BRIEF

submitted to

SPECIAL JOINT COMMITEE OF THE SENATE AND OF
THE HOUSE OF COMMONS ON THE CONSTITUTION OF CANADA

by

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SUMMARY

As the largest English Speaking Catholic School Board in Canada, having responsibility for educating 93,926 children in the Metropolitan Toronto area, Metropolitan Separate School Board respectfully seeks to appear before the Committee to explain its concerns set out herein that the Proposed Resolution respecting the Constitution of Canada :

a) fails to adequately preserve and protect the rights and privileges with respect to denominational schools which Roman Catholic Separate School supporters, a class of persons who have such rights and privileges, have enjoyed since before 1867;

b) fails to ensure that proposed amending formulae respect and preserve such rights and privileges; and

c) should be amended to correct such failures in the manner set out in Section VI (p. 20) of this Brief.

NOTEZ, S'il Vous Plait:

Metropolitan Separate School Board tient presenter l'excuse, car il n'a pu présenter au Comité qu'une version en anglais de son exposé; il soumettre la version française ultérieurement.

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I. STATUS OF METROPOLITAN SEPARATE SCHOOL BOARD

1.01 Metropolitan Separate School Board ("MSSB") was incorporated by The Metropolitan Separate School Board Act, 1953, Statutes of Ontario, 1953, Chapter 119, and, throughout the whole of the geographical area of Metropolitan Toronto in the Province of Ontario, exercises the powers and fulfils the duties of an urban separate school board within the meaning of and pursuant to its act of incorporation and The Education Act, 1974, Statutes of Ontario, 1974, Chapter 109, as amended.

1.02 MSSB is the successor to the Board of Trustees of the Roman Catholic Separate Schools for the City of Toronto, a separate school board that existed at the time of coming into force of the British North American Act, 1867, Statutes of the Parliament of the United Kingdom of Great Britain and Ireland, 30-31 Victoria, Chapter 3 ("Constitution Act, 1867").

1.03 MSSB is a "denominational school" within the meaning of section 93 of the Constitution Act, 1867, which

section provides, in part, as follows:

> "In and for each Province, the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:
>
> (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the union...".

1.04 Since 1953, the number of pupils being educated by MSSB has risen from 18,500 to the present total of 93,926, the number of teachers and other staff has grown from 534 to the present total of approximately 6,050, and the number of schools under the jurisdiction of MSSB has increased from 45 to the present total of 207; in addition, the operating budget has risen from $2,469,464 to approximately $195,000,000. These statistics verify that MSSB is the second largest school board in Canada, the largest school board in Ontario, and the largest English-speaking denominational school board in Canada.

1.05 MSSB respectfully suggests that these statistics require the recognition of the Special Joint Committee on

the Constitution of Canada that MSSB and its supporters are singularly affected by the proposed resolution respecting the Constitution of Canada.

II. MSSB POSITION ON PROPOSED RESOLUTION

2.01 At the outset, it is emphasized that MSSB is not opposed to the concept that the Constitution of a sovereign nation, such as Canada, should be vested in its entirety in the sovereign nation itself, and should not rest in a jurisdiction that is, strictly speaking, outside the parliamentary and legislative authority of such sovereign nation. MSSB does not, moreover, question the desirability, in general terms, of the expression in the Canadian Constitution of guarantees of basic rights and freedoms.

2.02 In fulfilment of the scriptural admonition to "love God and love your neighbour" as the root of Catholic morality, the support of MSSB for human rights and freedom transcends the enactment of any legislation designed to protect and foster public respect for such rights and freedoms in Canada or elsewhere. Catholic teaching, based upon both scripture and tradition, imposes upon every person the obligation, as a matter of faith and conscience, to love one's fellow man.

2.03 Founded upon the principle that every human being as a person is equal in the eyes of God to every other human

being as a person, and that as a result, every person has rights equal to those of all others, Catholic morality and Catholic education necessarily support proposals that strengthen and broaden the public expression of the inherent dignity, rights and freedom of all men. The religious, philosophical and publicly stated position of MSSB strongly supports the fundamental principles inherent in the concepts of the Canadian Charter of rights and freedoms.

2.04 Indeed, in the preamble of the working by-law of MSSB, the following is included:

> WHEREAS the Metropolitan Separate School Board recognizes that God, as a focal point of our lives, must also be the integrating influence of the school community, the curriculum, and day-to-day life of a Catholic school; and
>
> WHEREAS the Metropolitan Separate School Board recognizes its responsibility, in co-operation with the home and the parish, to provide a Catholic Education that will develop the full spiritual, physical, intellectual, psychological and emotional well-being of each child as an individual;
>
> THEREFORE, the basic objectives for the Board, its staff and each Catholic School shall be to help each student,
>
> (a) to develop a deep personal relationship with Christ, so that it manifests itself in his daily life;

> (b) to develop a love for the Church as the family of God's people;
>
> (c) to develop an appreciation and understanding of the personal worth and dignity of every man, as well as of himself;
>
> ...
>
> (i) prepare to make a useful contribution to society and to assume his obligation as a member of society.

Within the context of this presentation, the terms of sub-paragraph (c) above noted should be emphasized.

2.05 The role of the educator is perhaps the most significant of all roles in society, not only with regard to human rights and freedoms generally, but in all areas of social interchange in our society. MSSB cannot help but be cognizant of that role which it plays in today's multi-cultural, multi-racial society. Pursuant to such an awareness, MSSB has diligently sought to fulfil the needs of all pupils under its jurisdiction in the light of its religious and philosophical obligations.

2.06 The balancing of the rights of members of our society becomes the practical problem that must be examined,

weighed and tested against the very fundamental principle of equality. Undue emphasis on the rights of one individual member of society may, as a result, infringe upon the rights of other members of that society. In the field of human conduct, therefore, consideration of such potentially (and frequently, actually) competing interests must be reviewed in the light of this principle of equality.

2.07 Notwithstanding the strong support of MSSB for the principles inherent in human rights and freedoms legislation and in the Canadian Charter of rights and freedoms (Part I of the Constitution Act, 1980), the practical application of some of these principles as proposed in the Canadian Charter of rights and freedoms represents an improper balance of competing rights or interests. The exceptions taken by MSSB are not intended to discredit the expression of fundamental rights and freedoms contained in Part I of the Constitution Act, 1980, but are intended, rather, to shift the emphasis in an effort to establish a proper balance between such competing rights.

2.08 The objections of MSSB to the Constitution Act, 1980, lie principally in two areas:

.01 Those in which the proposals infringe either actually or potentially upon the constitutional protection now enjoyed by that class of persons who have by law at this time rights or privileges with respect to denominational schools; and

.02 Those in which the mechanism for amendment as proposed in the Constitution Act, 1980, may have the effect of eliminating the present constitutional protection of such rights or privileges.

3.04 Even granted that the political climate of 1980 differs vastly from the political climate of 1867, the inclusion of Section 93 in 1867 and the absence of a parallel or preserving section in 1980, apart from any other considerations, provokes MSSB to express its profound concern for the continued existence of denominational schools in general, and MSSB in particular, except, possibly, in name only.

3.05 Although it is considered neither necessary nor appropriate to cite all court judgments antecedent to the 1977 Alberta Court of Appeal decision referred to below, it is submitted that it is obvious to any person who has examined the law with respect to denominational schools, that since 1867, Canadian courts have not denied the right of denominational schools to impose criteria perhaps not otherwise available to "non-denominational" schools, based upon the constitutional protection that has been provided by Section 93 of the Constitution Act, 1867.

Solely by way of example, the distinction or discrimination of Canadians in various provinces on denominational grounds for educational purposes is in fact at

the present time authorized under the Constitution Act, 1867, and, as was recently reaffirmed by the Appellate Division of the Alberta Supreme Court, such distinction or discrimination cannot be overruled by provincial legislation such as the Individual Rights Protection Act of that Province (see re Schmidt and Calgary Board of Education, et al (1977) 72 D.L.R. (3rd) 330).

3.06 Media reports of comment upon the Canadian Charter of rights and freedoms have suggested that Section 24 of the Constitution Act, 1980, necessarily preserves the rights and freedoms that currently exist in Canada. Indeed, the explanatory note contained in the publication of the government of Canada entitled "The Canadian Constitution, 1980/La Constitutionne Canadienne", with reference to Section 24, indicates that the section is not intended to affect any rights and freedoms not specified in it. It must be observed, however, that the section itself does not specify that the guarantee in the Charter does preserve any rights and freedoms not specified in it. It is not an explicit statement that all existing rights and privileges are continued and preserved. If such is intended, an explicit statement to that effect will ensure that continuation and preservation.

3.07 Of perhaps the greatest significance for that class of persons who have by law any right or privilege with respect to denominational schools at this date, is the limitation expressed in Section 1, "subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government". Denominational schools and constitutional protection for any class of persons having rights or privileges with respect to denominational schools may not be "generally accepted" in such free and democratic societies with parliamentary systems of governments as may be seen in the United States of America, or other countries that might otherwise be described as "free and democratic societies with parliamentary systems of government".

3.08 As a denominational school, MSSB must be selective, and by reason of Section 93 of the Constitution Act, 1867, has a right to be selective, in the choice of the persons who will serve as part of the pedagogical team. The members of this team (at the instance of the parents as the persons having the denominational rights and privileges now protected by the same Section 93) inculcate by precept and example, in the children enrolled in MSSB schools, the philosophical and theological principles of Catholicisim upon which MSSB is based.

If Section 15 of the Constitution Act, 1980, is enacted, and no provision is included in the Constitution Act, 1980, specifically to preserve the rights and privileges with respect to denominational schools as contained in Section 93 of the Constitution Act, 1867, there is legitimate fear that on the basis of proper statutory interpretation, Section 15 might well prevail, thereby abrogating the right or privilege with respect to denominational schools.

3.09 Although, as indicated in Section 2.03 above, MSSB subscribes to the principle of equality, that principle is subservient to the right of MSSB to be denominationally selective in choosing those persons who will potentially influence the philosophy and theology transmitted to the pupils who or whose parents have chosen, as a matter of personal conscience, the Catholic Education offered by MSSB.

To exclude the pupils educated by MSSB now and in the future and their parents from such right is to abrogate their existing rights, the rights of that class of persons who have the rights and privileges inherent in denominational schools as currently protected by Section 93 of the Constitution Act, 1867.

3.10 With respect to Sections 25 and 29, the concern of MSSB is limited to those situations whereby the present right as contained in Section 93 of the Constitution Act, 1867, may be impaired or abrogated. With the exception of such concerns, MSSB does not have any objection to these sections.

IV. OBJECTIONS TO AMENDING FORMULAE

4.01 Although recognizing the need for some mechanism for the amendment of the Constitution, to enable governments in Canada to have the flexibility necessary to react to future situations and conditions that may well not be possible to predict or even imagine at this time, MSSB expresses equal concern that the provisions of Part 4 and Part 5 as amending procedures provide no protection for certain classes of persons, including those who have rights and privileges with respect to denominational schools. As a parenthetical observation, the concern expressed in this section is not unique to those who hold rights or privileges with respect to denominational schools, but must surely be shared by such other minorities as the native peoples of Canada with respect to their rights or freedoms.

4.02 With the exception noted in Sections 4.03 and following, MSSB expresses no opinion with respect to the alternative amending formulae, as such, that have been set out in Parts 4 and 5 of the Constitution Act, 1980. MSSB

does not consider that its responsibility for school matters and for denominational rights of its supporters extends to the expression of views in areas with which it has no specific and direct concern.

4.03 What is considered by MSSB to be of considerable significance is the fact that no amending formula presently proposed ensures that only that class of persons who have by law any right or privilege with respect to denominational schools will have the future right to determine that such right or privilege may be amended, varied or abrogated. Although, in principle, there is and can be no argument that the will of the majority should prevail where each is, equally with all others, affected by the variation, amendment or abrogation of the rights concerned, it is not appropriate that the will of the majority should prevail if that majority is not limited to those persons whose rights are being affected. Thus, it would be most appropriate to permit every citizen of Canada to vote in a referendum with respect to the any matter which may affect every citizen of Canada; but, on the contrary, it would not be at all appropriate to permit those citizens of Canada not enjoying a right or privilege protected in the Charter of rights and

freedoms to vote on the abolition of a right or freedom enjoyed by only a limited number of the citizens.

That this is neither a hypothetical nor illusory concern may be graphically illustrated by considering the situation in the Province of Ontario. One may assume that the number of children in schools under the jurisdiction of Separate School Boards, expressed as a percentage of all children in elementary and secondary schools, accurately predicts the number of citizens of Ontario who, expressed as a percentage of all citizens of Ontario, are a class of persons having the right or privilege with respect to denominational schools. A referendum amending, varying or abrogating the right or privilege of that class with respect to denominational schools would "load the vote" in favour of the amendment, variation or abrogation, by giving a vote on the question to those who do not enjoy the right or privilege.

4.04 Since most particularly constitutional legislation must provide for possibilities and not just probabilities, MSSB most urgently requests the Joint Committee and the Parliament of Canada to ensure that no amending mechanism be

included in the Constitution Act, 1980, that could have the effect of giving a majority, who do not share a right or privilege, the power to diminish or abrogate the right or privilege of those who do have such right or privilege.

V. SUPPORT OF OTHER PRESENTATIONS

5.01 Having reviewed the statements presented to your Committee by the Ontario Separate School Trustees Association dated November 24, 1980, and the submission of the Canadian Catholic School Trustees Association dated November 27, 1980, MSSB supports the concepts and concerns expressed therein.

VI. SUGGESTED TEXT

6.01 For the reasons inherent in the foregoing, MSSB urgently requests that the Joint Committee, and the Parliament of Canada, include in the Constitution Act, 1980, the following provision, or a provision to the same effect:

> (1) The guarantee in this Charter of certain rights and freedoms shall not be construed as preventing or limiting
>
> (a) any rights or privileges, by any provision of the Constitution of Canada, granted or secured with respect to separate, dissentient or other denominational schools;
>
> (b) the establishment or extension by authority of public statute or otherwise of any separate, dissentient or other denominational school or system of schools or of any scheme of funding from public revenues or otherwise for the support of such school or system as is deemed appropriate; or
>
> (c) the operation of any separate, dissentient or other denominational school or

system of schools in accordance with its denominational requirements including, but not limited to, the right to follow a selective policy with respect to enrolment on the basis of sex or religion and to employ persons subscribing to the tenets of a particular religion.

(2) An amendment to this section of the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by a referendum held throughout Canada under subsection 2 of Section 42 at which

(a) a majority of the class of persons, who have any right or privilege with respect to denominational schools, voting thereat, and

(b) a majority of any class of persons, who have any right or privilege with respect to denominational schools, voting thereat in each of the provinces, resolutions of the legislative assemblies of which would otherwise be sufficient, together with the

VII. CONCLUSION

7.01 MSSB commends the Parliament of Canada and the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada for seeking the views of individuals and organizations in Canada with respect to the proposed resolution for a joint address to Her Majesty the Queen; and for extending the original deadline to enable the interested individuals and organizations to participate in the process by which the Constitution of Canada will be returned to Canada from the Imperial Parliament.

7.02 MSSB has attempted to set out herein its fundamental and fearful concerns that the very existence of denominational schools, in general, and MSSB in particular, having enjoyed the protection of constitutional guarantee for over 113 years may be, as it were, wiped out by action neither advertant nor completely reflective.

7.03 MSSB has elsewhere, and hereby reiterates, a request to the Joint Committee that it be permitted to

appear before the Joint Committee for the purpose of laying before the Committee its concern that the rights enjoyed for more than a century may or could be eliminated.

All of which is respectfully submitted this 30th day of December, 1980.

METROPOLITAN SEPARATE SCHOOL BOARD

P. J. DUGGAN,
Chairman

B. E. NELLIGAN,
Director of Education