

CONFIDENTIAL

July 24, 1980

CHARTER OF RIGHTS

Report to Ministers by  
Sub-Committee of Officials

1. A sub-committee of officials representing all eleven governments and under the chairmanship of Roger Tassé met on July 22, 23 and 24 in Vancouver to examine the several issues on an entrenched Charter of Rights which had been referred to them by Ministers, namely

- (a) review the federal discussion draft of July 4, 1980 to consider how entrenchment of its provisions might impact on provincial legislative powers, having particular regard to the legal and practical implications of the proposed legal rights;
- (b) consider changes that would clarify and improve the language of the draft;
- (c) consider the possibility and desirability of entrenching the Canadian Bill of Rights rather than the proposed Charter;
- (d) consider the possibility of entrenching a Charter of Rights at the federal level only initially, thus permitting provinces to assess the impact of entrenched rights; and
- (e) consider the practicability of including an override (non-obstante) clause in an entrenched Charter, thus allowing jurisdictions to enact laws that would expressly supercede particular rights.

Note: Manitoba does not agree that the sub-committee was asked to review the language of the draft other than to examine its impact on legislative powers of the provinces, and does not agree that the sub-committee was asked to consider entrenchment of the Canadian Bill of Rights, but was asked to consider the possibility of amending the Bill of Rights as a means of extending the protection of freedoms at the federal level.

2. Items (a) and (b) (impact and language of proposed Charter provisions) were addressed together, it is being understood that discussion on these and other items were without prejudice to any province's position on the principle of entrenchment itself. This will be a matter for further ministerial consideration in light of this report.

3. On each of the categories of rights, a number of concerns were identified by officials both as to the meaning of certain expressions in the text and as to the implications for the exercise of legislative powers if rights were entrenched. The discussions brought forward numerous suggestions for modifications and improvements which will be given further consideration in attempting to prepare a revised text for review at the August meeting of Ministers, assuming that it be the wish of Ministers.

4. What follows with respect to each of the categories of rights and related matters is not an exhaustive description of all issues discussed, but simply an attempt to encapsulate some of the major concerns that were identified and the general views that were expressed.

5. Fundamental Freedoms (Section 2): Concerns were expressed here respecting such matters as:

- would freedom of religion interfere with existing confessional school rights, tax exemptions for religious institutions and qualifications for performing marriages?
- would freedom of expression preclude laws regulating advertising?
- should freedom of the press and other media be made clearer?

On none of these was there strong feeling that major modifications were essential; only that further reflection was needed in drafting specific provisions.

6. Democratic Rights (Sections 3-5): There was general agreement that these rights and their manner of expression were acceptable, subject to dropping the preambular clause to section 3. Manitoba, however, would not wish to leave to the courts determination of what limitations on the right to vote were reasonable.

7. Legal Rights (Section 6): Detailed discussion on this category produced a substantial number of serious concerns and reservations respecting both the specific language of the rights and the limits that would be imposed on existing legislative powers and administrative procedures and practices (both federal and provincial) if all proposed rights were entrenched.

One major concern related to the problems that would arise if all the rights applied not only to criminal and penal proceedings but to civil and administrative matters as well. On this point, a substantial majority of jurisdictions favoured limiting virtually all rights to criminal and penal matters and proceedings; this concern extended to a fair hearing in all cases where rights and obligations are being determined. A substantial majority favoured leaving protection in this area to legislation and common law.

Other concerns included:

- the consequences of possibly importing American jurisprudence relating to due process of law and non-admissibility of illegally obtained evidence. On this latter point it was agreed that we should not import the U.S. exclusionary rule nor should we permit a rule admitting all illegally obtained evidence. Rather, the rule should be one falling somewhere in between. As to the method of ensuring this result, it was agreed that the views of the Task Force on Evidence should be sought before any decision is taken respecting appropriate Charter wording;
- the dangers of leaving to courts the determination of "reasonable" standards for application of such rights as those relating to search, seizure and privacy;
- the difficulties that could arise by permitting a right to counsel whenever one is compelled to give evidence;

In general, a number of useful suggestions were made for modifications in the provisions of this category of rights which will be given further consideration.

8. Non-Discrimination Rights (Section 7): It was recognized that entrenching this category would create a very substantial limitation on existing legislative powers in an area where rights are evolving, and would leave to the courts broad powers to judge social values. There were also concerns about the wording of the draft proposals which would require further consideration in any redraft. Seven jurisdictions opposed including this category, with the others inclined to its inclusion if appropriate wording can be found.

9. Mobility Rights (Section 8): Apart from the first section (right of citizens to enter, remain in and leave Canada) on which most were agreed, a number of concerns were expressed about the substantial impact some of these provisions would have on provincial laws (economic and social), especially the property and employment rights. About one-half favoured inclusion of a right to move and take up residence but there was little provincial support for property and employment rights. Quebec strongly opposes any entrenchment of this category of rights.

10. Property Rights (Section 9): Concerns were expressed here both on the meaning of some of the provisions and on the substantive provisions as they would affect provincial laws or legislative powers. In particular, serious doubts were voiced about the wisdom of allowing courts to determine what is reasonable compensation for property taken. A large majority of jurisdictions felt that this category should not be included although some of these were sympathetic to the principle involved.

10.a. Limitation Clauses: On several occasions during discussion of the foregoing rights, concerns were expressed about the scope and meaning of the limitation clauses found in various sections. As one possible means of overcoming this problem federal representatives suggested that consideration be given to an opening clause in the Charter that would indicate that none of the rights and freedoms were absolutes but must be balanced against the interests of an organized free and democratic society operating under the rule of law. This could eliminate the need for any specific limitation clauses. This proposal was not favourably received by most provinces that responded to it.

11. Official Languages (Section 10): Note: On all language provisions of the draft Charter the representative of Quebec abstained from discussion and the Manitoba representative reserved on that province's position.<sup>7</sup> Suggestions were made for amendments to this section: one would have deleted all but the provision that "English and French are the official languages of Canada"; the other would have accepted this amendment but retained the provisions of section 10(2) allowing greater legislative protection for language use. A majority favoured retaining the section as is. On the question of entrenching section 10, four favoured, two opposed and two reserved.

12. Language Rights (Sections 11-16)

- (1) Section 11: On use of both languages in Parliament 8 were in favour; and on use of both languages in legislatures four were in favour, four opposed.
- (2) Section 12: With respect to statutes in both languages, 8 were in favour of the federal level, with only New Brunswick affirmative on this as a binding obligation for that province. As for those six provinces where the extent of the obligation would be left to their legislatures, five were in favour and one opposed. Seven provinces favoured the principle of both versions of the statutes being authoritative, one opposed.
- (3) Section 13: On the use of both languages in the courts, 8 agreed to this at the federal level. Ontario opposed a binding obligation for that province, while New Brunswick favoured it for itself. As for the six provinces where the extent of the right is for determination by the legislatures, three provinces were in favour (one suggesting this rule should apply for all provinces), one opposed and two reserved.

On the question of ensuring a witness to give evidence in either language in criminal and serious penal proceedings, a number of concerns were expressed about the language of the provision and its possible conflict with Criminal Code provisions on language of trials. Two provinces opposed inclusion of the right in any form, and two reserved. Four favoured its inclusion, with an amendment which would delete reference to the witness not being disadvantaged in testifying in his own language. One province abstained.

- (4) Section 14: On services to the public in both languages at the federal level, there was agreement on this although some provinces would object if it extended to RCMP contract services to the provinces. On services at the provincial level, three provinces were in favour with another three possibly in favour as long as no legal obligation was implied. Two provinces were opposed.
- (5) Section 15: Seven provinces were agreed on the preservation of third language rights in addition to French and English, one opposed.
- (6) Section 16: Some concerns were expressed on the draft proposals for minority language education rights, particularly with respect to the extent to which the courts could review the scope of a province's discretion in determining where numbers warrant. Other concerns expressed related to the practical problems that could arise in provinces with two or more separate school systems if provision for schools along linguistic lines were superimposed. An amendment to delete the test for the validity of provincial action implementing minority language education rights in section 16 (2) ("consistent with the right provided in subsection (1)") received support of three provinces with other provinces reserving their position. Concerning acceptance of the principle contained in section 16, four jurisdictions approved, two opposed and three abstained.

13. Undeclared Rights (Section 17): Concerns identified in this provision related to the courts inventing new rights, possible conflicts between specified and unspecified rights and the singling out for special attention of native peoples' rights. Each of these requires further consideration in terms of clarification of intent and content. On the acceptability of the principle in this section and on the exclusion of a reference to native rights, two provinces favoured the principle with native rights deleted, three provinces opposed the section in any form and four provinces reserved their position, two of whom would delete reference to native rights in any case.

14. Paramountcy of Charter Rights (Section 18): One province opposed inclusion of this provision which would render inoperative any law or administrative act conflicting with a Charter right. Several other provinces felt that no position could be taken on the acceptability of this provision until the specific rights to be included in an entrenched Charter were determined. Others indicated that if there is going to be an entrenched Charter, then a provision along the lines of this section is required.

15. Remedies for Violations of Rights (Section 19): Views were somewhat divided on the possible problems inherent in the wording of this provision which specifies the power of courts to grant appropriate remedies for breaches of rights where no other effective remedy or recourse exists. However, no jurisdiction appeared to disagree with the need to provide for remedies. One concern, generally shared, was that remedies should also exist for apprehended as well as actual breaches. As to whether invoking section 19 remedies should be conditioned on the absence of other effective recourses, some felt it should, while other jurisdictions took the opposite view. One province believed that court enforcement might be appropriate for certain types of rights but not others.

16. Application of Charter to Territories (Section 20): There were only two minor technical drafting changes proposed for this section.

17. No Extension of Legislative Powers (Section 21): This provision, which is designed to ensure that the Charter makes no change in the distribution of legislative powers, created doubts for some provinces as to its need. Three felt it should be deleted, two favoured its retention, one was indifferent and four reserved.

17. Protection of Existing Language Guarantees (Section 22): There was some provincial concern on this provision as to when the repeal of existing language guarantees in Quebec and Manitoba would take place. On the suggestion that the appropriate time would be when the Charter language rights are entrenched for these two jurisdictions, four jurisdictions agreed and five reserved their position. Quebec and Manitoba also noted concerns they have with the existing wording of the language guarantees in the B.N.A. Act and the Manitoba Act, in light of the Blaikie case. This matter will require further consideration.

18. Opting-in to Language Guarantees (Section 23): Manitoba proposed that this provision be amended to permit a province that opts into the more stringent language guarantees of the Charter to opt out subsequently. Four jurisdictions favoured this approach while five were opposed and one abstained.

19. The sub-committee next turned to item (c) of the mandate, an examination of the question of possible entrenchment of the Canadian Bill of Rights. However, due to differing views of the sub-committee's mandate on this matter, it was put over pending clarification by Ministers as to what was intended on this subject.

20. The sub-committee then turned to item (e) of its mandate, namely the practicability of including an override clause in an entrenched Charter. There was only time for a general canvassing of preliminary views on this matter but most jurisdictions felt that, if it were possible to fashion a suitable override clause, this could perhaps be an acceptable approach to dealing with an entrenched Charter. However, further discussion will be required to test the viability of this proposition.

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Chairman