts have been placed in a more direct adversarial role with the legislatures than is the case under our parliamentary system. Consequently, to the extent that fears of "judiciary tyranny" have any real grounds, the fact is in Canada that the courts do not readily override the clearly expressed will of the legislators in matters of social policy -- indeed, our courts have frequently stated that the wisdom of the legislation is not for them to decide, even in constitutional cases.

At the same time, we must recognize that in entrenching basic rights what we are seeking is a means to ensure that an objective body (the courts) can decide when an imprudent majority or bureaucrat has acted in a manner which infringes the rights of an individual or a minority. If from time to time these decisions are found to be so unacceptable to the electorate, then they can be changed by constitutional amendment -- but not by ordinary legislative enactment as is now the case.

With respect to entrenchment of rights "freezing" their development, it is difficult to appreciate this argument. If the rights are described in sufficiently general terms, our courts should have no difficulty in molding the language as values change. In doing this they will, of course, be guided by the laws enacted by the legislators which will be reflective of evolving social values.

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In sum, arguments against entrenchment of basic rights are not convincing. Rather, Canadians are entitled to have these rights spelled out in our basic law where they will know what they are and legislators and bureaucrats will be bound to abide by them. Moreover, Canadians have indicated they do not want a half-way measure such as entrenched rights applicable only at the federal level. Rights require protection at the provincial level as well.

This is particularly important in a federal state where jurisdiction over rights is divided between two levels of government and there are eleven different governments. To the greatest extent possible basic rights in a country should be common to all people wherever they live or move. This can only be assured by putting those basic rights in the constitution. And this is what Canadians want.

2. Entrenchment at Provincial Level

Questions have been raised respecting the propriety of Parliament requesting entrenchment of a Charter of Rights in the Constitution when a number of provincial governments have clearly indicated that they do not want an entrenched Charter applicable to the provincial level.

This, of course, raises the question of whether amendments to the Constitution can be legally sought from the U.K. Parliament by the Canadian Parliament without the consent of all the provinces when such an amendment affects the rights, privileges or legislative powers of the provinces.

The federal government's position on this is clear: there is no legally binding convention which requires that the consent of the provinces be sought for such amendments.

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Beyond this, it is important to consider the impact which an entrenched Charter would have on the existing balance of legislative powers between Parliament and the provincial legislatures. The Charter would involve no transfer of powers from one level of government to the other. Rather, it would place certain limitations on the powers of both federal and provincial legislatures and governments, in order to protect certain fundamental rights and freedoms of the individual that are recognized as essential in every advanced democracy.

Thus, the provincial governments can hardly argue that Parliament is attempting, by seeking an entrenched Charter, to transfer powers from the provinces to the federal level.

In addition, it is important to remember that in our federal system most fundamental rights and freedoms fall partly within federal jurisdiction and partly within provincial jurisdiction. Consequently, it is not very meaningful to tell citizens that, for example, their freedom of speech is assured against arbitrary limits being imposed by Parliament, but that there is no similar guarantee insofar as provincial laws are concerned. Or, that an accused has a number of constitutionally guaranteed rights when he is charged under the Criminal Code, but that there is no guarantee to these same rights if the charge is under a provincial Highway Traffic Act.

For all of these reasons, the federal government believes it is both constitutionally legal and proper to have the Canadian Parliament request the entrenchment of a Charter that will give all Canadians the same basic rights and freedoms wherever they choose to live in Canada.

3. Deleting the Charter from the Resolution and Entrenching Rights Following Patriation

The government considers that the Charter is fundamental to our Constitution and that the rights and freedoms included in the Charter are a statement of the very foundation of our society. Constitutional protection

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of individual and minority rights is the essence of being Canadian and the Charter is certainly as critical to the Constitution as an amending formula or the principle of equalization.

Waiting until the Constitution is patriated before entrenching the Charter is unsatisfactory because it would require the agreement of all or, depending on the amending formula adopted, of a certain majority of provinces. However, each time entrenchment of the rights and freedoms of Canadians is discussed with provinces, one or more provincial Premiers decide that they can only agree with entrenchment in return for some power, be it jurisdiction over offshore resources or cultural sovereighty. These discussions have inevitably ended in failure. Therefore, to have a Charter it is important that it be included in the Resolution; this last time, as it were, that Canada is going to Britain with the authority of the House of Commons and the Senate.

Quotes

"We are here tonight to strongly support the idea of an entrenched charter of rights which guarantees equal rights for women. This support was expressed and endorsed at our Canadian Advisory Council meeting last week in the following statement: The Canadian Advisory Council of the Status of Women supports entrenchment in the constitution of a charter of rights and freedoms which guarantees women's human right to equality."

Ms. Doris Anderson
President
Advisory Council on the
Status of Women
before the Special Joint Committee

"The Commission appeared before a special committee of Parliament on the 7th of September, 1978, it was in this very building, and made some specific recommendations and supported the principle of an entrenched charter of rights in a new constitution for Canada. We continue our strong support of that principle and I have polled all commissioners on this point, all eight commissioners."

Mr. R.G.L. Fairweather
Chief Commissioner of
Canadian Human Rights Commission
before the Special Joint Committee

"On the Charter of Rights and Freedoms, we of course have been pressing for such a charter for many years even before the formation of our committee that produced Towards a new Canada As we say in that report, the symbolic and educational value of proclaiming the rights of the individual as being beyond the power of a transient legislative majority can scarcely be exaggerated. But it is more than a symbolic

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tool. As we said also, beyond the symbolic and educational functions, a bill of rights can be an effective instrument of enforcement, particularly of fundamental political and legal rights. The courts can declare laws that violate constitutional rights invalid. In the absence of guaranteed rights a transient majority in Parliament or a legislature can do incalculable harm to a minority or an individual."

Mr. J.P. Nelligan
Chairman, Special Committee on
the Constitution of Canada
Canadian Bar Association
before the Special Joint Committee

"Canada will have the most effective Charter of Rights in the western world."

Mr. R.G.L. Fairweather
Chief Commissioner of
Canadian Human Rights Commission
following Mr. Chretien's statement
on January 12, 1981 regarding the
government's proposed amendments
to the Resolution.

Q

February 23, 1981

THE CHECKERBOARD EFFECT OF THE VANCOUVER FORMULA

The Vancouver amending formula would allow up to three provinces with up to 50% of the population of Canada to "opt-out" of any amendment of general application, including any amendment affecting:

(a) the powers of the legislature of a province to make laws;

(b) the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province;

(c) the assets or property of a province; or

(d) the natural resources of a province.

If adopted, this formula could lead to a checkerboard effect, where Canadians would gain or lose basic rights and freedoms as they travelled from province to province, where citizens might be denied the right to take up residence or pursue a livelihood in some provinces and where provinces would become increasingly unequal in terms of legislative jurisdiction.

Mr. Epp has spoken eloquently about the need to preserve diversity in a federation. But the diversity to be preserved in a federation relates to the use to be made of the legislative powers that are exercised by each of the member states in a federation, the special cultural values to be fostered by each, and the additional rights that each might wish to confer on its own residents.

No one disagrees with this. On the contrary, we strongly support this notion of diversity, which is the strength of a federal system and enriches the lives of all.

But members on this side reject the notion of a checkerboard of fundamental rights and freedoms:

- where mobility rights apply in all but three provinces;

- where freedom of the press and other media of information applies in all but three provinces;

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- where freedom of religion applies in all but three provinces;

- where everyone has the right to life, liberty and security of the person except in three provinces;

- where everyone has the right not to be subjected to any cruel and unusual treatment or punishment, except in three provinces.

There is no impediment in Canada to any province creating additional rights. But we could not agree to a proposition that would permit or, indeed, foster a checkerboard of fundamental rights and freedoms. Because they are fundamental, they are an integral part of the citizenship rights of all Canadians, they are part of those values which we hold in common, notwithstanding our differences and our diversity. Surely, these common values are the very basis of our nationhood.

A checkerboard of fundamental rights and freedoms is not synonymous with diversity: it is the antithesis of a common citizenship.

The Vancouver formula also would permit a checkerboard in the distribution of legislative powers. Surely, Mr. Epp, who wants all provinces to be treated equally, who claims that all provinces are equal, would not accept a situation in which all provinces ended up being unequal in terms of the legislative powers they could exercise.

Diversity enriches our federation. But diversity does not mean that the provinces should be unequal in legislative power or that the fundamental rights of Canadians should not be enjoyed from coast to coast. The government supports diversity. It rejects the checkerboard effect of unequal rights and freedoms and an unequal enjoyment of legislative power by the provinces.

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TAB R

CONTENTS OF THE PROPOSED CHARTER

Material to come.

February 25, 1981

CONSTITUTION ACT, 1981

PART I - CHARTER OF RIGHTS AND FREEDOMS

SUMMARY OUTLINE OF PROVISIONS

Section 1 - Recognized Rights and Limits

1. Rights and freedoms recognized subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 2 - Fundamental Freedoms

2. (1)(a) Freedom of conscience and religion.

(b) Freedom of thought, belief, opinion and expression, including freedom of press and other media of communication.

(c) Freedom of peaceful assembly.

(d) Freedom of association.

Sections 3-5 - Democratic Rights

3. Right of citizens to vote and to qualify for election to House of Commons or legislature.

4. (1) Limits on maximum duration of House of Commons and legislatures (5 years)

(2) except in case of national emergency.

5. Requirement for annual sittings of Parliament and legislatures.

Section 6 - Mobility Rights

6. (1) Right of citizen to enter, remain and leave Canada.

(2) Right of citizen and permanent resident of Canada to

(a) move to and take up residence in any province
(b) pursue a livelihood in any province.

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(3) Rights subject to (a) laws or practices of general application but without discrimination based on province of residence or previous residence or (b) laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Sections 7-14 - Legal Rights

7. Right to life, liberty and security of person and right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Right against unreasonable search and seizure.

9. Right against arbitrary detention or imprisonment.

10. Right on arrest or detention

(a) to be told promptly of reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to remedy of habeas corpus.

11. Right when charged with offence

(a) to be informed without unreasonable delay of specific offence;

(b) to be tried within reasonable time;

(c) of an accused not to be compelled to be a witness against himself;

(d) to presumption of innocence until proven guilty according to law in fair and public hearing before impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) to trial by jury in respect of serious offences, other than those under military law that are tried before a military tribunal;

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(g) to protection against retroactive offence unless at the time it constituted an offence under Canadian or international law or was recognized by international law as being criminal, at the time of commission;

(h) to protection against double jeopardy;

(i) to benefit of lesser penalty where law is changed before sentencing.

12. Protection against cruel and unusual treatment or punishment.

13. Right of witness compelled to testify in any proceedings not to have evidence used to incriminate him in subsequent proceedings, except prosecution for perjury or giving contradictory evidence.

14. Right of party or witness who does not understand or speak the language or who is deaf to assistance of interpreter in any proceedings.

Section 15 - Non-Discrimination Rights

15. (1) Right of every individual to equality before and under the law and equal protection and equal benefit of the law without discrimination and, in particular, because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

(2) Exception

Those programs or activities designed for "affirmative action" on behalf of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Section 16 - Official Languages

16. (1) English and French official languages of Canada with equal status, rights and privileges re use in all federal institutions.

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(2) English and French official languages of New Brunswick with equal status, rights and privileges re use in all provincial institutions.

(3) Power of Parliament and legislatures to advance the equality of status or use of English or French.

Sections 17-22 - Language Rights

17. (1) Right to use English or French in all debates and proceedings of Parliament.

(2) Rights to use English or French in all debates and proceedings of the legislature of New Brunswick.

18. (1) Statutes, records and journals of Parliament to be in English and French and both versions equally authoritative.

(2) Statutes, records and journals of legislature of New Brunswick to be in English and French and both versions equally authoritative.

19. (1) Right to use English or French in all proceedings of federally constituted courts.

(2) Right to use English or French in all proceedings of any court of New Brunswick.

20. (1) Right of public to communicate with and receive services in English or French from head or central office of any federal government institution and from any other federal office

(a) where there is a significant demand, or
(b) due to the nature of the office it is reasonable.

(2) Right of public to communicate with and receive services in English or French from any office of the legislature or government of New Brunswick.

21. Continuation of existing constitutional provisions with respect to English and French languages.

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22. Preservation of legal and customary rights or privileges for use of languages other than French or English.

Section 23 - Minority Language Educational Rights

23. (1) Right of citizens of Canada

(a) whose mother tongue is the minority language (English or French) of their province of residence, or,

(b) who received their primary school instruction in Canada in the minority language (English or French) of the province in which they reside,

to have their children receive their primary and secondary school instruction in that language in that province.

(2) right of citizens to have all their children instructed in the language (English or French) of the first child.

(3) right applies (a) wherever in a province the number of eligible children warrants provision out of public funds of minority language instruction and includes (b) where number of eligible children warrants educational facilities will be provided out of public funds.

Section 24 - Enforcement

24. (1) When rights are infringed or denied, courts are empowered to grant such relief or remedy for violation of Charter rights as may be deemed appropriate and just;

(2) Evidence obtained in a manner that infringes or denies a right guaranteed by the Charter shall be excluded if the court is satisfied that its admission would bring the administration of justice into disrepute.

Section 25-30 - General

25. The rights guaranteed in the Charter will not abridge the rights and freedoms of aboriginal peoples including (a) any rights recognized by the Royal Proclamation of 1763 and (b) any rights that may be acquired by the aboriginal peoples by way of land claims settlement.

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26. Preservation of any existing rights not specifically mentioned in the Charter.

27. Charter to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Rights of denominational schools guaranteed in the Constitution will not be abridged by Charter.

29. Charter provisions made applicable to Territories.

30. Legislative powers of any body are not extended in any way by the Charter.

Section 31 - Application of Charter

31. (1) Charter applies (a) to Parliament and government of Canada including Yukon Territory and Northwest Territory, (b) to the legislatures and government of each province.

(2) 3 year delay for section 15.

Section 32 - Citation

32. Cited as the Canadian Charter of Rights and Freedoms.

NOTE: Rights included in the Charter apply to persons, individuals, everyone, or citizens depending on the provision.

PLEASE NOTE THAT THIS IS A RETYPED COPY OF ORIGINAL LETTER AS PHOTOCOPY WAS ILLEGIBLE.

January 5, 1980

Dear Mr. Yurko:

In early December, you wrote me with regard to the commitment to the Vancouver consensus that had been made by officials, by Ministers, and by First Ministers. In undertaking to respond, I would like to make two preliminary points. First, I can reply with some authority only in terms of the discussions held by Ministers and officials. With regard to the First Ministers, insofar as their private discussions are concerned, my information must be regarded as 'hear-say'. Secondly, such recollections have something in common with the testimony of witnesses at an accident scene; everyone seems to remember the events somewhat differently. Thus, my response will perforce be limited and will clearly be from my own perspective.

In working their way through the twelve agenda items, the Continuing Committee of Ministers on the Constitution were able to turn their attention to the amending formula only towards the end of the second week of their discussions last July. As a result of an initial private ministerial review of this item, it was decided to establish a committee of officials to explore in detail the formula which has been submitted by Alberta at the February 1979 conference of First Ministers. The ministerial discussion revealed that neither the Victoria formula of 1971 nor the Toronto formula of 1979 had sufficient support to warrant reconsideration.

I might add that Ontario's approach to this item was consistent with the approach we had taken throughout the 1970's. Our preference for an amending formula was and remains Victoria. In our view, it provides the requisite balance between flexibility and rigidity; it has the advantage of relative simplicity; and, it treats the provinces equitably, using the same regional approach that the Fathers of Confederation used in the Senate when searching for a compromise between full equality of unevenly populated provinces and representation by population.

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Nevertheless, Ontario has always made it clear that we were willing to consider any other formula that would work and could garner intergovernmental support. It was for this reason that we agreed to look in depth at the formula proposed by Alberta, and even asked one of our staff to undertake the chairmanship of the committee of officials that the CCMC established for this purpose.

The officials' committee focussed its attention on this formula during the CCMC's meeting in Vancouver in late July, and hence the reference to it on the Vancouver formula. In its review, the committee identified three significant policy issues which it referred to Ministers for further consideration. These were:

- the degree of constitutional asymmetry that could result from the opting out feature, the so-called checkerboard effect;
- the financial implications of opting out of amendments; i.e., the possibility of double taxation;
- the recognition that some provisions of the constitution by their very nature were not amenable to opting out.

I would like to comment on each in turn.

1. <u>The checkerboard effect</u>

Since opting out is the unique feature of this formula, the potential checkerboard effect over time had to be considered. Several provinces were concerned about the long-term implications of such an approach. However, I think it is fair to say that in the end, the Ministers decided, with greater or lesser enthusiasm, that the risk involved was an acceptable one on the grounds that the potential difficulty would itself serve as an incentive to ensure broad support for any constitutional amendment.

It is my understanding that First Ministers also considered this problem. While several expressed serious concern, no one rejected the formula outright. I have the impression that all First

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Ministers might have been willing to overcome their doubts on this matter if it was the only outstanding issue in an agreed upon broad package of constitutional reform.

2. Double taxation

It was recognized that the formula could lead to double taxation in any province that opted out of a particular amendment. If a provincial power were transferred to Parliament, it would then be run on a national basis, paid for by all Canadian taxpayers. In an opted out province; however, it would continue to be run provincially, paid for by the taxpayers of that province.

Officials proposed three ways of dealing with this problem:

a) add to the formula the principle that if a province dissents from an amendment, it should not be penalized financially compared with provinces that have approved the amendment;

b) add to the formula the obligation that First Ministers or Finance Ministers review the financial implications of any proposed amendment;

c) make no constitutional provision and deal with the issue on a case by case basis.

While Ministers briefly discussed these three options, there was no consensus on which one to adopt. One province argued strongly for option a), stating that there should be no financial penalty for opting out. Others argued that with no financial penalty, there was no incentive for a province to accept an amendment; in effect, the incentive was to opt out.

I understand that when First Ministers examined this problem, they too came to no clear conclusion. A majority favoured consideration of options b) and c), but at least one held out strongly for option a). Thus, no consensus was reached among them.

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3. Universal applicability

Another difficult problem flowing from the Vancouver formula identified by the officials' committee was that there were certain aspects of the constitution to which opting out was inapplicable even if they related to the rights and privileges of the legislature or government of a province. For example, if provinces were to be involved in the process of selecting Supreme Court judges, it would not be possible for a province to opt out of a future amendment to this process. Similarly, mobility rights must logically apply across the country; opting out of any change to them is an unacceptable option. It thus became apparent that the opting out feature of this formula could realistically be exercised only in relation to the distribution of powers, and the property and assets of a province including natural resources.

If opting out did not apply to other aspects of the constitution, then the general amending provisions of the Vancouver formula would apply to them, i.e. two-thirds of the provinces with at least 50% of the population of Canada. However, many provinces argued that amendments on matters of great concern to them could be too easily achieved. For example, amendments concerning language and culture could potentially be passed without Quebec's consent. The right of a province to a number of members in the Commons not less than the number of senators from that province could be amended over the opposition of Prince Edward Island. The more the problem was considered, the more concerns began to be expressed by particular governments.

A number of options were considered by Ministers for dealing with the problem ranging from requiring unanimity to amend all or some of these matters to setting a higher population requirement for amending them. Moreover, Ministers even suggested that an attempt should be made to identify all items that could not be subject to opting out to see if they could be categorized. Consideration could then be given to several alternative amending approaches depending on the category involved. Unfortunately, this task was not carried out; no government sub-

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mitted its list of items or categories. In the circumstances, the Ministers could only bring the problem to the attention of the First Ministers, and they in turn were unable to devise a solution.

I have gone to some considerable length in recounting these events because I believe that they should be carefully considered by you and your colleagues in determining your ultimate stance on the federal resolution. While Ministers and First Ministers were willing to give serious consideration to the Vancouver formula in spite of its potential checkerboard effect in the hope of achieving consensus, they could not come up with solutions to the two serious technical problems the formula contains. The problem of applicability, in particular, reopened all the arguments with regard to the general formula. If opting out could not be applied, then a 50% population requirement was considered too flexible; unanimity was too rigid; 85% left out the Atlantic provinces; a regional formula was regarded as treating some provinces unequally.

In sum, our discussions held out the potential for consensus, but it was not achieved in fact. The explanation lies not in the ill will of any of the participants, but in defects inherent in the formula itself.

Let me note in conclusion that while Ontario supports the amending formula contained in the federal resolution, we remain conscious of the concerns expressed by several of our sister provinces. To this end, we regard the two year delay before this formula comes into effect as an opportunity to overcome the problems inherent in Vancouver or to consider a wholly new approach. Our willingness in this regard is consistent with our position over the past 9½ hears. The ball is in the court of those who object to the current formula; we are ready to play our part in the game.

Kindest regards,

Cordially,

Thomas L. Wells
Minister

Mr. William J. Yurko, M.P.
House of Commons
Room 456, West Block
Ottawa, K1A 0A7

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(Same letter sent to Premier Schreyer, Premier Hatfield, Premier Moores, Premier Regan, Premier Davis, Premier Campbell, Premier Blakeney.)

CONFIDENTIAL

Ottawa K1A 0 A

March 31, 1976

My dear Premier:

I had been hoping to be in touch with you well before this to advise you about progress in the exercise we started last April, with our discussion at 7 Rideau Gate, for "patriation" of the B.N.A. Act. Since then, all of you, with the exception of Premier Bennett, have received Mr. Gordon Robertson who has discussed the project with you on my behalf. Those discussions took place between May and mid-July of 1975. Premier Barrett was unable to arrange a meeting prior to the election in British Columbia but Mr. Robertson will be meeting Premier Bennett in early April. Discussions with Quebec have taken a good deal of time and it was not until March 5th that I had the opportunity of reviewing the question with the Premier of Quebec. I thought it essential to know his attitude before proceeding to further action.

You will recall that we started with agreement in principle on the desirability of "patriating" the B.N.A. Act and, at the same time, establishing as law the amending procedure that had been agreed to in Victoria in 1971. We also agreed that we would not, in the present "patriation"

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The Honourable Peter Lougheed,
Premier of Alberta,
Legislative Building,
Edmonton, Alberta.

exercise, consider substantive changes to the B.N.A. Act itself since any entry on that course would, as the discussions from 1968 to 1971 had shown, make early action impossible. Mr. Bourassa indicated, however, that it would be difficult for his government to agree to this, unless the action also included "constitutional guarantees" for the French language and culture. We agreed that our general acceptance of the plan, in principle, would be subject to more precise exploration and definition, and this was the purpose of the discussions Mr. Robertson had with you on my behalf. I should first report on what developed in the course of those discussions, although the Premiers Mr. Robertson saw later will be generally aware of the way in which our original proposal grew.

It quickly became apparent in Mr. Robertson's discussions that the action for "patriation" and establishment of the amending procedure would be more meaningful for, and more acceptable to, a number of provinces if certain other alterations in our constitutional situation could be established at the same time. Most of these alterations, with the exception of Mr. Bourassa's "constitutional guarantees", were among the things that had been included in the Victoria Charter. They included the provision for consultation with the provinces about appointments to the Supreme Court of Canada and the special handling of cases arising from the civil law of Quebec. They included also the provision concerning the reduction of regional disparities. Certain of the western provinces wanted to have the amending procedure itself modified so that the requirement with regard to consent from the four

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western provinces would be the same as that for the four eastern provinces. This would mean deletion of the population provision respecting the western provinces that was inserted at Victoria.

The main problem was the definition of the "constitutional guarantees" to which Mr. Bourassa had referred at the outset. Mr. Robertson found that the Premiers he spoke to after the initial discussions with Mr. Bourassa in May had no objection in principle to "constitutional guarantees", although all made it clear that they would want to consider them in detail once they had been worked out with Quebec and reduced to writing.

I will not go into all the difficulties that are presented by the concept of "constitutional guarantees"; they are many and complex. Discussions with Mr. Bourassa's representatives finally led to a formulation that was included in a document sent to him in November, 1975. I am enclosing a copy of the full document herewith. I would draw your attention especially to Parts IV and VI. The formulation of the principal "constitutional guarantee" is Part IV (Article 38). It is buttressed by Part VI (Article 40) and also by the provisions concerning language in Part III.

As I have mentioned, the "constitutional guarantee" was a concept raised by Mr. Bourassa and stated by him to be essential. Articles 38 and 40 attempt to cover the points made by his representatives. Mr. Bourassa knows that my colleagues and I share some concern about the Articles, and he understands that it will fall to him to explain them to his fellow Premiers, in the light of the facts relating to the position of the French language and culture in Canada.

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I should emphasize that the document, while it is styled a "Draft Proclamation", was put in this form simply to show with maximum clarity what the result would be if all the proposals, as they had emerged in the course of Mr. Robertson's consultations, were found acceptable by all governments. It should not be regarded as a specific proposal or draft to which anyone is committed at this stage, since there has not been agreement to the totality of it by anyone. It is rather in the nature of a report on the various ideas, including Mr. Bourassa's "constitutional guarantee", as they developed in the course of the informal discussions from April to November, 1975.

As I stated earlier, most of the "Draft Proclamation" consists of provisions of the Victoria Charter which various Premiers have asked to have included in any action we take. In some cases there are adjustments of the Victoria provisions in order to take into account altered circumstances since 1971 and to benefit by some hind-sight. The new parts of this "report" are the Parts IV and VI to which I have already referred. For ease of reference the main elements are:

(a) A Preamble. This is entirely new and is simply an idea of the way a total presentation might look.

(b) Part I is the amending formula contained in the Victoria Charter made applicable to those parts of the Constitution not now amendable in Canada. Thus Articles 49, 50, 51, 52, 56 and 57 of Part IX of the Victoria Charter are included, while Articles 53, 54 and 55, which were designed to replace Articles 91(1) and 92(1) of the British North

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America Act, are not. The amending formula has not been modified to take account of the views expressed by certain Western Premiers concerning the population qualification for agreement by the Western provinces. I suggest that this might be a matter that, in the first instance, the four Western Premiers might attempt to solve among themselves.

(c) Part II, which is Part IV of the Victoria Charter concerning the Supreme Court, with a final Article (included in another Part of the Victoria Charter) to protect the status of Judges already appointed.

(d) Part III, which is a modified version of Part II of the Victoria Charter concerning language rights. It would entrench the constitutional status of the English and French languages federally. It would not affect the provinces, but it would permit a province, under Article 35, to entrench its own provision if it so wished.

(e) Part IV, which is the "guarantee" designed to protect the French language and culture against adverse action by the Parliament and Government of Canada.

(f) Part V, which is essentially Part VII of the Victoria Charter on Regional Disparities. The presentation has been slightly altered but there is no change in substance whatever.

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(g) Part VI, which is a new Article designed to indicate the spirit in which Governments may enter into agreements. In two of the three areas specifically mentioned, major agreements with Quebec have been concluded over the past two years (family allowances and consultation on immigration).

Mr. Bourassa advised me in our conversation on March 5th that the things he considers to be necessary might well go beyond what we, in the federal government, have understood to be involved in the present exercise. In part they might relate to the distribution of powers. I advised him that the Government of Canada, for its part, feels that it can go no further as part of this exercise than the constitutional guarantees that are embodied in the document and that indeed even they might find difficulty of acceptance in their present form. To go further would involve entry upon the distribution of powers, with the consequences to which I have referred. We must, then, consider three alternatives that are open to us in these circumstances.

Let us begin with the simplest alternative. The Government of Canada remains firmly of the view that we should, as a minimum, achieve "patriation" of the B.N.A. Act. It is not prepared to contemplate the continuation of the anomalous situation in which the British Parliament retains the power to legislate with respect to essential parts of the constitution of Canada. Such "patriation" could be achieved by means of an Address of the two Houses of the Canadian Parliament to the Queen, requesting appropriate legislation by the British Parliament to end its capacity to legislate in any way with respect to Canada.

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Whereas unanimity of the federal government and the provinces would be desirable even for so limited a measure, we are satisfied that such action by the Parliament of Canada does not require the consent of the provinces and would be entirely proper since it would not affect in any way the distribution of powers. In other words, the termination of the British capacity to legislate for Canada would not in any way alter the position as between Parliament and the provincial legislatures whether in respect of jurisdictions flowing from Sections 91 and 92 or otherwise.

However, simple "patriation" would not equip us with an amending procedure for those parts of our constitution that do not come under either Section 91(1) or Section 92(1) of the B.N.A. Act. To meet this deficiency, one could provide in the Address to the Queen that amendment of those parts of the constitution not now amendable in Canada could be made on unanimous consent of Parliament and the legislatures until a permanent formula is found and established. In theory this approach would introduce a rigidity which does not now exist, since at present it is the federal Parliament alone which goes to Westminster, and the degree of consultation of or consent by the provinces is a matter only of convention about which there can be differences of view. In practice, of course, the federal government has in the past sought the unanimous consent of the provinces before seeking amendments that have affected the distribution of powers.

A second and perhaps preferable alternative would be to include in the action a provision that could lead to the establishment of a permanent and more flexible amending procedure. That could be done by detailing such a procedure in our Joint

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Address and having it included in the British legislation as an enabling provision that would come into effect when and only when it had received the formal approval of the legislatures of all the provinces. The obvious amending procedure to set forth would be the one agreed to at Victoria in application to those parts of our constitution not now amendable in Canada (Part I of the attached "Draft Proclamation"). This could be with or without modification respecting the four western provinces. (On this last point, the federal government would be quite prepared to accept the proposed modification and it is my understanding that the other provinces would equally agree if the western provinces can arrive at agreement.)

If we took the above step, we would achieve forthwith half of our objective of last April - "patriation" - and we would establish a process by which the other half - the amending procedure - would become effective as and when the provincial legislatures individually signify their agreement. Over a period of time, which I hope would not be long, we would establish the total capacity to amend our constitution under what is clearly the best and most acceptable procedure that has been worked out in nearly fifty years of effort, since the original federal-provincial conference on this subject in 1927. Until full agreement and implementation had been achieved, any constitutional changes that might be needed, and which did not come under Section 91(1) or Section 92(1) or which could not otherwise be effected in Canada could be made subject to unanimous consent. This would impose an interim rigidity for such very rare requirements for amendment, but, as I have said, the practice has, in any event, been to secure unanimous consent before making amendments that have affected the distribution of powers.

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A third and more extensive possibility still, would be to include, in the "patriation" action, the entirety of the "Draft Proclamation" I am enclosing. In other words the British Parliament, in terminating its capacity to legislate for Canada, could provide that all of the substance of Parts I to VI would come into effect in Canada and would have full legal force when, and only when, the entirety of those Parts had been approved by the legislatures of all the provinces. At that point, we would have, not only "patriation" and the amending procedure, but also the other provisions that have developed out of the discussions thus far. Here again, of course, until all the Provinces had approved the entire Draft Proclamation, any constitutional change which did not come under Section 91(1) or Section 92(1) would be subject to unanimous consent.

As you can see, there are several possibilities as to the course of action now to take. So far as the federal government is concerned, our much preferred course would be to act in unison with all the provinces. "Patriation" is such a historic milestone that it would be ideal if all Premiers would associate themselves with it.

But if unanimity does not appear possible, the federal government will have to decide whether it will recommend to Parliament that a Joint Address be passed seeking "patriation" of the B.N.A. Act. A question for decision then will be what to add to that action. We are inclined to think that it should, at the minimum, be the amending procedure agreed to at Victoria by all the provinces, with or without modification respecting the western provinces, and subject to the condition about coming into force only when approved by the legislatures of all the provinces as explained above.

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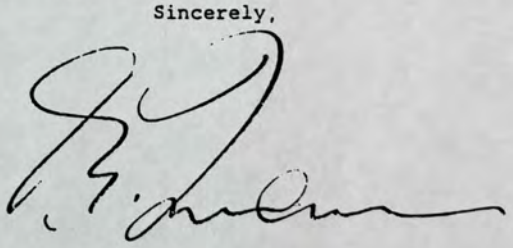
The implications of the different possibilities are complex, and you will undoubtedly want to consider them with care. To facilitate consideration, Mr. Robertson would be glad to come to see you, at a convenient time, for such discussions as you might wish to have. When opportunity offers at an early meeting, we might also discuss the matter together.

I would welcome your comments. Mr. Robertson will be in touch with your office to see if you would wish to have a meeting with him and, if so, what time would suit.

Prior to my meeting with Mr. Bourassa, I did not feel that I was in a position to place any documents before Parliament, but I now feel it proper to do so. I would like to table copies of this letter, as well as of the "Draft Proclamation" that is enclosed. If you have any objection, could you please advise me forthwith. If I do not hear to the contrary, I shall plan to table on April 9th. Should you wish to do the same in your legislature, I would of course, have no objection.

Sincerely,



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TAB T

ISSUES RAISED BY SENATORS

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March 5, 1981.

RE: SOURCE OF QUOTES BY SENATORS COOK AND THOMPSON IN THEIR ADDRESSES ON THE CONSTITUTION DEBATE

Legislative Override of Charter Rights

In his paper of February 3, 1981 entitled "Another Way of 'Entrenching' A Charter of Rights in the Canadian Constitution", Professor G.P. Browne of Carleton University (History Department) advocates a Charter of Rights that would have a "priority status" over ordinary legislation rather than being entrenched in the sense that modifications could only be made by the constitutional amending formula.

His reason for this approach stems from his belief that a fully entrenched Charter is incompatible with the basic principle of parliamentary supremacy in that entrenchment would

(1) transfer ultimate legislative power over social and cultural policies from the legislatures to the courts;

(2) shift the balance of power in favor of the federal government;

(3) increase doubts as to the impartiality of the judiciary;

(4) decrease respect for the rule of law; and

(5) reduce the role of legislators.

Before dealing with his proposal for a "priority status" Charter, it may be useful to make a few comments on Professor Browne's assertions set out above.

1. Transfer of Ultimate Legislative Power

In empowering the courts to review the compatibility of legislation with entrenched basic rights to determine if there has been an infringement of these rights, there is no transfer of ultimate legislative power to the courts.

In the first place, the courts do not legislate but adjudicate. Consequently, their role would be to examine a provision of a law to determine whether it is in conflict with a constitutionally guaranteed right, eg. does a law which prevents persons from assembling in an orderly and peaceful manner to practice their religious beliefs contravene the Charter guarantees of freedom of religion, association and peaceful assembly. Or, does the holding of a person in detention for three weeks before bringing him before a judge deny the right to habeas corpus. These are even now questions upon which the courts adjudicate under statutes or common law. Section 172 of the Criminal Code makes it an offence to disturb or obstruct an assemblage for religious worship and the common law assures the right to habeas corpus.

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In the second place, entrenched rights do not prevent the legislatures from enacting laws on matters covered by these rights. For example, freedom of religion does not mean that Parliament cannot enact laws making what some would claim to be a religious practice a criminal offence (eg. polygamy) or that provincial laws respecting zoning or disturbance of the peace will not apply to religious groups. Or again, the entrenched language rights will not preclude provinces from requiring either English or French as the primary language of business or work or requiring that students graduating from minority language schools possess proficiency in the majority language. Consequently, legislatures will continue to possess the primary responsibility for legislating matters of social, economic and cultural policies. The only restraint by the courts will be where they determine, as a matter of law, that certain legislation impinges unduly on basic rights or freedoms. As the United States Supreme Court and the Supreme Court of Canada have frequently observed: the court's concern is not with the wisdom of policy underlying the legislation, but rather with whether the legislation falls within the limits of the constitutional powers.

In the third place, even if the courts in exercising their constitutional review powers reach conclusions that are considered to be incompatible with needs or good of society, the legislators possess the ultimate power through constitutional amendment to reverse court decisions. Consequently, ultimate parliamentary sovereignty continues to prevail in the same way as it does when courts reach unacceptable decisions on matters involving the division of powers between Parliament and the provincial legislatures.

2. Shift of Power to Federal Government

The Charter does not contemplate or, indeed, authorize any shift of powers from the provinces to the federal level. Nor does it have the centralizing aspect suggested by Professor F.L. Jackson in his paper.

A simple reading of the Charter makes it quite clear that the effect of the Charter is to place restraints on both levels of government to interfere unduly with the basic rights of people. Were this not evident from the provisions themselves, then sections 30 and 31 place it beyond doubt. Section 31 states clearly that the Charter applies to both levels of government and section 30 assures that nothing in the Charter extends the legislative powers of any body.

Some seem to believe that the mobility rights in the Charter (section 6) place restrictions only on provincial laws that discriminate on the basis of residence. This is not the case. "Laws or practices of general application in force in a province" include federal as well as provincial laws and practices.

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The idea of the Charter creating a shift of power to the central government may arise from an erroneous attempt to compare the Charter with the U.S. Bill of Rights. In the latter document, certain of the rights guaranteed, such as the 14th amendment "equal protection of the laws" and the 15th amendment "right to vote", explicitly empower Congress to make laws for the enforcement of these rights. There is no comparable provision in the Charter.

Finally, it might be noted that, in relation to fundamental freedoms at least, the Charter probably imposes greater restraints on Parliament than it does on provincial legislatures. This, because the Supreme Court has in a number of earlier civil rights cases struck down provincial laws dealing with freedom of religion, speech and the press on grounds that such laws could only be enacted by Parliament.

3. Impartiality of Judiciary

While, rightly or wrongly, some provinces have alleged that the Supreme Court has shown a federal bias in deciding constitutional cases involving the distribution of legislative powers, it is difficult to imagine how any similar suspicions could be generated in cases involving infringement of Charter rights.

What the courts will be determining in these cases is not a "contest" between competing claims to legislative power by two levels of government, but rather claims by individuals or groups that a law, be it federal or provincial, is violative of Charter rights. Surely, this type of case cannot give rise to doubts as to the impartiality of the judiciary. Judges for many years have been adjudicating disputes between individuals and governments.

4. Decreased Respect for Rule of Law

This suggestion must be totally without merit. Surely the very basis of the rule of law is the role which the courts play in assuring that the law is applied to and observed by all, so that we live not by the rule of men but the rule of law. This was the very point made by the Supreme Court in the landmark case of Roncarelli v. Duplessis (1959) in which it was held that even the Premier and Attorney General of Quebec was subject to the ordinary laws in the ordinary courts.

Far from decreasing respect for the rule of law, an entrenched Charter interpreted by the courts would enhance respect for the rule of law by ensuring that legislators and bureaucrats cannot arbitrarily deprive individuals of their basic rights.

5. Reduce the Role of Legislators

As has already been indicated above, an entrenched Charter will not deprive the legislators of role in determining social issues. Nor will it diminish their role in protecting rights. Indeed the Charter will no doubt heighten their awareness of their role in this regard, encouraging them to scrutinize laws and delegated powers much more closely to ensure that Charter rights are not infringed.

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A Charter with "Priority Status"

Professor Browne's thesis, which he admits is not new, would be to have a Charter of Rights where the courts would initially determine if a particular law was in violation of any specified rights. If the court made such a determination and the affected legislature determined that it did not approve of the decision, it could then re-enact the law, either after a certain delay period or with a special majority vote with a free vote among members. He feels that such an arrangement would create a proper balance between "judicial supremacy" and "parliamentary supremacy".

Such a "legislative override" provision now exists in the Canadian Bill of Rights whereby Parliament may declare (as it has done with the War Measures Act) that a law is to operate notwithstanding the Bill of Rights. No special majority is required for such an enactment.

Approaches along these lines were considered by the Continuing Committee of Ministers on the Constitution during the past three years, but it was the conclusion of most provinces and the federal government that such a form of "entrenchment" was undesirable for a number of reasons.

First, experience with the Canadian Bill of Rights (a "priority status" enactment) has demonstrated that where parliamentary supremacy is maintained in the enactment, the courts are extremely reluctant to invoke the Bill of Rights to strike down offending legislation. Given the existence of parliamentary supremacy, the courts remain fully deferential to the will of the legislators, and conclude that where they have enacted a law which appears contrary to the Bill of Rights, they must have had the intention to do this. Consequently, simply as a matter of psychology, a "priority status" Charter would likely remain an ineffective device in the hands of the courts.

Second, a "legislative override" mechanism lays open to abuse the very integrity of basic rights that an entrenched Charter is designed to ensure. Rights, by their nature, are designed to protect the individual or the minority. If the majority in a legislature has determined in the first place to violate these rights, then it is doubtful that the individual or minority is going to prevent this from happening a second time. (Would the Manitoba or Quebec legislatures hesitate to reverse the decisions in Blaikie or Forest if they possessed the constitutional power to do so?) While requiring a special majority vote and/or a free vote might make the override of a court decision more difficult, it would not prevent the outcome.

Finally, the "legislative override" approach is simply a first step toward opting out of Charter rights by various jurisdictions and consequently creating a "checkerboard" Charter with rights varying from jurisdiction to jurisdiction. This would defeat one of the principal purposes of entrenching Charter rights in the first place -- to ensure that Canadians enjoy the same basic rights wherever they reside or travel to in Canada.

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For all these reasons, a partially entrenched Charter would appear to be a rather unsatisfactory means of enshrining basic rights in the constitution.

Comments regarding certain statements
in Senator Thompson's speech

(March 2, 1981 Senate Hansard No. 96)

Charter of Rights and Freedoms

1) "Certainly, all the provinces understand that this charter's purpose is to limit legislative jurisdiction by rendering inoperative provincial laws, which are, in the judgment of the court, inconsistent with the charter. The fact that it will also limit federal jurisdiction does not alter that fact of infringing on provincial jurisdiction."

Comments

- The rights included in the Charter are fundamental, a minimum guarantee, and although it may place certain limitations on the powers of both federal and provincial legislatures and government, these limitations would exist only to protect certain fundamental rights and freedoms of the individual that are recognized as essential in every advanced democracy.

- The rights and freedoms included in the Charter are a statement of the very foundation of our society and certainly require a clear expression in our Constitution.

- At present, rights and freedoms vary from place to place in Canada. If there is one overriding element of unity in a federal state it should be the greatest possible measure of commonality in the recognition and protection of basic rights so that a person moving from one place to another will be assured equal treatment and protection wherever he may be.

- In our federal system most fundamental rights and freedoms fall partly within federal jurisdiction and partly within provincial jurisdiction. Consequently, it is not very meaningful to tell citizens that, for example, their freedom of speech is assured against arbitrary limits being imposed by Parliament, but that there is no similar guarantee insofar as provincial laws are concerned. Or, that an accused has a number of constitutionally guaranteed rights when he is charged under the Criminal Code, but that there is no guarantee to these same rights if the charge is under a provincial Highway Traffic Act.

- We must be aware of Canada's obligations under international law in this regard. Canada, in 1976, with the agreement of the provinces, became a party to the U.N. International Covenant on Civil and Political Rights.

- Our courts do not readily override the clearly expressed will of the legislators in matters of social policy. In addition, if from time to time, the decisions of the courts are found to be unacceptable to the electorate, then these decisions can be changed by constitutional amendment. Without entrenchment, rights can be changed by ordinary legislative enactment and our fundamental rights are too important to be treated in this manner.

- A Charter of Rights is not a radical concept. All provinces already have Human Rights Acts or Human Rights Codes and provincial laws are subject to the provincial human rights legislation.

- The Charter does not have a centralizing effect: it does not authorize any shift of power from the provincial level of government to the federal level of government. Moreover, Section 30 of the Charter assures that nothing in the Charter extends the legislative powers of any body.

2) "Professor Browne, whom Senator Cook referred to, pointed out that the rights to "liberty" and enjoyment of property" which were applied by the American Supreme Court through its interpretation of the "due process clause" disallowed laws imposing maximum hours and minimum wage standards, prohibiting discrimination against trade unionists."

"Frankly, I wish I felt the excitement that others profess to feel over the transfer of protecting rights to the courts from the sovereignty of Parliament and the legislatures. I believe that the rationale, the explanation, for that transfer needs much less emotional rhetoric and more deliberation by all of us."

Comments

The concern, that entrenchment of rights would make the judiciary rather than legislators the final arbiters of what basic rights mean, seems based upon particular perceptions of what has happened in the United States under its Bill of Rights and the assumption that the same thing will occur in Canada. In the first place, it is easy for detractors to point to a United States Supreme Court decision of the past that held property rights to mean that slavery was acceptable or to decisions of the 1930's which thwarted some social legislation of the "New Deal", and ask "Do we want out courts making these kinds of judgments?" What is overlooked are other significant judgments of that same Court which have advanced the cause of civil liberties immensely and well before the

legislators were ready to move. One has only to refer to the landmark decision of 1954 where the Court held that segregated schools violated the principle of equal protection of the law, more than ten years before Congress enacted laws designed to counter racial discrimination. Was this a bad decision? Should the courts not have had the power to make this judgment to protect minority rights?

Beyond this point, one also has to note that under the congressional system of government in the United States the courts have been placed in a more direct adversarial role with the legislatures than is the case under our parliamentary system. Consequently, to the extent that fears of "judiciary tyranny" have any real grounds, the fact is in Canada that the courts do not readily override the clearly expressed will of the legislators in matters of social policy -- indeed, our courts have frequently stated that the wisdom of the legislation is not for them to decide, even in constitutional cases.

This principle has also been recognized by the United States Supreme Court. In a passage from the U.S. Court's judgment in Railway Employees' Dept. v. Hanson in 1956 dealing with labour laws and freedom of association: "Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises."

At the same time, we must recognize that in entrenching basic rights what we are seeking is a means to ensure that an objective body (the courts) can decide when an imprudent majority or bureaucrat has acted in a manner which infringes the rights of an individual or a minority. If from time to time these decisions are found to be so unacceptable to the electorate, then they can be changed by constitutional amendment. Without entrenchment, rights can be changed by ordinary legislative enactment and our fundamental rights are too important to be treated in this manner.

The argument that entrenching rights is foreign to our parliamentary system perhaps had some validity when it was being expounded by Dicey a century ago. In that era the principle of supremacy of Parliament had greater significance when Parliament was in fact making all the laws. Today, much of our law is not made by Parliament but by Ministers and officials through regulations, orders, rules, directives and the like. These do not receive effective public debate and consequently there is serious danger that laws will be made that infringe on basic rights without the public even knowing until some regulation is applied to an individual. In this context, it is difficult to contend that entrenchment runs counter to the concept of supremacy of Parliament. It would be more accurate to suggest that entrenchment would place restraints on the "supremacy of government". Indeed, viewed from this perspective, entrenching rights would enhance the supremacy of Parliament since legislators would have to be more conscious of specifying the conditions under which delegated powers were granted and administered -- to ensure that they accorded with the rights guaranteed by the constitution.

3) "What about the treatment of blacks and, indeed of their own Japanese Americans, to mention some who thought that their rights were secure and guaranteed by entrenchment?"

Comments

Even the architects of organized discrimination recognize the difficulties of a constitutionally entrenched Bill of Rights in the United States. When the American and Canadian governments were conspiring to deport—more correctly to send to Japan, because two-thirds were born here—and disperse Americans and Canadians of Japanese extraction, the then United States Under Secretary of State Edward Stettinius expressed his concern over some impediment in their grand design.

I quote:

> In view of a good number of Japanese of American nationality serving in our army whom we could not, in justice, deport, after they had fought for us, and citizenship laws differing in certain important respects from those of Canada . . .

He went on to state these citizenship differences. He went on to state these citizenship differences, and I quote again:

> The Canadians will probably realize that our situation is complicated by our laws relating to citizenship and the constitutional provisions regarding the native-born.

Thus because of the constitutionally enshrined Bill of Rights, the Japanese Americans were able to return to their homes a full nine months prior to the termination of the Pacific war, while the Canadian Japanese languished in the internment camps and were being deported, sent back to Japan most likely and dispersed, for almost four full years after the unconditional surrender of Japan when the presumed reasons for their confinement had vanished.

Mr. Art Shimizu
Chairman, Constitution Committee
National Association of Japanese Canadians
Before the Special Joint Committee - November 26, 1980

Also, in 1944 the U.S. Supreme Court ruled, on the question of internment of the Japanese Americans that the government could only intern the Japanese whose loyalty was in question. All others were to be released.

Gordon Barnett
995-2908

Senator Andrew Thompson
Speech to the Senate of March 2, 1981

Senator Thompson is to be commended for his deep concern for consensus in Canada on the constitutional question, for his proven record of work on behalf of minority groups and for the reflexion and considerable reading he accomplished before addressing the Senate on the Resolution. However, the conclusions he reached are hard to support for a number of reasons.

1. The Constitution as the fundamental consensus of a people for the life of a nation

The Goldfarb-Sorécom poll of July 1980 indicated the following:

Proposal:	Do Support July 1980
That the Constitution guarantee basic human rights such as freedom of speech, freedom of religion, and so on to all Canadian citizens, in such a way that no law, federal or provincial could go against them.	85.2%
That, where numbers warrant, language rights be guaranteed, that is, French minorities outside of Quebec and English minorities inside of Quebec be guaranteed the right to education in their own language.	79.5%
That Canadians in all provinces agree to share their economic opportunities, by means of the richer provinces helping the poorer ones.	85.8%
That Canadians from every province be allowed to work anywhere in the country, to buy and sell goods and services anywhere in Canada and to invest their money anywhere in the country, without restrictions set by a provincial government.	86.4%

The Goldfarb-INCI poll of September 1980 indicated the following:

Proposal:	Do Support September 1980
That the Constitution guarantee democratic and legal rights, fundamental freedoms, non-discrimination rights and so on to all Canadian citizens, in such a way that no law, federal or provincial, could go against them.	81%
That, where numbers warrant, language education rights be guaranteed, that is, French minorities outside of Quebec and the English minority inside of Quebec be guaranteed the right to education in their own language.	77%

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That the Constitution provide a written guarantee so that needy provinces will continue to receive financial assistance so that they may provide essential public services of good quality. 89%

That Canadians from every province be allowed to work anywhere in the country. 94%

That Canadians from every province be allowed to buy and sell goods and services anywhere in Canada and to invest their money anywhere in the country, without restrictions set by governments. 84%

If Senator Thompson is truly interested in "the fundamental consensus of a people for the life of a nation", he should ponder over these figures which indicate overwhelming support for the substance of the Resolution before the Senate. They indicate clearly, in my view, the fundamental consensus of a people for the life of a nation. It is not, of course, the consensus of provincial governments, but then no provincial government has the same degree of support that the people of Canada give to the entrenchment of the rights and freedoms mentioned above.

2. Professor Wade's comparison of Canada to Australia and the United States

Professor Wade, who is Professor of English Law at Cambridge University, ventured into the area of comparative federalism when appearing before the Kershaw Committee. On the basis of an abstract notion of federalism, he stated what the federal governments of the United States and Australia could not do and categorically declared that the federal government of Canada was similarly bound. However, the leading authority on federalism in the United Kingdom, K.C. Wheare, had this to say of Canada in his book Federal Government:

> "The case of Canada is more difficult. The Canadian Constitution -- the British North America Act, 1867, and certain subsequent amending acts -- divides the powers between provincial and Dominion legislatures in such a way that the provinces have exclusive legislative control over a list of enumerated subjects, and the Dominion has exclusive legislative control over the rest, which, 'for greater clarity', were enumerated also, though not exhaustively. The legislatures of Dominion and provinces are distinct in personnel from each other; neither has power to alter the Constitution so far as the distribution of powers is concerned. That power belongs to the United Kingdom parliament alone. The Courts may be invited to declare Dominion or provincial laws void on the ground that they transgress the field allotted to the respective legislatures by the Constitution. So far the federal

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principle is rigidly applied. But there are certain important exceptions. The executive of the Dominion has power to disallow any Act passed by a provincial legislature, whether or not the act deals with subjects falling within the legislative field exclusively assigned to the provinces. Further the Dominion executive appoints the Lieutenant-Governor of a province, that is, the formal head of the provincial government. It can instruct the Lieutenant-Governor to withhold his assent from provincial bills and to reserve them for consideration by the Dominion executive, and it may refuse assent to such reserved bills if it thinks fit. Finally, appointments to all the important judicial posts in the provinces are in the hands of the Dominion executive. These are all unitary elements in an otherwise strictly federal form of constitution. They are matters in which the regional governments are subordinate to the general government, and not co-ordinate with it.

"These are substantial modifications of the federal principle. Consider the powers of disallowance and of veto alone. They mean that, as a matter of law, the Dominion executive could prevent a provincial legislature from making laws upon its own allotted subjects, if the Dominion executive happened to disapprove the policy involved in the laws. The powers of disallowance and veto are quite unrestricted in law. They extend to financial legislation as much as to any other. The Dominion executive could prevent a province from raising revenue or spending money if it disapproved of its financial legislation. Could there be a more powerful weapon for centralizing and unifying the government than this? It is true that the Dominion parliament cannot itself legislate upon provincial subjects; it can only prevent the provincial legislature from doing so. In this respect the Canadian Constitution differs from that, for example, of South Africa, where not only may the executive of the Republic veto provincial ordinances but the parliament of the Republic can itself also legislate upon provincial matters. The federal principle is not completely ousted, therefore, from the Canadian Constitution. It does find a place there and an importance place. Yet if we confine ourselves to the strict law of the constitution, it is hard to know whether we should call it a federal constitution with considerable unitary modifications, or a unitary constitution with considerable federal modifications. It would be straining the federal principle too far, I think, to describe it as a federal constitution, without adding any qualifying phrase. For this reason I prefer to say that Canada has a quasi-federal constitution."

(Emphasis added)

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The Resolution now before Parliament would make Canada more genuinely federal in one important respect: it would establish in law, which is not now the case, a role for the provinces in the amending process, whether that role is played by provincial legislatures or the people of the provinces. At the present time, Parliament can, through a Joint Address, secure an amendment that affects federal-provincial relationships without provincial consultation or agreement and in the face of provincial opposition. This was the case in 1871, 1915, 1943, 1946, 1949 and 1949 (No. 2). However, if the Resolution now before Parliament is acted upon, it would not be possible for Parliament to secure amendments respecting federal-provincial relationships without provincial consent, whether it be expressed by legislatures or the people of the provinces.

3. The "Fourth Principle" in the 1965 White Paper

It should be noted that the 1965 White Paper does not say that the fourth principle has gained recognition but only increasing recognition and acceptance. Moreover, the publication goes on to state: "The nature and the degree of provincial participation in the amending process however, have not lent themselves to easy definition". If the nature and degree of provincial participation have not lent themselves to easy definition, how can the consent of the provinces have developed into a clear convention? Finally, the document cleary indicates that this fourth principle as well as the others are "not constitutionally binding in any strict sense". Inasmuch as the publication received the tacit approval of all provincial governments before it was released, it offers compelling authority for the proposition that provincial consultation and consent is not a constitutionally binding requirement of the existing amendment process.

4. The Distribution of Powers

The principle arguments raised by Senator Thompson in favour of provincial consent on proposed amendments deal with amendments respecting the distribution of legislative powers between Parliament and the provincial legislatures. A Charter of Rights does not alter the distribution of powers between the orders of government, although it does restrain both in the exercise of their respective powers in order to protect the rights of all Canadians -- those very people who provide "the fundamental consensus of a people for the life of a nation".

The Resolution provides for one amendment respecting the distribution of powers: the granting of jurisdiction to the provinces to legislate respecting indirect taxation and interprovincial trade in the area of resources. A few provinces might have preferred a greater increase in jurisdiction, but, to my knowledge, no province opposes what will be achieved through this amendment. It is important to note that this amendment is unique in the history of Canadian federalism: all previous amendments respecting the distribution of powers (1940, 1951, 1964) represented transfers of provincial jurisdiction to the federal authority. This amendment is the first transfer of federal jurisdiction to provincial authorities.

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5. Why failure to act on this Resolution will mean that Canadians will never get a Charter of Rights

As noted above, there is overwhelming support by the people of Canada for the entrenchment of fundamental rights, including language rights and mobility rights. But if we continue to pursue unanimous agreement among governments as a desirable goal (though not constitutionally necessary), we will effectively eliminate any chance of entrenching a Charter of Rights.

Why?

An increasing number of First Ministers have adopted the view in recent years that there should be unanimous agreement on a "package" in which there is something for every government. The agreement of a number of governments on any one item became contingent upon unanimous consent to each and every particular change that it strongly desired. But some changes desired by some governments are unacceptable to others while other changes require considerably more time before they can be developed in the form of specific amendments.

It is this "all-or-nothing" package approach which has led to inaction and stagnation. Yet the desire for change has grown over these past thirteen years, the momentum has built up and the expectation that governments would indeed soon break out of the impasse was confirmed by the promises of First Ministers last May. Yet, once again, an impasse was reached in September because of an impossible process. As long as Canada remains tied to that process, the prospects for change are nil.

The government of Canada is determined to break the impasse and, at the same time, to provide a Charter of Rights for all Canadians. The entrenchment of a Charter is strongly supported by Canadians in all regions of the country. All parties in the House of Commons and Senate participated in the strengthening of the original proposal during the sittings of the Special Joint Committee. It does not alter the distribution of legislative powers between the two orders of government. The government of Canada is convinced that if action on the Charter does not take place at the same time as patriation, it will become hostage to the bargaining over legislative powers that will begin once patriation has taken place.

COMMENTS ON SPEECH OF SENATOR DESCHATELETS

MATERIAL TO COME.

NOTES WITH RESPECT TO A PAPER TITLED

NEWFOUNDLAND SOVEREIGNTY AND THE CANADIAN CONSTITUTION

REF: BY F.L. JACKSON OF MEMORIAL UNIVERSITY, JANUARY 27, 1981

These notes respond to two points made in the above paper prepared by F.L. Jackson of Memorial University.

1. Mr. Jackson writes on page 8:

"...The general effect of the entrenchment of a charter of rights is to make it more difficult for provinces to take unique initiatives in matters pertaining to religion, law, education, social policy, and political rights. (The entrenchment of mobility rights seeks to frustrate provincial efforts aimed at enhancing the lot of its citizens and to focus greater economic power in federal hands.) Without some flexibility to set and enact its own economic and cultural priorities, a provincial government's function is reduced to mere administration and all decisions on policy become the prerogative of the federal central authority. This is just what the existing constitution sought to avoid."

Comments regarding the entrenchment of rights.

Nothing in the Charter requires uniform provincial laws respecting religion, education, social policy, etc. Provinces would still be free to approach matters in a unique way, limited only by the basic rights of residents of the province. A province could develop a totally different education system, the Charter would not prevent this as long as provision was made for minority language rights. The Charter will not force B.C. to establish state supported separate schools.

The rights included in the Charter are fundamental, a minimum guarantee, and although it may place certain limitations on the powers of both federal and provincial legislatures and government, these limitations would exist only to protect certain fundamental rights and freedoms of the individual that are recognized as essential in every advanced democracy.

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The rights and freedoms included in the Charter are a statement of the very foundation of our society and certainly require a clear expression in our Constitution.

At present, rights and freedoms vary from place to place in Canada. If there is one overriding element of unity in a federal state it should be the greatest possible measure of commonality in the recognition and protection of basic rights so that a person moving from one place to another will be assured equal treatment and protection wherever he may be.

In our federal system most fundamental rights and freedoms fall partly within federal jurisdiction and partly within provincial jurisdiction. Consequently, it is not very meaningful to tell citizens that, for example, their freedom of speech is assured against arbitrary limits being imposed by Parliament, but that there is no similar guarantee insofar as provincial laws are concerned. Or, that an accused has a number of constitutionally guaranteed rights when he is charged under the Criminal Code, but that there is no guarantee to these same rights if the charge is under a provincial Highway Traffic Act.

We must be aware of Canada's obligations under international law in this regard. Canada, in 1976 with the agreement of the provinces, became a party to the U.N. International Covenant on Civil and Political Rights.

Our courts do not readily override the clearly expressed will of the legislators in matters of social policy. In addition, if from time to time, the decisions of the courts are found unacceptable to the electorate, then these decisions can be changed by constitutional amendment. Without entrenchment, rights can be changed by ordinary legislative enactment and our fundamental rights are too important to be treated in this manner.

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Entrenching these rights would place restrictions on provincial legislatures' power to legislate contrary to protected rights, but it would equally limit the powers of Parliament.

The Charter does not have a centralizing effect: it does not authorize any shift of power from the provincial level of government to the federal level of government. Moreover, Section 30 of the Charter assures that nothing in the Charter extends the legislative powers of any body.

Comments regarding mobility rights.

As with other provisions in the Charter Section 6, regarding Mobility Rights, is not directed solely at the provinces. "Laws or practices of general application in force in a province" include federal as well as provincial laws and practices. The Mobility Rights prohibitions will therefore affect such federal initiatives as the construction of the Northern Pipeline in the Yukon.

Mobility of labour

In the absence of any provision in the *BNA Act* affirming the mobility and associated rights of Canadian citizens, the mobility of labour within Canada is not constitutionally secured. This deficiency is compounded by the lack of any safeguarding of business and professional mobility. In this respect, Canadian constitutional law contrasts sharply with the basic law of other federal states such as Australia, Switzerland, United States, India, as well as with the provisions of the "Treaty of Rome".

An institutional perspective

In spite of the deficiencies of the *BNA Act*, the ability of the federal authority to derogate from common market principles is constrained by the fact that Parliament emanates from a national constituency whose support any federal government must preserve to remain in office. Thus, discrimination on the basis of province or region of residence, location, origin and destination in federal laws, regulations and practices must be approved by a majority of the people's representatives in the House of Commons, and may therefore be deemed to be in the national interest. Political and public debates, as well as representations regularly made by all provinces on the relative "fairness" or "unfairness" of federal policies and programs, bear witness almost daily to the effectiveness of this constraint.

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There is no comparable limitation upon the ability of provincial legislatures to discriminate on the same basis, since they are accountable only to the electorate of a single province. ..... Where self-interest governs the use of such powers, the only effective restraint upon provincial ability to do so is fear of retaliatory action by other provinces. Obviously, this restraint applies more forcefully to the smaller and economically weaker provinces.

While it must be recognized that enlightened self-interest has largely prevailed so far, one must consider whether this legal void should be allowed to persist. That the possibility of retaliatory discrimination in the provincial domain is real has been exemplified recently by Nova Scotia's Bill 61, *An Act Respecting Petroleum Resources*, providing under section 26(1)(f) that regulations may be made "respecting the nature and extent of employment of Nova Scotians by holders of petroleum rights and others performing work authorized by a petroleum right." This was largely prompted by Newfoundland's *Petroleum and Natural Gas Act*. Sub-section 124.1 of the regulations pursuant to that act provides:

> *It is deemed to be a term of every permit or lease that a permittee or lessee shall give preference in his hiring practices to qualified residents of the province and shall purchase goods and services provided from within the province where competitive in terms of fair current market price, quality and delivery.*

For the purpose of the above section, residence has been defined to mean residence in the province for three years prior to 1978 or for a period of 10 years at any time.

An earlier example of retaliation occurred when the Province of Quebec adopted *The Quebec Construction Industry Labour Relations Act*. This act gives preference in employment to Quebec workers within 13 construction regions. While this measure may have been perfectly legitimate given the particular nature of employment in the construction industry, it had the effect not only of restricting mobility within the province but also of restricting the mobility of workers into Quebec, since no part of neighbouring provinces is considered to be within a Quebec construction region. The Ontario government introduced retaliatory legislation when it proved impossible to amend Quebec's regulations so that Ontario residents might be eligible to apply for classification on the same basis as Quebec workers. However, the legislation was allowed to die on the Order Paper.

"Securing the Canadian Economic Union
in the Constitution"
Government of Canada, 1980

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Surely, if being a Canadian means anything, it means the liberty to move anywhere in the country. The rights of Canadians to move their place of residence and to seek a living are fundamental aspects of a single and united country. If we permit the erection of barriers at provincial boundaries, then we are on the path to creating a balkanized country.

2. Mr. Jackson writes on page 10:

"...Others like Mr. Trudeau and his predominantly Montreal friends believe the answer lies rather in gaining the ascendency in Ottawa and seeking to impose biculturalism on the whole country."

Comments

The language rights in the Charter are of a modest nature and do not impose any obligations on individuals but rather on institutions of government: legislatures, courts and school systems.

The federal government confined the institutional language rights within the Charter to the federal level as well as maintaining the status quo for Quebec and Mantioba. Institutional language rights for residents of New Brunswick were included at the request of that province. In addition, the Charter entrenches minority language educational rights affirming the principle agreed by provincial Premiers in Montreal in 1978.

These rights only ensure that people can receive services, participate in public institutions and have their children educated in the minority language, subject to certain limitations. The Charter imposes nothing on the individual citizen in this context. Citizens can ignore these language rights. The Charter seeks only to ensure that language minorities will not be deprived of the opportunity to use their own language.

Gordon Barnett
995-2908

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THE CHARTER OF RIGHTS AND FREEDOMS

FEDERAL-PROVINCIAL CONSIDERATIONS: IMPACT ON QUEBEC LAWS

The following sets forth some general comments on the "Pratte Report" as reported in the Montreal Gazette on March 4, 1981. The Pratte Report identifies Quebec laws that could be adversely affected by entrenchment of the Charter of Rights.

First, the report cautions that a firm opinion cannot be given on what laws may be rendered inoperative by the Charter since section 1 (the limitation clause) is broadly cast and it is difficult in advance to predict how the courts will apply the "reasonable" and "demonstrably justified" limits test in given cases. This is a fair enough observation, but it should equally be noted that these are not tests peculiar to the Charter. Many of our ordinary laws, both civil and criminal, now call upon the courts to determine what is reasonable conduct in a given case (the Criminal Code requires establishment of "reasonable and probable cause" for an arrest and tort law/delict employs the "reasonable person" test) in determining if negligence was involved. Equally, our Criminal Code imposes upon anyone who is authorized to use force to demonstrate that the degree of force used in a particular case was not excessive; in other words that the force used was demonstrably justified by the circumstances. Consequently, to suggest that there is novelty in the generality of the language of section 1 is without foundation. Much of our law -- common and civil -- is based upon general principles to which the courts must give concrete content in specific cases. Obviously, in performing this task, the courts must weigh competing social, moral and political values in reaching their decisions, and the same process will pertain in interpreting the Charter.

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Second, the report alleges that the Charter imposes on the courts a completely new role which is more legislative than judicial, where they will be handing down political decisions rather than judicial decisions. This is challengeable in at least two respects. In the first place, the courts will not be "legislating" in the parliamentary sense. Rather, they will be -- as they now do -- examining a law, regulation or administrative action to ascertain if it is legally consistent with the provisions of another law -- the Charter. Where they find a conflict to exist, they will pronounce the law or action to be invalid, but they will not be "writing" a new law. That will remain with the legislatures. In this sense, the Charter is no different to the present distribution of legislative powers under sections 91 and 92 of the BNA Act: the courts must in both instances determine whether the federal or provincial law is constitutionally valid in light of the authority given by the constitution to make laws. In the second place, the decisions by the courts will not be more political and less judicial than they are now. The role of the courts will remain that of interpreting laws, and to the extent that the weighing of different values enters into the judgments it will not be different from that which now exists. Surely this is the very role that the courts play now in determining the constitutionality of laws (eg. in the Alberta Press Bill case of 1938 where the Supreme Court held that the Alberta laws were an undue limitation on freedom of speech and of the press). Equally, they do this in interpreting Human Rights Codes where the issues in question are very subjective (eg. what constitutes a bona fide occupational qualification for refusing a person employment on the basis of religion or handicap?). It seems particularly odd that Quebec would argue this position when they have enacted the most comprehensive Charter of Rights in Canada which contains many general principles (right to life, right to personal security, freedom of conscience, religion, expression, assembly and association, right to safeguard one's dignity, honour and reputation, right to equality in the exercise of one's rights without discrimination on many grounds, etc.). They are prepared to have the courts adjudicate their laws and actions in light of these very subjective and general provisions of the Charter of Human Rights and Freedoms. If this be the case, why do they question a similar role for the courts under the proposed Canadian Charter? Surely their Charter creates no less "judicial uncertainty" than the Canadian Charter.

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Third, the report suggests that under the Charter the courts will be able to set aside a law because the judges disagree with its policy. This is not the role of the courts in interpreting the Charter any more than it is their role in interpreting the distribution of powers. When they set aside a law it will be because they have concluded, as a matter of judicial interpretation, that the law is legally inconsistent with the Charter. This fear of the courts usurping the powers of the legislators appears to stem from what some perceive to be the role played by the U.S. courts in interpreting the American Bill of Rights. While there may be some basis for allegations that the U.S. Supreme Court on occasion has strayed beyond its judicial role, I think it fair to say that the prevailing view of that Court is well-stated by the following passage from the Court's judgment in Railway Employees' Dept. v. Hanson in 1956, dealing with labour laws and freedom of association:

> "Powerful arguments have been made here that the long-run interests of labor would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop. Mr. Justice Brandeis, who had wide experience in labor-management relations prior to his appointment to the Court, wrote forcefully against the closed shop. He feared that the closed shop would swing the pendulum in the opposite extreme and substitute 'tyranny of the employee' for 'tyranny of the employer'. But the question is one of policy with which the judiciary has no concern, as Mr. Justice Brandeis would have been the first to concede. Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary."

Turning to some of the specific Quebec laws that the report has identified as being in possible jeopardy once the Charter is adopted.

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Department of Justice
992-2320

Senator Andrew Thompson
Speech to the Senate of March 2, 1981

Senator Thompson is to be commended for his deep concern for consensus in Canada on the constitutional question, for his proven record of work on behalf of minority groups and for the reflexion and considerable reading he accomplished before addressing the Senate on the Resolution. However, the conclusions he reached are hard to support for a number of reasons.

1. The Constitution as the fundamental consensus of a people for the life of a nation

The Goldfarb-Sorécom poll of July 1980 indicated the following:

Proposal:	Do Support July 1980
That the Constitution guarantee basic human rights such as freedom of speech, freedom of religion, and so on to all Canadian citizens, in such a way that no law, federal or provincial could go against them.	85.2%
That, where numbers warrant, language rights be guaranteed, that is, French minorities outside of Quebec and English minorities inside of Quebec be guaranteed the right to education in their own language.	79.5%
That Canadians in all provinces agree to share their economic opportunities, by means of the richer provinces helping the poorer ones.	85.8%
That Canadians from every province be allowed to work anywhere in the country, to buy and sell goods and services anywhere in Canada and to invest their money anywhere in the country, without restrictions set by a provincial government.	86.4%

The Goldfarb-INCI poll of September 1980 indicated the following:

Proposal:	Do Support September 1980
That the Constitution guarantee democratic and legal rights, fundamental freedoms, non-discrimination rights and so on to all Canadian citizens, in such a way that no law, federal or provincial, could go against them.	81%
That, where numbers warrant, language education rights be guaranteed, that is, French minorities outside of Quebec and the English minority inside of Quebec be guaranteed the right to education in their own language.	77%

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That the Constitution provide a written guarantee so that needy provinces will continue to receive financial assistance so that they may provide essential public services of good quality.

89%

That Canadians from every province be allowed to work anywhere in the country.

94%

That Canadians from every province be allowed to buy and sell goods and services anywhere in Canada and to invest their money anywhere in the country, without restrictions set by governments.

84%

If Senator Thompson is truly interested in "the fundamental consensus of a people for the life of a nation", he should ponder over these figures which indicate overwhelming support for the substance of the Resolution before the Senate. They indicate clearly, in my view, the fundamental consensus of a people for the life of a nation. It is not, of course, the consensus of provincial governments, but then no provincial government has the same degree of support that the people of Canada give to the entrenchment of the rights and freedoms mentioned above.

2. Professor Wade's comparison of Canada to Australia and the United States

Professor Wade, who is Professor of English Law at Cambridge University, ventured into the area of comparative federalism when appearing before the Kershaw Committee. On the basis of an abstract notion of federalism, he stated what the federal governments of the United States and Australia could not do and categorically declared that the federal government of Canada was similarly bound. However, the leading authority on federalism in the United Kingdom, K.C. Wheare, had this to say of Canada in his book Federal Government:

> "The case of Canada is more difficult. The Canadian Constitution -- the British North America Act, 1867, and certain subsequent amending acts -- divides the powers between provincial and Dominion legislatures in such a way that the provinces have exclusive legislative control over a list of enumerated subjects, and the Dominion has exclusive legislative control over the rest, which, 'for greater clarity', were enumerated also, though not exhaustively. The legislatures of Dominion and provinces are distinct in personnel from each other; neither has power to alter the Constitution so far as the distribution of powers is concerned. That power belongs to the United Kingdom parliament alone. The Courts may be invited to declare Dominion or provincial laws void on the ground that they transgress the field allotted to the respective legislatures by the Constitution. So far the federal

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principle is rigidly applied. But there are certain important exceptions. The executive of the Dominion has power to disallow any Act passed by a provincial legislature, whether or not the act deals with subjects falling within the legislative field exclusively assigned to the provinces. Further the Dominion executive appoints the Lieutenant-Governor of a province, that is, the formal head of the provincial government. It can instruct the Lieutenant-Governor to withhold his assent from provincial bills and to reserve them for consideration by the Dominion executive, and it may refuse assent to such reserved bills if it thinks fit. Finally, appointments to all the important judicial posts in the provinces are in the hands of the Dominion executive. These are all unitary elements in an otherwise strictly regional governments are subordinate to the general government, and not co-ordinate with it.

"These are substantial modifications of the federal principle. Consider the powers of disallowance and of veto alone. They mean that, as a matter of law, the Dominion executive could prevent a provincial legislature from making laws upon its own allotted subjects, if the Dominion executive happened to disapprove the policy involved in the laws. The powers of disallowance and veto are quite unrestricted in law. They extend to financial legislation as much as to any other. The Dominion executive could prevent a province from raising revenue or spending money if it disapproved of its financial legislation. Could there be a more powerful weapon for centralizing and unifying the government than this? It is true that the Dominion parliament cannot itself legislate upon provincial subjects; it can only prevent the provincial legislature from doing so. In this respect the Canadian Constitution differs from that, for example, of South Africa, where not only may the executive of the Republic veto provincial ordinances but the parliament of the Republic can itself also legislate upon provincial matters. The federal principle is not completely ousted, therefore, from the Canadian Constitution. It does find a place there and an importance place. Yet if we confine ourselves to the strict law of the constitution, it is hard to know whether we should call it a federal constitution with considerable unitary modifications, or a unitary constitution with considerable federal modifications. It would be straining the federal principle too far, I think, to describe it as a federal constitution, without adding any qualifying phrase. For this reason I prefer to say that Canada has a quasi-federal constitution."

(Emphasis added)

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The Resolution now before Parliament would make Canada more genuinely federal in one important respect: it would establish in law, which is not now the case, a role for the provinces in the amending process, whether that role is played by provincial legislatures of the people of the provinces. At the present time, Parliament can, through a Joint Address, secure an amendment that affects federal-provincial relationships without provincial consultation or agreement and in the face of provincial opposition. This was the case in 1871, 1915, 1943, 1946, 1949 and 1949 (No. 2). However, if the Resolution now before Parliament is acted upon, it would not be possible for Parliament to secure amendments respecting federal-provincial relationships without provincial consent, whether it be expressed by legislatures or the people of the provinces.

3. The "Fourth Principle" in the 1965 White Paper

It should be noted that the 1965 White Paper does not say that the fourth principle has gained recognition but only increasing recognition and acceptance. Moreover, the publication goes on to state: "The nature and the degree of provincial participation in the amending process however, have not lent themselves to easy definition". If the nature and degree of provincial participation have not lent themselves to easy definition, how can the consent of the provinces have developed into a clear convention? Finally, the document cleary indicates that this fourth principle as well as the others are "not constitutionally binding in any strict sense". Inasmuch as the publication received the tacit approval of all provincial governments before it was released, it offers compelling authority for the proposition that provincial consultation and consent is not a constitutionally binding requirement of the existing amendment process.

4. The Distribution of Powers

The principle arguments raised by Senator Thompson in favour of provincial consent on proposed amendments deal with amendments respecting the distribution of legislative powers between Parliament and the provincial legislatures. A Charter of Rights does not alter the distribution of powers between the orders of government, although it does restrain both in the exercise of their respective powers in order to protect the rights of all Canadians -- those very people who provide "the fundamental consensus of a people for the life of a nation".

The Resolution provides for one amendment respecting the distribution of powers: the transfer of jurisdiction to the provinces to legislate respecting indirect taxation and interprovincial trade in the area of resources. A few provinces might have preferred a greater transfer of jurisdiction, but, to my knowledge, no province opposes what will be achieved through this amendment. It is important to note that this amendment is unique in the history of Canadian federalism: all previous amendments respecting the distribution of powers (1940, 1951, 1964) represented transfers of provincial jurisdiction to the federal authority. This amendment is the first transfer of federal jurisdiction to provincial authorities.

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5. Why failure to act on this Resolution will mean that Canadians will never get a Charter of Rights

As noted above, there is overwhelming support by the people of Canada for the entrenchment of fundamental rights, including language rights and mobility rights. But if we continue to pursue unanimous agreement among governments as a desirable goal (though not constitutionally necessary), we will effectively eliminate any chance of entrenching a Charter of Rights.

Why?

An increasing number of First Ministers have adopted the view in recent years that there should be unanimous agreement on a "package" in which there is something for every government. The agreement of a number of governments on any one item became contingent upon unanimous consent to each and every particular change that it strongly desired. But some changes desired by some governments are unacceptable to others while other changes require considerably more time before they can be developed in the form of specific amendments.

It is this "all-or-nothing" package approach which has led to inaction and stagnation. Yet the desire for change has grown over these past thirteen years, the momentum has built up and the expectation that governments would indeed soon break out of the impasse was confirmed by the promises of First Ministers last May. Yet, once again, an impasse was reached in September because of an impossible process. As long as Canada remains tied to that process, the prospects for change are nil.

The government of Canada is determined to break the impasse and, at the same time, to provide a Charter of Rights for all Canadians. The entrenchment of a Charter is strongly supported by Canadians in all regions of the country. All parties in the House of Commons participated in the strengthening of the original proposal during the sittings of the Special Joint Committee. It does not alter the distribution of legislative powers between the two orders of government. The government of Canada is convinced that if action on the Charter does not take place at the same time as patriation, it will become hostage to the bargaining over legislative powers that will begin once patriation has taken place.

Department of Justice / Ministère de la Justice

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité	
File number – numéro de dossier	
Date	March 5, 1981

BY HAND

TO/A: DEPUTY MINISTER

FROM/DE: SENIOR COUNSEL
(PUBLIC LAW)

SUBJECT/OBJET: PROFESSOR G.P. BROWNE'S PAPER
ON ENTRENCHING A CHARTER

Comments/Remarques

Attached are some comments that I have prepared on Professor Browne's paper advocating a "Priority Status" Charter.

F.J.E. Jordan
Att.

cc w/att. B.L. Strayer
F.E. Gibson
E. Goldenberg
B. Darling
G. Barnett

JUS 107A

March 5, 1981.

Legislative Override of Charter Rights

In his paper of February 3, 1981 entitled "Another Way of 'Entrenching' A Charter of Rights in the Canadian Constitution", Professor G.P. Browne of Carleton University (History Department) advocates a Charter of Rights that would have a "priority status" over ordinary legislation rather than being entrenched in the sense that modifications could only be made by the constitutional amending formula.

His reason for this approach stems from his belief that a fully entrenched Charter is incompatible with the basic principle of parliamentary supremacy in that entrenchment would

(1) transfer ultimate legislative power over social and cultural policies from the legislatures to the courts;

(2) shift the balance of power in favor of the federal government;

(3) increase doubts as to the impartiality of the judiciary;

(4) decrease respect for the rule of law; and

(5) reduce the role of legislators.

Before dealing with his proposal for a "priority status" Charter, it may be useful to make a few comments on Professor Browne's assertions set out above.

1. Transfer of Ultimate Legislative Power

In empowering the courts to review the compatibility of legislation with entrenched basic rights to determine if there has been an infringement of these rights, there is no transfer of ultimate legislative power to the courts.

In the first place, the courts do not legislate but adjudicate. Consequently, their role would be to examine a provision of a law to determine whether it is in conflict with a constitutionally guaranteed right, eg. does a law which prevents persons from assembling in an orderly and peaceful manner to practice their religious beliefs contravene the Charter guarantees of freedom of religion, association and peaceful assembly. Or, does the holding of a person in detention for three weeks before bringing him before a judge deny the right to habeas corpus. These are even now questions upon which the courts adjudicate under statutes or common law. Section 172 of the Criminal Code makes it an offence to disturb or obstruct an assemblage for religious worship and the common law assures the right to habeas corpus.

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In the second place, entrenched rights do not prevent the legislatures from enacting laws on matters covered by these rights. For example, freedom of religion does not mean that Parliament cannot enact laws making what some would claim to be a religious practice a criminal offence (eg. polygamy) or that provincial laws respecting zoning or disturbance of the peace will not apply to religious groups. Or again, the entrenched language rights will not preclude provinces from requiring either English or French as the primary language of business or work or requiring that students graduating from minority language schools possess proficiency in the majority language. Consequently, legislatures will continue to possess the primary responsibility for legislating matters of social, economic and cultural policies. The only restraint by the courts will be where they determine, as a matter of law, that certain legislation impinges unduly on basic rights or freedoms. As the United States Supreme Court and the Supreme Court of Canada have frequently observed: the court's concern is not with the wisdom of policy underlying the legislation, but rather with whether the legislation falls within the limits of the constitutional powers.

In the third place, even if the courts in exercising their constitutional review powers reach conclusions that are considered to be incompatible with needs or good of society, the legislators possess the ultimate power through constitutional amendment to reverse court decisions. Consequently, ultimate parliamentary sovereignty continues to prevail in the same way as it does when courts reach unacceptable decisions on matters involving the division of powers between Parliament and the provincial legislatures.

2. Shift of Power to Federal Government

The Charter does not contemplate or, indeed, authorize any shift of powers from the provinces to the federal level. Nor does it have the centralizing aspect suggested by Professor F.L. Jackson in his paper.

A simple reading of the Charter makes it quite clear that the effect of the Charter is to place restraints on both levels of government to interfere unduly with the basic rights of people. Were this not evident from the provisions themselves, then sections 30 and 31 place it beyond doubt. Section 31 states clearly that the Charter applies to both levels of government and section 30 assures that nothing in the Charter extends the legislative powers of any body.

Some seem to believe that the mobility rights in the Charter (section 6) place restrictions only on provincial laws that discriminate on the basis of residence. This is not the case. "Laws or practices of general application in force in a province" include federal as well as provincial laws and practices.

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The idea of the Charter creating a shift of power to the central government may arise from an erroneous attempt to compare the Charter with the U.S. Bill of Rights. In the latter document, certain of the rights guaranteed, such as the 14th amendment "equal protection of the laws" and the 15th amendment "right to vote", explicitly empower Congress to make laws for the enforcement of these rights. There is no comparable provision in the Charter.

Finally, it might be noted that, in relation to fundamental freedoms at least, the Charter probably imposes greater restraints on Parliament than it does on provincial legislatures. This, because the Supreme Court has in a number of earlier civil rights cases struck down provincial laws dealing with freedom of religion, speech and the press on grounds that such laws could only be enacted by Parliament.

3. Impartiality of Judiciary

While, rightly or wrongly, some provinces have alleged that the Supreme Court has shown a federal bias in deciding constitutional cases involving the distribution of legislative powers, it is difficult to imagine how any similar suspicions could be generated in cases involving infringement of Charter rights.

What the courts will be determining in these cases is not a "contest" between competing claims to legislative power by two levels of government, but rather claims by individuals or groups that a law, be it federal or provincial, is violative of Charter rights. Surely, this type of case cannot give rise to doubts as to the impartiality of the judiciary. Judges for many years have been adjudicating disputes between individuals and governments.

4. Decreased Respect for Rule of Law

This suggestion must be totally without merit. Surely the very basis of the rule of law is the role which the courts play in assuring that the law is applied to and observed by all, so that we live not by the rule of men but the rule of law. This was the very point made by the Supreme Court in the landmark case of Roncarelli v. Duplessis (1959) in which it was held that even the Premier and Attorney General of Quebec was subject to the ordinary laws in the ordinary courts.

Far from decreasing respect for the rule of law, an entrenched Charter interpreted by the courts would enhance respect for the rule of law by ensuring that legislators and bureaucrats cannot arbitrarily deprive individuals of their basic rights.

5. Reduce the Role of Legislators

As has already been indicated above, an entrenched Charter will not deprive the legislators of role in determining social issues. Nor will it diminish their role in protecting rights. Indeed the Charter will no doubt heighten their awareness of their role in this regard, encouraging them to scrutinize laws and delegated powers much more closely to ensure that Charter rights are not infringed.

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A Charter with "Priority Status"

Professor Browne's thesis, which he admits is not new, would be to have a Charter of Rights where the courts would initially determine if a particular law was in violation of any specified rights. If the court made such a determination and the affected legislature determined that it did not approve of the decision, it could then re-enact the law, either after a certain delay period or with a special majority vote with a free vote among members. He feels that such an arrangement would create a proper balance between "judicial supremacy" and "parliamentary supremacy".

Such a "legislative override" provision now exists in the Canadian Bill of Rights whereby Parliament may declare (as it has done with the War Measures Act) that a law is to operate notwithstanding the Bill of Rights. No special majority is required for such an enactment.

Approaches along these lines were considered by the Continuing Committee of Ministers on the Constitution during the past three years, but it was the conclusion of most provinces and the federal government that such a form of "entrenchment" was undesirable for a number of reasons.

First, experience with the Canadian Bill of Rights (a "priority status" enactment) has demonstrated that where parliamentary supremacy is maintained in the enactment, the courts are extremely reluctant to invoke the Bill of Rights to strike down offending legislation. Given the existence of parliamentary supremacy, the courts remain fully deferential to the will of the legislators, and conclude that where they have enacted a law which appears contrary to the Bill of Rights, they must have had the intention to do this. Consequently, simply as a matter of psychology, a "priority status" Charter would likely remain an ineffective device in the hands of the courts.

Second, a "legislative override" mechanism lays open to abuse the very integrity of basic rights that an entrenched Charter is designed to ensure. Rights, by their nature, are designed to protect the individual or the minority. If the majority in a legislature has determined in the first place to violate these rights, then it is doubtful that the individual or minority is going to prevent this from happening a second time. (Would the Manitoba or Quebec legislatures hesitate to reverse the decisions in Blaikie or Forest if they possessed the constitutional power to do so?) While requiring a special majority vote and/or a free vote might make the override of a court decision more difficult, it would not prevent the outcome.

Finally, the "legislative override" approach is simply a first step toward opting out of Charter rights by various jurisdictions and consequently creating a "checkerboard" Charter with rights varying from jurisdiction to jurisdiction. This would defeat one of the principal purposes of entrenching Charter rights in the first place -- to ensure that Canadians enjoy the same basic rights wherever they reside or travel to in Canada.

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For all these reasons, a partially entrenched Charter would appear to be a rather unsatisfactory means of enshrining basic rights in the constitution.

March 12, 1981

COMMENTS ON SPEECH OF SENATOR DESCHATELETS

Ref: Senate Debate No. 98, March 5, 1981
(pages 1962 - 1965)

1. "... This unilateral proposal threatens to break up, for all practical purposes, the balance of powers which has always existed between our two levels of government."

   - The Government's proposal does not transfer authority from the provinces to the federal government or Parliament; on the contrary there are two important additions to provincial authority being made: increased jurisdiction with respect to resources, and a guaranteed role in future constitutional amendments.
   - The Charter of Rights imposes limitations on both levels of government; however, it does not alter the balance of powers between the two levels in any way.
   - Allowing people, instead of governments to decide on constitutional change by way of referendum does not change the balance of power unless provincial governments do not act in accordance with the will of the people in their province. (To be approved a constitutional amendment would require approval by both a national majority and regional majorities.)
   - The proposal does alter the bargaining position of the provincial governments in that they will no longer be able to hold up patriation and an amending formula (measures which in fact decrease rather than increase federal powers) until they get increased provincial powers over a whole range of subjects. (Or as the P.M. has said in another context - bargaining fish for freedom); the real motive behind all the provincial noise is that they are losing a bargaining tool in the above - explained sense - a bargaining tool which by its nature is unfair and unbalanced (i.e.: federal government give us more powers or we won't agree to end our colonial link with Britain - even though such termination itself results in some increase to provincial powers).

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2. "If Parliament cannot unilaterally amend the substance of the Senate Act, it is obvious that the same principle would apply, when Parliament tries to amend unilaterally exclusive rights and powers granted in the Constitution to the provinces."

- The two Houses of the Parliament of Canada in passing the motion are not amending the constitution; a motion is not a bill; therefore the decision of the Supreme Court in the Senate Reference is not relevant to the capacity of the Senate, or of the House of Commons to pass a motion; Chief Justice Freedman, of the Manitoba Court of Appeal in rendering decision in the Reference case dealt with that argument in the following terms:

"The Attorney General of Manitoba alleges that because the Parliament of Canada cannot legislate to amend the Constitution of Canada in certain respects, it, therefore, cannot request that the Parliament of the United Kingdom, which has full legislative authority, to legislate. It is claimed that to do so would be to do indirectly what cannot be done directly. This is a complete misapplication of a well-known maxim. The fact is that nothing is being done indirectly and nothing is proposed to be done indirectly. Should the Senate and House of Commons decide to send the proposed Joint Address to Westminster, they would be doing directly exactly what they have always done directly in such cases, and the United Kingdom Parliament, in acting upon the request, would be doing directly exactly what it has always done directly when given such a request."

And Mr. Justice Matas:

"In my view, the Senate Reference is not applicable to the question before us. That decision was concerned solely with the power of the federal Parliament to enact proposed legislation under s. 91(1) of the British North America Act (added to the Act by the 1949 (No. 2) amendment) and did not deal

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with the subject matter of this Reference. The arguments of the provinces with respect to the effect of provincial status in Confederation and the convention were considered earlier in these reasons and were not accepted. These arguments cannot gain sustenance by reliance on a supposed implicit determination in the Senate Reference. Again, the 1949 (No. 2) amendment did not purport to deal with anything other than the grant to the federal entity of the power to make amendments of exclusively federal concern. No change in procedure for other amendments was stated explicitly in the amendment nor can one be drawn from it by necessary implication."

(Incidentally the Senate Reference did not say Parliament could not amend the Senate Act, as the Senator claims, but that it could not amend the B.N.A. Act, 1867 to abolish or significantly alter the Senate. Parliament can clearly amend the Senate Act since it enacted that Act in the first place.)

3. "Section 93 of the Constitution gives to the provinces, subject to specific provisions guaranteeing vested rights, the exclusive jurisdiction to legislate on matters of education ... Section 93 has always been our Maginot line of defence. We want to solve our linguistic and educational problems ourselves in Quebec and this proposal is an encroachment that I cannot accept."

- The Senator does not point out that exclusive legislative jurisdiction over education under section 93 is restricted in that provincial legislation cannot infringe denominational school rights; any act or decision of any provincial authority which affected rights or privileges of the Protestant or Roman Catholic minorities can be appealed to the federal Cabinet; and federal legislation can be enacted (pursuant to s. 93(4)) to ensure that such rights are protected. Entrenching a Charter of Rights to guarantee language education rights is not philosophically different from the present provisions of the B.N.A. Act.

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93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the

Provisions of this Section and of any Decision of the Governor General in Council under this Section. (43)

- His argument implies support for the restrictive provisions of Bill 101 re: minority language education.

4. "The project before us constitutes a precedent."

- That can only be one patriation, therefore the present action cannot constitute a precedent for future actions.

March 13, 1981

COMMENTS RE: "PROFESSOR" JACKSON'S DIATRIBE

(Ref: Newfoundland Sovereignty and the Canadian Constitution: Prof. F.L. Jackson, Memorial University, Jan. 27, 1981)

1. The allegation that a Charter of Rights is "republican" and therefore somehow antithetical to our parliamentry system of government is pure rhetoric only. The United Kingdom is now bound by the European Charter of Human Rights and the European Court of Justice decides cases arising under that Charter as it applies in the United Kingdom. This has not made that country any less of a parliamentry system of government. In recent years the entrenchment of Human Rights in all countries has been a major interest of the international community. Thus there is The Universal Declaration of Human Rights adopted by the United Nations; The International Convention on the Eliminating of Racial Discrimination; The International Covenant on Economic, Social and Cultural Rights; and The International Covenant on Civil and Political Rights. There is no suggestion in any of these that human rights need less protection under a parliamentry system of government than they do under other forms of government. (Ref: pp. 3 & 4)

2. "In contrast with the United States, Canada developed as a con-federation of colonies ... ." (p. 5)

Although Canada is colloquially referred to as a "confederation" it is well known by all political scientists, historians and lawyers that the colloquial terminology is not at all accurate, and that Canada is not a confederal system. Professor Peter Hogg of the Osgoode Hall Law School in his text Constitutional Law of Canada, 1977 describes the situation as follows:

> Canada is often described as a "confederation", and the process of union which culminated in 1867 is often described as "confederation".
>
> ... In a confederation in the technical sense the central government is the delegate of the states or provinces; its powers are delegated to it by the states or provinces, who retain the right to resume the delegated powers if they wish. It was a "confederation" which was established by the American colonies by the Articles of Confederation of 1777, because under that arrangement the central government was merely the delegate of the states. After the revolutionary war the final constitution which was adopted by the United States in 1787 made the federal government independent of the states and coordinate with them.
>
> In Canada the union of the provinces, like the union of the United States, established a central government which was in no sense the delegate of the provinces. It was independent of the provinces and coordinate with them.

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> Indeed, as we shall see later in this chapter, to the extent that the provinces and the central government are not coordinate it is the provinces which are subordinate to the central government—the opposite of confederation. During the discussions of union in British North America before 1867 the terms union, federation and confederation were not used in any consistent or precise sense; and the term confederation has now become an accepted term for the Canadian union of provinces.

And in the well known political science text, The Canadian Political System written by Professors R.J. Van Loon, and M.S. Whittington the following is found:

> A confederal union was also an alternative for the British North American colonies, but when this form of union was subjected to scrutiny it was recognized that a *confederation*[3] would provide only a slightly higher level of political integration than an alliance. In fact, a confederation is a union of sovereign states which features a permanent central decision-making body, or congress, to which the members of the confederation send delegates. Functionally, a confederation is more diffuse than an alliance, for the central congress is empowered to make decisions concerning a very wide range of subjects. The weakness of a confederation is that, as with an alliance, there is no transfer of sovereignty from the member states to the central congress. While empowered to make decisions, the congress is given no power to enforce them, and the members of the confederation can, if they choose, refuse to comply with any decision with which they disagree. The parties to a confederation agreement also have the right to secede from the union if they feel that its terms of reference no longer provide any benefits. Thus, while the confederal form of union is functionally more diffuse than an alliance, it suffers from many of the same faults. Furthermore, the example of the United States under the Articles of Confederation in the 1780s, with the chaotic condition of government during that period, gave the Fathers of Confederation ample cause for avoiding that particular form of union.

3. "Down to 1931, Canada and Newfoundland enjoyed a similar relation to the Crown. In that year the Statute of Westminster conferred Dominion status upon both countries, ..." (p. 5)

The Statute of Westminster did not confer Dominion status on Newfoundland. The Statute of Westminster never applied to Newfoundland until after it became a province of Canada. and then it applied to Newfoundland as a province, not as a Dominion. Although Newfoundland is listed in section one

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of the Statute as one of the "Dominions" to which the Act can apply, section 10 provides that the sections of the Act do not apply to any Dominion "unless that section is adopted by the Parliament of the Dominion". Newfoundland never passed an act adopting the Statute of Westminster and in 1933, of course, Commission government was introduced. Section 48 of the Terms of Union provides:

> "From and after the date of Union the Statute of Westminster, 1931, shall apply to the Province of Newfoundland as it applies to the other provinces of Canada."

This was the first time the Statute of Westminster applied to Newfoundland, that is, as a province.

The comments of the U.K. Attorney General, in debate on the amendment bringing Newfoundland into confederation, amply illustrate this (found at p. 1263 and 1266 U.K. House of Commons Debates, 9 March, 1949):

> The Attorney-General: The bridges still remain. It is our intention to maintain them. It is also true that the position has been radically altered since 1867 but, so far as Newfoundland is concerned, it has not been altered at all by the Statute of Westminster. The Statute of Westminster was in the main what is called an adoptive Act; that is to say, it was brought into operation in relation to the particular Commonwealth countries if and when the Legislatures of those countries chose to adopt it. Newfoundland never did adopt it. In consequence, the operative parts of the Statute of Westminster—Sections 2, 3, 4, 5 and 6—never at any time applied to Newfoundland. In any event, Section 7 of the Statute of Westminster expressly excluded the alteration or the amendment of the British North America Act, 1867, from the scope of the Statute of Westminster. Even if, therefore, the Act had been adopted by Newfoundland, there would still have been that exclusion by Section 7 of the effect of the Act on the old 1867 Statute. One can, therefore, quite safely say—and I have confidence in advising the Committee about this—that there is nothing contrary to the Statute of Westminster in what is now being done.

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> The true position in law—and I am expressing my opinion to the House about a legal matter subject always to the qualification that law is not an exact science—after the 1933 Statute had been passed, was that the United Kingdom Parliament enjoyed complete sovereignty, unfettered sovereignty, over Newfoundland and that Newfoundland, although in name a Dominion, was in fact a Colony. During this period, the United Kingdom Parliament passed a number of Statutes applicable to Newfoundland and it is significant that not only did nobody at any time doubt the capacity of this Parliament to pass Statutes binding on Newfoundland, but in the Statutes which were passed, Newfoundland was always ranked with Colonies and not with Dominions, as we called them then.

4. "Here it is most important to note that Canada, unlike other Dominions like Australia, specifically asked that special clauses be included recognizing the special status of provincial governments." (pp. 5 & 6)

There are special provisions respecting Australia in the Statute of Westminster. They retain United Kingdom supremacy over Australia state laws. The omission of reference to the Australian states on terms comparable to the Canadian provinces does not signify that the Canadian provinces are somehow more "sovereign". Indeed exactly the opposite is the case.

" K. C. Wheare in his text <u>The Statute of Westminister and Dominion Status</u> (1953, 5th ed) at p. 201 in discussing the application of the Statute of Westminister to Australia and Canada described the difference between the two systems:

"Similar problems were encountered in the application of the Statute to Australia to those which had arisen in the case of Canada. Here again there was a federal system of government, with the difference that whereas in Canada the residual powers

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rested with the federal parliament and government, in Australia the residual powers rested with the parliaments and governments of the States. The latter were much more powerful units in the federal system than were the Canadian Provinces, and their complete autonomy within their own sphere as against the federal parliament was more rigidly guaranteed and safeguarded. The States retained direct relations with His Majesty and His Majesty's Government in the United Kingdom through their Governors, who were appointed by His Majesty, on the advice of the United Kingdom Government, though usually in consultation with the State Government concerned. No such independent relations existed between the Provinces of Canada and His Majesty or the United Kingdom Government, for the provincial Lieutenant-Governors were appointed by the Governor-General of Canada on the advice of the Dominion Government. Similarly, the powers to reserve Bills or to disallow acts passed by the State legislatures in Australia, were under the control of the United Kingdom Government, whereas the same powers in Canada were under the control of the Dominion Government. To the student of political institutions, the Australian system comes nearer to the perfect type of federation than does the Canadian. And it is not surprising that the safeguards inserted in the Statute of Westminister, in order to maintain the Australian federal system unimpaired after the passing of the Statute, should be even more elaborate and rigid than in the case of Canada.""

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5. Professor Jackson does not note that section 7(1) of the Statute of Westminster states (Ref: p. 6):

> "Nothing in this Act should be deemed to apply to the repeal, amendment or alteration of the British North America Acts."

(i.e.: to an amendment of the Canadian constitution). Thus even if the Statute of Westminster had the effect claimed for it by Mr. Jackson, which it does not, it would be irrelevant to the patriation resolution before Parliament which pertains to a constitutional amendment.

6. > "Canada is in fact unique among modern nations in precisely the unusual manner in which its constitution seeks to reconcile contrary tendencies ... . The federal-provincial system of shared, interlocking sovereignty which seeks to hold together these contrary universalizing and particular-izing stresses ... ." (p. 6)

If Canada is unique among modern nations it is not because of the sovereignty of the provinces, it is because it is more a quasi-federal than a federal system. K.C. Wheare (who I think was advisor to the Newfoundland National Convention of 1946-1948) states in his book, Federal Government, 4th ed. 1963, p. 17-19, as follows:

> The case of Canada is more difficult. The Canadian Constitution—the British North America Act, 1867, and certain subsequent amending acts—divides the powers between provincial and Dominion legislatures in such a way that the provinces have exclusive legislative control over a list of enumerated subjects, and the Dominion has exclusive legislative control over the rest, which, 'for greater clarity', were enumerated also, though not exhaustively. The legislatures of Dominion and provinces are distinct in personnel from each other; neither has power to alter the Constitution so far as the distribution of powers is concerned. That power belongs to the United Kingdom parliament alone. The Courts may be invited to declare Dominion or provincial laws void on the ground that they transgress the field allotted to the respective legislatures by the Constitution. So far the federal principle is rigidly applied. But there are certain important exceptions. The executive of the Dominion has power to disallow any Act passed by a provincial legislature, whether or not the act deals with subjects falling within the legislative field exclusively assigned to the provinces. Further the Dominion executive appoints the Lieutenant-Governor of a province, that is, the formal head of the provincial government. It can instruct the Lieutenant-Governor to withhold his assent from provincial bills and to reserve them for consideration by the Dominion executive, and it may refuse assent to such reserved bills if it thinks fit. Finally, appointments to all the important judicial posts in the provinces are in the hands of the Dominion executive. These are all unitary elements in an otherwise strictly federal form of constitution. They are matters in which the regional governments are subordinate to the general government, and not co-ordinate with it.

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These are substantial modifications of the federal principle. Consider the powers of disallowance and of veto alone. They mean that, as a matter of law, the Dominion executive could prevent a provincial legislature from making laws upon its own allotted subjects, if the Dominion executive happened to disapprove the policy involved in the laws. The powers of disallowance and veto are quite unrestricted in law.[1] They extend to financial legislation as much as to any other. The Dominion executive could prevent a province from raising revenue or spending money if it disapproved of its financial legislation. Could there be a more powerful weapon for centralizing and unifying the government than this? It is true that the Dominion parliament cannot itself legislate upon provincial subjects; it can only prevent the provincial legislature from doing so. In this respect the Canadian Constitution differs from that, for example, of South Africa, where not only may the executive of the Republic veto provincial ordinances but the parliament of the Republic can itself also legislate upon provincial matters. The federal principle is not completely ousted, therefore, from the Canadian Constitution. It does find a place there and an importance place. Yet if we confine ourselves to the strict law of the constitution, it is hard to know whether we should call it a federal constitution with considerable unitary modifications, or a unitary constitution with considerable federal modifications. It would be straining the federal principle too far, I think, to describe it as a federal constitution, without adding any qualifying phrase. For this reason I prefer to say that Canada has a quasi-federal constitution.

7. The criticism of the referendum process as part of the amending formula illustrates the irrational and emotional tone of the whole paper:

> "The federal government can still unilaterally call 'foul' and ask the people through a referendum to break the so-called 'deadlock'." (p. 8)

The referendum process allows the people to decide directly when their governments do not agree. A national majority is required, instead of approval by the federal government (i.e.: Parliament), and regional majorities are required instead of approval by provincial governments (i.e.: legislatures). It is a strange kind of "foul play" to provide that the electorate should be the ultimate decision maker on whether or not the policies of their governments really reflect their wishes.

8. > "The entrenchment of mobility rights seeks to frustrate provincial efforts aimed at enhancing the lot of its citizens and to focus greater economic power in federal hands. Without some flexibility to set and enact its own economic and cultural priorities, a provincial government's function is reduced to mere administration and all decisions on policy become the prerogative of the federal central authority." (pp. 8 & 9)

This is pure emotionalism, with no relationship to the facts. The mobility rights guaranty applies to both the federal and provincial levels. How, then, can it put greater power in "federal hands"? There is no provision in the resolution which increases federal power. The Charter of Rights, it is true, limits both the federal and provincial government, in favour of increased protection for individuals in our society. The only transfer of power is in favour of the provincial government. They will, under the resources amendment, obtain increased authority with respect to resources, including authority to regulate interprovincial trade in such resources and to levy indirect taxes thereon.

9. It is laughable to suggest that Mr. Trudeau supports "a two nation country" after all the times he has publicly spoken so vehemently against this concept. (Ref: pp. 10 & 11)

... 9

10. "But Newfoundland was a sovereign dominion and negotiated on an equal basis, with the Crown acting only as a mediator ... . And so it was decided that we would formally revert to full sovereignty minutes before the hour of union." (p. 14)

At the time of Union, Newfoundland was not sovereign - as any Newfoundlander knows. Perhaps Professor Jackson is not a Newfoundlander and is as unfamiliar with the history of that province, as he is with the law. In 1933 Newfoundland's constitution was repealed and it was governed by a Commission of six members appointed by the United Kingdom Government under the chairmanship of a Governor. At the time of Confederation, this lack of independence is illustrated by the fact that the National Convention recommended to the United Kingdom that a referendum be held putting two choices to the people: continued commission government or a return to their own legislature and responsible government. It was the United Kingdom government which insisted that a third question be added to the ballot: Confederation with Canada.

Also, sovereignty was not returned to Newfoundland minutes before it entered confederation. It is probable that this argument relates to section 7 of the Terms of Union which provides:

> "The Constitution of Newfoundland as it existed immediately prior to the sixteenth day of February, 1934, is revived at the date of Union and shall, subject to these Terms and the British North America Acts 1867 to 1946, continue as the Constitution of the Province of Newfoundland ... ."

The constitution of Newfoundland did not revive before confederation but at the same time; it did not revive any "sovereignty" because it is subject to the Terms of Union themselves and the British North America Acts which give Newfoundland the same status as the other provinces of Canada. The purpose of the section was really to restore Newfoundland's legislature so that it would be on an equal footing with the other provinces.

... 10

Lord Ammon, in speaking to the 1949 legislation in the House of Lords explained the situation as follows (U.K. Debates, House of Lords, p. 310 and 315-16, 15 March, 1949):

> As your Lordships' House will know, this Bill and the events which have led up to it have been the subject of criticism both in Newfoundland and in another place. It has been said that His Majesty's Government have shown themselves to be undemocratic in their treatment of Newfoundland. It is said that we should first have restored to Newfoundland her previous Constitution, leaving it to a Newfoundland Parliament to decide whether or not to accept the terms offered by Canada. As there have been many misconceptions about our attitude in this matter, I should like briefly to review the policy which we and our predecessors in office have consistently followed during the last few years. This policy has its foundation in the Newfoundland Act of 1933. In that year, as the result of the financial stress to which the Island had been subjected, a Royal Commission was appointed to inquire into the financial situation of the Island. The Royal Commission recommended that responsible government should be suspended and that the Island should be governed by a Commission of six appointed members, three of them from Newfoundland and three from this country, under the chairmanship of a Governor. These proposals were accepted by the Newfoundland Legislature, at whose request Parliament here passed the Act of 1933.
>
> There is another point of contention. It is said that by virtue of the Statute of Westminster we have no right to legislate for Newfoundland except at the request of an elected Legislature, and that the whole procedure which we have been following is, therefore, *ultra vires*. This need not detain us long. The plain fact is that the Legislature of Newfoundland, prior to its suspension, had never adopted the optional provisions of the Statute of Westminster. May I refer your Lordships to paragraph 48 of the Schedule to the present Bill, which puts that matter right by indicating that the Statute will apply under the procedure that is being suggested? To-day there is no Parliament of Newfoundland, and the Statute, therefore, has no present application to Newfoundland.

MOTION TABLED BY THE MINISTER OF JUSTICE IN THE HOUSE OF COMMONS ON FEBRUARY 13, 1981, TOGETHER WITH THE OCTOBER 2, 1980, PROPOSED RESOLUTION AND EXPLANATORY NOTES AS TO AMENDMENTS

MOTION DÉPOSÉE PAR LE MINISTRE DE LA JUSTICE À LA CHAMBRE DES COMMUNES LE 13 FÉVRIER 1981, ACCOMPAGNÉE DU PROJET DE RÉSOLUTION DU 2 OCTOBRE 1980 ET ASSORTIE DES NOTES EXPLICATIVES CORRESPONDANT AUX MODIFICATIONS PROPOSÉES

Motion tabled by the Minister of Justice in the House of Commons February 13, 1981

Motion déposée à la Chambre des communes par le ministre de la Justice le 13 février 1981

25005–19-2-81

Rec'd 5.3.81

Department of Justice / Ministère de la Justice

Security Classification – Cote de sécurité	
File number – numéro de dossier	
Date	March 5, 1981

MEMORANDUM/NOTE DE SERVICE

BY HAND

TO/A: DEPUTY MINISTER

FROM/DE: SENIOR COUNSEL
(PUBLIC LAW)

SUBJECT/OBJET: PROFESSOR G.P. BROWNE'S PAPER
ON ENTRENCHING A CHARTER

Eddie

Browne's paper was the basis of many of Sen Cook & Sen Thompson's remarks. Sen Perrault has asked for an analysis of it.

Barb

Comments/Remarques

Attached are some comments that I have prepared on Professor Browne's paper advocating a "Priority Status" Charter.

F.J.E. Jordan
Att.

cc w/att. B.L. Strayer
F.E. Gibson
E. Goldenberg
B. Darling
G. Barnett

– this covering page – not to be included in pkg.

JUS 107A

DRAFT

March 17, 1981

COMMENTS ON THE SUBMISSION OF PREMIER WILLIAM R. BENNETT ON BEHALF OF BRITISH COLUMBIA TO THE SPECIAL JOINT COMMITTEE ON THE CONSTITUTION OF CANADA DATED JANUARY 9, 1981

1) "The basic characteristic of a federal democracy is that two coordinate orders of government exist, each exercising its own responsibilities and neither one subordinate to the other. This concept of partnership is the very essence of Canadian federalism. This is the basis on which British Columbia entered the federation in 1971. The Terms of Union of that entry have been described by judicial authority as "a transaction ... being of the nature of a treaty between two independent bodies ..."[1]

[1] Attorney General of British Columbia vs. Attorney General of Canada (1887), 24 S.C.R. 345 at 372." (p. 1)

Comments

This characterization of Canadian federalism compares with that of a leading authority of federalism who had this to say of Canada in his book, Federal Government:

> **"The case of Canada is more difficult. The Canadian Constitution -- the British North America Act, 1867, and certain subsequent amending acts -- divides the powers between provincial and Dominion legislatures in such a way that the provinces have exclusive legislative control over a list of enumerated subjects, and the Dominion has exclusive legislative control over the rest, which, 'for greater clarity', were enumerated also, though not exhaustively. The legislatures of Dominion and provinces are distinct in personnel from each other; neither has power to alter the Constitution so far as the distribution of powers is concerned. That power belongs to the United Kingdom parliament alone. The Courts may be invited to declare Dominion or provincial laws void on the ground that they transgress the field allotted to the respective legislatures by the Constitution. So far the federal principle is rigidly applied. But there are certain important exceptions. The executive of the Dominion has power to disallow any Act passed by a provincial legislature, whether or not the act deals with subjects falling within the legislative field exclusively assigned to the provinces. Further the Dominion executive appoints the**

... 2

Lieutenant-Governor of a province, that is, the formal head of the provincial government. It can instruct the Lieutenant-Governor to withhold his assent from provincial bills and to reserve them for consideration by the Dominion executive, and it may refuse assent to such reserved bills if it thinks fit. Finally, appointments to all the important judicial posts in the provinces are in the hands of the Dominion executive. These are all unitary elements in an otherwise strictly federal form of constitution. They are matters in which the regional governments are subordinate to the general government, and not co-ordinate with it.

"These are substantial modifications of the federal principle. Consider the powers of disallowance and of veto alone. They mean that, as a matter of law, the Dominion executive could prevent a provincial legislature from making laws upon its own allotted subjects, if the Dominion executive happened to disapprove the policy involved in the laws. The powers of disallowance and veto are quite unrestricted in law. They extend to financial legislation as much as to any other. The Dominion executive could prevent a province from raising revenue or spending money if it disapproved of its financial legislation. Could there be a more powerful weapon for centralizing and unifying the government than this? It is true that the Dominion parliament cannot itself legislate upon provincial subjects; it can only prevent the provincial legislature from doing so. In this respect the Canadian Constitution differs from that, for example, of South Africa, where not only may the executive of the Republic veto provincial ordinances but the parliament of the Republic can itself also legislate upon provincial matters. The federal principle is not completely ousted, therefore, from the Canadian Constitution. It does find a place there and an importance place. Yet if we confine ourselves to the strict law of the constitution, it is hard to know whether we should call it a federal constitution with considerable unitary modifications, or a unitary constitution with considerable federal modifications. It would be straining the federal principle too far, I think, to describe it as a federal constitution, without adding any qualifying phrase. For this reason I prefer to say that Canada has a quasi-federal constitution."

(Emphasis added)

... 3

The Resolution now before Parliament would make Canada more genuinely federal in one important respect: it would establish in law, which is not now the case, a role for the provinces in the amending process, whether that role is played by provincial legislatures or the people of the provinces. At the present time, Parliament can, through a Joint Address, secure an amendment that affects federal-provincial relationships without provincial consultation or agreement and in the face of provincial opposition. This was the case in 1871, 1915, 1943, 1946, 1949 and 1949 (No. 2). However, if the Resolution now before Parliament is acted upon, it would not be possible for Parliament to secure amendments respecting federal-provincial relationships without provincial consent, whether it be expressed by legislatures or the people of the provinces.

2) "It is to be noted that the Victoria Charter 1971 amending formula would have provided both Quebec and Ontario with a separate voice on constitutional amendment, but all four western provinces notwithstanding their size and present status in the country, would be given only one voice. We considered that this formula failed to reflect the importance of the West in Confederation. In terms of labour force, population, capital investment, provincial product, it is readily apparent that any effect or realistic amending formula should give greater credence to the West than one voice out of five which is what the Victoria amending formula would have provided. (The other four being Quebec, Ontario, the Atlantic region and the federal government.)" (pp. 3 & 4)

Comments

The government of Canada does not intend to impose forthwith an amending procedure of its own devising. Rather, a two stages approach to the adoption of an amending formula is proposed that will provide ample opportunity for governments to work out a formula together.

The Victoria formula has been included as a fall-back under this approach, because, if no agreement can be reached on an alternative, it has the advantage of being a fully developed amending procedure that was agreed to by all provinces in 1971. It provides for a "national consensus" based on the consent of Parliament and at least six provincial legislatures distributed over the four regions of Canada and which would, in practice, represent over 80 percent of the population. For the present, Quebec and Ontario would have the power to veto an amendment. For the future, any other province attaining 25 percent of Canada's population, would also acquire

... 4

a veto power. Meanwhile, the Western and Atlantic regions would have a proportionately greater voice in terms of their populations than Quebec or Ontario.

Considering the following: Quebec and Ontario respectively represent about 27 percent and 36 percent of the Canadian population. Yet British Columbia and Saskatchewan (with more than 50 percent of the population of the West but less than 15 percent of the nation's total population) could veto a proposed amendment. Moreover, any three Atlantic provinces, representing at most about 9 percent of the Canadian population, could block an amendment.

3) "The current round of federal/provincial discussions dates back to a proposal set forth by Prime Minister Trudeau by letter of March 31, 1976 when he sought approval of all provincial governments to renew negotiating processes for constitutional change and proposed three options:-

a) simple patriation
b) patriation with an amending formula
c) patriation with an amending formula and substantive changes

The Prime Minister's letter clearly recognized that patriation with an amending formula could be accomplished only when approved by the legislatures of all provinces and by the federal Parliament." (p. 2)

Comments

Although it was evident in his letter to Premier Bennett that the Prime Minister would prefer to act in concert with all the provinces in securing patriation of the Constitution, he also clearly acknowledged that there were other courses of action open to him, including unilateral action. In his letter, he also noted:

"As you can see, there are several possibilities as to the course of action now to take. So far as the federal government is concerned, our much preferred course would be to act in unison with all the provinces. "Patriation" is such a historic milestone that it would be ideal if all Premiers would associate themselves with it.

But if unanimity does not appear possible, the federal government will have to decide whether it will recommend to Parliament that a Joint Address be passed seeking "patriation" of the B.N.A. Act. A question for decision then will be what to add to that action."

... 5

4) "There was great willingness on the part of the provinces to seek agreement. The provinces concurred on a large range of issues. Unfortunately, however, the federal government did not add its support to the substantial provincial consensus that had been reached on most of the twelve items." (p. 9)

Comments

The Prime Minister addressed this comment in his speech to the B.C. Central Credit Union on February 19, 1981, when he said:

"Well that's how Premier Bennett explained the failure of September. And that's why he condemned the action in the Federal Parliament without the consent of all the provinces. So when he went to Montreal, he went there in January, without me and with high hopes. And he was giving an interview the day of the meeting, on January 9th, 1981...- it was not January, it was February 9th, 1981 - Premier Bennett said - and I'm quoting from the Edmonton Journal - his Government has worked out proposals for a constitutional amending formula he believes will be acceptable to Ottawa and the provinces. And then speaking within quotes, he said this, Premier Bennett: "I believe with the work we have done on it, and the work that can be contributed by the other provinces, that we can come up with a formula that is acceptable." But the day after, on February 10th, the press reported, and I quote again: "Bennett's compromise attempt met with failure largely because too many of the provinces don't want to compromise." End of quote. So the premiers failed, and Mr. Bennett failed, and I wasn't around. But that's nothing new. I wanted the support of all the premiers for our proposals on patriation and the amending formula. We tried all summer. We tried in September. And I've been trying since 1968. All to no avail. And long before my efforts, Prime Ministers and Premiers have been trying too. MacKenzie King tried in 1927, and he failed. Bennett tried, a Westerner, and he failed. St. Laurent tried, a Quebecer, and he failed. Pearson tried, a central Canadian, and the results were always the same, failure. There was always one or another province that would not go along. So we have had 54 years of failure. And that's why we must move now to break the blockade. To end our dismal and dishonourable record of failure in doing that basic thing that every other sovereign country in the world has managed to do, give itself its own Constitution in its own country, amendable in that country."

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5) "These proposals, in many respects, would alter federal-provincial relationships and seriously infringe upon or diminish the responsibilities and powers of provincial legislatures. The Charter of Rights, for example, represents a substantial alteration to existing constitutional arrangements and would be a sweeping limitation on existing provincial legislative authority. For the past 113 years the concept of parliamentary supremacy (at both levels of government) has been a cornerstone of our constitutional framework. These proposals would replace that fundamental precept and constrain parliamentary and legislative action." (p. 10)

Comments

The Government's proposal does not transfer authority from the provinces to the federal government or Parliament; on the contrary there are two important additions to provincial authority being made: increased jurisdiction with respect to resources, and a guaranteed role in future constitutional amendments.

The Charter of Rights imposes limitations on both levels of government; however, it does not alter the balance of power between the two levels in any way.

Allowing people, instead of governments to decide on constitutional change by way of referendum does not change the balance of power unless provincial governments do not act in accordance with the will of the people in their province. (To be approved a constitutional amendment would require approval by both a national majority and regional majorities.)

The proposal does alter the bargaining position of the provincial governments in that they will no longer be able to hold up patriation and an amending formula (measures which in fact decrease rather than increase federal powers) until they get increased provincial powers over a whole range of subjects. (Or as the P.M. has said in another context - bargaining fish for freedom); the real motive behind all the provincial noise is that they are losing a bargaining tool in the above - explained sense - a bargaining tool which by its nature is unfair and unbalanced (i.e.: federal government gives us more powers or we won't agree to end our colonial link with Britain - even though such termination itself results in some increase to provincial powers).

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Regarding parliamentary supremacy, in empowering the courts to review the compatibility of legislation with entrenched basic rights to determine if there has been an infringement of these rights, there is no transfer of ultimate legislative power to the courts.

In the first place, the courts do not legislate but adjudicate. Consequently, their role would be to examine a provision of a law to determine whether it is in conflict with a constitutionally guaranteed right, eg. does a law which prevents persons from assembling in an orderly and peaceful manner to practice their religious beliefs contravene the Charter guarantees of freedom of religion, association and peaceful assembly. Or, does the holding of a person in detention for three weeks before bringing him before a judge deny the right to habeas corpus. These are even now questions upon which the courts adjudicate under statutes or common law. Section 172 of the Criminal Code makes it an offence to disturb or obstruct an assemblage for religious worship and the common law assures the right to habeas corpus.

In the second place, entrenched rights do not prevent the legislatures from enacting laws on matters covered by these rights. For example, freedom of religion does not mean that Parliament cannot enact laws making what some would claim to be a religious practice a criminal offence (eg. polygamy) or that provincial laws respecting zoning or disturbance of the peace will not apply to religious groups. Or again, the entrenched language rights will not preclude provinces from requiring either English or French as the primary language of business or work or requiring that students graduating from minority language schools possess proficiency in the majority language. Consequently, legislatures will continue to possess the primary responsibility for legislating matters of social, economic and cultural policies. The only restraint by the courts will be where they determine, as a matter of law, that certain legislation impinges unduly on basic rights or freedoms. As the United States Supreme Court and the Supreme Court of Canada have frequently observed: the court's concern is not with the wisdom of policy underlying the legislation, but rather with whether the legislation falls within the limits of the constitutional powers.

In the third place, even if the courts in exercising their constitutional review powers reach conclusions that are considered to be incompatible with needs or good of society, the legislators possess the ultimate power through constitutional amendment to reverse court decisions. Consequently, ultimate parliamentary sovereignty continues to prevail in the same way as it does when courts reach unacceptable decisions on matters involving the division of powers between Parliament and the provincial legislatures.

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6) "This established constitutional convention became firmly recognized in a federal White Paper of 1965 which sets out the basic principles to be followed in obtaining an amendment to the Constitution of Canada. It is stated at page 15:-

> "The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces."" (pp. 11 & 12)

Comments

It should be noted that the 1965 White Paper does not say that the fourth principle has gained recognition but only increasing recognition and acceptance. Moreover, the publication goes on to state: "The nature and the degree of provincial participation in the amending process however, have not lent themselves to easy definition:. If the nature and degree of provincial participation have not lent themselves to easy definition, how can the consent of the provinces have developed into a clear convention? Finally, the document clearly indicates that this fourth principle as well as the others are"not constitutionally binding in any strict sense". Inasmuch as the publication received the tacit approval of all provincial governments before it was released, it offers compelling authority for the proposition that provincial consultation and consent is not a constitutionally binding requirement of the existing amendment process.

7) "Negotiation and compromise leading to accord is the Canadian way and I urge that further attempts once again be made." (p. 14)

Comments

The Hon. Gerald Regan, in his address to the Commons on March 2, 1981, had this to say about similar references by the Leader of the Opposition about "the Canadian way":

> The Leader of the Opposition talks of the present process of constitutional patriation as being divisive and he says that this has not been the Canadian way. I will deal with that particular inaccuracy in a moment, . . .

. . . . He was concerned about dissension. He contrasted the present process to that followed in the development of medicare in Canada; he picked that particular example. He said that the cause was as important, but that in the case of medicare what he called the Canadian federal process was followed.

His choice of an example of the federal process is apt, but if he thinks it serves his argument, his knowledge of even recent political history is faulty. Medicare is the crowning glory of our Canadian social system. It is the most striking example of the difference between the Canadian and American ways of life, but its birth was accompanied by anything but unanimity. If he thinks all the provinces were happy at its advent, I want to assure him that they were not. It was imposed by federal spending power when, as usual, the provinces were unable to agree, either among themselves or with the feds, on any medicare scheme.

Here are some of the comments of that era regarding the sort of federal process to which the hon. member referred. Premier Robarts said of medicare:

> Medicare is a glowing example of a Machiavellian scheme that is in my humble opinion one of the greatest political frauds that has ever been perpetrated on the people of this country.

In this House a prominent Conservative of that time, Mr. Fulton, said the following concerning the medicare proposal:

> —heavy handed and ruthless, financial blackmail . . . not co-operative federalism but . . . dictatorial federalism of the worst sort.

This was the certain type of "unanimity" which existed on medicare. I could quote the comments of four or five other premiers if time allowed, but I think what it comes back to is simply this: the Right Hon. Leader of the Opposition has now been corrected on how medicare came about. I am sure he was corrected before I said these words, but medicare is not an exception. How it really came about is what the federal process in Canada is, as is the federal process elsewhere. Because as a government we have moved to end 50 years of deadlock on patriation, he contends that we have given up on the federal system. He argued that we should not have done that, that the federal system has not failed, that we should meet and listen to the premiers disagree among themselves for another 50 years or longer to achieve unanimity, in the same way as six premiers who opposed our proposition recently met in Montreal and could not even agree on an amending formula or on whether or not to go to England.

The Right Hon. Leader of the Opposition does not understand that it is not the federal system which has failed; it is unanimity which has failed. "

March 10th, 1981

NOTE TO MR. MICHAEL KIRBY

David Lewis on the Constitution

I have received the tape of Jack Webster interviewing David Lewis in Vancouver on Thursday, February 19, 1981. In general, Mr. Lewis' comments on the Constitution were favourable. I have included some of his remarks below.

Mr. Lewis' defense of the NDP's support for the Constitution:

> " ... a proposition which contained all the elements that our party has been asking for since 1933. We have wanted that the Constitution be brought to Canada ... that it contain a Charter of Rights and Freedoms ... and an amending formula that wasn't strangling, as the unanimity rule is strangling."

Reason for opposition to the Constitution and other things:

> " ... is a terrible dislike of the Prime Minister in the West and a dislike that is almost hatred ... paranoid ... it's rather irrational to let that kind of anger with him ... to affect the content ... people don't look at the content of the constitutional position."

Dispelling the belief that there is an attempt to make Canada a unitary state:

> " ... it's an impossible thing and therefore it never will happen. You can't anymore make a unitary state of Canada than you can turn cheese into the moon. You've got a country that stretches from one ocean to the other with regional loyalties. No one can make this country into a unitary state ... .

. . . /2

Mr. Lewis argued that because the ten premiers and the Prime Minister could not reach agreement:

> " ... that's why unilateral action became absolutely unavoidable unfortunately ... there will always be tensions and conflicts in this country ... because of the distances, different backgrounds ... different cultures ... different histories, there will always be those conflicts."

Defending a Charter of Rights:

> "Every statement we (the NDP) have made for over fifty years about amending the Constitution has contained a reference to a Bill of Rights ... If you had only one government you might get away without anything in the Constitution which is a watchdog of your civil liberties against government. But when you've got eleven governments, any one of which can go berserk some day then you need something in the Constitution that limits the power of the governments to interfere."

On the process of patriation:

> " ... what was demeaning is that we ever permitted it to stay this long. That we ever permitted this blasted Constitution to remain an act of the British Parliament. ... the British Parliament has to do what the Canadian Parliament tells it to do. Get the hell out of our hair and we'll have the Constitution home. There's nothing demeaning because that's the only way you can do it."

I hope this information is useful. Contact me if you need any more details on this matter.

ORIGINAL SIGNED BY
ORIGINAL SIGNÉ PAR
Hershell E. Ezrin

c.c.: Mr. Eddie Goldenberg

PEGEEN WALSH/rs

March 5, 1981.

Legislative Override of Charter Rights

In his paper of February 3, 1981 entitled "Another Way of 'Entrenching' A Charter of Rights in the Canadian Constitution", Professor G.P. Browne of Carleton University (History Department) advocates a Charter of Rights that would have a "priority status" over ordinary legislation rather than being entrenched in the sense that modifications could only be made by the constitutional amending formula.

His reason for this approach stems from his belief that a fully entrenched Charter is incompatible with the basic principle of parliamentary supremacy in that entrenchment would

(1) transfer ultimate legislative power over social and cultural policies from the legislatures to the courts;

(2) shift the balance of power in favor of the federal government;

(3) increase doubts as to the impartiality of the judiciary;

(4) decrease respect for the rule of law; and

(5) reduce the role of legislators.

Before dealing with his proposal for a "priority status" Charter, it may be useful to make a few comments on Professor Browne's assertions set out above.

1. Transfer of Ultimate Legislative Power

In empowering the courts to review the compatibility of legislation with entrenched basic rights to determine if there has been an infringement of these rights, there is no transfer of ultimate legislative power to the courts.

In the first place, the courts do not legislate but adjudicate. Consequently, their role would be to examine a provision of a law to determine whether it is in conflict with a constitutionally guaranteed right, eg. does a law which prevents persons from assembling in an orderly and peaceful manner to practice their religious beliefs contravene the Charter guarantees of freedom of religion, association and peaceful assembly. Or, does the holding of a person in detention for three weeks before bringing him before a judge deny the right to habeas corpus. These are even now questions upon which the courts adjudicate under statutes or common law. Section 172 of the Criminal Code makes it an offence to disturb or obstruct an assemblage for religious worship and the common law assures the right to habeas corpus.

...2

In the second place, entrenched rights do not prevent the legislatures from enacting laws on matters covered by these rights. For example, freedom of religion does not mean that Parliament cannot enact laws making what some would claim to be a religious practice a criminal offence (eg. polygamy) or that provincial laws respecting zoning or disturbance of the peace will not apply to religious groups. Or again, the entrenched language rights will not preclude provinces from requiring either English or French as the primary language of business or work or requiring that students graduating from minority language schools possess proficiency in the majority language. Consequently, legislatures will continue to possess the primary responsibility for legislating matters of social, economic and cultural policies. The only restraint by the courts will be where they determine, as a matter of law, that certain legislation impinges unduly on basic rights or freedoms. As the United States Supreme Court and the Supreme Court of Canada have frequently observed: the court's concern is not with the wisdom of policy underlying the legislation, but rather with whether the legislation falls within the limits of the constitutional powers.

In the third place, even if the courts in exercising their constitutional review powers reach conclusions that are considered to be incompatible with needs or good of society, the legislators possess the ultimate power through constitutional amendment to reverse court decisions. Consequently, ultimate parliamentary sovereignty continues to prevail in the same way as it does when courts reach unacceptable decisions on matters involving the division of powers between Parliament and the provincial legislatures.

2. Shift of Power to Federal Government

The Charter does not contemplate or, indeed, authorize any shift of powers from the provinces to the federal level. Nor does it have the centralizing aspect suggested by Professor F.L. Jackson in his paper.

A simple reading of the Charter makes it quite clear that the effect of the Charter is to place restraints on both levels of government to interfere unduly with the basic rights of people. Were this not evident from the provisions themselves, then sections 30 and 31 place it beyond doubt. Section 31 states clearly that the Charter applies to both levels of government and section 30 assures that nothing in the Charter extends the legislative powers of any body.

Some seem to believe that the mobility rights in the Charter (section 6) place restrictions only on provincial laws that discriminate on the basis of residence. This is not the case. "Laws or practices of general application in force in a province" include federal as well as provincial laws and practices.

...3

The idea of the Charter creating a shift of power to the central government may arise from an erroneous attempt to compare the Charter with the U.S. Bill of Rights. In the latter document, certain of the rights guaranteed, such as the 14th amendment "equal protection of the laws" and the 15th amendment "right to vote", explicitly empower Congress to make laws for the enforcement of these rights. There is no comparable provision in the Charter.

Finally, it might be noted that, in relation to fundamental freedoms at least, the Charter probably imposes greater restraints on Parliament than it does on provincial legislatures. This, because the Supreme Court has in a number of earlier civil rights cases struck down provincial laws dealing with freedom of religion, speech and the press on grounds that such laws could only be enacted by Parliament.

3. Impartiality of Judiciary

While, rightly or wrongly, some provinces have alleged that the Supreme Court has shown a federal bias in deciding constitutional cases involving the distribution of legislative powers, it is difficult to imagine how any similar suspicions could be generated in cases involving infringement of Charter rights.

What the courts will be determining in these cases is not a "contest" between competing claims to legislative power by two levels of government, but rather claims by individuals or groups that a law, be it federal or provincial, is violative of Charter rights. Surely, this type of case cannot give rise to doubts as to the impartiality of the judiciary. Judges for many years have been adjudicating disputes between individuals and governments.

4. Decreased Respect for Rule of Law

This suggestion must be totally without merit. Surely the very basis of the rule of law is the role which the courts play in assuring that the law is applied to and observed by all, so that we live not by the rule of men but the rule of law. This was the very point made by the Supreme Court in the landmark case of Roncarelli v. Duplessis (1959) in which it was held that even the Premier and Attorney General of Quebec was subject to the ordinary laws in the ordinary courts.

Far from decreasing respect for the rule of law, an entrenched Charter interpreted by the courts would enhance respect for the rule of law by ensuring that legislators and bureaucrats cannot arbitrarily deprive individuals of their basic rights.

5. Reduce the Role of Legislators

As has already been indicated above, an entrenched Charter will not deprive the legislators of role in determining social issues. Nor will it diminish their role in protecting rights. Indeed the Charter will no doubt heighten their awareness of their role in this regard, encouraging them to scrutinize laws and delegated powers much more closely to ensure that Charter rights are not infringed.

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A Charter with "Priority Status"

Professor Browne's thesis, which he admits is not new, would be to have a Charter of Rights where the courts would initially determine if a particular law was in violation of any specified rights. If the court made such a determination and the affected legislature determined that it did not approve of the decision, it could then re-enact the law, either after a certain delay period or with a special majority vote with a free vote among members. He feels that such an arrangement would create a proper balance between "judicial supremacy" and "parliamentary supremacy".

Such a "legislative override" provision now exists in the Canadian Bill of Rights whereby Parliament may declare (as it has done with the War Measures Act) that a law is to operate notwithstanding the Bill of Rights. No special majority is required for such an enactment.

Approaches along these lines were considered by the Continuing Committee of Ministers on the Constitution during the past three years, but it was the conclusion of most provinces and the federal government that such a form of "entrenchment" was undesirable for a number of reasons.

First, experience with the Canadian Bill of Rights (a "priority status" enactment) has demonstrated that where parliamentary supremacy is maintained in the enactment, the courts are extremely reluctant to invoke the Bill of Rights to strike down offending legislation. Given the existence of parliamentary supremacy, the courts remain fully deferential to the will of the legislators, and conclude that where they have enacted a law which appears contrary to the Bill of Rights, they must have had the intention to do this. Consequently, simply as a matter of psychology, a "priority status" Charter would likely remain an ineffective device in the hands of the courts.

Second, a "legislative override" mechanism lays open to abuse the very integrity of basic rights that an entrenched Charter is designed to ensure. Rights, by their nature, are designed to protect the individual or the minority. If the majority in a legislature has determined in the first place to violate these rights, then it is doubtful that the individual or minority is going to prevent this from happening a second time. (Would the Manitoba or Quebec legislatures hesitate to reverse the decisions in Blaikie or Forest if they possessed the constitutional power to do so?) While requiring a special majority vote and/or a free vote might make the override of a court decision more difficult, it would not prevent the outcome.

Finally, the "legislative override" approach is simply a first step toward opting out of Charter rights by various jurisdictions and consequently creating a "checkerboard" Charter with rights varying from jurisdiction to jurisdiction. This would defeat one of the principal purposes of entrenching Charter rights in the first place -- to ensure that Canadians enjoy the same basic rights wherever they reside or travel to in Canada.

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For all these reasons, a partially entrenched Charter would appear to be a rather unsatisfactory means of enshrining basic rights in the constitution.