



CANADA

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E. Goldenberg

COMMISSIONER OF OFFICIAL LANGUAGES

COMMISSAIRE AUX LANGUES OFFICIELLES

January 23, 1981

The Honourable Jean Chrétien, P.C., M.P.
Minister of Justice and
Attorney General for Canada
House of Commons
Ottawa, Ontario
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Committee and Private
Legislation Branch
Comité et Législation Privée

My dear Minister:

I have reviewed carefully your statement of January 12, 1981, to the Special Joint Committee on the Constitution and the consolidation of the Proposed Resolution and possible amendments which accompanied it. I remain concerned that a problem relating to language rights which was raised when I was before the Special Joint Committee has not been clearly resolved.

You will note from the attached letter to the Co-Chairmen of the Committee, at page 3, that the point raised relates to a possible anomaly which may arise in that existing constitutional language rights in the Provinces of Quebec and Manitoba would be subject to amendment by a different procedure from that which would apply to other language rights provided for in the Charter.

That situation, which arises by virtue of Section 43 of the Proposed Resolution - and which is amplified by Section 47 taken in conjunction with Section 50(b) - would not be rectified by the amendments which you tabled on January 12. In fact, the anomaly seems to have been compounded by the inclusion of provisions relating to language rights in New Brunswick. In other words, if the present amendments are enacted, it would appear that we would be left with a situation whereby language rights in the provinces of Quebec and Manitoba would be less firmly

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COMMISSIONER OF OFFICIAL LANGUAGES COMMISSAIRE AUX LANGUES OFFICIELLES

entrenched than the equivalent constitutional rights in New Brunswick. If so, I hope you would agree to consider appropriate changes to the text to ensure that existing constitutional rights relating to language will be as strongly entrenched as any new rights which may be incorporated in the Proposed Charter.

I am taking the liberty of sending a copy of this letter to the Joint Chairmen of the Committee on the Constitution of Canada.

Parliament Buildings
Ottawa, Ontario

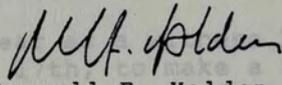
Attention: Senator Harry Hays
Mr. Serge Joyal, M.P.

Yours sincerely,

Joint Chairmen

Dear Sirs:

It was my pleasure to appear before your Committee on Monday, November 2nd and to answer questions on the proposed Resolution respecting the Constitution of Canada.


Maxwell F. Yalden

I have had an opportunity since that time to consider the comments and observations from members of the Committee, c.c. Senator Harry Hays ✓ and Mr. Serge Joyal, M.P. I confirm through you to members of your Committee that I continue to believe that they should stand as presented. Briefly, and for the record, the essential elements of our position on the proposed Resolution as then stated were as follows:

- language rights should be included in an entrenched Charter of Rights and Freedoms;
- the provisions of the Charter which relate to the protection of the rights of the official-language minorities do not go far enough - particularly as regards so-called Section 133 rights in Quebec and New Brunswick;
- the Charter ought to enshrine a right for persons charged with a criminal offence to be tried in their own official language;



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COMMISSAIRE AUX LANGUES OFFICIELLES

December 12, 1980

The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada
Parliament Buildings
Ottawa, Ontario

Attention: Senator Harry Hays }
Mr. Serge Joyal, M.P. } Joint-Chairmen

Dear Sirs:

It was my pleasure to appear as a witness before your Committee on Monday, November 17th, to make a statement and to answer questions on the proposed Resolution respecting the Constitution of Canada.

I have had an opportunity since that time to consider the comments made in my prepared statement, in light of questions and observations from members of the Committee, and I wish to confirm through you to members of your Committee that I continue to believe that they should stand as presented. Briefly, and for the record, the essential elements of our position on the proposed Resolution as then stated were as follows:

- language rights should be included in an entrenched Charter of Rights and Freedoms;
- the provisions of the Charter which relate to the protection of the rights of the official-language minorities do not go far enough - particularly as regards so-called Section 133 rights in Ontario and New Brunswick;
- the Charter ought to enshrine a right for persons charged with a criminal offence to be tried in their own official language;

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- Section 20 of the proposed Resolution should be amended, particularly as regards differences between that Section and the provisions of related clauses in the Official Languages Act, the exceedingly vague formulation of geographical areas in which the rights in question would apply, and the matter of federal offices "located in" various areas as distinct from serving those areas;
- Section 23, relating to minority language educational rights, should be redrafted to delete both the citizenship qualification and the proviso that sufficient numbers be identifiable in a given area to warrant the expenditure of public funds on minority language educational facilities. Recognition should also be given to the right of the official-language minority to administer their own educational institutions.

In addition to the points set out above, a number of members of the Committee raised issues which are of considerable importance to the subject of language rights in Canada. Having now had an opportunity to review the transcript and to reflect upon these additional issues, I should like to communicate through you to members of the Committee the following observations for their consideration.

First, Mr. Lorne Nystrom, M.P., commented on the possible implications of Section 43 of the proposed Resolution on existing language rights contained in Section 133 of the British North America Act and in Section 23 of the Manitoba Act. Mr. Nystrom suggested that the constitutional rights enjoyed by the linguistic minorities in Quebec and Manitoba might, by one interpretation of Section 43, be susceptible of amendment or abrogation by the respective provincial legislatures acting in concert with the Parliament of Canada, i.e., that they would not enjoy the protection of the more complex procedure for amending the Constitution of Canada provided for in Sections 41 and 42 of the proposed Resolution. Put another way, the question is whether the linguistic rights contained in Section 133 of the BNA Act and Section 23 of the Manitoba Act might be less well protected than other linguistic rights explicitly referred to in the proposed Charter.

Upon reviewing the matter I wish to confirm my view that Mr. Nystrom could well be right in arguing that the Section 133 and Section 23 rights may not offer as clear and unequivocal a form of protection as do those in the new Charter, and that the resolution should be amended to remedy this weakness and to ensure unequivocally that they cannot be amended in a manner different from that provided for other rights specifically set out in the Charter.

Second, Senator Tremblay asked about the wording of Section 1 of the proposed Resolution which contains the limiting clause,

"... subject only to such reasonable limits as are generally accepted in a free democratic society with a parliamentary system of government".

I replied that I was more troubled by those words as a citizen of Canada than as Commissioner of Official Languages, because they were so vague that I did not know what they might allow. Subsequent to my appearance before the Committee, I have read the remarks of other witnesses and I must say that I find myself in considerable sympathy with those who are disturbed by the present wording and its possible implications for limiting the scope of the Charter of Rights. In relation to language rights, I am particularly concerned about its possible consequences, at some future time, if the words "where numbers warrant" should be retained in Section 23.

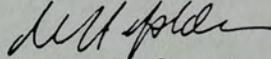
The third issue upon which I believe additional comments may be in order was one raised by Mr. David Crombie, M.P., as to the relationship between the mobility right contained in paragraph 6(2)(b) and the language rights enshrined elsewhere in the Charter. I said at that time that I supported mobility rights in the Charter. I added that I was not sure how far a court would be prepared to go in deciding that the right "... to pursue the gaining of a livelihood in any province" might have implications for language rights, particularly in the matter of minority language education.

Having reflected upon this question I am still of the opinion that the right in question could be held to reinforce the right to education in the minority language, or the right to other appropriate government services, on the grounds that otherwise one's right "to pursue ... a livelihood" would be adversely affected. It is conceivable as well that such a right might be interpreted as affecting

language legislation in a province, for example, concerning the linguistic qualifications of certain professionals. As far as I can see, however, the clause in question would not be such as to limit fundamental language rights as they are stated in the Charter.

I hope that these few additional comments may be of some use to members of the Committee. I should like to thank you again for providing me with an opportunity to appear before you and to engage in what I found to be a most stimulating and worthwhile exchange of views.

Yours sincerely,



M.F. Yalden

c.c. Mr. Richard Prégent } Joint Clerks
Mr. Paul Belisle } of the Committee