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New clause following
Clause 26

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Moved by

That the proposed amendment to the new clause 26 of the proposed Constitution Act, 1980 be amended by striking out everything immediately following the words "this Charter" and substituting the following:

"abrogates or derogates from any rights or privileges guaranteed by the Constitution of Canada in respect of denominational, separate or dissentient schools."

SECRET

January 26, 1981.

MEMORANDUM TO THE PRIME MINISTER

Constitutional Resolution

There are essentially three items which have come out of last week's Committee meetings which require decisions by you and the Minister of Justice.

I. Provincial Language Rights

The first relates to language rights in the provinces, that is Section 133 and its equivalent in Sections 16 to 20 in the resolution. The N.D.P. has given us good reason to believe that they will not propose any motion which would seek to impose official bilingualism on Ontario. Instead they will seek agreement of the Committee on a separate resolution proposed by Mr. Nystrom and seconded by Mr. Crombie and Mr. Mackassey which would ask the Legislature of Ontario to agree to official bilingualism at least in the area of the Courts and the legislature. This resolution would come from the Committee itself and would not be part of the constitutional resolution which will come back to Parliament.

This idea is not a new one and has been mentioned in the Committee by Mr. Chrétien in the last few weeks and has been welcomed by Liberal members of the Committee. However, in order to ensure that there will be no negative reaction from Premier Davis, it would be appropriate to negotiate the wording of such a resolution with Mr. Nystrom so that it does not confine itself strictly to Ontario. That is, it would apply to all provinces. One possible way of doing this would be to refer in the Committee resolution to the Victoria Charter and ask all provinces to extend, and give the appropriate constitutional status for, the use of French within their jurisdiction. I think you should discuss this matter with Mr. Chrétien immediately as the issue may come before the Committee as soon as tomorrow (Tuesday) afternoon.

There is another decision on language which requires your attention. The Conservatives have introduced an amendment (see attached) which would provide for opting-in to all or part of Sections 16-20. The amendment is very similar to what you proposed in Victoria in 1971 (see attached), in C-60 (see attached) and indeed last summer.

The Conservative amendment applies equally to all provinces and does not make any specific reference to Ontario. It does not set a precedent for opting-in to other parts of the Charter because it is predicated upon being part of a Charter which is binding on both levels of government.

When proposed in Committee, it will be very difficult for government members to reject the principle of opting-in to constitutional protection of language rights. Yet Jim Coutts thinks that it would be a major error if we voted for opting-in on Sections 16-20. I have discussed the issue with Premier Davis' officials and they are strongly opposed to the proposal for opting-in. However, I know that it is favoured both by Mr. Chrétien and by Mr. Tassé. You should discuss this with Mr. Chrétien.

II. Regional Majorities

The N.D.P. raised last week the possibility that Section 42 could permit a referendum to pass in either Atlantic Canada or Western Canada without the support of a majority of the population of the region. In essence, it is possible that a narrow majority in two provinces could be outweighed by a massive no vote in the other two provinces. The N.D.P. will therefore propose an amendment which would provide that a referendum could only pass if in addition to a majority in two provinces in Western Canada with fifty per cent of the population of Western Canada, there is a majority of voters in Western Canada in favour, and similarly in Atlantic Canada, the requirement would be a majority in two provinces and a majority in the entire region.

You will recall that this proposal has been rejected by Cabinet basically on the grounds that it is not in symmetry with the provisions of Section 41. Nonetheless, you may want to reconsider in view of the changes already made in the referendum procedures and in view of the fact that in simplifying the explanation of the referendum, many

government spokesmen have talked about the requirement of a majority in Western Canada and in Atlantic Canada. It will be difficult to explain the rationale for a system which would permit the passing of a referendum where a majority in Western Canada and a majority in Atlantic Canada have actually voted against.

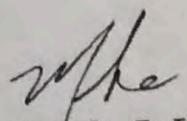
Personally, I would not change the resolution from its current form. However, Mr. Chrétien thinks that the proposed change should be supported by the government.

III. Denominational Schools

The Conservatives have proposed an amendment to ensure that Charter rights do not infringe upon the denominational school rights guaranteed in Newfoundland by Term 17 of the Terms of Union with Newfoundland.

Concerns have been expressed by church groups from Newfoundland and other provinces and by Premier Blakeney that the Charter provisions respecting freedom of religion and non discrimination on grounds of religion might infringe upon or restrict the rights to establish or manage publicly supported denominational or separate schools guaranteed by the Constitution under Section 93 of the BNA Act (Ontario and Quebec) or equivalent provisions which, as a practical matter, apply in Manitoba, Saskatchewan, Alberta and Newfoundland, as set out in the respective instruments admitting them.

While the Department of Justice does not believe that such concerns are founded, there is no doubt that it would be better to express clearly that there is no intent to derogate from such rights. The only disadvantage of making special reference to the preservation of these constitutional provisions in face of the Charter is that it might carry some implication that the Charter overrides other sections of the Constitution. However, this result is not inevitable and the risk is probably acceptable. I do not believe that the Conservative amendment is acceptable as it is applicable only for Newfoundland. However, I would support an amendment in more general terms as would Mr. Chrétien and Mr. Tassé. A draft is attached for your consideration.


Michael J.L. Kirby

VICTORIA CHARTER

PART II

LANGUAGE RIGHTS

Art. 10. English and French are the official languages of Canada having the status and protection set forth in this Part.

Art. 11. A person has the right to use English and French in the debates of the Parliament of Canada and of the Legislatures of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Newfoundland.

Art. 12. The statutes and the records and journals of the Parliament of Canada shall be printed and published in English and French; and both versions of such statutes shall be authoritative.

Art. 13. The statutes of each Province shall be printed and published in English and French, and where the Government of a Province prints and publishes its statutes in one only of the official languages, the Government of Canada shall print and publish them in the other official language; the English and French versions of the statutes of the Provinces of Quebec, New Brunswick and Newfoundland shall be authoritative.

Art. 14. A person has the right to use English and French in giving evidence before, or in any pleading or process in the Supreme Court of Canada, any courts established by the Parliament of Canada or any court of the Provinces of Quebec, New Brunswick and Newfoundland, and to require that all documents and judgments issuing from such courts be in English or French, and when necessary a person is entitled to the services of an interpreter before the courts of the other Provinces.

Art. 15. An individual has the right to the use of the official language of his choice in communications between him and the head or central office of every department and agency of the Government of Canada and of the Governments of the Provinces of Ontario, Quebec, New Brunswick, Prince Edward Island and Newfoundland.

Art. 16. A Provincial Legislative Assembly may, by resolution, declare that any part of Articles 13, 14, and

Schedule of enactments, etc., repealed or amended

128. (1) On the commencement of this Act, the portions of the enactments set out in column I of Schedule A to this Act are, in so far as they are part of the law of Canada, repealed or amended in the manner and to the extent specified in column II of that Schedule.

Idem

(2) The provisions of the Act of 1867, as amended by any subsequent constitutional enactment, set out in column I of Schedule B to this Act are, in so far as they are part of the law of Canada, repealed as of the day effect is given by law to the designated provisions of Part I of this Act set out in column II of that Schedule opposite those provisions of the Act of 1867 as so amended.

Idem

(3) The portions of the enactments set out in column I of Schedule C to this Act are amended in the manner and to the extent specified in column II of that Schedule as of the day effect is given by law to the designated provisions of Part I of this Act set out in column III of that Schedule opposite the portions of those enactments so amended and set out in column II thereof.

Construction of English and French versions of Act

129. The English and French versions of this Act are equally authoritative and shall be construed together according to the ordinary rules applicable at the commencement of this Act for the construction of the English and French versions of the statutes of Canada, but to the extent that the English language version of any designated provision set out in sections 91 to 95 or sections 121 to 123 remains unchanged in its substance from the text of the constitutional enactment to which it corresponded immediately before its coming into effect as law, the French language version corresponding to that English language version shall, from and after its coming into effect as law, have the same force and effect as that English language version, and shall not be held to operate as new law.

II SPECIAL RULES AND PROVISIONS

Statement of aims of Canadian Federation: how initially construed

130. (1) On and after the commencement of this Act, the statement of aims of the Canadian federation set out in section 4 of

128. Section 128 sets up three schedules for the repeal in phases of existing provisions of the Act of 1867 and other Acts. Schedule A contains the provisions that would be repealed immediately and Schedules B and C relate to those to be repealed as the designated provisions come into effect by entrenchment.

129. This section provides rules relating to the construction of the English and French versions of the Bill.

130. This section provides for the constitutionalization and entrenchment of the statement of aims of the Canadian federation. (See the Introduction hereto, category 3.)