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PROPOSED RESOLUTION FOR JOINT ADDRESS TO HER MAJESTY THE QUEEN RESPECTING THE CONSTITUTION OF CANADA

BRIEFING NOTES FOR USE IN PARLIAMENT

October 6, 1980

PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE CONSTITUTION OF CANADA – BRIEFING BOOK USE IN PARLIAMENT, OCTOBER 1980 (1)

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INTRODUCTION

Objectives

Following are the principal objectives to be achieved by the measure.

(1) Provision for a completely Canadian amending procedure for the entire Canadian Constitution.

(2) "Patriation" of the Constitution.

(3) Entrenchment of a Charter of Rights and Freedoms for Canada.

(4) Entrenchment of principles of equalization payments and reduction of regional disparities.

(5) Some provision for modernization of the text of the Constitution, now and in the future.

Elements of the Measure

The main elements contained in the proposed measure are as follows.

(1) Resolution for a Joint Address, requesting enactment of a statute by the Parliament of the United Kingdom, as described in (2).

(2) Proposed United Kingdom statute - the Canada Act, the French version of which is contained in Schedule A, which would give force of law to that set out in (3) below.

(3) Schedule B - The Constitution Act, 1980 (pp. 3-16) containing new provisions of the Canadian Constitution, and also including Schedule I to the Constitution Act which would list most statutes making up the Constitution of Canada and would rename them.

PROPOSED RESOLUTION ...
CONSTITUTION OF CANADA – BRIEFING BOOK USE IN PARLIAMENT,
OCTOBER 1980

Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada

WHEREAS in the past certain amendments to the Constitution of Canada have been made by the Parliament of the United Kingdom at the request and with the consent of Canada;

Projet de résolution portant adresse commune à Sa Majesté la Reine concernant la Constitution du Canada

Le Sénat et la Chambre des communes du Canada réunis en Parlement, considérant:

que le Parlement du Royaume-Uni a modifié à plusieurs reprises la Constitution du Canada à la demande et avec le consentement de celui-ci;

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PREAMBLE TO THE RESOLUTION

The first clause of the preamble describes the historical situation whereby in the past amendments to parts of the Constitution have been made by the United Kingdom Parliament.

A list of the amendments made in the past by the United Kingdom Parliament is set out at Tab A.

Many amendments can already be made in Canada; for example, pursuant to section 91(1) of the British North America Act, which provides that Parliament may legislate to amend the Constitution of the federal government, and section 92(1) which provides that provincial legislatures may amend the Constitution of the province, and other provisions of the Constitution such as the British North America Act, 1871 which provides that provincial boundaries may be changed when Parliament and the concerned provincial legislatures agree.

The "request and consent" of Canada refers to the convention that the U.K. would not legislate for Canada except with its request and consent expressed in most cases by the two houses of Parliament. Sections 4 and 7(1) of the Statute of Westminster preserve that convention.

The full text of the Statute of Westminster, 1931 is found at Tab B.

The constitutional convention of "request and consent" does not require the request and consent of provincial governments or legislatures. In fact, there was no consultation with the provinces in the case of eight of the fourteen major amendments made by the United Kingdom thus far.

1871 - Establishment of new provinces.

1875 - Privileges and immunities of the House of Commons.

1886 - Representation of the Territories in the House of Commons.

1915 - Redefinition of senatorial divisions.

1943 - Postponement of redistribution of House of Commons seat.

1946 - Readjustment of representation in the House of Commons.

1949 - Entry of Newfoundland.

1949(2) - Establishment of the amending power of Parliament (section 91(1)).

AND WHEREAS it is in accord with the status of Canada as an independent state that Canadians be able to amend their Constitution in Canada in all respects;

que, de par le statut d'État indépendant du Canada, il est légitime que les Canadiens aient tout pouvoir pour modifier leur Constitution au Canada;

Also, it is not unusual for the federal government to seek and obtain a constitutional amendment from Westminster despite the opposition of some of the provinces.

(a) In 1907 the federal government obtained an amendment to the B.N.A. Act increasing federal subsidies to the provinces. All provinces, except British Columbia, agreed to the proposed amendment. The amendment was obtained despite British Columbia's objections.

(b) In 1943 an amendment was sought to suspend until after the war the redistribution of seats in the House of Commons. The amendment was sought and obtained despite Quebec's objection.

(c) In 1946 an amendment to section 51 of the B.N.A. Act changing the representation in the House of Commons was sought. Quebec objected. The amendment was granted.

(d) Twice in 1949 amendments to the B.N.A. Act were obtained despite provincial objection. One amending section 91 of the B.N.A. Act to give Parliament legislative authority to amend the Constitution of Canada with certain important exceptions. The other admitted Newfoundland into Confederation. In both cases the amendments were sought and obtained without consultation with the provinces despite provincial claims that the provinces should have been consulted and their consent sought.

A more detailed discussion of the constitutionality of what is being called unilateral patriation is found under Tab C.

The second clause of the preamble describes the present status of Canada as an independent state and that it is therefore desirable for Canadians to have the ability to amend their Constitution in Canada. Canada's independent status was recognized by the United Kingdom in 1926. The Balfour Declaration of that year stated, with respect to Great Britain and the Dominions:

> "They are autonomous Communities ... equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

When this independent status was embodied in the Statute of Westminster in 1931, federal and provincial governments could not agree on an amending formula; therefore, that statute was expressly stated by section 7(1) to not apply to amendments to the British North America Acts, 1867-1930.

Sections 4 and 7(1) of the Statute of Westminster are repealed by the present measure - (see item 16 to Schedule I to the Constitution Act, 1980). Also, section 2 of the Canada Act expressly states that no Act of the United Kingdom Parliament passed after the coming into force of the Constitution Act, 1980 shall apply as part of the law of Canada. This is one of the important substantive and symbolic aspects of patriation.

The third clause of the preamble describes the desirability of providing for constitutionally-entrenched fundamental rights and other amendments to the Constitution (Part I of the Constitution Act, 1980). The other amendments are:

- entrenchment of the principle of equalization and the amelioration of regional disparities (Part II of the Constitution Act, 1980);
- a requirement that a constitutional conference of First Ministers be held each year during which the interim amending formula is in force (Part III of the Constitution Act, 1980);
- a formula for amendment (Parts IV and V of the Constitution Act, 1980);
- renaming of the British North America Acts to the Constitution Acts, and some other modernization (Part VI of the Constitution Act, 1980).

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PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE CONSTITUTION OF CANADA – BRIEFING BOOK USE IN PARLIAMENT, OCTOBER 1980 (1/)

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To the Queen's Most Excellent Majesty:
Most Gracious Sovereign:

We, Your Majesty's loyal subjects, the Senate and the House of Commons of Canada in Parliament assembled, respectfully approach Your Majesty, requesting that you may graciously be pleased to cause to be laid before the Parliament of the United Kingdom a measure containing the recitals and clauses hereinafter set forth:

A Sa Très Excellente Majesté la Reine,
Très Gracieuse Souveraine:

Nous, membres du Sénat et de la Chambre des communes du Canada réunis en Parlement, fidèles sujets de Votre Majesté, demandons respectueusement à Votre Très Gracieuse Majesté de bien vouloir faire déposer devant le Parlement du Royaume-Uni un projet de loi ainsi conçu:

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REQUEST CLAUSE

The Address is similar to previous Addresses to the Monarch. It asks the Queen to have the Canada Act placed before the Parliament of the United Kingdom for enactment.

It will be noted that there are some slight changes from the wording of previous Addresses which have said:

> "We, Your Majesty's most dutiful and loyal subjects, the /Senate and/ Commons of Canada in parliament assembled, humbly approach Your Majesty, praying that you may graciously be pleased to cause a measure to be laid before the parliament of the United Kingdom to be expressed as follows:"

The changes deleting "most dutiful", replacing the word "humbly" by respectfully and "praying" by requesting are modernizations; they are not attempts to make it appear as though Canadians are less "dutiful" than previously.

The mechanism followed on past occasions for transmittal has been:

(i) the Clerk of the House or Houses concerned has sent the Joint Address to the Clerk of the Privy Council who in turn transmitted the Address to the Secretary to the Governor General;

(ii) the Secretary to the Governor General has transmitted the Address to the Private Secretary to the Queen;

(iii) at the same time the Clerk of the Privy Council has written to the Under-Secretary of State for External Affairs requesting that Canada House in London inform the Commonwealth Relations Office that the Address was en route to Buckingham Palace;

(iv) after the Address was received by the Queen, it was sent by Her Majesty's Private Secretary to the Commonwealth Relations Office for submission to the British Parliament.

(The appropriate British ministry is now the Foreign and Commonwealth Office.)

PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE CONSTITUTION OF CANADA – BRIEFING BOOK USE IN PARLIAMENT, OCTOBER 1980 (1)

ANNEXE A—SCHEDULE A

An Act to amend the Constitution of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Loi modifiant la Constitution du Canada

Sa Très Excellente Majesté la Reine, considérant:

qu'à la demande et avec le consentement du Canada, le Parlement du Royaume-Uni est invité à adopter une loi visant à donner effet aux dispositions énoncées ci-après et que le Sénat et la Chambre des communes du Canada réunis en Parlement ont présenté une adresse demandant à Sa Très Gracieuse Majesté de bien vouloir faire déposer devant le Parlement du Royaume-Uni un projet de loi à cette fin,

sur l'avis et du consentement des Lords spirituels et temporels et des Communes réunis en Parlement, et par l'autorité de celui-ci, édicte:

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CANADA ACT

The Canada Act is set up in a split page format for consideration by Parliament. In the United Kingdom, however, the french version will appear as a schedule since the Parliament of that country enacts its statutes only in English. Thus the word "ANNEXE A" appears at the top of the french version. The United Kingdom has agreed to this procedure to enable us to have official French and English versions of the Act.

The long title of the Act is "An Act to amend the Constitution of Canada". The short title "Canada Act" is set out in section 4 of the Act.

Preamble

The preamble to the Canada Act recites the action taken in Canada that makes it appropriate for the United Kingdom Parliament to enact the proposed Bill that is a request by the Senate and the House of Commons as well as by Canada.

The two requests noted in the preamble are not redundant; they are necessary because, by convention, amendments to the British North America Acts are enacted by the United Kingdom on the request and consent of the Senate and the House of Commons, but the Canada Act amends the Statute of Westminster as well as the B.N.A. Acts and consequently by virtue of section 4 of that Act the consent of Canada is required as well. Section 4 requires that the "Dominion" (Canada) has requested and consented.

Enacting clause: This is the form used in enacting United Kingdom statutes.

Constitution Act, 1980 enacted

1. The *Constitution Act, 1980* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

Adoption de la *Loi constitutionnelle de 1980*

1. La *Loi constitutionnelle de 1980*, énoncée à l'annexe B, est édictée pour le Canada et y a force de loi. Elle entre en vigueur conformément à ses dispositions.

Parliament of United Kingdom not to legislate for Canada

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1980* comes into force shall extend to Canada as part of its law.

Cessation du pouvoir de légiférer pour le Canada

2. Les lois adoptées par le Parlement du Royaume-Uni après l'entrée en vigueur de la *Loi constitutionnelle de 1980* ne font pas partie du droit positif au Canada.

Adoption de la Loi constitutionnelle de 1980

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Section 1 - Constitution Act 1980 enacted

Section 1 - Gives the Constitution Act, 1980, which is set out as Schedule B, force of law in Canada.

The Constitution Act, 1980 is set out as a schedule to the Canada Act to clearly separate those matters which have primary application in Canada from those which have primary application in England. The Canada Act comes into force when it is enacted and receives royal assent in the United Kingdom. The Constitution Act, 1980 only comes into force when it is proclaimed in force by the Governor General of Canada.

The section provides that the Constitution Act, 1980 "shall come into force as provided by that Act" and section 57 of the Constitution Act, 1980 provides for this to occur on proclamation of the Governor General. Section 58 provides for the special procedure for bringing Part V of that Act into force.

Section 2 - Parliament of the United Kingdom not to legislate for Canada

Section 2 - Must be read in conjunction with the repeal of sections 4 and 7(1) of the Statute of Westminster (refer item 16 of Schedule I to the Constitution Act, 1980). This section is a major element of "patriation". It provides that no future Acts of the United Kingdom shall extend as part of the law of Canada.

French version

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

3. La partie de la version française de la présente loi qui figure à l'annexe A a force de loi au Canada au même titre que la version anglaise correspondante.

Version française

Short title

4. This Act may be cited as the *Canada Act*.

4. Titre abrégé de la présente loi: *Loi sur le Canada*.

Titre abrégé

Section 3 - French Version

Section 3 - Provides for the French version of the Canada Act to be set out in Schedule A, and for that version to be equally authoritative as the English version. (For Canadian purposes the schedule has been printed in a split page format, beside the English version)

- Putting the French version in Schedule A is a way of enabling the United Kingdom Parliament, which enacts all its legislation in English only, to give us an official French version of the statute. This has never been done before with respect to any United Kingdom constitutional enactment for Canada, although it was suggested in the Fulton-Favreau proposals of 1965. While there are translations of the various U.K. amendments available, including the British North America Act, 1867, and these appear in the Appendices to the consolidation of federal statutes, these are not official French versions because the statutes were enacted only in English. The only parts of the Constitution for which there are at present official French versions are those which have been enacted by the Canadian Parliament, such as the Manitoba Act, the Saskatchewan Act, and the Alberta Act, as well as certain amendments to the Constitution of the Province of Quebec (and perhaps to some extent, some of those of Manitoba - which will be extended as that province translates its statutes to comply with the recent Supreme Court decision.)

- The Constitution Act, 1980, by its own terms, is official in both French and English since section 56 of that Act so provides.

- Section 54 of the Constitution Act requires the Minister of Justice to prepare an official French version of constitutional statutes where one does not now exist; consultation with the provinces would, of course, have to take place since such version could only be enacted with the provincial consent. (See notes on sections 54 and 55.)

Section 4 - is the short title.

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SCHEDULE B

CONSTITUTION ACT, 1980

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

I INTRODUCTION

1. Part I of the Constitution Act, 1980 comprising sections 1-30, entrenches a Canadian Charter of Rights and Freedoms which would establish for all Canadians a common guarantee of certain basic rights and freedoms essential to maintaining our free and democratic society and a united Canada. The provisions of the Charter are designed to have application to the federal, provincial and territorial levels of government. This, of course, is based on the belief that the rights and freedoms contained in the Charter are of equal importance to an individual wherever he or she resides in Canada, and they should thus be as uniform as possible throughout the country.

2. At present in Canada, a number of rights are found in a variety of federal and provincial laws. At the federal level they are found in such statutes as the Canadian Bill of Rights, the Canadian Human Rights Act, the Official Languages Act and the Criminal Code. At the provincial level there are enactments dealing with such matters as political, legal, non-discrimination and linguistic rights. However, with few and limited exceptions, none of the rights and freedoms are constitutionally guaranteed. What protections Parliament or a provincial legislature has enacted in the past can be removed or limited by another ordinary enactment in the future.

3. In addition, rights at the provincial level vary from province to province. (For example, only three provinces -- Québec, Alberta and Saskatchewan -- have legislated expressly to recognize what we call fundamental freedoms and legal rights, although all provinces have now enacted non-discrimination laws.) Federally, the Canadian Bill of Rights has frequently been construed by the courts so that its protections are subject to whatever restrictions Parliament had placed upon them prior to the Bill's enactment in 1960. Hence, many of the rights have been given only limited scope.

4. Thus the only effective means to assure to Canadians common basic rights and freedoms which are clearly inalienable by ordinary legislative action is to place them in the constitution where they can be changed only by amendment of that document. Entrenchment will also make clearer the nature and extent of protected rights and the duty of the courts to ensure that the rights are not infringed by law-makers or governments.

5. The Charter would assure protection to several categories of rights and freedoms: fundamental freedoms, democratic rights, mobility rights, legal rights, non-discrimination rights, language rights at the federal level and minority language education rights. Some of these are drawn from existing constitutional rules or federal and provincial laws; others are new.

6. Since no right or freedom in an organized society is an absolute liberty to do as one wishes, the opening section of the Charter indicates that the guaranteed rights are subject to reasonable limits normally recognized in a free and democratic society with a parliamentary system of government. This statement will serve as a guide both to the legislators when enacting laws dealing with basic rights and to the courts when testing such laws against the guaranteed rights.

7. Finally, unlike the present Canadian Bill of Rights, the Charter is more than an interpretive guide for the courts. Section 25 expressly provides that any law which is inconsistent with Charter rights is to be struck down as inoperative and of no force and effect. Consequently, the courts are told that the Charter provisions are to be given paramount effect in cases of conflict.

8. As for implementation of the Charter, upon its adoption by the United Kingdom the whole of the Charter (with the exception of non-discrimination rights) becomes binding upon the federal, provincial and territorial governments and legislatures. The non-discrimination rights will have application three years after the adoption of the Charter to permit all governments the necessary time to bring their various laws into line with the provisions of the non-discrimination rights.

CONFIDENTIAL
October 28, 1980

CHARTER OF RIGHTS: CRITICISMS BY LE DEVOIR

Several articles critical of the Charter of Rights have appeared recently in Le Devoir. Set forth below are the principal criticisms along with suggested responses.

1. How are the qualifications on rights in section 1 ("subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government") going to be interpreted by the courts? Would the War Measures Act fall into this category?

   Response: The purpose of the qualification is to indicate to individuals, governments and courts the general bounds within which rights may be limited by reference to the general practices of any society that is based on the traditions of freedom and parliamentary democracy--in other words one that respects the rule of law. The concept of "generally accepted" is not novel to courts, particularly common law courts, which have always developed laws by looking at pronouncements of courts in other similar jurisdictions to see what is "generally accepted"--or a prevailing view.

   What is overlooked in this qualification is the term "reasonable". The courts are not directed to apply any limits that are generally accepted--they must satisfy themselves that the limits are reasonable, and it is only those limits that can be imposed.

   The War Measures Act may be found to be reasonable in the limits imposed, depending on the circumstances at hand. Up until now the courts have not been able to judge measures taken under that Act because it was not subject to the Canadian Bill of Rights. However, it will be subject to judicial scrutiny under the Charter and any action taken under it in the future will be subject to court review. It will be for the courts to decide if limits imposed by that Act are reasonable and acceptable.

2. Under "fundamental freedoms" (section 2(b)), does the expression in French "grands moyens d'information" exclude the "petits moyens d'information"?

   Response: This is probably a valid point. The English version speaks of "media of information" and the French should probably read simply "moyens d'information" without qualification.

3. Under section 3, what will be an "unreasonable distinction or limitation" on the rights to vote? Would it not be better to use the Quebec Charter formulation: "Every person legally capable and qualified has the right to vote"?

   Response: The purpose of this formulation is to allow the courts to determine if a particular disqualification is reasonable or not. While quite

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clearly a limitation based on age of maturity would be found reasonable, such may not be the case with respect to a distinction based on previous criminal conduct or on holding judicial office.

Adopting the Quebec formulation would guarantee nothing since all it provides is that such persons as the law permits to vote may vote. There is no test of whether the disqualifications are reasonable or not.

4. Under section 4, a legislature or Parliament may extend its life in times of real or apprehended war, invasion or insurrection. How would this be interpreted in relation to the October 1970 Crisis?

Response: Such a decision would initially be made by the legislative body in question. However, this decision could be challenged in the courts which would determine if the facts in question justified the action. If the courts were not satisfied, they could declare that the legislative body was exercising powers unconstitutionally.

5. Under mobility rights (section 6) the right to pursue the gaining of a livelihood is guaranteed. Does this mean recognition of a right to work--that the government must provide work for unemployed? Does it mean that one has the right to work in the language he speaks?

Response: This is a misinterpretation of the section. It does not guarantee the rights in any absolute sense but only in terms of their exercise and enjoyment without discrimination based on province or previous province of residence. Consequently, it is not a guaranteed right to work but rather a right to pursue the gaining of a livelihood without discrimination based on province of residence. Nor is it a right to work in one's own language; all it means is that if language is a relevant job qualification, then a different requirement cannot be imposed on those coming from outside the province than is demanded of those resident in the province.

6. Will the mobility rights exception (laws of general application other than those that discriminate on the basis of residence) mean that local preference hiring laws, fish and game laws that give preference to residents and rules respecting qualification of lawyers will be invalid?

Response: In the case of local preference hiring laws, the answer is yes unless they discriminate equally among residents and non-residents. With respect to fish and game laws these would not relate to the gaining of a livelihood and hence are not affected. As for qualifications respecting the practice of law, these will not be affected as long as the qualifications are the same for anyone seeking to practice in the province.

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7. In section 8, why does the English version speak only of search or seizure on lawful grounds while the French version speaks of "les fouilles, les perquisitions et les saisies *abusives*" etc.?

Response: This is an error in the French text. The word "abusives" needs to be removed.

8. In sections 10 and 11 why are different time-frame expressions used as, for example, to be informed *promptly* of the reasons for arrest or detention, to retain and instruct counsel *without delay*, to be informed *promptly* of the specific offence and to be tried within a *reasonable time*?

Response: Each of these expressions have nuances (subtle, perhaps) which are nevertheless important. Without delay is the highest test and means "immediately" since the advice of a lawyer is critical and requires no delay to give effect to. Promptly means as quickly as possible and ties in with the idea that it may take some time to decide on the grounds for arrest or a charge, but it must not be very long. Reasonable time means just that and will vary with the complexity of the particular trial. The terminology corresponds essentially to that used in the UN Covenant on Civil and Political Rights.

9. In the non-discrimination rights (section 15), provincial human rights codes have additional grounds for non-discrimination (e.g. sexual orientation, civil status, social condition). Will these provincial laws be invalid to the extent they depart from those in the Charter and are not uniform across the country? Why doesn't the Charter provide that ordinary laws can add to the Charter rights and thereby make the additions equally entrenched to avoid two levels of rights?

Response: On the first point, additional grounds for non-discrimination in human rights laws will not be rendered invalid because they are not also found in the Charter. The grounds set forth in the Charter are simply a "core" group of non-discrimination grounds, and adding grounds by ordinary law will not render those laws incompatible with Charter provisions since the laws will not be inconsistent with Charter rights.

On the second point, the purpose of an entrenched Charter is to set forth basic or minimal rights and freedoms applicable generally. There is nothing incompatible with certain rights being entrenched and others being dealt with by ordinary laws. When there is sufficient agreement among the jurisdictions that additional rights are ripe for entrenchment, this can be done under the amending formula. The other approach would result in certain entrenched rights applying in some provinces but not in others. That is why provincial opting in was not provided for in the Charter.

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10. Why is there provision in section 16(2) for provinces to "extend the status or use" of English and French when there is nothing in the Charter providing for the status or use of these languages (except in Quebec and Manitoba - s. 21)?

Response: Section 16(2) is simply a "preserving" clause to ensure that in spelling out certain language rights in the Charter it is not intended that provinces cannot enact laws to provide the use of French or English or to give them official status (as New Brunswick has done). It may be noted that the Charter does provide for language rights in education in every province--thus it is not inappropriate for this provision to speak of "extending the status or use" of the languages.

11. In section 20 dealing with language of services to the public the test is "in areas where a substantial number of persons use French or English". Is this the same test as in section 23 (education rights) where the expression "where the number of children in an area warrant" minority language education facilities?

Response: In general the answer is yes, although as presently worded section 20 (unlike section 23) is not based upon the numbers demanding the services but rather merely on the presence of a substantial number of persons who use the minority language. It is proposed to modify the wording of section 20 to gear it to the demand for services so that it would read in part: "where it is determined...that there is a significant demand for communications with and services from (an office in any area) in both official languages". This follows essentially the language of section 9 of the Official Languages Act.

12. Does the preservation of rights and privileges respecting the use of languages other than English and French (section 22) suggest that there is to be a recognition of these other languages as official languages?

Response: No. All section 22 does is state that entrenching certain rights respecting the status and use of French and English is not to be construed as interfering with any rights or privileges that may be granted by law or practice for the use of other languages, such as the native languages in meetings, in courts or other forums.

13. Does section 23 leave to the majority (through the legislature) the power to determine the circumstances (e.g. where numbers warrant) in which the minority will be entitled to minority language education?

Response: Only to the extent that they make laws that are in conformity with the Charter rights. If provinces enact laws which limit minority education rights unreasonably these will be struck down by the courts.

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14. Does the "provision of minority language education facilities" in section 23 include the establishment of separate school commissions?

Response: This would depend on the circumstances of each particular case. If there were, say, only 10 minority language students in an area it would probably be sufficient that separate language instruction be provided within the existing framework of the school and board. If, however, the number of minority students was large enough to warrant separate schools then it could be argued that facilities should include separate school boards to administer the system.

15. Why does section 23 not specify who has authority to legislate to give effect to minority language education rights?

Response: Because it is unnecessary to spell out what is already clear. Under section 93 of the BNA Act provinces are given legislative jurisdiction to make laws in relation to education and clearly this includes the power to make such laws as are necessary to give effect to the rights in section 23. Obviously, it is not intended that Parliament legislate on this matter and this is made clear by section 28 which provides that the Charter does not extend existing legislative powers.

16. How can one say in section 28 that the Charter does not extend the legislative powers of any body when Parliament is acting unilaterally to impose a Charter on the provinces, including education rights which are clearly a provincial power?

Response: This fails to distinguish between the power of the Canadian Parliament to request the U.K. Parliament to make amendments to the BNA Act and the power of the Canadian Parliament to enact laws under the constitution. In the first case it is not an exercise of legislative power by the Canadian Parliament; it is legislation enacted by the U.K. Parliament. In the second case, which is what section 28 deals with, it would be Parliament or a provincial legislature enacting a law. All section 28 says is that the existing division of legislative powers under the constitution is not changed. That is why Parliament could not legislate to give effect to the minority language education rights.

17. Why was the application of the non-discrimination rights delayed for three years in all respects? Why wasn't the delay confined to the specific problem areas? What is the status in the meantime of provincial human rights acts whose provisions contravene the Charter provisions?

Response: The non-discrimination rights involves a very complex area of law where one cannot readily ascertain the many provisions of legislation and regulations that might give rise to claims of discrimination on one or more of the prohibited grounds. Consequently, the delay is necessary

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in order for all governments to review their laws to ascertain where contraventions of the Charter rights might arise. It was felt that this approach was preferable to creating a multitude of litigation in the courts over legislative provisions that could be readily changed, given some time.

In the meantime, provincial and federal human rights legislation will continue to operate in the normal fashion since the Charter provisions will not be in effect.

18. Why were only the minority language education rights and not the "institutional" language rights imposed on all provinces? Why are only Quebec and Manitoba singled out for the latter? If simple statutory protection is good enough for New Brunswick's minority then why is this also not sufficient for the English minority in Quebec?

Response: Educational language rights were singled out for inclusion in the Charter because all provinces had agreed in 1978 that these rights should pertain to the English and French minorities. When it became evident that all provinces but New Brunswick were opposed to entrenchment of "institutional" language rights (courts and legislation), the government decided that only viable approach at this time was to maintain the status quo. Thus, the only institutional language rights at the provincial level are those already existing in the constitution for Quebec and Manitoba.

This does not mean that other provinces cannot be added. If New Brunswick still wishes to have institutional language rights entrenched for that province, it can be done by a simple amendment to section 133. Equally, this can be done for other provinces such as Ontario.

The federal government remains firmly of the view that there must ultimately be a guarantee of minority language rights for francophones in the other provinces and will continue to press the provinces for some agreement on this.

19. Could a parent circumvent the "mother tongue" test in section 23(1) by moving temporarily to another province and then returning to demand that his children be educated in the minority language under 23(3)?

Response: This is highly unlikely. Section 23(2) is designed to ensure continuity of language of education within a family in the same manner as section 73(d) of Bill 101 does. A court will not treat lightly a change of residence that is not for genuine purposes and would undoubtedly reject a case where a person had simply changed his residence in order to enrol a child in school to take advantage of the special rule under section 23(2). It must be borne in mind that changing a residence with a family is not something most people do lightly.

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20. Will immigrants normally considered "francophones" (such as those who come from Haiti, North Africa, Cambodia and Belgium) be denied the right on becoming citizens to have their children educated in French outside Quebec because their mother tongue will be creole, arabic, khymer or flemish?

Response: Yes, in the same way as "anglophone" immigrants from India, Pakistan or Nigeria whose mother tongue is one of those country's dialects will not have the right to go to English schools in Quebec.

21. Will Anglophones in Quebec lose rights that they now have under Bill 101 such as the right to go to English schools even where numbers do not warrant?

Response: This will depend on the goodwill and good sense of provincial legislatures. Obviously the Charter of Rights cannot spell out detailed rules for how rights, including language rights, are to be protected or implemented. It can only assure minimum guarantees. We would anticipate that Quebec will maintain its present law respecting requirements for establishing English language education facilities, and would hope that other provinces will find it unnecessary to invoke the "where numbers warrant" provision. However, this is the wording to which provincial Premiers agreed in 1978.

CONFIDENTIAL
October 28, 1980

(Section 2)

CHARTER OF RIGHTS -- FREEDOM OF RELIGION AND DENOMINATIONAL SCHOOLS -- NEWFOUNDLAND

Premier Peckford of Newfoundland has stated that entrenchment in the Charter of Rights of "freedom of religion" would threaten the existing protection of state-funded denominational schools in Newfoundland.

When Newfoundland became a Canadian province in 1949 one of the Terms of Union provided as follows:

> EDUCATION
>
> 17. In lieu of section ninety-three of the British North America Act, 1867, the following Term shall apply in respect of the Province of Newfoundland:
>
> In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,
>
> (a) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and
>
> (b) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

This was a more explicit guarantee of denominational educational rights than that contained for other provinces in section 93 of the BNA Act in that it expressly assured the public funding of denominational schools on a non-discriminatory basis.

Premier Peckford appears to believe that if freedom of religion is entrenched in the constitution the result will be that public funding for denominational schools will become illegal in the same manner as in the United States. This position fails to distinguish between the wording of the Charter and that of the U.S. Bill of Rights.

The Charter simply speaks of freedom of religion while the U.S. Bill of Rights provides that

> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof..."

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This provision has been interpreted as having two branches: the "establishment" clause and the "free exercise" clause. It is under the "establishment" clause that the U.S. courts have held that there can be no government financial support for denominational schools since this would violate the "separation between Church and State". It has never been suggested that the "free exercise" clause is the basis for any such prohibition. Indeed, that clause has been interpreted to ensure that parents have a right to send their children to a religious rather than a public school.

Consequently, far from precluding the continuation of state funding for denominational schools, the entrenchment of freedom of religion would reinforce the constitutional provisions in the Newfoundland Terms of Union regarding state funding of denominational schools.

If Premier Peckford bases his concern over the preservation of denominational schools on other provisions of the Proposed Resolution, such as minority language education rights or the amending formula, then his concerns would seem to be equally without foundation.

Section 23 dealing with educational language rights does not in any way impinge upon the right to maintain and fund denominational or non-denominational schools -- it simply adds an overlay to the existing school systems by ensuring certain rights to instruction in the French language.

With respect to any possible amendments to Term 17 of the Terms of Union, this is clearly a provision affecting only one province. Consequently, it could not be amended except with the consent of Newfoundland either under section 34 or section 43. It may be argued that the general amending formulae (section 33 or section 41) or the referendum amending procedure (section 42) could be invoked to make an amendment of this nature. In our view this is not the case since, as a rule of statutory construction, the particular rule takes precedence over the general one. Thus, the special rule for amendments concerning one or more but not all provinces will govern in those cases and will not be superceded by the rules for general amendments.

NOTE: If this matter requires placing beyond doubt, then an amendment could be proposed to section 47 providing that the special procedure for amendments set out in section 43 operates notwithstanding the general amending procedures.

No amendment is recommended in respect of section 34 as the consent of Newfoundland to any amendment during the interim period would be necessary.

CONFIDENTIAL
October 31, 1980

(Section 6)
CHARTER OF RIGHTS -- MOBILITY RIGHTS
NORTHERN PIPELINE PREFERENTIAL HIRING

Under the Northern Pipeline Act, Foothills (the company building the line) was granted authority to construct the Yukon portion of the pipeline subject to certain undertakings given by it during the National Energy Board hearings. These undertakings are now being elaborated by the Northern Pipeline Agency as terms and conditions to be imposed on Foothills through adoption by the Governor in Council as Schedule III to the Act.

Certain of the proposed terms and conditions could, unless drafted with some care, be in conflict with the mobility rights (section 6) of the Charter of Rights as these relate to the right of citizens and permanent residents of Canada to (a) move to and take up residence and (b) pursue the gaining of a livelihood in any province or territory without discrimination based primarily on their province or territory of residence or previous residence.

Specifically, the proposed terms and conditions in question are those that would provide, with respect to the Yukon portion of the pipeline,

(a) for job preference to be given to residents of the Yukon and the Mackenzie District of the Northwest Territories;

(b) for job training preference to be given to these same residents, with particular emphasis on training and employment for women and native people; and

(c) for non-residents of the Yukon and the Mackenzie District to be hired only at locations outside the Yukon Territories.

In our view, it is possible to accomplish to a substantial degree the major objectives of these terms and conditions if they are properly drafted to avoid residence as the dominant criterion in all cases.

The following principles would have to govern the preparation of valid terms and conditions.

1. Job preference could not be given to residents in absolute terms. However, given the very weak socio-economic infrastructure of the Yukon and the serious impact that a massive influx of outside workers (some 3,500) could have on the social fabric of the Territory and its communities (some of which are primarily native), it would be a reasonable limit on the mobility rights to require Foothills to control the number of persons that it hires from outside the Territory by ascertaining first that there are not sufficient employees in the Territory. The purpose of such a condition would be to ensure that the influx of outsiders did not threaten the public order,

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safety and welfare of the northern communities, and could thus be viewed as a legitimate restriction on mobility rights.

2. The same basis would govern the condition that hiring of non-residents would normally take place at locations outside the Territory. This would provide equal opportunity for residents and non-residents to seek the gaining of a livelihood in the Yukon, but the non-residents would be subject to the constraint on their inflow that their hiring not place an undue burden on the physical and social infrastructure of the Territory and its communities. Intake of non-resident workers would thus be regulated for this purpose.

3. With respect to principles one and two, Foothills would be obliged to consult with the Northern Pipeline Agency and the Yukon Government as to the numbers of outside workers that could be engaged at any given time, this to be determined on the basis of the sufficiency of accommodation and other facilities, the levels of social tension in the northern communities. the desirable growth rate for the local communities, etc. However, in elaborating these criteria care must be taken to ensure that they are not being used as a colorable device for discriminating among persons primarily on the basis of residence. In other words, they must be genuine grounds for limiting the influx of non-residents based on the social factors mentioned earlier.

4. With respect to job training for local residents, this in itself should not contravene the mobility rights in the Charter if it is a program which is not designed solely to give job preference to residents on the pipeline. In other words, it must be a program which is designed to teach local residents skills which will be of general value to them and to place them on an equal footing with other persons to compete in the employment marketplace generally.

5. With respect to special job training and employment preference being given to native peoples and women, these could be justified on the basis of affirmative action programs for disadvantaged persons or groups under section 15(2) of the Charter. However, this condition (at least as it relates to job preference) should not be limited to women and native peoples resident only in the Yukon and the Mackenzie District since such a restriction would contravene the mobility rights provision.

6. The guiding principle in the preparation of the terms and conditions must be to avoid employing the residency preference <u>except to the extent that it can be demonstrated to be justifiable as a reasonable limitation based on the need for preserving public order, safety, health and social stability in an area of the country that has a very fragile socio-economic infrastructure</u>.

SECTION 10: ADDENDUM: APPLICATION TO CANADIAN FORCES; RIGHT TO RETAIN AND INSTRUCT COUNSEL WITHOUT DELAY

This addendum concerns the right to retain and instruct counsel as such right relates to persons who are subject to the Code of Service Discipline, established in Parts IV to IX inclusive of the National Defence Act.

1. While there are no formal provisions that would prevent a person who has been arrested or detained by military authorities under the Code of Service Discipline from retaining and instructing counsel without delay, because of the isolated areas in which some members of the Canadian Forces are serving, e.g., in the far north, or because of the fact that servicemen are serving in foreign countries, there may from time to time be some practical restrictions on the right to retain and instruct counsel. For example, where the arrest or detention occurs in Cyprus it may, indeed, be difficult for an accused to retain and instruct a Cypriot lawyer to advise him with respect to Canadian military law. However, subject to such practical limitations there are no specific limitations on this legal right.

2. When a case that arises under the Code of Service Discipline is to be tried by court martial, the accused is offered the services of a military lawyer at no expense to him to defend him at his trial, or he may hire counsel for that purpose at his own expense. However, should the accused wish to retain and instruct counsel at any time prior to the actual convening of a court martial for his trial, he would normally be expected to retain counsel at his own expense.

3. The system of summary trials that has been established under the Code of Service Discipline may be vulnerable in respect of this requirement with respect to counsel. These trials are conducted by officers of the Canadian Forces who are not trained in the law, but whose powers are, for that reason, limited in respect of the severity of sentences that may be awarded. An accused who is to be tried by summary trial is not permitted to be represented by legally trained counsel, although provision is made in the regulations for an officer to assist the accused (the assisting officer who is normally a regimental officer could of course coincidentaly be legally trained). It is intended to strengthen these provisions by requiring that an officer to assist the accused be appointed in all cases and by permitting him to fill a more meaningful role in respect of the trial. It would be impossible to administer the summary trial system if the right to retain and instruct counsel is interpreted in the strict sense of meaning legally trained counsel and is applicable to summary trials with the forces. In this connection the possibility of proposing an amendment to the National Defence Act is being considered similar to the one referred to in DND comments on s.11 (Right to Bail).

SECTION 11: ADDENDUM: APPLICATION TO CANADIAN FORCES; RIGHT TO BAIL

This addendum relates to the lack of any provision in the Code of Service Discipline (established by Parts IV to IX inclusive of the National Defence Act) respecting bail.

1. Because of the nature of military life it would be a difficult task to attempt to provide a meaningful right to bail in the Code of Service Discipline. To be effective the right would have to be one that is easily available within a very short period time at all of the myriad locations in which members of the Canadian Forces are serving. While there is no specific right to bail as such, section 137 of the National Defence Act does require that when an accused person has been placed in custody for 8 days without his trial having been proceeded with, a report stating the reasons for further delay must be made to a person who is empowered to convene a court martial and similar reports are required every 8th day until his trial has been held. In addition, every person who has been held in custody for a total of 28 days without trial may petition to the Minister to be freed from custody and must be freed from custody when he has been held for a total of 90 days. It is proposed to strengthen these provisions by an amendment to the National Defence Act.

2. While the lack of any specific provisions for bail in the National Defence Act has not caused any difficulties to date, if a successful challenge were to be made under the law as it now exists, an amendment could be sought to declare that the National Defence Act shall operate notwithstanding the Canadian Bill of Rights. The lack of any ability to seek a similar provision in respect of the charter is of some concern.

SECTION 11: ADDENDUM : APPLICATION TO CANADIAN FORCES; RIGHT NOT TO BE TRIED OR PUNISHED MORE THAN ONCE

This addendum relates to a perceived conflict between the provisions of the National Defence Act and the Right that would be provided under paragraph 11(f) of the charter not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted.

1. Section 61 of the National Defence Act provides that nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court. It further provides that where a person has been sentenced under the National Defence Act in respect of a service offence, and is afterwards tried by a civil court for the same offence, the civil court shall, in awarding punishment, take into account any punishment imposed by the service tribunal for the service offence, and provides for a remission of any unexpired term of any punishment involving incarceration that was imposed under the National Defence Act following an acquittal or conviction by the civil court.

2. In 1973, discussions were held between officials in the Department of National Defence and the Department of Justice with a view to removing or amending section 61 of the National Defence Act in so far as it contains within it the concept of double jeopardy. At that time the Department of Justice advised against any such attempt because of the requirement to first consult with each of the provinces and the unlikelihood of obtaining their agreement to forego jurisdiction in favour of the military.

3. Informal arrangements avoided for the most part cases of double jeopardy. However, those requirements involve consultation between military and civilian authorities in cases of potential difficulty and depend upon the good will of all concerned. If the charter is adopted it will be necessary to re-examine the need to repeal section 61 of the National Defence Act. Arrangements will however have to be made with the appropriate civil authorities but as these already exist in a number of places one can assume no problem should arise if s.61 is repealed.

CONFIDENTIAL

November 3, 1980

(Section 15)

CHARTER OF RIGHTS -- NON-DISCRIMINATION RIGHTS

A number of issues have arisen respecting the non-discrimination provisions (section 15) of the Charter. There is concern by the Advisory Council on the Status of Women that as worded section 15 would not ensure effective equality of women with men. The Canadian Human Rights Commission is concerned that certain grounds of non-discrimination have not been included (eg. handicap, sexual orientation, marital status) and that the limitation in section 1 ("limits generally accepted") would nullify equal rights. The Associations for the Handicapped contend that handicap must be included as a ground, and this is supported by the Special Parliamentary Committee on the Disabled and the Handicapped. Saskatchewan is very concerned that including "age" as a ground would cause serious problems for many laws that differentiate on the basis of age. David Crombie, M.P. has raised questions concerning the nature of the "affirmative action" clause (15(2)) and the meaning of "disadvantaged".

1. Advisory Council of Status of Women

The chief contention of this organization is that the new non-discrimination provision is little different in wording from that now found in the Canadian Bill of Rights, which has not been found fully effective in ensuring equality of rights as between men and women. In support of this position, two Supreme Court decisions are cited.

The first is Lavell and Bedard in 1973 (two cases heard together) involving two Indian women who lost their native status under the Indian Act by marrying non-Indian men. Although the Indian Act did not impose a similar disability on Indian men who married non-Indians, the Court concluded that this distinction did not constitute a denial of "equality before the law" on the basis of sex since the concept of equality before the law simply meant "equal application and enforcement of the laws before law enforcement authorities and the ordinary courts". That a law was in substance unequal as between sexes did not violate the Bill of Rights if it was enacted in pursuit of a "valid federal objective".

The second case, Bliss v. A.G. Canada (1978) raised the question whether the Unemployment Insurance Act provisions dealing with benefits for pregnant women contravened the Bill of Rights in effectively denying a woman after childbirth a right to claim benefits normally available to other unemployed persons. The Court held that in specifying a special regime of benefits for pregnant women the U.I. Act could properly deny such persons advantage of the benefit provisions available to others. This was not a denial of equality before the law because of sex since the special provision was not directed at all women as opposed to men, but only to pregnant women.

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Certainly the Lavell case provided a wrong result, and probably also the Bliss case, but it is not so clear that this is as much a result of the wording of the non-discrimination provision of the Bill of Rights as it is the Court's repeated reluctance to use the Bill of Rights to over-rule enactments of Parliament. Clearly in the Lavell case the Court was determined to find a rationale to avoid striking down section 12(1)(b) of the Indian Act, emphasizing that the Bill of Rights was not an entrenched document. Similarly in Bliss, the Court said "compelling reasons ought to be advanced to justify the Court...to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by Parliament..."

Beyond this judicial reluctance to use the Bill of Rights, the Court has chosen to ignore a most important aspect of the anti-discrimination provision in the Bill, namely the right of the individual to "the protection of the law". This, of course, is an abridged version of the "equal protection of the laws" provision of the U.S. Bill of Rights which has been the bulwark of protection against discrimination in that country. Under that provision the U.S. courts have made considerable progress in invalidating laws and programs which draw unreasonable or irrational distinctions between men and women such as sex based insurance and retirement benefit schemes and laws preferring the mother as the custodial parent or giving male veterans preference in government employment.

It is our view that section 15(1) of the Charter, clearly labelled as "non-discrimination rights" and amended to include "equal protection of the law without discrimination because of... sex", is a clearer direction to the courts both that unreasonable sex discrimination is forbidden and that laws contravening this provision are to be struck down (see section 25). In other words, the Charter is not, like the Bill of Rights, a mere interpretive guide but an overriding law. Consequently, in our view this provision should lead the courts to overrule the decision in Lavell and Bedard and probably in the Bliss case as well. In addition it would no doubt lead to a conclusion that section 63(1) of the Income Tax Act is invalid since it discriminates in favor of women in allowing child care expenses as a deduction from income. Nevertheless, with the jurisprudence now developed by the Supreme Court in the Lavell and Bliss cases, such an outcome cannot be certain.

In addition, there have been enough doubts raised about the "equal protection of the laws" provision in the U.S. Bill of Rights as an effective means to eliminate sex discrimination that Congress in 1972 proposed the Equal Rights Amendment which would explicitly provide that "equality of rights under the law shall not be denied abridged... on account of sex". The Advisory Council has picked up the concept of this, suggesting section 15(1) be reworded to provide that "every individual shall have equality of rights under the law... including not only freedom from discrimination but also the positive right to equality".

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The wording of this proposed provision is rather unclear and it is not certain that it would have a more significant result in overcoming discrimination than the present phraseology. There will undoubtedly always be situations in which courts will find justifiable distinctions among people including distinctions based on sex. For example, it is unlikely a court would ever conclude that separate public washroom facilities were an unreasonable distinction. Nevertheless, if a wording which makes it clearer to the courts that discrimination on any of the enumerated grounds is always to be a "suspect classification", then we should be receptive to a proposal for change. It could thus be indicated in Committee that the proposals of the Advisory Council on the Status of Women are being reviewed with a view to possible clarification of section 15.

The Advisory Council also believes a provision should be included to deal with cases where a particular segment of a group (male or female) is treated differently from the rest of that same group and the other sex. This is designed to overcome the specific situation under the Unemployment Insurance Act where pregnant females are dealt with differently from other females and men.

This would appear to be an attempt to deal with details of non-discrimination that should not properly be spelled out in an entrenched Charter which is directed to enunciating principles. Such details are better left to the legislatures and the courts. However, since so many laws today are benefit oriented, it could be indicated that we are looking at section 15 to see if express mention of benefits might be appropriate.

Finally the Advisory Council contends that women should be expressly identified as one of the "disadvantaged persons or groups" for which affirmative action measures may be taken under section 15(2) of the Charter. While this approach of singling out one group is not desirable, it may be appropriate to have the "affirmative action" provision refer back to the specific grounds of non-discrimination set out in section 15(1), since section 15(2) is simply designed to ensure that non-discrimination on the grounds set out in section 15(1) does not prevent affirmative action on behalf of these persons if they are disadvantaged.

2. Canadian Human Rights Commission

The first point raised by the Human Rights Commission is the limited number of non-discrimination grounds found in section 15(1) of the Charter. In particular they question the omission of marital status and physical handicap (which are both included in the Human Rights Act) and of mental handicap, sexual orientation and political belief which the Commission is advocating be included in the Human Rights Act.

Originally in July the federal government's position was that the non-discrimination clause be open-ended on grounds: it would simply state that "Everyone has the right to equality before the law and to the equal protection of the law without distinction or restriction other than any distinction or restriction provided by law that is fair and reasonable having regard to the object of the law." The intent of this was to leave to the courts the evolution of the particular grounds and the limits on the rights based upon the "reasonable classification" test which has already been developed by the judiciary.

However, this formula was much opposed by the provinces on the basis that it left far too much power to the courts in an area of the law which is relatively new (human rights codes have only developed in the last 10-15 years) and where specific qualifications had to be spelled out for certain non-discrimination grounds. The provinces were opposed to inclusion of any non-discrimination rights but felt that if they must be included the grounds should be strictly confined to a "core" group of those which had been traditionally recognized.

It was thus that the proposed list of grounds was developed. The only significant new ground added is "age" which may in itself cause problems since so many laws involve age as a basis of distinction. However, it is felt that most age-based laws are for reasonable purposes (except possibly mandatory retirement) which will be upheld by the courts. The Supreme Court of the United States has even held that mandatory retirement laws based on age are valid as a reasonable test of ability to perform one's duties. (Massachusetts Board of Retirement v. Murgia, 1976)

With respect to marital status, this ground was omitted because of the difficulty that arises in defining its scope. This problem was noted in the recent adjudication by Professor Peter Cumming under the Human Rights Act where the question was whether the Income Tax Act discriminated in permitting certain deductions for married spouses, but denying them to unmarried couples (common law or homosexual relationships). While the limits on the scope of marital status and its rights can be spelled out in human rights laws or other legislation, this is not really possible in the Charter which must be written in general terms with general qualifications. Nor is this the kind of deliniation that can properly be left to the courts, given the fundamental social and economic policy issues involved.

The same may be said with respect to physical and mental handicap as a ground for non-discrimination. These involve varying degrees of disability which have to be defined in some detail and which clearly require the specification of certain limits on the rights which may be accorded such persons. This was evident when physical handicap was included in the Human Rights Act. It required a lengthy definition and was confined in its application only to employment, with an exception respecting bona fide occupational requirements. It was not extended to other activities under the Act such as provision of accommodation and services, since to avoid discrimination against the physically disabled often requires special action and expenditures to put them on an equal footing (eg. ramp access for wheelchairs, special elevators, utilities at special heights and other facilities). This problem was recognized by the Human Rights Commission in recommending that physical handicap be extended beyond employment to include provision of services, facilities and accommodation: it also recommended that this extension not impose undue hardship on the person required to provide the services, etc.

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Consequently, it is evident that to include the handicapped in the categories against whom discrimination would be forbidden under the Charter would necessitate definitions and qualifications which are not appropriate for elaboration in a Charter nor appropriate for leaving to the courts to formulate. They are much better left to be dealt with in human rights legislation where the qualifications and definitions can be specified in the necessary detail.

With respect to sexual orientation as a ground for non-discrimination, two different considerations arise. First is the question of social and moral policy. The recognition of homosexuality as something which may be openly accepted as a lifestyle is certainly not beyond dispute and debate. It carries strong religious and moral overtones, and certainly in the area of employment (especially in schools, the military and police forces) there are many who argue that homosexual employees pose risks to others. Whether these views be right or wrong, it can be fairly said that this is only an emerging ground of non-discrimination which is not yet ripe for recognition in an entrenched Charter. Indeed, none of the human rights codes in Canada, except Quebec's, have included sexual orientation as a non-discrimination ground.

On a more practical level, unlike many other grounds of differentiation, discrimination due to sexual orientation does not normally arise out of legislative distinctions but rather out of practices and attitudes. Consequently, the better means of dealing with this ground is by placing it in human rights codes rather than in a Charter which is directed primarily at legislative abuses.

Finally, with respect to including political belief as a non-discrimination ground, it is rather more difficult to make the case against its inclusion. In a free and democratic society one of the essential individual rights is that of holding and expressing political beliefs. While certain reasonable limits must be placed on this (eg. the right of public servants to participate in political activities, employment of persons by political parties), it is difficult to contend that in general laws should be able to discriminate because of political belief any more than because of religious belief.

Consequently, it is submitted that if this ground is proposed for addition to the non-discrimination rights, it could be accepted.

The second main point raised by the Human Rights Commission is that the "limitation clause" in section 1 would effectively enable legislatures to impose whatever limits they wished on non-discrimination and other rights. This is a view shared by Walter Tarnopolsky and one that has been raised in House debate.

This contention seems based on the inclusion in section 1 of the wording "limits as are generally accepted", the argument being that whatever the courts find to be 'generally accepted" in the laws will be a reasonable limit. In other words, if laws of most jurisdictions permit discrimination on the basis of age or sex in certain circumstances, the courts will find this discrimination to be a reasonable limit.

This conclusion would appear to be based on a misreading of section 1 which was intended to direct the courts to a determination not only of the general acceptance of a limit but as well to an assessment of its reasonableness. If this intention is not clear then section 1 could be amended to read "subject only to such limits as are reasonably justifiable in a free and democratic society". This would perhaps place a heavier onus on the governments to justify their actions as reasonable, and would conform with what was recommended by the Joint Parliamentary Committee in 1972. (The Committee in 1978 was of the view that no express limitation clause was necessary; that the courts would read in reasonable limits in any case.)

4. Associations for the Handicapped and Special Parliamentary Committee

These organizations have been pressing to have "handicap" included as a ground of non-discrimination, emphasizing that handicapped persons represent 10% of the population and that 1981 is designated as the International Year of the Disabled Person.

As noted earlier, because of the various limits (especially of an economic nature) that are necessary to qualify the rights of handicapped persons, protection of this category of persons against discriminatory practices is much better dealt with in human rights legislation where appropriate conditions can be spelled out.

It can be noted that human rights acts now provide for certain protection of handicapped persons and, at least at the federal level, consideration is being given to expanding that protection based on recommendations made by the Human Rights Commission.

5. Inclusion of "Age"

The Saskatchewan government has expressed strong concerns about including "age" as a ground for non-discrimination. This is based on a fear that many legislative provisions which use age as a basis of distinction (such as age of marriage, age of majority, age of retirement, age as a criteria for insurance and pension plans, etc.) would be called into question and possibly struck down as unreasonable.

This is perhaps a genuine concern although as noted earlier it is considered that most age-based distinctions can probably be justified as reasonable distinction. However, it is a very complicated area where the jurisprudence is by no means settled. Therefore it may be wise to withdraw this ground on the basis that, for the present, it is a ground that is perhaps best dealt with in human rights acts where appropriate limits may be spelled out. Certainly, the Special Senate Committee Report on Retirement Age Policies earlier this year recognized the problems that would arise if there were any immediate abolition of a mandatory retirement age.

However, at this point we could simply indicate to the Committee that "age" poses particular problems as a ground for non-discrimination in an entrenched Charter, and that we are looking at it further to see if it is appropriate to include it with the other grounds. One danger with including it is that the courts may have to allow so many exceptions to it that its inclusion could weaken the protection that the courts would otherwise give to the other grounds of non-discrimination.

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5. Affirmative Action Programs (section 15(2))

Concern has been expressed by David Crombie, M.P. on how this provision would be interpreted in light of the United States jurisprudence, particularly with reference to the Bakke case decided by the U.S. Supreme Court in 1978.

That case involved the validity of an admissions program at the University of California Medical School where sixteen of its 100 student positions in first year were reserved for economically and/or educationally disadvantaged persons and members of minority groups (blacks, Chicanos and Indians). These positions were filled by students with lower grades than regular students. Bakke, a white student denied admission despite his high grades, challenged this program on grounds that it discriminated against him because of race.

While the Supreme Court by 5-4 ordered the School to admit Bakke because of the discrimination, it must be noted that a majority of the Court did not rule out racially (or socially & economically) based affirmative action programs in all cases. It simply held that the University of California program was too rigid in specifying a fixed quota of places for disadvantaged persons. If the University had operated a more flexible program of recruitment for such persons, it would not have offended the "equal protection of the laws" clause in the Bill of Rights. The results of the Bakke case have been summed up by Schwartz on Constitutional Law as follows:

> *Bakke* appears to bar rigid racial preference merely because of race: "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."[5] But the same prohibition does not apply to taking race into account in determining eligibility for educational or other public programs. The state has a substantial interest that legitimately may be served by an admissions program that involves the competitive consideration of race. Racial classification to that extent would be valid to ensure racial diversity in governmental programs, even when there has been no finding of past racial discrimination. When such a finding has been made, the implication is that specifically race-conscious corrective measures may be used. In such a case, in order to eliminate the effects of racism, the law must first take account of race; in order to treat the racial victims of discrimination equally, it must treat them differently.[6] Under *Bakke*, the already-referred-to Harlan assertion that "Our Constitution is color-blind"[7] must be seen as an aspiration rather than as reflection of reality.[8] Until the effects of discrimination are eliminated, race may be taken into account for purposes of protective classification.

It must also be remembered that Bakke was decided in circumstances where there was no constitutional provision allowing affirmative action programs. Under the Charter, such programs will be expressly recognized as not being in contravention of non-discrimination rights and consequently, the doubts raised in Bakke should not occur here.

Summary

In light of the foregoing, it could be indicated that close consideration is being given to the various representations that have been made with respect to strenghtening the non-discrimination rights, and that it may be possible to accommodate, in some measure, a number of the concerns. At the same time, it should be emphasized that not all discriminatory practices can be accommodated in a Charter of Rights, since many of them require positive legislation with necessary definitions and qualifications to make the protection effective.

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SECTION 15: NON-DISCRIMINATION RIGHTS

Addendum Respecting Discriminatory Provisions in Federal Legislation

After the Report of the Royal Commission on the Status of Women was made, most discriminatory provisions relating to sex were removed from federal statutes. This was done by amendments to the *Citizenship Act*, the *Canada Pension Plan*, the various government superannuation Acts and several Acts relating to veterans. It was also accomplished through the *Statute Law (Status of Women) Amendment Act*. The last mentioned Act, which came into effect in 1975, removed miscellaneous discriminatory provisions from statutes such as the *Canada Elections Act*, the *National Defence Act* and the *Criminal Code*.

After these amendments were made, few instances of specific sex discrimination were left in the statutes. What remains largely involves the differential impact of legislation which is more subtle and difficult to pinpoint. For example, government superannuation statutes suspend pension benefits to a surviving spouse who remarries. Such provisions originally applied only to widows. When survivorship benefits were later extended to widowers, so was the suspension of pension on remarriage, which thus continues to reflect an outmoded social attitude based on sex. The courts would probably not find such provisions to be discriminatory on the grounds of sex although they are clearly discriminatory on the grounds of marital status and in fact affect more women than men, although this may change with time.

Where discriminatory provisions remain in federal statutes it is usually because the needed amendments form part of a broad plan to change a complex statutory scheme that has taken years to develop (the sex offences of the *Criminal Code*), or there is some other problem that has prevented change (the agreement with the Indians that has delayed repeal of the discriminatory provisions of the *Indian Act*). Also some provisions that distinguish between men and women remain on the books because they protect existing rights of persons in classes in which there could not now be additional members (e.g. widows of certain service personnel of the Second World War in classes that had no women members who could leave widowers).

Various statutes that continue to contain provisions that distinguish on grounds proscribed in section 15 are set out below. This does not mean the Act or section would necessarily be found to be invalid after the coming into force of section 15. Some provisions, such as those relating to a closed class, cannot discriminate because there is no one to discriminate against. As for enactments that do contain discriminatory provisions, the mere entrenchment of section 15 does not ensure that they will be held invalid. The Supreme Court continues to follow precedents and to date in only one case, Drybones, has a claim under the Bill of Rights relating to equality before the law been successful. No case based on sex discrimination has ever been successful in the Supreme Court.

1. Race

(1) The *Indian Act:* The Act distinguishes between Indians and non-Indians but this legislation is designed to do just that in the interest of protecting Indian status and rights. It flows from Parliament's express mandate under section 91(24) of the B.N.A. Act to make laws for Indians and Indian lands. Parliament could not carry out its mandate without distinguishing between Indians and others. The main problem comes from provisions, such as section 12,

which discriminates against Indian women who marry non-Indians. It is possible that, when the Charter comes into effect, these sections would be held to be invalid provisions of an otherwise valid Act. However, women's organizations fear that the discriminatory provisions may also be held to be valid because

(a) in the leading cases on Indian women, Lavell and Bedard, the Supreme Court did not find any discrimination based on sex or race arising out of section 12 of the Act;

(b) in the one other case involving race, Canard, the Supreme Court upheld a prohibition in a regulation under the Act disqualifying Indian spouses from administering the estates of their intestate deceased spouses although no such disqualification applies to non-Indian spouses; and

(c) section 24 of the Charter, which continues existing native rights, may arguably in the future be found by the court to validate the entire *Indian Act*.

2. National or Ethnic Origin

(1) The *War Measures Act*: This Act (section 5) prohibits the release on bail of a person under arrest as an enemy alien during a period when the Act is in force. Also regulations made under the Act could affect persons of a particular national or ethnic origin as happened in the case of persons of Japanese national or ethnic origin in the Second World War.

(2) *Alien Labour Act:* This Act, with some limitations, prohibits any person in Canada from prepaying the transportation or assisting any alien or foreigner into Canada under contract to perform labour or service. Immigrants who come to Canada contrary to the Act may be deported. The Act is a reciprocal type of statute and applies only in respect of countries that have similar laws applying to Canada.

(3) Immigration Regulations: It is possible that some references to national or ethnic origin may remain in some immigration regulations.

3. Colour

It is doubtful that any federal enactments discriminate directly on this ground. Discrimination in respect of colour usually occurs in respect of employment and housing and is more likely to be found in provincial legislation. Even there, it would not likely consist of direct provisions but might arise out of the differential impact of legislation on people of different colours.

4. Religion

(1) The *Lord's Day Act:* This Act, which may be more honoured in the breach than the observance, prescribes many prohibitions relating to activities on the Lord's Day (Sunday). Provinces may authorize some activities that would otherwise be prohibited by the Act. The Act, of course, relates to Christian observances and makes no exceptions or variations for persons of other religions.

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(2) Military Regulations: A separate briefing note is being prepared on the military regulations. However, it may be noted that they do include some limitations relating to dress that may effect certain religions or persons of certain ethnic origins, e.g. the wearing of turbans and other articles of dress by Sikhs.

(3) The *Holidays Act*, the *Bills of Exchange Act* and Other Statutes prescribing holidays: These Acts prescribe holidays applicable to the Christian religions and do not provide for holidays applicable to other religions.

5. Sex

As stated above, most specific discriminatory provisons that distinguish between men and women have been removed from the law. Some laws that do not so distinguish but have a discriminatory impact and that are harder to locate still remain.

Some provisions that do continue to distinguish between men and women are:

(1) *Criminal Code:* A number of provisions of this Act continue to differentiate between men and women such as the infanticide and rape provisions and the provision respecting indecent assault (which prescribes a higher penalty if the victim is a man). A separate briefing note on the *Criminal Code* is under preparation.

(2) Military Regulations: The continuing differences under military law are to be dealt with in a separate briefing note. However, it may be noted that the last sex reference in the *National Defence Act* was repealed by the *Statute Law (Status of Women) Amendment Act*.

(3) The *Income Tax Act:* This Act specifically distinguishes between men and women in some cases and may, in other cases (such as rollover provisions) have a normally different impact as between men and women. Provisions that specifically distinguish are those relating to

(a) the child care deduction;

(b) the child tax credit; and

(c) family allowances wherein allowances paid to a wife may be taxed to her husband.

(4) The *War Veterans Allowance Act:* Allowances are available to female veterans or widows at 55 and to male veterans or widowers at 60.

(5) *Unemployment Insurance Act:* The Act provides a special category of insurance known as maternity benefits. To qualify for such benefits, a woman must have worked longer than the period normally necessary to qualify for unemployment benefits and there is a two week waiting period. In Bliss, the Supreme Court held that a woman who sought work one week after the birth of her child, and who did not meet the more stringent requirements that would have allowed her to obtain maternity benefits, also did not qualify for normal unemployment benefits although any other worker with the same qualifications would have been entitled to benefits.

It is also alleged that the *Unemployment Insurance Act* is administered in a way discriminatory to women in that closer scrutiny is given to women looking for work and questions asked about whether they are employing babysitters, etc. Benefits for men are not dependant on the answers to such questions.

(6) *Public Service Employment Act:* There is a discriminatory provision in the regulations that permits a man a day of paid leave on the birth of a baby but does not permit a woman to use paid leave (other than holiday leave) for the birth of a baby. She is not even allowed sick leave while she is in hospital.

(7) *Indian Act:* See Race above. This Act contains provisions that deprive Indian women who marry non-Indians of their right to remain on a band list and a provision that changes the band of a woman when she marries a man from another band.

(8) *Canadian Human Rights Act:* Section 14 of this Act permits some exceptions to its prohibitions against discrimination as, for example, where there is "a bone fide occupational requirement". While it is probable that no provisions of this Act would be found to be invalid by reason of the Charter, the Act will have to be examined carefully with the Charter in mind.

(9) Capacity to marry: Preconfederation British law applicable to Canada fixes the minimum age for marriage at 12 for girls and 14 for boys.

6. Age

Age is substantively different from the other grounds of discrimination set out in the Charter. It is not a fixed inherent characteristic as are most of the other grounds and there must be many more exceptions to the general rule of non-discrimination relating to age than there should be in respect of the other grounds of discrimination. Further, it may be argued that the tests relating to whether a distinction on the basis of age is discriminatory must be less rigid than the tests applicable to the other proscribed grounds of discrimination. This is illustrated by the fact that many statutes at present distinguish on the grounds of age and it is doubtful that these would be found invalid when section 15 of the Charter comes into effect. This could cause a problem in the enforcement of the Charter in that tests applied in respect of age may be followed in other cases to water down the effect of the other categories of discrimination. Laws that contain references to age include:

(1) *Criminal Code:* This is dealt with in a separate briefing note but involves such matters as the age of criminal responsibility.

(2) *Juvenile Delinquents Act:* This Act is dealt with in the *Criminal Code* briefing note. It treats juvenile offenders in a different manner to adult offenders.

(3) Military Law: This is dealt with in a separate briefing note. There are rigid age limits both for joining and for leaving the Canadian forces.

(4) *Canadian Human Rights Act:* This Act contains a number of special exceptions that relate to age in relation to occupational requirements. For example, section 14 provides that it is not a discriminatory practice for a person to be refused employment if he is below the minimum age or beyond the maximum age for the employment. Also employment may be terminated at the "normal age of retirement" for employees working in similar positions These provisions will have to be considered carefully with the Charter in mind.

(5) Pensions, Superannuation and Veterans Legislation: These Acts relate to age in various ways such as

(a) age to qualify for benefits;

(b) age of spouse or surviving spouse to qualify for benefits in some cases; and

(c) age at which dependant children cease to be eligible for benefits.

(6) Acts Containing Specific Retirement Ages: A number of Acts creating government corporations and agencies contain provisions fixing a mandatory retirement age for officers. Also a mandatory retirement age is fixed for Senators and some judges in the *British North America Act* and for other judges in the *Judges Act* and the Acts creating the courts of which the judges are members.

(7) *Adult Occupational Training Act:* The benefits under this Act are limited to persons who are one year or more older than the regular school leaving age.

(8) Capacity to Marry: Preconfederation British law applicable to Canada fixes the minimum age for marriage at 12 for girls and 14 for boys.

Subsection 15(1) Addendum : Application to Canadian Forces; Equal Protection of the Law Without Discrimination Because of Race, National or Ethnic Origin, Colour, Religion, Age or Sex

Eligibility for enrolment and service in the Canadian Forces is not based on or dependent upon the race, national or ethnic origin, colour or religion of a recruit or member and as a consequence those proscribed grounds of discrimination set out in the Charter have no application to the Canadian Forces. Age and sex are, however, relevant to the matter of enrolment and service in the Canadian Forces, particulars of which are set out below. It should be noted that this Addendum deals only with significant limitations in which age and sex are relevant factors in so far as the Regular Force component of the Canadian Forces is concerned. Generally speaking, those limitations also apply, mutatis mutandis, to the Reserve Force component of the Canadian Forces.

Age

The significant limitations in which age is a relevant factor are as follows:

1. The minimum age at which recruits may enrol in the Canadian Forces is seventeen, except in the case of Regular Officer Training Plan candidates for whom the minimum enrolment age is sixteen. The minimum age of seventeen is based upon the assumption that few persons younger than seventeen would have the maturity required to carry arms or to bear the physical and mental strains associated with service in the Canadian Forces and appears to have been accepted in Canadian society as the minimum age for military service. It is doubtful that the Canadian public would support having persons of the age of sixteen or younger serving in the armed forces. In the case of Regular Officer Training Plan candidates the minimum age was established at sixteen to allow candidates graduating from high school at that age to start their university training in September of the same year. Although these candidates participate in military training each summer between academic sessions, they spend their first four years of service in a military college or civilian university and will not therefore enter the mainstream of military service until they are at least twenty years of age.

2. The maximum enrolment ages for recruits other than officers varies from twenty-four to thirty-three years depending upon the recruits' enrolment skills and the trade which is being applied for. Maximum ages are based upon time required to complete a full career in the service. This matter is presently the subject of a comprehensive study by the Canadian Forces in the context of the provisions of the Canadian Human Rights Act which may result in adjustments being made in the area of maximum enrolment ages.

3. The maximum enrolment ages for officer recruits presently varies from sixteen to thirty-four years depending upon the career Plan being applied for. This matter is included in the Canadian Forces study referred to in paragraph 2 above.

4. There are variations between the ages at which members of the Canadian Forces are compulsorily released because of age. One of the reasons for the existence of this variation is that prior to the formation of the Canadian Forces in 1968 each of the three former Services (Royal

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Canadian Navy, Canadian Army and Royal Canadian Air Force) had its own terms of service embodying its own compulsory release ages. Additionally, each Service provided for variations in release ages which were based on rank and specific occupations or trades. With the formation of the Canadian Forces in 1968 new terms of service respecting compulsory release ages were introduced to govern those members who had no previous single Service affiliation. The new terms of service applied automatically to those members who enrolled in the Canadian Forces after unification (1 February 1968) and electively to members of the former three Services who exercised a one-time conversion option. Members not electing the new terms of service remained bound by the terms of service which existed in their former Service. The matter of compulsory release age is included in the Canadian Forces study referred to in paragraph 2 above.

5. A number of Canadian Forces orders contain age limitations in respect of such career matters as the eligibility to participate in lengthy career training courses and matters of that kind. Restrictions of this nature have been under review since the implementation of the Canadian Human Rights Act and wherever any limitation based on age cannot be justified on the basis of a "bona fide occupational requirement" within the meaning of paragraph 14(a) of that Act, the age limitation is deleted.

Sex

The significant limitations in which sex is a relevant factor are as follows:

1. The Canadian Forces have excluded women from service in primary and near-combat trades and classifications, some remote locations and from duty at sea or as members of aircrew. Because of the provisions of the Canadian Human Rights Act respecting sex as a proscribed ground of discrimination in matters of employment, the Canadian Forces have initiated trial programmes to determine the suitability of women to serve on board a sea-going non-combatant ship, as part of a field unit involved in near-combat operations under cold weather conditions, as members of aircrew at near-combat operational or training units, at an isolated unit where members serve an unaccompanied tour of duty and as members of field units involved in combat service support operations. Should the trials establish that women are suitable for employment in any or all of the areas being evaluated it is likely that those areas will be opened up to them as quickly as possible. Should the trials establish, however, that women are not suitable for employment in any or all of the areas indicated on the basis of a bona fide occupational requirement within the meaning of paragraph 14(a) of the Canadian Human Rights Act, it is likely that the consequent decision not to open any such occupational area or areas to women will be challenged under the provisions of the Canadian Human Rights Act. In that regard, it should be mentioned that officials of the Canadian Human Rights Commission are aware that the foregoing trials are being conducted by the Canadian Forces.

2. The trials mentioned in paragraph 1 above do not relate to the determination of the suitability of women for employment in purely combat trades or classifications. The Canadian Forces are not, at the present time, considering the initiation of trials to determine the suitability of women in actual combat operations.

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SECTION 15: NON-DISCRIMINATION RIGHTS

Criminal Law

The criminal law field should not present much of a problem to the equality before the law and equal protection of the law provision of the Charter.

Since the decision in R. v. Hauser et al. (1979), 46 C.C.C. (2d) 481 (S.C.C.), it is uncertain which statutes are enacted under Parliament's criminal law power. Most criminal legislation is found in the Criminal Code which does not discriminate on the basis of race, national or ethnic origin or colour. However it does discriminate on the basis of age and sex, and perhaps religion. Other statutes that discriminate are the Juvenile Delinquents Act which discriminates on the basis of age and the Lord's Day Act which discriminates on the basis of religion.

Age

Section 12 of the Code provides that no person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of seven years. Section 13 provides that no person between ages seven and fourteen shall be convicted of an offence unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong. These are general provisions and apply to all offences. On the other hand, section 147 provides that no male person shall be deemed to commit the offences of rape, attempted rape, statutory rape or incest while he is under age fourteen.

Under these rules, a six year old is immune from prosecution but an eight year old is not, and a thirteen year old will have a defence that is not available to a fifteen year old. This type of scheme that applies to all children in Canada of a certain age can be rationalized on the basis that its aim is to offer special protection to children, a practise generally accepted in a free and democratic society with a parliamentary system of government.

The Juvenile Delinquents Act is another scheme designed to offer special protection to children, but it does not apply equally to all children in Canada. Subsection 2(1) defines "child" as a boy or girl apparently or actually under age sixteen, or such other age as may be directed in any province pursuant to subsection 2(2), which allows the Governor in Council to increase the age to eighteen. Most provinces have left the age at sixteen, but Newfoundland and British Columbia have increased it to seventeen, and Quebec and Manitoba have increased it to eighteen. The result is that a seventeen year old who robs a bank will be charged with a delinquency under the Juvenile Delinquents Act if it happens in Montreal, but with robbery under the Criminal Code if it happens in Toronto.

Although in R. v. Burnshine (1974), 15 C.C.C. (2d) 505 (S.C.C.) it was held that provisions in the Prisons and Reformatories Act authorizing indeterminate sentences for offenders under age twenty two in British Columbia and Ontario did not offend the Canadian Bill of Rights, the same result would not necessarily follow under the Charter.

It is submitted that the scheme under the Juvenile Delinquents Act which affords different protection depending upon the province where the incident took place is inconsistent with the equality before the law principle enshrined in the Charter. The latest draft of the proposed Young Offenders Act contains the same type of scheme because the provinces have been unable to agree amongst themselves on a common age.

Sex

A number of provisions of the Criminal Code discriminate on the basis of sex. Most concern sexual offences or prostitution, but there are others such as paragraph 381(1)(a) which speaks of "threats of violence to that person or to his wife or children", and subsection 745(1) which speaks of "personal injury to him or his wife or child".

In the area of sexual offences, section 143 provides that only a male can commit rape and only a female can be raped. Section 146 protects females under age fourteen from sexual intercourse, but not males. For the offence of indecent assault, section 149 provides for a five year penalty where the victim is a female but section 156 provides for a ten year penalty where the victim is a male. In the area of prostitution, paragraph 195(1)(d) provides that it is an offence to procure a female to become a common prostitute, and subsection 195(2) enacts a presumption that evidence that a male lives with or is habitually in the company of prostitutes is, in the absence of evidence to the contrary, proof that he lives on the avails of prostitution.

In the proposed sexual offences bill, the Code is being amended so that it applies equally to both sexes. The only provisions that will remain sex specific are those dealing with giving birth, such as infanticide in section 216 (a female person causing death of her newly born child while her mind is disturbed from effects of giving birth or effect of lactation consequent on birth) and abortion in section 251 (intending to procure the miscarriage of a female person whether or not she is pregnant).

Religion

The Lord's Day Act prevents business from being transacted and numerous other activities from being conducted on Sunday, except as authorized in the Act or by provincial law. An argument could be made that this discriminates against those religions that use some other day for religious observance.

Subsection 260(1) of the Code creates the offence of blasphemous libel. As "blasphemy" is defined in the Shorter Oxford as profane speaking of God or sacred things, an argument could be made that this discriminates against those religions that do not worship God as a spiritual being.

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October 9, 1980

(Section 20)
CHARTER OF RIGHTS: LANGUAGE RIGHTS: COMMENTS
BY MR. MAX YALDEN, COMMISSIONER
OF OFFICIAL LANGUAGES

In a meeting with Mr. Roger Tassé on October 9, Mr. Yalden indicated in a general way the position he will likely take on the language rights in the Charter if and when he appears before the Joint Parliamentary Committee on the Proposed Resolution.

Generally his comments will be favourable to the inclusion of language rights in an entrenched Charter as a demonstration of their importance in Canada. However, he will be critical of a number of omissions or limitations on the provisions and of the drafting of at least one provision.

Section 16 - Official Status and Use of English and French

Mr. Yalden is very pleased to see constitutional recognition being given to French and English as official languages and to their equality of use in all federal institutions.

Sections 17-19 & 21 - Institutional Bilingualism (legislatures, Debates and Courts) at Federal Level and in Québec and Manitoba

Mr. Yalden is disappointed that these provisions have not been extended to New Brunswick and Ontario since they have such large minority language populations. He assumes New Brunswick will want to opt in and is critical of Ontario's reluctance to do so.

Section 20 - Language of Services to Public

Mr. Yalden is generally pleased with this provision, although he would like to see more parallelism between it and the provisions of the Official Languages Act. He has two particular concerns about the drafting and intent of the provision. First, he notes that as the latter part of the provision is drafted ("and has the same right with respect to any other office... where that office is located in an area in which it is determined, in such manner as may be prescribed or authorized by Parliament, that a substantial number of persons within the population use that language") it may be difficult to ensure services in both languages to persons living inside a "designated area" where some of the federal offices outside that area provide services to those people. In other words, a regional office in Halifax may serve the entire Maritimes, but if only some area of New Brunswick is made a "designated area", persons living there would not have a right to services in both languages from the Halifax office.

Second, he worries that this same provision gives rise to the concept of "bilingual districts" contained in the Official Languages Act but never implemented. Given the political problems with "bilingual districts" and the government's earlier announced intention not to implement these, he wonders about the wisdom of drafting the provision in this manner. (He will not be raising this latter point before the Committee.)

These are both valid comments and consideration will have to be given to a re-draft of the latter part of section 20, perhaps along the following lines:

> "Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in either official language, and has the same right with respect to any other office of any such institution where it is determined, in such manner as may be prescribed or authorized by Parliament, that there is a significant demand for communications with and services from that office in both official languages."

Section 23 - Minority Language Educational Rights

Mr. Yalden continues to be opposed to limiting the right of minority language education to citizens. Ideally, he favours freedom of choice, but accepting the fact that this is to be a minority right, he feels very strongly that no distinction should be drawn between immigrants and citizens. He feels that even if there is a problem today which dictates the exclusion of immigrants, this is a very shortsighted perspective since what is being written into the constitution will become a permanent rule even when it is no longer needed.

November 3, 1980

(Section 23)

THE STATE OF MINORITY LANGUAGE EDUCATION IN THE TEN PROVINCES OF CANADA (A SUMMARY AND UPDATE OF A REPORT BY THE COUNCIL OF MINISTERS OF EDUCATION, PUBLISHED IN JANUARY, 1978)

Laws, Regulations, and Policy

The legislative provisions regarding minority language education vary from one province to another.

New Brunswick guarantees to its French and English residents instruction in their own language. Its laws provide that the chief language of instruction in every school shall be the mother tongue (English or French) of the majority of the students, that the other children shall be given instruction in their own language, either in that school or in another school, conveyance or boarding costs being covered, and that all children will receive instruction in the second language.

In Quebec the Education Act requires a school board to provide education for every eligible member of the English-speaking minority, eligibility being defined by the terms of Quebec's Charter of the French Language. A school board may provide this instruction, either by organizing English-language classes or by making an agreement with another school board.

In Ontario and in Manitoba, if the parents so request, and a specified minimum number of students at the elementary or secondary level can be assembled, the school board has a legal obligation to provide instruction in French.

In Saskatchewan the law permits a school board to provide French-language instruction, the terms and conditions being confirmed by the Lieutenant-Governor in Council.

Alberta's laws permit the use of French as a language of instruction, but the decision to provide French-language instruction rests with the school board.

In Prince Edward Island the law requires a school board to provide French language education when a prescribed number of children whose mother tongue is French make the request.

In Nova Scotia, Newfoundland and Labrador, and British Columbia, there is no reference in the law to the language of instruction. In Nova Scotia school boards have traditionally been free to grant permission to use French as the language of instruction. In Newfoundland school boards have the discretionary right to introduce French as the language of instruction and in British Columbia it is the policy of the government to make it possible for parents to have choice of either official language as the language of instruction for their children.

MINIMUM ENROLMENT CONDITIONS - WHERE NUMBERS WARRANT

Newfoundland

No prescribed minimum enrolment conditions. This is left to the discretion of the local school boards.

Prince Edward Island

Grades 1-9, 25 children within any three consecutive grade levels.

Grades 10 and above, no prescribed number. The school board decides when a sufficient number can be assembled.

Nova Scotia

No prescribed minimum enrolment conditions. This is left to the discretion of the local school boards.

New Brunswick

No minimum enrolment conditions. All children have the right to instruction in their mother tongue.

Quebec

No minimum enrolment conditions but eligibility is defined in the Charter of the French language.

Ontario

Elementary Level:	25 students who can be assembled into a class, a group of classes or a school.
Secondary Level:	20 students who can be assembled into a class, a group of classes or a school.

Manitoba

Elementary Level:	28 pupils for each grade.
Secondary Level:	23 pupils for each grade

Saskatchewan

Grades 1-6:	15 pupils in three consecutive grades
Grades 6-up:	15 pupils per grade

Alberta

No minimum enrolment conditions. This is left to the discretion of local school boards.

British Columbia

Elementary Level: 10 students at any grade level.

NEWFOUNDLAND AND LABRADOR

Current Situation - Laws, Regulations, and Policy

In Newfoundland no reference is made in the school legislation regarding French as a language of instruction in the schools.

School Boards have the discretionary right to introduce French as the language of instruction.

Minimum Enrolment Conditions

No fixed minimum numbers, this is left to local discretion.

NOTES: There are no exclusively French school boards in the province and French-language instruction is not treated separately at the provincial level.

PRINCE EDWARD ISLAND

Current Situation - Laws, Regulations, and Policy

An amendment to the Prince Edward Island School Act which came into effect in 1980, requires school boards to provide French language education if French is the mother tongue of the majority of students within its area. The Act also requires that school boards providing English language education shall provide French language education when the prescribed number of children whose mother tongue is French make the request.

Minimum Enrolment Conditions

For grades 1 to 9, when twenty-five children whose mother tongue is French and who are within any three consecutive grade levels request French language education the school board shall provide this education "if it considers that the prescribed number of children can reasonably be assembled for the purpose" (from the regulations).

For grades 10 and above, when a number of children whose mother tongue is French request courses using French as the language of instruction the school board shall provide such courses "if it considers a sufficient number of children can be assembled for that purpose" (from the regulations).

NOTES: Over 75% of the francophones in P.E.I. live in the electoral district of Egmont. The members of the Evangeline School Board in the district of Egmont are Acadians.

NOVA SCOTIA

Current Situation - Laws, Regulations, and Policy

No reference is made to the language of instruction in the Education Act or in the Regulations under the Act. However, school boards have traditionally been free to grant permission to use French as the language of instruction and have done so in the local school districts which are predominantly French-speaking.

Minimum Enrolment Conditions

No fixed numbers, this is left to the discretion of the school board.

NOTES: There are no school boards responsible solely for the French-speaking language group. The administrative structure in schools where French-language instruction is offered is the same as in other schools and generally French-language instruction is treated as an integral part of the board's education program.

In schools where instruction in French is given, the proportion of instruction given in French varies from 50% to 100% at the elementary level and from 40% to 60% at the secondary level.

In schools where French-language instruction is offered, such instruction is open to anyone, although in practice very few English children enrol in French-language programs.

NEW BRUNSWICK

Current Situation - Laws, Regulations, and Policy

Students in New Brunswick are assured under the law of education in their mother tongue, English or French. In 1969, New Brunswick granted official status to both French and English. In 1977 the following legislation referring to language of instruction came in to force:

Section 12

In any public, trade or technical school

(a) where the mother tongue of the pupils is English, the chief language of instruction is to be English and the second language is to be French;

(b) where the mother tongue of the pupils is French, the chief language of instruction is to be French and the second language is to be English;

(c) subject to paragraph (d), where the mother tongue of the pupils is in some cases English and in some cases French, classes are to be so arranged that the chief language of instruction is the mother tongue of each group with the other official language the second language for those groups; and

(d) where the Minister of Education decides that it is not feasible for reason of numbers to abide by the terms of paragraph (c), he may make alternative arrangements to carry out the spirit of this Act.

Minimum Enrolment Conditions

No minimum enrolments - any child has the right to instruction in his mother tongue.

NOTES: Five school boards (1978) are involved exclusively with French-language education and are administered in French. At the provincial level New Brunswick essentially has two parallel administrative structures, one dealing with French-language education and the other with English-language education.

In French school, all subjects, except English as a second language, are taught in French. This policy applies for all subjects, grades 1 to 12.

Although French instruction is accessible to any student regardless of mother tongue, the tendency is for francophones to go to French schools and for anglophones to go to English schools.

QUEBEC

Current Situation - Laws, Regulations, and Policy

The Charter of the French Language (Bill 101) requires school boards to provide instruction in English for all children who are eligible under the law to receive this instruction.

The following children may receive instruction in English:

(i) at the request of their father and mother

(a) a child whose father or mother received his or her elementary instruction in English in Quebec

(b) a child whose father or mother, domiciled in Quebec on [August 26, 1977] had, received his or her elementary instruction in English outside Quebec

(c) a child who, in his last year of school in Quebec before [August 26, 1977] was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school

(d) the younger brothers and sisters of a child described in paragraph (c).

(ii) English-speaking children coming from a province which has concluded a reciprocity agreement with Quebec. [None]

(iii) The following categories of persons staying in Quebec temporarily:

(a) children of persons coming to Quebec to study or to carry on research activities or assigned to Quebec by their employer or taking up a post for a period of not more than three years, provided that one of the parents has received his primary or secondary education in English or that one of their children has already begun or completed his studies in English

(b) children of persons officially assigned to Quebec as representatives or officers of an international agency or a foreign country

(c) children of members of the Canadian Armed Forces assigned temporarily to Quebec.

Minimum Enrolment Conditions

No minimum number required; any qualified child has the right to instruction in the Engligh language.

NOTES: Quebec's education system is organized on a confessional basis. Catholic school boards are responsible for all education of all Catholic students in their territory, whether English or French. Protestant school boards are responsible for all Protestant students. As approximately 98% of the students enrolled in Protestant schools are taught in English and approximately 92% of students attending Catholic schools are taught in French the division of school boards along denominational lines gives the minority English-speaking group control over their education services.

In English schools all subjects are taught in English except French as a second language, which is a compulsory subject from the first to the eleventh year.

ONTARIO

Current Situation - Laws, Regulations, and Policy

Ontario law requires school boards to establish French-Language Instructional Units (a class, group of classes, or school in which French is the language of instruction) where numbers warrant.

The programs offered in the French-Language Instructional Units are intended for the French-speaking population. French may be the language of instruction for all subjects (except English) from kindergarten to grade 13. English is a compulsory subject from grades 5 to 12.

Minimum Enrolment Conditions

Where at least 25 students at the elementary level or 20 students at the secondary level can be assembled into a class, a group of classes or a school and French language instruction is requested by these students the school board must by law provide this instruction.

NOTES: A system of grants is available to school boards providing French-language education programs, in recognition of the higher costs of providing French language instruction.

There are no school boards responsible solely for the education of the French-speaking population group.

Accessibility to French-language classes is normally restricted to francophones, but non-francophones may be admitted subject to the approval of an admissions committee.

MANITOBA

Current Situation - Laws, Regulations, and Policy

Law 113, which came into effect in 1970, gave French an equal status to English as a language of instruction in the public schools.

Minimum Enrolment Conditions

If in any grade the parents of 28 pupils at the elementary level or 23 pupils at the secondary level request their school board to provide instruction in French or English, the school board must by law provide this instruction. When the number of pupils is less than 28 at the elementary level or 23 at the secondary level, the Minister of Education may authorize the setting up of classes in one or other of the languages.

NOTES: In the school boards offering French language education no separate administrative structure is set up to deal exclusively with French language education. This administrative structure leads to the majority group making decisions on matters affecting the minority.

To encourage local school jurisdictions which provide French-language education to offer programs in which the language of instruction is French for all subjects except English as a second language, the Department of Education offers funding arrangements whereby schools indicating an intention to develop such programs may receive special grants.

French language instruction is open to any student regardless of his mother tongue.

As of grade 4, English must be part of the curriculum for all pupils receiving their instruction in French.

SASKATCHEWAN

Current Situation - Laws, Regulations, and Policy

The Saskatchewan Education Act states that English shall be the language of instruction in schools but that Cabinet shall designate schools in which French shall be the principal language of instruction in a designated program.

Minimum Enrolment Conditions

French language instruction must be requested by the parents of at least 15 students in each "instructional grouping". For grades 1 to 6 an instructional grouping is considered as three consecutive grades; for grades 6 and above it is a single grade.

NOTES: The existence of designated schools, where French instruction is available, is subject to Cabinet approval. Designated schools offer two types of program:

Type A:
- French is the language of instruction for all courses except English;
- provides activities emphasizing the French-Canadian culture;
- the administration may be conducted in French.

Type B:
- more than 50% but less than 80% of instruction time is devoted to instruction given in the French language.

The Province provides grants to pay for the implementation of a French Language Program.

ALBERTA

Current Situation - Laws, Regulations, and Policy

In Alberta the School Act empowers school boards to authorize the use of French as a language of instruction subject to the regulations of the Minister.

In 1976 a new regulation establishing minimum requirements in English Language Arts for all schools was adopted. This regulation meant that instruction may be given in French for all subjects except English Language Arts provided that:

a) a resolution authorizing the use of French as the language of instruction is passed and delivered to the Minister;

b) arrangements satisfactory to the Minister are made for instruction in English to be given to all pupils whose parents so desire;

c) instruction in English Language Arts is given for minimum periods as follows:

grades 1 and 2 - not less than 1 hour/day
grades 3 to 6 - not less than 190 hours/year
grades 7 to 9 - not less than 150 hours/year
grades 10 to 12 - not less than 125 hours/year

d) the courses of study and instructional materials are those prescribed or approved by the Minister.

Minimum Enrolment Conditions

The system does not consider enrolment numbers but leaves the decision to each school board.

NOTES: There is no separate administrative structure at the provincial level dealing specifically with French language education.

Given "b" above, school boards must give priority to parents who wish to have their children educated in English before arrangements can be made to use French as a language of instruction.

Provincial funds are made available for the development of curricula in French and to offset transportation costs to schools offering instruction in French.

Any student in Alberta may be admitted to French-language classes where these are available, although individual school jurisdictions may regulate admittance on the basis of language competency in French.

BRITISH COLUMBIA

Current Situation - Laws, Regulations, and Policy

It is the policy of the provincial government to make it possible for parents to have a choice of either official language as the language of instruction for their children. School district authorities are responsible for establishing "classes" when a sufficient number of children requesting French language education is available.

Minimum Enrolment Conditions

A "class" shall be established in any school district where there are ten or more students of elementary school age whose parents have requested instruction in French.

A "class" may include all grades in the elementary school but where the enrolment exceeds twenty-five, an additional "class" shall be established and students grouped in terms of a Primary Division and an Intermediate Division.

NOTES: The Ministry recommends the establishment of French language "classes" within existing schools rather than the creation of separate exclusive French language schools.

Priority is to be given to children of Francophone parents. Students must understand French sufficiently to be taught in that language at the level at which the program is implemented.

The province provides supplementary funds to meet some additional costs incurred in implementing the French Language Curriculum.

Guarantee of Rights and Freedoms

Rights and Freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

Garantie des droits et libertés

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés énoncés ci-après, sous les seules réserves normalement acceptées dans une société libre et démocratique de régime parlementaire.

CONFIDENTIAL

Guarantee of Rights and Freedoms

SECTION I - GUARANTEE OF AND LIMITS ON RIGHTS

This introductory section serves two purposes: (1) to indicate that the rights and freedoms set forth in the Charter are guaranteed and (2) to indicate that no right or freedom is absolute but subject to certain limits -- limits that are reasonable in the context of a free and democratic society with a parliamentary system of government.

The guarantee of rights and freedoms is an attempt to overcome any implication that the rights are only those as they existed at the date of adoption of the Charter -- one of the problems that arose in the courts' interpretation of the opening words of the Canadian Bill of Rights which "recognized and declared" that certain rights "have existed and shall continue to exist". By simply stating that the Charter guarantees the rights and freedoms, there is no implication that the rights are only in the state and with the limits that existed in 1980.

The limitation clause is cast in general terms that will permit the courts to determine if a particular limit imposed on a right is reasonable in the circumstances of the case, having regard to standards of conduct generally accepted in our society and others of a similar nature. It may be questioned whether the qualification "with a parliamentary system of government" would preclude the Canadian courts from looking at the decisions of United States courts on particular rights since the U.S. system is presidential and not parliamentary. The answer is that our courts could look to the U.S. decisions on similar points and use these as guides in formulating interpretations of similar rights found in the Charter. The difference will be -- or is intended to be -- that under a parliamentary system the courts traditionally show greater deference to the judgment of the law-makers with respect to policy issues. Consequently, implicit in this expression is the idea that the Canadian courts should not, as the U.S. courts have done from time to time, readily attempt to substitute their value judgments for those expressed by the legislators on the substantive aspects of legislation.

The approach in section 1 differs from that taken in the Canadian Bill of Rights and from that proposed in Bill C-60. In the former no indication is given that rights are subject to any limits while in C-60 (and subsequent federal proposals) specific grounds (national security, public order, health, morals, etc.) for limiting rights were identified. In commenting on the limitations spelled out in C-60 the Joint Parliamentary Committee in 1978 was of the view that no such explicit direction to the courts was necessary since they would imply such limitations on rights in any case.

It is agreed that it is both unnecessary and undesirable to spell out specific limits on rights. On the other hand, it is felt important for individuals, legislators, governments and courts to be aware that no right is unlimited in its exercise and to give some guideline as to the formulation of the limits.

As to the formulation itself, it is designed to reflect the balance that must exist between the courts who will be the ultimate judges of what are reasonable limits and the legislatures which in a parliamentary system of democratic government have the initial responsibility for defining reasonable limits on individual rights and freedoms.

It may be argued by some that the clause as formulated may be weighted too much in favor of the law-makers by use of the term "generally accepted". In other words, if the legislatures all impose a certain limit on a right -- forbidding the free expression of a particular ideology -- would this not be a "generally accepted" limit? This overlooks the fact that the courts may still assess its reasonableness as an acceptable limit in a free and democratic society.

[However, if there is considerable pressure to ensure that greater restraints are placed on the powers of legislatures to determine "generally accepted" limits, one might consider a re-wording along the following lines: "subject only to such limits as are reasonably justifiable in a free and democratic society with a parliamentary system of government". This would place a greater onus on the legislators to demonstrate the necessity for the limits being imposed. It would also accord with the recommendation of the Joint Parliamentary Committee in 1972.]

A further issue that may be raised is whether the limits that may reasonably be imposed under this section apply to rights that have their own specific limits spelled out. This is the case with respect to democratic rights, mobility rights and minority language education rights. With respect to the rights to vote and stand for elective office, it is unlikely that there are further limits which could be contemplated beyond those that would fall under the "unreasonable distinction or limitation" test found in section 3.

As for mobility rights, it would be possible to contemplate circumstances other than those specified in section 6 where further limits might be imposed. For example, one could foresee limits being placed on mobility rights in the interests of national defence, to control public order or to protect public health. There may even be extreme economic situations that would justify limits being placed on mobility rights, although these are difficult to imagine.

With respect to minority language education rights, it is unlikely that there would be circumstances arising under section 1 which would justify limits other than that spelled out in section 23: "where numbers warrant". If a province sought to deny these rights on economic grounds, this would probably not be considered reasonable if it were at the same time providing majority language education facilities.

PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE CONSTITUTION OF CANADA - BRIEFING BOOK FOR USE IN PARLIAMENT (1)

NOTE ON CHARTER OF RIGHTS AND WAR MEASURES ACT

There are three key elements in the War Measures Act that are likely to be affected by adoption of the Charter of Rights. (No question is raised, however, about Parliament's ability to enact contingency legislation providing for exceptional powers in emergency situations such as war, invasion or insurrection. The real question is the extent to which the application of those powers in a particular emergency may be found to be reasonable in the circumstances of the case.)

The first element concerns section 2 of the War Measures Act which provides that a proclamation by the Governor in Council that a state of real or apprehended war, invasion or insurrection exists and the duration of its continuance is conclusive evidence of that state of affairs.

The courts have indicated in the past that they do have the power to review such a proclamation to determine if the facts indeed support the issue of the proclamation. However, the courts have been at the same time very reluctant to second-guess the judgment exercised by the government.

Under the Charter of Rights, however, the rights guaranteed by the Charter (including those such as fundamental freedoms and legal rights most likely to be affected by a proclamation of emergency) are expressly made, by section 1, subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

With this guarantee entrenched in the constitution it is certainly more likely that the courts would indeed be prepared to review the facts of a particular emergency to determine if the proclamation was justified to limit guaranteed rights and freedoms.

Consequently, it is likely that section 2 to the extent that it purports to make a proclamation of emergency conclusive of the fact would not be valid to prevent the courts from inquiring into the justification for the proclamation.

The second element involves section 3 of the Act which gives the Governor in Council sweeping powers to make such regulations or orders as the government deems necessary or advisable for the security, defence, peace, order and welfare of Canada. Particular powers given include

- censorship of expression and communication,
- arrest, detention, exclusion and deportation.

Each of these powers may be justified by the circumstances of the case, and section 1 of the Charter would permit the exercise of them if they were reasonable in the circumstances. A determination of that would, under the Charter, have to be measured in each case by looking at the particular provisions of the Charter and the limits authorized by section 1.

For example, section 2 provides for freedom of opinion and expression including freedom of the press and other media. In times of emergency, however, it may be reasonable to limit these freedoms by censorship as, for instance, prohibiting publication of military manoeuvres during wartime. On the other hand, it may not be reasonable in the same circumstances to prohibit persons from speaking out in opposition to the war.

Again, the legal rights in the Charter provide for detention of persons only in accordance with law that is fair, for an arrested person to know the reasons and test the validity of his detention, and for citizens to enter, leave and remain in Canada. Here, the emergency circumstances may justify some limits on these rights, but those limits would have to be reasonable. For example, it would be difficult to justify a detention which had no reasonable time limits, a denial of the right to habeas corpus or the deportation of a citizen of Canada.

In every instance of a limit being imposed, the individual would be entitled to go before a court to have its reasonableness tested. This the courts would do by looking at the normal Charter rights and then by looking at the limits imposed thereon under the War Measures Act and determining if those limits were reasonable in the circumstances of the crisis.

The third element, and probably the most important, concerns section 6(5) of the Act which provides that anything done under the War Measures Act shall not be deemed to violate a right or freedom under the Canadian Bill of Rights. This, of course, means that Parliament has decided that the Bill of Rights does not prevail over actions, orders or regulations taken or made under the War Measures Act. Consequently, no such action or regulation can be challenged in the courts as infringing freedoms or rights in the Bill of Rights.

Under the Charter of Rights, this will no longer be the case since, unlike the Bill of Rights, the Charter does not contain an override clause. Consequently, once the Charter is in place, anything done under the War Measures Act will be subject to scrutiny by the courts to determine if it conforms with the guarantees as specified in the Charter. This gives the courts a large jurisdiction over rights which it does not possess at all now under the War Measures Act.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of information; and

(*c*) freedom of peaceful assembly and of association.

Libertés fondamentales

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes:

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres grands moyens d'information;

c) liberté de réunion pacifique et d'association.

Fundamental Freedoms

SECTION 2 - FUNDAMENTAL FREEDOMS

This section sets forth in a modified form the four freedoms now found in section 1(c)-(f) of the Canadian Bill of Rights which read as follows:

(c) freedom of religion
(d) freedom of speech
(e) freedom of assembly and association
(f) freedom of the press

2(a) Freedom of conscience and religion

At present the Canadian Bill of Rights provides simply for freedom of religion, which means that anyone is free to espouse a religion of choice and to practice it. However, it does not address those who choose to have no religion, and freedom of conscience is added to provide for this circumstance.

Unlike the U.S. Bill of Rights, the Charter provision does not prohibit the making of any law respecting an establishment of religion, which has been interpreted by the U.S. courts as forbidding state support for denominational schools and religious exercises in schools. Consequently, there will be no danger under the Charter that denominational schools, as guaranteed by section 93 of the BNA Act, would become prohibited. Nor would it prevent prayers in the schools, although the Canadian courts have held that children attending a denominational school cannot be required to observe the religious exercises if they are not of that faith. This is clearly as it should be.

Concern has also been expressed that freedom of religion would prevent the state requiring that stores close for business on Sunday. This argument was rejected by the Supreme Court in the Sunday Bowling Alley Case in 1963 which held that the Lord's Day Act did not contravene freedom of religion under the Bill of Rights in requiring businesses to close on Sundays.

With respect to freedom of conscience, inclusion of this will likely mean that school children cannot be subjected involuntarily to religious exercises. Whether it will permit those who believe in non-violence (eg. Quakers) to refuse military service is doubtful. Even in the United States conscientious objectors have not been permitted by the courts to refuse to serve, although such persons are able to serve in non-violent duties.

Incorporation of this second freedom accords with what was accepted in the Victoria Charter and is consonant with the U.N. Covenant on Civil and Political Rights (Article 18). It is also reflective of what was recommended by the Joint Parliamentary Committee in 1972 and is similar to the provisions of C-60. The CBA study of 1978 proposed inclusion of this provision.

Under provincial laws, Alberta recognizes freedom of religion, Quebec recognizes freedom of conscience and religion and Saskatchewan recognizes freedom of conscience, religious association, teaching, practice and worship.

During the February 1979 First Ministers Conference all provinces except Manitoba agreed that if there were to be an entrenched Charter, these and the other fundamental freedoms contained in section 2 should be included in the Charter. More recently, when provincial officials prepared their "counter draft Charter" during the CCMC meetings in August, they included all the fundamental freedoms except "freedom of conscience". (Ministers from Manitoba and Alberta, however, stressed that this draft did not reflect the official position of their provinces.)

2(b) Freedom of thought, belief, opinion and expression, including freedom of the press and other media of information

At present the Canadian Bill of Rights provides simply for "freedom of speech" and "freedom of the press". The expanded formulation is designed to do two things.

With respect to the concept of free speech, the formulation recognizes that self-expression can take a variety of forms in addition to speech itself. In addition, to ensure the enjoyment of self-expression it is necessary to recognize its preconditions: thought, belief and opinion must also be freedoms. One is entitled to hold thoughts, beliefs and opinions even though the views may not be shared by others.

With respect to freedom of the press, this has been expanded to include other media of information such as radio and television. At the same time the freedom has been linked to freedom of expression generally to indicate that the freedom of the news media is not different from the rights of ordinary individuals to give expression to their views.

None of these freedoms is without limits, of course, and these limits will continue to be recognized under section 1 unless they are found to be wholly unreasonable. These include provincial laws against defamation and federal laws governing blasphemy, sedition and obscenity. In addition there are also laws providing for censorship of movies, for example. Some of these which are extremely rigid might well be challenged as unreasonably suppressing freedom of expression. On the other hand, laws which censor statements calculated to generate racial hatred would likely be seen as reasonable.

While freedom of thought, opinion and expression were included in the Victoria Charter no reference was made to freedom of the press. However this latter freedom is contained in the Canadian Bill of Rights and is implicitly recognized in the U.N. Covenant on Civil and Political Rights (Article 19). Consequently, it should be included in the Charter. In this regard it might be noted that the CBA study in 1978 recommended inclusion of "freedom of thought, opinion, expression and communication".

Bill C-60 provided for freedom of thought, opinion and expression and freedom of the press and other media for the dissemination of news and the expression of opinion and belief.

2(c) Freedom of peaceful assembly and of association

These freedoms are now found in the Canadian Bill of Rights but without the qualification "peaceful". This modification does not really change the substance of the freedom to assemble, however, since it has long been recognized that assemblies may only take place in a lawful and orderly manner. Including the qualification "peaceful" in the freedom of assembly may perhaps ensure that the onus is clearly on the Crown to establish that an assembly or demonstration is for other than peaceful purposes, thus preventing the blanket banning in advance of assemblies in public places.

Such was the situation in the Dupond case where a majority of the Supreme Court in 1978 held valid a Montreal bylaw which banned all public assemblies in the streets and parks of the City for a thirty-day period on grounds of apprehended disorder or threats to safety, peace or public order. While the court considered this a valid exercise of provincial powers to prevent disorder, it is highly unlikely that such a general anticipatory law would withstand the right of peaceful assembly unless the authorities could show that any particular assembly was likely not to be peaceful.

The proposed formulation is identical to that adopted in the Victoria Charter and reflects the provisions of the U.N. Covenant on Civil and Political Rights. Equally it is the same as provisions in Quebec and Saskatchewan laws.

It follows the proposals of the Joint Parliamentary Committee of 1972, the CBA study of 1978 and the provisions of Bill C-60.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has, without unreasonable distinction or limitation, the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Droits démocratiques

Droits démocratiques des citoyens

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales; ce droit ne peut, sans motif valable, faire l'objet d'aucune distinction ou restriction.

CONFIDENTIAL

Democratic Rights

SECTIONS 3-5 - DEMOCRATIC RIGHTS

These provisions embody the basic principles upon which a democratic form of government are founded: universal suffrage, periodically elected governments and regular sessions of elected representatives.

SECTION 3 - DEMOCRATIC RIGHTS OF CITIZENS

This section ensures that Canadian citizens will have the right to vote in provincial and federal elections and the right to be a candidate for election to the House of Commons or a legislative assembly. The only restrictions that may be placed on these rights are those that are determined to be reasonable such as age (minors), mental incompetence, etc.

It was felt that the "reasonable distinction or limitation test" was preferable to spelling out the grounds since what are considered grounds for disqualification today may not be deemed appropriate at some future time. This approach will provide greater flexibility for the legislatures to spell out grounds of ineligibility, and as long as they are reasonable the courts will not interfere. For example, it may be quite reasonable to deny a judge the right to run for political office or to participate in an election campaign, but is it reasonable to deny him the right to vote?

It may be asked why there is an apparent "double-barrelled" limitation clause here, ie. the "reasonable limits" test under section 1 and the "reasonable distinction or limitation" test in section 3. The purpose is that one may impose a limit on the right to vote under section 1, eg. age, which does not amount to a distinction among people, eg. judges and other persons. Consequently, it was felt desirable to include the more specific qualifications in section 3.

Previous proposals on this subject (Victoria Charter, Joint Parliamentary Committee, 1972, CBA study, 1978 and Bill C-60) all contained specific grounds on which the right to vote could not be denied (eg. race, colour, ethnic origin, religion, sex). The problem with this approach is that a list always poses difficulties: should one not also include grounds such as age, marital status, political belief, economic status, etc? In other words, rather than try to draw up an "exhaustive" list, is it not preferable to simply use the "reasonableness" test, and leave its application to the legislatures and the courts?

This is essentially the approach taken in the U.N. Covenant on Civil and Political Rights (Article 25). The Saskatchewan Bill of Rights recognizes the right of every qualified voter to exercise his franchise freely, and the Quebec Charter of Human Rights provides that every person legally capable and qualified has the right to be a candidate and to vote at an election.

It has been suggested that entrenching the right to vote and to qualify for elective office may place in jeopardy federal and provincial laws placing limits on election expenditures and government contributions to political parties. It is difficult to see how this relates to the rights to vote and to be a candidate. Where the issue of such laws is more likely to arise is in the context of freedom of expression. This was the basis on which federal laws in the United States providing for government contributions to presidential candidates and limits on contributions from other sources was attacked before the Supreme Court. It may be that a similar challenge could be brought on the basis of freedom of expression in Canada. However, it should be noted that the Imperial Oil case in 1963 the Supreme Court held that a provincial law precluding trade unions from using membership dues to finance political parties was not a violation of freedom of expression.

Another concern expressed is that provincial residency laws as a qualification for voting may be struck down as unreasonable. In Quebec there is a one year residency requirement and other provinces have similar requirements. Obviously residence in a province is a reasonable requirement and residency for a year would also seem to be a reasonable period in which to clearly establish the intention to be a "resident".

SECTION 3: ADDENDUM 1: RIGHT TO VOTE

Distinctions and Limitations on the Right to Vote in Canada

A number of distinctions and limitations at present apply to the right to vote in federal and provincial (including territorial) elections.

The principal ones are as follows:

Qualifications

1. In all federal and provincial elections, the voter must reside in the polling division and, in all provincial elections, there is an additional requirement for residence in the province mostly varying from 6 to 12 months although Newfoundland requires only one month's residence. Some exceptions are made in the various jurisdictions to include certain persons who are not actually in residence, such as armed services and R.C.M.P. personnel, students and persons working for the federal or provincial government outside the jurisdiction.

2. All jurisdictions require Canadian citizenship although some also permit British subjects to vote.

3. All jurisdictions have a minimum age qualification of 18 or 19.

Disqualifications

1. There is a considerable divergence in the law over the disqualification of judges. This varies from a disqualification of all judges of any court (Ontario), through various degrees of limitations that may relate to the judges before whom a controverted election petition may be taken, to the laws of Quebec and British Columbia which permit judges to vote.

2. Most provinces limit the right of all or some prisoners to vote although this varies from jurisdiction to jurisdiction.

3. Most provinces place some limitations, ranging from general to very detailed, on the right of persons with a mental illness or disability to vote.

4. The right of election officials and some party workers varies from province to province. In some provinces, only the returning officers are prohibited from voting and this is usually because they are given the casting vote in case of a tie.

5. In some jurisdictions, certain election offences, in addition to some other penalty, carry with them a limitation on the right to vote in the current election or over a period of up to seven years.

6. Other minor limitations occur in particular provinces such as a limitation on financial officers of political parties in Quebec and one on members of local government Boards in Saskatchewan. Only one province, British Columbia, appears to limit the right to vote to persons who have an adequate knowledge of English or French.

It is suggested that most of the distinctions and limitations set out above would be held to be of a kind "generally accepted in a free and democratic society with a parliamentary system of government". However, some may be questioned in the courts as being unreasonable, such as wide limitations on the right to vote of judges to include even those before whom election petitions or prosecutions cannot come. Also the right of prisoners to vote may well be brought before the courts.

There are a few other distinctions in the legislation, particularly in British Columbia and Newfoundland, that, on the surface, appear to be contrary to the Charter, such as those that extend a right to a "wife". If such provisions are not defined to mean a "spouse", they could be found to be inoperative pursuant to section 25 of the Charter as being distinctions based on sex prohibited by section 15.

Another distinction that may be open to challenge is the Saskatchewan limitation on members of local government Boards since no other jurisdiction seems to feel the necessity for such a limit. Also the British Columbia requirement respecting an ability to speak English and French may be subject to question.

The extension of the right to vote to some but not all classes of persons normally living inside a jurisdiction but temporarily outside of it during an election is also arguably an unreasonable distinction. On the other hand, this limited extension is arguably a reasonable one on the basis of cost and certainty.

The following Schedule sets out the main limitations and distinctions on the right to vote in federal and provincial elections.

SCHEDULE

PRINCIPAL QUALIFICATIONS AND DISQUALIFICATIONS AFFECTING RIGHT TO VOTE IN CANADA

JURISDICTION	QUALIFICATIONS TO VOTE				PERSONS DISQUALIFIED TO VOTE						
	Age	Residence in Province (1)	Citizenship: Canadian	Citizenship: Other British Subject	Judges appointed by: Governor in Council (2)	Judges appointed by: Province	Prisoners	Mentally Ill	Some Election Officers	Persons who have committed election offence	Other
CANADA	18		Yes	No	Yes	No	Yes	Yes	Yes	Yes	Some party workers
ONTARIO	18	12 months prior to polling day	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	
QUEBEC	18	(domiciled) 12 months prior to polling day (3)	Yes	No	No	No	No(4)	No	Yes	Yes	Financial officers of political parties
NOVA SCOTIA	18	12 months prior to date of writ	Yes	Yes	Yes	No	Yes	Yes	Yes	No	
NEW BRUNSWICK	18	6 months prior to issue of writ	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	
MANITOBA	18	12 months prior to issue of writ	Yes	Yes	Yes	No	Yes	Yes	Returning Officer (5)	Yes	
BRITISH COLUMBIA	19	12 months in Canada, 6 months in B.C. prior to applying for voter registration	Yes (6) and some wives (7)	Yes (6) and some wives (7)	No	No	Specified convictions	No	No	Yes	Inadequate knowledge of English or French

CONFIDENTIAL

R-11244

PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE CONSTITUTION OF CANADA – BRIEFING BOOK USE IN PARLIAMENT (1/)

SCHEDULE (Cont'd)

PRINCIPAL QUALIFICATIONS AND DISQUALIFICATIONS AFFECTING RIGHT TO VOTE IN CANADA

JURISDICTION	QUALIFICATIONS TO VOTE				PERSONS DISQUALIFIED TO VOTE						
	Age	Residence in Province	Citizenship		Judges appointed by		Prisoners	Mentally Ill	Some Election Officers	Persons who have committed election offence	Other
			Canadian	Other British Subject	Governor in Council (2)	Province					
PRINCE EDWARD ISLAND	18	12 months prior to date of writ	Yes	No	Yes	No	Yes	Yes	Yes	No	
SASKATCHEWAN	18	6 months prior to issue of writ	Yes	Yes, if a voter on June 23, 1971	Yes	Yes	Yes	Yes	Yes	Yes	Member Local Government Board
ALBERTA	18	6 months prior to issue of writ	Yes	No	Yes	No	Yes	No	Returning Officer (5)	Yes	
NEWFOUNDLAND	18	1 month preceding election day (7)	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	
N.W.T.	19	12 months prior to polling day	Yes	No	Yes	No	Yes	Yes	Returning Officer (5)	Yes	Some party workers
YUKON	19	12 months prior to polling day	Yes	No	Yes	No	Yes	Yes	Returning Officer (5)	Yes	

NOTES: (1) Federal and provincial residence requirements also require residence in the polling division on date of the issue of the writs or the preparation of the list of electors or on the polling date.

(2) May relate to some but not all federally appointed judges; e.g. federal disqualification does not apply to citizenship judges.

(3) Some persons residing outside Quebec while working for the government of Quebec or Canada retain a prior right to vote. Also in some other provinces (e.g. P.E.I.) armed forces personnel and students outside the province can vote.

(4) If domiciled where imprisoned.

(5) Returning Officer has casting vote.

(6) Persons "entitled within the province to the privileges of a natural born Canadian citizen or British subject".

(7) Contains a distinction based on sex that may be contrary to Charter.

CONFIDENTIAL

R-1134A

1991

PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE CONSTITUTION OF CANADA – BRIEFING BOOK USE IN PARLIAMENT (1/)

SECTION 3: ADDENDUM 2: RIGHT TO BE A CANDIDATE

Distinctions and Limitations on the Right to be a Candidate at an Election in Canada

A number of distinctions and limitations at present apply to the right to be qualified for membership in Parliament or a legislative assembly. There are three aspects to qualifications as a member: One must

(a) be qualified as a voter and not disqualified from voting as set out in Addendum 1 above;

(b) be qualified as a candidate as discussed in this Addendum;

(c) not be disqualified from being a member.

The provisions that disqualify a person from being a member are generally set out in the Legislative Assembly or equivalent Act of a province and are set out federally in the *Senate and House of Commons Act* and the *House of Commons Act*. In some cases, they may also be set out in controverted elections legislation. Generally speaking, a person is not qualified, or a member ceases to be qualified, to be a member if the person is guilty of certain election offences, becomes a member of another legislative body, enters into certain contracts with the government or is guilty of certain acts of a fradulent character.

This addendum relates to the various election Acts and the provisions thereof respecting the qualifications to be a candidate at an election and the persons ineligible to be candidates.

Qualifications

1. In all jurisdictions the candidate must be qualified to be a voter.

2. Two provinces have age differentials. A person may vote at 18 in Nova Scotia and Prince Edward Island but before becoming a candidate, must be 19 in Nova Scotia and 21 in Prince Edward Island.

3. Generally speaking, the residence requirements are the same as for voters but residence in the electoral district may or may not be required. Newfoundland, which just requires one month's residence for voting purposes, requires a candidate to be ordinarily resident in the province for six months. Also, British Columbia raises provincial residence from six months for voters to twelve months for candidates.

Disqualifications

1. Federally, and in some provinces, many but not all the disqualifications are specified in the elections legislation. They are the disqualifications that relate to voters and also some that relate to such matters as election offences (which do not disqualify a person as a voter in some provinces) government contracts or employment and membership in another legislative body.

2. Some provinces on the other hand do not spell out the disqualifications of candidates or do so only by reference to the Legislative Assembly Act or other Act that relates to the disqualification or ineligiblity of a person to be a member of the legislative body.

3. Quebec, which permits judges and prisoners to vote, makes it clear that they cannot be candidates at an election.

It is difficult to prejudge whether a court would find any of the distinctions or limitations to be contrary to the Charter. There are no provisions, either federal or provincial, in the election laws themselves that are obviously contrary to the Charter. Perhaps some limitations, such as the federal limitation on certain court officials like a sheriff or clerk of the peace, might be found to be unnecessary and hence unreasonable. Similarly some countries permit public employees to run for public office with fewer limitations than in Canada and it could be argued that public servants are entitled to greater rights. Also, some of the provincial distinctions between the right to vote and the right to be a candidate, such as those relating to minimum age, might be open to challenge.

The following Schedule sets out, in broad terms, the kinds of qualifications to be a candidate and the provisions relating to ineligibility now found in federal and provincial law.

SCHEDULE

CANDIDATES AT AN ELECTION

JURISDICTION	QUALIFICATIONS TO BE CANDIDATE	PERSONS INELIGIBLE AS CANDIDATES
CANADA	Any elector	Those guilty of election offences, government contractors, members of provincial legislatures, certain court officers and government employees other than employees on leave therefor.
ONTARIO	Any elector	Persons disqualified by Legislative Assembly Act or any other Act, certain election officials and persons found guilty of election offences.
QUEBEC	Any elector	Judges, prisoners, prior candidates guilty of certain election offences, official agents, members of Parliament, persons disqualified by Legislature Act.
NOVA SCOTIA	Any elector 19 years of age or more	Persons disqualified under House of Assembly Act or any other Act and persons guilty of certain election expenses
NEW BRUNSWICK	Any elector	Senators, members of Parliament, contractors with government, federal government employees, and certain other officials
MANITOBA	Any elector	Certain election officials, persons guilty of election offences
BRITISH COLUMBIA	Any qualified voter registered in an electoral district who has resided in British Columbia twelve months	Persons guilty of certain election offences
PRINCE EDWARD ISLAND	Citizen by birth or naturalization who is 21 or more	Persons disqualified under any other Act, persons guilty of certain corrupt practices
SASKATCHEWAN	Any "ordinarily resident" elector No minimum residence requirement	Persons disqualified by Legislative Assembly Act or any other Act.

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SCHEDULE (Cont'd)

CANDIDATES AT AN ELECTION

JURISDICTION	QUALIFICATIONS TO BE CANDIDATE	PERSONS INELIGIBLE AS CANDIDATES
ALBERTA	Any elector	Persons disqualified by Legislative Assembly Act or any other Act
NEWFOUNDLAND	Any elector ordinarily resident for six months or more	Persons disqualified by any Act, persons guilty of election offences
YUKON TERRITORY	Any elector	Persons ineligible to be a member unless the grounds of ineligibility is such he can divest himself of them within 30 days after election and he promise so to do prior to election
NORTHWEST TERRITORIES	Any elector	Those guilty of election offences, government contractors, members of Parliament or a legislature, federal or territorial government employees other than employees on leave therefor

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R-1021

PROPOSED RESOLUTION FOR JOINT ADDRESS
CONSTITUTION OF CANADA - BRIEFING BOOK USE IN PARLIAMENT

Duration of elected legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Mandat

4. (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date du rapport des brefs relatifs aux élections générales correspondantes.

Prolongations spéciales

(2) Le mandat de la Chambre des communes ou celui d'une assemblée législative peut être prolongé respectivement par le Parlement ou par la législature en question au-delà de cinq ans en cas de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, pourvu que cette prolongation ne fasse pas l'objet d'une opposition exprimée par les voix de plus du tiers des députés de la Chambre des communes ou de l'assemblée législative.

SECTION 4 - DURATION OF ELECTED LEGISLATURES

Section 4(1) which limits the duration of a House of Commons or a provincial legislative assembly reflects provisions now found in section 50 of the BNA Act and in provincial constitutions. They guarantee that in the normal course of events the elected representatives must regularly seek a mandate from the voters at least once every five years. While this obligation is already entrenched for the House of Commons (by virtue of sections 50 and 91(1) of the BNA Act) the provisions in provincial constitutions can be changed by ordinary law. Section 4(1) would guarantee the maximum limit for all elected legislatures.

Section 50 of the BNA Act and similar provisions in provincial constitutions are not repealed since they contain provisions dealing with an earlier dissolution of Parliament by the Governor General and the legislature by the Lieutenant Governor.

Provisions similar to section 4(1) were found in the Victoria Charter and in Bill C-60 and were endorsed by the CBA study of 1978.

Section 4(2) permits a House of Commons or a legislative assembly, in time of real or apprehended war, invasion or insurrection, to extend its duration beyond the specified limit if such extension is not opposed by more than one-third of the members of the legislative body. This is unchanged for the House of Commons which now has this power and limitation under section 91(1) of the BNA Act, but it is a new provision for the provincial legislatures which under existing law could extend their duration whenever they so decided.

Under Article 7 of the Victoria Charter it was proposed to extend this same provision to the legislatures but it could only be invoked once the Government of Canada had declared the state of national emergency to exist. Under Bill C-60 the change was made to enable a provincial legislature to act without a formal declaration by the federal government.

There could be some criticism of this provision for leaving such broad power to the legislatures, particularly with respect to determining when a state of war or invasion exists. Since these are clearly matters of national concern, their determination should likely be left to Parliament. In reality, however, if a legislature were to extend its life on the basis of a war when Parliament had taken no similar action, a court would likely find the provincial action to be without foundation.

The CBA study in 1978 approved the provisions of this section but recommended that the determination of a state of emergency be made by the House of Commons.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

5. Le Parlement et les législatures tiennent une séance au moins une fois tous les douze mois.

Séance annuelle

SECTION 5 - ANNUAL SITTINGS OF ELECTED LEGISLATIVE BODIES

This section provides that there must be a sitting of the House of Commons and each provincial legislature at least once every twelve months. This adapts the existing provisions of sections 20 and 86 of the BNA Act (and the provisions of provincial constitutions in some cases) which ensure that the governments of the day remain accountable to their respective legislative bodies. The modification in wording from the present constitutional text is to change "session" to "sitting" in recognition of the fact that sometimes (as in 1974-76) a single session of Parliament may continue for more than twelve months.

It is to be noted, however, that under the present BNA Act this obligation is entrenched for Parliament under section 91(1) of the BNA Act but is not similarly entrenched for the provincial legislatures. Under this section the obligation would be entrenched for each body.

A similar provision was agreed to in the Victoria Charter and was found in Bill C-60. It was endorsed by the CBA study in 1978.

With respect to sections 4 and 5 the question may arise as to the role of the courts in cases where Parliament or a legislature violates the provisions of these sections, ie. by extending its life on improper grounds or by not holding an annual sitting. The likely legal remedy would be a declaration by the courts that the legislative body was in violation of the constitutional provisions. Then it would rest with the force of public opinion to bring the offending body into line with the law.

Mobility Rights

Rights of citizens to move

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Liberté de circulation et d'établissement

Droits des citoyens

6. (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

Droits généraux

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit:

a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;

b) de gagner leur vie dans toute province.

Restriction

(3) Les droits mentionnés au paragraphe (2) sont subordonnés:

a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;

b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.

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Mobility Rights

SECTION 6 - MOBILITY RIGHTS

Section 6(1) would entrench in the constitution the basic rights of citizens

- to leave Canada,
- to return to Canada, and
- to remain in Canada.

These are important rights which should pertain to all Canadian citizens - to freely come and go - and not be subject to involuntary removal from Canada. These are essentially the rights which citizens have now, subject to normal limitations such as restrictions in times of war or where one is serving a sentence in prison. Perhaps the most important guarantee is to remain in Canada, thus preventing what occurred at the end of World War II when orders in council were adopted authorizing the deportation to Japan of persons who were Canadian citizens. Even in wartime, it is hoped that the Courts would find this an unreasonable limit on a citizen's right to remain in Canada. On the other hand, it would be a reasonable limit on the right to remain in Canada to require citizens in time of war to go abroad to fight.

The only mention of a citizen's rights in the Canadian Bill of Rights and in C-60 was the right not to be arbitrarily exiled. This protection is of doubtful value and was criticized by the Joint Parliamentary Committee in 1972, which recommended inclusion of a provision that would preclude a Canadian from being deprived of his citizenship in any circumstances. However, as noted in the Canadian Bar study of 1978, there are circumstances where the removal of a Canadian's citizenship are proper -- as where a Canadian is born with dual citizenship and must make a decision by a certain age whether he wishes to retain his Canadian citizenship or to opt for the other. Consequently, the provision in section 6(1) does not address the issue of whether one may lose his Canadian citizenship, but is confined to the mobility rights that flow from that status.

Section 6(2) would give to Canadian citizens and persons who are permanent residents of the country (persons intending to become citizens) certain inherent constitutional rights founded upon their status in Canada. These rights are based on the concept of Canada as an economic and political union in which Canadians should be free to move, reside and work without discrimination based upon provincial or territorial boundaries.

"Permanent resident" is the terminology used in the Citizenship Act to describe an immigrant who has been lawfully admitted to Canada for taking up permanent residence, and who may after three years residence in Canada acquire Canadian citizenship. While the courts will no doubt be guided by this meaning in interpreting the term in section 6(2) it will ultimately be up to the courts to decide its meaning in any particular case when a question as to the exercise of the rights under section 6(2) arises.

The first right is to change one's province of residence and to enjoy all the benefits that flow from that without discrimination based on the fact that one comes from another province. The receiving province would be able to impose the same obligations on the newcomer as on any other residents (taxes, job qualifications, educational requirements) and could specify reasonable residency requirements for receiving public social services (welfare, health care, etc), but would not otherwise be able to treat the person differently simply because he comes from another province. Thus, for example, a law which provided that a person who moved from one province to another could not acquire property in the latter province until he had resided there 10 years while someone born in the province could acquire it immediately, would be struck down.

The second right is to pursue the gaining of a livelihood in any province whether one in fact moves to another province or resides in one province and seeks a job in another. This provision would prevent a province from precluding people from other provinces from seeking work in that province simply because they are or had been resident in another province. Again, all the regular laws of the province would apply respecting qualifications for employment (eg. job training, union membership, experience, health, etc.) as long as they apply equally to similar persons in the province, and the reasonable rules respecting residency would apply.

Laws and practices that are likely to be affected by this provision are the following:

- proposed Terms and Conditions under the Northern Pipeline Act that require preference to be given to residents of the Yukon and Northwest Territories in construction of the Yukon portion of the pipeline.
- regulations under the Newfoundland Petroleum Act which provide that residents of that province are to be given preference for work in exploration for and exploitation of petroleum resources in the offshore. (Nova Scotia has proposed to make similar rules.)
- regulations governing the Quebec construction industry which establish preferential hiring rules for residents of Quebec.

This sub-section would not, however, give a person living in one province the right to acquire and hold land in another province if that other province restricted landholding only to residents of that province. [It is arguable, however, that section 6(2)(b) does extend to that situation where a person's mode of gaining a livelihood is investing in revenue-producing properties.]

With respect to section 6(2), somewhat similar provisions were proposed in Bill C-60, although the right of a resident of one province to acquire and hold land in another province has been dropped. This has been done for two reasons. First, such property rights are more akin to the movement of capital rather than people and thus don't really fall into a Charter of individual rights. Second, given the particular concerns of Prince Edward Island about non-residents buying up large parts of the scarce land resources of the Island, it was felt that inclusion of the property rights would impose an undue hardship on that province.

In examining the mobility rights provisions of C-60, the Joint Parliamentary Committee in 1978 was critical of the fact that such rights were limited to citizens and recommended that unless the rights could be extended equally to permanent residents, the provision should be withdrawn. To meet this concern, the rights now apply to both citizens and permanent residents.

The CBA study in 1978 recommended that the constitution provide for free movement of manpower throughout Canada. The Canadian Unity Task Force in 1979 urged that the free movement of services be guaranteed in the constitution and that the provinces seek to reduce impediments to the mobility of persons in the professions.

Legal Rights

Life, liberty and security of person

7. 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.

Garanties juridiques

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Legal Rights

SECTIONS 7-14 - LEGAL RIGHTS

The rights set forth in these sections are the essential legal rights which must be afforded to people in the course of their legal relations with the State or the machinery of justice. They prescribe a series of safeguards designed to ensure that the individual is treated with elemental fairness when he is subjected to the law, particularly in criminal and penal proceedings.

Many of the rights are drawn from provisions now found in the Canadian Bill of Rights; others are drawn from provisions of the U.N. Covenant on Civil and Political Rights.

SECTION 7 - LIFE, LIBERTY AND SECURITY OF PERSON

This section is a modification of section 1(a) of the Canadian Bill of Rights which reads as follows:

> "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law"

The two modifications are deletion of the reference to enjoyment of property and the changing of "due process of law" to "in accordance with the principles of fundamental justice." The deletion will be dealt with later.

Section 7 ensures that no person may have his life, freedom or personal security removed or interfered with by the State except by duly specified legal procedures that are inherently fair in the sense that they meet all the requirements of natural justice -- fair procedures, an opportunity to know the reasons for the action, a right to make a full answer and defence and to have the matter determined by a fair and impartial tribunal.

Some question may be raised whether "security of the person" encompasses more than physical security in the context of the legal process, and includes the right to economic security in the sense of a right to work or to social security. Certainly the courts have never construed it in this extended manner, and its being placed in the context of "legal rights" should dispell any concern that it would be given a broader construction. It simply states the proposition that a person has the right to be physically secure when subjected to legal processes, and subsequent rights, such as protection against unlawful search or seizure and cruel and unusual punishment or treatment, are elaborations of this general right.

Similarly the right to life does not mean that a life can never be taken. As Laskin, C.J. observed in the Morganthaler case (1976), abortion laws are not contrary to the Bill of Rights as long as prescribed procedures are followed. Equally, in Miller and Cockriell v. The Queen (1977), the Supreme Court ruled that capital punishment did not contravene the Bill of Rights.

Equally, the right to liberty does not mean the freedom to do anything one chooses, but rather in the context of "legal rights" it means the right not to be arrested or detained unlawfully and the right to be released on bail as the law provides.

The reason for replacing the term "due process of law" is not so much because of how it has been interpreted by the courts under the present Canadian Bill of Rights, but rather because of how it has been interpreted as an entrenched provision of the U.S. Bill of Rights. There "due process" has been given both a procedural content and a substantive content, and under the second head the U.S. courts have in effect attempted to substitute their value judgments for those of the legislators on whether a particular social measure is good or bad. This was the case with much of the "New Deal" legislation and more recently with laws relating to capital punishment and abortion. Instead of asking whether the limitation of the law on "life, liberty or property" was procedurally fair, the courts were asking whether the legislature had a right to enact laws limiting these rights at all.

The Canadian courts have yet to venture this far in applying the concept of "due process". While there have been a number of judicial expressions implying a substantive content in the expression, the decisions have in fact restricted the phrase to its application as a test of procedural fairness. However, there have also been some judicial indications that were the Bill of Rights an entrenched document, there might be greater scope for giving "due process" a substantive content.

In these circumstances, it is considered wiser to avoid the use of the "due process" expression and replace it with one that more clearly indicates the objective: to ensure procedural fairness when these rights are being restricted. Such an approach is more consistent with the provisions of the U.N. Covenant on Civil and Political Rights which provides that no one shall be arbitrarily deprived of his life and that a person may be deprived of his liberty only on grounds and procedures established by law. (Articles 6 & 9)

This modification is also consistent with the position taken by the Joint Parliamentary Committee in 1972 which preferred "principles of fundamental justice" to "due process of law".

As for deletion of the right to enjoyment of property found in the Canadian Bill of Rights, this has been done for two reasons. First, the provinces objected to entrenching property rights of any kind, feeling that such rights should be left to be dealt with by the ordinary laws. Second, property rights are more in the nature of economic rights and such rights are not dealt with in the Charter.

The concern of the provinces is very real in this area when one considers the broad range of laws that may affect property rights: zoning, taxation, environmental protection, preservation of agricultural lands, industrial development, development of highway systems, condemnation of unsafe premises, etc. These laws involve important social and economic judgments where the courts may not be properly equipped to evaluate the values involved. This is particularly the case where the courts might adopt the position that their role is to get into the substantive fairness of the law and substitute their judgment for that of the legislatures.

However, none of these arguments is likely to overcome the strong opposition in Parliament to dropping property rights, particularly since they are included in the Canadian Bill of Rights, were included in C-60 and appeared in recent federal drafts including the one tabled in Montreal on July 9, 1980. In C-60 it had been proposed to make the deprivation of the use and enjoyment of property "in accordance with law" rather than by "due process of law". This proposal was objected to by the Joint Parliamentary Committee which wanted "due process" restored.

[If considerable pressure builds for restoration of property rights it may be necessary to consider inserting the provision contained in C-60. This was the position taken by the CBA study in 1978 which argued that the provision should not go further and require "just compensation" since it was felt this was a matter for legislative and not judicial determination. However, if property rights are reinstated, it will simply reinforce provincial resistance to the Charter.]

Search or seizure

8. Everyone has the right not to be subjected to search or seizure except on grounds, and in accordance with procedures, established by law.

8. Chacun a droit à la protection contre les fouilles, les perquisitions et les saisies abusives dont les motifs ne sont pas fondés sur la loi et qui ne sont pas effectuées dans les conditions que celle-ce prévoit.

Fouilles, perquisitions et saisies

SECTION 8 - UNLAWFUL SEARCH OR SEIZURE

This provision is new to the legal rights now found in the Canadian Bill of Rights. It protects a person against the authorities carrying out searches or seizures against him of his property unless such activities are clearly authorized by law. Two tests would have to be met. First, the search or seizure must be based upon a law authorizing the activity. Second, the procedures used in carrying out the search or seizure must conform with those prescribed by law. Consequently, the legislators will have to spell out clearly both the grounds for a search or seizure and the procedures under which the law enforcement authorities are to carry out these activities.

In addition, however, this provision must be read in conjunction with section 7 which provides that a person may be deprived of his security only in accordance with the principles of fundamental justice. Thus, it may be argued that a search or seizure must meet not only the foregoing tests but in addition the test of inherent fairness. Consequently, section 7 builds in to this provision an additional test whereby the search or seizure must be both lawful and fair. If it fails, the court may rule the activity or the law to be in contravention of the Charter.

This provision is somewhat different to that found in the U.S. Bill of Rights which prohibits unreasonable searches and seizures and which was the provision found in C-60. This wording would have enabled the courts to inquire into the reasonableness of the law authorizing the search or seizure. Under the wording of this section, the role of the courts will be to assess whether the search or seizure is in conformity with what the law provides and whether that law and procedure are fair.

The Joint Parliamentary Committee in 1972 and the CBA study of 1978 both recommended protection against unreasonable searches and seizures. The U.N. Covenant on Civil and Political Rights does not deal specifically with search or seizure, but does provide that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence (Article 17).

What will be the effect of this new provision with respect to evidence illegally obtained ?

Detention or imprisonment

9. Everyone has the right not to be detained or imprisoned except on grounds, and in accordance with procedures, established by law.

9. Chacun a droit à la protection contre la détention ou l'emprisonnement dont les motifs ne sont pas fondés sur la loi et qui ne sont pas effectués dans les conditions que celle-ci prévoit.

Détention ou emprisonnement

SECTION 9 - UNLAWFUL DETENTION OR IMPRISONMENT

This provision is a modification of the right now found in section 2(a) of the Canadian Bill of Rights which protects against arbitrary detention or imprisonment. (The protection against arbitrary exile is now dealt with under Mobility Rights (see section 6).) This provision ensures that no one may be held by the authorities or imprisoned except on grounds provided by law and by the procedures prescribed for such detention or imprisonment.

As with section 8, however, this provision must be read in conjunction with section 7 which provides that a person may be deprived of his liberty only in accordance with the principles of fundamental justice. Thus, again it may be argued that a detention or imprisonment must be both lawful and inherently fair in terms of the procedures prescribed or followed.

The U.N. Covenant on Civil and Political Rights provides for protection against arbitrary arrest or detention. At the same time, the U.N. Covenant provides that no one shall be deprived of his liberty except on grounds and procedures established by law. The Quebec Charter of Human Rights also provides that no one may be deprived of his liberty except on grounds provided by law and in accordance with prescribed procedure. On the other hand the Saskatchewan Bill of Rights provides freedom from arbitrary arrest or detention and C-60 provided for protection against arbitrary detention and imprisonment.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Arrestation ou détention

10. Chacun a le droit, en cas d'arrestation ou de détention:

a) d'être informé dans les meilleurs délais des motifs de son arrestation ou de sa détention;

b) d'avoir recours sans délai à l'assistance d'un avocat;

c) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

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SECTION 10 - RIGHTS ON ARREST OR DETENTION

These provisions are the same in substance as those now found in section 2(c) of the Canadian Bill of Rights. They are all designed to protect the rights of a person against arbitrary or unlawful actions by law enforcement authorities. Thus anyone who is held or arrested by any authority has the right to be told the legal reasons for his being taken into custody, the right to contact and consult a lawyer forthwith to obtain legal advice, and the right to have a court determine expeditiously whether the detention is lawful.

These rights would apply both to civil and penal matters (as would all the legal rights). Thus, for example, a person detained in a mental institution under a provincial law would have the right to know the reasons or grounds for his detention. However, if he were incapable of understanding, or if the doctor believed that telling him the reasons might harm his condition, then it would be sufficient to tell the reasons to his guardian who could, if he wished, then exercise the rights of the detainee to retain counsel and determine the validity of the detention.

The right to retain and instruct counsel does not mean that the State must furnish legal aid where the individual cannot afford a lawyer. Nor does it mean that a person must be informed of his right to counsel. On the first point, the wording of this right is different to the U.S. Bill of Rights provision which states that an accused is to have "the assistance of counsel for his defence". (This has been interpreted to mean a right to legal aid.) On the second point, the B.C. Court of Appeal in Re Vinarao (1968) held that there was no obligation on the police to inform an accused or anyone else of his right to counsel. However, in 1972 the Supreme Court held in the Brownridge case that a failure by the police to allow an accused to consult his lawyer was a reasonable excuse for his refusal to provide the breath sample as required by law.

The provisions of this section are all reflected in the U.N. Covenant on Civil and Political Rights (Articles 9 & 14). In addition the Quebec Charter of Human Rights and the Saskatchewan Bill of Rights contain somewhat similar provisions. The Joint Parliamentary Committee of 1972 and the CBA study of 1978 recommended entrenchment of these rights and they were included in C-60.

We cannot be sure that this will be the interpretation of a Court.

Proceedings in criminal and penal matters

11. Anyone charged with an offence has the right

(*a*) to be informed promptly of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*d*) not to be denied reasonable bail except on grounds, and in accordance with procedures, established by law;

(*e*) not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence;

(*f*) not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted; and

(*g*) to the benefit of the lesser punishment where the punishment for an offence of which he or she has been convicted has been varied between the time of commission and the time of sentencing.

Affaires criminelles et pénales

11. Tout inculpé a le droit:

a) d'être informé dans les meilleurs délais de l'infraction précise qu'on lui reproche;

b) d'être jugé dans un délai raisonnable;

c) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

d) de ne pas être privé d'une mise en liberté assortie d'un cautionnement raisonnable, sauf pour des motifs fondés sur la loi et dans les conditions que celle-ci prévoit;

e) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction;

f) de n'être poursuivi ou puni qu'une fois pour une infraction dont il a déjà été définitivement acquitté ou déclaré coupable;

g) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

CONFIDENTIAL

SECTION 11 - RIGHTS WHEN CHARGED WITH OFFENCE

These provisions expand upon the rights now found in section 2(f) of the Canadian Bill of Rights and provide a number of protections for an accused whether the offence be under federal or provincial law.

(a) to be informed promptly of the specific offence. This means that the person charged has a right to be told promptly of the specific offences in order that he may be in a position to prepare his defence. If the law does not provide for this it would be struck down. If the law enforcement authority does not provide the information required by law, it is likely that the courts would order him to do so and failing that, might dismiss the case. This is a new provision drawn from Article 14 of the U.N. Covenant on Civil and Political Rights. Canada was questioned earlier this year by the U.N. Committee on Human Rights for not explicitly providing this protection.

(b) to be tried within a reasonable time. This means that the person charged must have his case tried without undue delay. Obviously, if the accused himself causes the delays there can be no complaint, but where the delays result from inaction by the prosecution or the courts, it will rest with the legislators to enact laws that are designed to ensure that delays of this kind are not permitted. If the legislatures spell out reasonable periods within which a trial is to take place it is not likely the courts will question these. If the law does not provide for trials without undue delay, it will be held in violation of the Charter. Where the prosecutor or court causes undue delay the court might dismiss the charges.

This provision is not the same as that found in the U.S. Bill of Rights which requires a "speedy trial". It is a new provision drawn from Article 14 of the U.N. Covenant on Civil and Political Rights.

(c) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. This is the same provision as now found in the Canadian Bill of Rights and reflects basic principles of our criminal justice system. It places the onus on the prosecution to establish guilt, but does not preclude the so-called "reverse onus" rules whereby the accused may be required to rebut certain factual presumptions. The trial must be fair (including the right to be represented by counsel) and the adjudicator impartial and independent. The requirement for public trials does not mean that there can never be in camera proceedings, and these reasonable limits would be recognized under section 1. For example, closed hearings would be permitted as now in the interests of the accused (juveniles), the complainant or public morality (rape cases) and national security (guarding of defence information). However, it will rest with the courts to determine ultimately what the reasonable limits are.

(d) not to be denied reasonable bail except on grounds, and in accordance with procedures, established by law. This provision is a modification of section 2(f) of the Canadian Bill of Rights which now provides for the right not to be denied reasonable bail without just cause. The new wording will make it clearer that the legislature may specify, as is now done, the grounds upon which bail may be denied, eg. where the accused is likely to commit another offence or to flee the country. Similarly, it recognizes the power of the legislature to spell out conditions where the onus is on the accused to show why bail should not be denied.

(e) not to be convicted under ex post facto laws. This is a new provision which derives from Article 15 of the U.N. Covenant on Civil and Political Rights. It recognizes a fundamental principle of our criminal law that a person cannot be tried for an act that was not an offence at the time it was committed.

(f) not to be put in double jeopardy. This is another new provision that derives from Article 14 of the U.N. Covenant on Civil and Political Rights. Again it recognizes another basic principle of our criminal law that no one should be tried twice for the same offence. This does not mean that a person cannot be tried for two different offences arising out of the same facts. It does mean that he may not be tried twice for the same offence.

(g) to receive a lesser punishment where the penalty has been varied between the time of commission and the time of sentencing. This is another new provision drawn from Article 15 of the U.N. Covenant on Civil and Political Rights. Again, it reflects a basic principle of our law that where the penalty for an offence is reduced those who have not been sentenced should receive the benefit of the lesser penalty, and where it is increased they should not suffer from the greater penalty.

While a number of these rights go beyond those proposed in Bill C-60, all of them are recognized under the U.N. Covenant and under Canadian law, and are important enough to be entrenched as basic legal rights. A number of these rights are now recognized under the Quebec Charter of Human Rights (see Tab J for details).

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

Punition

CONFIDENTIAL

SECTION 12 - CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT

This section reproduces the provisions of section 2(b) of the Canadian Bill of Rights and is designed to protect the individual from inhuman forms of treatment or punishment at the hands of the State. For example, the Supreme Court in Miller and Cockriell v. The Queen in 1977 held that capital punishment does not constitute cruel and unusual punishment. On the other hand, the Supreme Court held in McCann v. The Queen in 1976 that certain conditions of solitary confinement in prison do violate this protection.

Article 7 of the U.N. Covenant on Civil and Political Rights goes somewhat further in providing that no one shall be subject to cruel, inhuman or degrading treatment or punishment and the Quebec Charter of Human Rights requires an accused person to be treated with humanity and with respect due to the human person.

The proposal in section 12 was endorsed by the Joint Parliamentary Committee in 1972 and the CBA study of 1978. It was included in C-60.

Self-crimination

13. A witness has the right when compelled to testify not to have any incriminating evidence so given used to incriminate him or her in any other proceedings, except a prosecution for perjury or for the giving of contradictory evidence.

13. Chacun a droit, s'il est contraint de témoigner, à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

Déclaration incriminante

SECTION 13 - PROTECTION AGAINST SELF-CRIMINATION

This provision, now found as a part of section 2(d) of the Canadian Bill of Rights, elaborates the principle of protection against self-crimination. While a witness may be compelled to testify in a particular proceeding where his evidence is relevant, he has a right not to have any of that evidence that may incriminate him used in any other proceedings against him. The only exceptions are where he is subsequently prosecuted for perjury (lying) in giving that evidence or where he is prosecuted for giving that evidence in contradiction of evidence given by him in other proceedings.

Thus, this provision is an important element in the legal process and one that should be protected. Both the Joint Parliamentary Committee in 1972 and the CBA study of 1978 recommended inclusion of this right and it was contained in C-60.

Note: Missing from this provision are two other rights found in section 2(d) of the Canadian Bill of Rights and in C-60. These are the right not to be compelled to give evidence if denied (a) counsel and (b) other constitutional safeguards. With respect to (b) it has never been clear what these might be and consequently there is no great problem in dropping them. With respect to (a) the provinces objected strenuously to the idea of any witness being entitled to counsel when obliged to testify and it appears that in practice counsel is not frequently sought. Thus it has been dropped. This does not mean that in an appropriate case a court could not order that counsel be provided. Nor does it mean that a person could not be represented by counsel. Indeed, section 24 provides that other rights not mentioned in the Charter continue to exist.

On a further point, the Charter does not continue the right to a fair hearing in accordance with the principles of fundamental justice for the determination of a person's rights and obligations. This is an important right recognized in section 2(e) of the Canadian Bill of Rights, particularly in the civil and administrative law areas.

It has been omitted because of strong provincial opposition based on concern as to its scope and meaning. There have been substantial developments in recent years in the administrative law field as to the scope of the rules of natural justice. In particular the "fairness" doctrine has been given a very wide application in administrative proceedings, and the jurisprudence is yet unsettled. Consequently, it was decided to omit reference to the right to a fair hearing until the legal principles are clearer. In the meantime, the courts will continue to apply the rules to civil and administrative proceedings as they have in the past and section 24 will continue the rights in this area.

[However, if there is strong pressure to include the right to a fair hearing as set forth in section 2(e), this could be done, but it would make the Charter more unacceptable to the provinces.]

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted has the right to the assistance of an interpreter.

14. La partie ou le témoin qui, lors de procédures, ne comprennent pas ou ne parlent pas la langue employée ont droit à l'assistance d'un interprète.

Interprète

CONFIDENTIAL

SECTION 14 - RIGHT TO ASSISTANCE OF AN INTERPRETER

This provision is now found in section 2(g) of the Canadian Bill of Rights. It provides to a party or witness a fundamental guarantee of the right to an interpreter to assist him in giving evidence or in understanding the proceedings where the proceedings are in a language he either doesn't understand or doesn't speak. This right pertains regardless of the language involved.

The inclusion of this provision was recommended by the Joint Parliamentary Committee of 1972 and by the CBA study in 1978. The provision was contained in C-60.

Non-discrimination Rights

Equality before the law and equal protection of the law

15. (1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

Affirmative action programs

(2) This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

Droits à la non-discrimination

Égalité devant la loi et protection égale de la loi

15. (1) Tous sont égaux devant la loi et ont droit à la même protection de la loi, indépendamment de toute distinction fondée sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge ou le sexe.

Programmes d'action sociale

(2) Le présent article n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation des personnes et des groupes défavorisés.

Non-discrimination Rights

SECTION 15 - NON-DISCRIMINATION RIGHTS

This provision deals with two aspects of discrimination. First, section 15(1) would assure equality before the law and equal protection of the law to everyone without discrimination based on race, national or ethnic origin, colour, religion, age or sex. Second, section 15(2) would permit "reverse discrimination" or "affirmative action" programs carried out to ameliorate the conditions of groups or individuals who are socially or economically disadvantaged.

This represents a change in approach from the Canadian Bill of Rights which provides in section 1 that the listed human rights and fundamental freedoms (including equality before the law and protection of the law) are to be enjoyed without discrimination by reason of race, national origin, colour, religion or sex. Consequently the proposed section 15 is broader than the Bill of Rights since the non-discrimination is not limited to the enumerated rights, but is general in application. In addition, the grounds of ethnic origin and age are added.

On the other hand, the provision is not as broad as the "equal protection of the laws" provision of the U.S. Bill of Rights since that non-discrimination clause is not qualified by any grounds. On the other hand, the unlimited nature of the U.S. provision has led to many difficulties in its interpretation including involvement of the courts in formulating social values.

For example, the school desegregation cases in the U.S. have led to court orders for wholesale bussing of students to meet this racial balance decreed by the courts. More recently the courts have ordered states to carry out legislative redistricting to ensure that each district has equal representation in the legislature. Again, in recent time, the courts have gotten into the question of whether school taxes that are higher in one school district than in another constitute a denial of equal protection of the laws.

Non-discrimination is very difficult to deal with in a Charter because many grounds of non-discrimination require qualifications which cannot be spelled out in a constitutional document and are better dealt with in positive legislation. Even with the "reasonable limits" test provided in section 1 it would be very difficult for the Courts to fashion the specific limits required for grounds such as handicap or marital status.

What has been attempted in section 15 is to adopt a "core" group of well-recognized grounds for non-discrimination where the courts can fairly readily define the accepted limits, leaving other grounds for non-discrimination to be dealt with in the federal and provincial human rights acts where the various qualifications can more properly be spelled out.

This is not a very satisfactory approach to the subject but it at least recognizes the importance of banning non-discrimination in certain areas while at the same time admitting that a substantial area of non-discrimination must come from legislative development. The only real alternatives to this approach are to omit non-discrimination entirely from the Charter or to insert a general provision which grants equality before the law and equal protection of the law to everyone without distinction.

Because a substantial number of federal and provincial statutes will have to be examined and amended to eliminate discriminatory provisions that might violate section 15 (eg. Indian Act, Income Tax Act, employment and pension laws and existing non-discrimination acts), this section will not come into force until three years after the adoption of the Charter. Allowing time for amendment of existing legislation will avoid the expense to litigants of challenging the present laws in the courts.

[There will no doubt be pressure to expand the grounds for non-discrimination to include a variety of other matters such as political belief, marital status, physical handicap, sexual orientation, etc. If there is an inclination to expand the grounds, the best recourse may be to go for a provision that simply provides "Everyone has the right to equality before the law and to the equal protection of the law without unreasonable distinction or limitation", recognizing that this will place a very heavy burden on the courts.]

The non-discrimination rights will not become effective until three years after adoption of the Charter in order to allow each level of government to review all existing legislation to ascertain where discriminatory provisions exist and to consider if they require amendment to ensure that they will comply with the non-discrimination rights. Examples of laws requiring review at the federal level are pension legislation, defence legislation, income tax legislation, the Indian Act and the Lord's Day Act. At the provincial level, pension, taxation, insurance legislation will require review. In addition, all existing human rights laws will need to be reviewed to ensure that the non-discrimination provisions thereunder are consistent with section 15.

October 20, 1980

FEDERAL AND PROVINCIAL NON-DISCRIMINATION ACTS

SUMMARY OF ACTIVITIES COVERED AND PROHIBITED GROUNDS OF DISCRIMINATION

1. Canadian Human Rights Act

A. Activities

- Provision of goods, services, facilities and accommodation to public
- Commercial and residential occupancy
- Employment and related activities
- Equal pay
- Publication of discriminatory materials
- Telephone communication of hate messages

B. Grounds

Race, national or ethnic origin, color, religion, age, sex, marital status, pardoned conviction and physical handicap.

2. Alberta Individual Rights Protection Act

A. Activities

- Provision of services, facilities and accommodation to public
- Commercial and residential occupancy
- Employment and related activities
- Equal pay
- Publication of discriminatory materials

B. Grounds

Race, religious beliefs, color, sex, age (45-65), ancestry, place of origin, marital status, physical characteristics (includes physical handicap).

3. B.C. Human Rights Code

A. Activities

- Provision of services, facilities and accommodation to public
- Residential occupancy
- Employment and related activities
- Equal pay
- Publication of discriminatory materials
- Sale of property

B. Grounds

Race, religion, color, sex, marital status, age (45-65), ancestry, place of origin, political belief, criminal or penal conviction.

...2

4. Manitoba Human Rights Act

A. Activities

- Provision of services, facilities or accommodation to public
- Commercial and residential occupancy
- Employment and related activities
- Equal pay
- Publication of discriminatory materials
- Contracts offered to public
- Sale of property

B. Grounds

Race, nationality, religion, color, sex, age, marital status, ethnic or national origin, political belief, source of income, family status, physical handicap.

5. New Brunswick Human Rights Code

A. Activities

- Provision of services, facilities and accommodation to public
- Commercial and residential occupancy
- Employment and related activities
- Publication of discriminatory materials
- Membership in trade, professional and business associations
- Sale of property

B. Grounds

Race, color, religion, national origin, ancestry, place of origin, age (19 & over), marital status, sex, physical disability.

6. Newfoundland Human Rights Code

A. Activities

- Provision of services, facilities and accommodation to public
- Commercial and residential occupancy
- Employment and related activities
- Equal pay
- Publication of discriminatory materials

B. Grounds

Race, religion, religious creed, sex, political opinion, color, ethnic, national or social origin, age (19-65), marital status, garnishment.

...3

7. Nova Scotia Human Rights Act

A. Activities

- Provision of services, facilities and accommodation to public
- Commercial and residential occupancy
- Employment and related activities
- Equal pay
- Publication of discriminatory materials
- Sale of property
- Membership in professional, trade or business association
- Admission to volunteer services
- Association with individuals or groups

B. Grounds

Race, religion, creed, color, ethnic or national origin, sex, age (40-65), marital status, physical handicap.

8. Ontario Human Rights Code

A. Activities

- Provision of services, facilities and accommodation to public
- Commercial and residential occupancy
- Employment and related activities
- Equal pay
- Membership in professional associations
- Publication of discriminatory materials

B. Grounds

Race, color, creed, nationality, ancestry, place of origin, sex, marital status, age (40-65).

9. P.E.I. Human Rights Act

A. Activities

- Provision of services, facilities and accommodation to public
- Commercial and residential occupancy
- Employment and related activities
- Equal pay
- Publication of discriminatory materials
- Membership in professional, business or trade association
- Sale of property
- Association with individual or groups

B. Grounds

Race, religion, creed, color, sex, marital status, ethnic or national origin, political belief, age (18-65), physical handicap.

...4

10. Quebec Charter of Human Rights and Freedoms

A. Activities

- Provision of goods and services to public
- Any legal (judicial) act, eg. lease or rental of premises or sale of property
- Access to public transport or public place eg. hotels, restaurants, etc.
- Employment and related activities
- Equal pay
- Membership in professional associations
- Publication of discriminatory materials

B. Grounds

Race, color, sex, civil status, religion, political convictions, language, ethnic or national origin, social condition, sexual orientation, physical and mental handicap.

11. Saskatchewan Human Rights Code

A. Activities

- Provision of services, facilities and accommodation to public
- Commercial and residential occupancy
- Employment and related activities
- Carrying on any business, enterprise or occupation
- Equal pay
- Membership in professional and trade associations
- Education
- Publication of discriminatory materials
- Contracts
- Sale of property

B. Grounds

Race, religion, creed, color, sex, nationality, ancestry, place of origin, marital status, age (18-65), physical disability.

12. Northwest Territories Fair Practices Ordinance

A. Activities

- Provision of services, facilities and accommodation to public
- Residential occupancy
- Employment and related activities
- Equal pay
- Publication of discriminatory materials

B. Grounds

Race, creed, color, sex, marital status, nationality, ancestry, place of origin, place of residence.

13. Yukon Territory Fair Practices Ordinance

A. Activities

- Provision of services, facilities and accommodation to public
- Residential occupancy
- Employment and related activities
- Equal pay
- Publication of discriminatory materials

B. Grounds

Race, religion, creed, color, ancestry, sex, marital status, ethnic or national origin.

NOTE: It must be remembered that not all grounds of non-discrimination apply equally to all activities. For example, in most jurisdictions sex is the only ground for non-discrimination re equal pay.

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Extension of status and use

(2) Nothing in this Charter limits the authority of Parliament or a legislature to extend the status or use of English and French or either of those languages.

Langues officielles du Canada

Langues officielles du Canada

16. (1) Le français et l'anglais sont les langues officielles du Canada; elles ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

Portée

(2) La présente charte ne limite pas le pouvoir du Parlement et des législatures d'améliorer le statut du français et de l'anglais ou de l'une de ces langues, ou d'en développer l'usage.

CONFIDENTIAL

Official Languages of Canada

Sections 16 to 22 deal with the status and use of English and French at the federal level in Canada, preserve the existing rights as to their use at the provincial level and continue whatever rights or privileges as may exist in Canada with respect to languages other than English and French.

SECTION 16 - OFFICIAL STATUS AND USE OF ENGLISH AND FRENCH

Section 16(1) incorporates the provisions of section 2 of the Official Languages Act making English and French the official languages of Canada with equal rights and privileges as to their use in all institutions of government at the federal level.

This means that each language is for federal purposes an officially recognized language and that each is an equal working language within the federal government. It does not mean that the government as a manager may not continue to designate language positions in the public service as requiring one or both languages.

The meaning of section 2 of the Official Languages Act has been addressed in two cases. In 1976, Joyal v. Air Canada in the Quebec Superior Court held that section 2 provided a right for use of both languages as languages of work in the public service. This was confirmed in 1977 by the Federal Court of Appeal in Gens de l'Air v. Lang, but in that case it was also held that laws could specify the circumstances in which one or other of the languages must be used. This is likely to be the interpretation given to section 16(1), namely a right subject to reasonable limits.

Section 16(2) assures that, despite the specific provisions in the Charter dealing with the use of English and French, nothing prevents Parliament or the legislatures from providing for more extensive use or status of one or both of the two languages. Consequently, Parliament may, as it has in the Official Languages Act, provide for the use of both languages in public notices, court judgments, services to the travelling public. Similarly, provinces may provide, as New Brunswick and Quebec have, that one or both languages are the official language(s) of the province and spell out the circumstances in which they are to be used. (This does not mean that Quebec and Manitoba can limit the use of both languages in circumstances where there is now a constitutional provision governing their use, ie. section 133 of the BNA Act and section 23 of the Manitoba Act.)

Article 10 of the Victoria Charter provided that English and French were to be the official languages of Canada and this was recommended by the Joint Parliamentary Committee in 1972. The CBA study in 1978 endorsed this approach adding that the two languages should be given equality of status at the federal level. The Canadian Unity Task Force simply called for entrenchment of the principle of equality of status, rights and privileges of the two languages for all purposes declared by Parliament at the federal level. This was the approach taken in C-60.

Proceedings of Parliament

17. Everyone has the right to use English or French in any debates and other proceedings of Parliament.

17. Chacun a le droit d'employer la langue officielle de son choix dans les débats et travaux du Parlement.

Travaux du Parlement

CONFIDENTIAL

SECTION 17 - LANGUAGE OF PROCEEDINGS IN PARLIAMENT

This section provides that any person has the right to use either English or French in the debates and other proceedings of Parliament. This is a restatement of the right now found in section 133 of the BNA Act, but it makes clear that the right extends to committee proceedings as well, and covers witnesses appearing before such committees as well as members themselves.

This adds nothing new to the existing practices in Parliament. The Victoria Charter included a similar provision and all reports and studies since that time have recommended placing this right in an entrenched Charter. It was included in C-60.

Parliamentary statutes and records

18. The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

Documents parlementaires

18. Les lois, les archives, les comptes rendus et les procès-verbaux du Parlement sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.

SECTION 18 - LANGUAGE OF STATUTES, RECORDS AND JOURNALS

This section requires that the statutes, records and journals of Parliament be printed and published in both English and French and makes both language versions of these documents equally authoritative.

This is essentially the same as the requirements now specified under section 133 of the BNA Act, as interpreted by the Supreme Court in the Blaikie and Forest cases of 1979.

Similar provisions were contained in the Victoria Charter and reports and studies since that time have recommended inclusion of a provision the same as this. It may be noted that not only are both versions of the statutes to be authoritative (as now required by the Official Languages Act), but also both versions of the records and journals. In C-60, provision was made only for the statutes to be equally authoritative in both languages, but it appears to make sense, in light of the Blaikie case, that the official records of Parliament also be equally authoritative.

Proceedings in courts established by Parliament

19. Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

19. Chacun a le droit d'employer la langue officielle de son choix dans toutes les affaires dont sont saisis les tribunaux établis par le Parlement et dans tous les actes de procédure qui en découlent.

Procédures devant les tribunaux établis par le Parlement

CONFIDENTIAL

SECTION 19 - LANGUAGE IN THE COURTS

This section simply reproduces in more grammatically correct terms those provisions of section 133 of the BNA Act providing for the use of English and French in all courts established by Parliament -- the Supreme Court, the Federal Court and other judicial or quasi-judicial tribunals. It entitles any person to use either language before these courts, orally or in writing, and to have processes issued by the courts in either language.

This does not mean that all the judges of the courts must be bilingual; it does mean that the courts must have the necessary facilities available to enable the use of either language. This is now the case in all federally constituted courts. Judgments of the courts will continue to be published in both languages pursuant to the Official Languages Act.

This provision is similar to that contained in C-60. While the Victoria Charter contained broader provisions dealing with provincial courts as well, it essentially incorporated the rights now found in section 133 with respect to federally constituted courts. This is equally the case with respect to the Joint Parliamentary Committee report of 1972, the CBA study of 1978 and the Canadian Unity Task Force Report of 1979.

Communications by public with federal institutions

20. Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, as he or she may choose, and has the same right with respect to any other office of any such institution where that office is located within an area of Canada in which it is determined, in such manner as may be prescribed or authorized by Parliament, that a substantial number of persons within the population use that language.

Communications entre les administrés et les institutions fédérales

20. Chacun a, au Canada, à titre privé, droit à l'emploi de la langue officielle de son choix pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services; il a le même droit à l'égard de tout autre bureau de ces institutions situé dans une région du Canada où il est reconnu, conformément aux modalités prévues ou autorisées par le Parlement, qu'une partie importante de la population emploie la langue qu'il a choisie.

CONFIDENTIAL

SECTION 20 - LANGUAGE OF COMMUNICATIONS WITH FEDERAL GOVERNMENT

This section would provide a right to any member of the public in Canada to use English or French in communicating with or receiving available services from institutions of government at the federal level.

This right would pertain

(a) in regard to any head or central office of a federal institution anywhere in Canada, and

(b) in regard to any other office of a federal institution located in any area of Canada where Parliament determines that a substantial number of persons in that area use the minority language.

At present there are no constitutional guarantees respecting the language of services to the public. The only provisions are those found in sections 9 and 10 of the Official Languages Act. What section 20 would do is give a constitutional guarantee that in the circumstances described there would be a right to have such services. It would not abrogate the more extensive provisions found in the Official Languages Act; these would continue and could be added to by Parliament.

The new provisions would mean that a member of the public would have an absolute right to communicate with and receive services from a head or central office of a federal institution wherever it may be located. Thus one could exercise these rights with the Privy Council Office in Ottawa, the Department of Veterans Affairs in Charlottetown or Air Canada in Montreal. In addition this right would exist with respect to any other office (a local UIC office or a regional office of Transport) in any area designated by Parliament.

It may be criticized that this latter right is dependent upon Parliament deciding where there are "sufficient numbers" to warrant such service whereas this issue is to be ultimately determined by the courts in respect of minority language education rights. In response to this it may be said that the right to minority language education is more basic than the right to communicate with the government but this is not a very compelling argument. There may thus be considerable pressure to make the provisions of this section and section 23 parallel.

The provisions of this section are very similar to those contained in the Victoria Charter. The Joint Parliamentary Committee in 1972 recommended that there should be a constitutional right for "every person to communicate in either language with any department or agency of the Government of Canada". The CBA study in 1978 took a more realistic approach in recommending provisions similar to those in section 20, as did the Canadian Unity Task Force in 1979.

Sections 9 and 10 of the Official Languages Act provide as follows:

DUTIES OF DEPARTMENTS, ETC., IN RELATION TO OFFICIAL LANGUAGES

Services to public in both languages in certain locations

9. (1) Every department and agency of the Government of Canada and every judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to an Act of the Parliament of Canada has the duty to ensure that within the National Capital Region, at the place of its head or central office in Canada if outside the National Capital Region, and at each of its principal offices in a federal bilingual district established under this Act, members of the public can obtain available services from and can communicate with it in both official languages.

Services to public in other locations

(2) Every department and agency of the Government of Canada and every judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to an Act of the Parliament of Canada has, in addition to but without derogating from the duty imposed upon it by subsection (1), the duty to ensure, to the extent that it is feasible for it to do so, that members of the public in locations other than those referred to in that subsection, where there is a significant demand therefor by such persons, can obtain available services from and can communicate with it in both official languages. 1968-69, c. 54, s. 9.

Services to travelling public in Canada or elsewhere

10. (1) Every department and agency of the Government of Canada and every Crown corporation established by or pursuant to an Act of the Parliament of Canada has the duty to ensure that, at any office, location or facility in Canada or elsewhere at which any services to the travelling public are provided or made available by it, or by any other person pursuant to a contract for the provision of such services entered into by it or on its behalf on and after the 7th day of September 1969, such services can be provided or made available in both official languages.

Services elsewhere than in Canada

(2) Every department and agency described in subsection (1), and every Crown corporation described therein that is not expressly exempted by order of the Governor in Council from the application of this subsection in respect of any services provided or made available by it, has the duty to ensure that any services to which subsection (1) does not apply that are provided or made available by it at any place elsewhere than in Canada can be so provided or made available in both official languages.

Exception re s. (1)

(3) Subsection (1) does not apply to require that services to the travelling public be provided or made available at any office, location or facility in both official languages if, at that office, location or facility, there is no significant demand for such services in both official languages by members of the travelling public or the demand therefor is so irregular as not to warrant the application of subsection (1) to that office, location or facility. 1968-69, c. 54, s. 10.

DEVOIRS DES MINISTÈRES, ETC., EN CE QUI A TRAIT AUX LANGUES OFFICIELLES

Services au public dans les deux langues en certains endroits

9. (1) Il incombe aux ministères, départements et organismes du gouvernement du Canada, ainsi qu'aux organismes judiciaires, quasi-judiciaires ou administratifs ou aux corporations de la Couronne créés en vertu d'une loi du Parlement du Canada, de veiller à ce que, dans la région de la Capitale nationale d'une part et, d'autre part, au lieu de leur siège ou bureau central au Canada s'il est situé à l'extérieur de la région de la Capitale nationale, ainsi qu'en chacun de leurs principaux bureaux ouverts dans un district bilingue fédéral créé en vertu de la présente loi, le public puisse communiquer avec eux et obtenir leurs services dans les deux langues officielles.

Services au public dans d'autres endroits

(2) Tout ministère, département, et organisme du gouvernement du Canada et tout organisme judiciaire, quasi-judiciaire ou administratif ou toute corporation de la Couronne créés en vertu d'une loi du Parlement du Canada ont, en sus du devoir que leur impose le paragraphe (1), mais sans y déroger, le devoir de veiller, dans la mesure où il leur est possible de le faire, à ce que le public, dans des endroits autres que ceux mentionnés dans ce paragraphe, lorsqu'il y a de sa part demande importante, puisse communiquer avec eux et obtenir leurs services dans les deux langues officielles. 1968-69, c. 54, art. 9.

Services aux voyageurs au Canada ou ailleurs

10. (1) Il incombe aux ministères, départements et organismes du gouvernement du Canada, ainsi qu'aux corporations de la Couronne, créés en vertu d'une loi du Parlement du Canada, de veiller à ce que, si des services aux voyageurs sont fournis ou offerts dans un bureau ou autre lieu de travail, au Canada ou ailleurs, par ces administrations ou par une autre personne agissant aux termes d'un contrat de fourniture de ces services conclu par elles ou pour leur compte après le 7 septembre 1969, lesdits services puissent y être fournis ou offerts dans les deux langues officielles.

Services ailleurs qu'au Canada

(2) Il incombe aux ministères, départements et organismes mentionnés au paragraphe (1), et aux corporations de la Couronne y mentionnées qui ne sont pas expressément exemptées, par décret du gouverneur en conseil, de l'application du présent paragraphe relativement à des services fournis ou offerts par eux, de veiller à ce que les services, auxquels ne s'applique pas le paragraphe (1), fournis ou offerts par eux partout ailleurs qu'au Canada puissent l'être dans les deux langues officielles.

Exception au par. (1)

(3) Le paragraphe (1) n'exige pas l'emploi des deux langues officielles pour des services aux voyageurs fournis ou offerts dans un bureau ou autre lieu de travail si la demande de services dans les deux langues officielles, de la part des voyageurs, y est faible ou trop irrégulière pour justifier l'application du paragraphe (1). 1968-69, c. 54, art. 10.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

21. Les articles 16 à 20 n'ont pas pour effet, en ce qui a trait à la langue française ou anglaise ou à ces deux langues, de porter atteinte aux droits, privilèges ou obligations qui existent ou sont maintenus aux termes d'une autre disposition de la Constitution du Canada.

Maintien en vigueur de certaines dispositions

SECTION 21 -- PRESERVATION OF EXISTING OFFICIAL LANGUAGE RIGHTS

This section makes it clear that sections 16-20 do not exhaust or abrogate existing rights or obligations respecting French or English now provided for in the constitution.

This is particularly important now that the Charter does not deal with language rights at the provincial level. Consequently, the provisions of section 133 of the BNA Act relating to Quebec and section 23 of the Manitoba Act will continue to apply so that in Quebec and Manitoba the use of English and French in the legislatures, the statutes and the courts will continue to apply.

However, no provisions are made in the Charter for the institutional use of English and French in the other provinces. These will be left to be dealt with by provincial laws as is now the case. At the same time if provinces, such as New Brunswick, wish to entrench institutional language rights at the provincial level (eg. the right to use both languages in the legislatures, the statutes, the courts and in services to the public) this can be done by appropriate amendments to section 133 of the BNA Act.

It might also be noted here that existing federal laws dealing with language rights will continue to have application in the provinces. These are section 11 of the Official Languages Act which provides for a witness in any criminal proceeding to give evidence in either English or French and section 462.1 of the Criminal Code which gives an accused the right to have his trial heard by a judge and/or jury who speak the official language of the accused. The provision in the Criminal Code was enacted in 1978 and is now in force for New Brunswick, Ontario and the Territories. Its provisions for bringing it into force read as follows:

Coming into force in any province

6. (1) Sections 1 and 5, other than subparagraph 462.1(1)(*a*)(ii) of the *Criminal Code* as enacted by section 1, shall come into force in any province only on a day fixed in a proclamation declaring those sections to be in force in that province.

Entrée en vigueur dans une province

6. (1) Les articles 1 et 5 à l'exception du sous-alinéa 462.1(1)*a*)(ii) du *Code criminel*, tel qu'édicté par l'article 1, n'entrent en vigueur dans une province qu'à une date fixée par proclamation à cet effet.

Idem

(2) Subparagraph 462.1(1)(*a*)(ii) of the *Criminal Code*, as enacted by section 1, shall come into force in any province only on a day fixed in a proclamation declaring that subparagraph to be in force in that province and, for greater certainty, on and after that day but not before that day, Part XIV.1 of the *Criminal Code* applies with respect to a person accused in that province of an offence punishable on summary conviction.

Idem

(2) Le sous-alinéa 462.1(1)*a*)(ii) du *Code criminel*, tel qu'édicté par l'article 1, n'entre en vigueur dans une province qu'à une date fixée par proclamation à cet effet et, pour plus de certitude, la Partie XIV.1 du *Code criminel* s'applique, à partir de ce jour seulement, à toute personne accusée dans cette province d'une infraction punissable par voie de déclaration sommaire de culpabilité.

Coming into force of section 2

(3) Section 2 shall come into force on the day on which sections 1 and 5, other than subparagraph 462.1(1)(*a*)(ii) of the *Criminal Code* as enacted by section 1, come into force in the Province of Quebec.

Entrée en vigueur de l'article 2

(3) L'article 2 entre en vigueur le jour où les articles 1 et 5 à l'exception du sous-alinéa 462.1(1)*a*)(ii) du *Code criminel*, tel qu'édicté par l'article 1, entrent en vigueur dans la province de Québec.

Coming into force of section 3

(4) Section 3 shall come into force on the day on which sections 1 and 5, other than subparagraph 462.1(1)(*a*)(ii) of the *Criminal Code* as enacted by section 1, come into force in the Province of Manitoba.

Entrée en vigueur de l'article 3

(4) L'article 3 entre en vigueur le jour où les articles 1 et 5 à l'exception du sous-alinéa 462.1(1)*a*)(ii) du *Code criminel*, tel qu'édicté par l'article 1, entrent en vigueur dans la province du Manitoba.

nal Code as enacted by section 1, come into force in the Province of Manitoba.

Coming into force of section 4

(5) Section 4 shall come into force on the later of the days on which sections 1 and 5, other than subparagraph 462.1(1)(*a*)(ii) of the *Criminal Code* as enacted by section 1, come into force in the Province of Quebec and in the Province of Manitoba.

Consultation

(6) No proclamation may be issued under subsection (1) or (2) unless the Minister of Justice and the Attorney General of the relevant province have consulted together with a view to ensuring the orderly implementation of the provisions to which the proclamation would relate.

Where no agreement reached

(7) Where, following consultation pursuant to subsection (6), the Minister of Justice and the Attorney General of the relevant province have not reached agreement as to an appropriate date for implementation of the rights that would be provided by the issuance of a proclamation under subsection (1) or (2), no proclamation may be issued under whichever of those subsections is applicable fixing a date that is earlier than two years after the date of issuance of the proclamation.

dicté par l'article 1, entrent en vigueur dans la province du Manitoba.

Entrée en vigueur de l'article 4

(5) L'article 4 entre en vigueur le jour où les articles 1 et 5 à l'exception du sous-alinéa 462.1(1)*a*)(ii) du *Code criminel*, tel qu'édicté par l'article 1, entrent en vigueur dans la province de Québec ou dans la province du Manitoba, la plus éloignée de ces dates étant retenue.

Consultation

(6) Aucune proclamation ne peut être lancée en vertu des paragraphes (1) ou (2), sauf si le ministre de la Justice et le procureur général de la province concernée se sont consultés dans le but d'assurer la mise en œuvre efficace des dispositions qui seraient visées par la proclamation.

Absence d'accord

(7) Lorsque, après les consultations visées au paragraphe (6), le ministre de la Justice et le procureur général de la province concernée ne peuvent s'entendre sur une date permettant de donner effet aux droits qui résulteraient d'une proclamation en vertu des paragraphes (1) ou (2), aucune proclamation en vertu de ces paragraphes ne peut être lancée fixant une date qui est antérieure à l'expiration de la période de deux ans qui suit son lancement.

CONFIDENTIAL
October 10,1980.

SECTION 21 - CHARTER OF RIGHTS

BRIEFING NOTE -- CHARTER OF RIGHTS --
LANGUAGE RIGHTS AT PROVINCIAL LEVEL

Question: Why does the Charter of Rights, unlike the draft Charter tabled by the Prime Minister at the First Ministers Conference in September, not include provision for institutional language rights in Ontario and New Brunswick?

Answer: The draft federal Charter tabled at the FMC in September contained provisions for institutional language rights (ie. use of English and French in legislative bodies, statutes, courts and in providing services to the public) at both the federal and provincial levels of government.

Apart from New Brunswick, there was little provincial support at the FMC for inclusion of these provisions. Consequently, when the federal government decided to proceed with the Proposed Resolution now before Parliament, it was decided to maintain the status quo with respect to institutional language rights at the provincial level. Thus, the institutional language rights provisions of the Charter are confined to the federal government level (sections 16-20).

The only reference to institutional language rights at the provincial level is in section 21 which, as noted above, simply preserves the status quo. What this provision means is that the existing constitutional rights respecting the use of English and French in the legislative debates, the statutes and the courts in Québec (under section 133 of the BNA Act) and Manitoba (under section 23 of the Manitoba Act) are continued.

Provinces such as New Brunswick, that may want to entrench similar language rights for their populations, will be able to do so by an amendment to the constitution agreed to by the province concerned and the Parliament of Canada (sections 34 and 43 of the Constitution Act, 1980).

Question: Is the omission from the Charter of institutional language rights for Ontario the result of bargaining between Prime Minister Trudeau and Premier Davis?

Answer: No. As indicated earlier, the federal government took a policy decision when deciding to proceed with the Proposed Resolution not to include in the Charter any provision dealing with institutional language rights at the provincial level. This decision was taken without any bargaining with Premier Davis.

Possible Supplementary Question

Question: Since the federal government decided as a matter of policy not to deal in the Charter with institutional language rights at the provincial level, why did it then decide to include minority language education rights?

Answer: This is a rather different matter. Here, the provincial Premiers had all agreed at their meeting in Montreal in February 1978 on the principle that each child of the French or English speaking minority in a province is entitled to receive his or her education in the primary and secondary schools in the minority language wherever numbers warrant. Indeed, Premier Levesque had offered to enter into reciprocal agreements with other provinces to give effect to this principle. Surely it is better, as the Task Force on Canadian Unity suggested, to entrench this principle in the constitution where it can be guaranteed and not left simply to provincial reciprocity.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

22. Les articles 16 à 20 n'ont pas pour effet de porter atteinte aux droits et privilèges, antérieurs ou postérieurs à l'entrée en vigueur de la présente charte et découlant de la loi ou de la coutume, des langues autres que le français ou l'anglais.

Droits préservés

SECTION 22 - PROTECTION OF OTHER LANGUAGE RIGHTS

This section is designed to ensure that any rights or privileges that exist with respect to the use of languages other than English and French are not impaired by the provisions of the Charter. Thus if there is a right to use Ukranian or Cree, for example, in public meetings, courts or other institutions in certain parts of Canada, these rights are not interfered with.

A provision similar to this was contained in the Victoria Charter and in C-60. The Joint Parliamentary Committee in 1972 recommended that provinces be empowered to declare third languages equal in status with English and French. (They can do this without any constitutional authorization.) The CBA study proposed a constitutional provision authorizing governments to assist ethnic groups to promote their languages. (Again, no constitutional authority is required to enable this.) The Quebec Liberal Party Beige Paper, of course, recommended that the native languages be placed on an equal footing with English and French in the areas of services to the public, education and penal proceedings in courts.

Minority Language Educational Rights

Droits à l'instruction dans la langue de la minorité

Language of instruction

23. (1) Citizens of Canada whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside have the right to have their children receive their primary and secondary school instruction in that minority language if they reside in an area of the province in which the number of children of such citizens is sufficient to warrant the provision out of public funds of minority language educational facilities in that area.

Langue d'instruction

23. (1) Les citoyens canadiens dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de leur province de résidence ont le droit de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité dans toute région de la province où le nombre des enfants de ces citoyens justifie la mise sur pied, au moyen de fonds publics, d'installations d'enseignement dans cette langue.

Continuity of language of instruction

(2) Where a citizen of Canada changes residence from one province to another and, prior to the change, any child of that citizen has been receiving his or her primary or secondary school instruction in either English or French, that citizen has the right to have any or all of his or her children receive their primary and secondary school instruction in that same language if the number of children of citizens resident in the area of the province to which the citizen has moved, who have a right recognized by this section, is sufficient to warrant the provision out of public funds of minority language educational facilities in that area.

Continuité d'emploi de la langue d'instruction

(2) Le citoyen canadien qui change de résidence d'une province à une autre a le droit de faire instruire ses enfants, aux niveaux primaire et secondaire, dans la langue, française ou anglaise, dans laquelle l'un de ses enfants recevait son instruction dans la province de son ancienne résidence, dans toute région de sa nouvelle province de résidence où le nombre d'enfants de citoyens jouissant d'un droit reconnu au présent article justifie la mise sur pied, au moyen de fonds publics, d'installations d'enseignement dans cette langue.

CONFIDENTIAL

Minority Language Educational Rights

SECTION 23 - MINORITY LANGUAGE EDUCATIONAL RIGHTS

Section 23(1) establishes a basic new right respecting the language of educational instruction for children of the English or French speaking minority population in each province. It provides the conditions under which the right to minority language education may be exercised.

First, the right pertains only to citizens of Canada resident in a province or territory.

Second, the citizen must have as his first language learned and still understood that of the English or French linguistic minority of the population of the province or territory of residence.

Third, the citizen must reside in an area in the province or territory where there are a sufficient number of children of similar citizens to warrant the provision of minority language educational facilities.

Put in concrete terms, in Québec a citizen whose first language learned and still understood is English will have a right to have his or her children receive their primary and secondary education in English when that person resides in an area of the province where there are enough children of English speaking citizens to warrant minority language schooling. In the other provinces and the territories the same situation would pertain for French speaking citizens.

The right is confined to citizens to meet the provincial concerns (primarily Québec) that immigrants would, if they also had the right, tend to assimilate with the minority language group when the desire is to have them identify with the majority language population. Similarly, the right is limited to those whose "mother tongue" is French or English since those are the two languages which the section is seeking to foster and protect.

Consequently, the provision will work hardships on the non-citizens and those whose "mother tongue" is neither English or French, but it must be remembered that the essential goal of this right is to preserve the cultural heritage of the two founding language groups.

It might be noted that section 23(1) would create the following situation with respect to immigrants whose first language is English or French. If an English speaking person immigrates to Quebec from Britain, Jamaica or Pakistan then during the period (minimum three years) before becoming a citizen he would have no right to send his children to English language schools, and under Bill 101 they would have to attend French language schools. However once the immigrant became a citizen he would have the right to have his children educated in English.

Equally, a French speaking immigrant coming to Ontario would not during the first three years have a right under this section to send his children to French language schools (although provincial law may permit him to do this in any case). However, after he became a citizen, he would have this right under the Charter.

As for the question of "where numbers warrant", this will be a matter for the provinces to determine in the first instance, but where they fix the numbers so high as to effectively nullify the right, the courts will step in to rule that the law is invalid.

The provinces would also be able to enact reasonable laws for determining what the "first language learned and still understood" by a citizen is. This could include the specification of certain presumptions of "first language" based, for example, on the place from which the person comes or the language in which he has been educated. Again, such laws would have to be reasonable.

The provinces will also have to enact laws to determine whether both or only one parent is required to make the decision as to whether the children are to go to a minority language school. However, the right itself will arise whenever one of the parents has as his or her first language learned that of the minority language population of the province.

Section 23(2) provides for an exception to the general rule in section 23(1) that the "mother tongue" of the citizen parents governs. This provision permits a citizen who moves from one province to another after any of his children are in school to have all his children continue their education in the language in which they started. Thus, for example, an Italian speaking citizen resident in Québec who has enrolled his children in French language schools would, upon his move to Toronto, have the right to continue his children's education in French even though under section 23(1) he would not have this right. This right, like the first, is subject to there being sufficient children in the area to which he moves having a right to French language instruction.

It is important to note that these rights are minimum guarantees and do not preclude the provinces from providing greater rights, as some of them now do, such as allowing immigrants and citizens to send their children to minority or majority language schools as they may choose.

The main impact of the rights under this section are two-fold. First, in Québec it would override the provision of Bill 101 which limits the right to English language education to children one of whose parents received his or her primary education in English in Quebec. Under section 23 children of English speaking citizens (wherever the citizen may have been educated) will be able to send their children to English language schools. Second, outside Québec it will ensure that children of the French speaking minorities will have a right to a French language education for their children.

This provision will be attacked by many provinces on grounds that it is imposing upon them an obligation in a field of exclusive provincial jurisdiction and constitutionalizing a right which the Canadian Unity Task Force said (at least in its formal recommendations) should be left to be dealt with by provincial laws until all provinces had agreed on a common policy.

In this regard it should be noted that at the Premiers' Conference of February 1978 in Montreal the following principle was unanimously accepted:

> "Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary and secondary schools in each province wherever numbers warrant."

The Premiers did qualify this by stating:

> "It is understood, due to exclusive jurisdiction of provincial governments in the field of education, and due also to wide cultural and demographic differences, that the implementation of the foregoing principle would be as defined by each province."

This accord was noted by the Canadian Unity Task Force at page 109 of its report where it is stated that given the unanimity on the principle, it should be entrenched in the constitution.

In the past the federal government has taken the position that there should be freedom of choice in educating children in English or French. However, recognizing the particular hardship this might impose on the provinces, particularly Québec, it is now proposing a more limited minority language education right.

The federal proposal in C-60 was also a minority language right limited to citizens but based on the "primarily spoken language" of the parent. The problem with this definition is its ambiguity and the difficulty in applying it. Since a person could have both English or French as his "primarily spoken languages", and since those whose mother tongue was neither English or French could readily acquire either English or French as his "primarily spoken language", this approach would have amounted in effect to a free choice of language education for children.

The CBA study of 1978 opted for the free choice approach, while the Canadian Unity Task Force in 1979 proposed adoption of the principle enunciated by the Premiers in 1978, including a similar right for children changing province of residence. The Québec Liberal Party Beige Paper proposed the right of minority language choice, based upon mother tongue. The Joint Parliamentary Committee in 1978 did not pronounce decisively on this matter, but questioned how far constitutional guarantees might be used to promote language rights.

CONFIDENTIAL

October 7, 1980.

BRIEFING NOTE -- EFFECT OF CHARTER OF RIGHTS ON QUEBEC BILL 101 LANGUAGE OF EDUCATION PROVISIONS

Question: What would be the effect of the minority language education provisions in the Charter of Rights on the language of education provisions of Québec's Bill 101?

Answer: Section 23 of the Charter has been developed in a manner so as to cause the least disruptive effect on Québec's language law, while at the same time ensuring that Canadian citizens in Québec or moving to that province, whose first language is English, have the same rights as French speaking citizens in the other provinces and the Territories.

Bill 101 provides in general that children in Québec are to be educated in French. The exception is for children whose mother or father has been educated at the elementary school level in English in Québec. Thus, Bill 101 requires not only that all non-English-speaking children attend French language schools. It also places the same requirement on English-speaking children in Québec who don't fall into the exception as well as those who move to that province from elsewhere in Canada.

It is to protect these latter groups that Section 23 of the Charter is directed in the same way as it will protect French-speaking children in the rest of Canada. What it provides is that in Québec a parent, who is a Canadian citizen and whose first language is English, will have the right to send his or her children to English schools. Thus, it will not provide this right to immigrants even though they may be English speaking, nor will it disrupt the general rule of Bill 101 that French is the usual language of instruction in that province. Indeed, Québec will still be able to require that all students graduating from school in that province have a proficiency in the French language.

Section 23 also provides that immigrants to Québec upon becoming citizens will be able to have their children educated in the first language of these parents where this is English. However, this should cause no significant impact for two reasons. First, as immigrants these parents will have to send their children to French language schools in Québec, and they are not likely to change their language of instruction to English after this period. Second, the number of English-speaking immigrants to Québec is now only about 4,000 per year, so the impact of these numbers on the French language is not likely to be great.

Finally, section 23 provides that where a citizen with children in school moves from another province to Québec he or she will have the right to continue to have all of his or her children continue their education in English if that was the language in which they began their instruction outside Québec. This is essential to ensure continuity of language of education for children, and the same rule applies to French language students who move with their parents from Québec to another part of Canada.

What, in fact, the Charter does is give constitutional effect to the principle agreed to by all Premiers in Montreal in 1978 that

> "Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or the secondary schools in each province wherever numbers warrant."

This, of course, goes further, as does the Charter, than the offer made by Premier Levesque to the other provinces in 1977. That offer was to enter into reciprocal arrangements with the other provinces whereby the same rights to English language instruction as were granted under Bill 101 (to children whose mother or father had received elementary education in Québec) would be extended to children moving from another province to Québec if that other province granted similar French language instruction to its Francophone minority.

The real problem with this so-called "Canada Clause" (apart from the fact that reciprocal agreements and legislated rights do not provide permanent guarantees to minority language education) is that in many of the English language majority provinces French-speaking parents will not have received their education in French simply because it is only in recent years that facilities for providing French language education have existed.

In sum, the Charter provisions will make some change in Bill 101 by guaranteeing the right of children of all English-speaking citizens in Québec to receive their elementary and secondary school instruction in English wherever numbers warrant. But, more important, it would give this same right as a constitutional guarantee to children of Canadian citizens in other parts of Canada whose first language is French -- to have their education in the French language.

Undeclared Rights and Freedoms

Undeclared rights and freedoms

24. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada.

Droits et libertés non expressément visés

Droits et libertés non expressément visés

24. La présente charte ne nie pas l'existence des droits et libertés qu'elle ne garantit pas expressément et qui existent au Canada, notamment les droits et libertés des peuples autochtones du Canada.

SECTION 24 - UNDECLARED RIGHTS AND FREEDOMS

This section is designed to ensure that by guaranteeing certain rights and freedoms specifically in the Charter, this does not intend to deny the existence of other rights including those that may pertain to the native people. In other words, the Charter does not pretend to be exhaustive of the rights of Canadians.

For example, certain rights found in the Canadian Bill of Rights do not appear in the Charter: property rights and the right to a fair hearing. As recognized rights under Canadian law, they would continue to be recognized.

Similarly, the native peoples claim the existence of certain rights under treaties and as aboriginal rights. As these rights may become crystalized by court decisions or by negotiation, they will not be denied simply because they are not enumerated in the Charter.

This provision has been redrafted from the one in C-60 to take account of the views of the Joint Parliamentary Committee that native rights should not be limited to those under the Royal Proclamation of 1763.

In this regard, it may be noted that there are certain other provisions of the Charter that bear particularly on the matter of native peoples rights. These are:

- section 22 which would preserve any legal or customary rights and privileges with respect to the use of native languages.

- section 15(1) that protects against discrimination based on race and sex. This would be particularly relevant to the provision of the Indian Act (section 12) which discriminates against Indian women who marry non-Indians. This provision would almost certainly be found in violation of section 15(1).

- section 15(2) which would authorize "affirmative action" programs for native peoples who are disadvantaged as a result of past discrimination or inaction.

General

Primacy of Charter

25. Any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

Dispositions générales

Primauté de la charte

25. La présente charte rend inopérantes les dispositions incompatibles de toute autre règle de droit.

CONFIDENTIAL

General

SECTION 25 - PRIMACY OF CHARTER

This section is intended to make explicit the overriding effect of the Charter where any law, whether statutory or common law, is inconsistent with a provision of the Charter. The provision is important since it directs the courts to strike down any law that is inconsistent, thus avoiding the reluctance shown by the courts to doing this under the existing Bill of Rights.

A similar provision was found in C-60. However, it applied only to individual rights and not to collective rights. In this Charter no such distinction is made and consequently the courts may apply the full force of the Charter in testing the validity of any law.

There may be some concern that this section addresses only laws that are in conflict with Charter provisions and does not deal with administrative actions taken pursuant to such laws. This is a deliberate omission since the administrative action can be attacked by attacking the law which authorized it.

There is no provision in this Charter, as there was in C-60, expressly enabling a person whose rights are infringed to apply to a court for a declaration or injunction where no other remedy is available. This provision was supported by the Joint Parliamentary Committee in 1978 which felt that it should go even farther and oblige the courts to grant whatever remedy was appropriate for infringement of rights.

In earlier drafts of the proposed Charter, including the one made public by the federal government on July 9, 1980, provision was made for a court to grant whatever remedy or relief was appropriate for a breach of the Charter rights. After discussion with the provinces which objected to this provision, it was decided to delete the provision. This was done because it was felt that the courts already possess sufficient powers to grant appropriate remedies for breaches of the law by means of declarations and injunctions, and that in the common law tradition they would develop the necessary remedies for Charter breaches as the cases arise. [However, having spelled out the specific obligation on the courts to strike down laws contravening the Charter, it may be argued that no other remedies are available as, for example, where an accused is denied access to a lawyer. There will likely be great pressure from civil libertarians to have a remedies provision put in the Charter.]

Laws respecting evidence

26. No provision of this Charter, other than section 13, affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto.

Droit sur la preuve

26. A l'exception de l'article 13, les dispositions de la présente charte ne portent pas atteinte aux lois sur l'admissibilité de la preuve en justice, ni aux pouvoirs du Parlement et des législatures de légiférer en cette matière.

SECTION 26 - PRESERVATION OF EXISTING EVIDENCE LAWS

This section states that, except for the right respecting the protection against self-crimination (section 13), nothing in the Charter affects the existing rules on admissibility of evidence or the legislative powers to make laws on that subject.

This provision is a compromise with the provinces and relates to the legal rights respecting unlawful searches and seizures and denial of the right to counsel. Under similar provisions in the U.S. Bill of Rights, the American courts have held that a violation of these rights by the police results in any evidence obtained being ruled inadmissible. In other words, the U.S. courts have decided that the only effective means to control police from conducting unlawful or unreasonable searches and seizures or from denying an accused access to counsel is to refuse to admit evidence obtained in violation of these rights. This has resulted in many admitted offenders being set free because without such evidence a conviction could not be sustained.

In Canada, the law generally permits the admissibility of any evidence as long as it is relevant even though it may have been obtained by means that are not in accordance with the law. The provinces wanted this right enshrined in the constitution. The federal position was that the law relating to evidence is presently under review and is in a state of evolution. While agreeing that we did not favour the American rule of absolute exclusion in every instance of a right being violated, at the same time we could not agree to entrenching a rule of admissibility in all cases.

Consequently a compromise was arrived at whereby the Charter would provide that the rules respecting the admissibility of evidence, as they are laid down by the courts from time to time or by the legislators, would govern. This leaves open the question of how the courts will treat evidence which has been obtained in violation of Charter rights, rather than freezing any particular approach in the Charter.

This will be a very controversial provision since civil libertarians, and the Joint Parliamentary Committee in 1978, feel strongly that an entrenched Charter should explicitly empower the courts to exclude evidence which has been obtained in contravention of a Charter right. In our view this is not a satisfactory solution. The rule in the United States has not demonstrably reduced the incidence of police violations of basic rights; it has, however, enabled admitted criminals to be set free. The solution thus does not appear to lie in this approach but rather in providing more effective laws to discipline police who engage in denying basic legal rights.

The approach set out in this section would leave open to Parliament and the legislatures the power to either enact sanctions for violations of the particular rights or to make laws excluding the admissibility of illegally obtained evidence. It seems better to place the onus here rather than leaving to the judiciary the power to adopt rules similar to those in the United States.

Application to territories and territorial authorities

27. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

27. Dans la présente charte, les dispositions qui visent les provinces, leur législature ou leur assemblée législative visent également le territoire du Yukon, les territoires du Nord-Ouest ou leurs autorités législatives compétentes.

Application aux territoires

SECTION 27 - APPLICATION OF CHARTER TO TERRITORIES

This provision is designed to give the Charter the same effect in the Yukon Territory and Northwest Territories as it has in the provinces.

Legislative powers not extended

28. Nothing in this Charter extends the legislative powers of any body or authority.

28. La présente charte n'élargit pas les compétences législatives de quelque organisme ou autorité que ce soit.

Non-élargissement des compétences législatives

CONFIDENTIAL

SECTION 28 - NO EXTENSION OF LEGISLATIVE AUTHORITY

This section simply states the basic rule that nothing in the Charter is intended to affect the distribution of powers under the BNA Act as between Parliament and the provincial legislatures.

Some powers of both Parliament and the legislatures will be limited since neither will be able to enact laws contravening the Charter. However, vis à vis each other, the balance of power remains unchanged.

Application of Charter

Application of Charter

29. (1) This Charter applies

(*a*) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province and to all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have application until three years after this Act, except Part V, comes into force.

Application de la charte

Application de la charte

29. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, ainsi qu'à tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, ainsi qu'à tous les domaines relevant de cette législature.

Restriction

(2) Par dérogation au paragraphe (1), l'article 15 ne s'applique que trois ans après l'entrée en vigueur, exception faite de la partie V, de la présente loi.

CONFIDENTIAL

Application of Charter

SECTION 29 - APPLICATION OF CHARTER

This section makes clear, in section 29(1), that the Charter upon its adoption has immediate application throughout Canada at the federal, provincial and territorial levels.

Section 29(2), however, provides that the non-discrimination rights (set out in section 15) will have no application until three years after the adoption of the Charter. Since the non-discrimination rights will have an effect on a broad range of federal and provincial legislation, this delay period will be necessary to enable appropriate adjustments to be made to existing laws.

NOTE: No provision is made in the Charter for the repeal or modification of the Canadian Bill of Rights upon the entrenchment of the Charter.

Since the Charter replaces most but not all provisions of the Bill of Rights it will be necessary to consider amendments to the Bill of Rights to ensure that there is no conflict or overlap between its provisions and those of the Charter.

There are a few rights in the Bill of Rights that are not repeated in the Charter. For example, the Charter omits reference to the right to a fair hearing for determination of a person's rights and obligations, the right to counsel when compelled to testify, and the right to enjoyment of property. These we would want to continue in force at the federal level.

Similarly there are the provisions in the Bill of Rights requiring the Minister of Justice to examine all regulations and Bills before their adoption to determine if any of their provisions are inconsistent with provisions of the Bill of Rights. We would want to amend this to extend its application to the Charter, and it may be desirable to transfer this provision as amended to the Department of Justice Act which specifies the other duties and responsibilities of the Minister of Justice.

Citation

Citation

30. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

Titre

30. Titre de la présente partie: *Charte canadienne des droits et libertés*. Titre

CONFIDENTIAL

Citation

SECTION 30 - TITLE OF CHARTER

This section provides that the Charter shall be known as the Canadian Charter of Rights and Freedoms.

CONFIDENTIAL

October 20th, 1980.

BRIEFING NOTE

AMENDMENTS TO THE SENATE

UNDER THE CONSTITUTION ACT, 1980

(Sections 48 & 50)

The Court in the Senate reference indicated that, at present, most significant amendments must be made by the United Kingdom Parliament; however, less significant amendments might be made by the Canadian Parliament. Among the latter are the following: some changes to the qualifications of Senators (e.g.: property qualifications but not residency requirements); some changes to tenure (e.g.: imposing a retirement age of 75); changing the name of the Senate; and perhaps changes to increase the number of Senators, providing this does not alter the system of regional representation. Among the matters Parliament clearly could not amend, according to the Senate reference, are: the abolition of the Senate; changing the powers of the Senate to provide for a suspensive veto only; changing the proportion of Senators per province (e.g.: increasing the number of Senators from Alberta or B.C.); changing the residence qualifications of Senators; changing the method of appointment in a fundamental way (e.g.: provincial appointment or direct election).

Under the Constitution Act, changes to the Senate which require the use of the general amending formula (section 50) and, therefore the approval of the provinces, are: changes to the powers of the Senate (e.g.: to either abolish it or to provide for a suspensive veto); changes to the proportion of Senators per province; and changes to the residence qualifications of Senators. Such changes could also be made by approval of a national referendum under section 42.

All other aspects of Senate reform could be accomplished by Parliament alone pursuant to section 48. Thus, under the Constitution Act, 1980, amendments could be made to the Senate by the Canadian Parliament which now can only be made by the United Kingdom Parliament. Among such amendments, there is at least one which is significant: changing the method of appointment of Senators (e.g.: to allow for provincial appointment or direct election). It has been suggested that this matter is perhaps one that should be under the general amending formula (i.e. listed under section 50) since it is a matter which concerns the provinces as well as Parliament. If this change is pressed in Committee it is something to which the government could agree. However, for the reason indicated below, it is not a change that the government would likely want to initiate.

It is important to note that amendments made to the Senate by Parliament alone would in every case require the Senate itself to acquiesce in the amendment. Amendments made under the general amending formula, pursuant to section 41, however, could be made without Senate approval since section 43 provides that Senate opposition may be overridden by the House of Commons repassing the appropriate resolution. Such override could only occur in cases where the required number of provinces under section 41 have agreed to the amendment. When approval is sought by referendum the Senate, by virtue of section 42, would have to agree to the holding of the referendum.