

Canadian Federation of Civil Liberties and Human Rights Associations



La Fédération Canadienne des Associations des Droits de l'Homme

"OUR RIGHTS AND FREEDOMS"

RECOMMENDATIONS
IN RESPECT OF
THE CONSTITUTION ACT, 1980

BRIEF

PRESENTED TO THE SPECIAL JOINT COMMITTEE
ON THE CONSTITUTION OF CANADA

by

THE CANADIAN FEDERATION OF CIVIL LIBERTIES AND
HUMAN RIGHTS ASSOCIATIONS

OTTAWA, November 24th, 1980

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INTRODUCTION

The Canadian Federation of Civil Liberties and Human Rights Associations appreciates this opportunity to present its views to the Committee arising from the proposed Constitution, both as to procedure and content.

Although our Federation favors both patriation of the Constitution and entrenchment of a Charter of Rights, we cannot support the procedure adopted by the Government, i.e. unilateral action, or the contents of the proposed Charter of Rights. We appreciate that the Constitutional process has been ongoing, as between the Federal Government and the various Provinces, for many years. This fact, however, does not in our mind justify the indecent haste with which this important legislation is being dealt.

From a practical point of view, the Charter falls far short of Canada's internal and international obligations. It has not adequately dealt with the issue of native rights or the preservation of existing native rights. It has inadequately addressed the question of reciprocal language rights.

We propose to deal on a clause by clause basis with some of the inadequacies of the Charter. First however we are compelled to deal with what we view as the improper means by which Parliament chose to do unilaterally what it could not achieve by consent. We accept that complete unanimity with the Provinces may well be impossible and that action must take place. Parliament, however, must find legitimacy for the proposed constitution in the people of Canada.

The Recital on page 12 of the proposed Bill "whereas Canada has requested and consented to the enactment of an Act of the Parliament

of the United Kingdom" we find to be misleading, as we see no evidence of this Consent from the people of Canada although, given the opportunity, following full discussion and amendment it may well be forthcoming.

We cannot accept that the end justifies the means. A democratic country cannot be conceived by any other than a democratic act, thus consent must be obtained either from the Premiers, or from the people of Canada through either a referendum or a general election on this specific issue.

CLAUSE BY CLAUSE ANALYSIS

We will deal with objectionable clauses, individually by submitting amended wording, or whole new clauses, followed by a brief explanation for each change or addition.

GUARANTEE OF RIGHTS AND FREEDOMS

Proposed Clause 1

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out herein.

EXPLANATION

Explanatory Note Clause 1

It is our position that if the rights set out in the Charter are subject to "reasonable limits accepted in a democratic society with the Parliamentary System of Government", that they will not be entrenched but will be subject to parliamentary change. For this reason we believe the reference to subject to parliamentary change should be removed.

If rights are to be entrenched, they should be subject to change only by the means set out for amending the Constitution in parts 4 and 5. Unless the present clause is changed the whole of the Charter of Rights and Freedoms will be subject to parliamentary change and thereby not constitutionally entrenched.

DEMOCRATIC RIGHTS

Proposed Clause 4.(2)

- 4.(2) In time of 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.

EXPLANATION

Explanatory Note Clause 4.(2)

There is no necessity, it is submitted, to provide a waiver of rights because of "apprehended war, invasion or insurrection". This power is too easily capable of misuse or misapplication. The extension of Parliament should only be sanctioned in the event of war, invasion, or insurrection, not on the basis of the fear or apprehension that either of these three states may exist.

LEGAL RIGHTS

Proposed Clause 8.

8. Everyone has the right not to be subjected to search or seizure except in accordance with the principles of fundamental justice.

Explanatory Note Clause 8.

It is submitted that the words "on grounds and in accordance with procedures, established by law" should be removed from this Section as it would permit Parliament to abrogate the provisions of this Clause of the Charter by amendment of existing legislation or enacting new legislation. The inclusion of the words "as established by Law" negates the precept that the rights are entrenched and not subject to parliamentary change.

Proposed Clause 9.

9. Everyone has the right not to be detained or imprisoned except in accordance with the principles of fundamental justice.

Explanatory Note Clause 9.

The words "on grounds and in accordance with the procedures established by Law" should be removed as no protection is afforded from legislative amendment by this wording and as we have said the concept of entrenchment does not apply if the legislature can indirectly amend the legislation or the "Law" and thus effect the protection deemed to be afforded by this Section.

Proposed Clause 10.

10. Everyone has the right on arrest or detention
 - (a) to be informed immediately of the reasons therefor;

Explanatory Note Clause 10.(a)

It is felt that "immediately" implies more urgency than "promptly" and should be held to be sooner in time than "promptly". The principle is that the accused should be informed immediately of the reason for his detention and it is felt that the most direct means of stating this is by the use of the word "immediately".

Proposed Clause 10.(b)

- 10.(b) Everyone has the right on arrest or detention to be informed immediately of the right
- (i) to remain silent;
 - (ii) to retain and instruct counsel in private;
 - (iii) the right to legal aid;
 - (iv) the right to have counsel present during questioning.

Explanatory Note Clause 10.(b)(i)

This right exists in Canada today and should be entrenched. The information should be communicated immediately in a free and democratic society. To insure that rights are known they must be communicated.

Explanatory Note Clause 10.(b)(ii)

This right exists in Canada today and should be entrenched. The information should be communicated immediately in a free and democratic society.

Explanatory Note Clause 10.(b)(iii)

This right exists in Canada today and should be entrenched and the information should be communicated immediately to the accused in a free and democratic society.

Explanatory Note Clause 10.(b)(iv)

This right does not now exist in Canada today. It is submitted it should exist in a free and democratic society and should be entrenched in a proposed Bill of Rights.

Proposal - New Clause 10.(c)

(It is proposed that the following Clause 10.(c) would replace the existing 10.(b):

10.(c) To remain silent; to retain and instruct counsel immediately in private; to legal aid; to have counsel present during questioning.

EXPLANATION

Explanatory Note Clause 10.(c)

These rights simply reflect any rights outlined in the warning to be given in Section 10.(b). They all, with the exception of the right to have counsel present during questioning, exist in Canada today. They therefore should be entrenched. At present an arrested person may not always have the right to retain and instruct counsel immediately. This aspect should be entrenched as a delay may

Explanatory Note Clause 10.(c)
Continued

be a denial; an accused who does not see counsel for days following arrest has effectively been denied counsel. In a free and democratic society, an accused should be permitted to have counsel present during questioning. Apart from being in accordance with the rules of natural justice, it could save valuable court time at trial.

Proposed Clause 10.(d)

(It is proposed that the following Clause 10.(d) would replace the existing Clause 10.(c):

10.(d) To have the validity of the detention determined by way of habeas corpus or other proceedings and to be released if the detention is not in accordance with the principles of fundamental justice.

EXPLANATION

Explanatory Note Clause 10.(d)

This amendment is recommended because habeas corpus is not the only means used for judicial release. In fact, in most cases the bail provisions of the Criminal Code of Canada are used. The words "if the detention is not lawful" should, we would submit, be removed as this undermines the principle of entrenchment. Parliament may make lawful that which is not in conformity with the rules of fundamental justice.

Proposed Clause 11.(a)

11.(a) to be informed immediately of the specific offence and the rights enumerated in Clause 10.(b) hereof.

Explanatory Note Clause 11.(a)

This would cause Section 11 to conform with the recommended Section 10.(b) of our proposed change.

Proposed Clause 11.(c)

11.(c) To be presumed innocent until proven guilty according to law in a fair and public hearing in accordance with the principles of fundamental justice.

Explanatory Note Clause 11.(c)

The words "by an independent and impartial tribunal" should, we recommend, be removed as they do not reflect our system of justice which has, as its foundation, the jury system. The recommended change would be in conformity with Clause 7. and would reflect the present system and any changes which may be made from time to time. This appears to be a problem only in the English version of the Bill.

Proposed Clause 11.(d)

11.(d) not to be denied bail except on grounds and in accordance with the principles of fundamental justice.

Explanatory Note Clause 11.(d)

If existing provisions of the Charter of Rights were followed, bail could be denied by procedures established by the Law. Parliament could from time to time change the procedures established by Law thereby avoiding the principle of entrenchment. With our proposed change, Parliament could still make amendments to the various bail acts by they would have to be in conformity with the rules of fundamental justice.

Proposed Clause 11.(f)

11.(f) not to be tried, convicted or sentenced more than once for an offence for which he or she has been finally convicted or acquitted or where charges have been withdrawn.

Explanatory Note Clause 11.(f)

The words "convicted" or "sentenced", we submit, should be added as they more clearly reflect the desired result which is the prevention of double jeopardy. Again at the end of the Clause the addition of the provisions "where charges have been withdrawn" would cover cases where the Crown at a later stage in a trial would withdraw charges only to lay them at a later date.

Proposed Clause 12.

12. Everyone has the right not to be subjected to abuse of process, cruel and unusual treatment or punishment.

Explanatory Note Clause 12.

The abuse of the judicial system directed against a citizen falls with the category of wrongs which should find clear protection in a Charter of Rights. This appears to be the appropriate Section for the protection against abuse of process.

Proposed Clause 13.

- 13.(a) A person shall not be compelled to give evidence where that evidence may tend to incriminate that person.

Explanatory Note Clause 13.(a)

Clause 13., and the present Canadian Evidence Act cause individuals to give incriminating evidence against themselves. The fact that the evidence or statements themselves cannot be used directly at a subsequent trial provides minor protection. The information obtained at bail hearings and trials of co-accused often assist the Crown in obtaining additional information which itself is used against the person from whom the information was obtained. The present technique used by some Crown Counsel at bail hearings causes an individual to testify against himself. The Court is thus used as an investigative tool which tends to bring the Court and the administration of Justice into disrepute. Our suggestion follows the American System. The present Clause 13. does not meet Canada's international commitments under Article 14 Sub-Section 3(g) of the Covenant of Civil and Political Rights.

Proposed Clause 13.

13.(b) Illegally obtained evidence shall not
be admissible in any judicial proceeding.

Explanatory Note Clause 13.(b)

The acceptance by any Court of evidence which has been obtained illegally, permits and to some degree encourages law official to break the law to convict another of breaking the law. This is not philosophically or morally sound.

Proposed Clause 15.(1)

15.(1) Everyone has the right to equality
of service, to equality before the Law
and to equal protection of the Law
without discrimination.

Explanatory Note Clause 15.(1)

The list of prohibited categories in the present Clause 15.(1), we would submit, limits the categories protected to those specifically listed. We believe that these rights should extend to all people, and that discrimination should be prohibited on any ground. We believe that this can best be achieved by making a blanket, general, statement rendering these rights inalienable. Equality of service should be provided to all.

Proposed Clause 20.

20. Any member of the public in Canada has the right to communicate with, and to receive available services from, any office of any institution of Parliament or government of Canada in English or French, as he or she may choose.

Explanatory Note Clause 20.

The designation of "where numbers warrant" avoids the clear obligation to provide the service in either language at this time; or at least to set the standard high. Equivocation at this time could mean failure to attain the ultimate goal for all time.

Proposed Clause 23.

- 23.(a) 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.
- (b) 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.

Explanatory Note Clause 23.

The designation of "where numbers warrant" has the potential to be unreasonably restrictive. We believe that the right should be stated clearly and without exception.

Proposed Clause 24.

24. The guarantee in this Charter of certain Rights and Freedoms shall be in addition to any rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the aboriginal people of Canada known as Indians and Inuit and in particular all agreements and treaties between Their Majesties and Aboriginal Peoples, and all proclamations and guarantees made to Aboriginal Peoples whose traditional lands lie wholly or partly in Canada shall continue in force.

Explanatory Note Clause 24.

These rights should be stated in the affirmative as opposed to the present draft which shows them to be framed in the negative. We feel that a statement should be made assuring native peoples that any existing rights shall not be abrogated and that the Government of Canada will stand in the place of Her Majesty the Queen in relation to all existing treaties, etc. If greater rights cannot be given then certainly none should be removed, this is the danger which native groups fear.

New proposed Clause 24.(a)

24.(a) The guarantee in this Charter of certain rights and freedoms shall be in addition to any rights and freedoms pertaining to Canada's various ethnic, religious or linguistic communities; and ethnic, religious or linguistic minorities shall in community with other members of this group have the right to enjoy their own culture, to profess and practice their own religion and to use their own language.

Explanatory Note Clause 24.(a)

There appears to be no expression in this Bill of the concept that Canada is a mosaic of many rich and diverse cultures. These we believe should be protected and encouraged and the confirmation of this commitment should find expression in this Bill.

New proposed Clause 24.(b)

24.(b) The guarantee in this Charter of certain rights and freedoms shall be in addition to any rights or freedoms that pertain to, encourage and enhance the right of peoples to freely determine their political status within Canada, and freely pursue their economic, social and cultural development.

Explanatory Note Clause 24.(b)

This clause confirms that, within Canada, the right of self determination and the principle that political power rests ultimately with the people. This concept we believe finds appropriate expression under the heading of Undeclared Rights and Freedoms.

Proposed Clause 52.

52.(d) The generally recognized rules of
International Law and the United Nations
ovenants to which Canada is a signatory.

Explanatory Note Clause 52.

This additional provision would bring into our Constitution human rights to which Canada is obligated. As Canada has already signed the Covenants there should be little reticence in acceptance of the principle that they be incorporated into our own Canadian Charter of Rights.

CONCLUSION

Apart from the specific recommendations which we have made for amendment to the Charter of Rights, and our general introductory statements, we believe that the Bill does not contain sufficient impetus for affirmative action. It is hoped however that the recommended change in Section 52 would go a long way to correcting this deficiency.

As to the whole of the constitutional process, we would recommend the following procedural changes.

1. That the time table for constitutional reform be extended to allow full input by all Canadians.
2. That the Government circulate the proposed Constitution to all Canadians for their full information.
3. That the Joint Senate House of Commons Committee on the Constitution travel to all parts of Canada and receive briefs.
4. That following amendments to the Bill, it be submitted to the people of Canada for approval.

In conclusion, it is recommended that failure to follow a democratic means of patriation and entrenchment will render the Constitutional process subject to internal and external challenge. This dramatic change to our Constitution must be made in compliance with democratic procedures.

Thank you very much for your attention.