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Excerpt from journal article tentatively named "A New Drafting History of the Canadian Charter of Rights and Freedoms: The 1980-1982 Drafting Period"[1] (Charles Dumais and Michael Scott), Appendices—A Clause by Clause Progression of the Charter of Rights and Freedoms, Appendix 3: Charter Progression Tables—Sections 2-33, 35, 52(1), Property Rights, and the Preamble[2]

Section 33: Notwithstanding Clause

August 15, 1980	**August 15, 1980: Charter of Rights: Status Report**	"…if there is considerable provincial sentiment for including a provision, the federal officials would propose a clause which might permit an override under one or more of the following conditions: (a) that enactment of an override law would require some special majority vote, eg. 60% (b) that any law with an override clause would have a limited life, eg. five or ten years, unless in the meantime an amendment to the Charter had been made remedying the problem perceived by law."
August 29, 1980	**August 29, 1980: Charter of Rights. Report to Ministers by Sub-Committee of Officials**	"One mechanism was discussed, in the event it is decided that an override clause is necessary (and this could depend on the ultimate scope and wording of an entrenched Charter), is a requirement that any law enacted under an override provision be adopted by a 60% majority of the legislative body and that any such law would expire after a specified time period, e.g., five years unless repealed earlier. There was no discussion of the particular categories of rights to which any override clause might apply."

[1] Formerly "A New Drafting History of the Canadian Charter of Rights and Freedoms: The 1980-1982 Drafting Period."
[2] Tables compiled by Michael Scott and reviewed by Charles Dumais.

August-September, 1980	**Cabinet Document: The Provincial Discussion Draft dated August 28, 1980**	"Legislative Override Clause… Federal officials raised doubts respecting the necessity for an override clause but suggested that if there should be one it should be restricted by requirements that any law enacted under an override provision be adopted by a 60% majority of the legislative body and expire after a specific time (e.g., 5 years" […] "At the FMC some of the following adjustments in the federal position might be contemplated: […] (e) Override Clause: possible inclusion of an override clause whereby a legislative body could expressly provide that a law would operate notwithstanding certain Charter Rights. Fundamental Freedoms, Democratic Rights and Language Rights would not be subject to this override clause. In the event that it is decided to include an override clause, it could be made subject to such requirements as a 60% majority vote of the legislative body and an automatic expiry of any law enacted after a specified time period, e.g., five years."
August 30, 1980	**August 30, 1980: Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers Conference and Beyond**	ibid. (probably comes from same document)

Sep. 8-12, 1980	**September 8-12, 1980: Report of the Continuing Committee of Ministers on the Constitution to First Ministers. Charter of Rights:**	"One mechanism that was discussed, in the event it is decided that an override clause is necessary (and this could depend on the ultimate scope and wording of an entrenched Charter), is a requirement that any law enacted under an override provision be adopted by a 60% majority of the legislative body and that any such law would expire after a specified time period, e.g., five years unless repealed earlier. There was no discussion of the particular categories of rights to which any override clause might apply."
Sep. 13, 1980	**September 13, 1980: Government of Quebec, "A Proposal for a Common Stand of the Provinces."**	Charter of rights Fundamental freedoms Democratic rights Judicial rights Discrimination rights -all existing laws deemed valid -non-obstante clause
October 24, 1981	**October 24, 1981: Memorandum for the Prime Minister from Michael Kirby re Possible Changes that might be Acceptable if they Result in a Provincial Consensus**	"…In order to ensure that such a device is only used in the most exceptional and deserving situation, we could consider providing for the following: 1) A "notwithstanding" clause would be valid for five years only. It could be renewed for another five years, which would mean that the legislature would need to debate the question before the clause would be passed again. 2) We could provide that a "notwithstanding" clause would need to relate specifically both to a specific clause of the derogating legislation and the specific section of the Charter that it is in conflict with.

		3) There could be a refinement that a "notwithstanding clause must be passed by 60% or 66% of the members of the legislative assembly…"
October 29, 1981	**October 29, 1981: Memorandum to the Minister, Charter of Rights**	"A Non Obstante Clause A final option is to provide a means whereby Parliament or a legislature could enact a law contrary to the Charter by specifically declaring the intention to override. The mechanism could be restricted by requiring adoption by a two-thirds majority in a legislature and further providing that the law would automatically expire after five years. […] A variant of a general non-obstante clause would be to limit it to Section 15 which guarantees rights some of which remain subject to considerable evolution…."
Oct. 29, 1981	**October 29, 1981: Memo from Deputy Minister of Justice of Michael Kirby re Non obstante clause**	"A sunset provision would on the other hand provide a degree of control on the use of an override clause and allow public debate on the desirability of continuing the derogation further."
Oct. 31, 1981	**October 31, 1981: Memorandum for Michael Kirby [from Eddie Goldenberg]**	"With respect to legal rights, a compromised based on an over-ride clause would be satisfactory. The same would be true for equality rights inasmuch as an over-ride clause would be necessary for age, sex, and disability. We spoke of an over-ride clause requiring a two-thirds majority of a

		legislature and which would have a sunset clause." […] Elements of a Deal […] Charter of Rights […] - Mobility rights subject to over-ride by a majority of legislatures - Legal rights subject to over-ride by two-thirds of a legislature with a five year sunset clause -Equality rights applicable across the board except for age, sex, and disability which would be subject to an over-ride
Unknown date, prob. Nov. 1981	**November, 1981: Unknown draft**	Charter in 5 years? ~~7 years~~ +2 ans of the majority 6-60% not for non discrimination legal mobility aboriginal referendum out vote 2/3 of assembly "5 ans" donne une chance d'inscrire cela dans le programme de n'importe quel parti provincial dans la prochaine election 2/3 n'est pas necessaire +Ont. 133

Nov. 3, 1981	**November 3, 1981: Canada Act (B.C. Position):**	32A. *[Sections 2 and 7 to 15 of this Part shall]* not apply to an Act of the Parliament of Canada or the legislature of a province which specifically provides that *[any or all of these sections does not apply thereto.]*
Nov. 4, 1981	**November 4, 1981: Jean Chretien, Roy Romanow, Roy McMurtry, The Kitchen Accord**	All the Charter But the 2nd Half of it as stated By Hatfield Non Obstante […] -5 year "Sunset" on the legal, special rights a la s. 4(2)
Nov. 4-5, 1981	**November 4-5, 1981: Compromise on Fundamental Freedoms:**	HAVE NON OBSTANTE CLAUSE APPLY FOR 5 YEARS WITH THE PROVISO THAT AFTER THAT TIME AN OBJECTIVE GROUP WILL REVIEW WHETHER IT IS APPROPIRATE FOR IT TO CONTINUE TO APPLY AND MAKE RECOMMENDATIONS TO THE FIRST MINISTERS.
Nov. 5, 1981	**November 5, 1981: Constitutional Proposal Submitted by the Government of Newfoundland at the First Ministers Conference:**	(3) CHARTER OF RIGHTS & FREEDOMS - THE ENTRENCHMENT OF THE FULL CHARTER OF RIGHTS AND FREEDOMS NOW BEFORE PARLIAMENT WITH THE FOLLOWING CHANGES […] (A) NON OBSTANTE CLAUSE COVERING SECTIONS DEALING

		WITH LEGAL RIGHTS AND EQUALITY RIGHTS. THIS WOULD MAKE IT POSSIBLE FOR PARLIAMENT OR A LEGISLATURE TO OVERRIDE THESE PROVISIONS OF THE CHARTER IN CERTAIN SPECIFIED CIRCUMSTANCES.
Nov. 5, 1981	**November 5, 1981: Proposal [No Title], Version 1, Copy 1:**	(3) Charter of Rights & Freedoms - The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes: (a) Non obstante clause covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights. This would make it possible for Parliament or a Legislature to override these provisions of the Charter in certain specified circumstances.
Nov. 5, 1981	**November 5, 1981: Proposal [No Title], Version 2 with Notes:**	(3) Charter of Rights & Freedoms - The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes: (a) Non obstante clause *[with 5 year limit]* covering sections

		dealing with Fundamental Freedoms[3], Legal Rights and Equality Rights. This would make it possible for Parliament or a Legislature to override these provisions of the Charter in certain specified circumstances.
Nov. 5, 1981	**November 5, 1981: Proposal [No Title], Version 3 with Notes [Missing Pages]:**	(3) Charter of Rights & Freedoms - The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes: (a) A ~~non obstante~~ *[notwithstanding]* clause covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights. Each non obstante provision would require reenactment not less frequently than once every five years.
Nov. 5, 1981	**November 5, 1981: Proposal [No Title], Version 4:**	The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes: (b) A "notwithstanding" clause covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights.

[3] "Fundamental Freedoms" is circled. There's also an illegible note in the margin.

		Each "notwithstanding" provision would require reenactment not less frequently than once every five years.
Nov. 5, 1981	**November 5, 1981: Working Draft, Consolidation of proposed constitutional resolutions tabled by the Minister of Justice in the House of Commons on February 13, 1981 with the amendments approved by the House of Commons on April 23, 1981 and by the Senate on April 24, 1981**	33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2, sections 7 to 15 or section 28 of the Canadian Charter of Rights and Freedoms.[4] (2) An Act or a provision of an Act of Parliament or of the legislature of a province in respect of which a declaration is made under subsection (1) shall have such operation as it would have but for the provision of the Canadian Charter of Rights and Freedoms referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

[4] There is an illegible handwritten note on Section 33 in the Peckford version.

Nov. 6-?, 1981	**November, 1981: Possible Amendments for Quebec:**	"There are 3 possibilities to be considered: … 2. Mobility Rights "Allow for a "non obstante" by a province where the exercise of the right of mobility would substantially alter the linguistic equilibrium of the population of that province. (This is preferable to Ryan's proposal, from a technical point of views, but meets the same objective.) […] 3. Minority Language Education Right: […] If it is decided to transform the Quebec Clause into the CANADA Clause there is a need to provide either for an opting in, or an opting out for a non obstante for Section 23(1)(a) and 23(2). The advantage of the non obstante over the opting in is that it might be easier for a Quebec government to decide to be bound if situation which might arise contrary to all expectations through the use of a non obstante. With an "opting in", a province is locked in without any possibility of derogation whatever happens. The advantage of the "non obstante" over an opting out is that the "non obstante", which

		is a kind opting out, must be reviewed every five years."
Unknown date, prob. Nov. 1981	**Cabinet Document: Preferred Options**	"We have indicated our willingness to accept the Canada Clause. This was understood to mean at least that we would be prepared not to insist on the mother tongue test in Quebec, and also that we would not insist on imposing on Quebec the right of citizens who do not meet the mother tongue test nor the instruction test, to continue the education of their children in English. In order to implement the concept of the Canada Clause, we would have to provide either: (a) for a non-obstante on both S. 21 (1)(a) (mother tongue) and S. 23(2) (continuation of instruction) in the case of Quebec, or (b) at the very least for "an opting in" or a "non-obstante" on the mother tongue test (S. 23(1)(a)).
Nov. 9, 1981	**November 9, 1981: Recontre avec Rene Dussault (Roger Tassé)**	Re: Sec. 23(2): "A l'égard de cet article, nous avons exploré trois possibilités : […] (2) une clause « non obstante » : un telle clause permettrait à une province de déroger au droit de l'article 23(2) lorsque la sécurité culturelle de la province est menacée, comme discutée dans le cas du droit à l'établissement. » […]

		« Dussault a indiqué, qu'à son avis, il serait nécessaire de permettre : …. (b) Une clause dérogatoire (possiblement des mesures de redressement) qui pourrait être en conflit avec les articles 23(1)(b) – (clause Canada), et l'article 23(2) – (droit des allophones) lorsque ces mesures se justifient parce que la sécurité culturelle du Québec est menacée.
Nov. 9, 1981	**November 9, 1981: Memorandum for Mr. Kirby, Quebec and the Constitutional Agreement [from D.R. Cameron]**	"The following six options in the area of language of education should be considered in the light of the preceding considerations: […] 2. Language rights (in Quebec alone, or in all the provinces) could be made subject to a notwithstanding clause.
Nov. 10, 1981	**November 10, 1981: Memorandum for the Minister (from Roger Tassé) re: Propositions for Quebec**	"Mr. Ryan proposes that the Canada clause be adopted and that the mother tongue test for Quebec be subject to opting-in, opting-out, or non obstante… To allow a non obstante clause renewable every five years would be a major symbolic concession and would be seen as an important gesture…." […] "Mr. Ryan would subject to a non obstante provision the part of Section 23(2) which protects the right of a Canadian citizen to continue to send his children to school anywhere in Canada in English or French if one of his

		children has attended school in that language anywhere in Canada. In effect, we are dealing with a mobility clause. …I have come to the conclusion that there is no option which overcomes the objection that some Canadians would have fewer rights than others when they move to different parts of the country. If the Canada clause is not subjected to a non obstante provision in the case of a mass influx from other provinces to Quebec, then there is no rationale for restricting the mobility provision in the case of Canadian citizens with children in school in Canada even if the citizens did not receive his education in English in Canada…"
Nov. 12, 1981	**November 12, 1981: Various Drafts of Clauses [Untitled]:**	Option I - Population Percentage 34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections, where (a) the percentage that the population of the province whose first language learned and still understood is that of the English or French linguistic majority, as determined by the most recent general census, is of the total population of the province, as determined by that census,

		has decreased by at least five per cent from (b) the percentage that the linguistic majority population of the province, as determined by the general census of the population of Canada required to be taken in 1981, was of the total population of the province, as determined by that census. (2) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to. (3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force. (4) A declaration made under subsection (1) shall cease to have effect six months after the publication of the results of the next general census, taken no earlier than five years after the previous general census, or on such earlier date as may be specified in the declaration. (5) The legislature of a province may re-enact a declaration made under subsection (1) where the

		condition set out in that subsection is met. (6) Subsection (4) applies in respect of a re-enactment made under subsection (5). <u>Option II - School Population Percentage</u> 34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections, where (a) the percentage that the primary and secondary school population of the province that receives its instruction in the language of the English or French linguistic majority is of the total primary and secondary school population of the province has decreased by at least five per cent from (b) the percentage that the primary and secondary school population of the province that received its instruction in the language of the English or French majority on January 1, 1982 was of the total primary and secondary school population of the province on that day. (2) An Act or a provision of an Act in respect of which a declaration is made under

		subsection (1) shall come into force no earlier than three months after the Act has been assented to. (3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force. (4) A declaration made under subsection (1) shall cease to have effect five years after it come into force or on such earlier day as may be specified in the declaration. (5) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met. (6) Subsection (4) applies in respect of a re-enactment made under subsection (5). <u>Option III – Majority Substantially Altered</u> 34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections, where the exercise

		of any of the rights referred to in those subsections would substantially alter the linguistic equilibrium of the English and French linguistic populations in that province. (2) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to. (3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force. (4) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier day as may be specified in the declaration. (5) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met. (6) Subsection (4) applies in respect of a re-enactment made under subsection (5). <u>Option IV - Majority Declared by Legislature to be Altered</u>

		34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections. (2) A legislature may make a declaration under subsection (1) only if the declaration is approved by the votes of two thirds of its members. (3) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to. (4) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force. (5) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier day as may be specified in the declaration. (6) The legislature of a province may re-enact a declaration made

		under subsection (1) where the condition set out in that subsection is met. (7) Subsections (2) and (5) apply in respect of a re-enactment made under subsection (6). 34. (1) La législature d'une province peut adopter une loi où il est déclaré que celle-ci ou une de ses dispositions a effet indépendamment des paragraphes 6(2) et (3), du paragraphe 23(1) ou du paragraphe 23(2) de la présente charte ou de tous ces paragraphes dans le cas où le pourcentage, par rapport à la population totale de la province, des habitants dont la première langue apprise et encore comprise est celle de la majorité francophone ou anglophone selon le recensement général le plus récent a diminué d'au moins cinq pour cent selon le recensement général de 1981. (2) La loi ou la disposition qui fait l'objet de la déclaration ne peut entrer en vigueur qu'à compter de trois mois suivant sa sanction. (3) La loi ou la disposition qui fait l'objet de la déclaration visée au paragraphe (1) n'a l'effet qu'elle aurait sans l'application de la disposition en cause de la charte qu'à l'égard des individus qui sont venus s'installer dans la province après l'entrée en vigueur de cette loi ou de cette disposition.

		(4) La déclaration visée au paragraphe (1) cesse d'avoir effet six mois après la publication des résultats du recensement général qui suit de cinq ans au moins le recensement qui est à l'origine de celle-ci ou à la date antérieure qui est précisée dans la déclaration. (5) La législature d'une province peut adopter de nouveau une déclaration visée au paragraphe (1) si les conditions énoncées à ce paragraphe continuent à s'appliquer. (6) Les paragraphes (3) et (4) s'appliquent à toute déclaration adoptée sous le régime du paragraphe (5).
Nov. 12, 1981	**November 12, 1981: Memorandum to Roger Tassé from Eddie Goldenberg re Draft changes to the constitutional Resolution with Handwritten Notes:**	33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2, sections 7 to 15 or section 28 of this Charter (2) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3) of the Charter where the exercise of any of the rights referred to in those subsections would (seriously threaten to) substantially alter the linguistic equilibrium of the population in that province.

		(3) The legislature of Quebec may expressly declare in an Act of that legislature that the Act or a provision thereof shall operate notwithstanding paragraph 23(1)(a) of the Charter. (4) An Act or a provision of an Act in respect of which a declaration is made under subsection (1), (2) or (3) shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (5) A declaration made under subsection (1), (2) or (3) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (6) Parliament or a legislature of a province may re-enact a declaration made under subsection (1). (7) The legislature of a province may re-enact a declaration made under subsection (2). (8) The legislature of Quebec may re-enact a declaration made under subsection (3). (9) Subsection (5) applies in respect of a re-enactment made under subsection (6), (7) or (8).
November 16, 1981	**November 16, 1981: Various Drafts of Clauses [Untitled]**	Override in the case of massive migration 33.1 (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding

		subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter where (a) the percentage that the population of the province whose first language learned and still understood is that of the English or French linguistic majority population of the province, as determined by the most recent general census, is of the total population of the province, as determined by that census, has decreased by at least five per cent from (b) the percentage that the population of the province whose first language learned and still understood is that of the English or French linguistic majority population of the province, as determined by the general census taken in 1981, was of the total population of the province, as determined by that census. (2) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to. (3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or

		provision thereof comes into force. (4) A declaration made under subsection (1) shall cease to have effect six months after the publication of the results of the next general census after the declaration is made or on such earlier date as may be specified in the declaration. (5) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met. (6) Subsection (4) applies in respect of a re-enactment made under subsection (5).
Nov. 16, 1981	November 16, 1981: Telex from Roger Tassé re: Override of Section 28 in Section 33 of Charter and Wording of Mobility Rights Derogation under Section 6(4)	"PARLIAMENT OR THE LEGISLATURE OF A PROVINCE MAY EXPRESSLY DECLARE IN AN ACT OF PARLIAMENT OR OF THE LEGISLATURE, AS THE CASE MAY BE, THAT THE ACT OR A PROVISION THEREOF SHALL OPERATE NOTWITHSTANDING A PROVISION INCLUDED IN SECTION 2 OR SECTIONS 7 TO 15 OF THIS CHARTER, OR SECTION 28 OF THE CHARTER IN ITS APPLICATION TO DISCRIMINATION BASED ON SEX REFERRED TO IN SECTION 15."
Nov. 18, 1981 (presented to Parl on Nov. 20)	November 18, 1981: Resolution Respecting Constitution Act:	33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act

		or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4). 33.(1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte, ou de l'article 28 de cette charte dans son application à la discrimination fondée sur le sexe et mentionnée à l'article 15.

		(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte. (3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur. (4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1). (5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).
Nov. 24, 1981	**November 24, 1981: Resolution Respecting Constitution Act:**	Section 33(1) is amended. Subsection (4) in English seems to contain a drafting mistake now, which says "the legislature". It will eventually go back to being "a legislature" without an amendment. 33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. **(2)** An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this

		Charter referred to in the declaration. **(3)** A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. **(4)** Parliament or the legislature of a province may re-enact a declaration made under subsection (1). **(5)** Subsection (3) applies in respect of a re-enactment made under subsection (4). **33 (1)** Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte. **(2)** La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte. **(3)** La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur. **(4)** Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1). **(5)** Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

Nov. 26, 1981	November 26, 1981: Resolution Respecting Constitution Act:	Same
Dec. 2, 1981	December 2, 1981: Resolution Respecting Constitution Act, Voted and Passed by House of Commons:	**(4)** Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Further Reading—Discussions Surrounding Clause:

- March 5, 1981: Legislative Override of Charter of Rights:
- November 12, 1981: Memo from the Deputy Minister to the Minister of Justice, Le Québec
- November 19, 1981: Memo from Deputy Minister to Minister of Justice re Override Clause in Relation to Section 28 of Charter

(I.) CHARTER OF RIGHTS, REPORT TO MINISTERS BY SUB-COMMITTEE OF OFFICIALS

JULY 24, 1980

Source: Sub-Committee of Officials, "Charter of Rights: Report to Ministers…" (Jul. 24, 1980)[1]

DOCUMENT: 830-83/019

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 Tasse 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 supersede 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.

-2-

[1] Full citation: Sub-Committee of Officials, "Charter of Rights: Report to Ministers by Sub-Committee of Officials," Doc 830-83/019 (Jul. 24, 1980).

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 over coming 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./ 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 l0(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 s 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.

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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 juris dictions 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 he 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.

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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 juris dictions, 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.

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20. The sub-committee then turned to item (e) of its mandate, namely the practicability of including an over ride 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.

Roger Tassé
Chairman

(I.) MEMORANDUM FROM DEPUTY MINISTER OF JUSTICE TO PRIME MINISTER, CHARTER OF RIGHTS

AUGUST 5, 1980

Source: Memo from Deputy Minister of Justice to Prime Minister, Charter of Rights (Aug. 5, 1980)

Security Classification
CONFIDENTIAL

Date
August 5, 1980

TO: THE PRIME MINISTER

FROM: DEPUTY MINISTER OF JUSTICE

SUBJECT: CHARTER OF RIGHTS

[…]

10. General

A number of sections of the new draft have not been mentioned. This is because they have not been significantly changed from the July 4 draft and because they do not raise issues on which we feel your instructions are required at this time.

There remains, however, one further important issue which is not raised by the draft, but which will likely be discussed further at the federal-provincial meetings later this month. One of the matters referred by Ministers to the committee of officials was the possibility of including a "notwithstanding" clause in the Charter thereby permitting a legislative body to enact a law overriding one or more rights by an express provision in the enactment to that effect. This approach, you may recall, was considered in some detail during the 1978-79 negotiations, but most provinces finally had considerable doubts about its political acceptability. It is, however, an approach that could alleviate to some extent provincial concerns about the rigidity of the Charter in the face of "bad" court decisions. On the other hand, it is a provision that could seriously undermine the efficacy of the Charter if it were invoked too frequently.

On the basis of preliminary discussions with provincial officials,' it would appear that a "notwithstanding" clause has some appeal to the provinces. We, however, continue to have considerable reservations about its desirability and, indeed, its necessity, particularly if the legal rights are more clearly defined. Thus we propose at this point to continue to press for a Charter without a "notwithstanding" clause, while at the same time not foreclosing the possibility of a decision being taken at an appropriate time to include such a provision if this would bring a substantial number of provinces into the Charter.

[…]

(I.) CHARTER OF RIGHTS, STATUS REPORT

AUGUST 15, 1980

Source: [Cabinet Memo?], Charter of Rights, Status Report (Aug. 15, 1980)

CONFIDENTIAL

August 15, 1980

9 CHARTER OF RIGHTS

A. STATUS REPORT

At the conclusion of the July CCMC meetings, no decisions had been taken by Ministers on an entrenched Charter. There had been general statements of positions by Ministers at the opening plenary sessions in Montreal followed by closed ministerial discussions in Toronto. This was followed by meetings of officials in Vancouver where the federal discussion draft of July 4, 1980 was examined in detail as one part of the mandate referred to the committee of officials for examination and report. On the basis of these various discussions, the provincial positions on each category of rights may be summarized as follows (see following back ground notes for a more detailed outline of provincial positions):

1. Entrenchment of Charter of Rights: Although several provinces have reservations about the principle of entrenching rights in the constitution, only Manitoba and Alberta appear at this point to be firmly opposed to the concept. Alberta's position may be a bargaining stance; Manitoba's is not.

2. Fundamental Freedoms and Democratic Rights: Apart rom Manitoba and Alberta, there appears to be general acceptance for entrenching these categories.

3. Legal Rights: Again, apart from Manitoba and Alberta, there seemed to be a willingness to see some legal rights entrenched. However, Ontario, Quebec, Saskatchewan, Nova Scotia and PEI remain opposed to extending these rights beyond the criminal and penal sphere.

4. Non-discrimination Rights: There is little support for including this category in the Charter: only Ontario, New Brunswick and Newfoundland remain committed to it.

5. Mobility Rights: Again, this category draws little support, and most provinces are particularly opposed to the rights pertaining to acquisition of property and seeking employment. Even on the right to move and take up residence in another province support will likely be found only from B.C., Newfoundland, PEI, New Brunswick and Ontario.

6. Property Rights: This category drew support from only B.C. although Ontario, PEI, and New Brunswick were sympathetic to the principle.

7. Federal Language Rights: There was no strong opposition to this category (Quebec abstaining and Manitoba reserving throughout the discussion on all language rights), although Nova Scotia and PEI opposed declaring French and English to be the official languages of Canada and Alberta and Saskatchewan reserved their positions.

8. Provincial Language Rights: There is little agreement in this area. Ontario remains strongly opposed to entrenchment of both languages for the courts and statutes (as do Quebec and Manitoba). New Brunswick is strongly in favor. The six other provinces appear to have no firm views but obviously favor the Pepin-Robarts approach of leaving the matter to provincial laws.

9. Minority Language Education Rights: Putting aside Quebec and Manitoba which oppose including this category, there are only three provinces (Ontario, Newfoundland and New Brunswick) that are prepared to commit themselves to entrenching the "Montreal Agreement", but even they are doubtful about making it a binding legal obligation. B.C. and Saskatchewan profess to be opposed to including even the principle while the others reserved their position on this. It is evident that virtually all provinces are taking up the perceived Pepin-Robarts position of leaving this matter to provincial determination.

Proposed Federal Strategy

From the foregoing summary it is evident that the federal government will have to be prepared to. make a number of concessions in the upcoming discussions in order to seek a broader consensus on an entrenched Charter.

To this end it is proposed to lay before the committee of officials on Tuesday, August 26 a revised discussion draft Charter that would contain the following elements:

1. An introductory clause stating that the rights and freedoms are subject to the reasonable limits generally accepted in a free and democratic society. This would enable the removal of the various limitation clauses that were provided in the earlier draft, thus arguably giving the courts a broader power to recognize limits imposed on rights than if the precise grounds for justifying limits were spelled out. This may appeal to those provinces that were having problems with the meaning of the specific limitation clauses.

2. Fundamental freedoms and democratic rights essentially as in the earlier draft but with same minor modifications to meet provincial concerns.

3. Legal rights revised substantially to make their meaning and application clearer, especially with regard to criminal and penal matters. In this regard, the principal provision relating to rights in civil and administrative proceedings would be dropped (the right to a fair hearing for the determination of one's rights and obligations).

Also, the rule respecting self-crimination has been clarified and the courts will be prevented from adopting the American rule respecting the exclusion of all illegally obtained evidence (by virtue of revised remedies sections (26 & 27)). These changes are all designed to meet provincial concerns.

4. Mobility rights maintained in the same form as before, but subject to possible reconsideration in light of the section 121 draft on "Powers over the Economy". (It may be desirable to consider transferring the rights to acquire property and to seek employment from the mobility rights to the provisions for an economic union.)
5. Non-discrimination rights revised to specify the grounds of forbidden discrimination. This was an approach advocated by some provinces. However, it may prove equally unworkable and consideration may have to be given to eventually eliminating this category.

6. Property rights would be eliminated as a category in response to near unanimous provincial opposition to it.

7. Official languages of Canada would be tied in. to the principles of section 2 of the Official Languages Act (equality of status of the two languages in federal institutions) to assure provinces that official languages were not being imposed on them.

8. Languages at federal level would remain unchanged since they engendered no real provincial opposition.

9. Languages at the provincial level would be as before with three important changes: (a) Ontario and Manitoba would be offered a five year delay to print and publish statutes in both languages and a ten year delay to implement the use of both languages in the courts; (b) the obligation to ensure that a witness in criminal and penal proceedings be heard in the official language of his choice would be dropped; and (c) it would be made clear that provincial obligations to provide services to the public in both languages would be matters solely for determination by the legislatures.

10. Minority language education rights would be modified to employ the test of "mother tongue" of the parents thus making it clearer for provinces in determining who would qualify for minority language instruction. However, the determination by provinces of the criterion and the question of "where numbers warrant" would remain subject to judicial review -- a point that the provinces will likely continue to oppose. In addition, it is possible that Quebec may be offered a ten year delay period to give full effect to these rights. [Note: all of the foregoing is dependent on approval being received from the Prime Minister based on the memorandum sent to him on August 14.]

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In addition the Charter would continue to include provisions or he recognition of unenumerated rights that may exist including those that may pertain to native peoples, and for a more limited scope of remedies that the courts may grant. This latter is designed to meet a concern of many provinces that the remedial powers were too broad.

As noted above, it is assumed that this revised Charter draft will be discussed by the committee of officials prior to further discussions by Ministers. However, if the subject is raised in ministerial discussions before officials have an opportunity to consider the draft, it is recommended that the Minister make the following points:

- that the revised draft h s to be prepared to take into account a number of concerns raised earlier by provincial officials;
- that the general limitation clause in section 1 (which replaces the specific limitation clauses) is designed in part to avoid confining the courts to any specific grounds for permitting limits to be placed on rights, thus giving wider latitude to possible grounds for limits being recognized by the courts;
- that legal rights have been more clearly defined and limited in the civil and administrative areas, including clarification of the self- incrimination rule and non-admissibility of evidence;
- that non-discrimination rights have been narrowed and property rights dropped; and
- that concessions are proposed respecting the scope and implementation of provincial language rights.

- that, in light of the foregoing, the committee of officials be requested to review the revised draft and report back to Ministers.

In addition to all the. foregoing, it is proposed that the committee of officials pursue further discussions on including in the Charter an override clause which would permit an ordinary law to expressly override specific Charter rights. While the federal position will initially be to convince the provincial officials that such a clause is undesirable and unnecessary, if there is considerable provincial sentiment for including a provision, the federal officials would propose a clause which might permit an override under one or more of the following conditions:

(a) that enactment of an override law would require some special majority vote, eg. 60%
(b) that any law with an override clause would have a limited life, eg. five or ten years, unless in the meantime an amendment to the Charter had been made remedying the problem perceived by the law.

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In summary, discussions by officials would first focus on the revised draft Charter seeking as much consensus as possible and underlining again the federal government's commitment to an effective entrenched Charter for both levels of government. Next, there would be discussion on the possible inclusion of a satisfactory override clause. Finally, the committee would turn to the two remaining aspects of its original mandate: a Charter applicable initially only at the federal level and a possible strengthening of the existing Canadian Bill of Right applicable only to federal laws. Since neither of these has any real merit, little time would be devoted to their consideration.

[Included in the background notes as an elaboration on the foregoing Status Report are a revised Charter draft and copies of memoranda to the Prime Minister dated August 5 & 13 dealing with the revised Charter and the question of a provision on minority language education rights. The Charter draft is subject to further drafting modifications and to substantive changes in minority language education rights depending on the response from the Prime Minister on the latter point.]

(I.) MEMORANDUM FOR THE PRIME MINISTER, POSITIONS ON THE TWELVE ITEMS FOR THE CCMC AND FMC

AUGUST 20, 1980

Source: Memo for the Prime Minister, Position on the Twelve Items for the CCMC … (Aug. 20, 1980)[1]

CONFIDENTIAL

August 20, 1980

MEMORANDUM FOR THE PRIME MINISTER

Positions on the twelve Items for the CCMC and FMC

Attached are summaries of positions on each of the twelve negotiating items that we would recommend Mr. Chretien place on the table at the CCMC next week and of positions that would be reserved for use at your discretion at the FMC from September 8 to 12. In accordance with the strategy memoranda that you have considered, some negotiating room has been retained to provide you with flexibility in the final stages of the negotiating process.

The items are listed in the order that we have recommended for their consideration at the FMC so that, in reviewing the flexibility that is left for you, you can do so in the sequence in which opportunities for use of that flexibility will be presented to you in the course of the FMC.

This memorandum has been discussed with Mr. Chretien and he agrees with it. Also, in accordance with the decision of Cabinet, both the CCMC and FMC positions have been discussed with, and have the support of the appropriate line departments.

1. Charter of Rights

[…]

-2-

[…]

FMC

At the FMC, some of the following adjustments in the federal position might be contemplated:

(a) Limitation clauses: possible indication that consideration might be given to use of more specific limitation clauses for certain categories of rights, if provinces are strongly opposed to the federal proposal that will be made at CCMC to delete them (this would be contingent upon federal officials being able to draft suitable new limitation clauses);

[1] Full citation: Memorandum for the Prime Minister, Position on the Twelve Items for the CCMC and FMC (Aug. 20, 1980). This memo includes a telex from Roger Tassé on the Override of Section 28 in Section 33 of Charter and Wording of Mobility Rights Derogation under Section 6(4).

(b) Legal rights: possible containment of all legal rights to the criminal and penal domains only (a reassessment of federal position on specific legal rights would be made after the CCMC);

(c) Non-discrimination rights: possible withdrawal of this category of rights in face of continued provincial opposition;

(d) Provincial language rights: possible further concessions to Ontario in implementation of language rights in courts, e.g., possible implementation on a regional basis where numbers warrant (this assumes Ontario will no accept the delay period offered at the CCMC);

(e) Minority language education rights: possible offer to Quebec of a delay period of up to ten years to give effect to minority language education rights (referred to in Mr. Tasse's August 13 memorandum to you):

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(f) Override Clause in Charter: while discussion of including an override (notwithstanding clause, particularly, for legal rights, would take place during the CCMC meetings, any decision to accept the proposal would be deferred until the FMC. (Although we recommend that, as you indicated in your section to one earlier memorandum, the inclusion of an override clause should be resisted at the FMC.)

[…]

Michael Kirby

(I.) CONTINUING COMMITTEE OF MINISTERS ON THE CONSTITUTION, CHARTER OF RIGHTS: REPORT TO MINISTERS BY SUB-COMMITTEE OF OFFICIALS

AUGUST 29, 1980

Source: CCMC, Charter of Rights, Report to Ministers (Aug. 29, 1980)[1]

DOCUMENT: 830-84/031

CONFIDENTIAL
August 29, 1980

CHARTER OF RIGHTS

Report to Ministers by Sub-Committee of Officials

1. Since its report of July 24, 1980 to Ministers, the sub-committee of officials has met this week to consider:

(a) a revised federal discussion draft Charter dated August 22, 1980;
(b) a provincial proposal dated August 28, 1980 for modifications and deletions in the federal discussion draft;
(c) the practicability of including an override (non obstante) clause in an entrenched Charter; and
(d) the possibility of strengthening the Canadian Bill of Rights as an alternative to an entrenched Charter.

2. As before discussions on these items proceeded without prejudice to any province's position on the principle of entrenchment itself, it being felt that this was a matter for ministerial consideration in light of this report.

Federal Discussion Draft of August 22, 1980

3. This draft was prepared in light of concerns of provincial officials noted in the earlier report and sought to cover in particular the following points:

- to remove the specific grounds for limiting rights by specifying in section 1 that all rights are subject to generally accepted reasonable limits,
- to clarify and limit the scope of legal rights,
- to ensure that courts could not exclude improperly obtained evidence on that ground alone,
- to contain the scope of non-discrimination rights,
- to eliminate the category of property rights,
- to allow for some restrictions on mobility rights[2],

[1] Full citation: Continuing Committee of Ministers on the Constitution, "Charter of Rights: Report to Ministers by Sub-Committee of Officials," Doc 830-84/031 (Aug. 29, 1980).

[2] A revised draft on mobility rights was tabled by federal officials to correspond with amendments being proposed to Section 121 of the BNA Act. A copy is annexed to the federal draft Charter of August 22, 1980. [Original document footnote]

- to eliminate the right of witnesses in criminal and penal proceedings to give evidence in English or French as they choose.

-2-

In addition, officials of Ontario and Manitoba were invited to consider a delay provision for the implementation of the language rights provisions respecting statutes (five years) and courts (ten years).

4. Following examination of the revised draft, officials of most provinces remained concerned about both the scope of rights covered by the draft and by the language of many of its provisions. To respond to these concerns provincial officials met and prepared a joint provincial proposal for a Charter in the event one was to be entrenched. This was subsequently reviewed with federal officials.

Provincial Proposal for a Charter, August 28, 1980

5. The changes which this proposal would make in the federal draft are set out in a tabular comparison of Charter of Rights drafts annexed hereto and carry the unanimous support of provincial officials except as otherwise indicated in the table.

6. The principal changes may be summarized as follows:

- several of the legal rights would be deleted,
- other of the remaining legal rights would be qualified by a "lawful grounds and prescribed procedures" test rather than a "reasonable or non-arbitrary" test,
- non-discrimination rights would be deleted,
- mobility rights, if included in the Constitution, would not be in the Charter,
- undeclared rights would be deleted,
- the remedies section for breach of rights would be deleted, and
- the paramountcy of Charter rights provision would be qualified to ensure that admissibility of evidence rules would not be superseded.

7. Provincial officials did not make any joint proposal on official languages and language rights, feeling that further discussion by Ministers of the federal draft provisions was required on this matter.

8. Federal officials indicated in response to the joint provincial proposals that a number of changes advanced would be given close consideration in a re-examination of the federal draft. With respect to some of the others, serious doubts were expressed about the acceptability of proposed changes and deletions.

Legislative Override Clause

9. Some consideration was given to the possible inclusion in an entrenched Charter of an override clause whereby a legislative body could expressly provide that a law would operate notwithstanding a Charter right. While some do1;1h was voiced about the desirability of including such a provision, there was general agreement that further consideration should be given this matter.

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10. One mechanism that was discussed, in the event it is decided that an override clause is necessary (and this could depend on the ultimate scope and wording of an entrenched

Charter), is a requirement that any law enacted under an override provision be adopted by a 60% majority of the legislative body and that any such law would expire after a specified time period, e.g., five years unless repealed earlier. There was no discussion of the particular categories of rights to which any override clause might apply.

Strengthening Canadian Bill of Rights

11. As an alternative to entrenching a Charter, some consideration was given to the possibility of strengthening the Canadian Bill of Rights by making it a clear statement of effective rights rather than an interpretive statute. In discussion of this matter, it was noted by federal officials that this would not be seen as a viable approach to protecting basic rights since it

- would apply only at the federal level,
- would not cover the range of rights contemplated in the federal draft, particularly language rights, and
- would not guarantee common basic rights to persons throughout Canada.

Issues for Ministers

12. In light of the foregoing summary, the following issues arise for consideration and determination by Ministers:

(1) Should there be an entrenched Charter of Rights?

(2) If so, which categories of rights should be included from among the following categories:

(a) fundamental freedoms
(b) democratic rights
(c) legal rights (including the scope of such rights)
(d) non-discrimination rights
(e) mobility rights
(f) language rights at the federal level
(g) language rights at the provincial level
(h) minority language education rights?

(3) Should inclusion of an override clause along the lines described above be contemplated?

13. Annexed hereto are the following documents:

(1) Federal Discussion Draft of Charter, August 22, 1980
(2) Provincial Proposal for a Charter, August 28, 1980
(3) Provincial Tabular Comparison of Charter Drafts.

Roger Tassé
Chairman

(I.) REPORT TO CABINET ON CONSTITUTIONAL DISCUSSIONS, SUMMER 1980, AND THE OUTLOOK FOR THE FIRST MINISTERS CONFERENCE AND BEYOND

AUGUST 30, 1980

Source: Report to Cabinet on Constitutional Discussions, Summer 1980 … (Aug. 30, 1980)[1]

MINISTERS' EYES ONLY

Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers Conference and Beyond

[…]

II. The Issues

This section summarizes federal and provincial positions on the twelve items under negotiation as at the end of the August 26th to 29th CCMC meetings, highlights significant outstanding issues and sets out positions that the Prime Minister might adopt at the First Ministers Conference. It then outlines a proposed strategy for the FMC based upon the mood of the August CCMC, the positions on the twelve items at the end of those meetings and the overall strategy for the negotiations developed earlier in the summer. It concludes with an estimate of the position in which the federal government might find itself at the conclusion of the FMC.

The twelve items are not dealt with in the order in which they were originally identified for consideration by the CCMC, but rather in the order proposed for their consideration at the FMC in the Prime Minister's communication to the Premiers. In order to keep this part as brief as possible, the official report from the CCMC to the FMC is annexed. That report deals with each of the items in greater detail and includes any "Best Efforts Drafts" "Federal Drafts" and "Provincial Drafts" referred to in this section.

1. Charter of Rights

(1) Federal and Provincial Positions

At the direction of CCMC Ministers, a subcommittee of officials met during the week of August 25 to consider:

(a) a revised federal discussion draft Charter dated August 22, 1980, which was prepared in light of concerns raised by provincial officials during the Vancouver meetings;

(b) a provincial draft Charter dated August 28, 1980;

[1] Full citation: Report to Cabinet on Constitutional Discussions, Summer 1980, and the Outlook for the First Ministers Conference and Beyond (Aug. 30, 1980).

(c) an override (non-obstante) clause in an entrenched Charter;

(d) the possibility of strengthening the Canadian Bill of Rights as an alternative to an entrenched Charter.

Officials discussed these items without prejudice to any province's position on the principle of entrenchment.

The Federal Discussion Draft dated August 22, 1980

Most provinces continued to have some concerns about the federal draft even though a number of significant concessions had been included (revised limitation clause, modification of legal rights, deletion of property rights and delays for Ontario and Manitoba on implementation of provincial language rights).

The Provincial Discussion Draft dated August 28, 1980

Provincial officials met and prepared a joint provincial proposal for a Charter in the event one was to be entrenched. Provincial officials did not consider language rights feeling that further discussion on these rights was required at the Ministers' level.

There was general agreement from all provinces with the federal proposals with respect to the general limitation clause, Fundamental Freedoms, Democratic Rights and some Legal Rights.

The principal changes proposed by provincial officials were:

- deletion of the legal rights and qualification of others by a "lawful grounds and prescribed procedures" test rather than a "reasonable-or non-arbitrary" test.
- deletion of non-discrimination rights, the remedies section for breach of rights and mobility rights (provincial officials suggested if the latter category was included in the Constitution it should not be in the Charter).
- qualification of the paramountcy of Charter rights to ensure that admissibility of evidence rules would not be superseded.

The provincial draft was subsequently reviewed with federal officials. Federal officials indicated that a number of changes would be given consideration. However, serious doubts were expressed about the acceptability of some changes proposed in the legal rights category and about the deletions of non-discrimination and mobility rights.

Legislative Override Clause

Some doubt was voiced about the desirability of including such a provision. Many provinces felt they could not respond to this question until they knew what categories of rights would be included in the Charter. There was general agreement that further consideration should be given to this matter. Federal officials raised doubts respecting the necessity for an override clause but suggested that if there should be one it should be restricted by requirements that any law enacted under an override provision be adopted by a 60% majority of the legislative body and expire after a specified time (e.g., 5 years).

Strengthening the Canadian Bill of Rights

In discussion of this matter federal officials noted tha½even if the Bill of Rights was made into a clear statement of effective rights rather than an interpretive statute, these rights would continue to apply only at the federal level, would not cover the range of rights contemplated in the draft Charter and would not guarantee basic rights to persons across Canada.

Ministers' Discussions

Ministers agreed to refer the report of the committee of officials to the First Ministers.

Ministers also indicated their position with respect to entrenchment of a Charter. Canada, New Brunswick, Newfoundland and Ontario indicated agreement with entrenchment, Ontario specifying they agreed with a limited Charter, and other provinces indicated they opposed an entrenched Charter.

Language rights, mainly minority education language rights, were briefly discussed. The principal participants were Canada, Quebec and Ontario. Quebec eld to its current position, Ontario indicated willingness to entrench minority education rights. Other provinces remained silent and likely hold to the positions they put forward at earlier meetings. Some provinces, notably New Brunswick, Ontario, Prince Edward Island and Newfoundland favour entrenchment, but nearly all others feel the Pepin-Robarts approach of provincial legislation is the only acceptable routs.

(2) Significant Issues

While progress at the August 26th to 29th meetings was significant, there remain areas of fundamental difference between the federal position and that of some or all of the provinces. One of these is highlighted by the omission from the provincial draft of any reference to non-discrimination rights. The provincial proposal to deal with mobility rights in the context of the economic union is undoubtedly motivated by their view that the federal government is much more likely to proceed this autumn on a Charter of Rights than it is on an economic union provision. Finally, undoubtedly the most significant issues remain the concept of entrenchment and the question of language rights.

(3) FMC Position

At the FMC some of the following adjustments in the federal position might be contemplated:

(a) Legal Rights: modifications to the language of some legal rights in light of the provincial concerns, development of provisions to preclude courts from adopting American jurisprudence excluding illegally obtained evidence in all cases, possible withdrawal of invasion of privacy right and right to be tried within a reasonable time;
(b) Non-discrimination Rights: possible withdrawal or re-definition of this category of rights in face of continued provincial opposition;
(c) Provincial Language Rights: in order to meet concerns of Ontario, possible further concessions to Quebec, New Brunswick, Manitoba and Ontario in implementation of language rights in courts, e.g., possible implementation on a regional basis where numbers warrant. This offer would only be made if Ontario did not feel that the offer of a ten-year delay was sufficient. Ontario did not give a firm answer on the ten-year delay at the CCMC meeting.
(d) Minority Language Education Rights: possible offer to Quebec of a delay period of up to ten years to give effect to minority language education rights.

(e) Override Clause: possible inclusion of an override clause whereby a legislative body could expressly Provide that a law would operate notwithstanding . certain Charter Rights. Fundamental Freedoms, Democratic Rights and Language Rights would not be subject to this override clause. In the event that it is decided to include an override clause, it could be made subject to such requirements as a 60% majority vote of the legislative body and an automatic expiry of any law enacted after a specified time period, e.g., five years.

Conclusion

The summer of CCMC negotiations has created circumstances in which there is now a possibility of reaching agreement on a package of constitutional amendments. This possibility has developed largely because of the three elements of the federal negotiating strategy.

- the statements that the federal government was going to take action this fall and would do so unilaterally if necessary. While this was initially not believed by most of the provinces, events of the last week (Mr. Chretien's two speeches, the leaked Pitfield memo, etc.) have finally convinced the~ that the federal government is deadly serious this time. This conviction will· cause several provinces to come to the FMC wanting an agreement, but for political reasons needing in that agreement at least one item which they regard as being of political significance in their own province;
- the distinction between the People's Package and the Package of Government Powers and Institutions and, most importantly, the refusal of federal negotiators to bargain elements in one package against elements in the other. This, combined with the Gallup poll showing the popularity of the People's Package, and the insistence by federal negotiators that unilateral action would be on the whole package has led to closer agreement on a Charter of Rights than there has been before. The task at the FMC will be to broaden agreement on the Charter, in particular to get it to include language rights and mobility rights;
- the direct linking of Powers over the Economy (a new Section 121) with the resources item and the federal position that there would be no agreement on resources without agreement on Section 121.

Within the confines of maintaining these three key strategic principles, the challenge of the FMC will be to try to move the provinces toward an agreement recognizing that:

a) an agreement on a ~~smaller~~ *[broader]* package is infinitely preferable to unilateral action on a ~~larger~~ *[smaller]* package provided that the ~~smaller~~ *[broader]* package includes the elements of the People's Package.
b) package provided that the s r package includes the elements of the People's Package; the federal government must be seen to b~ negotiating in good faith, and to be trying hard to reach a negotiated solution, so that unilateral action is publicly acceptable if it becomes necessary;

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, PROPOSAL FOR A COMMON STAND OF THE PROVINCES, QUEBEC

SEPTEMBER 8-12, 1980 [SEP 13?]

Source: Federal-Provincial Conference of First Ministers, Proposal for a Common Stand (Sep. 13, 1980)[1]

DOCUMENT: 800-14/085

FEDERAL-PROVINCIAL CONFERENCE
OF
FIRST MINISTERS ON THE CONSTITUTION

Proposal for a common stand of the Provinces

QUEBEC

Ottawa
September 8-12, 1980

The attached text has been prepared by Quebec for the purpose of specifying the common stand of the provinces on the series of subjects discussed by the Conference.

It was distributed to the provincial delegations and discussed by the ministers on Thursday, September 11,and served as a basis for the discussion by the First Ministers of the Provinces on Friday morning, September 12.

The appendices have been added to assist in understanding the text.

Québec Delegation
Ottawa, September 13, 1980.

DISCUSSION DRAFT

[The Provinces of Canada unanimously] agree in principle to the following changes to be made to the Constitution of Canada. It is understood that these changes are to be considered as a global package and that this agreement is a common effort to come to a significant first step towards a thorough renewal of the Canadian federation.

1. Natural resources

1979 Best effort draft (APPENDIX A)

2. Communications

[1] Full citation: Federal-Provincial Conference of First Ministers on the Constitution, "Proposal for a Common Stand of the Provinces, Quebec," Doc 800-14/085 (Sep. 13, 1980).

Provincial consensus draft, August 26, 1980 (APPENDIX B)

3. Upper Chamber
Best effort draft for a Council of the Provinces, as an interim solution. (weight of vote and implementation to be set after consensus reached on horizontal federal powers) (APPENDIX C)

4. Supreme court of Canada

Entrenchment
6-5 at least on constitutional matters
Alternate chief-justice
Appointment procedure, consultation & consent, (no dead-lock mechanism) (APPENDIX D)

4a. Judicature

Repeal of S.96
Constitutional guarantees (APPENDIX E)

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5. Family law

Sub-committee draft (APPENDIX F)

6. Fisheries

Sub-committee draft, July 21, 1980 (APPENDIX G)

7. Off-shore resources

Principle of equal treatment for on-shore and off-shore resources

8. Equalization

Manitoba – Saskatchewan draft less paragraph 3. (APPENDIX H)

9. Charter of rights

Fundamental freedoms
Democratic rights – all existing laws deemed valid
Judicial rights – non-obstante clause
Discrimination rights
Official languages of Canada
Use of official languages in federal institutions & services
S.133 applicable to Ont., Que, N.B., Man.
Multilateral reciprocity agreement to be concluded without delay (Bill 101: Canada clause).

10. Patriation

Alberta Amending Formula (APPENDIX I) for matter subject to opting-out, with provision for financial arrangements between governments.

Victoria formula for other matters (APPENDIX J)

-3-

Implementation of patriation delayed until unanimous approval (APPENDIX 1)

11. Powers over the economy

No new S.121 (or Saskatchewan draft) (APPENDIX K)
Part of new S.91(2)

12. Preamble

Quebec proposal (APPENDIX L)

If a satisfactory interprovincial consensus is reached in this way, it must be accompanied when tabled by an announcement of the following measures:

(1) As soon as the federal government has given its assent to this consensus, the matters will be returned to the ministers' committee for final drafting of the texts in their legal form.
(2) Another list of subjects must be established to be covered by constitutional discussions at the ministerial level in the following months:

- the horizontal powers of the federal government; (spending power, declaratory power, power to act for "peace, order and good government", etc.);
- culture;
- social affairs;
- urban and regional affairs;
- regional development;
- transportation policy;
- international affairs;
- the administration of justice.

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(3) Another conference of First Ministers must be called for December to approve the texts drafted on the twelve subjects (initial list) and to discuss the results of the work done on the new subjects (second list).
(4) If the results of this work are satisfactory, then the Canadian Parliament could adopt its address to the Queen at the beginning of 1981.
(5) Another Conference of First Ministers to be held in February 1981 to approve the texts drafted on the second list.
(6) From February 1981: adoption of the resolutions of the ten Legislatures and Parliament to bring patriation into effect and to implement the second list according to the amending formula.
(7) Final Act of the British Parliament to be adopted hopefully in June 1981 implementing the amendments of the first list.[1]

[1] Several appendices are part of the document, but are not related to the Notwithstanding clause.

(I.) MEMORANDUM, LEGISLATIVE OVERRIDE OF CHARTER RIGHTS

MARCH 5, 1981

Source: Memorandum, Legislative Override of Charter Rights (Mar. 5, 1981)

March 5, 1981

Legislative Override of Charter Rights

In his paper of February 3, 1981 entitled "Another Way of 'Entrenching' A Charter of Rights in the Canadian Constitution", Professor G.P, Browne of Carleton University (History Department) advocates a Charter of Rights that would have a "priority status" over ordinary legislation rather than being entrenched in the sense that modifications could only be made by the constitutional amending formula.

His reason for this approach stems from his belief that a fully entrenched Charter is incompatible with the basic principle of parliamentary supremacy in that entrenchment would

(1) transfer ultimate legislative power over social and cultural policies from the legislatures to the courts;

(2) shift the balance of power in favor of the federal government;

(3) increase doubts as to the impartiality of the judiciary;

(4) decrease respect for the rule of law; and

(5) reduce the role of legislators.

Before dealing with his proposal for a "priority status" Charter, it may be useful to make a few comments on Professor Browne's assertions set out above.

1. Transfer of Ultimate Legislative Power

In empowering the courts to review the compatibility of legislation with entrenched basic rights to determine if there has been an infringement of these rights, there is no transfer of ultimate legislative power to the courts.

In the first place, the courts do not legislate but adjudicate. Consequently, their role would be to examine a provision of a law to determine whether it is in conflict with a constitutionally guaranteed right, eg. does a law which prevents persons from assembling in an orderly and peaceful manner to practice their religious beliefs contravene the Charter guarantees of freedom of religion, association and peaceful assembly. Or, does the holding of a person in detention for three weeks before bringing him before a judge deny the right to habeas corpus, These are even now questions upon which the courts adjudicate under statutes or common law. Section 172 of the Criminal Code makes it an offence to disturb or obstruct an assemblage for religious worship and the common law assures the right to habeas corpus.

In the second place, entrenched rights do not prevent the legislatures from enacting laws on matters covered by these rights. For example, freedom of religion does not mean that Parliament cannot enact laws making what some would claim to be a religious practice a criminal offence (eg. polygamy) or that provincial laws respecting zoning or disturbance of the peace will not apply to religious groups. Or again, the entrenched language rights will not preclude provinces from requiring either English or French as the primary language of business or work or requiring that students graduating from minority language schools possess proficiency in the majority language. Consequently, legislatures will continue to possess the primary responsibility for legislating matters of social, economic and cultural policies. The only restraint by the courts will be where they determine, as a matter of law, that certain legislation impinges unduly on basic rights or freedoms. As the United States Supreme Court and the Supreme Court of Canada have frequently observed: the court's concern is not with the wisdom of policy underlying the legislation, but rather with whether the legislation falls within the limits of the constitutional powers.

In the third place, even if the courts in exercising their constitutional review powers reach conclusions that are considered to be incompatible with needs or good of society, the legislators possess the ultimate power through constitutional amendment to reverse court decisions. Consequently, ultimate parliamentary sovereignty continues to prevail in the same way as it does when courts reach unacceptable decisions on matters involving the division of powers between Parliament and the provincial legislatures.

2. Shift of Power to Federal Government

The Charter does not contemplate or, indeed, authorize any shift of powers from the provinces to the federal level. Nor does it have the centralizing aspect suggested by Professor F.L. Jackson in his paper.

A simple reading of the Charter makes it quite clear that the effect of the Charter is to place restraints on both levels of government to interfere unduly with the basic rights of people. Were this not evident from the provisions themselves, then sections 30 and 31 place it beyond doubt. Section 31 states clearly that the Charter applies to both levels of government and section 30 assures that nothing in the Charter extends the legislative powers of any body.

Some seem to believe that the mobility rights in the Charter (section 6) place restrictions only on provincial laws that discriminate on the basis of residence. This is not the case. "Laws or practices of general application in force in a province" include federal as well as provincial laws and practices.

-3-

The idea of the Charter creating a shift of power to the central government may arise from an erroneous attempt to compare the Charter with the U.S. Bill of Rights. In the latter document, certain of the rights guaranteed, such as the 14th amendment "equal protection of the laws" and the 15th amendment "right to vote", explicitly empower Congress to make laws for the enforcement of these rights. There is no comparable provision in the Charter.

Finally, it might be noted that, in relation to fundamental freedoms at least, the Charter probably imposes greater restraints on Parliament than it does on provincial legislatures. This, because the Supreme Court has in a number of earlier civil rights cases struck down provincial laws dealing with freed om of religion, speech and the press on grounds that such laws could only be enacted by Parliament.

3. Impartiality of Judiciary

While, rightly or wrongly, some provinces have alleged that the Supreme Court has shown a federal bias in deciding constitutional cases involving the distribution of legislative powers, it is difficult to imagine how any similar suspicions could be generated in case s involving infringement of Charter rights.

What the courts will be determining in these cases is not a "contest " between competing claims to legislative power by two levels of government, but rather claims by individuals or groups that a law, be it federal or provincial, is violative of Charter rights. Surely, this type of case cannot give rise to doubts as to the impartiality of the judiciary. Judges for many years have been adjudicating disputes between individuals and governments.

4. Decreased Respect for Rule of Law

This suggestion must be totally without merit. Surely the very basis of the rule of law is the role which the courts play in assuring that the law is applied to and observed by all, so that we live not by the rule of men but the rule of law. This was the very point made by the Supreme Court in the landmark case of Roncarelli v. Duplessis (1959) in which it was held that even the Premier and Attorney General of Quebec was subject to the ordinary laws in the ordinary courts.

Far from decreasing respect for the rule of law, an entrenched Charter interpreted by the courts would enhance respect for the rule of law by ensuring that legislators and bureaucrats cannot arbitrarily deprive individuals of their basic rights.

5. Reduce the Role of Legislators

As has already been indicated above, an entrenched Charter will not deprive the legislators of role in determining social issues. Nor will it diminish their role in protecting rights. Indeed the Charter will no doubt heighten their awareness of their role in this regard, encouraging them to scrutinize laws and delegated powers much more closely to ensure that Charter rights are not infringed.

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A Charter with "Priority Status"

Professor Browne's thesis, which he admits is not new would be to have a Charter of Rights where the courts would initially determine if a particular law was in violation of any specified rights. If the court made such a determination and the affected legislature determined that it did not approve of the decision, it could then re-enact the law, either after a certain delay period or with a special majority vote with a free vote among members. He feels that such an arrangement would create a proper balance between "judicial supremacy" and "parliamentary supremacy".

Such a "legislative override" provision now exists in the Canadian Bill of Rights whereby Parliament may declare (as it has done with the War Measures Act) that a law is to operate notwithstanding the Bill of Rights. No special majority is required for such an enactment.

Approaches along these lines were considered by the Continuing Committee of Ministers on the Constitution during the past three years, but it was the conclusion of most provinces and

the federal government that such a form of "entrenchment" was undesirable for a number of reasons.

First, experience with the Canadian Bill of Rights (a "priority status" enactment) has demonstrated that where parliamentary supremacy is maintained in the enactment, the courts are extremely reluctant to invoke the Bill of Rights to strike down offending legislation. Given the existence of parliamentary supremacy, the courts remain fully deferential to the will of the legislators, and conclude that where they have enacted a law which appears contrary to the Bill of Rights, they must have had the intention to do this. Consequently, simply as a matter of psychology, a "priority status" Charter would likely remain an ineffective device in the hands of the courts.

Second, a "legislative override" mechanism lays open to abuse the very integrity of basic rights that an entrenched Charter is designed to ensure. Rights, by their nature, are designed to protect the individual or the minority. If the majority in a legislature has determined in the first place to violate these rights, then it is doubtful that the individual or minority is going to prevent this from happening a second time. (Would the Manitoba or Quebec legislatures hesitate to reverse the decisions in Blaikie or Forest if they possessed the constitutional power to do so?) While requiring a special majority vote and / or a free vote might make the override of a court decision more difficult, it would not prevent the outcome.

Finally, the "legislative override" approach is simply a first step toward opting out of Charter rights by various jurisdictions and consequently creating a "checkerboard" Charter with rights varying from jurisdiction to jurisdiction. This would defeat one of the principal purposes of entrenching Charter rights in the first place — to ensure that Canadians enjoy the same basic rights wherever they reside or travel to in Canada.

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For all these reasons, a partially entrenched Charter would appear to be a rather unsatisfactory means of enshrining basic rights in the constitution.

(I.) MEMORANDUM FROM MICHAEL KIRBY FOR THE PRIME MINISTER RE POSSIBLE CHANGES THAT MIGHT BE ACCEPTABLE IF THEY RESULT IN A PROVINCIAL CONSENSUS

OCTOBER 24, 1981

Source: Memorandum from Michael Kirby for the Prime Minister, Provincial Consensus (Oct. 24, 1981)[1]

SECRET

October 24, 1981

MEMORANDUM FOR THE PRIME MINISTER

Possible Changes that might be Acceptable if they Result in a Provincial Consensus

This note discusses the kind of possible changes to the constitutional measure that the government might be prepared to accept in order to attract increased provincial support. It thus relates to the process by which substantial provincial consent might be secured as distinct from the content of the package, which is the subject of a separate note.

These possible changes – or trade off positions – represent constitutional packages which are somewhat less than the implementation of the full resolution immediately upon proclamation and more than (or better for the federal government than) our final compromise offer. They represent options that, for one reason or another, the federal government cannot offer but that it might find acceptable if they were offered by a province and were to carry substantial provincial support.

We have identified three such packages:

1) The B.C. package
2) A "non-obstante" clause
3) The Toronto consensus

[what of the [illegible]?]

1. The B.C. Package

Our understanding is that such a package would roughly take the following form:

a) Patriation
b) unanimity for two *[[illegible]this timing with present delay]* years followed by a referendum to decide between a provincial and federal amending formula, if there is no agreement
c) Splitting the remainder of the resolution into two Parts: The Charter and Canadian Conventions.

[1] Full citation: Memorandum from Michael Kirby for the Prime Minister re Possible Changes that might be Acceptable if they Result in a Provincial Consensus (Oct. 24, 1981).

-2-

The "Canadian Conventions" would include minority language education rights, mobility rights, and the equalization provisions now in the resolution. Also included in this Part could be democratic rights and, possibly, fundamental freedoms. This Part of the resolution would go into effect immediately and would be binding on all jurisdictions.

The remainder of the Charter of Rights (legal rights, equality rights) as it now stands in the resolution, along with Native rights would be negotiated over a two-year period after which it would come into effect either with an opting-in provision or by application of the amending formula that will be in effect at the end of the two-year period (or possibly four-year depending on whether there is a referendum on the amending formula or not). If the Victoria formula were to be in force at that time, the Charter could be brought into force through federal-provincial agreement or *[Does B.C. say [illegible]?]* through a national referendum provided that the referendum passed regionally as well as nationally as now called for in the resolution. Even if Victoria was not in force at that time, there could be a provision for the coming into force of the Charter but only after a referendum passed regionally as well as nationally as now called for in the resolution.

It is not clear from the discussions we have had with the B.C. people how the other language rights and the natural resources provisions will be dealt with in the B.C. package. Insofar as language rights (other than education rights) are concerned, we would insist that they come into force immediately, possibly as part of the 11 Canadian Conventions" since they affect only those governments that have agreed to them. Different considerations apply to the natural resources provisions and these are discussed elsewhere in this package of material.

Looking at the merits of such a package, it is to be noted that patriation would be immediately effected and that the ultimate amending formula, if there is no federal-provincial agreement after two years of negotiations, would be decided upon by way of a referendum. On these two counts, this is essentially what the measure now provides for. Regarding the Charter of Rights, the advantage insofar as we are concerned, is that those parts of the Charter that we regard as essential (minority language education rights, mobility rights) are implemented immediately, while, at the same time, saving face for those Premiers who have argued that they do not want a Charter of Rights.

-3-

Insofar as federal objectives are concerned, it would certainly be preferable to have a situation where the two key elements of the Charter (minority language education rights and mobility rights) with possibly democratic rights and fundamental freedoms go into effect immediately and everywhere, with the remainder subject to an opting-in or opting-out provision, rather than a situation where the whole Charter s put at risk through a referendum, or we find ourselves in a checker-board situation if an opting-in or out provision were used rather than a referendum.

Of course, the key question is whether substantial provincial support will develop for such an approach. Some provinces (like B.C., Saskatchewan, perhaps Nova Scotia and P.E.I.) might find it attractive. It is clear that Quebec (because of its opposition to both minority language education rights and mobility rights) and Newfoundland (because of its opposition to mobility rights) are likely to strenuously oppose such an approach. Other provinces might also oppose such a move for a variety of reasons. However, a number of provinces might decide to go along with this approach depending on the changes that we might find acceptable in respect

of the coming into force or the implementation of the Charter and possibly the amending formula itself.

2. A Non-Obstante Clause

Under this option, the patriation and amending formula, equalization and natural resources provisions would remain as is subject to such "refinements" in respect of the amending formula as you might accept.

The Charter of Rights and the Native rights would also be immediately entrenched.

However, an amendment would be made to the measure to allow the federal Parliament and provincial legislatures to enact legislation that is in conflict with or derogates from the rights and freedoms guaranteed by the Charter and possibly the native rights provisions. In each and every such case of derogation the federal or provincial legislation would have to specially provide that the legislation is enacted notwithstanding the provisions of the Charter.

-4-

The advantage of such a provision is that it meets the argument that many Premiers have made that an entrenched Charter is not consistent with the principle of Parliamentary Supremacy. It would also meet the point that some Premiers have made that the measure should not affect or diminish the powers and rights of provincial legislatures. A "notwithstanding" clause would leave with each provincial legislature the power to make a law that is in conflict with the Charter. In other words, the provincial legislature would still be supreme.

The danger, of course, is that there might be a flood of derogations enacted by provincial legislatures. The experience, however, in Canada, with such a derogation mechanism would tend to indicate that such danger is not great.

Insofar as the Canadian Bill of Rights is concerned, in 20 years a "notwithstanding" clause has been used once. In Alberta, in 10 years, such a clause has been used once, and in Quebec, once as well, in 4 years. This shows that governments are very reluctant to pass legislation that is in conflict with what their electorate consider to be fundamental values shared by all. To do otherwise would be done at great risk and peril.

In order to ensure that such a device is only used in the most exceptional and deserving situation, we could consider providing for the following:

1) A "notwithstanding" clause would be valid for five years only. It could be renewed for another five years, which would mean that the legislature would need to debate the question before the clause would be passed again.
2) We could provide that a "notwithstanding clause would need to relate specifically both to a specific clause of the derogating legislation and the specific section of the Charter that it is in conflict with.
3) There could be a refinement that a "notwithstanding" clause must be passed by 60% or 66% of the members of the legislative assembly.

With these safeguards, we could probably accept the concept of a "notwithstanding" clause. In effect, both politically and legally, the non-obstante laws of the kind discussed here constitute a most demanding form of opting-out.

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3. The Toronto Consensus

The so-called "Toronto consensus" formula which received broad provincial support in 1978-79 provided for unanimity on changes in provisions which affect provincial ownership of or jurisdiction over natural resources. This formula would have required the consent of at least seven provincial legislatures representing at least 85 per cent of Canada's population for all other entrenched matters. Implicitly, the "Toronto consensus" gave a veto to both Quebec and Ontario (85% of the population) and to at least one province in each of the four regions (7 provinces). It gave explicit recognition to Alberta's concern (unanimity for amendments respecting natural resources.)

Ontario is now prepared to give up its veto, but would not insist that Quebec do the same. In the final analysis, Ontario can live with a seven provinces and §0% formula in which one of the provinces must be Quebec.

If this formula, with the changes just referred to, were to be agreed to by the provinces, including Quebec, we should accept it. This would represent a major breakthrough.

This option does not deal with the other provisions of the measure, like the Charter, etc. Our options in this respect are discussed earlier in this note and in separate notes.

As you will have realized, the B.C. package and the "non-obstante" deal with the Charter of Rights while the "Toronto consensus" option deals with the amending formula. This last option could therefore be merged into a broader package with either of the two other options on the Charter.

4. A Substantial Provincial Consensus

A difficult question we would be faced with in respect of any of these options would be: What is a substantial provincial consensus? Would the support of six provinces representing 60% of the population of Canada be substantial for that purpose? Would any six provinces do or should account be taken of their distribution? For example, would the support of the four Atlantic provinces, plus Quebec and Ontario be sufficient? Or would the support of all provinces except Alberta, Newfoundland and Quebec be adequate? Or would the support of all provinces except Quebec be sufficient?

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One possible measure of substantial provincial support is to be found in the amending formula (Victoria) that the federal government has proposed in the measure or possibly in amending formulae that have been proposed in the past, like the Toronto consensus. These formulae all require for constitutional changes, a national and provincial or regional consensus and recognize the special position of Quebec by extending it a veto power.

To proceed with the B.C. package without the consent of Quebec, and perhaps without the consent of one or two other provinces, would raise the question as to whether this is in accord with what the Supreme Court said on the Convention. A strong argument could be made that, conventionally, the consent of Quebec is required in matters relating to language of education in the province. The judgment of the Supreme Court leaves that possibility very much open.

In the final analysis, a difficult trade-off decision may be required as to whether it is preferable to agree to a package like the B.C. one if it were supported by all provinces except Quebec and perhaps Alberta and Newfoundland, rather than to adopt one of our compromise offers which is assigned to "conventionalize" the measure.

Michael J.L. Kirby

(I.) MEMORANDUM FROM EDDIE GOLDENBERG TO THE MINISTER [OF JUSTICE], CHARTER OF RIGHTS

OCTOBER 29, 1981

Source: Memorandum from Eddie Goldenberg to the Minister, Charter of Rights (Oct. 29, 1981)

S E C R E T

October 29, 1981

MEMORANDUM TO THE MINISTER

Charter of Rights

Further to our meeting yesterday, you wanted a list of options on dealing with the Charter. There are four major options of which some can be subdivided.

I. No basic change – binding on both levels of government

The advantage of this approach is clear in terms of having a Charter applying in the same manner across the country. The major disadvantage is that it is the approach which is least likely to achieve agreement or consensus next week.

II. Opting-in on the Charter

The advantage of this approach is that it would produce full agreement next week. The disadvantages are obvious. However, this option can be refined in different ways.

First, it could apply only if a majority of the provinces with a majority of the population opt-in immediately. The advantage would be that the Charter would actually apply at the Federal level and in most provinces. The disadvantage is that the checkerboard would remain.

Another variant would be for parts of the Charter i.e., democratic rights and fundamental freedoms,

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language and mobility to apply across the board with general opting-in for legal rights and equality rights or opting-in only if a majority of provinces agree to opt-in immediately. The advantage of this option is that political pressures would in a short period of time force all provinces to opt-in. The disadvantages of this approach are, first, that some parts of the Charter will still be imposed on those who refuse to agree; second, that there will be opposition from the federal N.D.P. and special interest groups who will not want a checkerboard with respect to equality rights; and , third, that it is very difficult to choose rationally which parts of the Charter should be applicable everywhere and which should be subject to opting in.

III. Opting-out on the Charter

This approach can be used in exactly the same way as opting-in. The only real difference is that it would create greater political difficulties for those provincial governments which do not want to be bound by the Charter. The opting -out option could have the same variants as the opting-in option. An additional variant would be to require a two-thirds majority of a legislature for opting-out.

The advantages and disadvantages of opting out are basically similar to those of opting-in apart from the added pressure on recalcitrant provinces.

IV. A Non Obstante Clause

A final option is to provide a means whereby Parliament or a legislature could enact a law contrary to the Charter by specifically declaring the intention to override. The mechanism could be restricted by requiring adoption by a two-thirds majority in a legislature and. further providing that the law would automatically expire after five years.

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The advantage of this approach (which is found in the Diefenbaker Bill of Rights and many provincial human rights statutes) is that it removes the element of compulsion from the imposition of the Charter; it would be supported by Saskatchewan; and it would provide flexibility for governments in the case of obviously bad court decisions.

The disadvantage of this approach is that it potentially removes the protection a Charter provides for unpopular minorities. For those who argue that the override clause will rarely be used, there is the counterargument that the real need for a Charter may be exactly in those circumstances.

A variant of a general non-obstante clause would be to limit it to Section 15 which guarantees rights some of which remain subject to considerable evolution. This approach would probably satisfy Premier Blakeney and would be more acceptable than opting-out of Section 15. At the same time, the question should be asked whether an override clause should apply to discrimination based on race, religion, national or ethnic origin . The real worry which Premier Blakeney has, and which many others share, is how courts will interpret discrimination based on sex, age, or disability.

Amending Formula

Another issue which we discussed yesterday dealt with the deadlock-breaking mechanism with respect to the choice of an amending formula. You should be aware that the present provision does not allow the entire provincial option to be put forward nor does it permit a different dead lock-breaking mechanism from being proposed.

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Consensus

Another issue on which you will have to focus is what constitutes a consensus. If agreement is reached with all provinces except Quebec, Alberta and Manitoba, will you be able to argue in Quebec that there is a true consensus?

Opening Statement

Finally, you will want to discuss with the Prime Minister the nature of his opening statement. He really has two options. The first is to make a short statement explaining the nature of the conference and stating that he will be flexible in private meetings. In this way, he would encourage negotiations in private and could reserve for his closing statement a public explanation of his offers.

The second option would he to put some of his offers on the table immediately and to challenge the Premiers to demonstrate their flexibility. The advantage of this approach is that the Prime Minister would immediately take the initiative; the disadvantage is that he would begin negotiating in public and would make it more difficult to turn to private sessions.

Eddie Goldenberg

(I.) MEMORANDUM FROM DEPUTY MINISTER OF JUSTICE TO MICHAEL KIRBY RE NON OBSTANTE CLAUSE

OCTOBER 29, 1981

Source: Memorandum from Deputy Minister of Justice to Michael Kirby (Oct. 29, 1981)[1]

Department of Justice

MEMORANDUM/NOTE DE SERVICE

Security Classification
SECRET

Date
October 29, 1981

TO/A: MR. MICHAEL KIRBY
FROM/ DE: Deputy Minister of Justice
SUBJECT/OBJET: Non obstante clause

Comments/ Remarques

Further to our earlier discussions concerning the possible inclusion of a non obstante clause in the Canadian Charter of Rights and Freedoms , set forth below are some observations and comments respecting the four Canadian jurisdictions having such clauses in their human rights legislation.

The Canadian Bill of Rights (1960)

The opening clause o! section 2 of the Canadian Bill of Rights provides that every federal law shall be so construed and applied as not to abrogate or infringe on the rights recognized in the Bill unless such law expressly declares that it shall operate "notwithstanding the Canadian Bill of Rights".

At the time of the enactment of the Canadian Bill of Rights, section 6(5) of the War Measures Act was amended so as to provide that any action taken pursuant to the War Measures Act is not in contravention of the Canadian Bill of Rights. As a result of this amendment, the regulations issued during the October crisis of 1970 pursuant to the War Measures Act were exempted from the application of the Canadian Bill of Rights.

These regulations were later replaced by the Public Order (Temporary Measures) Act, 1970 which expired on April 30, 1971. It was necessary to include in this Act the non obstante clause required by section 2 of the Canadian Bill of Rights. This was accomplished by section 12(1) of the Act. However, section 12(2) restricted the non obstante clause by providing that it did not override

[1] Memorandum from Deputy Minister of Justice to Michael Kirby, Non obstante clause (Oct. 29, 1981).

section 2, paragraphs (a) to (g) of the Canadian Bill of Rights except those provisions dealing with arbitrary detention or imprisonment and denial of bail without just cause.

The non obstante clause has never been included in another federal law.

Alberta (1972)

Section 2 of the Alberta Bill of Rights contains provisions similar to those of the Canadian Bill of Rights. Their effect is that any law of Alberta can override the Alberta Bill of Rights by expressly providing that it shall operate "notwithstanding the Alberta Bill of Rights".

Alberta has never enacted laws with a non obstante clause.

Saskatchewan (1979)

Section 44 of the Saskatchewan Human Rights Code provides that every law of the province is inoperative to the extent that it authorizes or requires the doing of anything prohibited by that Act "unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act".

Hence, Saskatchewan laws can , by a non obstante clause, override the provisions of the Human Rights Code which protect fundamental liberties or prohibit discriminatory practices.

No laws containing the non obstante clause have been enacted by Saskatchewan.

Quebec

The Quebec Charter of Rights and Freedoms, adopted in 1975, protects a broad range of rights including fundamental freedoms, political rights, legal rights, equality rights and economic and social rights. However; the Quebec Charter rights can be denied by an ordinary act of the National Assembly which "expressly states that it applies despite the Charter" (see Article 52). In addition, the rights in the Charter apply only to laws which have been enacted since the adoption of the Charter in 1975 (see Article 52). Consequently, if a pre-1975 law denies protection against discrimination

or the right to a fair trial, it is not rendered invalid by the Charter.

In 1977, the Quebec Government included a non-obstante clause in the early version of Bill 101. Due to public outcry, the clause was deleted from the Bill before its enactment. Further, there are seven Quebec laws which expressly state that they apply despite the Charter of Rights and Freedoms or some of its provisions. A brief description of these laws is attached.

An examination of the attached list suggests a number of comments.

First, some of the rights the Quebec legislation sought to derogate from are not guaranteed in the Canadian Charter (v.g. #5, 6, 7.).

Second, the Quebec Charter does have a reasonable limitable cause like Section 1 of the Canadian Charter. We do not have much doubt that that Section would have permitted the kind of limits that are found in the attached list without any need for an override. Except with respect to the derogation (#5) relating to the right of parties to be represented by lawyers in

small claims courts, none of these derogations seem , in any event, to raise much problem as they seem to be reasonable, and thus one wonders why an override clause s necessary. Indeed, none of these other override has aroused much public controversy. This is in contrast with the derogation that the Quebec government had wanted to impose in respect of Bill 101 and which the government was forced to withdraw by public opinion in the province.

Third, the Quebec Charter permits an override to continue indefinitely without subsequent review by the legislature. A sunset provision would on the other hand provide a degree of control on the use of an override clause and allow public debate on the desirability of continuing the derogation further. This would allow those who feel aggrieved by the derogation to come forward and make their case.

Roger Tassé

enc.

(I.) MEMORANDUM FROM EDDIE GOLDENBERG TO MICHAEL KIRBY RE GANG OF EIGHT

OCTOBER 31, 1981

Source: Memorandum from Eddie Goldenberg to Michael Kirby (Oct. 31, 1981)

S E C R E T

October 31, 1981

MEMORANDUM FOR MICHAEL KIRBY

Last night I met with Jim Matkin and Mark Krasnick. The purpose of this note is to report on what they said and then to make some recommendations based on what I learned.

A) The Position of the Gang of Eight

(The following is a report of a conversation not an assessment)

It is very clear that the gang of eight have not been able to agree on any compromise position. They have nothing to propose other than the April Accord and none of them will make individual proposals except as a reaction to whatever might be proposed by either the Federal government or Ontario. It will only be when we make proposals that there will be any chance that the eight will begin to break apart.

Leaving Levesque aside, the toughest members of the eight are Lougheed, Lyon and Peckford. The position of British Columbia will be to stick with them for as long as possible in order to try at the appropriate time to bring them along. British Columbia wants to act as a mediator and will therefore sit back and say nothing for a long time.

In looking at each Premier, they believe that Peckford is close to Bennett and will in the end do what Bennett wants. Buchanan very much wants a deal. His only major concern is the referendum. McLean is tougher than Buchanan, but in the end will follow Buchanan.

-2-

Levesque is probably impossible. Lyon may not be completely intractable because of the political imperatives in Manitoba of looking reasonable if he can claim a partial victory. Blakeney is moderate but does riot want to be out in front of the others; he understands that he has lost a lot of credibility and does not know how to regain it; Lougheed is hung-up on the amendment formula which he considers crucial to his conception of Canada; Bennett wants to be the mediator and wants a deal. He is not concerned with substance as.much as with the process of getting a deal.

B) Tactics

In terms of tactics, the greatest fear is that the meeting will fail not because the elements of a deal are not possible but because no one will have the courage to make the first move. In addition another stumbling block will be the distrust each participant has for each other. It

was suggested that if each Premier were asked to list his ten favorite people, no name of any Premier would appear on any list!

They want the Prime Minister to be flexible and to compromise. But they are afraid of how the Prime Minister may do so. They do not want him to produce complete texts early on because this will be looked upon by those who are paranoid as a set up or as another unilateral act.

Mark and Jim disagree with each other on the opening statements. They both admit that several of the eight will be very tough and the best to expect from any of them is the expression of a general willingness to negotiate in good faith without stating where they might demonstrate their own flexibility.

-3-

Jim believes that the Prime Minister should merely outline the historical background and should state that he will make concrete proposals in private. Mark is afraid that sticking to the historical back ground will quickly lead to an argument over the interpretation of history and that the Prime Minister would do better to outline areas where he will be flexible without tabling drafts. My views are found later in this memo.

Both Mark and Jim see long private sessions with a great deal of shadow boxing at the beginning. They do not expect a demonstration of a willingness to compromise from many Premiers for quite a while.

C) Substance

We had a very long discussion on substance and explored a great number of possibilities. I will subdivide this section into the amending formula and the Charter. There was a recognition that the more we move towards the provincial amending formula the more the provinces will move towards our Charter of Rights.

i) Amending Formula

It is very clear that for all of the Gang of Eight other than Lyon and Lévesque the amending formula is much more fundamental than the Charter. The basic problems with our formula are the ones we know i.e., the Terms of Union for Newfoundland, the perpetual veto for Ontario and Quebec, the inadequate protection of resources, the deadlock-breaking mechanism and, for dramatic effect, the Senate veto which will be raised by more than just Saskatchewan.

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In terms of resolving the problems if we proceed using our formula as a basis, the most difficult issue will be that of the perpetual vetoes. Jim made clear that a numerical formula would be acceptable if it were close to the formula in the Accord. In other words, the eight do not want to see the 85% figure in the Toronto Consensus because it gives a de facto veto to Ontario. Even if Ontario were prepared to compromise, I do not know how to resolve the problem it would create not for the government of Quebec but for us in Quebec.

I do not see much difficulty in resolving the other issues relating to our amending formula.

The other approach which Jim suggested is to begin with the Accord and state that we would be prepared reluctantly to accept it with certain refinements. The refinements he suggested relate to opting-out. He made three proposals. The first would be to have unanimity instead of opting-out. This resembles Fulton-Favreau. The second would be to permit opting-out only by referendum within a province. The third would be to create a mechanism to ensure that Federal approval of an amendment would only come after the position of all the provinces is known. The result of this would be to enable Parliament to veto an amendment because some provinces have opted out.

ii) Charter of Rights

In discussing the Charter, it is interesting that neither Jim nor Mark even spoke of opting-in or opting-out. They agreed that no one has any real problems with democratic rights or fundamental freedoms. Mobility for most is less a problem of principle than of drafting. There is concern that the Courts should not be the final arbiter in conflicts over mobility.

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We discussed a possible compromise stemming from suggestions made in the summer of 1980. The solution would be the following: Section six would remain as is with the proviso that a provincial law specifically contravening it would be effective if approved by a majority of the legislatures representing a majority of the population of Canada.

With respect to language rights, the difficulty that struck me is the apparent reluctance on Jim's part (reflecting the views of some of the provinces) to recognize that for a deal to be made with the Federal government, it will be necessary to break with Levesque. He kept asking about a half-way house which could satisfy Levesque. Of course, that does not exist. He made it clear that Lougheed does not want to isolate Levesque.

With respect to legal rights, a compromise based on an over-ride clause would be satisfactory. The same would be true for equality rights inasmuch as an over-ride clause would be necessary for age, sex, and disability. We spoke of an over-ride clause requiring a two-thirds majority of a legislature and which would have a sunset clause. What surprised me was Jim's view that an over-ride clause which preserves the theory of parliamentary supremacy might be enough to bring Lyon along at the end. I should point out that there is already a limited over-ride clause in Section 4 on the life of a Parliament.

iii) Assessment and Recommendations

My assessment of the meeting is that if we can get the ball rolling, the elements of a deal are there to be had. To get the ball rolling would require the Prime Minister to demonstrate flexibility in his opening statement and to put some cards on the table in public. For example, he should state immediately that

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he is prepared

a) to find ways of resolving Newfoundland's problem;
b) to change the deadlock-breaking mechanism to what he offered Saskatchewan;
c) to find a formula to treat all provinces equally while recognizing Quebec's language and cultural particularities;

d) to examine how to preserve legislative supremacy in areas where rights are in the process of evolution.

To me it is very important to get the conference off to a good start and to force each province to think of compromise from the start. The old way was for opening statements to reiterate and firm-up old positions. The old way has not worked.

iv) Elements of a Deal

In my view, we should be seeking a consensus that would be along the following lines:

a) Amending Formula

- No entrenched veto other than Quebec on language
- Unanimity on resources
- Unanimity on changes in the amending formula dealing with amendments concerning only one province
- Seven provinces representing seventy-five per cent of the population.

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- Deadlock-breaking mechanism subject to a veto by a majority of legislatures
- No perpetual Senate veto (if absolutely necessary).

Charter of Rights

- Fundamental freedoms, democratic rights and language rights applicable across the country
- Mobility rights subject to over-ride by a majority of legislatures
- Legal rights subject to over-ride by two-thirds of a legislature with a five year sunset clause
- Equality rights applicable across the board except for age, sex, and disability which would be subject to an over-ride.

Equalization, Resources and Native Rights

- As is.

Timing of the Charter

I far prefer using the over-ride as a bargaining tool than suggesting changes in coming into effect of all or part of the Charter. The over-ride is very useful in that it allows some flexibility in dealing with bad Court decisions. It would not be a compromise merely for the provinces, it would be potentially very useful to all governments in the future.

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v) A Bold Approach

There is one possible approach different from anything that has been suggested which could ensure a deal. While it is probably not attractive to you or the Prime Minister, I hope you will think about it. It is simply to state at the very beginning that if the provinces were to accept

the Charter of Rights with a few refinements, the Federal government would accept the provincial amending formula with a few refinements.

Since the provincial formula provides for a Federal veto, since we would have a Charter of Rights, and since constitutions are not easily or often amended, I do not believe that in reality we would be losing very much by taking such a bold step.

Eddie Goldenberg

(I.) UNTITLED DRAFT

NOVEMBER, 1981

Source: Untitled Draft (Nov. 1981)

Charter in 5 years? ~~7 years~~
+2 ans of the majority
6-60%
not
for
non discrimination
legal
mobility
aboriginal

referendum out

vote 2/3 of assembly

"5 ans" donne une chance d'inscrire cela dans le programme de n'importe quel parti provincial dans la prochaine election

2/3 n'est pas necessaire
+Ont. 133

(I.) CABINET DOCUMENT: PREFERRED OPTIONS

OCTOBER-NOVEMBER, 1981

Source: Cabinet Memorandum, Preferred Options (October-November, 1981)

SECRET

Preferred Options

1. Financial compensation:

This is a critical issue with the Quebec provincial Liberals. In my view it could become a hot issue in Quebec generally and we should try to diffuse it now. This can be done by accepting the following:

(a) a constitutional guarantee of financial compensation for provinces opting out of constitutional amendments dealing with education and other matters relating to culture;

(b) a constitutional obligation, as in the case of natives, to discuss the question of financial compensation where a province exercises its right to opt out in areas other than education and culture, at a conference of First Ministers to be held within a year after the corning in force of the Constitution Act 1981.

2. Mobility rights:

I would do nothing. Quebec possesses all the instruments of intervention that it may require to project the linguistic equilibrium of Quebec in the face of a very unlikely massive migration of English speaking Canadians into Quebec. For example, Quebec could require a good command of French as a condition precedent to the obtaining of a college or university diploma, a good command of French for the practice of any professions in Quebec, or could take measures to encourage the use of French in the work place, etc.

3. Language of Education

We have indicated our willingness to accept the Canada Clause. This was understood to mean at least that we would be prepared not to insist on the mother tongue test in Quebec, and also that we would not insist on imposing on Quebec the right of citizens who do not meet the mother tongue test nor the instruction test, to continue the education of their children in English. In order to implement the concept of the Canada Clause, we would have to provide either:

-2-

(a) for a non-obstante on both S. 21 (1)(a) (mother tongue) and S. 23(2) (continuation of instruction) in the case of Quebec, or

(b) at the very least for "an opting in" or a "non-obstante" on the mother tongue test (S. 23(1)(a)).

(I.) MEMORANDUM, POSSIBLE AMENDMENTS FOR QUEBEC

NOVEMBER, 1981

Source: Memorandum, Possible amendments for Quebec (Nov. 1981)

SECRET

Possible Amendments for Quebec

Any proposition for change to the Accord of November 5, 1981, should be assessed against the following objectives:

1. the support of the group of 9 provinces to the amendments. (The unanimous support of all nine provinces is an essential precondition to the acceptance of any further amendment to the Resolution);

2. the support of the Quebec Liberals to the Resolution, as amended;

3. the support of the people of Quebec for the Resolution, as amended;

4. minimum of delay in presenting the amendments to the House of Commons.

There are 3 possibilities to be considered:

1. Financial Compensation:

(a) a constitutional guarantee of financial compensation for provinces opting out of constitutional amendments dealing with education and possibly other matters relating to culture;

(b) a constitutional obligation, as in the case of natives , to discuss the question of financial compensation where a province exercises its right to opt out in areas other than education (and possibly culture), at a conference of First Ministers to be held within a year after the coming in force of the Constitution Act 1981;

(c) a constitutional obligation for the Prime Minister to include on the agenda of the first First Ministers' Conference after an amendment is approved the issue of compensation for any province which has opted out.

2. Mobility Rights:

Allow for a "non obstante" by a province where the exercise of the right of mobility would substantially alter the linguistic equilibrium of the population of that province. (This is preferable to Ryan' s proposal, from

-2-

a technical point of views, but meets the same objective) .

3. Minority Language Education Right:
(a) Opting in for Section 23 as whole for Quebec.

or

(b) CANADA clause only is brought in force in Quebec. Under the Quebec Clause of Bill 101, the children of the mother or father who has received in Quebec his or her primary education in English are entitled to receive their education in English in Quebec.

The Quebec Clause becomes the Canada Clause by providing that the children of the mother or father who has received in Canada (instead of Quebec) his or her primary education in English are entitled to receive their education in Quebec. The Canada Clause test is now embodied in S 23(1) (b) of the Resolution. But Section 23 goes much beyond the Canada Clause by extending the minority language education right to citizens of Canada whose mother tongue is English (in the case of Quebec) (S. 23(1)(a)) and to citizens of Canada who do not meet the Canada Clause test nor the mother tongue test (e.g. an Italian born in Italy) but whose children have already started their education in English, to continue their education in English in Quebec.

In the result, S. 23(1) (a) (mother tongue test) and S. 23(2) (rights of citizens that do not meet the mother test or the Canada Clause test but who have children who continue their education in English) completely alter the meaning and substance of the so-called Canada Clause by extending the right to minority language education much beyond those who have received their primary education in Canada .

-3-

If it is decided to transform the Quebec Clause into the CANADA Clause there is a need to provide either for an opting in, or an opting out or a non obstante for Section 23 (1) (a) and 23 (2) .

The advantage of the non obstante over the opting in is that it might be easier for a Quebec government to decide to be bound if it knows that it will be able to cope with a situation which might arise contrary to all expectations through the use of a non obstante. With an "opting in", a province is locked in without any possibility of derogation whatever happens. The advantage of the "non obstante" over an opting out is that the "non obstante", which is a kind of opting out, must be reviewed every five years.[1]

[1] This memo contains an attachment, which is a draft of Section 23 and not relevant to the Notwithstanding Clause.

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, BRITISH COLUMBIA POSITION, CANADA ACT DRAFT

NOVEMBER 3, 1981

Source: Federal-Provincial Conference…, British Columbia Position, Canada Act Draft[1]

CANADA ACT

An act to give effect to a request by the Senate and House of Commons of Canada

[BC Position]

[…]

[Non obstante]

32A. *[Sections 2 and 7 to 15 of this Part shall]* not apply to an Act of the Parliament of Canada or the legislature of a province which specifically provides that *[any or all of these sections does not apply thereto.]*

[1] Full citation: Federal-Provincial Conference of First Ministers on the Constitution, British Columbia Position, Canada Act Draft (Nov. 3, 1981).

(I.) THE KITCHEN ACCORD

NOVEMBER 4, 1981

Source: Chretien, Romanow, McMurtry, The Kitchen Accord, R12830-0-9-F (Nov. 4, 1981)

1

Patriation
+
Vancouver Amending Formula
(No Fiscal equivalents)
+
All the Charter
But the 2nd Half of it
as stated By Hatfield
Non Obstante

On the all, Nfld. wants a
slight (?) change on mobility
- Affirmative Action - if a
provs. employments rate is below
ntl. average - they can discriminate

Never - Min. Lang. Rights: 2 yrs
to opt in. If no opt in,
automatic referendum in the prov.

(2.)

Resources - as is
Equalization - as is

Alta., Sask, Nfld

481

9:30 pm

Goldenberg 232-0137
Chretien 235-0995

- Sec. 34 Charter rights
-5 year "Sunset" on the
legal, special rights
a la s. 4(2)

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, COMPROMISE ON FUNDAMENTAL FREEDOMS

NOVEMBER 4-5, 1981

Source: Federal-Provincial Conference of First Ministers…Compromise (Nov. 4-5, 1981)[1]

COMPROMISE ON FUNDAMENTAL FREEDOMS

HAVE NON OBSTANTE CLAUSE APPLY FOR 5 YEARS WITH THE PROVISO THAT AFTER THAT TIME AN OBJECTIVE GROUP WILL REVIEW WHETHER IT IS APPROPIRATE FOR IT TO CONTINUE TO APPLY AND MAKE RECOMMENDATIONS TO THE FIRST MINISTERS.

[1] Full citation: Federal-Provincial Conference of First Ministers on the Constitution, "Compromise on Fundamental Freedoms," (Nov. 4-5, 1981)

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, CONSTITUTIONAL PROPOSAL SUBMITTED BY THE GOVERNMENT OF NEWFOUNDLAND

NOVEMBER 5, 1981

Source: Federal-Provincial Conference, Constitutional Proposal… Newfoundland (Nov. 5, 1981)[1]

THE GOVERNMENT OF NEWFOUNDLAND, IN AN EFFORT TO REACH AN ACCEPTABLE CONSENSUS ON THE CONSTITUTIONAL ISSUE WHICH MEET THE CONCERNS OF THE FEDERAL GOVERNMENT AND A SUBSTANTIAL NUMBER OF PROVINCES, SUBMITS THE FOLLOWING PROPOSAL:

(1) PATRIATION

(2) AMENDING FORMULA

- ACCEPTANCE OF THE APRIL ACCORD AMENDING FORMULA WITH THE DELETION OF SECTION 3 WHICH PROVIDES FOR FISCAL COMPENSATION TO A PROVINCE WHICH OPTS OUT OF A CONSTITUTIONAL AMENDMENT.
- THIS CHANGE WOULD MEAN THAT A PROVINCE OPTING OUT WOULD HVAE TO BEAR THE FINANCIAL CONSEQUENCES OF ITS ACT.

(3) CHARTER OF RIGHTS & FREEDOMS

- THE ENTRENCHMENT OF THE FULL CHARTER OF RIGHTS AND FREEDOMS NOW BEFORE PARLIAMENT WITH THE FOLLOWING CHANGES

(A) WITH RESPECT TO MOBILITY RIGHTS THE INCLUSION OF THE RIGHT OF A PROVINCE TO UNDERTAKE AFFIRMATIVE ACTION PROGRAMS FOR SOCIALLY AND ECONOMICALLY

-2-

DISADVANTAGED INDIVIDUALS AS LONG AS A PROVINCE'S UNEMPLOYMENT RATE WAS ABOVE THE NATIONAL AVERAGE.

(B) NON OBSTANTE CLAUSE COVERING SECTIONS DEALING WITH LEGAL RIGHTS AND EQUALITY RIGHTS. THIS WOULD MAKE IT POSSIBLE FOR PARLIAMENT OR A LEGISLATURE TO OVERRIDE THESE PROVISIONS OF THE CHARTER IN CERTAIN SPECIFIED CIRCUMSTANCES.

(C) WITH RESPECT TO MINORITY LANGUAGE EDUCATIONAL RIGHTS A PROCEDURE WOULD BE ADOPTED WHEREBY THE SECTION WOULD COME INTO FORCE IN ANY PROVINCE WHOSE LEGISLATURE ADOPTED THE PROPOSAL. IF WITHIN TWO YEARS A LEGISLATURE HAD NOT ADOPTED THE SECTION A BINDING REFERENDUM WOULD BE HELD IN THAT PROVINCE TO DETERMINE THE ISSUE. THE NEWFOUNDLAND GOVERNMENT WOULD INTRODUCE IN THE

[1] Full citation: Federal-Provincial Conference of First Ministers on the Constitution, "Constitutional Proposal Submitted by the Government of Newfoundland," (Nov. 5, 1981).

HOUSE OF ASSEMBLY THE NECESSARY RESOLUTION TO ADOPT THESE PROVISIONS OF THE CHARTER WITH RESPECT TO NEWFOUNDLAND.

-3-

(4) THE PROVISIONS OF THE ACT NOW BEFORE PARLIAMENT RELATING TO EQUALIZATION AND REGIONAL DISPARITIES, THE RIGHTS OF THE ABORIGINAL PEOPLES, NON RENEWABLE NATURAL RESOURCES, FORESTRY RESOURCES AND ELECTRICAL ENERGY WOULD BE INCLUDED.

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, THE NOVEMBER ACCORD, FIRST DRAFT

NOVEMBER 5, 1981

Source: Federal-Provincial Conference, November Accord, first draft (Nov. 5, 1981)[1]

November 5, 1981

In an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the Federal Government and a substantial number of Provinces, we submit the following proposal:

(1) Patriation

(2) Amending Formula

- Acceptance of the April Accord Amending Formula with the deletion of Section 3 which provides for fiscal compensation to a Province which opts out of a constitutional amendment.
- This change would mean that a Province opting out would have to bear the financial consequences of its act.
- The Delegation of Legislative Authority from the April Accord is deleted.

(3) Charter of Rights & Freedoms

- The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes:

-2-

(a) With respect to Mobility Rights the inclusion of the right of a province to undertake affirmative action programs for socially and economically disadvantaged individuals as long as a province's unemployment rate was above the National average.

(b) Non obstante clause covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights. This would make it possible for Parliament or a Legislature to override these provisions of the Charter in certain specified circumstances.

(c) We have agreed that the provisions of Section 23 in respect of Minority Language Education Rights will apply to our Provinces. Any Province not agreeing to be bound by this Section continues to have the right to accept the application of the Section to their Province at any future time.

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[1] Full citation: Federal-Provincial Conference of First Ministers on the Constitution, The November Accord, First Draft (Nov. 5, 1981).
[Needs confirmation] These drafts were found in the Trudeau papers [add archival information] A second copy of this version was found in Brian Peckford's letter to Prime Minister Trudeau.

(4) The provisions of the Act now before Parliament relating to Equalization and Regional Disparities, and Non Renewable Natural Resources, Forestry Resources and Electrical Energy would be included.

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, THE NOVEMBER ACCORD, SECOND DRAFT

NOVEMBER 5, 1981

Source: Federal-Provincial Conference, November Accord, second draft (Nov. 5, 1981)[1]

November 5, 1981

In an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the Federal Government and a substantial number of Provinces, we submit the following proposal:

(1) Patriation

(2) Amending Formula *[No referendum]*

- Acceptance of the April Accord Amending Formula with the deletion of Section 3 which provides for fiscal compensation to a province which opts out of constitutional amendment. *[2/3 vote]*
- The Delegation of Legislative Authority from the April Accord is deleted.

(3) Charter of Rights & Freedoms

- The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes:

-2-

(a) With respect to Mobility Rights the inclusion of the right of a province to undertake affirmative action programs for socially and economically disadvantaged individuals as long as a province's unemployment [*level of employment*] rate was above [*below*] the National average.

[5 y. sunset (Bennett illegible)] [checkmark][2]

(b) Non obstante clause [*with 5 year sunset*] covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights. This would make it possible for Parliament or a Legislature or override these provisions of the Charter in certain specified circumstances.

[*Illegible:* *Nfl, B.C., Alta, Sask, P.E.I, Man, N.S., Ont, N.B.*] *[checkmark]*[3]

(c) We have agreed that the provisions of section 23 in respect of Minority Language Education Rights will apply to our Provinces. ~~Any Province not agreeing to be bound by this Section~~

1 Full citation: Federal-Provincial Conference of First Ministers on the Constitution, The November Accord, Second Draft (Nov. 5, 1981). These drafts were found in the Trudeau papers [add archival information].

2 This is found in the column beside subsection (b). The checkmark is covering the text.

3 This is found in the column beside subsection (c).

~~continues to have the right to accept the application of the Section to their Province at any future time.~~

(4) The provisions of the Act now before Parliament relating to Equalization and Regional Disparities, and Non Renewable Natural Resources, Forestry Resources and Electrical Energy would be included.

[Aboriginal] [checkmark][1]

[1] The checkmark covers the text.

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, THE NOVEMBER ACCORD, THIRD DRAFT

NOVEMBER 5, 1981

Source: Federal-Provincial Conference, November Accord, third draft (Nov. 5, 1981)[1]

November 5, 1981

In an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the federal government and a substantial number of provincial governments, the undersigned governments have agreed to the following:

(1) Patriation

(2) Amending Formula:

- Acceptance of the April Accord Amending Formula with the deletion of Section 3 which provides for fiscal compensation to a province which opts out of a constitutional amendment.
- ~~This change would mean that a province opting out would have to bear the financial consequences of its act.~~
- The Delegation of Legislative Authority from the April Accord is deleted.

(3) Charter of Rights and Freedoms:

- The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes:

  (a) With respect to Mobility Rights the inclusion of the right of a province to undertake affirmative action programs for socially and economically disadvantaged individuals as long as a province's [level of [illegible]] employment rate was below the National average.

  (b) A ~~non obstante~~ [*not withstanding*] clause covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights. Each non obstante provision would require reenactment not less frequently than once every five years.[2]

[1] Full citation: Federal-Provincial Conference of First Ministers on the Constitution, The November Accord, Third Draft (Nov. 5, 1981). These drafts were found in the Trudeau papers.

[2] Page two of the original document is missing.

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, THE NOVEMBER ACCORD, FINAL DRAFT

NOVEMBER 5, 1981

Source: Federal-Provincial Conference, November Accord, final draft (Nov. 5, 1981)[1]

November 5, 1981

In an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the federal government and a substantial number of provincial governments, the undersigned governments have agreed to the following:

(1) Patriation

(2) Amending Formula

- Acceptance of the April Accord Amending Formula with the deletion of Section 3 which provides for fiscal compensation to a province which opts out of constitutional amendment.
- The Delegation of Legislative Authority from the April Accord is deleted.

(3) Charter of Rights and Freedoms

- The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes:

(a) With respect to Mobility Rights the inclusion of the right of a province to undertake affirmative action programs for socially and economically disadvantaged individuals as long as a province's employment rate was below the National average.

(b) A "notwithstanding" clause covering sections dealing with fundamental Freedoms, Legal Rights and Equality Rights. Each "notwithstanding" provision would require enactment not less frequently than once every five years.

-2-

(c) We have agreed that the provisions of section 23 in respect of Minority Language Education Rights will apply to our provinces.

(4) The provisions of the Act now before Parliament relating to Equalization and Regional Disparities, and Non Renewable Natural Resources, Forestry Resources and Electrical Energy would be included.

(5) A constitutional conference as provided f or in clause 36 of the Resolution, including in its agenda an item respecting constitutional matters that directly affect the Aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included

[1] Full citation: Federal-Provincial Conference of First Ministers on the Constitution, The November Accord, Final Draft (Nov. 5, 1981). These drafts were found in the Trudeau papers. This draft contains the exact same wording as the final November Accord, which was signed by all first ministers, except Quebec.

in the Constitution of Canada, shall be provided for in the Resolution. The Prime Minister of Canada shall invite representatives of the Aboriginal peoples of Canada to participate in the discussion of that item.

Dated at Ottawa this 5th day of November, 1981

CANADA

……
Pierre Elliott Trudeau
Prime Minister of Canada

ONTARIO

……
William G. Davis, Premier

NOVA SCOTIA

……
John M. Buchanan, Premier

-3-

NEW BRUNSWICK

……
Richard B. Hatfield, Premier

MANITOBA

……
Sterling R. Lyon, Premier

BRITISH COLUMBIA

……
William R. Bennett, Premier

PRINCE EDWARD ISLAND

……
J. Angus MacLean, Premier

SASKATCHEWAN

……
Allan E. Blakeney, Premier

ALBERTA

……
Peter Lougheed, Premier

NEWFOUNDLAND

……
Brian A. Peckford, Premier

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, THE NOVEMBER ACCORD

NOVEMBER 5, 1981

Source: Federal-Provincial Conference, Verbatim Transcript, (Nov. 5, 1981)[1]

FEDERAL-PROVINCIAL CONFERENCE

OF

FIRST MINISTERS ON THE CONSTITUTION

Ottawa

November 2-5, 1981

November 5, 1981[2]

In an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the federal government and a substantial number of provincial governments, the undersigned governments have agreed to the following:

(1) Patriation

(2) Amending Formula

- Acceptance of the April Accord Amending Formula with the deletion of Section 3 which provides for fiscal compensation to a province which opts out of constitutional amendment.
- The Delegation of Legislative Authority from the April Accord is deleted.

(3) Charter of Rights and Freedoms

- The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes:

(a) With respect to Mobility Rights the inclusion of the right of a province to undertake affirmative action programs for socially and economically disadvantaged individuals as long as a province's employment rate was below the National average.

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1 Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript (unverified and unofficial) (Ottawa: 2-5 November 1981).

2 [Footnote in progress] The wording of the agreement is unchanged from the final draft. The final accord contains signatures and a note stating that Manitoba only agrees depending on the approval of their legislature for clause 3 (c) re minority language education rights. This agreement would then be solidified into concrete wording with the November 5th draft, which follows this document.

(b) A "notwithstanding" clause covering sections dealing with fundamental Freedoms, Legal Rights and Equality Rights. Each "notwithstanding" provision would require enactment not less frequently than once every five years.
(c) We have agreed that the provisions of section 23 in respect of Minority Language Education Rights will apply to our provinces.

-2-

(4) The provisions of the Act now before Parliament relating to Equalization and Regional Disparities, and Non Renewable Natural Resources, Forestry Resources and Electrical Energy would be included.

(5) A constitutional conference as provided f or in clause 36 of the Resolution, including in its agenda an item respecting constitutional matters that directly affect the Aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, shall be provided for in the Resolution. The Prime Minister of Canada shall invite representatives of the Aboriginal peoples of Canada to participate in the discussion of that item.

Dated at Ottawa this 5th day of November, 1981

CANADA

.....
Pierre Elliott Trudeau[1]
Prime Minister of Canada

ONTARIO

.....
William G. Davis, Premier

NOVA SCOTIA

.....
John M. Buchanan, Premier

-3-

NEW BRUNSWICK

.....
Richard B. Hatfield, Premier

MANITOBA

[subject to approval of section 3 (c) by the Legislative Assembly of Manitoba]

.....
Sterling R. Lyon, Premier

BRITISH COLUMBIA

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[1] All names are signed in the original document. Quebec is not listed on the document's signatories.

.....
William R. Bennett, Premier

PRINCE EDWARD ISLAND

.....
J. Angus MacLean, Premier

-4-

SASKATCHEWAN

.....
Allan E. Blakeney, Premier

ALBERTA

.....
Peter Lougheed, Premier

NEWFOUNDLAND

.....
Brian A. Peckford, Premier

FACT SHEET

The notwithstanding or override clause as applied to the Charter of Rights & Freedoms

A notwithstanding clause is one which enables a legislative body (federal and provincial) to enact expressly that a particular provision of an Act will be valid, notwithstanding the fact that it conflicts with a specific provision of the Charter of Rights and Freedoms. The notwithstanding principle has been recognized and is contained in a number of bills of rights, including the Canadian Bill of Rights (1960), the Alberta Bill of Rights (1972), The Quebec Charter of Rights and Freedoms (1975), the Saskatchewan Human Rights Code (1979), and Ontario's Bill 7 to Amend its Human Rights Code (1981).

How it would be applied

Any enactment overriding any specific provisions of the Charter would contain a clause expressly declaring that a specific provision of the proposed enactment shall operate, notwithstanding a specific provision of the Charter of Rights and Freedoms.

Any notwithstanding enactment would have to be reviewed and renewed every five years by the enacting legislature if it were to remain in force.

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, THE NOVEMBER ACCORD, FRENCH VERSION

NOVEMBER 5, 1981

Source: Conference Fédérale-Provinciale des Premiers Ministres, Compte rendu textuel (Nov. 5, 1981)[1]

CONFERENCE FEDERALE-PROVINCIALE

DES

PREMIERS MINISTRES SUR LA CONSTITUTION

Entente des Premiers ministres sur la Constitution le 5 novembre 1981

Ottawa
le 2 au 5 novembre 1981

Le 5 novembre 1981

Dans un effort pour en arriver à un consensus acceptable sur la question constitutionnelle qui satisfasse les préoccupations du gouvernement fédéral et d'un nombre important de gouvernements provinciaux les soussignés se sont entendus sur les points suivants:

(1) Le rapatriement de la Constitution
(2) La formule d'amendement

- La formule d'amendement proposée dans l'Accord d'avril a été acceptée en supprimant l'article 3, qui prévoit une compensation fiscale à une province qui se retire d'un amendement constitutionnel.
- La délégation de pouvoirs législatifs prévue dans l'Accord d'avril est supprimée.

(3) La Charte des droits et libertés

- La Charte complète des droit: et libertés soumise au Parlement sera inscrite dans la Constitution avec les modifications suivantes:

(a) En ce qui concerne la liberté de circulation et d'établissement, il y aura inclusion du droit d'une province à mettre en oeuvr des programmes d'action en faveur des personnes socialement et économique désavantagées tant que le taux d'emploi de cette province demeurera inférieur à la moyenne nationale.

(b) Une clause "nonobstant" s'ap quera aux articles qui traite des libertés fondamentales des garanties juridiques et des droits à l'égalité. Toute disposition "nonobstant" devrait être adoptée de nouveau au mains tous les cinq ans.

[1] Conference Federale-Provinciale des Premiers Ministres sur la Constitution, Compte rendu textuel (non révisé et non officiel) (Ottawa: 2-5 novembre 1981).

(c) Nous sommes convenus que l'article 23, qui a trait au droit à l'instruction dans la langue de la minorité, s'appliquera dans nos provinces.

-2-

(4) Les dispositions du projet actuellement à l'étude au Parlement qui ont trait à la péréquation et aux inégalités régionales ainsi qu'au: ressources non renouvelables, aux ressources forestières et à l'énergie électrique seraient incluses.

(5) Sera prévue dans la Résolution la conférence constitutionnel mentionnée à l'article 36 de la Résolution et son ordre du jour inclura les questions constitutionnelles qui intéressent directement les peuples autochtones du Canada, notamment la détermination et la définition des droits de ces peuples à inscrire dans la Constitution du Canada. Le Premier ministre du Canada invitera leurs représentants à participer aux travaux relatifs à ces questions.

Fait à Ottawa le 5 novembre 1981

CANADA / POUR LE CANADA

……..
Pierre Elliott Trudeau
Prime Minister of Canada /
Premier ministre du Canada

ONTARIO / POUR L'ONTARIO

……..
William G. Davis, Premier /
Premier ministre

NOVA SCOTIA / POUR LA NOUVELLE-ÉCOSSE

……..
John M. Buchanan, Premier /
Premier ministre

NEW BRUNSWICK / POUR LE NOUVEAU-BRUNSWICK

……..
Richard B. Hatfield, Premier /
Premier ministre

MANITOBA / POUR LE MANITOBA

……..
Sterling R. Lyon, Premier /
Premier ministre

BRITISH COLUMBIA / POUR LA COLOMBIE-BRITANNIQUE

……..
William R. Bennett, Premier /
Premier ministre

PRINCE EDWARD ISLAND / POUR L'ÎLE-DU-PRINCE-ÉDOUARD

……..
J. Angus MacLean, Premier /
Premier ministre

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SASKATCHEWAN/POUR ·LA SASKATCHEWAN

……..
Allan E. Blakeney, Premier /
Premier ministre

ALBERTA / POUR L'ALBERTA

……..
Peter Lougheed, Premier /
Premier ministre

NEWFOUNDLAND / POUR TERRE-NEUVE

……..
Brian A. Peckford, Premier /
Premier ministre

NOTE EXPLICATIVE

Application à la Charte des droits et libertés de la clause "nonobstant" ou clause dérogatoire.

On entend par clause "nonobstant" une disposition qui permet à un corps législatif de prévoir expressément qu'une loi particulière sera valide nonobstant le fait qu'elle entre en Conflit avec une disposition précise de la Charte des droits et libertés. L'or indice qui sous-tend cette clause est reconnu et retenu dans un certain nombre de déclarations des droits, dont la Déclaration canadienne des droits (1960), l'Alberta Bill of Rights (1972), la Charte québécoise des droits et libertés de lla personne (1975) et le Saskatchewan Human Rights Code (1979), et le projet de loi 7 de l'Ontario ayant pour but d'amender le Human Rights Code (1981).

Comment cette clause s'appliquerait

Tout texte législatif contrevenant à toute disposition précise de la Charte renfermerait une clause déclarant expressément qu'une disposition précise dudit texte legislatif s'appliquera nonobstant une disposition précise de la Charte des droits et libertés.

Tout texte législatif "nonobstant" devrait, pour demeurer en vigueur, être passé en revue et renouvelé tous les cinq ans par le corps législatif l'ayant adopté.

(I.) FEDERAL-PROVINCIAL CONFERENCE OF FIRST MINISTERS ON THE CONSTITUTION, CLOSING STATEMENTS

NOVEMBER 5, 1981

Source: Federal-Provincial Conference, *Verbatim Transcript* (2-5 November 1981), 88-133.[1]

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THE CHAIRMAN: Well, when we met Monday morning I suggested that we had a short but a difficult agenda and that we had to ask ourselves if we wanted patriation, if we wanted an amending formula and if we wanted a charter.

I am happy to report on behalf of the conference that a consensus has been reached on those three areas and I will deal very briefly with them, each in turn, because I realize that we are all anxious to attend to other business.

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Sur le rapatriement, je suis content de dire que nous avons résolu ce problème, que nous sommes mis d'accord non seulement sur le fait qu'il devait y avoir une constitution canadienne, mais que nous sommes mis d'accord sur une formule pour amender cette constitution. C'est dire qu'après cent quatorze ans d'existence le Canada devient, au sens technique, au sens légal, enfin un pays indépendant. Il reste bien sûr au Parlement canadien et au Parlement britannique d'entériner ces accords, mais le fait que nous ayons formé un consensus, je pense, nous permettrait de franchir ces étapes avec la coopération des partis d'opposition ici, la coopération du gouvernement et des partis d'opposition britanniques.

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On the amending formula, we have also reached a consensus. It is, roughly stated, the accord formula reached last April by the Premiers, the eight Premiers meeting on April 16th, I believe. It is essentially that accord formula with one subtraction, important, I know, for Québec, which I will return to later, but in essence I think the main part of that accord formula is the one that Canadians will have as their amending formula to the constitution.

On the charter, we have a charter. It is not the charter, exactly the one that was processed through the House of Commons and Senate during several months, but we have a charter of which Canadians can be proud and which I hope we will still be able to say it is probably the best charter in the world.

So I think we can be satisfied that in these three days of arduous work and very substantial compromise, that we have come out with an amending formula and a charter.

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[1] Full citation: Federal-Provincial Conference of First Ministers on the Constitution, *Verbatim Transcript* (unverified and unofficial) (Ottawa: 2-5 November 1981), 88-133.

I want to say that I am very grateful to my fellow Premiers, to our ministers, to our officials who worked very hard to make this possible. I have to give the credit to others, because I must concede that on the final compromises, they were not of my making. They were the making of the ministers and Premiers around this table.

I think as Chairman I was entitled to sum up very briefly what we had done. I think now as head of the Canadian delegation I would like to say three things; maybe two will be enough.

I have one regret. I put it on the record. I will not return to it. I have the regret that we have not kept in the amending formula a reference to the ultimate

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sovereignty of the people as could be tested in a referendum. The Premiers know my thoughts on that. I respect theirs. I just want to express that regret and, of course, it is not an indication in any sense that I will not support and fight for this agreement with all my heart.

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L'autre remarque que je voulais faire, s'adresse essentiellement au gouvernement de la province de Québec et au peuple québécois.

Si je comprends bien, et bien sûr le premier ministre Lévesque aura l'occasion d'exprimer ses vues là-dessus, si je comprends bien la province de Québec ne peut par son gouvernement provincial, ne peut malheureusement pas être signataire de cet accord où les dix autres participants sont signataires, parce que nous a-t-on dit ce matin, c'était inacceptable de soustraire la clause compensatoire de la formule d'amendement. Autrement dit une province qui choisit de ne pas accepter un amendement n'aurait pas la garantie constitutionnelle de recevoir une compensation pour ce retrait.

J'ai expliqué que c'était la compensation constitutionnelle qui avait causé des difficultés et il est facile de voir pourquoi. Si une province par exemple très riche refusait un amendement constitutionnel nous permettant par exemple d'avoir une législation s'adressant aux personnes âgées en leur permettant d'avoir des pensions mobiles, d'une province à l'autre, si une province riche décidait de ne pas être partie de cet accord et demandait en plus qu'on lui paie de l'argent, il est sûr que nous ne pourrions jamais effectivement avoir une telle législation.

Mais je m'empresse d'ajouter qu'en toute justice, je pense qu'en dehors de la constitution cette question devra être examinée et je le dis, une fois pour toutes, nous sommes prêts dans les heures, dans les jours qui suivent, à regarder encore cette question qui pose des problèmes au gouvernement de la province du Québec.

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Deuxièmement, la raison qu'on nous a donnée pour ne pas signer cet accord c'est sur la clause de mobilité permettant à des canadiens de diverses provinces d'aller habiter et de se chercher du travail dans d'autres provinces. Nous pensons que ce concept est essentiel à nos notions d'un Canada où les canadiens peuvent aller travailler ou ils veulent, mais nous avons reconnu dans le texte, surtout sur la

pression de monsieur Peckford, une formule qui permet aux provinces qui souffrent de chômage au-dessus de la moyenne, de se protéger par des législations spéciales. Là encore je dis au gouvernement québécois que notre porte n'est pas fermée. Si nous pouvons trouver d'autres formules pour accommoder les inquiétudes justifiées d'une province, que ce soit le Quebec ou une autre province, nous sommes prêts à accepter d'étudier des textes, comme nous l'avons fait avec les réserves de monsieur Peckford et qui ont finalement obtenu son assentiment.

Troisièmement, une des raisons pour lesquelles le gouvernement québécois ne peut pas signer cet accord, à ce qu'on nous a dit, c'est que nous ne disons pas expressément que la clause qui désormais obligera les neuf provinces anglophones à donner de l'éducation à leur minorité francophone, et je le dis en passant, je crois que c'est un jour noble pour le Canada ou enfin nous avons reconnu que les minorités scolaires francophones par tout le Canada auront maintenant une garantie constitutionnelle d'être protégées.

Nous avons entendu de la bouche du premier ministre québécois qu'il ne pouvait pas accepter l'équivalent pour la province de Québec, mais je le comprends

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dans une façon qu'il ne voulait pas que ça lui soit imposé, parce que d'une façon générale l'éducation relève de la juridiction provinciale, donc il ne voulait pas que ça lui soit imposé. Je réplique, évidemment, qu'en vertu de la constitution actuelle le gouvernement fédéral doit protéger les minorités scolaires, cela est écrit expressément dans l'article 93, paragraphes 3 et 4 de la constitution actuelle.

Cependant, je veux encore dire au gouvernement québécois que là-dessus dans les heures qui suivent, nous sommes prêts à continuer la discussion et j'ai offert à monsieur Lévesque, notamment, que si — et là j'entre dans des expressions techniques qui sont connues surtout au Québec — s'il préférait par exemple la clause Canada, nous serions prêts à en discuter et je l'espère, à rédiger le texte autrement pour que cela satisfasse ses objections. Mais, il est clair que comme gouvernement canadien, nous ne pouvions pas prendre une position dans la constitution ou nous aurions obtenu que les minorités francophones soient constitutionnellement protégées, mais que les minorités anglophones du Québec ne le seraient pas, e parle toujours du domaine scolaire.

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So those are the three points on which we have reached the fundamental and, I think, extraordinarily opportune agreement among· nine provinces and the federal government, and those are my views on what can still be done in the future. The constitution is entrenched, it is not written in stone for all time, and I hope that in the weeks and, if necessary, months to come, we will still be able to convince our colleagues from Quebec to do in the constitution what, in fact, historically has always been done in Quebec since the beginning of confederation, to treat their Anglophone minorities in the school system equitably. I am convinced it can be done and therefore, although there is one sad note in this conclusion, I am hopeful that with goodwill and in the interests of Canada and of its peoples, we will very soon be able to make this accord unanimous.
Voilà ce que je voulais dire. I call on Premier Davis.

HON. WILLIAM DAVIS: Mr. Prime Minister and fellow Premiers, to say that this is something of an emotional moment for all of us, certainly speaking for myself, is something of an understatement. I think it is fair to state, Mr. Prime Minister, that there were some around this table, perhaps myself included, who wondered on Monday morning whether in fact this would ever happen.

I don't want to get emotional, but I was talking to some of the media on the way in and as is their custom and is their responsibility, they started to sort of ask about winners and losers. I would only make this observation, Mr. Prime Minister: that from my standpoint, there is only one winner on this occasion, and that is our country.

The compromise, the agreement that has been signed, I think indicates clearly that we can, as Canadian

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political leaders, show that flexibility, that ingenuity on occasion, that stubbornness that brings about a document that has eluded us for a lot of years. I was there, Mr. Prime Minister, with you and the Premier of New Brunswick, who brings his passionate beliefs to these occasions as we well know, when we felt we had achieved it in 1971. We have met on many occasions since that time and I think we have gotten to know one another and the diversity of this country as a result of those meetings and those discussions.

I think, Mr. Prime Minister, the agreement that we have signed demonstrates that we do have that diversity, but that we do have some things in common that we can put above the interests that we individually represent.

I guess, Mr. Prime Minister, that there would be those in the academic world and the legal community and the critics who will analyze this agreement. They will note its shortcomings, its deficiencies, and that I am prepared to accept. I guess all of us try to achieve perfection. I never have. I am sure the rest of you may have, but I have never been able to do it, but I say to you, sir, that while this does not represent perfection, it doesn't represent exactly everything that our own province or that I would like to have achieved, it does represent something that not only in terms of the symbolism, in terms of what is actually going to be written, it represents a feeling amongst the people around this table that there is something to this nation, there is something to being a Canadian that is fundamental to the future wellbeing of this country.

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Mr. Prime Minister, I am a partisan politician and I expect that tomorrow morning I will find some reason, sir, to remind you of other issues. I may even be so provocative as to challenge your Minister of Finance, but I have to say to you, sir, as chairman of this meeting and Prime Minister of this country, that you have in the past three days demonstrated a measure of flexibility which some of your critics would not have expected, a willingness to compromise where some said it could not be done and, Mr. Prime Minister, as I say, tomorrow is another day. There will be other issues, but I could not in conscience say to the people of this country anything other than that while we have argued with you, while sometimes we disagree with

you that, in fact, sir, you have demonstrated what is essential in this country, the ability to compromise and to accept diversity and the views of so many others.

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I look around this table, Mr. Prime Minister, and I see men who have the same passionate feelings about this country. We may not express them as well as Premier Hatfield and some others but we have those feelings. I think of how far some of them have come, Mr. Prime Minister, in the past three days. I think of the Premier of Alberta, and he may not want to acknowledge it, but he has moved a little bit …

— Laughter

… he has moved a little bit. I look at the Premier of Newfoundland and, you know, it is interesting a lot will be written about this conference but I mentioned it in the closed session where the public was not there and where the media weren't there to portray all of this, that the consensus that has now appeared was presented by the Premier of the province that last entered confederation. I think that has some interesting historical perspectives, and of course the Premier of Saskatchewan who philosophically disagrees with the Premier of Ontario on some issues, but a gentleman for whom I have respect, and who too demonstrated the ability to move in the compromise to find something that would be acceptable and something that we as Canadians can accept with great pride.

I look at the Premier of British Columbia and I can't think of any Premier around this table, Mr. Prime Minister, who has had a more difficult year than the Premier of that great province. I don't know any man who can wear three hats as readily as he can; Chairman of the committee of 10 Premiers, Chairman of what I call the Group of Eight, and also as Premier of the great province of British Columbia. He too has dealt with this in a way that

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I think is Canadian.

I regret the absence of the Premier of Manitoba because I know he would want to share in this event and those who don't I guess include my own political philosophy will understand if I say to Premier Lyon that he is missed on this occasion and I am not putting in, it is not a free-time political promotion, but Sterling, wherever you are, good luck in the next few days!

— Laughter

All of us regret, Mr. Prime Minister, the absence of our colleague from Nova Scotia so ably represented of course here at the table, but I know that Premier Buchanan I am sure would wish he were part of this occasion and last but not least the philosopher of the group, I think, the Premier of what is I guess our smallest province but one that is vital to this country and who I guess is participating unless somebody calls a conference for tomorrow morning, in his last federal-provincial meeting and I can't think, Mr. MacLean, of a gentleman who has served this country in terms of international conflict, in terms of political leadership, what more appropriate occasion it would be than for your last involvement with respect to this particular accomplishment.

I would say to my colleague, the Premier of Quebec, that I regret that we were not able to find the words perhaps on mobility, the concern that he feels with respect to the fiscal equivalents in the amending formula, and I guess I can only say to the Premier of that province that I hope over a period of time we can find ways and means that your great province, sir, can be included in the spirit and the intent of what we are doing today.

Mr. Prime Minister, I have really very little

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else to say. I look at the gentleman on my geographic left and probably philosophical right, the Minister of Justice of Canada …

— Laughter

… and I know sir, what he has gone through and the innumerable speeches he has made with which we all totally agree or disagree, but I could not miss the opportunity to express my respect for him.

Mr. Prime Minister, it is a day that Canadians will remember; it is a day on which I think we can all rejoice. It is not the product of any one person. It is not the product of any group of people. It is the product of men who have a feeling about this nation, who recognize the sensitivities, the delicacies, the diversities, but who in the final analysis have done something that others have not been able to do, to agree at long last that this country will patriate its constitution. We will have a charter, and we know now how to amend that constitution. Mr. Prime Minister, I thank you.

THE CHAIRMAN: Thank you Premier Davis.

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Je donne maintenant la parole au premier ministre Lévesque.

HON. RENE LEVESQUE: Alors, messieurs, après cet hymne à l'harmonie de monsieur Davis, je dois dire que je regrette profondément que le Québec se retrouve aujourd'hui dans une position qui est devenue, en quelque sorte, une des traditions fondamentales du régime fédéral canadien, tel qu'il fonctionne, le Québec se retrouve tout seul.

Ça sera au peuple québécois, et à lui seul, d'en tirer la conclusion.

Je suis arrivé ici lundi, avec un mandat voté l'unanimité des partis, un mandat de l'Assemblée nationale du Québec, qui demandait au gouvernement fédéral, et qui demandait évidemment aussi à nos collègues auteur de la table, mais d'abord au gouvernement qui a été l'auteur du projet qui est devant la Chambre des communes, ça lui demandait cette résolution de renoncer au caractère unilatéral de la démarche et surtout à renoncer a imposer de cette façon quelque'atteinte que ce soit aux droits et aux pouvoirs de l'Assemblée nationale du Québec sans son consentement, parce que derrière l'assemblée nationale du Québec, la source du pouvoir sont les citoyens du Québec. Je m'étais permis d'insister aussi sur le fait que le premier

ministre fédéral et son gouvernement agissaient ainsi sans aucun mandat explicite, sans aucun mandat d'aucune sorte des citoyens, non seulement du Québec, mais du reste du Canada.

Et, à ce point de vue d'ailleurs, l 'apparente offre de compromis spectaculaire d'hier matin, c'est-à-dire

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l'offre référendaire nous a paru intéressante, parce que sur le fond justement, c'était possiblement une façon démocratique de sortir de l'impasse, de donner à tous les citoyens qui sont la seule source du pouvoir et personne auteur de cette table n'a de pouvoirs équivalents, de donner à la population l'occasion de se prononcer et c'était en même temps la seule proposition fédérale qui puisse respecter le mandat que nous avons reçu de l'assemblée nationale du Québec. Dès hier après midi, le premier ministre fédéral s'est en quelque sorte employé à détruire lui-même cette offre à mesure qu'il la précisait. Pourtant, si monsieur Trudeau était sérieux, s'il était sincère et sans détour à ce moment là, il pourrait renoncer à nous imposer ce projet à nous du Québec d'une façon qui, pour nous du Québec, demeure toujours unilatérale. Il pourrait dans cette perspective tenir son fameux referendum, rien ne l'empêche de le faire, il n'a besoin de l'accord d'aucun d'entre nous auteur de cette table. En tout cas, sans ça, pour notre part, nous devons constater que monsieur Trudeau a choisi délibérément, pour obtenir l'adhésion du Canada anglais, une démarche qui a pour effet d'imposer de force au Québec, une diminution de ses pouvoirs et de ses droits sans son consentement alors que tous les partis représentés à l'Assemblée nationale ont déjà, à l'unanimité, rejeté cette formule.

A propos de la formule d'amendement qui est la devant nous, signée par les dix autres gouvernements, il n'y a plus, à toutes fins utiles, ce qui depuis cent

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quatorze ans, depuis le début de la confédération, à représenté la garantie essentielle de la protection des droits et des pouvoirs du Québec, c'est-à-dire une forme valable et non pas une forme punitive de droit de veto. En ce qui concerne la mobilité — qui est la traduction constitutionnelle de l'effort que faisait le gouvernement fédéral l'an dernier pendant toutes les négociations pour imposer des pouvoirs centralisateurs sur l'économie — en ce qui concerne la mobilité, la formule qui est la devant nous, risque toujours d'écorcher nos competences legislatives dans ce domaine dont le peuple québécois autant que quiconque a besoin.

Et finalement, en ce qui concerne notre compétence exclusive en éducation, on nous a laissé le droit de ne pas nous le faire imposer, mais en enlevant quatre lignes dans le projet qui a été proposé ce matin dans la conférence à huis clos, on introduit un élément de chantage permanent sur le Québec en ce qui concerne la renonciation éventuelle de sa compétence exclusive et de son droit exclusif de décider ce qu'il fait dans le domaine de sa culture, de son identité et à la source de tout ça dans le domaine de l'accès à ses écoles. J'ai bien entendu tout à l'heure, les intentions de bonne volonté à ce point de vue, du premier ministre fédéral; on pourrait prendre le temps de trouver de meilleures formules, on pourrait peut-être ajuster ceci ou cela; je vous donne ma parole ou quelque chose du genre que je vais m'y employer; mais seulement au cas ou on ne le saurait pas, à moins que ça ait changé,

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l'avis a été donné ce matin vers onze heures, que la Chambre des communes ouvre le débat soi-disant final sur cette résolution, dès demain matin; et je ne vois pas très bien, après les quatre jours que nous venons de passer ici, comment concrètement, pourrait se réaliser — je m'excuse, monsieur le premier ministre fédéral, je ne vous ai pas interrompu un seul instant —

LE PRESIDENT: Pas demain.

HON. RENE LEVESQUE: Pas demain, quand? Mais enfin c'est ce que vous avez dit hier.

LE PRESIDENT: Non non, pas hier, il n'y avait pas d'entente.

HON. RENE LEVESQUE: Ah! hier c'était ça, aujourd'hui c'est autre chose.

LE PRESIDENT: Il n'y avait pas d'entente hier.

HON. RENE LEVESQUE: D'accord.

LE PRESIDENT: Il y en a une ce matin.

HON. RENE LEVESQUE: D'accord, d'accord, on verra. De toute façon, vu que ça va changer profondément la résolution, le projet fédéral qui est devant la Chambre des communes, il n'y a plus aucune raison pour que ce débat soit artificiellement limité à deux jours, et je fais appel, en particulier aux québécois, je fais appel aux québécois dans les deux chambres fédérales, de quelque parti qu'ils soient, de ne pas expédiés manu militari en deux jours, un projet qui a été chambardé comme ça et qui continue de brimer profondément les droits du Québec. Pourtant, nous sommes venus ici pour négocier de bonne foi, on n'a pas hésité à participer à des

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offres de compromis à partir desquelles il nous paraissait possible jusqu'à la dernière, non, jusqu'à la dernière minute de la journée d'hier, d'arriver à des consensus qui pourraient satisfaire tout le monde y compris nous du Québec. J'ai d'abord, voici jusqu'où nous sommes allés très rapidement dans les grandes lignes. J'ai d'abord posé la question évidente qui découlait de la motion de l'assemblée nationale au premier ministre: Est-ce que vous êtes prêts a renoncé à l'unilatéralisme, et de toute façon à renoncer à enlever quelque pouvoir que ce soit et quelque droit que ce soit au Québec sans son consentement?

La réponse est devant nous dans un accord des dix autres gouvernements, cette réponse c'est: non.

J'ai demandé ensuite si l'accord qui avait été conclu entre huit provinces depuis le mois d'avril 81 ne serait pas une façon honorable d'en sortir, c'est-à dire ce fameux rapatriement qui est devenu une obsession symbolique et aussi une formule d'amendement qui respecterait en pratique le droit de veto du Québec, sans rien changer à ses droits et à ses pouvoirs reconnus depuis 114 ans et tout le reste attendant une nouvelle négociation, la réponse est devant nous, c'est: non. Nous

avons ensuite participé avec les mêmes sept autres provinces, à huit, à la mise au point d'un nouveau compromis incluant cette fois une partie substantielle du projet de charte, mais une partie de cette charte qui ne pouvait brimer d'aucune façon, à notre avis, nos droits et nos pouvoirs québécois. Ca a été présenté au premier ministre fédéral comme on le sait, ce compromis, la réponse on la connaît, ça a été non.

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Puis le premier ministre fédéral lui-même je l'ai évoqué dans une démarche surprenante et qui paraissait prometteuse au départ — a prétendu ouvrir sur une solution référendaire, mais il y a attache lui même de telles conditions, que c'est devenu en réalité un pur ballon fabriqué pour être dégonflé, et finalement, ce matin, avant de quitter la séance, j'ai posé deux questions finales, quant à nous, au premier ministre fédéral, et à tous nos collègues ici et ces questions étaient celles-ci: premièrement, vous avez proposé hier qu'à défaut de consensus, ce projet fédéral n'entre pas en vigueur ni quant à la formule d'amendement ni quant à la charte des droits, puisque sans l'appui de la majorité du peuple québécois parce que dans votre formule référendaire que vous proposez hier, il s'agissait d'un référendum dans le cadre qui a toujours ete la tradition au Canada, c'est-à-dire sur la base des quatre grandes régions dont le Québec en constitue une à lui seul. Aujourd'hui c'est bien sur vous avez l'accord, monsieur le premier ministre fédéral, des autres provinces, sur un projet d'entente, mais vous n'avez pas l'accord du Québec, vous n'avez pas dans le consensus du tout, au sens où ça vous paraissait nécessaire dans la perspective référendaire que vous avez vous-même définie, est-ce que vous seriez prêt à vous engager à ne pas imposer ce projet avant qu'il ait été soumis au peuple du Québec et que ce peuple ait accepté majoritairement? La réponse a été: non, bien sûr, on garde, nous, le droit de consulter le peuple du Québec, finalement pour arriver! un dernier point, c'est ma dernière question et la dernière contribution qu'on a faite

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a cette négociation, j'ai demandé ceci: vous-même, monsieur le premier ministre fédéral, et plusieurs de nos collègues, d'une façon bien sentie, éloquente même, et qui nous a paru sincère en cours de route, vous avez reconnu que depuis 114 ans, pour des raisons qui constituent toute la dualité canadienne, vous avez reconnu que le Québec devait avoir cette garantie fondamentale que représentait son droit de veto en ce qui concerne ses droits et ses pouvoirs qui sont déjà dans la constitution actuelle. Il était entendu entre huit provinces dans un accord signé, que ce droit de veto pouvait raisonnablement être maintenu–nous l'avons accepté, même si nous avons été critiqué comme gouvernement- pouvait raisonnablement être maintenu à condition que si on décidait de l'exercer ce droit, il y aurait une compensation financière, qu'on ne soit pas pénalisé pour avoir exercé un droit de veto.

Maintenant, cet accord est émasculé complètement, neuf, dix gouvernements viennent de signer une entente qui comporte pour le Québec un droit d'opting out — comme on dit en anglais — un droit d'option en ce qui concerne tout changement à ces droits et ces pouvoirs, mais nous serons pénalisés financièrement à chaque fois si c'est la volonté du gouvernement fédéral.

On a même — heureusement ou malheureusement eu la pudeur d'enlever trois lignes dans le texte initial du projet qui a été signé, trois lignes qui soulignent les conséquences de cette émasculation de l'accord des

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huit provinces: "This change would mean that a province opting out would have to bear the financial consequences of its act."

Ce changement, c'est-à-dire l'abolition de toute compensation financière en cas d'exercice du droit de veto, ce changement signifierait qu'une province qui exercerait ce droit devrait en porter les conséquences financières. Il est évident qu'à partir de là que même si elles ont été enlevées, ces trois lignes représentent bien, definissaient bien clairement l'esprit et les conséquences de votre projet commun maintenant.

En terminant, je voudrais remercier pour le temps ou nous avons été ensemble et ou j'ai l'impression, j'ai eu l'impression que c'était une collaboration qui pouvait même acquérir un certain caractère permanent, pour ce temps où nous avons été ensemble, je voudrais remercier mes collègues des sept autres provinces de la collaboration que nous avons réussi à maintenir pendant au-delà d'un an, mais les bonnes choses — semble-t-il — ont toujours une fin, aujourd'hui le Québec revient à sa position traditionnelle, hélas! Puis c'est pas nous qui l'avons cherchée, ça finit avec nous qui sommes seuls dans notre coin. Tout ça c'est plutôt triste, je ne pense pas que ça soit triste seulement pour le Québec, peut-être plus encore pour le Canada, ça signifie encore un autre durcissement du régime en ce qui nous concerne, le carcan qu'il représente — parce qu'il ne faut pas oublier les positions traditionnelles non seulement du Québec mais depuis quelques années des autres provinces

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aussi — le carcan que représente, tel qu'il est devenu, le régime fédéral actuel, on prétend à notre endroit le resserrer encore en réduisant des pouvoirs et des garanties qui étaient déjà terriblement insuffisantes.

Il n'est absolument pas question pour un gouvernement québécois qui se respecte, d'accepter une pareille évolution. Jamais le gouvernement actuel du Québec ni votre serviteur ne capitulerons là-dessus. Jamais nous n'accepterons qu'on nous enlève quelque pouvoir que ce soit et surtout des pouvoirs à la fois traditionnels et fondamentaux, sans notre consentement, et je répète que nous prendrons tous les moyens qui nous restent pour empêcher que ça se produise.

LE PRESIDENT: Merci, monsieur Levesque.

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I now call on the Attorney-General of Nova Scotia, Mr. Harry How.
HON. HARRY HOW: Thank you, Prime Minister, Perhaps the Nova Scotia delegation might be permitted at this time a measure of special pride because approximately 114 years ago, Nova Scotia was one of the four original partners in Confederation. We greatly regret, Mr. Prime Minister, that our distinguished Premier, John Buchanan, cannot be here now to share in this historic moment of

national achievement by our First Ministers. He was called away at the last moment by the sad death of his father-in-law.

The accommodation reached, Mr. Prime Minister, by the First Ministers at this conference, although spearheaded by the Premier of Newfoundland, is very reflective of the views of Premier Buchanan, as expressed by him from time to time in the past, in past constitutional meetings, and particularly so at this historic meeting. It is also reflective, we should add, of his repeated assertions that the way to achieve constitutional amendment was by the process of negotiation: here in Canada and an endeavour to reach a consensus in this most difficult of national objectives. His faith that Canadians could reach agreement at home rather than have one imposed by one level of government here at home, or perhaps legislated by a government outside our nation has, I suggest, been clearly vindicated by the consensus reached at this historic conference.

My colleague Mr. Edmund Morris will conclude on behalf of the province of Nova Scotia.

HON. EDMUND MORRIS: I may be permitted to say that there has been for some time a perception in Nova Scotia, which we will now earnestly hope will be diminished by today's agreement, that whatever the universe has recently been doing, the country has not been unfolding as it should. With

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today's agreement we believe that Canada, and Nova Scotians in it as Canadians, can move forward to deal in greater hope and confidence with pressing matters needing our resolution.

There are few greater truths than the great line from King Lear "All hands leave go, when the great wheel runs down the hill". By what has been achieved today, we Nova Scotians will believe that the great wheel has been arrested in its turning and can now begin to be trundled back uphill again.

As it was at the beginning of Canada, Nova Scotia, one of its founders, is gratified to have played a full and steady part, a calm and even role, in all of the converse and deliberations leading up to today's agreement. It will be our purpose and meaning to do so in fullest measure in the future. Thank you, Prime Minister.

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THE CHAIRMAN: Thank you, Mr. Shakespeare — Mr. Morris. Premier Hatfield, you have the floor.

HON. RICHARD HATFIELD: Mr. Prime Minister, I want to say at the outset that what we are celebrating here makes me very excited. I believe, as you said at the outset, that we have achieved something very substantial and very significant. As this country was born in compromise, it is now or very soon will reach its full maturity because of compromise. Canada is compromise and a lot of compromising has been done and I say that with pride.

Mr. Prime Minister, reference has been made that I have been involved in this process for a very, very long time and over the course of that period I have had a

lot to say and some of it was not very nice, especially remarks I made about those who didn't necessarily agree with me.

I want to say, Mr. Prime Minister, that reference was made this morning that we had to swallow a lot. Well, when I signed that agreement I swallowed all those unkind words, but there is one thing I won't take back, one statement I made that I won't take back. I have been saying it for a long time and that is that the political leadership of this country has the competence and the maturity to bring about what we have brought about today and I am very proud of my colleagues and I feel very grateful to have been involved with them in this process.

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There has been a lot of time and a lot of effort, there has been an awful lot of paper, there have been an awful lot of proposals, there have been an awful lot of things considered. When I think of the numbers of times that we would reach a decision and say, "Let's give it to our officials and let them work it out," well, I want to say to those officials, they did work it out and they should share in the pride that we have today.

The Premier of Quebec has made the statement that Quebec is now alone again. Mr. Prime Minister, the people of Quebec have been a very important part of Canada and they still are. Quebec is not alone. Quebec is still in Canada and Canada is still working with, and it will continue to work with Quebec, with the people of Quebec. I said at the outset that I am excited. I am excited today by the challenge that the impossibility of unanimity presents to us now, a challenge to make sure that people in this country understand that while we are proud of what we have accomplished, we are not satisfied. We are not satisfied. There is still a lot more to be done, and I am confident, based on the example that we have set, I am confident that the political leadership of this country will continue to make that kind of progress that will give to everyone in this country a sense of security.

There is one particular thing I want to say because it is important to us here, or important to my province.

Monsieur le premier ministre, je suis très heureux car cette entente nous permet des progrès dans les possibilités d'éducation pour les francophones et les anglophones au Canada.

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But that is an area where we have made very important and very historic progress, but there is still a lot to be done. I am concerned about the fact that there are provisions for opting out in important areas. I want to give an undertaking that I will do everything possible to urge the Legislature of New Brunswick not to use that opportunity, consistent with my firm view that if we are going to have rights, they must be shared by all Canadians, regardless of where they live.

We couldn't get all that we wanted. We have got a great deal but there is still a lot to do. I want to make a special appeal to every member of Parliament that they do consider this agreement and that they do make every effort to understand how broad and good it is and that they give it their support. I would like to hope that

they would support it unanimously. I would like to hope that they would support it as soon as possible.

Mr. Prime Minister, I want to say again that compromise is Canada and the reason I think the compromise came about is because during this whole process we heard the voices of Canadians. The pressure was felt, let me tell the people of Canada, that what they had to say was heeded and it was considered and, Mr. Prime Minister, that is our Canadian parliamentary system, that is our Canadian way of doing things and it still works and it works for all Canadians in every part of Canada.

Merci.

Le president: Merci, monsieur Hatfield. The Attorney-General of Manitoba, Mr. Mercier, has the floor.

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HON. G.W.J. MERCIER: Thank you, Mr. Chairman. I signed this agreement, of course, on behalf of Premier Lyon. We have accepted a constitutional accord as an amending formula. We believe that this formula is better for Canada than provincial vetos. The solution will give a veto only to the federal government to protect the national interest and a limited right of withdrawal to the operation of an amendment within a province.

This right of withdrawal would apply only when existing provincial rights, powers and privileges are being taken away. When we consider that such amendments have only occurred on five occasions since 1867 and only when unanimous provincial consent was sought and obtained, I submit that the use of the opt-out provision will be a rare occurrence.

We deeply regret the non-participation of Québec in our agreement. We had supported their stand on fiscal equivalency if the opt-out provision was exercised and would have preferred to retain that provision, but, Mr. Chairman, under our agreement, the rights of Canadians will be protected, not only by the constitution but more importantly by a continuation of the basic political right our people have always enjoyed, — the right to use the authority of Parliament and the elected Legislatures to identify, define, protect, enhance and extend the rights and freedoms Canadians enjoy. We have achieved this within the four corners of what the Supreme Court has called the federal principle.

Now, Mr. Chairman, let me suggest to you on behalf of the province of Manitoba that all of us move on to the truly urgent and important matters that concern us and that concern Canadians about the current state of our

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economy: interest rates, mortgage payments and inflation.

Mr. Chairman, you will be bringing down your budget next week. You will be dealing with the impact of high interest rates. You can be assured that we in Manitoba will cooperate with the resources that we have available to make your measures work, to give real and significant help to the Canadians that live in our province. We know that we cannot do it alone, Mr. Chairman. We know that we need the federal nature

of Canada to achieve the things our people want us to achieve. So, Mr. Chairman, just as we have tried to work with you on the constitution, we will try to work with you and your government on the economy.

We, the provincial governments of Canada and the people of Canada, need the partnership of the government you lead to overcome our current economic problems and to make the most of our economic and social opportunities. There is an important job to be done with respect to our economy, Mr. Chairman, and neither level of government can do it alone. Perhaps the best way for Canada and for us to end this conference is for you and your government to accept the partnership of the provinces in meeting the real and urgent economic problems of Canadians and in building on the real and exciting economic opportunities that lie before the people of Manitoba and of every part of this country.

Thank you, Mr. Chairman.

THE CHAIRMAN: Thank you, Mr. Mercier. The Premier of British Columbia, Mr. Bennett.

HON. WILLIAM BENNETT: Mr. Prime Minister, Premiers, I guess when we started we all started out to develop a "made in Canada" constitution. We did not want to have our constitution developed by any sort of discussion

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taking place in Great Britain, other than in their Parliament and today we have achieved that. I think every representative, be he a premier or a minister or part of the delegation, some of whom have laboured for many years on constitutional reform, should take some pride that we have been able to achieve it in the Canadian way. We have done it in our own country. We have done it with compromise and we have done it with a great deal of give and take that I think is essential if the country is to work. It is not, as some have asked, a game of winners or losers. It is a game in which many people showed their great ability to put the country, put the interests of all parts of Canada first, ahead of either provincial or regional interests, which in turn I believe all premiers here have respected and preserved, which are as important to Canadians.

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I have one regret, I regret the province of Quebec cannot sign this document today, but I assure the people of Quebec, as I do the people of the other provinces, that I would not sign this document if I did not think it was good for Canadians in all 10 provinces of this country. I would not sign this document if I did not think it met equally the needs of the people of British Columbia, or the needs of those in all the other provinces including Quebec.

I can say this to the Premier of Quebec, that if I still was the Premier of British Columbia in a number of years and found that our constitution did not fairly represent all of the people in this country, and all of the parts of the country including my own province, I would move for additional constitutional reform; for a constitution should be a living document. Those things we have put in are not cast or graven in stone, they are merely a guide for today and hopefully governments in

the future will be able to continue to make more workable and make more noble, perhaps, our Canadian constitution.

What we have done is be able to bring this constitution to our country and never again will we live under the threat of having to hold that discussion or constitutional talks in any other country in any other part of the world. While I don't think we will eliminate the debates of the future, and the stresses and strains of confederation, at least we will be doing it in Canada and at least we will be doing it with our made-in-Canada constitution.

Perhaps if I could, as well as talking to the Canadian people I could mention something to the people of

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British Columbia; for when we came to these conferences we came to achieve three things. The first thing we wanted to do was preserve and strengthen the federal system and to defend the integrity of the Supreme Court of Canada decisions, and I believe we have done that. Secondly, it has long been our position in British Columbia that if this country is to not only have equity and be equitable, that no province, no matter how populous or how historically important, should have a veto over any other part of the country. That doesn't mean that any province would become a second-class citizen, but the veto process we have had in the past has created an implication that some provinces were less equal than others, and that is why I could not support the original Victoria Charter amendment, or amending formula, even though I know a distinguished member of my family was there in 1971 with Premier Davis, the Prime Minister, and Premier Hatfield, and agreed to that formula. I am sort of pleased that we have been able to complete the job this year.

THE CHAIRMAN: He's watching.

HON. WILLIAM R. BENNETT: He is watching and I want to reassure it is not going to happen, but I would hate to think that the people of British Columbia or you might consider another

Bennett was going to have to deal with you in 10 or 20 years when I am long gone.

— Laughter

HON. WILLIAM G. DAVIS: I can give you the assurance that will not be the case, from my standpoint.

HON. WILLIAM R. BENNET: That will be reassuring to my children.

— Laughter

HON. WILLIAM G. DAVIS: On second thought, I've got two boys .

— Laughter

HON. WILLIAM R. BENNETT: Anyhow, Mr. Prime Minister and Premiers, I think we can take a lot of pride in this day. I do . I take a lot of satisfaction from the

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hard work starting many years ago for us but when we first became government and then in September of 1980, the development of the accord in January and I can think of significant events, I can think of Supreme Court decisions, I can think of the work-up to get this meeting and it has all been worth it for all of us and I congratulate each and every member, Mr. Prime Minister yourself, and each Premier and I am proud to have had the opportunity to negotiate with you and to receive some of your sometimes very strong advice in reaching this conclusion.

Let me say that I think we are embarked on hopefully a new spirit in this country, and the bitterness that has enveloped Canada for the last two or three years will be gone. Recently a number of provinces were able to achieve significant energy agreements with the government of Canada. Today we have achieved agreement on constitutional measures that will patriate our constitution. Prime Minister and Premiers, there are many outstanding issues on the agenda of the Canadian people that still need to be resolved, and I hope that rather than seeing this meeting as a sort of conclusion that we see it as another in the building blocks of providing the climate and the opportunity for agreements between Newfoundland and other provinces, that will help to build the Canadian fabric, the economy and a sense of belonging together.

In my opening statement to this conference, I said the following; fifty years from now when historians look back upon our activities here this week, I would hope they would conclude that through national leadership and in the Canadian way of compromise, conciliation and consensus,

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we succeeded in forging a constitution to serve as a beacon of hope to generations of Canadians and that in the process we overcame a temporary period of national dissention. Mr. Prime Minister and Premiers, I know all Canadians share that hope and share that prayer but today I know they also share the satisfaction and joy and pride we take in this moment.

THE CHAIRMAN: Thank you, Premier Bennett. Premier MacLean.

HON. J. ANGUS MacLEAN: Thank you, Mr Prime Minister and colleagues. It is well-known that the objectives we have been trying to achieve have been divided into three categories, the question of patriation of our constitution and striving to find an amending formula and then the re-stating and addition to the so-called Canadian Charter of Rights and freedoms to be included in the constitution. My personal feeling was that this should have been done in two stages, that the result would have been better if we had the first two things accomplished and then went on in a different atmosphere to achieve the third. But, I am like, all of my colleagues, I have been ready to make concessions for the general good.

I regret, of course, that some of our colleagues, Mr. Lyon of Manitoba and Mr. Buchanan of Nova Scotia are unable to be here for reasons that have already been stated, but I want to congratulate the Premier of our newest province, Newfoundland, the Honourable Mr. Peckford for his major contribution to achieving this consensus. I would like to express my personal appreciation to Premier Davis

for the kind words he said about myself, and I consider that one of the key things, one of the most important things, and perhaps the greatest achievement is that we as a group have at long

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last achieved an amending formula that all provinces, I think, can feel is reasonably fair.

Now, I understand the reservations of Quebec and I will speak about that later , but as the Premier of the smallest province, I want t o say that I am greatly strengthened in my belief in canadianism by the fact that now provinces, before the law as it were, will be treated like human beings, like people, as individuals and not according to their weight.

The recognition that the voice of a province, no matter how small, is important with regard to its own obligations and with regard to its rights and privileges in Confederation, I think is very important. The recognition that constitutions should be amended by consensus, and by discussion between the units that make up the two levels of government, rather than by any attempt at unilateral action by either level of government I think is very important. I should remind Canadians however, I think that the agreement that we have achieved has little bearing on many problems
facing Canadians and is indeed irrelevant to many of them. All governments should, I think, now give their full attention to the problems which are the first concern of most Canadians.

I think that as a result of the long deliberations that have gone on for more than a year now, the concept of confederation is better understood by many people and my view of a constitution is that it is a code, a framework. It is very important that it be observed not only to the letter, but in the spirit. My expectations are that the conventions which we have created over the years will be observed in the future and strengthened in the years ahead.

In a way, I think that Confederation is

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something like a marriage, its success or failure depends more upon how the participants treat each other, and how they live up to the spirit of the arrangement, I think that is much more important than the wording of the vows.

I might add that as a Canadian I am proud to have been one of the so-called Gang of Eight, who have, through their hard work over a long period, I think have made a major contribution to us achieving an amending formula. I want to pay tribute to Premier Levesque in those deliberations for his objective reasonableness and for his flexibility and for the very major concession he was willing to make on behalf of his province in giving up the right of veto which they held and accepting in its place, merely the opportunity to opt out, and I don’t know how this can be achieved but I think we should strive towards a situation where a province would neither benefit nor be penalized if it chose to opt out of any particular situation.

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On a personal note, Mr. Prime Minister, I am very pleased indeed that we have reached this milestone before the few days remaining to me as Premier of Prince Edward Island, the cradle of confederation, have run out, and I want to express my appreciation not only to my colleagues, the First Ministers, but also to other ministers and to officials who have contributed so much in this achievement for Canada.
Thank you.

THE CHAIRMAN: Thank you, Premier MacLean. Premier Blakeney of Saskatchewan.

HON. ALLAN BLAKENEY: Mr. Prime Minister, I am happy to join in this occasion. I welcome the tone set by you, by Premier Davis and by the other speakers. I particularly welcomed Premier Davis' submission to the meeting. I don't know when I have heard his words more gracious or seen his mood more ebullient. I regretted that there wasn't anything I needed very badly from Ontario right at the moment, because I think this is the day I might have got it.

HON. WILLIAM DAVIS: I am glad to hear you didn't need anything.

HON. ALLAN BLAKENEY: Speaking of the agreement, I would say that it doesn't include everything that Saskatchewan would have wished and probably every government would say the same, but it is a reasonable compromise, a bargain and an honourable bargain for Canada. It contains an amending formula which protects the vital interests of individual provinces, but still allows Canadians

to amend their constitution without unanimity. It doesn't provide a veto. It removes the perpetual veto from the Senate which is something that we were interested in. It contains a Charter of Rights which protects the interests of individual Canadians, yet in several vital areas allows Parliament and Legislatures to override a court decision which might affect the basic social institutions of a province or region and this is fully consistent with the sort of argument we have put forward that we need to balance the protection of rights with the existence of our institutions which have served us so well for so many centuries.

It spells out clearly the protection of resources and I need not tell you the importance which our province has put upon that. It is acceptable to the federal government and nine provinces, and I believe that meets the test of being constitutionally done by the Supreme Court.

Saskatchewan has taken the position that we should not move with constitutional amendment unless we met that test which I had phrased as the double majority, a majority in the House of Commons, which will be yours to secure, Mr. Prime Minister, and a consensus of the provinces which, as it seems to me, we have here today.
As I say, I believe the agreement meets that test.

The pleasure which I feel today is tempered by the fact that the package is not supported by the Government of Quebec. I wish that they had decided otherwise, because the participation of Québec in building

our country has been enormous and will continue to be of the greatest importance in the years ahead. Some of us did address this problem with all the care we could. As we saw it, in the past Québec had had a de facto veto which didn't carry with it fiscal compensation applicable in some areas, but at any rate that wasn't part of the arrangement.

Then the Supreme Court came along and said no province has a veto, all that is needed is consensus.

Meanwhile the Group of Eight had been working on a basis which involved the principle that all provinces would be treated alike. This clearly — this combination of events clearly presented some hazards for the province of Québec and we were persuaded and strongly persuaded that under those circumstances the vital interests of the province of Québec should be protected by an opt-out arrangement. I am sorry that it is perceived that the current arrangements are not adequate for that. I had believed and still believe that it gives a high measure of protection and allows Canadians in this very diverse country to develop their own particular destinies within the overall united Canada, all those it seemed to me were pretty important objectives which by and large had been achieved. So I look on our accomplishment as no small feat.

So I look on our I think it is a great day for Canada. We will patriate our constitution, we will have a way to amend it here in Canada, we will have a Charter of Rights which is consistent with the tradition of British parliamentary democracy and we undertake to deal with the rights of native Canadians. We have strengthened the confederation bargain by making it easier for people to

move across Canada and take jobs. We have strengthened the Canadian confederation bargain by improving the protections of French-speaking and English-speaking minorities. We are happy to participate in that. We will have a "made in Canada" constitution. Canadians indeed will have completed a major act of nation-building that we began a hundred and fourteen years ago and I, for my part, Mr. Prime Minister, am proud to have had the opportunity to participate in this exercise with you and with my fellow premiers on behalf of the people of Saskatchewan.

THE CHAIRMAN: Thank you, Premier Blakeney. Premier Lougheed of Alberta.

HON. PETER LOUGHEED: Thank you, Mr. Prime Minister.
It is certainly an occasion that has very great significance because it really represents, in my judgment, what this country is about and its federal system.

As I said in my opening remarks, it had to be done by consensus and not by unilateral action. I have struggled through with you, Mr. Prime Minister, over the course of this summer, the very complex and difficult negotiations in the area of energy and again in that case, as well as in this, there had to be adjustments and modifications made by all who were involved, and that is the Canadian way we do things. It is not easy, but it bears a second example of where it can be done.

Albertans had objectives coming into this conference that were important objectives. We wanted patriation and a "made in Canada" constitution and, Mr. Prime Minister, I want to assure you that I didn't really

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want to go to London. I really wanted to go to Eglinton, but not to London. In any event, I am glad I can go to London perhaps at another occasion for a different purpose.

The amending formula was a fundamental objective for our province. Back in 1976 when we were to degree alone then, we took a position on behalf of the people of Alberta that in a confederation there should be no provinces that were second-class provinces and we shouldn't be in a position where rights could be taken away from our province, rights that we had and have today, without our concurrence. It was a fundamentally important point for us and we struggled through, I guess it is five years now, to come to this point and we are extremely pleased that this amending formula reflects that equality of provinces. We never sought a veto for Alberta and that is what brought us to the opting-out situation. We have never been anything other than a proponent of a Charter of Rights, but it had to be done, in our judgment, in a way that did not affect the supremacy of the elected people and they had to be in a position in a parliamentary system that they could respond through their elected legislature to the interpretation of what might come over the years ahead to decisions of the courts in interpreting a Charter of Rights.

The very first bill our legislature introduced was an Alberta Bill of Rights, and I am proud of that. Certainly we and others made some movement in the Charter of Rights and that is part of being here and I am pleased to be a part of it. Yes, my friend, Bill, we did budge and your persuasion was helpful in our budging.

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The other thing that was important in our objective was that we respected the decision of the Supreme Court of Canada with regard to what is the constitutional convention of this country and that is what has happened here today.

Finally, and I know others disagree with me, but as a parliamentarian I believe very strongly that decisions should be made by political leadership, not made by way of referendum and that referendum is a divisive approach. I appreciate others disagree with me, but I feel very, very strongly about that. We had a group of eight that came about after the unilateral federal action. We worked together on an amending formula and I regret today with the others that Québec is not part of this consensus.

Quebéc pressed, and I understand it, they pressed that if they were going to exchange their veto for an opting-out position, that they should have in exchange a position that gave them the financial compensation for their opting-out. That was the position they took. It was not our original view, it wasn't our view in what was known as the Vancouver consensus, but it was pressed and pressed eloquently as a position to be taken by the province of Québec.

I regret that they have taken the view that it was fundamental, if I understand it, to their acceptance of this accord today. I join with Premier MacLean, Prime

Minister, in what he said, and I think I saw you nod with regard to it, that what has to happen here is one of two things on this matter: either we find a situation of resolving this matter in terms of fairness,

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resolving it perhaps constitutionally, perhaps in some other way, that is the question of a province opting out and being placed in a position by doing so of unfairness.

As you said, Mr. Prime Minister, in your opening remarks, and I understand the objection, a province opting out for reasons of jurisdiction and the reason being — the result therefore being that they be in a position of benefiting as well in a financial way was, I think, at the heart of yours and other concerns on that amending formula, but Mr. MacLean's comment has to be, "Where do we go from here?" and there have to be assurances given that there be that fairness there, that if the opting out creates a jeopardy or a situation that is just simply not fair, then we are assured political realities will respond to it.

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Finally, I just want to congratulate not any one particular Premier, but all of the 10 Premiers and the 10 delegations. Everybody was involved in this process. There were no bystanders. Some took initiatives in a public way, some took initiatives in a private way, but everybody has been involved, and I think that it proves to me, and I think to Canadians, and I am sure to Albertans, that Canada works and Canada as a Confederation will continue to work and work well in the spirit we have here. Recognizing that some difficulties exist can be a good foundation to move forward in the recognition that within those other areas where we need the co-operation, economically in other areas, we can use this as a launching pad together with the spirit of the energy agreement to work together for the benefit of citizens wherever they live in this country.

THE CHAIRMAN: Thank you, Premier Lougheed. Premier Peckford of Newfoundland.

HON. BRIAN PECKFORD: Mr. Prime Minister, I listened with great interest to what Nova Scotia had to say and what Mr. Morris had to say and it brought back to my mind my days as an English teacher, and Shakespeare came very quickly to mind, and surely the last three days haven't been "Much Ado About Nothing". I am reminded of Wadsworth's comments in one of his poems:

"We see into the life of things"
and I am reminded of Tennyson:
"To seek to strive, to find and not to yield"

and I am reminded most particularly of Frost when he said in the title of one of his poems, "The Road Not Taken".

Mr. Prime Minister, I think this is a great day as most other Premiers have said, for Canada. I think it is a great day for four principles which we have articulated right from the beginning of this process. It is a great day for balanced federalism, for parliamentary democracy, for the equality

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of the provinces and for consensus. I think it is also, if I may say so, Mr. Prime Minister, a great day for you personally and for some of the people, the First Ministers who have supported to you as I have said in closed session, on the principles of a Charter. I think that is very, very significant. Whilst we mightn't have what I wanted, or other Premiers wanted, or what you yourself , Mr. Prime Minister, wanted, I think it is once again, a good balance and a good consensus and the principle has been established which I think is extremely important and does provide a lot of evidence to your notion of a national will or a national consensus, as you sometimes phrase it. So, I think it is a big day for you and for those people who have expounded eloquently over the years on the question of nationhood and on the question of Canadianism, and I don't want to diminish it, even though I can say a whole bunch of things about Provincialism.

I think it is also important to note the role of the federal government in this whole process, the role of the Supreme Court of Canada, and the role of the provinces and that is the way it has to be and continue to be. From Newfoundland and Labrador's point of view it is a big day for us in the sense that as some of the Premiers have indicated, for us it is our terms of union, a recognition of particular circumstances that exist in our province as it relates to us trying to become not only constitutionally but in real terms, economically, socially, equal Canadians. Given those recognitions, it won't be long now before we will be able to exclaim in effect and in economic terms the equality which we so much desire and wish to seek. The spirit of co-operation, the consensus that we have here today must extend on into the future and we must grapple with many

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of the issues that others have mentioned, and I am sure we can do that.

Mr. Prime Minister, I guess as still a relatively young Canadian and young Newfoundlander, let me say this, as sincerely as I can, that I feel more fully a Canadian today than I have ever felt since I have been old enough to think, to know and to try to understand. It is a proud day for us all. Let us move forward from here to continue to build in the spirit of consensus, in the spirit of federalism so that surely some of the words that we have heard years back about somehow this century being so much Canada's can be fully realized before the century is out. Given our energy agreements and given the agreement today, who knows? We still have 17 or 18 years left to truly make it what Laurier said it could and should be. Thank you.

THE CHAIRMAN: Thank you Premier Peckford and thank you particularly for your kind words addressed to me. I am inclined to reciprocate by saying that the draft that finally brought us to an agreement was presented by you this morning, but we all have what is called in French l'esprit d'escalier, badly translated, afterthought, and I don't think I will open the meeting for any afterthoughts because we had better grab the signatures, this piece of paper, and run before anyone changes his mind. La séance est ajournée.

— Adjournment (2:15 p.m.)

(I.) CONSTITUTION ACT, WORKING DRAFT

NOVEMBER 5, 1981

Source: Consolidation of proposed constitutional resolution tabled by the Minister… (Nov. 5, 1981)[1]

WORKING DRAFT

November 5, 1981

Consolidation of proposed constitutional resolution tabled by the Minister of Justice in the House of Commons on February 13, 1981 with the amendments approved by the House of Commons on April 23, 1981 and by the Senate on April 24, 1981 as WORKING DRAFT November S, 1981 further revised on instructions from the Prime Minister of Canada and the Premiers of nine Provinces at their Meeting at Ottawa on November 5, 1981.

[…]

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare !pan Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2, sections 7 to 15 or section 28 of the Canadian Charter of Rights and Freedoms.

Operation of exception

(2) An Act or a provision of an Act of Parliament or of the legislature of a province in respect of which a declaration is made under subsection (1) shall have such operation as it would have but for the provision of the Canadian Charter of Rights and Freedoms referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

[1] Full citation: Consolidation of proposed constitutional resolution tabled by the Minister of Justice in the House of Commons on February 13, 1981 with the amendments approved by the House of Commons on April 23, 1981 and by the Senate on April 24, 1981 as WORKING DRAFT November S, 1981 further revised on instructions from the Prime Minister of Cana-da and the Premiers of nine Provinces at their Meeting at Ottawa on November 5, 1981. (Nov. 5, 1981).

[Footnote in progress] This draft reveals the first fully-worded version that followed the November Accord, which would change slightly before being submitted to Parliament on November 20th. Previous to its discovery, the history jumped from the November Accord to the November 20th resolution to Parliament. However, this important draft was the first attempt at wording the Notwithstanding clause precisely and the contents of this draft would provoke a flurry of correspondence between the First Ministers (and changes) leading to the introduction to Parliament on the 20th.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

(I.) MEMORANDUM, THE RESOLUTION AS AMENDED BY FIRST MINISTERS AGREEMENT

NOVEMBER, 1981

Source: Memorandum, The Resolution as amended by the First Ministers Agreement (Nov. 1981)

THE RESOLUTION AS AMENDED BY THE FIRST MINISTERS AGREEMENT

[…]

6. Multiculturalism

The section (27) that provides that the Charter is to be interpreted in a manner consistent with the preservation and enhancement of our multicultured heritage. The "override" section does not apply to this section as such.

The "override", however could be used to prevent the operation of a Charter right as may have been interpreted with the aid of section 27. In other words, if a court where to give a consent *[unacceptable]* to the right to non-discrimination (Section 15) because of Section 27, a legislature could pass legislation to "non-obstante" that right.

(I.) MEMORANDUM, DIFFERENCES BETWEEN THE OLD AND NEW CONSTITUTIONAL RESOLUTION

NOVEMBER, 1981

Source: Memorandum, Differences between the old and new Constitutional Resolution (Nov. 1981)

Differences Between the Old and New Constitutional Resolution

I - The Charter of Rights

The Charter of Rights in the new Resolution is the same as in the Resolution previously before Parliament with two exceptions.

1) Mobility

The new section 6(4) which results from the Accord signed by the Prime Minister and nine Premiers provides that despite general mobility rights, provinces with below average employment may take special measures favouring their own residents who are seeking work.

2) The Over-ride Clause

There is a new provision in the Charter which enables Parliament or provincial legislatures in certain circumstances to over-ride sections of the Charter. The over-ride clause requires that a law state specifically that all or part of it applies notwithstanding a particular section of the Charter. Such a law automatically expires after five years unless specifically renewed by a legislature. It should be clear that an over-ride is very different from a general opting out provision. No province can opt out of the Charter of Rights.

The over-ride clause does not apply to Section 28 of the Charter which provides that "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

The concept of an over-ride clause is not new in Canada. Experience has demonstrated that such a clause is rarely used, and, when used, is usually non controversial. The Alberta Bill of Rights was enacted in 1972 and includes an over-ride clause. The Saskatchewan Human Rights Code of 1979 also has an over-ride provision. Neither has ever been used.

The Canadian Bill of Rights enacted in 1960 by Mr. Diefenbaker also contains an over-ride provision. In twenty years, the only time it has ever been used was in the Public Order Temporary Measures Act enacted in November 1970 after the October Crisis of that year. But the regulations under that Act which derogated from the Canadian Bill of Rights expired less than six months later on April 30, 1971.

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The Quebec Charter of Rights and Freedoms adopted in 1975 contains an over-ride clause which has been used several times. However, its use has been non controversial.

[…]

(I.) CANADA, HOUSE OF COMMONS DEBATES, THE CONSTITUTION

NOVEMBER 6, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 12594-12595.

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THE CONSTITUTION

PROVISION RESPECTING WOMEN'S RIGHTS

Miss Pauline Jewett (New Westminster-Coquitlam): Mr. Speaker, in the absence of the minister responsible for the status of women my question is for the Prime Minister. As the Prime Minister knows, Clause 28 of the constitutional resolution is a paramountcy clause outside the charter. I remind him that Clause 28 is the one saying

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

What I would like to ask the Prime Minister is if he can tell the House whether Clause 28 will continue to have paramountcy. That is, will it override any attempts made to deny equality to women?

Right Hon. P. E. Trudeau (Prime Minister): Mr. Speaker, I can only answer that my impression is that the clause would continue. I have not been involved in the drafting which went on between provincial and federal officials yesterday afternoon and, I believe, during the night as well.

I cannot answer firmly but I want to tell the hon. member—and this applies also to the Standing Order 43 motion put by the member for Malahat-Cowichan-The Islands—is that we took the draft presented to us by the seven premiers. They had made a lot of deletions from our original draft which is before the House. One of those deletions was precisely the clause concerning aboriginal rights. They are the ones who deleted it. If there was any deletion of the clause that concerns the hon. member—

An hon. Member: You agreed to it.

Mr. Trudeau: I understand. I agreed to a lot of things that were not my first choice, yesterday. That must be understood. I was looking for a consensus, and I got a consensus.

Some hon. Members: Hear, hear!

Mr. Trudeau: When the member is finished shaking his fist he can realize that I sought a consensus on the basis of a series of deletions to our charter, the best charter in the world which I believe some of the members over there supported. I accepted a consensus put to me by seven premiers. There were some

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deletions, and aboriginal rights was one of them. Maybe the other clause was another. I am not sure. I will have to check that, and that is why I say I will see what was done on the drafting overnight.

I cannot conceive how the member from Malahat-Cowichan- The Islands could come out with an untruth as enormous as the one he did when he said that Saskatchewan was supporting aboriginal rights and somehow we were not. It is Saskatchewan and the other six that put to us a draft without aboriginal rights. It is in the discussion that ensued that I said I found that difficult to accept. but if they were

facing me with this draft could we at least have a federal-provincial conference agreed where we would try to see what the native people agreed to among themselves, assuming they can agree among themselves, and that is far from certain, but I said let us at least give them a chance to meet with us. That is how it happened.

Some hon. Members: Hear, hear!

(I.) MEMORANDUM FROM D.R. CAMERON FOR MR. KIRBY, QUEBEC AND THE CONSTITUTIONAL AGREEMENT

NOVEMBER 9, 1981

Source: Memorandum from D.R. Cameron for Mr. Kirby, Quebec… (Nov. 9, 1981)[1]

CONFIDENTIAL

November 9, 1981

MEMORANDUM FOR MR. KIRBY

Quebec and the Constitutional Agreement

In the next days and weeks, the government must decide how to apply the constitutional agreement in Quebec, and its decision will have far-reaching consequences. The purpose of this note is to review the options facing the government in the light of these longer-term consequences, and to suggest a course of action for the short-term.

The Context

Although many options are now open to the federal government, they may be divided very roughly into two schools of thought. The first school belongs to the "hardliners"; the second group may be called the "conciliators".

1. The hardliners believe that the federal government should act firmly, in one way or another, to ensure the application of the constitutional agreement in Quebec, even though the provincial government has not consented. This could be accomplished simply by imposing the constitutional changes on Quebec, or by seeking the direct approval of the people of Quebec to do so, either in a federally-sponsored referendum or in one the PQ may be provoked into holding. This group argues that Quebec cannot be exempted from the agreement or treated differently from other provinces, and that the federal government should not try to avoid a confrontation with the PQ. It is eager to deliver a "knock-out" blow to separatism and welcomes a confrontation with the PQ now, in order to do so. Persons of this view are likely to argue that it will be much harder to fight the PQ in an election or referendum a few years hence when the PM has left the federal stage. They also argue that a second defeat for

the PQ following upon last year's referendum would be a very damaging blow from which separatism would not soon recover. And they think that the resolution an the Charter would be very good grounds on which to fight, because the principles they embody are highly popular, even among Quebec francophones.

2. The conciliators argue that it is neither necessary nor prudent to "impose" anything on Quebec, or to pick a fight with the PQ at this time. They are inclined to argue that the

[1] Full citation: Memorandum from D.R. Cameron for Mr. Kirby, Quebec and the Constitutional Agreement (Nov. 9, 1981).

constitutional wangles have been too visible for too long and that they should now be played down in Quebec as elsewhere. They argue that continued polarization is not helpful, and that the federal government should not go out of its way to provide the PQ with ammunition or with occasions to incite anti-Canadian sentiment in Quebec. They are concerned that the current constitutional dispute could be used to fabricate a long-lived myth about Ottawa's high-handed invasion of Quebec's sovereign powers, a myth that could poison federal politics in Quebec for years to come. They are inclined to attach considerable importance to the position of Mr. Ryan and of the provincial Liberal party, and to think that everything practical should be done to make it possible for the latter to distance themselves from Levesque and to support the constitutional agreement in a manner consistent with the recent resolution of the National Assembly. The conciliators think that it would be possible: to devise a number of acceptable ways to meet the concerns of the people of Quebec; to be seen to be conciliatory rather than aggressive; to nip in the bud any potential myth about the despoliation of Quebec; to undercut any PQ attempts to portray the federal government as intransigent; to rob the PQ of the target it is seeking; and to offer the Quebec Liberal party a way to escape its present entanglements and to support the constitutional package.

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The Course Proposed

This note adopts the view that both approaches may have something to be said for them but that before embarking on the first, the possibilities of the second should be carefully explored. In our view, there is nothing to be gained by precipitous action to "coerce" Quebec at this time, and perhaps something to be lost: harmful and groundless myths could be embedded in the minds of many Quebecers for a long time to come; and the federal government's potential allies in Quebec might find it more difficult to come to its support, and to the support of the constitutional settlement. We recommend instead that, before taking action of this kind, the federal government take time to assess its long-term consequences. In the meantime, it should explore, and should be seen to explore, all possible means to meet the concerns of the people and of the government of Quebec in the three most sensitive areas.

The Options

1. Language of Education

Of the three areas of concern, language of education is the most sensitive and symbolically the most powerful. In evaluating options for action in this area, the following considerations should be kept in mind:

- Since 1867, no other Canadian province has ever had minority education rights forced on it without its consent (Manitoba came close in 1896) despite many flagrant and well remembered abuses, especially in Ontario and the West.
- Even in the current resolution, the federal government has conspicuously declined to "impose" Section 133 on Ontario.
- Quebec has by far the best historical and contemporary record of concern for its linguistic minority.
- The education rights and opportunities of Quebec anglophones are not fragile or threatened and it is un likely that they would be altered or improved by such language of education provisions as are likely to be included in the constitutional resolution. This is not the case for minorities in other provinces.

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- The sociological condition of the minority in Quebec and the francophone minorities elsewhere a e not comparable, and many Quebecois rightfully reset crude attempts to equate them.
- The francophone population in Quebec is the only provincial linguistic majority which has ever bee demographically and institutionally vulnerable (in relation to its minority) and which continues to harbour deep-seated fears of becoming so again at some future time.
- The moral case for minority rights is very strong and can be expected to prevail in Quebec, as it ultimately has elsewhere, because of Quebec's historic commitment to the fair treatment of minorities (both its own and others') and because of the contemporary attitudes of francophone Quebecois as revealed in opinion polls.
- The argument in Quebec is not about substance (on which every one is agreed) but on process. The wrong process could provoke unnecessary opposition, even from those who would otherwise support the substance of what is done.
- Ryan and the PLQ are not opposed to the entrenchment of minority rights but they are committed to the view that changes of this magnitude to the powers of the provincial government should require the prior consent of the National Assembly.

The following six options in the area of language of education should be considered in the light of the preceding considerations:

1. Language rights could be treated in the same way that mobility rights have been handled in the constitutional accord. That is to say, they could be made subject to certain social conditions, in this case demographic or linguistic trends in a province or in some part of a province.

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The advantage of this approach is that it would address directly the insecurity felt by franco phone Quebecois. The disadvantage is that it would not, of itself, meet the concerns in the area. of process (provincial consent); it would qualify language rights in a way that many might find morally repugnant (there are already objections to the "where numbers warrant" condition on that score); and it would present a very delicate task to the courts. Perhaps its chief disadvantage is that it would seem to confer a very questionable right on a majority language group to limit the growth of a minority.

2. Language rights (in Quebec alone, or in all the provinces) could be made subject to a notwithstanding clause.

The advantage of this option, like the preceding one, is that it would offer reassurance to a linguistic majority which felt itself potentially vulnerable to demographic trends. The disadvantages are also the same: it would not, in itself, address the process question; and it would qualify language rights in a way that would potentially negate their value, especially outside Quebec.

3. The language of education clause could be made subject to an "opting-in" provision, for Quebec alone.

This approach would have the advantage of providing Ryan and the PLQ with a way to distance themselves from the PQ, to support the constitutional package and to urge that Quebec now "opt in". That Quebec would opt in at some future date is almost certain, but the country might have to wait for a provincial election or two. The greatest advantage of this option is

that it puts paid to any allegations of coercion by the federal government, or unilateral invasion of a provincial jurisdiction without provincial consent.

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Its greatest disadvantage is that it leaves the language of education rights of the anglophone minority in Quebec unprotected for the time being, and it seems to treat provinces unequally. On the other hand, the Quebec minority is not one in urgent need of protection; the other provincial governments have not insisted that Quebec be treated like the others; and they were not coerced even when they ill treated their minorities in a way that Quebec never has.

4. The Charter's provision for minority language rights could include a separate clause applicable to Quebec alone, and the Quebec clause could remain unproclaimed for the time being until the situation in Quebec has been clarified – or perhaps until provincial consent has been obtained.

This option has the advantages of the previous .one, and the added advantage that it would leave the federal government free to act if changing circumstances warranted such action. It would have the corresponding disadvantage that the triggering mechanism would not be left unequivocally in Quebec hands.

Consequently the jurisdictional question would not have been settled, and the overtone of potential coercion would remain, no matter how benign the federal government declared its intentions to be.

5. The federal government could simply delay proclamation of the language of education provision for all provinces for the time being , in order to allow time for the situation in Quebec to resolve or clarify itself.

This option would have the advantage of buying time, but it would have the disadvantage of making minority rights in the other provinces conditional upon Quebec affairs. This would deny rights to some minorities even if for a relatively brief time, and it would be difficult to avoid charges of blackmail in Quebec , even if that were not the intention of the federal government.

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6. The proclamation of the language rights clause for all provinces could be made explicitly conditional upon the consent of Quebec.

While this option would apply pressure to Quebec, the pressure would backfire. It would seem to be a case of bargaining for rights and would undermine the moral position which the federal government has used to justify action on the constitutional resolution. It would be denounced as a form of blackmail in Quebec and has already been rejected by the premiers of the other provinces.

Our conclusion is that, of the preceding options, those most deserving of consideration are opting-in (3), delayed proclamation for Quebec (4), and a notwithstanding clause for Quebec alone (2). It should be noted that the latter could be combined with either of the other two options, and might improve them if it were. In the same way, any of these options could and probably should be combined with a redrafting of the language of education rights to bring them into harmony with the so-called "Canada clause".

2. Fiscal Compensation

While it is difficult at first glance to see how the concerns of Quebec in the area of fiscal compensation could be met, there may be options deserving of study – and the very fact of studying them might be the kind of conciliatory action which would undermine any attempts by the PQ to portray Ottawa as intransigent.

For example, it might be possible to include a ceiling condition similar in principle to the one that has been employed for mobility rights. Provinces might be entitled to some form of compensation if their contribution to the federal treasury were not above a certain ceiling; or as long as the federal contribution did not exceed a certain portion of the total federal expenditure for the proposed national initiative, or did not exceed a certain portion of any corresponding provincial measure. The point here is not to suggest any particular mechanism but to suggest that time ought to be taken to explore all practical suggestions which do not undermine the federal governments basic principles or its fiscal capacity.

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The very fact of studying such options, and of being seen to study them, would help to take the wind out of the sails of the PQ, if its aim were to portray the federal government as intransigent. At the closing session of the FMC, Premiers Lougheed and McLean both called on the federal government to explore all fair and reasonable ways of compensating governments who might wish to opt out of future constitutional amendments. If the federal government were to respond to this invitation either through an internal study of its own, or a study undertaken in cooperation with the provincial governments, the PQ would find it very difficult to make a case against the federal government, and the PLQ would find it all the easier to climb on board the constitutional settlement.

3. Mobility Rights

In our view, mobility rights do not present a major problem in Quebec. The federal government has already gone a long way to take the sting out of them for provinces facing problems of local unemployment. In this form, mobility rights should be relatively easy to sell in Quebec and the challenge would seem to be primarily a matter of communications: to convey the degree to which Quebec's margin of manoeuvre is protected, the slight degree to which Quebec is likely to be affected, and the advantages for Quebecers to enjoy ability rights in other provinces.

However, if the federal government wished to undermine the PQ case altogether, it could consider making mobility rights subject to an opt-in provision for Quebec (or some of the other alternatives, such as delayed proclamation or a non obstante, suggested for language of education above). In our view, this does not appear necessary at this time but could be kept in mind as events unfold or in the context of any discussions which may be held with the PLQ.

Conclusion

The federal government should not commit itself too quickly to a coercive course of action in Quebec, or to "impose" the constitutional accord on that

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province. There are both tactical reasons and reasons of substance to avoid premature commitments. Tactically, it makes sense to keep the PQ off balance by holding our options open. As far as substance is concerned, the Prime Minister has offered to pursue discussions

with Quebec to see whether differences can be ironed out and agreement can be rescued. Some time will be required to follow through on this commitment. In the meantime, the federal government should evaluate those options, especially in the area of language, which would help to portray the federal government as flexible, which would preclude the development of premature myths about the supposed coercion of Quebec by "English Canada" or about another conscription crisis, which would allow the people of Quebec some time to make up their own mind on the language issue, that would meet the tactical needs of the provincial as well as the federal Liberal parties, and that might help to smooth passage of the resolution through the House of Commons.

D.R. Cameron

R. Heintzman/djs

(I.) NOTE DE SERVICE DE ROGER TASSÉ, RENCONTRE AVEC RENE DUSSAULT

NOVEMBER 9, 1981

Source: Note de Service de Roger Tassé, Rencontre avec Rene Dussault (Nov. 9, 1981)

Le 9 novembre 1981

SECRET

RENCONTRE AVEC RENE DUSSAULT

Durant notre première rencontre qui a duré plus de deux heures, nous avons discuté de trois questions:

1) la compensation financière dans le cas de retrait d'une province suite à un amendement constitutionnel affectant les droit ou privilèges des législatures provinciales;

2) le droit d'établissement;

3) le droit à l'éducation dans la langue de la minorité.

En abordant ces trois questions, Rene Dussault a développé un même thème : le danger que présente l'accord fédéral/provincial du 5 novembre pour la sécurité du fait français au Québec. Sur ces trois points, selon Dussault, les autorités du Québec seraient sans défense, si à l'avenir l'équilibre culturel et linguistique de la population était sérieusement menace.

Plus concrètement, en ce qui concerne la compensation financière, si un amendement constitutionnel était adopté transférant une compétence législative provinciale au Parlement dans un domaine critique pour la survie du fait » français au Canada, v.g. l'éducation, il serait injuste de ne pas assurer une compensation financière au Québec. Sans compensation, les citoyens du Québec seraient soumis à double taxation. Dussault a noté que par le passé, des ajustements ont éventuellement été faits à certains programmes fédéraux dans le but de permettre au Québec de recevoir une compensation financière raisonnable, mais ceci n'a été rendu possible qu'à la suite de négociations assez pénibles, et que, tout événement, Québec a perdu des sommes considérables avant qu'Ottawa ne consente à la compensation. Il a mentionné une somme de plus de $200 millions perdus par Québec dans le domaine seulement des pensions. Pour Dussault, spécialement parce que le Québec n'a pas de droit de veto en vertu de la formule d'amendement, il est critique d'améliorer le texte constitutionnel dans le but d'éviter que Québec ne soit place à l'avenir dans une situation ou ses citoyens devraient devoir choisir entre ou bien accepter de payer double taxes, ou bien, faire comme les autres provinces, et après s'être retire d'un amendement constitutionnel, remettre la compétence provinciale en cause au Parlement, ce qui dans les domaines de l'éducation, ou culturels et linguistiques, pourrait avoir un effet néfaste pour le fait français au Québec.

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En ce qui concerne le droit d'établissement, Dussault a mentionné que le problème est au niveau de l'article 6(2) qui reconnait aux citoyens canadiens de s'établir n'importe ou au pays

et d'y prendre résidence sans distinction basée sur leur province d'origine. Pour Dussault, le problème avec cette disposition, n'en est pas un qui existe présentement ou qui est susceptible de survenir dans l'avenir immédiat. Mais comme il s'agit d'un texte constitutionnel, il importe, selon lui, de considérer comment seraient traitées certaines situations susceptibles de survenir et de mettre en danger le fait fran9ais au Québec. Il pense, par exemple, à la possibilité qu'un jour, dans 10, 15, 20 ans, la décroissance de la majorité française au Québec, par rapper à la minorité anglaise, – en d'autres mots, un processus de minorisation du fait français au Québec – rende nécessaires certaines restrictions sur le droit d'établissement au Québec des citoyens des autres provinces. Ces restrictions auraient pour but de permettre des mesures de redressement – de nature temporaire – de facon à assurer une plus grande stabilité et un renforcement du fait français au Québec. En acceptant le texte de l'article 6 tel que libelle le Québec se priverait d'outils d'intervention qui pourraient être essentiels dans l'avenir et il serait impuissant devant les dangers démographiques qui pourraient menacer son existence comme fait français.

En ce qui concerne le droit à l'éducation dans la langue de la minorité, les préoccupations de Dussault se situent au même niveau que dans le cas du droit à l'établissement, en plus des problèmes poses par le critère de la langue maternelle donnant ouverture au droit.

Relativement a ce critère de la langue maternelle, Dussault rappelle les querelles des années '70 à propos de l'application d'un tel test. Ré-introduire un tel test au Québec encouragerait la reprise de ces querelles.

En ce qui concerne son autre préoccupation, Dussault fait valoir que le Québec ne devrait pas se priver d'instruments qui lui permettent d'intervenir et de prendre des mesures de redressement dans le cas ou sa survie, ou sa sécurité, serait mise en danger dans un avenir plus ou moins lointain dont il est impossible de prévoir toutes les coordonnées à ce moment-ci.

Il a exploré avec moi un certain nombre de possibilités – a l'égard de chacun de ces trois points – qui seraient de nature à corriger les déficiences de notre texte constitutionnel tel qu'il les perçoit. Ce sont les suivantes:

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1) le droit à la compensation financière:

(a) une conférence constitutionnelle : il pourrait être prévu dans la contribution que lorsqu'une province exerce son droit de retrait, la question d'une compensation financière pour cette province, devrait être mise l'ordre du jour de la première conférence des premiers ministres qui suivrait !'adoption de l'amendement en question

(b) le droit une compensation financière serait lie au droit à un paiement de péréquation : en liant ainsi le droit une compensation l'article 35 (paiement de péréquation), ce droit serai nié aux provinces riches. Il serait possible aussi de prévoir que la référence a l'article 35 n'a qu'un caractère indicatif et non obligatoire.

(c) le droit à une compensation financière dans le cas d'un transfert au Parlement de certaines compétences provinciales: Il serait possible de prévoir le droit à une compensation financière, comme suggère dans l'accord des huit provinces d 'avril 1981, mais seulement dans le cas du transfert au Parlement d'une compétence provinciale dans le domaine de 11 éducation et d'autres domaines relies ou touchant la culture. Dans le cas de transfert de compétence dans d'autres domaines, la possibilité de compensation demeurerait sans toutefois qu'une province

y ait droit. Cette approche a deux valets permettrait de protéger le Québec contre des réaménagements massifs que pourraient vouloir entreprendre les provinces anglophones dans le sens d 'une plus grande centralisation et unification des pouvoirs entre les mains d'Ottawa, en assurant de droit au Québec une compensation dans des domaines qui sent critiques pour sa sécurité et sa survie comme fait français.

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2) Le droit d'établissement:

Possibilités de mesures de redressement qui pourraient être en conflit avec ce droit dans le cas où la sécurité culturelle d'une province est en danger : il s'agirait ici de prévoir qu'une province puisse prendre des mesures qui iraient a l'encontre de l'article 6(2) lorsque le rapport entre la population de la majorité, et celle de la minorité, subit un écart prononce, sur une période plus ou moins longue, qui mette en danger de façon sérieuse l'équilibre linguistique et culturelle de la province. Une telle situation se produisant, il serait alors permis à la province de prendre des mesures de redressement qui pourraient possiblement être en conflit avec le principe de l'article 6.

Même si pour Dussault, le danger qu'un nombre considérable d'anglophones des autres provinces s'établissent au Québec a un point tel qu'il pourrait en résulter un déséquilibre sérieux entre la minorité anglophone et la majorité française au Québec est tout à fait improbable, il croit essentiel de reconnaitre au Québec des instruments nécessaires d'intervention dans la constitution, pour le cas où l'improbable se produisait dans un ·avenir plus ou mains lointain.

3) Le Droit a l'education dans la langue de la minorite:

(a) la clause Canada : l'article 23(1)(b) ne fait pas de difficulté, sujet a ce qui est dit plus bas.

(b) le test de la langue maternelle: il serait possible de prévoir que ce test s'applique immédiatement aux neuf provinces anglophones. Il ne s'appliquerait au Québec qu'à la suite d'une demande de cette province à cet effet (Opting in pour le Québec).

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(c) l'article 23(2): cet article a comme objectifs la reconnaissance de deux droits : (1) le droit du citoyen canadien qui réside au Québec, dont la langue maternelle n'est pas l'anglais, et qui n'a pas été éduque en anglais au Canada, d'inscrire ses enfants a l'école anglaise au Québec a condition que ses enfants aient déjà entrepris leur éducation a l'école anglaise. Ceci est nécessaire en vue de conserver aux italiens du Québec, par exemple, ce que la loi 101 elle-même leur reconnaissait. (2) le droit du citoyen canadien qui réside hors Québec, dont la langue maternelle n'est pas l'anglais, et qui n'a pas reçu son éducation en anglais au Canada, d'inscrire ses enfants à l'école anglaise, en venant s'établir au Québec, si ses enfants recevaient leur éducation en anglais avant de venir au Québec.

Pour Dussault, le premier volet de cet article 23(2) ne présente pas de problème. Le deuxième volet présente un problème considérable, semblable a celui qu'il a soulevé relativement au droit d'établissement mentionne plus haut.

A l'égard de cet article, nous avons explore trois possibilités:

(1) limiter le droit de l'article 23(2) aux citoyens à une date déterminée, v.g. le 5 novembre 1981: il s'agirait d'une clause a caractère « grand father » – protégeant les droits des citoyens présents mais non les citoyens qui dans l'avenir obtiendront leur citoyenneté par naturalisation.

(2) une clause « non obstante » : une telle clause permettrait a une province de déroger au droit de l'article 3(2) lorsque la sécurité culturelle de la province est menacée, comme discutée dans le cas du droit à l'établissement.

(3) des mesures de redressement : il serait possible de prévoir, plutôt qu'une clause dérogatoire, la possibilité de mise en œuvre de mesures de redressement qui pourraient être en conflit avec le droit reconnu par cet article lorsque la sécurité culturelle de la province est menacée. Cette variante serait possiblement plus restrictive et contraignante que la précédente.

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Dussault a indiqué, qu'à son avis, il serait nécessaire de permettre :

(a) au Québec de se lier à l'article 23(1)(a) – langue maternelle par voie d'opting in;

(b) une clause dérogatoire (possiblement des mesures de redressements) qui pourrait être en conflit avec les articles 23(1)(b) – (clause Canada), et l'article 23(2) – (droit des allophones) lorsque ces mesures se justifient parce que la sécurité culturelle du Québec est menacée.

J'ai indiqué à Dussault que certaines de ses propositions (v.g. possibilité de conférence des premiers ministres pour discuter de compensation fiscale) poseraient probablement peu de problème, mais que d'autres (v.g. le droit a la compensation financière dans le cas de transfert de compétence a Ottawa, ou une clause non-obstante dans le case de l'article 23, ou un programme de redressement) poseraient des difficultés considérables a Ottawa, et seraient extrêmement difficiles à faire accepter.

Dussault a indiqué qu'il importe de ne rien imposer au Québec.

Il a débuté la rencontre en indiquant que des mécanismes et principes de compensation financière prévus pour le « opting out » en matière d'amendement constitutionnel devrait aussi s'appliquer dans les cas ou Ottawa utilise son pouvoir de dépenser. Je lui ai répondu que cela était hors question, à ce moment-ci certainement. Il n'a pas insisté.

Roger Tassé

(I.) CANADA, HOUSE OF COMMONS DEBATES, THE CONSTITUTION

NOVEMBER 9, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 12633-12635.

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THE CONSTITUTION

REQUEST FOR REPORT ON NEGOTIATIONS WITH QUEBEC

[Translation]

Mr. Jacques Guilbault (Saint-Jacques): Madam Speaker, my question is directed to the Prime Minister and concerns the Constitution. Since the media mentioned today that Mr. Ryan, Leader of the Opposition in Quebec, sent a telex to the Prime Minister of Canada which, it seems, contained substantial suggestions on breaking the constitutional deadlock between Quebec and Ottawa, could the Prime Minister tell the House whether he intends to follow up any of Mr. Ryan's suggestions, and could he also report to the House on the progress of negotiations which, I hope, are still continuing between the government of Quebec and the Government of Canada with a view to reaching an agreement that would be agreeable to all provinces, including Quebec?

Right Hon. P. E. Trudeau (Prime Minister): Madam Speaker, since Thursday when the conference was drawing to a close I have said on behalf of the Canadian government that we were prepared to seek accommodation on the three points with which the government of Quebec was in disagreement, and if solutions or compromise formulas could be found, we were prepared to look into these. To this day, and I checked earlier with the Minister of Justice, we have not had word from the government of Quebec. Actually, I think they wanted the conference to be a failure, and now they would not want it to succeed through the action of a compromise formula. Mr. Ryan has proposed such a formula which we will examine carefully I would first like to know what are the PQ government's views on the subject and, if it is a valid formula, we might look into it.

[English]

TELEX FROM LEADER OF THE OPPOSITION IN QUEBEC NATIONAL ASSEMBLY

Right Hon. Joe Clark (Leader of the Opposition): Madam Speaker, I have a supplementary question for the Prime Minister in relation to the telex from Mr. Ryan, which I have not had an opportunity to see but which I understand has at least two elements. First, there are some specific suggestions regarding the three outstanding matters cited by the Prime Minister and Premier of Quebec to be at issue. Also, if I

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understand correctly, there is a request by Mr. Ryan, the leader of the Liberal opposition party in the Quebec National Assembly, that the Government of Canada be prepared to negotiate with the government of Quebec to enable the participation and involvement of Quebec in a full constitutional settlement.

Does the Prime Minister intend to respond positively to that request by Mr. Ryan and to do everything possible to involve the province of Quebec in a full constitutional solution'!

Right Hon. P. E. Trudeau (Prime Minister): Madam Speaker, I honestly am not clear on what the Leader of the Opposition intends when he says insisting "on a full constitutional solution".

There are three areas on which the government of the province of Quebec indicated that it disagreed. I have indicated that we are prepared to look for some accommodation in those three areas providing they do not result in a position which would break up the accord reached with the nine provincial governments last week, and providing they ensured fairness for all Canadians.

I am really repeating my previous answer to the member from Saint-Jacques, but if the Leader of the Opposition has some further supplementary I would be happy to entertain it.

INCLUSION OF QUEBEC IN CONSTITUTIONAL AGREEMENT

Right Hon. Joe Clark (Leader of the Opposition): Madam Speaker, naturally we would like to have the opportunity to see as soon as possible the resolution which the Government of Canada I understand is drafting as a result of the accord signed between the Prime Minister and nine of the premiers. What I am interested in is having an undertaking from the Prime Minister that he will vigorously and fully pursue an agreement with the province of Quebec and that he will not place any artificial obstacles in the—

Some hon. Members: Oh, oh!

Mr. Clark: —any artificial obstacles in the path of an agreement. Would the Prime Minister give his undertaking on that; and also an undertaking that he would be prepared to respect what I understand to be the spirit of the request of Mr. Ryan, that spirit being that all efforts be made to include the province of Quebec in a constitutional agreement signed by and supportable by the other premiers?

Right Hon. P. E. Trudeau (Prime Minister): Madam Speaker, I believe my previous answers and what I have been saying since Thursday noon should satisfy the Leader of the Opposition as to the spirit and the willingness we have had about including Quebec in a final solution. In so far as the first point about the federal government drafting an amendment to the resolution is concerned, I want the Leader of the Opposition to take note that it has been the joint work of the federal and provincial officials to try to put into legal texts the agreement that nine provinces and the federal government reached last Thursday and Friday.

As to his other point about not putting up artificial barriers, I do not know what the Leader of the Opposition would define as an artificial barrier. For instance, on education and linguistic rights for minorities what would he consider an artificial barrier—the federal government trying to ensure that English-speaking Canadians in Quebec have the same rights French-speaking Canadians in the other provinces now have? If we insisted on that, would that be an artificial barrier in the eyes of the Leader of the Opposition?

EQUALITY OF THE SEXES

Right Hon. Joe Clark (Leader of the Opposition): Madam Speaker, I suppose that so long as we have an implicit undertaking from the Prime Minister that he will respect the spirit sought by Mr. Ryan of an honest attempt to include the province of Quebec in this accord, we will have to wait to see the resolution which comes forward.

However, let me ask a specific supplementary question of the Prime Minister in relation to the resolution that is being drafted. Would the Prime Minister confirm that in the original accord, signed by himself and the nine premiers on Thursday, the opt-out or override provisions do not apply to the guarantee of equality of male and female persons which, the Prime Minister will recall, was set down

deliberately in a separate section, Section 28, of the original resolution?

Right Hon. P. E. Trudeau (Prime Minister): Madam Speaker, I think this is the question asked by the hon. lady in the New Democratic Party the other day. I had a chance to look this up since then, as I said I would—

Mrs. Mitchell: Hon. lady?

Mr. Trudeau: If some can say "hon. gentleman", is it prohibited to say "hon. lady"?

Mrs. Mitchell: Hon. member.

Mr. Trudeau: Madam Speaker, would you like me to call her something else?

Some hon. Members: Hear, hear!

Mr. Trudeau: My understanding is that in the work done by the federal and provincial officials the "notwithstanding" clause would indeed apply to that particular section.

Mr. Rae: It shouldn't.

Mr. Trudeau: The hon. member says it would not.

Mr. Rae: I am saying it shouldn't.

Mr. Trudeau: Oh, well, we know that the Leader of the Opposition has always argued that we should have a charter made in Canada by Canadians. Now that we will have our own Constitution, now will be his chance to have a charter

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made in Canada by Canadians, and over the next years he will be able to fight to put back in the charter what we had in the original charter which his party combated tooth and nail for the past year.

Some hon. Members: Hear, hear!

Mr. Trudeau: The Leader of the Opposition asks me if we will make an honest attempt to seek some kind of compromise. We have been trying since Thursday. We have indicated to the Parti Québécois, the Quebec government, that we are willing to hear some words from them particularly on the mobility clause, as we got from Premier Peckford, which would answer the problem the Parti Québécois has with the charter as it is now presently conceived. We have not heard from them.

I just want to reiterate to the Leader of the Opposition that we have a duty to protect minorities, and we are trying to find a way to convince the government of Quebec that it should share in that duty of protecting minorities. I recall for the Leader of the Opposition that I believe it was less than a couple of months ago that he was speaking in Montreal and undertook to communicate with the Premier of Quebec to make sure that the government of Quebec would see its way clear in some way to protect the English-speaking minorities in Quebec. I wonder if he has since then communicated with the premier and if it would not be useful now for him to communicate with the Premier of Quebec to indicate his concern for these minorities, as he said he would a couple of months ago.

Some hon. Members: Hear, hear!

Mr. Clark: Madam Speaker, I find it rather strange that the Prime Minister should be putting questions to me, but I will not follow his practice; I will answer the question. The answer to the question is yes, I have.

Some hon. Members: Hear, hear!

DETAILS OF ACCORD

Right Hon. Joe Clark (Leader of the Opposition): Madam Speaker, the hon. member for Timmins-Chapleau is the only empty barrel with a mustache in the House.

Some hon. Members: Oh, oh!

Mr. Chénier: We want to keep you as leader, Joe.

Mr. Clark: Madam Speaker, there is a great deal of heckling from the Liberal side, perhaps to stop questions about the equality of male and female persons. However, let me come back to the specific communique of the accord tabled in the House of Commons by the Prime Minister which says that there was agreement on the entrenchmerit of the full charter of rights and freedoms now before Parliament, with the following changes:

(b) A "notwithstanding" clause covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights.

The Prime Minister will recall that there was a deliberate effort made, when the original resolution was prepared, to put Section 28 in a separate section. That separate Section 28 is not referred to in the list of exceptions I have just quoted.

Is the Prime Minister telling us that the Government of Canada is now changing the accord which was signed by the Premiers? Are we going to have a resolution which has an opting-out or override clause applied to Section 28, when the accord did not have an opting-out or override clause applying to Section 28?

Right Hon. P. E. Trudeau (Prime Minister): No, Madam Speaker, I am not saying that. The Government of Canada did not want to take anything out of the resolution which was before the House; nothing. We wish the Leader of the Opposition had supported it when it was here the first time, but I did say that the officials of the federal and provincial governments did meet on Thursday and Friday, and my understanding of that meeting is that this particular section would be subject to the "notwithstanding" clause.

Mr. Clark: That changes the accord.

Mr. Trudeau: Let me make it clear that everything in the charter now we would want to keep. Anything taken out is taken out because of the accord.

Mr. Clark: No.

Mr. Trudeau: The Leader of the Opposition says "No". I wish he would get hold of the nine premiers and get them to interpret the accord.

I can show a piece of paper too.

Miss MacDonald: Shame on you.

Mr. Trudeau: The lady from Kingston says "Shame". She did not support the charter when it was here.

Some hon. Members: Right on!

Mr. Trudeau: She did not support it when it gave absolute equality to the sexes. Hon. members opposite did not support it when it gave recognition to aboriginal rights.

As a result of the accord last week we have had to take certain things out, not because we wanted to take them out but because we were asked to take them out as the price of an agreement. I will not be saddled now with any weakness of the charter, which the party opposite refused to support and is now crying about because it does not appear in its entirety. They wanted a charter made in Canada. Let them sit down to work now and start making a charter in Canada. That means agreeing with the provinces that they should protect these people.

Some hon. Members: Hear, hear!

[…]

(I.) MEMORANDUM FROM ROGER TASSÉ FOR THE MINISTER RE: PROPOSITIONS FOR QUEBEC

NOVEMBER 10, 1981

Source: Memorandum from Roger Tassé for the Minister re: Propositions for Quebec (Nov. 10, 1981)

SECRET

November 10, 1981

MEMORANDUM FOR THE MINISTER

RE: Propositions for Quebec

You have asked for my views on the accept ability from the Federal point of view of Mr. Ryan's proposals. I have examined them carefully and am of the view that the following are acceptable.

Financial Compensation

Mr. Ryan has proposed a) a constitutional guarantee of fiscal compensation for provinces opting out of constitutional amendments dealing with education and other matters relating to culture; b) immediate negotiations with respect to other matters to ensure that provinces will not be subject to injustices as a result of opting out; c) if there is no agreement during such negotiations, a constitutional obligation for the Prime Minister to include on the agenda of the first constitutional conference after an amendment is approved the issue of compensation for any province which has opted out.

Proposals a and c are acceptable. I would recommend that b be accepted in a different manner. Rather than holding immediate negotiations, the issue could be inscribed on the agenda of the constitutional conference which will take place in the year following patriation.

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Minority Language Education

Mr. Ryan proposes that the Canada clause be adopted and that the mother tongue test for Quebec be subject to opting-in, opting-out or non obstante.

It is clear that Mr. Ryan's proposal with respect to the Canada clause is acceptable. His position with respect to the mother tongue test should also be acceptable. The purpose of the mother tongue test is to allow francophones outside of Quebec who, because of a lack of facilities, were not educated in French to send their children to school in French. The same problem does not exist in Quebec. However, the linguistic tests of Bill 22 are now rightly or wrongly a symbol of conflict in Quebec. To allow a non obstante clause renewable every five years would be a major symbolic concession and would be seen as an important gesture. It would be a recognition of the possibility of different treatment for Quebec because of its linguistic specificity.

Some of Mr. Ryan's proposals are not acceptable

Mobility

Mr. Ryan recognizes the importance of mobility rights as fundamental in a federal country but expresses concerns about potential dangers to the linguistic balance in Quebec. He proposes a change to the clause to permit measures to be taken for renewable five year periods to counter substantial dangers to the linguistic balance.

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It is offensive to the principle of single citizenship to contemplate constitutional barriers to the right to move freely anywhere in the country for any reason including linguistic or ethnic origin. This is so fundamental to our notion of Canada that no exception can be made.
In practical terms, Quebec has become more and more French since 1867 and the French nature of Quebec has probably never been stronger than it is today. At the same time, New Brunswick is becoming more French. Any measure in the terms proposed by Mr. Ryan are more likely to be used to the detriment of francophones in New Brunswick than to the detriment of anglophones in Quebec.

Quebec will not be prevented by the Charter from protecting its distinctive French character. Bill 101 can continue to regulate the language of work and the language of the professions. It will remain within the right of the province to require a full knowledge of French as a criterion for graduation from high school and university. Nothing in the Charter will take away the instruments required to keep Quebec French.

Language of Education

Mr. Ryan would subject to a non obstante provision the part of Section 23(2) which protects the right of a Canadian citizen to continue to send his children to school anywhere in Canada in English or French if one of his children has attended school in that language anywhere in Canada. In effect, we are dealing with a mobility clause.

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I have examined various options to meet Mr. Ryan's concerns. However, I have come to the conclusion that there is no option which overcomes the objection that some Canadians would have fewer rights than others when they move to different parts of the country. If the Canada clause is not subjected to a non obstante provision in the case of a mass influx from other provinces to Quebec, then there is no rationale for restricting the mobility provision in the case of Canadian citizens with children in school in Canada even if the citizen did not receive his education in English in Canada. In practical terms, Quebec will retain the ability to require that no one can graduate from high school without a complete knowledge of French. I would therefore reject Mr. Ryan's proposal on Section 23(2).

Conclusion

All of Mr. Ryan's proposals on fiscal compensation are acceptable as are two of his three proposals on language of education. His proposals on mobility are not workable because there is no drafting that would solve the problem of creating barriers to mobility which are contrary to the concept of a single Canadian citizenship.

Roger Tassé

(I.) NOTE DE SERVICE: SOUS-MINISTRE [ROGER TASSÉ] À MINISTRE [JEAN CHRÉTIEN], LE QUÉBEC

NOVEMBER 12, 1981

Source: Note de Service: Sous-Ministre à Ministre, Le Québec (Nov. 12, 1981)

Ministère de la Justice

NOTE DE SERVICE

Cote de sécurité
S E C R E T

Date
Le 12 novembre 1981

TO/A : MINISTRE

FROM/DE : SOUS-MINISTRE

SUBJECT/OBJET : Le Québec

Comments/ Remarques

S'il faut en croire les dépêches en provenance de Québec, ce matin, il ne faut pas exclure du tout la possibilité que le gouvernement du Québec signe – a certaines conditions évidemment—l'entente du 5 novembre.

Il semblerait en effet que le gouvernement du Québec s'apprêterait à annoncer qu'il est prêt à reprendre les négociations. Pour obtenir l'accord de Québec, il faudra faire des concessions importantes. Étant donne les concessions déjà faites aux provinces anglophones, je crois qu'il faudra—et que nous pouvons faire des concessions importantes au Québec.

Sur les 3 points en litige, je crois qu'il nous faudra consentir ce qui suit:

(1) Compensation financière:

Garantie constitutionnelle en matière d'éducation et de culture avec garantie de discussions à une rencontre des Premiers ministres, dès le retour de la constitution, en vue de trouver une formule qui permette d'éviter des injustices dans le cas de retrait dans les autres domaines

OU

s'il le faut, il faudrait accepter une garantie de compensation dans tous les cas de retrait.

(2) Liberté de circulation:

Je n'aime pas la proposition de Ryan. Dans des négociations avec Québec, il faudrait tenter de les convaincre d'accepter la clause telle quelle—

ou au moins la proposition Ryan. Sinon – si cela est nécessaire pour obtenir la signature de Lévesque, une claude « non-obstante ».

(3) Le droit l'éducation dans la langue de la minorité:

Il faudrait accepter la clause Canada purement et simplement. Ce qui veut dire une clause « non-obstante » concernant le test de la langue maternelle et le droit la continuité de l'éducation dans sa langue maternelle. Lévesque accepterait peut-être. Mais même là, s'il le faut, j'accepterais une clause « non-obstante », pour obtenir la signature de Lévesque.

Toute clause « non-obstante » oblige Lévesque a un débat sa législature, permet aux libéraux de faire la démonstration publique de l'équité et de la justesse de ces droits dans un contexte canadien. Si une « clause non-obstante » est imposée malgré tout, le débat devra être repris dans 5 ans—… avec l'espoir que les mentalités auront été modifiées entre-temps et qu'un gouvernement fédéraliste sera alors en place.

Le fédéralisme ne peut pas marquer des points au Québec et y avoir une place de choix en étant impose d'Ottawa. La victoire du fédéralisme au Québec contre les forces séparatistes devra passer par un parti politique provincial fort. Ce qui n'exclue évidemment pas l'aide des forces fédéralistes Ottawa. Imposer quoi que ce soit au Québec, d'Ottawa, ce moment-ci, alors que nous sommes si prêts d'une entente, risquerait de porter un coup au fédéralisme dont le Québec prendra grand temps se relever.

Roger Tassé

(I.) MEMORANDUM FROM EDDIE GOLDENBERG TO ROGER TASSÉ INCL. DRAFT CHANGES TO THE CONSTITUTIONAL RESOLUTION

NOVEMBER 12, 1981

Source: Memorandum from Eddie Goldenberg to Roger Tassé (Nov. 12, 1981)

CONFIDENTIAL

November 12, 1981

MEMORANDUM TO MR. ROGER TASSE

Re: Draft changes to the constitutional Resolution

I have the following comments on the drafts which you gave me this morning.

1) Section 33 (2)

Would a declaration made by a Legislative Assembly be sufficient or would such a declaration be subject to a test in a Court?

What would the effect be of this section on New Brunswick?

2) Section 38.1

This section refers to the "next conference composed of the Prime Minister of Canada and the first ministers of the provinces convened by the Prime Minister of Canada".

Is this supposed to mean any federal-provincial conference of first ministers or should it be restricted to a constitutional conference?

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CONFIDENTIAL

3) Section 36

The draft seems to suggest that section 36 is an alternative to section 38.1. Can it not be an addition so that section 38.1(2) would apply if no agreement is reached at the conference referred to in section 36?

4) Section 56 (2) (3)

I have no difficulty with the drafting; however, I am concerned about the substance . It seems to me that the whole Act should be proclaimed on the same day otherwise there is an invitation to continuing controversy.

Eddie Goldenberg

November 12, 1981

Section 33

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2, sections 7 to 15 or section 28 of this Charter. [Can we resolve this?]

[Disagree][1]

Idem

(2) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3) of the Charter where the exercise of any of the rights referred to in those subsections would (seriously threaten to) substantially alter the linguistic equilibrium of the population in that province. *[who would decide – a Court or a declaration of an Assembly – What about New Brunswick?]*[2]

Idem

(3) The legislature of Quebec may expressly declare in an Act of that legislature that the Act or a provision thereof shall operate notwithstanding paragraph 23(1)(a) of the Charter. *[Mother tongue]*

Operation of exception

(4) An Act or a provision of an Act in respect of which a declaration is made under subsection (1), (2) or (3) shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(5) A declaration made under subsection (1), (2) or (3) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(6) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Idem

(7) The legislature of a province may re-enact a declaration made under subsection (2).

Idem

(8) The legislature of Quebec may re-enact a declaration made under subsection (3).

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1 Written in the column of subsection (2).

2 This note is in reference to the phrase "(seriously threaten to) substantially alter the linguistic equilibrium of the population in that province," which is highlighted in pen.

Five year limitation

(9) Subsection (5) applies in respect of a re-enactment made under subsection (6), (7) or (8).[1]

[1] The rest of the drafts attached to this memo do not appertain to the Notwithstanding Clause.

(I.) MEMORANDUM FOR MINISTERS WITH DRAFTS

NOVEMBER 12, 1981

Source: Memorandum for Ministers (Nov. 12, 1981)[1]

SECRET

MEMORANDUM FOR MINISTERS

1. The Problem

If one were to impose on Quebec provisions respecting mobility rights (section 6) and minority language education rights (section 23), the Parti québécois will play upon the fears of francophone Quebecers by claiming that the linguistic majority of Quebec could be swan ped in the future by a substantial increase of non-franco phone school children or workers without Quebec being able to take the necessary measures to redress the situation.

2. The Options for Solution

The options presented below are designed to undermine this argument through one of four alternative amendments to the constitutional resolution. Each possible amendment has essentially two parts : the first part is a test which determines when the linguistic majority is in danger of being swamped. The second part states what action the government may take to redress the situation if the "swamp test" has been met.

All options are designed to permit Quebec to cope with any significant change in linguistic balance in the future without derogating from the rights already acquired by individuals living in Quebec prior to the time when a decision is made (or a test has been met establishing) that the majority linguistic population is in danger of being swamped: derogation would only apply to citizens who come to Quebec more than three month s after adoption of a law derogating from the education rights and/or mobility rights in the Charter.

Although the fear of being "swamped" is of particular concern to Quebec, all options are designed to apply to all province s equally. Furthermore, all options treat all citizens the same way (e.g., the options do not distinguish between citizens educated in Canada and those educated abroad).

All derogation options have a sunset clause: unless a renewal of the derogation meets the "swamp test", it will cease at a given point in time.

Quebec's law respecting the language of work will continue in effect and may well have a significant impact on the migration of workers to that province, perhaps reducing the need to ever use any of the derogation provisions contained in the four options outlined below.

3. Options: Summary

(1) Both mobility rights and minority language education rights come in force immediately in

[1] An exact copy of the drafts were found in looseleaf alongside other clauses at the LAC. The draft copies were identical in wording with the exception of an additional French draft. Unfortunately, the French draft only consisted of "Variante I" ie. "Option I". Options II-IV are in English only. This additional draft has been added to the end of this memo for completeness.

all provinces in the form in which they are set out in the Resolution as amended following the federal-provincial Agreement of November 5.

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(2) The options presented below are designed to give a province ways and means of taking corrective action should there be a massive migration into a province which would substantially alter the equilibrium between the French and English population in the province which exists at the time of proclamation of the constitutional resolution.

(3) OPTION 1

- An objective test to decide if there is "massive migration" into the province from other provinces based on a drop (e.g. 5%) in the percent of the population of the linguistic majority of the province, with 1981 as the base year.
- In case of such a drop, a province can "non obstante" mobility rights and/or language education rights.
- 5 year renewable sunset provision on any such "non-obstante".
- It affects only citizens that move into the province after a date that is set out in provincial legislation and which comes into force no earlier than 3 months after passing of the Act containing then "non-obstante" clause.

(4) OPTION 2

- One objective test for the mobility right: same as under option 1.
- A different objective test for the minority education right: a drop (e.g. 5%) in school enrolment of linguistic majority as compared to total school enrolment.
- Base: School enrolment as of January 1, 1982.
- In case of such a drop, a province can enact "non-obstante" legislation related to mobility or minority language education rights.
- It affects only citizens that move into province, as in option 1.

(5) OPTION 3

- A subjective test like "substantial alteration of the equilibrium between the English and French population of the province", with ultimate control in the hands of the court to determine if a "substantial alteration" has actually taken place.
- The "non-obstante" clause would otherwise work as in Options 1 and 2.

(6) OPTION 4

- The simplest of all four options provides that a "non-obstante", with 5 year sunset, etc., can

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be passed by a provincial legislature but only when 2/3 of its members assent to it. That is, the legislature by 2/3 vote determines that the linguistic majority is in danger of being swamped and this determination is not subject to a factual test (as in options 1 and 2) or to an appeal to the courts (as in option 3). It applies to both mobility rights and minority language education rights.

November 12, 1981

Option I – Population Percentage

Exception where express declaration

34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections, where

(a) the percentage that the population of the province whose first language learned and still understood is that of the English or French linguistic majority, as determined by the most recent general census, is of the total population of the province, as determined by that census,

has decreased by at least five per cent from

(b) the percentage that the linguistic majority population of the province, as determined by the general census of the population of Canada required to be taken in 1981,was of the total population of the province, as determined by that census.

Coming into force

(2) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to.

Operation of exception

(3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force.

Limitation

(4) A declaration made under subsection (1) shall cease to have effect six months after the publication of the results of the next general census, taken no earlier than five years after the previous general census, or on such earlier date as may be specified in the declaration.

Re-enactment

(5) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met.

Limitation

(6) Subsection (4) applies in respect of a re-enactment made under subsection (5).

November 12, 1981

Option II – School Population Percentage

Exception where express declaration

34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections, where

(a) the percentage that the primary and secondary school population of the province that receives its instruction in the language of the English or French linguistic majority is of the total primary and secondary school population of the province

has decreased by at least five per cent from

(b) the percentage that the primary and secondary school population of the province that received its instruction in the language of the English or French majority on January 1, 1982 was of the total primary and secondary school population of the province on that day.

Coming into force

(2) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to.

Operation of exception

(3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force.

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Limitation

(4) A declaration made under subsection (1) shall cease to have effect five years after it come into force or on such earlier day as may be specified in the declaration.

Re-enactment

(5) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met.

Limitation

(6) Subsection (4) applies in respect of a re-enactment made under subsection (5).

November 12, 1981

Option III – Majority Substantially Altered

Exception where express declaration

34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections, where the exercise of any of the rights referred to in those subsections would substantially alter the linguistic equilibrium of the English and French linguistic populations in that province.

Coming into force

(2) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to.

Operation of exception

(3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force.

Limitation

(4) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier day as may be specified in the declaration.

Re-enactment

(5) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met.

Limitation

(6) Subsection (4) applies in respect of a re-enactment made under subsection (5).
November 12, 1981

Option IV – Majority Declared by Legislature to be Altered

Exception where express declaration

34. (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter, or all those subsections.

Limitation

(2) A legislature may make a declaration under subsection (1) only if the declaration is approved by the votes of two thirds of its members.

Coming into force

(3) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to.
Operation of exception

(4) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force.

Limitation

(5) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier day as may be specified in the declaration.

Re-enactment

(6) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met.

Limitations

(7) Subsections (2) and (5) apply in respect of a re-enactment made under subsection (6).

VARIANTE I – POURCENTAGE DE LA POPULATION

Dérogation par déclaration expresse

34. (1) La législature d'une province peut adopter une loi où il est déclaré que celle-ci ou une de ses dispositions a effet indépendamment des paragraphes 6(2) et (3), du paragraphe 23(1) ou du paragraphe 23(2) de la présente charte ou de tous ces paragraphes dans le cas où le pourcentage, par rapport à la population totale de la province, des habitants dont la première langue apprise et encore comprise est celle de la majorité francophone ou anglophone selon le recensement général le plus récent a diminué d'au moins cinq pour cent selon le recensement général de 1981.

Entrée en vigueur

(2) La loi ou la disposition qui fait l'objet de la déclaration ne peut entrer en vigueur qu'à compter de trois mois suivant sa sanction.

Effet de la dérogation

(3) La loi ou la disposition qui fait l'objet de la déclaration visée au paragraphe (1) n'a l'effet qu'elle aurait sans l'application de la disposition en cause de la charte qu'à l'égard des individus qui sont venus s'installer dans la province après l'entrée en vigueur de cette loi ou de cette disposition.

Restriction

(4) La déclaration visée au paragraphe (1) cesse d'avoir effet six mois après la publication des résultats du recensement général qui suit de cinq ans au moins le recensement qui est à l'origine de celle-ci ou à la date antérieure qui est précisée dans la déclaration.

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Nouvelle adoption

(5) La législature d'une province peut adopter de nouveau une déclaration visée au

paragraphe (1) si les conditions énoncées à ce paragraphe continuent à s’appliquer.

Effet de la dérogation et de la restriction

(6) Les paragraphes (3) et (4) s’appliquent à toute déclaration adoptée sous le régime du paragraphe (5).

(I.) LOOSE DRAFTS OF VARIOUS CLAUSES, OVERRIDE IN THE CASE OF MASSIVE MIGRATION

NOVEMBER 16, 1981

Source: Draft, Override in the case of massive migration (Nov. 16, 1981)

Override in the case of massive migration

Section 33.1

Exception where express declaration

33.1 (1) The legislature of a province may expressly declare in an Act of the legislature that the Act or a provision thereof shall operate notwithstanding subsections 6(2) and (3), subsection 23(1) or subsection 23(2) of this Charter where

(a) the percentage that the population of the province whose first language learned and still understood is that of the English or French linguistic majority population of the province, as determined by the most recent general census, is of the total population of the province, as determined by that census,

has decreased by at least five per cent from

(b) the percentage that the population of the province whose first language learned and still understood is that of the English or French linguistic majority population of the province, as determined by the general census taken in 1981, was of the total population of the province, as determined by that census.

Coming into force

(2) An Act or a provision of an Act in respect of which a declaration is made under subsection (1) shall come into force no earlier than three months after the Act has been assented to.

Explanatory Note

– This Section would give a province (like Québec) the power to take corrective action should there be a massive migration into the province which substantially alters the balance between the French and English in the province which exists according to the 1981 general census.

– A drop (e.g. 5%) in the percent population of the linguistic majority of the province (with 1981 as the permanent base year) is the test to decide if there was "massive migration" in the province.

– Where this happens, the province may "non obstante" mobility rights (S. 6(2) and (3)) and/or language education rights (S. 23).

– There is a 5 year renewable sunset provision on any such "non obstante but the "non obstante" can only be renewed where the 5% variation continues.

– The derogation affects only citizens that take up residence in the province after a date set out in the provincial legislation which comes in force no earlier than 3 months after the passing of the provincial Act containing the "non obstante" clause.

– The section could come into force for all provinces at once, or could initially apply only to Québec, with other provinces having a year in which to opt in.

Operation of exception

(3) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration, but only in respect of individuals who have become residents of the province after the Act or provision thereof comes into force.

Limitation

(4) A declaration made under subsection (1) shall cease to have effect six months after the publication of the results of the next general census after the declaration is made or on such earlier date as may be specified in the declaration.

Re-enactment

(5) The legislature of a province may re-enact a declaration made under subsection (1) where the condition set out in that subsection is met.

Limitation

(6) Subsection (4) applies in respect of a re-enactment made under subsection (5).

(I.) NOTE FOR THE PRIME MINISTER FROM ROGER TASSÉ, OVERRIDE OF SECTION 28 OF THE CHARTER OF RIGHTS

NOVEMBER 16, 1981

Source: Note for the Prime Minister from Roger Tassé, Override of Section 28…(Nov. 16, 1981)[1]

SECRET

November 16, 1981

NOTE FOR THE PRIME MINISTER

SUBJECT: Override of Section 28 of the Charter of Rights

We are continuing our discussions with provincial officials with a view to their agreeing that there be no override possible in respect of section 28, except to the extent that an override might be adopted in respect of non-discrimination on the basis of sex found in section 15.

I have this morning sent out the attached telex to my provincial counterparts. That telex speaks for itself I believe. I hope that the approach that I have suggested will commend itself to my provincial counterparts as a means of implementing what I understand to be the decision of the First Ministers on November 5, that is:

1) an override be possible in terms of equality rights set out in section 15 including the right to non-discrimination on the basis of sex, and

2) that otherwise it be impossible to have an override in respect of section 28.

I will report back to you as soon as I have received a response from the provinces.

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In a conversation with .Mr. Broadbent today, I have indicated to him that I had been in touch with my counterparts this morning, suggesting an approach that would in my view resolve the problem and it is possible that he will raise the issue with you at Question Period today.

Roger Tassé

Encl.

[1] Full Citation: Note for the Prime Minister from Roger Tassé, Override of Section 28 of the Charter of Rights (Nov. 16, 1981). This memo includes a telex from Roger Tassé on the Override of Section 28 in Section 33 of Charter and Wording of Mobility Rights Derogation under Section 6(4).

November 16, 1981

TELEX – FLASH

TO: DISTRIBUTION
FROM: ROGER TASSE
DEPUTY MINISTER OF JUSTICE

RE: OVERRIDE OF SECTION 28 IN SECTION 33 OF CHARTER AND WORDING OF MOBILITY RIGHTS DEROGATION UNDER SECTION 6(4)

PROBLEM REMAINS IN WORKING DRAFT OF RESOLUTION PREPARED NOVEMBER 5, 1981 WITH INCLUSION OF SECTION 28 IN SECTION 33 OVERRIDE CLAUSE. AS DRAFTED, SECTION 33 WITH SECTION 28 INCLUDED WOULD ALLOW LAWS WHICH COULD OVERRIDE CATEGORIES OF RIGHTS WHICH ARE NOT OTHERWISE SUBJECT TO SECTION 33 OVERRIDE. FOR EXAMPLE, A VOTING LAW COULD BE ENACTED WHICH CONFERRED THE RIGHT TO VOTE UNEQUALLY ON MEN AND WOMEN EVEN THOUGH DEMOCRATIC RIGHTS ARE NOT SUBJECT TO OVERRIDE CLAUSE. THIS WAS NOT THE INTENTION OF THE FIRST MINISTERS ACCORD NOR OF THE OFFICIALS WHO DEVELOPED THE WORKING DRAFT.

AS I UNDERSTAND THE DESIRE OF A NUMBER OF PROVINCES TO HAVE SECTION 28 INCLUDED IN SECTION 33 OVERRIDE, IT IS TO ENSURE THAT A LAW OVERRIDING SECTION 15 PROTECTION AGAINST DISCRIMINATION BASED ON SEX WILL NOT BE STRUCK DOWN BECAUSE IT IS IN CONFLICT WITH THE GUARANTEE OF RIGHTS EQUALLY TO MEN AND WOMEN IN SECTION 28.

I BELIEVE THIS CONCERN CAN BE MET IN THE FOLLOWING MANNER:

(1) LEAVE SECTION 28 AS IT APPEARS IN THE WORKING DRAGT OF NOVEMBER 5: "NOTWITHSTANDING ANYTHING IN THIS CHARTER, EXCEPT SECTION 33, THE RIGHTS AND FREEDOMS REFERRED TO IN IT ARE GUARANTEED EQUALLY TO MALE AND FEMALE PERSONS.", AND

(2) AMEND SECTION 33(1) TO READ: "PARLIAMENT OR THE LEGISLATURE OF A PROVINCE MAY EXPRESSLY DECLARE IN AN ACT OF PARLIAMENT OR OF THE LEGISLATURE, AS THE CASE MAY BE, THAT THE ACT OR A PROVISION THEREOF SHALL OPERATE NOTWITHSTANDING A PROVISION INCLUDED IN SECTION 2 OR SECTIONS 7 TO 15 OF THIS CHARTER, OR SECTION 28 OF THIS CHARTER IN ITS APPLICATION TO DISCRIMINATION BASED ON SEX REFERRED TO IN SECTION 15."

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THE MODIFICATION IN SECTION 33 WOULD PUT BEYOND DOUBT THAT A LAW WHICH OVERRIDES SEXUAL NON-DISCRIMINATION PROTECTION UNDER SECTION 15 WOULD NOT BE SUBJECT TO CHALLENGE ON GROUNDS THAT IT CONFLICTED WITH THE GUARANTEE OF SEXUAL EQUALITY UNDER SECTION 28. AT THE SAME TIME, WOMENS GROUPS WOULD BE ASSURED THAT AN OVERRIDE OF SECTION 28 WAS LIMITED ONLY TO SECTION 15 NON-DISCRIMINATION AND COULD NOT BE USED TO ENACT SEX-BASED DISCRIMINATION LAWS IN RELATION TO OTHER CATEGORIES OF RIGHTS.

WITH RESPECT TO SECTION 6(4) ON MOBILITY RIGHTS WE WOULD PROPOSE, IN LIGHT OF THE VIEWS EXPRESSED BY NEW BRUNSWICK, NEWFOUNDLAND, ALBERTA AND SASKATCHEWAN, IN RESPONSE TO MY TELEX OF NOVEMBER 10, TO LEAVE THE TERM "RATE

OF EMPLOYMENT" AS FOUND IN NOVEMBER 5 WORKING DRAFT. STATISTICS CANADA HAS NOW ADVISED THAT IT IS A MORE STABLE INDICATOR OF ECONOMIC PERFORMANCE THAN "RATE OF UNEMPLOYMENT".

I PROPOSE TO ARRANGE A TELEPHONE CONFERENCE CALL TO DISCUSS THE FOREGOING PROPOSAL WITH YOU ON TUESDAY, NOVEMBER 17 AT 12 NOON EASTERN STANDARD TIME.

ROGER TASSE
DEPUTY MINISTER OF JUSTICE

DISTRIBUTION:
ALL PROVINCIAL DEPUTY ATTORNEYS GENERAL AND DEPUTY MINISTERS FOR INTERGOVERNMENTAL AFFAIRS (EXCEPT QUEBEC)

(I.) CANADA, HOUSE OF COMMONS DEBATES, THE CONSTITUTION

NOVEMBER 16, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 12777.

THE CONSTITUTION

RECOGNITION OF WOMEN'S RIGHTS

Mr. Edward Broadbent (Oshawa): Madam Speaker, my question is addressed to the minister responsible for the status of women. The minister knows that following certain answers given by the Prime Minister with respect to Clause 28 in the old constitutional resolution, the precise meaning and significance of that clause are unclear. She also knows that there have been discussions taking place, as I understand it, between the federal and provincial officials in recent days. I wonder if she is now in a position to outline to the House the precise meaning of that clause.

Hon. Judy Erola (Minister of State (Mines)): Madam Speaker, I will be happy to answer the question. The precise meaning of the clause as we see it, is that Section 15, where the nonobstante applies, refers to the specific definition of sexual discrimination for a very specific act. In Clause 28 the broad principle is stated, one in which the women of Canada are very much interested and are very positive about. They wish this to remain within the charter, of course. I should like Oral Questions to advise hon. members that we are optimistic at this stage and hope that Clause 28 in the general section will remain intact. We may know by the end of the day.

ASSURANCE SOUGHT ON PRECISE MEANING OF FEDERAL-PROVINCIAL ACCORD

Mr. Edward Broadbent (Oshawa): Madam Speaker, as I understand the minister's answer, the position of the federal government is to maintain the force of Clause 28 as it now is. She has indicated, though, that there is not yet agreement on that, I assume, by all those provinces that have participated in the accord. Since it has been suggested that we may well have a resolution before the House on Thursday of this week, may I ask the minister if she is prepared to assure the House that we will know ahead of that time what the precise meaning of Clause 28 is in terms of an accord that has been reached between the federal government and the provinces?

Hon. Judy Erola (Minister of State (Mines)): Yes, Madam Speaker, I can assure the hon. member that hopefully by this evening we will have the precise meaning and the terms of the agreement with the premiers.

EFFECT OF UNITED NATIONS CONVENTION ON ELIMINATION OF DISCRIMINATION

Miss Pauline Jewett (New Westminster-Coquitlam): Madam Speaker, my question is also for the minister responsible for the status of women. I am very pleased indeed, as I am sure all members of the House are, by the answer the minister has given that Clause 28, the equality clause, will remain intact, just as it is now.

If I may, I should like to congratulate the minister on opening her office to the representatives of millions of Canadian women who are extremely concerned that Clause 28 be kept intact.

Some hon. Members: Hear, hear!

Miss Jewett: We are very glad to join in the applause.

Article 2(a) of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women requires state parties to "undertake to embody the principle of equality of men and women in their national constitutions". My first question was to have been whether the federal government still supports this convention and I take it the answer is yes. May I ask the minister whether it has been brought to the attention of the provinces that a serious violation of this convention would be brought about if Clause 28 were eliminated, overridden, or changed in any way?

Hon. Judy Erola (Minister of State (Mines)): Yes, Madam Speaker, that has been a very forceful part of the argument presented to the premiers.

(I.) MEMORANDUM TO MEMBERS OF LIBERAL CAUCUS FROM JEAN CHRÉTIEN, THE CHARTER OF RIGHTS AND THE NON OBSTANTE CLAUSE

NOVEMBER 17, 1981

Source: Memorandum to Members of Liberal Caucus from Jean Chrétien (Nov. 17, 1981)[1]

November 17, 1981

Memorandum to all members of Caucus

From: The Honourable Jean Chretien

The Charter of Rights and the Non Obstante Clause

The purpose of this paper is to explain the effect of the non obstante (over-ride) clause which will be part of the Canadian Charter of Rights and Freedoms.

It is important at the outset to understand that the entire Charter of Rights will be entrenched in the constitution and that no province will be able to opt-out of any provision of the Charter. The agreement signed by the Prime Minister and nine Premiers does not emasculate the Charter. Democratic rights, fundamental freedoms, mobility rights, legal rights, equality rights, and language rights are all enshrined in the Constitution and apply across the country.

What the Premiers and the Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non controversial circumstances by Parliament or legislatures to over-ride certain sections of the Charter. The purpose of an over-ride clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy.

The over-ride clause in the Charter of Rights will require that a law state specifically that part or all of it applies notwithstanding a particular section of the Charter.

-2-

Such a law automatically expires after five years unless specifically renewed by a legislature. The effect of this provision is first that it will be politically very difficult for a government without very good reason to introduce a measure which applies notwithstanding the Charter of Rights. Second, a sunset provision of five years provides a degree of control on the use of an override clause and allows public debate on the desirability of continuing the derogation further.

It is important to remember that the concept of an over-ride clause is not new in Canada. Experience has demonstrated that such a clause is rarely used, and, when used, is usually non controversial. The Alberta Bill of Rights was enacted in 1972 and includes an over-ride

[1] [Footnote in progress] Full citation: Memorandum to Members of Liberal Caucus from Jean Chrétien, The Charter of Rights and the Non Obstante Clause (Nov. 17, 1981). Found amongst these papers was a French version of this memo and draft versions of the memo in both English and French. With regards the English drafts, the final draft is indistinguishable from the memorandum. The first draft had negligible changes. To consult these, please visit [LINK TO COME]

clause. The Saskatchewan Human Rights Code of 1979 also has an override provision. Neither has ever been used.

The Canadian Bill of Rights enacted in 1960 by Mr. Diefenbaker also contains an over-ride provision. In twenty years, the only time it has ever been used was in the Public Order Temporary Measures Act enacted in November 1970 after the October Crisis of that year. But the regulations under that Act which derogated from the Canadian Bill of Rights expired less than six months later on April 30, 1971.

The Quebec Charter of Rights and Freedoms adopted in 1975 contains an over-ride clause which has been used several times. However, its use has been non controversial and is instructive in looking at how the over-ride may be applied in terms of the new constitutional Charter.

For example, despite the provision in the Quebec Charter guaranteeing that everyone is equal before the law, the Juries Act states that a lawyer cannot be a member of a jury. Despite the guarantee of open trials in the Quebec Charter, the Youth Protection Act provides for circumstances where Juvenile Court may hold closed sessions. Despite the protection in the Quebec Charter for the privileged doctor-patient relationship, the Highway Safety Act requires a doctor to inform the License Bureau of the name of a patient who is medically incapable of driving a motor vehicule.

-3-

These examples demonstrate the utility of an over-ride clause where strict application of a Charter would otherwise lead to absurd results. What is interesting as well in the Quebec experience is that the first draft of Bill 101 would have made its provisions applicable notwithstanding the Quebec Charter of Rights and Freedoms. In this controversial area, public pressure forced the Quebec government to delete the clause from the Bill.

It is because of the history of the use of the over-ride clause and because of the need for a safety valve to correct absurd situations without going through the difficulty of obtaining constitutional amendments that three leading civil libertarians have welcomed its inclusion in the Charter of Rights.

Allan Borovoy, general counsel to the Canadian Civil Liberties Association was quoted in the Montreal Gazette of November 7, as saying "Our reaction is one of great relief. They did not emasculate the Charter." He went to say that:

"The process is a rather ingenious marriage of a bill of rights notion and a parliamentary democracy. The result is a strong Charter with an escape valve for the legislatures. The 'notwithstanding' clause will be a red flag for opposition parties and the press. That will make it politically difficult for a government to over-ride the Charter. Political difficulty is a reasonable safeguard for the Charter."

According to Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission, "I'm in no mood for nit-picking today. I'm feeling tremendously upbeat." (Montreal Gazette, November 7, 1981). Mr. Fairweather said that the over-ride clause will become as dead from lack of use as a clause in the British North America Act that –

-4-

at least in theory -- still enables Ottawa to disallow provincial legislation. Referring to longstanding provincial opposition to entrenched rights, Mr. Fairweather said, "the gang of no has become the gang of yes!"

Professor Walter Tarnopolsky is a past president of the Canadian Civil Liberties Association and an international expert on bills of rights. His view is that the over-ride clause "is really not such a bad idea, and could have a great many advantages." (Globe and Mail, Nov. 9, 1981)

It should be clear, in conclusion, that the compromise reached by the Prime Minister with the nine Premiers maintains the principle of a full, complete and effective constitutional Charter of Rights. It does not exclude rights which had previously been guaranteed. In fact, the Charter has been improved because unforeseen situations will be able to be corrected without the need to seek constitutional amendments.

(I.) TELEX FROM THOMAS L. WELLS TO JEAN CHRÉTIEN

NOVEMBER 17, 1981

Source: Telex from Thomas L. Wells to Jean Chretien (Nov. 17, 1981)

JUSTICE OTT

MIGA PLAN TOR
NOVEMBER 17, 1981
TO THE HONOURABLE JEAN CHRETIEN
MINISTER OF JUSTICE

The following is provided to confirm the views expressed by Ontario officials during the conference call at noon today

- Proposed section 39 re fiscal compensation: Acceptable to Ontario
- Proposed section 59 re minority language education rights in Quebec: Acceptable to Ontario
- Proposed section 58 re Minority language education rights in Manitoba: subject to federal Manitoba agreement: Acceptable to Ontario
- Section 6(4) re use of term 'Rate of employment': Acceptable to Ontario
- Proposed amendment to section 33(1) limiting its override of section 28 to matters of discrimination based on sec referred to in section 15: Ontario's policy preference would be to have no limitation on section 28

Please keep me or my officials informed with regard to discussion with Manitoba on section 58 and with concerned provinces on section 28 and 33(1) would also appreciate knowing as soon as possible when resolution will be introduced into Parliament

THEE HONOURABLE THOMAS L. WELLS
MINISTER OF INTERGOVERNMENTAL AFFAIRS
TELEXT 06 218562

JUSTICE OTT
MIGA PLAN TOR

(I.) CANADA, HOUSE OF COMMONS DEBATES, THE CONSTITUTION

NOVEMBER 18, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 12890-12891.

12890

[English]

THE CONSTITUTION

RECOGNITION OF WOMEN'S RIGHTS

Hon. Flora MacDonald (Kingston and the Islands): Madam Speaker, I have a straightforward question that is directed to the Prime Minister, regarding the constitutional proposals. Will the Prime Minister confirm that ail of the provinces, except Saskatchewan, have now agreed to the inclusion intact of the equality clause, Section 28, as it was introduced to the House of Commons earlier this year with unanimous approval by all parties of this House?

Right Hon. P. E. Trudeau (Prime Minister): Madam Speaker, the negotiations on this particular subject have been going on for several days because it was a matter of clarifying what the premiers intended when they signed the accord. There has been, effectively, disagreement between them as to

12891

what particular interpretation should be given to a particular section. I can only say that to this moment it has been impossible to get all nine premiers who signed the accord, on the same wavelength, and to agree to the same text.

Mr. Blackburn: You do not have to worry about Sterling Lyon any more.

Mr. Trudeau: Since we told the provinces that we would be tabling the resolution in its final form today, as a direct answer to the hon. lady's question I must say that there is more than one province which disagrees with the complete restoration of the section as it was. Therefore, in the spirit of the accord, I think we will have to go with a modified version of the text that we had originally proposed, not only in the resolution which has been before the House for a year, but also in the drafting sessions. I do not think it is appropriate to point out any particular province. There has been a great deal of negotiations going on, but obviously there is some lack of unanimity among the provinces as to what was intended in the accord.

(I.) TELEX FROM PREMIER BRIAN PECKFORD

NOVEMBER 18, 1981

Source: Telex from Brian Peckford to Prime Minister's Office (Nov. 18, 1981)

SSPREMIER PECKFORD ANNOUNCED TODAY THAT THE PROVINCIAL GOVERNMENT HAS INDICATED INA TELEGRAM TO THE FEDERAL GOVERNMENT THAT NEWFOUNDLAND SUPPORTS THE POSITION THAT THE OVERRIDE CLAUSE SHOULD NOT APPLY TO SECTION 28 OF THE CHARTER PROVIDING FOR THE CONSTITUTIONAL EQUALITY OF THE SEXES.

HOWEVER, THE PREMIER HAS CONFIRMED HIS SUPPORT OF THE FEDERAL GOVERNMENT'S POSITION THAT THE WORDING OF THE RESOLUTION SIGNED BY THE FEDERAL GOVERNMENT AND NINE OF THE PROVINCES CANNOT BE CHANGED WITHOUT THE UNANIMOUS CONSENT OF ALL SIGNATORS.

THE BRITISH COLUMBOA GOVERNMENT HAS PROPOSED THAT SECTION 28 BE EXCLUDED FROM THE LEGISLATIVE OVERRIDE. THE GOVERNMENT OF NEWFOUNDLAND SUPPORTS THIS PROPOSAL.

NOVEMBER 18, 1981

PREMIERS OFFICE
ST. JOHNS, NFLD.

TELTEX A OTT

PREMIER SNF

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(I.) TELEX FROM ROGER TASSÉ RE: APPLICATION OF SECTION 23 – MANITOBA AND WORDING OF SECTIONS 28 AND 33(1) OF CHARTER.

NOVEMBER 18, 1981

Source: Telex from Roger Tassé re: Application… (Nov. 18, 1981)[1]

DATE
NOVEMBER 18, 1981

PRECEDENCE
FLASH

FROM: MR ROGER TASSÉ, DEPUTY MINISTER OF JUSTICE, OTTAWA
TO: (SEE DISTRIBUTION LIST ATTACHED)

RE: APPLICATION OF SECTION 23 – MANITOBA AND WORDING OF SECTIONS 28 AND 33(1) OF CHARTER

Following consultations with the office of the Premier-Elect of Manitoba Today, Section 58 of the Constitutional resolution has been deleted. Thus, there is no special proclamation of section 23 for Manitoba: section 23 comes into force for that Provinces of the same day as for other provinces under Section 57.

With respect to the wording of Section 28 and 33(1) of the charter, in light of discussions yesterday and today with Provincial Ministers and officials the following wording is being inserted in the Charter:

PAGE 2

"Section 28 – Notwithstanding anything in this Charter except section 33, the Rights and Freedom referred to in it are guaranteed equally to male and female persons."

"Section 33(1) – Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to 15 of this Charter, or section 28 of this charter in its application to discrimination based on sex referred to in section 15."

[1] Full citation: Telex from Roger Tassé Re: Application of Section 23 – Manitoba and Wording of Sections 28 and 33(1) of Charter (Nov. 18, 1981).

(I.) TELEX FROM ROY ROMANOW TO JEAN CHRÉTIEN & ALLAN BLAKENEY

NOVEMBER 18, 1981

Source: Telex from Roy Romanow to Jean Chretien (Nov. 18, 1981)

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JUSTICE OTT
INTGOV AFF REG

NOVEMBER 18, 1981

TO: HON. JEAN CHRETIEN, MINISTER OF JUSTICE, GOVERNMENT OF CANADA

FROM: HON. ROY RAMANOW, MINISTER OF INTERGOVERNMENTAL AFFAIRS
SASKATCHEWAN

C.C. HON. ALLAN BLAKENEY, PREMIER

This has reference to your latest telephone call of November 18, 1981.

Let me detail the situation as I understand it.

The accord of November 5, 1981, agreed that the charter of rights would remain intact, but that sections dealing with fundamental, legal, and equality rights later identified to be section 2, and sections 7 to 15, and section 28 would be subject to a notwithstanding clause. This was incorporated into the officials working draft of November 5, 1981.

Subsequent to the drafting by the officials on November 5, 1981, it became evident that some additional drafting changes would be required to more precisely accommodate the agreement by first ministers. Accordingly, officials were instructed to review suggested drafting changes in a conference call on November 17, 1981. During that call, the federal officials suggested a compromise wording which would more clearly delineate the respective application of section 28 and section 33, the purpose being to ensure that sexual equality was not brought under the ambit of section 33 in respect of sections other than section 15. Saskatchewan agreed to that compromise.

Since yesterday some now wish to eliminate the application of section 33 to section 28 entirely.

This is a change in substance, and therefore, a change to the agreement itself.

Premier Blakeney has stated that the Saskatchewan government is prepared to accept the accord of November 5, 1981, even though, as with any compromise, there were elements he would have otherwise preferred. If the accord of November 5, 1981 were to be changed, in substance, then, it is incumbent on us to consider another change of substance, too.

More specifically, if the agreement is now to be re-opened and if changes to section 28 are to be agreed to, it seems only fair to change the agreement to include section 34 for the native

peoples of Canada. To change the substance of the agreement in this way, without further considering a change to reinstate section 34 is not acceptable to us.

To summarize, we are quite willing to maintain the original agreement and to accept the compromise wording on section 33, worked out and agreed to by officials on November 17, and telecopier to us later that night. However, if you propose to change the substance of the agreement, and amend section 28, we would agree to it only if another change in the substance of the agreement is accepted as well, namely, the reinstatement of section 34 on native rights.

Finally, my deputy has suggested in an earlier telex that the complexity and frequency of proposed drafting changes would necessitate a further quick meeting of officials. This would permit an opportunity for an exchange of views and eliminate confusion.

I look forward to your early reply.

ROY J. ROMANOW

VVVVM

(I.) TELEX FROM ROY ROMANOW TO JEAN CHRÉTIEN

NOVEMBER 18, 1981

Source: Telex from Roy Romanow to Jean Chretien (Nov. 18, 1981)

JUSTICE OTT

INTGOV AFF REG
NOVEMBER 18 18, 1981
3:30 PM

TO JEAN CHRETIEN

FROM ROY ROMANOW

STRICTLY CONFIDENTIAL

Our position is as follows. We believe the accord should be adhered to. If the accord is to be departed from, there is more than one change that must be considered.

We have agreed to the treatment of section 28 contained in your draft telecopier to us on November 17 1981.

We are now told by telephone that it is now proposed to treat section 28 differently by removing it from the ambit of section 33. We have grave reservations about this because of the danger that this would be interpreted to make unconstitutional all affirmative action programs for women. The resolution to be presented to parliament, as sent to us by Mr. Kirby, dealt with this problem adequately.

We have a further problem, premier Blakeney has taken the position that if the accord is re-opened, he would press for the old section 34 to be reinstated, as it appeared in the parliamentary resolution, and in Saskatchewan's submission to the conference on Wednesday, November 4. We would be very reluctant to agree to any departure from the accord that failed to honour that position.

In order to get agreement, we would, however (1) agree to the Kirby parliamentary resolution telecopier to us on November 17, 1981, which we regard as consistent with the November 5, 1981 accord or (2) agree to including section 28 as a free standing clause in a revision of the accord which included the reinstatement of section 34. We would agree to this reluctance because although we wish to see the former section 34 included in the accord, we continue to have grave misgivings about the affect of the proposed section 28 on all affirmative action programs for women.

ROY J. ROMANOW
MINISTER OF INTERGOVERNMENTAL AFFAIRS
SASKATCHEWAN
+
JUSTICE OTT

INTGOV AFF REG
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(I.) TELEX FROM HARRY HOW TO JEAN CHRÉTIEN

NOVEMBER 18, 1981

Source: Telex from Harry How to Jean Chretien (Nov. 18, 1981)

JUSTICE OTT

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HON. JOHN CHRETIEN MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA
TLX 053-3604 HOUSE OF COMMONS OTTAWA ONT.
BT

Nova Scotia continues to understand from the agreement reached in Ottawa on November 5'81 that section 28 would be subject to the notwithstanding provision of section 33(1). This was considered necessary in order for the provision of section 33(1) to effectively apply to section 15 in respect to discriminate based in sex. The latest suggestion that section 28 not be subject the provisions of section 33(1) is substantive change in the accord and beyond the bounds fo the agreement entered into on November 5'81 and such a suggestion, in our opinion, would have the effective of section 28 be free standing and therefore the basis for challenging federal or provincial legislation which provides preferential benefits to women on grounds that such legislation not treat male and female persons equally. Accordingly Nova Scotia agrees to the suggested draft changes to section 33(1) set out in Taffe Telex of November 16'81 but is unable to agree at this time to deleting section 28 from the provisions of section 33(1) which is considered to be a substantive change from the accord. And beyond the bounds of the agreement entered into on November 5/81.

Hon. Harry W How QC Attorney General Province of Nova Scotia

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JUSTICE OTT

(I.) TELEX FROM NEIL CRAWFORD TO JEAN CHRÉTIEN

NOVEMBER 18, 1981

Source: Telex from Neil Crawford to Jean Chretien (Nov. 18, 1981)

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JUSTICE OTT
ATT GEN EDM
NOV. 18/81
TO: HON. JEAN CHRETIEN,
MINISTER OF JUSTICE

In confirmation of the latest conference call of federal-provincial officials convened by Mr. Tasse on the 17th November, I would like to confirm the position taken by Alberta during the course of the call.

Alberta concurs with the position taken by British Columbia that section 28 of the proposed resolution should not be subject to federal or provincial legislative override.

From: HON. NEIL CRAWFORD
ATTORNEY GENERAL
PROVINCIAL ALBERTA

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JUSTICE OTT

ATT GEN EDM

(I.) RESOLUTIONS RESPECTING CONSTITUTION ACT, ENGLISH VERSION

NOVEMBER 18-DECEMBER 2, 1981

Source: House of Commons Debates, 32nd Parl, 1st Sess., 12992-12993, 13174-13175, & 13641-13642

November 18, 1981[1]

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

November 24, 1981

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

December 2, 1981 – Final Version

Exception

33. (1) Parliament or the legislature of a province may expressly declare in an Act of

[1] This version was presented to Parliament on November 20, 1981, but the draft itself is dated November 18th.

Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

(I.) RESOLUTIONS RESPECTING CONSTITUTION ACT, FRENCH VERSION

NOVEMBER 18-DECEMBER 2, 1981

Source: Débats, 32e Lég., 1re Sess, 12992-12993, 13174-13175, & 13641-13642[1]

November 18, 1981[2]

Dérogation par declaration expresse

33.(1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte, ou de l'article 28 de cette charte dans son application à la discrimination fondée sur le sexe et mentionnée à l'article 15.

Effet de la dérogation

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

Durée de validité

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

Nouvelle adoption

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

Durée de validité

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

November 24, 1981

Dérogation par declaration expresse

33 (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

Effet de la dérogation

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

Durée de validité

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

Nouvelle adoption

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

Durée de validité

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

December 2, 1981 – Final Version

Dérogation par declaration expresse

[1] Full citation: Débats de la Chambre des communes, 32e Lég., 1re Sess, 12992-12993, 13174-13175, & 13641-13642

[2] This version was presented to Parliament on November 20, 1981, but the draft itself is dated November 18th.

33 (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

Effet de la dérogation

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

Durée de validité

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

Nouvelle adoption

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

Durée de validité

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

(I.) TELEX FROM GERALD OTTENHEIMER (NFLD) TO JEAN CHRÉTIEN

NOVEMBER 19, 1981

Source: Telex from Gerald Ottenheimer to Jean Chretien (Nov. 19, 1981)

TELTEX B OTTAWA
+
PREMIER SNF
NOVEMBER 19, 1981

HONOURABLE JEAN CHRETIEN
MINISTER OF JUSTICE AND ATTORNEY
GENERAL OF CANADA
HOUSE OF COMMONS

OTTAWA

I wish to advise your, on behalf of the Government of Newfoundland, that the revised draft of the constitutional resolution is acceptable to this government, with the following provision:

1. That every attempt be made to gain the agreement of the signatories to the constitutional accord to the retention of section 28 as contained in the original resolution, without any right to override its provisions by an act of parliament or legislature.

2. That the consent of the government of Manitoba be obtained to the wording of section 58, which provides for the coming into force in Manitoba fo the Minority language rights contained in section 23.

Gerald R. Ottenheimer
Minister of Justice and Attorney General.

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Premier SNF

(I.) MEMORANDUM, RIGHTS GUARANTEED TO BOTH SEXES

NOVEMBER 19, 1981

Source: Memorandum, Rights Guaranteed to Both Sexes (Nov. 19, 1981)

CONFIDENTIAL
November 19, 1981

RIGHTS GUARANTEED TO BOTH SEXES

Section 28 - Notwithstanding anything in this Charter except section 33, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The purpose of section 28 is to place beyond doubt any question that the rights and freedoms in the Charter are to apply equally to men and women. However, a number of provinces felt that section 28 had to be included in the section 33 override to ensure that a law overriding section 15, protection against discrimination based on sex, would not be struck down because it was in conflict with the guarantee of rights equally to men and women.

Therefore a specific provision in section 33(1) limits the application of the notwithstanding clause to section 28 to discrimination based on sex referred to in section 15.

Section 33 - (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15.

Thus, while section 28 will be subject to the override provision on all non-discrimination rights, it will not permit other provisions of the Charter to be construed as permitting discriminatory practices against women.

Therefore, if a court decides that it is discriminatory to charge young male drivers higher insurance premiums than young female drivers, a province could override the court's decision. The Charter does not give an individual the right to a driver's license or to insurance. on the other hand, if a province wished to limit freedom of association on the basis of sex, using the override clause, this could not be done. Freedom of association is a Charter right and is guaranteed equally to both sexes

CONFIDENTIAL

1. CHARTER OF RIGHTS

TABULAR COMPARISON OF CHARTERS - SUMMARY OF PROVISIONS

NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:	Same provision.	
Section 1 - Guarantee of Rights and Freedoms		
1. Rights and freedoms guaranteed subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	Same provision.	
Section 2 - Fundamental Freedoms		
2. (a) Freedom of conscience and religion (b) Freedom of thought, belief, opinion and expression, including freedom of press and other media (c) Freedom of peaceful assembly (d) Freedom of association	Same provision.	This section will be subject to the "notwithstanding clause". NOTE: Some provinces were concerned about how the courts might construe certain of the freedoms such as freedom of conscience.

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NOVEMBER 5, 1981	APRIL 24, 1981 PROPOSED	REMARKS

ACCORD	RESOLUTION	
Sections 3-5 - Democratic Rights		
3. Right of citizens to vote and to qualify for election to House of Commons or legislature	Same provision	
4. (1) Limits on maximum duration of House of Commons and legislatures (5 years) (2) except in case of national emergency	Same provision	
5. Requirement for annual sittings of Parliament and legislatures	Same provision	
Section 6 – Mobility Rights		
6. (1) Right of citizen to enter, remain and leave Canada	Same provision	

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
Section 6 - Mobility Rights		
(2) Right of every citizen of Canada and every person who has the status of permanent resident to (a) move to and take up residence in any	Same provision	

province (b) pursue a livelihood in any province		
(3) Rights subject to (a) laws or practices of general application but without dis-crimination based on place of residence or previous residence or (b) laws providing for reasonable residency requirements for publicly provided social services	Same provision	

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.	No similar provision.	This section was included in the Charter following the November 2, 1981 First Ministers' Conference. The provision will allow a province to pass laws or establish programs designed to give priority to residents of the province. This local hiring preference can only be initiated by a province when the employment rate of that province in the preceding year, as determined by Statistics Canada, was below the national average rate of employment in Canada.
Sections 7-14 – Legal Rights		
7. Right to life, liberty and security of person and right not to be deprived	Same provision.	This section will be subject to the "notwithstanding clause".

thereof except in accordance with the principles of fundamental justice		
8. Right against unreasonable search and seizure	Same provision.	This section will be subject to the "notwithstanding clause".
9. Right against arbitrary detention or imprisonment	Same provision.	This section will be subject to the "notwithstanding clause".

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
10. Right on arrest or detention (a) to be told promptly of reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right (c) to remedy of habeas corpus	Same provision	This section will be subject to the "notwithstanding clause".
11. Right when charged with offence (a) to be informed without unreasonable delay of the specific charge; (b) to be tried within reasonable time; (c) not to be called as a witness in own trial; (d) to presumption of innocence until proven guilty	Same provision	This section will be subject to the "notwithstanding clause".

according to law in fair and public hearing before impartial tribunal; (e) not to be denied reasonable bail without just cause;		

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
(f) to trial by jury in respect of serious offences, other then those under military law that are tried before a military tribunal; (g) not to be found guilty of any act or omission unless at the time it constituted an offence under Canadian or international law or was criminal according to general principles of law recognized by the community of nations; (h) to protection against double jeopardy; (i) to benefit of lesser penalty where law is changed before sentencing		
12. Protection against cruel and unusual treatment or punishment	Same provision	This section will be subject to the "notwithstanding clause".

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
13. Right of witness who testifies in any proceedings not to have evidence used to incriminate him in subsequent proceedings, except prosecution for perjury or giving contradictory evidence	Same provision	This section will be subject to the "notwithstanding clause".
14. Right of party or witness who does not understand or speak the language used at proceedings or who is deaf to assistance of interpreter.	Same provision	This section will be subject to the "notwithstanding clause". SECTIONS 7-14 NOTE: Some provinces were concerned about the scope of the legal rights. In particular they felt that American jurisprudence on due process of law and admissibility of evidence could be imported into Canadian law. They did not want the courts to have broad powers to define such terms as reasonableness and promptly.

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
Section 15 - Equality Rights		
15. (1) Rights of every	Same provision	This section will be subject to the "notwithstanding

individual to equality before and under the law and to equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (2) Exception Those laws, programs or activities designed for "affirmative action" on behalf of disadvantaged individuals or groups including those disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.		clause". NOTE: Even with the three year delay provision included in the Charter some provinces were concerned with the impact these rights would have on provincial legislation.

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
Section 16 - Official Languages		
16. (1) English and French official languages of Canada with equal status, rights and privileges re use in all federal institutions (2) English and French	Same provision	

official languages of New Brunswick with equal status, rights and privileges re use in all provincial institutions (3) Charter does not limit Parliament or legislatures from advancing the equality of status or use of English and French		
Sections 17-23 – Language Rights		
17. (1) Right to use English or French in all debates and proceedings of Parliament (2) Right to use English or French in all debates and proceedings of the legislature of New Brunswick	Same provision	
18. (1) Statutes, records and journals of Parliament to be in English and French and both versions equally authoritative	Same provision	

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
(2) Statutes, records and journals of the legislature of New Brunswick to be in		

English and French and both versions equally authoritative		
19. (1) Right to use English or French in all proceedings of federally constituted courts (2) Right to use English or French in all proceedings of any courts in New Brunswick	Same provision	

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
20. (1) Rights of public to communicate with and receive services in English or French from head or central office of any federal government institution and from any other office of such institution where (a) there is significant demand (b) due to the nature of the office it is reasonable (2) Right of public in New Brunswick to communicate with and receive services in English and French from any office of any institution of the	Same provision	

government of New Brunswick		
21. Preservation of rights, privileges or obligations for use of English and French that exist by virtue of other constitutional provisions	Same provision	
22. Preservation of legal and customary rights and privileges for use of languages other than French and English	Same provision	

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
23. (1) Right of Citizens of Canada (a) whose first language learned and still understood is the minority language of their province of residence or, (b) who received their primary school instruction in Canada in the minority language of the province in which they reside to have their children receive their primary and secondary school instruction in that language (2) Right of Citizens of Canada of whom any child has or is receiving primary or	Same provision.	NOTE: Quebec Applied to Quebec— Section 23 with the exception of subsection 23(1)(a). Section 23(1)(b), the "Canada Clause" and Section 23(2), the continuation of education right will provide reciprocity between Quebec and the other provinces. Mr. Levesque agreed to this reciprocity at the time of the St. Andrews and Montreal declarations of provincial First Ministers. Opt-in for Quebec - A separate proclamation clause (Section 58) will provide a mechanism for Quebec to opt-in to Section 23(l)(a) once the National Assembly signifies its approval of this Section in

secondary school instruction in English or French in Canada to have all their children receive this instruction in the same language (3) Rights in (1) and (2) (a) apply wherever numbers warrant (b) include the right to minority language educational facilities where numbers warrant		respect of Quebec.

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
Section 24 - Enforcement		
24. (1) Anyone whose Charter rights have been infringed or denied may apply to a court to obtain remedy (2) When evidence is obtained in a manner that infringed or denied Charter rights the evidence will be excluded if its admission in proceedings would bring the administration of justice into disrepute		
Sections 25-31 - General		
25. Charter rights will not abrogate or		

derogate from any aboriginal treaty or other rights including (a) rights recognized by the Royal Proclamation of 1763; (b) rights that may be acquired by way of land claims settlement		
26. Preservation of any rights not specifically mentioned in Charter		
27. Charter interpreted to preserve and enhance multicultural heritage		

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
28. Notwithstanding anything in this Charter except section 33 the rights and freedoms referred to in it are guaranteed equally to male and female persons.	28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.	This section will be subject to the "notwithstanding clause".
29. Rights and privileges guaranteed by or under the Constitution in respect of denominational, separate or dissentient schools not affected by Charter	Same provision.	

30. Charter provisions made applicable to Territories	Same provision.	
31. Legislative authority is not affected except as expressly provided by the Charter	Same provision.	
Section 32 -- Application of Charter		
32. (1) This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and	32. (1) Charter applies (a) to Parliament and government of Canada and all matters within authority of Parliament including matters relating to Yukon Territories and North-west Territories	Technical amendment.

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
(b) to legislature and government of each province in respect of all matters within the authority of legislatures. (2) Section 15 will not have effect until three years after the Constitutional Act, 1981, except Part VI, comes into force	32. (1)(b) to legislature and government of each province and all matters within the authority of legislatures. Same provision.	Technical amendment.
33. (1) Parliament or the	No similar provision.	This section was included in the Charter following the November 2, 1981 First

legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.		Ministers' Conference. The clause enables a legislative body to enact legislation that conflicts with the following provisions of the Charter of Rights and Freedoms: Section 2 - Fundamental Freedoms Section 7 to 14 - Legal Rights Section 15 - Equality Rights Section 28 - Rights guaranteed to both sexes Any notwithstanding enactment would expire five years from the date of enactment unless renewed by the legislative body.

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NOVEMBER 5, 1981 ACCORD	APRIL 24, 1981 PROPOSED RESOLUTION	REMARKS
(4) Parliament or a legislature of a province may re-enact a declaration made under sub-		

section (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).		
Section 34 - Citation		
34. Cited as the Canadian Charter of Rights and Freedoms	Same provision.	

(I.) MEMORANDUM FROM DEPUTY MINISTER TO MINISTER RE OVERRIDE CLAUSE IN RELATION TO SECTION 28 OF CHARTER

NOVEMBER 19, 1981

Source: Memorandum from Deputy Minister to Minister of Justice, Override Clause…(Nov. 19, 1981)[1]

Department of Justice

MEMORANDUM

Security Classification
CONFIDENTIAL

Date
November 19, 1981

TO: MINISTER

FROM: DEPUTY MINISTER

SUBJECT: OVERRIDE CLAUSE IN RELATION TO SECTION 28 OF CHARTER

Comments

It is being alleged by women's groups that the provision in section 33 of the Charter of Rights which allows for a limited override of section 28 (equality of rights and freedoms between men and women) as it relates to non-discrimination based on sex in section 15 destroys the concept of equality of rights between males and females in the Charter.

This is simply not the case. The override in section 33 with respect to section 28 is strictly confined to discriminatory laws enacted in relation to section 15 as, for example, a law providing for different rates for motor vehicle insurance as between young men and women. This does not undermine the equality guarantee in section 28 with respect to all other rights guaranteed by or referred to in the Charter. Thus, all fundamental freedoms, democratic rights, legal rights, mobility rights, language rights, or other rights which may flow from the construction rules (Section 25, 26, 27) respecting aboriginal people and multicultural heritages remain guaranteed equally to men and women and cannot be overridden on the basis of sex.

It is our opinion that the ability to override equality rights in section 15 of the Charter, including sex, would have been the same as it is under the present wording of section 33, even if there had been no reference in that section to 28. In other words,

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[1] Full citation: Memorandum from Deputy Minister to Minister, Override Clause in Relation to Section 28 of Charter (Nov. 19, 1981).

once section 15 equality rights were included in the section 33 override clause (as agreed to by First Ministers on November 5), this specific reference to section 15 enables legislatures to override non discrimination based on sex, since otherwise the reference to an override of section 15 would have been meaningless. Whether there is a specific reference or not to section 28 in section 33 (the override clause) section 28 can only operate to prevent a right in the Charter from being denied equally to males and females if that particular right is not specifically subject to the override clause.

In the light of the foregoing, the specific reference in section 33 to 28 as it applies to discrimination based on sex in section 15 simply makes crystal clear – places beyond any possible doubt – what is already implied, i.e. that section 15, including sex, may be overridden under section 33. It removes the doubts that some provinces had that, without the reference in section 33 to section 28, the paramountcy provision in section 28 might have prevented an override of section 15, on basis of sex, contrary to the First Ministers' agreement.

The difficulty that we faced, after the November 5, 1981 meet ng of officials, was that most provinces were insisting that it should be possible to override section 28 in its application to all of the rights guaranteed by the Charter and not only the equality rights of section 15 in respect of sex.

What we have succeeded to do yesterday in the resolution that was tabled in the House, is to restrict severely the scope of override in respect of section 28 by specifically limiting it to sex in section 15. As a result, there can be no doubt that an override can be placed on section 15 in respect of sex, but on no other rights guaranteed in the Charter. This, we understand is consistent with the First Ministers' agreement.

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Our preference was to leave section 28 alone without specifically referring to it in section 33 (the override section). In our view, the same end result would have been obtained. In other words, an override could have been placed on section 15 in respect of sex. However, some provinces were worried that, if this question were to be tested in Court, that because of the paramountcy clause in section 28, the Court might have concluded that it was not legally permissible to have an override on section 15 in respect of sex.

In the result, the difference between what we now have in the resolution and our preferred position which was shared by the majority of the provinces yesterday afternoon pertains more to "presentation" (textual awkwardness and negative perception by women groups) than to legal substance.

In light of the foregoing, while we would have preferred to see the clearer and simpler text (no specific mention of section 28 in the override clause), any changes at this time to implement our preferred position, would not alter the legal substance of the authority to override section 15 in respect of sex but might seriously threaten the First Ministers' agreement.

Roger Tasse
Deputy Minister of Justice

c.c. The Hon. J. Erola
c.c. Mr. Michael Kirby

[Attachment]

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, except section 33, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Exception where express declaration

[…]

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

[…]

Egalite de garantie des droits pour les deux sexes

28. Indépendamment des autres dispositions de la présente charte, exception faite de l'article 33, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

[…]

Dérogation par déclaration expresse

33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte, ou de l'article 28 de cette charte dans son application a la discrimination fondée sur le sexe et mentionnée a l'article 15.

Effet de la dérogation

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

Durée de validité

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

Nouvelle adoption

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

Durée de validité

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

(I.) CONSTITUTION: PARLIAMENTARY DEBATE BRIEFING NOTES

NOVEMBER 19, 1981

Source: Constitution: Parliamentary Debate Briefing Notes (Nov. 19, 1981)

CONFIDENTIAL

Some Arguments for Proceeding Without Quebec's Consent

[...]

How the Resolution Strengthens Quebec and Canadian Duality

How the Resolution Strengthens Quebec and Canadian Duality Far from jeopardizing Quebec's cultural and linguistic heritage, the constitutional resolution is the culmination of over 100 years of struggle for the official recognition of the French language and of Canadian duality. It is not the end of the struggle, but it is the end of the beginning and gives French Canada's cultural and linguistic heritage greater protection than it has ever had.

The resolution enhances the position of Quebec and of the French language and culture in Canada in many ways, including the following:

[...]

- The inclusion of a notwithstanding clause in the Charter gives Quebec the power to override the equality rights section, if necessary, in order to promote and protect the residents of Quebec. Thus the provincial government's powers to aid Quebecers are fully protected;

[...]

Thus the constitutional resolution lays the foundation of a new clause in which French-speaking Canadians in Quebec and elsewhere can feel more at home, and for which they can feel a new pride and loyalty. It achives the goals and rights which French Canadians have sought for generations. That is why Quebecers support it.

CONFIDENTIAL

Quebec Issues

[...]

Quebec's Ability to Promote Quebecers Protected

The P.Q. government has frequently alleged that the "equality rights" in the proposed Charter would limit the Quebec government's ability to promote and protect the residents of that province. While this allegation was always dubious in law, the addition of a notwithstanding clause to the Charter has now removed any vestige of credibility. If a case should ever arise in which the Quebec government's powers were limited in the way suggested, it will now have

the power to override the equality rights of the Charter, should it choose to do so. Thus the provincial government's powers to promote and protect Quebecers are fully protected.

CONFIDENTIAL

November 19, 1981

CHARTER OF RIGHTS AND FREEDOMS

Apart from the changes summarized below the elements Charter remain the same as in the April 24 Resolution.

SUMMARY

Summary of changes made to the April 24, 1981 Proposed Resolution in keeping with the Accord of November 5, 1981.

1. Notwithstanding Clause (Section 33)

An override clause has been included in the Charter which enables a legislative body (federal or provincial} to enact laws which will operate notwithstanding a specific provision of the Charter.

The override clause will apply to Fundamental Freedoms, Legal Rights and Equality Rights. It will also apply to section 28 (equal rights to both sexes) in respect of discrimination based on sex referred to in section 15 (equality rights).

2. Mobility Rights - Exemption (Section 6(4))

An affirmative action provision has been included in the mobility rights which will permit provinces to pass laws or establish programs designed to give preference to residents of the province when local employment is available.

Provinces can only implement affirmative action programs when the provincial rate of employment is below the national average.

3. Minority Language Educational Rights (Section 23)

All provinces with the exception of Manitoba and Quebec agreed to be bound by the provisions of section 23, in the November 5, 1981 Accord.

Manitoba agreed to be bound subject to the approval of the legislative assembly. The Premier elect of Manitoba has indicated that Manitoba will be bound without the necessity of legislative assembly approval.

Section 23 with the exception of subsection 23(1) (a) will be applied to Quebec.

The "Canada clause" (section 23(1) (b)) and the continuation of education right (section 23(2)) provide the minimum of reciprocity between Quebec and the other provinces. Mr. Levesque agreed to this reciprocity at the time of the St. Andrews and Montreal declarations

of provincial First Ministers. Quebec's Bill 101 made provision for this reciprocity and the Resolution does little more than give effect to section 86 of that law.

The "mother tongue test" (section 23(1) (a)) will only come into force in Quebec once the National Assembly signifies its approval of this section in respect of Quebec (section 58).

CONFIDENTIAL

November 17, 1981

THE NOTWITHSTANDING CLAUSE

Section 33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter, or section 28 of this Charter in its application to discrimination based on sex referred to in section 15.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a reenactment made under subsection (4).

DEFINITION

The notwithstanding or override clause included in the Charter of Rights and Freedoms enables a legislative body (federal or provincial) to enact expressly that a particular provision of an Act will be valid, notwithstanding the fact that it conflicts with a specific provision of the Charter. The notwithstanding clause will only apply to certain Charter rights - Fundamental Freedoms, Legal Rights and Equality Rights. Democratic Rights, Mobility Rights and Language Rights are not subject to the notwithstanding clause.

APPLICATION

Any enactment overriding any specific provisions of the Charter would contain a clause expressly declaring that a specific provision of the proposed enactment shall operate notwithstanding a specific provision of the Charter.

SAFEGUARDS

Any legislative override is of a limited duration -- five years -- to ensure that it is reviewed by a subsequent legislature to determine if its continuation is warranted. To remain in force the notwithstanding enactment would have to be renewed by the legislature.

The Charter reflects norms of our society which are fundamental and governments will hesitate before breaching these rights. Overriding the courts' interpretation of the Charter will not be done lightly by any Canadian government. Politically there would have to be very sound and widely accepted reasons for such a provocative act.

-2-

BACKGROUND

The notwithstanding principle has been recognized and is contained in a number of bills of rights in Canada:

- The Canadian Bill of Rights (1960)
- The Alberta Bill of Rights (1972)
- The Alberta Individual's Rights Protection Act (1972)
- The Quebec Charter of Rights and Freedoms (1975)
- The Saskatchewan Human Rights Code (1979)
- Ontario's Bill 7 to amend its Human Rights Code (1981)

To our knowledge, the legislatures of Alberta and Saskatchewan have never enacted laws which would have required that the notwithstanding provision be used.

The government of Canada has used the notwithstanding clause on one occasion, The Public Order (Temporary Measures) Act, 1970 which expired on April 30, 1971 contained a non-obstante clause as required by section 2 of the Canadian Bill of Rights. However, the non-obstante clause was restricted to certain legal rights of the Canadian Bill of Rights (those provisions dealing with arbitrary detention or imprisonment and denial of bail without just cause) despite the fact that under the provisions of the War Measures Act all the rights in the Canadian Bill of Rights were subject to the override clause.

Quebec has used the notwithstanding provision on seven occasions (Appendix I). Most limitations imposed by the Quebec government likely stem from the fact that the Quebec Charter contains no specific "reasonable limits" clause and the government was therefore fearful that without the override the courts might construe the Charter provisions as being without any limits. Under the Canadian Charter overrides similar to those enacted by the Quebec government would likely be unnecessary since section 1 would permit these types of limits. Also, in some cases, the Quebec overrides deal with rights not included in the Canadian Charter of Rights and Freedoms, e.g. protection for the doctor-patient relationship, lawyers in small claims courts, etc.

PROVINCIAL CONCERNS

Some provinces felt that including a notwithstanding clause in the Charter of Rights and Freedoms would preserve the idea of the supremacy of Parliament. Furthermore, some provinces had specific concerns regarding certain sections of the Charter and wished to have the notwithstanding clause applied to these sections:

- Section 2 - Fundamental Freedoms

Some provinces were concerned about how the courts might construe certain of the freedoms such as freedom of conscience. Also some provinces were concerned about the effect of certain freedoms on provincial legislation, such as freedom of expression and provincial control over advertising or provincial laws regarding pornography.

Sections 7 to 14 - Legal Rights

Some provinces were concerned about including certain legal rights (search and seizure as they felt this could result in Canadian courts adopting undesirable American jurisprudence relating to exclusion of all illegally obtained evidence.

Some provinces felt that applying rights beyond criminal and penal proceedings to include civil and administrative proceedings would extend legal protections to areas where such protections are not now applicable and, in some cases, would be unwarranted.

Also, some provinces were concerned that the test of "reasonable" or "arbitrary" which qualifies some rights could result in unforeseeable and undesirable court decisions.

- Section 15 - Equality Rights

Some provinces felt that equality rights or non-discrimination rights are a developing area of the law where new grounds are being developed in federal and provincial human rights legislation and where certain grounds such as sex, age or mental or physical disability still require exceptions or limitations.

Even with the three year delay provision included in the Charter, some provinces were concerned with the impact these rights would have on provincial legislation. Entrenchment of these rights would require extensive legislative amendments and some provinces felt they would not be able to offer protection against discriminatory practices in some areas because the Charter would require that protection once offered could not be conditioned to meet social realities.

Also, some provinces were concerned about how the courts would interpret these rights.

A separate note is attached with respect to Equal rights for both sexes (section 28).

FEDERAL GOVERNMENT POSITION

The federal government felt that a notwithstanding clause was both unnecessary and undesirable. The clause was unnecessary because section 1 of the Charter gives sufficient guidance to the courts as to the limits on the rights included in the Charter. The clause was undesirable because it is a provision that could seriously undermine the efficacy of the Charter if it were invoked too frequently.

Nevertheless, in reaching a consensus with the provinces with respect to the Charter of Rights and Freedoms, the federal government felt it was preferable to include a notwithstanding clause applicable to certain rights rather than delete or dilute rights. In addition, the notwithstanding

clause was preferable to an "opting-out" or "opting-in" clause. The notwithstanding clause must be applied to a specific provision of the Charter and it can apply only to individual pieces

of legislation. This prevents a legislature from passing an omnibus bill exempting it from all provisions of the Charter.

Therefore, the entire Charter of Rights will be entrenched the Constitution and the agreement signed by the Prime Minister and the nine Premiers does not emasculate the Charter. Democratic rights, fundamental freedoms, mobility rights, legal rights, equality rights and language rights are all enshrined in the Constitution. Also, the section regarding our multicultural heritage (section 27) and the section regarding the non derogation of aboriginal rights (section 25) remain in the Charter and are not subject to the notwithstanding clause.

The notwithstanding clause is unlikely ever to be used except in exceptional circumstances by Parliament or legislatures to override certain sections of the Charter. It will be politically very difficult for a government without very good reason to introduce a measure which applies notwithstanding the Charter of Rights. All uses of the notwithstanding clause will have to be fully debated in Parliament or the provincial legislatures and this will provide a very considerable degree of protection against the unwarranted use of the clause. In addition, if such a measure is used by a legislative body, the sunset provision of five years provides a degree of control on the use of the notwithstanding clause and allows public debate on the desirability of continuing the derogation further.

There is a certain value in including a notwithstanding clause in the Charter. The notwithstanding clause is a safety valve which will ensure that legislatures rather than judges have the final say on important matters of public policy. By using the override clause unforeseen situations will be able to be corrected without the need to seek constitutional amendments. For the sake of parallelism, the notwithstanding clause can also apply to federal legislation.

NOTE: A similar principle to the notwithstanding clause exists in other countries. In some cases Charters indicate that rights may be suspended for definite or indefinite periods. In other cases, provision is made to pass laws which breach individual rights.

APPENDIX I

CONFIDENTIAL

QUEBEC CHARTER OF RIGHTS AND FREEDOMS – A NON-OBSTANTE CLAUSE

(1) La Loi sur les jurés, LRQ, 1976, c. J-2, art. 52

Les dispositions de cette loi portant sur les points suivants s'appliquent malgré la Charte des droits : Qualités requises des jurés (ex. la citoyenneté) : inhabilité (ex. un avocat, un député ou son conjoint; jury unilingue français ou unilingue anglais).

(2) La Loi concernant les services de santé dans certains établissements, L.Q., 1976, C. 29, art. 14

Cette loi ordonnait aux salariés des établissements de santé de mettre fin à leur grève et de retourner au travail. Son article 14 prévoyait que nonobstant la Charte des droits, un salarié était présumé avoir contrevenu à l'ordre de retour au travail prescrit par la loi dès qu'il était prouvé prima facie qu'il n'avait pas travaillé au cours de la journée prescrite.

(3) La Loi sur la protection de la Jeunesse, L.Q., 1977, c. 20, art. 82

Nonobstant l'article 23 de la Charte des droits garantissant une audition publique, les audiences du Tribunal de la jeunesse se tiennent à huis clos sous réserve de certains exceptions.

(4) La Loi sur la libération conditionnelle des détenus, L.Q., 1978, c. 22, art. 44

Les dispositions traitant de l'octroi de la libération, de sa suspension ou révocation, et de la procédure devant la commission ont effet malgré les articles 23 (audition impartiale par un tribunal indépdendant) et 34 (assistance d'avocat) de la Charte.

(5) Code de procédure civile, articles 997.1 et 955(3), L.Q. 1977

Nonobstant la Charte, l'avocat ou l'agent de recouvrement ne peut agir comme mandataire d'un client devant le Tribunal des petites créances.

(6) Le Code de la sécurité routière (1981), art. 523

Malgré l'article de la Charte consacrant le droit au secret professionnel, un médecin doit faire rapport à la Régie du nom de tout patient qu'il juge inapte à conduire un véhicule routier.

(7) Loi modifiant la Loi sur la protection de la jeunesse (1981)

Malgré le droit au respect du secret professionnel dans la Charte, les professionnels doivent signaler les cas d'enfants ayant besoin d'assistance.

November 13, 1981

-- QUOTES --

Alan Borovoy - General Counsel to the Canadian Civil Liberties Association said: the accord would strengthen civil liberties in Canada, and bring more civil rights cases before the courts.

"I was concerned they would weaken the terms of the Charter - change the words. But it has emerged relatively unscathed from the Conference. I hope we can use what they've done to advance the cause of civil liberties in this country.''

He said many provinces would probably choose not to exercise their opting-out rights because such action would be politically unpopular. "The notwithstanding clauses will be a red flag for opposition parties and the press."

Gordon Fairweather - Chief Commissioner of the Canadian Human Rights Commission said: he can't imagine a province using the opting-out provision. He agrees with Mr. Borovoy's remarks regarding the notwithstanding clause.

Walter Tarnopolsky - Past President of the Canadian Civil Liberties Association said: The compromise clause is "really net such a bad idea, and could have a great many advantages". He notes that in the United States the preponderance of human rights cases deal with the abuses in administrative, executive and police actions -- a non-obstante clause is usually not relevant to these issues.

(I.) CANADA, HOUSE OF COMMONS DEBATES, RESOLUTION RESPECTING CONSTITUTION ACT, 1981

NOVEMBER 20, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 13013-13060

13013

[English]

THE CONSTITUTION

RESOLUTION RESPECTING CONSTITUTION ACT, 1981

Hon. Jean Chrétien (Minister of Justice and Minister of State for Social Development) moved:

[...][1]

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He said: Madam Speaker, in introducing the resolution preceding confederation in the Parliament of Canada, Sir John A. Macdonald stated:

The whole scheme of confederation, as propounded by the conference, as agreed to and sanctioned by the Canadian government, and as now presented for the consideration of the people and the legislature, bears upon its face the marks of compromise. Of necessity there must have been a great deal of mutual concession. If we had not felt that we were bound to set aside our private opinions on matters of detail, if we had not felt ourselves bound to look at what was practicable, not obstinately rejecting the opinions of others nor adhering to our own; if we had not met in a spirit of conciliation, we never would have succeeded.

It is with pride that I am able today to introduce a constitutional resolution supported by all governments who believe in a strong and united Canada.

Some hon. Members: Hear, hear!

Mr. Chrétien: The resolution before this House is the product of a consensus among governments; but, equally important, it reflects the values, aspirations, the hopes and dreams of an overwhelming majority of Canadians.

Before I explain the content of the resolution, I want to pay tribute to the members of my caucus and to my colleagues in the cabinet for their collaboration, their advice and their total support over the last 18 months. I want to pay a particular tribute to the Prime Minister (Mr. Trudeau) for this historic achievement.

Some hon. Members: Hear, hear!

Mr. Chrétien: I want to thank other members of the House of Commons for their constructive advice and support. I want also to pay tribute to my colleagues in provincial governments who worked hard to achieve consensus two weeks ago. I want to thank the thousands of Canadians who contributed so much to the work of the parliamentary committee. And I want to point out to Canadians the role of the Leader of the Opposition (Mr. Clark), who spent a year telling us that process is more important than substance. I am sure that in this debate he will criticize the substance resulting from the process.

[1] [Footnote in progress] Here Minister Chretien submits the entire Constitution Act to Parliament. This draft can be viewed on p. ___ of this volume.

Some hon. Members: Oh, oh!

Mr. Chrétien: In 1865, George Brown told the Parliament of Canada:

The whole great ends of this confederation may not be realized in the lifetime of many who now hear me. We imagine not that such a structure can be built in a month or in a year. What we propose now is but to lay the foundations of the structure, to set in motion the governmental machinery that will one day, we trust, extend from the Atlantic to the Pacific.

Today we have the opportunity to complete and expand that structure. The resolution before this House provides for the patriation of the Constitution. After 114 years, Canada will finally have achieved its full legal independence. No longer will it be necessary to go to the Parliament of another country to amend our Constitution.

[Translation]

The resolution provides as well for an amending formula, that is, a mechanism which will enable us to make future changes to our Constitution. This is extremely important because today marks the end of one stage of constitutional reform and the beginning of another. The second stage of constitutional reform will deal with changes in our national institutions so that there is better regional input in the workings of the national government; it will deal with the securing of the Canadian economic union and with the division of powers.

Of course it will deal with the constitutional recognition of the rights of our native peoples. I am anxious that this process get underway as soon as possible because it is part of our commitment not only to the people of Quebec and to native peoples but to all Canadians.

An amending formula makes that process easier. The resolution provides that in the future, amendments to the constitution will be made with the approval of seven provinces representing fifty per cent of the population. If, however, an amendment takes away provincial powers, privileges or proprietary rights, it will not apply in a province whose legislature expresses its dissent. I will speak later about the issue of fiscal compensation for those provinces which opt out.

For a few matters including the monarchy, the composition of the Supreme Court, and certain language rights, the consent of Parliament and all provincial legislatures will be required.

[English]

I want now to turn to the Charter of Rights and Freedoms. It is important at the outset to understand that the entire Charter of Rights and Freedoms will be entrenched in the Constitution and that no province will be able to opt out of any provision of the charter. The agreement signed by the Prime Minister and nine Premiers does not emasculate the charter. Democratic rights, fundamental freedoms, mobility rights, legal rights, equality rights and language rights are all enshrined in the Constitution and apply across the land.

What the Premiers and the Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections of the charter. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy.

The override clause in the Charter of Rights and Freedoms will require that a law state specifically that part or all of it

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applies, notwithstanding a particular section of the charter in the Constitution. Such an override automatically expires after five years unless specifically renewed

by a legislature. The effect of this provision is, first, that it will be politically very difficult for a government to introduce without very good reason a measure which applies notwithstanding the Charter of Rights and Freedoms in the Constitution. Second, a sunset provision of five years provides a degree of control on the use of an override clause in allowing public debate on the desirability of continuing the deliberations further.

It is important to remember that the concept of an override clause is not new in Canada. Experience has demonstrated that such a clause is rarely used and, when used, it is usually not controversial. The Alberta bill of rights was enacted in 1972 and includes an override clause. The Saskatchewan human rights code of 1979 also has an override provision. Neither has ever been used.

The Canadian Bill of Rights, enacted in 1960 by Mr. Diefenbaker, also contains an override provision. In 20 years, it has only been used once.

The Quebec charter of rights and freedoms adopted in 1975 contains an override clause which has been used several times. However, it has never successfully been used in a controversial manner. What is interesting in the Quebec experience is that the first draft of Bill 101 would have applied notwithstanding the Quebec charter of rights and freedoms. In this controversial area public pressure forced the Quebec government to delete the clause from the bill.

It is because of the history of the use of the override clause and because of the need for a safety valve to correct absurd situations without going through the difficulty of obtaining constitutional amendments that three leading civil libertarians have welcomed its inclusion in the Charter of Rights and Freedoms.

Allan Borovoy, general counsel to the Canadian Civil Liberties Association, was quoted in the Montreal *Gazette* of November 7 as saying: "Our reaction is one of great relief. They did not emasculate the charter." He went on to say:

The process is a rather ingenious marriage of a bill of rights notion and a parliamentary democracy. The result is a strong charter with an escape valve for the legislatures. The "notwithstanding" clause will be a red flag for opposition parties and the press. That will make it politically difficult for a government to override the Charter. Political difficulty is a reasonable safeguard for the charter.

Gordon Fairweather, who is well known in this House and is the Commissioner of the Canadian Human Rights Commission, said this: "I'm in no mood for nitpicking today; I'm feeling tremendously upbeat". That quote is from the Montreal *Gazette*, November 7, 1981. Mr. Fairweather said that the override clause will become as dead from lack of use as a clause in the British North America Act that, at least in theory, still enables Ottawa to disallow provincial legislation. Referring to long standing provincial opposition to entrenched rights, Mr. Fairweather said: "The gang of no has become the gang of yes!"

Some hon. Members: Hear, hear!

Mr. Chrétien: Professor Walter Tarnopolsky is a past-president of the Canadian Civil Liberties Association and an international expert on bills of rights. His view is that the override clause "is really not such a bad idea, and could have a great many advantages". That quote is from *The Globe and Mail*, November 9, 1981.

It should be clear, in conclusion, that the compromise reached by the Prime Minister with the nine Premiers maintains the principle of a full, complete and effective constitutional Charter of Rights and Freedoms. It does not exclude rights which have previously been guaranteed. In fact, the charter has been improved because unforeseen situations will be able to be corrected without the need to seek

constitutional amendment. For those who remain concerned about the override clause, let me remind them that it has been said that "The price of liberty is eternal vigilance". Pressure groups must remain vigilant and we are seeing such vigilance now from women who are arguing for the removal of the override clause in Section 28 and the aboriginal people who are fighting for the reinstatement of their rights. I will say more about that in a moment.

So, what does this Charter of Rights and Freedoms do? First, it protects fundamental freedoms common to all Canadians, such as freedom of speech, of religion, of the press and freedom to vote and to hold office.

Second, it guarantees the freedom of Canadians to establish residence and seek a job anywhere in Canada without regard to provincial borders. It establishes one Canadian citizenship rather than ten provincial citizenships. But it recognizes the need for special measures to be taken to protect local residents in provinces whose rate of employment is below the national average.

Third, the charter guarantees legal rights of Canadians. It sets out protection against arbitrary arrest, against unreasonable search and seizures. It enumerates the rights of an accused to be defended by counsel, to have a fair trial, not to be forced to testify against oneself. It ensures that where evidence is obtained illegally, it shall not be used where, by doing so, the administration of justice will be brought into disrepute.

Fourth, the charter enumerates equality rights. In this area the government is taking bold steps forward in order to ensure the equality of women before and under the law. I know some would have hoped that we could do even better, and I hope we can in the next few days. The ball is now squarely in the court of Premier Blakeney. This government and the party I belong to are confident we can and must succeed. But we also know that we must not break the accord or all will be lost. I am sure that the efforts of the Minister of State for Mines (Mrs. Erola) who is responsible for the status of women will bring about the result that is the desire of every member of this House.

Some hon. Members: Hear, hear!

Mr. Chrétien: No one can deny that this constitutional charter marks very substantial progress. If its provisions are

not perfect, they are infinitely better than the protection for women in, for example, the American constitution.

In addition, the charter specifically prohibits discrimination against those with physical or mental disabilities. This is a great achievement which makes Canada a world leader in the International Year of the Disabled. Much credit should be given to the hon. member for Don Valley East (Mr. Smith) and to other members of the Special Committee on the Disabled and the Handicapped.

Some hon. Members: Hear, hear!

Mr. Chrétien: Fifth, the charter deals with language rights and I will speak to this in a few minutes.

Finally, the charter makes specific reference to the multicultural nature of our society. At the time of confederation, our forefathers established a new country based on two great cultures, the English and the French. Over the last 114 years, Canada has been enriched by the contribution of immigrants from the four corners of the earth. Because Canada prides itself on not being a melting pot, we are establishing today that the charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". As far as the government is concerned, the multicultural heritage of Canadians is such

an important fabric of our nation that it must be reflected in our Constitution.

[Translation]

I want to speak now to my fellow Quebecers, and I want to tell them that it is essential to distinguish between the interests of Quebec and the interests of the parti Quebecois. The people of Quebec, whenever they have been asked to choose, have always come out clearly for Canada, and so we have chosen to listen to those who ran as federalists and were elected to serve Quebec in this house as opposed to those members of the government of Quebec who act as separatists after they are elected, but who can only get elected when they promise not to bring about separation during their mandate.

I want to say that I regret very much that Premier Levesque agreed to give up the Quebec veto. The loss of the veto is not recuperable, but the interests of Quebec have been protected in this resolution by the work of the 74 federal liberal members in this house and by the constructive suggestions of the Leader of the Quebec Liberal Party.

What then does the resolution do to protect the duality of Canada? First, it guarantees in the Constitution the rights of francophones to schools in the nine English-speaking provinces. This is extremely important as a protection for our minorities who for generations have fought for their rights. But it is equally important for the thousands of francophone Quebecers who each year since the Parti Québécois has come to power have moved to other parts of Canada.

Second, the resolution guarantees the rights of English-speaking Canadians to educate their children in English in Quebec. This merely enshrines in the constitution what Quebec has done of its own free will for over one hundred years. Even if the Parti Québécois opposes this constitutional guarantee being extended to the anglophone minority, the great majority of Quebecers see it as fair and just. Quebecers have never wanted to abuse the rights of the anglophone minority, and I believe that today, now that we have finally obtained education rights for francophone minorities in the nine other provinces, they will agree that it is only fair and just that we should do the same for the anglophone minority in Quebec, as we have been doing for that part 114 years.

Third, the resolution provides that where Quebec opts out of a constitutional amendment giving power to Ottawa in matters of education or other cultural matters, fiscal compensation will be paid. This was suggested by Mr. Ryan and was subsequently supported and imposed on Cabinet by the Quebec caucus.

Fourth, the resolution guarantees bilingualism at the federal level in the Parliament of Canada, in the institutions of the federal government, and in the services of the federal government. Here, I wish to point out that the manner in which bilingualism is to be entrenched in the Constitution in the future ensures that even a majority of this Parliament and of all the other provinces will not be enough to change this provision without the consent of the Province of Quebec. In fact, we have given Quebec a veto in this respect.

We have been accused of betraying Quebec, of threatening the French language, of taking away Quebec's ability to control its own economy. If there has been a betrayal, the guilty one is René Levesque for giving up the veto. Nothing in the resolution threatens the French language. Instead the rmolution strengthens French across Canada. In Quebec, it does nothing to affect the provisions of Bill 101 with respect to the language of work, the language of the professions, or other matters relating to French as the official language of Quebec. As far as the economy is concerned, the resolution cannot be blamed for Mr. Parizeau's last budget.

As Quebecers we must choose between the objectives of the Parti Québécois and the challenge of belonging to a country that spans a continent. As for me, I adopt the words of Laurier:
"We are French Canadians, but our country is not confined lo the territory over-shadowed by the Citadel of Quebec; our country is Canada; it is the fertile lands bordered by the Bay of Fundy, the Valley of the St. Lawrence, the regions of the Great Lakes, the Prairies of the West, the Rocky Mountains, the lands washed by the famous ocean where breezes are said to be as sweet as the breezes of the Mediterranean, our fellow-countrymen are not only those in whose veins runs the blood of France.

They are all those, whatever their race or whatever their language, whom the fortunes of war, the chances of fate, or their own choice have brought among us. As far as I am concerned, those are my fellow countrymen. I am a Canadian. The rights of my fellow countrymen of different origins are as dear to me, as sacred to me, as the rights of my own race. What I claim for us is an equal place

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in the sun, an equal share ofjustice, of liberty; that share we have it; we have it amply, and what we claim for ourselves, we are anxious to grant to others.

[English]

I want to speak now about native peoples. No one is sorrier than I that it was not possible two weeks ago to agree to entrench in the Constitution the recognition and affirmation of aboriginal and treaty rights. Our failure to do so was a consequence of a process which required the making of compromises. But I would be less than honest if I did not say that the cause of the constitutional recognition of aboriginal rights was not helped by the fact that leaders of the native peoples have spent a great deal of time and energy lobbying against the section in the previous resolution which they now seem to like.

I do want to point out that there is no change in the provision of the Charter of Rights and Freedoms with reference to native rights. Section 25 states that nothing in the charter shall be construed so as "to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the original peoples of Canada".

It is the old Section 34, which was not part of the charter, which is not in the resolution before the House. Many of us both on this side of the House and on the other side of the House are very sorry about that, and probably the most sorry is my friend the Minister of Indian Affairs and Northern Development (Mr. Munro), who has worked so hard from the beginning to make sure we had this in the Charter of Rights and Freedoms. He worked with me and with the hon. member for Nunatsiaq (Mr. Ittinuar). However, we have succeeded in including in the resolution a provision which requires the holding of a constitutional conference within a year to deal with the subject of constitutional recognition of the rights of the native peoples. I hope native leaders will come to that conference with a well-defined position.

Some have suggested the immediate application of Section 34 to the federal government and matters under federal jurisdiction. The government is prepared to act immediately on this suggestion if the leaders of the National Indian Brotherhood, the Native Council of Canada and the Inuit Committee on National Issues indicate their support for it by Tuesday, November 24. If such support is not forthcoming by the deadline, the government will keep the same proposal on the table for the purposes of all future negotiations on the identification of the rights of the aboriginal peoples.

The government would prefer that the recognition and affirmation of aboriginal and treaty rights be fully reinstated in the

resolution but cannot do so without the consent of the nine provinces which are parties to the accord. I know that native leaders have attempted to obtain this consent, so far without success. Many provinces have now informed us that they would agree to be bound by Section 34. I hope this means that in the next two or three days the other parties to the accord will agree to be bound so that we can have a speedy and satisfactory resolution of this issue.

Mr. Broadbent: You just need one more.

Mr. Chrétien: I was on the telephone all day yesterday, part of last night and this morning. All members of Parliament can be useful in this regard, not by trying to gain political points but by doing our duty, if we believe firmly in this. We have to put gentle pressure on all the provinces, and I am sure that with the movement there is now we can do that. If hon. members are in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario or any other provinces, they should do their homework. I think it is coming, but don't rock the boat!

Some hon. Members: Oh, oh!

Mr. Chrétien: They should not try to gain some political advantage. The native groups of Canada and others have been very effective. It is my view that it is the wish of all Canadians that we reinstate Section 34 in the Constitution.

Some hon. Members: Hear, hear!

Mr. Chrétien: It is the view of Canadians that having given our word when we signed the accord, we have to keep it. I want to affirm in this House that we will not impose it on the provinces if they do not want it. There is a mechanism that will permit us to do that eventually. Since the Government of Canada gave its word, it has the duty to respect that. I am sure the provinces understand the message of Canadians and are about to tell us that we will go to London with the entrenchment of both the women's rights in Section 28 and the native rights in the Constitution.

Some hon. Members: Hear, hear!

Mr. Chrétien: I know the hon. member for Nunatsiaq today must rightly be disappointed that the resolution as introduced does not enshrine aboriginal rights. I hope that we succeed in enshrining aboriginal and treaty rights in relation to federal matters immediately. I hope that the eight remaining provinces agree to be bound immediately, but if we have to wait a year to reach a consensus with the provinces for all of Canada, the wait will be less important than the fact that we intend to succeed.

I do not have time to talk about the elements of the resolution dealing with equalization or about the extension of provincial jurisdiction over national resources. Others will speak to these items during this debate. I merely want to conclude by quoting the words of George Brown in the confederation debates:

No Constitution ever framed was without defect; no amount of talent and wisdom and integrity combined in preparing such a scheme could have placed it beyond the reach of criticism. To assert. then, that our scheme is without fault, would be folly. It was necessarily the work of concession; not one of the thirty-three framers but had, on some points, to yield his opinions; and, for myself, I freely admit that I struggled earnestly, for days together, to have portions of the scheme amended. But admitting all this—admitting all the difficulties that beset us—admitting frankly that defects in the measure exists— I say that, taking the scheme as a whole, it has my cordial, enthusiastic support. without hesitation or reservation. I believe it will accomplish all, and more than all, that we, who have fought so long ever hoped to see accomplished. It will lay the foundations deep and strong of a powerful and prosperous people.

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[Translation]

Madam Speaker, finally, I must say, to you and to the other members of this House, that it is unfortunate that we did not obtain the agreement of the tenth province, the province of Quebec. I feel that the Premier of Quebec had a duty here to forget his party and to act as the representative of the province of Quebec. There are only three clauses that separate us. Considerable progress has been made on two of the clauses, and if misgivings still exist, we are prepared to discuss them. Considerable gains have been made in the last two days, both with respect to Section 28, which guarantees the equality of men and women in the Constitution, and in our present discussion on the entrenchment of aboriginal rights in the Constitution. In the days to come we could still find common ground for agreement, which would enable Quebec to join the rest of Canada on the day we give our country a new Constitution, the day when we shall achieve a new level of maturity in this country, when people will have equal rights and when we can be different while at the same time sharing the responsibilities and privileges of being Canadians.

[English]

Today is a great day for Canada. We will have a better country. There will be more justice, more friendship, more sharing in our land. Canada, as I have said so many times, is a great country. When we have finished our work, it will be a greater country of which we can all be proud. Today we are making sure this country will survive. It is a worthy cause. For all of us, nothing is better than Canada. Vive le Canada!

Some hon. Members: Hear, hear!

Right Hon. Joe Clark (Leader of the Opposition): Madam Speaker, I want to begin with two brief remarks. I say this genuinely in respect for the parliamentary tradition. I regret that on this matter that goes so much to the heart of what Canada is about and touches so directly the concerns of the Prime Minister (Mr. Trudeau), particularly on one of those rare days when I have something good to say about him, the Prime Minister has chosen to leave this House before I have the opportunity as Leader of the Official Opposition to respond to the introduction of the resolution by the Minister of Justice (Mr. Chrétien).

I understand he is busy. We are all busy. This is a matter which has commanded his attention for some time. I would have hoped that his respect for the institution of Parliament would have been such that he might have been prepared to stay. Does the Minister of Justice—

Mr. Chrétien: Madam Speaker, I would like to make a suggestion to the Leader of the Opposition. Rather than split his speech in two, he could postpone his speech until two o'clock. The Prime Minister could be here. It would then not be necessary to debate this problem. I am sure the Leader of the Opposition will be making an important speech and we should not force him to split it in two.

Mr. Clark: Madam Speaker, I am simply interested in my audience. If I'will have the benefit of speaking to the Prime Minister when we come back, I will call it one o'clock.

Madam Speaker: This House stands adjourned until two o'clock.

At 12.48 p.m. the House took recess.

AFTER RECESS

The House resumed at 2 p.m.

Madam Speaker: When the House adjourned the Right Hon. Leader of the Opposition (Mr. Clark) had the floor.

Mr. Clark: Madam Speaker, it is a pleasure for me, naturally, to rise in this debate. I think in our minds over the past several

months there was some doubt as to whether or not this stage of the debate would ever occur. I think all of us who have faith in Canada are pleased that we were able to force respect for the Supreme Court of Canada, for our Parliament and for the processes of Canadian legislation to the extent that it has resulted in this new, very much improved resolution before the House of Commons. It has afforded members of the House the opportunity to make further improvements to a resolution much improved over the one that was dealt with through the last several years.

Some hon. Members: Hear, hear!

Mr. Clark: I do not intend this to be a partisan speech at all, Madam Speaker.

I would ask the Minister of Justice and members of Parliament not to seek partisan gain in this debate. I think that would be advice that all of us would endorse. The minister should not seek too frequently to blame others, whether they are provinces, native groups or others, for deficiencies in the resolution that is before the House of Commons. If the minister engages too much in that, I think there will be the temptation on the part of others to engage in a tone of debate that will not be helpful in advancing our processes here.

This is not another phase in the constitutional debate. This is very much a new phase. There is now a much different atmosphere in the country. Everyone taking part in the debate bears some of the scars of compromise, and there is nothing at all dishonourable about that. Compromise is the way we make Canada work. However, to end with compromise, one must start with principle.

I understand the Prime Minister will be arriving soon. I wish the Prime Minister were here when on one of those few occasions in the House I will pay tribute to him. I think the last time was when he promised to leave. I will not spend too much of my time in the debate in praise of the Prime Minister, but I would like to say that I will not soon forgive him for some of the consequences resulting from his methods with regard to the Constitution. I think it is appropriate that this

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House should recognize the depth of his commitment to his goals, and the skill and the passion that he exercised in pursuit of them. All of the members of this House desire that the Constitution of Canada be brought home with an amending formula.

The Prime Minister introduced the resolution that brought us this far and brought a flexibility to make that initiative acceptable to most of the other partners in confederation. I want to congratulate the Prime Minister both for his determination that we have always known him to have, and for the flexibility, which I have to confess we were surprised to find, and the flexibility, I should say, we hope will continue.

Some hon. Members: Hear, hear!

As for the Conservative Party, even though the Prime Minister introduced this resolution to the House, we kept it here and allowed the Canadian system of Parliament, the Canadian system of the courts and the Canadian system of a first ministers' conference to improve significantly the document with which we began.

As the country knows, the Prime Minister and I have different views of our country. History will judge whether this resolution better reflects his view or mine. Those are questions that will be determined later.

The question for today is whether the combination of determination and compromise which brought us this far can be extended to allow us to continue to progress in this phase of the Constitution debate. While it is true we have made progress, it is also true there is much more to do and it is particularly true that the

Parliament of Canada has the duty to improve this resolution.

[Translation]

While offering my congratulations, Madam Speaker, I would like to say some words in praise of the Premiers of the English-speaking provinces.

[Editor's Note: And the Prime Minister having entered the Chamber.]

Sir, you have just missed the only words of encouragement and approval I shall probably ever address to you in my career—

Mr. Trudeau: You can always repeat them!

Mr. Clark: No, never! Opportunity only knocks once! But I would like to say some words in praise of the premiers of the English-speaking provinces who voluntarily exercised their own freedom of decision in a truly Canadian spirit by recognizing minority language educational rights in their provinces. Naturally, we shall have to wait and see how this commitment is put into practice, and it will be interesting to see how generously the provincial governments will interpret the words "where the number so warrants". The premiers of the nine provinces where French is the minority language have agreed to this extremely important principle. As a Canadian who has been fortunate enough to be exposed to both languages, I wish to congratulate the premiers on their foresight.

[English]

At this stage of the debate of the resolution, there are three specific amendments which my party proposes to introduce. There may be more later after further consideration of the implications of the resolution and consideration of proposals which may come, for example, from spokesmen of the people of Quebec. It is not our intention to extend the debate unduly, but it is our hope that everyone in the House will work constructively to bring the country together.

Our first amendment, which I will move later today, will reinstate, without qualification, the guarantee in Section 28 of the equality of male and female persons.

Some hon. Members: Hear, hear!

Mr. Clark: The House will not be surprised that my amendment in this case will be introduced by my good friend and colleague, the hon. member for Kingston and the Islands (Miss MacDonald). The present resolution will allow Parliament or a legislature to treat women as less equal than men, or men as less equal than women. We intend that the rights and freedoms set forth in all the provisions of the resolution will be guaranteed equally to male and female persons. I will elaborate on our reasons later.

The second amendment we propose would restore in the resolution the guarantees of aboriginal title which had been affirmed by Parliament, either in the language contained in Section 34 of the first resolution or in very similar language. Again I will elaborate on our reasons later, but I say to my friends in the New Democratic Party that before I came down to the House for question period this morning I received some encouragement to make a telephone call. I have made that telephone call, and l am given to understand that there may be communication between the premier of a province and the Prime Minister of Canada regarding some movement which might be made on that matter later in the day.

The third amendment would restore to the resolution the precise language accepted by Quebec and seven other provinces in the agreement signed in April known as the April Accord respecting compensation for provinces that opt out of constitutional changes which deprive them of rights those provinces have traditionally enjoyed.

[Translation]

We have been considering the resolution in detail since we received it this Wednesday, and three comments are in order. First of all, we would like to pursue our in-depth study. We would like to bear the opinions of, and consult with, people whose interests are not adequately represented in the resolution, and we want to make specific amendments to improve the resolution where possible. My second comment is that today, we are not dealing exclusively with the agreement signed by the ten first ministers on November 5, since the resolution goes

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further than the agreement. I am happy with the changes that have been made, with the exception of those concerning the equality of men and women, but it cannot be argued that Parliament is bound by this agreement. The government was not bound by the agreement and neither is Parliament. My third comment is, more specifically, that the Parliament of Canada has a fundamental duty to find ways of persuading Quebec to participate in this agreement. My party will introduce amendments to improve the contents of the resolution, but the absence of Quebec affects its very foundation. Aside from the question of how effective the resolution can be if Quebec does not participate, I believe we all agree that it would be far better if Quebec were also included. The government has shown the same attitude with respect to the new Sections 39 and 58. It has, in fact, been my opinion since the agreement was tabled in the House. We must all work together to make the Constitution reflect the interests of all Canadians.

[English]

The Minister of Justice spoke during his remarks of the amending formula. I will not comment upon the acts of acrobatics that he had to contemplate to speak so favourably of an amending formula which he condemned so vigorously not many months ago. Of course, the amending formula has been before the House previously, precisely on October 22 last year, when I proposed the amending formula along with patriation as a means to bring our Constitution home. I do not intend to comment on the fact that other parties are now embracing what they once rejected, but rather I want to comment quite seriously on the regrettable irony that a proposal which has been around so long was studied so little by people who pretend to be constitutional experts. Simply because the federal government expressed disapproval, respected commentators suspended their own judgment of the merits of the Vancouver amending formula.

Some hon. Members: Hear, hear!

Mr. Clark: Perhaps if they had taken this formula more seriously some time ago, its advantages would have been evident earlier and advocated earlier than was in fact the case. I raise this because there is a similar danger that normally thoughtful members of the House or of the public or normally thoughtful commentators might also accept unexamined some of the other assumptions of the government's present ease. One must remember that on a constitutional matter the government's assumptions have been proven wrong consistently- proven wrong by public opinion, proven wrong by Parliament, proven wrong by the Supreme Court of Canada, and proven wrong by the provinces. At the very least their assumptions deserve careful scrutiny, and most particularly that is the case when the Constitution, the unity and perhaps the future of the country are at stake.

I suggest that one false assumption is the suggestion that initiatives by Parliament will unravel and doom the accord signed by the ten first ministers two weeks ago. There is absolutely no evidence that individual premiers or provinces are so opposed to the equality of men and women, to the concept of aboriginal title and to the idea of just compensation for the

provinces, that Parliament's actions in Parliament's jurisdiction will cause any province to pull out.

Some hon. Members: Hear, hear!

Mr. Clark: Indeed, many of us and many Canadians believe Parliament is here precisely for the purpose of acting in Parliament's jurisdiction. We are a deliberative and legislative body, not a rubber stamp for a prime minister or for premiers That obligation to act is most profound in fields where Parliament is the sole or crucial custodian of vital national interests such as the state of our aboriginal people or the unity of our divided nation.

For years my party and I have argued for a country where the provincial legislatures and the federal Parliament were both strong. Having made that case, we do not now propose to abandon our duty as the federal Parliament simply because the provinces have exercised their duty. The debt of our special obligation to Canada's original people is clear and unchallengeable.

I suggest there is also a special duty in today's circumstances to heal the division the premiers and the Prime Minister left between the rest of Canada and the province of Quebec. One could argue that the recent divisions within Quebec or about Quebec have been fought within the French Canadian family, between the francophone Premier of Quebec and the francophone Prime Minister, both from the province of Quebec. Today, however, the division is quite different. On one side is the Canadian government and the nine provinces where Francophones are a minority; on the other side, by accident or by design, is the one province where Francophones are the majority. That is the division of which separatists have dreamed. That can very easily be portrayed as the rejection of the French minority by the non-French majority in the country.

Madam Speaker and my colleagues in the House, only one agency can bridge that gap with authority, doing so in the name of all of Canada, and that is this Parliament, where Canadians of non-French origin constitute the majority, but where all of us, of whatever origin, are determined to build an accord large enough for the people of Quebec to feel comfortably at home.

Some hon. Members: Hear, hear!

Mr. Clark: If there was ever a time for the national Parliament to speak and act for the nation, now is that time. Instead of being silent and afraid to act, we should be creative, seeking to build on the progress of the last 12 months. Just as most first ministers were prepared to put down personal prejudice in the national interest, so too, I hope, might we rise above partisan, personal or regional interest to find solutions for our country, Canada.

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This Parliament is one of the partners in confederation, We have acted effectively regarding the whole resolution. The other partners, the premiers, have acted creatively after the Supreme Court decision. Now it is up to us to act again, creatively and constructively, in Canada's interest.

The other assumption which requires careful and serious scrutiny is the view that the present government of Quebec wants no agreement. I will suggest a test which may make them show their true colours. However, whatever the motive of the government of Quebec, the people of Quebec may want a just Canadian solution, and may want it ardently enough to force the Parti Québécois to put the people of Quebec first.

Some hon. Members: Hear, hear!

Mr. Clark: Of course, on this question we must berealists. I have been a realist concerning this matter since the day the constitutional debate began, a day when most people said the action of the Prime Minister was unstoppable. That very

realism requires that we analyse and not merely blindly accept the argument that the present Quebec government will never agree to anything. As I will argue later, it has already agreed to the April accord, but it did so with seven other provinces of Canada. However, it is fair to assume that it will agree only if the people of Quebec force it to agree or support it in that agreement.

Therefore, as the Parliament of the whole country, as the Parliament which can be the last agency to bring our whole nation together, our attention should be paid to the people of Quebec—and not just the government of Quebec. Our standard, when we vote and speak in this House, should be whether provisions in this resolution or amendments to this resolution help the people of Quebec to stay comfortably within our common country, Canada.

Some hon. Members: Hear, hear!

Mr. Clark: I indicated that the first amendment we wanted to introduce, the one which l will be introducing today, relates to the equality of male and female persons. I would like to speak about that for a moment. When representatives of the federal and provincial governments met, they agreed that certain rights set out in the Charter of Rights and Freedoms should be limited by Section 33 of the new resolution by the non obstante clause. In the accord which was tabled in this House of Commons by the Prime Minister on November 5, the non obstante clause did not apply to Section 28, which guaranteed the equality of male and female persons. I believe that is an uncontested version of what happened, both in the conference and afterward.

Indeed, what happened, to the best of our ability to reconstruct it, is that after the Prime Minister came to Parliament and the Premiers went home, the officials of both levels of government got together and decided to apply the non obstante clause to Section 28. The government, in this amendment and resolution, has unfortunately accepted the officials' amendment and has not acted on the accord which was reached by 10 of the 11 first ministers when they met here in early November. As a consequence of the change brought to this matter by officials, Section 28 is subject to Section 33. A limit is placed upon the equality of male and female persons which was not explicitly intended to be so placed by the ll first ministers of Canada when they met in conference in November in the capital of the country.

In recent days there has apparently been some dramatic shifting of opinion on the question. In one case, we learned that at least one Premier had not been informed of the exact nature of the work being undertaken by his officials and the position being ascribed to his government by his officials. My colleague, the hon. member for Kingston and the Islands (Miss MacDonald), brought that matter directly to the attention of the Premier of Nova Scotia. I should say, in passing, that the hon. member for Kingston and the Islands did so at her own initiative and that of her party and, without the benefit of advice from the government, brought that to the attention of the premier of the province of Nova Scotia. When he understood what was at issue, he immediately indicated his willingness to have Section 28 stand without limitation and expressed his willingness to associate himself, along with other Premiers and certainly along with his party, with the idea of the equality of treatment of male and female persons. Therefore, that changed.

We are not sure what is happening in the province of Saskatchewan. At last report, the New Democratic Premier of the province of Saskatchewan, that spokesman for rights in that party of rights, was proposing to trade rights for rights.

An hon. Member: Don't go so low.

Mr. Clark: "Do not go so low," someone suggests from the New Democratic benches. If those hon. members are

interested in speaking for principle, let me suggest that they get up from the House, suffer the loss of hearing a few minutes of my speech, call Roy Romanow, call Allan Blakeney, and tell them to stop playing games with rights and to give us unanimous agreement so that male and female persons can be treated equally under the constitutional proposals.

Some hon. Members: Hear, hear!

Mr. Clark: I want to deal with the substance of what we are proposing. The substance of our amendment guarantees that men and women will have equal access to the rights and freedoms set out in the Charter of Rights and Freedoms proposed in this resolution. Some of those rights and freedoms will already be limited by the application of Section 33. However, where they exist they will exist absolutely equally for women and for men. That is the purpose of the amendment I am introducing, seconded by my colleague, the hon. member for Kingston and the Islands, That is an amendment which I hope will commend itself to this whole House, so that this whole House can go on record as supporting the guarantee of equal treatment of male and female persons in Canada.

Some hon. Members: Hear, hear!

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Mr. Clark: Let me elaborate briefly for a moment. Two years ago, as prime minister, when statements were still made on motions, if Your Honour can remember that far back—

Some hon. Members: Oh, oh!

Mr. Clark:—I had the opportunity to make a statement on motions marking the fiftieth anniversary of the Person's case in Canada. The Person's case, as this House will recall, was a case brought by five courageous women who, I am pleased to say, came from my province of Alberta and believed that it was absolutely unacceptable that interpretations of the Supreme Court of Canada should prevent women from being interpreted as persons in a way which would not allow them to be appointed to the Senate. One might ask why they would ever want to be appointed there; but certainly, their case was that if anyone were to be appointed there, they should have as much right to be appointed as men. They raised the case, they fought the case and they won the case. From that point in the late 1920s and early 1930s, we achieved a very significant movement forward toward equality of status of male and female persons.

I make the point that while the symbolic battle was won with Senator Cairine Wilson being named to the Senate, we had only begun to approach the issue. The Senate was the symbol. The issue was inequality. The symbol has been repaired. The inequality persists.

I will not spend long on this point because too many of us, to our shame, know that if we have a daughter, as I do, she will not have the opportunity in this country to play hockey if she chooses to do so in the same way that a male child might have.

We know that women are denied equal rights to use the training they acquire, whether professional training—

Miss Bégin: They can play ringette.

An hon. Member: Why don't you play hockey, Monique?

Mr. Clark: Yes, they can play ringette. That is right. They can play something else.

Some hon. Members: Oh, oh!

Mr. Clark: I do not want to get into partisan debates so I will not comment on my continuing surprise at the Minister of National Health and Welfare (Miss Bégin).

Some hon. Members: Oh, oh!

Some hon. Members: Hear, hear!

Mr. Clark: What I am going to say, I say also as someone who is occasionally guilty of the infraction myself. Nothing demonstrates the point I am trying to make more dramatically than matters about which this House jokes or titters most often. They usually relate in one way or another to the status of women. For instance, the dispute as to whether my colleague, the hon. member for Kingston and the Islands, should be called an hon. lady when I am called an hon. member. That sort of thing indicates that prejudice runs deep, even in this House where we are supposed to stand and fight against prejudice.

That, I believe, makes the case very clearly and very dramatically why, even though we have espoused the goal of equality, we need to take that step one point further. What must be put right into the Constitution of Canada is the guarantee that male and female persons will be treated equally in relation to the rights and freedoms of Canadians. That will be another step forward, as was the Person's case some 50 years ago which guaranteed in daily practice, where wages were paid and people were hired, that female persons were to be treated equally with male persons.

Some hon. Members: Hear, hear!

Mr. Clark: At this point I would like to move a motion, and I will, continue my remarks after having done so. I move, seconded by the hon. member for Kingston and the Islands:

That the proposed Conslirurion Act 1981 be amended

(a) by striking out clause 28 and substituting the following:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

(b) by striking out subciause 33(1). and substituting the following:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

What that does is remove the non obstante clause from Section 28. It restores the guarantee of equality of male and female persons to the position enjoyed when the accord was tabled in this House of Commons by the Prime Minister of Canada after his meeting with the first ministers.

There is another matter to which an hon. member of my party will be addressing himself and submitting an amendment later. It cannot be done today because we can only submit one amendment at a time if we want to have them voted on individually, as we do. This other matter of major importance has to do with the question of aboriginal rights, aboriginal title. As I say, that will be introduced later. I was given to understand by the speech made by the Minister of Justice (Mr. Chrétien) that there are some negotiations continuing with representatives of at least some of the status Indian groups. We will naturally want to take account of those negotiations and to keep current with them. But I make the specific point, Madam Speaker, as someone who has had the interests of the native people at heart for a long time both in

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this House and in this country, that the Parliament of Canada cannot wait forever for that kind of agreement. Parliament has a duty to act.

I want to speak for a moment, if I might, of the nature of that duty, the nature of our responsibility to the aboriginal people of the country. One in this nationalist age would be reluctant to quote a poet from the

United States, except perhaps in the case of aboriginal title, because the aboriginals were here before the United States or Canada was, before the forty-ninth parallel meant anything more than another widening in the trees. I am struck by the words of Robert Frost when speaking of Americans, Canadians, people who came late to this continent. He said:

The land was ours before we were the lands.

Mr. Frost was speaking of the white population, not the natives. The land of this continent belonged to, was used by, the original people well before the concept of land took root as something that was possessed and parcelled out. Land, to the natives, was where you lived, where you worked and where you took your nature. It was heritage, not just territory. In a very real sense, land and people were the same. We took that away, we who came later. We took it away as an inevitable consequence of our civilization and the compensation we offered was often meagre, often mean, sometimes nothing at all. But the original people were here before our civilization. Our treatment, our meagre, mean treatment of them, has increased our obligation, not diminished it. We cannot reverse history, but we can take account of it. A minimum step must be for this Parliament to put in a document that deals with the rights of our people and to acknowledge at least the particular rights of our first people to draw their life and their culture from what we made our land.

Some hon. Members: Hear, hear!

[Translation]

Mr. Clark: I would like to discuss a third amendment we want to move. It is said that under no circumstances will the present Premier of Quebec accept the constitutional agreement. Whether or not this is true, it is significant that in April, the Government of Quebec, together with the premiers of seven other provinces, signed a very important constitutional agreement, namely the April accord, which basically contained the Vancouver amending formula we are discussing in the House today. So, in April, Quebec took the extraordinary step of giving up its veto right, yes, its veto right, thereby agreeing that the constitution could be changed without its consent. Quebec did not give up its veto right for nothing. It was offered in exchange for a reasonable guarantee of fiscal compensation for provinces who choose to opt out, that is, who decide not to go along with a constitutional amendment. It is common knowledge that this guarantee of full fiscal compensation was the only reason why Quebec signed the accord. It was also common knowledge that if the guarantee were withdrawn, Quebec would reject the accord, so that taking this compensation out of the accord was tantamount to forcing Quebec to withdraw. At this point I do not care who deleted the compensation clause, but whoever is responsible did, in fact, force Quebec's hand. I do, however, want to rebuild this agreement, and it makes sense to start with the guarantee that has always been the essential condition for Quebec's participation, the full compensation guarantee. That is why I feel that compensation is the crucial factor, for all of us who hope to produce an agreement that all the provinces, including Quebec, will agree to sign. It must be said, to the federal government's credit, that it has gone part of the way; it has offered compensation with respect to certain provincial powers, namely, those concerning education and other cultural matters. However, this is only part of the guarantee, it is less than the guarantee in the April accord.

[English]

If we want a truly Canadian agreement with all partners participating, we must offer everything in November that was offered in April; and if the government of Quebec says no today to something it accepted in April, then it stands accused by its own actions of putting its indépendantiste

ideology ahead of the interests of the people of Quebec.

Some hon. Members: Hear, hear!

Mr. Clark: Mr. Speaker and colleagues in this House of Commons, colleagues who want to have a Constitution and an accord to which all of our people can be party, let us give it the choice. Indeed, if you will, let us force the government of the province of Quebec to make that choice. Let us force it to justify rejecting in November what it accepted in April.

Some hon. Members: Hear, hear!

Mr. Clark: The present resolution does not do that. The present resolution allows the PQ government of Quebec to take an easy way out, to say it had more in April than it has in November. Why not take that argument away from Quebec? Why give it that argument which it can use, if that is its desire, to stay out of the constitutional accord? Why not force it to make the choice? The only way to force it is by making in November the same offer the government of Quebec signed in April. That seems to me to be elemental logic. That seems to me to be a very effective way of seeing exactly where the Parti Québécois government does stand, and of seeing whether there is an opportunity for this Parliament to act in a way which will bring Quebec in and serve the interests of the people of Quebec.

Some hon. Members: Hear, hear!

Mr. Clark: We are seized here not simply with the question of giving the government of Quebec a choice and forcing it to face it; we are also dealing here with the opportunity to give Canada the chance of an agreement in which all partners can join. To give Canada a chance, as I have indicated, we will

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propose an amendment to guarantee any province that opts out fully what was guaranteed in the April accord.

I want to speak for a moment about the amending formula, opting out and the compensation question. If it is accepted that in areas of jurisdiction, strictly limited by Section 37, that might be transferred from the provinces to the federal government, a province should be able to decline to opt in, it follows that such an option must be a real option.

It is worth reminding hon. members of the House of the real nature of this amending formula, because it has not yet been fully understood. It is a formula that combines the required features of flexibility and equal treatment of provinces. I commend the Premier of Ontario for his very real flexibility in agreeing to allow such a concept to be recognized by the removal of any provincial veto. The formula allows changes to be made when it is demonstrated that such changes are needed. At the same time, it ensures that changes are not made without due consideration. Seven provinces must agree to an amendment, they must have among them at least a majority of the population, and if the federal government does not want to agree it can stop it on its own.

It is a formula that recognizes the fact that in Canada there are identities and problems unique to one province or region. It allows those problems to be met and those identities to be expressed without preventing the development of a national will. In certain limited cases, a maximum of three provinces could decline to opt in to amendments that would take from them rights and powers they have held since confederation. That is what the formula means.

What our amendment means is that that right would not have to be bought; that right would be there with compensation included. It would not have to be bought by a province that wanted to exercise it. A legislature would be free to decide if the people of the province would be best served by jurisdiction being transferred to Ottawa or retained by the province.

Madam Speaker, colleagues in this House of Commons and Canadians who want to help and heal our country, let me make the point that if that is to be a free decision, no province should be forced to incur a financial penalty. That is simple justice. That is the simple justice that is denied by this proposal. That is the simple justice that was approved by the Premier of Saskatchewan when he signed the April accord. And that is the simple justice I suggest should be approved by the Parliament of Canada now so we can ensure that the right of opting out includes the right to do so freely, and not with a requirement to buy what we call a right.

Some hon. Members: Hear, hear!

Mr. Clark: Madam Speaker, that amendment will be introduced later in this debate by another of my colleagues. I would have introduced it today if the rules of the House permitted.
They allow only one amendment to be introduced today, so we will consequently introduce this and the amendment respecting aboriginal rights later.

What we are doing now in what I hope is a genuine, non-partisan way is discussing—

Mr. Benjamin: It sure sounded like it.

Mr. Clark: I hear from the NDP. I would repeat, if the NDP has things to say, particularly Mr. Benjamin from Regina, let him say them to his premier.

We are discussing the Constitution of our country in a way that most of us feel is non-partisan. Because it is our country, and because the questions are so basic to our rights, to our future, to our unity and to our vision of our country, all of us are affected personally. When I say all of us are affected personally, I am not simply speaking of members of Parliament who sit in this House or the members of the other place; I am speaking of hundreds of thousands of our fellow citizens across the country, some of whom are demonstrating now around legislatures in various parts of the country. I am speaking of people who came in hundreds and wanted to come in thousands to appear before the special committee that looked into the first resolution, Canadians from the length and breadth of the land, from sea to sea to my seatmate's northern sea, who worried, talked and thought about our Constitution during the last year. This ordeal has been wearing on all of us, but I think what this process has done, among other things, is made the Constitution much more human and much more real to many more Canadians.

If I might ask the indulgence of the House for a moment, I want to speak briefly in a personal way. This month is the beginning of my tenth year in this Parliament. Like others who are here I came to the House of Commons with certain goals and bearing certain prejudices. One of my prejudices, one of those I was fortunate to learn at home, is that there are no differences in the capacities and potential of men and women. I grew up in a farm community, and on farms men and women work equally. I grew up in a town during wartime, at a time when many of the men were away. They were not at home to run the businesses so the women ran and often ran them better. If there was a question of equality after the men came home, it was whether they were as good as their wives were at running the businesses.

The hard reality, however, that we have all encountered is that barriers do stand in the way of women, barriers that do not stand in the way of men. l personally am proud to be able to play some small role, with the introduction of the amendment today, in trying to bring those barriers down and trying to move us, in law and in thought, toward that kind of equality which exists in fact, if one regards the capacities and potential of male and female persons in this country.

I grew up, Madam Speaker, with native people, not as a legal concept but as neighbours to people like me; native people who lived not far away from my

town. One of the first accomplishments that I can remember as a private member in a minority Parliament during 1972 to 1974, a time when committees were able to do something, is when I, along with

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my colleague from Kingston and the Islands and my colleague from Yukon (Mr. Nielsen), were able, with the help of the New Democratic Party members at the time, to have accepted for the first time a resolution by a committee, which was subsequently accepted by this whole House of Commons, which recognized the legitimacy of aboriginal title and rights in this country.

From my background of having known native people in my earliest days and having been involved in the defence of their rights since my time in Parliament, I certainly cannot be neutral on that question now, and my party does not intend to be neutral. It is for that reason that we have moved this amendment on aboriginal title.

Some hon. Members: Hear, hear!

Mr. Clark: As for Quebec—

[Translation]

—I am the most bilingual citizen of High River, Alberta, and I have had a chance to learn not only the language but also something of the nature of the people of Quebec.

[English]

I cannot think of my country without Quebec and I have to say that I believe that is the position of virtually every member of this House of Commons.

Some hon. Members: Hear, hear!

Mr. Clark: However, it is not good enough to be here to think good thoughts. We are here to act. That is what we were elected to do by our constituents across the country and that is our obligation.

I have the honour in this House to be the Leader of Her Majesty's Loyal Opposition. There is, perhaps, a special obligation on me, as there is on the Prime Minister and certain other officers of the House, to take that responsibility with a particular seriousness. But that responsibility falls upon all of us. It is, perhaps, particularly because of my disinterest in some of these questions that I can move some of the amendments and speak to them as I have today. I am obviously not a woman—one of the 52 per cent majority which women constitute in this country; I am among the minority. I am not a Canadian of Inuit, Indian or aboriginal ancestry. I am not a Quebecer, except in spirit. Perhaps I have a special capacity, a special quality, to come here to ask others who are not native, women, Quebecers—and if they are Quebecers, not supporters of the Parti Quebecois—to recognize the tremendous importance to Canada of having a Constitution which will respect the rights and equality of women, underline the rights of the aboriginal people, and be large enough to include and make the people of Quebec feel comfortably at home.

That is the purpose of our amendment and that is the purpose of our party. That, I hope. will be the result of our deliberations and our debate on this resolution which is now before us.

Some hon. Members: Hear, hear!

Madam Speaker: I am sure members of the House will appreciate that, because of the drafting technicalities, it is important that I reserve judgment on the acceptability of this motion.

Mr. Edward Broadbent (Oshawa): Madam Speaker, for more than 100 years we, as a nation, have been in pursuit of a completely autonomous nationhood. For more than 100 years this goal has eluded us. In these days we are

now approaching success at last. In short, the final stage of the process is under way.

Since the birth of our movement as a party in the 193Os, we, along with others, have been in the forefront in advocating the need for an independent Constitution, a charter of rights and a working amending formula to meet the needs of the future evolution of our country. We have also said that the uniqueness and grandeur of the province of Quebec must forever be a cherished and crucial consideration in constitutional change. Quebec is not and never will be a province just like the others. It adds in its vitality, its architecture, by its composers, filmmakers and poets, a richness and diversity for which all Canadians can be thankful.

Some hon. Members: Hear, hear!

Mr. Broadbent: Finally, in recent years our party has become aware, at long last, of the moral claims of Canadian women and the native people of our land. It would be nice to be able to say that politicians, not only in our party but other parties, have been aware of the concerns of women and native people for many years and, indeed, decades. But that would do injustice to the truth. We all know that in this Parliament and in the legislatures across the country the concerns of the native people and the legitimate claims of Canadians women have been on the political agenda for all too short a time in our history.

In approaching constitutional change, then, we have these concerns and these values. When the process of constitutional change began in a serious way last fall, we said, along with others, that now is the time to act and create a fully independent Canada within a political framework that would make possible the creation of a society that is at once just and exciting, a society that is at the same time peaceful and humane.

As we all know, the process has not been an easy one. It has not been, to put it euphemistically, without tension. These tensions have revealed themselves in all our regions, in all our institutions and in all our political parties. I emphasize that this situation has occurred during every period of our history since the birth pains of nationhood were being experienced. There was no reason for Canada to have been an exception and we were not.

Earlier today the Minister of Justice (Mr. Chrétien) appropriately paid tribute to the Prime Minister (Mr. Trudeau) and the first ministers who met not long ago to develop a new accord. I want to join, on behalf of my colleagues, with the Minister of Justice in paying tribute to those men, representing

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all the parties of Canada and all the regions of Canada, for the sincere and good results, on the whole, that they produced.

Some hon. Members: Hear, hear!

The Minister of Justice (Mr. Chrétien) alluded to the particular role members of his party played in the development of the constitutional change process which has brought us to today’s debate. I think it would be understandable in this context, without doing it in any boastful sense, if I underlined a few contributions to this process which have been made by my party. I am very proud of the role we played in improving the content of the original resolution. Specifically I single out the following contributions of the New Democratic Party, without which certain provisions in the resolution would not have been included. I noted with interest that two of the key amendments to which the Leader of the Opposition (Mr. Clark) referred—and which he wants put back in the resolution—were the precise amendments the New Democratic Party insisted upon and obtained in the first resolution last spring.

Some hon. Members: Hear, hear!

Mr. Broadbent: The first of these contributions I want to mention—because I

think it is very important, given the regional nature of Canada—was that as a result of early discussions, broad new powers were given to the provincial governments over the development, control and management of their resources.

The second was our writing and insistence upon the acceptance of Section 28 in the original resolution which gave paramountcy to the equality of men and women. That was a product of the New Democratic Party of Canada and was finally accepted, I am pleased to say, by all parties in this House.

The third was the writing and insistence upon of Section 34 which recognized treaty and aboriginal rights. That was moved by one of my colleagues. It was written by the New Democratic Party, submitted and finally agreed to by all members in the House.

I am proud of the role my party played on those two important questions at this point in our history affecting the women of Canada and our native people. I have noted that as part of the process of the development of the Constitution the other parties went along with these suggestions.

As we all know, following the debate which took place last spring and following the decisions reached by certain courts, it became the strong view on this side of the House that the final vote on the resolution had to wait until the Supreme Court of Canada made a final judgment on the resolution. That judgment contained two messages. It said it was strictly legal but, on the other hand, it pointed out that broader consensus for constitutional change ought to be found. This process eventually took place and, as I have noted, the premiers and the Prime Minister (Mr. Trudeau) deserve credit for what they achieved. The amending formula was changed. The absolute veto for the Senate was dropped, and the Charter of Rights and Freedoms was modified to make it blend with our parliamentary tradition.

Mr. Siddon: You favoured all those things?

Mr. Broadbent: I will deal with that in a minute. I would be less than honest if I said that my colleagues and I were perfectly happy with all these things. We would have preferred that the original charter be binding universally without exception across Canada. That was our first preference.

Some hon. Members: Hear, hear!

Mr. Broadbent: Nonetheless, as a number of civil liberties authorities have said, overall in the context of serious compromise what we still have remains a good charter of rights. As the Minister of Justice has said, certain rights will remain absolute. Among those over which legislatures may pass laws the onus is upon those legislatures to pass specific legislation to justify such transgressions, and such negating laws would have to be renewed every five years. Thus, opposition parties and especially private interest groups in our society must remain vigilant.

In the early part of the last century a great French writer, Alexis de Tocqueville, wrote what was perhaps the most profound study of American society, and one of the distinguishing features he singled out about North American society was the vitality of interest groups and the creative input they had in making a democratic society with individual liberties possible. The kind of charter we now have before us will indeed permit legislatures on a five year renewal basis to undermine certain equalities if they wish, so it is mandatory that all of us who concern ourselves with civil liberties keep the pressure on at all times.

[Translation]

Madam Speaker, there is a most notable absentee among the signatories of that constitutional resolution. One cannot ignore the absence of Quebec at those negotiations. It is most unfortunate that Quebec was unable to agree with the other governments. We must recognize the

uniqueness of the province of Quebec as I said earlier. Quebec, as a distinct society, is entitled to a special place within the Canadian community. However, it must be recognized however that the constitutional resolution before us partly confirms this. It was high time! It is not necessary to prove that Quebec is different from the other provinces, it is obvious.

This resolution, for the first time in the history of Canada, is a step in that direction. It is a beginning rather than the end of a process. I was pleased and even relieved to learn that the Prime Minister had amended the constitutional resolution. Thus Quebec will be entitled to some compensation if it ever wanted to opt out of any cultural or educational programs that the other provinces wanted to entrust to Ottawa. For legitimate and reasonable reasons, Quebec must control and administer those areas.

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[English]

However, in this context I want to say that the proposal which has just been made by the Progressive Conservative Party of Canada is not one that is acceptable to us. The suggestion that in all domains where there is constitutional change approved by the constitutional amending process which would enable a province to opt out and obtain financial compensation in so doing would indeed create, in terms of all kinds of social programs, a checkerboard Canada. That is a view which we would not put up with.

Some hon. Members: Hear, hear!

Mr. Broadbent: It is one thing to recognize, as we ought to, the unique nature of the province of Quebec. It is one thing to recognize the unique qualities of Quebec—and I give credit to the government at last for doing this—in the cultural and educational domains require special consideration, but it is quite another thing for us to say that as a general principle for all provinces all new ideas like medicare, if proposed and accepted by constitutional amendment, could be rejected with compensation. Then the rich provinces could retain the money while the rest of the provinces would have medicare. I say to the Progressive Conservative Party of Canada that we would never have had medicare in Canada as a national program if that had been in effect at the time.

Mr. Clark: Madam Speaker, I rise on a point of order. I would be the last to want to interrupt the Leader of the New Democratic Party (Mr. Broadbent)—

Mr. Deans: Why are you doing it, then?

Mr. Clark:—nor would I want him to commit himself to a position without perhaps fully understanding it. The example of medicare that he has just used would not be prohibited by the amendment we have brought forward. The Leader of the New Democratic Party, naturally, may make the decisions he wishes to make. However, I would hope that before he finally and absolutely commits his party, he might provide us with an opportunity to go through with him in detail what has been proposed so if there is an opportunity to extend an amendment that would bring in Quebec, he will judge that on the basis of proper information.

Mr. Broadbent: We can have a longer discussion on that point in future. I stand by what I said. The agreement that has been achieved would, by amending the Constitution, enable one province to opt out of that and obtain financial compensation. I listened to the Leader of the Opposition with great care and will read with even greater care what he has had to say. Certainly the preliminary reaction would be that social programs involving constitutional change could lead to the richer. provinces opting out all along the line, leaving the poorer provinces to pay.

I will continue with the main points I want to make concerning the province of Quebec at this point in my comments.

[Translation]

English schools are no longer open to one and all in Quebec. The children of immigrants will have to attend French schools. As well, only Canadians who have attended English primary schools in Canada will be allowed to send their children to English schools in Quebec. Those amendments reflect greater respect for the distinctive character of Quebec. There is still room for improvement. For instance, arrangements ought to be made with respect to mobility should migratory movements appreciably alter Quebec's population balance. Quebec is already a distinct society in fact. I have in mind here the legal system and the Quebec Pension Plan in particular. That is good for Quebec and for Canada as a whole. Finally, Madam Speaker, francophones outside Quebec will gain recognition of their rights to education in all provinces of Canada. After 114 years, there is still progress to be made so that within a relatively short time francophones outside Quebec may be able to control their educational and social institutions just as anglophones do theirs in Quebec.

[English]

I want to note in this context that I am pleased to be able to send my daughter to a French language school which opened two years ago. For the first time we have a French language public school in the province of Ontario. There were Catholic schools teaching in the French language. Finally, the province of Ontario in the city of Ottawa is making French language available in the public system. Francophones all across our land must have that right.

Some hon. Members: Hear, hear!

Mr. Broadbent: I want now to turn to two fundamental matters which must be of concern to all Canadians, namely equality of the sexes and the rights of Canada's aboriginal peoples. Before doing so, I want to say that when completed in a just form, I would like this resolution, particularly the Charter of Rights and Freedoms, to hang on the wall of every classroom in every school in every region of Canada. I do not say this because I believe in propaganda. I say it because I believe constitutions are fundamentally about rights, rights are fundamentally about people and people from childhood on must be encouraged to acquire a deep understanding of their own liberties as well as an even deeper appreciation of the liberties of others.

Some hon. Members: Hear, hear!

Mr. Broadbent: Turning now to this document, I ask in all seriousness, would we want children anywhere in Canada to read a document which says, "Men and women are equal except when a group of politicians say they are not"? That is what is in this document. It is neither good for young boys nor for young girls.

In our culture at this time, this kind of symbolism can mean only one thing. It does not mean that males can be discriminated against as well as females. Everyone in this chamber and everyone in Canada knows that it means it is accept-

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able to discriminate against women, against young women, against girls. We find that totally offensive in this year of 1931.

In changing the original resolution with this act, we have taken a step backward, reversing completely the progress we had made in recent years. The progress toward achieving greater equality for women has, to understate it, not been exactly exciting. However, we have made and have been making up until this document some changes. However, when we put into a constitutional document written in 1981 the principle of inequality, what are we doing? We are not simply pausing or stalling; we are turning things backwards, we are institutionalizing inequality, and we cannot accept that.

We must restore the original positive wording of Section 28. which ensures the paramountcy of the principle that men and women are equal. The Leader of the Opposition mentioned his intention of moving an amendment. We had the same proposal, so it would be totally redundant for us to do that. I simply indicate that the amendment will have our full support, if for no other reason than that in the original document we wrote it in the first place.

I want to turn now to aboriginal children in the same schools, looking at the same document. Consider the children in Old Crow, Inuvik, on the reserves or in schools in the cities of western Canada where many of our native people have come in recent years. What would those young Indian children think when looking at that document on the wall, given their heritage, especially when they know that this land was once their land? How did they lose it? They lost it by violence, treaties or trickery. They know in their bones that is what happened to them as a people in the northern part of North America, and with much more violence in the southern part. It is impossible for a white person to put himself in the skull ofa young Indian child and know what is going on in his or her mind. What will happen when they hear, as they will in their schools, about this process and when they see the kind of documents we know will be sent out that will be put on the school walls in Old Crow or in Inuvik? In this context, I would like to say I was at a meeting in Alberta a week ago with Indian leaders. I heard a whole series of them. Many of them I had met previously. I agree with what the Minister of Justice and Attorney General said, because—and I want to say that in passing—some of the leadership in the Indian community is no better or worse, I suspect, than the leadership in the political parties of Canada.

Mr. Trudeau: And in the CLC.

Mr. Broadbent: And in the CLC, I will agree with the Prime Minister. I would also ask him to agree with me that the same is true of the Chamber of Commerce as well.

Some hon. Members: Hear, hear!

Mr. Broadbent: The point I want to make is that, having sat for an hour over breakfast and listened to the Indian leaders-and I heard the legal arguments before—I agree with them. But perhaps because I heard them before, I was not overly moved. There was an older man there who had kept silent. He was not one of the young, educated Indian lawyers nor, for all I know, was he one of the chiefs. I apologize to him through the House if he was in fact one of the chiefs of one of tho bands from Alberta. Just before we broke for breakfast he spoke to me in a very low voice. He said, "I don't know what you are going to do in Ottawa. I don't know if we're going to get our rights, as I think we should have had them—"—and he was an older man—"—but I do know that my grandchildren will be very upset if we don't get our treaty rights". Then there was complete silence. That is all he had to say. He did not say it in a threatening tone, nor as a political bottom line, nor with animosity. There was almost a sense of pathos about what he did have to say, Madam Speaker. If I understood him correctly, he was saying, "My generation of Indians has had it. We have gone through it and we did not get the rights." He said to me as a white Canadian politician, "You have to think of the young Indians who are coming along."

That is my special plea today, Madam Speaker. It is a plea I am making in the House of Commons and to the premiers. I have talked to more than the majority of them during the past ten days. I know there are more than the majority of the premiers who are willing to entrench aboriginal and treaty rights. I know we are short of one or two premiers. I say that they must come forward so that we can send this document to England so that it will provide justice for our native people.

Some hon. Members: Hear, hear!

Mr. Broadbent: I will not be moving an amendment on this subject today because one of our subsequent speakers will do that, Madam Speaker. The obvious force of the points that I have just made is that Clause 34 as written in the original resolution should be restored to the document before the House.

I want to conclude by saying that it is very rare in politics that a nation or a group of politicians is given the opportunity to make a historic decision that can be both practical and decent, that can be at once just and prudent. We in Canada are now on the threshold of such a decision. To follow through, we must now fully entrench treaty and aboriginal rights. A number of us have already said that the resolution before us is not perfect but it is good and requires improvement. The improvement, in my judgment, would add integrity to Parliament's treatment of men and women and to our treatment of the aboriginal peoples of Canada.

In the final analysis, national unity is not about federal-provincial relations, or the relations between different regions as abstract entities; it is about people. All of the people must be treated with integrity in this document. National unity, when we talk about provinces, is one thing. National unity, when we talk about the relationships of people, is what really counts.
I want to conclude by saying that national unity without integrity is not possible. I hope our goal in this debate, before the final vote is taken, is to achieve that national integrity.

[Translation]

Mr. D. M. Collenette (York-East): Madam Speaker, I am very glad to speak in such a historic debate. I have been saying

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for years that the renewal of the Constitution is the most important question in the country, and I am deeply grateful to our Prime Minister (Mr. Trudeau) who has worked without respite. Mr. Speaker, I believe that when future generations will look back they will readily acknowledge the greatness of this Prime Minister who has so firmly urged Canadians to face this challenge. So now we must answer the question as to whether we, as Canadians, have risen to the occasion.

[English]

That is my message this afternoon, that is my small, modest contribution to this great constitutional debate. Have we been equal to the challenge that has been laid before us? This is a time of joyous outpouring. We will soon forward this resolution to Her Majesty. With the passage of the enabling legislation at Westminster and the subsequent proclamation here in Canada, we will at last have our own Constitution. We will end the anomaly of being a major power in the world, a major independent country with its Constitution residing in another country. This process has a particularly relevant meaning for me because I came with my family from Great Britain some 20 to 25 years ago and I have always found it somewhat incongruous that the country that I knew and learned about in my education as a young boy was really not independent and had not really attained the last vestige of independence. It is particularly touching for me to have been a participant as a Member of Parliament at this significant time in our history, when we are at last making Canada fully and truly independent in every sense of the word.

The proclamation of these changes will finally give us in this country a way to amend our Constitution. It will also give us a Charter of Rights and Freedoms. This is cause for joy. However, our joy must be tempered by the knowledge of what might have been. To follow on the comments made by the Leader of the New Democratic Party, I must say that what was the best charter of rights, in his words, is still an excellent Charter of Rights and Freedoms.

We all have reason to be proud of the charter, but improvements still must be made. The Hon. Leader of the Opposition (Mr. Clark), the Hon. Leader of the New Democratic Party (Mr. Broadbent), as well as the Minister of Justice (Mr. Chrétien), touched upon the need to make improvements, to go forward. By passage of this resolution constitutional change will not be over. It is but another phase in the ongoing constitutional development in the history of the nation.

There are many purists in the House. I was one who, along with the Prime Minister (Mr. Trudeau), with just about everyone on this side of the House as well as many members on the opposition side, believed that fundamental rights and freedoms were so sacrosanct and so inviolate that they should be entrenched in a constitution beyond the temporal winds of legislators such as ourselves. We have heard many speeches in the debate from hon. members who have described Canadian legislatures and indeed this Parliament—of course I am thinking of the ignominious incident in the Second World War dealing with Japanese Canadians—as not having been the best guarantors of individual rights. This is why the charter which has emerged over the past year in debate in the House and through the participation of thousands of Canadians was such a noble document. It proposed that all basic freedoms and rights would be entrenched in the Constitution free of any legislative qualification.

The constitutional accord which was signed two weeks ago after much deliberation entrenches rights. However, fundamental freedoms, legal rights and equality rights are subject to a provincial or federal legislative override. In addition, as has been pointed out, our original intentions as expressed in the original resolution in the House on the question of native's and women's rights have not yet come to fruition. They were not included in the constitutional accord. Indeed this is a glaring, startling and regrettable omission which we must all resolve to correct, whether it is to be corrected in the days which follow in debate in the House or whether it is to be corrected after patriation with the new amending formula which will be at our disposal.

We must address these questions. It has been argued with some justice that it will be difficult to override the charter, that the charter will provide an imperative for our courts that will make it very, very difficult for any legislature to tamper with the provisions relating to rights or to pass any legislation which would derogate from those rights. I shall not rest, and I am sure there are others in the House and in the country who will not rest until we achieve, once and for all, the complete entrenchment of these rights from any legislative sanction.

[Translation]

Mr. Speaker, first of all let us look at one of the main reasons why constitutional reform was so important for Canada, namely the entrenchment of the constitutional guarantees which ensure the survival of the French language and culture. As an English-speaking Canadian, I must admit that I am not proud of the way French-speaking Canadians have been treated for many decades. The two major examples of the shameful treatment of the French minority by the English majority have already been outlined during this debate. They happened in Manitoba in 1890 and in Ontario in 1912. There have been many other such cases, the most recent one being the air traffic controllers strike in 1976. Unfortunately, Mr. Speaker, it was the ambivalence of English-speaking Canadians which showed once more that francophones cannot rely on the good will and the generosity of the legislators to guarantee their language rights.

Mr. Speaker, the survival and the promotion of the French language are important concerns for the Liberal Party of Canada, the Liberal Party of Quebec, and of course, the Parti Québécois. However, the latter believes, because of its destructive

and reactionary ethnically-based prejudice, that the pro-

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tection of the French language requires cutting back of some of the rights of the English minority established in Quebec. This contemptible nationalism has brought even more urgency to the need for linguistic guarantees, and the attitude of Mr. Levesque and his friends during the recent constitutional talks has emphasized the dishonesty of such a policy.

The former protector of the French language is now turning his back on the French minorities outside Quebec. This agitator has betrayed his provincial colleagues by refusing to sign the constitutional accord. This fanatic, whose slogan is Je me souviens, has abandoned his own province by renouncing to the veto of Quebec. Why is this, Mr. Speaker? Because this man and his party are determined to sabotage Confederation whatever the cost, even at the risk of weakening the position of their own province in future constitutional debates. If Quebec is now alone, Mr. Speaker, the Quebec premier is to blame.

[English]

This is why I am so happy, even in perhaps the most modest way, that we have entrenched French language rights in the constitutional Accord, that we will at once be making our peace with those of our French-speaking brothers and sisters who have gone before us, who suffered discrimination and found that their language and culture were suppressed. My only sadness is that we have not quite given in this resolution the same rights to the English minority of Quebec; almost but not quite. But I believe what we have done for the English minority in Quebec will go a long way toward ensuring that the rights of English-speaking Quebecers will be safeguarded in the years ahead. It is my hope—and I think it is the hope of everyone in the chamber—that at some point, hopefully very soon in the future, when there will be an end to the independent party in Quebec, a federalist party once again will be in power, will come into the accord and join the other nine provinces and the federal government to preserve these rights and to entrench them for all Canadians.

I would be remiss if I did not say a few words about Section 133 of the present British North America Act and about my profound regret that the Premier of my province, notwithstanding the fact that he showed great vision in trying to reach a new constitutional accord, notwithstanding the fact that he supported our party which introduced the original resolution, has failed to extend these basic rights to the province of Ontario. That is something else for which we as Ontarians should fight in the years ahead. At the provincial level, and even at this level, by using the power of our influence as Members of Parliament, we should prevail upon the government of Ontario and upon subsequent governments or premiers of Ontario to make this last great gesture in the name of language equality in this country.

I just want to reflect on the process that we have gone through in the last year or so. I have been very caught up in that process and, like many hon. members on both sides of the House, have worked extremely hard both day and night, because this was not just another piece of legislation and not just another parliamentary act. This was something more profound. Very seldom in the lifetime of an individual can he or she make or hope to make some contribution to history. All of us in this chamber have made such a contribution in the past year, despite the differences in our opinions. I think it is a testimony to the greatness of our parliamentary tradition that we were able to come to an agreement in this country without bloodshed, without brother and sister fighting against each other, and without civil strife.

Let us look at other countries in the world to see how they acquired their

constitutions. Even Great Britain went through some bloody times, going back to Cromwell, going back to the chartist movement in the 1830s, and the social protests in that country during the development of their constitution.

We have indeed been fortunate. We should indeed be proud that we have been civilized enough in this country to fight with every last ounce of our strength, but with words and not physically, not fighting with each other in a manner which would cause irreversible bitterness. That is why the process which went on in the last year was so rewarding and monumental.

I think especially of the deliberations of the Joint Special Committee on the Constitution. Day in and day out, this committee's deliberations showed that democracy was indeed alive and well in our country. Many Canadians and many groups were represented and were able to express their point of view. Hundreds of briefs were received. The televising of those committee deliberations had a lot to do with provoking thought on the part of individual Canadians who otherwise would not have involved themselves with this question. We then saw the matter go to the Supreme Court. I would not want to reflect on judicial decisions, however, I must say that the decision that the original constitutional resolution was not constitutional in the convential sense must be accepted. I think that the Supreme Court really did not address the problem of the definition of proper conventions. It said that there had to be consent of the provinces.

However, I want to draw Your Honour's attention to a statement made by the noted constitutional professor, the late E. V. Dicey, in his well known work entitled "The Law of the Constitution". He stated that "the fundamental dogma of modern constitutionalism" is that "the legal sovereignty of Parliament is subordinate to the political sovereignty of the nation". The Supreme Court of Canada asserted that the original resolution, as I stated, was not constitutional in the conventional sense and that the political sovereignty of the nation was defined as a substantial consensus among the provincial and federal governments.

As an individual Canadian, I am offended that convention is defined in those terms. It is for that reason that I have always been of the view—and I stated it in the House many years ago in a debate on a referendum bill, Bill C-9, in the second session of the Thirtieth Parliament—
that political sovereignty should be defined as the will of the people as expressed by themselves rather than by elected politicians.

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It is my belief that in order to determine the rules of the game and to determine the rules which will govern us as a people, as distinct from moral issues and other questions, we should consult the people via the referendum mechanism. It is not an idea which would be unique to Canada. I just look at what has happened in Great Britain in recent years, where there have been two such referenda, one on entry into the Common Market and the other on questions of devolution of powers for Scotland and Wales. Therefore, one cannot argue that referenda are not in the British parliamentary tradition.

It is significant that the offer of a referendum was made by the Prime Minister during the negotiations, and it was turned down by many of the provinces. I regret that. What we saw was that the Canadian way, as described by the Leader of the Opposition and many of the provinces, really was the wheeling and dealing among elected politicians and elected governments to determine the rules by which the public and the people of Canada would live. Indeed, one may describe this Canadian way as one which permits some degree of moral cynicism.. I am prompted here to reflect upon some of the thoughts of the late American theologian, Reinhold Niebuhr. In his classical defence of democracy, entitled

"The Children of Light and the Children of Darkness", he identified the powers of will and persuasion, the forces in society. It was Mr. Niebuhr who said that we may well designate the moral cynics who know no law beyond their own will and interest with a scriptural designation of "children of this world" or "children of darkness". Those who believe that self-interest should be brought under the discipline of a higher law could then be termed "the children of light".

He defines the children of light as those who seek to bring self interest under the discipline of this more universal law and in harmony with the more universal good. One does not want to get overly metaphysical in this very practical constitutional debate, but I think we must view what has gone on in the last little while with some disquietude that, in a sense, the will of the people themselves has been excluded and that there were those who could not put aside their own self-interest and could not seek a higher vision of what Canada was to become in the next century. However, in a sense, they settled for something which is good but which could have been infinitely better.

That is why I find it somewhat distasteful at the moment to see this continual bartering of rights, this continual trading off of native rights or women's rights. Surely the protection of those rights can stand or fall on their own merits. I suppose that I will leave this place a happy person—whether after the next election or whenever—because I was able to play some small role in the historic development of this country in the bringing in of a new Constitution. However, I would exhort all of us to be, in Reinhold Niebuhr's words, "children of light". Let us put aside our self-interest and our petty divisions. Let us try to go beyond ourselves and see the greater view. Let us see the new vision of Canada. Let us try to attain that vision. We can start the attainment of that vision by trying to realize our original objectives.

What we have before us now is good. It is great. It is a source of great joy. But it could have been better.

I am reminded of a story we studied in high school written by Robert Louis Stevenson. I believe the title of the story was El Dorado. In life one must always be searching and grasping for a new ideal. We must have a new goal. I entreat members of the House of Commons to see as their goal the complete restoration of the charter of rights as it was originally intended in the resolution so that all Canadians may live in dignity and harmony.

I would exhort all of those who read the House of Commons debates and all those Canadians who follow the issues of the day not to let their politicians off the hook. We have triumphed, yes, but we could have done better.

Let us hope that in the days, the months and the years ahead we will finally achieve our complete goal, the complete entrenchment of the basic rights notwithstanding the notwithstanding clauses, so they can stand by themselves all time and enshrined for oblivious to political change. That is what I am pledging to work for in my remaining time as a member of Parliament. I hope that my colleagues feel the same way.

Some hon. Members: Hear, hear!

Mr. John Bosley (Don Valley West): Mr. Speaker, before beginning my remarks I want to say to the honourable member who has just finished speaking that it would be nice for once if someone on the government benches would admit that we viewed the Supreme Court decision on television. It is difficult to listen to members on the other side almost claiming credit for a resulting process for which all Canadian fought.

Before I came here in 1979, it was my privilege to represent many of the people I now represent at the municipal level of government. During that time I had the

honour to be involved, along with others, several of whom are now members in this House representing all sides, in the creation and implementation of a bold new urban plan for the city of Toronto. That plan from start to finish took several years. It involved dozens of compromises, the creative co-operation of literally hundreds of citizens in Toronto and thousands of hours of meetings. At the end, one Toronto wag commented that the plan was perfect and typically Toronto. It had to be good because it displeased everybody equally.
When I left municipal politics to seek this office, I did so with a question mark in my mind. Those members who are familiar with the mind-set peculiar to municipal councillors that the sun rises and sets on one's municipality, perhaps can best understand the doubt as to whether life in the House could ever be as stimulating as municipal work or whether any project here could ever be as important and challenging as our new plan was.

I rise today just a few days short of three years since I left municipal affairs to participate in this debate, a debate essentially about another plan, the proposed new plan for Canada's constitutional future.

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I can only say that this experience, the experience of being part of our constitutional renewal, has been in so many ways the highlight of my so far short public career. I want to try to express to you, Sir, to my party, to the House and, most important, to the people who sent me here, my intense feeling of gratitude for the privilege of being here at this historic time. This promises to be an emotional debate. Earlier speakers members at various times showed through their tears the emotion they felt. I do not expect to have that effect on members, but I can say this, that however one views this resolution, whatever one's political bias, there can be no doubt that the importance of this date for Canada is felt on all sides of the House.

The writing of constitutions must be among the most noble and important work in which people's elected representatives engage. I am here in some measure because the previous member for Don Valley West, Mr. Jim Gillies chose not to run. Perhaps with your indulgence, Mr. Speaker, I might read into the record his favourite quote. He used it always to advise his constituents, now my constituents, on matters of importance. It seems this quote has merit in our discussions today. The quote will be familiar to many people here. It goes like this:

Make no little plans: They have no magic to stir men's blood—make big plans, aim high in hope and Work.

The philosophy behind those words continues something along the line of: "Aim high in your hopes and dreams remembering that our grandchildren will probably do things that we never dreamed of. Let your watchword be justice and your beacon be hope,"

Let us be clear and sure that the spirit in which we approach this debate is exactly that: hope for justice for all Canadians, including women, men, our native people and all Canadians, especially the people of Quebec.

Let us also be clear that this debate must not delay dealing with the other urgent problems this country faces, and our unreasonable delay would serve no one.

There are several matters I want to raise in this debate. We are, however, approaching four o'clock and I would like to make sure that I put something on the record before I proceed to deal with what I think are absolutely vital questions in this debate, specifically the issues of equality of men and women, the issue of the protection of the treaty rights of our aboriginal people, and the amendments which my leader proposed earlier today.

We received a telex in which I believe the House will be interested because quite a bit

of admirable discussion has taken place about attempting to persuade premiers to come on side with native rights and men's and women's rights. This telex came from the Premier of Ontario, the Hon. William G. Davis. It was addressed to the Right Hon. Joe Clark and to Duke Redbird, president, Ontario Métis and Non-Status Indian Association, Native Council of Canada offices, To those who want to know where Ontario stands, I can say it stands foursquare behind the entrenchment of the rights of the aboriginal peoples and for Section 28 unamended. I will quote for the record from the telex. It reads, in part:

Ontario remains committed to the accord signed on November 5. However, to the extent there is significant opportunity prior to the end of the debate in Ottawa to influence those who do not support the current provisions for women's rights and the inclusion of aboriginal rights, we will be endeavouring to do so.

It continues:

We do express our sincere regret that aboriginal rights were excluded from that agreement.

It concludes:

We remain committed to the principle of entrenching rights for both women and native peoples.

Let there be no mistake about where Ontario stands.

I propose to continue that argument when I am next allowed to rise, Mr. Speaker.

Mr. Deputy Speaker: It being four o'clock, the House will now proceed to the consideration of private members' business as listed on today's order paper, namely public bills, notices of motions and private bills.

(I.) CANADA, HOUSE OF COMMONS DEBATES, THE CONSTITUTION

NOVEMBER 20, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 12978-12980

12978

THE CONSTITUTION

RECOGNITION OF WOMEN'S RIGHTS

Hon. Flora MacDonald (Kingston and the Islands): Madam Speaker, my question is directed to the Prime Minister. He will recall that a couple of days ago I asked him how many provinces have not yet given their consent to withdrawing the

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override provision to the equality clause, Section 28. Following question period the Prime Minister will recall that he intimated informally to me across the floor of the House of Commons that there were two such provinces. Then he intimated that, if that number were reduced to one, he might consider reinstating the clause as it was in the original, but that he could not do so if it were two or more provinces.

Seeing that there seems to be only one province now which is withholding its approval, I ask the Prime Minister most sincerely whether he would, in concert with eight provinces, agree to reinstate Section 28 to give full equality to male and female persons as it was in the original resolution?

Some hon. Members: Hear, hear!

Right Hon. P. E. Trudeau (Prime Minister): Madam Speaker, the hon. lady should have terminated her question by saying, "as it was in the original resolution, which the Tories did not support".

Some hon. Members: Hear, hear!

Mr. Nielsen: Not true.

Mr. Crombie: Be serious.

Madam Speaker: Order, please. There is very little time remaining in question period, and we would like to hear from a lot of questioners.

Mr. Trudeau: The hon. lady is asking me a hypothetical question because I do not know how many provinces will in the end support the amendments to restore the charter to its original form, the way it had been proposed. I do not know how many provinces, in the end, will support: maybe all, maybe not all.

I would say the same thing about aboriginal rights. Maybe all will support the restoration of aboriginal rights, and maybe they will not. However, the question remains hypothetical in the sense that I cannot say in advance what the courts would have defined as a consensus of the provinces. We know that too did not appear to be enough. We know that ten is not necessary. I do not know how many provinces we would need to go to London in order that we would have established the constitutionality in a conventional sense of the demarche. I suppose that could only be settled by the courts.

If the question does arise, we will have to make up our minds on this side of the House if "x" number of provinces is enough or not. I hope we will not have to ask ourselves that question because I am sure the house will let any changes to the accord made on Thursday, two weeks ago, be made with the consent of the provinces. I think that is important.

I fail to understand what the laughter is

about on that side of the House. Maybe I could have a supplementary question and try to deal with the question.

QUERY RESPECTING NUMBER OF NON-CONSENTING PROVINCES

Hon. Flora MacDonald (Kingston and the Islands): Madam Speaker, I would like to put a supplementary question. The Prime Minister will remember, of course, that Section 28 was not in the proposals brought before the House a year ago this October, and presented by the Prime Minister.

Some hon. Members: Hear, hear!

Miss MacDonald: That section was added in April of this year with the consent and agreement of all parties of this House, because I think we all want to see that section carried out. Therefore, I really want to come back to the question that I posed to the Prime Minister and the information that I understood he conveyed to me the other day that, while two provinces would present some difficulty for him in undertaking to make any change to the clause as it now stands before the House, if that number were reduced to one he might consider it. I am asking him will he now consider that?

Right Hon. P. E. Trudeau (Prime Minister): Madam Speaker, the hon. member makes a point that Section 28 was not in the charter when it was first introduced. She is right, of course, and she is right that many other changes in the charter were made following the introduction into this House in October of last year. She should be reminded of the process which caused that to happen.

We had a pretty good charter in the month of June, 1980. The Minister of Justice attempted to get provinces on side. I now think the House realizes how hard that is on some aspects of the charter and aboriginal rights.

The Minister of Justice, in an attempt to get the provinces on side, watered down that charter in many aspects in the hope of getting a consensus in September of 1980.

We did not get the consensus. Therefore we decided to act with just the authority of Parliament. Since Parliament was going to act on its own, at least in so far as our party and most of the New Democratic Party was concerned, we could afford to improve the charter.

I remind the hon. member of what position she and her party took at that time.

Some hon. Members: Oh, oh!

Mr. Trudeau: Hon. members do not like to be reminded of that, Madam Speaker.

Some hon. Members: Hear, hear!

Mr. Siddon: Answer the question!

An hon. Member: You did the Canadian thing!

Mr. Trudeau: It was that we patriate the Constitution with an amending formula, and that then, after, we would write a charter in Canada.

Mr. Siddon: Let's do that after, then!

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Mr. Trudeau: We are going to patriate with an amending formula, and we are going to have a pretty good charter. But let us do what that party has urged all along. Let us, when the Constitution comes back, write a charter in Canada, and then we will get into the job together and do the parts that are not completed.

Mr. Siddon: Let's do that!

Mr. Trudeau: Surely that was the position for the whole of last year, that we should write the charter in Canada. How can they now say, "Write it in this House of Commons, even if the provinces do not want to do this?" They have been saying

the contrary to that for a year.

Some hon. Members: Hear, hear!

Miss MacDonald: You changed your position. That's not what you said the other day.

* * *

(I.) CANADA, HOUSE OF COMMONS DEBATES, RESOLUTION RESPECTING CONSTITUTION ACT, 1981

NOVEMBER 23, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 13082-13147

13082

THE CONSTITUTION

RESOLUTION RESPECTING CONSTITUTION ACT, 1981

[English]

The House resumed from Friday, November 20, 1981, consideration of the motion of Mr. Chrétien:

[…]

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Madam Speaker: Just before we proceed, I want to tell the House that I have examined the amendment proposed by the right hon. member for Yellowhead (Mr. Clark), seconded by the hon. member for Kingston and the Islands (Miss MacDonald), and I find it to be in order. I am prepared to read it to the House.

An hon. Member: Dispense.

Madam Speaker: Shall I dispense?

Some hon. Members: No.

Madam Speaker: The right hon. member for Yellowhead, seconded by the hon. member for Kingston and the Islands, moves:

28. Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

(b) by striking out subclause 33(1), and

substituting the following:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Mr. John Bosley (Don Valley West): Mr. Speaker, when we broke off debate on Friday I had indicated that I was happy to read into the record a telex from the Premier of Ontario with regard to that province's view of Section 28 and the protection in the charter for the treaty rights of our native people. It is amazing, sometimes, what happens over a weekend. In a way, I am rather happy to have had the break in the middle of my speech since I am equally proud to put into the record today what the attorney general of Ontario had to say over the weekend about Section 28. It has now been admitted by the attorney general of Ontario and the Premier of New Brunswick that the resolution before this House to make Section 28 subject to the override provisions was never discussed prior to the creation of the resolution and its introduction in this House. It was not on the table, and now that it is public I hope it will allow us to discuss it at length, as we proceed in this debate on that issue, precisely because of the importance that has been attached by members opposite, including the Prime Minister (Mr. Trudeau) and Minister of Justice (Mr. Chrétien), to the need to preserve the accord without amendment.

Aside from the fact that there are a number of amendments in the resolution that are,

in fact, outside of what was discussed leading up to the November 5 accord, it is now becoming more clear that the amendment to Section 28, which is being used as a block by members opposite to the amendment which my leader has moved, was in fact also brought in after the accord was drawn. As this becomes more clear, I hope we will recognize the simple justice that returning to Section 28 will bring.

Before I continue my remarks which I started last week, I might also indicate my sadness, after listening to my Prime Minister—and I say that advisedly and only as a citizen—returning to the shotgun diplomacy style. I think most members of this House realize that in the middle of some very complex behind-the-scenes negotiations to try to bring everybody onside concerning the amendment to Section 28, as well as amendments to the rest of the charter which my leader has proposed, including what will become clearer—if it is not now public—about conversations with several people in the province of Quebec, that it is frustrating, using that word advisedly, to come back to this house in Ottawa to hear the Prime Minister indicate that as long as the amendment is decided on by tomorrow night, it is all right. That is another guillotine, Mr. Speaker.

At this point in the debate, it is worth reminding ourselves that it was this same Prime Minister who wished to impose this same guillotine and tried to impose it last year. It is the same Prime Minister who tries to impose this guillotine on these clauses who did not include these rights in the original document presented to the House of Commons. It is the same Prime Minister who fought the committee which tried to put these rights in. The Prime Minister is now arguing that these rights are not there because of the premiers whom he did not want to meet with in the first place.

It surely should be clear by now that the reasons for the amendments in the resolution relating to aboriginal rights, treaty rights and to women's rights are that they were taken out, apparently, in the meetings. It takes two to agree. Therefore, all attempts to portray the Premiers as the villains I hope will be rejected by the general public, because it took the Prime Minister of Canada to agree to remove those rights in order for the accord to get to this House of Commons. Let us not forget that.

As we continue this debate, which as I indicated I hope will not be unnecessarily long, I would like to make some general comments and then return to the specific matter of our amendments. I should also point out in that respect that as a

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Canadian, I believe that any discussions this week which will help improve this charter can only be regarded as helpful by all of us in this House. l would like it to be clear on the record that if it requires more time in the back room to sort these problems out, I do not believe there is one member on this side of the House who is not prepared to see the debate lifted out of this House so we can continue with the budget. I would like to make that very clear at this time.

There will be an attempt made by some to argue that, because some of us are trying to improve the charter, we regard the resolution and its improvement as the priority of the Conservative Party. The priority of Canadians today is to get people back to work. In this country, the right to a job is equally important as the right to equality. If it is necessary for us to break off this debate so we may conclude the budget debate, which was the position put forward by our House leader last week, and since we have had no finality yet as to when we would be able to conclude the budget which we would like to see concluded as soon as possible, I am sure members on this side would not only support that but would regard concluding our economic package as very important.

I would like to refute a current view about

what we have been through in the last year to 15 months, I think that just as important as to note the issues that our party is moving amendments on—which I will come to later—in that now that we have all had the direct experience of the difficulties of constitution—writing in our diverse federal state, this experience should give us cause to marvel at and be grateful for the sagacity and capacity of the fathers of our nationhood who more than 100 years ago had the ability to craft what until now has been the backbone of our written Constitution, the BNA Act.

Now that we may be so close to a totally made-in-Canada Constitution, it seems fitting to note that those who hold to the view that for all those years we have been fundamentally flawed, that we have been somehow eunuched as a nation, are wrong, It is precisely because of the wisdom of our forefathers that the exact opposite is true. Because of that wisdom, we have had a package of laws, conventions and co-operation which has allowed us to live together as well as we have while we have sought a consensus on how to take the next step, a consensus which reflects our essence as a federation, a consensus which in itself contains the way to amend our constitutional package in future in line with the reality and spirit of our federalism.

Some have argued that federalism could not work, that more meetings last year would not help to resolve the impasse, and that we could not wait any longer and our nationhood demanded severe unilateral action. When our party undertook to fight such radical unilateralism, a fight initiated by a decision which took guts and courage and a commitment to principle by the leader of our party, a decision in keeping with the traditional Canadian way of doing things—and I hope more Canadians will come to see these qualities as the highest qualification for the highest office in this land—there were some, notably those who think the world can best be governed through a newspaper column rather than through the melee of politics, who thought we must either be kidding or that we were crazy, that we were suicidal or bent on self-destruction.

Time and the Supreme Court have shown the opposite. Time has shown that compromises can be found, Time has shown that consensus and agreement is possible if one wants it and is willing to work for it. Time, even since the first ministers' meeting and the accord which resulted from it, has shown that even further agreement is possible. I am referring to the ongoing attempts to protect the equality of women and men from the override provisions of Section 33 and of the hard work toward that end by so many women and some men in the last few days.

I mean no offence to others involved in those conversations if I mention in this House again the telegram that came from the Hon. John Buchanan of Nova Scotia as a direct result of the intense efforts of the hon. member for Kingston and the Islands (Miss MacDonald).

Some hon. Members: Hear, hear!

Mr. Bosley: When our party fought for more time last fall and last winter, it was because we believe our underlying constitutional law, conventions and practice are fundamentally sound enough that we could afford to take the time to make change properly and get it right the first time, rather than rush ahead with who knows what possibly disastrous consequences. We thought that was, at the very least, what had been promised Quebecers in the spring of 1980, particularly federalists in the province of Quebec.

[Translation]

Mr. Speaker, we still believe this, and that is why it is important to amend Clause 39 so that a province wishing to retain the right to provide services in any area now under provincial jurisdiction will receive financial assistance if in the future this field of jurisdiction is transferred from the provinces to the federal government by

constitutional amendment. It is not only fair and equitable that a province which continues to provide services receive reasonable compensation from Ottawa if the federal government provides and pays for these services in other provinces, but the omission of such a reasonable clause was probably the first of the three reasons mentioned why the Quebec government did not sign the agreement.

[English]

The amendment has the support of at least the eight provinces which originally dissented, including Quebec, and appears to be opposed only by the government here. Not only is it just, therefore, but its adoption by this House is critical if we are serious about trying to bring at least the people of Quebec into this historic moment.

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[Translation]

Whatever we might think about the sincerity of the commitment to federalism of the Premier of Quebec, I cannot overemphasize to those opposite the true fairness of the amendment which the Quebec premier as well as the other premiers consider so important. I cannot believe that anyone would seriously consider not offering an olive branch to the Quebec people when this is not only possible, but has the added advantage of strengthening the resolution without diminishing the support of the rest of the provinces.

[English]

Not only, therefore, is it just and reasonable, but it must be pointed out that, contrary to the views expressed last week by the Leader of the New Democratic Party (Mr. Broadbent), who argued that the amendment would somehow protect rich provinces which would be able to keep out socially beneficial programs, in fact it will do exactly the opposite. So that it is clear for those who listen or read Hansard, what the amendment says is that in the case of a constitutional amendment—in other words, an amendment which in future has the support of at least seven provinces, meaning that a majority of the provinces will already have decided that a program should be undertaken—contrary to the view of the Leader of the New Democratic Party, in the circumstance where a province stays out it should be entitled to the right to be paid. The reason for that is to protect provinces which will be put in the position, without such protection, of having to cast votes at a constitutional conference without protection from whose who are better off than they are. That surely is the spirit of federalism.

I mentioned earlier that it is critical that Section 28 apply without limitations—if hon. members will excuse my view of this thing—so that men will at long last be guaranteed equal treatment with women under the law. Without that change let us be absolutely clear that the resolution would be deeply and fundamentally flawed, and without that change at least some will argue that the resolution will not deserve our support. Some will say that in addition to that change the compromise allowing legislatures to override, at least temporarily, court decisions which appear in a legislature's view to be inappropriate also eliminates a flaw.

When I started on Friday I made reference to my earlier experience at the municipal level with the Toronto Centre plan and the view of one critic that it must be good because it equally displeased everybody. I think that might be exactly true regarding the override provisions, but this compromise is typically and indisputably Canadian. Those who favour parliamentary supremacy will be able to say that that has been preserved, and perhaps it has been. Those who prefer the coded or entrenched protection of our individual rights will be able to say that that has been achieved, or almost so, and that political pressure will prevent too frequent use of the override. Like the Toronto plan, in other words, the change will equally displease everybody.

This is a difficult issue because it is an attempt to marry two important federalist principles. One is that there should be no constitutional change without the consent of those affected; in other words, our provinces. The other is a desire to separate from government some of our freedoms for which there is in the law no final protection today because Parliaments may do what they wish.

I know my own view, and it is this. When we—and I—argued for the right of the provinces to consent, it never occurred to me that the answer the provinces would find would be the right to override basic freedoms. I would much have preferred, and would still prefer, a negotiated and, if necessary, an abbreviated list of individual freedoms agreed to by the provinces and by the federal government—thereby preserving the Canadian way—adopted by the governments as binding on themselves and therefore not subject to being overriden.

I believe government has now become so big that relying on political pressure to prevent a government from taking away our individual rights—and in this context I think particularly of the government opposite–is naive. Whether wiser negotiation by the federal government or a step by step approach moving simply to patriate with an agreed amending formula would have produced a happier result in this regard appears now to be a question for the historians, but one cannot help but wonder; what if?

If an important compromise has been reached on the charter, therefore, there nevertheless remain other flaws which should, and I hope will, be corrected. Here I think particularly of the refusal of too many governments and too many parties to include the right to property, a right which most Canadians regard as fundamental to their wellbeing. There is one other major flaw which can be corrected before this document is passed, since I am persuaded that the odds for getting property included are not very large. I am persuaded of that by those who are smiling at me; I sat and watched the neosocialists and the true socialists get together last year to prevent the inclusion of property, and I suspect they have not changed their view on that one bit.

One other major flaw that can and should be corrected before passage of this resolution is the resolution's failure to recognize native and aboriginal rights and treaty rights. Some will argue that too many provinces object to the inclusion of the old Section 34, although I am glad to see that that number shrinks every day. I repeat that it would be a shame if the personal timetable for this document of the Prime Minister were to prevent the movement, which appears to be growing, toward recognition of these rights from achieving its proper fruition.

Some will argue that too many provinces object to the inclusion of the old Section 34, which in fact only recognizes that treaties were signed and rights were created, as our common law has made so clear. To them and to those provinces I only say that the rights created by the Crown—which we now regard as our Queen—in treaties with our first peoples predate the provinces themselves and, while the provinces have legitimate concerns with regard to the interpretation of those treaties, the desire of some that our constitutional law not recognize that those rights exist is both impractical, given

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existing court decisions, and, to put a kind face on it, less than noble. Just as this Parliament had a duty to protect the legitimate involvement of the provinces themselves in the development of a Canadian constitutional consensus, so this Parliament and other Parliaments have a duty to protect the treaty rights of those whose rights were created even before the rights of our Parliament were created.

I said I would not speak for very long

today. It is not the wish of those on this side, as we will be indicating throughout, to delay unduly conclusion of the matter. It certainly is not mine. I indicated earlier I would prefer, if necessary, that we revert to the budget. However, I want in closing to deal with one or two matters.

I specifically refer to the argument being made by hon. members opposite, notably the Prime Minister and the Minister of Justice, who in their comments on Friday said that no amendments were possible because that would violate the spirit of the accord. Second, and this caused me the greatest problem, the phrase was used by the Minister of Justice on behalf of his government that "we must keep our word with the provinces". Suffice it to say that would be the first time in the entire history of the government that it kept its word on anything.

I am therefore loath to accept the argument from people who gave us wage and price controls, promised us no oil increases and said if there were they would quit if elected, that they are supposed to do what is asked of them because they wish to honour their word. On the other hand, it is possible that a lesson may be learned over there—that when they give their word, they should honour it. Maybe that lesson will be learned.

I now want to deal with the more important question.

Some hon. Members: Oh, oh!

Mr. Bosley: Sometimes the other side does react. I am more than happy to be part of a group that makes them respond to concerns about keeping their word. Let me repeat to the hon. member for Willowdale (Mr. Peterson) that I hope that is something his party learns.

In closing, let me return briefly to the more important issue, the issue of moving amendments. The resolution adds matters outside the accord, notably the section applying what is called the Canada clauses on minority language rights. That would imply to me, given the argument that one cannot introduce amendments not described in the accord, that the government may introduce amendments or modify the accord but no one else may.

I suggest, as members from this side will be continually suggesting, that to try and say to members of Her Majesty's Loyal Opposition that they have no role to play in trying to improve a process or resolution is ludicrous. This document, as we will continue to indicate until it is corrected, is fundamentally flawed.

To ask members of the House of Commons in I981 to support a document which not only does not recognize treaty and aboriginal rights but attempts to deny the fundamental justice that every Canadian subscribes to, namely the equality of our people, be they men or women, are so far behind the times that I guess if it were not actually before us, I would have said there was not a hope in heck that we would see it.

As I said at the beginning, this is historic; this is constitutional renewal. If we are going to go this route and if we are to proceed, it is to me and many member of my party critical that we honour the promises we made in the referendum in 1980. It is critical that we honour the expectations of Canadians and honour the traditions of the original writers of our constitutional law. Now that we are making change, because of the strength they gave to this country all those years, let us honour their commitment to Canada and to the people of Canada today and make sure we do it right with justice and honour the first time.

Hon. Donald J. Johnston (President of the Treasury Board): Mr. Speaker, members of this House need not be reminded by me of the historical significance of this debate to which the hon. member for Don Valley West (Mr. Bosley) just made reference, nor of the remarkable consensus that has been forged between

the diverse interests which are the very nature of Canada and, of course, of the importance of enshrining in our Constitution a Charter of Rights and Freedoms. Nor need I remind hon. members of the compromises and the disappointments that compromises necessarily entail in order to reach a consensus. I suggest those kinds of compromises are necessary for the greater good consensus can bring.

The hon. member for Don Valley West mentioned the issue of sexual equality and aboriginal rights. These issues are very much alive, alive to the point where some members seem to suggest that they may vote against this resolution on that account. I have received representations from members of my constituency of St. Henri-Westmount requesting me to vote against the resolution on those grounds.

Let us all hope that these matters will be resolved before the resolution leaves this House. In any event, to those in the House who have negative feelings about the resolution on that account and to those members of the community who are not directly present here but who are asking us to reject the resolution on that account, I ask them to reflect upon the following.

What would be accomplished by defeating this resolution? Would a defeat of the resolution in its present form be a victory for sexual equality? Would a defeat in any way enhance the aboriginal rights to which the hon. member for Don Valley West just made reference? Would it accomplish anything other than to rekindle the constitutional haggling and debate which has lingered on for so many years? I ask hon. members to bear in mind that this resolution before us prejudices no one. It gives rights. It takes nothing away, it only adds. Most importantly, it adds a means of accomplishing further constitutional change here in Canada. This resolution provides Canadians with the tools to finish the job, to ensure

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that the charter is improved to meet the legitimate concerns and demands of those who may require further protection.

[Translation]

Mr. Speaker, by voting against the resolution just because of a few shortcomings, we may very well undo all that has been achieved up to now, and raise the same feelings of bitterness again, and we shall not be helping those individuals and groups who failed to obtain what they wanted and hoped to obtain through the Canadian Charter of Rights and Freedoms. They have not won yet, Mr. Speaker, but they have not lost. Perhaps such members who intend to vote against the resolution will indeed do so, safe in the knowledge that the resolution will be passed just the same, because enough fellow members will act responsibly to support a measure that is in the best interests of all Canadians, including those they claim to protect.

[English]

I suggest that to vote against this resolution because it does not contain enough would be an odd way indeed of advancing the cause of sexual equality or aboriginal rights. In my judgment it would be tantamount to a declaration that if some cannot have everything they want at this point in terms of this resolution, others should have nothing. I know that such is not the spirit or the motive of those who take issue with the resolution, but unfortunately that would be the result. That is what a vote against this resolution would be saying.

Surely it is a selfish gesture to deny the rights the charter contains to Canadians because the charter has certain defects, defects which I am the first to agree we should all strive to correct as soon as the Constitution is patriated from the United Kingdom. But the defects take nothing away. They are omissions. This is the very process of compromise, Mr. Speaker, that

the Supreme Court of Canada has told us is an essential element of the constitutional convention. The convention has now been observed.

[…]

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[…]

Hon. Jake Epp (Provencher): Mr. Speaker, once again it is an honour to participate in the development of our Canadian Constitution. Before I begin my comments, I want to thank the Minister of Justice (Mr. Chretien) who, prior to leaving the House this afternoon, indicated to me that he would not be present for my remarks. I understand he is engaged in the activity of telephoning various premiers, an activity which some of us have also engaged in over the last days, weeks and months. I can appreciate the work that lies before him today. One hundred and sixteen years ago, the provincial Parliament of Canada engaged in a debate on the confederation of the British North American colonies. While it was the practical men such as Macdonald, Cartier, Brown and Gait who outlined the immediate advantages of the confederation scheme, it was Thomas D'Arcy McGee who outlined the general principle which was to be the foundation of the new nation. He said:

There is something in the frequent, fond recurrence of mankind to the federal principle, amongst the freest peoples, in their best times and worst dangers. which leads me to believe that it has a very deep hold in human nature itself-an excellent basis for a government to have.

In the one hundred and fourteenth year of the confederation which those men helped to create, Canadians have debated this same cornerstone of the Canadian nation—the federal principle.

On one side there have been those who have grown impatient with the federal process and who believed that federalism no longer worked. They felt that the merits of such measures as an entrenched charter of rights or a clarification of resource jurisdiction justified a departure from the Canadian tradition of seeking compromise and consensus on major constitutional issues.

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On the other side there have been those who have fought for the maintenance of the federal principle. We believed that unilateral action was based on a false premise: that the federal system no longer worked and that progress could not be reached by compromise and consensus. We rejected that attitude completely.

On October 2, 1980 the Right Hon. Leader of the Opposition (Mr. Clark) recognized that the government's constitutional proposal offended the federal principle. Since that time, under his direction, the federal Progressive Conservative Party has fought the government at every step to ensure that the federal system would be protected. We were among those who believed that the federal system still could work if all our political leaders had the will to make it work.

On November 2 of this year, almost one year after the government's original deadline for debate on its unilateral action, an event occurred for which those of us who defended the federal principle had fought long and hard. Eleven political leaders of Canada who both represented and reflected the diversity of Canada met to discuss the constitutional resolution.

This meeting was made possible by the decision of the Supreme Court of Canada that the government's original plans were unconstitutional. It is the conclusion of that meeting that we are discussing today. That decision occurred before the government's proposals were rushed off to Great Britain only because our party, under our leader, fought a long parliamentary battle last spring. Many Canadians may have

forgotten that at that time we were told by the Leader of the New Democratic Party (Mr. Broadbent) that we were wasting the taxpayers' money and that we should get on with the job, although it was a position that he had supported earlier. In spite of it all, we remained determined to fight for the right of the Supreme Court of Canada to render its decision. We remained hopeful that Canada's first ministers would use the opportunity which we had provided them to meet once more.

On November 2 the first ministers did use that opportunity. And on November 5, Canada's political leaders restored our faith in the federal system. They proved that they could put aside their personal, political and sectional interests to reach a compromise for all Canadians. I suggest to hon. members that the same spirit must prevail in this House as well.

In defending the Canadian federal tradition of consensus, we were often accused of being naive or of failing to support such worthwhile measures as the Charter of Rights and Freedoms. But we retained our faith in the nation, in the principle of federalism and in Canada's political leaders. And in the end, I believe we and all Canadians who held that view have been rewarded for that faith.

What, then, is the resolution before us and how does it compare to the old resolution? I believe that Canadians have been rewarded by a new constitutional resolution which is dramatically different from the one which we debated last fall, winter and through the spring.

When speaking in those debates, I and other members of my party outlined four main objections to the government's proposal. Our primary objection was to the unilateral action of the federal government. The resolution before this Parliament today has the support of ten Canadian governments. It represents the result of compromises on all sides. As a result, Canadians will have a truly Canadian Constitution made in Canada through the Canadian tradition of consensus.

We also objected to the interim amending formula which would have subjected Canada to the tyranny of unanimity for several years. We believed such a complicated formula was unnecessary because agreement could be reached on a permanent way to amend the Constitution in the future if the federal and provincial governments met once more to discuss it. The new resolution contains no interim amending formula. We must ask why that is so. It is because the agreement which we always believed was possible was reached.

The old resolution also had a permanent amending formula to which we objected. The outdated Victorian formula did not conform to the reality of the Canada of today nor, I suggest to hon. members, to the Canada of tomorrow. It did not treat the provinces equally and it provided central Canada with a permanent veto.

Since October 2 of last year, our party maintained that the so-called Vancouver consensus amending formula represented the reasonable basis for an agreement among all governments. The Vancouver formula had the advantages of treating provinces as equals and of being flexible while still protecting the diversity of Canada.

It is this formula, as adapted through intergovernmental co-operation, which is contained in the present resolution. I say to all hon. members that it was that amending formula, one which created different classes of provinces and therefore, by extension, different classes of citizens in Canada, that we fought so hard to have removed from the resolution. Those of us who do not come from central Canada felt it was time not only that we be given equal rights, but that we also be given the responsibility of contributing to the country on an equal basis.

Among the government's original proposals there was one feature which we regarded as highly dangerous and divisive. That was

the referendum provision, controlled entirely by the federal government, which was open to potential abuse and would have created needless strife within the country. There are those who say it is the ultimate exercise of democracy, but if we look at the old resolution we will see that the manner in which it could be used would have led to division, strife and rancour rather than agreement. Canadians did not want a Constitution which might pit region against region and neighbour against neighbour. Canadians needed and wanted a Constitution which would unite them.

There is no provision for a permanent referendum anywhere in the present resolution. Canada's political leaders have indicated in their wisdom that such a dangerous and divisive

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mechanism, a provision which like unilateral action reflected a distrust of the federal principle, was unnecessary, Throughout the debate on the old resolution, our party offered a number of compromises which would have eliminated our major objections. But most of all, we asked that all our governments return to the bargaining table to discuss the constitutional proposals. When they finally did, Canada's governments removed the most objectionable sections from the old resolution and, I believe, crafted a completely new document of which Canadians should be proud.

The Constitution agreement reached by ten Canadian governments and opposition parties in this House produced a Charter of Rights and Freedoms in which all Canadians should take much pride.

The charter of Rights and Freedoms before the House today contains all the essential features which were developed by the Special Joint Committee on the Constitution, with exceptions that I will come to later, in response to the representations of thousands of Canadians. Today those representations are crafted in a document which will enable the courts, Parliament and the legislatures actively to protect the rights of all Canadians.

The premiers' particular contribution was to introduce the concept of a legislative override. This is an important innovation which will strengthen the effectiveness of the charter of Rights and Freedoms. I think it is important that Canadians understand this innovation, particularly because some people are suggesting that this innovation has produced a "watered down" Charter of Rights and Freedoms.

No country in the world, not even Canada, enjoys a system which could perfectly guarantee our rights. The Parliament and legislatures of Canada are not perfect. They have done injustices to individuals and minority groups. But the Supreme Court of Canada is not infallible either. lt is equally capable of making mistakes and doing an injustice to Canadians. In an imperfect world Canadians must choose between frail human institutions and decide which should hold the final authority.

A legislative override leaves the final authority, and only the final authority, with the people's elected representatives. You might then ask how that would work. Suppose a future Supreme Court decided that provincial legislation allowing prayers in public schools violated the charter, and specifically the freedom of religion provisions? A provincial legislature would have to decide whether this legislation was so important and so popular that it should still be enacted. It might feel that the court had misinterpreted the intentions of those who drafted the Charter of Rights and Freedoms or the popular will of the people.

Having decided that the legislation was important enough, Parliament or the legislature would have to state publicly that it would pass the legislation knowing that it conflicted with the Charter of Rights and Freedoms. Not only that, it would have to introduce the legislation knowing it would have to be passed and scrutinized again every five years. Obviously, a government

would do this only when it felt that the legislation was very important and was supported by most people. This probably explains why legislative overrides have never been used by any of the provinces which include them in their bill of rights in Canada at the present time.

It is important that Canadians understand that Parliament or a provincial legislature would not be opting out of the guarantee of, in this example, freedom of religion. It would only be stating that this single piece of legislation should still be effective even if it conflicts with the freedom of religion. All Canadian governments have affirmed their commitment to protecting our traditional rights, such as freedom of religion and speech. Ten Canadian governments are also committed to guaranteeing more modern rights, and here I am thinking specifically of the rights of the mentally and physically disabled. It is that section which I believe puts our charter in the vanguard of a modern charter, so to speak, and I am pleased to see those provisions included.

The importance of the commitment of Canadian federal and provincial governments to the rights contained in the charter should not be underestimated. This commitment will open the way to progress in including further guarantees in the Constitution over which our party has expressed some concern. More importantly, all the work which was done, all lofty phrases which were inscribed, and all the promises which were made by all parties in this Parliament during the hearings of the Constitution committee would have been worthless without the full commitment of the provincial governments to the Charter of Rights and Freedoms. It was unthinkable, in my view, that we would have a charter of rights and freedoms and then we would have provinces saying from time to time that the charter would not apply in their province. How, for example, would one be able to opt out of rights?

There are a number of members who insist that a charter of Rights and Freedoms is a hollow document, that it cannot protect the rights of citizens. While I am one who cherishes the rights handed down through the English common law, I remain convinced that redress for violations of rights by government is made possible through the inclusion of a charter of rights and freedoms—the example of Japanese Americans who, while not protected by the charter of rights of the United States either, were given compensation after the war. Japanese Canadians have not been compensated to this day. I have one such person in my riding at the present time. What we have to fear is not the violation of our rights by our fellow citizens, but by the government itself.

Additionally, there are those who point to the U.S.S.R. and other dictatorships as having an entrenched charter of rights, and yet, despite this provision, violations of human rights goes on daily. How do we answer this charge?

I said that our government institutions are fallible because we as people are fallible. The difference between the U.S.S.R. and democracies though is apparent. Dictatorships use charters for propaganda purposes. They have no intention, either at home or internationally, to observe the rights they so piously adopt.

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I would now like to Speak personally for a moment. My father and his family carne to this country in the 1920s. They were given freedom. Yes, they were given that freedom without a charter. But many immigrants, because of the loss of country and status, see a charter as a symbol, as a written guarantee of the rights they so vigorously defend. charters can be empty of resolve. My uncle spent 22 years in a labour camp in the Soviet Gulag. My cousins to this day cannot return to the Ukraine where their family lived, but must remain in the so-called virgin lands. The rights in the U.S.S.R. are empty. Their charter is for propaganda purposes only. But let us not compare either the purpose

or the action of the Soviet authorities with our country and the desire of its citizens to protect our basic rights.

On October 6, 1980 the Minister of Justice suggested that the government was completing the work of the Right Hon. John George Diefenbaker. Back then, nothing could have been further from the truth. Prime Minister Diefenbaker respected and loved Canada too much to have acted unilaterally in a way which would have affected the federal system. But I am also certain Prime Minister Diefenbaker dreamed of the day when all provincial governments would commit themselves to entrenching a bill of rights in the Constitution. Now Canada's first ministers have helped to fulfil that dream.

The Canadian Charter of Rights and Freedoms affirms and extends the freedoms of all Canadians. It should be a source of pride to all Canadians for all generations to come. If the first ministers drafted a document of which all Canadians should be proud, some people must be wondering why our party has suggested some changes to the accord. Perhaps it is because, as Sir John A. Macdonald once said of the American constitution:

To say that it has some defects is but to say that it is not the work of Omniscience, but of human intellect.

We must not forget that our first ministers met in a pressure packed period of four days and may not have had the opportunity to consider the full implications of some of the actions taken.

I am suggesting that Parliament has a role to play to ensure that the rights of all Canadians have been kept in mind and to provide, though it might be foreign to us in this chamber, "sober second thought" to their work. That there is room for change and "sober second thought" is obvious from the fact that the resolution which we are debating is not identical to the one which would have been produced by the constitutional accord.

A tremendous furor has been created over the application of the "notwithstanding clause" to the guarantee that rights should apply equally to men and women. A similar furor has surrounded the absence of the guarantee of aboriginal rights from the present resolution. Both of these outcries, on the part of women and on the part of the native peoples, have been perfectly justified. And it would now appear that both important segments of the Canadian federation will find a place in the final accord which this Parliament will approve. That is a hopeful sign.

It is a hopeful sign because it indicates that many Canadians want to play a part in the agreements which are often reached by first ministers behind closed doors. They want to make sure that those agreements truly reflect the diversity of the Canadian federation. Canadians have shown that they want to be part of the process of constitutional change. I want to speak for a moment about native rights. People sometimes ask me why I am interested in going beyond the entrenchment of the rights that are now in Section 25. One of the practical examples I have been using is as follows. Suppose, Mr. Speaker, that you have bought a quarter section of land but when you receive title you find that you receive title for that quarter section with one small omission: the back 40 acres are not included. Suddenly you find that instead of 160 acres you have only 120 acres, although the deal was for 160 acres.

There are many Indian people in Canada today whose treaties still are unfulfilled. They still have treaty entitlement. They are still cut off from lands in British Columbia, and there are treaties still to be signed north of 60. I say to Canadians, all we are asking is for a fair deal. We are asking them to apply this to themselves to see whether or not it would be acceptable to them if the agreements they had made were in fact different from the agreements they received in the end. Also in reference to Section 28, this party, as proposed by my leader on Friday last, insists that Section

28, as it appeared in the resolution which came out of the joint committee, be restored in its full power.

There is a hopeful sign during these days and these hours when these negotiations take place that these agreements can be made and included as amendments to our constitutional proposals.

On Friday also the Minister of Justice suggested that every Member of Parliament should use gentle persuasion wherever possible to pave the way for a solution in the areas of disagreement. It is in this spirit, and not in a partisan way, that our party has been seeking a reconciliation in the areas I have mentioned of women's and native rights. Now is not the time for any party or person to trumpet their role in bringing about a potential consensus in these areas. It is a time for all of us quietly to play whatever role we can in bringing about these changes.

It is in this same spirit that members of our party have been seeking to make the constitutional accord acceptable to the people of, and perhaps the government of, Quebec. As a Canadian from the west, I can remember the isolation and alienation which we felt when the constitutional proposals were going to be imposed on us, proposals we thought were detrimental to our region and our people. I do not think we should forget now that the same sense of isolation could be felt by another important region of the country.

Under the direction of our leader, we have been seeking to make the constitutional proposals acceptable to the people of Quebec. That is the spirit in which we will propose the

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amendment on financial compensation. That is the spirit in which today our leader has contacted the Premier of Quebec concerning minority language education provisions. The Leader of the Opposition has asked the Premier of Quebec for a clear commitment that his government will recognize the right of all Canadian citizens to minority language education. We are asking the Premier to take the essential first step, in guaranteeing these rights, after which would commit the government of Quebec to accept the rights of all Canadians to minority language education voluntarily.

All Canadians would like to see all regions involved in the final constitutional accord, and all Canadians feeling at home in this country. What we are seeking is a compromise which would make the accord acceptable to the government of Quebec.

Some members of the House, the press and of the public might say that is impossible. If that is the case, let us be sure that the people of Quebec realize that their government will reject all reasonable proposals. If, regrettably, that is the case, let us make it clear to the people of Quebec that they only appear to be isolated, isolated by a Quebec government which is more interested in deliberately asserting its separatist views than in working within the framework of the Canadian federation to reach a genuine agreement.

I want to spend some time, Mr. Speaker, speaking in reference to how the accord affects the people living north of 60, in the Northwest Territories and the Yukon.

The accord provides an amending formula which, I believe, requires modifications to meet the requirements of Canadians living north of 60. Many of us dream of the day when Canadians living in the Northwest Territories and the Yukon achieve full responsible government. That should happen today. I just cannot understand why we cannot have full responsibility for those territories today, why we cannot accept the concept that those who are elected must be responsible to those who elect them, and why we cannot remove the federal bureaucratic shackles that have existed for so long north of 60; but I guess change comes very slowly.

Having said that, we look forward to the day when they will achieve full responsible government, and once having achieved that government they eventually will make the decision on the advisability of attaining provincial status. The amending formula allows these citizens to make that judgment, as we see it now, without further change to the amending formula; that is, we are not restricted to the number of provinces needed under the amending formula, but rather to a mathematical formula. There is a section in the accord which I seriously believe brings into question the future of the people living north of 60, and that is Section 41, specifically Section 41(e).

As this Parliament takes a sober second look at the resolution, we might also want to consider the part of the constitutional resolution which will involve the provinces in the creation of new provinces out of Canadian territories. The power to create new provinces out of territories presently rests with the federal government. That is in Schedule 2 of the amendments to the British North America Act, 1871. According to the resolution, this power will still rest with Parliament in part, but in another section, namely Section 41—the schedule is in conflict with Section 41-this power will rest with the federal and the provincial governments. This contradiction should be cleared up so that the intentions of the government in this matter are very clear to all concerned. I suggest to the Minister of Justice that he look at both the schedule and Section 41(e) to see if we cannot clarify that matter before the resolution has the final approval of this House.

Mr. Nielsen: And Section 41 (f)

Mr. Epp: My colleague, the hon. member for Yukon (Mr. Nielsen), also refers to Section 41(f). l believe he will be speaking more specifically about the north later on in the debate.

As always when compromise is reached, one would like to see changes which cannot be achieved at the moment without jeopardizing the agreement itself. For example, the fact that property rights have been left out is of personal concern to me and I know to many colleagues on this side of the House at least. I urge the provinces to rethink their opposition to this provision. If rights relating to property can be included for other groups, such as natives, I would think that some way could also be found to guarantee property rights and yet allow provincial governments the administrative freedom to acquire property for the benefit of the general public.

I also want to issue a warning to this Parliament and future legislators regarding the absence of rights for the unborn. I am not speaking as a critic of my party but personally as a member of this House. The Minister of Justice and his officials argue that the charter is neutral on this issue. I pray that legislators and courts will not take away, because of this neutrality, the rights of the most defenseless in our society. If I have any disquiet today, Mr. Speaker, it is on that topic.

Some hon. Members: Hear, hear!

Mr. Epp: In conclusion, the debate in this Parliament on the resolution is beginning to settle in the minds of all members of this House the fact that constitutional compromise is possible. When we have concluded this debate Canada will have a Constitution which contains all of the good features of the British North America Act which have served us well in the past. Canada will also be able to change its Constitution in Canada, and we will have entrenched a commitment to equalization, a fuller definition of provincial resource ownership, as well as the charter of Rights and Freedoms to which I referred earlier.

I am relieved that a debate which began in anger and which has created deep divisions in the country is ending in good will. I hope there are others like myself who have had their faith in the federal principle, upon which this nation was founded, rewarded, and I hope there are others whose faith in the principle has been restored.

There are many challenges to be overcome in the coming decades which will require the same Canadian tradition of consensus and compromise. It is time that we left division. It is time that we left the bitter words of the last year far behind us and start to face the challenges of the future.

Someone has said, and John A. Macdonald used to paraphrase it, that Canada is more than a mere geographical expression. All of us who have taken a look at Canada's geography know its geographical grandeur. Whether one sweeps from east to west to north or the other way around, one has been filled with awe with our country. Canada is more than a geographical expression. It is a land of people, people who in their own way each want to build a better Canada. During the confederation debates in 1865, the Hon. George Etienne Cartier said:

I view the diversity of races in British North America in this way: we were of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare. This diversity is our strength.

The question might be asked, how do we repay those who laid the foundation of this country? Lord Tweedsmuir probably said it best when he said, "We can only pay one debt to the past, by putting the future in debt to ourselves". That, Mr. Speaker, has been our work and that should be our legacy.

Hon. Judy Erola (Minister of State (Mines)): Mr. Speaker, I am very proud at this moment to be a Canadian woman. Equality for myself and all Canadian women has ceased to be an elusive dream. Instead, it is taking on the shape of reality, moulded by generations. It is equality not according to the old maxim "As persons in matters of pains and penalties", but as persons in the matter of rights and equality. You can bet that we want full equality.

What is this equality that we women have been fighting for? How many generations of men and women have asked the question: What do women want? Well, for our grandmothers who were not even considered persons and who fought for the vote, and for our mothers who supplied the labour force during the war and since, and for our sisters and daughters and granddaughters, I will tell you what we want. We want the rights in the Charter of Rights and Freedoms guaranteed equally to male and female persons. That means the original wording of Section 28:

Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. It is that simple. We want the reference to Section 28 in the override clause, Section 33, deleted. The charter will then carry a forceful statement of equality. This will give the courts a strong direction that sex discrimination cases require their strictest scrutiny.

For those who argue that affirmative action programs are jeopardized by the removal of Section 28 from Section 33, I remind them that the present constitutional proposals clearly state that affirmative action programs are not subject to the normal rules barring discrimination on the basis of sex. To go back to some of the things which have happened to women in this country, I am sure there are many who are not aware of the fact that long before the era of the suffragists, women in Quebec, Nova Scotia and New Brunswick had been entitled to vote and hold office. Why? What happened? Simply because it had not occurred to anyone to make laws to prevent them from voting. Of course, you can guess what happened when this existed; legislation was enacted to remove that right.

It was not until April 25, 1940, with the capitulation of Quebec, which was the last province to give votes to women, that the injustice was overturned. It is curious to

recall that in our so-called enlightened age it is almost impossible to believe that the late Senator Therese Casgrain as recently as 1970 became the only one of Canada's leading suffragists to hold federal office. I would like to think that Madame Casgrain, who died just three weeks ago, would be sitting in that gallery this afternoon, but I am sure that she is with us in spirit today. Well, women got the vote and, as most women know, we who were busy building homes, feeding cattle, ploughing the fields and milking the cows—as my mother did—having babies and raising families, then had to fight for the right to be recognized as persons. Most of us in this House are familiar with the Persons' case, but I think it is worth while to go over it again. In 1928 five Alberta women, the "five persons" as they were later known, Henrietta Edwards, Irene Parlby, Louise McKinney, Nellie McClung and Emily Murphy, appealed to the Supreme Court of Canada to decide whether women were "qualified persons" who could be appointed to the Senate. Of course, the Supreme Court rejected this idea. The case was then appealed to the Judicial Committee of the Privy Council in England who accepted the idea that women were, indeed, persons. This now forms part of the constitutional law of this country.

However, this should serve to remind the men of this country that for decades, right up to the present time, women have participated and agonized in this constitutional exercise. We look upon the events of the past year as events which have been controlled, to a large degree, by women themselves. They did not let the drafters of the Constitution forget. Back in February, 1981 many thousands of women told the federal government that equality must be guaranteed in any charter of Rights and Freedoms to be entrenched in the Constitution. The government agreed to this and a special guarantee, Section 28, was added to the charter in the general clause. In April, 1981 this guarantee of equality for women and men was passed by all three parties in the House of Commons. Women thought that they had a guarantee that all laws in Canada would have to treat men and women in Canada equally. So there it Was. We have the charter, standing the way we want it, clearly defined. The battle was won, we

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thought. However, it was not. Why? Because the provinces, the Supreme Court and the opposition parties put this government in the position of bargaining for consensus. The provinces changed the charter without consulting the people within the provincial boundaries.

We will recall, but I think it proper to remind this House and the people of Canada that it was the federal government that held constitutional hearings and an all-party committee sat for months. There were 303 witnesses, including individuals and groups, along with almost 1,000 briefs, letters and telegrams which were heard and received. The committee listened, responded and so developed a charter that did respond to the hearts and minds and needs of the people of Canada.

When it was found that the charter had changed, bowing to the pressure of the provincial premiers, the women looked up and said "No". Women, united as never before, said no. It was time to tell the provinces no. Much credit is due to special groups and dynamic individuals who I will name later on this afternoon, but the credit for speaking out goes to the women of Canada, women working both in and out of their homes, mothers, grandmothers and daughters and particularly the women of this House. I refer to the member for Kingston and the Islands (Miss Macdonald), the hon. member for New Westminster-Coquitlam (Miss Jewett), the hon. member for Vancouver East (Mrs. Mitchell) and the hon. member for Vancouver Centre (Miss Carney)—in fact, all the women on the opposite side of the House.

It goes without saying—but I think I should mention it— that the women on this side of the House have given tremendous support, particularly my close friend and colleague, the Minister of National Health and Welfare

(Miss Begin), who is leading us into another major battle for pension reform, which is very much needed to ensure the economic security of the women of this nation.

I must also pay tribute to the Prime Minister (Mr. Trudeau), who displayed his total commitment and confidence when he appointed me as the minister responsible for the status of women.

We have also been supported all the way by those women members in the other place. I refer to Senators Bird, Rousseau and Neiman who have worked tirelessly in support of these efforts.

Who actually galvanized these women into action? Two groups provided the main thrust. The ad hoc committee, with women such as Pat Hacker, Lynda Ryan Nye, Rosemary Billings, Marylou McPhedran and countless others, and the Canadian Advisory Council on the Status of Women-capably led by its president, Lucie Pepin, I am pleased to say—have provided an extremely powerful force in the past few weeks. Fortuitously, the council was meeting in Vancouver at the time of the signing of the final resolution, and it moved very quickly and very effectively. If there was any doubt about the strength and integrity of the Canadian Advisory Council on the Status of Women, those doubts have surely been dispelled by the events of the past ten days.

I would like to remind this House that the president of the advisory council, Lucie Pepin, and many of her provincial chapter councils, met this last weekend in Saskatchewan. These groups have managed to reach almost every Canadian woman and, I must say, it is working. This network—and we call it a network because that is what it is—went into action and the premiers heard from the women. Pressure continued to mount on each premier until, one by one, they fell. But will we have Saskatchewan? In order to adhere to the spirit of the accord, we must have all the provinces onside. I say to Saskatchewan, to the Premier of Saskatchewan, to the people of Saskatchewan: join us. I am convinced that reason and justice will prevail.

I must also say that much credit must go to a group of women which has worked largely behind the scenes for the past week or two. I refer to my department, Status of Women Canada, and its co-ordinator, Maureen O'Neil, who with a small but highly skilled staff have kept me and my colleagues informed of the implications of the various decisions and options offered throughout these negotiations.

On Friday the Leader of the Opposition (Mr. Clark) spoke of his background of growing up on a farm where women were equal. I share that background. I grew up on a farm, and I had the added advantage of growing up next door to an Indian reservation. This has helped me to understand the even greater injustices which have been done to native women. These women—including Sandra Lovelace, Jeanette Lavell and Mary Two Axe Early—must share equality with men under and before the law, a law for all Canadians.

Again I return to the Leader of the Opposition who, on Friday and on previous occasions, indicated his sensitivity to and understanding of this issue. This has been healthy for this country and for this House because during the past week, as never before, the men of this House have opened the doors and let the views of women in. Lest we think this has been a battle fought for and with women only, just this afternoon I received a letter from a senior citizen, and I am compelled to quote part of it:

I am a senior citizen war veteran who believes that l fought for a better world and society.

It is hard to understand that a minister had to be appointed to sec that a Canadian's rights have to be upheld. There should be no question in our country of any Canadian being slighted on their rights. As l write this I am sorry to hear the radio news that there

is a question of whether or not rights will be included in the Constitution. All Canadians must enjoy equal rights without questions being involved. It is a shame that any Member of Parliament should voice anything contrary.

Thank you for trying to make Canada equal for all citizens. You will pardon us, Mr. Speaker, the women of Canada, if we are optimistic and hopeful and just a little bit cocky. We have come a long way, but there is one step to go.

I will close on that rather optimistic and perhaps light note because I think a little humour always helps us move along the way. I feel today very much as the quarterback of the Edmon-

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ton Eskimos must have felt at about this same time yesterday. How can we lose? One final kick. We are still in the game.

Some hon. Members: Hear, hear!

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[…]

Miss Pauline Jewett (New Westminster-Coquitlam): Mr. Speaker, I too am grateful to have the opportunity to participate in this debate. I believe this is the third occasion on which I have addressed myself to the question of the role of women in Canadian society and to the future equality of women with men in Canadian society. Therefore, like others, I am distressed to discover that what is called an "override clause" has been put in the equality of rights clause, Section 28. With a lot of my colleagues, I was very glad that many features in the accord that was reached between the first ministers of the provinces and the Prime Minister (Mr. Trudeau) the other day are good ones, are progressive ones, are strong ones and are desirable ones. In that connection I was very happy to read that the new Premier of Manitoba had said that he will certainly not renege on francophone rights in that province or subject them to legislative approval.

Some hon. Members: Hear, hear!

Miss Jewett: There are good things in this resolution, but it is almost heartbreaking to see the legislative override of some of the most fundamental and most important parts of the Charter of Rights and Freedoms. When the proposal was put before the House of Commons I think we all felt that section 15, the equality of rights section outlawing discrimination on grounds of race, colour, religion, sex and so on, and its second component, the affirmative action provision encouraging legislatures to take affirmative action for disadvantaged groups, was one of the strongest parts of that charter. Perhaps it was because there were no women present, or perhaps it was because there were no black people present that the first ministers of this country crippled that section of the charter. It is all very well to say that a specific act can discriminate only for five years, but to me that almost destroys the intent, the purpose, the symbolism and the substance of that section. To then go on and apparently subject Section 28—which the women of Canada strove so hard to get in the Constitution and which the House unanimously passed in April-to an overriding provision that a legislature or the Parliament of Canada could deny the very rights and freedoms referred to in this charter guaranteed equally to male and female persons and that the government would do this apparently as an oversight, that it had not really thought about Section 28, the section to which Parliament gave a great deal of thought, adds insult to injury.

Hon. members will remember that the very day after the accord was signed I asked the Prime Minister (Mr. Trudeau) whether Section 28, the section guaranteeing women's equal rights with men, was included. I remind you, Mr. Speaker, that

the Prime Minister said:

I can only answer that my impression is that the clause would continue. I have not been involved in the drafting which went on between provincial and federal officials yesterday afternoon and, I believe, during the night as well. He went on to say:

There were some deletions, and aboriginal rights was one of them. Maybe the other clause was another. I am not sure. I will have to check that, and that is why I say I will see what was done on the drafting over night. A few days later a writer for La Presse said:

[Translation]

Questioned in that connection on the day following the constitutional conference by a NDP member, Miss Pauline Jewett. Mr. Trudeau admitted his lack of concern.

Mr. Trudeau remembered that he had sold off native rights. However, he only had a vague idea about women's rights. We know that women are rather unimportant. A mere bunch. I tell you—

[English]

It was, of course, tragic that Section 34 affirming the rights of the native peoples, the aboriginal peoples of Canada, was dropped. At least they were remembered long enough to be dropped. Women were not even remembered.

Let us take a look at what the provincial premiers have said in the few weeks since while struggling to get back on side. Their comments vary from that of the Premier of New Brunswick saying there had been no discussion at all of Section 28, that their intention in the accord was to have Section 28 remain intact, with no override, as a statement of the equal rights of women with men, to that of the Premier of Alberta saying, first, that he was not sure whether or not Section 28 had been discussed, and then saying later that he had not intended that it be subject to the limitation that we have been calling the override, which would take the guts right out of it. We find Premiers Bennett and Davis saying that it certainly was not their intention to take out that section, and we find the officials saying that "it had been a drafting error".

I think we might all come to the conclusion that no one seems to know whether they discussed this section, although the balance of the evidence seems to be that the first ministers did not discuss it. However, if they did discuss it, the impression most of them give is that they wanted Section 28 to remain intact, symbolically and substantively. No one has come forth publicly and said that this section was to be overriden as Section 15 was overriden.

I would suggest to you, Mr. Speaker, and to fellow members that we could appropriately, given this incredible confusion, pass the section in its original form in which we saw it in April. As I understand it, it is not part of the accord that it should be overriden, given what all of the premiers have said.

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But what does this tell us about the position of Canadian women in society? Are we simply a detail, a drafting error? I noticed that we were recently blessed with the neanderthal wisdom on the editorial page of The Citizen of Ottawa. The editorial was headed "fix the details later". The editorial reads:

The complaints by various women's and native organizations about the constitutional resolution new before Parliament are not sufficiently persuasive— Let me emphasize the words "the complaints". We are talking about our very rights as human beings, in the case of women, the women's human right to equality, and in the case of the native peoples of Canada, their rights as the original peoples of this country. This editorial is talking about these as complaints. That is why a great many of us

are distressed by the possibility that eviscerated Clause 28 will remain. Not a single member of this House, barring the Prime Minister and the Minister of Justice (Mr. Chrétien) who were the negotiators, should support Section 28 if this override remains in it.

Some hon. Members: Hear, hear!

Miss Jewett: Not a single member of this House should support it. But if any members do support it, do you know what they would be doing, Mr. Speaker? It would mean that we would be taking an enormous backward step, we would be denying the principle of equality of men and women. We would not have even the status quo. We would be going farther and farther backward.

I hope the minister responsible for the status of women agrees, I believe she does. I hope she does. She was not part of the negotiations. I do not know whether she asked, but she certainly did not know what had happened to Section 28. I hope that neither the minister responsible for the status of women, nor any woman nor indeed any member, would support this section unless the amended version that we are discussing today is brought in by the government itself on the ground that the cheapening of Section 28 was not intended in the accord.

For those who would argue that they can only accept the quality of women conditionally, I believe that they too are saying that they do not believe in the fundamental principle of equality of women with men. They are denying, as I said a moment ago, women's human right to equality. It is a goal to be achieved because we do not have it yet; it is a goal to be achieved in and of itself. That is how a lot of us see the original Section 28. We see this, as I say, symbolically as an expression of the equality in our society of men and women, their entitlement equally to the rights and freedoms in the charter. We see it that way, as I say, symbolically. We also see it as a section in its original form of enormously important substance, because we do not in fact have equality, and when I say "we" I mean women. We do not in fact have equality today. Therefore, Section 28 becomes a goal to achieve.

For those who worry that affirmative action programs would somehow be ruled out by Section 28, I can only say that as long as an affirmative action program is a program that will help to achieve what is in Section 28 there is no conflict whatsoever, and Section 15(2) and Section 28 would be in harmony.

Similarly, if there is a discriminatory act under Section 15(1), and it is a positive act which is helping to achieve greater equality for those who do not have it now, then it too would fall within the ambit of the broad statement of equality in Section 28.

The fears then, it seems to me, although legitimately raised, are not legitimately founded. As a previous speaker said, there should be no taking of credit; every woman's group in Canada had a great deal to do with getting the paramountcy clause, as I call it, Clause 28, included in April. I personally think the former minister responsible for the status of women had a great deal to do with getting the clause in.

Miss MacDonald: Right on.

An hon. Member: He sure did.

Miss Jewett: Every time he spoke, he turned another million Canadian women into feminists.

An hon. Member: The Lloyd works in strange ways.

Miss Jewett: While I am not going to single out, with that exception, who made such enormous contributions to the whole concept and principle of equality of the sexes, I must with sorrow express my regret that, with the exception of the present minister responsible for the status of women, and I am sure, although I do not know, the present Minister of National

Health and Welfare (Miss Begin), no other woman on the Liberal side has engaged in this battle. They were not present at the famous February convention. They were not present at rallies in the past two weeks through which we have been trying to get the clause restored in its purity, and they were not even present today, with one exception, when the minister responsible for the status of women spoke. Have the women of the party been speaking outside the House, holding rallies and organizing? I am very distressed to say they have not. It seems that they have become gagged. Even in Quebec—

[Translation]

Three days ago, an article appeared in the newspaper La Presse:

A gentle Yvette. The organizer of the Yvettes' movement, Mrs. Louise Robic, slightly worried the Liberals by insisting that the government account for its failing to entrench women's rights. Canadian women want to know what happened to their rights and freedoms… "A lot of women will be suffering from ulcers", she said.

What could have become a real dispute did not last long however because Mrs. Robic, as befits a good liberal, readily accepted. Mr. Chrétien's arguments. And she added: Well, we must fight the provinces, not the women of Quebec or Canada.

[English]

What can we do? I said a moment ago that the constitutional accord, or much of it, was worked out in the kitchen between the Attorneys General of Saskatchewan and Ontario

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and the federal Minister of Justice—if ever there was a time when a woman should have been in the kitchen!

Some hon. Members: Hear, hear!

Miss Jewett: Much of it was drawn up, as indeed the whole accord was, without giving that kind of thought to the needs and the rights of the native peoples, the disabled and certainly of women, and I guess that proves once again that much as others may sympathize—goodness knows, many men do— when they get down to their negotiating and dealing, they do not think of the other half of the population not represented, and they do not think of the disadvantaged. Those thoughts are not paramount.

Therefore, as far as women are concerned, we must once again have our own party develop affirmative action programs, and develop them now, with the party leaders at all levels and the committees in every constituency saying: We must have 50 per cent of our candidates women.

Some hon. Members: Hear, hear!

Miss Jewett: That kind of action must be taken, and not just in the weak ridings. Since the kitchen-created Constitution was influenced enormously by officials, federal and provincial, only two of whom to my knowledge were women, clearly we must have an affirmative action program now in the federal public service of Canada to ensure that women are pulled up—and there are lots of bright women there—and put in positions of responsibility and authority. The federal government did it once, and rightly so, when it discovered that francophones constituted only 7 per cent or 8 per cent of the senior public service. The federal government did it just by saying: That will not do. I do not believe there was even a written edict; it was just the Prime Minister saying: That will not do. That is the kind of leadership women have not had from the men of Canada in the Liberal Party and government. There has to be affirmative action there. Clearly, it is in the senior ranks of politics and the bureaucracy that power resides.

Despite the evisceration of this document, the Supreme Court of Canada will still have a role to play, and it must also be changed.

There must be women on the Supreme Court of Canada as well, and this has been argued before. That should be the next fight.

The lawyers who will be working to interpret this Constitution in various cases will, I am confident, be increasingly more balanced as more women graduate from law school. As I have said, the fact that there are more women graduating from law school is one of the most exciting things which has happened in recent years.

I read an article today by Michele Landsberg of the Toronto Star entitled "Help wage war for women's equality". It is an excellent article and I recommend it to all Members of Parliament. In that article she suggests that there be a women's watchdog in Ottawa to protect our equality rights. Right now the best watchdog in Ottawa is the ad hoc committee. I would also approve of that suggestion. I believe that until we have a strong if not equal, or perhaps for a period more than equal, representation in this House of Commons and in provincial legislatures, such as in Manitoba where women members constitute 12 per cent, and in the bureaucracies both federally and provincially, I do not believe we will be able to ensure that the indifference and neglect to the fundamental principle of equality of women will be seriously addressed. As I have said, I hope that the government will realize that since the dismantling of Clause 28, according to most of the premiers, was not part of the accord, it can proceed and we can proceed in Parliament.

It is true that it was neglect and indifference that made this so, but it provides us with a chance to benefit from it. We must remember, as the hon. member for Provencher (Mr. Epp) said a moment ago, that as important as the two orders of government are in this country, because it is a federal system, it can be said there is a third order. That is the people of Canada who are represented by various groups and many organizations. During the last year, we have certainly seen that third order in operation, as far as the women of Canada are concerned. I wonder if the provincial premiers have ever read the marvellous briefs that were prepared for the Joint Committee on the Constitution by women's groups and other groups all across this country. I wonder if they know that there is a third order, which is the people of Canada represented by these diverse groups.

finally, I submit that if we do not restore Section 28—and all of what I have said applies to Section 34 concerning the rights of the aboriginal people—it will go down not as an important day in Canadian history but as a day of infamy. I do not believe that is too strong a word to describe this. I hope that when the women of Canada have 95 per cent of the representation in the House instead of the 5 per cent they now have, and when we hold 100 per cent of the premiers' places instead of none, and if, as may well be, we are pioneering a new constitutional accord, I hope and I am indeed confident that we will not treat the other half of the population with the indifference, injustice and complacency which so many of their number have inflicted upon us. That is a promise.

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Mr. Robert Daudlin (Essex-Kent): Mr. Speaker, I rise to participate in this debate, humbled by the importance and magnitude of the project that we are undertaking but filled with joy at participating in the final act of the attainment of majority for Canada and the law permitting the amendment of our constitutional document at home.

I wish that the official opposition had earlier been more concerned with substance than with the process which, in my view, might well have strengthened the negotiating stance taken by the federal government on behalf of all Canadians and might, in the end, have produced an even more positive result with regard to those concerns which

are now being universally expressed as they pertain to certain absences from the resolution.

Even this evening, my friend, the hon. member for Calgary North (Mr. Wright), has once again returned to the old sop of concerning himself with the process. I-Ie spoke of the Prime Minister (Mr. Trudeau) having banged heads in Canada to achieve his concept of the nation while, at the same time, he seemed somehow able to escape the inevitable logic of the fact that the Leader of the Opposition (Mr. Clark) in his term must obviously have been attempting to do the same thing with respect to his concept of what this nation is all about. I think that rather than pointing fingers at each other this evening, we would be taking this debate a step further by suggesting that positions were very strongly held on both sides of this House which, I hope as this debate draws to a close, will produce a resolution that does nothing but win a victory for Canada and for Canadians.

Notwithstanding the past, however, I wish to express my pleasure at the support now being shown for the substance of the resolution agreed upon by the Prime Minister and the Premiers which, with some reservations, is enjoying almost universal support.

Like many others, had I had my preference, I would have preferred a charter of rights and freedoms without the override, without the safety valve as it has been called. Nevertheless, I can accept the position of the Hon. Minister of Justice (Mr. Chrétien) that the override is a safety valve, that it is required to prevent absurdities and, indeed, will undoubtedly rarely be used. But I must at least remind hon. members that the effect of the override is once again to entrust the rights of our minorities to the benevolence and good will of parliaments and legislatures elected by the majorities which have, unfortunately, in the past been found wanting in the measure of compassion and caring necessary to treat our minorities with justice and equity.

The fact is, however, that the Canadian compromise which we now have before us and upon which the loyal opposition insisted, has resulted in the negotiation of a safety valve. I trust that we can count on ourselves and on future parliamentarians to be guardians of minority rights and to ensure that those clauses are so infrequently used that future amendments—and I am sure there will be some—will include the removal of non obstante clauses, or safety valves as they have been characterized.

But lest my comments be regarded by some as being too negative, let me say again that I am jubilant, personally and on behalf of my constituents that the Thirty-second Parliament is coming to grips with this last vestige of colonialism, and is bringing Canada of age.

Let me say as well that if I am jubilant at the event, I am ecstatic at the content and the substance. I suppose it would be correct to say that I am high on Canada this evening. I can stand here proudly and say that as a Canadian I have come of age, that I am a citizen of a country that has had enough faith in itself, its political system and its institutions to require that it have the right and obligation to amend its own basic governing legislation at home. In addition to that, the bringing home process has been accompanied by the creation of the Charter of Rights and Freedoms envisaged by my colleagues and by the government, perfected and forged by the parlia-

mentary committee to which we all owe a debt of gratitude, and kept through much trial and heat, thanks to the perseverence, vision and shared conviction that what was right should and must remain, all of which was shown by my colleagues on this side of the House. History will show, I am convinced, that when others would have abandoned principle for process, this party stood steadfast, resolute in its determination to provide a charter of rights

and freedoms from which every Canadian present and future can benefit.

An hon. Member: And they changed it.

Mr. Daudlin: History will show that while some preached division, discord and failure, this party and those who support it held faithfully to the principle that the people themselves had expressed throughout, that is that patriation with an amending formula go together with a charter of rights and freedoms.

You will remember that there were many in this House who were prepared to throw that charter of rights and freedoms out with the bath water, who were prepared, as the debate continued, to deal only with patriation and, if necessary, to put in an amending formula but, if that was impossible, to deal only with patriation even without the amending formula. Throughout that debate we continued to say no, we must have the amending formula together with patriation; we must have the Charter of Rights and Freedoms. I agree with my hon. friend who says we changed it, but I ask him very sincerely, who required the change?

Mr. Gamble: Everybody.

Mr. Daudlin: He says that he speaks on behalf of everyone.

Mr. Gamble: I didn't say that.

Mr. Daudlin: I presume to speak on behalf of those people who sent me here, and I tell you that he does not speak for the people in Essex-Kent.

I need not enumerate the content and provisions of the Charter of Rights and Freedoms as others have done that already, but suffice it to say that bold new steps have been taken, new frontiers have been envisaged, and the course toward a new Canadian future has been set.

Speaking parochially for a moment, let me say that Essex-Kent, if any place in Canada, can claim to be as truly multicultural as the concept itself implies. A mixture of English, Scottish and Irish, later added to by French, and still more recently by German, Russian, Ukrainian, Portuguese, Lebanese, Japanese, Dutch, and even more recently by the Vietnamese and Laotian migration has created a mix that cried for recognition beyond the original concept of the founding races. I take great joy on behalf of my constituents who have for many years lived the principle now embodied in the words expressing the multicultural nature of our society, and I thank the drafters for those words.

May I say that I share the disappointment of all members of this House, and I trust it is all members, that as yet we have not settled the issue of sexual equality which I, as others, had hoped would also have been entrenched. It cannot be too often said that it is not this government that has stood in the past or that now stands in the way of an accord on this issue, and I join my voice with all others in this country in calling upon the remaining premier to recognize the necessity of joining his brother premiers in rectifying this unfortunate deletion to the charter.

An hon. Member: How are you going to vote on it?

Mr. Daudlin: Mr. Speaker, the member asks how I am going to vote on it. I suggest to him that there is too much good in this resolution to be thrown out just because the agreement unfortunately leaves out certain portions that should be there. I agree with him, it should be there, but I am not one of those who feel that because something is absent the rest should be thrown out. I do not believe the rest of Canada feels that way either.

It is my hope and desire that a settlement will be achieved on the issue of native rights and on the question of Quebec's absence from the accord as well. Surely all members wish that. But again the same reasoning, in my view, applies. The difficulty we have is, having achieved so

much, can we legitimately say that, because we have not achieved in these areas, all else must fail, all else be thrown out? I find it difficult to understand how someone can stand and suggest that because there is a certain portion missing we must lose everything else. This puts me in mind of the child who goes out to play football, does not like the rules and says he is going to take his football home and the game must end. All should not be lost. We have gained so much and there is more to be gained, unquestionably. Surely we have provided the mechanism whereby more can be gained in the immediate, the short-term and the long-term future. Certainly it would be good to have perfection, but I suspect that even what we perceive as perfection, were we able to achieve it tonight, might not be perceived as that perfection a year, five years or ten years from now. So to argue that I and others should not vote for the resolution as it stands or as it may be modified over the next few days, or even the next few hours as the discussion goes on, would be ridiculous in the extreme, and could surely be likened to the ostrich putting its head in the sand. I do not think that is what we are here for. I think we are here as practical politicians to achieve what can be achieved now and for the future, and to ensure that in fact the mechanisms we put in place are sufficiently flexible to allow more to be achieved if and when we can.

I think that my constituents can accept the offers that have been made to Quebec in an effort to induce that government to surmount its avowed separatist aims and to help forge a new Canada. As an aside I must say that I am proud to see the entrenchment of minority education rights across Canada since, as a member of a linguistic minority in my province, I know what pressures have been present that, but for this step,

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must ultimately result in the eradication of the French language outside of Quebec.

This momentous accord is a giant step toward equality of our two founding races, and I urge upon my fellow Canadians in Quebec to support our actions to entrench what they have so willingly given without legislation for the past 100 years. I hope that even at this late hour that accord can be reached on the final obstacles and that the whole of the country will march to the sound of a new Canadian drummer; a new accord as we are trying to forge it this evening and in the next few days.

finally, Mr. Speaker, let me say, without partisanship intended but with a great deal of pride in my party, that I as a Liberal have always held my head high in the recognition of the fact that I am a member of the party that brought to this nation such great social legislation as the Canada Pension Plan, family allowances, universal medicare, and I have been prouder still to see across this land a flag made Canada's by a great Liberal Prime Minister.

You will pardon me, Mr. Speaker, if I confess that with the resolution now before us I and those who support me will stand just a little taller, not only as Liberals, but as Canadians proud of our heritage, confident in our future and thankful today for the men and women of this government who have, on behalf of all Canadians, provided the tools for present and future Canadians to get on with and complete the job begun so well in I867.

As I have said, there are those who have suggested that in fact the document is incomplete. In terms of a personal view, I would indicate that I wish we had been able to do something in respect of the unborn. I recognize the undertakings which have been given and I recognize the neutrality of the resolution so far as the unborn are concerned. I share the concern expressed by the hon, member for Provencher (Mr. Epp) in relation to what this and other legislatures will do regarding the unborn, those least able to protect themselves in our society. I would hope that that solid support for the unborn which comes from all sides of this House will emerge in a

resolution dealing with another piece of legislation.

An hon. Member: We had a resolution. You rejected it.

Mr. Daudlin: I hope that there will be continuing support for what the member across the way says he had, and I hope it will come from all parties, particularly the members of the New Democratic Party who will see the wisdom of coming forward with recommendations to the Minister of Justice to amend the Criminal Code to allow us, in fact, to protect the unborn.

An hon. Member: It's a deal!

Mr. Daudlin: I will hold him to that. I believe it is one of the most fundamental and important things we have to do in this Parliament. It is not something we can do with this resolution but, in my view, it is something which has to be done. I believe that this was the wrong document with which to do it. I believe that if the good will that, in fact, is beginning to show through in this debate can be continued with respect to this issue, we can resolve that as well. I am particularly pleased that we are able to achieve what we have done this evening. What we are working toward this evening—

An hon. Member: Talk about the resolution and the unborn.

An hon. Member: Keep going. You have five minutes.

Mr. Daudlin: When you find that members have such tremendous interest in hearing what you have to say, it is particularly gratifying, Mr. Speaker.

I have travelled through my constituency and across Canada, as I hope many of my colleagues have done, to find out what it is that Canadians want. I believe that what we are achieving is what was being sought. I am satisfied that the resolution, and particularly the charter of Rights and Freedoms, gives us the guarantees that Canadians were looking for.

An hon. Member: You were unhappy a moment ago.

Mr. Daudlin: The hon. member does not seem to understand how one can be unhappy but at the same time pleased with what is achieved. It is very difficult to explain, but I will try again.

An hon. Member: Tell us about the resolution and the unborn.

Mr. Daudlin: Perhaps it would be easier, Mr. Speaker, if the member were in his own seat so we could have a question and answer period. Perhaps he would prefer to remain anonymous, I suggest that notwithstanding his attempt to make light of this issue, a thinking member of this House could not accept this resolution as the be-all and end-all, could accept it as a finality of what we embarked upon a year ago, and knows that we as imperfect persons could not not have come up with perfection. We have come close, Mr. Speaker. I suspect that over the years, dealing with the foundation we have been able to achieve, historians will say that this Parliament has achieved something spectacular and that this was a moment in history of which Canadians can be very proud.

Some hon. Members: Hear, hear!

Mr. Chrétien: On a point of order, Mr. Speaker, I am pleased to be able to inform the House that I have obtained from all provinces which are parties to the accord their agreement that Section 28 on the equality of men and women should apply without the override clause. In addition, I am happy to report to the House that all provinces have agreed to enshrine aboriginal rights in the Constitution.

Some hon. Members: Hear, hear!

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Mr. Hal Herbert (Vaudreuil): I rise tonight near the end of this great constitutional debate that has been causing so much difficulty in this country. With the news that has been given to us of the agreement reached on the two outstanding and most controversial subjects, there is very little that one could say. However, I feel I should take a few minutes to put on the record some thoughts with regard to a couple of matters on which I have personally been questioned on the effect of the constitutional resolution when it is passed.

First I should say, Mr. Speaker, as someone who came to this country some 40 years ago now, I liked what I saw. I spent some 15 months training in this country during the war. I liked it so much that when the war was over I wanted to come back. I did come back with my family. Although I travelled fairly extensively in Canada, I liked what I saw in Quebec. I settled in Quebec, and I have lived there ever since. I did not choose Quebec because I thought that I would be able to continue to speak the English language; in fact, quite the contrary. I assumed that I would probably be obliged to brush up on my French. However, that was not so. If I can interject here, somewhat to my disappointment that was not so. I continued to operate for some 10 or 15 years in the English language, even though I was in the construction industry, building from Trois-Rivieres, what we used to call Three Rivers, to Chicoutimi and throughout the province, and even in the capital city of Quebec. That was to change.

I think the big change came with Bill 22. Mr. Speaker, because you were a part of that action at that time, you will know that I as an individual did not speak against Bill 22, even though I felt there were some parts of that bill that I did not particularly like. However, over all I felt it was necessary that some action be taken to redress what was certainly an unacceptable situation in the province of Quebec.

I was somewhat unhappy when Bill 22 was replaced with Bill 101. However, even today we have learned to live with Bill 101. Life for the Anglos in the province of Quebec is not really all that bad.

However, as I said at the outset, I want to make a couple of comments on parts of the resolution on which I have been questioned. first I should like to comment upon the non

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obstante override clause as it applies to the charter of Rights and Freedoms. The entire charter of Rights and Freedoms will be entrenched in the Constitution and no province will be able to opt out of any provision of the charter. The agreement signed by the Prime Minister and the nine Premiers does not emasculate the charter. Democratic rights, fundamental freedoms, mobility rights, legal rights, equality rights and language rights are enshrined in the Constitution and apply across the country. What the premiers and the Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections of the charter.

The Quebec charter of rights and freedoms adopted in 1975 contained an override clause which has been used several times. However, its use has been non-controversial and is instructive in looking at how the override may be applied in terms of the new constitutional charter. For example, despite the provision in the Quebec charter guaranteeing that everyone is equal before the law, the juries act indicates that a lawyer cannot be a member of a jury. Despite the guarantee of open trials in the Quebec charter, the youth protection act provides for circumstances where juvenile court may hold closed sessions. Despite the protection in the Quebec charter for the privileged doctor-patient relationship, the highway safety act requires a doctor to inform the license bureau of the name of the patient who is

medically incapable of driving a motor vehicle. It is because of the history of the use of the override clause and because of the need for a safety valve to correct absurd situations without going through the difficulty of obtaining constitutional amendments that leading civil libertarians have welcomed its inclusion in the Charter of Rights and Freedoms.

I should like to make a few comments on the subject of indirect taxation. The British North America Act gives the federal government the power to raise taxes by any means, including indirect taxation, but does not give the same power to the provinces. The provincial authority is contained in Section 92(2) of the BNA Act which indicates direct taxation within the provinces. Thus, under our present Constitution, provincial taxation powers are limited to the raising of a direct tax within the province for provincial purposes. In order to decide whether a tax was direct or indirect, the courts have adopted the John Stuart Mill definition of direct and indirect taxes. This means that a tax is held to be a direct tax when it is demanded from the very person who is intended to pay it. On the other hand, a tax is held to be an indirect tax when it is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Whenever a court has had to decide whether a tax was direct or indirect, it examined the tax in order to find out whether it met that definition. The purpose of the proposal is to free the provinces from the obligation to meet the direct tax test when they levy a tax on non-renewable resources.

In giving provinces the power to levy indirect taxes on non-renewable resources, we are giving provinces the power to levy a tax whose burden does not fall on the very person on whom the tax is levied. This could mean that a tax levied on a non-renewable resource in a province might be paid by residents of another province, if the resource subject to tax were exported to the other province. However, an indirect tax in non-renewable resources should not discriminate between the province and other parts of Canada. Federal taxing powers would not be affected by the proposal. The federal government would retain the power to raise money by any mode or system of taxation on resources, as well as on any other goods or activities.

During all the constitutional discussions of the past several years, there was full agreement that, apart from resources, provinces should not be permitted to apply indirect taxes, the effects of which would be felt by persons outside the province imposing the tax. For example, it would not be fair for a province in which automobiles are manufactured to impose an indirect tax on such automobiles which would then have to be paid, not only by the residents of that province but by the residents of all provinces to which the automobiles were shipped. On the other hand, it was also agreed that non-renewable natural resources presented a special case. It was generally accepted by the provinces and by the federal government that provincial governments through any mode of taxation should be able to ensure that a fair return was received by the residents of the province which was disposing of the resource. It was agreed that provinces should be given indirect taxing powers, with the proviso that their tax laws could not discriminate between resources used in the province and those exported. In other words, an indirect tax by Saskatchewan on, say, potash would have to be the same, whether the potash was used by residents of Saskatchewan or shipped outside.

Another subject of considerable interest in the province of Quebec at the present time is the subject of denominational schools. I should like to make a few comments on the subject. Concerning religious guarantees in the Constitution, Section 93 of the British North America Act, 1867, is the only provision in the act which refers to such guarantees. Section 93(1) provides that no province may prejudicially affect rights or privileges with respect to denominational schools which existed at law in the provinces at the time of Confederation.

However, the section does not make any reference to freedom of choice respecting language of education. Jurisprudence indicates that the rights and privileges guaranteed by Section 93(1) are those relating to the establishment of denominational schools and religious teaching therein. But the section does not prevent provinces from regulating the curriculum generally of such schools or prescribing the language of instruction to be used. A decision of the judicial committee of the Privy Council in 1916, in the case of Trustees of the Roman Catholic Separate Schoolsfor the City of Ottawa v. MacKeI1, held that Ontario legislation which restricted the use of French as a language of instpuetion in the schools of that province was valid provincial legislation relating to education and not contrary to the provisions of Section 93. However, this does not mean that the provinces are free to prevent the establishment and operation of denominational schools and the teaching of

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denominational tenets, doctrines and practices in those schools. Quebec's charter of the French language, Bill 101, regulates the language of instruction in the schools of the province, but it does not address itself to the broader issue and, indeed, it could not constitutionally abrogate Section 93 guarantees.

Obviously I would have liked to have seen a lot more freedom in the language provisions in the constitutional resolution. I also fully agree that it is much better to arrive at a consensus, to arrive at a compromise. In that respect, perhaps unwillingly, but nevertheless I accept that the inclusion of the Canada clause is the best we can expect in the circumstances. May I call it ten o'c1oek?

The Acting Speaker (Mr. Blaker): I thank the hon. member for calling it ten o'clock.

[…]

THE CONSTITUTION—PROPOSAL THAT REPRESENTATIVES OF MINORITIES ATTEND CONFERENCE

Mr. Jean-Robert Gauthier (Ottawa-Vanier): Mr. Speaker, on November 9, I asked a question of the Prime Minister (Mr. Trudeau) concerning the Constitution, Since the beginning of the constitutional debate in this House, and certainly since the historical agreement between the federal government and the nine consenting provinces was signed, the contents of the charter of rights has continued to be the focus of political debate. If I am not mistaken, Mr. Speaker, I heard this evening that the issues of equal rights for women and native rights had been settled, at least from what we heard in this House earlier.

One very important issue, however, remains to be settled, that of the francophone minority outside Quebec. During this brief debate this evening, I should like to deal with the situation where we, francophones, living in provinces with an English majority, find ourselves in this federation, which is becoming for us a real maze of interpretations. Of course, I refer to the charter of rights, a charter which should be universally applied, but which, in this case, relinquishes the universality principle to the provincial legislatures by letting them determine how it will be implemented. Because of all these optional or "nothwithstanding" clauses, especially as concerns the provisions on basic freedom, legal guarantees and equal rights, this charter is probably the only federal document which will take its meaning from provincial jurisdictions and legislation. In other words, the federal government proposed but the provinces dispose.

This means that the Canadian who wishes to travel in his own country will have to check carefully and practically every day how the various provinces interpret the Constitution before leaving his province for another. The legal guarantees of this

Canadian, if arrested, for instance, could vary when he steps across a provincial border. At the limit, in view of this potential multitude of rights which apply or do not apply, we may wonder if we are still in the same country or in a federation of many countries.

A more detailed examination of the contents of this charter reveals that the clauses concerning linguistic rights and the right to education in the language of the minority are firm and universal clauses which are not subject to the opting-out principle. This means that the members of a linguistic minority of either official language may have their children educated in their own language at the elementary and secondary levels only where numbers warrant. As concerns the principles involved, while several premiers, such as Mr. Bennett and Mr. Davis, do not agree and say that Clause 23 will not change anything, I believe that this clause still provides guarantees which seem adequate at first glance. However, as one looks a bit further, one finds that in actual practice the reality is somewhat strange. Let us take an example. A group of French-language parents residing in one of the seven provinces not subject to Section 133, which gives access to legal and legislative institutions, file an application for a French school in their community. The school authorities, the school board answer that the application is turned down because the number of children does not warrant a French school in the area. The parents will then have to find the money, energy and support to go to court and pursue their rights at their own expense. The case will be heard in the provincial Supreme Court. And there lies the irony. Since the charter of rights does not recognize in that Canadian province the access to legal and legislative institutions in the minority language, these parents will have to fight in English for the recognition of the minimum constitutional rights granted them as French- speaking citizens.
So this is in the charter of rights, a serious flaw that makes it in my view both unacceptable and utterly incomplete. Minorities are granted certain rights but not the tools needed to have them enforced. Even the Ontario Premier has no hesitation in recognizing that the charter of rights gives nothing more to French speaking residents in his province, and I refer you to a report published no later than today in the Montreal Paper Ia Presse, where Mr. Davis is quoted as making the statement utterly shocking to us Franco-Ontarians that there was nothing new there, the charter did not change much in the Ontario situation.

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When he replied to a question I directed to him in the House on November 9, the Prime Minister recognized that the linguistic rights applied only to elementary and secondary schools. He stated that he was prepared to convene a federal- provincial conference of the type I had suggested to review the whole question following patriation. This is indeed a com- mendable and significant response. Yet, because I know a number of premiers, I am very much concerned about the outcome of such Ia meeting, but I remain optimistic about the possibility of it being held.

According to the information I have checked today, Mr. Speaker, of the nine provincial premiers-I should perhaps exclude Mr. Hatfield who is the only one who recognized fully the linguistic rights of both anglophones and francophones— two have replied: Mr. Hatfield, of course, and Mr. Blakeney, of Saskatchewan, who said: "If the others go, I will certainly go too". Naturally, there was no reply from Bill Davis, and I must say that I am very disappointed with the Ontario Premier's refusal. In Ontario, the province with the greatest minority of francophones—some 500,000 of them—-I do not understand his refusal to take part in a federal-provincial conference which could be the perfect forum to consider and discuss in depth the last problem which remains to be settled in this country, that is, the treatment of francophone minorities out- side Quebec. Thank you, Mr. Speaker.

Mr. Jim Peterson (Parliamentary Secretary to Minister of Justice and Minister of State for Social Development): Mr. Speaker, all members of this House congratulate the hon. member for Ottawa-Vanier for his unremitting efforts to protect the rights of francophones outside of Quebec, for his tenacity and his eagerness to standup for the rights of francophones throughout Canada.

The hon. member has suggested a federal-provincial conference to enable francophone groups outside Quebec to state their grievances. He worked hard to get the provinces to agree to that meeting but in spite of his efforts, only two are in favour of such a meeting. Such a conference could only bring results if the provinces would agree to attend. Once again our efforts should be channelled towards that end. This being said, we have to recognize at the same time that the new constitution will do much for francophones outside Quebec. first bilingualism is made official at the federal level. Second both language groups are considered equal in every area: executive, legislative and legal. Third the right of linguistic minorities to education is recognized. I know well that in spite of all that, the hon. member as well as many others would rather see the rights of francophones outside Quebec given greater recognition. It must be recognized as well, however, that we have proved that with good will and co-operation between the federal and provincial governments, much can be accomplished. To wit, Mr. Speaker, the historial agreement the Minister of Justice (Mr. Chrétien) announced to the House 45 minutes ago, the agreement on women's rights and aboriginal rights. We all congratulate him. We are very proud to be Canadians.

(I.) CANADA, HOUSE OF COMMONS DEBATES, RESOLUTION RESPECTING CONSTITUTION ACT, 1981

NOVEMBER 24, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 13194-13209

THE CONSTITUTION

RESOLUTION RESPECTING
CONSTITUTION ACT, 1981

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Hon. Flora MacDonald (Kingston and the Islands): Mr. Speaker, I rise to take part in this debate today in a mood vastly different from that which would have characterized my approach had I spoken yesterday. My remarks then would have conveyed my anger that once again the fundamental principle of the equality of women and men was under siege and my despair that an 80-year-old struggle for the basic rights of women in this country had brought us but such a short distance and, finally, I would have expressed my fervent hope that right and reason would yet prevail.

I am glad to say that hope has won the day. I feel a deep and overwhelming sense of relief—and then of jubilation— that the amendment before us is to be accepted and Section 28 entrenched without qualification and without any override provision in the charter. That section merits repeating:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

But as we accept this amendment before us, let us not forget the hurdles that had to be overcome to achieve it nor the hard work and effort of thousands of Canadian women and men who made it possible.

Section 28, as hon. members will remember, was not in the original constitutional proposals introduced into the House in October of 1980. Neither was it a product of the weeks and months of the hearings of the joint parliamentary committee on the Constitution. That hard-working committee produced many amendments, but Section 28 was not among them. No, that section was the creation of hundreds—indeed, thousands—of Canadian women who converged on Ottawa last spring to speak their minds about what they considered their fundamental rights.

Who were those women and what did they represent? They were of all political affiliations and no political affiliation. They came from all parts of Canada and all backgrounds. They were housewives and students, professional women and store clerks, grandmothers and their children and their children's children bound together by one great common bond, to see that justice prevailed.

The lobby that ensued in the weeks following the women's ad hoc committee on the Constitution was one of the most successful and resourceful that Parliament Hill has ever witnessed. They convinced party member individually and collectively that a Charter of Rights and Freedoms, to be worthy of The Constitution its name, must declare forthrightly and nobly the true equality of women and men.

On a historic day last April, April 21,

Section 28, which I read a little earlier, was accepted unanimously by all members of the House of Commons. That is the way it remained until earlier this month when the first ministers met in one last effort to make federalism work. They met to see if they could come up jointly with an agreed upon constitutional resolution. At that time Section 28 was left untouched, either through neglect or oversight or because it was considered to be of no great importance.

At that conference earlier this month Section 28 was not even discussed, as various first ministers have admitted. But bureaucrats, who have a way of dealing with what they consider technical details, soon put an end to that. They persuaded their political masters to emasculate Section 28 by subjecting it to a legislative override. Women, once again denied full equality in law, by their thousands took up anew the battlecry of equal rights.

During these past two weeks we have witnessed their tremendous effort with admiration and have been proud to be a part of it. The results are as we see them today—full restoration of the guarantee of equality in law to women and men, I am almost tempted to say, Mr. Speaker, "Let us hurry and get this resolution off to Westminster before somebody changes his mind".

Some hon. Members: Hear, hear!

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And your chances of being poor increase if

Mrs. Margaret Mitchell (Vancouver East): Mr. Speaker, it gives me great pleasure to rise today in the House, a very important day for all of us in this House and indeed for the people of Canada. As we all know, last night the Minister of Justice (Mr. Chrétien) announced that the nine provinces which signed this provincial accord agreed that Section 28 of the equality of men and women would apply in the new Constitution, and would apply without the provinces being able to override this section.

The minister also announced that the provinces had now agreed to enshrine existing aboriginal rights in our new Constitution, the word "existing" being added to the former Section 34 which will be reinstated. I need not say once again how delighted we in the New Democratic Party are, after all the struggles of so many people in our party and in other parties and indeed citizen organizations across this country, that these new developments have taken place and are now approved across our land.

Some hon. Members: Hear, hear!

Mrs. Mitchell: As a member of the New Democratic Party and caucus, I am very proud that Section 28 was introduced by the New Democratic Party last spring. It was done in conjunction with many advocates from women's groups who had legal advice among their own members and worked very hard to make sure that there were provisions in this Constitution that would make absolutely certain that equal rights for men and women would be entrenched.

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I am also very proud that it was my leader and my party that over the past three or four years have made this a major issue in our campaigns and indeed in our performance in this House. There is certainly no issue more important than the whole question of the rights of aboriginal peoples and women of Canada.

Some hon. Members: Hear, hear!

Mrs. Mitchell: We in the New Democratic Party rejoice that equal rights for men and women once again will have paramountcy as a national goal which no province can

ignore and, indeed, which the federal government also cannot ignore.

Women of Canada can take great pride in their very successful lobby which they organized over the past two-week period and previously last spring. They were able to protest the federal-provincial accord which had overridden equal rights for men and women in Section 28.

We should not forget, Mr. Speaker, that the first ministers of our provinces did not see this as a national right and priority. They did not consult with Canadian women. They had no Canadian women in their ranks sitting at the table making decisions. The Prime Minister (Mr. Trudeau) himself was willing to trade off protection of women's rights for an accord that protected other rights but not the rights of women in Canada.

These attitudes, I must say made by male politicians who control decisions in this country, will not soon be forgotten by Canadian women, even though we are rejoicing that the changes have been made. I want to quote one woman lobbyist who said:

Hell hath no fury like a woman scorned.

This proves once again with dramatic clarity that it will be absolutely essential in the future to have women politicians in local, provincial and federal governments.

Another point which makes me very proud to have been associated with women's groups who have lobbied so hard for equal rights and who have worked along with their parliamentarians in this regard is the solidarity which they showed toward the rights and efforts of native people, and the commitment which they still have to try to remove the provincial override from all sections which affect people's rights generally.
This morning a member of the ad hoc women's committee said to me, and I quote:

Last night's announcement is a good beginning, but we have only won half the battle. We must get rid of the override completely regarding fundamental freedoms in Section 2 and also the Sections 7 to 15 regarding rights and freedoms which must be universally applied across Canada with no override clause for provinces.

This will be an effort to be continued not only by women's groups but by all of us who are concerned about equality in our country that applies equally from sea to sea, regardless of which province we may live in.

For example, in British Columbia it happens that we have a very weak Human Rights Commission. The permanent members to this commission have not yet been appointed by the government. I regret to say, Mr. Speaker, that recently members of this commission were chastised because of their attitude and their language toward women. It is very reminiscent, incidentally, of Senator Hays, our famous representative on the Constitution committee. Is this the kind of body, in a province such as British Columbia, that we want to protect people's rights and put pressure on the government?

Also in British Columbia we have a government which recently has forced women on welfare who have a young child to go to work. It uses very punitive measures to do this by depriving them of a certain amount of their welfare cheques. This is the kind of thing, again, that makes women fearful, especially if they think provinces may have undue authority with regard to certain rights, particularly as they apply to women.
On the other side of the continent, I want to say that I was told this morning by a woman from St. John's that their premier worked very hard to keep offshore resources under provincial jurisdiction. We agree with that decision, but it is ironical, Mr. Speaker, that women who are applying for these very jobs in offshore resources have been refused work and have appealed

to the Human Rights Commission. I mention these examples to reinforce the importance of this change and the importance of having a national policy, not a policy that can be changed from province to province.

Some hon. Members: Hear, hear!

Mrs. Mitchell: I agree with the ad hoc women's committee—I am quoting them rather frequently because I have seen them on many occasions in my office—that we have a long way to go and that there will be many cases to test these constitutional provisions. But we are pleased that such a good start has been made. By including Section 28 with no override, we expect, for example, that the Supreme Court of Canada will never again be able to rule against women as it did in the Lavell, Bédard and Bliss cases, as well as in other instances mentioned by the hon. member for Kingston and the Islands (Miss MacDonald) and yesterday by the hon. member for New Westminster-Coquitlam (Miss Jewett).

Some concerns have been expressed that guaranteeing equal rights for male and female persons may undermine affirmative action programs designed to open opportunities for women and for other minorities, such as the handicapped and ethnic groups. Of course, this will be tested in the courts. However, it is our clear understanding that equality is a constitutional goal, a goal which will apply to all provinces as a result of the change. Provincial affirmative action programs are the means of achieving equality through equal treatment of women and other minorities. This means the goal of equality will be entrenched and that affirmative action will be constitutionally protected as a means to achieve equality. We now have a federal principle, Hopefully this will be an impetus to encourage affirmative action programs within federal jurisdictions,

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provincial jurisdictions and also in the municipal levels of government.

Before I move on to other aspects of discrimination and constitutional rights upon which I should like to touch today, I want to place in the record a summary of the evolution and development that has occurred in the Canadian women's movement as a result of their fight for equality over the past few months. Never have Canadian women organized so quickly, realized their potential and lobbied so effectively for so just a cause.

Some hon. Members: Hear, hear!

Mrs. Mitchell: This is a summary of how they did it and what they gained through mass action and organization. It is important for women across Canada to know this and to learn from experiences so that they can go on to further actions of this kind. It reflects an awakening and the involvement of a whole new generation of women, along with many concerned men and many of us who are in older generations.

The ad hoc committee, for example, is connected with hundreds of organizations across the country. In January, 1981, women found out that the second promised conference on issues relating to the Constitution was cancelled. An ad hoc committee was formed to work with women in Parliament because there were so few of us in the House of Commons. The ad hoc conference was held on February 14. Hundreds of women attended on very short notice. There were no funds available from the government to help them get here or even to pay for telephone calls and stamps. They met, they lobbied, they learned, and they took many actions which caused many of us to become much more actively concerned about the Constitution, as it did not cover the rights of women at that time. They met with each caucus, with party leaders and with powerful people at all levels of government.

Of course, the committee was also connected with many groups across the country, such as the National Association of

Women and the Law, provincial advisory councils, the Canadian Teachers' Federation, the YWCA, the Ottawa women's lobby, business and professional women, women in trade unions and women concerned with political action. It was a very democratic process and a very enlightening one. I know my colleagues will agree when I say that this was the major reason for having an expanded Constitution today, with the removal of the provincial override on women's rights in Section 28.

Some hon. Members: Hear, hear!

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Mrs. Mitchell: Finally, Mr. Speaker, I want to refer briefly to Section 15 which deals with equality rights and states as follows: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

I am saddened that this position, which is so important and should be so universal, still has the provincial override. I should like to illustrate the importance of this by citing the example of what happened to the Chinese and Asian people of Canada. This demands that there must be full protection of their rights. In my riding as in other parts of western Canada, many Chinese were brought to Canada to work on the CPR. There was a head tax imposed by the federal government of $50 per person. It was raised to $100 in 1900 and to $500 in 1903. In 1907 a riot occurred in Vancouver's Chinatown, instigated by the Asiatic Exclusion League, which was formed in 1907 in response to the increased Japanese, Chinese and East Indian immigration. These people were being excluded because they were Asian. Splinter mobs went through Chinatown breaking windows, then they moved to Powell Street in the Japanese quarter for more of the same. Some Chinese domestic and kitchen workers tried to oppose this but, of course, they were subjected to all kinds of discrimination.

The exclusion act was not repealed until 1947, when immigration was permitted but with increased restrictions on Asian groups. finally, in 1967 the federal government adopted the universal merit system which ended discrimination. However, it was not until 1947 that Canadians of Asian origin finally won the right to vote.

We are also very familiar with the internment of Japanese Canadians and the shame and nightmares that continue for all Canadians who think of this situation.

I should like to draw to the attention of the Minister of Employment and Immigration (Mr. Axworthy) the present concern of East Indians in our country. We have expressed our view in questions. We must be sure that under the Immigration Act there is equal treatment for all people, regardless of their country of origin, their race and ethnicity.

Some hon. Members: Hear, hear!

Mrs. Mitchell: In conclusion, Mr. Speaker, I want to say once again that we are very proud that we are reaching the conclusion of this very historic process. I am particularly proud that it was this party that fought so hard for inclusion of both

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the aboriginal rights section and Section 28 which protects the rights male and female persons.

I want to congratulate all members of the House and all people across Canada who worked so hard for this great day for Canadians.

Some hon. Members: Hear, hear!

Mr. Deputy Speaker: Is the House ready for the question?

Some hon. Members: Question.

Mr. Deputy Speaker: The question is on the amendment. Is it the pleasure of the House to adopt the amendment?

Some hon. Members: Agreed.

Mr. Deputy Speaker: Carried.

Mr. Nielsen: No, no, no.

Mr. Deputy Speaker: All those in favour of the amendment will please say yea.

Some hon. Members: Yea.

Mr. Deputy Speaker: All those opposed will please say nay. In my opinion, the yeas have it.

Mr. Nielsen: No. And more than five members having risen:

Mr. Deputy Speaker: Call in the members.

The House divided on the amendment (Mr. Clark), which was agreed to on the following division:

(Division No. 125)

YEAS

Messrs.

[…]—222.

NAYS.

Messrs.

Nil

[Translation]

Madam Speaker: I declare the motion carried.

[…]

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[…]

GOVERNMENT ORDERS

[Translation]

THE CONSTITUTION RESOLUTION RESPECTING THE CONSTITUTION ACT, 1981

The House resumed consideration of the motion of Mr. Chrétien on the Constitution of Canada, as amended.

Hon. Roch La Salle (Joliette): Mr. Speaker, the last time I had the privilege of speaking on this very important subject in the House was last March. I remember clearly that I asked Parliament to be careful, to take its time, and I see that today we are still discussing the same subject—not for long, probably-but I feel that once more I shall have to caution the members of this House to beware and take the time to make sure that all Canadians agree to these so very important amendments.

Thank you, Mr. Speaker, for allowing me to speak about a matter that is very dear to my heart. I am both happy and sad to talk about the constitutional draft. I am happy because, like most Quebecers, I thought that at last we would succeed in achieving constitutional renewal in a way that would be satisfactory to all Canadians and Quebecers, and I am sad because The Constitution the resolution ignores the eminently relevant recommendations made by the Pepin-Robarts commission on what has been commonly called the Canadian reality. In doing so, I feel the resolution has betrayed the history of Canada and has refused to recognize the

Canadian duality and Quebec's distinctive position among the other provinces. A reality that has in fact been recognized and endorsed by federalists who want federalism to have respect for the partners concerned. I have no intention of giving government members a course in political science, but I think a country's basic laws, in other words, its constitution, should truly and accurately reflect every aspect of that country, while respecting and entrenching in its clauses the inalienable rights and freedoms of all citizens. When the Fathers of Confederation after much pondering gave us the British North America Act in 1867, they had broadly defined the basic principles that were to lay the foundation of our country, namely, duality and the sharing of powers between two levels of government. That is what has always been referred to as Canadian federalism. A few years ago, a famous Canadian said, and I quote:

Federalism is by its very essence a compromise and a pact. It is a compromise in the sense that when national consensus on all things is not desirable or cannot readily obtain, the area of consensus is reduced in order that consensus on some things be reached. it is a pact or quasi-treaty in the sense that the terms of that compromise cannot be changed unilaterally.

That famous Canadian was none other than the Prime Minister of Canada (Mr. Trudeau). In his book "Federalism and the French Canadians", the same Prime Minister wrote, and I quote:

The centralists are the ones who should be in a hurry to change the Constitution.

In any case, in his book on federalism, the Prime Minister did not seem to have boundless confidence in constitutional reforms that are hastily construed in order to solve our problems. In my opinion, he wrote, it would be an illusion to look for (a solution) in sweeping constitutional changes.

As for the Charter of Rights, Mr. Speaker, which the present Prime Minister sees as having exceptional merits, at the time he did not look on it as a panacea. Legal guarantees by themselves are far too fragile to ensure the survival of the French language and culture. And he added the following sentence which today both he and the members of his party could usefully ponder over.

People who think such guarantees arc enough may be the most dangerous enemies of the traditions we wish to safeguard and perpetuate.

Mr. Speaker, that is exactly what we are discussing today, some 114 years after our first Constitution Act. Can the terms of an agreement be changed without the consent of one of the parties that was already recognized at the time as one of the two founding peoples of this country? It is important that all Canadians know that Quebecers, as much as the government they freely elected on April 13 last, object to a breach of

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agreement that by a stroke of the pen deprives them of any possibility of a compensating formula, that would allow the federal government to impinge on a jurisdiction that heretofore had been the exclusive domain of the provinces ever since 1867.

We, members from Quebec—and I say we because we sit on both sides of this House, although not many on this side—may have something in common all the same. And I would like to remind the Quebecers opposite that under the governments of Maurice Duplessis, Jean Lesage, Daniel Johnson, Jean-Jacques Bertrand as well as Robert Bourassa, which was not so long ago, we all supported those Quebec premiers in difficult periods and for different reasons, those premiers who steadfastly defended the educational rights of Quebecers against any invasion by the federal government. All those premiers,

Mr. Speaker, swore that never would the federal government infringe on that basic right of Quebecers. As much for historical and geographical as for linguistic and cultural reasons, those premiers realized they represented the people in Quebec. All members from Quebec who sit opposite today supported, encouraged and applauded as much as I did, those federalist governments of the province of Quebec, whatever their political affiliations. Those Union Nationale and Liberal governments in Quebec always had a strong sense of belonging to the Quebec identity, and they never strayed from it.

I believed, and probably all those hon. members believed in such a philosophy, and I still do. How can we now betray what we so steadfastly defended all our lives, Mr. Speaker? I, for one, have not changed, I have respected and still respect my Quebec origin and that philosophy that was not incompatible with the national objective pursued by every federal government.

How can one imagine today, Mr. Speaker, that the objections of the present Quebec government are sacrilegious, since we supported the previous premiers for identical reasons, and we even commended them for their courage in defending steadfastly the future and the emancipation of the people in Quebec?

If I may, I would like to recall that when I first came to Ottawa in I968, I was warned that I would first have to meet the challenge of convincing my English-speaking colleagues in the House. I accepted the responsibility to defend my province honestly and to convince my colleagues that they should ensure the fundamental rights of my province. I believed then and I still believe in a federalism respectful of its partners. What I find embarrassing today, Mr. Speaker, is that, to meet my basic responsibilities, I have to plead with my French-speaking colleagues about the issue now before the House in front of my colleagues from the other provinces. I had never imagined that this could be possible, especially since the 74 Liberal members from Quebec could have avoided putting their province in this strait-jacket. Where are they now, these proud representatives of the people of Quebec in Ottawa? This is the question now being asked by thousands of Quebecers.

If I may, I would like to take this opportunity to congratulate my leader who showed his open-mindedness and his statesmanship during this debate last Friday when he made an original and positive contribution in his capacity as Leader of the Progressive Conservative Party. All the government members should read and re-read this speech and many of them should reflect on their own position instead of trying to ridicule the comments made by my leader last Friday in this House, The speech made by the leader of our party is a model of clarity and understanding during this troubled period of our history, Mr. Speaker. The Progressive Conservative Party has moved three amendments of which two have already been accepted unanimously, and I have every reason to believe that the Canadian people will be grateful for the leadership shown not only by my leader, but also by my party concerning the rights of women and the native people.

I believe that the third amendment will be agreeable to both the government and the people of Quebec. Last April, the Quebec government relinquished its veto right in exchange for a reasonable guarantee of financial compensation if ever they decided to opt out of a constitutional amendment. We want to grant this full financial compensation. The day after the conference, Mr. Ryan, the leader of the Liberal Party in Quebec, also stated that he would not have signed the accord. Even Mr. Bourassa, the former premier of Quebec, stated a few days ago during an open-line program that he would not have signed the accord either given the conditions that prevailed then. Most of the responsible political observers in Quebec have come to the same conclusion. They say that the government’s resolution proposal is even worse than the status quo. It is clearly a

step backwards for Quebec generally. The federal government cannot claim the right to rewrite our Constitution without the consent of one of the two founding peoples, This situation is highly explosive, Mr. Speaker. This government should relinquish its arrogant and cynical position. Unfortunately, for several members of this House, Canada is simply Ottawa. They have forgotten that negotiating in good faith is the basis of federalism. I very much fear that their centralizing approach to federalism and narrow view of the future have made them so blind that they cannot see that they are dividing rather than uniting Canadians. They are so blind that they refuse to respect the Canadian fact. I also want to take this opportunity, Mr. Speaker, to appeal to the premiers to ponder a little over the implication of the isolation of Quebec. And since any appeal to the Prime Minister of Canada would fall on deaf ears, I wonder if they could not convince the Prime Minister of Canada to shift his position, explore possible solutions and try to find one that would be acceptable for the people of Quebec so that Quebec would agree to sign this resolution before it is sent to London.

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I seldom have the opportunity to urge the members of another party to reconsider what they are doing, Mr. Speaker, but I urge them just the same to dare state the views of hundreds of thousands of their fellow-citizens who elected them to represent them with dignity rather than betray them. They can imagine what they will find to say to justify themselves when they face a swarm of furious electors blaming them for their irresponsibility, their utter lack of respectability and dignity. It is completely shocking and distressing, Mr. Speaker, to find that their sense of belonging is no longer consistent with that of their electors. They are the only ones in great enough numbers to prevent something irrevocable from happening. Instead of forcing on Quebec a plan whose terms it cannot decently accept at present, why does the federal government not allow tempers to cool off, why does it not calm down and make a final attempt to conclude an honourable agreement with and for Quebec instead of driving the present government to something irrevocable and running the risk—

Mr. Tousignant: I rise on a point of order, Mr. Speaker.

The Acting Speaker (Mr. Blaker): The hon. member for Témiscamingue (Mr. Tousignant) on a point of order.

Mr. Tousignant: Could the hon. member for Joliette (Mr. La Salle) tell us what Mr. Levesque would be ready to accept?

The Acting Speaker (Mr. Blaker): I am sorry, but without the consent of the hon. member for Joliette, the Chair cannot accept that intervention as a point of order. The hon. member for Joliette.

Mr. La Salle: Thank you, Mr. Speaker. The Prime Minister of Canada, in the speech he made in Quebec City, said that even if his proposal were passed without Quebec's consent, it will remain on the table for a future federalist government in Quebec. If he is consistent, Mr. Speaker, why not wait for that future federalist government in Quebec, since he has pointed out that the federal government will maintain its position until a government agrees to it? We would then see whether or not a federalist government in Quebec would accept the current proposal. A little more time will not matter much in the history of Canada but, at least in the meantime, Quebecers, even the most nationalist amongst them, will have time to reflect on such constitutional compromise as might prevent breaking the federal tie. If the federal government persists in its present approach, I fear it may lead the country headlong toward a catastrophe of such magnitude that the word "Canada" might within a generation or two become a mere historical footnote.

The Quebec government is being blamed for having given up its traditional veto right

as provided for in the amending formula contained in the April agreement; if, in the eyes of the Minister of Justice, giving it up is such an infamy, why then, The Constitution on his own authority, does he not reinstate it on behalf of Quebec which he claims to represent even better than the government of that province itself? The minister knows that the loss of the veto right was conditional upon fiscal compensation. Everyone knows that the notorious veto right is a cause of tension and disagreement, that it is bound to disappear sooner or later. In fact, if the veto right is so essential to Quebec, as the Minister of Justice maintains, why then did he not use it during the night of November 5 and demand that the approval of Quebec be an essential condition of the agreement? How could I possibly support the present resolution when it grants one province the right to opt out of a constitutional amendment without financial compensation, except in the case of linguistic and cultural programs? To begin with, where do the boundaries lie between cultural, social and economic matters? In fact, do they not overlap? Where are the limits of each to be drawn? Those are some of the problems the courts will eventually have to solve, But one point is more important still. Since when can one be penalized for exercising a right the Constitution has recognized for 114 years? The right to opt out with financial compensation, the terms of which would be agreed upon by the parties, must not be weakened. Otherwise, no province, and not only Quebec, would ever be able to develop integrated policies either in the area of social security or even its own economy planning. The Prime Minister acts as though he were afraid some rich province might, at the expense of the poorer ones, opt out of a new federal program and use the accrued funds to serve its own selfish ends. The Prime Minsiter does not seem to trust the fair play and common sense of his provincial counterparts. Why does he not think of the unfair burden he would impose on a poor province which, for whatever reason, could not accept the new constitutional amendment?

The right to opt out without full financial compensation and non obstante clauses is an illusion which may lead us into centralization and deny the provinces their right to act in their own jurisdiction in their people's best interests. When, on the morning of November 5, the Prime Minister simply removed the compensatory clause, his intention was clearly to put Quebec in chains. The time may come, before long, when other provinces may find it difficult to bear the iron collar they have themselves agreed to wear. As to the manpower mobility clause, it does not take into sufficient account Quebec's social and cultural structure. It seems to me that it should be possible to carry out a more in-depth analysis of its potential effects on provincial economies, and find ways to give local workers better protection against a possible massive invasion from other provinces. I suggest that the provinces' manpower training programs and local manpower preference policies should not be jeopardized, as this would prevent local workers from finding employment or developing new skills while workers from other provinces would take over their jobs.

[…]

(I.) CANADA, HOUSE OF COMMONS DEBATES, PETITION

NOVEMBER 25, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 13243

PETITION

MRS. MITCHELL—THE CONSTITUTION—REQUEST FOR DELETION OF SECTION 33 OF CHARTER

13243

Mrs. Margaret Mitchell (Vancouver East): Madam Speaker, it is my duty to present a petition to the House sponsored by the Ad Hoc Committee of Canadian Women on the Constitution. This petition asks for the removal of the override section, Section 33, from the Charter of Rights and Freedoms. It is the hope of Canadian women that members of Parliament will delete the shockingly regressive Section 33 in order to guarantee that basic rights and freedoms-and 25 of them are listed-cannot be violated by the provinces or the federal government.

* * *

(I.) CANADA, HOUSE OF COMMONS DEBATES, RESOLUTION RESPECTING THE CONSTITUTION ACT

NOVEMBER 26, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 13355-13369

THE CONSTITUTION

RESOLUTION RESPECTING THE CONSTITUTION ACT, 1981

[...]

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[Translation]

Mr. Jean-Robert Gauthier (Ottawa-Vanier): Mr. Speaker, the purpose of my comments will be to clarify my position on the proposed resolution for patriation of the Canadian constitution, because I feel it is essential at this point in the debate to explain exactly why I disagree with the motion. First of all, I want to make it quite clear that I am personally in favour of patriating the Canadian constitution. Our country will not be fully sovereign until it is able to decide for itself what its future is to be. Patriating our constitution to Canada will remove any lingering traces of colonialism, and from now on, Canadians will make their own decision. I am not opposed to the government's objectives in introducing this motion, nor am I objecting to the way it was done, although I would have preferred the Government of Quebec to have been a partner in the agreement that was concluded. The present situation is probably due to the ambiguity of the Supreme Court decision in which the Justices washed their hands of the whole thing simply tossing the ball back in the politicians' court. It is important to understand which constitutional provisions relate to the Charter of Rights. After establishing what the objectives

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of these provisions are, I will argue about the expected implementation of these provisions.

[English]

The main purpose of a constitution is to guarantee the rights of citizens beyond the reach of any political power. Furthermore, it should not be used to protect the rights of majorities but rather those of minorities, for the former, the majorities, protect themselves naturally through their numbers, through political influence and through the environment they create. That is why protection of the rights of the minorities cannot be left in the hands of the majorities, nor in those, for that matter, of the various legislative assemblies.

A constitution is in fact, Mr. Speaker, a social contract which binds a whole nation, and to which each citizen is subject. The latter element should ensure that each and every citizen enjoys respect and equality within the social body, regardless of his origin, opinions, language and beliefs.

[Translation]

In the present constitutional resolution presented to the Parliament of Canada by the federal government, these rights ,will be entrenched in a charter of rights and freedoms. The charter is intended to be universal, above everything else. Its primary objective is to guarantee equal rights to all individuals throughout Canada. The rights in the charter include the right to fundamental freedoms and democratic rights, which are covered by Clauses 1 to 5, and with which I wholeheartedly agree.

Clause 6 guarantees mobility rights and rights to gain livelyhood everywhere in Canada. Although I agree with the essence of this clause, we shall see that other constitutional provisions make it somewhat less than ironclad, and I would go so far as to say that in practice, its existence is threatened. Clauses 7 to 15 guarantee legal rights, and for the same reasons I gave concerning Clause 6, the implementation of these rights is also threatened throughout Canada. Clauses 16 to 22 deal with official languages, and it is said specifically that these provisions apply to the Parliament of Canada and to New Brunswick. The status of official languages in other provinces is regulated by earlier constitutional provisions in Section 133 of the British North America Act and Section 23 of the Manitoba Act. There, Mr. Speaker, we have the crux of the constitutional resolution. A direct consequence of the fact that the status of the French language is governed by such provisions is that all clauses in the charter starting with Clause I6 are, in effect, English only in seven out of 10 provinces.

[English]

It is true that mobility rights and legal rights are guaranteed under the charter, but in reality are those rights guaranteed to French-speaking citizens if they cannot, except in three provinces, be tried in their own language, buy a house in their own language or register their will in their own language? Indeed, can they use their own language to carry on business, make transactions, sign contracts, etc? No, Mr. Speaker.

[Translation]

Clause 23 gives constitutional guarantees with respect to language educational rights, up to and including secondary school, in all provinces including Quebec. The wording of Clause 23 is not specific about the administration and control of minority language educational institutions. A liberal and broad interpretation will probably be necessary to establish that the legislators of this House, by applying the process in subparagraph 23(3)(b), and I quote:

(3) The right of citizens of Canada under subsections (1) and (2) . . .
(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

That is the process, Mr. Speaker. With due respect to my friend Bill Davis, the premier of my province, there is still a glimmer of hope.

Not more than a week or two ago, my Canadian First Minister told me something I would like to read to you, in reply to a question I asked him on November 9. His answer was: "So I think that to start with, francophones outside Quebec should take time out to celebrate, but not too long", and I agree, Mr. Speaker, there is a glimmer of hope in the fact that a liberal interpretation of this clause may give us access to the administration and control of our educational institutions.

[English]

Of course, some will say that since the charter grants minority language education right, throughout the country, the rights of the francophones are, indeed, protected. However, the charter imposes a notion of quantity by specifying, quite ignobly, "where the number is sufficient to warrant"—that famous clause. What will this number be? Who will decide what is to be that number, the provinces concerned or the courts of justice? We can look forward to some tough battles on this question, Mr. Speaker, in the years to come.

Furthermore, in seven provinces out of ten, including my province of Ontario, a French-speaking citizen will not be able to use his mother tongue in the legislative assembly and courts since these rights will not be guaranteed by the Canadian Constitution. Can it truly be said that equal rights are

guaranteed to all?

[Translation]

The irony of this situation can be readily appreciated. Since the Charter of Rights does not give access to legal and legislative institutions in the language of the linguistic minority in that Canadian province, parents will have to fight in English to obtain recognition of a minimum of the constitutional rights granted to them as francophones. This serious deficiency in the Charter of Rights makes it unacceptable in my opinion. We are told that the charter safeguards the rights of linguistic minorities, but it does so only partially. Minorities are given certain rights, but not the tools required to ensure that they are respected. That is why I disagree with this proposal, Mr.

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Speaker. The inclusion of a charter of rights reflects the desire to grant the same rights to all Canadians. Yet, these rights granted in the charter are denied in practice by other provisions. This is what I question. I am told that as a French-speaking Canadian, I am given every right while, in fact, these rights can be exercised fully and completely only in three provinces. In its present version, our future Constitution will maintain the notion of two classes of citizens: those who have rights across the country, namely English Canadians, and those who have rights only in three provinces, namely French-speaking Canadians.

Even the Right Hon. Prime Minister (Mr. Trudeau) was against this disparity of linguistic rights at the time. In reply to a question I asked in this House concerning the equality of linguistic rights, Mr. Trudeau replied, as reported on page 2642 of *Hansard* for January 29, 1979:

—I would insist on the fact that this bill of rights should and must include a bill of rights protecting official language minorities all over the country.

This commitment has been partly met and some of these rights are included in the charter. The problem therefore comes basically from Section 133 which, because of its exclusive application to Quebec, cancels out the total application of these rights in seven other Canadian provinces. Section 133 is the tool used by the English-speaking majority to have access to parliamentary and legal institutions through its minority. This means that all English-speaking Canadians can have access to the democratic institutions in their own language throughout the country, including Quebec, where they are in a minority, and I quite agree with that. However, the majority of the provinces, or seven out of ten, are refusing to grant French-speaking Canadians from Quebec and elsewhere the same right to access in their own language to legislative and legal institutions.

[English]

I am against this double standard in applying legislation in Canadian territory. I am truly embarrassed to realize that today, in 1981, the majority continues to impose itself, even where the members of its group are in a minority, and refuses to grant the same rights to the other linguistic community. I would feel much better if we abolished Section 133 of the British North America Act, thus putting an end to the preferential treatment afforded to the majority.

All provinces should be subjected to the application of such a provision, or it should be simply deleted as was proposed by the Pepin-Robarts Task Force on Canadian Unity. I believe that the arguments brought forward by that commission are the same as those I am advancing tonight.

[Translation]

Moreover, I am not the only one to hold that view. My colleagues of the Ontario branch of the Liberal Party of Canada unanimously passed the following proposal last fall. I will spare you the preamble, but

the resolution reads as follows:

. . . Resolved that this meeting of the Liberal Party of Canada (Ontario) firmly support the application of Section 133 of the Constitution to Ontario.

[English]
Even public opinion supports this position which seems to indicate that the population is often more awake than certain politicians would lead us to believe.

At the provincial level, an opinion poll commissioned by *The Globe and Mail* revealed that in Ontario more than 53 per cent of the population agree that the province of Ontario should be bound by Section 133. In my own riding of Ottawa-Vanier, this figure exceeds 66 per cent, according to an opinion poll taken in October, 1981. Over 83 per cent of the population in my riding demand that francophones outside Quebec be granted the same constitutional rights as those granted to the English-speaking minority in the province of Quebec, namely, a completely autonomous education system, which we do not have in Ontario, and the right to use their own language in the legislative assemblies and the courts. Under the present resolution this equality of treatment is denied francophones. For this equality to exist, Section 133 should either be made applicable to those provinces which are not bound by it, or be abolished in the provinces of Quebec and Manitoba.

[Translation]

Now who objects to that? The Ontario Premier, Mr. Davis, of course, and several of his provincial counterparts. The federal government was compelled by Mr. Davis to accept this way of thinking in order to get his support. At that time, since eight provinces out of ten rejected the patriation proposal, the Prime Minister had no choice. Besides, he stated at a recent press conference that nothing would please him more than to compel Ontario to recognize its francophones by forcing Section l33 on that province; but the interplay of political alliances prevented him from doing so. *La Presse* reported in its edition of Monday, November 23, the comments of Premier Davis who said, and I quote:

It is quite obvious that our strong objection to Ottawa's initial intention to review Section 133 of the Constitution in order to institutionalize bilingualism has led the Canadian government to give up that idea.

Mr. Davis, on the other hand, claims that Ontario should not be forced to grand francophones these rights, that Ontario would do it at its own pace, that is, slowly. Need I remind hon. members of all the battles fought by francophones in Ontario to get a few statutory privileges. Need I remind hon. members, to question the good will of Mr. Davis, of the painful clashes I witnessed as school trustee from I966 to 1979? Sturgeon Falls in 1971-72, Cornwall in 1973, Elliot Lake in I974, Windsor-Essex, Penetanguishene, and this is only in Ontario, Mr. Speaker, but I could mention similar battles now being fought all over Canada. Mr. Speaker, I should like to read the preamble of the Ontario legislation creating a French school in Essex. I think this preamble is quite eloquent about the legal recognition of francophones in Ontario. I quote:

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[English]

An Act to require The Essex County Board of Education to provide a French-language Secondary School

Assented to July 12th, 1977

WHEREAS the French language advisory committee of The Essex County Board of Education has, since 1969, consistently recommended that a French-language secondary school be provided; and whereas, upon such recommendation having been rejected by the Board in the year 1974, the Languages of Instruction Commission of Ontario recommended that

the Board provide such a school; and whereas The Essex County Board of Education, having initially rejected the recommendation of the Commission. subsequently agreed in April, 1975 to proceed with construction of a French-language secondary school, but on and after the 23rd day of February, 1976 ceased to proceed therewith; and whereas a mediator appointed by order in council No. 1452/76 recommended in February, 1977 that the Board build such school, but the Board, on or about the 8th day of March, 1977, decided not to build the school and it is now apparent that no such school will be provided at this time; and whereas there are sufficient French-speaking secondary school pupils resident in or adjacent to the area of jurisdiction of The Essex County Board of Education who have elected to be taught in the French language to warrant the provision of a French-language secondary school: and whereas the public interest, and in particular the interests of such French speaking secondary school pupils, require that such a school be constructed;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

And the bill followed nine years after the formal recommendation, Mr. Speaker.

[Translation]

The meagre comfort we have obtained from the Ontario government over the past 100 years is the result of bitter fighting such as that I have just described. And Mr. Davis would have us believe that he will grant us additional rights when the Constitution will allow him not to. Let us not dream in colour, Mr. Speaker. One of the best ways to ensure that linguistic minorities enjoy these rights forever is to spell it out in the Constitution. Because the current resolution fails to do so, I must in all conscience voice my opposition. The resolution is incompleted and unfair to francophones. It will create two classes of citizens. It will create a checker board country of legal exemptions. I am sure we could do better, much better.

Another aspect of this resolution which reveals even more its real worth, is the presence in the Charter of a great many non obstante clauses. These clauses of course are the result of the negotiated compromise between the federal government and the nine provincial governments. However, if we reflect upon the result of that compromise we realize that this resolution is probably the only federal document which has to rely upon provincial jurisdiction or legislation to become operative. As I pointed out in an earlier speech, that is a good example of a situation where the government of Canada proposes and where provincial governments dispose. How then can we speak of a Canadian constitution? We should instead speak of a constitution of the Canadian provinces made possible through the federal government. Those numerous opting-out clauses leave us in a rather strange situation, Mr. Speaker. I see that you are about to rise. I do not know whether my time is up, but I would seek the unanimous consent of the House to finish my speech because I have only a few pages left to read.

Mr. Deputy Speaker: Is there unanimous consent to allow the hon. member to continue?

Some hon. Members: Agreed.

[English]

An hon. Member: Relevancy. Remember there is an amendment on the floor.

Mr. Gauthier: I thank hon. members for their consent. I will speak for another three or four minutes at most.

An hon. Member: Speak about the provincial territories.

[Translation]

Mr. Gauthier: To put it another way, a

Canadian citizen anxious to travel in his own country will have to check very carefully, before leaving his province, how the constitution is interpreted in the provinces where he intends to stay. For instance, if he were to be arrested his legal rights might vary when he crosses a border. Faced with what may be a great number of rights which are applicable or not applicable, the least one can do is wonder whether one is still in the same country or in a federation of different countries. Despite this imbroglio of legal situations which might develop and which I find deplorable, I can fully appreciate the spirit of compromise and co-operation which paved the way for the present agreement. I am all the more pleased to see that this spirit of compromise is enduring, as we have noticed in the past two days. It is that same will to compromise which enabled the governments to return to the bargaining table and redefine a new constitutional agreement which now includes the right to equality for Canadian women and the acknowledgement in our constitution of the rights of the native people.

On these two issues, Mr. Speaker, I am in complete agreement with the position taken by the government of Canada. In view of these demonstrations of good will and of compliance with the true spirit of federalism, I seek the support of all members so that our Constitution will recognize, apart from the rights I just mentioned, the right for citizens of both official language groups to an equal treatment. In fact, Mr. Speaker, that simply means the implementation of the motion I introduced today under Standi4ng Order 43 to ask that all provinces recognize the linguistic duality of Canada and be subjected to Section 17(2), 18(2), 19(2) and 20(2) of the resolution. That would establish in law the equality sought by both language groups. I therefore ask that the government and this House introduce an amendment to that effect, since I cannot do so for reasons of parliamentary procedure. I hope Mr. Speaker that I have made my position clear.

[…]

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[…]

Mr. Baker (Nepean-Carleton): […] I listened tonight to the hon. member for Ottawa-Vanier (Mr. Gauthier) who spoke rather feelingly of what is a charter of rights and freedoms. If] quote him correctly, he said that a charter of rights in a Constitution is designed to protect the rights of minorities against majorities.

Hon. members may recall that last fall I said in the House that the rules of practice, what is in Beauchesne, what is in the parliamentary tomes, is that the majority does not necessarily have the right to rule. We protect minorities in the country; we have to protect minorities here.

I listened to the hon. member speak—he did not speak before in the debate—and tonight he spoke with feeling from

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his own position. I could understand how he felt. I personally felt that way last fall. As I listened to him, I said to myself that he should have faith in this new beginning because this Constitution has within it the right of all of us as Canadians to participate in advancing rights. That is an important feature.

When the accord was reached, there were some who said that it should not be changed by Parliament. "Don't rock the boat" said the Minister of Justice (Mr. Chrétien). I suggest we have improved the boat. We have added equality of the sexes. We have had unanimous agreement today with respect to the rights of the native people.

We are now talking about an amendment, which I hope will be supported in the House and which I hope will meet with agreement, that will allow the people of the Northwest

Territories and the people of Yukon, those people north of 60, to feel that their opportunity, when they want to exercise it, to become a province like Prince Edward Island, like Ontario, like Quebec, like Alberta and like British Columbia, is not taken away from them.

Some hon. Members: Hear, hear!

Mr. Baker (Nepean-Carleton): I think that is worthy of support. They want only to preserve the right to realize their future aspirations.

I have not travelled much, but I have been in the north several times and I can attest to the spirit of enterprise and the spirit of the future of the people in northern Canada. I think we in the House owe them passage of this amendment. I hope it can be done. I do not say anything tonight in a partisan sense, Mr. Speaker.

The Minister for Veterans Affairs (Mr. Campbell) was kind enough to mention that all members of the House had contributed to bring us to the point at which we are now, and he is right. The resolution before us now is different; the amending formula is different; the Charter of Rights and Freedoms is different, and the differences in Canada are respected in this document.

The Supreme Court of Canada was allowed to function. It brought down a judgment which I say is a brilliant judgment, one that could not be picked apart. It gave the country a second chance. It said the government had a legal right to do what it wanted but to beware if it moved without substantial provincial support. It would be unconstitutional and, I think, divisive and damaging to the country. We have reached a new plateau.

In his kindness in paying tribute to all members of the House, the minister included the Leader of the Opposition. I hope hon. members will allow me to say something about my leader and his part in this process.

There would not have been renewed negotiations but for the steadfastness of the Leader of the Opposition who inspired a sense of commitment to the importance of consensus in the constitutional process.

Some hon. Members: Hear, hear!

Mr. Baker (Nepean-Carleton): There are many who may disagree with my leader. It is a free country; they can disagree with him if they want. Of course, he reserved the right to disagree with them. He believed in the importance of consensus, in understanding and compromise, and he fought for those things.

I say with as much modesty as I can muster that it was my party which led a battle in the House. It wits not understood early in the battle that it was to delay the process, to delay a steamroller, which we honestly believed was wrong. Ultimately, the courts were allowed to decide and make that historic landmark judgment.

I was very proud to be the House leader of the party during that process. I must say that I am delighted not to be the House leader of the party today. When I listened to the point of order being argued today, I was delighted to be able to sit as an observer, because as my friends know, I have argued many points of order before. However, it was important. I do not say this in a partisan sense, looking back on it now, because it is the way things have evolved. However, hon. members will recall that this former resolution was to be in Britain by Christmas—

An hon. Member: It will be.

Mr. Baker (Nepean-Carleton):—Christmas of 1980. It is best for the country that it was not there in 1980 because I believe—

Some hon. Members: Hear, hear!

Mr. Baker (Nepean-Carleton):—we would have done great damage. I want to

pay tribute to my leader who, right from the outset, said where he stood and never changed his ground. In his speech the other day, he indicated the importance of having Quebec at the table of the accord. He said that we, as a party and as a Parliament, should grasp every opportunity to keep alive any chink of light there might be to have Quebec as part of that accord.

It is important to repeat again and again that there will be an empty chair at the table of confederation if the House approves this resolution. It is important that we keep that chink of light alive if we can because this is not the end of the constitutional process. This is, by virtue of the Constitution itself, the beginning of the constitutional process, a process which will go on as long as this country exists. All of us, everywhere, must try to keep that alive.

I do not know the attitude of the government of Quebec. However, I believe it is important that, whatever we do, we hold ourselves open to the people of Quebec. That is why my leader has proposed an amendment in terms of full compensation for opting out. That is important, as he stated so well to the people of Quebec. That is why I hope that in the discussions he is having there could be some settlement with respect to the issue of language.

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I want to see the Canada clause adopted in that province. I am a Canadian. My children will grow up in this province as Canadians. I would like them to be able to go to that province. My friends on the other side shake their heads, suggesting that it may be impossible, and it may be; but my case is only that that chink of light should be kept alive if it is at all possible. Governments come and go. Public men come and go. As they come and go, attitudes change and societies evolve. Surely, we would want the society in Quebec or elsewhere to evolve so that, as the hon. member for Ottawa-Vanier said, the override clause could be diminished so that rights would be completely entrenched, if they are there at all. This would mean there would be no opting out and there could be no absence from one chair at the table of confederation.

Your Honour can judge from what I say, that I am overjoyed that we have moved from the process of confrontation to one where I feel a great sense of coming together. I think it is important that the resolution go forward with the broadest support we can muster in the House of Commons. We have spent a great deal of time. I believe now, as I look back on it, that time has not been wasted.

Some hon. Members: Hear, hear!

Mr. Baker (Nepean-Carleton): There are some things in this country that we must tackle, as they are very important to Canadians who may be watching this debate and wanting this debate to end quickly. I want it to end quickly. I want the government to be able to move quickly, regardless of what the vote may be in the House of Commons.

I believe we have demonstrated that Parliament is not the rubber stamp of federal-provincial conferences. We have now demonstrated, in at least two instances, that there is room to improve even their good work, that their work is likely the first word and not the last word, and that this is the Parliament of all Canadians.

I hope that hon, members of the House will approach the amendment put by my successor as House leader, my colleague, the hon. member for Yukon (Mr. Nielsen), in the spirit in which he put it; namely, it is important that we keep the principle of equalization for women and for the aboriginal people of the country entrenched in our Constitution, and that people be allowed to move freely from province to province. Equally, people who want to form provinces, and people who want to protect the boundaries to protect their potential to

form provinces, should have that right. That is why, as a person who has been a visitor north of 60, I make a plea to my friends in the government to accept this reasonable amendment put forward by my colleague, the hon. member for Yukon.

In the dying days of the debate, I do not think I will participate in this constitutional debate any further. I appreciate the latitude that Your Honour has allowed me. I feel very much like the hon. member for Ottawa-Vanier felt, as he had not participated in the debate either. I had the opportunity sooner. We will engage in many things, but none more profound than what we are concerned with now.

I want to thank my colleagues on all sides for their kind attention to what I had to say.

Some hon. Members: Hear, hear!

Mr. Maurice Dupras (Labelle): Mr. Speaker, I wish to begin my remarks in the debate on this resolution by praising my predecessor, the distinguished hon. member for Nepean-Carleton (Mr. Baker). I listened to his speech and I was very impressed by the quality of his contribution to the debate. I did not expect anything else. I knew in advance that my friend, the hon. member for Nepean-Carleton, would bring a constructive contribution to this debate. It is unfortunate that he could not inspire his colleague, the hon. member for Joliette (Mr. La Salle).

[Translation]

It is a shame, Mr. Speaker, that the member for Joliette did not choose to make the kind of speech just held by his colleague from Nepean-Carleton. However, I would have liked to have heard from my respected colleague from Nepean-Carleton how he intends to convince Mr. Davis, the Premier of Ontario, to recognize minority rights in Ontario, as demanded by my colleague from Ottawa-Vanier (Mr. Gauthier), on the same terms as they are recognized in New Brunswick and Quebec. I hope that the member for Nepean-Carleton will be able to convince his colleagues and Mr. Davis that they would be well advised to do so. In fact, if national unity is the issue, Mr. Davis should be made to understand that the Progressive Conservative members in the House of Commons are supporting this petition being made by the members from Quebec on behalf of the people of the Province of Quebec. And contrary to the claims of our colleague from Joliette, although the Government of the Province of Quebec is not represented among the signatories to the agreement, Quebecers do not lack representation. And this, Mr. Speaker, is because the main architects of the new constitution are people from the Province of Quebec—I see that my colleague from Nepean-Carleton agrees. Since I have only a few minutes until ten o'clock, Mr. Speaker, before breaching points that are of particular concern to me, especially regarding the resolution, I wish to say a few words in praise of those who, in fact, have worked for months toward that historic moment when Canada and Canadians will have their own Canadian constitution, and I am, of course, referring to the Minister of Justice (Mr. Chrétien) and the Right Hon. Prime Minister (Mr. Trudeau).

Mr. Speaker, Canada enjoys an enviable reputation in the rest of the world, and that is why the world is watching us today and why observers are anxious to see how Canadians are going to deal with the issue of getting a truly Canadian constitution, how they are going to convince Canadians from every part of the country that there are tremendous benefits in national unity and that Canadians should have a made-in-Canada constitution. The same observers, whether they are

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from Europe, Asia or South America, will probably be very surprised to see how passionately involved Canadians have become in their country in the course of this debate. At the beginning of November the situation seemed to have reached an

impasse, but then came incredibly rapid developments and we are now actually about to create a truly Canadian constitution. And this is thanks to the spirit of co-operation shown by all heads of provincial parties, all provincial first ministers, with one exception, of course, but with 74 members in the House of Commons, one can say that Quebec is amply represented and that the interests of Quebecers are in good hands. We have been doing this for years, Mr. Speaker. If there are 74 of us, it certainly did not happen by accident, and the reason is surely that the members from the province of Quebec are dedicated to defending the interests of Quebecers.

Of course, the Government of the province of Quebec was in a position where it could not sign this kind of agreement, for the simple reason that its number one priority and raison d'être is to separate the province of Quebec from Canada. Would the party's militants agree to having their leader sign and become a Father of the Canadian Confederation? Imagine! I do not understand how anyone could entertain the thought that those people would be capable of coming to Ottawa in good faith and making a sincere contribution to advancing the case of Canada's Constitution. In fact, they made it quite clear that they thought it was a non-starter and that they were not interested. The whole point of their being there was to apply delaying tactics. Every time a solution seemed imminent, every time a problem was resolved, they managed to find other ways to obstruct the proceedings and to keep Canadians from getting their made-in-Canada constitution. Of course, that is part of their program. And that is how they keep the aspirations of their militants alive.

Mr. Speaker, today the Premier of the province of Quebec or perhaps I should say the provincial Premier of Quebec, is claiming that he has a veto right, which he himself had refused last April, when he acknowledged that he did not, in fact, have a right of veto. Besides, if he had been convinced that he had veto powers, he would not have found it necessary to go to the Supreme Court and ask them to decide whether two major provinces, with the Canadian Government, could ensure the patriation of our constitution with an amending formula and the Charter of Rights. If he had felt for a minute that he really had that veto right, he certainly would not have gone to the Supreme Court. Clearly Mr. Speaker, his arguments are frivolous.

I referred earlier to the contribution of the hon. member for Joliette, the Progressive Conservative member for Joliette. I had expected that his contribution to this debate would be inspired by loftier sentiments.

Once again, Mr. Speaker, he kept carping at his colleagues from Quebec. It is a nice thing in such an assembly to hear someone claim that only he can be right. This reminds me, Mr. Speaker, of that soldier who was marching out of step in a parade and saying: I am not out of step, all the others are. This is absolutely shocking and what I found most disappointing in his intervention was his lack of support for his leader. After hearing him, the first question you wanted to ask was this: Is his leader really sitting at the House of Commons or in the Quebec Legislative Assembly? And from his comments, to which we are unfortunately used, I infer that his leader is not sitting in this House but in Quebec. However, as a member of the federal Parliament addressing the constitutional proposal, it seems to me he should have supported his own leader, the leader of the federal Progressive Conservative Party in his efforts to convince his Quebec leader to sign the agreement, like his counterparts from the other provinces. But he did not, Mr. Speaker. He did not have the decency to praise his leader's commendable efforts to convince Premier Levesque, on behalf of the Quebec people, to support the resolution as suggested and supported by the other premiers. But he may also see some political advantage in trying to turn Quebecers' minds away from matters which are relevant to them. The longer the

debate goes on, the better it is for him because there are problems Quebecers have and wish to discuss among themselves, for instance the gasoline tax increase, the National Holiday scandal, the high increases in electricity rates and many other matters, such as the scandals and the mismanagement at the Department of Education. Quebec, or at least the present provincial government is pleased that the debate is still going on in this place because it keeps the people's minds occupied in every province and especially in Quebec.

Mr. Speaker, before calling it ten o'clock I would simply like to repeat how tiresome it is for us Quebecers that so much time is being spent on deciding to give ourselves a Canadian constitution. With your permission I will read a statement by one of my predecessors here in this House of Commons, the member for Labelle in the 1930s, Mr. Henri Bourassa, who upon returning from a trip—Mr. Speaker, I see that you want to call it ten o'clock, so I will wait until tomorrow to quote my colleague and predecessor, Mr. Henri Bourassa.

(I.) CANADA, HOUSE OF COMMONS DEBATES, THE CONSTITUTION

NOVEMBER 26, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 13295-13296

THE CONSTITUTION

APPLICATION OF OVERRIDE PROVISION—
MOTION UNDER S.O. 43

Mr. Svend J. Robinson (Burnaby): Madam Speaker, I rise on a matter of urgent and pressing necessity pursuant to the provisions of Standing Order 43. In view of the fact that Section 33 of the proposed Constitution resolution would

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permit provincial and federal governments to override and deny fundamental rights to Canadians, including freedom of conscience and religion, freedom of the press, freedom of association, and the right to protect from discrimination against the physically and mentally disabled, ethnic and racial minorities, the elderly, and possibly women, and in view of the fact that the federal-provincial accord refused to protect these groups from possible discrimination, I move, seconded by the hon. member for Beaches (Mr. Young):

> That this House urge the Minister of Justice to propose amendments to the constitutional resolution, eliminating the possibility of Section 33, the override provision, applying at the very least within federal jurisdiction.

Madam Speaker: Is there unanimous consent for this motion?

Some hon. Members: Agreed.

Some hon. Members: No.

* * *

(I.) CANADA, HOUSE OF COMMONS DEBATES, RESOLUTION RESPECTING CONSTITUTION ACT, 1981

NOVEMBER 27, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 13389-13340

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GOVERNMENT ORDERS

[English]

THE CONSTITUTION

RESOLUTION RESPECTING
CONSTITUTION ACT, 1981

The House resumed, from Thursday, November 26, consideration of the motion of Mr. Chretien:

[…]

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[…]

Mr. Ian Waddell (Vancouver-Kingsway): Mr. Speaker, indeed this is a surprise. I followed closely the remarks of the hon. member for Esquimalt-Saanich (Mr. Munro), but I could not quite understand whether he finds the Constitution so fatally flawed that he will vote against it. I almost gathered this from his speech.

I should like to say something generally about the Constitution and something precisely about the particular amendment of the hon. member for Yukon (Mr. Nielsen). A constitution is more than a mechanical set of ground rules: it is a mirror reflecting the national soul. I agree with the last speaker that we must take time to make this the best document possible.

We in the New Democratic Party have consistently argued for three historic goals: patriation of the British North Ameri ca Act, 1867, hitherto Canada's main constitutional document; an amending formula which would do justice to the regional diversity of Canada; and a charter of fundamental freedoms and rights. Today I had the opportunity to speak with the Minister of Transport (Mr. Pepin). On the basis of my experience as a westerner and partly as a northerner, and his experience from travelling around the country with the inquiry into the Constitution for years, we both agree that Canada is a difficult and regional country. But this is part of the greatness of the country. We wanted to see an amending formula which would do justice to the regional diversity that is Canada.

This is not new for us. It is consistent with the history of our movement, the movement of the CCF and the NDP. For example, in 1927 J. S. Woodsworth introduced a motion to patriate the Constitution. The same motion prompted the calling of the first constitutional conference which really began the entire process we now see culminating.

The New Democratic Party and its predecessor, the CCF, have a record in civil liberties unsurpassed by any political party. One need only mention our fight for the vote for Chinese Canadians, against the shabby treatment of the Japanese Canadians, as well as our opposition to the War Measures Act. On a provincial level, T. C. Douglas introduced Canada's first bill of rights in Saskatchewan in 1947. We have consistently fought against Canada's political colonialism to the United Kingdom.

Today, every day in the House and in every committee, we fight against Canada's present economic colonialism to the United States. It is a consistent history. One would expect that we would welcome, support and advocate the government's thrust toward a new constitution.

I should like to put one matter to rest. The Constitution was made in Canada. It was made by 900 individuals who

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appeared before the committee, the presentation of 300 briefs and the work of approximately a hundred members. I should like to pay tribute in my speech today to the excellent work of the hon. Minister of State (Mr. Joyal), as able co-chairman of the committee, as well as that of the hon. member for Burnaby (Mr. Robinson) and the hon. member for Yorkton-Melville (Mr. Nystrom) as members of the committee.

This Constitution was made in Canada and at every stage of the process Canadians wanted to make it a better and more contemporary constitution. That was always the resolve.

Some doubts were raised in the country about the legality of the process, so it was proper that the finished package be referred to the Supreme Court of Canada. When the Supreme Court ruled that it was legal but not constitutional in the conventional sense, it was proper for this party to hold out for another first ministers' conference. That is history, Mr. Speaker. We had that first ministers' conference and in the end we had a document.

That document contains some improvements. For example, the Senate veto was deleted and that is an improvement. But it also had some fundamental flaws, Mr. Speaker. There were four-and perhaps a fifth one is this amendment dealing with the north.

The first fundamental flaw was the removal of the principle of equality between men and women. That was restored, however. The second flaw was that it removed an explicit and positive affirmation about native rights. That was restored, but only partly, because the word "existing" was added to Section 34. I want to speak further about that in a few minutes, Mr. Speaker. That amendment was very symbolic for the native people and it is something upon which we can build. The third flaw is that the accord does not include Quebec.

The fourth flaw is that the charter has been somewhat emasculated. The principal concession that the premiers won from the federal government in the November 5 accord was the provincial override on fundamental freedom, legal rights and equality rights in the charter.

The purpose of an entrenched charter is to give the courts, in an open and direct manner, the authority they need to protect our basic freedoms if legislative and government restraint should fail. If legislatures are given the power to cancel that judicial authority, as they now have been, they are most likely to use it when there is a failure of restraint. Canadian history shows that it has been, by and large, the provincial legislatures and their creatures, the municipalities, that have most often violated fundamental rights.

I am a lawyer, Mr. Speaker, and I have appeared in every level of court in Canada on civil liberties cases and I have seen this pattern emerge very clearly. It is in our history, from Mr. Roncarelli's liquor licence to the Alberta press laws, most recently to the anti-parade by-laws in some of our cities which affect freedom of assembly. It is a sorry picture.

There have been violations of civil liberties in this country and if the legislatures are given an override, they may use it some time when restraint is called for.

A great lady who once represented my riding of Vancouver Kingsway in this House, Grace Macinnis, told me that her husband, Angus Macinnis, stood up against a tidal wave of public opinion when it was proposed to confiscate the homes and property of Japanese Canadians and move the people away from the west coast during the war. I am afraid that could happen again and that is why I think it is unfortunate that we do not have an entrenched charter. We will have to live with that, however. We expected that some concession would be made to the premiers and this is it. I just want to express my disappointment about that, Mr. Speaker.

This is not the kind of charter that we, as socialists, believe in, Mr. Speaker. We believe that the hungry must be fed; the ailing must be helped; the old must be looked after and the young must be allowed to go as far as possible in school. These ideals are almost universally accepted. They belong in a twentieth century constitution but what we have here is a nineteenth century charter.

Socialists are concerned with the growth of the human spirit. This charter talks of freedom but we know that no one is really free if unemployed, if poor or if unable to send his or her children as far as possible in school.

Last weekend 100,000 people demonstrated on Parliament Hill. I think they were demonstrating for economic freedom in the interests of working people, students and pensioners.

[Translation]

Mr. Speaker, if it is true, as it has often been said, that the Prime Minister and his liberal caucus are the most legitimate representatives of Quebec and that we can ignore the designs of the Quebec premier, Mr. Rene Levesque, I ask myself a few questions. Why do the same principles and reasoning not apply to the other provinces? Have the aspirations of the premiers of anglophone provinces been brushed aside when they were inconsistent with those of the federal members from those provinces? Surely not Mr. Speaker. The Parti quebecois may fail to reach its goal of Quebec independence but it will remain a political power in Quebec for several years to come. This is why it must be taken seriously, this is why we cannot allow ourselves to ignore the legitimate aspirations of Quebec merely because the Parti quebecois is in power.

As federal Members of Parliament, it is our duty to be prudent. What should we do? I think that the federal Parliament should do its utmost to respect the traditional position of Quebec in constitutional matters. In April, 1981, Quebec agreed to a patriation project with seven other provinces. I think that this constitutional resolution should contain the basic principles of the agreement reached among those eight provinces. How could Mr. Levesque reasonably object to such a resolution? To maintain the principle of two majorities in Canada, I would even be willing to consider the right for Quebec and for Quebec only to opt out of federal programs

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coming under its own jurisdiction and to receive a fair financial compensation.

[English]

We cannot say that the federal Liberals necessarily represent Quebec. It is not said of me that I represent the provincial interests of British Columbia; I represent national interests. If we are to take provincial interests into consideration, then we must carefully consider the government of Quebec. The Parti Quebecois will not just go away. I suggest that in this regard we should examine the April accords and try to implement them. I have gone so far as to say that we may have to consider giving Quebec, but only Quebec, the right to opt out of programs with financial compensation.

The reason that I will vote for this package is that it embodies, not in a perfect way but in a general way, the picture that I have of Canada. I see Canada as two founding societies, the English and the French, built on the foundation of the aboriginal people. That is why we fought so hard to get Section 34 included.

Some hon. Members: Hear, hear!

[…]

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[…]

Hon. David Crombie (Rosedale): Mr. Speaker, I would like to propose and speak to the following motion:

That the proposed Constitution Act 1981 be amended by adding after Clause 31 of Part I the following new clause:

"32. Nothing in this charter affects the authority of Parliament to legislate in respect of abortion."

The other day, the hon. member for Etobicoke-Lakeshore (Mr. Robinson) asked the Prime Minister (Mr. Trudeau) a question with respect to this matter. The Prime Minister responded in this fashion:

If the essence of the question is whether this House continues to have the right to deal with abortion, Madam Speaker, the answer is yes. It will be the Parliament of Canada which will still be writing the Criminal Code, and members of this House will have the responsibility, and I wish them well. in dealing with the problem of abortion.

In my view, all sides of the House and, indeed, Canadians across the country, want to ensure that Parliament has the right to legislate if any changes are deemed necessary with respect to the law on abortion. The difficulty for a great number of Canadians is that conflicting legal difficulties throw that matter into doubt. We want to make it clear that Parliament's freedom to legislate on this matter is unimpaired.

Some hon. Members: Hear, hear!

Mr. Crombie: That is the purpose of the amendment, and there is no other. Abortion is not merely a legal matter, and it is not only a medical matter; it is both. For many people it is also a moral question. Those who believe in, and call them selves Pro-Life, have a strong moral conviction that life begins at conception. They hold a deep and abiding reverence for the sanctity of human life. They even have difficulty with the existing legislation. Those who believe in, and call themselves Pro-Choice, believe, as stated in I Corinthians, that the body is the temple of the Holy Spirit; therefore, they believe that abortion and the question of abortion is a personal and individual responsibility. They hold that conviction so strongly that they have difficulty with the existing legislation.

Many of us on all sides of this House and throughout the country represent constituents who understand and agree with at least some parts of both of those positions. Indeed, it has been my experience that when Canadians themselves deal with the matter of abortion in specific situations, they approach the matter with soul-wrenching honesty. They try to do the right thing and they try to choose the good. They try to do what they ought to do.

If Your Honour has ever been involved in any specific circumstance, you know that there is a desperation concerning the question of abortion as people strive to get a moral perspective in dealing with the onslaught of circumstance. That is why the vast majority of Canadians approach the matter with a feeling of individual responsibility to themselves, to their families, to their communities, and to their God, taking into consideration their reverence for life. That has been my experience; but it may not be the same for all at all times.

There are some people who think that abortion is only a medical matter and that it is devoid of any moral context. There are others who think that there are no moral, theological or compassionate grounds for the act of abortion. It is not my purpose, in this amendment, to evaluate or judge any of those perspectives. I want to ensure that these perspectives will be heard when the question is raised in the Parliament of Canada.

Some hon. Members: Hear, hear!

Mr. Crombie: It took 350 years to establish the parliamentary system where legislation governing our actions with respect to life and death would be determined not by those appointed by the state but, rather, by those elected by the people themselves.

Some hon. Members: Hear, hear!

Mr. Crombie: None of us disagree on that: not the Liberals, not the New Democrats, not the Conservatives, not Pro-Life, not Pro-Choice, and not anyone in the middle. We all agree that Parliament must have the freedom to decide. The purpose of this amendment is simply to make sure and make clear to all that that is, indeed, our intention.

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For those who have doubts about the matter being in the Constitution, this will lay to rest their fears. For those who do not have any doubts, it should give them no problem because this motion does not alter the substance of the charter one whit.

Some hon. Members: Hear, hear!

Mr. Crombie: Through this amendment, I am simply making explicit what the Minister of Justice (Mr. Chretien) and the Prime Minister made implicit yesterday.

Some hon. Members: Hear, hear!

Mr. Crombie: Moreover, I should add that since the amendment deals only with the Parliament of Canada, it should not have any effect on the accord between the federal government and the provincial governments.

Some hon. Members: Hear, hear!

Mr. Crombie: I would also like to say that in my view this amendment strengthens the charter. It will remove doubt from those who would like to be able to support the charter, just as we removed doubt in Section 28 when Parliament restored equality to full guarantee, as no override is contained in that section. Finally it agreed with the ancient Chinese philosopher that women hold up half the sky, therefore confirming that in this country there should be clear equality between women and men.

Some hon. Members: Hear, hear!

Mr. Crombie: We have also removed the doubt concerning Section 34 and native rights, as many people in on both sides of the House are attempting to do with respect to the doubts raised in the Province of Quebec.

When I was asked if I might speak on this motion, I prepared some notes. I do not mind saying that a number of people got in touch with me. Although they agreed with the substance, they asked why I was doing it since I was not directly involved with the issue and had not participated on behalf of my party on the issue. I make these comments today and, in a sense, put my neck on the line because I believe in this Charter of Rights and Freedoms.

Some hon. Members: Hear, hear!

Mr. Chretien: What about the accord?

Mr. Crombie: I believe in the accord.

Mr. Chretien: You believe in the accord?

Mr. Crombie: The Charter of Rights and Freedoms is very important, not because it

will deliver immediate realities tomorrow, but because it contains articles of faith and testimonies of hope for the people whom this Constitution governs.

Some hon. Members: Hear, hear!

Mr. Crombie: This charter not only sets down the rights, the freedoms and the privileges for which generations of Canadians have fought and died, its provisions also extend to Canadians who until now have had great difficulty understanding that in this country they had an equal stake in the future. This charter allows those people to come into the Canadian home. What I want to do through this amendment is to allow the doubters to come home. I want to allow the doubters to come home and support this charter.

The story of Thomas is an old story, but it was Jesus of Nazareth who told us that it was necessary to go with the doubters one more time, to go with the doubters that one extra mile. That is the purpose of this amendment.

This charter was built by all of us. It is not the product of the Liberal Party of Canada, it is not the product of the Conservative Party and it is not the product of the New Democratic Party alone. I served on the constitutional committee and I know that this charter is the product of all of us. It is not a triumph of one group over another. It is not a triumph of one view over another. This charter moves us one giant step closer to the goal of the Right Hon. John George Diefenbaker in 1961 when he stated that his reason for having an entrenched charter of rights was as follows:

I am a Canadian, a free Canadian, free to speak without fear, free to worship God in my own way, free to stand for what I think right, free to oppose what I believe wrong, free to choose those who shall govern my country.

Therefore, I can decide the questions that are vital to me.

Some hon. Members: Hear, hear!

Mr. Crombie: Mr. Speaker, I am aware that this motion causes difficulty, and it was not my purpose to cause difficulty. I ask the government to consider my motion. It is a simple one. It allows those who want to support this Charter of Rights and Freedoms to be able to support it once they have been assured that the Parliament of Canada, not the courts alone, will deal with the question of abortion.

I want to emphasize that all of the groups, no matter on which side of the question they are, want Parliament to decide.

Some hon. Members: Hear, hear!

The Acting Speaker (Mr. Ethier): I see the hon. member for Burnaby (Mr. Robinson) rising on a point of order.

Mr. Robinson (Burnaby): Mr. Speaker, will the hon. member permit a brief question?

The Acting Speaker (Mr. Ethier): Is there unanimous con sent for the hon. member to ask a question?

Some hon. Members: Agreed.

Some hon. Members: No.

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[Translation]

Right Hon. P. E. Trudeau (Prime Minister): Mr. Speaker, in addition to the comments I am about to make regarding this particular amendment, including various reasons why I feel the amendment is redundant, I should also like to take this opportunity to explain the government's general position with respect to amendments that are presented to the House at this stage, undoubtedly for perfectly good reasons, with a view to further improving the charter. Of course there is room for improvement in the charter like everything else that is made by

man, and we admit as much. However, I would like to suggest to the House that at this stage, any further amendment such as the one presented by the hon. member opposite and the one that has just been defeated and which was moved by the member for Yukon (Mr. Nielsen), is actually a threat to the accord concluded on November 5 which finally gave us our own constitution amendable in Canada with a charter of rights, of which a member of the opposition has just said that it was very good in its present form.

I shall first address the substance of the amendment. The Minister of Justice (Mr. Chretien) has explained several times in this House, in point and verbally on other occasions, that in his view, which is supported by his own Department of Justice, the charter is at this point in time neutral with respect to abortion. In other words, the charter does not say whether abortions will be easier or more difficult to practise in the future. The charter is absolutely neutral on this matter, and according to the interpretation of senior officials and agents of the Department of Justice and according to the minister himself, under the constitution the House retains the right to amend the Criminal Code, which is the statute affecting the issue of abortion. So, as I said yesterday, I believe, in answer to a question by the member for Etobicoke-Lakeshore (Mr. Robinson), the House will probably have to decide in the weeks, months or years ahead, depending on the wishes of its members, whether the Criminal Code should be amended to make abortion less readily or more readily available. The onus will be on us. This, Mr. Speaker, is to reassure those who feel that under the charter we are losing some of our rights with respect to abortion. However, as I said yesterday to the member for Etobicoke-Lakeshore, should a judge conclude that on the contrary, the charter does, to a certain extent, affect certain provisions of the Criminal Code, under the override clause we reserve the right to say: Notwithstanding this decision, notwithstanding the charter of rights as interpreted by this judge, the House legislates in such and such a manner on the abortion issue.

Mr. Speaker, that is our general argument. Moreover, towards the end of his speech I heard the hon. member for Rosedale (Mr. Crombie) say that there were still people who had some doubts about this, and he said, and I hope I am quoting him correctly:

[English]

"We want the doubters to come home. "We want the doubters to feel reassured as a result of this charter, and, therefore, I am proposing an amendment relating to abortion".

Once again I think what the hon. member is doing is being done with the utmost of good faith. But I wonder why he does not also attempt to satisfy doubters with regard to the question of capital punishment. Maybe the right to life, which is guaranteed in the charter, in some way affects the possibility of restoring or abolishing capital punishment. There are certainly some doubters on that point. I see some hon. members in the backbenches behind the hon. member for Rosedale (Mr. Crombie) nodding in assent.

What about the question of euthanasia? It also affects the right to life. Why do we not say that nothing in this charter prevents us legislating on that? What about genetic engineering? What about all the doubts that will arise on every other subject? We have the right to have conscription, maybe; the right to send men to war to kill other people or be killed themselves. All these things may cause doubt in some people's minds.

This is to say, Mr. Speaker, that we cannot expect in advance, in the short time we have, without the test of the application of this charter in the courts and without some experimentation with its effects, to bring all the doubters home, as the hon. member would like to see us do.

I will go on to another argument which once again affects not particularly this amendment but others. The Minister of Justice (Mr. Chretien) has handed me several pages of argument to the effect that this amendment is not only unnecessary but could, indeed, be harmful because, by excluding from the charter the right to do something as regards abortion, lawyers and judges might be inclined to conclude that since we made that exclusion for abortion and did not make it for euthanasia, capital punishment and so on, therefore the charter itself precludes the Parliament of Canada from legislating in those areas.

That is just one of the many arguments the Minister of Justice has just handed me. I will not go into them at this stage. They are all good, but it seems to me we have another reason which does not affect only this amendment, but which affects the amendment moved earlier by the hon. member for Yukon (Mr. Nielsen) and no doubt will affect other amendments which will be moved in the course of today, Monday, Tuesday or Wednesday. I want to explain the attitude this party has as regards those amendments.

When I was meeting with the ten provincial first ministers on November 3, 4 and 5 I was meeting them not only with the desire of this party but with that of others to seek one final compromise, which I must say in my own heart I was not very optimistic about reaching, though I was very determined, as was the Minister of Justice who was assisting me, that we would ago as far as was conceivably possible to try to make an accord possible. Not only was that argued on this side of the

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House, it was a very firm enjoinder of the Leader of the Opposition (Mr. Clark) and the Leader of the New Democratic Party (Mr. Broadbent), who made strong, I would say almost vociferous, statements to the effect that if we went there and did not negotiate in good faith, they would fight us tooth and nail all the way. They would not let us go to London.

I must say this was not surprising coming from the Leader of the Opposition. This has always been his position, and I respect it. But the Leader of the New Democratic Party, who has been a supporter of the previous resolution before the House, made it very clear to me too that if there was not some compromise, if there was not a genuine attempt to reach an agreement, he would not be able to guarantee that he or his caucus would support this party in the resolution which was then before the House.

The Government of Canada went to that meeting of first ministers intent on compromise, intent on reaching agreement even if that meant giving up some parts of the charter or, indeed, some formula for amending which we thought, and, as I indicated in answer to questions earlier today, probably still think, is better than the one with which we are now going to proceed to Westminster. But we compromised. We were asked to compromise and we did compromise.

The result is that we reached an accord which is historic not only in content but in bringing into effect the will of the Canadian people and of successive governments since they began the attempt in 1927, to give a constitution to Canada, the only sovereign country in the world which until now, and it is still true today, did not have its own constitution amendable in its own country—a constitution as a result of an accord which would have these historic, momentous dimensions.

This did mean on this side giving up quite a bit. It meant telling the premiers: We will give in to you when you want a *non obstante* clause; we will give in to you when you do not want the Victoria formula but prefer the Vancouver formula which was also the preferred formula of the Leader of the Opposition-but at least we will sign this accord in good faith and will undertake as a government to see it

through the House of Commons. I think we have lived up to the spirit of that accord until now.

It is true that with regard to the two amendments, one concerning women and equality between the sexes, and the other concerning aboriginal rights and the entrenchment thereof in the Constitution, the Minister of Justice did support changes. He did so after consulting with the nine signatories to the accord who gave their consent in circumstances which are known. It is true also that in an effort to reach out to the government of Quebec we also brought in other amendments, one on the Canada clause and the other on some form of compensation when there is opting out of constitutional change in areas concerning culture and language, two subjects which, of course, are very important to the preservation of the identity of the French-speaking Canadians who are largely citizens of Canada residing in Quebec. It is true that the Minister of Justice did this. He did this in the case of the first two amendments because I think the results showed that if the equality of sexes amendment and the aboriginal rights amendment were left out of the accord, it was not the result of a wilful desire of the ten signatories to take out of it what had been before the House and the country for a year. In that sense I think the Minister of Justice, though I know he felt he was walking on eggs, treading gingerly, knew every time he picked up a phone to speak to the premier or attorney general of a province he was risking their saying: "Look, what are you people doing in Ottawa? You are trying to force us, blackmail us or threaten us into recognizing such and such a pressure from such and such a lobby group. You are end-running the accord." I must say the provinces have shown a great deal of forbearance and the Minister of Justice a great deal of patience in getting the improvements we already have.

I say, as regards the two amendments relating to the particular situation of Quebec, that they were not only brought before the House with the consent of the nine signatory provinces, but with the support, I believe it is fair to say, of at least a majority of the official opposition and of the NDP because they, as we on this side, feel it was and is important to bring the province of Quebec, through its legal government—I say "legal", but is it legitimate; I am not sure—into signing this accord.

That is the story of the amendments we had until now. That is why, from now on, when it comes to improving the charter in ways that had not been put before the House or had not been accepted in the previous resolution, improving the charter to bring doubters home as the present amendment suggests, or improving the charter to give satisfaction to the requests of the Council of the Northwest Territories or Yukon, as the amendment brought in by the member for Yukon (Mr. Nielsen) does, we say those improvements should be made in the charter when it is in Canada and when we have an amending formula to improve that charter.
I think that was the point of view expressed ad nauseam by the official opposition last year when we were trying to—

The Acting Speaker (Mr. Ethier): I regret to interrupt the Right Hon. Prime Minister. There was a House order earlier this day that at 4.30 the question would be put. However, he may continue with the unanimous consent of the House. Is it agreed?

Some hon. Members: Agreed.

Mr. Trudeau: I am sorry I did not realize that the vote was for 4.30, Mr. Speaker. I beg the indulgence of the House to permit me to at least terminate this last argument I was in the process of making.

Any amendment now which is brought before the House and which does not have support of the nine premiers, we will vote against. We will vote against it because we are holding our word to them. When the Minister of Justice (Mr. Chretien) telephoned them during these past days,

the premiers said that if that was the last time we would go to them, it was all right. But we are also keeping our word that

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we gave them when we signed that accord, that imperfect as it was, we would be bound by that accord and we would not try to make end runs in order to improve it in some way that had not been done through the accord.

Once again, for a year the official opposition has been telling us that it wants a charter written in Canada, that it does not want it to be done in London and does not want Westminster to tell Canadians what their rights are. For the past ten days they have been trying to change this resolution so as to tell Westminster to tell us what this charter should be. Surely a minimum of consistency should be required. We had a charter. We have one now. It is not perfect, nor was it in the previous resolution, but now that we have an accord, now that we are proceeding to Westminster at least in a way in which the courts indicated was not only legal but constitutional, let the accord and the resolution go to Westminster. Let it come back and let us use the amending formula not only to bring other doubters on board if we have to, but even then to continue trying to bring the government of Quebec on side and hopefully as well the government of Ontario when it comes to entrenching Section 133.

These are the tasks ahead of us, Mr. Speaker. We should now turn our efforts in these last days to making sure that we do not destroy the historic accord of November 5. My caucus, my cabinet and I have reached this conclusion in past discussions, including one which we had this morning amongst several ministers in which we said that from now on we cannot risk accepting any amendments, no matter how desirable, because they do risk endangering the accord.

I think the first precept of ethics is to make sure that the aim for the better does not destroy the good.

We had made this decision and I told the leader of the House that I intended to speak in this way on this amendment, but just 15 minutes ago I was handed the text of a telex sent to me by the premier of British Columbia who, as we know, is the chairman of the premiers' conference for this year.

It is a telegram that was not solicited by me or my government and of which I had no knowledge until after we had made the decision that I have just announced.

With your permission, Mr. Speaker, I will read this tele gram which has reached my office by telephone. I am told the telex is on its way. The telegram reads:

I am writing to you on behalf of the nine provinces that signed the November *5* constitutional accord. The agreement reached in Ottawa is a significant achievement in the affairs of our nation and was only possible through compromise on the part of all of us. I have been asked by my colleagues to inform you that additional constitutional change should only be considered in Canada following the patriation of our Constitution. My colleagues and I believe that further negotiation must not put at risk the accord and that the package should be approved by Parliament as it now stands and proceeded with without further delay.

That is the position of the nine provinces which signed the accord. That is the position of this government and, regardless of the merits or demerits of any amendment put forth between now and the adoption of this measure, this government, and I hope members of this caucus, will respect the word we gave when we signed that accord and will agree to be bound by a compromise agreement ·which was constantly described as the Canadian way, by a compromise agreement which we

signed in good faith and which we will defend in this House with utmost vigour.

Some hon. Members: Hear, hear!

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(I.) CANADA, HOUSE OF COMMONS DEBATES, RESOLUTION RESPECTING CONSTITUTION ACT, 1981

NOVEMBER 30, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 13462-13529

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GOVERNMENT ORDERS

[English]

THE CONSTITUTION

RESOLUTION RESPECTING
CONSTITUTION ACT, 1981

The House resumed, from Friday, November 27, consideration of the amended motion of Mr. Chrétien:

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[English]

Hon. Mark MacGuigan (Secretary of State for External Affairs): Mr. Speaker, more than one hundred years ago we Canadians set out on a great undertaking. At first hesitatingly, subsequently hopefully, we Canadians began the process of binding a continent together to create a country. Now we are about to complete the work of 1867.

In this, the last week of our new constitutional debate in Canada, our emotions are a mixture of satisfaction at what we have attained in the amended resolution before us and of regret at what we have not been able to accomplish.
It would be easy for those of us on this side to give way entirely to sentiments of disappointment. We have had to accept an amending formula which we regard as seriously flawed. Yet it must surely be clear by now that we place a much higher priority on the attainment of a Charter of Rights and Freedoms than we do on any amending formula, whatever its merit. In fact, it was this very difference in priorities that enabled us to reach agreement with the dissenting seven. Like the seven, we protected our highest value in the settlement; unlike them, we assigned first place to the rights of Canadians. We fought, not for power for ourselves, but for the people. And we won.

[Translation]

However, even in the Canadian Charter of Rights and Freedoms we have been unable to protect the Canadian people as much as we should have liked. Full protection will be possible only if and when a future Quebec government, deter mined to fight for rather than against Canada, agrees to the provisions on education. In addition, it will be possible only if also the other provinces do not override periodically the rights guaranteed in the Charter. Total protection depends on the continued good will of provincial governments and the continuing vigilance of Canadians.

[English]

But complete actualization of potential protections may not be needed at every moment of constitutional life. Professor Walter Tarnopolsky, perhaps the country's leading civil liber ties specialist and the director of the new Institute of Human Rights at the University of Ottawa, developed the notion of the override in the *Canadian Bar Review* in 1975. He said:

I believe a notwithstanding clause … may be the only restraint we need place on the legislature…One must be realistic and understand that the most one can expect from a written bill of rights and judicial review is control of administrative and police action…Whether the courts do hold legislative or administrative action inoperative or invalid, is not always as important as the fact that they

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can do so, and as the fact that in rendering their decisions they can amplify the terse terms of the Bill of Rights and infuse them with principles to which society aspires and will compel, even indirectly, the public servants to adhere to. Even in the United States, the Supreme Court has invalidated very few Acts of Congress, but its judgments are guidance of what will be tolerated.

If Professor Tarnopolsky is right in estimating that it is not acts of Parliament or of the legislatures that will from time to time need to be declared invalid, but rather administrative actions under their authority, then perhaps the people have not lost very much through the introduction of the legislative override mechanism. In any event, they can bring into play all their skills in political lobbying. Even if worst comes to worst and an infringing law is enacted, it has a maximum life of five years, thus allowing special interest groups further opportunities of defeating it at five-year intervals.

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Mr. David Smith (Parliamentary Secretary to President of the Privy Council): Mr. Speaker, like most members of the House who have had an opportunity to speak in this debate, I consider it a great honour to do so. This is a historic debate and undoubtedly is the most significant debate on the most significant matter the House has ever dealt with.

Some of the famous debates concerned the building of the CPR under Sir John A. Macdonald, the navy bill under Borden, conscription, pipeline, the flag debate—all of these have gone down in Canadian history as part of our heritage and our tradition. But this constitutional debate is the greatest of them all, and that is why it is a pleasure to have the opportunity to participate in it.

I have not had a speech ready to give at a moment's notice, Mr. Speaker, because we were in a period of flux until recently. Earlier today when I had to decide what I would say when I spoke today, I thought I might talk about some of my feelings and about how I regard where we are at this point in the debate.

My attitude is a very positive one. I have a feeling of pride because I think the House is going to do a very good thing in two days' time. I think it is important that we recap for a moment the elements of what we are about to do in patriating the Constitution.

Until the beginning of this year many Canadians did not know that the Constitution of Canada did not reside in Canada but was still an act of the British Parliament. Canadians now know that for a variety of reasons we have not been able to bring that Constitution home for 114 years. As the result of this debate, many Canadians are now aware that we started making a conscious effort to bring the Constitution home in 1927 under Mackenzie King. In 1931, the Statute of Westminster was passed and the other dominions, as they were then called, cut the umbilical cord, but for several reasons Canada was not able to do that.

I was surprised to hear the hon. member for Red Deer (Mr. Towers) say that he felt we must make haste slowly. If any nation has ever made haste slowly on the subject of the Constitution, it is Canada. The question of patriating the Constitution is

not in contention. Just a couple of months ago people were saying, "Leave it; it has been fine for years and there is no need to worry about patriating it." I think it is clear that the consensus in the country now supports patriating the Constitution.

We have a very good amending formula which I think is reasonable and fair, Mr. Speaker. In all honesty, it is not all that I personally had hoped for. I liked the provision for a referendum when there seemed to be no other way to get agreement. I have never been afraid of going to the people, particularly with the built-in safeguards that were in the referendum procedure which would have required a majority of the people in each of the four regions to vote in support of a constitutional amendment. We compromised on that because

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there was a real desire to reach an agreement with the provinces. That agreement was reached, and there was an accord.

I admit I am somewhat surprised not just by the attitude of the hon. member for Red Deer but by many members of the official opposition who, for months when the government was prepared to go ahead without the consent and agreement of most of the provinces, kept urging the government to try to reach an accord at all costs. Now that the accord has been reached, they are prepared to break it for a variety of amendments which they have put forward.
The NDP were at least prepared to go ahead, regardless of whether a majority of the provinces agreed. I think it is now consistent with that position for them to move amendments to the accord, but I find it difficult to understand the position of the official opposition in this regard.

Notwithstanding my remarks about the opposition and their attitude to the Accord, I think it is fair to say that when the debate on the Constitution began there was a fair bit of acrimony when the subject of the amending formula came up. I do not think that acrimony exists now. There may be some people who disagree but we do not have the dissension we once experienced in the House.

We now have a charter, Mr. Speaker, and I think it is a good charter. I have always been committed to the concept of a charter although I realize that not everyone in the House has been. Earlier today I read some of the speeches hon. members opposite made when the item first came up for debate. Many members, particularly in the Conservative Party, were opposed to the basic concept of a charter before there was even any debate on what it might contain.

We know the position of former Premier Lyon and, quite frankly, I think it hurt him in the recent provincial election although that would be difficult to measure. A lot of people do not fully understand the ramifications of the charter or the ramifications of bringing the Constitution back home.

When it comes to a question of wanting the problem solved or not wanting it solved, I think most people want it solved. When it comes to the question of helping or hindering, I think most people want to see the premiers of this country helping. To the extent that former Premier Lyon was a hindrance, I think the people of Manitoba spoke and clearly indicated their sentiments on that.

Personally, I have never been in doubt about the charter. I have to admit that I have been greatly influenced by the experience of chairing the Special Committee on the Disabled and the Handicapped which went across the country and listened to hundreds of handicapped and disabled people speak about their feelings and why they wanted a charter. Many of them said; "Don't leave us at the mercy of the provinces. We want this charter and we want it in force right across the country." Well, Mr. Speaker, it is in force right across the country. I know that

some disabled people objected to the override clause but we strove for the best deal with the provinces, and I think that rather than the disabled people of this country being at the mercy of the provinces now, the provinces are at the mercy of the charter. The provinces cannot pass that override provision in a piece of general legislation every few years. They must put it in every act that they want it to apply to and they have to re-enact it every five years or else it automatically lapses.

The political reality of a formula such as that is that it will rarely, if ever, be used. And I do not think it is likely to be used with respect to the disabled and handicapped people of this country.

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Mr. Ron Stewart (Simcoe Stewart): […] Under Section 28 the notwithstanding clause is really an override. The much vaunted Charter of Rights and Freedoms is really not entrenched or enshrined in the Constitution. It is subject to change at the future discretion of federal and provincial legislators. I happen to disagree with this approach. The draftsmen are attempting to ensure that the custodians of our rights will not be appointed judiciary, but the elected representatives in the federal and provincial arenas.

I happen to be one of those who feel and believe strongly that basic human rights are not negotiable and not amendable. These rights were not given to us by the state. They are inalienable rights which stem from centuries of civil and common law, from confrontations with the monarchs and the barons, and from bloody battles in the defence of liberty and freedom. These are inalienable rights, as has been stated so many times; the right to life, liberty and the ownership of property. The state is not giving us any rights we do not already possess. To attempt to formalize these rights in a charter is carrying coals to Newcastle. Anything that is not written down I can do. It is those things that are done backwards that I fear.

The right to freedom of religion does not require any legislation which may permit a "notwithstanding" clause. The right to freedom of speech does not require any legislation which may permit a "notwithstanding" clause. The right to freedom of assembly does not require any legislation which may permit a "notwithstanding" clause. The right to own property does not require any legislation which may permit a "notwithstanding" clause.

By the way, under Section 2, where is the right to possess and enjoy the ownership of private property in the Charter of Rights and Freedoms? You will not find it, and do not give me the bally-hoo about provincial rights.

May only the state own property? The right to own property is a sacred right in this country and in a few others. Its omission from the charter is indefensible in my opinion. Historically we have always had that inalienable right to property. Even Machiavelli, who was championed by the right hon. gentleman across the way, stated:

When neither their property nor their honour is touched, the majority of men live content.

Let me quote from Charles Evans Hughes in a speech at Elmira, New York, in 1907. He said this:

We are under a constitution, but the constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the constitution.

Pope Leo XIII stated in 1891:

Every man has by nature the right to possess property as his own.

It is ludicrous in my view to propose such a tentative charter. It is an affront to simple justice, equality, liberty and freedom to propose a charter which might be subject to change at the whim or caprice of some legislative body. Freedom of speech, religion, assembly and the right to own property are basic human rights. They are less than secure or safe if they are subjected to a "notwithstanding" clause.

These fundamental freedoms should mean the same throughout each and every province in this country. We have always assumed that our rights are universal and portable. We have never considered for a single moment that they might vary or be subjected to different interpretations depending on what province we are in.

If rights must be entrenched, so be it, but let them be entrenched without qualification or override. In my lifetime I

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have seen too many abuses of the rights of some, ostensibly to protect the rights of others.

I think perhaps it was John Stuart Mill who said literally that every man has the right to go to hell in the manner of his own choosing so long as he does not bother his neighbour. I would prefer to take my chances with the courts interpreting my rights. I do not subscribe to the doctrine of legislative supremacy in all cases. If you prefer to go the route of legislative supremacy, maybe you should talk to the Japanese-Canadians whose rights were overridden during World War II, or talk to the Jehovah's Witnesses in Quebec.

I do not favour any lossely worded protection of basic rights which will permit the passage of discriminatory legislation. It has been written by others that the "notwithstanding" clause is a "watering down," a "gutting" and a "disembowelling" of the Charter of Rights and Freedoms. The "notwithstanding" clause weakens the charter, it does not strengthen it. Freedom of religion means just that—no "ifs", "ands" or "buts". The same goes for our other fundamental rights and freedoms.

Will we be better off with a Charter of Rights and Freedoms? Will we be more united? Will this proposed charter divide us? Those are interesting questions.
The United States has an entrenched charter, but its charter was wrestled, fought for an bled for. It was a declaration of independence from another country. That is a vast, vast difference.

On the other side of the Atlantic the United Kingdom does not have an entrenched charter of rights. In fact, the U.K. does not have a formal constitution. The U.S.S.R. has one of the broadest and most humanitarian charters for the protection of civil liberties that exists anywhere in the world. Need I say any more? So much for entrenchment.

We have existed for 114 years without an entrenched chart er of rights and freedoms, and I think that, with a couple of obvious exceptions, we have done remarkably well. Most Canadians want an end to this debate, but I do not believe they wish an imperfect charter as the price. I do not believe they want an imperfect Constitution. I would again like to quote from Senator Forsey who said:

—if we get an entrenched charter of individual and minority linguistic rights, putting them out of the power of Parliament or the provincial legislatures to touch…Such a charter would give the courts wholly new, and vitally important, powers over a vast new field of subjects; and the history of the United Stales shows how courts can interpret an entrenched bill of rights to block social progress. So the drafting of such a bill, or charter, will be both delicate and crucial.

For example; a constitutional guarantee for parents to have their children educated in their mother-tongue (French, English, or native) would not protect the freedom of choice which the United Nations has

declared essential. An English-speaking Canadian who wanted to have his children educated partly in French, or a French-speaking Canadian who wanted to have his children educated partly in English, or an Indian or Inuit who wanted to have his children educated partly in French or English, would have no constitutional protection whatever.

I do not believe that the people of Canada wish to trade parliamentary law for constitutional law. I feel somehow this evening that my remarks here are redundant. The dye has already been cast. We are all aware of it on this side of the House.

The government is determined to proceed hastily with this inferior product while we suffer the consequences later. It may be news to the government but Canadians do not rate the Constitution very highly in the pecking order. As Canadians perceive it, I am told that it ranks about fifth. It rates below the economic issues.

I am sure that most Canadians condemn the headlong haste of this government to patriate the Constitution. No one will disagree with the laudatory principle of patriation of the British North America Act to Canada so that our national infrastructure may be amended in Canada by Canadians, which is not the situation now. Patriating the British North America Act and adopting an amending formula are long overdue measures, but as the old Chinese proverb says, "Every journey of a thousand years requires a first step."

Many of my colleagues and I are prepared to take that first step but many of us are reluctant to voice our approval for something which is incomplete, inferior and a product of poor draftsmanship.

Give us the ways and means to unite this country. Give us the opportunity to unite as Canadians while casting partisan politics aside for the common goal, and give us the hope that we may have a basic resolution which can be examined and improved from time to time. Wednesday at 3 p.m. is not long enough. Let us not attempt to hobble future generations of Canadian legislators, the judiciary and ordinary Canadians with what is expedient and at the time politically proper.

We must do what is right. I must do what I consider right and not just what is popular. It is to be hoped that all our constituents will understand what we are doing. We will always need a salve in this country to soothe the regions and provinces, but now more than ever.

Let us slowly embark on that journey of a thousand years, but we should make haste slowly. Next Wednesday at three o'clock is a moment of great personal and national decision. Donne said, "Ask not for whom the bell tolls, it tolls for thee."

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Mr. Blenkarn: Certainly she is that way; she wants to make problems.

Let us go further. They proposed an amendment that would provide that only Quebec should opt out. They proposed an amendment of that sort because they said that if we were really concerned about Quebec, we should provide such a clause only for the province of Quebec.

I say to you, Mr. Speaker, that it is important that the clause with respect to opting out be the same for all provinces. The present clause is the same for all provinces, and we suggest that it be widened. We suggest that if it were widened, there would be a very good possibility that the government of Quebec, or eventually the people of Quebec, would find no difficulty in joining the accord. As long as Section 40 is left the way it is, the government of Quebec will always have an excuse to stay out of the accord. If we do not change Section 40, we continue to exacerbate the problem.

This afternoon the minister of state said that he would be prepared to accept an opting-out clause that would allow all provinces equally to opt out of amendments and be compensated. If the NDP were really interested in making this constitutional package work, why would they not go along with that? If they were, they would support the member for Provencher and the Leader of the Official Opposition.

In my opinion, there is only one conceivable problem in this package and that is that there is no *quid pro quo,* if you like, for Quebec's Joss of a veto. If there were clear compensation for opting out, there would be no way for any Quebec government to say it is not protected. In fact, no province which has agreed to the accord could object, because the effect of the amendment by the hon. member for Provencher is to extend provincial rights rather than to restrict them. Therefore, it is clear that no province which signed the accord would object to the broadening of Section 40. If the amendment by the member for Provencher were accepted, it would be virtually impossible for Quebec not to join in the accord, and the only objection would come from the federal government, a federal government which wants to carry on the war in the province of Quebec to the detriment of all Canada.

I say that the amendment by the hon. member for Provencher must be agreed to because all the provinces which signed the accord will accept it, and if those provinces accept it, Quebec will have no logical, or even illogical, reason to say to the people of Quebec that they have been hurt by the constitutional amendment. It will have no logical objection to the Constitution.

The only ones who might be hurt are those who insist that federal power should be expanded. Is that the view of the government? The minister of state has said that he has no objection to compensation on an opting-out basis. Surely we can pass that amendment and make it virtually impossible for the Premier of Quebec to give any valid reason not to go along with the accord.

I would like to deal now with the matters before us concerning the Charter of Rights and Freedoms. In my office in the House of Commons and in my constituency office I have a framed copy of John Diefenbaker's Bill of Rights. In a way, that Bill of Rights allows a government to change or alter rights if it specifically passes a statute to exempt a particular

item from the Bill of Rights. That Bill of Rights is looked upon proudly by my constituents and others who come to my office as an important charter of their rights, even though in that Bill of Rights Parliament reserved the right to restrict rights by specific amendment in a particular section of the statute. The charter before us now allows the same restriction on rights. It provides for a government to override some basic rights on a five-year basis. That means that the political process—not the judges—will determine where rights really stand. It is perhaps more restrictive than the Diefenbaker Bill of Rights in terms of the ability of Parliament or legislatures to alter, control or vary rights.

It has been suggested that the "notwithstanding Section 33" is not a good one. I suggest that while I am not as happy as I might be with "notwithstanding" sections, there is essentially no difference between that "notwithstanding" section and clauses in the Diefenbaker Bill of Rights. Therefore, when people say that they will not support this charter of rights because of Section 33, they should read the Diefenbaker Bill of Rights.

I am proud of the Diefenbaker Bill of Rights. It has flowing language which appeals to people. Perhaps one of the difficulties with the proposal which is before us is that the language could be better, perhaps more poetic.

However, this Charter of Rights and Freedoms is what John Diefenbaker would have liked to have seen entrenched in our Constitution. He tried to get approval for something like this, but found he could not. After more than a year, we may well be able to entrench basic rights in our Constitution, rights which are much like the rights in the Diefenbaker Bill of Rights.

I am concerned that there is not enough protection in the charter now before us for the rights of the family. It concerns me that on Friday the House defeated an amendment which would have made it clear that only Parliament could legislate with respect to the question of abortion. I believe we made a mistake in that respect.

I do not think that the charter as it is prevents Parliament from legislating on the matter of abortion, but there is a matter which should have been made clear. I would have been happier had the right to life of the unborn been protected in the charter. Perhaps it will be the subject of an amendment some time in the future.
I am troubled that the right to protection of property is not in the charter. I would like to have seen the protection of the right to property so it cannot be taken away without due process of law.

We still have our Bill of Rights in the province from which I come. That Bill of Rights is in place, and the right to own property is protected by the Bill of Rights of that province. If we had worked a little longer, perhaps we might have been able to entrench the right to own property in this Constitution. I very much appreciate the position of the Prime Minister when he says that we have worked long on this matter and that we should now approve the Constitution and patriate it from England with an amending formula, but with that amending formula and in the upcoming discussions perhaps we can entrench the right to hold property and not have it taken away without due process of law. I think that is possible.

I think it is possible to make other changes that hon. members from time to time have requested. There have been valid suggestions, but it is about time somewhere in the course of things that we moved with what we have done so far, finished what we have worked on and left other things which must be worked on to the next round of discussions, to the next round of negotiations and to the next round of debate, because if we debate and debate and debate, we will never accomplish anything.

When we pass statutes in this place, many of us have ideas which would improve them, but we pass them nevertheless, not because we think they are perfect but because they are steps in the direction in which we want to go. In the course of human work nothing is absolutely perfect, so while under Section 33 rights might be curtailed, while there are no property rights and while the rights of the unborn are not protected, this Charter of Rights and Freedoms is a pretty good effort. It may not be perfect. It is not perfect, but neither are we perfect. We should move ahead at this time so that we will have an opportunity to improve as we go. However, let us now move ahead because it is time to move ahead. We have had full discussion. We have had long committee hearings. We now have the agreement of nine of the ten provinces. That in itself is evidence of massive consensus. We have massive consensus on what we presently have, and while it might be that none of us are absolutely satisfied with what we have, we are all generally satisfied. it would be wrong for someone to vote against this matter because of dissatisfaction with one item or two items. Those who might think that to vote against this resolution is to vote against the Prime Minister—and if it were there just to do that, I would do it myself—are wrong. They are wrong because the package before us is no longer the emanation of the Prime Minister. He may have been the driving force behind putting this resolution before Parliament but, after all, the government always has the right to introduce legislation and bring

it forward. However, what is before us today is entirely different from what the Prime Minister brought before us. On the question of amendment alone, hon. members on this side will remember a non-confidence motion we proposed, that the Constitution of Canada be patriated with the Vancouver amending formula. That is exactly what we have. We will now have patriation of the Constitution, the British North America Act, after 114 years with the Vancouver consensus as an amending formula.

Mr. McDermid: Think of all the time we would have saved if they had listened to us.

Mr. Blenkarn: My hon. friend says, "Think of all the time we would have saved if they had listened to us." They did listen to us.

Mr. McDermid: It took them a year.

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Mr. Blenkarn: If we analyse the content of the package before us, we find that to a large extent the package was crafted by members of my party sitting in the constitutional committee, making suggestions in debate and, through their premiers, negotiating with the Prime Minister at federal provincial conferences. We have had a great input into what is here. Indeed, all members of the House had an input. This is not a package hammered through by an arrogant Prime Minister, although his insistence has been important to Canada because, without his insistence, we perhaps would not have come this far.

An hon. Member: Right on.

Mr. Blenkarn: It is important that we as a nation establish finally our total sovereignty. No matter how we look at it and no matter how we speak out, it has always been a problem for all of us when speaking to people from other countries and when being asked how we amend our Constitution. We have had to say that we pass a statute and send it off to Great Britain, and they rubber-stamp it. Maybe they do and maybe they do not, but what kind of sovereignty is it for a nation not to be able to amend its own Constitution on its own?

The resolution before us allows the amendment to the British North America Act to be renamed the Canada Act by us in Canada, with an amending formula calling for the consent and support of seven provinces and this House. That is an important step forward in the sovereignty of this nation. There are those who come from other lands who, although perhaps not born of British heritage, cannot say that they inherited rights, as I say I have. My rights go back to the time of the Magna Carta. There are people who come from lands where arrest in the middle of the night is not uncommon. There are people who come from lands where the right to stand up and speak one's mind is unknown. There are people who come from lands where exercising the right to get together in large groups is illegal and exercising the right to print what they want to print or to speak out and say what they want to say lands them in the gulag.

Such people ask, and have always asked, where it says we in Canada can do these things, and I have pointed to the Bill of Rights. But these rights were not entrenched. This charter entrenches those rights, and while some of us may say that we have these rights and do not need to have them in writing, at least we can say to our constituents, to ourselves and to our children that we have rights. We can say we have the right to move about this country freely. We can leave this country freely if we want to. We can say what we want. We can write what we want. We can think what we want. We can gather together where we want. Those rights must be expressed. They are expressed in this charter, and I will be proud when I can hang this charter on the wall in my constituency office and send it to my constituents, because it is about time we had these rights entrenched in law. They

are imperfect, perhaps, but they are entrenched for all Canadians.

(I.) CANADA, HOUSE OF COMMONS DEBATES, RESOLUTION RESPECTING CONSTITUTION ACT, 1981

DECEMBER 1, 1981

Source: House of Commons Debates, 32nd Parl., 1st Sess., 13554-13609

GOVERNMENT ORDERS

[Translation]

THE CONSTITUTION

RESOLUTION RESPECTING
CONSTITUTION ACT, 1981

The House resumed, from Monday, November 30, consideration of the amended motion of Mr. Chrétien:

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[…]

[English]

Mr. Allmand: Mr. Speaker, as I was about to say, it is with very mixed emotions that I address this constitutional resolution this afternoon. On the one hand, I am pleased that we have an agreement to proceed with patriation, an amending formula and a Charter of Rights and Freedoms. There are many good clauses in the resolution which I support. As hon. members know, I have been a strong proponent of patriation, a Canadian Constitution and a Canadian Charter of Rights and Freedoms for a long time. Hon. members can read my speech in this House of March 12 this year, when I gave full-hearted support to the resolution which was then before us.

On the other hand, I am not happy at all with the revised charter, with the new amending formula, the new wording which applies to the charter, and the new wording on aboriginal rights. In particular, I am not pleased with the introduction of the "notwithstanding" clause into the charter, a so-called override clause, and, in particular, as it would apply to Section 2, fundamental freedoms, and Section 15, the equality clause. For me, these two clauses were key ones which I think would have helped protect Canadians on many issues which are not foreseen today.

Second, I was opposed to the introduction of the word "existing" in the aboriginal rights clause. I voted for the amendment to eliminate that word from that particular guarantee clause for our aboriginal people. It is my opinion that the addition of the word "existing" will lead to confusion and ambiguity and cannot help but limit the application of those protections for our native peoples.

I am also concerned that there is no veto power for the province of Quebec. In our original resolution, we did have such a power. We do not have it now. I think we have always recognized that Quebec, as the only province with a French-speaking majority, should have that protection in dealing with amendments put forward by other provinces. It seems to me that the amendment put forward by the NDP in this debate would go a long way to getting support among the people in the province of Quebec, if not from the Quebec government.

Some hon. Members: Hear, hear!

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[…]

[Translation]

Mr. Louis Duclos (Montmorency-Orléans): Mr. Speaker, I have been a member of this House for a little over seven years, and I have never heard anything as stupid as the comments just made by my colleague from Bow River who, to a degree most unusual in this House, has been making a spectacle of his ignorance. I suggest he take the figures he was quoting for

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DREE grants and divide them by the population of each province, a very simple mathematical operation, and he will see that Quebec is not getting more than its fair share.

Mr. Speaker, at the end of the constitutional conference at the beginning of November this year, the Premier of Quebec gave three reasons why he felt that Quebec could not sign the accord entered into by the federal government and the nine other provinces of Canada. First, he mentioned his disagreement with Section 6 of the draft resolution which dealt with mobility rights. Second, he indicated his disagreement with Section 23 which, he felt, would seriously restrict Quebec's constitutional powers with respect to education. Third, he did not agree with the absence of fiscal compensation from the amending formula.

Mr. Speaker, I do not think the issue of mobility rights warrants a lengthy discourse. I fail to understand why anyone would object to the entrenchment of such a clause in the Charter of Rights. Why, in the Common Market, workers can move freely from one sovereign state to another sovereign state, while here in Canada, there are any number of barriers that prevent Canadian citizens from moving from one Canadian province to another, all within the same country. I feel that this objection is not well founded and is basically an expression of the separatist leanings of the Quebec government. I do not intend to dwell further on Section 6. Personally, if this were the only problem, I would unreservedly support the resolution which is now before the House.

Now, regarding the second objection made by the government of Quebec and which concerns the minority language educational rights guaranteed under Section 23, that is an entirely different matter. Basically, Mr. Speaker, what we must ask ourselves if we want to consider this issue seriously is: Does Section 23 truly guarantee that francophones outside Quebec and anglophones living in Quebec will have the same rights? Curiously enough, if one merely reads the wording of Section 23, it would seem that the section is more favourable to francophones outside Quebec, because under Section 23, any person with French as his mother tongue, whether that person was educated in Canada or outside Canada, would be able to go to French schools outside Quebec. While in the case of anglophones in Quebec, because of the restriction included in Section 59, it would be necessary to have been educated in English in Canada.

But in practice, Mr. Speaker, what are the real facts? In practice, I think that true equality will not stem from that section, if only because the where-the-number-so-warrants restriction will cause a lot more problems to French-speaking people outside Quebec than to English-speaking Quebecers. It is simply a matter of being somewhat familiar with the geographical distribution of French-speaking Canadians outside Quebec and to be aware of the concentration of English-speaking Canadians in the western part of Quebec to realize that in the case of English-speaking residents of Quebec, the where-the-number-so-warrants restriction will not be a source of major problems since, in any event, even outside the greater Montreal area, the entire structure is already in place. One of my colleagues told me that in a certain village of the Gaspé area they have one English school for 15 families. With respect to French-speaking people

outside Quebec, everything will be left to the discretion or interpretation of the courts, and we have no guarantee that their interpretation will meet the needs of French-speaking Canadians. I will come back to that later on, Mr. Speaker.

Second, Section 23 does not give French-speaking people outside Quebec the possibility of getting organized or of setting up their own structures which they will be able to control themselves, namely, school boards. We are all fully aware of the 35 per cent of French-speaking Ottawans who, for years now, have been complaining and urging the government of Ontario to allow them to control their own institutions. The answer has always been the same—no. Compare that with the situation prevailing in Quebec, and I would suggest that nobody can argue the contrary.

Besides, Mr. Speaker, the French-Canadian Association of Ontario sent a letter to the members and the senators of the Canadian Parliament. I will not read it because I may run out of time. In it they stated just how essential it was to guarantee their future in Ontario, more particularly in the Ottawa area, and to what extent it was also possible to find a satisfactory formula to enshrine that right in the Constitution. Mr. Speaker, I think that by putting the Canada clause in the Constitution we are asking Quebec to take a certain risk. Well, the province could take that risk or pay the extra costs to the extent that they would be offset by equivalent benefits for French-speaking people outside Quebec. It was with that in mind that I wrote to the Prime Minister (Mr. Trudeau) on November 17 to propose a draft of Section 23 whose result would have been to use the treatment reserved for the English minority in Quebec as a standard to define the rights of French-speaking people outside Quebec.

As you know, Mr. Speaker, our French-speaking brothers outside Quebec have good reasons to be concerned. Indeed, whether it is the Federation of Francophones Outside Quebec, the French-Canadian Association of Ontario, the Association of French Canadians of Alberta or the Association of French Canadians of Saskatchewan, they are the people who have to live in those conditions every day, and I think they are in an ideal position to assess the situation and the kind of life they lead in Canada. And all those people tirelessly repeated again last week that they had come to Ottawa to let us know that Section 23 does not do them justice.
Other statements are also of course a cause for concern. For instance, after the ratification of the agreement by the ten, Premier Bill Bennett went back to British Columbia and

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replied to someone who mentioned that the school rights of francophones had been entrenched in the Constitution: you know, what we have done basically is simply to entrench what we are already doing. And what are they doing in British Columbia? In about ten schools, there are French, classes, not French schools, but simply French classes. This means that when the children go out in the schoolyard, they must speak English. Of course, in such conditions, the school becomes a marvellous assimilation tool. But the last straw, Mr. Speaker, was the publication of a letter written by the Ontario Premier to a woman voter in which he said that, basically, the inclusion of Section 23 in this resolution was not designed to change anything at all in Ontario-Heaven forbid-but rather to counter what was being done in Quebec both under Bill 22 of Mr. Bourassa's Liberal government and under Bill 101 of the Parti Québécois government.

In the face of such statements, Mr. Speaker, I believe we have every reason to be at the very least sceptical and to have serious doubts about the equality which is supposedly reflected in this Section 23. Of course, paragraph 23(1)(a) now provides for an opting-in alternative, which in a sense is a step in the right direction, but I realize the potential unfairness to our anglophones who have shown their good will. What is somewhat paradoxical, Mr.

Speaker, is the fact that it will finally be the anglophones who have shown good will by sending their children to French schools who will have to pay the price of this section. Personally, this makes me sad.

Mr. Speaker, I suggested two solutions to this problem in a letter to the Prime Minister. Since it was agreed to let the notwithstanding clause apply to the provisions of the Constitution which concern the basic freedoms, the legal guarantees and equal rights in order to alleviate the concerns of some provinces, I suggested to the Prime Minister that this also apply to linguistic rights. It seems to me, Mr. Speaker, that if this clause can apply to such important issues as the right to life, the right to security and all the basic freedoms that are traditionally included in charters of rights throughout the western world-the notwithstanding clause applies to all these issues; the only matters to which it does not apply are Section 23, Section 6 and the democratic rights-it seems to me, Mr. Speaker, that the same could be done for linguistic rights. Or does this mean that in this country, we have linguistic rights, or first-class rights, and certain other rights, or second-class rights?

We have serious cause for reflection on this matter. It seems to me that in return, Quebec could have promised to amend Bill 101 and replace the Quebec clause by the Canada clause. This would have put linguistic rights on the same footing as the other rights, it would have maintained Quebec's jurisdiction over educational matters and would also have reassured Quebec anglophones. I believe this would have been an honourable compromise because, at the moment, the Canada clause does not pose any problem for the francophone majority in Quebec. There might be 5,000 more anglophones in the English school system in Quebec out of a population of 185,000, which represents from 2½ per cent to 3 per cent more anglophones students in the English school system. This would have caused no problem. In the long run, it would have been an insurance policy for Quebec because the supremacy of the Quebec National Assembly would have been maintained in case, which is most unlikely, present conditions should change in Quebec for any reason and this province should become, which is not impossible, the Alberta of the year 2000 with the immigration of a great number of workers from other provinces in Canada. In such a case, the Quebec government would have all the flexibility and all the powers required to remedy the situation.

Anyhow, even if the Péquiste government had refused to make such a commitment, the coming into power of a federalist party at the next election, the Quebec Liberal party, would have allowed us to do that and I can assure you that under the present political circumstances in Quebec, there is every likelihood that the Parti Québécois will be defeated. Mr. Speaker, the time allotted to me is running short so that I will now deal with the amending formula. Such as we know it, the amending formula gives a veto right which is theoretical with a financial compensation restricted to educational and cultural matters. In all other areas, it would be difficult for a province such as Quebec to resist centralization if ever the other provinces, seven, eight or nine of them, wanted it. For example, it could happen that seven, eight or nine provinces decide that from now on housing would strictly come under federal jurisdiction. In such a case, the Quebec government could choose to keep its jurisdiction or take the risk of financially penalizing its taxpayers who, if Quebec decided to stick to its principles and jurisdictions, would have to keep paying their taxes to the federal government to finance programs in seven or eight other provinces and, moreover, if Quebec wanted to provide the same services in the province, then additional taxes would have to be paid.

Mr. Speaker, is that an amending formula with financial compensation, what is so often called shortsighted separatism? I would like to remind you, Mr. Speaker, that with the financial compensation or the

opting out, there was never any question of removing federal powers to give them to the provinces. On the contrary, it is essentially a defensive measure to enable a province such as Quebec to preserve its present constitutional powers. It is said that it would create a balkanized Canada. We should never forget, Mr. Speaker, that anyhow, in extreme cases, the federal government has a veto right and that under the amending formula, it could always object.

Mr. Speaker, are the poorer provinces threatened in any way? At this point, a distinction must be made between financial and fiscal compensation. In the case of fiscal compensation, I agree that because total tax points differ from one

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province to another, there might be some danger, but in the case of financial compensation which is based essentially on the following criterion, that is, the amount the federal government would have spent in the province availing itself of the right to opt out, there should be no problem.

Mr. Speaker, time flues and I should like to speak of the negotiations per se. I feel that the time is almost up, as we say, that down deep in the heart of all Quebecers, there lies a secret wish. They dream of the day when their two great political idols, the two bright stars of Quebec's political sky, the Prime Minister of Canada and the Quebec Premier, make peace, shake hands and start solving the problems of concern to Quebecers. I appeal to all, Mr. Speaker. Some will say I am being naive, I know, but I think history will have more to say about the contribution of those two men if they settle their differences because, as you know, the storm is gathering over the horizon. Even more serious problems will have to be resolved. The time has come to solve those constitutional problems because, whether it be the international or the economic situation, tomorrow we will have to concentrate exclusively on bread and butter issues. And, Mr. Speaker, there will be much disappointment. I am afraid Quebecers have lost this war through attrition. What I mean is that Quebecers are so bored with all these talks about the Constitution that they are ready to let us do whatever we feel like doing. And that is the reason Quebecers have not opposed this resolution the way they should have. People truly believe that once the constitutional issue is settled—if I may really use the word "settled" in this context, for a great many things could be said about this—we will be able to quickly solve the other problems which concern them.

I should like to conclude by saying that during the few remaining hours—we can no longer say weeks or days-we must do everything possible. I think that there is a strong possibility that reason will prevail in this country, and that Canadians and Quebecers would be extremely grateful to their elected representatives who could finally shake hands and who would direct the action of their respective governments more toward bread and butter issues.

[English]

Mr. Rae: Mr. Speaker, I rise on a point of order. I wonder whether the hon. member for Montmorency-Orléans (Mr. Duclos) would accept a question?

The Acting Speaker (Mr. Blaker): The time of the hon. member for Montmorency-Orléans (Mr. Duclos) has expired. Accordingly I would seek the unanimous consent of the House for there to be an exchange of questions and answers. Is it agreed that the hon. member for Broadview-Greenwood (Mr. Rae) may ask a question?

Some hon. Members: Agreed.

Mr. Rae: Mr. Speaker, I listened with a great deal of interest to the hon. member's speech and with a great deal of sympathy for what he had to say. It struck me that there was a fundamental contradiction in what he was suggesting. In the first half of his speech he emphasized the importance

of the minority rights of francophones outside the province of Quebec, with which I am in complete agreement. Therefore, if is so much concerned with the rights of francophones outside the province of Quebec—

[Translation]

—why is he willing to let the rights to education in the minority language be subject to the notwithstanding clause, since that would not actually protect the rights of the French minority groups which is one on the things we gained and achieved with Section 23?

Mr. Duclos: Mr. Speaker, the answer is quite simple. I gave the interpretation which the Premier of British Columbia, for instance, lends to Section 23, and we know what the Premier of Ontario thinks of that section, so that actually if Section 23 is subjected to a notwithstanding clause the results will be about the same with regard to the minorities outside Quebec. I would very much appreciate it if the hon. member were to personally intervene and use his influence as future leader of the Ontario NDP at Queen's Park to get the Premier of Ontario to finally provide justice to Ontario's French-speaking minority, especially in the Ottawa area where they represent 35 per cent of the population. We cannot say that it is a very small minority. In Quebec's case, a notwithstanding clause would allow the National Assembly to maintain its legislative authority and as you know, you do not have to worry about Quebec, history shows our degree of tolerance.

[English]

Mr. G. M. Gurbin (Bruce-Grey): Mr. Speaker, I join the debate in its concluding moments with the hope, which I am sure all hon. members have, for a successful constitutional future for Canada.

I would like to start by suggesting to the hon. member for Montmorency-Orleans (Mr. Duclos), who spoke previously, that he should interpret the comments made by the hon. member for Bow River (Mr. Taylor) in the context of the effort that the hon. member for Bow River had made to bring forward to the House, a point of view which is indeed shared by many people in Canada for historic reasons. His effort was honest, and he made an attempt to bring those issues forward to the House.

Some hon. Members: Hear, hear!

Mr. Gurbin: In coming to these concluding moments, I think that most of us will agree that the resolution as it stands before us now asks as many questions as it answers. As time goes on and as history views us, we may indeed sec many problems which are not now obvious and many difficulties which are not

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now apparent. In spite of that, I think most of us would like to offer congratulations at this time to all those who have taken part in this debate, with particular reference to the hon. member for Provencher (Mr. Epp)—

Some hon. Members: Hear, hear!

Mr. Gurbin: —and with particular reference and best wishes to the hon. member for Hochelega-Maisonneuve (Mr. Joyal).

While we have in the House a certain sense of having done our part, having participated in this. debate, the country at large undoubtedly feels a sense of relief. That sense of relief is best illustrated in a letter sent to me by one of my constituents. It expresses a peculiar kind of relief and contains a slight contradiction. However, I would like to quote a short paragraph from the letter, which reads as follows:

One might have hoped that the government might have addressed itself to economic and unemployment problems in recent years rather than to the Constitution except that, to have done so, on its dreary

track record might have led us over the brink of economic disaster instead of simply up to it where we now teeter.

In a way, that is kind of a backhanded comment; but it is a comment which I think really illustrates the mood of the people, certainly the mood among my constituents and, I suggest, the mood of the people in Ontario and other provinces. It is the kind of thing which suggests that there has been a "notwithstanding" clause which is far more important in the country at large than the "notwithstanding" clause that the premiers have put in the Constitution, a clause which relates to the charter. In other words, the country has a genuine hope and an honest desire to see a constitution for Canadians that is made in Canada, one that is our very own. However, notwithstanding that, many people in Canada have identified their feeling that other issues are also very important and could have been dealt with in the long period of time we have taken to deal with the Constitution.

As others have said repeatedly, the original resolution was brought forward to the House last October. We had two basic problems with that resolution. We had a problem in terms of the process, and we had a problem in terms of the substance of the charter which was presented to us in the first instance. The original resolution suggested a unilateral federal action. It was a process which, over the past year or more has been modified and on which the government has been seen to be accommodating. We have indeed had a process which most of us would see as fairly complete, one which started first with the extension of the parliamentary committee which dealt with the substance of the charter and which allowed numerous Canadians from all across the country to present their cases, concerns and hopes to the government.

We also saw a parliamentary debate which was difficult for most Members of Parliament. It took a long period of time, and finally it ended in an additional process being added, that is, consideration by the Supreme Court of Canada as to whether or not the actions we were taking and the position which had been established by the official opposition was indeed accurate. The Supreme Court of Canada decided that the government itself did not have the right to take unilateral action and that consensus was required if not legally, at least in terms of our constitutional conventions. Following that judgment by the Supreme Court, we were taken into the next phase so that the cadence and the rhythm of the process was maintained. The Prime Minister of Canada (Mr. Trudeau) made the additional effort of bringing the whole constitutional issue before the premiers.

During that conference, it was stated on numerous occasions that it was not possible to achieve this kind of consensus, that it was not worth while engaging the premiers in additional discussions, and that no fruitful benefits would flow from that activity. However, as a result of that additional process, we reached an accord which brought back to Parliament a modified resolution which included many aspects of the discussions in Parliament of the many concerns which had been brought forward. The resolution was then presented to the House of Commons and was then subjected to an additional review. As we all know, that review resulted in two major amendments which accepted the fact that there was an equality of rights for women, which was not subject to the "notwithstanding" clause that had been introduced. Also, there was a modified acceptance of aboriginal rights and treaties. I think this must be considered to have been a due process of law, a part of the procedure that was worth while, and that it was indeed a part of the tradition of the Parliament of Canada to act on constitutional matters or those which affect the federal government as the supreme authority.

At that point, however, I think that one of the basic flaws in the whole issue became apparent. It became most apparent on Friday of last week, four days ago, when the hon. member for Rosedale (Mr. Crombie) and then the Prime Minister

spoke. The case was well put by the hon. member for Rosedale in terms of the need for additional adjustments to the resolution in order to establish some of the things which would, particularly in the future, relate to federal government actions. These actions and the kind of proposal which was made and brought forward by this party through the hon. member for Rosedale suggested, particularly in the areas of moral concerns, that Parliament would be supreme. It was not intended to change the amendment. This had nothing to do with the substance of the charter or the accord on which the provincial premiers had reached consensus. It had nothing to do with denying any of the contributions by other groups and agreements during the development of the charter and the resolution. It dealt with an additional affirmation that Parliament was supreme in matters which were under federal jurisdiction.

The Prime Minister quite properly pointed out that these matters not only related to the area of abortion, but also related to matters such as capital punishment and, in the future, could relate to issues such as euthanasia or conscription in times of war. However, in this instance the Prime Minister came up with a major inconsistency when he denied the opportunity to include that affirmation in the charter and in the constitutional resolution before it left our House. I think that that in itself should register on the minds of Canadians

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across the country. That should also tell us something about the intransigence, rigidity and inflexibility of the Prime Minister in dealing with this whole matter. There have been a number of times when he has dug in his heels and has, in fact, caused more problems than he has solved by not dealing, in an open and forthright manner, with the problems; which have originally been created on matters of specific substance which were introduced in the resolution last October.

The other major area of concern involves the matter of Quebec. the hon. member who spoke previously spent some time dealing with his concerns regarding language rights and other issues within the province of Quebec. I think that in keeping with what the hon. member for Bow River has said, all of us should share equally his concern that the province of Quebec be treated as part of the Canadian family. Indeed, anglophone within Quebec should have the same rights and privileges as Canadians across the country and should have the same rights as francophones in other provinces. It was interesting to hear the hon. member for Lincoln (Mr. Mackasey), who was on an open-line show this morning, discussing this matter in some detail. It appears be is taking up the banner and will spend a good deal of his considerable energy to make sure those rights are protected within that province.

The fact that the Prime Minister at this important point in time will not make that extra effort and take that final step or whatever gesture is required to allow Quebec the opportunity to be incorporated in the first instance in this charter is just another major inconsistency and flaw in the approach that the Prime Minister has taken.

I believe the charter is imperfect. There is no question that there are and that there will be many matters within the charter about which all of us will have concerns and provisions which we will come to regret. There is no question that in the area I represent, and I think in many areas across the nation, the question of property rights, which has been described by many other members before me, is an important matter. It is a matter that many of us would like to have seen included in this charter and seen affirmed for the rights of future Canadians.

Property rights seem to have been possible in other countries. The right to own property seems quite reasonable. Property rights have a major impact on individuals across the country who feel increasingly

that provincial or federal actions seem to threaten their right to own property. The right to own property seems to be one of the basic tenets of a democracy. This is only one example of many of the inadequacies that are within the charter.

I believe as time goes on that many of these matters can be dealt with. We have a situation now where many of the pundits and critics of this whole constitutional discussion, although new things are happening quickly from day to day, are changing their minds about certain parts of the resolution. After the provinces bad reached an accord and after the premiers had met with the Prime Minister, some people found very good reason to be concerned about the fact that the final step should be taken by 11 individuals in our country because the impact of what they were doing and the long-term consequences affected all Canadians. The reactions of the critics and the people who are looking at the constitutional resolution in the context of today are only momentary. History itself will be the only measure of whether or not this is a good or a bad resolution.

I think it is important that we go forward from the time of the vote on this resolution as it passes from Parliament. We should go forward in the spirit of hope that successive governments will have the good judgment and patience to deal with the inadequacies within the charter and that Members of Parliament will maintain the faith and the confidence of their constituents and will exercise their authority and their responsibilities in such a way that this charter, whether or not it is inadequate now, will serve the purpose of all Canadians.

[…]

(I.) LETTER FROM PREMIER BRIAN PECKFORD TO PRIME MINISTER TRUDEAU RE NOVEMBER ACCORD

JANUARY 27, 1982

Source: Letter from Premier A. Brian Peckford to Prime Minister Trudeau (Jan. 27, 1982)

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THE PREMIER

THE GOVERNMENT OF THE PROVINCE OF NEWFOUNDLAND ANO LABRADOR

1982 01 27

Right Honourable P.E. Trudeau
Prime Minister of Canada
House of Commons
Ottawa, Ontario

My dear Prime Minister:

Please find attached a copy of the set of relevant documents that I collected at last November's successful Constitutional Conference. It is my intention to make the set public, but as a courtesy I felt I might send you a copy with this covering letter.

Included in this set is a paper from British Columbia, which, while circulated among certain Premiers and discussed between yourself and Premiers Bennett, Lougheed and Buchanan on the afternoon of Tuesday, November 3, 1981, was never formally tabled at the First Ministers Conference. As well, there is the Saskatchewan proposal that was tabled at midmorning on Wednesday, November 4, 1981. As well, please find attached a copy of a proposal tabled by New Brunswick on the matter of the Charter of Rights.

I should point out that by late Wednesday morning I had the disquieting feeling that the meetings and documents up to that time were falling short of the various degrees of compromise required on the different issues to effect a general consensus. However, I had also developed by that time a feeling that individually, the vast majority of the First Ministers were expressing such willingness to compromise that there had to be a consensus in there somewhere. Out of these musings I drafted the one page "Draft Compromise" hereto attached about midday on Wednesday. In consultation with my

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delegation, I expanded that one piece of paper into a couple of pages with more detail, and member of my delegation began to circulate that document (the second in the set attached) among various other delegations after supper on Wednesday, November 4, 1981. Progress w s m d by members of my delegation, and about midnight they request d I join a group at a suite in the Chateau Laurier. Thus I joined a late night meeting of officials and three Premiers, namely Blakeney, Buchanan and MacLean. The net result of Wednesday night's work was the document entitled: "Constitutional Proposal submitted by Government of Newfoundland…"

(third in the attachment), which I presented to the full First Ministers Conference on the morning of Thursday, November 5, 1981. What developed from my document was, of course, the Constitutional Accord, signed by ten of the eleven Governments, about midday on Thursday, November 5, 1981.

Prime Minister, although I did not share all of your views on the Constitutional issue, I did share your intensity of feeling about the importance of it. As the fateful conference wore on, I was, as I stated earlier, alarmed at the lack of consensus arising out of the abundance of expressed desires to compromise. I was pleased and honoured to hear your kind remarks to me at the close of the Conference. I was proud to have been able to synthesize a consensus. It could not have been done, however, without the desire for compromise expressed by yourself and all but one of the Premiers.

In conclusion, therefore, I hope that these few words and attachments will be of use and/or interest to you. Canada, I'm sure, is much the better for the events described above.

I remain,

Sincerely yours

A. BRIAN PECKFORD
PREMIER

cc – Provincial Premiers

(I.) UK, HOUSE OF COMMONS DEBATES ON THE CANADA BILL

FEBRUARY 23, 1982

Source: UK, House of Commons Debates, "Aboriginal Rights Commission" 774-779 (Feb. 23, 1982)[1]

ABORIGINAL RIGHTS COMMISSION

Mr. Powell In that case, the right hon. Gentleman, like Wotan in "The Ring", claims the right to declare: What I have not said, forever remain it unspoken". An examination of the legislation itself—we shall come to these points in detail later—raises this question acutely.

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Indeed, it goes far to imply an answer to my second question; for in perusal of the schedule, hon. Members will have noted the provision for a constitutional convention to be held after 15 years.

Subject to correction, the implication of that provision in the schedule is that it is possible for a legislative authority in Canada, if it can obtain the assent which all legislative authority requires, to amend the provisions of the schedule. We are therefore writing into the schedule provisions that look forward to the possibility not merely of amendment in accordance with the provisions governing amendment in the schedule as drafted, but to amendment that could amend or repeal those very limitations and conditions apparently placed on the ways, the manner and the modalities by which the constitution may in future be amended. The constitution and the schedule presented to us look to the possibility—I would say more than that, they look to the intention—of future amendment of the terms, limitations and restrictions in the schedule. Otherwise, it is extremely difficult to attach any meaning to the provision to which I have referred.

5.15 pm

If there is a legislative authority in Canada—as is presumed by those provisions, and as I assume, although the hon. Member for Islington, South and Finsbury does not—which is capable of amending this legislation, although in obedience to convention or sweet reasonableness or bowing to the various balancing pressures within that country it may refrain from using that power, it seems to me to follow that the Canadian Parliament can alter whatever we enact by the Bill. In my submission, at least, we are passing for Canada legislation that we could have given Canada the full power to pass for itself and which is in no way entrenched, in that there is nothing in the provisions which cannot subsequently be modified, amended or repealed by a legislative authority in Canada.

If that is so—and, if I were a Canadian, I should be appalled to be confronted by this House with the denial that my country has a sovereign Parliament—it becomes all the more permissible, if that were necessary, for us to attend to what we are doing, because, for some reason, we are being asked to do for Canada what Canada could do for itself.

It may be that among the reasons why we are being so asked is the belief sedulously created in Canada that what we do can have a sacrosanct character that protects it against any further or ulterior action in Canada. If that is not the case, it is incumbent upon us not only to consider what we do here and what we place

[1] Full Citation: UK, House of Commons Debates, "Aboriginal Rights Commission," vol 18 (1982), cols 774-779.

momentarily on our statute book but to ensure that we do not give a false impression of entrenching or guaranteeing rights and liberties that it is impossible for us to entrench or to guarantee.

That brings me, I hope not after too long a journey, to the wording of paragraph 1 of schedule B, to which I seek to introduce a preliminary amendment. The schedule reads: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it", but it does not stop there. It continues: subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. I wonder—and this is germane to my amendment—just what kind of guarantee is conveyed by such a provision. If the rights and freedoms are guaranteed, we should understand what is meant by their being guaranteed

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subject…to such…limits…as can be demonstrably justified in a free and democratic society. Is this a justiciable wording? That is to say, is it the meaning and intention of those who have asked us to make that wording law that it shall be the courts in Canada that will decide whether the justification is demonstrable?

Mr. George Cunningham The right hon. Gentleman will know that those words have been much argued about in Canada, on the grounds that he mentions. He will also recollect, however, that those words or words virtually identical with them are part of the European Convention on Human Rights which, to the limit to which it. is justiciable in this country--that is, to some extent—is subject to court interpretation. Therefore, although it may seem odd in Canada, it should not seem odd that those words should be justiciable in this country.

Mr. Powell I realised, although I am obliged to the hon. Member for Islington, South and Finsbury for reminding me of it, that these words had occurred elsewhere and in a context that has my unreserved detestation and rejection—the subordination of this country to the decisions of a foreign court and the habit of the subjects of the Crown to appeal against the court; of the Crown to an external court. The reminder that I have received from the hon. Member does not in any way reconcile me to these words or make them more palatable.

Nor does the reminder help to answer the specific question which I am, in a sense, putting to the people of Canada at the moment when they have removed their constitutional law, or are removing it, from the statute book of another country and taking it home, as they say. The question is: in their country are the sovereign political decisions in the future intended to be taken by judges or by their representatives in Parliament assembled? Surely I do not need to say that this is not a quibble. In this place of all places one does not need to say that.

The natural meaning of what we might be thought to be doing by enacting part I of schedule B is giving to the judges of a court the ultimate political decisions as to what is "a free society", what is "a democratic society", what is "justifiable" in such a society and what is "demonstrable".

I hope that I do not discern any movements or indications of impatience in you, Mr. Weatherill. I trust at least that it is not tedium on your part.

The Chairman I hasten to assure the right hon. Member that it is not impatience. Rather, I am waiting for him to talk to his amendment. I guess that he is paving the way towards his amendment, which brings parts I and II into clause 1.

Mr. Powell I had wondered whether such thoughts were passing through your mind, Mr. Weatherill. But the meaning of the term "guarantees" in paragraph 1 of part I is germane to the validity or desirability of the amendment that I have introduced, because I seek to widen the scope of the term Canadian Charter of Rights and Freedoms and to widen it in a particular

way. To justify that, and in doing so, not to mislead any of those who might otherwise be misled by such a proposition, it is necessary to understand what is and what is not guaranteed, and what is the meaning of guarantee in the context of part I. Otherwise, I do not see how the Committee could form a judgment on the question of whether that terminology should extend to part II as well as to part I of the schedule.

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I sum up my conclusion on the nature of the guarantee, the extension of which is the purpose of the amendment. My object is to elicit correction or confirmation from a source of some authority. My conclusion is that Canada has no intention, and no notion that intends, to be a country where the political decisions are taken on the judicial bench.

I know that there are contexts in which it might be argued that they have that situation already and perhaps are vainly attempting to continue it by the Bill. But that it is the intention of the Canadians that what is a "free and democratic society", what can be "justified" in it, what can "demonstrably" be justified in it and what limits can therefore be "prescribed by law" in that country ought to be taken, not by their elected representatives but by a court, is something which hitherto had not occurred to me. If that is so, then we ought, on behalf of those who have asked us so to legislate, to face the fact that there is, and there will be, little real or natural meaning in the term "guarantees" in paragraph 1 of part I.

I know that the schedule contains provisions which specifically say that the legislative authorities can neglect, and can legislate notwithstanding, portions of the Charter of Rights and Freedoms, notably the portions contained in paragraph 2 to 7. Perhaps the deliberate omission of paragraph 1 of part I from that exclusion could have conveyed the notion to some—and we are talking about real people, many of whom are anxious, and many of whom may be confused as to what is going on—that there is some unique effective guarantee contained in part 1 of the schedule.

It so happens that the schedule is at present drawn to limit the expression "Charter of Rights and Freedoms" to the contents of part I. I cannot, I think, have been the only hon. Member studying this schedule who, when he read part II, found himself puzzled and disquieted that that part had been excluded from the definition of the Charter of Rights and Freedoms, for part II, headed Rights of the Aboriginal Peoples of Canada happens to be an affirmation—we shall come to certain parts of the wording later on—the aboriginal and treaty rights of the aboriginal peoples of Canada". Therefore, it is a fair question for the House to ask: why was that part of this schedule not thought to be appropriate to be part of the Charter of Rights and Freedoms? It is no use saying that the Charter of Rights and Freedoms is not concerned with the rights of the aboriginal peoples. There are several sections in part I which deal with the rights of the aboriginal peoples. I have looked with some care at those sections to see whether, somehow, they made part II superfluous. I could not conclude that they did. Indeed, if part II is superfluous, then why is part II in the schedule anyhow?

We have two causes of doubt which I think we ought to remove. The second of my amendments, the Committee may be relieved to hear, is wholly consequential to my first. I see the Minister of State nod. That is the first agreement that I have elicited from the Treasury Bench. I hope it is an augury of good things to come. At least some common ground has been established with the Foreign Office Minister on the Front Bench.

We have to establish two matters. We have to establish what justification, if any, there could be for excluding part

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II from the charter. Surely, by doing that, one undermines any confidence that the charter is intended to give or convey to the aboriginal peoples. It seems to be a step which might almost have been designed to instil doubts and hesitation, so specifically to have excluded part II. If, as I hope, the Committee agrees that part II should be part of the charter, we should make clear how extensively the sense of the word "guarantees" in association with the charter is limited both by what I believe to be the constitutional position of the Canadian legislature in future and also by what I believe to be the political facts that are tacitly and, in some cases, explicitly acknowledged in the wording of the schedule.

I shall now direct my attention briefly and appropriately at this stage to amendment No. 17 which proposes that the word "existing" should be left out of paragraph 35 in part II of the schedule.

5.30 pm

Mr. George Cunningham Will the right hon. Gentleman answer this question? What difference does it make whether part II is part of the description of the Canadian Charter of Rights and Freedoms? Does it not mean only that part II is not subject to the words in section 1 which say that they are to be interpreted subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society? Does this not mean that part II, dealing specifically with aboriginal rights, is free from that limitation while part I is subject to the limitation? Is part II not therefore in a privileged position compared to part I? Is there any other difference?

Mr. Powell The hon. Member for Islington, South and Finsbury has entered upon a most ingenious train of thought. This will become news, perhaps headline news today or tomorrow—I forget which day it is now in Canada—when the newspapers learn that the effect of their charter of rights and liberties is actually restrictive and that the other parts of the constitution are guaranteed more effectively and subject to less limitation and dubiety than the parts described as the charter of liberties. This is a most alarming point, to which I hope an answer will be given.

The hon. Member for Islington, South and Finsbury underlines the labile nature of this concept "guarantee" in section 1 of the schedule. It becomes all the more incumbent upon hon. Members to draw to the attention of those for whom we are legislating the extraordinarily inefficacious character fo the wording that an attempt has been made to devise with whatever objectives—whether those that I apprehend or those suggested by the hon. Member for Islington, South and Finsbury.

The insertion of the word "existing, " which nowhere else that I have found in the document appears in connection with the aboriginal and treaty rights of the aboriginal peoples of Canada, has not surprisingly been the subject of considerable anxious debate and questioning. I can see at least two reasons why that word would be better away than present. Are the existing rights rights that may in future be determined to have existed now? I think that it must be so. If either a court decision or a legislative Act pronounces upon the state of the rights of the aboriginal peoples at this moment, or at the moment of this legislation coming into effect, the consequence of the word "existing" would be restrictive. Far from conveying the implication that whatever they have now is

preserved in perpetuity, it would actually open a loophole to the meaning and interpretation of their rights being limited by subsequent judicial or legislative action.

[…]

(I.) UK, HOUSE OF COMMONS DEBATES ON THE CANADA BILL

MARCH 3, 1982

Source: UK, House of Commons Debates, "Business of the House," 363-372 (Mar. 3, 1982)[1]

Business of the House

[…]

The First Deputy Chairman (Mr. Bryant Godman Irvine)

I remind the Committee that we are taking schedule B with clause 1, so if any hon. Member wishes to raise points on schedule B other than those already raised on the amendments this is the time to do so.

Question proposed, That the clause stand part of the Bill.

10.15 pm

Mr. J. Enoch Powell

Despite the breadth and latitude of the ruling of the Chairmen of Ways and Means that you, Mr. Godman Irvine, have just repeated, it would be tedious if those of us who have taken a detailed interest in the Bill were to use this opportunity to deal with the individual matters in schedule B which were the subject of amendments which have not been selected. Therefore, I wish to address myself to the general question of what sort of document it is that we are enacting by enacting schedule B through adding clause 1 to the Bill.

Part of the schedule is loosely described as a bill of rights and defines itself and entitles itself as a charter of rights. But is this a charter or a bill of rights in the sense that it constitutes a basic constitution that can be interpreted by the courts, and, as a result, the rulings of the courts become law, binding upon citizens of the country concerned and incapable of being amended by its legislature? In other words, is it a document analogous to the constitution of the United States or, to take a different analogy, is it analogous to the European Convention on Human Rights, to which this country has undertaken compliance, compliance with that convention as adjudged, defined and applied by the European Court of Human Rights.

I wish to put three tests in the light of the context of the schedule, in accordance with which I believe that that question can be answered. The first is the generality of a great many of the provisions of the schedule. I shall take only two instances. The first, section 1 of the schedule, where the charter of rights and freedoms guarantees the rights and freedoms set out in it and then follow the words: subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. I take as my second example one that I think may be of particular concern to the hon. Member for Workington (Mr. Campbell-Savours), who, I think, will have section 7 in mind, which says: Everyone has the right to life. If these are prescriptions interpretable by courts and capable, through interpretation by courts, of being made the specific law of the land, then the courts, in effect, become the supreme legislature of the country concerned. The largest of public questions, the most specific matters touching criminality and personal relations and behaviour, cease to be within the competence of the elected representatives of the people and are laid down in accordance not necessarily even with precedent, for there can be no precedent in

[1] Full Citation: UK, House of Commons Debates, "Business of the Houe," vol 18 (1982), cols 363-372.

interpretating such wide and cloudy generalisations. These are interpreted perhaps in accordance with some principles of law derived, I know not whence. Perhaps in the case of the European Court of Human Rights they are derived from Roman law, but they are not derived from the common law of Britain.

So, we ask when we look at a great many of the provisions in this charter" does this mean—for if it is a charter it would mean—that the Canadians are constituting

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their supreme court as, in effect, their legislature on all these matters which in this country are settled finally—subject to external obligations, which we are now starting to explore and which are undertaken by the Government—by Parliament and, specifically, by this House? It should be understood that, in the sense of being an entrenched and justiciable document, a charter of liberties or a bill of rights is incompatible with parliamentary sovereignty.

It is also incompatible with the rule of law as we understand it, which requires that the law shall be so defined and of such a character that the citizen may reasonably inform himself in advance of what will or will not be adjudged to be lawful. Certainly, no one reading the generalities of the early part of the schedule could possibly decide how a court would rule upon so many measures which in legislation we are careful by procedure to define as accurately and precisely, and often intelligibly, as we

The second characteristic to which I draw attention is that such a document as this usurps—if it is an entrenched justiciable constitution—the parliamentary right of taxation. The courts in effect become not merely the legislature, the lawmaking authority, but the taxing and financial authority of the State. I invite the Committee to examine section 23(3) which states the right of citizens of Canada … to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction". There is an immense range of such questions which the House decides week by week as it goes about its business of granting Supply and providing Ways and Means.

A question of quantity—of what it is that warrants the given expenditure of public funds—is, in our view, a matter which ultimately can be decided only by this House, which controls taxation and the expenditure of public money. But, if a court is to be the last instance of decision on what number of citizens is sufficient to warrant the provision to them out of public funds of minority language instruction, the spending and taxing power, pro tanto, is in effect passed to a court. That power cannot logically be restricted to the particular subject to which the judgment of the court relates, for there could be a whole series of judicial decisions carrying expenditure and, consequently, taxation implications.

We know well enough that every decision to spend on A is potentially a decision not to spend on B. If an authority allows one part of public expenditure, and therefore, of taxation, to be pre-empted by some other authority, then in effect all the decisions of policy which involve public funds and public expenditure are transferred away from the elected assembly, representative of the people, to another authority of a different kind altogether.

The third aspect has been discussed already this evening, and I shall not enter at length into it again. This Parliament is sovereign, subject to the qualifications principally introduced in 1972. However, for theoretical purposes let us treat Parliament as what most of us thought it was when we entered it—a sovereign Parliament. If we so wish—although we

normally choose not to—we can reverse the individual judgments of any court in the land. If we do not agree with the construction of the law or statute in any court—including the highest in the land and

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the one upstairs—we alter the law to conform with our view of public policy and, ultimately, with our judgment of the general will of the people of this country. Therefore, the right to amend and correct interpretations of the law—which cannot be separated from the right to make law that is inherent in a parliamentary body—is incompatible with the entrenchment of a constitution, or with a constitution of such a character that its judicial interpretation becomes part of the binding law of the State. Therefore, the document before us is one of two things: either it is a Bill of rights in the proper sense of the term and, therefore, incompatible with parliamentary sovereignty as we know it, or it is a mere piece of legislation, like any other—such as a road traffic Act, the European Communities Act 1972, or any other major or trivial legislation—that the House has the undoubted power to amend according to its judgment and with the necessary co-operation from elsewhere. Which type of document is it? Which type of document did the Canadians think that it was when they sent it to us?

As I pointed out earlier with the assistance of the Minister, we have been told. In the preamble to the message by which the Bill was transmitted from the Canadian Parliament to Her Majesty, we are told: it is in accord with the status of Canada as an independent state that Canadians"— I do not think that that means Canadian judges— be able to amend their Constitution in Canada in all respects".

If we had a constitution, or were talking loosely and described our whole body of statute law as our constitution, we would say that. We would say that the British can amend their constitution in the United Kingdom in all respects; and who would say us nay? I believe that that is what the Canadians meant. I cannot believe that the Canadian inheritrix of the sovereignty of this House is content with anything less in Canada than we possess in the United Kingdom. If that is what is meant, it is delusive and untrue to represent the document as if it were an entrenched constitution, a guarantee of rights, a Bill of Rights or anything of that type. Any section of the Canadian public that have been led to that conclusion—no doubt unwittingly by the Government and by hon. Members who have spoken, but by others elsewhere wittingly—have been misled.

In adding schedule B with clause 1 to the Bill, it is our duty to make plain not only to ourselves but to those in Canada the nature—in our view and even more, in theirs, as they have expressed it—of schedule B and consequently of the so-described Canadian constitution. It is, like our law, subject to amendment; like our taxes, subject to the will, and like our interpretation of the law, it is subject to the correction of their Parliament in all respects and without restriction.

10.30 pm

Sir John Biggs-Davison (Epping Forest)

Your immediate predecessor in the Chair, Mr. Armstrong, very kindly informed the Committee that anything would go in this debate provided that it was within the compass of Schedule B. Therefore, I wish to refer to clause 58 of the Bill in the spirit of my new clause 3 which the Chair, in its wisdom, did not select.

I invite those who manage the progress of parliamentary business to ensure that the coming into force of this

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measure, which is the subject of clause 58, shall occur after and not before the Quebec Court of Appeal has ruled on the provincial

Government's test case which is to be heard this very month.

I am not concerned—and I do not think that the Committee should be concerned—with the nature of Quebec's objections to the Bill. Quebec objects to arrangements for fiscal compensation for opting out of the constitutional amendments, it objects to the provision concerning minority language educational rights, and it also objects to mobility rights. We are not concerned with all that, but I suggest that we ought to be concerned with Quebec's claim to the right of veto over constitutional changes to which the province does not agree.

The Government of Quebec favoured me with a copy of the letter which the First Minister wrote to my right hon. Friend the Member for Cambridgeshire (Mr. Pym), who, like his opposite number in Ottawa, is President of the Privy Council. The letter complains of failure to respect Quebec's traditional veto with regard to fundamental constitutional changes", and it goes on to assert that it would be highly improper for the United Kingdom Parliament to act in the matter until the conclusion of the legal proceedings now in progress. Such action would be contrary to constitutional tradition.

There is no suggestion that this is a question of legality; it is a question of constitutional tradition. But the Supreme Court of Canada laid emphasis upon the importance of constitutional convention as well as of constitutional law, and the Supreme Court, just like the Judicial Committee of the Privy Council in the past—to which reference has been made from the Opposition Front Bench—was unequivocal in stating that there are no exceptions. It said "There are no exceptions", in 115 years of the constitution of Canada, that have allowed the legislative power of provinces to be affected without their consent.

On Second Reading my right hon. Friend the Lord Privy Seal referred to what might be called "the British Columbia exception" of 1907, which I submit turned out not to be an exception at all. I shall not repeat what I said on Second Reading.

Much praise has been lavished—and rightly so—on the Select Committee on Foreign Affairs, headed by my hon. Friend the Member for Stroud (Sir A. Kershaw). In its first report, the Select Committee said, in words that were quoted by the Lord Privy Seal on Second Reading: The United Kingdom Parliament is bound to exercise its best judgment in deciding whether the request in all the circumstances conveys the clearly expressed wishes of Canada as a federally structured whole. The question that worries me is whether the federally structured whole, which is Canada, founded on a compact between Upper and Lower Canada, has made clear its expressed wishes on the matter. The Select Committee's report states that Her Majesty's Government and Parliament here should comply with the joint address from Canada only where it is clear that the request is such that it conveys the clearly expressed wishes of Canada as a whole, bearing in mind the federal character of the Canadian constitutional system".

In Quebec there are, of course, different opinions. Quebec also contains a quarter of the population of Canada. However, in the past—and this is the constitutional tradition to which Monsieur René Levesque referred in his letter to my right hon. Friend the Leader of the House—proposed amending formulae always included

the Quebec veto. The original proposal by the Federal Government included it, and the veto is to be enshrined for the future in the patriated constitution.

A brief quotation from that great Canadian Tory, Sir John A. Macdonald, that Disraeliesque character, may be apposite for my right hon. and hon Friends. He said: It has been understood that no proposal which would threaten the individuality and personality of Lower

Canada would ever be acceptable to the people of that part of Canada".

Quebec has had a veto. Quebec has never forgone a veto, despite what has been said in some quarters. There is nothing new about Quebec's position. For example, in the Dominion Provincial Conference in 1927, the then Minister of Justice, Mr. Ernest Lapointe, drew a distinction between what he called "old" amendments, which would require no more than majority consent of the Provinces, and vital and fundamental amendments involving such questions as provincial rights, the rights of minorities, or rights generally affecting race, language and creed".

That, of course, is what this Bill does.

I do not presume to pronounce on these matters—nor do I think that any right hon. or hon. Member of this Committee should do so. However, I anxious that we do nothing here to threaten confederation. Early on, we paid much attention to the judgment of the Supreme Court. We should not now place ourselves in danger—or place our Canadian subjects in danger—of being at variance with the courts. Therefore, I ask, as is quite possible within the conduct of business, that there should be a moderate stay in the enactment of this great measure.

Mr. Campbell-Savours

The right hon. Member for Down, South (Mr. Powell) made a very interesting contribution to our debate. I apologise for the fact that I am not in good voice, which I have lost over the past few days. The right hon. Member set out to prove that we should be concerned about the possible judicial interpretations that may be made arising from the patriation of this Bill of Rights, and that we may well be removing from the Canadian House of Commons the right to legislate, to the extent that the Canadian Supreme Court may seek to overturn whatever decisions it may wish to take because whatever it does has to comply with the terms, sections and requirements of the charter that we are being asked to patriate.

Before I come to the matter that I want to raise, I wish to point out that I have no desire to prevent this Bill of Rights or charter from being constitutionally patriated. I join all right hon. and hon. Members who seek that there should be patriation, but I have one considerable reservation—what will happen when judicial interpretation affects certain sections of the Bill. My intention in raising the point about the unborn in Canada is not that I wish in any way to interfere in their right to legislate on abortion. On the contrary, I wish to do the opposite. I wish to provide them with the right to choose for themselves, I believe that the Bill, including schedule B, will no longer allow them that right.

People in Canada should have the right to choose for themselves whether they want more liberal legislation on abortion or more restrictive legislation. In my view, because of the way in which the Bill of Rights and charter are construed at this stage, they will not have the right to take those decisions.

Last year, the hon. Member for Bute and North Ayrshire (Mr. Corrie) introduced a Bill on abortion which

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in the case of the British Parliament was designed further to restrict. He was able to do that in the state of the law then prevailing. My case is that under the Bill as we are required to patriate it, that will not be the case, and that a Member of the Canadian Parliament will not have the right to go to that Chamber to seek the approval of that House for any Bill without the courts intervening with the objective of overturning whatever law is provided for by the Canadian Parliament.

Mr. J. Enoch Powell

The hon. Gentleman has several times referred to our patriating the constitution in schedule B. I make more than a pedantic point when I say that we cannot be patriating that because it does not exist to be patriated. We are making it de novo, and we are choosing to make it so. It is a separate question—I am not interfering with the hon. Gentleman's main argument—whether or not we patriate that which we can patriate.

Mr. Campbell-Savours

The right hon. Gentleman clarified what I should have said. Perhaps I slightly misled the Committee, although I am sure the right hon. Gentleman will again put me right if I veer slightly from the truth.

Let me refer directly to the section that causes me some concern. Section 52 says that under the Charter of Rights and Freedoms the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is … of no force or effect.

That merely reinforces the point that I am making, which is that the Charter itself will provide a framework on which Canadian legislation will be based. As I understand it, it will be Canadian legislation as approved by the courts, because they will become the testing ground for any legislation that is the subject of appeal.

I turn to the position of the unborn in Canada. Section 7 of the Charter says: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The section includes the crucial words, words of international renown: "everyone", "person" and "individual". Those words are of particular concern to rue, because in a number of cases heard not only in Canada but in America and in the United Kingdom they have proved useless for the protection of the unborn.

10.45 pm

From a substantial amount of case law, I wish to refer the Committee to some particular cases. In the case of both Dehler v Ottawa Civic Hospital in 1980 and Edwards v Attorney-General of Canada in 1930 the word "person" was held to exclude the foetus. In the Canadian case of Morgentaler v Regina in 1975 the word "individual" was held to exclude the foetus. In the case of Paton v British Pregnancy Advisory Service, "person" was held to exclude the foetus, and in a Canadian case to which I shall return later, Roe v Wade, the foetus was also held not to come within the definition of "person".

I am not in a position to say how eminent the Canadian Library may be, but I am told that it is a very responsible source of information, as I am sure that it is if it is as good as our Library. The Canadian Library maintains that the words "everyone", "person" and "individual" are all interchangeable. I am also told that in Committee in the

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Canadian Parliament when an amendment was being considered the Canadian Government admitted that the words were all interchangeable and of equal value.

I suggest that section 7 is a danger in that it rules out any protection for the foetus, and that the courts may rule on the basis of the section. However, in section 33 there is an overriding exception, which covers section 2 and sections 7 to 15. At first glimpse that would appear to rule out the section that I have just dealt with and therefore perhaps remove the danger that I have spent the past five minutes referring to. But that is not so, because the moment one rules out that section another section—section28—arises. It says: Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons". Again, that wicked word "person" returns. We must ask ourselves

why it arises again in the Bill. Let me go into the origins of that. It was thought up by the women's movement in Canada. I am told that there was much argument about its inclusion. The Canadian Advisory Council on the Status of Women, in November 1980, stated: The recommendations to include the word 'person' was to prevent the foetus from having protection in the Charter. It is clear that that section has also been interfered with in such a way as to provide good work and income for the courts and the Supreme Court of Canada and, no doubt, it will give them the opportunity, when tested against the background of the charter, to change the law in favour of liberal abortion, which is not the open or explicit intention of the Canadian Parliament. I am convinced that that would not be the intention of this Parliament, if this matter were known to the whole House.

As I understand it, criminal code 251 is the current law in Canada governing administration of abortion. The charter will give courts the opportunity to dismantle criminal code 251—I dissent from the views expressed by the right hon. Member for Down, South when referring to the American constitution, and I am sure that he will intervene and tell me where I am mistaken—in the sense that Canadians seem to be talking about the Bill of Rights in the same way as the Americans appear to refer to the American constitution.

The precedent for my remarks is the case I referred to earlier and which ruled out, in the definition of "person", the word "foetus". That was the case of Roe v. Wade, heard in Texas, in which the court, in effect, ruled in favour of an appellant challenging the existing restrictive American law on abortion in about 1972 or 1973. The appellant tested that law in the courts, which ruled that the law, as it existed in Texas, offended amendments 9 and 14 of the American constitution. Therefore, no sooner had the decision had been taken to reward the appellant with a favourable response in the Texas courts, than all the law on restricting forms of abortion in America was wiped out overnight. That is my precedent and I simply ask the House whether it could happen again.

There is an obligation on the House—as my amendments sought to show—to decide on this matter. Of course, that decision cannot now be taken because these matters have passed. All I am trying to stop is a precedent, which occurred in the United States of America, happening within Canada. Hon. Members would wish to see that brought about.

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The same Canadians reject my analysis. I have heard the word "neutral" being used to refer to the Bill on many occasions over the past week. However, is it neutral? Many people in Canada believe that it is not neutral; a firm of banisters—Stephen's, French and McKeown—and many other organisations and societies in Canada maintain that this Bill lacks neutrality. The women's movement in Canada believes that it is not neutral. It may seek to press it as neutral at this stage, but it maintains that it is not. The. Catholic Church maintained that it is not neutral and, if the Dehler v. Ottawa civic hospital judgment is right, it certainly is not neutral. I quote Mr. Justice Robins in his summing up of that case, who said: Accepting as fact the conclusion the plaintiff seeks to establish by testimony at trial, that is, that a foetus is a human being from conception, the legal result obtained remains the same. The foetus is not recognised in law as a person in the full legal sense.

Therefore, it seems that some eminent people in Canada are willing to prejudge what may happen if those matters are tested in the courts of Canada. They believe not that the Bill is neutral but that it will lead to abortion on demand in Canada, which was never the intention of this Parliament. We are doing that from here. It is we who are responsible for what is returned to Canada.

In some way or another we should seek to amend the Bill. There are two ways of doing

so. The right hon. Member for Down, South dwelt at great length on one of them. We know that there are some major obstacles to amendment in Canada. One is the requirement that the federal Government should support amendment and that seven out of the 10 provinces representing 50 per cent. of the population should approve it. That is a severe hurdle, particularly in the light of the considerable frictions that have existed traditionally between the provinces and the federal Government.

Alternatively, we can amend the Bill. However, repeatedly over the last week I have been informed that we are not here to amend. We can table amendments and they will be heard, but the Government do not wish to accept amendments. We are being used—it cannot be proved either way until it is tested in the courts in Canada—perhaps to change the law in Canada in our name without being provided with the right to amend in any way what could be the source of whatever changes take place in Canadian law.

Mr. Trudeau tells us that it is unnecessary for us to express that view. I shall make clear what Mr. Trudeau said about the amendment when it was dealt with in the courts. When the amendment to which I referred was discussed in the House of Commons in Canada, he said: If the essence of the question is whether this House"— that is the Canadian Parliament— continues to have the right to deal with abortion, Madam Speaker, the answer is yes. It will be the Parliament of Canada which will still be writing the Criminal Code and the members of this House will have the responsibility, and I wish them well, in dealing with the problem of abortion. Mr. Trudeau was seeking to reassure the Canadian House of Commons that it would retain the right to legislate.

In 1979, when we were dealing with the Transport Bill, undertakings were given with every confidence by Ministers at the Dispatch Box as to the effects of legislation on transport undertakings. However, as we have subsequently found out in the last few months, the courts overruled the will of the politicians. The view of Mr. Trudeau is but the will of a politician. I maintain that that desire and the belief that the Canadian Parliament will

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retain the right to legislate is not necessarily to be accepted not only because of the precedents here but because of the precedent in Canada.

When criminal code 251 was brought before the Canadian House of Commons in 1969, the then Justice Minister, Turner, gave a number of clear assurances to the House. He said that there would be no increase in abortion, no eugenic abortion and no Medicare cover for abortion.

I am not interested in whether it is right or wrong to have more permissive or more restrictive abortion legislation. I am saying that what the Justice Minister made clear to the Canadian House of Commons at that time did not prevail. In every one of those areas there were changes, proving that the assurances given by Mr. Trudeau and Mr. Turner were not valid.
Therefore, the assurances given by Mr. Trudeau to the Canadian House of Commons should be no more valid on this issue than they were then or in the case of our own Minister in the Standing Committee debates on the Transport Bill in 1969.

11 pm

The issue that we have to decide is very simple, although we do not have the right to do so, because there are no amendments. It is whether this Committee accepts that the Canadian Parliament and not the Canadian courts has the exclusive right to decide about abortion. In my view, as schedule B stands, that will not be so and it will be the Canadian courts which decide.

That view has been expressed not only by me as a Labour Member of this House and

by three Labour or equivalent Members of the Canadian House; it was expressed and indeed almost mirrored in speeches made by Conservative Members of the Canadian House of Commons. Every Conservative Member of the Canadian House voted in favour of the amendment that I tabled but which was not selected. So there is agreement in Canada and great anxiety about what has happened. Yet we are not in a position to discuss it. Indeed, members of Mr. Trudeau's own party defected on this issue when it was debated in the Canadian Parliament.

Whatever we do, we must ensure that generations of Canadians in the future have the right to decide for themselves whether they want more permissive or more restrictive abortion legislation. It is my submission that as the charter stands today that will not be their right, because the Canadian courts will effectively have removed it.

Mr. John G. Blackburn (Dudley, West)

I have attended most of the debate and I do not pretend, nor would I deceive the Committee by suggesting, that I am an authority on constitutional law. But I exercise the sovereign right of every member of this Committee to express an opinion, particularly at this historic moment, as it has been described, for Canada. It may indeed be a sacred moment. By the grace of God, let us hope that it is not a tragic moment for Canada.

The proceedings of the Committee got off to a very fine start with a speech that few Members of the House will ever forget—that of the right hon. Member for Down, South (Mr. Powell). The right hon. Gentleman outlined to us then and said again today in very clear tones that two issues are involved. Will it be the right of an elected House of Commons of Canada to create the legislation, or will it be a matter that is left to the judiciary?

During the course of the Committee, time and again hon. Members have come squarely to the issue of why we

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are debating the Bill. We are doing so because we have to and we have been invited by the Canadian Government to pass the legislation. I shall not take much time but there are times in one's public and political life when one is called upon to stand up and be counted.

Tonight, and with this Bill, I am prepared to stand up and be counted on one issue. That matter relates to the legislation contained in the Bill under sections 52 and 7. I think that you would rule me out of order, Mr. Armstrong, if I were to develop an argument for or against abortion. That is not my intention. But, in passing this legislation, we have a solemn responsibility as a legislative assembly to make sure that it leaves this place as we would wish it to be. Section 52 says: The constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. We cannot accept section 52 without spending just a moment examining section 7. When we do so, we know, in the quietness of our hearts, that the eventual decision of this legislation will rest, not with the House of Commons of Canada but with the judiciary.

I just place it on record that, in my judgment, humble though it is, but saturated with sincerity, I would prefer the legislation of the Canadian people to rest with the Canadian House of Commons rather than with the judiciary. I direct two questions to the Front Bench, on which I would value its guidance. Is it true that, with the knowledge that my right hon. Friend has, the passage of the Bill could open the way for the facility of abortion without question within the terms of this constitution? If that is so, I want him to know that there are hon. Members who

would find that proposition morally offensive.

[…]

(I.) CANADA, HOUSE OF COMMONS DEBATES, EMERGENCY MEASURES, APPLICATION OF CHARTER RIGHTS

MARCH 29, 1982

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EMERGENCY MEASURES

APPLICATION OF CHARTER OF RIGHTS

[…]

Mr. Svend J. Robinson (Burnaby): Madam Speaker, my supplementary question is directed to the Prime Minister. When the Prime Minister invoked the War Measures Act in 1970, he trampled on and overrode the fundamental rights protected by the Canadian Bill of Rights.

Some hon. Members: It was Parliament.

Mr. Robinson (Burnaby): He now proclaims that the Charter of Rights will protect Canadians from abuses under the emergency planning order which, among other things, will allow him to impose sweeping censorship and to commandeer all media for an unlimited period of time.

Is the Prime Minister prepared to assure the House that under no circumstances will his government make use of the "notwithstanding" clause in the Charter of Rights to deny, during times of emergency, the fundamental rights of all Canadians, or is the Charter of Rights to become as useless during times of emergency as was the Canadian Bill of Rights when the Prime Minister said, "Just watch me", in 1970?

Some hon. Members: Oh, oh!

Right Hon. P. E. Trudeau (Prime Minister): Madam Speaker, I would first point out to the hon. member that the War Measures Act was adopted in 1970 with the concurrence of hon. members on both sides of this House.

Mr. Clark: With information withheld.

Mr. Trudeau: Second, the "notwithstanding" clause was brought into the Charter, as the hon. member knows, at the insistence of the provinces. The federal government had a Charter which did not have a "notwithstanding" clause. I am sorry that the hon. member, personally, if my recollection is correct, did not support it. However, I do know that one of the leading forces in introducing a "notwithstanding" clause was Premier Blakeney of Saskatchewan. I would hope that that hon. member would use his influence to get Premier Blakeney, along with other premiers, to revert to the original bill that we had.

Some hon. Members: Hear, hear!