

circled
revised
page 4, 1980

Social Policy and the
Constitution of Canada:

A brief to the Special Joint Committee
of the Senate and the House of Commons,
regarding the Proposed Resolution to
Her Majesty the Queen respecting the
Constitution of Canada

Canadian Council on Social Development
Karen Hill
Geoff Norquay
3 December 1980

Social Policy and the
Constitution of Canada:

A brief to the Special Joint Committee
of the Senate and the House of Commons,
regarding the Proposed Resolution to
Her Majesty the Queen respecting the
Constitution of Canada

Canadian Council on Social Development
Karen Hill
Geoff Norquay
3 December 1980

SUMMARY OF RECOMMENDATIONS

Section 1: Citizen Involvement in The Process of Constitutional Reform

1. The Council expresses its concern relating to the limitations on citizen involvement in the current constitutional reform process. The meaningful involvement of citizens in their government requires several facilitating factors: time, information, understanding of the issues, access to the decision-makers, opportunity for involvement, and opportunity to be heard. We are concerned that the current process offers few of these factors. We suggest that the federal government expand its funding to assist citizens' groups to become more knowledgeable and to participate more fully in constitutional reform.

Section 2: Comments on The Resolution

General

1. Much of the wording of the Resolution lack specificity and requires clarification. For example, the terms "reasonable" and "unreasonable" are frequently used in the Resolution, raising many unanswered questions. "Every citizen", "every person" and "everyone" are also used at several points in the Resolution and their meaning is not always clear.
2. The lack of a preamble reflects a limited vision of the purpose of the Constitution. The Council suggests that the Constitution should have a preamble that recognizes the history and nature of our country and describes the ideals and values to which Canadians aspire.
3. The lack of enforcement mechanisms limits the implementation of the Constitution.
4. The limited scope of the proposed charter of rights reflects a limited view of this essential aspect of citizenship as well as an unrealistic view of the ease with which future improvement will be possible.

Citizen Participation

1. We recommend that Section 2, Fundamental Freedoms be broadened to include wording consistent with the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights. In addition, we request clarification as to whether the

right to freedom of expression applies to registered charitable organizations and suggest it should.

2. We recommend that Section 3, Democratic Rights be clarified to include the right to hold office as well as the right to vote.

3. With respect to Section 7, Legal Rights, we recommend that this section be expanded to include the right to privacy.

4. In order that the Constitution may reflect a more comprehensive view of the fundamentals of democracy, we suggest the entrenchment of the principle of freedom of information and suggest that the Committee consider adding sections on the democratic and civil responsibilities of citizens.

Social Policy

1. Section 6 of the draft Resolution allows people the right to "pursue the gaining of a livelihood in any province." We recommend that Canadians be accorded the right to obtain employment as well as to "pursue" it.

2. Section 6 (3) (a) and (b) allows provinces to limit mobility, as long as such restrictions are not based on residence, and allow all levels of government to limit access to social services based on residence. We strongly recommend that residency not be allowed to become a criterion in determining eligibility for social services.

3. Section 15 (1) outlines grounds on which discrimination is prohibited. We believe that the grounds suggested are narrow in scope, omit major groups, and are inconsistent with Canada's international commitments. We recommend that the Committee alter this section to include "handicapping conditions", "socio-economic status", "marital status", "sexual orientation", and "political belief" and that the phrase "such as" preceding any listing of categories be added. We recommend addition of a separate section recognizing equality between the sexes.

4. Section 15 (2) appears to intend to allow affirmative action programs. We uphold that principle, but question the wording, and suggest wording consistent with the recommendation of the Canadian Human Rights Commission.

5. We believe that Section 24 regarding native rights is inadequate. We believe that all peoples of Canada should have an opportunity for full involvement in the process of Constitutional reform. We believe the Constitution should reflect previous commitments, and support the recognition of aboriginal and treaty rights in the Constitution.

6. Section 31 is apparently intended to enshrine the principle of equalization. We question the possible impact of this section on social programs where governmental jurisdiction is unclear, and recommend that the Committee seek to ensure that no change in current social program operation, funding or delivery will take place as a result of the clause.

Section 3: Social Rights

1. The Council recommends that the following social rights be entrenched in the Constitution:

- a) the right to employment and to protection against unemployment;
- b) the right to safe and healthy working conditions;
- c) the right to form and join trade unions;
- d) the right to an adequate standard of living with access to the necessities of life;
- e) the right to health care uncompromised by economic circumstances;
- f) the right of protection of the family;
- g) the right to education; and
- h) the right to social security and social insurance.

All of these rights are contained in the International Covenant on Social, Economic and Cultural Rights, to which Canada is a signator.

INTRODUCTION

The Canadian Council on Social Development is a national voluntary agency engaged in the formulation and promotion of just social policies. Nothing is so reflective of the character of a country and the quality of life of its people as the social policies it adopts. Because the constitution forms the basic framework through which social policies are created and implemented, our organization has taken a keen interest in the recent attempts of the federal and provincial governments to arrive at a consensus on the structure and content of Canada's new constitution.

The creation of a new constitution is a rare opportunity indeed for a nation and its people; all too often it is the result of war or revolution. Rarely do the people of a free and democratic country have the opportunity to define afresh those rights and freedoms to which they subscribe, and make them part of a living constitutional document.

Because of the historical rarity of Constitutional reform there are few people who can rightly claim to be experts. We do not present ourselves as experts in the field of constitutional law, however, we do have sixty years of experience in the formulation and promotion of social policy in this country, and it is from this vantage point that we offer our comments.

CONTEXT OF CONSTITUTIONAL REFORM

Constitutional reform in the 1980's will take place in a climate marked by distrust, uncertainty and financial concern. As well as social and economic shifts, the roles and relationship of governments may also change. The co-operative federalism of recent decades appears to be breaking down as provincial governments bring legal action against the federal government regarding Constitutional change, and control of natural resources.

In the 1980's, all legislative matters are overlaid with financial overtones. Some governments face serious fiscal deficits and others enjoy considerable surpluses. Though this is a recurring phenomenon, the positions of some of the players have changed, and former "have-not" provinces now hold favourable financial status.

In reacting to perceptions of expenditures being out of control, governments are responding by cutting funds for programs which appear to be expendable. These trends do not auger well for continuing efforts to deal with poverty and inequitable income distribution.

In this climate, those concerned with social development face a number of challenges. Many of those challenges will be coloured by events in the process of Constitutional reform. As governments work out distribution of powers and funding relationships, the future of programs for the sick, the troubled and the needy people of Canada hangs in the balance.

We have chosen to emphasize three areas of concern in our examination of the "Proposed Resolution for a Joint Address to Her Majesty the Queen regarding the Constitution of Canada." In Section One we examine the role citizen involvement has played in the process of constitutional reform. Section Two comments on implications of specific sections of the Resolution in relation to citizen involvement and social policy. In Section Three, we encourage the government to entrench social rights as an essential element of the Charter of Human Rights.

CITIZEN INVOLVEMENT

Current Process - Special Committee on the Constitution

The Canadian Council on Social Development has a long-standing interest in the ability of Canadians to take part in the decision making process which affect their lives. Citizen participation is one of the values on which our organization is based. Our recent publication "Access and The Policy-Making Process"¹ is a current

example of our commitment to sustain citizen involvement.

Canadians have not been adequately involved in the current process of constitutional reform. Though we recognize the continuing efforts over recent years to resolve the issues surrounding patriation of the Constitution, we are dismayed by the sudden haste with which the process is now taking place. We are concerned that the undue urgency constructs nearly insurmountable barriers to the public's ability to understand, respond and take part in Constitutional renewal. We must ask what over-riding public interest in being served by the excessive haste.

The meaningful involvement of citizens requires several facilitating factors--time, understanding of the issues, access to the decision makers, information, opportunity for involvement and opportunity to be heard.

The current process of constitutional reform offers few of these factors. Only after a wide expression of public concern was televising of proceedings allowed. The Committee is limited to meeting in Ottawa, though we understand the expenses of some witnesses may be borne by the Committee.

The Committee has of course heard these and other complaints before. However, we would be remiss in not demonstrating our clear objection to these barriers to citizen involvement.

The Process of Constitutional Reform

Constitution-making in Canada has always been more of a political process than a process belonging to and responding directly to Canadians at large. We believe a new constitution must be more than political, and that the views of all Canadians who want to contribute should be received in the process.

We acknowledge the role of Parliament in making laws and in governing the country, and we support the continuation of our current representative system of government. Our suggestion that citizen participation is vital in the making of a new Canadian Constitution

is not just an iconoclastic belief, but firmly grounded in the principles of democracy in which citizens' rights come before the rights of institutions.

As was pointed out in our recent study of citizen involvement in policy making, "The current federal system of government in Canada is not entirely within the traditional representative system because federal-provincial relations tend to overshadow the role of Parliament."² We believe that the development of our new Constitution is a task which must rise above intergovernmental relationships. Constitution-making is a larger task with greater obligation on parliamentarians than law-making. Its impact will be felt in this country, by each of us now, and by every person who lives here in the future.

The constitution of a country is more than a statement which sets out relationships between governments. A constitution is also more than a legal framework. It must be an expression of our history, our character, our values as well as our aspirations. If we are to obtain a Constitution that meets these high standards, then the people who will be most affected must have the rights, as well as full opportunity, and adequate information to take part in and contribute to its development. Therefore, we make the following requests:

- That funds within the Secretary of State Department's Assistance to Community Groups program be increased to provide support for groups wishing to educate themselves about Constitutional reform and participate in this process.

- That the Government of Canada take steps to encourage the direct participation of Canadians in Constitutional reform, through direct financial and resource assistance to further local efforts in increasing understanding and participation.

SECTION 1

GENERAL COMMENTS ON THE RESOLUTION

1. Wording of the Resolution

In many sections of the Resolution wording is vague. The terms

"reasonable" and "unreasonable," for example, require clarification in many sections of the Resolution, but their lack of specificity raises many unanswered questions. Of particular concern to us is the term "reasonable" as it relates to the quality of essential public services in Section 31 (1) (c).

Lack of consistency also causes confusion in various sections, no less than four terms describing persons are used. "Every citizen", "every person", "everyone" and "any member of the public" serve to describe the scope of individuals who would be affected by various sections. For example, in Section 6 (1) "Every citizen of Canada has the right to enter, remain in and leave Canada." Is this intended to mean that right is not available to landed immigrants? We believe that the Resolution should be clear about those cases where citizenship is intended to be a limiting factor, and should only be used in phrases appropriate to that intent.

Vague or inconsistent wording in this Resolution will undermine amending processes in the future.

The resolution to amend and patriate Canada's Constitution is too important to contain drafting errors. As Canada's Commissioner of Human Rights, Gordon Fairweather, stated in his presentation to you, "we must seek excellence from the beginning. Why should we settle for anything less?"

Finally, we suggest that the Resolution could be much improved, and made more comprehensible if a list of definitions were appended, as is often the case with new legislation.

2. Lack of Preamble

In addition to providing the legal framework for the country, ordering relationships among governments, and between the state and the people, our Constitution can also set down the ideals and values which our nation holds. Through a reasoned statement of purpose which recognizes our history and the nature of our country, our Constitution should declare the values to which we aspire.

Edward Blake, a noted Canadian parliamentarian, said over one hundred years ago that "The future of Canada . . . depends very largely upon the cultivation of a national spirit."³ The preamble to our Constitution should reflect that national spirit.

A preamble would serve as inspiration to Canadians, and would as well demonstrate recognition that our Constitution is more than a law; it is the cornerstone for our future.

3. Enforcement

The Resolution focuses largely on matters of right and principle, as is consistent with a document of its scope. However, even rights which are strongly stated and comprehensively inclusive can be rendered meaningless if no means exists to redress their abrogation.

The International Covenant on Civil and Political Rights⁴ obliges* Canada to ensure that violations of rights and freedoms can be redressed:

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

* "1.2.1. In this connection it should be noted that Canada, with agreement of the provinces, has also ratified the Optional Protocol to the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. Canada has also made a declaration under Article 41 of the International Covenant on Civil and Political Rights, which allows other countries to call attention to any failure on Canada's part in fulfilling her obligations under that Covenant. Canada has thus increased her accountability to the world community in this regard."

- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted. 5.

We acknowledge the existence and status of federal and provincial Human Rights Commissions in Canada, and believe that the inclusion of the right of redressing violation of rights and freedom would serve to enhance the Commissions' abilities to expand and carry out their mandate.

4. Limitations of the Proposed Charter of Rights

Many witnesses have pointed out the limited nature of this proposed charter of rights and freedoms. Though we will add to that list of limitations in this submission, we would only say here that the charter of rights appears to reflect a limited concept of both the essential role such a charter will play in the future, as well as an unrealistic view of the difficulties that will likely be faced in improving the charter following patriation.

Canada's Constitution must rise above political pragmatism. The document must reflect therefore goals and aspirations, even though the pragmatists among us may say "it can't be done." Truly, discrimination will never be completely erased because it is based in prejudice which cannot be legislated away; but this fact does not keep us from striving toward our goal of better human conditions.

The Constitution will and should be a permanent document. Regardless of what type of amending formula is ultimately agreed upon, the process of amendment will be cumbersome and time consuming, as befits alteration of a document of such importance. If we carry out a hurried and superficial adjustment to the British North America Act today, we may find that fine-tuning it tomorrow is not realistic.

SECTION 2

THE RESOLUTION AND CITIZEN PARTICIPATION

The question of citizen participation in Canadian society is minimally addressed by the current resolution. We believe this fundamental omission must be remedied, and concur with the 1978 statement of Prime Minister Trudeau:

"The renewal of the Federation must confirm the pre-eminence of citizens over institutions, guarantee their rights and freedoms, and ensure that these rights and freedoms are inalienable."⁶

One of the primary functions of a Constitution is to order the relationships between the citizenry and the government. As the Government of Canada recognized in its 1969 publication, The Constitution and the People of Canada: "there should be constitutional guarantees ensuring that society, through its governments, will respect the rights of individual citizens."⁷

One responsibility of government to the people is articulated to a certain extent in the section which sets out maximum time between elections. Other responsibilities could be articulated, as we have suggested in our request for enforcement mechanisms.

The rights of people in relation to government are also articulated, to a certain extent by the right to vote, and the proclamation of civil and political rights which are set out as fundamental freedoms in the Resolution. We suggest, however, that the relationship between the state and the citizenry could be clarified through rewording of several sections.

Clarification of Rights and Responsibilities

Section 2

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.

A clarification which would be helpful relates to the definition of "everyone." Does the definition include organizations and groups?

We would point out that current tax laws prohibit registered charitable organizations from fully expressing opinion on actions of government. Paradoxically, we would like to point out that these organizations are encouraged to consult with government ministers on many occasions, and in fact are occasionally criticized if they do not speak out on issues for which the government feels public discussion and comment is required.

Our organization, like all registered charities, is non-political in the sense that we do not promote particular ideologies. Like many others we devote considerable attention to public education activities so that Canadians are well informed of proposed and existing policies of governments, agencies and other organizations. We believe that the extent to which a society tolerates and encourages freedom of expression is an indicator of the stability of the nation, as well as an indicator of its receptivity to change. We suggest that the committee consider wording in section 2 particularly which would reflect the importance of freedom of expression for both individuals and organizations.

We recognize of course the concern of some groups regarding "hate" literature, and would suggest that the wording consistent with Article 19 (3) of the International Covenant on Civil and Political Rights would address their concerns:

ARTICLE 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals. 8

Section 2 (b) Freedom of thought, belief, opinion and expression, and of the press are essential to the exercise of democratic traditions.

We support the statement of these principles and would suggest that the committee consider wording consistent with Article 19 of the International Covenant on Civil and Political Rights.

Section 2 (c) Freedom of assembly and association form another indispensable part of democratic society. While we support the inclusion of this section, we believe the adjective "peaceful" is an example of wording which should be reworked. The security of the nation, and the public order, must be maintained, but we believe the concern which underlies the use of this word would be more appropriately expressed by wording consistent with Article 22 of the International Covenant on Civil and Political Rights:

ARTICLE 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Section 3

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.

A clarification is required regarding whether or not the right to "be qualified for membership" is the same as having the right to seek and hold office.

Section 7

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.

Right to Privacy

Political participation and the prerogative of privacy have been identified by Bertrand de Jouvenal as the two fundamentals of democracy.¹⁰ The right to privacy appears to have been addressed in a tangential way by Article 7, by the inclusion of the phrase 'security of person'. Because of its importance to the democratic process, we suggest the principle be strengthened by forming a separate section, with wording which clearly articulates both the scope and importance of the concept.

In our opinion, the Constitution should contain several other sections which would strengthen democratic tradition and practice. Enshrinement of the principle of freedom of information, for example, would act to remind both government and citizens that government exists only through the consent of the people.

We remind the committee of the key recommendation of the Task Force on Government Information Policy:

"1. The right of Canadians to full, objective and timely information and the obligation of the State to provide such information about its programmes and policies be publicly declared and stand as the foundation for new government policies in the field. This right might be comprehended within a new constitution in the context of freedom of expression."¹¹

A further addition which would clarify relationships between the State and the citizenry would be some reflection of the responsibilities of citizens in the continuation of Canadian society. Some constitutions require citizens to pay taxes, to obey the law, for example.

While we make no specific recommendations in this area, we would ask the committee to consider expanding the Resolution to reflect the duties citizens must bear, as well as the rights to which they are privileged.

THE RESOLUTION AND SOCIAL POLICY

In this section we will address the specific concerns of our organization regarding social policy in the proposed resolution. We will not address issues regarding jurisdiction unless raised by the wording of the resolution itself. While we of course recognize the crucial nature of division of responsibility and relationships between governments with reference to social policies, we are looking forward to addressing those and other more specific social policy concerns during discussions of Sections 91 and 92, of the British North America Act, which we expect will take place following patriation.

Section 6

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.

6 (2) (b)

We are concerned that the wording of this section may be interpreted to mean that people may not have the right to obtain employment, only to seek it. We believe that the person who wants to be gainfully employed should have the right to do so in any part of the country. We suggest this section be rewritten to reflect Article 6 of the International Covenant Economic, Social and Cultural Rights, in which the signators "recognize the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and (agree to) take appropriate steps to safeguard these rights."¹²

6 (3) (a) and (b)

These clauses could well have the effect of limiting the mobility rights as specified in section 6 (2) (b), to the extent of reducing the nation to a series of sovereign states. As we understand this section, it would allow provincial governments to prevent Canadian citizens and landed immigrants from moving between or within provinces, on whatever grounds the provinces might enact as law, except residency. Though the provinces would be subject to the general prohibition of discrimination on "human rights" grounds, such as age, race, sex, national origin, they could be allowed to prevent Canadians from moving into their province for any other legislated reason they choose. Though provinces have this right now under the British North America Act, they must bow to national interest when required. Section 6 (3) (a) appears to extend provincial rights regarding migration, and to further limit federal jurisdiction. Through this section one would appear to become less a Canadian, than a holder of Manitoba citizenship, or Newfoundland citizenship, or Ontario citizenship.

In addition to our general concern regarding mobility for all Canadians, we are specifically concerned with section 6 (3) (b) which would place severe restrictions on access to social services. Access

to public social services is already limited by defining eligibility. Benefits under the Old Age Security and Guaranteed Income Supplement programs are available only after ten years residence in Canada. Canadians face residency restrictions at the provincial level for access to public housing, and for discretionary income supplements and tax credits.

Regarding access to public social services, the Canada Assistance Plan has taken the lead in enforcing mobility rights by requiring provision of social assistance,* without regard for residence.

Given CAP's recognition of the importance of portability of social benefits, we must ask about its future, if Section 6 (3) (b) is enacted. It appears that the universal nature of the Canada Assistance Plan could be ruled invalid. What consequence will that have for people in need of social assistance? In a society as mobile as Canada's it would be a tragedy if the new Constitution allowed residency to become a criterion in the determination of eligibility for human services.

If our Constitution is to truly reflect our hopes for the future, and is to serve as a statement of the principles to which this nation aspires, surely these sections which now reflect an insular attitude and lack of generosity must be stricken. One must ask what higher goal these restrictions would address? What national interest? Our 1971 statement titled "Social Policies for Canada" outlined our hopes for achieving equity of access to services by saying "There must be nationally accepted social goals and some minimum level of equality

* "Social Assistance" is the term used in the C.A.P. legislation to designate income support for needy persons. "Social Services" means services provided to persons in need, or likely to be in need, in order to ameliorate social conditions. Social Assistance must be provided without regard for residence, but residency requirements may be imposed as a condition of receiving social services.

in program benefits and service standards for all".¹³ To permanently enshrine barriers to social service is unacceptable. We recommend that Canada's Constitution reflect mobility rights consistent with Article 12 of the International Covenant on Civil and Political rights.

ARTICLE 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.¹⁴

Section 15

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.

Though we agree with what we believe was a laudable intent, we must join the ranks of those who question the effect of this section, in relation to the scope of groups who would be protected by its provisions, and in relation to enforcement mechanisms.

As the Committee has been told, neither physically nor mentally handicapped persons would be protected by this section. We would also point out that discrimination on the basis of sexual orientation, marital or family status, political belief or socio-economic status* would not be prohibited by Section 15 as drafted.

Clearly a statement which will guide judicial decisions for decades should be both flexible and inclusive in order to accommodate changing social conditions as well as to safeguard the rights of the present populace.

We believe "handicapping conditions", "sexual orientation" and "socio-economic status", "marital situation" and "political belief" should be added to the list and that the clause should be rendered more flexible by adding "such as" preceding any description of status. This section should include as well prohibition of discrimination in both the substance and application of the law.

We also suggest inclusion of a separate section recognizing equality between the sexes, and would recommend wording consistent with Article 3 of the International Covenant on Civil and Political Rights, for example.

ARTICLE 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

* Some recognition of this type of discrimination is found in Ontario's proposed revision of its Human Rights Code, whereby landlords will no longer be able to deny accommodation to people who are receiving public assistance.

Section 15 (2)

We uphold the principal of affirmative action* which we believe forms the intent of this section. This principle creates the backdrop against which many social programs are implemented. Programs which seek to equalize opportunity or lessen inequality of any kind are to be applauded.

A troubling aspect of Section 15 (2) relates to the use of the term, 'disadvantaged', especially when used in conjunction with the categories identified in 15 (1). It can be inferred that only those persons or groups who agree to label themselves as 'disadvantaged' will be eligible for affirmative action programs. We urge that Section 15 (2) be redrafted to fulfill its intent to legitimize affirmative action, through terminology less stigmatizing to the intended program beneficiaries. The phrase 'amelioration of the conditions of certain specified classes of persons', as recommended by the Canadian Human Rights Commission appears to reflect more appropriate wording.

Section 24

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.

This section does not appear to deal adequately with concerns expressed by native groups. We believe that all peoples of Canada should have an opportunity for full involvement in the process of Constitutional reform. We believe the Constitution should reflect previous commitments made to native peoples, and we therefore support the recognition of aboriginal and treaty rights in the Constitution.

* "Affirmative Action" is most frequently thought of as government policies and programs aimed at increasing opportunities for people who as a group have experienced limited opportunities, because of membership in that specific group.

Section 31

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to
promote equal
opportunities

31. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

Commitment
respecting
essential public
services

(2) Parliament and the government of Canada are committed to taking such measures as are appropriate to ensure that provinces are able to provide the essential public services referred to in paragraph (1)(c) without imposing an undue burden of provincial taxation.

Section 31 raises a myriad of questions about both intent and effect. A glossary of terms would undoubtedly provide clarification.

Definitions: To what extent does "commitment" indicate intent to take action. Is this a statement of principle, or one for which the government can be held accountable?

"promoting" - this term is often used in the sense of selling a product; one "promotes" a football team. We believe our country should "provide" equal opportunities, or at the very least "ensure" them.

"measures" - does this mean money, or would it mean federal provision of services as well?

"essential public services" - What are these? Services that all of the population use now? Do they include services which a majority might use in the future? What kind of services are included? Are income support services, social services, cultural programs included?

"reasonable quality" - both these are value-laden words subject to broad interpretation. Though we seek clarification, we nevertheless heartily approve the foundation which their intent will provide for the development of national standards for social programs. Though some progress has been made over the last decade, the limited availability of quantifiable measures of quality has been a serious impediment to improvement in planning and delivery of social programs.

We reiterate our 1971 statement quoted on page 17 regarding the necessity for nationally accepted social goals and levels of service.

The Canadian Council on Social Development has devoted considerable attention to the development of social goals. Our publication of "Social Policies for the Eighties" (scheduled for 1981), marks the third decade for which we have looked to the future of social programs in Canada. Our ten-volume study of "Personal Social Services in Canada"¹⁶ is but one of dozens of research studies carried out by our organization which contribute to the development and implementation of social goals at both the federal and provincial levels of government.

In addition to questions of definition, we are unclear about the effect of Section 31 on social programs. Equalization payments are one of several types of fiscal instruments through which revenues of the federal government are currently used to fund social programs. (Tax points, "block funds", and conditional grants and cost-sharing are others.)

Provincial jurisdiction over most social programs is relatively clear; and while federal involvement in paying for these services is not as evident, their financial contributions have played a major role in the development and implementation of a wide range of social programs.

It could be inferred from Section 31 that the provinces will be responsible for all essential public services (however defined), including those for which the federal government has taken primary responsibility and initiative, even though its Constitutional jurisdiction to take such actions might be subject to question. (Employment-related services are an example.)

While much discussion has taken place about jurisdiction and financing of social programs over the many years of Constitutional talks, to our knowledge and to that of the public no settlement on these issues has yet been arrived at.

The massive review of social program funding* currently in progress contributes to our concern about the possible impact on social programs of Section 31.

We believe it would be most unfortunate if Section 31 would serve to resolve any of these issues in such a way as to preclude future options for several reasons.

In the first place, little public discussion of social policy issues took place during the most recent rounds of Constitutional debate. Though governments seemed to have reached consensus on the issue of family law, several provinces later withdrew their consent. As well, few of the planners, funders or providers of public or private social programs have had the opportunity to understand, much less discuss social policy implications of this resolution. We are looking forward to a comprehensive discussion of these and other social policy issues following early on the patriation of the Constitution.

We seek reassurance from the government and from the committee that Section 31 will have no impact on current jurisdiction planning, funding, delivery and receipt of public or private social programs.

*A review of funding through a number of cost sharing agreements is being conducted by officials from several federal departments. The objectives of the review are unclear. Statements by the Minister of Finance, in his Budget speech, do little to allay our fears: "The government intends to achieve net savings in (the social policy envelope) to help finance initiatives in other envelopes . . . Savings are expected to include reductions in federal transfers to provinces to areas coming under provincial jurisdiction". (Budget Speech, p. 33)

SECTION 3

SOCIAL RIGHTS

We believe social rights should be entrenched in the Canadian Constitution. As J.B. Lanctôt said in Canada's report to the 14th International Conference on Social Welfare,

"A proclamation of human rights which would guarantee the fundamental liberties without providing concrete measures to alleviate inequalities between men would be quite incomplete. It would allow the gap to widen between the strong and the weak."¹⁷

Social rights present complex questions of alternate values, definitions of rights and responsibilities and the allocation of resources throughout society. In addition social rights are more susceptible to shifts in public opinion and are consequently more dynamic than human and civil rights. Despite these difficulties, we believe that the vast majority of Canadians would subscribe to the following social rights: the right to employment and to protection against unemployment; the right to safe and healthy working conditions; the right to form and join trade unions; the right to an adequate standard of living with access to the necessities of life; the right to health care uncompromised by economic circumstances; the right of protection of the family, the right to education, and the right to social security and social insurance. These are all contained in the provisions of the International Covenant on Social Economic and Cultural Rights, to which Canada is a signator.¹⁸

Social rights are not as easily definable as civil rights; indeed they arise from a different conceptual base. It is helpful to point out a number of distinguishing characteristics.

The framework provided by Laroque¹⁹ illustrates key differences between civil rights and social rights. Firstly social rights are not purely legal principles -- they are more rules of action. They are not natural rights, but are based on the belief that man need

not be subjected to natural law, at least in the economic and social fields. Technical progress is viewed as a means by which the natural order of things can be altered.

Social rights have the collectivity, rather than the individual as their base. They recognize the necessity and inter-relationship between person and community. The family's right to protection by the society and by the state is also part of social rights. As part of the collectivity, the rights of workers are also social rights. Because modern labour problems can not be solved on a purely individual basis, workers must have the right to form trade unions, and the right to strike.

A further distinguishing characteristic of social rights is their relative, rather than absolute nature. They reflect conditions of technical, economic and social development at a given point in time. Finally, while civil rights express the willingness of the State to protect the individual from interference with this liberty, social rights reflect the State's willingness to give people the means to develop and fulfill themselves.

There may appear to be a conflict between roles of the State, in relation to Constitutional entrenchment of social rights. On the one hand the State says "hands off - don't interfere," and on the other, expresses its belief that individuals must be helped. If one looks at the concept of liberty as the common element of both social and civil rights, their complementary nature becomes clear.²⁰ Civil and political rights allow the individual to be free from interference; social rights provide the opportunity by which that liberty can be exercised, in conquering limitations with which nature, individuals or society may have burdened some people. The aim of social rights is to provide equality of opportunity, rather than to expect precise equality.

The enjoyment of these rights is not easily attainable, even in our prosperous and economically developed country. Many social programs have been implemented over the past forty years to assist Canadians in

their struggle to obtain these internationally recognized goals and we acknowledge that universal enjoyment of each of these rights may never occur. Nevertheless, we believe the inspirational value that articulation of these rights would serve is invaluable, both as a statement of this nation's commitment to improving the lives of its citizens, and as goal statements against which progress can be measured.

We suggest the committee consider adding sections which would reflect wording consistent with principles articulated in the International Covenant on Social, Economic and Cultural Rights, especially Articles 9, 10, 11, 12, and 13.

ARTICLE 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

ARTICLE 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of children should be prohibited and punishable by law.

ARTICLE 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

- (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
- (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

ARTICLE 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

ARTICLE 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State. 21

1. Chapin, Henry and Deneau, Denis. Access and the Policy-Making Process, Canadian Council on Social Development, Ottawa, 1978.
2. Chapin and Deneau, p. 7.
3. Blake, in "A Time for Action: Toward the Renewal of the Canadian Federation". Rt. Hon. P. E. Trudeau, Prime Minister, Government of Canada, 1978, p. 4.
4. International Covenant on Civil and Political Rights, in A Canadian Charter of Human Rights. Hon. P. E. Trudeau, Minister of Justice, 1968, pp. 117-135.
5. International Covenant on Social, Economic and Cultural Rights. p. 118.
6. A Time for Action: Toward the Renewal of the Canadian Federation. P. E. Trudeau, Government of Canada, 1978. p. 8.
7. Trudeau, P.E. The Constitution and the People of Canada, Government of Canada, Ottawa, 1969, p. 8.
8. International Covenant on Civil and Political Rights, p. 124.
9. International Covenant on Civil and Political Rights, pp. 124, 125.
10. Duchacek, Ivo. D. Rights and Liberties in the World Today: Constitutional Promise and Reality. ABC-Clio Press, Santa Barbara, 1973, p. 52.
11. From "To Know and Be Known", final report of the Task Force on Government Information Policy (d'Iberville Fortier, Chairman), August 1969. Cited in "Submission on C-43, Access to Information Bill", ACCESS (A Canadian Committee for the Right to Public Information), October 1980, p.3.
12. International Covenant on Social, Economic and Cultural Rights, in A Canadian Charter of Human Rights. Hon. P.E. Trudeau, Minister of Justice, 1968, p. 109.
13. Social Policies for Canada, Canadian Council on Social Development, Ottawa, 1971, p. 18.
14. International Covenant on Civil and Political Rights, p. 121.
15. International Covenant on Civil and Political Rights, p. 118.

16. Hepworth, H. Philip. Personal Social Services in Canada, Vol. 1-10, Canadian Council on Social Development, 1972-1974.
17. Human Rights and Social Welfare in Canada: Report of the Canadian Committee of the International Council on Social Welfare to the XIV International Conference on Social Welfare, J. B. Lanctôt, Chairman. Canadian Welfare Council, 1968, p. 5.
18. International Covenant on Social, Economic and Cultural Rights, pp. 107-116.
19. Laroque, Pierre. "Human Rights, Social Work and Social Policy" in Social Welfare and Human Rights, proceedings of the XIVth International Conference on Social Welfare, Helsinki, Finland, August 18-24, 1968. Columbia University Press, 1969, p. 77.
20. Development and Participation: Operational Implications for Social Welfare, Report of the Canadian Committee to the 17th International Conference on Social Welfare, Nairobi, Canadian Council on Social Development, 1974, p.4.
21. International Covenant on Social, Economic and Cultural Rights, pp. 110-112.