

Manitoba Association for Rights and Liberties
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INTRODUCTION TO BRIEF ON THE PROTECTION OF HUMAN RIGHTS AND
CIVIL LIBERTIES IN THE CANADIAN CONSTITUTION
PRESENTED BY DR. RALPH JAMES

The Manitoba Association for Rights and Liberties is pleased to appear before the legislative committee which is conducting hearings to consider the matter of reform of the Canadian constitution.

As a human rights and civil liberties organization, MARL is primarily concerned with the question of protection of human rights and civil liberties in the constitution.

Soon after the Manitoba legislature adopted the resolution to hold these hearings, MARL appointed a broad representative committee to study this question, consisting of William Neville, political studies department, U. of Manitoba; Muriel Smith, former member of the Manitoba Human Rights Commission and David Walker, political science department, U. of Winnipeg. This committee met several times during September and October and each of them placed their own views in writing. These views together with a draft brief were presented to the Annual Meeting and Conference of our association on November 6 and 7.

An enlarged committee of some 15 people then became involved in the further development of our brief and ultimately it was presented and approved in substance at a special meeting of the newly elected Board of Directors of our association on Wednesday, November 12.

The brief which has resulted does not necessarily represent the individual view of any one member of the original committee, although

elements of their submissions are included in it. The brief as a whole does represent the concensus view of the Manitoba Association for Rights and Liberties as developed through the various meetings which have been outlined.

Our delegation today includes Paul Walsh and Jill Oliver who will present the brief, our Director Abraham Arnold and a number of other members who are in attendance.

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Brief on the Protection of Human Rights and Civil Liberties
in the Canadian Constitution

In Canada and in Manitoba there is clearly a great deal of popular support for the idea that our new constitution should offer protection for human rights and civil liberties in what has come to be known as an entrenched charter of rights.

Canada has a system of government based on democratic standards and traditions and the ultimate test for any declarative statement on human rights is how well we put these fine words into effect in relation to our own highly acclaimed democratic standards.

By this self-imposed test it should be realized by the proponents of an entrenched charter of rights as well as by those who oppose it that the issues involved are not as clear-cut as they may appear from either side of the question.

It is important for those who strongly support the concept of an entrenched charter to understand clearly the concerns of those who either oppose it or seriously question it.

Those who tend to oppose or question the need for a charter, suggest that by and large our rights have been and are fairly well protected under our present system of legislative enactments, common law and practices stemming from those British traditions which we acknowledge as a primary source of our own democratic government. While occasional weaknesses in our system of rights protections are admitted by the opponents of a constitutional charter of rights, these are not considered significant enough to warrant the curtailment

of the powers of parliament that would be brought about by a bill of rights entrenched in the constitution.

However imperfect may be our institutions, to believe that human rights are important is, surely, to believe that they ought not easily be amended, abridged or tampered with. Ours is a heterogeneous society; it is one in which very different traditions and understandings of human rights exist side-by-side: it is one, therefore, in which both the opportunities and the temptations exist for the numerically greater to impose on the numerically weaker. Ours is a society characterized by bigness as an organizational principle: in business, in labour and most especially in the state itself: it is one, therefore, in which the organization may easily and indifferently oppress or intimidate the individual.

It is important, however, to recognize that what is at issue is the fact that majorities -- or those who are numerically greater -- are easily misled into thinking that minorities have no rights -- or at least fewer rights than have the majority.

The principle of majoritarianism -- that majorities shall prevail and rule -- is both a necessary and acceptable one in our political life. To transfer that principle to the area of human rights, however, is to run the risk of saying that rights come and go, as majorities come and go. If one does take that position, then some things we have regarded as fundamental -- the right to vote, freedom of conscience, free speech, and so on -- would in fact have to be regarded as ephemeral and transitory.

Alternatively, if we believe that certain rights -- and perhaps those largely defined by long tradition, usage and acceptance -- are

basic and subject to more than the whims of today's transitory majorities, then we might well have to conclude that such rights should be at some remove from today's transitory majorities. In short, one would have to conclude that some things should be placed beyond the immediate reach of parliament; and we do.

To assess how much importance should be assigned to the supremacy of parliament vis-a-vis rights protection, it is necessary to fully understand the notion.

'Supremacy of Parliament' suggests that those who pass the laws somehow have complete control over the legislative process and, by implication, the meaning of these laws in our everyday life. It implies that parliamentarians are in charge of policy development, law-making, implementation and adjudication. In fact, we know now that this is an unrealistic expectation of elected officials, in Canada or in any other western democracy. The specific institutional arrangement of federalism with its independent and concurrent spheres of power implies that neither level of government is supreme. Rather it indicates that different governments have different roles, some aspects clearer than others and that if one body seeks to enact laws beyond its constitutional authority, it is likely to be challenged in the political arena and in the courts. At best, we have the primacy of parliaments but certainly not the supremacy of any single parliament.

The second assumption is that parliamentarians are in control of what government does in society. Both academics and more popular writers such as Walter Stewart, have written intensively on the difficulty of legislatures controlling the public service. While we

still may cling to the notion of rule of law as the guiding principle for bureaucratic action, the fact of the matter is that, in the minds of many, governments are beyond the control of legislators. No one is in control. And there are sufficient examples to substantiate this subjective viewpoint. Since rule of law by itself is no longer a valid operational concept (although it still is a legitimate ideal in parliamentary democracy) action is needed to ensure that the intentions of elected officials (ie. the will of the people) are expressed in laws, regulations, orders-in-council, etc.

Most North American governments have already acknowledged their inability to cope with the administration of their laws by setting out new processes for dealing with abuses in the public administration system. The most common approach is the establishment of the office of an ombudsman, a relatively new feature of our parliamentary system. As an officer reporting directly to the legislature, the ombudsman is able to use his authority -- particularly the power of public disclosure -- to ensure that the exercise of authority is consistent with the principles of parliamentary democracy. By challenging the rule of the majority (ie. the cabinet), the ombudsman effectively supports the legislature.

Both levels of government have responded to the questions of individual rights vis-a-vis the public and private sectors by establishing human rights commissions. In some cases these are officers of the legislature but most frequently they are officers of the government reporting through the minister as would any civil service agency.

This approach to the problem of human rights centres on

individual cases of discrimination where an individual takes the initiative and lodges a complaint against a public or private organization. In many instances these cases lead to changes in legislation and a greater public awareness of human rights.

The major drawback is that these commissions alone are insufficient in dealing with all the problems that arise in the field of human rights. Their roles vary from province to province and Canadians are likely to find that enforcement procedures are uneven. Protection from discrimination in one province does not necessarily mean equal treatment in another. As commissions are created by, and subject to, provincial legislatures, and consequently the political executive of the day, their roles vary from year to year. Citing just one example of a change that has downgraded the effectiveness of a provincial commission, we find that the Manitoba government under Premier Sterling Lyon has cut back the budget of Manitoba's Human Rights Commission to the point that its educational role has been abandoned almost entirely, staff is limited to case work only and few resources are set for promotional activity.

The proponents of constitutional rights protection now have their attention focused on the proposed charter of rights which is part of the 1980 Constitution Act.

In speaking to this issue to members of the Manitoba legislature, we must respond to the position of Premier Lyon in opposing the charter as expressed at the last federal provincial conference. We respectfully take issue with the Premier when he suggests that there is no historical justification for the entrenchment of human rights in the Canadian constitution.

Premier Lyon did cite the obvious example of the mistreatment of Japanese Canadians during the Second World War but then he pointed out that Japanese-Americans received similar treatment in the U.S. which does have an entrenched Bill of Rights. This demonstrates that even constitutionally entrenched rights do not provide absolute protection from the abuse of human rights and civil liberties. We are informed however, that the American Bill of Rights did make it possible for Japanese-Americans to receive substantial redress after the war and such redress was not available to Japanese Canadians.

There are a number of earlier and more recent examples of restrictions on civil liberties imposed or attempted by the federal government and also by various provincial governments. The most notorious of these was the imposition of the War Measures Act in connection with the 1970 October crisis in Quebec.

It should be noted however, that the FLQ episode of 1970 was not the first time that there was a suspension of civil liberties in Canada in time of peace. As painful as it may be to us as Manitobans we must recall that it was in 1919 during the Winnipeg General Strike that the Canadian government amended the Immigration Act and the Criminal Code to deal with individuals accused of sedition. As a result aliens could be deported without trial and Canadians imprisoned for alleged "Bolshevism". But there was no excuse for the arrest and imprisonment of numerous Winnipeg union leaders and ordinary workingmen other than an attempt to defeat the legitimate efforts of the labour movement to achieve better working conditions.

Most recently in our own Manitoba legislature an attempt was made to put into the statutes a provision for search and seizure without due process as part of the Energy Authority Act introduced at the last session. We believe this section of the act was withdrawn primarily because of the intervention of MARL which was the only organization, alert enough in the heat of mid-summer, to protest this potential invasion of civil liberties before the Law Amendments Committee.

It is also widely recognized today -- and John Diefenbaker who gave us the first Canadian Bill of Rights recognized it from the outset -- that the actions of the Federal government in 1946 in response to the Gouzenko revelations about a spy network in Canada, represented an unwarranted suspension of civil liberties for the persons suspected of being espionage agents; they were held incommunicado, denied counsel and interrogated before charges were laid.

There are other examples including the Padlock Law and the Roncarelli case during the Duplessis era in Quebec which took many more years to obtain redress than they would have if there had been constitutional protection. There was also the attempt of the Aberhart government of Alberta to restrict freedom of the press. More recently the Supreme Court of Canada refused to invoke the Diefenbaker bill of rights to strike down an anti-demonstration by-law in the city of Montreal. It is felt that constitutional protection for freedom of assembly would have led to a different court decision in this latter case.

Moreover, during the recent federal-provincial constitutional conference that failed, the Globe and Mail recalled:

In 1968 we wrote, "anybody who doubts that Canadians need to be protected from governments that would deny (their) rights has only remember the infamous Ontario Police State Bill."

The Report of the Task Force on Canadian Unity (A Future Together - Observations and Recommendations, p. 106) states: "There have been enough episodes in recent Canadian history to make us believe that some basic rights should be protected by the constitution." In addition to mentioning the treatment of Japanese Canadians in World War II and the October crisis in Quebec, the task force cites "the recently revealed illegal activities of our security forces, not to mention the general pervasive growth in the power of governments.."

Reference to the pervasive growth of government as an added reason for constitutional protection of human rights is supported by the recent experience of the Canadian Human Rights Commission. While every province in Canada has a Human Rights Act and a commission to enforce that Act, it is the federal Human Rights Commission that has proven to be the strongest rights enforcement body in the country through the powers assigned to it under the Canadian Human Rights Act. Its work is limited of course to the federal jurisdiction, but its experience, in little more than two and a half years since the federal act was proclaimed, indicates that a large part of the commission's efforts are devoted to combatting restrictions on human rights caused by the pervasiveness of various government departments.

The Canadian Human Rights Act gives the federal commission power to review regulations, rules, orders, by-laws and other instruments

embodied in Acts of Parliament and under this section it has accepted various complaints of discrimination and infractions of rights by various departments of the federal government. On several occasions the right of the commission to investigate government departments has been challenged in the courts by the government itself. To date, the courts have sustained the power of the commission to investigate complaints against the government.

Notwithstanding its success in this regard, the federal Human Rights Commission has taken a stand in favor of an entrenched charter of rights in the constitution and has recommended the inclusion of additional rights beyond those proposed in the current Constitution Act or in the draft Constitution Act of 1978.¹

It is also noteworthy that here in Manitoba the provincial Human Rights Act is binding on "The Crown and every servant and agent of the Crown." Nonetheless, while there have been complaints of rights

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1. Extract from Final Report of the 1978 National Conference: Human Rights in Canada...The Years Ahead, p. 4, Commission Activities:
 - b) Brief to the Joint Senate House of Commons Committee to study the Constitutional Amendment Bill - Sept 7/78 (see Special Report Recommendations III(1) - the entrenchment of a Bill of Rights).

It was recommended by the Commission that the proposed federal Charter of Rights and Freedoms be broadened to proscribe discrimination based on physical handicap, marital status and sexual orientation. It was also suggested that the Charter be amended to permit special programs which under the Canadian Human Rights Act may differentiate in favour of certain groups who may have suffered or likely to suffer discrimination.

The Joint Committee recommended that marital status be added to the prohibited grounds of discrimination if problems of differential treatment of single and married persons in the tax laws, pension legislation or unemployment insurance can be resolved. It also recommended that the Charter should not prevent special programs on behalf of disadvantaged groups.

infractions by government departments, the provincial Human Rights Commission has not been able to effect the resolution of any complaint against the government. We note that for the first time the Manitoba Human Rights Commission has established a tribunal to hear a complaint against the government on age discrimination (the Aubrey Newport case) but it took two years before the Commission decided to move on the complaint. Apart from the question of enforcing the provisions of the Human Rights Act within the government bureaucracy, it is noteworthy that the Manitoba Act has not yet been given primacy over other statutes. In fact, only three provinces, Quebec, Saskatchewan and Alberta have given their Human Rights Acts primacy.

In his argument against an entrenched charter of rights, Premier Lyon suggested that "Parliament and Legislatures are better equipped to resolve social issues than judges who are not accountable to the people."

In urging that "some key individual and collective rights should be entrenched in a new constitution", the Unity Task Force also noted the importance of judicial decisions in constitutional matters and therefore recommended "changes to ensure the independence of the Supreme Court of Canada and to make it credible to all Canadians including those in Quebec." We will refer to the role of the judiciary again later in this brief.

Premier Lyon has also argued that "an entrenched charter, by its inflexibility, would inhibit the development and acknowledgement of new rights."

The Task Force on Canadian Unity explained in its report that an entrenched charter of rights need not be so inflexible as to inhibit the development of new rights. The Task Force recommended that some fundamental rights could be entrenched while others are left to a "combination of legislative and court protection." The possibility was also suggested "to entrench only general principles and to incorporate details in ordinary legislation, federal and provincial."⁴

We are also concerned with Premier Lyon's comments on freedom of religion in relation to prayers in our schools and the combatting of "cult activity". If freedom of religion means what it says, a non-Christian student should indeed not be compelled to recite or listen to a Christian prayer, day after day, as though it were an established state prayer. And what reason is there for government to get involved in combatting any so-called "cult" unless that cult can be shown to be involved in criminal or otherwise illegal activity? A "cult" may simply be a religious group which does not have widespread recognition or acceptance. There is no need to advocate a general policy of combatting cults unless we propose, in fact, to recognize a state religion. This of course would indeed mean that we have no freedom of religion.

Another major argument against the inclusion of a charter of rights in the Canadian Constitution is that this would be an infringement of provincial power over civil rights granted under the B.N.A. Act. Section 92 of the B.N.A. Act which sets out provincial powers, lists "Property and Civil Rights in the Province." This linkage should alert us to the difference between civil rights and civil liberties. The report of the Unity Task Force makes it clear that "civil rights" in the context of the B.N.A. Act are not synonymous with "civil liberties". Civil rights in this context, says the report, "refers mainly to matters of private law, such as property, torts, contracts and estates." Some aspects of fundamental rights protection may be included in civil rights, the task force report adds, such as "defamation, trade union certification and the status of married women." To the extent that the charter infringes on government

it does so in favor of the individual vis-a-vis all levels of government.

In a final reference to Premier Lyon's statement at the constitutional conference last September we note his comment that the existing "federal and provincial bills of rights" already give us the "alleged advantages" of "symbolic and educational value" ascribed to an entrenched charter. We assume that for Manitoba he is referring to the provincial human rights act. Although this Manitoban statute is not known as a "Bill of Rights" it must be acknowledged that it does include a greater number of categories for protection against discrimination and consequent human rights infractions, than do most other provincial human rights act and a greater number of categories than those included in the proposed charter. We have already indicated some limitations of the Manitoba Human Rights Act and our own research and studies show that there are further deficiencies.⁵ In addition, it must be stressed that the Manitoba Act is not a Bill of Rights in the generally understood sense of guaranteeing equal protection under the law and other related traditional rights of a democratic society.

Summing up our position to this point we would therefore urge that the Manitoba government recognize the need for the extension of human rights protection in our province. Considering the fact that the Canadian government with the agreement of the provinces has signed the International Covenants on Human Rights we believe there is an obligation on the provinces together with the federal

5 See report of the MARL Citizens Task Force on the Manitoba Human Rights Act

government to further the objectives of these covenants in Canada through a constitutional Charter of Rights.

We consider that the presentation of a charter of rights at this time has the positive value of promoting greater discussion on the whole area of human rights and civil liberties in Canada today and we trust and hope that these discussions can be directed along positive lines. We believe that the inclusion of a charter of rights and freedoms in the constitution will not only be of greater symbolic value but will also have a more far reaching educational value than the existing Canadian Bill of Rights..

One important reason that the courts have been found wanting in dealing with issues of human rights and civil liberties, is because the existing bill of rights does not have primacy over other statutes. The courts have therefore not acted with greater firmness and sensitivity on human rights issues because the judiciary recognizes that any act of parliament may be set above the bill of rights. It is felt that if the Canadian parliament, hopefully with the ultimate support of all provincial legislatures, declares in favour of a bill of rights in the constitution, that this will make a compelling impression on the members of the judiciary to persuade them to deal more forthrightly with civil liberties issues and in accordance with the broader perspectives on human rights and fundamental freedoms which are coming to be widely accepted.

Regarding the text of the Charter of Rights as presented in the Constitution Act 1980, there are many serious reservations. Considerable concern has been expressed about section 1 which says that the Charter shall be subject only to such "reasonable limits

as are generally accepted in a free and democratic society with a parliamentary system of government."

This section is considered too vague and has been seriously criticized by civil libertarians as making it possible to justify all the limits that have previously been invoked against human rights in Canada including the example cited earlier in this brief.

We believe with the Canadian Civil Liberties Association that this section would actively undermine the role of the intended charter of rights to restrain legislative violations of human rights. We believe that this section ought to be completely removed or substantially changed. If a limitation clause must be included in the charter, it should be restricted to limits which can be demonstrated to be necessary and the onus should be on the government to demonstrate the necessity for any limitation.

With regard to paragraph three on the right to vote, there is concern about the use of the phrase "without unreasonable discrimination or limitation". It is felt that there should be no limitation of voting rights other than those of age and nationality.

We also share with the C.C.L.A. the opinion that "any restriction on legal rights such as habeas corpus should require the most overwhelming of emergencies". We believe that the charter ought to explicitly state the intention to overcome the restrictive interpretations which undermine the value of the 1960 Canadian Bill of Rights. We also believe that the possible use of the War Measures Act ought to be made more difficult by a charter of rights. Further, that it ought to protect the individual against unreasonable search and seizure and offer better protection of the right to counsel.

Section 15 of the charter is widely regarded as not going far enough in that it does not protect women's rights in society generally and it is felt that other non-discrimination rights should be included, such as protection of the handicapped. This section ought to ensure equal protection under the law without any unreasonable discrimination. We further believe that the reference to the rights and freedoms of the native peoples of Canada in Section 24 is insufficient and that there ought to be some clearer protection for native rights included in the charter.

Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission has already testified before the parliamentary committee and urged elimination of weaknesses in the charter including some of those cited above. Earlier he also proposed that the sections dealing with equality before the law and equal protection under the law for all people without discrimination should "not be subject to repeal in any circumstances including a national emergency".⁶ Mr. Fairweather, who is a former provincial Attorney-General as well as a former PC member of the House of Commons, has also urged that since Canada is a signatory to the UN International Covenant on Human Rights - an action which was taken by the federal government, in agreement with the provincial governments - that therefore non-discrimination rights such as those included in the UN Covenants should be written into the charter and also be placed beyond repeal.

6 October 25 address to the National Black Coalition of Canada

The Manitoba Association for Rights and Liberties strongly favors an entrenched charter of rights.

However, we believe that there ought to be more time allowed for discussion. For this reason, we would urge the Manitoba government to reconsider its position against the entrenchment of rights in the constitution and to participate in that discussion in a positive manner.

The Canadian people have already expressed themselves in favour of a constitutional guarantee for basic human rights as demonstrated not only at various human rights conferences, but by the results of the Gallup poll on this question taken last summer in which 91% of the respondents answered "yes" across the country and in the west, including the prairie provinces and B.C., the response was even higher at 95%.

In spite of the criticism often levelled at public opinion polls, we do know that polls have also become a tool of the government. We would urge the Manitoba government that in recognition of the deriving of its power from the voters, it ought to respond to public opinion, by contributing to the development of an improved charter of rights rather than completely opposing a charter of rights in the constitution.

Respectfully submitted for the Manitoba Association for
Rights and Liberties,
Dr. Ralph James, President
Paul Walsh
Jill Oliver
Abraham Arnold, Executive Director

7 The third Canadian Conference on Multi-culturalism, Oct 1978
"strongly recommends that the Canadian Bill of Rights be
incorporated in the constitution of this country to ensure
proper protection for peoples of all ethnic backgrounds."

The First Canadian Conference on Human Rights sponsored by the
Canadian Human Rights Commission in Dec. 1978 included the following
recommendations in the special report presented to parliament:

(1) p. 6 III Human Rights Legislation

It is recommended that an amended and enlarged Bill of Rights
be entrenched in the Constitution, in order to safeguard the
freedoms and inalienable human rights of all individuals in
Canada.

- (2) It is recommended that the Bill of Rights take precedence over
all other Acts of Parliament and guarantee equal rights to all.

Extract from p. 13, VII Education

- (1) It is recommended that all levels of the judiciary should be
sensitized regarding human rights issues.

We recognize of course that last summer's public opinion poll could by now be somewhat dissipated in the dissent that has been created by the autumn controversy between the federal and provincial governments. This demonstrates that a majority can indeed be transitory and underlines the need to place some of our fundamental rights and freedoms beyond the easy reach of the majority.

It's just not satisfactory for a provincial government to say to the federal government: "Our human rights act is good enough for us and better than your proposed charter." If we want to demand that other countries honor human rights we ought to set a better example in our own country.

No one political party can claim to have a better answer than another party for the protection of human rights and fundamental freedoms. The best approach has probably been devised by the national unity task force headed by Jean luc Pepin and John Robarts. The positive recommendations of the task force are regrettably being ignored on all sides. If every political party could heed the civil libertarians in its own ranks we would more likely achieve a consensus in favor of an entrenched charter of rights. That charter should not just be a vacuum packed educational symbol but a document that does the following:

1. takes cogniscance of what we have already achieved in human rights protection in Canada,
2. recognizes those rights we must now enshrine for guaranteed protection,