

CONFIDENTIAL

July 5, 1980

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July 3, 1980

9. CHARTER OF RIGHTS AND FREEDOMS

B. Background and Federal Position

An entrenched Charter of Rights has been central to the constitutional discussions since 1978 and remains one of the more contentious issues with the provinces both in philosophical and in substantive terms.

The federal government views an entrenched charter, including protections for the English and French language minorities, as essential to a renewed Constitution.

With an entrenched charter, many of the basic values of Canadians would have special guarantees, being placed beyond the reach of ordinary legislative and administrative processes. Also, a minimum level of basic rights would be assured to Canadians wherever they may reside in the country. Equally, entrenchment would underline and reinforce Canada's commitment to the principles contained in the International Covenant on Civil and Political Rights to which we adhered in 1976.

An entrenched Charter would place some restrictions on provincial legislatures' power to legislate contrary to protected rights, but it would equally limit the powers of Parliament. However, it would not prevent a legislature or Parliament from adding to the protection of rights, as they have done under their human rights legislation. What it would prevent is legislation depriving persons of entrenched rights. Entrenchment is therefore not a redistribution of powers. The Joint Parliamentary Committee on the Constitution in 1972 noted "the fact is that the losers in the "power game" under an (entrenched) Bill of Rights are the totality of governments and the winners are the people".

Overall Federal Stance for CCMC

Provincial positions as of February 1979 may be tentatively assessed as follows: all provinces except Manitoba seem prepared (albeit reluctantly in some cases) to see at least fundamental freedoms and democratic rights entrenched (P.E.I. may change its stance given the new provincial government). Five provinces (P.E.I., Newfoundland, Ontario, New Brunswick, Nova Scotia) accepted the entrenchment of legal rights and three others (Alberta, British Columbia and Quebec) were prepared to consider entrenchment. Five provinces supported minority language education rights (P.E.I., Ontario, New Brunswick, Newfoundland and Saskatchewan) with British Columbia reserving its position. These same five provinces (Ontario having major reservations) and Alberta (also with major reservations) supported the protection of general language rights. British Columbia reserved its position on this category as well. During Mr. Chrétien's tour in May 1980 all provinces agreed on minority language education rights. With respect to the other categories of rights in the Charter, only New Brunswick has demonstrated support.

With little effort it is likely that a majority would accept a Charter limited to fundamental freedoms, democratic rights, and some language rights.

Despite the opposition by many provinces, and even though the former government proposed a more modest Charter in 1979 (limited to fundamental freedoms, democratic rights, legal rights, language rights and undeclared rights), it is proposed that the initial federal position be that a comprehensive Charter is the desired objective, including both the above-mentioned rights and non-discrimination, mobility and property rights. Not all categories may ultimately be retained, but it provides for a more flexible bargaining stance.

Very early in the negotiations we should establish the fact that there will be a Charter included in the new Constitution. Once a consensus is achieved on that point (perhaps using the Fundamental Freedoms and Democratic Rights as lead cards) the federal team can work on the other categories of rights, gathering support in bilateral meetings etc., and add each category as general agreement is reached.

#### Categories of Rights

- A. Fundamental Freedoms (Section 2 of the federal "Discussion Draft" of July 4, 1980 - attached)

#### Background

This section incorporates the four freedoms found in C-60, with freedom of the press and other media being linked to freedom of thought, opinion and expression.

This section has remained essentially unchanged through several rounds of CCMC meetings and the February 1979 First Ministers Conference (FMC).

We recognize that entrenchment of these freedoms would limit the scope of legislative action but this is viewed as desirable insofar as it prevents any legislative body from arbitrarily infringing upon these basic freedoms.

The limitations permitted on these freedoms are essentially those prescribed in the Victoria Charter.

Although there has been some question as to the use of "national security" in the limitations clause (Section 2.2) it is suggested that we retain this expression. "National security" is a term used in international human rights instruments as a basis for limitations of certain rights. The term is recognized and used by Canadian governments and judiciary.

Fundamental Freedoms - Evolution of Provincial Positions

At the November 1978 FMC, only four provinces were receptive to entrenched Freedoms and Rights (New Brunswick, P.E.I., Newfoundland and Ontario). Quebec, B.C., Saskatchewan and Manitoba were firmly opposed to any entrenchment, as was Alberta unless an override clause was included. Nova Scotia favoured entrenchment only at such time as there was an agreed list of basic rights having application equally to every jurisdiction.

At the Officials meeting in January 1979, New Brunswick, Nova Scotia, Ontario, Saskatchewan and B.C. agreed that if there was to be a Charter, the Freedoms and rights should be entrenched with no override clause. Manitoba dissented, Alberta abstained and Quebec indicated it would not subscribe at this time. Newfoundland and P.E.I. were not represented.

In the report of the CCMC, February 1979, the co-chairman, Mr. Romanow, noted in his introductory comments: "There was broad (but not unanimous) agreement that at least fundamental freedoms and democratic rights should be included" in an entrenched Charter.

At the February 1979 FMC all provinces, except Manitoba, agreed that if there were to be an entrenched Charter these freedoms should be included. Manitoba opposed any entrenchment, other than possibly some expansion of S. 133 (or S. 23 of the Manitoba Act) to include some additional language rights. Manitoba does not regard this as "entrenchment".

At the Halifax meeting of the CCMC, October 1979, a Committee of Officials reported that there was general (although not unanimous) agreement to entrench fundamental freedoms and democratic rights.

Following the June 9, 1980 meeting of First Ministers Manitoba reiterated its strong opposition to an entrenched charter of rights. P.E.I. also displayed wariness on this issue.

Fundamental Freedoms - Federal Stance for CCMC

Given that all provinces but Manitoba and possibly P.E.I. agree that these Freedoms would be included in a Charter very little time should be spent discussing this category. Agreement on this part will follow naturally when agreement to have an entrenched Charter is reached. No significant change to the item should be contemplated although we should agree to discuss the precise drafting if necessary.

- B. Democratic Rights (Sections 3-5 of the federal "Discussion Draft")

Background

These are essentially the same rights as were accepted at Victoria in 1971.

With respect to the right to vote and qualifying for election, the general limitations in section 3 were arrived at when it became evident that agreement could not be reached on a list of non-discrimination grounds.

Democratic Rights - Evolution of Provincial Positions

Provincial positions on these rights evolved in almost exactly the same way as with Fundamental Freedoms. The only slight difference is that Manitoba indicated at the Officials meeting in January 1979 that it dissented specifically with respect to voting and office holding rights.

Democratic Rights - Federal Stance for CCMC

This item could be dealt with in the same manner as Fundamental Freedoms since there exists the same general consensus with respect to its inclusion in the Charter.

Some provinces have expressed concern over how the courts may interpret the non-discrimination clause in Section 3 ("without unreasonable distinction or limitation") in terms of qualification to vote and to be a candidate. Bill C-60 had specified the grounds for non-discrimination, but the list of grounds became so controversial it was decided to adopt the present wording. Although one could try to specify the grounds, this would be a time-consuming exercise and, since agreement on a list will be very difficult to achieve, this should be avoided if possible and should not be proposed by the federal side.

C. Legal Rights (Section 6 of the federal "Discussion Draft")

Background

This section would provide a number of specific rights to protect persons against abuses that may flow from the operation of the legal system.

Quite a number of these rights are drawn from those already in the Canadian Bill of Rights. Others are drawn from the U.N. Covenant, as follows:

- the right to be secure against unreasonable searches and seizures;
- protection against ex post facto laws creating crimes and punishments retroactively;
- protection against double jeopardy;
- the right of a person charged with a criminal or penal offence to be informed of the specific charges, and to be tried in a reasonable time; and,
- benefit of lesser penalty where law is changed.

A number of provinces have objected to the scope of this section because they feel that the legal rights should apply only to criminal and other penal proceedings. The argument is that non-penal matters cover a vast array of bodies and proceedings where such constitutional guarantees might create undue rigidity and protracted litigation. Probably only items 6(1)(i), (j) and (k) would apply to non-penal proceedings as well as to penal matters.

It is worth noting that both the Canadian Bill of Rights and the Quebec Charter of Human Rights and Freedoms cover civil as well as criminal matters (e.g. the right to a fair and public hearing before an independent and impartial tribunal, the right to counsel in civil cases).

The rights listed are essential and reflect "rights" which have already had their existence affirmed by the courts to some extent and in some circumstances.

#### Legal Rights - Evolution of Provincial Positions

At the November 1978 FMC only two provinces (New Brunswick and P.E.I.) were receptive to any entrenchment of legal rights. Newfoundland and Ontario, while prepared to support Fundamental Freedoms and Democratic rights, were opposed to the entrenchment of legal rights. Quebec, B.C., Saskatchewan and Manitoba were firmly opposed to any entrenchment, as was Alberta unless an override clause was included. Nova Scotia favoured entrenchment only of basic rights applicable to all jurisdictions.

At the Officials meeting, January 1979, only New Brunswick appeared prepared to accept legal rights for entrenchment, even if an override clause was included. Other provinces felt the protections were too broad and vague, and should be left to ordinary legislation. Newfoundland and P.E.I. were not represented at this meeting.

On the basis of the report of the CCMC, February 1979, the positions of the provinces were as follows: New Brunswick, and possibly P.E.I., supported entrenchment of legal rights; Ontario indicated some willingness to see some legal rights entrenched but preferred its own version; other provinces felt strongly that they should not appear in an entrenched Charter.

At the February 1979 FMC, P.E.I., Ontario, New Brunswick, Nova Scotia and Newfoundland were supportive of including legal rights in the Charter; Alberta, B.C. and Quebec were prepared to consider entrenching some of the rights; Manitoba and Saskatchewan were firmly opposed.

At the Halifax meeting of the CCMC, October 1979, a Committee of Officials reported that a number of provincial representatives indicated a willingness to consider inclusion of some legal rights if they were confined to criminal and penal matters.

At the Sub-Committee of Officials' meeting in Toronto (November 1979) six provinces indicated varying degrees of sympathy for inclusion of this category (P.E.I., Newfoundland, New Brunswick, Nova Scotia, Quebec and Ontario). Manitoba maintained its position of opposition to entrenchment, and Alberta,

B.C. and Saskatchewan were generally opposed to inclusion of this category.

No specific comments were made regarding legal rights following the June 9 FMC which would permit an update of these assessments.

Legal Rights - Federal Stance for CCMC

Provincial positions on this item have changed since it was discussed at the November 1978 meeting. The initial support of two provinces grew to six by November 1979 (P.E.I. (possibly), Quebec, Ontario, New Brunswick, Newfoundland and Nova Scotia). Also, Alberta and B.C. might agree to entrenching some of the rights. It is suggested that the federal delegation concentrate its initial efforts in the CCMC on gaining a consensus for the rights applying to criminal and penal proceedings. Once this has been achieved we could, if necessary, encourage public debate on those rights that would be left in abeyance and perhaps sway the provinces in this manner

D. Non-Discrimination Rights (Section 7 of the federal "Discussion Draft")

Background

Although this is a difficult area in which to define the nature of the protection, these rights are required since no existing human rights law deals with anti-discrimination generally, with the exception of Quebec's Human Rights Charter. The other laws are confined to prohibiting discrimination only in specified areas such as employment, accommodation and the provision of services to the public. They do not address the question of laws which discriminate in other areas such as immigration, social-security, etc.

Non-discrimination rights are addressed by the Canadian Bill of Rights.

The section is now drafted with a general clause in order not to have to enumerate grounds of non-discrimination on which general agreement seems unlikely.

This section also contains a provision to permit affirmative action programs for disadvantaged groups so that such programs can be developed without running afoul of anti-discrimination rights.

Non-discrimination rights were dropped by the former government at the CCMC in Halifax in October 1979.

Non-Discrimination Rights - Evolution of Provincial Positions

At the November 1978 FMC only two provinces (New Brunswick and P.E.I.) were prepared to consider these rights.

At the Officials meeting, January 1979, no province except New Brunswick appeared prepared to accept these rights for entrenchment with or without an override clause, and even New Brunswick had concerns about the scope of the provision. It was felt that legislatures and not courts should determine these rights. Newfoundland and P.E.I. were not represented at this meeting.

In the report of the CCMC, February 1979, only New Brunswick supported the inclusion of non-discrimination rights in the Charter. P.E.I. had not participated in the CCMC discussions.

No change in above positions was indicated at the February, 1979 FMC.

Non-Discrimination Rights - Federal Stance for CCMC

Only New Brunswick supports entrenchment of these rights. Other provinces are opposed on grounds of this section's vagueness and because they feel it is an area where the social and legal policy is evolving and consequently better left to legislative response through human rights codes. However, codes do not provide constitutional guarantees.

It is proposed that the federal delegation initially press for inclusion of this category, being prepared to examine more precise language which may overcome many of the present concerns. Ultimately it may be necessary to withdraw the category if a suitable formula cannot be found. However, a sustained effort should be made to achieve agreement on these very important rights before dropping this category from the Charter. These rights are particularly important given that our society is made up of a number of races speaking many different languages and with different customs. These rights require positive constitutional support.

The federal delegation could offer to work with provinces to develop a non-exhaustive list of grounds for non-discrimination. If it becomes apparent that no progress can be made in achieving consensus on these rights through private debate consideration might be given to presenting the federal stance to the public.

E. Mobility Rights (Section 8 of the federal "Discussion Draft")

Background

Essentially what we are seeking in this section is to ensure that Canadian citizens enjoy basic rights throughout the country without discrimination based upon either province of residence or province of birth.

Some provision must be made for the free mobility of people in Canada; something consistent with Article 12 of the International Covenant on Civil and Political Rights which assures a right to liberty of movement and a choice of residence to persons lawfully within the State.

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Most provinces oppose the inclusion of this category for reasons that are evident in the Quebec law respecting influx of construction workers and those of Newfoundland and Nova Scotia on offshore oil riggers.

This section has been changed from the February 1979 draft to ensure the right to acquire and hold property, and to eliminate the limitation in cases of "overriding economic or social conditions".

This section was not presented to the CCMC at the Halifax meeting in October 1979.

Mobility Rights - Evolution of Provincial Positions

As with non-discrimination rights, it appears that only New Brunswick is sympathetic to entrenching these rights. Other provinces fear that the rights are too novel and probably unnecessary. The provinces are worried about how the courts might interpret the provisions.

Mobility Rights - Federal Stance for CCMC

Initially the federal delegation should attempt to secure agreement with respect to the rights of citizens to enter, remain in and leave Canada as well as to move to and take up residence in any province or territory 8(1) and 8(2) (a). Provisions concerned with holding property and gaining a livelihood (8(2) (b)) could also be considered in the discussion on the Powers Affecting the Economy.

In any case it is essential that provisions ensuring the mobility of persons in Canada be placed in the Constitution and it is recommended that the federal delegation maintain a firm position on this principle. The precise wording of the principle should be open to discussions as well as its ultimate location in the Constitution.

F. Property Rights (Section 9 of the federal "Discussion Draft")

Background

A change has been made in this section from the February 1979 draft to require that deprivations of property rights be "in accordance with law and for reasonable compensation". This is to preclude the courts from judging the fairness of provincial or federal laws.

This section was not presented to the CCMC at the Halifax meeting in October 1979.

Property Rights - Evolution of Provincial Positions

As with Mobility Rights and non-discrimination rights, the provinces with the possible exception of New Brunswick have serious reservations about placing any protection of these rights in an entrenched Charter. Provinces believe that the issue of expropriation and control of property rights is a subject more properly determined by the legislatures rather than the courts.

The provinces have been strongly opposed to entrenching property rights fearing that it will limit their ability to regulate land use and disposition. It is not likely that they will relent on this although section 9(2) is designed to meet some of their concerns.

Property Rights - Federal Stance for CCMC

It is proposed that the initial federal position be to press for inclusion of this category, being prepared to modify the language further to meet valid provincial concerns. If these cannot ultimately be overcome, it may be necessary to consider dropping the category.

G. Language Rights (Sections 10-16 and 22-23 of the federal "Discussion Draft")

Background

The Charter of Rights examined by governments in 1978 and 1979 included language rights which, for purposes of discussion, may be divided into three broad categories:

- (a) those respecting areas of federal jurisdiction (use of French and English in Parliament, in the statutes, records and journals of Parliament, in the courts and in communications with head or central offices of federal government institutions);
- (b) those respecting areas of provincial jurisdiction other than education (the use of French and English in all provincial legislatures, in all court cases involving a serious offence under provincial penal law and in communications with the head or principal offices of provincial government institutions where practicable and necessary as defined by the provincial legislature; binding provisions respecting French and English in the statutes, records and journals of the legislature and in the courts of New Brunswick, Quebec and Ontario, with "opting-in" provisions for other provinces);
- (c) minority official language education rights. (MOLEPS)

Language Rights - Evolution of Provincial Positions

All governments would appear to be willing to entrench rights in category (a). With respect to categories (b) and (c), the federal government and the government of New Brunswick have both been strong partisans of entrenchment. The other provinces have been either reticent or opposed to such action. The present government of Quebec is strongly opposed to any action that would limit the capacity of the Assemblée nationale to determine language policy. A number of other provinces, while not opposing language rights in principle, have argued that the rights, where appropriate or feasible, should be provided by provincial legislation rather than by the Constitution.

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At the end of the First Ministers' Conference in February, 1979, some movement had occurred. It appeared that Newfoundland, Prince Edward Island, New Brunswick and Saskatchewan were willing to accept category (b) rights; Ontario and Alberta had major reservations; British Columbia reserved its position; and Nova Scotia, Quebec and Manitoba rejected them. (In December, 1979, however, the Supreme Court upheld the continued application to Manitoba of s. 23 of the Manitoba Act, which provided for the use of French and English in the legislature, in its statutes and in the courts.)

With respect to category (c) rights, Newfoundland, Prince Edward Island, New Brunswick, Ontario and Saskatchewan were prepared to accept them. They were rejected by Nova Scotia, Quebec and Manitoba, and Alberta and British Columbia reserved its position.

In discussions with the Minister of Justice following the Quebec referendum, Nova Scotia indicated that it would now be prepared to contemplate the entrenchment of minority official language education rights (perhaps with federal financial support). Manitoba also indicated that it might be brought around on the entrenchment of minority official language education rights. Saskatchewan would contemplate entrenching language rights as part of an overall package of constitutional changes.

Language Rights - Federal Stance for CCMC

Following the Supreme Court decision respecting the Manitoba Act, it is recommended that Manitoba should join New Brunswick, Quebec and Ontario as provinces where the provisions respecting the use of French and English in the legislature, in statutes and in the courts would be binding. (cf secs 12 (2) and 13 (2))

Once the Charter is entrenched s.133 of the B.N.A. Act and s.23 of the Manitoba Act will be repealed.

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Following the Blaikie case, doubt has arisen as to the application of the provisions of s. 133 to delegated legislative or regulatory authorities. The Supreme Court decision indicated that a legislature (or Parliament) could not seek to avoid the consequences of the section by delegating its powers to another body. It is not clear, however, which bodies enjoying delegated authority would be subject to s. 133. Quebec has been granted a rehearing on this aspect of the Blaikie case. Hearings will begin in the fall and a decision should not be expected until 1981. The federal government will argue that there are three categories of bodies enjoying delegated legislative or regulatory authority:

- (a) those over which the legislature has direct control (e.g., the Lieutenant-Governor in Council, the Governor in Council, individual Ministers, etc.);
- (b) those that are independent of the legislature or Parliament because of the manner in which the members are chosen (e.g., Territorial Councils, school boards, municipal councils, etc.);
- (c) those in a grey area that are independent or quasi-independent (e.g., appointed commissions or boards whose members have fixed tenure and who are not answerable directly to the legislature or Parliament).

The position which the federal government will take before the Supreme Court is that s. 133 (or its equivalent) should apply to (a) but not to (b). In the case of (c), the degree of control by a legislature or Parliament, or by the executive, should determine whether or not s. 133 should apply. This could be determined on a case-by-case basis by the courts.

On the assumption that the Supreme Court will come down along these lines (which are not too onerous), it is not recommended that any attempt be made to clarify the relevant Charter provisions at this time. In the event of a broader construction of these language rights by the Court, federal-provincial discussions could be held with a view to limiting the rights along the lines indicated above.

It is recommended that a section (23) be added to enable other provinces to opt for the linguistic obligations falling on New Brunswick, Quebec, Ontario and Manitoba. This provision has been picked up from the Victoria Charter to enable the other six provinces to subscribe to language obligations similar to those of the above four. While it is perhaps more cosmetic than real, it may make the four provinces more amenable seeing the moral pressure placed on the remaining six.

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With respect to minority language education rights, this provision (section 16) remains as in the April 3, 1979 draft, applicable only to children of Canadian citizens and with no explicit provision for judicial review of a province's determination of what constitutes "where numbers warrant." The limitation to citizens is as in C-60 to meet Quebec's concerns and probably should be retained, although the provinces themselves in the "Montreal Statement" did not imply any such limitation. As for the question of judicial review, it would appear from reading section 16 that a court would review any attempt by a province to negate the right declared in section 16(1). However, this could be put beyond doubt by reinserting the "reasonableness" requirement in section 16(2) but this would be strongly opposed by the provinces.

There will likely be great difficulty in achieving agreement among the provinces on the proposed language rights unless attitudes have changed recently. There will have to be considerable flexibility in the federal position on the scope and wording of the various provisions and possibly a need to restrict further some of the proposals. If it becomes evident after protracted negotiations that the general language rights proposals cannot be sold, it may be necessary to concentrate on the minority language education provisions as a more limited first step. However, this tactic should be adopted only as a last resort.

NOTE: Section 17 of the April 3, 1979, draft respecting action by institutions of government that might adversely affect the preservation of rights in the future of identifiable English or French language communities to the use of French and English has been deleted. This section arose during the 1975-76 discussions on patriation and was unconnected with specific entrenched language rights. Its possible meaning and application have been a source of confusion, particularly with respect to "identifiable linguistic communities". If a number of specific rights for official language minorities can be entrenched in the Charter, the need for this section would be less.

III. IMPLEMENTATION OF CHARTER

In earlier versions of a Charter and discussions thereon three particular implementational aspects were considered. The first involved the linkage of provincial adherence to a Charter with repeal of the federal powers of reservation and disallowance. The second entailed various formulae whereby a province could "opt-in" to some categories of rights while avoiding others. The third permitted a province to adhere to the Charter with an override clause whereby it could derogate from Charter obligations by adopting a law "notwithstanding the provisions of the Charter."

All these concepts originated from the plan of C-60 whereby Parliament would first become bound by the Charter and provinces would subsequently opt in. Under the present approach of a joint federal-provincial effort to draft and adopt a Charter, the earlier concepts do not appear particularly appropriate. Engaging the reservation and disallowance

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powers would simply be an invitation to the provinces to link bargaining on a Charter with the "powers" negotiations. Opting in could lead to a "patchwork" Charter and including an override clause tends to reduce the value of entrenched rights. In addition, the provinces generally had rejected the opting in and override concepts by last year and had always opposed the linkage with reservation and disallowance.

Consequently, it is recommended that the federal position not include these implementational concepts in the upcoming negotiations.