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MEETING OF THE CONTINUING COMMITTEE

OF MINISTERS ON THE CONSTITUTION

THE CHARTER OF RIGHTS

Quebec's Position

Montreal, Quebec

July 8-11, 1980

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July 15-19, 1980

Quebec's firm and resolute commitment to the protection of citizens' basic and individual rights is a course that was undertaken several years ago. Clearly, the protection of Quebec citizens provided by the Quebec Charter of Rights and Freedoms, in conjunction with the federal Bill of Rights, is unrivalled in scope by that of few--if any--other provinces.

Quebeckers unanimously support the fundamental freedoms (such as freedom of religion, of thought, of speech, and of the press) and the basic principles of democracy (such as universal suffrage, elections every four or five years, and annual sittings of Parliament). These rights exist and are respected in Quebec.

Thus the question raised by the federal proposal for a constitutional Charter of Rights is not "Does Quebec intend to protect the rights of its citizens?" but rather "What is the best way to protect the rights of the citizens of Quebec?"

The proposal to entrench a broad range of individual rights in the constitution provokes a number of concerns. Before supporting such a Charter, Quebec must be convinced that constitutional entrenchment offers the most effective means of protection, that the rights covered in the Charter represent values common to all Canadians, and that their meaning and scope are well defined.

i) Advantages of entrenchment

a. The protection of individuals would, in principle, be enhanced by entrenchment of a Charter of Rights in

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the constitution. Entrenchment would prohibit any body, even a legislature, from violating the principles contained in the Charter.

b. It might also be maintained that the courts would accord greater value to an entrenched charter than to a merely legislative one, which, as the expression of the will of a particular legislature, can easily be amended by a conflicting expression of will from the same body. In any case, the courts have so far refused to grant to the present federal Bill of Rights any status clearly above that of other laws.

c. The ceremony of entrenchment would confer on the Charter of Rights a symbolic and inspirational value.

d. Lastly, entrenchment would ensure uniformity of basic and individual rights across Canada.

ii) Disadvantages of entrenchment

a. Entrenchment would limit the legislative jurisdiction of the provinces to an extent determined by the number and variety of rights contained in an entrenched Charter. The results of reform in federal and provincial jurisdictions must be known before the concrete consequences of entrenchment of a Charter of Rights can be adequately assessed. Entrenchment could be disadvantageous if it occurs before agreement on the division of powers between federal and provincial governments.

b. Entrenchment could lead to a "government of judges" and may not constitute the most democratic means of protection of rights.

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The subject of rights and liberties is a vast field, still in a state of constant evolution. Constitutional entrenchment would inevitably complicate and hamper this evolution and would strip elected assemblies of the power to shape it in accordance with democratic principles. This responsibility would pass from the hands of elected representatives into the hands of appointed judges.

This was, in fact, the point made recently by one of the most eminent members of the Canadian judicial system, Mr Louis-Philippe Pigeon, former judge of the Supreme Court: "I wish to emphasize that, in considering the probable effect of an entrenched Charter of Rights, we must realize that entrenchment would entail handing over to the courts a significant portion of the power to legislate. In my opinion, it would be mistaken to view this as a function comparable to that of interpretation of a federal constitution."

The Canadian political system is founded on legislative representation and sovereignty. By the transference of legislatures' powers to the courts, citizens are deprived of their most effective instrument of influence over the evolution of their individual rights. Thus, the fundamental principles of democracy are at stake in the decision on whether or not a Charter of Rights should be entrenched, since we must decide whether it is citizens or judges who will determine the evolution of rights.

c. The broader the range of rights to be entrenched in the Charter, the more serious this latter disadvantage becomes.

For example, the federal draft proposes to entrench the freedom of citizens to move about from one province to another. No one, and least of all Quebec, objects to this freedom as a general principle. But when one considers its meaning, implications, and consequences, a problem

arises. This freedom might mean that Quebec could, for example, be prevented from controlling entry into the professions, as it does now, on the ground that Quebec regulations were more restrictive than those of other provinces and hence interfered with mobility.

Similarly, entrenching the freedom of movement could lead to the standardization of educational systems across Canada, because differences among systems could be interpreted as barriers to mobility.

If the courts did interpret this right in such ways, and Quebec subsequently wanted to propose, for example, to amend the Charter to restore a more normal situation, it would have to set in motion the process of amending the Constitution in which this right had been entrenched. And we know that constitutional change does not come easily in Canada.

Obviously these disadvantages, inflexibility and diminished legislative responsibility, would be much less serious if the Charter entrenched only the most fundamental rights and freedoms, whose meaning and implications are well-known and have been tested in the courts. These rights and freedoms represent values to which all Canadians subscribe, and hence pose fewer difficulties. This is the case for the freedoms mentioned earlier--freedom of religion, freedom of expression, freedom of thought, freedom of the press, and so on--the fundamental principles of democracy. Along with these freedoms come the basic rights in criminal proceedings--the presumption of innocence, the right to a fair trial, the right to counsel, and so forth. The question here, then, is which rights should be incorporated in any charter.

In short, Quebec wants the fundamental rights of citizens to receive the broadest and most effective protection possible, but it questions what the best means of providing such protection would be. Quebec therefore approaches the issue of the entrenchment of rights with a very open mind, even though it has serious doubts about this method and is weighing

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its advantages and disadvantages. But Quebec will oppose the use of a Charter in a direct attempt to alter its social and cultural priorities, as might happen in the area of language rights.

The special case of language rights

Quebec firmly opposes the entrenchment in the Constitution of language rights whose effect would be to limit its freedom of action regarding so vital a matter as its collective future. Quebec cannot agree to exchange its autonomy in this area for limited powers subject to judicial interpretation.

The very act of entrenching language rights in the Constitution would freeze them for future generations. Should any change be necessitated by social developments that are as normal and healthy as they are unpredictable, a constitutional amendment would be required. For Quebec, this would mean not only that the language rights of Quebeckers had been determined by all the provinces and the federal government to begin with, but also that any adjustments to meet changing needs would require the consent of these same parties. For all intents and purposes, once language rights in Quebec had been decided, they would be set in stone. The least one can say is that this is a rather inflexible arrangement for an area essential to the future of Quebeckers, Anglophones as well as Francophones.

In short, language policy in Quebec society requires an attention and a flexibility that no constitutional entrenchment could provide.

With its proposed Charter and Statement of Principles, Ottawa is clearly trying to re-establish the difficult situation that used to prevail in the area of language policy in Quebec. According to these federal proposals, language rights would be incorporated into the Constitution and, so to speak, defined for all Quebeckers forevermore. In light of all the discussions, proposals, debates, and demonstrations that were required, and all the false hopes that were raised, before the social and linguistic peace that now reigns was achieved, this stubborn determination to change the situation and provoke renewed debate is difficult to understand.

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In fact, Quebec is inclined to believe that this debate might be only a pretext to modify Bill 101 so as to "rebilingualize" Quebec and re-establish the free choice of language of instruction provided under the ill-famed Bill 63.

With regard to the protection of minorities, Quebec believes that no constitution, however complete, can force people to change their attitudes, or governments to pursue policies that they do not really believe in. And that is what is really involved in the issue of protection of minorities. Mollifying general provisions for protecting the rights of minorities will not really change the fate of these minorities if the political will to do so is not there.

Only concrete measures adopted with respect to specific matters can really improve the status of minorities. In this connection, Quebec must say, without undue modesty, that it thinks its treatment of its Anglophone minority has been truly exemplary. The situation of English speakers in Quebec is incomparably better, in all respects, than that of French-speaking minorities elsewhere in Canada. No Charter, no general statement of intention, has been necessary.

For all these reasons, Quebec is of the opinion that with regard to language rights, it is wiser to follow this recommendation by the Pépin-Robarts Commission:

> "In our opinion, the protection of linguistic rights at the provincial level can be treated, at this time, in either one of two ways: extending the constitutional guarantees of Section 133 to every or to some provinces, or removing these guarantees, inviting the provinces to legislate safeguards for their minorities, taking into account the diversity of local situations, with the hope that a consensus between the provinces might form on a common denominator which eventually could be included within the constitution of the country."
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> After due consideration, we now think that the second option would be wiser and more likely to be successful in the long run, involve less confrontation, and be more in agreement with the spirit of the federal system.