

BRIEF

TO

THE SPECIAL JOINT COMMITTEE  
ON THE CONSTITUTION OF CANADA

from

THE NEW BRUNSWICK HUMAN RIGHTS COMMISSION

Houses of Parliament

OTTAWA, ONTARIO

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## I. INTRODUCTION

An entrenched constitutional "Charter of Rights" is but one of many instruments available for the enhancement of human rights. However, a Charter of Rights has a very special status among the other instruments.

The Courts are but one of many institutions available for the protection of human rights. However, the courts have a very special status, among the other institutions.

It is the view of the New Brunswick Human Rights Commission, the second such institution in Canada, established in 1967 to administer a provincial Human Rights Act, that a variety of human rights instruments and institutions will always be necessary for the enhancement of human rights in Canada. Therefore, a note of caution needs to be sounded in order to prevent the misconception that the proposed Charter of Rights and Freedoms is designed to be the only instrument for the protection of human rights in Canada. One might easily appreciate this point by underscoring the importance of such human rights instrument, as the 1976 Race Relations Act in Great Britain, notwithstanding the ratification by Great Britain of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the passage by Congress of the Civil Rights Act notwithstanding the American Bill of Rights.

In Canada, existing laws protect many rights and freedoms. The proposed Canadian Charter of Rights and Freedoms will serve to

supplement some of these laws by establishing some basic standards for the enjoyment of human rights throughout Canada. However, continued legislative action will be required as the new human needs and rights will dictate. That is, the legislative institutions will continue to be the major institution for the furtherance of human rights in Canada. This becomes especially evident when one considers the 'programmatically' nature of such rights as the right to work, the right to social security, the right to leisure, which rights are described in the International Covenant on Economic, Social and Cultural Rights, ratified by Canada in 1976.

A third institution for the protection and enhancement of human rights is the voluntary sector, or public opinion. The people and the people's interest will, through citizen vigilance continue to be the most important institution for the protection of human rights.

## II. RELATION OF THE PROPOSED CANADIAN CHARTER OF RIGHTS AND FREEDOMS TO INTERNATIONAL HUMAN RIGHTS STANDARDS

1. The attention of parliamentarians has been drawn to the United Nation's International Covenants on Human Rights and also to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms. One notes that both the explanatory comments which have accompanied the resolution before Parliament, and many of the briefs submitted to the Joint Committee have referenced the aforementioned international human rights instruments.

2. Preambular Paragraph #3 - ENTRENCHMENT

"And whereas it is also desirable to provide in the Constitution of Canada for the recognition of certain fundamental rights and freedoms and to make other amendments to that Constitution "

The New Brunswick Human Rights Commission enthusiastically supports the entrenchment of a statement of rights in the Canadian Constitution. We are not persuaded by those who argue that such a move is contrary to contemporary, 1980 parliamentary democracy. We note carefully, for the Committee's attention, the fact of great changes which have occurred with regard to the protection of human rights in Great Britain. The United Kingdom has ratified the European Convention for the Protection of Human Rights and Fundamental Freedom, and has recognized the competence of the European Court of Human Rights with regards to Great Britain. Therefore, as we move towards the close of the 20th century the principle of "the supremacy of parliament" is being recasted with the ascendance of the principle of "the supremacy of law".

A new federation has evolved in Europe, and Great Britain is a part of this new European community. Therefore, we now have a new application of Dicey's admission that:

"federalism is necessarily based on the supremacy of law, not of Parliament."

It cannot be any longer validly argued that "entrenchment" is undesirable on the ground of the traditional thesis on 'parliamentary supremacy'. A change of great significance for the protection of

human rights has occurred for Britain as part of the European community. Indeed there are many authorities in England who have advanced the ideas of an entrenched Bill of Rights for the United Kingdom or making the European Convention part of the domestic law of England.

### 3. Article One - Canadian Charter of Rights and Freedoms

We find that the present wording of Article One of the proposed Canadian Charter of Rights and Freedoms poses at least three difficulties:

i) reasonable limitations should be "strictly required" and not "generally accepted" limits

ii) under no circumstances should the human rights of a Canadian ever be limited solely on the grounds of discrimination because of race, national or ethnic origin, colour, religion, language or sex

iii) in times of emergency not all rights need to be restricted

The New Brunswick Human Rights Commission recommends that Article One be amended to read as follows:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are strictly required in a free and democratic society, provided that such limits do not involve discrimination solely on the ground of

race, national or ethnic origin, colour,  
religion, language or sex."

i) It is our view that the current wording of Article 1, is unnecessarily broad. What is considered to be "reasonable" at any particular time often depends on what is "generally accepted", so that these two tests both depend on the popular mood at a given time. This may not provide adequate protection to unpopular minorities, who are in the greatest need of protection. The words "generally accepted" are also vague and subjective. The substitution of words "strictly required", adds a more objective and more stringent test to section 1. This expression is contained in article 4 of the International Covenant on Civil and Political Rights, which reads as follows:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligation under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 15 of the European Convention similarly uses the phrase "strictly required":

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

ii) The New Brunswick Human Rights Commission urges the Parliament to make a provision that would not permit any derogation of the human rights of Canadians solely on the ground of discrimination because of race, national or ethnic origin, colour, religion, language or sex. It is our opinion, that the entire anti-discrimination struggle, that the provincial human rights agencies have been engaged in over the past 15 years, would be undermined if rights could be limited solely because of such things as the colour of one's skin. It is for this reason that the New Brunswick Human Rights Commission has recommended that the phrase: "provided that such limits do not involve discrimination solely on the ground of ..." be added to the first Article of the proposed Charter.

It will be noted, that we have taken this quoted phrase from Article 4 of the International Covenant on Civil and Political Rights.

iii) The present brief invites the Joint Committee to examine the problem in the present resolution with reference to emergency situations. The International Covenants give specific attention to this issue.

#### 4. Article 15 - Non-Discrimination Rights

##### (a) The Proscribed Grounds of Discrimination

If Article 15(1) is to include a list of proscribed grounds of discrimination, then the New Brunswick Human Rights Commission would recommend that the list be that which is contained in both the European Convention and the U. N. Covenant on Civil and Political Rights.

Presently, Article 15(1) provides:

"Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national *nationality* origin, colour, religion, age or sex."

We recommend that it be amended to read as follows:

Everyone has the right to equality before the law and to the equal protection of the law without discrimination on any ground such as race, *national or ethnic origin* colour, religion, age, language, sex or other status.



If this recommended change is made to the present Article 15 it would have the advantage of making the non-discrimination provision of the Charter more congruent with the various anti-discrimination statutes in Canada. For example, the proscribed grounds of discrimination in the New Brunswick Human Rights Code, include physical disability, marital status, ancestry and other grounds not included in Article 15, however, pursuant to the "ejusdem generis" rule of interpretation would be included as a proscribed ground of discrimination. It is important, therefore, that the words "such as" and "or other status" be added. It will also provide for the Charter of Rights to be responsive to the grounds that will evolve as society changes.

The attention of the Committee is drawn to the fact that the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by the United Kingdom provides as follows:

Article 14

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"

Secondly, the United Nation's International Covenant on Civil and Political Rights, which Canada ratified after consultation with it's provinces, provides as follows:

Article 26

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The proposed amendment would bring Canada's laws into greater conformity with this Covenant, and by the provision of the proscribed ground of language would be of special importance in a Country which has so many different languages being spoken. We note that language was included as a proscribed ground of discrimination in Section 9 of Bill C-60.

(b) Equality before the Law

The New Brunswick Human Rights Commission has carried the brief of Sandra Lovelace, the New Brunswick Maliseet Indian woman

who does not have equality before the law. Sandra Lovelace like all native women who marry non-status Indians lose their Indian Rights because of Section 12(1)(b) of the Indian Act. Since the Supreme Court of Canada in the Bedard & LaVell case has given a particular interpretation to 'equality before the law', many are concerned that this phrase should be changed.

United States experience with "equality before the law" is brought to bear on this subject. The famous XIVth Amendment of 1868 provided that no state shall

"... deny to any person within its jurisdiction  
the equal protection of the laws"

This Amendment was soon interpreted by the United States Supreme Court to extend to all races; not just Blacks, but many efforts were made to 'get around' this provision. One recalls the doctrine of "separate but equal" that appeared in Plessy v Ferguson, the case in which Louisiana state legislation that required Blacks and Whites to ride in separate railway cars. This doctrine was finally repudiated in the famous case of Brown v Board of Education. With the complete rejection of the Plessy philosophy we find the American courts operating on the basis of egalitarianism. We wish to be ensured that the same egalitarian principle will be understood to underlay any 'equality before the law' provision in the Charter of Rights. Several briefs have been submitted to the Committee on this point and we lend our support to their request for clarification.

5. Article 24 - Indian Rights for Indian Women

The New Brunswick Human Rights Commission has learned through its "good offices" intervention on behalf of Sandra Lovelace, that specific protection is required in order to ensure equal rights for Indian women. We therefore strongly recommend that Article 24 be amended by adding the appropriate phraseology to obviate the legislative discrimination of the type that appears in Section 12(1)(b) of the Indian Act.

III. AFFIRMATIVE ACTION - Section 15(2)

The New Brunswick Human Rights Code provides the legislative faculty for the establishment of affirmative action programmes.

Section 13 of the Code reads:

13(1) On the application of any person, or on its own initiative, the Commission may approve a programme to be undertaken by any person designed to promote the welfare of any class of persons.

13(2) At any time before or after approving a programme, the Commission may

(a) make inquiries concerning the programme,

(b) vary the programme,

(c) impose conditions on the programme, or

(d) withdraw approval of the programme, as

the Commission thinks fit.

13(3) Anything done in accordance with a programme approved pursuant to this section is not a violation of the provisions of this Act.

Similar provisions for affirmative action programmes can be found in most of the other provincial anti-discrimination statutes. It is therefore, important that there appears a provision such as that contained in Section 15(2) of the proposed Charter. This, our Commission supports because it allows us to combat discrimination and especially the effects of discrimination.

It is necessary for anti-discrimination agencies to be able to conduct affirmative action programmes, because this is the only way that we will ever overcome the effects of many years of disadvantage which such groups as the visible minorities, women and the handicapped have experienced.

(b) Subsection 15(2) now reads as follows:

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

It is proposed that it be amended to read as follows:

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

As presently worded, subsection 15(2) seems to be exempt from subsection (1) even those affirmative action programs that are undertaken without legal authority. In order to ensure that such programs do not unfairly discriminate and are not used as a device to avoid subsection 15(1), it is proposed that subsection 15(2) be amended so that only legally authorized plans be exempted. Presently such plans must be approved by a Human Rights Commission or some such monitoring agency and accordingly are less likely to be abused.

#### CONCLUSION

The ideal situation would be one in which the entire proposed Charter would be revised in the light of the International Covenants on Human Rights, not only the Covenant on Civil and Political Rights, but also the Covenant on Economic, Social and Cultural Rights.

If the practical dynamics of "realpolitik" in Canada are such that the current proposal must go forward, then we would urge careful consideration of the above suggested amendments.

APPENDIX I  
CONVENTION FOR THE PROTECTION  
OF HUMAN RIGHTS  
AND FUNDAMENTAL FREEDOMS

*The Governments signatory hereto, being Members of the Council of Europe,*

*Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;*

*Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;*

*Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;*

*Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;*

*Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration,*

*Have agreed as follows:*

*Article 1*

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I

*Article 2*

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

*Article 3*

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

*Article 4*

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

*Article 5*

1. Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;