



Security Classification / Classification de sécurité: CONFIDENTIAL - BY HAND. Date: December 2, 1980

MEMORANDUM/NOTE DE SERVICE

TO: DEPUTY MINISTER

FROM: SENIOR COUNSEL (PUBLIC LAW)

SUBJECT: CBA SUBMISSION ON PROPOSED RESOLUTION

COMMENTS/REMARKS

I have reviewed the submission of the Canadian Bar Association respecting changes that it feels should be made in the Proposed Resolution.

A number of changes suggested by the CBA have already been met in proposals put forward by the Minister in his memorandum to Priorities and Planning.

There are, however, some suggestions that warrant further consideration in terms of modifying the provisions of the Resolution, while others, in my view, do not.

1. Section 2 - Freedom of the Press and Other Media

The CBA argues that identifying "freedom of the press and other media" establishes it as a separate freedom from that of freedom of expression. This is somewhat of an overstatement since the freedom is only one that is "included" in freedom of "thought, belief, opinion and expression". In any case, we have been over this ground before and concluded that it would be difficult to drop this reference.

2. Section 2 - Freedom of Peaceful Assembly and of Association

The CBA argues that not separating these two freedoms (as they are in the UN Covenant) could lead to them being interpreted as freedoms only to be enjoyed in combination. This is speculative, at best, since the present wording makes clear that they are not conjunctive. However, if there is any real doubt, it could be resolved by separating the two into distinctly separate freedoms.

3. Section 6 - Mobility Rights

(a) With respect to section 6(1), the CBA argues that the right to enter, remain in and leave Canada, should be expanded beyond citizens to encompass others lawfully in Canada in order to meet our international obligations. The purpose of the Charter is not to guarantee all rights recognized by Canada's international commitments, but to guarantee certain basic rights. If we were to broaden this guarantee, it would be necessary to spell out specific limitations.

(b) With respect to section 6(2), the CBA has questioned whether there is only one right (to change province of residence to pursue the gaining of a livelihood) or two rights -- to change residence and to pursue the gaining of a livelihood. If the latter, the CBA suggests there is no guarantee of non-discrimination when changing province of residence.

This, I do not follow, since the non-discrimination is addressed not only to province of present residence but also to province of previous residence, the latter of which refers to a change of residence.

4. Section 13 - Protection Against Self-Crimination

The CBA contends that this section does not cover the right of an accused not to be compelled to give evidence at his own trial. This is true, but neither does section 2(d) of the Bill of Rights which is all section 13 is trying to restate. Section 2(d) simply provides that no one shall compel a person to give evidence if he is denied protection against self-crimination. It does not speak of the right not to be a compellable witness. However, in Curr v. The Queen (1972) Laskin J. did interpret 2(d) as meaning that, in the case of an accused person he cannot be made a compellable witness.

Article 14 of the UN Covenant does provide that a person charged with a criminal offence is entitled not to be compelled to testify against himself or to confess his guilt. It would be possible to reflect this in section 11 by an amendment granting to anyone charged with an offence the right not to be compelled to testify against oneself (a right against self-crimination).

...3

5. Additional Legal Rights

The CBA argues in favour of a number of additional legal rights: the right to privacy, the right to government information, the right to be informed of the right to retain counsel, the right to legal aid and the right to enjoyment of property.

With respect to privacy and government information, even the CBA admits that these are vague and emerging rights, and we should likely maintain the position that it is premature to entrench them.

As for being informed of the right to retain counsel and the right to legal assistance, these are both covered by the UN Covenant, but our discussions with the provinces on including them were very negative. While I still see some merit in including in section 10 the obligation to inform an arrested person of his right to retain and instruct counsel, I do not see the need to include a right to legal aid since this is available in most cases anyhow.

As for property rights, there is growing pressure from many groups for its inclusion, and we may have to reconsider our position on it. It could be added back into section 7, although it perhaps does not really fit there now.

6. Trial in Language of Accused

The CBA argues that an accused in a criminal case should have the right to be tried in his "official language" (English or French). This is a submission that has been made by a number of witnesses.

I believe it is impractical to add this provision now, and that we should continue to argue that it is best dealt with at this time in the Criminal Code.

7. Section 26 - Admissibility of Evidence

Like other witnesses, the CBA argues that this provision should be dropped, leaving it to the courts to exclude improperly obtained evidence in appropriate cases. Further, the CBA argues, this section could enable the making of laws that would imperil other legal rights, eg. enacting a law which made evidence admissible even though it was not adduced during a trial.

This section is causing a number of problems, but I am not sure what we can do about it in light of our position with the provinces. It can either be dropped, assuming our courts will not follow the U.S. route (but we must remember that we now have a very broad remedies section), or modified to state that evidence shall not be inadmissible only because it was obtained in contravention of a Charter right. If a change is to be made, I would favour deletion of the section altogether.

8. Sections 27 and 29 - Application to Territories

The CBA suggests that sections 27 and 29 leave the status of the Territories under the Charter unclear. I fail to appreciate the problem here. Section 27 is simply a shorthand way of indicating that provisions of the Charter referring to provinces also include the Territories, while section 29 indicates that the Charter applies to both levels of government including the Territories.

9. Section 31 - Equalization and Regional Disparities

The CBA says that section 31(1) is cumbersome as drafted, and would move the qualifying words to a third subsection. This would probably take the form of "(3) Nothing in this section alters the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority."

I see nothing wrong with such a change, although the wording was agreed to during the summer negotiations.

10. Section 41 - General Amending Formula

The CBA feels there is a latent ambiguity in section 41(i)(b) (ii) and (iii) in that these could be read as requiring that the Atlantic and Western resolutions must include the two provinces in each region that together have 50 + % of the population.

This is a possible interpretation, which might be corrected by changing the wording to read: "two or more of the Atlantic provinces with a combined population, according to the then latest general census, of at least fifty percent...".


F.J.E. Jordan

cc B.L. Strayer
E.I. MacDonald