Patriation, The Charter of Rights,
and Canada's Constitutional Future

Positive Action Committee Brief on
The Proposed Resolution Respecting the Constitution of Canada

Positive Action Committee
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POSITIVE ACTION COMMITTEE BRIEF ON
THE PROPOSED RESOLUTION RESPECTING THE CONSTITUTION OF CANADA

Introduction

The Positive Action Committee was formed in December 1976, the month following the election of the Parti Québécois, with the aim of establishing a constructive role for the non-Francophone community of Quebec. What we seek in Quebec is an open, pluralistic society in which people of all languages and cultures are welcome. We accept the position of French as the primary language of communication, and believe that Canada's future depends upon a close partnership of its French- and English-speaking communities that will overcome the antagonisms of the past.

This partnership we are pledged to promote. The many initiatives we have taken over the past 3½ years on behalf of our 50,000 members have all been designed to encourage the direct involvement of Quebec's non-Francophone communities.
in every aspect of life in our province. Our motto is:
a strong Quebec in a united Canada.

The Government's Proposal

The government's constitutional proposals are far-reaching in their implications. It is safe to say that, if adopted, they will set the pattern for social, political and especially linguistic development in Canada for many years to come. Hence the importance of making sure that these proposals are the right ones to mould our future.

Positive Action supports the objective of patriation. Patrionation will bring our constitution into our hands and make it subject to our national will. Of all the countries in the world, Canada is the only one whose constitution is in the keeping of another nation. This is an intolerable situation. A constitution is the fountainhead of a country's sovereignty, the supreme principle that legitimizes all its laws and political institutions.

One of the advantages of the government's resolution is that it provides for French and English versions of the constitution which are equally authoritative. At present, the British North America Act exists only in English. Patrionation will correct this anomaly whereby the constitution exists in only one of our country's official languages.

There will be few if any Canadians who oppose patriation as such. What many will challenge is the government's timing. Opponents of the resolution will say that patriation should come not first but last in the process of constitutional reform. Only after the constitution has been completely re-written, they will say, agreement reached on all issues including division of powers between the federal and provincial governments, should we then proceed to bring the constitution
home. Instead of being the invitation that leads us to further discussions and negotiations, patriation should be the crowning diadem of constitutional reform, the jewel that symbolizes final agreement.

This is a seductive line of argument, but one which we feel in the circumstances to be unrealistic. Given the present pace of constitutional negotiations, it could be many years before agreement on all issues is reached. A more practical, and in all probability more productive, modus operandi would be to agree to an amending formula first, patriate, and then accomplish the process of constitutional reform in stages. Such a procedure holds out the hope of substantial reform within our lifetimes.

The Process

Our first preference would be for patriation first and entrenchment second. But if these steps were followed without prior agreement on an amending formula, the requirement of unanimity would to all intents and purposes block entrenchment for the foreseeable future.

The best and perhaps only solution that can still be achieved is to urge the first ministers to meet once again immediately following the deliberations of this Committee to address themselves solely to the question of an amending formula. As a pre-condition for the success of this meeting, we recommend that the Federal government drop its proposal for amendment by way of referendum (Section 42). This idea so strikes at the notion of consensus as to undermine the federal system as we know it.
Taking into account the weight of public opinion in favour of patriation, the realization of the damage to federalism that the imposition of an amending formula by the Federal government could cause, and the humiliating spectre of premiers and Federal government ministers flying back and forth to London to press their respective cases before the Parliament of Westminster, surely an amending formula can now be found in Canada.

If an amending formula is beyond the imagination and spirit of compromise of the first ministers, then we see no alternative but to proceed with the proposed resolution, amended to reflect the wishes of Canadians as expressed to your Committee.

The people of our province who voted in favour of renewed federalism when they voted 'NO' in the referendum were not thinking of amending formulas and entrenched rights alone. We were envisaging a major revision of the Constitution and a re-distribution of powers. The proposed resolution and the method of proceeding is, therefore, perceived by many in Quebec, rightly or wrongly, as something far short of what they expected to obtain when they voted 'NO'.

But if the constitution remains in London, or unanimity is required to amend the formula, how will we ever renew our Federation and change our Constitution?

To break the logjam, therefore, if agreement cannot be reached at this time to an amending formula, we see no alternative but to patriate and to work within Canada towards the renewed constitution that all Canadians desire.
The Charter of Rights

From the point of view of the ordinary citizen, the most important feature of the government's resolution is its inclusion in the constitution of a charter of rights. This charter guarantees for every person the fundamental freedoms of conscience, religion, expression and association, in addition to legal and democratic rights and the right of non-discrimination. Under mobility rights, the charter grants to every Canadian and permanent resident the important right to take up residence and seek employment in any province he chooses. Finally, under language rights, the charter accords to Canadian citizens whose mother tongue is that of the French or English language minority of any province the right to educate their children in that language, where numbers warrant.

These rights, if they went far enough, would provide a basic minimum content to the notion of citizenship in Canada. Hence the importance of a charter of rights which cuts across provincial boundaries. If we as Canadians attach importance to being able to point to something that distinguishes us from Americans, it will not be sufficient to say that in Saskatchewan we have such-and-such rights, whereas in Nova Scotia or British Columbia we have such-and-such other rights. To say what constitutes being a citizen or a resident of Canada we must be able to point to rights that are one and the same no matter where we live. For that reason, a federal charter of rights can and ought to be a powerful instrument for forging a sense of national identity.
The rights contained in the proposed charter, if they went far enough, would provide some concrete legal content to the assertion, "I am a Canadian". But in our opinion they do not. In the domain of language rights the government, in an attempt to produce a package that would win the support of at least some provinces, has watered down its projected charter to the point that many important rights remain unprotected. What is remarkable in the present proposal is that on all previous occasions, and even as recently as August of this year, the Federal government had included in its proposals a much stronger set of rights. Suddenly, in October, we find language rights reduced to one only, the right to minority language education. We cannot but protest. In the remainder of our brief we examine various language rights in addition to this one, and show why their entrenchment in the constitution is not a minor matter, but in the long run of decisive importance for the future of our country.

Language Rights

In a brief to the Pépin-Robarts Commission in 1978, the Positive Action Committee recommended entrenchment of the following linguistic rights:
a) The right of every person whose mother tongue is English or French to have his children educated in their mother tongue anywhere in Canada.

b) The right of every person to communicate with the federal government and its agencies in English or French, anywhere in Canada.

c) The right of every person to communicate with provincial and municipal governments and their agencies in English or French, where numbers so warrant.

d) The right of every person to health, social and cultural services, including broadcasting, in English or French, where numbers so warrant.

e) The right of every person charged with a criminal offence to be tried in English or French, where numbers so warrant.

f) The right of native persons to have their children educated in their native tongue, where numbers so warrant.

g) The right of persons whose mother tongue is other than English or French to have their children learn that tongue, where numbers so warrant.

Nothing has caused us to alter this position.

We still believe strongly in the importance of the right to minority language education, to a criminal trial
in French or English everywhere in Canada. We still believe in the right for English and French-speaking minorities and native peoples to have access to health, social and cultural services in their language and the right to communicate with all levels of government in French and English where the numbers warrant.

In addition, following numerous contacts and discussions with A.C.F.O., l'Association canadienne-française de l'Ontario, we have now come to believe equally strongly in the necessity of constitutional provisions for the official status of the French language in the legislatures and courts of provinces other than Quebec. We, in Quebec, are perhaps in a better position to speak to this latter recommendation than any other group in Canada, given the long and honorably sustained tradition of bilingualism in the legislature and courts of our province.

**Language of Legislature and Courts**

Bill C-60, the Constitutional Amendment Bill presented to the Canadian Parliament in June 1968, contains the following clause (Section 14 (2)):

1. Any individual has the right to use English or French, as he or she may choose, in any of the debates or proceedings of the legislative assembly of any province.

This right is also recommended by the Bar Association, and is contained in the federal constitutional proposals to the provinces (working paper) of August 22, 1980.

We urge most strongly that this provision be reintroduced into the present resolution. If the right to use one of Canada's official languages in the debates or proceedings of a legislative assembly is denied, then representation to the official language minorities across Canada is effectively denied. If a French-speaking person
in a province of Canada where that right is not granted must use the English language in the debates of his assembly, he and his fellow citizens can hardly feel represented in the fullest sense of the word. To many English-speaking Canadians, the right to speak English or French in any legislative assembly may appear a piece of empty symbolism, but this is far from being the case.

In addition to the preceding right, Positive Action wishes also to propose the following:

2. **Sections 133 of the BNA Act and 23 of the Manitoba Act should be extended to New Brunswick and Ontario.**

These sections establish both French and English as the official languages of the legislature and the courts of Quebec and Manitoba. The extension to Ontario and New Brunswick was recommended by C-60, the Bar Association, the Beige Paper and the federal proposals of August 22nd.

As English-speaking Quebecers, we have borne witness to the use of both languages not only in the legislature but also before the courts in our province. Whether it be in Montreal where there are nearly one million English-speaking people or in the Beauce where only a handful reside, whether it be a civil or criminal trial, any witness or litigant can testify or plead in both languages. Even under Bill 101, this right, while limited for corporations in civil trials, never attempted to prevent witnesses or litigants from speaking English in the courts.

The bilingual courts of Quebec are a source of pride to our Bar and Bench and an example to our country.

Having offered in Bill C-60 to guarantee to the French-speaking people of New Brunswick and Ontario the right to speak French in the courts of these provinces, and having extended it to the people of Manitoba in the Charter proposed on September 10th, the Government now proposes to abandon them. Between September 10th and
October 6th, 1980, 223,785 Franco-New Brunswickers and 462,075 Franco-Ontarians have been sent away empty-handed from the constitutional table (see Annex A).

It has been said that the French-speaking people of New Brunswick have some protection in their provincial Charter. But clearly, their rights are not entrenched and could be changed at the whim of different provincial governments. What is the necessity of enshrining any right if we need not enshrine the rights of the people of New Brunswick to use French in the courts and legislatures because that right is given to them by a provincial charter? If there is any argument in favour of entrenchment and we submit there is, then it is no answer to say because there is a right given in the provincial charter, it need not be entrenched in the constitution of Canada.

Secondly, it is hard to understand how Ontario has escaped entrenchment considering that there are more French-speaking people in Ontario than any other province outside Quebec, and that Ontario, while expressing the will to grant the right to use French in its courts and legislature has been unable to take the final step to make that right official. As recently as the week of October 13th, a select committee of the Ontario legislature endorsed the principle of making French the official language in its legislature and courts. And yet, despite that show of support, now and formerly on the presentation of Bill 89 in 1978, Premier Davis will not take the final step.

Will the people of Canada ever have a better opportunity to persuade the Premier of Ontario to take that final step than during the debate of the presently proposed constitution?

Have we forgotten the emotional debate over the trial of Gérard Filion? It was but three short years ago that editorialists, lawyers, minority groups across Ontario and Quebec and throughout the country were crying out for
a trial in French for Gérard Filion in Ontario, and despite the overwhelming demand for such a trial, the right was never granted. If we do not take the opportunity today to redress this injustice, we may never have the opportunity again.

If rights should be the subject of bargaining - and we submit that they should not - surely, the government has offered a very bad bargain to the Canadian linguistic minorities in the bill presently under discussion. To put it crudely, in order to persuade Ontario to agree to the entrenchment of a somewhat conservative educational right for Canadian citizens, the minorities of all other provinces, except Manitoba and Quebec, are asked to abandon their linguistic rights in the legislature and courts.

Ideally, we would recommend the immediate extension of section 133 of the BNA Act to all provinces. To do otherwise would be in effect to say to the French-speaking people of one part of the country that they have more right to be at home than those in other parts of the country. But we have regretfully come to the conclusion that it would be unrealistic and divisive at this stage of our history to press for the right of French-speaking people to use the French language in any pleading or process of all or any of the civil courts of those provinces outside Quebec, New Brunswick, Manitoba and Ontario.

We, nevertheless, hope that before long the successful implementation of 133 in four provinces will lead the others to provide the same rights for French-speaking litigants before their courts and to consent to entrenchment of these rights.

Similarly, while any individual should have the right to use English or French in the legislative assemblies of any province as set out in our first recommendation, it may be too soon to ask the provinces other than those listed
in the preceding paragraph to print and publish the Acts of their legislatures in English and French. Hopefully this right will also be extended to all provinces within a reasonably short delay.

3. **A person charged with a criminal offence has** the right to be tried in English or French if that is his ordinary language, and every native person to be tried in his mother tongue.

Most prior studies of the constitution, including the Pépin-Robarts Commission and other reports, have recommended the entrenching of the right to be tried in English or French. Once again this right is dropped from the present proposal, having been included in prior recommendations of the Federal government. We recommend it be restored.

There is a fundamental distinction to be made between those who are seeking adjudication of their civil rights and those whose liberty is at stake in criminal proceedings. Anyone who has stood in a court at the time of an arraignment and seen the charges read to a man or woman who clearly cannot understand those charges, realizes that justice is not served by such a process.

Anyone who has observed an accused attempting to follow the evidence of a witness whose language he does not understand and whose words may put that accused behind bars and deprive him of his liberty, realizes once more that justice cannot be served by such a process.

We, therefore, urge this Committee to recommend the entrenchment of the right for a person to be tried in English or French when charged with a criminal offence anywhere in Canada.
Minority Language Education Rights

These rights have caused more difficulty, more division, more emotion than any of the others. The reason is obvious. Once you deny the right of a person to send his child to a particular school - whatever the school, whatever the language - you are interfering with a basic type of human freedom. At the same time, we in Quebec sympathize with the fears expressed in the late 1960's and early 1970's that unrestricted access to English schools might tip the demographic balance in our province in such a way as to threaten the long-term future of French language and culture.

In the light of these considerations, Positive Action proposes the following paragraphs in place of Section 23 of the resolution:

4. All persons whose first language learned and still understood is that of the French or English language minority of the province in which they reside or to which they move have the right to have their children receive their pre-university education in that language.

5. French- and English-speaking provincial minority groups have the right to administer their own educational institutions, under the overall jurisdiction of the provincial authority.

6. Native peoples have the right to have their children receive their school instruction in their language.
We understand and sympathize with the Francophone from Saskatchewan, Ontario or any province other than Quebec who cannot obtain schooling in French for his child. If Canada is to do more than pay lip-service to the concept of linguistic duality, she must do justice to the educational needs of the Francophone outside Quebec. We also hope that others understand our frustration in Quebec when a child is denied education in English because his grandfather sent his father to a French school. We hope they understand our frustration when the child of a couple who comes to Quebec from Manitoba or the United States is denied the same education in English that his cousin is currently receiving.

Some ask, "Why have the non-Francophones of Quebec suddenly become sympathetic to the French outside Quebec?" "Surely", they say, "it is simply out of self-interest." And we reply, "Of course it is out of self-interest." Would any one of us have built Canada if we did not think we would benefit from our efforts? Do we go to war only to protect others? Or do we go to protect ourselves? Do we not build hospitals, schools and churches for our own communities and families? And is it wrong because this is our reason? We now fight alongside our French-speaking colleagues because we believe in their cause and because we hope they will come to believe in ours.

It is, we submit, in the interest of all Canadians that the two largest linguistic communities be able to educate their children in their language anywhere in this land. The survival of the official language minorities in each province demands this. And without these minorities, Canada will in the long run separate into two monolingual and politically independent communities as surely as oil separates from water.
We support, therefore, the government's intention to entrench minority language education rights in the constitution. Our proposal differs from Section 23 in two respects:

a) It extends to immigrants the same rights as citizens.
b) It omits the provision "where numbers warrant".

Both these differences, which are endorsed by the Beige Paper and the Bar Association, are important. In the first place, if we wish Canada to have a reputation for fairness we should make as few distinctions as possible, beyond the denial of the right to vote, between citizens and immigrants. Secondly, it is our firm belief that the right to minority language education should not be contingent upon numbers. In particular, the lengthy condition in the Constitution Resolution: "if they reside in an area of the province in which the number of children of such citizens is sufficient to warrant the provision out of public funds of minority language educational facilities in that area" is in our opinion clumsy, impractical and difficult to apply. We cannot imagine a court ordering a school board to build a school under this provision and the argument that the building of the school is not warranted by the number of prospective students would be an almost certain defence to every action.

As we have already stated, French-speaking people outside Quebec should have the right to have their children educated in French, but that is not enough. These minorities need not only the right 'to have their children receive instruction in the minority language' but the right to administer the schools where the instruction will be given. 23(1) would not have given great comfort to the people of Essex county or Penetanguishene when they were fighting for a school. If this country is to survive
with recognition of the principles of duality discussed in the Pépin-Robarts report and other reports since, situations such as Essex County and Penetanguishene must not be repeated. 23 (1) is not enough.

Positive Action believes that the official language minorities of the ten provinces have played an essential role in making Canada a unique country in which to live. We consequently deplore the growing assimilation of Francophones outside Quebec and the increasing exodus of Anglophones from Quebec. We feel that the linguistic ghettoization of Canada will result in a poorer, more homogeneous and less interesting country.

In conclusion, we believe that education is the key to ensuring that the Canada of the future will be home for English- and French-speaking Canadians everywhere in the country. Left to their own devices, the provinces have refused or been slow to grant minority educational rights. Manitoba's action in repealing the Manitoba Act in 1890 and eliminating bilingual schools in 1916 as well as Ontario's Regulation 17 are but examples. While the Protestants of Quebec were guaranteed their schools, it was not by a French-speaking majority. The attempt by the Parti Québécois to deny English-speaking education to the children of those who were not educated in Quebec in English is another example of provincial disdain for minorities. We must act now to ensure that these minorities survive in the face of increasing pressure from their respective majorities.
Health and Social Services

7. **Everyone has the right to access to health and social services in English or French wherever the numbers warrant.**

Although access to health and social services in French or English has not been at the forefront of the entrenchment debate, Positive Action believes it to rate in importance immediately after the rights recommended in the legislatures, courts and schools. When we have to use health and social services, the question of whether they can be delivered in English and French has a direct bearing on their effectiveness.

Hospitals

Since Confederation, English-speaking Canadians living in Quebec have for the most part been able to obtain hospital services in English. During the same period of history, French-speaking Canadians outside Quebec except in certain densely populated regions have had great difficulty in obtaining those services in French.

Today, while in the metropolitan area hospital services in English are readily available, in other parts of the province of Quebec these services are threatened.

The Jeffrey Hale Hospital in Quebec, founded and staffed by English Quebecers, is now basically a French-speaking hospital. The Brome-Missisquoi Hospital in Cowansville, the Harrie Memorial Hospital in Ormstown, also founded and originally staffed by predominantly English-speaking Quebecers, now do not conform to
Finally, the patient about to be discharged after open heart surgery grasps for the details of the surgical team's post operative instructions.

To be able to ensure that these services will be provided in the French and English languages, and in other languages wherever possible, will go a long way to alleviating the problems outlined above.

**Social Services**

What are social services?

Social services involve youth, couples, families, handicapped children, the aged, hospital patients, adult offenders and communities. They seek to help individuals with special problems to understand their situations and adapt to them.

What do the various persons requiring these services have in common?

Generally they face a problem that requires that they receive services in the cultural setting from which they come, and in the language in which they most easily converse.

Social services are, by their very nature, socio-cultural services. As they are socio-cultural services, the institutions and the structures that support them should reflect that fact.
We believe therefore that every French-speaking Canadian outside Quebec and English-speaking Canadian inside Quebec should have the right to receive social services in their language wherever the numbers warrant. In order to guarantee this principle, the institutions dispensing social services should be controlled and managed by members of their community wherever possible.

In Quebec, since 1978, we have come to realize the importance of this issue as sectorization in the region of Montreal has threatened our ability to provide services of this nature in the English language. By sectorization, the government is attempting to have each social service centre provide these services on a geographical rather than cultural basis. As a result, the only English-speaking social service centre - Ville-Marie - would be serving all the French-speaking people in its territory as well as the English; and English-speaking Quebecers outside the Ville-Marie territory would come under a different agency. While this issue is presently undecided, it highlights the need for entrenchment of the right of the French and English communities to receive these services in their language.

The couple in need of matrimonial counselling; the teenager deciding whether to have an abortion or give birth to an illegitimate child; the senior citizen requiring the comfort and aid of a home visit - all these services must be provided in the language of the client and by a person of the same cultural background if they are to be effective.
We are not sufficiently informed in relation to the social service sector outside Quebec to offer detailed comments. We know that it is impossible for many, if not the majority, of French-speaking Canadians to obtain these services in French except in certain areas of Ontario, Manitoba and New Brunswick. (See Annex B). But the same principles apply. For the services to be rendered effectively, they must be available in the language of the recipient.

Radio and Television Services

8. A person in any part of the country should be able to receive radio and television services in English and French.

In effect, this means providing to the Francophones outside Quebec broadcasting and television services similar to those presently enjoyed by Anglophones in Quebec. In certain instances, we understand, due to the insufficiency of numbers or technical difficulties, this may involve the provision of radio services only. However, the principle itself of furnishing both services to Francophones throughout the country must be endorsed and the exceptions justified. After receiving recommendations from across the country, the Pépin-Robarts Commission recommended that this right be enshrined.

If we were to attempt to isolate the two most critical elements necessary to the survival of a language and a culture, we would probably opt for education and T.V. and radio. This is not to downplay the importance of health, social, legal and other services; it is merely to distinguish those services to which there is exposure regularly, on a daily basis.
It should be noted that a French network of both radio and T.V. has already been developed outside the Province of Quebec, offering programming which is thoroughly deserving of praise. While we are not fully conversant with the technical difficulties and financial implications involved in extending this coverage to all parts of Canada, the experience of Quebec, particularly with the private networks, would seem to indicate that the problems are not insurmountable.

Communications With Provincial Government

9. Any person should be able to address and receive communications from his provincial government in English or French.

Communications of citizens with the various levels of government have been increasing at a rapid pace. This has been the natural result of the relentless growth of the public service rendered necessary by the ever-increasing intervention of government through legislation and regulation in the private sector. The lives of groups of people and individuals as well as corporations have been greatly affected by this relatively recent phenomenon. And, as history has taught us, this growth, while it may be slowed, will not be stopped. The reasons therefore are several, but it is not our purpose here to elaborate on them. We wish merely to indicate that a citizen's life today, as it will be even more so tomorrow, is very closely enmeshed in, and affected by, the burgeoning government bureaucracy.
Because of this new closeness between the citizen and the bureaucracy, communications, both verbal and written, have multiplied. Thus, while it may have been tolerable to be without a bilingual service when only occasional communications were required, it has now become unacceptable.

The citizen today, ever-more conscious of the proliferation of government services and sensitive to the fact that his tax dollar is paying for both the service and the salary of the bureaucrat furnishing that service, is demanding both the benefit of and input into the service. The citizen and the bureaucrat, by choice or by circumstance, are being thrown together and the tax-paying citizen surely has the right to expect that the service for which he has paid be rendered to him in a language (English or French) which he understands.

This same principle applies of course to communications with municipal governments, although here we would add the qualification "where numbers warrant", in view of the obvious dilemmas which would otherwise be created.

Conclusion

We believe your Committee can play an important and constructive role in Canada's constitutional debate. If you are only able to make a report based on a division of opinion along party lines, we may be destined to a constitution made in part elsewhere. If you are able, however, to achieve unanimity, you may help to give us a Canadian constitution made in Canada by Canadians. In that constitution we urge you to insist on the entrenchment of linguistic rights that will be the pride of Canadians now and in the future.

Storrs McCall
Co-chairmen of the Positive Action Committee
# ANNEX "A"

<table>
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<th>PROVINCE</th>
<th># OF FRENCH-SPEAKING PERSONS</th>
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The above figures are 1976 Statistics Canada figures.
**ANNEX B**

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Source: "Deux Poids, Deux Mesures" - Fédération des Francophones Hors Québec
Published May 1978.