

SUBMISSION
ON THE
CONSTITUTION OF CANADA

SOCIÉTÉ FRANCO-MANITOBAINE

(AMENDED VERSION)

NOVEMBER 1980

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SOCIETE FRANCO-MANITOBAINNE

194 boul. Provencher (C.P. 145)
St-Boniface, Manitoba R2H 3B4
Telephone: (204) 233-4915

20 November 1980

The Honourable Senator Harry Hays and
Mr. Serge Joyal,
Co-Chairmen of the Special Joint Committee
of the Senate and of the House of Commons
on the Constitution,
Houses of Parliament,
Ottawa, Ontario

My dear Co-Chairmen,

The Société franco-manitobaine has distributed a
brief to members of the Committee on November 18th, 1980.
Changes have now been made to that Brief. Enclosed here-
with is a complete, final, amended Brief.

Respectfully submitted,

Gilberte Proteau,
President, Société franco-
manitobaine

Joseph E. Magnet,
Counsel, Société franco-manitobaine

JEM/ajm

Encls.

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17 November 1980

The Honourable Senator Harry Hays and
Mr. Serge Joyal,
Co-Chairmen of the Special Joint Committee
of the Senate and of the House of Commons
on the Constitution,
Houses of Parliament,
Ottawa, Ontario

My dear Co-Chairmen,

The Soci  t   franco-manitobaine has the honour to present the enclosed submission. The submission contains the observations of the Soci  t   on the Proposed Resolution respecting the Constitution of Canada.

The Soci  t   franco-manitobaine is a Provincial Association of Franco-Manitobans established since 1916 and continued by special Act in 1969 for the purpose of promoting the economic, political, cultural and educational interests of the French speaking population of Manitoba. The Soci  t   enjoys close ties with sister Franco-Canadian provincial associations in the provinces with anglophone majorities as well as with various groups in Quebec.

The Soci  t   has studied the Proposed Resolution. The Soci  t   endorses the guarantees of liberty sought to be achieved by entrenchment of the Canadian Charter of Rights and Freedoms, subject, however, to the submissions that follow. Franco-Manitobans, as an official language minority in the Province of Manitoba, are acutely aware that it is desirable to offer greater protection to minority rights through a Charter-based judicial review system. The Soci  t   is of the view that the rights of minorities are not best protected by legislatures, since legislatures are primarily responsible to the majority. Therefore, the Soci  t   strongly supports entrenchment of minority rights. This support is conditional upon a guarantee of access to the Courts and inclusion of an enforcement mechanism to insure constitutional behaviour by public authorities. It is appropriate to allow the Courts, with their long traditions of independence, to resolve disputes about constitutionally guaranteed minority rights, rather than to leave absolute responsibility with the legislature.

The Soci  t   has a special concern with entrenchment of minority linguistic rights and educational rights. Principally, the Soci  t   has addressed its attention to the content of these rights. It has considered whether the proposed Charter adequately reflects the original guarantees to Franco-Manitobans at Confederation and satisfies the future needs and expectations of the Franco-Manitoban community. Moreover, because minority rights necessarily take a certain colouring from the general scheme of the Charter in which they appear, the Soci  t   has had to explore the impact of the Charter as a whole.

Minority rights are fragile. That is why the Soci  t   believes that constitutional entrenchment is desirable. The rights should be put beyond the power of majorities easily to diminish or abrogate. Accordingly, the Soci  t   has considered the amendment clauses of the Proposed Resolution.

Having made these preliminary observations, the Soci  t   is pleased to direct the attention of the Special Joint Committee to the submissions on specific sections of the Proposed Resolution which are attached.

Respectfully submitted,

Gilberte Proteau,
President, Soci  t   franco-
manitobaine

Joseph E. Magnet,
Counsel, Soci  t   franco-manitobaine

JEM/ajm

Encls.

SUBMISSIONS OF THE SOCIÉTÉ FRANCO-MANITOBAINE
RESPECTING THE CONSTITUTION OF CANADA

November 1980

SECTION I

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government."

The Société is of opinion that the Section is superfluous and should be deleted.

The Section purports to guarantee rights subject to limitations. The Société observes that in all Charter-based judicial review systems, the courts imply qualification. This is properly a judicial task. To begin the Charter with a statement of limitations adds nothing. However, it seriously diminishes the educational impact of the Charter by diluting perception of constitutional liberty. Furthermore, this approach overemphasizes the importance of the legislature to measure for itself what constitutionally guaranteed liberty requires. It may weaken curial willingness to devise remedies for breach of Charter rights.

Furthermore, Section I attempts an unharmonious reconciliation of a Court-review Charter system with the theory of parliamentary supremacy that is neither desirable nor successful. The reference in S.1 to limitations consistent with a parliamentary system of government weakens at the outset the proposed Charter. It is likely to provoke a lengthy but sterile debate about parliamentary sovereignty. This would be a poor point of departure from which to chart the proposed new course for Canadian constitutional law.

SECTIONS 17, 18 and 19

"17. Everyone has the right to use English or French in any debates and other proceedings of Parliament.

"18. The Statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

"19. Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament."

The Société observes that Section 23 of the Manitoba Act, as judicially interpreted, embraces the same language rights, with respect to the courts and legislature of Manitoba, as are contained in Sections 17-19 of the Proposed Resolution with respect to the Courts and Parliament of Canada. Section 23 of the Manitoba Act is part of fundamental Canadian constitutional law, beyond the powers of the Manitoba legislature or Parliament to abridge: see Forest v. A.G. Manitoba (1979), 30 N.R.213 (S.C.C.).

Notwithstanding entrenchment of linguistic rights at Section 23 of the Manitoba Act, Franco-Manitobans have been denied such rights consistently since 1890. In 1890, the Official Language Act of Manitoba unilaterally abrogated the protection of Section 23 to Franco-Manitobans by providing that

"the English language only shall be used in the records and journals of the legislative assembly of Manitoba, and in any pleading or process in or issuing from any Court in the Province of Manitoba. The Acts of the legislature of Manitoba need to be printed and published only in the English language."

This Act has been struck down by the judgments of four separate courts, in 1892, 1909, 1976 and most recently by the Supreme Court of Canada in 1979. The judgments of 1892 and 1909 were ignored. They were not even reported. The Attorney General of Manitoba stated, with

respect to the 1976 judgment: "The Crown does not accept the ruling of the Court...". Today, in disregard of the Supreme Court's judgment, the legislature of Manitoba persists in denying to Franco-Manitobans the protection of Section 23.

In the last session of the legislature, of 115 bills submitted, only 9 were submitted in both languages. Virtually, no progress has been made in translating previously enacted laws. The Government of Manitoba has no known plans to provide a bilingual court system, or to train necessary legal personnel. In short, Franco-Manitobans have been faced for the past 90 years with concentrated, deliberate legislative subversion of their constitutional rights.

The Société is of the opinion that the Constitutional status of the French language in Manitoba would be reinforced if these rights were entrenched as part of Sections 17, 18 and 19 of the proposed Charter. Although the legal impact of including reference to the courts and legislature of Manitoba in these sections would be slight, the educational impact would be considerable. Statement of Franco-Manitoban linguistic rights in the Charter would reaffirm Canada's commitment to the principle of duality. It would impact this fundamental precept on Canadian consciousness.

Furthermore, under S.50(b) of the Proposed Resolution, entrenchment in the Charter would make amendments to Franco-Manitoban rights subject to sections 41 and 42 of the Proposed Resolution. The Société is of opinion that amendment of such important minority rights should be forced to climb the hurdle of sections 41 and 42. It is not enough that French minority rights be dependent on the will of the government of Manitoba and the English majority in Parliament.

legal principles to claims asserted under their constituent legislation, even if created by the legislature of Quebec. As the Supreme Court noted, today such agencies are significant regulators of "a wide range of individual and corporate activities... The guarantee given for the use of French or English in court proceedings should not be liable to curtailment by provincial substitution of adjudicative agencies for courts..." The Société agrees, and is of opinion that S.19 must be broadened accordingly.

Therefore, the Société recommends that the words "and the legislature of Manitoba" be added after the word "Parliament" in S.17^{*}; that the words "and the legislature of Manitoba" be added after the word "Parliament" in Section 18; that the words "or the legislature of Manitoba" be added after the word "Parliament" in S.19; and that the words "or statutory adjudicative agency" be added after the word "court" in S.19. The Société also recommends inclusion of the following section:

"19a. Either official language may be used in Manitoba by any person in dealings with any administrative body created by Parliament or the legislature of Manitoba, having regard to the necessity to promote both official languages in Manitoba."

SECTION 20

"Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, as he or she may choose, and has the same right with respect to any other office of any such institution where that office is located within an area of Canada in which it is determined, in such manner as may be prescribed or authorized by Parliament, that a substantial number of persons within the population use that language."

* NOTE: Complete redrafted sections with suggested additions and deletions, appear at the "Summary of recommendations", at P.12 of this brief. Line numbers are counted from the printed version of the Proposed Resolution, not this brief.

The Soci t  is of opinion that s.20 should be made more specific with respect to the right to receive federal government services in French in Manitoba.

When Franco-Manitobans entered Confederation, they constituted a majority of the population of the then Province of Manitoba: see Gunn and Tuttle, History of Manitoba (1880) p. 467. Since 1870, Franco-Manitobans have steadily diminished as a percentage of the Manitoba population. Today they constitute approximately 6% of the provincial inhabitants. The decline of Franco-Manitobans can be attributed in part to the assimilating effect produced by unconstitutional Manitoba legislation. This assimilation must be stopped and the decline reversed. The principle of Canadian duality, reaffirmed by all serious constitutional commentators, requires this at the minimum.

To redress these wrongs, the Soci t  is of opinion that S.20 should take an affirmative step. Broadened access to French language federal government services should be constitutionally guaranteed in Manitoba.

Furthermore, the Soci t  is concerned that bilingual federal government services be available where the service is rendered even if rendered "out of the office." Certain agencies in Manitoba provide assistance in English alone in the field, even though formal bilingualism is in place "in the office."

Accordingly, the Soci t  recommends that the words "Manitoba or" be added after the word "within" in line 9 of section 20; that the words "or a field representative provided by such office" be added after the word "office" in line 4 of Section 20; and that the words "or field representative of such office" be added after the word "office" in line 7 of Section 20.

SECTION 23

"(1) Citizens of Canada whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside have the right to have their children receive their primary and secondary school instruction in that minority language 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.

"(2) Where a citizen of Canada changes residence from one province to another and, prior to the change, any child of that citizen has been receiving his or her primary or secondary school instruction in either English or French, that citizen has the right to have any or all of his or her children receive their primary and secondary school instruction in that same language if the number of children of citizens resident in the area of the province to which the citizen has moved, who have a right recognized by this section, is sufficient to warrant the provision out of public funds of minority language educational facilities in that area."

The Société is of the opinion that protection of Section 23(1) must be broadened.

First, the Société sees no good reason why protection of S.23(1) in Manitoba should be limited to "Citizens of Canada". Secondly, the first three words of S.23(1) are not clear whether both parents must have first learned and still understand the minority language to trigger protection of S.23(1), or whether one parent is sufficient to activate the section. In the Société's opinion, S.23(1) is unrealistic if it requires both parents to qualify in Manitoba. In any event, the Société objects to the concept of "first language learned and still understood". This implies language testing which the Société regards as improper. It is unfair to require Franco-Manitobans, who have been submitted to unconstitutional assimilative pressure, to bear any onus that they first learned or still understand French. This would condone the effects of unconstitutional legislation. Third, the Société

observes that, as presently drafted, S.23(1) implies that only publicly-funded minority language education will be permitted. In the Soci t 's opinion, the right to privately funded minority education should be explicitly recognized in the event that such a need arises. Fourth, the Soci t  is concerned that administrative control over minority schools remain with the minority community. The Soci t  observes that S.23(1) is defective in not recognizing this right. In the Soci t 's opinion, the theory of collective rights to education is incomplete if it does not include administrative control. Finally, the Soci t  is of opinion that a right should be recognized to French language immersion education. Immersion education is an important element in development of the French language in Manitoba.

The Soci t  refrains from stating any general rule to solve all official language minority education rights in Canada. Provincial francophone communities are at different stages of development. However, with respect to Franco-Manitoban minority education rights, the Soci t  recommends that the following section be added:

23.1 "Everyone residing in Manitoba has the right to have his or her children receive their kindergarden, primary and secondary school instruction in the official language of his or her choice in institutions which use the official language requested. Public funds shall be provided for instruction in the language requested. The language of administration shall be the language of instruction. In exceptional cases and without prejudice to the development of the minority official language, instruction may be offered in the language requested in an institution giving instruction in, and administered in, the other official language. Nothing herein stated prejudices the right to establish private schools."

23.2 Everyone in Manitoba has the right to official language immersion education. Public funds shall support institutions necessary for exercise of this right.

The Société is concerned that limitation of S.23(2) rights to citizens of Canada creates undue opportunity for the government of Manitoba to pressure immigrants to assimilate to the Anglophone stream. Furthermore, Franco Canadians who come to Manitoba from other Provinces, where they did not have access to French language education, may be denied French education in Manitoba. Under S.23(2) Manitoba could deny such persons French education even if they move to an area of Manitoba where French education is available. The Société suggests that freedom of choice should prevail with respect to choice of language of instruction for all immigrants arriving in Manitoba. The Société refrains from proposing any general rule to govern all provinces. However, with respect to Manitoba, the Société recommends that the following section be included:

23(2).1 "Where any person establishes residence in Manitoba, that person has the right to have any or all of his or her children receive their kindergarden, primary and secondary school instruction in the official language of his or her choice. Public funds shall be provided for such instruction."

SECTION 25

"Any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect."

To remove doubts, and to prevent a judicial controversy similar to that which surrounds the Canadian Bill of Rights, the Société recommends that the words "enacted before or after the coming into force of this Charter" be inserted after the word "law" in S.25.

SECTION 34

"Until Part V comes into force, an amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and by the Legislative assembly or government of each province to which the amendment applies."

The Société is seriously concerned about the opportunity created by S.34 to amend with relative ease S.23 of the Manitoba Act. Section 34 entitles the Government of Manitoba to diminish or abrogate S.23 of the Manitoba Act if it secures the agreement of Parliament. In the Société's opinion, justice is not best served by making constitutionally guaranteed French minority rights dependent upon the will of two English majorities.

The only precedent for amending the Constitution of Canada relating to a provincial field that did not directly concern all provinces was the B.N.A. Act of 1930. This dealt with the jurisdiction of the Western provinces over their natural resources. In this case, the amendment was obtained by the Federal Government after consultation with the provinces directly affected. In one province, a resolution was adopted by the legislature after the Premier expressed the consent of his government to the amendment.

However, the B.N.A. Act, 1930 was concerned to increase provincial government powers. S.34 would make it possible to do something completely different; it would provide a method for diminishing or abrogating minority rights at Section 23 of the Manitoba Act. There is no Canadian constitutional law precedent for diminishing minority guarantees in this way.

In the Soci  t  's opinion, minority language rights should not be amendable in so easy a fashion. Abridgment of Franco-Manitoban rights would have serious repercussions on other francophones in Canada. Their freedom to establish residency anywhere in Canada, guaranteed by Section 6(2), would be meaningless unless there are some provinces where they need not fear assimilation. Therefore, the Soci  t   recommends that Section 23 of the Manitoba Act not be susceptible of amendment without utilizing the procedures at S.41 and S.42 of the Proposed Resolution.

Alternatively the Soci  t   recommends that S.34 be modified by adding the words "voted by three-fourths of the membership of" before the word "the" in line 7 of S.34; by adding the same words before the word "the" in line 8 of S.34; that the word "of" in line 7 of S.34 be deleted; and that the words "or government" be deleted from line nine of S.34.

SECTION 43

"An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor-General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies."

The Soci t  makes similar observations with respect to S.43. However, unlike S.34, S.43 omits the government of the province from amendment proceedings in respect of matters affecting some but not all provinces. S.43 requires that the legislative assembly of the province authorize the amendment.

For the reasons expressed in the commentary to S.34, the Soci t  recommends that amendments to Section 23 of the Manitoba Act be made only by the procedures specified at Sections 41 and 42 of the Proposed Resolution.

Alternatively, the Soci t  recommends that the words "voted by three-fourths of the membership of" be inserted before the word "the" in line 7 of S.43; before the words "the legislative assembly" in line eight of S.43; and that the first and last words in line 7 of S.34 be deleted.

MISCELLANEOUS

Enforcement

The Soci t  observes that the effectiveness of the proposed Charter is seriously diluted by failure to include any provision for enforcement. Experience with the Canadian Bill of Rights and the 90 year history of S.23 of the Manitoba Act makes all too plain that Courts are hesitant to devise constitutional remedies in the absence of such a provision. Furthermore, the International Covenant on Civil and Political Rights, 1966, to which Canada is a signatory, require that Canada "ensure that any persons whose rights or freedoms as herein recognized or violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity...".

In the Soci t 's opinion, failure to include an enforcement clause leaves the political thrust of the Charter incompletely realized. Therefore, the Soci t  recommends inclusion of the following provision:

"25. "Every person or group whose constitutional rights, powers, privileges, or immunities are infringed or are threatened to be infringed by a public authority shall be entitled to full and effectual relief, by mandatory or restraining order of a superior Court. Pecuniary compensation shall be awarded in appropriate cases".

SUMMARY OF RECOMMENDATIONS

1. Delete section 1.

2. Amend section 17 to read:

"17. Everyone has the right to use English or French in any debates or other proceedings of Parliament and the legislature of Manitoba".

3. Amend section 18 to read:

"18. The statutes, records and journals of Parliament and the legislature of Manitoba shall be printed and published in English and French and both language versions are equally authoritative".

4. Amend section 19 to read:

"19. Either English or French may be used by any person in or in any pleading in or process issuing from, any court or statutory adjudicative agency established by Parliament or the legislature of Manitoba".

5. Add the following section:

"19a. Either official language may be used in Manitoba by any person in dealings with any administrative body created by Parliament or the legislature of Manitoba, having regard to the necessity to promote both official languages in Manitoba".

6. Amend S.20 to read:

Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office or field representative of such office of an institution of the Parliament or Government of Canada in English or French, as he or she may choose, and has the same right with respect to any

other office or field representative of such office of any such institution where that office is located within Manitoba, or within an area of Canada in which it is determined, in such manner as may be prescribed or authorized by Parliament, that a substantial number of persons within the population use that language".

7. Add the following sections:

"23.1 Everyone residing in Manitoba has the right to have his or her children receive their kindergarden, primary and secondary school instruction in the official language of his or her choice in institutions which use the official language requested. Public funds shall be provided for instruction in the language requested. The language of administration shall be the language of instruction. In exceptional cases and without prejudice to the development of the minority official language, instruction may be offered in the language requested in an institution giving instruction in, and administered in, the other official language. Nothing herein stated prejudices the right to establish private schools.

"23.2 Everyone in Manitoba has the right to official language immersion education. Public funds shall support institutions necessary for exercise of this right."

8. Add the following section:

"23(2).1 Where any person establishes residence in Manitoba, that person has the right to have any or all of his or her children receive their kindergarden, primary and secondary school instruction in the official language of his or her choice. Public funds shall be provided for such instruction."

9. Amend S.25 to read:

"Any law enacted before or after the coming into force of this Charter that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no effect".

10. Make sections 41 and 42 of the Proposed Resolution apply to amendments to S.23 of the Manitoba Act. Alternatively, amend S.34 to read:

"Until Part V comes into force, an amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions voted by three-fourths of the membership of the Senate and House of Commons and by three-fourths of the membership of the Legislative assembly of each province to which the amendment applies".

11. Make sections 41 and 42 of the Proposed Resolution apply to amendments to S.23 of the Manitoba Act. Alternatively, amend s.43 to read:

"An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor-General under the Great Seal of Canada where so authorized by resolutions voted by three-fourths of the membership of the Senate and House of Commons and by three-fourths of the membership of the legislative assembly of each province to which the amendment applies".

12. Add the following section:

"25a. Every person or group whose constitutional rights, powers, privileges, or immunities are infringed or are threatened to be infringed by a public authority shall be entitled to full and effectual relief, by mandatory or restraining order of a superior Court. Pecuniary compensation shall be awarded in appropriate cases".