



CANADA

SPECIAL JOINT COMMITTEE
ON THE CONSTITUTION OF CANADA

COMITÉ MIXTE SPÉCIAL
SUR LA CONSTITUTION DU CANADA

COMMITTEES AND PRIVATE LEGISLATION BRANCH
DIVISION DES COMITÉS ET DE LA LÉGISLATION PRIVÉE

This binder has been prepared for Members of the Special Joint Committee on the Constitution of Canada as a working document during the consideration of the Committee's Report. It contains:

- A - Copy of the Proposed RESOLUTION
- B - Alphabetical List of Witnesses
- C - Briefing notes of WITNESSES as prepared by the Research Staff of the Library of Parliament.

Paul Bélisle
Richard Prigent
Joint Clerks of the Committee

Prepared by: Jean-Claude Devost
Committee Clerk

Document Not Scanned

THE PRIME MINISTER

LE PREMIER MINISTRE

5-2-10-80

Alphabetical List of Witnesses

- Advisory Council on the Status of Women, Canadian
- Afro-Asian Foundation of Canada
- Aird - (SEE LOVE)
- Alberta Chamber of Commerce
- Alberta Social Credit Party
- Algonquin Council
- Alliance for Life
- Anglican Church of Canada
- Association canadienne-française de l'Ontario
- Association culturelle franco-canadienne de la Saskatchewan
- Association of Iroquois and Allied Indians
- Association of Métis and Non-Status Indians of Saskatchewan
- Attikamek-Montagnais Council
- British-Columbia Civil Liberties Association
- Business Council on National Issues
- Campaign Life-Canada
- Canada West Foundation
- Canadian Abortion Rights Action League
- Canadian Association for the Prevention of Crime
- Canadian Association of Chiefs of Police
- Canadian Association of Crown Councils
- Canadian Association of Lesbians and Gay Men
- Canadian Association of the Mentally Retarded
- Canadian Association of Social Workers
- Canadian Bar Association
- Canadian Bar Association, Newfoundland Branch
- Canadian Catholic School Trustees' Association
- Canadian Chamber of Commerce
- Canadian Citizenship Federation

(witnesses)

- Canadian Civil Liberties Association
- Canadian Committee on Learning Opportunities for Women
- Canadian Connection
- Canadian Consultative Council On Multiculturalism
- Canadian Council on Children And Youth
- Canadian Council on Social Development
- Canadian Federation of Civil Liberties and Human Rights Associations
- Canadians for Canada
- Canadians for One Canada
- Canadian Human Rights Commission
- Canadian Jewish Congress
- Canadian Life Insurance Association
- Canadian National Institute for the Blind
- Canadian Polish Congress
- Church of Jesus Christ of Latter Day Saints
- Coalition for the Protection of Human Life
- Coalition of Provincial Organizations of the Handicapped
- Cohen, Professor Maxwell
- Commissioner of Official Languages
- Council for Yukon Indians
- Council of National Ethnocultural Organizations of Canada
- Council of Quebec Minorities
(See "Association canadienne-française de l'Ontario")
- Denominational Educational Committees of Newfoundland
- Fédération des francophones hors Québec
- Federation of Canadian Municipalities
- Federation of Independent Schools of Canada

(witnesses)

- Federation of Saskatchewan Indians
- German-Canadian Committee on the Constitution
- Government of New Brunswick
- Government of Nova Scotia
- Government of Prince Edward Island
- Government of Saskatchewan
- Government of the Northwest Territories
- Government of the Yukon Territory
- Indian Association of Alberta
- Indian Rights for Indian Women
- Inuit Committee on National Issues
- Italian-Canadians National Congress (Quebec Region)
- LaForest, Dr. Gérard V.J.
- Love - Aird
- Media Club of Canada
- Mennonite Central Committee (Canada)
- National Action Committee on the Status of Women
- National Anti-Poverty Organization (see Public Interest Advocacy
Center)
- National Association of Japanese Canadians
- National Association of Women and the Law
- National Black Coalition of Canada
- National Indian Brotherhood
- Native Council of Canada
- Native Women's Association of Canada
- New Brunswick Human Rights Commission
- New Democratic Party of Alberta

(witnesses)

- Nishga Tribal Council
- Nuw-Chah-Nulth Tribal Council
- Ontario Conference of Catholic Bishops
- Parti de l'Union National du Québec
- Positive Action Committee
- Progressive Conservative Party of Saskatchewan
- Protestant School Board of Greater Montreal
- Public Interest Advocacy Center (National Anti-Poverty Organization)
- Rémillard, M. Gil
- Russell, Professor Peter H.
- Saskatchewan Human Rights Commission
- Société Franco-manitobaine
- Ukrainian Canadian Committee
- Union of British Columbia Indian Chiefs
- Union of New Brunswick Indians
- Union of Nova Scotia Indians
- Union of Ontario Indians
- United Church of Canada
- Vancouver People's Law School Society
- World Federalists of Canada - Operation Dismantel



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

REVISED BRIEFING NOTES

The notes previously prepared on the National Advisory Council on the Status of Women were based on a background paper prepared for the Council and some press clippings, since no brief was then available. A draft brief was received Wednesday evening and the following information is based on it.

WITNESS: Canadian Advisory Council on the Status of Women (Doris Anderson)

DATE OF APPEARANCE: 20 November 1980

SOURCE OF INFORMATION: Draft Brief.

BACKGROUND: Created in 1973, the Council's purpose is to bring before the government and the public matters of interest and concern to women, and to advise the government on actions that it deems necessary to improve the position of women in society. The Council is funded by the federal government.

Prepared by: Paul Martin

Research Branch
Library of Parliament

20 November 1980

SUMMARY OF POSITION:

1. Basic theme:

In favour of the principle of entrenching in our constitution protection for our basic rights and freedoms. Welcomes the fact that the Charter of Rights will apply both to the provinces and to the federal government. However, their support for the principle of entrenchment does not mean that they approve of every aspect of the proposed Charter of Human Rights and Freedoms. They take issue with a number of its provisions relating, among others, to the prevention of discrimination.

2. Major points:

s. 15

The guarantee is not strong enough. The phrase "Everyone has the right to equality before the law..." has been interpreted by the Supreme Court of Canada to mean "equality in the administration of the law". It does not prevent inequality that is built into legislation, as was only too clearly shown in the Bedard and Lavell cases. By itself, this phrase is not an adequate guarantee. The N.A.C.S.W. has no confidence that the simple addition of one word, "equal", will provide sufficient protection.

Recommends that subsection 15(1) be replaced by a new subsection 15(1), reading as follows:

- 15(1) Every individual shall have equal rights in law including the right to equality before the law and to the equal protection and benefit of the law.
- (2) Such equal rights may be abridged or denied only on the basis of a reasonable distinction. Sex, race colour, national or ethnic origin, and religion will never constitute a reasonable distinction except as provided in (3).

This formulation begins with an explicit statement of equal rights, one that will linger in the memory and perform the educational function desirable in a Charter. It preserves the guarantee of equality in the administration of the law. The last phrase is balanced, so that a Court will not think that only "protective" laws are to be extended equally. The introductory phrase is thereby made flexible enough to allow considered judicial adjustment of rights to meet changing conditions.

The Charter would, to use words our Chief Justice has applied to the Bill of Rights, "itself enumerate prohibited classifications which the judiciary is bound to respect". The list of prohibited or suspect classifications does include more than "race" or "sex": they believe that these few additions reflect Canadians' views about what sort of discrimination is most grave.

The legislator would have freedom to make distinctions on bases other than those enumerated in subsection 15(2), but those bases would still have to be reasonable ones.

The Council removed the term "discrimination" from the proposed section. They believe that its use suggests that people must be adversely affected before they can invoke the equality guarantee. This leaves too much leeway for highly subjective judgments about what is and is not an adverse affect.

s. 15(2)

Subsection 15(2) of the proposed Charter is designed to permit legitimate programs for the benefit of disadvantaged groups, thus preventing them from being ruled invalid on account of subsection (1). The Council thinks that this is an important principle. A constitution by itself cannot eradicate past injustice: legislative activity by both the federal and provincial governments is necessary.

However, as s. 15(2) now stands, it has some deficiencies. Firstly, its protective sweep is not limited to programs sanctioned by a legislature. By using this section, private employers might try to justify their own measures for giving preference to one group. The Council thinks that only programs authorized through legislation should be protected.

The Council proposes that s. 15(2) be replaced by the following:

Nothing in this Charter limits the authority of Parliament or a legislature to authorize any program or activity designed to prevent, eliminate or reduce disadvantages likely to be suffered by or suffered by any group of individuals when those disadvantages are related to the race or sex of those individuals, or other unreasonable basis of distinction pursuant to subsection 15(2).

This wording restricts the availability of the protection to programs dealing with correction of the results of race and sex discrimination, or discrimination based on the other unreasonable bases set out in subsection 15(2), or found by a Court pursuant to that subsection.

s. 29

The Council opposes the three-year moratorium on implementation of section 15. The rationale for delaying implementation for three years is to give the governments time to bring their laws into accord with the Charter's requirements. They do not think this is a valid reason. They believe an omnibus bill to achieve conformity with the Charter could be prepared and tabled in no more than six months. It should have been done long ago. The only way to promote government action is to remove the moratorium. The moratorium means that some will experience more than a three-year wait for justice. This is considered unconscionable, and extremely incongruous given the haste with which the government is proceeding with the rest of the resolution.

Section 29(2) should be completely removed from the Charter.

s. 24

The Council is unsure whether section 24 of the proposed Charter will justify other differentiations between Indian women and men, on the basis of real (or imagined) customs, rights, or ancient freedoms. To clarify the position, they would like to see added at the end of section 24 the phrase: "...provided that such rights or freedoms pertain equally to native men and women."

s. 26

The Council is concerned about the impact of this section on the guarantees in section 15, which deals with equality in the administration of the law. Does it mean that there can properly be different provisions concerning the admissibility of testimony of a woman than a man, an Indian and a non-Indian, a religious person and an agnostic? A bias against women in the laws of evidence could prejudice the fair trial of the issue. They ask that the section be amended so that its introductory words are:

No provision of this Charter, other than sections 13 and 15...

s. 3

This section guarantees certain political rights "without unreasonable distinction or limitation." The Council is not convinced that this qualifying phrase need be so broad. They think that section 3 should begin, "Subject to section 15..." The prohibited bases for distinction set out in section 15 would thereby be incorporated as forbidden bases for denying the right to vote and hold office.

s. 1

Section one is considered deplorable. If it is allowed to continue in its present form, there is no point in having the rest of the Charter. Our liberties and rights will be in greater jeopardy while "guaranteed" by a Charter containing section one than ever they have been. This exception is a contradiction of the whole idea behind a Charter of Rights. A limitation which is "generally accepted" in a society with a parliamentary system of government is, essentially, a limitation which has the acceptance of a majority.

To say that we will limit our liberties in ways that have majoritarian approval from time to time is to say that our Charter is hollow.

The standards by which a Court can determine this question will be difficult to develop. The provisions of section one may invite the Courts to continue to respond to the rule of Parliamentary supremacy, and uphold virtually every limitation on freedom enacted by a legislature. In that event, only limitations imposed in regulations or other non-parliamentary forms would ever be seriously scrutinized. Section 25, indeed the whole charter would be deprived of all meaning.

On the other hand, the courts might be vigorous in scrutinizing limitations on the terms of the Charter, even when those limitations were imposed by legislative majority. Parliament would doubtless be wounded by any intimations in this scrutiny that its actions are unfree, undemocratic, or unparliamentary. Section one might thus precipitate needless, and sharp, conflict between the Courts and the legislature.

If it is regarded as necessary to provide for curtailment of liberty in times of national crisis, the Council asks that the grounds for such curtailment be precisely and narrowly articulated.

It does not think it desirable to have the limitations on our liberties take pride of place in section one. In lieu of the present section one, it proposes a simple statement of purpose, which would appear as section one:

The Canadian Charter of Rights and Freedoms guarantees to every individual the rights and freedoms set out in it.

Then, it proposes the addition to section 29, in place of the present subsection (2) the following:

29 (2) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, Parliament may temporarily restrict certain rights and freedoms to the extent strictly required by the exigencies of the situation in order to preserve the other rights and freedoms set out in this Charter; provided that such restrictions shall not involve discrimination solely on the ground of race, colour, sex, religion or ethnic origin.

(3) No derogation from sections 2(a), 3, 7, 12, 14, 16-22 and 23 is permissible under section 29(2).

The proposed subsection (3) stipulates those liberties which should never be curtailed, even in times of emergency. The list closely parallels that in the International Convention.

GENERAL

The Council would like to see each section which now begins with "Everyone" be changed, so that it begins "Every individual"; in French, the phrase could be "Chaque individu".



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Afro-Asian Foundation of Canada

Mr. Sebastian Alkatusey, Chairman

Ms. Carole Christinson, Director of the Foundation

Mr. Justin Tiji, Director of the Foundation

DATE OF APPEARANCE: January 6, 3:30 p.m.

FORM OF SUBMISSION: Brief

BACKGROUND:

The Afro-Asian Foundation was founded in March 1980 for the purpose of encouraging cooperation among organizations representing people of African and Asian descent. There are now 27 affiliated associations.

Prepared by: John McDonough

Research Branch
Library of Parliament

January 12, 1981

MAIN POINTS:

The Afro-Asian Foundation seeks to explain the historical contributions made by non-White citizens to the settlement and development of Canada; although these achievements are generally ignored by the Canadian system of education.

Afro-Asians have suffered injustices as a racial minority before and since Canada has become a modern nation state: enslavement, discriminatory immigration policies that sought to keep Canada White and the "formal and informal practices of institutional racism".

Non-White Canadians continue to suffer discrimination in education, employment, job promotion, housing and recreational facilities, as well as unequal protection by law enforcement agencies.

The concept of "two founding races does a disservice to that quarter of the population which is of neither British nor French origin; it is no longer adequate to express the reality of modern Canada.

The Afro-Asian Foundation endorses the aim of the Government to patriate the Constitution with an enshrined Bill of Rights.

RECOMMENDATIONS:

s. 2

Fundamental Freedoms

There should be a clause which would protect the places of worship of Afro-Asian religious sects from vandalism and defamation.

s. 6

Mobility Rights

This clause should specifically state that no person may lawfully be denied freedom of movement or freedom of employment in any Canadian territory on the basis of race, colour or national origin.

s. 7

Life, Liberty and Security of Person

Afro-Asian minorities must be protected against all forms of violence to which they are presently exposed by groups whose objective is the promotion of racism and violence.

s. 15

Non-Discrimination Rights

No person may be discriminated against in places of employment, education, health, political and social institutions, on the basis of race, colour, religion or national origin; explicit provision should also be made for adequate enforcement.

s. 23

Minority Language Educational Rights

Wherever feasible, all children, regardless of mother tongue or national origin, shall be entitled to receive public education in the official language of their choice.

s. 24

Undeclared Rights and Freedoms

The Afro-Asian Foundation supports the principle that aboriginal rights and Indian Treaties be safeguarded in the new Constitution.

In addition -

The Constitution should create a Federal Commission to hear complaints of discrimination by non-White minorities.

An affirmative action program should be established to ensure representation of non-White minorities in decision-making positions at all levels in public bodies.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Alberta Chamber of Commerce
Reinhold Lehr, President
Maureen Mahoney, Public Affairs Manager
Duncan McKillop, Chairman of the Task Force on
Constitutional Change

DATE OF APPEARANCE: December 16, 1980, 10:30 a.m.

FORM OF SUBMISSION: Brief and News Release dated November 6, 1980.

BACKGROUND: The Alberta Chamber of Commerce is a federation of 120
Boards of Trade and Chambers of Commerce in Alberta.

SOURCE FOR NOTES: 5 page submission.

Prepared by: Amos Shiosberg

Research Branch
Library of Parliament

15 December 1980

BASIC THEME

No patriation without unanimous agreement on an amending formula.

MAIN POINTS

1. Patriate constitution with unanimously agreed-upon amending formula based on the principles of "Vancouver Consensus Draft".
2. Do not include principle of "equalization" in constitution. Leave this for subsequent amendment.
3. Following patriation with unanimously agreed-upon amending formula, include Premiers' Annual Conference in constitution.
4. Delete Charter of Rights and Freedoms from constitution as adequate protection already exists in federal and provincial laws.
5. Following patriation with unanimous amending formula, include following amendments:

Resource Ownership - reaffirm provincial control

Resource Taxation - provinces to have exclusive right to tax and collect royalties from management and sale

Economic Union - remove barriers to free movement of persons, goods, services and capital in Canada; establish ongoing joint review to harmonize federal and provincial laws, practices and policies affecting Canadian economic union.

Transportation - expand provincial jurisdiction to make this concurrent power.

Declaratory Power - revise to require a concurrence of province affected.

Emergency Power - place limit on duration of federal government's power to assume special responsibilities in times of emergency; require federal government to prove legitimacy of action.

Reservation and Disallowance - repeal these federal powers.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The Alberta Social Credit Party:

Rod Sykes, Leader

Ray Speaker, M.L.A., House Leader

DATE OF APPEARANCE: January 7, 1981: 8:30 p.m.

FORM OF SUBMISSION: Brief (18 pages)

John McDonough

Research Branch
Library of Parliament

12 January 1981



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

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WITNESS:

The Alberta Social Credit Party:

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DATE OF APPEARANCE: January 7, 1981: 8:30 p.m.

FORM OF SUBMISSION: Brief (18 pages)

John McDonough

Research Branch
Library of Parliament

12 January 1981

MAIN POINTS (General):

The Social Credit Party has appeared before the Special Joint Committee to show respect for Canada's national parliamentary institutions. Mr. Sykes regrets that Mr. Lougheed has refused to come before the Committee.

Mr. Sykes is critical of Premier Lougheed's "war" with the rest of Canada.

Mr. Sykes describes Western Canada as being a truly multicultural society, that is not English and not French, that has no time for the old squabbles of Central Canada.

Mr. Sykes makes the point that for ten years at least, the Liberal Party has not been a national party with a national mandate. It therefore has no mandate for the constitutional initiative that it is taking now.

Indian Rights:

The Indians collectively have something analogous to the status of a Province in the sense that they have the right to be consulted where changes are contemplated.

Indians have rights and those rights and their Treaties must be dealt with concurrently with dealings with the Provinces.

Patriation:

Mr. Sykes traces the current proposed Joint Resolution to a plan in 1949-50 to patriate the constitution which he claims was conceived by Prime Minister St-Laurent but never implemented.

The Alberta Social Credit Party endorses the request to Westminster that jurisdiction over the B.N.A. Act be transferred to Canada. This is seen as being a cosmetic action of little urgency.

Amendment:

The Alberta Social Credit Party is against any change to the present B.N.A. Act (outside of simple patriation) being made by the British Parliament. Any such changes would never be acceptable to Canadians. Change can only be brought about by the accepted federal-provincial procedures that have been hammered out over a hundred years of federal-provincial negotiations.

The constitution must be brought to Canada unchanged, so that Canadians may decide in Canada what to do about it.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The Algonquin Council:

Lena Nottaway
William Commanda
Richard Kistabish
Salamon Wawatie
Major Kistabish
Louis Jerome
Kermot Moore
Pamela Keistabish

DATE OF APPEARANCE:

January 5, 1981, 6:00 p.m.

SOURCE OF NOTES:

Opening Statement during the testimony

BACKGROUND:

The Algonquin Nation is geographically outlined by the Ottawa River watershed which stretches from the Abitibi region of the North to the Ottawa and St. Lawrence Rivers in the South.

Prepared by: John McDonough

Library of Parliament
Research Branch

January 13, 1981

MAIN POINTS:

It must be remembered that the native people, the Algonquins, were and always will be the first inhabitants of our land.

The Algonquin people have always enjoyed self-determination and have always managed by themselves without assistance from anyone.

The Algonquins look to the Royal Proclamation of 1763. They did not sign any Treaties and they did not extinguish their rights as to trapping and fishing.

According to the Algonquins the whole issue of the constitution is based on land and the way of living together, yet there is not the slightest mention of Indians on their land in the proposed Joint Resolution.

THE ALGONQUIN ACT:

They wish to reach an agreement on the boundaries of the territory over which the Algonquins have full jurisdiction. This jurisdiction would be transmitted and implemented by an Algonquin Act. This would define the territory where the Algonquins would have control of ownership of the resources, control of education, political freedom, cultural and religious freedom, hunting, fishing, control of health and environmental protection laws. This would be a contract between two nations, the Euro-Canadians and the Algonquins.

PATRIATION:

The Algonquin Council rejects the idea that by patriating the constitution the Canadian Parliament has the right to make any decision concerning their people without consultation.

AMENDMENT AFTER PATRIATION:

Since most provincial Premiers oppose native rights, any such discussion would be meaningless.

RECOMMENDATIONS:

The Algonquin Council proposes the creation of representative government for native people flowing from the universal principles of justice; by "native" they mean status, non-status Indians and Métis.

This concept is that of a country-wide native constituency, which would elect Members of Parliament on a per capita and territorial basis. They would represent the indigenous entity in the same manner as the established government represents the economic, social, cultural, civil and political rights of other Canadians.

All benefits which presently accrue to the provinces must go to the native constituency, including equalization payments, as per the policy on have not provinces.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Alliance for Life - Alliance pour la vie

Karen Murawski, former Vice-President
Dr. Paul de Bellefeuille, Associate Professor
of Pediatrics at the University of Ottawa, and
Pediatrician at the Children's Hospital for
Eastern Ontario
Major J.J.H. Connors (Retired), CD, LL.B.,
MHH, FRSH, consultant in health matters.

DATE OF APPEARANCE:

December 18, 1980, 11:00 a.m.

SOURCE FOR NOTES:

Letter to the Special Joint Committee and a
telephone conversation with Mr. David Peppin,
President of Alliance for Life.

BACKGROUND:

Alliance for life is the national coordinating
body for the pro-life movement in Canada. It
represents 165 pro-life groups across the
country. In the past 10 years, the Alliance
has made numerous representations to the
Canadian government on behalf of unborn and
disabled children and more recently on behalf
of the handicapped and the disabled.

Prepared by: Serge Pelletier
Research Branch
Library of Parliament

December 17, 1980

BASIC THEMES:

- 1) The fetus is a human being.
- 2) The law has traditionally upheld the rights of the fetus: the fetus can inherit, sue for injury, can be the beneficiary of a trust and is protected by the criminal statutes on neglect. But the unborn and disabled child does not have the right to life.
- 3) Due to a lack of specificity, the Charter of Rights is both potentially favourable and potentially unfavourable to the right of life of born and unborn children. By shifting the responsibility of interpreting that right from Parliament to the Courts the Charter creates the possibility of a situation similar to the one created by a U.S. Supreme Court decision on the right of life in 1973.

RECOMMENDATIONS:

s. 7

LEGAL RIGHTS

That the unborn receive the special protection of being named under s. 7 of the Canadian Charter of Human Rights which will be respectfully requested to include "everyone" from "conception to natural death" has the right to life.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Most Reverend Edward W. Scott, Primate
Anglican Church of Canada

DATE OF APPEARANCE: January 7, 1981, 9:30 a.m.

FORM OF SUBMISSION: Brief

SOURCE: Telephone conversation with the Reverend Scott

BACKGROUND: Worked as a priest in various parishes.

Director of Social Service and Priest
Director of Indian Work, Diocese of Rupert's
Land, Manitoba, 1960

Assistant-Secretary, Council for Social Service,
General Synod, Anglican Church of Canada, 1964.

Consecrated Bishop of Diocese of Kootenay, B.C.
1966.

Elected Primate, Anglican Church of Canada, 1971.

Elected Moderator of the Central Committee,
World Council of Churches, 1975.

Prepared by: François Bernier

Research Branch
Library of Parliament

January 6, 1981

BASIC THEME:

Stress is laid on the importance of human rights and values. Constitutional law, viewed in its Canadian context, consists of more than the B.N.A. Act itself, but includes as well a number of traditions and conventions which also have importance.

MAJOR POINTS:

Patriation and Amending Formula

Both with regard to patriation and the question of an amending formula, there is need for cooperation. Opposition to unilateral patriation is therefore expressed and it is hoped that consensus, rather than unanimity, should be the governing principle and requirement for constitutional change.

Regarding the amending formula more specifically, the brief recognizes and supports the inclusion of an amending formula precedent to patriation. However, the amending procedures now contained in the proposed Constitutional Act need to be better detailed and any acceptable amending formula should be consistent with the necessity of cooperation between the different governments.

Human Rights

The brief expresses basic support for the entrenchment of human rights provisions in the Constitution.

In the area of native rights, however, the brief deplores the lack of consultation and active involvement by native peoples in the constitutional revision.

Section 24 of the Charter, which most directly concerns native peoples, is inadequate in its present form. While it may not be necessary to define in the Charter the content of these rights, as revised, s. 24 should, at a minimum, protect such rights as now exist from legislative interference.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESSES:

L'Association Canadienne Française de l'Ontario

Yves St-Denis, Président Général
Gérard Lévêque, Secrétaire Général
Robert Choquette, bénévole, historien à l'Université
d'Ottawa (en congé sabbatique)

Council of Quebec Minorities

Eric Maldoff, President
Geoffrey Chambers, Executive Director
James Leavy, Lawyer

DATE OF APPEARANCE: Wednesday, November 19, 1980: 4:30 p.m.

SOURCE FOR NOTES: In the absence of an advance copy of the Brief, the information contained in this note was obtained during a telephone conversation with Mr. Gérard Lévêque of A.C.F.O.

BACKGROUND:

L'Association Canadienne Française de l'Ontario was founded in 1910 and has been the principal spokesman for the francophone minority in Ontario since that time. It is made up of 18 regional councils and 17 affiliated organizations. A.C.F.O. is representative of all regions of Ontario and of all levels of the francophone population in Ontario.

The Council of Quebec Minorities is an umbrella group made up of 42 organizations and associations which are principally representative of the linguistic and ethnic-cultural minorities in Quebec. They are concerned about the role of these minorities in Quebec and have a particular interest in language rights.

MAJOR POINTS:

Section 133 of the B.N.A. Act should be amended to include Ontario within its purview.

The linguistic minority in the provinces should control their own schooling.

Section 23(1) and (2) of the Charter should be amended to make it applicable to "residents" rather than "citizens".

The availability of health and social services to the linguistic minorities in their language will be addressed as an important issue.

Mr. James Leavy of the Council of Quebec Minorities will be making some representations concerning the provisions of the Charter dealing with legal rights and non-discrimination.

COMMENTS:

The provision of English and French school boards might make sense in Ontario and Quebec but it might add an unwelcome complication to the present division between Protestant (or secular) and Roman Catholic boards. Would the witnesses wish the Committee to consider the repeal of the parts of section 93 of the B.N.A. Act (Legislation respecting Education) with respect to the religious guarantees?

It might also be noted that the denominational education system in Newfoundland is even more complicated.

Would the witnesses consider that for areas where the minority language group was very small that minority language education might be better administered under a general school board with provisions for the expression of the special concerns of the minority language parents?

Prepared by: John McDonough
Philip Rosen

Research Branch
Library of Parliament

18 November 1980

SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

L'Association culturelle franco-canadienne de la Saskatchewan

DATE OF APPEARANCE:

Tuesday, November 25, 1980, 9:30 a.m.

SOURCE OF NOTES:

Brief

BACKGROUND:

Founded in 1912, the A.C.F.C.S. has over 2,000 members. Its aims are to develop a collective awareness among the Fransaskois, to ensure visibility of the francophone element in Saskatchewan and to work towards the realization of an equal "partnership" between the minority and the majority of this province.

Prepared by: Paul Martin

Research Branch
Library of Parliament

November 21, 1980

ASIC THEME:

The A.C.F.C.S. is greatly concerned in view of the possibility that the constitutional project may be accepted in its present form because it believes that this project in fact brings nothing new whereas it might have unfortunate consequences. As they are drafted, the provisions relating to language will, in the A.C.F.C.S.'s view, not achieve the aim of protecting official minorities, and of ensuring equality and mutual respect of the two groups.

MAJOR POINTS:

1. Education rights
s. 23(1)

The intent of section 23(1) appears to them to be positive since it recognizes the right to education in French for their children. However, the Association is greatly worried by the wording of this section, firstly because of the ambiguity of some of the words used, but mostly because it does not see how this right could be exercised in Saskatchewan given the restrictions mentioned in the section. The number of students will have to be sufficient to justify the provision of any needed educational facilities. This number will likely be very high and met with difficulty where the population is widely scattered.

Furthermore, if the courts are called upon at some point to judge what constitutes a "sufficient" number of children with respect to a specific region, without further guidelines than those given in section 23, the Association believes that the courts will more than likely rely on the opinion of the legislators or the school administrators. In other words, the matter rests largely in the hands of the majority.

The A.C.F.C.S. raises many questions among which:
What exactly is meant by the confused concept of educational facilities? Does this refer to school boards? To French schools? Could it not be claimed that immersion programs in English schools are indeed French language educational facilities? Who will determine and how, whether the parents understand the language to a sufficient extent?

s. 23(2)

According to the A.C.F.C.S., the second part of section 23 provides a further example of the inequalities it will create: if anglophones coming from predominantly anglophone provinces will thus have access to English schools in Quebec, the francophones of Quebec will not likewise have access to French schools in Saskatchewan since these do not exist. The Fransaskois, for their part, will be able to gain access to French schools in Quebec and, maybe, in Manitoba.

This fundamental inequality, arising from the effects of section 23, on the English-speaking Quebecers on the one hand, and on the Fransaskois (and other francophones

outside Quebec) on the other hand, appears, in their view, to be totally unacceptable especially when it is to be found in a document which should set the very cornerstone of the nation. In the complex socio-linguistic situation which exists in Canada, the objective should be equality in fact and not merely equality in principle; what is needed then are measures which will lead to equality rather than a universal principle which has divergent effects.

2. Federal Services
s.20

Section 20 of the constitutional project is in their view, a step backwards which will affect the Fransaskois' access to services in French.

The very idea of subordinating federal services to limited and ill-defined circumstances restricts access for francophones to services in their language throughout the country and undermines the federal vision, so extensively promoted lately, of a Franco-Canadian at home in every part of Canada.

3. Legal Status of the French Language
s.21

Section 21 of the project states that provisions concerning official languages do not abrogate or derogate from any right, privilege or obligation that exists or is continued by virtue of any other provision of the Constitution of Canada. Yet, in Schedule I which lists the acts which are part of the Canadian constitution, mention of the North-West Territories Act of 1877 was avoided or omitted, although the official status of the French language in Saskatchewan rests largely on that act.

4. Responsability of Provinces

The provisions of the project dealing with language, sections 16 to 23 inclusively, only recognize a certain federal bilingualism and education rights without great scope. The proposed resolution, as it is now worded, does not deal with several sectors which most affect the daily life of the citizens, namely the services provided by provincial authorities.

The present constitution provides for a certain bilingualism in three of the thirteen governments in Canada: those of Quebec and Manitoba and the federal government. That a project for constitutional renewal, drafted in 1980 with the specific purpose of adapting to the new Canadian reality and of protecting the official linguistic minorities, should perpetuate this inequality by ignoring the needs of eight provinces grouping 94% of francophones outside Quebec, is both surprising and inadmissible.

The English-speaking Quebecers are not the ones who suffered from discrimination and were the targets of deliberate and effective measures of assimilation. The Fransaskois and other francophones outside Quebec were. It is therefore in favour of these that the linguistic provisions should be drafted so that they may enjoy these rights. The A.C.F.C.S. does not believe that it is Quebec's position which hurts the interests of francophones outside Quebec because:

- (1) the present project, rejected by Quebec, offers the Fransaskois mostly symbolic rights, and
- (2) if one wanted to amend the wording of provisions giving the Fransaskois real rights, this could be done in such a way that the autonomy which Quebec needs to protect its francophone population is not attacked. If need be, different measures could be drafted for Quebec and for the anglophone provinces.

RECOMMENDATIONS

1. The clear and unequivocal recognition of the Canadian duality and of the two founding nations. It is a truth, drawn from history, which has marked our federation in an indefectible way. In no way does it deny other aspects of the Canadian reality, such as the primordial presence of the Ameridians and the contribution of other groups.
2. The recognition of the responsibility of provincial, as well as federal, governments, of ensuring the equality of status of the francophone population and of encouraging the development of francophone communities through appropriate legislation and policies.

Section 23

3. The recognition of the right of the minority to use the language of the official minority, without regard to the number of students.
4. The recognition of the principle of control over and management of francophone schools by francophones.

Section 20

5. A much more generous and precise definition of access to federal services in the language of the minority. This access, which should not require a previous decision by Parliament as to numbers, should be guaranteed at least in all urban centres of the country and in all regions where there are francophone communities, although small.
6. The recognition of the legal status of the French language in Saskatchewan, before the courts and in the legislative assemblies, as provided for in certain provisions in the North-West Territories Act. The provisions of the Act itself should at the very least be maintained.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Association of Iroquois and Allied Indians:

Charles Cornelius, President of the Association
Gord Peters
Dean Jacobs
Chief Bill Tooshkenig

DATE OF APPEARANCE: January 5, 1981: 8:00 p.m.

FORM OF SUBMISSION: Brief (4 pages)

BACKGROUND:

The membership of the Association exceeds 9,000 status Indian men, women and children in the province of Ontario.

John McDonough

Research Branch
Library of Parliament

13 January 1981

IN POINTS:

The Royal Proclamation of 1763 was enacted by George III employing a Crown Perogative to legislate directly for the colonies. It is the first written Constitutional Document for Canada, its provisions still being in effect. The Association represents those Nations described in the Royal Proclamation as "The Several Nations or Tribes of Indians with whom we are connected and who are under our protection".

The Association declares that they have a specific relationship to the Imperial Crown, characterized as a Protectorate. The Crown therefore has an obligation to protect the Nations under the Royal Proclamation. Any change in this relationship should only occur by mutual negotiation and agreement.

The Royal Proclamation of 1763 is the source of all power for the negotiating and entering into of Treaties. Neither the B.N.A. Act of 1867; the Statute of Westminster of 1931; nor any other piece of legislation in Canada before or after Confederation gives authorization for Canadian Officials to negotiate Treaties with Aboriginal Nations.

The Royal Proclamation of 1763, as a Perogative Imperial Enactment relating to Canada, has no application to England, is not a law of England nor an Act of the Parliament of the United Kingdom. The changes in responsibility from the Imperial Crown to Canada, occurred in practice but not in law. The Nations represented by the Association now call upon the Imperial Crown to help in their struggle to decolonize their relationship with Canada and the United Kingdom.

The Nations wish to be self-governing Nations within Confederation. They want to maintain their special relationship with the Crown, a relationship which is parallel to that of the Government of Canada and the Canadian Provinces.

PATRIATION

On November 29, 1980, the Association of Iroquois and Allied Indians passed a resolution (in brief) noting that:

(a) unilateral patriation of the B.N.A. Act by any government of Canada directly threatens the rights and entitlement of the Indian Nations, and

(b) that such unilateral patriation without the consent of the Indian Nations was a breach of the special relationship between those Nations and the Imperial Crown.

It was therefore resolved that the A.I.A.I. was authorized to take all the necessary action to ensure that no patriation of the B.N.A. Act is carried out until the consent of the Indian Nations is granted.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Association of Métis and Non-Status Indians of Saskatchewan:

Jim Sinclair, President

DATE OF APPEARANCE: December 9, 9:00 p.m.

FORM OF SUBMISSION: Position Paper

BACKGROUND: The Association is not affiliated with the Native Council of Canada, the "national" organization representing Métis and non-status Indians.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 9, 1980

JOR POINTS:

PATRIATION

The Association is concerned that if the Constitution is patriated without any guarantee of native rights, the present government may act unilaterally to extinguish all existing rights without adequate compensation. At its annual conference held in August 1980 the Association adopted the following resolution:

That there be no patriation until there is unanimous agreement on a Native Bill of Rights to be entrenched in the Constitution. We are not prepared to relinquish the present protection provided by the BNA Act and other British law and precedents, for native rights, until an acceptable alternative is guaranteed.

The brief encloses an Appendix D a "Declaration of Métis Rights". Among the rights set out in the declaration are the following: the right to have the "special status" of native people entrenched in the Constitution; the right to have cultural differences recognized and protected, including the right to have native children educated in their language and in the traditional customs, beliefs, and art forms of native culture; the right for native groups to have their own representatives in all legislative assemblies, and to have public documents and acts published in native languages; the right, until a settlement is achieved, to determine when and how the resources on lands in the North, which natives have traditionally occupied, will be developed; and the right to ensure that these lands are developed for the benefit of native people in "partnership with other Canadian people".

PARTICIPATION IN CONSTITUTIONAL REFORM

Maintains that the five areas concerning which the Prime Minister "endorses direct participation by the Indian leadership at the table with the governments on those constitutional matters which directly affect Indian people" (letter of the Prime Minister, Appendix B) are too narrow. These areas are aboriginal rights, treaty rights, internal native self-government, native representation in political institutions, and the responsibilities of the federal and provincial governments for the provision of services to native peoples.

Natural resources, economic development, education and immigration were described as areas which are of vital concern to native people and which fall outside of the ambit of participation just noted as envisaged by the federal government.

Full participation at ministerial meetings and meetings of First Ministers concerning all aspects of constitutional reform was requested.

Objects to the fact that the federal government is only providing financial assistance for the preparation of studies and representations on the Constitution to the National Indian Brotherhood, the Inuit Committee on National Issues and the Native Council of Canada (letter of the Prime Minister, Appendix A). The Native Council of Canada, for example, "does not represent a significant portion of the non-status native population of Canada." It was stated further that only the leaders of provincial and territorial organizations can represent their people.

COMMENTS:

The Association points out that the Native Council of Canada does not represent many non-status Indians and that they would be better represented by provincial and territorial organization. Does this not present a very significant problem for national legislators who wish to respond to native demands as a whole when their representatives have problems agreeing among themselves?

To insert native rights in the Constitution should there not be an agreement among all concerned about just what these rights are? Would the Association care to offer their definition of aboriginal rights?

Would the Association care to comment on the definitional problem of who is an Indian? If the standards of the Indian Act are inadequate should the definition be left to the individual concerned? Or, can a case be made that the native communities, however defined, would pass an ultimate judgment on the status of individuals? Should equal rights be extended to both Indian men and Indian women?

SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Attikamek-Montagnais Council
Mr. René Simon, President
Mr. Aurélien Gill, Chief of Pointe Bleue
Mr. Ernest Ottawa, Representative of the Attikamek Nation
Mr. René Dupuis, Legal Counsel for the Council

DATE OF APPEARANCE: 17 December 1980; 3:30 p.m.

FORM OF SUBMISSION: Brief (14 pages)

BACKGROUND: The Attikamek-Montagnais Council is an Indian organization comprising twelve bands concerned with promotion of Indian land rights.

The Council is affiliated to the Indian Brotherhood of Canada and to the Association of Indian Nations of Quebec.

Prepared by: Claude StPierre
Research Branch
Library of Parliament
17 December 1980

POINTS:

The Attikamek and Montagnais peoples have the duty to make every effort to obtain recognition of their native rights, of their Indian rights and of their rights as sovereign nations in order to build a satisfactory future for all generations to come.

Though it is extremely difficult to carry the burden of proof before courts which are both judge and party, the Council believes that their rights are as equal and as fundamental as those of the majority. It continues to hope that our ancestors' past commitments over lands and resources will be respected and that account will also be taken of their cultural traditions such as the non statutory native law which maintains the principle of collective property.

The lands they have held for time out of mind have never been covered by any treaty. On these lands, the Attikamek and Montagnais peoples have enjoyed full sovereignty and a social and cultural system based on equality. Refusal to change the system has led to the current situation yet they have never renounced their sovereignty and their territory. The redefinition of the relationship with the dominant society must be based on the recognition of this sovereignty. The Council wishes to renew and strengthen its people's special cultural values in institutional areas which concern them and want to see enshrined in the constitution of this country guarantees which will ensure respect of their aboriginal rights. The concept of gradual assimilation is rejected and the special cultural nature of the natives becomes the cornerstone of multiculturalism.

Aboriginal rights, sometimes recognized by jurists and by treaties, are rights to sovereignty. Denial of these rights is based on superior force. Rights to life use of ancestral lands are generally recognized but the Council rejects such a unilateral definition since it is restrictive and limits these rights of life use to hunting, fishing and trapping only on Crown lands. These rights are not even exclusive and must be shared with sportsmen, forestry and mining companies and with Hydro-Quebec. The rights to sovereignty should include the totality of resources on their lands.

Aboriginal rights can be traced way back, even before the Royal Proclamation of 1763. The parcelling of their lands and the repeal of aboriginal rights carried out at that time should not be recognized. Indian law is based on the needs of the community and allows for equal access to the land and its resources. Its aim is to protect the environment and ensure the constant renewal

of resources for the well-being of future generations. Having rejected the model of the white society, the Council seeks to promote a model community-oriented society where collective rights override individual rights.

The argument of non-use of certain lands cannot be used to limit the choice of these lands nor their geographic area.

Finally, the extinction of territorial rights should not be sought as the basis for all agreements between the dominant group in society and the natives. The Council rather seeks recognition of aboriginal rights which should be clearly enshrined in the constitution.

Since the arrival of Europeans, the natives have seen their most fundamental rights set aside. The various resources of the continent have been taken over. During the XIXth century, development of lands spared till then began. The forestry companies devastated the hunting lands; the hydroelectric power plants built reservoirs and rendered useless vast tracts of land; the mining concerns treated the natives like pariahs on their own lands. Furthermore, the dominant society hunting and fishing for sport appropriated animal resources. All these developments were carried out with disregard for natives.

Worried by the political projects of the present government of Canada, anxious not to lose their rights through future patriation of the constitution, opposed to the disappearance of its people, the Council wants recognition of land rights, of the right to retain their status as Indians and of the right to develop the institutions and culture of the native peoples.

RECOMMENDATIONS:

Recognition of the natives as a founding people on a equal basis with the anglophones and francophones.

Recognition of their rights to sovereignty on their own lands.

Control over development of their lands in the view of ensuring their economic, social and cultural well-being.

Establishment and control by natives of their political, social, economic, education and cultural institutions.

Right of natives to veto institutions, statutes and affairs which affect them, equal to that held by provinces



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

SUBMITTED BY: British Columbia Civil Liberties Association
David Copp, Vice-President
(Professor of Philosophy, Simon Fraser University)
Bill Black, Discrimination Committee Head
(Professor of Law, University of British Columbia)

DATE OF APPEARANCE: 9 December 1980

BACKGROUND: B.C.C.L.A. was founded in 1962 and is a member of the Canadian Federation of Civil Liberties and Human Rights Associations. Approximately 400 individuals and 50 organizations have memberships in it.

The main activities of B.C.C.L.A. are to investigate substantive complaints, lobby for change, and to publish studies on civil liberties.

Prepared by: Stephen Fogarty
John McDonough

Research Branch
Library of Parliament

7 December 1980

SUMMARY

GENERAL OBSERVATIONS

Criticizes the government for failing to make the actual terms of the Charter known to the Canadian people. The government leaflets describing the Charter are misleading.

Time for Parliamentary consideration should be extended.

GUARANTEE OF RIGHTS AND FREEDOMS

s. 1

Delete. As drafted, this section amounts to "an attempt to disentrench an affirmative Charter of Rights, and to entrench the doctrine of Parliamentary supremacy".

This section effectively grants Parliament the power to determine how "fundamental" rights are to be. The courts would merely have the role of determining how "reasonable" is any limit placed on rights by Parliament. But the courts are not directed to determine what is "reasonable" according to constitutional principles. Instead, they would be required to take into account what is "generally accepted", or the will of the majority. This is hardly an adequate protection for minorities. (pp 2 to 3)

Parliament should not be granted undetermined powers to restrict rights. Specific criteria should be contained in the Constitution to deal with emergency situations. The following points should be taken into account when drafting such a section (Appendix to Brief):

- (1) Limit an emergency clause to crisis situations which threaten the life of the nation.
- (2) The pre-conditions for the exercise of emergency powers should only refer to specific observable events. Terms such as "apprehended insurrection" should be avoided.
- (3) The use of emergency powers should be referred to the House of Commons as soon as possible. The invocation of emergency powers would cease to have effect if concurrence were denied by the House.

- (4) Limit the duration during which emergency powers may be used to four weeks following their invocation. Any extension should require approval by the House of Commons.
- (5) Procedures should be established whereby a limited number of Members of Parliament could move revocation of emergency powers.
- (6) The emergency powers clause should require the government to restore usual citizens' rights forthwith once the authorized period of emergency has ended. Moreover, it should be required that the reputations of persons damaged during an emergency period be cleared according to the findings of an independent tribunal.

FUNDAMENTAL FREEDOMS

- s. 2 These freedoms are not guaranteed due to the present wording of s. 1 (p. 2).

LEGAL RIGHTS

The recurring use of the phrase "except on grounds and in accordance with procedures, established by law" (e.g. ss. 8, 9 and 11(d)) means that the legal rights set out in the Charter are not to be entrenched after all. Parliament would be free to alter the supposed constitutionally-entrenched rights of citizens at any time by merely passing a statute. (pp. 4-5)

- s. 7 Uncertain whether this section is meant to cover arrest. If it does cover arrest, the words "except in accordance with the principles of fundamental justice" should not be used as they are too vague, and could lead to varying judicial interpretations.

The Charter should state that no citizen can be arrested except on reasonable and probable grounds.

- s. 8 This section would permit wide powers of search and seizure, such as those now available to peace officers under writs of assistance. It should be required that the privacy of a citizen's person and home may only be invaded by those officers who have warrants issued by a judicial officer for a particular person and/or place and time, and covering certain items.

Exemptions should only be permitted in "the most exceptional cases". (pp. 5-6)

- s. 9 If "detention" is read by the courts to include arrest itself, this section is inadequate. (p. 6)
- s. 10 This section should include procedural safeguards requiring that, prior to any questioning, "a person arrested or detained must be told that he has the right to remain silent, that any statement he chooses to make may be used as evidence against him..., and that he has the right to have counsel present, either retained or appointed". (p. 8)
- s. 10(b) Individuals must have the right to the assistance of counsel, whether or not they have the money available to "retain" such counsel. (p. 8)
- s. 11(c) Should be amended to ensure that the concept "fair hearing" applies to all instances of decision-making where a person's rights and obligations, of any kind whatsoever, are to be determined. (pp. 10-11)
- The right of an accused person in criminal proceedings to a trial by jury of his peers should be included. (p. 13)
- s. 13 This section, if applied to the accused, is totally inadequate. It would erode the rights against self-crimination now enjoyed by Canadians.
- Recommends an unequivocal statement that the "accused shall not be compelled to testify against himself at trial". (p. 7)

NON-DISCRIMINATION RIGHTS

- s. 15 The protection offered should go beyond traditional grounds to encompass political belief, physical disability, former criminal conviction, and sexual orientation. (p. 12)

OFFICIAL LANGUAGES OF CANADA

- s. 19 Should be extended to include all provincial Courts of Appeal and Supreme or Superior Courts, as the case may be, rather than merely courts "established by Parliament". (p. 12)

UNDECLARED RIGHTS AND FREEDOMS

- s. 24 Inadequately protects the rights of native people. The section may well erode these rights rather than enhance them. Negotiations are currently underway on numerous fronts for the rights of native peoples to become recognized, while this section would only protect rights which are now established by law.

This section may preclude the federal government from exercising its constitutional powers concerning native people under s. 91(24) of the B.N.A. Act. (p. 11)

GENERAL

- s. 25 Inadequate as drafted. Violations of rights will not be limited only to laws determined inconsistent with the Charter, but will also incorporate actions by public officers and agencies. The courts' jurisdiction to provide adequate remedy for violations of the latter kind should also be granted in unequivocal terms. (p. 12)
- s. 26 Amend to include the assertion that illegally-obtained evidence will not be admissible in judicial and quasi-judicial proceedings. (p. 9)

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

- s. 41 Amendment of Charter should be restricted to the amending formula set out in this section. (p. 13)
- ss. 42, 50 Recourse to referenda pursuant to these sections could endanger minority rights. (p. 13)

COMMENTS:

- s. 15 Would the witnesses care to comment on the suggestion made earlier today by the National Association of Women and the Law that section 15 (Non-discrimination Rights) uses a two-tier test when approaching the grounds of discrimination. The first tier would include sex, race, national or ethnic origin, colour or religion and a "strict scrutiny" test would apply to these distinctions. The second category of grounds would be open-ended and the courts could apply either a "strict scrutiny" test or a "reasonableness" test depending on their judgment of the circumstances.

16

Both the Civil Liberties Association and the Canadian Jewish Congress argued for the deletion of s. 26 but did not wish to assert a total "exclusionary rule". They argued that the matter should be left to a test of "reasonableness" and a judgment of the circumstances by the courts. Might this not ameliorate some of the extreme worries of the Police Chiefs who have argued against the exclusionary rule.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Business Council on National Issues

Peter Gordon, Chairman and Chief Executive Officer of Steel Company of Canada, Vice-Chairman of the Council

Gerry Heffernan, Chairman of Co-Steel Ltd., Chairman of the Task Force on Government Organization

James Fleck, President of Fleck Industries, Chairman of the Steering Committee on the Constitution.

DATE OF APPEARANCE:

January 7, 1981, 7:30 p.m.

SOURCE:

Draft notes - Letter to the First Ministers, September 2, 1980.

BACKGROUND:

The Business Council on National Issues (BCNI) is an association of the Chief Executive Officers of some 140 major corporations across Canada. The Business Council was formed to enable its members to make a constructive contribution to public policy, especially economic.

Prepared by: François Bernier
Monique Hébert

Research Branch
Library of Parliament

January 7, 1981

MAIN POINTS:

The Business Council on National Issues believes a federation is the best possible form of government for Canada.

The Council opposes patriation of the constitution in the absence of substantial provincial agreement on an amending formula.

Regarding a possible amending formula, the Council supports either unanimous agreement, or the Vancouver or Victoria formula, and rejects the use of a constitutionally binding referendum as part of an amending formula (S.38 (3)).

The Council seeks constitutional protection for certain rights affecting the corporate person, such as the freedom to speak out independently for its interests without fear of reprisal, the right to own and enjoy all forms of property, the denial of which must only be made through due process of law, and the right to freely mobilize goods, services, capital and entrepreneurship within Canada's territorial boundaries.

Lastly, the Business Council would like the new constitution to acknowledge and protect the economic system by ensuring that "generating the wealth" be put on an equal footing with "sharing the wealth".

RECOMMENDATIONS:

Amending Formula

The Council supports patriation of the constitution with an agreed upon amending formula (unanimity or the Victoria or Vancouver formulas).

Economic Rights

The Council recommends constitutional incorporation of certain fundamental rights for the corporate person, and protection of the free flow of economic factors within Canada, as in S.92 of the Australian Constitution: "Inter-course among the states... shall be absolutely free", and S.99, the federal government (The "Commonwealth") "shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another state or any part thereof".



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Campaign Life:

Mrs. Kathleen Toth, President
Mrs. Gwen Landolt
Dr. Michael Barry

DATE OF APPEARANCE:

January 8, 1981: 5:30 p.m.

FORM OF SUBMISSION:

Brief (11 pages)

BACKGROUND:

Campaign Life is a national pro-life organization working at all levels of government to secure full legal protection for all human life, including the unborn, the aged and the handicapped.

Prepared by: John McDonough

Library of Parliament
Research Branch

January 13, 1981

BASIC THEME:

The concern of Campaign Life lies with the proposed entrenched Charter of Rights, which is a sharp departure from British Parliamentary tradition.

MAIN POINTS:

The most important effect of an entrenched Charter of Rights would be that it would give rise to a shift in power from Parliament, which is subject to public opinion, to the Supreme Court of Canada, which is not.

In the United States the Supreme Court has interpreted similar phrases to those of the proposed Charter of Rights as follows:

- (a) "right to life" to exclude the unborn child.
- (b) "freedom of religion" to prohibit the use of the Lord's Prayer in the Public Schools.
- (c) "freedom of expression" to strike down some State obscenity laws.

With regard to discriminatory legislation as in the case of Japanese Canadians in World War II, there is no reason to suppose that the courts would be any less subject to prejudice than the general public.

It is possible that public pressure will induce legislators to pass legislation to protect the life of the unborn child but they may be thwarted by the Supreme Court of Canada which would have the power under the proposed Charter to undermine the will of the people. This would be retrogressive and undemocratic.

A decision by the Supreme Court would be final with the exception of a constitutional amendment. However any amendment procedure entails enormous political and social upheaval leading to divisiveness and acrimony.

The present system of appointments to the Supreme Court of Canada is open to abuse; even the more complex American system, has not prevented Presidents from "packing" the Court.

Individual rights and freedoms have been well preserved under the Canadian Parliamentary system; a Charter of Rights should not be entrenched in the Constitution.

If on the other hand one is entrenched, Campaign Life, offers the following recommendations.

RECOMMENDATIONS:

s. 1

The Limitations Clause

The expression "reasonable limits" would give the Supreme Court unprecedented wide and sweeping powers to make political decisions.

The wording of s. 1 would have the effect of rendering the remaining sections of the Charter meaningless since it would override any of the rights and freedoms, including that of the right to life.

This section should be deleted.

s. 7

Right to life, liberty and security of the person

The "right to life" must be specifically spelled out, in exact language, that the "right to life" shall include the right to life of the unborn child, conceived but not yet born.

Campaign Life would preface section 7 with the following sentence:

"Everyone from the moment of conception onwards, who is innocent of any crime, has the absolute right to life."



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Canada West Foundation

Stanley C. Roberts, President
Dr. David Elton, Research Director
Hon. J.V. Clyne, Member of the Council of the Canada
West Foundation

DATE OF APPEARANCE: 25 November 1980, 8:00 p.m.

SOURCE OF NOTES:

Telephone conversation with Joan Hudson of the Canada West Foundation, discussion paper entitled: Alternatives: Towards the Development of an Effective Federal System for Canada, and Stanley C. Robert's 1979 Alan B. Plaunt Memorial Lecture.

BACKGROUND:

The Canada West Foundation was established December 31, 1970. It is funded by individual and institutional memberships including support from the four western provincial governments and the governments of the N.W.T. and Yukon Territory. It has two basic objectives: to initiate and conduct research programmes regarding the economic and social characteristics of the North and West; to initiate and conduct informational and educational programs.

Prepared by: John McDonough

Research Branch
Library of Parliament

24 November 1980

MAIN POINTS:

The Canada West Foundation is strongly opposed to the "unilateralism" of the proposed Joint Resolution and they propose that constitutional reform be placed in the hands of an Assembly designed for that purpose.

They have some reservations about the wording of the Charter of Rights and Freedoms.

They oppose the proposed amending formula and appear to favour some variation of the "Vancouver Consensus".

COMMENTS:

Amendment formulae: The "Vancouver Consensus" would allow for amendments to the Constitution of Canada after authorization by resolutions of the Senate and the House of Commons and the assent by resolution of the Legislative Assemblies in two-thirds of the provinces representing at least fifty per cent of the population of Canada according to the latest general census.

Any amendment affecting:

- (a) the powers of the Legislature of a province to make laws,
- (b) the rights or privileges granted or secured by the Constitution of Canada to the legislature of the government of a province,
- (c) the assets or property of a province, or
- (d) the natural resources of a province

would have no effect in any province where the Legislature had voted to dissent, until that Legislature voted to withdraw its dissent.

The "Chateau Laurier consensus" of September 12, 1980 agreed with the above Vancouver consensus or, as it is also called, the Alberta Amending Formula only with respect to the list of four matters which are subject to the opting-out provision. The Victoria formula was to be used for all other matters.

In a discussion paper prepared for the Canada West Foundation for March 1978,⁽¹⁾ revised and amended in May 1978 after a conference, the authors suggested a different amending formula:

Constitutional amendments could be proposed by the legislatures of any province or by the House of Commons; they would come into effect if they received the approval of the House of Commons and the government of:

- (a) every province that has now or will have in the future a population of more than 20% of the population of Canada;
- (b) two provinces of the Atlantic region
- (c) two provinces of the Western region whose combined population is more than half that of the region.

Should any proposed amendment fail because of lack of support in only one region, the proposed amendment be submitted to the population of that region. The referendum would simply ask the electors to support or overrule the decision of their provincial government(s); if the provincial government(s) is/are overruled, then the amendment is ratified.

It is worth noting that this proposal is closer in spirit to the Victoria formula or s. 41 of the proposed Joint Resolution than it is to the aforementioned Vancouver Consensus. This earlier proposal insisted that the Western veto consist of "two western provinces whose combined population is more than half that of the region". The witnesses may care to comment on a similar proposal in s. 41(b)(iii) in light of other suggestions that it is unnecessary to insist that the western veto by western provinces have half the region's population.

They also proposed that any constitutional amendment resulting in reductions in the real assets and property of a particular province or provinces require the consent of that province or provinces.

Senate Reform:

In the 1979 Alan B. Plaunt Memorial Lecture at Carleton University, Stanley Roberts spoke out forcefully for an elected Second Chamber to act as a counter-balance to

(1) David Elton, E.C. Englemann, Peter McCormick, Alternatives: Towards the Development of an Effective Federal System in Canada, Amended, Canada West Foundation, May 1978, pp. 33-36.

the House of Commons. Members would be elected for a fixed term (say six years) with one-half elected at a time (say three years). These members would represent constituencies in regions with common properties (not provinces, but inter-provincial or intra-provincial regions). According to Mr. Roberts, this chamber would have similar powers to those given to (but not often used by) the present Senate, including the power to turn back legislation from the House of Commons. The new Senate should have an advise and consent role on senior government appointments and it would be a "brokerage house" to hear and negotiate the ever-changing needs of Canadian society. It would appear that such a chamber would not be based on the principle of representation by population.

Constitutional
Assembly

Some criticisms have been levelled at the concept of a Constitutional Assembly. Most proposals seek to have someone or some body choose the appropriately representative Canadians. If the candidates to such an Assembly are to be elected, would they not resemble the current membership of the House of Commons? Whenever the idea has been mentioned, there appears to have been little or no support from the provincial premiers. If the Federal Government legislated such an Assembly into existence, would it not be accused of unilateralism and seeking to arrange the memberships and perhaps the agenda in its favour?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Canadian Abortion Rights Action League
Eleanor Wright-Pelrine, and,
Wendell W. Watters, M.D., Honorary Directors.
J. Robert Kellermann, and
Ellen Murray, Legal Counsel

DATE OF APPEARANCE: 11 December, 1980

FORM OF SUBMISSION: Brief (4 pages)

BACKGROUND: Canadian Abortion Rights Action League (C.A.R.A.L.)
was formed in 1974 to counteract the anti-abortion or
"pro life" movement which was being formed at that
time. It is concerned with the "fundamental rights
of women" to a medically safe abortion, the right of
women to have children should they choose to do so,
and the right of men and women to access to
information concerning contraception.

At present, there are approximately 2,000 individual
members and 29 organizations affiliated with
C.A.R.A.L..

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

11 December 1980

- 2 -

SUMMARY

GENERAL REMARKS: Comments that the Charter is poorly drafted, and may actually serve to deprive, rather than guarantee, the rights of Canadians. Its "deficiencies" may in part be explained by the speed with which it is being adopted.

Comments further that the Charter is seriously deficient because it does nothing to protect the fundamental rights of women to a medically safe abortion, a right "that is essential to women's freedom and health." (pp. 1-2)

Recommends that the Joint Committee serve the people of Canada by refusing to sanction the Resolution. (p. 2)

LIFE, LIBERTY AND SECURITY OF PERSON:

s. 7 If the Committee is determined to adopt the Resolution, it should be aware of the deficiencies of this section.

As drafted, this section could provide the basis of litigation directed at depriving women of any rights to an abortion. The words "the right to life" could be interpreted by the courts to extend to the embryo or fetus. This would have the result of rendering inoperative s. 25(1) of the Criminal Code which permits abortion for reasons of life or health when approved by a therapeutic abortion committee and performed by a doctor in a hospital. Thus, it is incumbent upon Parliament to ensure that the intention of this law is not frustrated by the Charter. (pp. 2-3)

Recommends, therefore, that the following be inserted in the Charter, following s. 25 thereof:

Nothing in this Charter is intended to extend rights to the embryo or fetus, nor to restrict in any manner the right of women to a medically safe abortion (p. 3)

Maintains that this draft section would not have the effect of changing any of the Criminal Code provisions concerning abortion. Rather, it would ensure that the Charter does not speak to the issue of abortion at all. (p. 3)



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Canadian Association for the Prevention of Crime

Frederick Sussmann and Tadeusz Grygier
Members of the Legislation Committee

SOURCE OF NOTES: Letter to the Committee (3 pages)

DATE OF APPEARANCE: 10 December 1980

BACKGROUND: The Association is a national voluntary body which was formed in 1919. Anyone may join the Association, but its membership is composed for the most part of police officers, judges and other persons directly concerned with crime prevention and the justice system. Its main objectives are to assist in the reduction of crime while promoting good criminal justice services for all Canadians.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament
December 10, 1980

SUMMARY

GENERAL REMARKS: Entrenchment of the Charter is supported, provided that certain amendments are made so that Canada's obligations under the International Covenant on Civil and Political Rights, 1966, are met.

The Association's comments are restricted to the Charter's sections concerning legal rights due to time limitations.

**GUARANTEE OF RIGHTS
AND FREEDOMS:**

s. 1 CAPC recommends deletion of this section. As drafted, the section would place the effectiveness of all following sections in doubt and would make problematic their capacity to nullify conflicting legislation. Deletion would remove any doubts as to the primacy of the Charter.

LEGAL RIGHTS:

s. 8, 9 and 11(d) Maintains that the phrase "except on grounds, and in accordance with procedures, established by law" would make these sections meaningless. The exemptions would permit any legislative override of the freedoms which these sections are supposed to protect.

Supports the intent of these sections which is to make arbitrary government action inadmissible.

s. 10(b) Recommends entrenchment of the right to free legal aid for those who have insufficient financial means in criminal proceedings.

s. 11(d) Recommends the consideration of "own recognizance" as an alternative to "reasonable bail".

s. 14

Recommends clarification of this section, at least in reference to criminal cases, so that it is clear that the right to an interpreter will not involve cost to the party or witness concerned.

LAWS RESPECTING
EVIDENCE:

s. 26

Recommends deletion, as the section does not entrench any specific or general right.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The Canadian Association of Chiefs of Police

Chief John W. Ackroyd, Metropolitan Toronto Police

Chief Thomas E. Welsh, Ottawa Police

Mr. Guy La France, Legal Advisor, Montreal Urban
Community Police

DATE OF APPEARANCE: 27 November, 1980, 9:30 a.m.

FORM OF SUBMISSION: Brief (8 pages)

BACKGROUND:

The Association, founded in 1905 (75th Anniversary this year) represents all major police forces in every province and territory of Canada. The membership consists of 275 Chiefs and Deputy Chiefs and 90 Associate Members. One aim of the Association is to foster uniformity of police practice and cooperation for the protection and security of the people of Canada.

Prepared by: John McDonough

Research Branch
Library of Parliament

26 November 1980

SASIC THEME

Under the proposed Charter of Rights, Parliament will be abdicating much of its responsibilities to decide what rights all citizens should enjoy by transferring authority to the courts.

The Association does not approve of the fact that an individual Judge will have the power to overrule Parliament in matters such as the powers and duties of policemen in the enforcement of criminal law.

RECOMMENDATIONS

s. 2(1)

Fundamental Freedoms

The Association feels that freedom "of conscience" is too vague and unnecessary. It may lead to court interpretations that would make sections of the criminal law (relating to morals and drug offences) inoperative.

ss. 7, 8, 9

Legal Rights

The Association fully agrees with these Sections as now drafted, and would be opposed to changes thereto.

s. 11

"Anyone charged with an offence has the right:

[a] to be informed promptly of the specific offence"

The Association recommends that this be changed to:

[a] to be informed promptly of the offence with which he or she is charged.

s. 11(b)

"to be tried within a reasonable time."

This section should be deleted unless specific times are laid down.

s. 13

Self-Crimination

People should be required to ask for the protection against self-crimination under the Canada Evidence Act or relevant Provincial Evidence Act.

s. 26

Laws Respecting Evidence

The Association agrees with this as drafted. It is opposed to the Exclusionary Rule of evidence adopted in the United States; this is considered by the Association to be "the greatest single road-block to effective and fair law enforcement" in the United States.

COMMENTS

Some witnesses that have come before this Committee have argued that Section 1 opens the Charter of Rights to the rule of Parliament and have asked that it be abolished. Does the Police Chiefs' Association feel that s. 1 will be in aid of its position with respect to the responsibility of Parliament?

Could the witnesses be more precise in describing the difficulty with s. 11(b) (the right to be tried within a reasonable time)?

With respect to the criticism of the self-crimination clause, s. 13, why should it not be granted automatically? The "street-wise" individuals who have been through the court process before may be expected to know their rights whereas many ordinary citizens will not have heard of the Canada Evidence Act.

Section 7 states that everyone has the right to life. Do the Police Chiefs feel that this could be used to open the debate on capital punishment to a judicial resolution?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The Canadian Association of Crown Counsel:

Roderick M. McLeod, Q.C., Toronto, Ontario
James H. Langston, Lethbridge, Alberta

DATE OF APPEARANCE: 27 November, 1980, 9:30 a.m.

FORM OF SUBMISSION: Brief (6 pages)

BACKGROUND:

The Canadian Association of Crown Counsel represents Crown Attorneys and other Crown Counsel employed throughout Canada by both Provincial Attorneys General and Departments of Justice and by the Attorney General of Canada.

Prepared by: John McDonough

Research Branch
Library of Parliament

26 November 1980

BASIC THEME

The Association is concerned that care be taken in the drafting of a Charter of Rights to ensure that, in enshrining legal principles which are fundamental to our criminal justice system, we do not impair the fairness, flexibility and effectiveness of that system by "strangling" it with endless courtroom arguments based on vague constitutional provisions.

The Association has limited its comments to the Legal Rights section of the Charter.

RECOMMENDATIONS

- s. 1 The limitation clause
- The Association would add the following to s. 1:
- "... including such limits as are or may be prescribed by statutes which clarify or define such rights and freedoms."
- This, they argue, clarifies the section. Although it results in a lesser form of entrenchment, basic rights could not be abrogated, but Parliament would share with the courts the role of clarifying and defining such rights and freedoms.
- s. 2 Freedom of conscience and religion
- The Association questions the necessity and wisdom of including the word "conscience".
- s. 10 Everyone has the right on arrest to be informed promptly of the reason ...
- The Association would replace the word "promptly" with the terminology in the existing Criminal Code to "... give notice where it is feasible to do so ...".
 [s. 29]
- s. 11(a) Anyone charged ... has the right to be informed promptly of the specific offence
- Same comment as with s. 10(a) with respect to the word "promptly".
- The words "specific offence" should be replaced with "offence with which he is charged".

s. 26

Laws respecting evidence

The Association appears to approve of the wording. They note that it leaves the continued evolution of the law of evidence to Parliament and the Legislatures and judicial interpretation of such laws as they may pass.

COMMENTS

The Association of Crown Counsel would appear to disagree with both the Police Chiefs and the Canadian Jewish Congress. Each has argued strongly for one conception of government. The Police Chiefs appear to favour Parliamentary supremacy whereas the Congress argued in favour of a strong Charter and judicial supremacy. The Association seems to feel that there can in fact be a middle way.

Does the Canadian Association of Crown Counsel agree with the need for a Remedies clause to deal with cases where rights are denied? Should there be some sanction against acts which are contrary to the Charter? How effective are present civil remedies?

Would the Association care to comment on the suggestion of the Canadian Civil Liberties Association that Section 10 (the arrest and detention clause) be augmented that people under arrest be informed of their rights as soon as practicable after their arrest? Such precautions, the Civil Liberties Association noted, were introduced into the United States by virtue of the Miranda case and research has shown that law enforcement did not suffer unduly from granting these additional protections to accused people.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: The Canadian Association of Lesbians and Gay Men

 Peter Maloney, Member of the Executive Committee
 George Hislop
 Paul-François Sylvestre
 Monique Bell

DATE OF APPEARANCE: December 11, 1980, 10:30 a.m.

FORM OF SUBMISSION: Brief (30 pages)

BACKGROUND: The Canadian Association of Lesbians and Gay Men
 is the successor organization to the Canadian
 Lesbian and Gay Rights Coalition which was founded
 in 1975.

Prepared by: John McDonough

Research Branch
Library of Parliament

January 12, 1981

BASIS THEME:

If Canada is to have a Charter of Rights, it must have an effective one: an ineffective Charter would, in many ways, be worse than none at all.

MAIN POINTS:

The brief contains extensive background material on Canada's gay community, and documents the need for an explicit statement of equal protection for gays. Their brief presents and refutes the arguments against such a statement.

Gay men and lesbians do not seek special treatment but assert their right to protection on the same basis as all other citizens.

They urge that the Charter be modified so that the rights it sets out can be effectively enforced.

RECOMMENDATIONS:

S. 15

Non discrimination rights

This section should be amended to make clear that the right to equality protects against all forms of discrimination. If a list of prohibited grounds is included, the wording should be changed so as to clearly show that the purpose is not to exclude other forms of discrimination from the protection the section provides. The wording proposed in paragraph 2-4 of the submission of the Canadian Human Rights Commission achieves this purpose.

The Association supports the Canadian Human Rights Commission recommendation that "sexual orientation" be included in any list of prohibited grounds.

S. 1

The limitations section

Judicial interpretation of the existing Bill of Rights suggests that the courts may interpret this section as authorizing laws that violate the Charter as long as they are duly enacted by Parliament or a provincial legislature. Minorities need protection from the will of the majority and section 1 may deny this when it is most needed.

Section 1 should be deleted.

Ss. 8-9, 11(d)

Legal Rights

Those sections which are limited by the phrase "on grounds, and in accordance with procedures, established by law" should be amended to give meaningful protection to those subjected to the criminal process.

REMEDIES:

The only remedy provided by the Charter is to declare an existing statute inoperative. Many violations of the Charter, however, will be caused by improper conduct of public officials rather than repressive statutes.

The Association recommends that the Charter include remedies for violations that result from the conduct of public officials as well as those caused by legislation. Courts should have the power to order officials to comply with the Charter, and they should be able to award damages for violations of the Charter, to exclude evidence gained as a result of illegal conduct, and to punish those intentionally violating the Charter.

The Association also recommends that an independent Commissioner be appointed to assist private individuals in enforcing their rights under the Charter.

RIGHT TO PRIVACY:

This is of particular importance to gay men and lesbians whose private lives have often been made the subject of regulation and public scrutiny.

An explicit statement of the right to privacy should be included in the Charter.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Canadian Association of Social Workers
Richard B. Splane, President
Gwyneth J. Gowanlock, Executive Director

DATE OF APPEARANCE: Thursday, 18 December 1980
9:00 P.M.

SOURCE OF INFORMATION: Brief dated November 29, 1980 and telephone
conversation with Mrs. Gowanlock

BACKGROUND: The Canadian Association of Social Workers is a federation of 11 member associations of professionally trained social workers (the ten provinces and the N.W. Territories). It was founded in 1926 and has approximately 7,000 members across Canada. It acts as its members' representative in dealing with social policy issues and in proposing social action to deal with the special concerns of the disadvantaged in Canada. The opinions and proposals contained in the brief of the association are based on past consensus among members, and the deliberations of its executive committee, composed of regional representatives.

Prepared by: Donald Macdonald

Research Branch
Library of Parliament

17 December 1980

SUMMARY

BASIC THEME:

The association's principal concern is that the Charter of Rights seek to ensure complete and undiscriminating availability and truly national uniformity of the most basic of rights - the right to social security. Accordingly, it recommends strengthening of some of the wording in the Charter, and consideration of jurisdiction over social welfare.

MAJOR POINTS:

s. 1

The "reasonable limits" referred to in s. 1 are unlikely to ensure protection of vulnerable groups and individuals against discriminatory legislative action in times of stress and crisis. Unless the language is strengthened, it should be deleted.

s. 6

The principle of entrenched mobility rights is strongly supported.

However, s. 6(3)(b), limiting the provision of social services by reference to residency requirements, would be a major hindrance to genuine mobility, since it is essential that all persons be entitled to income security and social and health services no matter where in Canada they are. This subsection would perpetuate retention of barriers to mobility.

It is realized that the question of jurisdiction as between federal and provincial governments may arise when this issue is discussed in relation to the Charter; but it affects rights that are fundamental, going beyond jurisdiction.

s. 15

Section 15(1) omits important forms of discrimination such as discrimination because of sexual orientation.

Section 15(2), dealing with affirmative action programs, is welcomed although it may be that it will fail in its purpose. The wording of the subsection may be such as to allow courts to strike down specialized programs which are not necessarily for particularly "disadvantaged" groups. The possible effects of this section should be studied carefully.

- 3 -

Division of Powers on
Social Welfare:

Although this matter is not specifically dealt with in the resolution, a major concern of the Association is jurisdiction over social welfare. It rejects exclusivity and supports jurisdiction being allotted according to the capacity of a given level of government to serve the interests of all Canadians best. Again, it is realized that questions of jurisdiction may be better dealt with in a future stage of constitutional reform, but since this issue affects a basic human right, the Committee should hear of it.

RECOMMENDATIONS:

- 1) Delete or strengthen s. 1 of the Charter.
- 2) Delete s. 6(3)(b) of the Charter
- 3) Include in s. 15 of the Charter important grounds of discrimination, including discrimination on the basis of
 - a) sexual orientation
 - b) political affiliation
 - c) a handicap
- 4) Further study of s. 15(2) to ensure that it will do what it is intended to do - allow affirmative action programs.
- 5) The association plans to refer to the International Policy on Human Rights of the International Federation of Social Workers, appended to its brief, when dealing with the Charter.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS : Canadian Association of the Mentally Retarded:
Mr. Paul Mercure, President
Mr. David Vickers, Vice-President
Mr. David Lincoln, a local President of People First

DATE OF APPEARANCE: November 21, 1980: 9:30 a.m.

FORM OF SUBMISSION: A letter with an enclosed Brief (7 pages)

BACKGROUND : The Canadian Association of the Mentally Retarded is a federation of ten provincial associations, comprising approximately 400 local associations with a total membership of about 4,500. the aim of the Association is to advocate on behalf of people who have a mental handicap.

Prepared by: Kate Dunkley
Stephen Fogarty
Research Branch
Library of Parliament

20 November 1980

Main Points:

Supports the entrenchment of a Charter of Rights, with particular mention of strong support for ss. 2 (fundamental freedoms), 3 to 5 (democratic rights), 6 (mobility rights) and 16 to 23 (language rights).

Notes with approval that several sections of the Charter use the term "everyone" or "anyone". Such terms ensure that the protection of rights is extended to all citizens. C.A.M.R. wishes to ensure that all Canadians are entitled to certain basic conditions which are an integral part of a civilized society, and not to secure special rights for those individuals it represents. Persons with a mental handicap should be legally entitled to enjoy the same basic rights which all persons value.

Recommendations:

s. 15

The non-discrimination clause

C.A.M.R. would prefer that the Charter contain universal statements designed to protect all individuals, instead of prohibiting discrimination against certain classes of persons. However, it was acknowledged that the practice of naming specific classes of persons has been used in several United Nations' covenants, Canadian federal and provincial legislation, and in American legislation.

Recommends that if it is judged necessary to name specific groups against which discrimination is to be prohibited, then "handicapping conditions", whether physical or mental, should be listed. Some form of protection for handicapped persons has been included in numerous Canadian human rights statutes, and it is only fitting that this principle should be incorporated into our new Constitution. Hundreds of thousands of Canadians were said to be affected by "some significant degree of handicap".

Comments:

What is their understanding of the term "handicapping" condition?"

How does it differ from, and why is it preferable to the terms "disability" or "handicap"?

With respect to the additional ~~social, cultural and economic~~ economic rights referred to (right to life and health care, food, clothing, etc.) would entrenchment of these involve direct governmental obligations to provide all these basic "conditions"? What would they consider to be the scope of these matters in a constitutional document?



CANADA

(Amended)

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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Canadian Bar Association

A. William Cox - President
Paul D.K. Fraser - Vice-President
John Nelligan - Chairman, Working Committee
L. Yves Fortier - Treasurer
Jacques Viau - Past President
Victor Paisley - Chairman, Civil Liberties Section
David Matas - Chairman, Constitutional and International
Law Section

DATE OF
APPEARANCE:

28 November, 1980

SOURCE OF
INFORMATION:

Towards a New Canada, Committee on the Constitution, Canadian Bar Association, 1978. This research study of the C.B.A. was not adopted by its members; however, at the 1979 Annual Meeting it was agreed to submit the study to the public as "of extraordinary value and a sound working document" and it was further agreed to accept "the general approach to the renewal of Canadian federalism taken in the report".

BACKGROUND:

The Association has over 28,000 members and represents more than 2/3 of the legal profession in Canada. It has been in existence since 1897 and was incorporated in 1921. It fosters cooperation among the incorporated law societies and bars of the provinces. Its objects include the advancement of jurisprudence, promotion of the administration of justice and the uniformity of legislation throughout Canada and the encouragement of a high standard of legal education, training and ethics. The Association completes its work through the sections and committees at both the national and provincial levels.

Prepared by: Hugh Finsten

Research Branch
Library of Parliament
24 November 1980

BRIEFING NOTES

The notes which follow indicate some of the differences between the 1978 Canadian Bar Association (C.B.A.) Committee recommendations and the provisions in the Proposed Joint Address.

PATRIATION

The C.B.A. suggests that the constitution should be adopted by action taken entirely in Canada by resolutions of the Canadian Parliament and all the provincial legislatures (p.6).

RIGHTS AND FREEDOMS

(1) Limitation Clause - Section 1.

The C.B.A. recommends that rights be suspended by the federal government only in the case of "war, invasion or insurrection" (p. 139) whereas the Joint Address provides that rights are subject "only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government".

Comments: Does the C.B.A. not foresee possible situations short of an actual insurrection that could require the suspension of rights? Are there any rights that even in time of emergency should not be limited?

(2) Fundamental and Democratic Rights - Sections 2-5.

The C.B.A. adds universal suffrage and free, democratic elections to the Joint Proposal rights. The C.B.A. anti-discrimination clause specifies the bases of discrimination (race, national or ethnic, origin, colour, religion or sex) whereas the Joint Address is more general in stating "without unreasonable distinction or limitation " (s. 3)

(3) Legal Rights - Sections 7-14.

Life, Liberty and Security of Person - Section 7

The C.B.A. recommendation contains the "due process of law" exception whereas the Joint Address wording is "except in accordance with the principles of fundamental justice".

Comments: The Canadian Bill of Rights and the C.B.A. proposal include "enjoyment of property". The Joint Address does not.

The Canadian Bill of Rights also uses the "due process of law" wording. Should there be any concern that the use of this phrase particularly with regard to its applicability to "liberty" of contract might result in the invalidation by judicial interpretation of otherwise acceptable legislation, as occurred in the United States with regard to the New Deal legislation? This was the basis on which the 1968 Canadian Charter of Human Rights (a federal proposal) and the 1972 (Molgat-MacGuigan) Special Committee on the Constitution objected to the wording of this clause.

- 3 -

The Civil Liberties Association suggested "fundamental justice" is similar to "natural justice" which is commonly used in administrative law, with regard to a fair hearing, but may be inappropriate with reference to the criminal process (7:31).

Search and Seizure - Section 8.

The C.B.A. provides for the right not to be subjected to "unreasonable search and seizure" whereas the Joint Address omits "unreasonable" and adds "except on grounds, and in accordance with procedures established by law".

Right not to be Denied Reasonable Bail - Section 11(d).

The C.B.A. adds "without just cause" whereas the Joint Address uses the wording "except on grounds and in accordance with procedures established by law".

Comments: Does the C.B.A. not prefer the legislatures to determine the rules when search and seizure is legitimate and when bail should be denied rather than leaving it to judicial determination to decide what is "unreasonable" and "just cause"?

Protection Against Self-crimination - Section 13.

The Joint Address applies only to witnesses "compelled to testify" and evidence is not to be used to incriminate him/her in any "other proceedings". The C.B.A. proposal states simply "the right to protection against self-crimination".

Comments: What is the protection in the U.S.? Does the C.B.A. see its unrestricted wording as being interpreted as broadly? Is the present "non compellability" right adequately protected by this provision in the Joint Address?

Other Legal Rights

Comments: The Canadian Civil Liberties Association recommended that accused persons should be informed of rights (to retain counsel) as soon as practical after arrest. They said that research indicates there will be no undue diminution of law enforcement. Does the C.B.A. agree with this view?

Does the C.B.A. agree with the entrenchment of the following legal rights not specifically mentioned in its study but contained in the Proposed Address: - right to be tried within a reasonable time; right to a public hearing by an independent and impartial tribunal; right not to be tried more than once if finally acquitted or convicted; right to the benefit of the lesser punishment where varied between commission of offence and sentencing; right not to be detained or imprisoned except on grounds and procedures established by law.

4) Non-Discrimination - Section 15

The Joint Address limits equality before the law and equal protection of the law to discrimination based on specific criteria (race, religion, etc.) whereas the C.B.A. recommendation makes the equal protection of the law provision a separate right not limited to those bases of discrimination enumerated. The C.B.A. does not refer to affirmative action programs.

Comments: What does the C.B.A. see as the legal effect of the difference in such wording? Will the result of this clause be to declare invalid legislation which prevents stores from opening on Sunday, Christmas and Easter; and require that foster children of one religion not be placed in homes where the family is of another religion? What effect will it have on age provision differentials between boys and girls in the Juvenile Delinquents Act and Child Welfare legislation?

(5) Mobility Rights - Section 6

C.B.A. study does not include mobility rights.

(6) Other Rights

C.B.A. recommended the following additional rights: reasonable access to all public information in the possession of federal, provincial and municipal departments and agencies; individual privacy should not be subjected to unreasonable interference.

(7) Undeclared Rights - Section 24.

The C.B.A. study provides that the enumeration of rights should "not be deemed to diminish" other fundamental rights of the individual; the Joint Address provides that the Charter "not be construed as denying the existence of" any other rights or freedoms that "exist" in Canada including those pertaining to native people.

Comments: At its 1980 Annual Meeting, the C.B.A. adopted a resolution that there be special constitutional provisions for native people, including recognition of the rights of women to native status on the same basic terms as men.

(8) Remedies - Sections 25, 26

The C.B.A. would guarantee access to the courts to enforce rights and to exercise judicial review (p.47). A remedy provision was also included in Bill C-60 (s.24) but the Joint Address does not contain such a provision. Section 26 would enshrine in the Constitution the common law rule that illegally obtained evidence is admissible if relevant.

Comments: What recourse is available to a person under the proposed Charter if he/she is denied any of the guaranteed rights? What effect does s. 25 concerning admissibility of evidence have with regard to possible remedies? The Civil Liberties Association recommended that the primary clause, s. 25, be extended to apply to administrative and police acts (7:11).

LANGUAGE RIGHTS

(1) Legislature - Sections 17-18

The C.B.A. would extend the right to use either official language to the provincial legislatures and territorial councils; their statutes or ordinances would be published in both languages. The Joint Address applies only to Parliament.

(2) Courts - Section 19

The C.B.A. recommendation was as follows - criminal offences: right to be tried in own (official) language; civil cases: right to use own (official) language in giving evidence and in any pleading and process in any court. The Joint Address applies only to courts established by Parliament.

(3) Communications with government - Section 20

The C.B.A. recommendation was as follows - federal departments and agencies: right to use either official language in communicating with head office, and with principal offices "in any area where a substantial proportion of the population uses that language"; provincial departments and agencies: communication with head offices in either language.

The Joint Address applies only to main offices of institutions of Parliament and federal government; and to any office of either "located within an area of Canada where it is determined by Parliament that a substantial number of persons within the population use that language".

(4) Education - Section 23

C.B.A. recommended the right of any parent to have either official language as language of instruction of children in publicly supported schools in areas where the number of people speaking the language warrants it. The Joint Address applies only to citizens "whose first language learned and still understood is that of the English or French linguistic minority population of the province ...".

(5) Other - Section 22

The C.B.A. provides for the right of federal and provincial legislatures to assist ethnic or linguistic groups in promoting their languages and cultures. The Joint Address preserves legal and customary rights and privileges acquired or enjoyed before or after Charter is in force concerning any other language.

EQUALIZATION AND REGIONAL DISPARITIES - Section 31

Similar proposals in C.B.A. and Joint Address.

The C.B.A. adds that the federal spending power, including the making of equalization payments should be recognized as a proper method of meeting the commitment to reduce regional economic disparities and that in planning and applying its fiscal and economic policies the federal government should be sensitive to the regional impact of these policies (p. 27).

AMENDING PROCEDURE - Sections 41-50

The C.B.A. proposes a general amending formula which would require the agreement of Parliament and majority of provincial legislatures including:

- all provinces that at any time have had, or may in the future have 25% of the population of Canada;
- at least two of the Atlantic provinces;
- at least two of the Western provinces comprising at least one of the two most populous (p. 143).

The C.B.A. and Joint Address enumerations of specific matters that are amendable only by the general amending formula are very similar. The C.B.A. adds to the enumeration:

- the principle of responsible government; position of Parliament and legislative assemblies as primary federal and provincial law-making bodies;
- the federal Parliament should be empowered to establish new provinces from territories not forming part of a province, and provide for their constitution and administration, and for such laws and conditions concerning their admission as may be necessary, but their representation in Parliament should be approved under the general amending formula;
- the federal Parliament should, with the consent of the legislatures of the provinces affected, be empowered to provide for the union of two or more provinces, for a province to be divided, or for the restructuring of two or more provinces, but their representation in Parliament should be approved under the general amending formula;
- mere alterations of provincial boundaries should continue to be made by statute of Parliament with the consent of the appropriate legislatures.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Newfoundland Branch, Canadian Bar Association

Raymond J. Halley, President
Edward Hearn

DATE OF APPEARANCE: 20 November 1980
3:30 P.M.

SOURCE OF INFORMATION: Telephone conversation with R.J. Halley

BACKGROUND: The Newfoundland Branch of the Canadian Bar Association has been in existence since 1951 and includes approximately 240 of the 300 Newfoundland lawyers as members.

Prepared by: Hugh Finsten

Research Branch
Library of Parliament

20 November 1980

BRIEFING NOTESBASIC THEME

The Newfoundland C.B.A. is concerned about provisions in the Joint Address which might affect the Labrador-Quebec boundary, the denominational school system and the case concerning ownership of offshore resources.

MAJOR POINTS

Amending Formula, Sections 41, 42

Referendum method changes the basic structure of Canada particularly between the federal and provincial governments.

Amendment formula might be used to change Item 2 of the Terms of Union which confirms the boundaries of Labrador as part of Newfoundland.

Comments: This argument could be applied to any provincial boundary, in fact the provinces themselves could be abolished as could the federal government through the amendment formula. Moreover, s. 43 is the amending formula applicable where one or more but not all of the provinces are involved; and it requires the consent of the provincial assembly concerned.

Freedom of Religion - Section 2

Amending Formula as well as the right of freedom of religion is seen as affecting Term 17 of the Terms of Union which, like s. 93 of the B.N.A. Act, protects denominational schools. In Newfoundland, public funding guarantees the existence of the denominational schools. There is concern that these provisions in the Joint Address might permit persons to teach in these schools although they do not share the same religious beliefs; there is also the concern that the funding system could be affected.

Mobility Rights - Section 6

Should include access of goods, services and capital.

Equalization - Section 31

General agreement with this proposal but it should specifically provide that payments be made directly to the provinces.

Resources

Schedule I, Item 16, removes the expression "and Newfoundland" from the Statute of Westminster. This could affect the province's court challenge over control of its offshore mineral resources.

Any resource amendment should include Labrador hydro power and offshore resources. The Western provinces were given their resources years after joining Confederation and the Ontario and Quebec borders were extended later to increase their land territories. In the same manner, Newfoundland should be given its offshore resources in a new constitution.

Comments: Concerning offshore mineral resources, court decisions in Australia, the United States and Canada (re: British Columbia offshore mineral rights) all recognized that the continental shelf and the mineral resources therein belong to the national government. In the U.S. and Australia, settlements were made thereafter so that title to the seabed within the three-mile territorial sea was given to the states. In Canada, the federal government signed an agreement in 1977 with all the Atlantic provinces except Newfoundland, which gave these provinces 100% of the resource revenues within three miles of the coast and a 75:25 split of revenues in favour of the provinces beyond three miles. Moreover, in international law, it is Canada, not the provinces, that is recognized as having jurisdiction over this area and it is Canada that will have to answer the claims of other members of the international community for breaches of the obligations and responsibilities imposed in international law, and more particularly by the agreements arising out of the Law of the Sea Conference.

Other Comments

Do the views of the Newfoundland section of the Canadian Bar Association represent those of the national organization on these matters? Provincial sections normally comment only on matters of purely local concern.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Canadian Catholic School Trustees' Association:

Phil Hannel, President
Frank Gilhooly, Past President
Father Patrick Fogarty, Secretary

DATE OF APPEARANCE: 3 December 1980. (10:30 a.m.)

FORM OF SUBMISSION: Brief

BACKGROUND: The Association represents the Trustees of Roman Catholic elementary and secondary schools, public and private, in seven Canadian provinces and the two Territories.

Prepared by: John McDonough

Research Branch
Library of Parliament

3 December 1980

BASIC THEME:

The Canadian Catholic School Trustees' Association supports the concept of a repatriated Constitution and the entrenchment of the rights of minorities.

The Association is, however, disappointed at the failure to entrench the future rights and privileges of publicly-funded Roman Catholic Separate Schools.

The Association asks the Government to respect section 23(3) of the United Nations Declaration of Human Rights: "that parents have the prior right to choose the kind of education they wish for their children." They refer to the precedent of the Newfoundland school system.

The Association expresses concern that there will be an attrition of denominational rights based on judicial interpretation of the proposed Charter of Rights.

In the United States, the courts have given supremacy to individual right of freedom of religion to the point where prayer is banned from schools.

The Association feels that s. 2 (freedom of religion), s. 15 (non-discrimination rights) and s. 25 (the primacy of the Charter) will provide the basis for the encroachment by judicial action of Catholic educational rights as provided by Section 93 of the B.N.A. Act.

The Association is concerned that the referendum provision s. 42 would make it possible for the rights of Catholic denominational schools to be eliminated in a single referendum by a simple majority.

The Association is equally concerned about s. 49 and the possibility that a provincial government acting alone could remove the right to denominational schools within its borders.

RECOMMENDATIONS:

s. 24

Undeclared Rights and Freedoms

This should be amended as to ensure denominational rights by adding the following subsections:

(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 it 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.

s. 36

Limitation on the use of interim amending procedure.

This section should be amended with the addition of the following section:

(2) The procedure prescribed by section 33 shall be used to amend any provision of the Constitution of Canada whereby any rights or privileges are granted or secured with respect to separate, dissentient or other denominational schools.

s. 50

Matters requiring amendment under the general formula

This section should be amended by adding the following paragraph:

(h) any rights or privileges, by the Constitution of Canada, granted or secured with respect to separate, dissentient or other denominational schools.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS : The Canadian Chamber of Commerce:
Mr. William F. Dunn, Chairman of the Executive Committee
Mr. Sam F. Hughes, President
Mr. Graeme T. Haig, Q.C., Chairman of the Constitution Reform Committee
Mr. André Bouchard, member of the Constitution Reform Committee

DATE OF APPEARANCE: November 19, 1980: 8:00 p.m.

SOURCES FOR NOTES : Letter dated November 13, 1980, containing two resolutions from the September 1980 Annual Meeting and a six-page report on Constitutional Reform prepared for September 1980.

BACKGROUND : The Canadian Chamber of Commerce is a national voluntary federation of 600 autonomous Chambers of Commerce and Boards of Trade in communities throughout Canada. Its membership also includes some 3,000 businesses of all types and sizes, as well as 70 national trade, business and professional associations.

Prepared by: John McDonough

Research Branch
Library of Parliament

17 November 1980

BASIC THEME:

The Chamber's principal concern is the strengthening of the political, economic and social fabric of Canada. The thrust of its submission is centered mainly on economic aspects of the constitutional reform debate, principally with the free movement of goods and services, labour and capital.

MAJOR POINTS:

- The federal government should take whatever steps are necessary through the medium of Federal-Provincial conferences and other methods of suasion to exercise influence on the provincial governments to curtail and restrain legislation and practices that restrict the freedom of Canadians to move and act equally in all parts of the country.
- The constitutional review process should lead to the strengthening of economic and political union in Canada while allowing each province to ensure its cultural and social development, and economic growth. This requires a national authority entrusted with responsibilities and powers sufficient to maintain the economic and political union within Canada.

RECOMMENDATIONS:

s. 6 Mobility Rights

The Chamber supports a federal authority vested with the necessary powers to avoid economic balkanization, and to remove limitations, imposed by provinces, to the free circulation of goods and services, labour and capital. Such restrictions should be a concern of the courts rather than becoming intergovernmental conflicts.

This appears to be in agreement with the federal proposals presented during the summer of 1980. Section 6 is more restricted, being limited to mobility with respect to taking up residence and gaining a livelihood. These rights may be restricted further by subsection (3) with respect to provincial laws of "general application ... other than those that discriminate among persons of present or previous residence" and laws providing for "reasonable residency requirements".

Equalization and Regional Disparities

The Chamber supports the proposition that the federal government ought to ensure the availability of basic services in all regions of Canada by means of transfer payments. Such redistribution should be accomplished through means which are identified and limited in scope to those necessary for the achievement of these objectives. This redistribution should not create economic polarization nor prevent or inhibit the movement of labour and resources towards opportunities. Conditional grants from federal to provincial authorities are unsatisfactory devices both from the point of view of the "practice of federalism" and as a means of seeking reduction of regional economic disparities. Cost-sharing programmes and conditional grants represent one of the principal areas where intrusion and overlap between activities of the two levels of government have been a source of intergovernmental antagonism.

Some basic services should be provided in all parts of Canada. While access can vary according to geographical location, volume of population, etc., it is the duty of the federal and provincial governments by consultation to set minimum standards and act to ensure they are observed. Those minimum standards should be established at a level which does not impede unduly the movement of people nor distort for individuals the consequences of their choice (i.e. to work or not to work, to move or not to move) or their sense of responsibility.

It is not clear whether the Chamber supports the present system of equalization payments and whether it would wish to see these payments enshrined in the constitution.

SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESSES:

Canadian Citizenship Federation

Nicolas M. Zsolnay, CM, Fr. Jur.,
Président of the Federation

Eric L. Teed, Q.C., Former member of the
Legislative Assembly of New-Brunswick
Former president of the Federation
Regional vice-president for the Maritime
provinces.

J. B. Rudnycky
Emeritus professor at the University of
Manitoba.
Former member of the Laurendeau-Dunton
Commission
Regional vice-president for Quebec

DATE OF APPEARANCE: 18 December 1980; 11:30 a.m.

BACKGROUND: The Canadian Citizenship Federation is concerned
with promoting good citizenship in Canada by
fostering understanding and closeness among
Canadians of all social groups.

This national federation is comprised of local and
regional councils. Many different organisations
are affiliated with it.

Prepared by: Claude St Pierre

Research Branch
Library of Parliament

17 December 1980

GENERAL COMMENTS

The Canadian Citizenship Federation promotes good citizenship, a value which applies to all citizens and all groups alike without distinction. It asks that the Committee examine the details of all constitutional submissions and proposals in the light of good citizenship and ensure that they in fact respect that criterion.

The Federation expresses regret that the process of constitutional reform is a partisan affair, yet bows before the fait accompli believing that the time has come to free Canada from the constitutional deadlock.

UNILATERAL PATRIATION

The Federation supports unilateral patriation believing, as it does, that no better solution exists.

CHARTER OF RIGHTS AND FREEDOMS

The Federation supports the concept of a charter of rights and freedoms. At the same time it expresses the wish that the statement of rights and freedoms correspond to a statement of duties and responsibilities. Indeed, these rights and freedoms could hardly be maintained unless citizens carry out their duties and responsibilities. This point should be written into the preamble to the constitution or in one of its sections.

Furthermore, the charter of rights should not include a long list of rights. This charter should be drafted like the Universal Declaration of Human Rights using as few words as possible. A more detailed statement of freedoms could be given in federal or provincial legislation.

Finally, the preamble to the constitution should state certain basic principles on which the courts could base their interpretation of the charter. This would avoid giving the courts excessive powers.

ENDING FORMULA

The Federation supports the proposed amending formula in the hope that Part IV of the project will permit the federal and provincial governments to find an acceptable solution.

It also hopes that the amending formula will give Prince Edward Island more influence in the process of constitutional reform. This wish stems from concern for good citizenship.

MULTICULTURALISM

The Federation considers itself to be the first Canadian organisation to truly examine the principle of multiculturalism and asks that this principle be enshrined in the constitution, either in the preamble or in one of the sections.

NATIVE RIGHTS

The Federation hopes that the constitution will settle the case of native rights. It urges that solutions be found to this problem which has persisted for much too long and which will not take care of itself. Failing such a settlement, the Natives on seeing themselves excluded from the future of Canada could react negatively.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Canadian Civil Liberties Association

Walter Tarnopolsky, President
Alan Borovoy, General Council

DATE OF APPEARANCE:

November 18, 1980: 9.30 a.m.

SOURCE FOR NOTES:

Brief telephone conversation with Alan Borovoy, November 17.

BACKGROUND:

The Canadian Civil Liberties Association was founded around 1964. There are over 5000 individual members plus 30 member groups (churches, synagogues, unions) which represents thousands of additional members. The purpose of the Association is the protection of the individual against the unreasonable invasion of his or her freedom and dignity by public authority.

Prepared by: John McDonough

Research Branch
Library of Parliament

18 November 1980

ASIC THEME:

The Charter of Rights and Freedoms, as presently written is severely defective.

MAIN POINTS:

s. 1

Guarantee of Rights and Freedoms

With respect to the limiting clause the Association wishes to discuss the difference between "acceptable" as opposed to "unacceptable" limits.

s. 8, 9, 10

Legal rights with respect to search, seizure, arrest or detention.

The Association feels that the protections contained herein really do not give people any more protection than they currently have.

The kind of protection which should be offered by a Charter of Rights would make the law itself subject to review. The phrase "in accordance with procedures established by law" gives to the authorities a great and potentially dangerous degree of authority.

Search and seizure as well as arrest and detention ought to be severely limited to strictly defined, valid purposes of government.

s. 15

Non-discrimination rights.

s. 23

Primacy of the Charter

This is perhaps too narrow. Mr. Borovoy suggested that he would like to see "any law" broadened to include not only statute law but also common law and administrative practices. (Will an administrative practice that is not precisely mandated by a statute be subject to a legal challenge?) The phrase may be judicially interpreted in this broad fashion but it could be given a restrictive interpretation.

Law respecting evidence

Mr. Borovoy indicated that the courts ought to be free to make their own judgements on the admissibility of evidence in case the evidence was acquired in such a way as to violate the Charter.

ADDITIONAL COMMENTS:

The above questions taken by the Civil Liberties Association may lend themselves to the concern that the Charter of Rights and Freedoms will encourage an overly, judicially active Supreme Court as in the United States where some of the decisions have led to complaints that it is the criminal who receives the protection of the law and the citizen does not. Is this not the role of elected legislatures?

In what ways are American rules of evidence different from Canadian or British rules?

Is the citizen better protected under one or other system of law?

This comparison with the United States might be made with respect to the legal provisions with respect to search and seizure as well as arrest and detention.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESSES: Canadian Committee on Learning Opportunities for Women

DATE OF APPEARANCE: 11 December 1980

FORM OF SUBMISSION: Brief (8 pages), with 2 Appendices

BACKGROUND: C.C.L.O.W. is a national voluntary organization which promotes learning opportunities for women. It represents the concerns of adult educators and administrators, community workers, policy makers, union representatives and concerned women who want and need to use learning opportunities for them. Its members are from every province and territory of Canada, and include anglophone and francophone persons.

C.C.L.O.W. is a member organization of the National Action Committee on the Status of Women. It wishes to make certain specific recommendations, but endorses all other recommendations of the National Action Committee.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

11 December 1980

SUMMARY

GENERAL REMARKS

C.C.L.O.W. approves the concept of entrenching rights in a Charter. However, it notes with regret that the proposed Charter is silent on the fundamental right of adults to learning programmes as a means to economic independence, meaningful work, and democratic participation in society. (p. 1)

Comments that this omission contradicts Canada's obligation as a signator to the United Nations International Bill of Human Rights, Article 26, concerning the right to universal access to learning, including basic or "fundamental stages", technical and professional education and higher education. (p. 2)

C.C.L.O.W. does not request any change of federal-provincial jurisdictions concerning education, but for constitutional recognition of the right of adults to learn. (p. 5)

Remarks that the delineation of federal and provincial responsibilities has created a haphazard, uncoordinated patchwork of learning programmes for women. Women are in particular need of adult programmes to provide academic upgrading, skill training, second language training, and career-life planning. Financial assistance and child care must be coordinated with such programmes. (pp. 5-6)

EFFECTIVENESS OF CHARTER FOR ADULTS "LACKING FUNDAMENTAL SKILLS"

Remarks that the Charter contains several guarantees of rights which are meaningless to those Canadians who are unable to use such freedoms because they lack the fundamental skills needed to exercise such rights. (p. 3)

The following sections of the Charter were cited as examples:

s. 2(b) and (c). These sections purport to guarantee freedom of expression, particularly through the media, and freedom of peaceful assembly and association. But there is no guarantee of basic adult learning to ensure that active participation in society is possible.

ss. 3, 19 and 20. These sections guarantee the right to vote, to use either of the official languages in a court established by Parliament or with central offices of federal government institutions. But thousands of Canadian adults can neither read nor write at a level that would make such a right meaningful.

s. 6(2). This section guarantees mobility rights. But it makes no guarantee for the necessary training adults would require in order to qualify for a job in any province. (pp. 3-4)

Recommends, therefore, that a new section be added to the Charter under the heading "Democratic Rights", to guarantee the right of every Canadian citizen and permanent resident:

to learning programmes as a means to participation in the democratic process, as a preparation for paid employment leading to economic independence, and for more effective involvement in family and community life. (p. 8)

NON-DISCRIMINATION RIGHTS

s. 15(1) Comments that the phrase "equality before the law" would not afford protection for women in the face of existing laws which discriminate against them either directly or indirectly in terms of their interpretation and implications.

Recommends that the aforementioned phrase on lines 1-2 at p. 6 of the proposed Resolution be amended to read "equality in the law". (p. 4)

s. 15(2) Comments that the historically-disadvantaged position of women in Canada requires that the commitment to affirmative action specifically name women as a target group. (p. 4)

Recommends that line 9 at p. 6 of the proposed Resolution be amended by adding thereto the words "including women." (p. 8)



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: The Canadian Connection
 Marion Dewar, Mayor of Ottawa
 Alan Clarke
 Mary Hegan
 Lawrence Greenspan
 Hon. David MacDonald

DATE OF APPEARANCE: January 6, 5:30 p.m.

FORM OF SUBMISSION: Brief, 115 pages

BACKGROUND: This is a community based movement which developed
 in response to the proposed Joint Resolution.
 It was launched by concerned Canadians and their
 organizations in order to enable Canadians to better
 understand the current constitutional discussions
 and to encourage and facilitate broader participation
 in the process.

Prepared by: John McDonough

Research Branch
Library of Parliament

January 12, 1981

BASIC THEME:

The Constitution belongs to all Canadians - past, present and future - and not solely to governments. It is neither just a law nor is it just an agreement by which federal and provincial governments regulate their relationships.

The Constitution must provide a sound framework for governing but it must also reflect the best understanding that Canadians have of themselves. It is a fundamental statement dealing with how people live with one another.

Changes to the Constitution must be attempted only when there is substantial agreement among Canadians in all regions of Canada.

AN ALTERNATIVE APPROACH TO CONSTITUTIONAL RENEWAL:

There needs to be developed an alternative approach to Constitutional reform. The "Royal Commission on Rural Life in Saskatchewan", the "Royal Commission on bilingualism and Biculturalism" and the "Berger Inquiry on the Mackenzie Valley Pipeline" are examples of concentrated efforts to encourage community based discussions on issues. There needs to be a similar community based process for the Canadian Constitution.

Such a process should have the following characteristics:

1. Be a real partnership between the voluntary and private sector and governments.
2. Within the partnership, no one partner would have control.
3. The process would need a timetable that would sustain the present momentum but would also ensure opportunities for seeking consensus.
4. It must facilitate community based discussions.
5. It would seek the broadest possible participation from Canadian associations and organizations.
6. The process would need adequate financial and other resources.
7. The Governor General and the Lieutenant Governors should be invited to be patrons of the process.
8. The media must be stimulated and engaged.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The Canadian Consultative Council On
Multiculturalism

Laurence Decon, Chairman
Gurbachan Singh Paul, Member
Rhéal Bérubé, Member

DATE OF APPEARANCE:

18 December 1980
8:00 P.M.

FORM OF SUBMISSION:

Brief (13 pages)

BACKGROUND:

The Canadian Consultative Council on Multiculturalism (CCCM) was created in May 1973. It is composed of 100 members representing almost all of Canada's cultural communities, including constituents from Inuit, Japanese, English, French ... Italian cultural origins.

Prepared by: John McDonough

Research Branch
Library of Parliament

18 December 1980

- 2 -

SUMMARY

BASIC THEME:

The CCCM supports the definition of Canada as a bilingual and multicultural nation and respects the linguistic status of English and French as defined in the Official Languages Act and in the Resolution.

Multiculturalism must be included in the Canadian Constitution - the fundamental national framework for all Canadians, present and future.

RECOMMENDATIONS:

Preamble:

A preamble should be added to the resolution in which a recognition of Canada's multicultural society is clearly stated.

It recommends adoption of the preamble set out in Chapter Six of the Special Joint Committee on the Constitution of Canada, 1972:

1. To establish a federal system of government within a democratic society;
2. To protect and enhance basic human rights;
3. To develop Canada as a bilingual and multicultural country in which all its citizens, male and female, young and old, native peoples and métis, and all groups from every ethnic origin feel equally at home;
4. To promote conomic, social and cultural equality for all Canadians as individuals and to reduce regional economic disparities;
5. To present Canada as a pluralistic mosaic, a free and open society which challenges the talents of her people;
6. To seek world peace and security, and international social progress.

- 4 -

s. 22

Rights and Privileges Preserved

The CCCM wishes to preserve the many multicultural programs already in place and they suggest the following wording:

22. Nothing in Sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is essential to the preservation and development of the multicultural reality of Canada.

s. 23

Minority Language Education Rights

As it reads, this section creates different classes of citizens and is clearly discriminatory. The Council however finds it difficult to reformulate s. 23 to remove the difficulties while trying to encourage the very legitimate demands that s. 23 is attempting to realize.

s. 24

Undeclared Rights and Freedoms

The Canadian Indian, Non Status, Métis, and Inuit people historically have been among the most disadvantaged people in Canada. The CCCM urges the Special Joint Committee to be receptive to the representations of the Native groups.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The Canadian Council on Children and Youth:

Andrew Cohen, Executive Director of the Council

Dr. Joseph Ryant, Member of Board of Directors

David Cruickshank, Vice-President of the Council

DATE OF APPEARANCE:

December 8, 1980, 9:00 p.m.

SOURCE FOR NOTES:

Telephone conversation with Andrew Cohen, Executive Director of the Council

BACKGROUND:

The Canadian Council on Children and Youth is a national non-profit organization dedicated to improving the situation of Canadian children. For over 20 years, the Council has acted as an informal umbrella organization, bringing together individuals and groups who share an interest in children and developing a variety of coalitions to advocate together for changes in the conditions affecting children. In 1979 the Council spearheaded the Canadian effort for the International Year of the Child and it has received the legacy from the Canadian Commission for International Year of the Child to be the national voice for children in Canada.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 8, 1980

MAIN POINTS:

Under the present laws of Canada, as judicially interpreted, children are not defined as "persons". They are therefore not protected by existing Human Rights legislation and there is no reason to believe that they would be protected by the proposed Charter of Rights and Freedoms.

Existing Human Rights legislation which includes age as a criteria is generally interpreted as including only those over the age of eighteen. The Canadian Human Rights Commission agrees that it has responsibility for children but has never taken up any of their cases.

An entrenched Charter of Rights should make specific provisions for children and the Council suggests some amendments.

Within the constitutional statement on legal rights children should be defined as persons and have full access to the legal rights defined therein.

RECOMMENDATIONS:

s. 7

Legal Rights

Legal rights should be available to persons under eighteen without discrimination unless detention for youth is in a separate setting from that of adults.

s. 11

Legal Rights in Criminal Proceedings

Counsel should be provided for children in criminal matters.

s. 14

Interpreter

The legal right for an interpreter should be extended to include people who do not understand the use of language and/or the process and legal proceedings.

s. 15(1)

Non-discrimination Rights

The concept of equality before the law should be rewritten to make it clear that the concept is not restricted to the existing list of forms of discrimination.

The prohibitive forms of discrimination should be expanded to include non-discrimination and equality before the law on the basis of "having children in your care and control". This is because families and other social groups are often discriminated against because they contain children. Rental accommodation is a primary example.

s. 15(2)

Affirmative Action Programs

Children should not have to be labelled as "disadvantaged persons or groups" in order to qualify for affirmative action.

COMMENTS:

Does the Canadian Council of Children and Youth intend that these rights be exercised personally by the children?

Will this not effect the present Canadian concepts of age of majority and the responsibility of guardianship?

What effect will this have upon the present parens patriae concept in juvenile cases?

The legal concerns of children may encompass civil as well as criminal matters. They are, for example, often a target of contention in divorce proceedings; they may inherit property or money; indeed some children may earn large sums of money. Would the Council's proposed amendment to section 7 safeguard the civil rights of children?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Canadian Council on Social Development

Ed Pennington, Member of the Board of Governors
Nicole DuMouchel, Member of the Board of Governors
Karen Hill, Program Director, Social Planning and
Citizen Participation

DATE OF APPEARANCE: 3 December 1980. (11:30 a.m.)

SOURCE OF NOTE:

Telephone conversation with Mr. Terrance Hunsley,
Executive Director, C.C.S.D., during preparation of
brief.

BACKGROUND:

The C.C.S.D. is a national voluntary organization. Its membership is comprised of Social Planning Councils, United Way Organizations, Family Service Agencies, business corporations and individuals. It is funded by a federal sustaining grant, grants from the provinces and territories, corporate donations and individual memberships. The C.C.S.D. does research in the social policy field; The Fact Book on Poverty and The Fact Book on Income Distribution are important publications. It sees its role as promoting progressive social policy.

Prepared by: John McDonough

Research Branch
Library of Parliament

3 December 1980

MAIN POINTS:

The C.C.S.D. is vitally concerned about constitutional reform as the British North America Act outlines both the jurisdiction over social programmes as well as the taxing powers to fund the programmes.

The C.C.S.D. recommends the inclusion of a Charter of Social Rights. This is based on Board policy adopted in 1977.

The C.C.S.D. is concerned with the social policy implications of the proposed Joint Resolution. They seek more inclusive grounds for the prohibition of discrimination, and the entrenchment of aboriginal and treaty rights.

The C.C.S.D. speaks of the limitations on citizen involvement in the current process of constitutional reform.

The C.C.S.D. recommends the addition of the right to freedom of information and the right to privacy.

RECOMMENDATIONS:

The Government, through the Secretary of State, should provide funds to assist citizens' groups in the preparation of briefs so that these groups could adequately represent the views of their constituents before this Committee.

s. 2

Fundamental Freedoms

(c)

Freedom of assembly should not be qualified with the word "peaceful". The restriction on assembly should be strictly defined.

(b)

The freedom of speech clause is framed as an individual right. Is it intended also for the expression of opinions by registered charitable organizations?

s. 3

Democratic Rights

Does the right to vote include the right to hold office?

s. 6(3)(b)

Mobility Rights

The C.C.S.D. seeks clarification of this section. They do not wish to see any further restrictions on the mobility of social service recipients.

s. 15(1)

Non-discrimination Rights

There should be more inclusive grounds for non-discrimination rights such as socio-economic status, marital status, sexual orientation, political beliefs, mental and physical handicap.

s. 15(2)

Affirmative Action Programmes

The phrase "disadvantaged groups" may work against the interest of some individuals and groups.

s. 7

Right to "security of the person"

Does this imply the right to privacy? The C.C.S.D. recommends such a right.

s. 24

Undeclared Rights and Freedoms

The C.C.S.D. supports the entrenchment of Aboriginal and treaty rights.

s. 31(1)

Equalization and Regional Disparities.

The C.C.S.D. is concerned that the wording of this section is such that the Federal Government might assert that it no longer has an obligation to assist the provinces in the social policy fields where it has been involved. The C.C.S.D. is concerned that present funding decisions may, in fact, predetermine certain jurisdictional relationships that are not yet clear.

In addition

The C.C.S.D. is concerned with the inconsistent use of terminology, such as everyone, every person, citizen.

The C.C.S.D. recommends the following additional rights: Freedom of Information, the Right to Privacy.

The C.C.S.D. recommends the inclusion of Social Rights in the Charter of Rights. It recognizes that Social Rights are not seen as legal individual rights but as desirable goals for the collectivity. They suggest the following rights: right to employment, right to protection of family, right to minimum levels of services, the right to education, the right to form trade unions.

The C.C.S.D. would ask the Special Joint Committee to consider the inclusion in the Constitution of individual responsibilities as well as rights, such as: the responsibility to pay taxes, to obey laws.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Canadian Federation of Civil Liberties and Human Rights Associations:

Edwin Webking - President, Lethbridge, Alberta
Norman Whalen - Vice-President, St. John, Newfoundland
Gilles Tardif - Director of the Federation, Montreal, Quebec

DATE OF APPEARANCE: December 8, 1980, 8:00 p.m.

FORM OF SUBMISSION: Brief (18 pages)

BACKGROUND: The Canadian Federation of Civil Liberties and Human Rights Associations was founded in 1972. It is a national federation of 23 community and provincial associations across Canada plus two other national organizations which are affiliate members. It has been concerned with the following issues: invasion of privacy, prisoners' rights, the right to strike, freedom of information, immigration and refugees, the abuse of police power, among others.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 8, 1980

MAIN POINTS:

The Association favours both patriation of the Constitution and entrenchment of a Charter of Rights.

It cannot however support the unilateral strategy adopted by the Government.

The Charter of Rights as presently written falls far short of Canada's internal and international obligations.

RECOMMENDATIONS:

With regard to the Constitutional process the Federation recommends the following procedural changes:

- That the time table for constitutional reform be extended to allow full input by all Canadians.
- That the Government circulate the proposed Constitution to all Canadians for their full information.
- That the Special Joint Committee on the Constitution travel to all parts of Canada and receive briefs.
- That following amendments to the Bill, it be submitted to the people of Canada for approval.

s. 1

The Limitations Clause

As presently written the whole of the Charter will be subject to parliamentary change and thereby not constitutionally entrenched. They propose the following wording:

- The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out herein.

s. 2

Fundamental Freedoms

The word "peaceful" should be removed from subsection (c) as a qualifier for freedom of assembly.

They suggest that the right to privacy be added as follows:

- Freedom of private communications and the inviolability of the mails.

s. 4(2)

Continuation of House of Commons in special circumstances.

The phrase "apprehended war, invasion or insurrection" should be removed because of the potential for abuse.

s. 8, 9, 11(d)

Legal Rights regarding search and seizure, detention, and bail.

The phrase "on grounds and in accordance with procedures, established by law" should be removed.

s. 10

Arrest or detention

s. 10(a)

The right to be informed

Everyone should have the right to be informed "immediately" not "promptly" as to the reason for arrest or detention.

s. 10(b) and (c)

The rights of the accused on arrest

The Federation would substantially enlarge these rights in the following amendment:

10(b) Everyone has the right on arrest or detention to be informed of the right

(i) to remain silent;

(ii) to retain and instruct counsel in private;

(iii) the right to legal aid;

(iv) the right to have counsel present during questioning.

10(c) To remain silent; to retain and instruct counsel immediately in private; to legal aid; to have counsel present during questioning.

- 10(d) To have the validity of the detention determined by way of habeas corpus or other proceedings and to be released if the detention is not in accordance with the principles of fundamental justice.

With the exception of the right to have counsel present during questioning all of these rights exist in Canada today. They would be entrenched in s. 10(c) and the accused would be informed "immediately" of these rights by virtue of s. 10(b). Section 10(d) is amended as indicated (underlined words) because habeas corpus is not the only means used for judicial release.

- s. 11 Proceedings in penal and criminal matters
- s. 11(a) The word "promptly" should be replaced with "immediately" with respect to being informed about the specific offence.
- s. 11(c) The words "by an independent and impartial tribunal" should be replaced by "in accordance with the principles of fundamental justice".
- s. 11(f) In addition to the word "tried", the words "convicted" and "sentenced" should be added to the double jeopardy clause.
- s. 12 Treatment or punishment
- "Abuse of process" should be added to the list of proscriptions.
- s. 13 Self-crimination
- The Federation suggests that the section should be reworded as follows:
- 13.(a) A person shall not be compelled to give evidence where that evidence may tend to incriminate that person.
- 13.(b) Illegally obtained evidence shall not be admissible in any judicial proceeding.

This simpler wording enlarges the scope of the section to include bail hearings, trials of co-accused. It also accepts that the American Exclusionary Rule should be a rule of Canadian Justice.

s. 15(1)

Non-discrimination Rights

The Federation proposes the following wording:

Everyone has the right to equality of service, to equality before the Law and to equal protection of the Law without discrimination.

Discrimination should be prohibited on any ground and equality of service should be provided to all.

s. 20 and

Communication by public with federal institutions.

s. 23

Minority Language Educational Rights

The phrase "where numbers warrant" should be withdrawn.

s. 24

Undeclared Rights and Freedoms

The Federation offers a considerably enlarged and restructured section. It would give a positive assurance: (a) to native people that their rights and treaties could not be abrogated, (b) to Canada's ethnic, religious and linguistic communities that their rights to practice their culture, religion and language would be guaranteed and, (c) to the people that they would have the right to freely determine their political status within Canada.

In addition
s. 52(d)

The Federation suggests the following clause to give assurance that Canada will abide by the U.N. covenants:

52(d) The generally recognized rules of International Law and the United Nations covenants to which Canada is a signatory.

COMMENTS:

Many other groups which have complained of "loopholes" in the Charter of Rights, particularly the Legal Rights, sections 7 through 14, have also sought modification to section 26 (Laws respecting evidence). Does the Federation have any suggestions for s. 26?

Some groups which have appeared before this Committee have been concerned with the "Americanization" of the Canadian judicial system. The Federation appears to take a totally opposite tact and particularly so in the following areas:

- Their section (1) makes no provision for a parliamentary role.
- Their section 10(b) conforms to the Miranda decision of the U.S. Supreme Court.
- Similarly in sections 10 and 11, the use of the word "immediately" gives the courts little discretion to apply a reasonableness test.
- The Federation's proposal for a new subsection 13(b) asks for the complete acceptance of the "Exclusionary principle". The courts would appear to have no leeway to apply a reasonableness test.

Would the witnesses care to comment on suggestions made by the Advisory Council on the Status of Women and the Saskatchewan Human Rights Commission that there be two levels within s. 15(1). One tier would contain: race, religion, ethnic origin and sex as non-derogable rights. The other proscription against discrimination such as physical disability would require a reasonableness test and they ought not be enumerated.

The right of self-determination proposed in the Federation's section 24 would not appear to have any degree of acceptance among Canada's national political parties? The use of the word "peoples" seems to make it "vague". The Parti Québécois argues that the "people" of Quebec have the right to self-

determination but the "people" of the west-end of the Island of Montreal do not and neither do the Cree of Baie James region. How does the Federation define the use of its word "people"? Can individual groups of "people" acting on their own or in concert with other seek a redefinition of powers within the Canadian Constitution. If so, how?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESSES:

Canadians for Canada

Mr. Robert A. Willson, Chairman and Chief
Executive Officer of Northland Bank
Dr. John Crispo, Co-ordinator
Mr. Alan Scarth, Legal Counsel
Mr. Donald Skagen

DATE OF APPEARANCE:

8 January 1981 - 4:30 p.m.

SOURCE:

Telephone Conversation with Mr. Willson

BACKGROUND:

Canadians for Canada is a non-partisan association of Canadian business executives, who are committed to help bring a solution to the nation's problems. It started in Calgary some two months go, and now has members in all regions of Canada. The association hopes to form, in the near future, steering committees in all provinces.

François Bernier

Research Branch
Library of Parliament

8 January 1981

MAJOR POINTS:

The association wishes to stress that they are deeply troubled by the existence of regional antagonism in Canada and want to underline the need for a unifying strategy apt to resolve regional discontent and disparities.

The association also believes that Canadians are ready and willing to participate in that process of reducing regional tensions.

In order to achieve these purposes, the current process of constitutional change should be delayed until proper mechanisms have been set so as to enable all Canadians to participate in the resolution of constitutional difficulties.

Finally, and this is an important point in the association's view, the need to elaborate a new Constitution with all due speed, should not blind us to other major problems facing the nation. In this respect, the necessity of finding a solution to the energy impasse should be of foremost concern to all.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Canadians for One Canada

Honorable James Richardson, National Chairman
Pat Newbound, President
Mr. W. Scandrett, Executive Director

DATE OF APPEARANCE: 14 December 1980, 9:30 A.M.

FORM OF SUBMISSION: 12 page brief to Committee

SOURCE FOR NOTES: Brief and Conversation with Spokeswoman Vera Lucas

BACKGROUND:

This organization, formed in Winnipeg in the fall of 1978 calls itself a political force and not a political party. It's motto is "Canada: one country - one people". With offices in Winnipeg, Ottawa and Toronto the organization boasts approximately 30,000 members across Canada including 2,500 members for Quebec. The underlying philosophy of the group is that Canada ought to be an equal partnership of all Canadians and not a partnership of two founding races.

Prepared by: Amos Shlosberg

Research Branch
Library of Parliament
December 15, 1980

- 2 -

Therefore language rights ought not to be legislated at the federal level and ought not to be entrenched in the constitution.

Honourable James Richardson,
Elected House of Commons 1968, re-elected 1972, 1974.
Sworn of the Privy Council 1968 - Minister without portfolio to 1969.
1969-1972 - Minister of Supplies and Services
1972-1976 - Minister of National Defence
Resigned from Cabinet 1976.
June 1978 crossed floor to sit as independent.
March 1978 - announced intention not to seek re-election and acceptance of National Chairmanship of Canadians for One Canada.
Remained in House of Commons until May 1979.

BASIC THEME:

The supremacy of Parliament; One Canada as envisioned by the Fathers of Confederation; minority rights respected and protected; nation united around the majority and the unifying symbol of its flag; a constitution that does not enshrine duality and diversity; while respecting those principles, a constitution that enshrines national unity.

MAIN POINTS:

Opposed to the supremacy of a written constitution as contrasted with the supremacy of a democratically elected Parliament. Also opposed to the United Kingdom Parliament making fundamental amendments to the Canadian Constitution without prior consultation or the approval of the Canadian public.

S. 16(1) OFFICIAL LANGUAGES OF CANADA

This provision should be deleted unless the principle is supported by national consensus. Canadians for One Canada opposes a bilingual Canada but supports the protection of minority language rights.

S. 41. GENERAL PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

This section should be rewritten to provide an amending procedure that treats all Canadians as equals to express the national will - best formula: approval of Parliament and seven provinces with at least 50% of the population.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Canadian Human Rights Commission:
R.G.L. Fairweather, Chief Commissioner
Mrs. Rita Cadieux, Deputy Chief Commissioner

DATE OF APPEARANCE: November 14, 1980: 3:00 p.m.

FORM OF SUBMISSION: Notes for an Address (4 pages) and Recommendations relating to the The Canadian Charter of Rights and Freedoms (5 pages).

John McDonough
Research Branch
Library of Parliament

12 January 1981

MAIN POINTS

The Canadian Human Rights Commission supports the principle of an entrenched Charter of Rights in a new constitution for Canada.

This support for entrenchment has been reinforced by a recent human rights tribunal decision which found that the Canadian Human Rights Act did not have primacy over the Income Tax Act. This might have been different if a constitutionally entrenched bill of rights had been in place.

The Charter of Rights and Freedoms of the proposed Joint Resolution is seriously flawed.

The Charter of Rights should offer protection at least as comprehensive as, and as close to the language and spirit of, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.

Parliament should make its intentions clear as to the scope of the protection offered under the Charter. The Commission feels that it should apply both to the substance and the administration of the law.

RECOMMENDATIONS

s. 1

Limitations Clause

This section raises fundamental doubts about just how serious is the commitment to reform.

Under the Covenant on Civil and Political Rights, non-discrimination rights (presented in s. 15) are non-derogable and cannot be made subject to limitations, even in war time.

Any general limitations clause should accord with the accepted clauses in the International Bills of Rights. The Commission supports the following wording:

- 1.(1) The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such limits prescribed by law as are reasonably justifiable in a free and democratic society.

(2) No limitations on the legal rights or the non-discrimination rights set out in this Charter may be made under this provision.

(3) This Charter guarantees the equal right of men and women to the enjoyment of the rights and freedoms set out in it.

However, if subsections (2) and (3) do not reflect Parliament's intention then the Commission suggests the following:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such limits prescribed by law as are reasonably justifiable in a free and democratic society.

s. 15

Non-Discrimination Rights

The Commission's first preference is for a general proscription of discrimination, with no grounds enumerated thus offering the broadest possible protection.

Alternatively, the Charter should provide general protection with a list of examples: "it should allow for no discrimination such as ...".

Less desirable would be a guarantee of no discrimination on a list of grounds. The list should include: race, sex, national or ethnic origin, colour, religion, age, marital status/situation de famille, physical or mental handicap, political belief or sexual orientation.

This section should be taken out from under the application of Section 1 of the present form of the Charter, or any other general limitations clause.

There is the need to allow for certain legislative distinctions to be made on the basis of the proscribed grounds in the interest of the public good. These limitations must be formulated carefully and specifically. They must be justifiably related to some bona fide social or economic amelioration of the condition of certain specified groups of persons, for example: guaranteed income supplement, family allowance.

To accomplish this end the Commission suggests the following wording:

"This section does not preclude any legislative distinction based on a proscribed ground of discrimination which is justifiably related to some bona fide amelioration of the condition of certain specified classes of persons."

Legislative distinction against a specified group of persons on the basis of a proscribed ground of discrimination would be allowed subject to such reasonably justifiable limitations as can be demonstrated to be necessary for reasons of compelling state interest. It should be made clear that this limitation is to be interpreted extremely narrowly and rigorously.

The Commission suggests the following wording:

"This section does not preclude any legislative distinction based on a proscribed ground of discrimination which is justifiably necessary for reasons of compelling state interest."

s. 8, 9, 11(d)

Legal Rights

The phrase "except on grounds, and in accordance with procedures established by law" appears to be an unnecessary qualification.

s. 26

Laws respecting evidence

This should be recast. In its present form, it clouds all that part of the Charter that deals with legal rights.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Canadian Jewish Congress

Select Committee on the Canadian Constitution
Prof. Maxwell Cohen, Chairman of Committee
Prof. Martin Friedland
Prof. Joseph Magnet

DATE OF APPEARANCE: 18 November 1980
15h30

FORM OF SUBMISSION: Brief, with covering letter containing arguments in favour of patriation as well as a letter addressed to the First Ministers calling for support for patriation and an entrenched Bill of Rights.

BACKGROUND:

The Canadian Jewish Congress (C.J.C.) was founded in 1919 and reconstituted in 1934. Its head office is in Montreal. Through a joint public relations committee, it co-operates with the Canadian lodges of the B'nai B'rith in matters affecting the civic status of Jews. The congress also maintains contact with Jewish communities of other lands, co-ordinates Canadian Jewry's effort for overseas postwar relief, and is concerned with problems of immigration, education, youth work and research.

The Select Committee on the Canadian Constitution includes experienced lawyers and scholars of Canadian constitutional law, Canadian human rights law and other public law areas. Its membership comprises individuals from all areas of Canada.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

17 November 1980

SUMMARY

ENTRENCHMENT OF RIGHTS

C.J.C. comments that after examination of the succinct arguments which have been tendered in favour of leaving basic rights and freedoms to the protection of statutes or of the common law alone, it does not believe that this would be adequate. Canadian history has shown that there have been great difficulties concerning the protection of language and minority education rights in Canada. A nationally recognized code of rules is necessary to protect the interests of individuals or groups from direct or indirect discrimination. The impact which the modern, interventionist state may have on the rights of individuals must also be taken into consideration. Moreover, Canada has obligations to protect rights as a signing party to international covenants.

It should be recognized that Canadian courts are not without experience in rendering judgments affecting rights whether these be based on certain sections of the B.N.A. Act or various bills of rights. Canadian legislatures have learned to take such judgments into account.

GUARANTEE OF RIGHTS AND FREEDOMS

- s. 1 Should be deleted. This section supposedly (1) guarantees the rights set out in the Charter and (2) provides justification for suspending them in an emergency. In fact, it fulfills neither function.

This section goes too far in recognizing the authority of legislatures in a charter-based judicial review system. Section 1 could be interpreted to imply "parliamentary sovereignty", thereby leading to ambiguity as to the authority of the entire Charter.

The Charter's sections should "state general constitutional rights in a terse, abstract way in order to maximize the impact of a sense of constitutional liberty on the Canadian consciousness."

If rights are to be suspended during emergency situations, the grounds for doing so should be stated succinctly. Accordingly, C.J.C. recommends that the following clause (Brief, p. 15) be inserted to provide for such circumstances:

- 28(a) In case of war, domestic insurrection or natural calamity threatening the life or safety of the nation or any part thereof, the rights enumerated in this Charter may be subjected to such reasonable limits as are strictly required by the exigencies of the actual emergency. Any measures enacted under this clause which are inconsistent with the ordinary operation of this Charter shall lapse after 20 days, if not further extended by a 2/3 vote of the Parliament of Canada.

FUNDAMENTAL FREEDOMS

- s. 2(b) Concerned about the possible effect of this subsection on the hate propaganda provisions of the Criminal Code. Notes that Canada has international obligations to prohibit such propaganda.

DEMOCRATIC RIGHTS

- s. 3 Notes that this section does not include the right to take office if elected.
- s. 4(2) Delete the words "real or apprehended", so as to bring this section in line with the emergency provision proposed above (see s. 1).

MOBILITY RIGHTS

- s. 6(1) Permanent residents should also be protected under this subsection.
- The words "subject to application of the law of extradition and criminal law" should be added to the end of this subsection. This would ensure Canada's compliance as a signatory to certain international agreements.
- s. 6(2) Add the words "everyone lawfully within Canada" so as to comply with international obligations concerning refugees.

LEGAL RIGHTS

- s. 7 The word "everyone" comprises persons in Canada illegally.
- s. 8 Permits searches and seizures of any kind if supported by statute. Section should be redrafted to protect against arbitrary or unreasonable searches and seizures.

9 Should be redrafted to prevent arbitrary and unreasonable detentions.

s. 10(b) Should be broadened to include, on arrest, the right to legal aid. This would comply with our international commitments.

A duty should be placed upon public authorities to inform an arrested person of the right to retain and instruct counsel without delay. The courts could determine whether evidence taken in breach of s. 10(b) should be excluded.

The French text is more clear as to the right of access to counsel than is the English text.

s. 11(c) Would not disturb the shifting onus doctrine as articulated by the Supreme Court.

s. 11(d) As drafted, would permit denial of reasonable bail if such were in accordance with law.

s. 11(e) Concerned with the effect of this paragraph on the successful prosecution of war criminals.

s. 11(f) Far too narrow. The word "offence" should be replaced by the words "acts giving rise to an offence", so as to protect against double jeopardy for related offences or offences substantially the same as the principal offence.

s. 13 Should be broadened to require that a witness in third-party proceedings be told that, although compellable, no evidence which he gives may be used against him in subsequent proceedings. This change would comply with our international obligations.

NON-DISCRIMINATION RIGHTS

s. 15(2) Comments that C.J.C. is generally not in favour of quota systems and regards such cases as exceptions.

OFFICIAL LANGUAGES OF CANADA

s. 16 Replace word "extend" in English text with "improve", so as to be in accordance with the French "d'améliorer".

ss. 19, 20 The words "English or French" are conceptually different from the French "la langue officielle".

MINORITY LANGUAGE EDUCATIONAL RIGHTS

s. 23 Everyone should be protected by this section, not just Canadian citizens.

s. 23(1) Objects to the concept "first language learned and still understood", which implies language testing.

As drafted, implies that only publicly-funded minority language education will be permitted. Privately-funded minority language education should also be permitted.

s. 23(2) Proposes that the rights under this subsection be extended to any resident of Canada, instead of Canadian citizens. Proposes further that the subsection include as a requirement "at least three consecutive years of his or her kindergarten, primary, or secondary instruction..."

GENERAL

s. 25 Proposes that the words "enacted before or after the coming into force of this Charter" be inserted after the word "law". This would avoid the type of confusion which has taken place concerning the applicability of the Canadian Bill of Rights.

Remarks that the Charter is deficient because it fails to provide for enforcement. The consequences of applying the Charter to civil and criminal cases as they arise before the courts is unclear. Remarks further that Canada is obliged, pursuant to the International Covenant on Civil and Political Rights, 1966, to ensure that individuals whose rights have been violated have access to a remedy, and to provide individuals subject to unlawful arrest or detention with an enforceable right to compensation.

Therefore, recommends that an enforcement clause (Brief, p. 14) be included:

25(a) Everyone entitled in law to the performance by a public authority of an act or omission shall, in cases of actual or threatened default, be entitled to full and effectual relief, by mandatory or restraining order of a superior court to compel the performance of the act of omission. Pecuniary compensation shall be awarded in appropriate cases.

APPLICATION OF CHARTER

s. 29(2) Recommends that the 3-year delay be restricted to the age provision of s. 15(1), and not to s. 15 as a whole.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: The Canadian Life Insurance Association

 Mr. Patrick D. Burns
 Mlle Lise Bacon
 Mr. Charles P. Galloway
 Mr. Charles C. Black
 Mr. Douglas Kent

DATE OF APPEARANCE: January 7, 1981, 3:30 p.m.

FORM OF SUBMISSION: Letter from the Chairman of the Association to
 the Minister of Justice, and opening statement.

BACKGROUND: Established in 1894, the Canadian Life Insurance
 Association is a voluntary trade association
 whose membership includes 127 Canadian, American,
 British and other European companies operating in
 Canada.

Prepared by: François P. Bernier

Research Branch
Library of Parliament

January 6, 1981

BASIC THEME:

The Association is concerned that s. 15(1) of the proposed Charter could be construed, in spite of s. 1 of the Charter, as prohibiting life insurance companies from differentiating on the basis of sex and age in the establishment of premiums and other aspects of life insurance plans.

COMMENTS:

It seems difficult to conceive of practical means of alleviating the Association's concern, short of a specific "insurance" exception in the Charter. The Association has expressed no specific recommendation to that effect.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Canadian National Institute for the Blind

Robert Mercer, National Managing Director
Dayton Forman, M.D., National Vice-President
David Lepofsky, LL.B., Ontario Board of Directors
member

DATE OF APPEARANCE: 12 December, 1980

SOURCE OF NOTES: Brief (3 pages)

BACKGROUND:

The C.N.I.B. is Canada's largest organization providing rehabilitation services to visually-handicapped persons. Its main goal is to achieve legal, social and economic equality and equality of opportunity for them.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

11 December 1980

SUMMARY

GENERAL REMARKS

The C.N.I.B.'s concerns with regard to the constitution are applicable not only to the interests of blind and partially-sighted Canadians, but to all mentally or physically handicapped persons.

The attitude of well-meaning but misinformed persons was said to often be the greatest handicap encountered by handicapped persons. (p. 1)

Patronizing and discriminating attitudes have resulted in numerous laws which openly discriminate against the handicapped. The basic rights afforded to all other individuals, such as minimum wage law protection, are sometimes denied to handicapped persons. (pp. 1-2)

GUARANTEE OF RIGHTS AND FREEDOMS

s. 1

Maintains that certain rights, such as the right to an interpreter (s. 14), necessary for deaf and blind persons, or the right to protection from discrimination (s. 15), should be exempt from this section because they are absolutes.

Alternatively, the wording of this section should be made more specific and narrow so the courts would not be able to interpret virtually all legislation enacted as being in concert with the Charter. (p. 3)

NON-DISCRIMINATION RIGHTS

s. 15

Comments that this section resembles too closely s. 1(b) of the Canadian Bill of Rights, which the courts have repeatedly interpreted as failing to invalidate discriminatory legislation. The failure to specifically mention "mental or physical handicap" will ensure that handicapped persons are to remain disentitled to equality before the law. In addition, any legislation discriminating against the disabled will continue to be permitted.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Canadian Polish Congress
Toronto, Ontario

DATE OF APPEARANCE: 20 November 1980, 16h30

FORM OF SUBMISSION: Brief. (Note that this submission was prepared in August 1980, prior to release of the proposed Resolution. Its comments are often directed towards "A Future Together", report of the Task Force on Canadian Unity.)

BACKGROUND: The Canadian Polish Congress was founded in 1934 under the name Federation of Polish Societies in Canada, and adopted its present name in 1944. Its principal goals are to foster the contribution of Polish Canadians to Canadian society while continuing cultural traditions. The latter goal includes education and language programmes, as well as maintaining family links with Poland and assisting persons living there.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

20 November 1980

SUMMARY

PREAMBLE; RECOMMENDATIONS FOR

Recommends that the Constitution include a Preamble affirming the right of every group, "not merely people of French or British origin, to preserve and cultivate their various languages and cultures within the broader Canadian context." The new Constitution will be a lasting document. Continuing immigration will render a document singling out the so-called "founding races" increasingly "objectionable and irrelevant, not to say racist".

Therefore, objects to Recommendation 28 of the Task Force on Canadian Unity which called for a preamble to "recognize the historical partnership between English- and French-speaking Canadians, and the distinctiveness of Quebec". This would ignore other groups as well as amount to a declaration that other provinces have second status. The Task Force's proposal that the preamble "recognize the richness of the contribution of Canada's other cultural groups" was termed patronizing, because it denied other groups an historical role equal to the English and French communities, or the "special status" of native peoples. (p. 1)

MOBILITY RIGHTS

- s. 6 Supports constitutional guarantees for the free movement of people and goods. Provincial legislation designed as protectionist can only lead to the balkanization of Canada. (p. 3)

NON-DISCRIMINATION RIGHTS

- s. 15 Supports the principle of equal status for every Canadian regardless of origin, race, religion, sex or so-called "historical status". Special privileges for any group or province imply inferior status for the rest of society. (p. 1)

OFFICIAL LANGUAGES OF CANADA

ss. 16-22

The principle of the equality of all languages, official or otherwise, should be incorporated into the Constitution. Practically, English and French would be the official languages. If official bilingualism is deemed desirable, it must apply equally to all provinces. A provincial government represents all residents and should not be empowered to assimilate the minority language through benign neglect or aggressive measures.

The proper way to preserve a particular culture is through the efforts of the members of the group, and not through government interference. If the Constitution is to include cultural preservation, a "revenue-sharing formula which will distribute money to each group on a proportional basis" should also be included. (p. 2)

MINORITY LANGUAGE EDUCATIONAL RIGHTS

s. 23

Recommends that the Constitution state that the provinces have educational responsibilities to all citizens wishing to preserve third languages. Canada cannot declare itself to be in support of the principle of multiculturalism while ignoring the language of minority groups. Without language, "culture ... is meaningless." (p. 2)

UNDECLARED RIGHTS AND FREEDOMS

s. 24

The Constitution should not recognize the "special place" of native peoples as recommended by the Task Force on Canadian Unity (Recommendation 8). The value placed in the Constitution on a particular group should not be related to the historical order according to which it immigrated into Canada. (p. 1)

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

s. 50(g)

Opposes any reform of the House of Commons that would involve the appointment of Members based on the popular vote received by each party.

Proposes as an alternative that the size of ridings be increased so that each one is entitled to more than one Member of Parliament. Electors should have the right to choose from a list of candidates whether individuals from more than one political party will represent them. (pp. 2-3)

s. 50(d)

Senate reform must include the principle of accountability through election. The Senate should be granted real and not "merely symbolic" powers, with regional representation ensured through assigning a specific number of Senators for each province. (pp. 2-3)

SUPREME COURT OF CANADA

Objects to the Task Force's recommendation to guarantee that the Court's membership would include four of nine justices from Quebec (Recommendation 59(ii)).

Recommends that the size of the Court be increased by awarding half of the seats on a regional basis and "the other half to reflect population shifts in the country." Such a formula would allow greater flexibility.

RESOURCES

Each province should be entitled to benefit from its resources without pursuing measures detrimental to the nation as a whole.



CANADA

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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: The Church of Jesus Christ of Latter-Day Saints
 Mr. Bruce Smith, President of Toronto Ontario East
 Stake
 Mr. Regan Walker, Executive Secretary, Toronto Stake
 Mr. Malcolm Warner, President, Hamilton Stake

DATE OF APPEARANCE: December 18, 1980: 2:30 p.m.

FORM OF SUBMISSION: Brief (7 pages)

BACKGROUND: The Church of Jesus Christ of Latter-Day Saints (the
 "Mormon Church") is a Christian organization with roots
 in Canada which go back to the early 1830s. There are
 at present approximately 85,000 members of the Church
 in Canada, with congregations in every Province and
 Territory.

John McDonough

Research Branch
Library of Parliament

12 January 1981

MAIN POINTS

As a Church, the delegation does not wish to take a position on the purely political aspects of the proposed Resolution; they do however wish to address the possible moral implications of the Resolution.

Their basic concern relates to the potential impact of certain proposals within the Resolution on the sanctity and strength of the family, on protection provided by society to women and children, on the relationships between courts and legislatures in making legal policy, and on the inviolability of fundamental freedoms.

RECOMMENDATIONS

s. 2

Fundamental Freedoms

The Church applauds the apparent intent of the proposals but is uneasy about the extent to which the Resolution succeeds (see comments respecting Part V).

s. 15

Non-discrimination Rights

The Church is concerned with the possible effect that s. 15 may have on the family. In attempting to remove discrimination because of sex and age it may, inadvertently, take away from women and children traditional freedoms and practices they now enjoy. It could permit wedlock between members of the same sex and this the Church opposes. It could do away with the traditional protection of women against military service. It may damage the criminal code provisions concerning sexual offences against children.

The Church declares that none of the foregoing should be construed as indicating less than a full commitment to the equality between the sexes.

s. 7

Right to Life

The impact of this section on the rights of the fetus is at best unclear as it does not define what constitutes a person. The Church is opposed to abortion on demand.

s. 24

Undeclared Rights and Freedoms

The Church strongly approves of this section.

rt V

Amendment Procedures

The Church applauds the apparent intent of the proposals to safeguard freedom of conscience and religion and that such rights must not be subject to the vagaries of legislatures. The procedures for amending the constitution must pay particular attention to the need to protect the fundamental freedoms of section 2.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Coalition for the Protection of Human Life:

Don McPhee, Executive Director
Dr. Elizabeth Callahan, Board Member
Dr. Berry De Weber, Consultant

DATE OF APPEARANCE: December 9, 10:30 a.m.

SOURCE OF NOTES: Preliminary draft of the brief

BACKGROUND: The Coalition for the Protection of Human Life was founded in 1973 as the political arm of the pro-Life movement. This organization was responsible for a petition of one million signatures seeking the full protection of the law for unborn Canadians; the petition was tabled in the House on May 29, 1975.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 9, 1980

MAIN POINTS:

A Charter of Rights is no guarantee of human rights or true justice; however if carefully and thoughtfully worded it may be a blessing.

RECOMMENDATIONS:

s. 1

The Limitations Clause

The section as written is dangerously vague. The phrase "democratic society with a parliamentary system of government" ties Canadian law to the laws and customs of other countries, over which Canadians have no control. They propose the following amendment:

"1. (1) None of the rights and freedoms set forth in this charter shall be abridged or suspended except when such action is necessary to preserve the security of the state and the force of this constitution. To have lawful status and effect, the necessity for any such action must be confirmed at the earliest practical opportunity by a vote of two-thirds of the members of both houses of Parliament.

(2) No one shall suffer any financial penalty or other retributive action for exercising any of the rights or freedoms set forth in this charter."

s. 2

Fundamental Freedoms

The Coalition would move the "right to life, liberty and security..." provision of s. 7, which lists the legal rights under the heading of fundamental freedoms. They would also add the right to property.

s. 15(1)

Non-discrimination Rights

The section as worded is too limited in that it would permit discrimination on grounds other than those listed. The Coalition would specifically add mental or physical capacity and the section would be left open with the phrase "or any other distinction".

Also the word "everyone" is open to misinterpretation. In 1857 the U.S. Supreme Court ruled that a slave was not legally a person. To correct this the Coalition would add the following sub-section:

"15. (2) In this charter 'everyone' means every living human being from the time of conception onward, regardless of any other physical or mental condition, distinction or circumstance. Moreover, no legal fiction shall be used to deny any human being any of the rights or freedoms set forth in this charter."

s. 15

Affirmative Action Programs

The phrase "disadvantaged persons or groups" might be used to deny some individuals the basic protection of the law, to achieve some supposed benefit for some other person or groups.

Because of the preceeding sub-section the Coalition would renumber this section 15(3) and add the following words: "provided that such law, program or activity shall not result in material harm or detriment to any other person or group."

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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Coalition of Provincial Organizations of the Handicapped (C.O.P.O.H.)

Mr. Jim Derksen, National Co-ordinator

DATE OF APPEARANCE: Tuesday, November 25, 1980, 10.30 a.m.

FORM OF SUBMISSION: Brief with Appendix (Summary obtained from interview with Mr. Derksen)

BACKGROUND: C.O.P.O.H. is a national alliance of disabled interest groups whose members are concerned disabled citizens, representing an alliance of 9 independent provincial organizations grouping 15-20,000 individuals organized into 80 local chapters.

The Coalition includes people with various physical disabilities, blindness, deafness, paraplegia, cerebral palsy, etc.

Prepared by: Katharine Dunkley

Research Branch
Library of Parliament

November 24, 1980

BASIC THEME:

C.O.P.O.H. endorses patriation of the constitution and the concept of entrenching a Charter of Rights.

C.O.P.O.H. wants "disability" or "handicap" included as a ground of discrimination in section 15.

MAJOR POINTS:

C.O.P.O.H. endorses the concept of a Charter of Rights generally. Members are men and women of various races, national and ethnic origins, etc. whose interests in human rights go beyond the narrow although important issue of inclusion of "handicap" as a prohibited ground of discrimination.

C.O.P.O.H. endorses in general the recommendation of the Canadian Human Rights Commission with caveat; with respect to the wording of non-discrimination rights in section 15, C.O.P.O.H. prefers the second "such as" option:

"Everyone has the right to equality under the law and to the equal protection of the law without discrimination on grounds such as... physical...handicap..."

C.O.P.O.H. urges that physical handicap be made one of the enumerated prohibited grounds. In view of the considerable support for this position, C.O.P.O.H. calls on those who oppose inclusion of handicap to provide clearly demonstrable and justifiably sound objections.

The Appendix to the Brief addresses question of cost, definition of handicap, and degree of handicap.

RECOMMENDATIONS:

s. 15(1)

Non-discrimination clause

The section should be reworded, as follows, and should include "physical handicap" as one of the enumerated prohibited grounds.

"Everyone has the right to equality under the law and to the equal protection of the law without discrimination on grounds such as... physical...handicap...

MENTS:

Why do they feel it is not necessary to define "disability" or "handicap" or degree thereof? (The Appendix gives the example that even a minor degree of disability should not be justifiable grounds for discrimination, just as it is not considered justifiable to discriminate because someone is slightly black or is 1/16 Jewish in origin).

If disability is not defined, how can the courts interpret it? If it is not defined, what is the utility of inclusion?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESSES: Professor Maxwell Cohen

DATE OF APPEARANCE: 8 January 1981 - 2:30 p.m.

SOURCE: Telephone Conversation with Professor Cohen

BACKGROUND: Professor Cohen is currently a scholar and resident at the Faculty of Law at the University of Ottawa and adjunct professor at Carleton University.

He is a Professor Emeritus of Law at the University McGill, where he was Dean of Law from 1964 to 1969.

He is past Chairman of the Constitutional and International Law Committee of the Canadian Bar Association (1964-1971), and adviser to New Brunswick on constitutional matters from 1967 to 1970. During 1972 to 1974, he was Chairman of the Advisory Committee on Marine and Environmental Conferences for External Affairs and since 1974 has been Chairman of the Canadian Section for the International Joint Committee on Canada and the United States.

NOTE: Professor Cohen intends to raise a number of personal views, additional to those presented on behalf of the Canadian Jewish Congress. He will briefly analyse the historical background and evolution of Canadian federalism and will comment on a number of recent unexpected issues with regard to patriation of the Constitution, the amending formula and the problems of federal-provincial co-operation.

prepared by: Monique Hébert

Research Branch
Library of Parliament

8 January 1981



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS : Maxwell F. Yalden
Commissioner of Official Languages

DATE OF APPEARANCE: November 17, 1980: 8:00 p.m.

SOURCES FOR NOTES : Presentation by Mr. Yalden to the Special Joint Committee on the Constitution, September 7, 1978; Interview transcript from CTV's Question Period, September 5, 1980; assorted newspaper articles

BACKGROUND: September 1969 - The Official Languages Act was proclaimed.

September 1977 - Max Yalden was appointed as the second Commissioner of Official Languages

Prepared by: John McDonough

Research Branch
Library of Parliament

14 November 1980

SUMMARY

BASIC THEME:

Mr. Yalden is a strong advocate for the entrenchment of language rights in the constitution. He has, however, expressed doubts concerning the unilateral entrenchment of minority language educational rights and he has indicated that the wording of the federal proposals is too restrictive.

MAJOR POINTS:

- itemizing the circumstances where the two languages have equality may restrict an individual's language rights.
- the provisions dealing with minority language educational rights restrict the rights of the majority and non-citizens.
- the wording of s. 20 outlining the public's right to communicate in either English or French with federal institutions appears more restrictive than the Official Languages Act.

RECOMMENDATIONS:

s. 15 Official Languages of Canada

This section of the proposed Joint Resolution differs from s. 13 of Bill C-60 in that it is a return to the more precise wording of the Official Languages Act. The emphasis is on the "equality of status" of English and French, and the

equal rights and privileges as to their use
in all the institutions of the Parliament and
Government of Canada.

This is a change which Mr. Yalden recommended in 1978.

s. 17-20 Use of French and English before Parliament, the federal
Courts and federal institutions.

Mr. Yalden criticized similar sections in Bill C-60 [s. 14-19] as he believed that the itemization of the circumstances where the two languages have equality could

appear to restrict an individual's language rights. In answer to a question before the 1978 Joint Committee, he argued that lawyers would not fail to point out this lack in the Constitution and would argue that the Constitution is more important than the Official Languages Act.

s. 20

Communication by Public with federal institutions

This section of the proposed Joint Resolution is very similar to s. 16 of Bill C-60. In his 1978 presentation, Mr. Yalden indicated that proposed section was more restrictive than sections 9 and 10 of the Official Languages Act in at least four respects:

1. it has no explicit application to Canadians outside Canada;
2. it makes no mention of the travelling public within Canada;
3. it applies, even to principal offices of federal institutions, only if they are in areas which remain to be defined in demographic terms; and
4. it contains no reference to other federal offices, whether in predetermined bilingual areas or elsewhere, where the right to communicate in the official language of one's choice might be respected.

Section 20 differs from s. 19 of Bill C-60 in that the following phrase is omitted: "or of any judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to a law of Canada" in reference to the public's right to use English or French with respect to federal government agencies.

s. 23

Minority Language Educational Rights

On the entrenchment of minority language rights, Mr. Yalden in response to a question on CTV's Question Period responded, "I don't see how the federal government can entrench an educational right in a constitution because the provinces, by everyone's admission, have absolute and sole jurisdiction over education".

With respect to the phrase "where numbers warrant", Mr. Yalden seemed to feel that this would not add to the problems of minority language education. On the CTV program, he responded, "there would be a legal basis upon which the minority community could insist on its rights and not have to think of these as being privileges that are accorded by a level of government that could take them away tomorrow like that, as they did in Manitoba".

During the discussions on Bill C-60, Mr. Yalden was critical of the provisions dealing with the language of instruction in schools in that minority-language education rights would apply only to the minority language groups - not to the majority group or to non-citizens - and raised the question whether further consideration should not be given to the free choice option. He suggested that administrative anomalies could arise with respect to the choice of schooling for the children of immigrants and with "immersion" training for the children of the majority.

Questions have also been raised about the rights of native Canadians whose mother tongue is a native language.

In response to a question during the 1978 hearings, Mr. Yalden said he would prefer to see basic education rights dealt with in the same sense as the Premiers of the Provinces did in a communiqué following their meeting in February 1978.⁽¹⁾

ADDITIONAL COMMENTS

s. 23(1) and (2) These sections of the Joint Resolution are somewhat less ambiguous and less circumscribed than the similar provisions of Bill C-60 [s. 21(1) to (5)].

The parent is no longer explicitly required to give notice of his or her intention to exercise the right to choose as in s. 21(2) of Bill C-60.

The provision "where numbers warrant" remains but the provincial role is less defined as in s. 21(3) of Bill C-60. Under the proposed Joint Resolution it is likely that the courts would be less inhibited in determining the numerical standard.

In 1978, Mr. Yalden argued that language rights should be less circumscribed because the provinces were protected by the "opting in" provision of Bill C-60 [s. 131]. This provision does not exist in the proposed Joint Resolution.

(1) Extract from the Provincial Premiers Communiqué in February 1978: "Each child of French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or secondary schools in each province wherever numbers warrant".

s. 133
of B.N.A. Act

Section 15(2) of Bill C-60, together with the opting-in provision [s. 131] proposed to extend s. 133 of the B.N.A. Act to the provinces of Ontario and New Brunswick. There is no similarly explicit recognition of s. 133 in the present proposed Joint Resolution although it has been argued that s. 43 may have a similar effect.



CANADA

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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Council for Yukon Indians:

Harry Allen, Chairman
Elijah Smith, Vice Chairman, land claims
negotiations
David Joe, Chief land claims negotiator
Mike Smith, Legal Counsel

DATE OF APPEARANCE: 3 December 1980, 3:30 p.m.

FORM OF SUBMISSION: Brief (9 pages), speech

BACKGROUND:

In May 1980, there was an amalgamation of twelve Yukon communities to form one central Indian Government, the Council for Yukon Indians. It represents both status and non-status groups, approximately 6,000 people.

Prepared by: John McDonough

Research Branch
Library of Parliament

3 December 1980

Reaction to the Submission by the Yukon Territorial government

The notes for the speech attempt to clear up any misunderstandings which may have resulted from the submission of the Yukon Territorial Government.

The Yukon Indian people are not opposed to development.

The policy of C.Y.I. is that a settlement of Indian rights takes priority over the attainment of provincial status.

The submission of the Yukon Territorial Government stressed that Aboriginal Rights be entrenched in the Constitution. The C.Y.I. suggests that the statement bears little relationship to the past actions of the Yukon Government.

MAIN POINTS:

The original peoples of Canada should not be considered as merely one of the very many special interest or minority groups. They are the original nations of this land.

The C.Y.I. supports the concept of a constitutionally entrenched Canadian Charter of Rights and Freedoms.

Native rights must also be protected in the Constitution.

Now is the time to act. However, the Special Joint Committee is requested to reject the proposed Joint Resolution unless there are substantial changes to meet the needs of the original peoples of Canada.

It is morally indefensible to suggest that Native rights be enshrined constitutionally at some later date. With the attitudes of various provincial governments, it would be more difficult to entrench Native rights after patriation.

Since 1973, the Council of Yukon Indians and the Canadian government have been attempting through consultation and negotiation to produce a comprehensive definition of the special rights and freedoms of the Yukon Indian people.

Within the last year, the C.Y.I. and the various governments have come tantalizingly close to a settlement.

The constitutional validity of such a settlement has been thrown into question by the proposed Joint Resolution.

RECOMMENDATIONS:

The proposed Joint Resolution must clearly establish that Canadian Natives are a special and discrete group of citizens.

With the recognition of special status must come special rights and protections.

Native peoples must be included in the proposed amending formula.

Native Agreements must be protected from the possibility that the courts could declare them to be unconstitutional.

C.Y.I. is concerned with mobility rights and may wish to negotiate residency requirements for participation in the Yukon political process. The C.Y.I. wishes an amendment to the proposed Joint Resolution to assure that any such provision would be constitutional.



CANADA

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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Council of National Ethnocultural Organiza-
tions of Canada:

Dr. Laureano Leone, President
Mr. Andriy Bandera
Mr. Algis Juzukonis
Mr. George Imai
Mr. Navin Parekh

DATE OF APPEARANCE:

December 9, 1980, 3:30 p.m.

FORM OF SUBMISSION:

Brief (10 pages)

BACKGROUND:

The Council was formed in the Spring of 1980 as a vehicle to form a consensus of opinion on issues that were of particular concern to the non-English, non-French minority cultural communities.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 8, 1980

MAIN POINTS:

The Council strongly supports in principle the entrenchment of a Charter of Rights and Freedoms in the Constitution. Because of their minority position the non-English, non-French ethnocultural communities have less recourse to the legislative process but if they are ensured access to the judicial process they will be able to protect and develop the fundamental freedoms enshrined in the Charter.

However the Council has several fundamental objections to the text of the proposed Charter.

The Council argues that the announcement by the Prime Minister, with the support of all opposition parties, that the Government accepted the recommendations of Book IV in the report of the Royal Commission of Bilingualism and Biculturalism was an official recognition of the rights and role of Canada's ethnocultural communities. However this remains a mere policy statement open to change to suit the government of the day.

The Council is apprehensive about a possible future preamble which would link a vague commitment to diversity or pluralism in Canadian society with more categorical references to duality, bilingualism or founding races.

The Council emphatically urges the inclusion in a new Canadian Constitution of a clear reference to the culturally pluralistic nature of Canada that would recognize the multi-cultural, multi-ethnic make-up of Canadian society. Such a reference should be made in the context of the Charter rather in a vague or poetic generality in a preamble. This would be in keeping with the U.N. Covenants which contain clauses protecting the linguistic and cultural rights of minorities.

RECOMMENDATIONS:

"s. 1

Limitations Clause

The Council objects to the generally phrased section 1 and recommends its revision so that any qualifications on rights are as specific and as limited as possible and do not detract from the intended impact of the Charter.

The Council further recommends the inclusion of a provision which would ensure the primacy of international agreements in the human rights area ratified by Canada over all existing and future legislation.

s. 10

Legal Rights: Arrest

The Council wishes to add the right of free legal aid.

s. 15(1)

Non-discrimination rights

The Council strongly supports the inclusion of the words "Physical and/or mental disability" in Section 15(1).

Because of its concerns over the minority language educational provisions of s. 23 the Council would also include "mother tongue" as a basic non-discrimination right.

It also urges the adoption of the following subsection to protect multicultural legislation:

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, nor preclude any law, program or activity which has as its objects the protection of heritage language cultural rights and the development of all cultures in Canada.

s. 16(2)

The Extension of the status and use of the Official Languages.

The Council urges the inclusion of the following:

or the right of a legislature to extend the status, rights and use to any other language.

s. 23

Minority Language Educational Rights

The Council argues that s. 23 is inconsistent with the mobility rights of s. 6. It recommends the inclusion of "every person who has the status of a permanent resident of Canada" in place of the word citizen. As it is s. 23

is clearly discriminatory to landed immigrants and new Canadians who have not yet acquired citizenship.

Moreover the Council feels that the concept "where numbers warrant" may prove to be a limitation on the rights of all Canadians.

s. 24

Undeclared Rights and Freedoms

The Council supports the position of the Native Peoples in their struggles to achieve political rights and urges this Committee to respect their views by deleting Section 24 and substituting two new Sections; one recognition of native rights, two protecting those rights by developing an amending formula requiring the agreement of the Federal Government and the Tribes or Nations whose rights are being amended.

COMMENTS:

Section 23 was designed in part to respond to a situation in Quebec where many French-speaking Quebecers felt that their culture was being endangered by immigration into the province, coupled with the fact that with the freedom of choice most immigrants were turning to the English-speaking school system.

Does the Council recognize the fear of French-speaking Quebecers that their culture is threatened by immigration patterns that are seen as tilting the cultural and linguistic balance in the province in favor of the English-speaking community there? Does the Council have any suggestions that will allay these fears?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The Joint Executive of the Denominational Educational Committees of Newfoundland

Mr. James Green, Counsel

DATE OF APPEARANCE: January 9, 1981, 11:30 a.m.

FORM OF SUBMISSION: Brief (40 pages)

BACKGROUND: The Denominational Education Committees of Newfoundland represents the religions' denominations recognized under the Department of Education Act of Newfoundland for the purpose of providing public schooling denominationally based in Newfoundland.

Prepared by: Claude St Pierre
Research Branch
Library of Parliament
January 8, 1981

Joint Executive of the
Denominational Education Committees
of Newfoundland

SUMMARY

GENERAL OBSERVATIONS:

On November 14, 1980, the Joint Executive of the Denominational Education Committee has appointed a sub-committee, set up to make representations to the appropriate authorities concerning the continued entrenchment of rights and privileges with respect to denominational schools existing presently in law in the province of Newfoundland so that the Canadian Constitution of 1980 will afford protection for the rights and privileges of denominational schools to no lesser extent than those are now protected in the actual Constitution of Canada for the province of Newfoundland and Labrador.

CHARTER OF RIGHTS
AND FREEDOMS

Fearing that the proposed charter proves detrimental to the survival of the denominational public school system in Newfoundland, the committees express grave reservations about its effects in the future.

Future judicial interpretations of sections of the Charter may hamper basic rights and privileges guaranteed to Newfoundland since judges will be able to declare unconstitutional any action or inaction of person or group said to be interfering with the rights and freedoms of the Charter. This also means a transfer of power from Parliament to the Supreme Court of Canada, limited only by its self-restraint. Study of the american experience in this field is not very encouraging.

Moreover, the Charter will give to individuals the right of freedom of conscience and religion against governmental interference and also against individuals, groups and organizations interference thus allowing judges to fix a line of demarcation between denominational school rights and the freedoms of individuals which means interpretation of the Constitution by courts in unexpected ways.

Consequently the rights and privileges of denominational schools are to be explicitly mentioned in the Charter of Rights. After all, it is only normal that rights provided by section 93 of the B.N.A. Act and its substitutes in Newfoundland be recognized in the Constitution avoiding a conflict of law between these and the provisions of the Charter.

Sections 2(a) and 15(1) do not provide a saving clause exempting groups enjoying constitutional protection such as denominational rights in education. A court interpretation of these sections could then go as far as to abrogate such rights. Also, section 25 of the project may have the effect of overriding these same guarantees.

The danger is that individual rights such as freedom of religion might prevail over the freedom of organized religion to protect the denominational integrity of the educational system. But no individual rights or freedom exist in absolute terms. Some of them must give way to larger rights otherwise democracy would be imperiled.

Even section 24 is not a protection to prior constitutional rights since it is too vague and uncertain in front of the generalities of the Charter proclaiming "the most fundamental values of Canadian society".

The Charter should state clearly the right of parents to choose the kind of education they wish for their children so that the right of people of Newfoundland to have their children educated in a system which allows the practice of a particular faith be preserved.

PROCEDURE FOR AMENDMENT

The amending formula proposed by the federal project could well be used in future years to make actual changes or derogate from the constitutional rights guaranteed to denominational education. But the committees view that it should not be made without the consent of the Senate and House of Commons, Legislature of Newfoundland and the affected denomination in Newfoundland.

The committees propose that section 50 be amended so as to assure that section 93 of the B.N.A. Act and its substitutes for Newfoundland will be assured as indicated in the first paragraph. This can otherwise be done by assuring that amendment to section 93 of the B.N.A. Act be amended only following an amended form of section 43 of the federal proposal, notwithstanding section 41 or 42.

The Committees are also concerned by the wording of section 47 and would like it to guarantee the approval of a legislature affected by a change.

Finally section 49 must be amended to make sure that a provincial legislature may not alter rights indicated in section 93 of the B.N.A. Act.

PENTECOSTAL EDUCATION SYSTEM

Since the denominational rights to Pentecostal Assemblies are not included in the original Terms of Union, section 17, it is asked that the request of the Newfoundland Legislature of 1968 to amend Term 17 to include the Pentecostal Assemblies of Newfoundland, thus entrenching their rights, should be responded by the federal government and consequently, the proposed amendment be effected before the Constitution is patriated in Canada.

This way the Pentecostal Assembly will be protected under Newfoundland's Terms of Union on the denominational education system in Newfoundland.

The Pentecostal Education Committee recommends that the federal government includes in article 1, 15, 25 and 43 of the proposed act wordings clearly insuring the rights indicated under Term 17 of the British North America Act. This will insure the future of the denominational system in Newfoundland.

PROPOSALS

Any right or privilege with respect to denominational, separate or dissentient schools granted or secured under section 93 of the Constitution Act, 1867, (formerly named the British North America Act, 1867), as amended, or under any provision of the Constitution

of Canada in substitution thereof, shall be a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms.

The guarantee in this Charter of certain rights and freedoms shall not be construed or interpreted as abrogating or derogating from any right or privilege with respect to denominational, separate or dissentient schools granted or secured under section 93 of the Constitution Act, 1867 (formerly named the British North America Act, 1867), as amended, or under any provision of the constitution of Canada in substitution thereof.

PROPOSED AMENDMENT

50. An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 41 or 42:

(h) Section 93 of the Constitution Act, 1867, (formerly named the British North America Act, 1867), as amended, and any provision of the Constitution of Canada in substitution thereof, provided always that no amendment in relation to this matter shall apply to any province unless it is authorized by resolution of the Legislative Assembly of that province, and provided further that no amendment in relation to this matter shall apply to any class or persons having rights and privileges in relation thereto in that province without the consent of any such class of persons.

43. Notwithstanding section 41 and 42, 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 ONLY 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.

49(2) This section shall not be deemed to authorize an amendment to section 93 of the Constitution Act 1867 (formerly named the British North America Act, 1867), as amended, or any other provision in substitution thereof.

SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Fédération des francophones hors Québec

DATE OF APPEARANCE: Wednesday, November 26, 1980; 4:30 p.m.

SOURCE OF NOTES: Brief

BACKGROUND: The Fédération des francophones hors Québec groups, since 1976, the nine provincial associations which, some time ago, took up the defence of the rights of francophones living in the nine Canadian provinces where the majority is anglophone.

Prepared by: Paul Martin

Research Branch
Library of Parliament

November 25, 1980

SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

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Research Branch
Library of Parliament

November 25, 1980

MAIN THEME

The F.F.H.Q. has long recognized the importance of enshrining individual and collective rights in the Canadian Constitution. However, in its view, the resolution currently under review is incomplete and should be greatly improved so that true linguistic equality between the francophones and anglophones of Canada can be assured.

MAIN POINTS

INSTITUTIONAL BILINGUALISM

The francophones outside Quebec deeply regret that the Constitution Act, 1980, does not explicitly recognize the principle of the two founding peoples of this country. The Federative pact of 1867 originated with the francophone and anglophone peoples.

With respect to official bilingualism, a first reading of sections 16 to 22 seems to give francophones outside Quebec reason to hope for the future. The charter of linguistic rights in the Constitution Act has priority over all other legislation. That seems to be a step forward since such is not the case with the present federal Official Languages Act.

s.21

Furthermore, under section 21, none of the provisions for language protection existing when the act comes into force, could be abrogated or diminished. For example, the rights and privileges set out in section 133 of the B.N.A. Act are continued for Quebec as are those set out in section 23 of the Manitoba Act. But, what protection will the francophones in the eight other provinces enjoy? Which minorities will be protected by the 1980 Constitution Act? Yet, over 50% of francophones outside Quebec live in Ontario. Why not include New-Brunswick at a time when it is about to recognize equality of status for its two linguistic communities and when its Prime minister has expressed his willingness to extend the application of section 133 of the B.N.A. Act to his province?

s.16

According to the F.F.H.Q., a more in-depth perusal of sections 16 to 22 of the proposed Resolution reveals several limits attached to the stated principle. Section 16 itself is ambiguous: it is derived from section 2 of the Official Languages Act, the exact scope of which the courts have so far been unable to define.

Furthermore, the principle enunciated in section 16 recognizes the equality of status and the equal rights and privileges of the use of the French language, but only to the extent provided for in the Charter. But, the obligation to use French is extremely limited. In fact,

sections 17 to 22 which clarify the enforcement of the principle set out in section 16 limit its scope, to such an extent that the francophones outside Quebec will find that their right to use French is as limited as it ever was before the proposed enshrining. For example, equality is recognized to the languages and not to the individuals and we might well wonder who could demand that the act be enforced.

Other ambiguities arise from the wording. What is the exact meaning of the word "institutions"? Differences are pointed out between the English and French texts: "in all institutions" becomes "dans les institutions" in the French version (s.16); does "travaux du Parlement" have the same meaning as "other proceedings"? (s.17) How would "tribunaux établis par le Parlement" be interpreted as compared to "any court"? (s.19,

s.17

s.19

s.20

The interpretation of the right to communicate with the offices of the federal government in the official language of one's choice, provided for in section 20, may give rise to a further restriction. Does the act create two classes of francophones outside Quebec on the basis of their residing close to or far from government offices?

s.21

Does section 21 protect rights guaranteed in other acts and namely in parts of the Canadian Official Languages Act although they are not included in the Constitution?

s.16(2)

The constitutional proposal leaves the francophones outside Quebec at the mercy of legislatures which might or might not choose to "extend the status or use of English and French or either of those languages" (s.16(2)). The Constitution Act, 1980, provides for no concrete mechanism, nor for any institution to ensure the enjoyment of the rights and privileges it wishes to guarantee in principle through section 16.

The francophones outside Quebec ask that the limits on the enjoyment of the right to use French, as set out in section 16, be eliminated.

RIGHT TO EDUCATION IN FRENCH FOR FRANCOPHONES OUTSIDE QUEBEC

s.23(1)

In a minority environment, the school is the main vehicle for the development of language and culture.

Section 23(1) appears to the F.F.H.Q. to be a goal that the legislator sets for himself rather than the true recognition of the right to education in French for the francophones outside Quebec. In its opinion, section 23(1) cannot, for example, force a government to provide a French school.

Furthermore, the wording of section 23(1) is so vague and leaves room for so many interpretations that provincial governments will look for as many loopholes as possible to refuse education services in French. The F.F.H.Q. wonders which criteria will be used to determine how many citizens there are "whose first language learned and still used" is French and what authority (ies) will be empowered to measure these criteria and to ensure that they are implemented. Section 23 does not specify what definition is to be given to the terms "area", "public funds" and "educational facilities".

Given the wording of section 23(1), the F.F.H.Q. does not think the francophones outside Quebec will be entitled to demand education totally in French, curricula, educational structures or the construction of homogeneous French schools. This is no minor problem since it may perpetuate the system of mixed schools. The right to education in French should not be confused with the right of francophones outside Quebec to demand French schools for their children.

The F.F.H.Q. also wonders what legislative or administrative authority will determine when the number of students is indeed sufficient. Will it be the school boards, the provincial ministries of education, the federal government or the courts? In this respect, it notes that the Charter of the French language in Quebec (Bill 101) does not impose numerical considerations on the anglophone minority of that province with regards to access to education in the language of the minority.

In fact, it would appear to the F.F.H.Q. that section 23(1) holds a traditional view of teaching in that it does not take into account technological developments.

A further, rather paradoxical aspect of section 23, to the extent that it might in fact be applicable, is that it only guarantees access to education at the primary and secondary levels. The anglophones in the province of Quebec have access to kindergarten, to primary and secondary schools, to colleges and universities offering education in their language. They also enjoy control over and management of their educational institutions.

Section 23(1) should be reworded so as to eliminate the two sets of standards. We would thus avoid having nine definitions of what constitutes, for example, a sufficient number of students or of what are in fact "educational facilities" to which francophones outside Quebec might have access. Furthermore, in the absence of any mechanism governing the enforcement of this right or setting precise rules to which anglophone provinces should comply, the right to education will remain as uncertain as it is now.

In its present form, section 23(1) places the burden of proof on the shoulders of francophone minorities outside Quebec. They will have to support lengthy delays before decisions are handed down by the judicial body. In the view of the F.F.H.Q., it is possible to do away with this difficulty by setting up a special court whose mandate will be to interpret, in as uniform a way as possible, the right to education in the language of the minority and to settle disputes arising out of the interpretation of the charter of linguistic rights.

GENERAL

s.1

The francophones outside Quebec question the need for section 1.

In a system where a tradition of parliamentary supremacy exists, this article can lead the judicial authorities to avoid challenging legislative decisions.

How will the courts interpret "subject only to"? "Generally accepted"? "Free and democratic society"? These difficulties of interpretation might come into play where the wording of sections, such as section 23, is already general and open to many different interpretations.

s.s.34,43

Sections 34 and 43, for the apparent purpose of ensuring flexibility, subtly open the way for federal-provincial bargaining which might harm the interests of francophones outside Quebec, depending on which government is in power. For francophones outside Quebec, this is a sword of Damocles permanently suspended above their heads.

s.52

The F.F.H.Q. was astonished to note that the Northwest Territories Act of 1877 is not included in Schedule I. If French and English were confirmed in Alberta and Saskatchewan by this act of 1877, the legislatures of these provinces could abrogate the status of the French language since the act which provides for it is not included in Schedule I which lists the legislative measures and orders which are part of the Constitution (s.52).

RECOMMENDATIONS

The Fédération des francophones hors Québec submits the following recommendations to the Committee's attention:

1. That the Constitution Act, 1980, and the Preamble of the of the future Canadian Constitution recognize the principle of the two founding peoples, francophone and anglophone, without prejudice to the rights of the Native people, as the very foundation of the Canadian Confederation and of the institutions which are a part of it.

2. That the principle of the equality of status of the French and English languages, as set out in section 133 of the B.N.A. Act, apply to all the provinces, and that it apply immediately to Ontario and New-Brunswick.
3. That the citizens have the right to use the official language of their choice before all judicial and administrative tribunals established by Parliament or by provincial legislatures.
4. That section 20 of the proposed Resolution dealing with the use of official languages apply to the governments of all the provinces.
5. That section 23 of the Constitution Act, 1980, be reworded so as to ensure the recognition of the right of francophones outside Quebec to education in their language from the pre-school to the post-graduate levels inclusively and of the right to schools and homogeneous school boards as well as to the administration of their educational facilities.
6. That a mechanism be established with very extensive powers whose mandate would be to settle disputes arising out of the enforcement of the charter of linguistic rights.
7. That section 1 be deleted or reworded in such a way that it may not be used to diminish or cancel the effect of the charter of linguistic rights.
8. That sections 34 and 43 allowing amendments to be made to the Constitution by agreement between the federal government and one or more provinces be amended in such a way that the rights of the official language minorities will, under no circumstances, be diminished or cancelled by the use of these articles.
9. That the Northwest Territories Act of 1977 be added to Schedule I and be part of the new Constitution.

COMMENTS:

Of the many groups who made representations to the Committee concerning the question of linguistic rights, none, to my knowledge, has recommended that section 15(1) be amended to include "language" in the list of prohibited grounds of distinctions. (Language is a prohibited ground of distinction in the Quebec charter of human rights and freedoms; the other acts, bills and charters, whether federal or provincial, do not provide so.) It might be useful to ask the F.F.S.Q. to speak to the need or advisability of amending s.15(1) to this effect.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Federation of Canadian Municipalities:

Mr. Dennis Flynn, President and Mayor of Etobicoke
Miss Glennis Perry, Executive Director of the
Federation

DATE OF APPEARANCE: November ²⁰~~18~~, 1980, 4:30 p.m.

FORM OF SUBMISSION: Municipal Government in a New Canadian Federal System: Report on the Resource Task Force on Constitutional Reform, 1980 (155 pages), plus a three-page summary.

BACKGROUND:

The Federation of Canadian Municipalities is the only national association for local governments. There are approximately 300 member municipal governments and 18 of the 20 provincial associations of local governments are members. In total, about eighty per cent of the Canadian population is, in a sense, represented within the Federation.

The Task Force on Constitutional Reform was established in January 1979, and charged with the task of preparing a scientific report that would set out the existing situation of municipalities within the Canadian system and would canvass the main alternatives for change available for the future.

Prepared by: John McDonough

Research Branch
Library of Parliament

18 November 1980

BASIC THEME:

A new Constitution ought to provide for a constitutional rôle, status, and powers (legislative and financial) of the municipalities as the third level of government within Canadian Confederation.

MAJOR POINTS:

In the post-World War II era the marked increase in the proportion of the Canadian population living in urban municipalities has led to new social and economic problems which have severely strained the largely static municipal financial resources.

The Federation has indicated that there is a crisis in decision-making power, flowing from the fact that existing municipal constitutional-legislative competences and their established techniques of social control through law could only with difficulty encompass the new social problems and the new forms of civil and criminal delinquency that accompany them.

As the Federation recognizes under the British North America Act Canadian municipalities are the creatures of the Provinces, and their powers to legislate and to impose taxes and raise revenues must therefore be derived, by constitutional indirection, from Provincial powers.

It complains that municipalities are denied legislative and fiscal autonomy and that the powers which they have are subject to the vagaries of Provincial governments which have tended not to have long-range, rational and orderly community development plans. Municipalities are not able to enter into agreements with the Federal government without using the intermediary of the Provincial governments. In comparison to other federal systems (United States, West Germany), Canada lacks the concrete machinery for intergovernmental cooperation involving the three levels of government (federal, provincial, municipal), or some of them, at any one time, and also as to the guarantee, on some more long-range and continuing basis, of legislative autonomy and financial autonomy to the municipalities, and even institutional autonomy (meaning here the ability to revise or amend, on one's own initiative, the basic municipal charter).

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RECOMMENDATIONS:

- Entrenchment in the Constitution of the principle of local government and of the three local government "autonomies" - legislative, financial, and institutional.
- The detailed specification of such "autonomies" in Provincial constitutional charters, or in the general Provincial constitutional systems in the absence of a specific Provincial constitutional charter.
- The same results could be achieved by putting everything in a new Constitution - both the general principles and also the detailed specifications, and that would involve an uninhibited constitutional acceptance of the existence of the three distinct levels of government, each of these being autonomous within its own federal system as a whole in deference to the principle of federal comity.

COMMENTS:

As already noted the position of the Federation of Canadian Municipalities runs against section 92(8) of the B.N.A. Act which states that municipal institutions in the Province are within the exclusive jurisdiction of the province. The proposed Joint Resolution, it is argued, has attempted to steer clear of any direct infringement of the constitutional division of powers and that is precisely what the municipalities seek.

It has been argued that many of the objectives of the proposed Joint Resolution are unlikely to be accomplished by any other means in the foreseeable future and therefore, to some extent, the end does justify the means. The Federation representatives might respond to whether or not they feel there is any likelihood of a change in their status given the present attitudes of Provincial governments. Is there any likelihood that administrative procedures might evolve to permit trilateral (federal-provincial-municipal) relations particularly in relation to the provision of public services? What is the present state of federal-municipal relations? What role is to be played by the Federal government with respect to urban problems under the current Constitutional system? What improvements might be possible under the current Constitution?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Federation of Independent Schools of Canada:

Mrs. Molly Boucher, President
Mr. Patrick Whelan, Treasurer
Mr. Gary Duthler, Director

DATE OF APPEARANCE:

December 18, 1980, 12:00 noon.

SOURCE FOR NOTES:

Letter to the Special Joint Committee.

BACKGROUND:

The Federation of Independent Schools represents over 90,000 pupils registered in a variety of independent schools across Canada.

Prepared by: Serge Pelletier
Research Branch
Library of Parliament

December 17, 1980

MAIN POINTS:

The Federation proposes that the constitutional rights of denominational schools as referred to in s. 93 of the BNA Act be specifically protected by the Charter of Human Rights.

RECOMMENDATIONS:

s. 15(2)

Other exemptions ought to be provided because race, creed, colour, age, etc., may be a "bona fide" occupational qualification and requirement for certain exclusively religious, philosophic, social and other non-profit organizations. Such corporate right would stand over against the individual rights to employment, for example, by a teacher of any other faith and against the right to continued employment where a person duly hired ceases to be in good standing in that community.

s. 23

Educational rights should be expanded beyond language educational rights to allow a more comprehensive freedom of choice in education to reflect ethnic, religious or other differences.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Federation of Saskatchewan Indians (FSI)
Sol Sanderson, Chief of FSI
Rodney Soonias, counsel
Delia Opekokew, counsel

DATE OF APPEARANCE: 18 December 1980
4:30 P.M.

FORM OF SUBMISSION: Book - The First Nations: Indian Government and the Canadian Confederation

SOURCE FOR NOTES: The First Nations, and conversation with Dr. Victor O'Connell, President, Kanata Institute for development and cultural pluralism

BACKGROUND: The FSI represents the registered and treaty Indians of Saskatchewan, who number approximately 50,000, and belong principally to the Dene, Dakota and Cree Nations. The FSI plays a leading role in the organization of educational, economic and governmental structures for its Saskatchewan constituents, and is that province's member in the National Indian Brotherhood.

Prepared by: Amos Shlosberg

Research Branch
Library of Parliament

18 December 1980

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SUMMARY

BASIC THEME:

Whether or not the Constitution is patriated, aboriginal rights must be entrenched. The expression of these rights must occur within the context of the recognition and entrenchment of the co-equal status of sovereign Indian governments having political and economic control of their community within the framework of confederation.

MAIN POINTS:

Native people have special rights in international law and are entitled to their aboriginal homelands and full control over their natural resources. Aboriginal rights encompass the Indian government's sovereignty over its people, lands and resources. This concept has historical recognition in the trust relationship of the native people with the Crown which has assumed responsibility for their protection.

The principle that can only fully be protected by entrenchment in the Constitution is that no form of government in Canada shall have the power to take or regulate any resources located on or associated with Indian lands, by any means, without the consent of the governing body of the Indian Nation. This governing body, without prejudice to its ultimate form shall have inter alia:

- the power to determine the forms of government;
- the power to define conditions for membership in the nation;
- the power to administer justice and enforce laws with the backup of court and enforcement systems;
- the power to tax;
- the power to regulate domestic regulations (marriage, divorce, illegitimacy, adoption, guardianship, and support of family members);
- the power to regulate property use;
- the power over social programs (i.e. the power to protect and promote the health, education and general welfare of our members through social, cultural and economic programs).

(First Nations, p. 45)

as well as the authority to delegate any of its powers.

- 3 -

The government of Canada, as the representative of the Crown should fulfill the latter's obligations by constitutionalizing aboriginal and treaty rights:

- (1) to protect the continued status of Indian people as Indians;
- (2) to protect and enhance Indian trust lands and resources;
- (3) to recognize Indian governments, which governments control their own legislative, executive and judicial bodies;
- (4) to include bands and their governments such as the FSI as units of self-government for revenue sharing purposes so that we are eligible for direct grants from the federal government;
- (5) to exclude Indians and their governments from any Charter of Rights and Freedoms which could come in conflict with group rights basic to Indian beliefs and the egalitarian ideals of Canada.

(First Nations, p. 45)

Such provisions would substantiate the principle that the Indian Treaties were entered into in the context of a confederation with the native peoples party to them, forming a political union with Canada for military, diplomatic and economic purposes. The ultimate form of Indian government may be decided by a referendum of Indian people.

Some of the choices for that form are:

1. The retention of the present system of trust relationship but with recognition of sovereign Indian governments, the creation of an Indian Rights Protection Office, and the enactment of an Indian Bill of Rights.
2. The establishment of an Indian province, whose territorial lease would be scattered across Canada.
3. "The complete reorganization of the constitution so that Canada is reorganized as a true confederation with the Indian governments being one group of sovereign states or provinces delegating certain responsibilities to a central government." (First Nations, p. 47)



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

German-Canadian Committee on the Constitution:

Dietrich P. Kieseewalter, Co-ordinating Chairman
Professor Gunther Bauer - Vice Chairman, Ottawa
Regional Alliance
Professor Klaus Bongart - Chairman, Kitchener-
Waterloo Regional Alliance, National Chairman,
Association of German Language Schools
Benno Knodel - Chairman, German-Canadian Alliance of
Alberta
Dr. Arthur Gaenke, Historian, National Archives

DATE OF APPEARANCE: 15 December 1980: 9:00 p.m.

FORM OF SUBMISSION: Brief (5 pages)

SOURCES OF NOTES: The German-Canadian Committee on the Constitution is an ad hoc group formed this year to examine and comment upon the proposed Joint Resolution. The Committee is affiliated with eleven national organizations of Canadians whose ethnic origins are from German-speaking countries, as well as with local organizations and interested individuals.

Prepared by: John McDonough

Research Branch
Library of Parliament

15 December 1980

MAIN POINTS

After Canadians of Anglo-Saxon or French background, German-Canadians are the largest ethnic group in Canada. German settlement dates back 227 years; they were among the early pioneers and today, German-Canadians are second only to the Anglo-Saxon majority in a number of provinces.

The German-Canadian Committee on the Constitution wishes to emphasize that it is dismayed with the speed with which the proposed Joint Resolution is being handled. It is also apprehensive about the growing rift among the various regions of Canada.

The committee is opposed to any threat to the unity of Canada.

Charters of Rights in and by themselves do not guarantee the protection of minorities. American citizens of German origin were not protected during the World Wars by the American Bill of Rights.

German-speaking citizens of Canada have faced discrimination and today are the victims of negative stereotyping.

RECOMMENDATIONS

s. 1

The limitations clause

This section is unacceptable. A "generally accepted" limitation of Rights and Freedoms in a parliamentary democracy is a limitation which is accepted by the majority. The guarantee for basic rights and freedoms must endure under all circumstances.

s. 2(b)

Freedom of expression

During the war years, Canadians of German origin were victims of mass hysteria; today, they are victims of negative stereotyping. There must be some form of effective prohibition against hate propaganda. The committee also recommends that the government implement laws which will make the mass media accountable for negative stereotyping and put additional means at the disposal of minority groups, so that they can more effectively protect themselves against such slander.

Multiculturalism

The Committee is disturbed to find the concept of Multiculturalism excluded from the proposed Charter of Rights.

s. 15

Non-discrimination rights

This section enunciates the right to equality before the law and to equal protection of the law without discrimination on a list of specific grounds. There is, however, no mention of cultural rights nor any guarantees to educate children in a third language.

s. 23

Minority language educational rights

The Committee strongly recommends that educational and cultural rights remain unqualified under provincial jurisdiction. If a proposed charter of Rights is to make any qualifications on this matter, these should be general and to the effect that all Canadians are to be guaranteed the right to choose and to develop their own culture. As it stands, s. 23 is a betrayal of the Federal Government's promise in 1971 that no one ethnic group would take precedence over any other.

COMMENTS

Other ethnic minority groups in appearing before this Special Joint Committee have wanted to see the concept of multiculturalism enshrined in a new Canadian constitution. There has, however, been some disagreement as to how this might be best accomplished. Some has stressed that multiculturalism or cultural diversity and plurality should be mentioned in a preamble to the constitutional document. Others have indicated that the preamble approach would not be very helpful and that multicultural rights should be enshrined in the Charter of Rights itself. Would the German-Canadian Committee on the Constitution care to comment on each of the above approaches?

The German-Canadian Committee could be asked how it would specifically define multicultural rights?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Government of New Brunswick
 The Honourable Richard Hatfield, Premier of New
 Brunswick

DATE OF APPEARANCE: December 4, 3:30 p.m.

SOURCE OF NOTES: Appendix I, of the Premier's Brief; telephone
 conversations with Barry Toole, Deputy Secretary
 to Cabinet for Policy and Priorities, and Don
 Dennison of the staff of the Executive Committee
 of Cabinet.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 3, 1980

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- BASIC THEME: Premier Hatfield has stated that he is prepared to approve the proposed Joint Resolution despite reservations that he may have respecting it. He feels very strongly that some matters, especially the referenda provisions, ought to be changed.
- MAIN POINTS: Premier Hatfield will ask that all referenda provisions be deleted from the proposed Joint Resolution.
- He approves in principle a Charter of Rights and will offer specific suggestions for improvement.
- He will comment on the situation respecting Native Canadians. There should be clear protection of their rights and land claims in the Constitution.
- It is important that there be a provision for equalization payments to be made directly to provincial governments. Although the Premier prefers the wording of the provincial consensus of September 1980, that wording was not agreed to by all provincial governments. The New Brunswick proposal is modified in the hope that it will achieve a greater degree of consensus.
- RECOMMENDATIONS:
- s. 1 Limitations Clause
- Section 1 should be amended by changing the period at the end thereof to a comma and adding thereto the following:
- "where those limits do not involve discrimination solely on the grounds of race, colour, sex, language, religion, political opinion, national or social origin, property or birth."
- ss. 8, 9, 11(d) Legal Rights
- The phrase "in accordance with procedures established by law" should be deleted from each of these sections.

s. 8

Search or Seizure

Section 8 be amended to read as follows:

"Everyone has the right to be secure
against unreasonable search and seizure."

s. 9

Detention or Imprisonment

Section 9 be amended to read as follows:

"Everyone has the right not to be arbitrarily
detained or imprisoned."

s. 11(d)

Proceeding in Criminal Matters: Bail

Section 11(d) be amended to read as follows:

"not to be denied reasonable bail without
just cause."

s. 15(1)

Non-Discrimination Rights

Section 15(1) 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, colour, sex, language, religion,
political opinion, national or social origin,
property, birth or other status."

ss. 16-20

Official Languages of Canada

New Brunswick seeks constitutional recognition that
English and French are the Official Languages of
New Brunswick and as such they shall have official
recognition in the courts, and legislature of New
Brunswick and residents of New Brunswick will be
able to communicate with their government in either
language.

s. 16

Official Languages

Subsection 16(2) be renumbered to subsection 16(3) and the following be inserted as subsection 16(2):

"English and French are the Official Languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the Legislature and Government of New Brunswick."

s. 17

Proceeding of Parliament

Section 17 be renumbered as subsection 17(1) and the following be inserted as subsection 17(2):

"Everyone has the right to use English or French in any debates and other proceedings of the Legislature of New Brunswick."

s. 18

Parliamentary Statutes and Records

Section 18 be renumbered as subsection 18(1) and the following be inserted as subsection 18(2):

"The statutes, records and journals of the Legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative."

s. 19

Proceeding in Courts Established by Parliament

Section 19 be renumbered as subsection 19(1) and the following be inserted as subsection 19(2):

"Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by the Legislature of New Brunswick."

s. 20

Communication by Public

Section 20 be renumbered as subsection 20(1) and the following be inserted as subsection 20(2):

"Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the Legislature or Government of New Brunswick in English or French."

s. 24

Undeclared Rights and Freedoms

This should be amended to more clearly and positively recognize the rights of the native peoples of Canada.

Part III

s. 31(2)

Equalization and Regional Disparities

Subsection 31(2) be amended to read as follows:

"Parliament and the Government of Canada are further committed to the principle of making equalization payments to provincial governments that are unable to provide essential public services of reasonable quality without imposing an undue burden of taxation."

Part IV

ss. 38(3), 39, 40

Interim Amending Procedure
Referendum Procedures

These sections should be deleted.

Part V

s. 41(1)(a)(ii)

Procedure for Amending Constitution of Canada
General Procedure

The qualification that if two Atlantic provinces join to defeat a constitutional proposal they must contain at least 50 per cent of the population of the region should be amended as follows:

"at least two of the Atlantic provinces, and".

s. 42

Amendment Authorized by Referendum

This section should be deleted.

s. 46

Rules for Referendum

This section should be deleted.

COMMENTS:

Perhaps Premier Hatfield could comment on why he thinks it preferable to revise sections 16 to 20 of the proposed Joint Resolution to make English and French the Official Languages of New Brunswick than to amend section 133 of the British North America Act.

It is noteworthy that Premier Hatfield has taken a "civil liberty" approach in his proposed amendments to sections 8, 9, and 11(d) where he seeks the removal of the phrase "in accordance with procedures established by law". One might then have expected that he might take a similar approach to section 26 - laws respecting evidence. Does the Premier think that this section should be left as it is?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Government of Nova Scotia

The Honourable John Buchanan, Premier of Nova
Scotia

The Honourable Harry How, Attorney General of Nova
Scotia

DATE OF APPEARANCE: 2 December 1980: 11:00 a.m.

SOURCE OF NOTE:

Telephone conversation with Mr. Jeremy Akerman,
Executive Director of Intergovernmental Affairs; he
emphasized the "unofficial" nature of his comments.

Prepared by: John McDonough

Research Branch
Library of Parliament

1 December 1980

MAIN POINTS:

The Premier will agree to "patriation" of the British North America Act with an amending formula.

However, the proposed Joint Resolution should be suspended immediately and remain suspended while the matter is before the courts.

The consultative process, via meetings of First Ministers, should be reconvened immediately. The one item on the agenda should be an amending formula.

Nova Scotia remains flexible as to the possible choices. Either the Vancouver consensus or the Victoria formula will be acceptable. If Victoria is to be chosen, then there should be an amendment to protect Prince Edward Island. However, there must be federal-provincial agreement on an amending formula.

When this consensus is reached, the British Parliament should be informed. They should amend the British North America Act with the addition of the amending formula which has been agreed upon in Canada. The British Parliament should then repeal section 7(1) of the Statute of Westminster and if possible, renounce any further rights to legislate with respect to the Canadian Constitution.

All future amendments of the Canadian Constitution should be made by Canadians in Canada. This includes any proposal for a Charter of Rights.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The Government of Prince Edward Island

Honourable J. Angus MacLean, Premier of Prince
Edward Island

Honourable Fred Driscoll, Minister of Education

Mr. Don G. MacCormac, Assistant Secretary to Cabinet
for Intergovernmental Affairs

DATE OF APPEARANCE: 27 November, 1980, 8:00 p.m.

FORM OF SUBMISSION: Brief (24 pages). Appendix containing statements by
the Government of Prince Edward Island during the
September 1980 First Ministers Conference (61 pages).

Prepared by: John McDonough

Research Branch
Library of Parliament

26 November 1980

BASIC THEME

Prince Edward Island opposes, in principle, the process of unilateral action. The Premier does however elaborate on some of his specific concerns with the substance of the Joint Resolution, especially the proposed amending formula, the use of referenda, the Charter of Rights and equalization.

MAIN POINTS

The Constitution is no ordinary law, it must not be imposed on the people by a group which has only a simple majority.

Most constitutions require unanimity to change them or, at the very least, a two-thirds majority.

The Constitution of Canada should be written by the people through their elected representatives in all eleven legislatures - in other words, through the political process. Because the political process has been thwarted by the Federal Government, Prince Edward Island is asking the courts to rule on the legality of the proposed Joint Resolution.

The Government of P.E.I. states that there exists in the country the basis for a constitutional package, given sufficient time and good will. To underline this point, Premier MacLean details the degree of provincial agreement in September 1980.

A basic problem with the present structure of Canadian federalism is the lack of a significant role for the provinces within national parliamentary institutions.

RECOMMENDATIONS

Part V. Procedures for Amending Constitution of Canada

The Government of Prince Edward Island maintains that the proposal is wrong when it imposes an Amending Formula on the country. The B.N.A. Act should be patriated, and an Amending Formula should be developed through agreement of the provinces and the Federal Government.

s. 41

General Amending Procedures

Prince Edward Island does not seek a veto power on constitutional amendments. (Appendix A, p. 45 - Premier MacLean indicated approval of the Vancouver agreement.)

Premier MacLean notes that in the formula in the proposed Joint Resolution, P.E.I. would be a third-class province as it would not be possible for P.E.I. in concert with any other province of the Atlantic Region to be representative of 50% of the population of that region. He would therefore welcome the change that has been suggested which would delete the need for two of the Atlantic provinces to constitute 50% of the population of the region.

s. 42

Amendment authorized by Referendum

Premier MacLean strongly urges the Committee to delete this section from the proposed Joint Resolution.

Constitutional deadlocks must be overcome by the traditional processes of consensus, compromise and cooperation.

Part I

The Canadian Charter of Rights and Freedoms

The Government of Prince Edward Island agrees that fundamental rights must be protected but disagrees with the method of entrenchment because it fears that it would weaken parliamentary democracy.

ss. 16-22

Official Languages of Canada

A new Constitution should preserve the existing constitutional rights, privileges and obligations respecting the French and English languages.

s. 20

The obligation that federal undertakings be made available in both languages is acceptable.

s. 23

Minority Language Educational Rights

The provincial legislatures must determine the extent to which provincial undertakings will be undertaken in which language. The legislatures must respect the rights and wishes of their minorities on the language question.

s. 15

Non-discrimination clause

This may require the abandonment or alteration of some highly valued legislative schemes. For example, Human Rights legislation has limits and exceptions which would be in violation of this section. Age-based schemes would be jeopardized.

s. 6

Mobility Rights

Premier MacLean expressed appreciation that the Federal Government withdrew its proposal to include in the Charter "the right of a citizen to own land in any province".

Premier MacLean might be asked whether he is pleased that the "right to own property" is not included elsewhere in the Charter.

Part II

s. 31

Equilization

Premier MacLean agrees with entrenching the principle of equilization in the Constitution.

He would like to see s. 31 improved by the mention of the words "equalization payments" and with the indication that these will be made to provincial governments.

The phrase "undue burden of taxation" is unclear and ill-defined.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Government of Saskatchewan

DATE OF APPEARANCE: 19 December 1980: 9:30 a.m.

SOURCES OF NOTES: Transcripts of the following statement and speeches by
Premier Alan Blakeney:

Statement on the proposed Joint Resolution, October 9
Speech, Dalhousie Law-Alumni Association, October 27
Speech, Wheat Pool, November 17
Government of Saskatchewan News Release, Intergovern-
mental Affairs, October 20, 1980.

Prepared by: John McDonough

Research Branch
Library of Parliament

18 December 1980

BASIC THEME:

Process:

Premier Blakeney has consistently objected to the unilateral nature of the proposed Joint Resolution. It is inconsistent with Canadian historical traditions and the nature of federalism.

Content:

Premier Blakeney has important reservations about what is and what is not contained in the Joint Resolution. He has, however, taken the approach that improvement will be feasible if the Federal Government is flexible and he may ultimately be able to support the proposal. But, he indicated on November 17 that Saskatchewan is not prepared to agree on the basis of a general commitment. "We will not consider agreeing to a new constitutional package until the 'i's' have been dotted and the 't's' crossed."

MAIN POINTS:

Premier Blakeney supports the objective of patriating the British North America Act but would have preferred that it be part of a larger package directed to a renewed federalism.

With respect to the Charter of Rights and Freedoms, it is the Saskatchewan view that, aside from language rights, it is unwise to entrench such a charter in the constitution as it is a move away from a desirable British tradition, toward a less desirable American tradition.

The provisions for the general amending formula must be changed so that the referendum procedure will not be loaded in favour of the federal government.

The commitment to equalization must be strengthened.

The aspects of the non-discrimination clause in the Charter of Rights must be examined for its probable effects on existing provincial laws, such as those regarding separate schools.

Ottawa must add a new provision, beyond those agreed to by N.D.P. leader Ed Broadbent, to strengthen provincial rights over resources. Attorney General Romanow has stressed that this is the key issue.

RECOMMENDATIONS:

ss. 16-20

Official languages of Canada

Language rights are part of the Confederation bargain and should be entrenched in the Constitution.

s. 23

Minority Language Educational Rights

Saskatchewan supports the entrenching in the Constitution of reasonable provisions respecting language rights in primary and secondary schools.

Part II

s. 31

Equalization and Regional Disparities

Saskatchewan strongly supports a revision to s. 31 to refer specifically to equalization payments.

Part V

Procedure for Amending the Constitution of Canada

s. 41

General procedures

In his Dalhousie speech, Premier Blakeney indicated that Saskatchewan is prepared to support an amending process which is similar to s. 41 although he would prefer a process which requires the consent of Parliament and the legislatures of all provinces with 20% of Canada's population, two of the Atlantic provinces and two Western provinces that have 50% of that region's population.

s. 41

Amendment authorized by Referendum

The Saskatchewan concerns are as follows:

1. The process could be used to by-pass totally the provincial legislatures. There is no requirement that the constitutional amendment even be considered by provincial legislatures before a referendum is called. Thus there could be a situation of extensive parliamentary debate - well publicized - little or no legislative debate and then a referendum. This clearly undermines the position of provincial legislatures, and deprives the public of adequate Parliamentary and legislative debate before a referendum. This provision must therefore be changed.

2. The process permits a referendum where provincial legislatures fail to agree to a federal proposal for constitutional change, but does not provide for a referendum where Parliament fails to agree to a proposal for constitutional amendment passed by all the provincial legislatures. It is a way to temper provincial intransigence but not federal intransigence.
3. All the rules respecting the referendums are solely within federal control with none of the safeguards which have been established over the years to ensure, for example, fair federal elections. This clearly requires some revision not only to make the rules fairer in fact, but also so that the rules will be seen to be fair by the Canadian public.

s. 38

Development of a provincially-devised alternative amending formula.

Premier Blakeney has noted that the requirements here are almost impossible to fulfil.

Resources

The amendments agreed to by Prime Minister Trudeau and N.D.P. leader Broadbent meet two of Saskatchewan's concerns - those dealing with indirect taxation and trade between provinces. There is a fear, as a result of court decisions, that Saskatchewan laws regulating the production and taxation of resources which enter international trade may be successfully attacked on the ground that only the federal government can make laws affecting international trade.

COMMENTS:

Charter of Rights

Saskatchewan has among the most advanced human rights legislation in the country. In its presentation before this Committee, the Saskatchewan Human Rights Commission indicated that, at present, federal legislation and judicial interpretation has a restrictive influence on their activities. They therefore argued for an entrenched Charter of Rights and asked that it provide for recourse, in the first instance, to statutory bodies such as their own. Knowing that the Government of Saskatchewan has supported the Saskatchewan Human Rights Commission in the past, would the Premier care to comment on their recommendations concerning the proposed Charter of Rights?

Noting that Saskatchewan has a large native population, would Premier Blakeney care to see aboriginal "rights" more firmly entrenched in the new Constitution?

It has been suggested that s. 26 (laws respecting evidence) is in the Charter at provincial insistence. Would Premier Blakeney care if it were removed?

Amending Formula

In light of the controversy with respect to the Western veto in the proposed amending formula, Premier Blakeney might be asked whether he favours a formula that requires two Western provinces with at least 50% of the region's population or simply two Western provinces without regard to population. Saskatchewan would have more say under the latter formulation as it has the smallest population of the Western provinces.

Does Premier Blakeney see a role for the Northwest Territories or the Yukon Territory in an amending formula?

Does Premier Blakeney have any specific suggestions as to how the referendum aspect of the general amending formula could be made more satisfactory?

First Ministers' Conferences

Would the Premier of Saskatchewan care to see the leaders of the governments of the Yukon and the N.W.T. represented as equal partners at future constitutional conferences?

Resources

What additional wording would Premier Blakeney like to see added to the proposed Joint Resolution to strengthen provincial control over resources?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Government of the Northwest Territories

Hon. George Braden, Leader of the Elected
Executive and Minister of Economic Development
and Tourism

Mr. Stien Lal, Legal Advisor to the Territo-
rial Government

DATE OF APPEARANCE:

November 25, 1980, 3.30 p.m.

FORM OF SUBMISSION:

Brief (10 pages)

Prepared by: John McDonough

Research Branch
Library of Parliament

25 November 1980

BASIC THEME:

The Government of the Northwest Territories offers strong support for "the idea of a Canadian Constitution". The firm hope is expressed that the Territories will attain provincehood in the foreseeable future. However, the Government of the Territories seeks greater recognition in the proposed Joint Resolution of its status as a duly elected government and greater consideration for its concerns.

MAJOR POINTS:

The Government of the Northwest Territories seeks recognition in all parts of the proposed Joint Resolution as a legitimate representative Government, including a role at First Ministers' Conferences.

The rights of native people need stronger protection.

Mobility rights would be acceptable in principle, except that such rights will have extraordinary consequences on the small northern population, and the Northwest Territories should therefore be exempted from this provision.

RECOMMENDATIONS:

s. 27

General reference: The Yukon Territory and the Northwest Territories are deemed to be provinces with respect to the Charter of Rights and Freedoms.

Recommend that the application of s. 27 be extended to cover all aspects of the Constitution Act, 1980, and not just the Charter of Rights and Freedoms.

Part IV

s. 33

Interim Amending Procedure

The Government of the Territories ought to be included in the provision requiring unanimous "provincial" consent.

s. 24

Undeclared Rights and Freedoms

The wording of this provision is general and vague. The Legislature and the Government of the Northwest Territories wish Native rights to be clearly and categorically set out in the Constitution.

ss. 16-20

Official Languages of Canada

The Legislative Assembly and Government of the N.W.T. support the preservation of English and French as the official languages.

They do however seek recognition for the "right" of Native peoples to the preservation and use of their languages.

s. 6

Mobility Rights

Unless there is special hiring protection for Northerners especially the Native people, Southern companies engaged in large scale activities in the oil and gas fields may make little or no effort to train and employ Northern residents.

The Northwest Territories should be exempted from this provision.

Part III

Constitutional Conferences

s. 32

Part III as written would disenfranchise Northerners from the right to participate at constitutional conferences at the First Minister level for all time to come or at least until the territories attain provincehood. This should be amended so that the elected leaders of the Territories are invited to attend the annual conference.

COMMENTS:

At the last session of the Legislative Assembly a resolution was passed to accept the principle of the division of the Territories into two parts subject to adequate public consultation and approval by plebiscite.

The Legislative Assembly is bilingual, with translation services in both Inuktitut (the Inuit tongue) and English. The Assembly has moved to increase native language content in

schools, and wherever there are enough students to warrant it, classes are provided in Inuktitut or one of several Dene dialects. French is also taught. Some members of the N.W.T. Legislative Assembly expressed concern that the entrenchment of English and French as official languages might inhibit their progress in strengthening the Native languages.

Might the proposed change to s. 27 (application to Territories to Charter of Rights) give the Northwest Territories provincial status upon passage of the Joint Resolution?

Has the Territorial Government given thought to how s. 24 (non-discrimination clause) might be amended so as to give greater recognition to Native rights and Treaty obligations?

Similarly do they have any wording to propose that could be included in a constitutional clause that would recognize and protect Native languages?

It has been suggested by others with respect to s. 23 (Minority Language Educational Rights) that Native citizens whose mother tongue is neither English or French should have the right to choose education in one language or the other. This proposed change would appear to be of great importance for the Cree who live in Quebec. What implications might it have for the Native peoples of the N.W.T.?

Does the Government of the Northwest Territories have any indication as to whether any of the current ten provinces have any reservations concerning their participation at First Ministers' conferences?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Government of the Yukon Territory

Mr. Chris Pearson, Government Leader of the
Yukon

Mr. Dan Lang, Minister of Tourism and Economic
Development

DATE OF APPEARANCE:

November 27, 1980, 10.30 a.m.

FORM OF SUBMISSION:

Brief (12 pages)

Prepared by: John McDonough
Stephen Fogarty

Research Branch
Library of Parliament

26 November 1980

BASIC THEME:

The Government of the Yukon supports the idea of "patriating" the British North America Act as it will rid Canada of its last vestiges of colonial status. The Yukon also wishes to divest itself of its present "colonial status" and to become a full province of Canada within the foreseeable future. The brief expresses the feeling that the Yukon has been the "neglected child" of Confederation.

RECOMMENDATIONS:

Aboriginal Rights:

That a clear and direct declaration that Canada recognizes the rights of its original peoples be included in the Constitution Act.

The Yukon recognizes that these rights cannot be detailed as they are now the subject of negotiations. Other than for symbolic purposes, would such a general statement of undefined rights be of any practical value?

Would the Government of the Yukon like to see its declaration of Native Rights apply equally to men and women?

Should there be protection for Native languages in the Constitution Act?

Provincehood:

The Government of the Yukon would like to see either a time frame or a constitutional mechanism for the Yukon's ultimate attainment of provincial status.

They propose that the following section be added to the Constitution Act:

Upon satisfying Canada that a majority of the electors in Yukon have indicated, by means of a referendum, that provincial status is desirable, the Government of Yukon may apply to Canada to become a province with all the powers and jurisdictions held by the provinces of Canada according to the Constitution Act in force at that time.

The preceding proposal does not indicate how Canada should respond to a positive referendum from the Yukon. Should the Canadian Government act alone to admit the Yukon as a province? Should this action be automatic? Do

the witnesses think that the other provinces may exercise a veto through the proposed amending formula?

RESOURCES:

Any amendment to the Constitution Act concerning ownership of resources should include a provision which would provide future provinces with equal control over their resources.

s. 32

Constitutional Conferences

Section 32 should be amended to allow the Government of the Yukon to participate as the official representative of the people of the Yukon in all future First Ministers' Conferences.

Would the Government of the Yukon expect a form of participation that would be less than full provincial status, until provincehood was reached?

s. 6

Mobility Rights

A major concern of the Government of the Yukon is the potential clash between the mobility provision of s. 6 and the established policies and legislation of Canada and the Yukon relating to employment, training and recruitment practices. Mega-projects organized by southern contractors require regulatory measures to protect the Yukon from a sudden influx of job-seekers as well as to ensure employment and training benefits for residents of the North. The Government of the Yukon recommends:

That in regions of Canada where significant economic development is taking place, various preferential hiring and purchasing policies may be implemented, provided that the Government of Canada and the provincial government agree that it is in the public interest.

The Government of the Northwest Territories simply asked to be exempt from s. 6. Might this not be a simpler mechanism than the above recommendation?

COMMENTS:

Frequently, arguments made in recent years concerning Yukon provincial status have been largely economic. Some persons maintain that the Yukon's control over resources and increased taxing powers as a province would free it from economic dependency on the federal government. Others claim that even with these increased powers the Yukon, due to its harsh climate and small, dispersed population, would still require substantial financial support. What significance do the witnesses attach to these arguments in relation to provincial status? Do they consider economic considerations to be of primary concern, or is provincehood primarily an issue of democracy (i.e. granting equal rights to Yukoners)?

Yukon Indians, and specifically the Council for Yukon Indians, have on numerous occasions stated that the Yukon should not attain provincial status prior to settlement of their aboriginal claims. What is the attitude of the witnesses to this issue? Should any future Constitutional amendment which might grant provincial status also contain a clause which would entrench the terms of a settlement?



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-SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

SUBMITTED BY: Indian Association of Alberta
Eugene Steinhauer, President
Roy Piekenberg

FORM OF SUBMISSION: Presentation to the Minister of Justice,
October 24, 1980

BACKGROUND: The Indian Association of Alberta is a member group
of the National Indian Brotherhood. This group
represents 42 bands with approximately 36,000
status Indians

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

December 2, 1980

MAIN POINTS:

PATRIATION

Rejects "totally" any attempt by the federal government to patriate the BNA Act unless treaty and aboriginal rights are entrenched in the proposed Canadian constitution. It is only upon recognition of treaties as a part of the constitutional fabric of Canadian government that justice will be brought to Indian people through a fair division of land and resources. (p. 7)

PARTICIPATION IN CONSTITUTIONAL REFORM

Maintains that Indian governments have the legal right to full and direct participation in the process of constitutional reform, a right said to be more fully defined than that of provincial governments. In addition, Indians have as a treaty right the legal right to direct access to the British Crown, and if the rights of Indians are not recognized by Canada, action will be taken to achieve recognition through the British Parliament and courts. Moreover Indians will exercise their right to self-determination, through the holding of referenda, if their rights are not recognized. (pp. 7-8)

The right to participation derives from the treaties, the terms of which provided that Indians would place themselves under the protection of the Crown. This is the "sacred trust" forming the corner-stone of Indian-European relations in Canada, and one to which Canadians are bound, as a condition of achieving independence. Canada's fulfillment of its trust up to now must be questioned. If there are to be changes to this trust or with Indians' relationship to the Crown, Indians must participate as partners in the alteration of this relationship. (;. 4)



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Indian Rights for Indian Women

Mrs. Nellie Carlson, Western Vice-President

Mrs. Rose Charlie, Board Member

Barbara Wyss, Treasurer

DATE OF APPEARANCE: December 2, 1980: 3:30 p.m.

FORM OF SUBMISSION: Brief (6 pages)

John McDonough

Research Branch
Library of Parliament

13 January 1981

IN POINTS:

It is outrageous that the proposed Joint Resolution makes no emphatic reference to the special status of the aboriginal peoples of this country.

The male-dominated native organizations have received Government funding to prepare sophisticated briefs but the IRIW, though it is a national organization, has received no funding.

IRIW favours patriation and an enshrined Charter of Rights. However, a number of the specific provisions of the Joint Resolution are vague, ambiguous in intent, or simply unacceptable in principle.

s. 6

Mobility Rights

Indians have special hunting and fishing rights within their own Treaty areas, but not outside them. Does the provision mean that a status Indian can carry his Treaty rights with him, or not? This matter needs to be stated clearly.

s. 7

Life, liberty and security of person

This section refers to "the principles of fundamental justice". These principles should be specified. If the Lavell decision could be affirmed under this section then the IRIW is unalterably opposed to it.

s. 11

Proceeding in criminal and penal matters

This neglects the fact that most Indians, and indeed, most poor people, cannot afford first-rate legal counsel, especially when an appeal to a higher court is involved.

s. 12

Cruel and unusual treatment

IRIW submits that Indian women who marry non-Indian men have long been subjected to treatment which is not only unusual but also cruel.

s. 14

Interpreter

This section allows the court to decide whether or not the participant in a proceeding does or does not understand English or French well enough to express himself or herself clearly in one or other of those languages. The decision whether or not a translator may be used should be, without exception, that of the accused.

s. 15

Non-Discrimination Rights

The phrase "equality before the law" is thoroughly unsatisfactory. This requirement has been interpreted as being of a highly formal character. It requires clearer and more specific definition and it should not allow continued inequality between Indian men and Indian women.

s. 24

Undeclared Rights and Freedoms

This could be interpreted as supporting Section 12(1)(10) of the Indian Act in which Indian men have rights denied to Indian women. IRIW is unequivocally opposed to this.

s. 31

Equilization and Regional Disparities

This section fails to realize that disadvantaged "regions" can and do exist within comparably affluent sectors. This is particularly so of many native communities.

Part V

Amending Procedures

The amending formulae are extraordinarily complex and would seem to permit the unilateral alteration or abolition of Indian agreements. IRIW cannot support this.



AMENDED VERSION

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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The Inuit Committee on National Issues:

Charlie Watt, Co-chairman of Committee, President of
Makiwick Corporation
Eric Togoona, Co-chairman of Committee, Past President
of Inuit Tapirisat of Canada

DATE OF APPEARANCE: December 1, 1980, 8:00 p.m.

SOURCE OF NOTE:

Conversation with Simon McInnes, Constitutional Advisor
to ICI; he emphasized the "unofficial" nature of his
comments.

BACKGROUND:

This committee was established in September 1979 to
represent the views of the 25,000 Inuit of Canada on
the Constitution. The committee consists of two
co-chairmen: Charlie Watt and Eric Togoona plus one
representative each of the six Regional Associations.
It reports to the annual meeting of the Inuit Tapirisat
of Canada but not to its Board of Directors. It was
set up as a separate organization because the I.T.C.
was so occupied with land claim negotiations.

Prepared by: John McDonough

Research Branch
Library of Parliament

1 December 1980

MAIN POINTS:

The present Patriation resolution does not enshrine the principle of aboriginal rights.

Unless the principle is enshrined now, it will be next to impossible to negotiate the substance of aboriginal rights in the post-patriation period.

The basis of these rights is by virtue of our status as aboriginal peoples. This status was confirmed by the Royal Proclamation of 1763.

The administrative and jurisdictional responsibility of the Federal government towards the Aboriginal peoples of Canada under s. 91(24) does not speak to the question of aboriginal rights.

Unless these steps are taken, the Patriation resolution will be the last step towards eradicating the aboriginal status of the Aboriginal peoples.

RECOMMENDATIONS:

s. 15

Non-discrimination Rights, "equality before the law"

This must be amended so that aboriginal rights will not be seen as going against the principle of equality before the law.

s. 24

Undeclared Rights and Freedoms

This section is negatively drafted and should be amended to explicitly recognize and affirm aboriginal rights.

Section IV
and
Section V

Interim Amending Procedures

Procedure for Amending Constitution of Canada

The amending formulae should be amended so that the Aboriginal peoples' consent must be sought on any amendment to the Constitution affecting their aboriginal rights.

Part III

Constitutional Conferences

s. 32

Aboriginal peoples want the commitment in the Resolution that they will directly participate in the First Ministers' conferences over the next two years in those matters on the agenda affecting them.

Schedule I

There is concern that Schedule I will be interpreted as an exclusive list of constitutional documents. Therefore, the following constitutional documents which are not listed ought to be included:

The Royal Proclamation, 1763, (1)

Her Majesty's Order in Council admitting Rupert's Land and the Northwest Territory, Respectively Into the Union

In addition

The commitment made by the Prime Minister to discuss the substance of a number of issues in the post-patriation period must be included in the Resolution.

COMMENTS:

Jurisdiction respecting the aboriginal people of Canada is found in the British North America Act, section 91(24).

The federal government is given exclusive jurisdiction with respect to:

(24) Indians and Lands reserved for the Indians

Section 26 of Bill C-60 was somewhat more explicit of its recognition of native rights by listing the Royal Proclamation of 1763:

26. Nothing in this Charter shall be held to abrogate, abridge or derogate from any right or freedom not declared by it that may have existed in Canada at the commencement of this Act, including, without limiting the generality of the foregoing, any right or freedom that may have been acquired by any of the native peoples of Canada by virtue of the Royal Proclamation of October 7, 1763.

The Inuit Committee on national issues might be questioned on their attitudes with respect to the following subjects:

(1) See Appendix A.

The effect that the mobility rights of s. 6 might have on their communities in the scarcely populated northern territory.

Whether there might be some added protection for native language rights in the areas of education, health, social services and criminal justice.

With respect to the minority language educational rights of s. 23, it has been suggested that native Canadians whose first language is other than English or French, nevertheless, be given the right to choose the principle language of instruction (French or English) for their primary and secondary education as well as allowing for bilingual or trilingual instruction to include native languages. This would be particularly important for the Inuit of Northern Quebec.

The Committee might be asked to comment on its position regarding the status of native women.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Italian-Canadians National Congress (Quebec Region)
Giovanni Molina, President
Antonia Sciascia, Legal Affairs Director

DATE OF APPEARANCE: 10 December 1980

FORM OF SUBMISSION: Brief (8 pages)

BACKGROUND: The Congress' Quebec Region was formed in 1970, and changed its designation from "Federation" to "Congress" in 1974. There are 70 member associations and 12 church parishes in Quebec affiliated with it.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

10 December 1980



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Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

10 December 1980

SUMMARY

GENERAL REMARKS

Comments that the Resolution is "sterile and insipid" as well as being "vague and imprecise".

The Resolution does nothing to inspire Canadians. It fails to reflect the fact that Canada is a nation "where no dream is impossible". Limitations contained in the Charter of Rights subject our freedoms to interpretations and restrictions which may actually reduce them.

It does not recognize the rights of native peoples, and makes no mention of the rights of minority groups to pursue their own cultural activities.

The Congress cannot support a charter which "appears to be drafted to please politicians and is not a Bill of Rights for all Canadian citizens", unless it states that all Canadians are equal regardless of linguistic affiliation, that all of Canada belongs to every Canadian, and that certain rights and freedoms are absolute. (pp. 1-2)

PREAMBLE

Deplores the omission of a preamble. A constitution must also be a statement of principles reflecting, on behalf of all citizens, the type of country they desire. (pp. 2-3)

Recommends that a preamble be included which recognizes the existence of two major linguistic communities, neither of which is homogenous, and the historical significance of the French and English communities, as well as recognizing that Canada has a rich cultural diversity. The goal of preserving the culture and heritage of Canada's cultural groups should also be recognized, as should be the development of the dual linguistic nature of Canada. (p. 2, 5)

MINORITY LANGUAGE EDUCATIONAL RIGHTS

s. 23

Comments that the apparent goal of s. 23 is not only to protect minority languages, but also to ensure that they prosper.

Remarks, however, that this section creates two classes of citizens: one class whose mother tongue still understood is an official language of Canada, and the other class of citizens whose primary language is not one of the official languages.

Remarks further that the version of s. 23 proposed by Senator Rizzuto (see Appendix to Notes) would not solve the problem of an anglophone citizen who had been educated in French having access to English schools for his children denied to him, or of a francophone citizen educated in English having access to French schools for his children denied to him. (p. 4)

Recommends, therefore, that the proposed Rizzuto amendment not replace s. 23 as drafted, but that it be added to it. In this way the criteria for citizens who are parents would be "first language learned and still understood" (proposed Resolution) or "received his primary or secondary instruction in Canada, in French or in English," (Rizzuto amendment), whichever is more favourable to the rights of the individual in any case. (pp. 4, 8).

Recommends further that s. 133 of the B.N.A. Act be extended to the provinces of Ontario and New Brunswick. (p. 6)

COMMENTS

In its brief, the Congress mentions (p. 4) immigrants in the context of when they become citizens. Does the Congress have any opinion on whether all or some of the provisions of s. 23 might be extended to include persons prior to their becoming citizens -- i.e. while they are still "permanent residents" under the Immigration Act?

Italian-Canadians National Congress

A P P E N D I X

Amendment to s. 23 proposed by the
Honourable Senator Pietro Rizzuto:

23(1) That any Canadian citizen who received his primary or secondary instruction in Canada, in French or in English, has the right to have his children registered in the school where he was instructed in all the Canadian provinces where the number of children of those citizens warrants the provision, out of public funds, of educational facilities in that language.

(2) That any Canadian citizen when one of his children is being or has been instructed in English or in French, has the right to have his other children receive their primary or secondary school instruction in that minority language either French- or English-speaking, everywhere in Canada, where the number of children of those citizens warrants the provision, out of public funds, of minority language educational facilities.

Source: Senate Debates, 27 October 1980, p. 973.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Dr. Gérard V.J. LaForest, Q.C.

DATE OF APPEARANCE:

January 8, 1981: 9:30 a.m.

SOURCE OF NOTES:

draft notes.

BACKGROUND:

Dr. LaForest is a commissioner with the Law Reform Commission of Canada and Professor of law at the University of Ottawa, Common Law Section. He is a Rhodes scholar and Yale graduate (LL.M. and J.S.D.). In 1968-70, he was the Dean of Law at the University of Alberta, followed by 4 years as Assistant Deputy Attorney General of Canada.

He has been a frequent consultant to the federal and provincial governments, and in 1977-78 was the Executive Vice-Chairman of the Canadian Bar Association's Committee on the Constitution of Canada. Since 1967, he has been an adviser to the Special Counsel on the Constitution to the Minister of Justice and the Prime Minister.

He is the author of "Disallowance and Reservation of Provincial Legislation", "Natural Resources and Public Property under the Canadian Constitution", "The Allocation of Taxing Powers under the Canadian Constitution and co-author of "Le Territoire Québécois".

Prepared by: François Bernier
Monique Hébert

Research Branch
Library of Parliament

January 7, 1981

MAIN POINTS:

Dr. LaForest underlines the fact that no constitutional text gives the British Parliament the power to affect changes in the Canadian Constitution, but rather that this power derives from the common law.

The adoption of the Statute of Westminster in 1931 had the following effects:

- 1) The statute removed most of the legal constraints to the legal supremacy of the Canadian Parliament and provincial legislatures.
- 2) The Colonial Laws Validity Act of 1865 was made inoperative.
- 3) The statute enabled laws of Parliament to have extraterritorial effect.

With regard to the Constitution, however, the powers of the British Parliament were left unimpaired, as expressed in section 4 of the Statute of Westminster.

"No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof."

Doctor LaForest then analyzes the consequences of the wording of S.4 in terms of potential challenges to a British law amending the Canadian Constitution.

He believes that the precedents and pertinent legal rules are not sufficiently clear to support the contention that unanimity has assumed the stature of a constitutional convention, having binding force.

ADDITIONAL POINT

Dr. LaForest doubts that the suggestion made by Professor Driedger, to the effect that S.2 (2) of the Statute of Westminster amounts to an abdication by the United Kingdom of legislative power over Canada.

Dr. LaForest submits that S.4 affords sufficient jurisdiction to the British Parliament to effect wide ranging constitutional modifications.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESSES: D.V. Love, Associate Dean
Paul L. Aird, Professor
Faculty of Forestry, University of Toronto

DATE OF APPEARANCE: 11 December 1980

FORM OF SUBMISSION: Brief (3 pages)

BACKGROUND: Professors Aird and Love are appearing as individuals
and not as official representatives of the Faculty of
Forestry or of the University of Toronto.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

11 December 1980

SUMMARY

MAIN THEME

Professors Aird and Love wish to ensure that Canada's resources will be better managed and used in perpetuity.

EQUILIZATION AND REGIONAL DISPARITIES

s. 31

Comment that although this section contains commitments to further economic development and provide essential public services, these goals will not be attainable unless a national commitment to better management and use of Canada's natural resources is included in the constitution.

The professors cite the fact that one job in ten and one carload of freight in five are dependent on the forest resource sector to demonstrate the importance of resource management for Canada. They note that the "World Conservation Strategy" of the United Nations Environment Programme stresses the importance of improved management of world resources.

They recommend, therefore, that in view of the importance of natural resources and of the belief shared by Canadians that "natural resources must be managed to benefit both present and future generations", s. 31 be amended by inserting the following paragraph at line 10 of page 9, and by redesignating the present paragraphs (a), (b) and (c) as (b), (c) and (d) respectively:

"31(1)(a) advancing the management and use of Canada's natural resources to meet the needs of society in perpetuity;"



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Media Club of Canada/Club Media du Canada
Esther Crandall, President

DATE OF APPEARANCE: December 11, 1980

FORM OF SUBMISSION: Brief (3 pages)

BACKGROUND: Organization has been in existence since 1904 and was incorporated under its present name in 1971. It is a national, independent, non-profit organization of journalists and professional writers. Its objectives include consulting with governments and other bodies; working for free and responsible expression through the communications media; developing and maintaining high professional standards; encouraging an understanding of Canada, its people and customs, in Canada and abroad.

Prepared by: Hugh Finsten

Research Branch
Library of Parliament

December 10, 1980

- 2 -

MAIN POINTS:

Freedom of the press provision will govern journalists and professional writers and affect every person in Canada for generations in the future.

There has not been sufficient time to prepare fair, responsible comments on the proposal.

COMMENTS:

Does the Association see the need to restrict freedom of expression to permit the prohibition of hate propaganda and, as stated in Art. 19 of the International Covenant on Civil and Political Rights, for "respect of the rights or reputations of others" as provided by law and as necessary. The section of the Covenant also permits, under the same conditions, the restriction of freedom of expression "for the protection of national security or of public order (ordre public), or of public health or morals".

Does the Association feel that the privilege against disclosing information in court (such as the solicitor-client privilege) should apply to newsmen? Would this not close off to the judicial process many areas in its search for truth and affect the rights of individuals to receive a fair trial. Could not such a privilege become a shield behind which irresponsible journalists could hide? Where names need not be revealed, it becomes impossible to evaluate the accuracy or fairness of reports.

The witness may wish to comment on the state of libel laws in Canada as recently exemplified by the Ian Adams case (S. Portrait of a Spy).

Does the witness agree with the Canadian Bar Association's recommendation to include a freedom of information clause in the constitution.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Mennonite Central Committee (Canada)
Winnipeg, Manitoba

Ross Nigh, Vice-Chairman
J.M. Klassen, Executive Secretary
William Janzen, Director, Ottawa Office

DATE OF APPEARANCE: 25 November 1980

FORM OF SUBMISSION: Brief.

BACKGROUND:

The Mennonite Central Committee (Canada) was founded in December 1963 and incorporated by an Act of Parliament, proclaimed in July 1964. It is the official service and relief agency of the Church and the affiliated Brethren in Christ Church, and is authorized by the members of both Churches to represent them before government.

The Committee has approximately 100 volunteers working in Canada and another 200 working in approximately 40 foreign countries. An example of its work is the Food Bank, whereby prairie farmers contribute to a grain pool for distribution to nations in need of relief. C.I.D.A. contributes to this fund on a 3/1 match basis. In Canada, for example, there are about 40 Committee volunteers working with Native communities in such fields as education and health care.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

19 November 1980

SUMMARY

FUNDAMENTAL FREEDOMS

s. 2

Recommends that the Charter contain a simple provision for "freedom of religion" without a reference to individuals or communities.

Some religions place emphasis on community life, rather than on the individual's adherence to the faith. The wording of the Charter should not be such that the courts will be required to adjudicate religious disputes in favour of the individual.

CONSCIENTIOUS OBJECTION TO THE TAKING OF HUMAN LIFE

Recommends that the Charter contain a section to protect those who on grounds of conscience or religion feel themselves unable to take human life. Remarks that provisions for exemptions from military duties have been part of the Canadian tradition since the Militia Act, 1793, which stated "persons called Quakers, Mennonists and Tunkers, who from certain scruples of conscience decline to bear arms shall not be compelled to serve in the said Militia, ...". During World War II, numerous Mennonites distinguished themselves in the Canadian Alternative Services Programme.

Remarks further that under the Basic Rights heading of the Basic Law of the Federal Republic of Germany, the following article is contained:

4(3) No one may be compelled against his conscience to render war service involving the use of arms. Details shall be regulated by a federal law.

Article 12a(2) and (3) of the German Basic Law contains further provisions concerning the requirement "to render a substitute service" for conscientious objectors.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: National Action Committee on The Status of Women:

Lynn MacDonald, President
Jill Porter, Chairperson of the Constitution Committee
Betsy Carr, Member of the Constitution Committee

DATE OF APPEARANCE: November 20, 1980, 10:30 a.m.

FORM OF SUBMISSION: Brief (7 pages), telephone conversation with Jill Porter

BACKGROUND: The National Action Committee on the Status of Women is a voluntary organization working to improve the status of women in Canada. NAC is an umbrella for more than 150 non-governmental organizations across the country - some regional, others Canada-wide. It promotes reform in laws and public policies, informs the public about women's concerns, and fosters cooperation among women's organizations.

Prepared by: John McDonough

Research Branch
Library of Parliament

19 November 1980

BASIC THEME:

The N.A.C. is in general agreement with the principle of entrenching a Charter of Rights. They feel however that there are serious omissions in the content of the present proposals and women could be worse off if the proposed Charter were enacted.

MAIN POINTS:

The imprecise wording of s. 1, the limitations clause, could allow for a variety of interpretations of permitted exceptions. If rights and freedoms have to be limited in time of war the exceptions must be specified.

Indian women need equal protection with their male counterparts.

The N.A.C. is very concerned with the past direction of Supreme Court decisions with respect to the "rights" of women.

RECOMMENDATIONS:

s. 1

The Limitation clause

This section should be deleted.

A section should be added noting that in time of war the following rights and freedoms are not to be abridged: the right not to be subjected to any cruel or unusual treatment or punishment, and the human right to equality in the law.

s. 15(1)

Equality before the law

The section should be amended to provide for equality in the law, as well as in the administration of the laws.

The human right to equality should be specified as a positive objective.

The specified categories of 15(1) should be amended to include marital status, sexual orientation and political belief.

There should be an additional clause to s. 15 specifying that discrimination on the basis of a specified category is proscribed whether all members of that category are affected or only some.

s. 15(2)

Affirmative action programs.

Following the phrase "disadvantaged persons or groups" the words "including women" should be added.

s. 24

Undeclared Rights and Freedoms.

Section 24 should be amended to include the phrase "providing that any such rights or freedoms apply equally to native men and to native women".

s. 25

Primacy of the Charter

A section should be added that would require the repeal of any law which discriminates on the basis of sex.

s. 29(2)

The delay in applying section 15 for three years.

This should be deleted.

in addition:

A new section should be added to guarantee the appointment of a representative number of women to the courts, including the Supreme Court of Canada. This might be expanded by the N.A.C. to include all courts, boards, tribunals and commissions whether federal or provincial.

The word "everyone" should be replaced with "every person" throughout the Charter.

COMMENTS:

Does the N.A.C. feel any particular concern that the phrase used in s. 7 that "Everyone has the right to life" might be used before the courts in an abortion case?

Should the proposed amendment concerning native women be made in the absence of some measure of acceptance by native organizations?

Is there any concern that the proposal to guarantee the appointment of a representative number of women to the courts and other regulatory bodies and commissions might lead

other "minority" groups (based on race, ethnic origin or language) to make similar representation demands?

The brief suggests that 1 or 2 women on the Supreme Court would make a difference on womens' rights cases however the recommendation of a "representative number of women" would suggest that the N.A.C. is asking for a representation of 51 per cent.

A number of witnesses who have appeared before the Committee have suggested a more general wording for s. 15 which does not list any specific grounds of potential discrimination, in order to give the section broader applicability. Would the N.A.C. consider this approach to be acceptable?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

National Association of Japanese Canadians

Gordon Kadota, President
George Imai, Past President
Dr. Art Shimizu, Constitution Committee Chairman

DATE OF APPEARANCE: 26 November 1980

FORM OF SUBMISSION: Brief.

BACKGROUND:

The Association was founded in 1946 under the name Japanese Canadian Citizens Association, and adopted its present name this year. Its main concerns continue to be the protection of civil and human rights. Other activities include assistance to the elderly and cultural programmes, with special emphasis under the latter category being placed on language instruction.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

25 November 1980

SUMMARY

ENTRENCHMENT OF THE CHARTER

Endorses the intent to entrench the Charter but objects to the wording of certain key section.

The forced evacuation and confinement of over 22,000 persons during World War II, the majority of whom were Canadian citizens by birth, underlines the need for any possible infringement of Canadian's rights to be "adjudicated by the most objective and impartial arbiter, the judiciary, rather than Parliament or the provincial legislatures in which the political powers can determine the outcome".

GUARANTEE OF RIGHTS AND FREEDOMS

s. 1 The words "reasonable limits as are generally accepted in a Parliamentary system of government" would not prevent a repetition of the injustices suffered by Japanese-Canadians during World War II by such means as the War Measures Act.

LEGAL RIGHTS

ss. 8, 9 Same comment with respect to the words "except on grounds and in accordance with procedures established by law" as under s. 1 above.

MAJOR POINTS:

The Association recognizes the advantages which flow from the entrenchment of a Charter of Rights and Freedoms. It is symbolic; it binds both provincial and the federal government to a uniform standard; it provides an alternative forum for the enforcement of basic rights.

However the Association cannot support the present Charter as it offers little protection and may cement inequalities within Canadian society.

The Association believes that the only legitimate way in which a new Constitution can be developed for all Canadians is through their own participation through a Constituent Assembly. The system must guarantee that a representative number of women are elected to this body.

RECOMMENDATIONS:

s. 1

The Limitation Clause

As worded this is a dangerously broad limitation clause. This clause would place Canada in breach of her international obligations with respect to the International Covenant on Civil and Political Rights. It should be replaced by a clause which exactly specifies the permissible limitations on protected rights and freedoms. The following components should apply:

- rights can be limited only in an emergency;
- the government must have articulated that an emergency exists to exempt itself from the Charter;
- the existence of an emergency is an objective situation which the court must assess and the onus would be on the government to establish that such a situation exists;
- the standard is "to the extent strictly required by the exigencies of the situation".
- some rights are protected in all situations (including the right to equality).

s. 15(1)

Non-discrimination Rights

The section should require equality in the content of the law, as well as in court procedure. Laws which distribute benefits unequally must also be prohibited.

The Association approves of a two tier system of rights under s. 15. In the first, distinctions should almost never be made on the immutable characteristics, such as sex, race, national or ethnic origin, colour or religion, which are unrelated to the ability or the capacity of a person. The other grounds: age, physical or mental handicap, marital status, political belief, sexual orientation or previous conviction are not necessarily invidious. A "strict scrutiny" test must apply to the first list of grounds. A "strict scrutiny" or a "reasonableness" test may be applied to the other grounds as circumstances warrant.

So that new grounds may be recognized words such as "on any ground including" should precede the list to show that it is not all inclusive.

s. 15(2)

Affirmative Action

The affirmative action clause should be reworded to tie the purpose of affirmative action programs to the prohibited grounds of discrimination. The Association would however leave s. 15(2) as it stands and would then add the following as s. 15(3).

Nothing in this Charter limits the authority of Parliament or the legislature to authorize any program or activity designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by any group or individuals when those disadvantaged are or would be based on or related to sex, race, or other ground protected under section 15(1).

s. 24

Undeclared Rights and Freedoms

The Association recommends that the words "provided that such rights pertain equally to Native women and men" be added to this section

to ensure that any special rights and freedoms that apply to Native peoples apply equally to both sexes.

s. 26

Laws respecting evidence

This section exempts the laws of evidence from the Charter; it must be deleted.

s. 29(2)

Application of the Charter - 3-year delay

The three-year delay is unnecessary and must be removed from the Charter.

In addition
new s. 2

The Association recommends the inclusion of a "purpose clause" in this Charter, similar in wording to article 3 of the United Nations Covenant on Civil and Political Rights. Such a clause would undertake to guarantee the equal right of men and women to the enjoyment of all civil, political and economic rights set forth in the Charter. The adoption of such a section at the beginning would reflect the intent and spirit of the Charter and provide an overriding statement of principle to be used in its interpretation.

also

The Association recommends that the Constitution guarantee a representative number of women on the Supreme Court of Canada.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: The National Black Coalition of Canada

Dr. Wilson Head, President

Mr. J.A. Mercury, Executive Secretary

DATE OF APPEARANCE: December 9, 9:30 a.m.

FORM OF SUBMISSION: Brief (12 pages)

BACKGROUND: The N.B.C.C. is a national organization of black people living in Canada. It was organized in 1969 as a result of increasing concern regarding prejudice and discrimination against black people in this country.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 8, 1980

-2-

MAIN POINTS:

The N.B.C.C. strongly supports the entrenchment of a Charter of Rights in the proposed new Constitution of Canada.

Black people have suffered from both official and informal discrimination in Canada.

In spite of national and provincial Human Rights legislation and commissions and the Diefenbaker Bill of Rights the problem of discrimination on the basis of race, sex, national origin, etc., still continues.

The N.B.C.C. has little confidence in the ability of the provincial governments to protect the human rights of Canadian citizens.

RECOMMENDATIONS:

s. 1

Limitations Clause

The phrase "reasonable limits" is too vague. Any limitations on the fundamental freedoms should be based on limits which the government of the day can demonstrate is necessary to the achievement of certain valid objectives.

s. 2(b)

Free speech

The N.B.C.C. supports free speech but recognizes that in practice there are some limits such as the doctrine of "clear and present danger". They suggest that it also be limited with respect to the preaching of hate and genocide against individuals or groups.

s. 3

Democratic Rights of Citizens

The phrase "unreasonable distinction and limitation" is too vague and should be removed.

s. 4(2)

Continuation of the House of Commons in Special Circumstances

The word "apprehended" may too easily allow governments to go beyond their normal powers. This should not be permitted unless there is a "clear and present danger", not mere apprehension.

ss. 7, 8, 9

Legal Rights

"The principles of fundamental justice" should be spelled out in precise terms; so should the concept of "procedures established by law".

s. 15

Non-Discrimination Rights

Either the provision should be extended to include marital status, the handicapped, and other disadvantaged groups, or discrimination should be, as suggested by the Canadian Civil Liberties Association, prohibited on any unreasonable grounds. Reasonable grounds would, as indicated earlier in this Brief, include Affirmative Action Programmes designed to redress a history of disadvantage based upon previous discrimination.

s. 24

Undeclared Rights and Freedoms

The treaty rights of the native people must be clearly honoured and enshrined in a new Constitution.

Constitutional protection must also be given to the preservation of the multi-ethnic nature of Canadian society.

COMMENTS:

The N.B.C.C. could be asked if it would care to comment further concerning the point that minority rights are not now well protected under provincial Human Rights legislation. Are there wide differences among provincial jurisdictions as to the protection of minority rights?

The witnesses are in a particularly good position to comment on the homily that you cannot legislate morality, that prejudice is a matter for education?

Would the witness care to comment on the proposition that race prejudice and discrimination is on the increase in Canada? Do they feel that an enshrined Charter of Rights would help? Are there other practical steps that would be of greater help?



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

National Indian Brotherhood:

Delbert Riley, President, N.I.B.
Sykes Powderface, Vice President, N.I.B.
Robin Green, Grand Chief of Grand Council Treaty
No. 3
Douglas Saunders, Legal Counsel
William T. Badcock, Legal Counsel
Grant Wedge, Consultant
Michael Posluns, Parliamentary Liaison

DATE OF APPEARANCE: December 16, 1980.

FORM OF SUBMISSION: Advance brief (28 pages)

BACKGROUND: The National Indian Brotherhood is a federation of provincial and territorial organizations representing status Indians in all 576 reserves in Canada. About half of this population is covered by treaties.

Prepared by: John McDonough

Research Branch
Library of Parliament

1 December 1980

BASIC THEME:

The issue of constitutional change is of fundamental importance to the aboriginal peoples of Canada. The question of the relationship between Canada and the Indian Nations and the Indian rights of self-determination have never been adequately defined in Canadian law. The Indian people have a special view that has not been understood by governments in Canada.

MAJOR POINTS:

There should be no patriation of the British North America Act until Indian people have been involved in the constitutional discussions and until Indian rights have been adequately protected in new constitutional provisions.

Despite promises, the N.I.B. has not participated in any of the constitutional discussions that have occurred to date.

The Imperial Crown has recognized and signed treaties with the Indian Nations; it has a duty to act in conformity with those obligations. The N.I.B. has, therefore, gone to Britain to present its case. Because Canada is a signatory to the United Nations' Covenants, the N.I.B. has and will again take its case to the U.N.

Indian Bands in British Columbia (with the support of the N.I.B.) have begun a court action against the proposed Joint Resolution on the basis of the special link between the Indian Nations and the Crown. The Canadian Government should wait for this case to be completed before proceeding with "patriation".

Indian leaders have been asked to wait for the "second round" of negotiations for their interests to be discussed. The N.I.B. considers that this role is no more certain or defined than it has been over the past two years.

The N.I.B. opposes any and all amending formulae which would affect the special constitutional status of Canadian Indians without their consent.

The N.I.B. supports human rights codes as Indians have often been victims of racist and discriminatory legislation. However, egalitarian laws have been used against their interests; their collective rights must be protected.

A Critique of specific sections of the proposed Joint Resolution

s. 1 Limitations clause

This should be deleted as it would allow governments to override aboriginal rights without the consent of the aboriginal people.

s. 3 The right to vote

There is concern that the provision that every citizen has the right to vote without unreasonable distinction or limitation in the election of a legislative assembly could be interpreted to include an Indian Band Council. Section 3 must not enable non-Indians, who are resident on Indian lands, to vote in Indian government elections. Nor should it invalidate proposed residency requirements for voting in northern areas.

s. 6 Mobility Rights

The reserve system involves a restriction on mobility in that non-Indians are restricted in their access to reserve lands; this must be protected.

s. 15(2) Affirmative Action Programmes for disadvantaged groups

The Indian people will not always be disadvantaged. There must be provisions that will allow band enterprises to preferentially hire band members. Economic disadvantage is one matter; cultural and political survival is equally important.

There should be a positive recognition of aboriginal rights such as:

The Aboriginal rights and treaty rights of the Aboriginal peoples of Canada are hereby confirmed and recognized.

s. 24 Undeclared Rights and Freedoms

This is limited to rights and freedoms "that exist" in Canada. Section 24 should apply both prospectively and retrospectively (as is the case with section 22 on rights to languages other than English and French). This is important as it will include future land claims settlements.

There is concern that this section would reopen litigation respecting the status of Indian women who marry white men. The ability to have special legislation for Indian populations must be maintained.

Part III

Constitutional Conferences

s. 32

A requirement of Indian participation, at least on matters affecting Indian people, should be included in any such provision.

Part IV
and
Part V

Interim Amending Procedure

Procedure for Amending Constitution of Canada

The constitution respecting native rights, especially section 91(24) of the British North America Act must not be amended without the consent of the Indian people.

ss. 34, 43

Constitutional amendment provisions which apply to one or more, but not all provinces.

There are limited constitutional protections for Indian hunting rights and treaty land entitlement in the B.N.A. Act of 1930, which apply exclusively to the three prairie provinces. There are special provisions in the Manitoba Act, in the terms of Union of British Columbia and the Order in Council transferring Rupert's Land and the N.W.T. to Canada. No changes relating to Indian people should be possible without the consent of the Indians affected.

s. 51 and
Schedule I

Consequential Amendments

Section 51 and Schedule I may be interpreted as an exclusive list of Canadian constitutional documents. Schedule I should therefore include the Royal Proclamation of 1763 and the Indian treaties.

RECOMMENDATIONS:

Rather than propose a series of remedial changes to the existing proposed Joint Resolution, the N.I.B. offers amendments which begin with a positive recognition of aboriginal, Indian treaty and self-determination rights.⁽¹⁾

(1) These recommendations are reproduced in full in Appendix A.

COMMENTS:

Is it necessary to define and specify "aboriginal rights" before they can be entrenched in the Constitution?

The N.I.B.'s proposed new section 23A, especially subsection 4(a) through (h), seems a bit unwieldy. The process of defining "mutual satisfaction" appears to be open to stalemate and inaction. Is it possible for an agreement to be judged to be satisfactory at one point in time and to be unsatisfactory at a later period? What happens in that case?

The N.I.B. has spoken of self-determination and related it to the concept of a third order of government. This seems to be the intention of Section 23A(e) and (g). Is this to be a kind of "municipalization" or are Indian Bands to acquire a kind of provincial status? What role would the Métis and non-status Indians have in such a concept?

The N.I.B. has asked that there be no extinguishment of aboriginal rights and that there be no expropriation of Indian lands. If this is so, how will economic development such as pipe-line construction take place?

On page 5 of their brief, the N.I.B. objects strongly that the government decided that it had the power to decide who was an Indian and who was not. On page 19, in commenting on the Lavell case, they insist that the new constitution must allow for special legislation for Indian populations. Does the N.I.B. have any proposal either constitutional or legislative that would allow for equal rights to be granted to both Indian men and Indian women?

In their critique of s. 32, constitutional conferences, the N.I.B. asks for Indian participation. Does this include Inuit, non-status Indians and Métis? If so, should all these groups be represented equally? Should the groups be in unanimous agreement in order for constitutional change to take place?

It has been suggested that the word "native" is inadequate to describe aboriginal rights. In the proposal for Section 23A, should "Aboriginal peoples of Canada" also include the Inuit and Métis? Should the constitution eliminate the distinction between status and non-status Indians and is this the purpose behind Section 23A(1)?

Appendix A

Aboriginal Rights and Freedoms

Section 23A

Explanatory Notes

This is a new section which provides for the recognition, confirmation and protection of Aboriginal rights.

- | | |
|--|---|
| (1) For the purposes of this Act the "Aboriginal peoples of Canada" includes the Indian peoples of Canada. | (1) This is a definition section intended to indicate whom we mean to include within the meaning of Aboriginal peoples without precluding broader inclusions. |
| (2) The Aboriginal rights and treaty rights of the Aboriginal peoples of Canada are hereby confirmed and recognized. | (2) This clause is the basic statement that is essential. |
| (3) Without limiting the rights of the Aboriginal peoples of Canada all rights confirmed or recognized by the Royal Proclamation of October 7, 1763 shall continue in force and the said Proclamation shall be deemed to be part of the Constitution of Canada so far as it touches on the rights of the Aboriginal peoples of Canada. | (3) This section continues the force of the Royal Proclamation while including it within the patriated Canadian Constitution. |



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Native Council of Canada

Harry Daniels, President, N.C.C.
Louis Bruyere, Vice President, N.C.C.
Gene Rheaume, Honorary President, N.C.C.
Vic Savino, Legal Counsel
John Weinstein, Director of Land Claims
Arthur Manuel, Legal Advisor

DATE OF APPEARANCE:

2 December, 1980 — 8:00 p.m.

FORM OF SUBMISSION

Brief

BACKGROUND:

The Native Council of Canada, established in 1971, is the national organization representing Metis and Non-Status Indians in Canada. The Executive is elected at large at the annual general Assembly by delegates from all across Canada. Its Board of Director is made up of the Presidents of its Territorial and Provincial affiliates.

The Metis and Non-Status Constitutional Review Commission was established with the aid of the N.C.C. to study and to hold hearings across the country on the constitutional question. Harry Daniels is the Commissioner; there are Deputy Commissioners who represent various Metis and Non-Status groups.

Prepared by: Stephen Fogarty
John McDonough

Research Branch
Library of Parliament

2 December 1980

- 2 -

GENERAL COMMENTS

Have not yet chosen to proceed through the courts. Consider themselves bound by the commitments shared with governments for full, equal and ongoing participation in constitutional change entailing a process of joint negotiations with government, premised on the recognition of our special status as Aboriginal peoples and conducted in a spirit of good faith.

MAJOR POINTS

- Section 1: Recognize the need to allow Parliament some room to respond to national emergencies but fail to see the need for a clause which offers as little protection from an errant majority Parliament than any common statute. Cannot accept such loop-holes for capricious governments.
- Section 15(2) Rewording of section concerning affirmative action programs to include the recognition of the aboriginal and treaty rights of the Aboriginal peoples of Canada.
- Section 24: Propose new wording similar to Bill C-60, s. 26, to ensure that all undeclared rights, not only native rights, would be strengthened.
- Section 51: Proposed an amending provision to provide for the consent of Aboriginal people with respect to constitutional provisions affecting their rights.

Following patriation, recommends that any future amendments be referred to a joint committee composed of native, federal and provincial representatives duly authorized to discuss, elaborate and negotiate constitutional amendments directly related to native peoples.

Propose a new s. 23(a) which is similar in nature to proposals made by the Inuit Committee on National Issues to confirm the intention of the federal and provincial governments to respect and negotiate the rights of Aboriginal peoples.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Native Women's Association of Canada
Marlene Pierre-Aggamaway, President
Donna Phillips, Treasurer
Brigid Hayes, Consultant

DATE OF APPEARANCE: December 2, 1980

FORM OF SUBMISSION: Declaration of Principles and Beliefs (2 pages)

BACKGROUND: The Association was formed in 1973 and incorporated federally in 1974. It provides program resources to complement the efforts of provincial, territorial and local native women's groups so that they may be afforded a national voice in Canadian political and social affairs. The Association represents women who are status Indians, non-status Indians, Métis and Inuit. Although some members of its staff receive a salary, the Association is primarily a volunteer organization.

The Native Women's Association of Canada is not affiliated on an official level with the National Indian Brotherhood, the Inuit Committee on National Issues or the Native Council of Canada.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

December 2, 1980

SUMMARY

MAIN POINTS:

That the various aboriginal people within Canada continue to constitute "sovereign nations."

That the aboriginal nations continue to hold a special relationship with the British Crown.

That as "sovereign nations" their aboriginal rights set out in the treaties, agreements and conventions and as based on their historical claim to lands cannot legally be diminished or extinguished by the various governments of the Canadian nation.

That the Canadian Constitution and not the Charter of Rights must state that the aboriginal people belong to sovereign nations and that this sovereignty will be recognized by Canada, including a recognition of the right of aboriginal people to self-determination.

That the rights of aboriginal people must be recognized to extend to all individuals of aboriginal descent no matter where they live in Canada.

That Native women have equal access to and participation in decision-making processes, and that they be protected in law against discrimination based on sex or marital status.

That Native women and children must have equal access to all social, economic, health and educational opportunities.



CANADA

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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

New Brunswick Human Rights Commission

Dr. Noel A. Kinsella, Chairman of N.B. Human
Rights Commission, Senior Human Rights
Commissioner in Canada

Mr. Francis Young, Legal Counsel

Professor John P. Humphrey, Advisor to the
Commission, President of the Canadian Human
Rights Foundation, formerly (20 years)
Director of the United Nations Human Rights
Division

Sandra Lovelace

DATE OF APPEARANCE:

November 24, 1980, 9.00 p.m.

SOURCE OF NOTE:

Telephone conversation with Dr. Kinsella

Prepared by: John McDonough

Research Branch
Library of Parliament

24 November 1980

BASIC THEME:

The New Brunswick Human Rights Commission is the second oldest in Canada, established in 1967. The Commission wishes to share its long experience in human rights and anti-discrimination legislation at the provincial level. Dr. Kinsella was closely involved in the federal-provincial consultations (1966-1967) with respect to Canada's ratification of the International Covenants.⁽¹⁾ As a signatory Canada, with the agreement of all provincial governments, has agreed to accept the internationally recognized standards of these covenants, but these standards are not reflected in the proposed Joint Resolution.

MAJOR POINTS:

The Charter of Rights and Freedoms should be redrafted in light of the international covenants so that, for example, Sandra Lovelace would be able to seek a domestic remedy and would not have to go to the United Nations.

The Commission supports entrenchment and will note that the "supremacy of law" argument has already been abridged with respect to the United Kingdom in that that country has already signed a European as well as the United Nations' covenants.

RECOMMENDATIONS:

s. 1

The limitations clause

This clause should be redrafted. The phrase "generally accepted" should be withdrawn in favour of the United Nations' terminology of "strictly required".

There should be a further clause specifying that there shall be no limitation of certain rights such as race and religion.

They acknowledge that there may be the need for a strictly defined emergency clause drafted along the lines already suggested by the Canadian Jewish Congress. Professor Humphrey might be invited to comment on this point.

(1) In 1976 Canada signed the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights.

RECOMMENDATIONS:

s. 15(1)

The Non-discrimination clause

The language of the anti-discrimination clause should be tied to the international Covenants.⁽¹⁾

The Non-discrimination clause ought to list only a very select and restricted number of rights and include the phrase "other such status". This will allow the courts to be generous in their interpretation as for example, with respect to the rights of those with a physical or mental handicapping condition. Therefore these along with sexual orientation ought not to be included in the listed rights. The witnesses might be asked whether age ought to be a listed right.

The phrase "equality before the law" ought to be changed to include equality with respect to the law itself.

s. 15(2)

Affirmative Action Programs

The use of affirmative action programs ought to be confined to those who are faced with discrimination. Therefore section 15(2) should allow only for those affirmative action programs that have the sanction of law.

s. 24

Undeclared Rights and Freedoms

This section should provide for the equal treatment of Native men and women. Since Sandra Lovelace will be with the delegation she may be asked to speak to this point.

(1) International Covenant on Civil and Political Rights

Article 2(1)

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

REMEDIES CLAUSE:

The Commission may also speak to the need for a Remedies Clause.

COMMENTS:

The delegation wishes to stress the importance of the international Covenants. Dr. Kinsella has been particularly active with respect to the inter-governmental negotiations in Canada and the Continuing Federal-Provincial Committee of Officials Responsible for Human Rights Legislation which reports on Canadian (federal and provincial) compliance with respect to the Covenants. Professor Humphrey is Canada's outstanding authority on international Human Rights legislation.

Sandra Lovelace is currently presenting a claim before the United Nations Human Rights Tribunal with respect to discrimination against Native women in the Indian Act. (section 12(1)(b)).



CANADA

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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Mr. Grant Notley, Leader
New Democratic Party of Alberta

DATE OF APPEARANCE: January 7, 1981, 4:00 p.m.

FORM OF SUBMISSION: Policy Document

Prepared by: François R. Bernier

Research Branch
Library of Parliament

January 7, 1981

MAJOR POINTS:

Institutional Reform

Council of the Provinces (p. 9)

The centerpiece of the proposed institutional reforms is the creation of a Council of the Provinces, replacing the Senate, in which all provinces are equally represented by provincially appointed members. Matters requiring Council consideration will be those affecting areas of concurrent powers, the definition of issues justifying use of federal emergency powers, treaties relative to provincial jurisdiction, shared-cost programs, and ratification or rejection of federal appointments to the Supreme Court.

Supreme Court (p. 8)

The existence of the Supreme Court should be provided for in the Constitution. No changes are proposed as to its structure or terms of reference, except that nominations would be subject to ratification by the Council of the Provinces.

House of Commons (p. 9)

While the majority of members would continue to be elected in the present manner, a certain number of members should be selected on the basis of proportionate representation.

Legislative Powers

Sections 91, 92, 93 of the B.N.A. Act (p. 11)

Section 93 of the B.N.A. Act should be reconfirmed.

The Position Paper also proposes revised versions of sections 91 and 92 of the B.N.A. Act (p. 11).

Declaratory Power (p. 12)

The proposed version of ss. 91 and 92 would render this power obsolete.

Disallowance and Reservation (p. 10)

These powers should be abolished.

Concurrent Powers (p. 12)

Agriculture and immigration would remain concurrent jurisdictions with federal paramountcy.

Regulation of foreign investment should be added to this category. Pensions and survivors benefits would remain concurrent jurisdictions with provincial paramountcy.

Spending Power (p. 10)

Shared-cost programs should require the approval of the Council of the Provinces.

Federal grants directly to individuals and unconditional grants to provincial governments should not.

Resources

Management of Resources (p. 10)

There must be a clarification of the division of legislative powers pertaining to the management of resources. In this endeavour, five principles should be respected:

1. The provinces should have the exclusive powers to legislate in relation to exploration, development, conservation and management of natural resources.
2. The provinces should have concurrent legislative powers to legislate in relation to the export of primary production of resources, with federal paramountcy in the area of international trade.
3. The use of the trade and commerce power (s. 91(2), B.N.A. Act) must be restricted so as not to abridge provincial powers except in emergency situations of compelling national interest (such exceptions requiring approval of both Parliament and the Council of the Provinces).
4. The provinces should have the power to raise money by any mode of taxation in respect of resources.

5. Provinces should be prohibited from instituting price discrimination between resources used in the provinces and resources exported to other parts of Canada.

Offshore Minerals (p. 11)

The federal government should have ownership of these resources but should be required to manage the development of such resources jointly with, and relate the majority of revenues received to, the adjacent province.

Proposals Related to the Proposed Constitution Act, 1980

Basic agreement for the entrenchment of human rights in the Constitution is expressed.

Language Rights (p. 8)

ss. 16-22

The right to use either official language should be protected in all provinces, and not just in Quebec and Manitoba.

Equalization (p. 10)

s. 31

Agreement with the proposed s. 31.

Amending Procedure (p. 9)

ss. 41-51

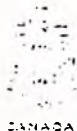
Future amendments to the Constitution should require approval of Parliament and of seven out of ten provinces in the Council of the Provinces, the combined populations of which would constitute at least 85% of the population of Canada. Amendments affecting language rights, education, or ownership and control of natural resources would require unanimity in the proposed Council.

All amendments approved by Parliament and the Council of the Provinces would be subject to ratification by a majority of Canadians in referendum procedures.

Native Rights (p. 8)

s. 24

The rights of native peoples must be enshrined in the Constitution, so as to protect such rights from unilateral encroachment by any of the two levels of government.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Nishga Tribal Council

Chief James Gosnell, President, Nishga Tribal Council;
Chief Rod Robinson, Vice-President, Nishga Tribal
Council;
Mr. Ed. Wright, Trustee;
Mr. Stuart Leggatt, Legal Counsel;
Mr. Donald Rosenbloom, Legal Counsel

DATE OF APPEARANCE: December 15, 1980, 8 p.m.

SOURCE OF NOTES:

Telephone conversation with Mr. Don Rosenbloom and
letter of Mr. Stuart M. Leggatt dated 19 November 1980.

BACKGROUND:

The Nishga Tribal Council represents all the Nishga Indians. Approximately 4,000 in number, the Nishga Indians reside in the Nass Valley in Northwest British Columbia on the North Pacific Coast. Their four villages are called New Aiyansh, Greenville, Canyon City and Kincolith. The Nishgas are not parties to any kind of treaty with any government which would extinguish their aboriginal title to their lands. These native people have a long history of prominence in the struggle for recognition of aboriginal rights. They appeared before the 1887 Royal Commission of Inquiry into the Condition of Indians, the McKenna-McBride Commission of 1915, presented in 1913 a petition to the Privy Council on the subject of aboriginal rights and have since appeared before numerous Parliamentary Committees. In 1973, they took the Calder case to the Supreme Court of Canada.

Prepared by: Amos Shlosberg

Research Branch
Library of Parliament

15 December 1980

BASIC THEME

Spokesman for the Council will review the history of the Nishga struggle for recognition of aboriginal rights and set out their major objections to the Canada Act in its present form. Their major recommendation would be that aboriginal rights ought to be entrenched in the constitution.

MAJOR POINTS

The basic defect in the Canadian Charter of Rights and Freedoms, from the point of view of the Nishgas, is that Article 24 fails to confer any kind of rights on the Indian peoples of Canada. At best, in order to determine their rights, the present provision requires reversion to common law rights as, in fact, there are no statutes which set out aboriginal rights. Moreover, it is the position of the Council that common law does not provide any rights with which native peoples can feel confident. The result is that they are thrust into the political and judicial winds of uncertainty.

Referring to the statements of Prime Minister Trudeau and Indian Affairs Minister Munro that once patriation is accomplished Indian rights will receive first priority in the process of constitutional amendment as a sham or political naïvete because no amendment to the constitution can take place without provincial consent, the Nishga Council will emphasize the need for the entrenchment of aboriginal rights in the constitution. From their point of view, this is mandatory because they feel that British Columbia will not agree to enshrine aboriginal rights in the constitution. It is their position that no administration, provincial or federal, has ever recognized such rights. As no amendment to the constitution can be had without provincial consent, it is their position that such rights will not be guaranteed by the process of constitutional amendment.

In order to support this position, the Council will set out the historical relationship between the provincial government and the aboriginal peoples.

RECOMMENDATION

Entrench aboriginal rights in the Canadian Charter of Rights and Freedoms.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Nuu-Chah-Nulth Tribal Council

George Watts, Chairman
Jack Woodward, Counsel

DATE OF APPEARANCE: 16 December 1980
8:00 P.M.

SOURCE OF INFORMATION: Written submission and conversation with Jack Woodward

BACKGROUND: The Nuu-Chah-Nulth, more commonly known as the Nootka Indians, were the first natives encountered by the white man in British Columbia. They constitute a linguistic and tribal group 3,000 strong whose members are divided into 15 bands, occupying approximately two dozen villages in the remote west coast of Vancouver Island. Chief present day occupations are fishing and logging. Not a party to any treaties, the tribal council has filed a formal comprehensive land claim with the federal government, respecting the area claimed as traditionally their home (outlined on the map which comprises the frontpiece of their submission).

Prepared by: Amos Shlosberg

Research Branch
Library of Parliament

16 December 1980

SUMMARY

BASIC THEME

The Constitution Act would define the constitution too narrowly and therefore erode or eliminate hitherto accepted principles of constitutional law. Of particular concern is the implied exclusion of the Royal Proclamation of 1763 which guaranteed native land rights. Moreover, by specifically mentioning rights and freedoms as they pertain to the native people of Canada in s. 24, the opposite effect may be achieved through the process of judicial interpretation. Native rights are of a different sort than those purportedly protected by the Charter. Instead, native rights relate to exclusive property interests, self government, and aboriginal title. These can best be protected by entrenching in the constitution the documents which define these rights.

MAJOR POINTS

Constitution Act, 1980

s. 52(1) Constitution of Canada

This section should be amended by deleting the present subsection (c) and substituting therefore:

(c) the Royal Proclamation of 1763;

and by adding thereafter:

d) all treaties entered into between the Government of Canada or the Imperial Government or a former colonial government or the Hudson Bay Company and any of the native peoples of Canada;

e) any amendment to any Act, Order, Proclamation, or Treaty referred to in paragraphs a), b), c) and d);

f) the statutes, charters and proclamations of England of constitutional significance, to the extent that they were incorporated into the constitutional law of Canada on July 1, 1867; and

g) the constitutional doctrines of the English common law which apply to Canada and the common law constitutional doctrines which are or may become recognized in Canada.

Canadian Charter of Rights and Freedoms

s. 24 Undeclared Rights and Freedoms

This section should be amended by excluding reference to the rights and freedoms of native peoples.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Ontario Conference of Catholic Bishops
Bishop Alexander Carter, President
Archbishop Joseph-Aurèle Plourde, Vice-President
Father Angus McDougal, General-Secretary
Father Raymond Durocher
Professor Joseph Maguet

DATE OF APPEARANCE: January 7, 1981, 2:30 p.m.

FORM OF SUBMISSION: Brief

BACKGROUND: The Ontario Conference of Catholic Bishops
links the thirty-two bishops of Ontario.

Prepared by: François Bernier

Research Branch
Library of Parliament

January 6, 1981

MAJOR POINTS AND
RECOMMENDATIONS:

The Conference has singled out four areas of concern:

The Rights of the Unborn

The Conference believes that s. 7 of the proposed Charter should be reworded to guarantee the right to life from the moment of conception onwards. The proposed text is as follows:

"Everyone, from the moment of conception onward until natural death, has the right to life. Everyone too, innocent of crime, has the right to liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The Rights of the Native Peoples

Section 24 of the Charter incompletely protects the rights of native peoples. While it may not be necessary to define the content of aboriginal rights in the Charter itself, the Charter should protect such rights as may exist from legislative encroachment by Parliament or the provincial legislatures. The Conference proposes an amendment to s. 24 as well as adding a new section as follows:

- "24. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada.
- 24(a). Aboriginal rights of native peoples of Canada including, without limiting the generality of the foregoing, the Royal Proclamation of 1763, Treaties entered into between native peoples and the Crown, aboriginal title to lands, and other such rights shall not be prejudicially affected by any legislation of Parliament or a Provincial Legislature. Nothing in this section prohibits the renunciation of aboriginal rights for compensation by native peoples of Canada."

The Rights of Denominational Schools

The Conference wishes to make certain that modification of the Constitution will not affect the continued existence of denominational school rights as they now exist under s. 93 of the British North America Act.

In this respect, the Conference submits two specific proposals: denominational school rights should be subject to the amending formula requiring the greatest degree of unanimity and be included as a new sub-division of s. 50, that is as section 50(h).

Section 24 of the Charter should also be further amended so as to clearly state that the rights and freedoms of the Charter cannot be construed so as to affect rights and privileges recognized and guaranteed under s. 93 of the B.N.A. Act.

Official Language Rights

The Conference supports the contents of sections 17, 18 and 19 of the Charter, but believes that the proposed Constitutional Act should go further in encouraging and preserving the growth of either official language where it is de facto in a minority position. The Conference also insists on the importance of the right to education in either official language for minorities in each province.

SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Parti de l'Union Nationale du Québec

Mr. Michel Le Moignan, Interim Leader, MNA (Gaspé)

Mr. Bertrand Goulet (attendance to be confirmed)

MNA (Bellechasse)

Mr. Claude Gélinas, Executive Assistant to the Interim
Leader

DATE OF APPEARANCE:

17 December 1980; 4:30 p.m.

FORM OF SUBMISSION:

Speech by the interim leader before the National Assembly
of Quebec

BACKGROUND:

The Union Nationale is a political party in Quebec currently
led by an interim leader, Mr. Michel Le Moignan. It has
five members elected to the National Assembly of Quebec.

Prepared by: Claude St Pierre

Research Branch
Library of Parliament

16 December 1980

The Union Nationale expresses its disapproval of the federal government's project for unilateral action and asks that Canadian and British Parliamentarians join in opposing this action. Quebec has the most to lose in this because the vision of a federalism based on unilateral action by the federal government is contrary to Quebec's vision.

Patriation

The patriation project is said to ensure Canada's independence and to end the 53-year old Canadian constitutional deadlock. As far as the Union Nationale is concerned, this approach is a subterfuge.

Canada acquires its independence with the Statute of Westminster of 1931. It is a sovereign state recognized as such by the international community. Since then, the British Parliament has never encroached on Canada's independence. The federal argument is based on form rather than on substance and the fact that the Queen remains as head of the Canadian state disproves Ottawa's argument about colonialism.

The idea of a 53-year old constitutional paralysis can also be rejected because this period has not been barren. Amendments to the constitution were made during this period. In 1949, there was partial patriation of powers which did not affect the exclusive jurisdiction of the provinces; unemployment and old age pension acts were amended. Amendments which affected the provinces were made with the consent of the provinces concerned. There was therefore no deadlock over half a century and several amendments to the British North America Act were indeed made during this time.

The argument of constitutional paralysis is used mostly to justify the use of force by the Parliament to the public. Patriation then permits the federal government to have the constitution amended immediately by the British Parliament and to face the provinces with a fait accompli on fundamental aspects such as the charter of rights and the amending formula.

Comprehensive constitutional reform

The Union nationale believes that the amending formula and patriation should follow a comprehensive constitutional reform. This vision stems from the fact that Quebec, heart

of the francophone nation, fights for its own views of the division of powers and of the nature of its federal institutions on the basis of its own distinctive characteristics. These concepts are at the very heart of a unified whole that only a comprehensive reform can protect.

A piecemeal approach might harm the recognition of Quebec's distinctive character and affect the division of powers and the shaping of federal institutions. Unilateral patriation might well institutionalize these dangers and set aside the use of unanimous consent which has often afforded us some degree of protection.

Amending formula

The proposed amending formula, as worded, gives Quebec a right of veto. However, the federal government can reserve for itself the right to hold a referendum on a question if a veto is cast.

This referendum opens the door to a centralization of powers in Ottawa and even more so because the formula will be enshrined in the constitution and will become a permanent tool for unilateral action. This approach denies the fundamental principle of the equality of the two orders of government. Such a request cannot be made without explicit consent by the government of Quebec.

Charter of rights and freedoms

It is unfair that a single order of government should impose an major constitutional amendment, namely the enshrining of a charter of human rights and freedoms, made under cover of patriation and by a foreign parliament. Such a measure is unfair and arbitrary especially when one considers that for all subsequent amendments the provinces will be bound by the rule of unanimous consent and by the amending formula which allows the federal government to disregard the will of provincial governments.

The Union Nationale maintains that the priority should be given to reaching an agreement between the two orders of government with respect to the division of powers before enshrining of a charter of rights can be considered. As Daniel Johnson said, a direct link exists between an enshrined charter and reform of the Supreme Court because the authority responsible for the application of the charter must be defined.

In a unitary country, a charter of rights reflects a tendency towards homogeneity of ethnic visions but in a federal country, the various rules of civil and common law require the previous creation of a constitutional court.

Furthermore, a Canadian charter of rights and freedoms should not be adopted by a foreign parliament.

Language rights

The Union Nationale believes that the proposal of the Pépin-Robarts Commission, whereby the provinces would ensure, through legislation, the protection of their linguistic minorities, is much more realistic in the long term.

RECOMMENDATIONS

The Union Nationale believes that patriation and the adoption of an amending formula should follow, and not precede, a period of constitutional reform. This reform should be comprehensive.

A new Canadian constitution should recognize the autonomy of each order of government in matters over which they have jurisdiction under the constitution. Until this principle is recognized, the Union Nationale will continue to oppose unilateral patriation.

The Union Nationale cannot agree to unilateral patriation without the explicit consent of the Quebec government.

The Union Nationale believes that agreement between the two orders of government on the division of powers should be given priority over enshrining of a charter of rights in the constitution.

The enshrining of a charter in the constitution should be linked directly to the reform of the Supreme Court.

The Union Nationale believes that the formula proposed by the Pépin-Robarts Commission is the fairest and the one most in accordance with the Canadian reality.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION.

BRIEFING NOTES

WITNESS: Positive Action Committee

DATE OF APPEARANCE: Tuesday, November 18, 1980
11:00 A.M.

SOURCE OF INFORMATION: Brief (entitled "Patriation, the Charter of Rights and Canada's Constitutional Future.")

BACKGROUND: Formed in 1976, "with the aim of establishing a constructive role for the non-francophone community of Quebec." Membership of approximately 50,000.

Prepared by: Paul Martin

Research Branch
Library of Parliament

17 November 1980

BRIEFING NOTES

1. BASIC THEME

- agrees with patriation but believes that agreement should be reached on amendment formula.
- the language rights of the Charter do not go far enough.

2. MAJOR POINTS

A. The Government's Proposal

- Positive Action supports the objective of patriation. Patriation 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 seen as an intolerable situation. (p.2)
- 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. (p.2)

B. The Process

- 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, it is recommended that the Federal government drop its proposal for amendment by way of referendum [Section 42]. (p. 3)

C. The Charter of Rights

- 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. (p. 5)
- But in its opinion, they do not go far enough. 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. (p.6)

• Language Rights

(i) Language of Legislatures and Courts

- 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. (p.8)

- 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. If we do not take the opportunity today to redress this injustice, we may never have the opportunity again. (p.10-11)

- Ideally, it feels it should recommend the immediate extension of section 133 of the BNA Act to all provinces, but it has regretfully come to the conclusion that it would be unrealistic and divisive at this stage of our history to press for such rights. It, nevertheless, hopes 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 this rights. Similarly, it feels that it may be too soon to ask the provinces other than Quebec, Manitoba, New Brunswick and Ontario to print and publish the Acts of their legislatures in English and French. It hopes that this right will also be extended to all provinces within a reasonably short delay. (p.11-12)

- 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. Justice cannot be served if the rights for a person to be tried in English or French when charged with a criminal offence anywhere in Canada is not recognized and entrenched. (p.12)

(ii) Minority Language Education Rights

- 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. (p.13)

- It is in the interest of all Canadians that the 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. (p.14)

- Its proposal differs from Section 23 in two respects: (a) it extends to immigrants the same rights as citizens and (b) it omits the provision "where numbers warrant". In the first place, if Canada is to have a reputation for fairness, few distinctions as possible should be made. Secondly, it firmly believes that the right to minority language education should not be contingent upon numbers. (p.15)

- 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 instructions will be given. If this country is to survive with recognition of the principles of duality, situations such as Essex County and Penetanguishene, must not be repeated. Section 23(1) is not enough. (p. 15-16)

- 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. We must act now to ensure that these minorities survive in the face of increasing pressure from their respective majorities. (p.16)

(iii) Health and Social Services

- 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 one has to use health and social services, the question of whether they can be delivered in English and French as a direct bearing on their effectiveness. (p.17)

(iv) Radio and Television Services

- 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. (p.22)

(v) Communications with Provincial Government

- 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. While it may have been tolerable to be without a bilingual service when only occasional communications were required, it has now become unacceptable. (p. 22-23)

- The tax-paying citizen surely has the right to expect that the service for which has paid be rendered to him in a language (English or French) which he understands. (p. 23)

- This same principle applies to communications with municipal governments, although here it would add the qualification "where numbers warrant". (p. 23)

3. RECOMMENDATIONS

The Positive Action Committee recommends the entrenchment of the following language rights in addition to, or as an expansion of, the rights enumerated in the Charter.

- s.17 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.
- ss.17, 2. Sections 133 of the BNA Act and 23 of the Manitoba Act should be
18,19 extended to New Brunswick and Ontario.
- s. 23 3. A person charged with a criminal offence anywhere in Canada, 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.
- s.23 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.
- s.23 6. Native peoples have the right to have their children receive their school instruction in their language.
- 7. Everyone has the right to access to health and social services in English or French wherever the numbers warrant.
- 8. A person in any part of the country should be able to receive radio and television services in English and French.
- s.20 9. Any person should be able to address and receive communications from his provincial government in English or French.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Mr. Grant Devine, Leader
Progressive Conservative Party of Saskatchewan

DATE OF APPEARANCE: January 6, 1981, 8:30 p.m.

FORM OF SUBMISSION: Brief

Prepared by: François P. Bernier

Research Branch
Library of Parliament

January 6, 1981

BASIC THEME:

There is really no need for a new Constitution, but rather for more understanding and compromise between the provinces and the federal government.

MAJOR POINTS:

The main reasons for reform of the Canadian Constitution are the desire to firmly establish the position of French Canada and of French-Canadians and to arrive at a new division of legislative powers between the two levels of government.

Regarding the division of powers, the brief argues that there is little need to modify the present Constitution, except perhaps for a few exceptions (marriage and divorce, taxation, ...).

Many of the problems encountered in Canada do not call for constitutional reform but rather for practical solutions. (For example, the conflicts in the field of communications would be better resolved by delegation of federal powers to the provinces rather than by modification of the present Constitution.)

As to rights relating to language, education and religion for French-Canadians, it is submitted that the present s. 93, and more specifically s. 93(3), offered sufficient guarantees and it is doubtful whether a better solution can be found.

On reform of certain federal institutions, the brief rejects the suggestion of an expanded Supreme Court that would represent all provinces.

On reform of the Senate, the idea of Senators being nominated by the provinces rather than by the federal government is rejected, as well as abolition of that body. Rather it is suggested that the best possible reform would be making that body an elective one.

RECOMMENDATIONS:

As to the present Constitution, five points are suggested:

- a) patriation of the British North America Act as it stands with the requirement of unanimous agreement for the patriation itself as well as regarding future changes.

- b) there should not be an entrenched Charter of Rights.
- c) cultural and regional divisions should be resolved through negotiations and compromise.
- d) the power of indirect taxation should be granted to the provinces.
- e) the principle of equalization should be recognized in the Constitution and be susceptible to future modification by agreement.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: The Protestant School Board of Greater Montreal

DATE OF APPEARANCE: Monday, 24 November, 1980, 8:00 p.m.

FORM OF SUBMISSION: Brief

BACKGROUND: The P.S.B.G.M. predates Confederation. It has had a lengthy experience with denominational education as found in Quebec. It is the largest Protestant School Board in Quebec and one of the largest in Canada. The Commissioners are representative of the non-Roman Catholic community and include at least one person from each of the following groups: Protestants, Jews, Greek Orthodox, whites, blacks, males, females, educators, housewives, lawyers, business men, and executives.

Prepared by: Paul Martin

Research Branch
Library of Parliament

24 November 1980

BASIC THEME:

The P.S.B.G.M. wants parents to have the kind of education they want for their children. To do this, they must have choices and the structures to fulfill their wishes and it feels that these structures and choices must be guaranteed by the Constitution.

MAJOR POINTS:

Its proposals are based upon 7 fundamental concepts:

1. That there is, has been, and will be a country, Canada, composed of two majority cultures and many others, numerically smaller but important because of Canada's multicultural nature.
2. That this country, Canada, has a fundamental responsibility to serve with equity and justice these many cultures and promote their welfare without sacrificing the rights of others and to respect these cultures.
3. That the right of each citizen to use his own language freely and to have this children educated in the official language of choice is fundamental and this right must be guaranteed in the new Constitution.
4. That education is a fundamental right of all citizens and therefore must be guaranteed on a Canada-wide, i.e. federal, basis.
5. That there are federal, provincial, and local responsibilities and jurisdictions in education which must be clearly defined in the Constitution and that appropriate financial support must be guaranteed to each authority so that it can carry out the role which has been assigned to it.
6. That money spent which raises the educational level of our country is an excellent investment for the development of our human resources.
7. That the culture or language of either major linguistic group, French or English, cannot be adequately preserved much less strengthened by having its schools under the control of the other major linguistic group, English or French.

It greatest fear is that the "new fathers of Confederation" will unwittingly contribute to the slow assimilation of English culture in Quebec and the French culture in other Provinces.

RECOMMENDATIONS:

A. Individual and collective rights

- s. 23 The right of all parents to choose either of the two official languages of Canada as the language of education for their children.

This right to choose differs from Section 23 of the proposed Constitution Act, 1980 which, if enacted will effectually prevent many English-speaking children, including children from Great Britain and the U.S. from being educated in English in Quebec, many English-speaking children in the other provinces from being educated in French, and many french-speaking children in Quebec and elsewhere from being educated in English. Surely this right to choose the language of instruction in a country with two official languages is a fundamental right.

- s. 21 The retention of the rights and privileges guaranteed by Article 93 of the B.N.A. Act, and the guarantee that any changes in the Constitution not diminish, infringe upon, or withdraw any educational rights and privileges already guaranteed in the B.N.A. Act.

B. The Federal Role

In its opinion, the Federal Government has several active roles to play in education. It proposes that the Constitution give full responsibility to the Federal Government for the following:

1. To establish a minimum level of education across Canada with the appropriate financial support but with freedom to other authorities to exceed these minima, if they so desire.
2. To subsidize minority education by direct payments to school boards.
3. To develop, and continuously improve courses, which shall be given in all Canadian schools, which will foster a pride in being a Canadian and belonging to a country called Canada.
4. To guarantee language instruction as follows:
 - First language: that all parents will have the right to have their children educated in either French or English, as they choose, i.e. the language of instruction is French or English as the case may be, where numbers permit.

- Second language: that each child will be given the opportunity to learn the other official language, French or English, as the case may be. All children should have some knowledge of the second language leading to the ultimate goal of a bilingual Canada.
 - Other languages: where numbers permit, it proposes that instruction be made available in other languages. This proposal will do much to retain and nourish the many cultures that are presently part of the Canadian mosaic.
5. The Federal Government should have the right and responsibility to disallow any provincial law which is prejudicial to individual and minority rights in education as stated in the Constitution.
 6. That there be established the office of educational Ombudsman which would have the responsibilities of hearing aggrieved parties, attempting to find acceptable solutions, and making recommendations to proper authorities for needed changes.

C. The Provincial Role

1. That, with the exception of the material envisaged in recommendation B.3, the provinces decide the content of their several curricula but with sufficient flexibility to allow school boards, in turn, to make provision for local and regional differences.
2. Recommends a provincial equalization program for school boards so that all children will have at least a minimum level of education within each province.
3. Recommends that school corporations be given primary if not exclusive rights to an adequate and relatively stable tax base.

COMMENTS:

Most of the recommendations with respect to federal and provincial roles in the field of education have nothing to do with the proposed Joint Resolution. These proposals deal more with the division of powers than with any of the matters under study by the Committee. The only recommendations that have any direct relation to the proposed Joint Resolution concern the Charter of Rights and, more specifically, freedom

of choice of language of education and the retention of denominational school rights.

The recommendation that the federal government be given the power to disallow prejudicial provincial legislation in the area of education is superfluous. The federal disallowance power under the B.N.A. Act (ss. 55-57) will not be abrogated. (That power has been exercised 112 times since 1867; the last time was in 1943).

The rights and privileges protected by s. 93 of the B.N.A. Act (as well as by s. 17 of the Alberta Act, s. 17 of the Saskatchewan Act, s. 22 of the Manitoba Act and clause 17 of the Terms of Union of Newfoundland with Canada) are maintained in force by virtue of s. 21 of the Charter. However, the amendment of these provisions could be made according to the procedure set out in s. 43 (or in s. 34 until Part V of the Charter comes into force). Those provisions were not made subject to the general amendment formula (s. 41 or 42 or, before the coming into force of Part V, s. 33).

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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The Public Interest Advocacy Center

The National Anti-Poverty Organization

Nick Schultz, PIAC

Andrew Roman, NAPO

Majorie Hurling, Executive Director,
NAPO

DATE OF APPEARANCE:

Friday, December 18, 1980, 10:15 a.m.

FORM OF SUBMISSION:

Brief (23 pages)

BACKGROUND:

The Public Interest Advocacy Center (PIAC) is a federal, not-for-profit corporation which makes legal services available to public interest groups which cannot afford to hire their own lawyers and are not eligible for legal aid.

The National Anti-Poverty Organization (NAPO) is a federal, not-for-profit corporation which serves as a focal point for some 1600 anti-poverty groups in every province and territory of Canada and has as well 3000 individual members. It is an advocate for the interests of Canada's poor.

Prepared by: John McDonough
Research Branch
Library of Parliament
December 17, 1980

MAIN POINTS:

PIAC and NAPO support the principle of the entrenchment of a Charter of Rights however the proposed Charter is seriously flawed.

The Charter must be amended to include the right to benefit from and share in the economic development and social progress of Canada.

As it stands the proposed Charter of Rights does not provide adequate protection from encroachment by ordinary Acts of Parliament.

The Diefenbaker Bill of Rights has had little effect.

Parliament must decide whether it wants to maintain parliamentary supremacy over the Charter of Rights or whether it seeks to entrench a Charter against this parliamentary tradition.

The need for a Charter is clear, however, time is needed for a consensus to develop on its contents.

RECOMMENDATIONS:

s. 1

The limitations clause

The meaningless vagueness of s.1 opens the door to the very abuse of parliamentary supremacy which the Charter is intended to check. It must be deleted.

s. 6(3)

Limitation subsection on mobility rights

Subparagraph (a) perpetuates the practice of discrimination against out of province tradespeople.

Subparagraph (b) identified a specific class of Canadians - those on welfare - and deprives them absolutely of the right to move.

Subsection 6(3) should be deleted in its entirety.

s. 10(b)

Right to retain counsel

This is meaningless if you cannot afford to pay the fees

s. 15

Non discrimination rights

They support the expansion of grounds to include physical and mental handicap, marital status, and sexual orientation.

SOCIAL AND ECONOMIC RIGHTS:

A Canadian Charter of Rights must contain provisions creating a right to be free from want modeled on the language of the Universal Declaration of Human Rights. It might include the following rights:

- the right to work
- the right to protection from unemployment
- the right to equal pay for equal work
- the right to just and favourable remuneration supplemented, if necessary, by other means of social protection
- the right to unionize
- the right to rest and leisure
- the right to paid holidays
- the right to an adequate standard of living including necessary social services and social security
- the right to education and choice of education.

There must be a clear statement in the Charter that those who lack the means will be provided the means to exercise and enjoy the rights enumerated in the Charter.

OTHER LEGISLATIVE ACTION:

The Interpretation Act

The Interpretation Act should be amended so as to instruct judges to interpret the Constitution Act 1867-70 differently from an ordinary statute. Judges should be able to examine the parliamentary debates which precede the passage of this legislation.

If Parliament wishes to have "equality before the law" interpreted in a substantive rather than a procedural way, this instruction should be provided in the Interpretation Act.

The Constitutions Act 1867-1980 should be declared to have primacy over all other statutes and the validity of all other statutes shall be judged by reference to the Constitution Acts.

The Supreme Court of Canada Act

The Supreme Court of Canada Act should be amended so as to permit any citizen to apply directly to that court for a declaration (or appeal, or other authoritative ruling) to determine whether a piece of legislation (or executive action pursuant thereto) represents a violation of his civil liberties. An application for leave should be brought before a single judge of the Supreme Court, in chambers. Consideration might be given to allowing such an application to be conducted in writing at the option of the applicant. Where the question of law is considered by the judge to be of sufficient importance to grant leave, the case should be heard forthwith, and since the respondent will invariably be the Crown, no costs should be awarded against the citizen unless the judge finds his action to have been brought in bad faith, or to be merely frivolous and vexatious.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: M. Gil Rémillard

DATE OF APPEARANCE: January 9, 1981, 9:30 a.m.

SOURCE OF NOTES: Brief to Committee, the third chapter of the first section of M. Rémillard's book, Le Fédéralisme Canadien, and a telephone conversation.

BACKGROUND: M. Rémillard is Director of the Constitutional Law section of the Canadian Bar Association (Quebec) and editor of the constitutional law report in the Quebec Bar Review. A lawyer with degrees in political science and philosophy and a doctor of laws, M. Rémillard has served as a legal consultant to the federal and Quebec governments, notably as adviser to the provincial minister of communications. He is currently Professor of Law in the Law Faculty of Laval University.

Prepared by: Brooke Jeffrey

Research Branch
Library of Parliament

8 January 1981

SUMMARYPATRIATION

Contrary to the opinion of the current federal government, patriation of the Constitution is a false problem; it is neither urgent nor difficult if established guidelines are followed. If the provinces and the federal government agree to change the terms of the Constitution it is not necessary to go to London, as the Statute of Westminster is in one sense a treaty between Canada and England, and in another sense a federal-provincial agreement. It is the unanimity rule and the concept of total constitutional revision which are being undermined by this proposed resolution. From a strictly legal point of view the federal power regarding patriation is considerable. However, if the federal government proceeds unilaterally in violation of the unanimity rule the provinces could appeal to the courts, and in view of the Supreme Court decision on the Senate it is highly probable that the Court would declare the federal proposal unconstitutional. Although the authority of custom and convention rests more on a political and moral base than a legal one, it is nevertheless an integral part of the Constitution. Overriding this, as does the present resolution, is placing in jeopardy the entire constitutional system and establishing a dangerous precedent. The author considers the proposed resolution on the Constitution of Canada illegal, since it appears to be:

- 1) contrary to the theories of agreement and compromise developed by the courts;
- 2) contrary to article 91 (1) of the BNA Act, which does not permit the federal Parliament to modify the division of powers in articles 91 and 92 regarding the legislative authority of Parliament and the provincial legislatures;
- 3) contrary to the constitutional convention or custom of unanimity for altering the division of legislative competence and all other federal elements of the 1867 agreement.

Moreover, citing the 1937 case [Attorney General of Canada vs. Attorney General of Ontario (1937) A.C. 326] the author believes that, even if the British Parliament passes the present Canadian resolution it will not be applicable to the provinces, as regards its federalist aspects, without the agreement of the provinces. In other words the Charter of Rights, the amending formula, etc., would not be any more binding on the provinces than an international treaty.

CHARTER OF RIGHTS AND LIBERTIES AND LANGUAGE RIGHTS

It is necessary to entrench fundamental freedoms in a new Constitution. However, any such Charter should be limited to the most classic rights, in order to allow the provinces to build on this according to their needs. Such a Charter should only include linguistic rights applicable at the federal level.

AMENDING FORMULA

In a federal Constitution the amending formula is critical, the absence of an amending formula in the BNA Act of 1867 is a lacuna which must be filled as soon as possible. The most acceptable amending formula is that proposed by the P  pin-Robarts Commission, particularly because of the referendum clause. However, he considers both impossible and unacceptable the establishment of an amending formula removed from the context of complete constitutional revision.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Professor Peter H. Russell
Department of Political Economy
University of Toronto

DATE OF APPEARANCE: January 8, 1980: 7:30 p.m.

SOURCE OF NOTES:

Brief (5 pages)
Telephone conversation, January 6, 1981.

BACKGROUND:

Professor Peter Russell is a Professor of Political Economy at the University of Toronto. He has been a Rhodes Scholar as well as the recipient of a C.D. Howe Fellowship. Although the University of Toronto has been his principal teaching assignment, where during 1971 to 1976 he was Principal of Innis College, he has also been associated with Harvard University and Makerere University, Uganda. From 1974 through 1977, he was Chairman of the Dene Land Claims Southern Support Group. During the years 1977 to 1980, he has been Director of Research for the Commission of Inquiry on Certain Activities of the R.C.M.P.

Professor Russell has edited several books and articles. He has demonstrated an interest in constitutional reform with particular emphasis on the role of the Canadian judiciary. Among his notable publications are:

Leading Constitutional Discussions, McClelland and Stewart, 1975, Revised Edition, 1973;
The Supreme Court of Canada as a Bilingual and Bicultural Institution, Queen's Printer, Ottawa, 1979;
"A Democratic Approach to Civil Liberties", (1969) University of Toronto Law Journal;
"The Canadian Supreme Court: Its History and Development in National Society", (1980) Canada-United States Law Journal.

BASIC THEME:

Professor Russell's brief stresses his primary concerns about the process of patriation and entrenchment of the Charter of Rights and Freedoms, and the use of referenda in the amending procedure. He has indicated that he would be willing to comment on any other aspects of the proposed Joint Resolution.

MAIN POINTS:

PATRIATION AND ENTRENCHMENT

Remarks that entrenchment amounts to nothing more or less than a change in the social contract between the governed and their governments, in that certain powers will be withdrawn from the governors elected by the people and transferred to the courts.

Doubts the merits of entrenching rights in the constitution due to the false hopes it raises, the political burden it will impose on the judiciary, and the possibility it might diminish our reliance on the processes of public discussion and democratic politics for resolving disputes about fundamental principles. (p. 1)

Entrenchment as a process should be reasonably popular and as unifying as possible. But the present Charter has been drafted in haste, is being pushed through the Parliament of Canada, will be enacted by a foreign legislature, and amounts to the powers of provincial governments being altered without their consent on a unilateral initiative of the federal government. (p. 2).

If it is decided that entrenchment is necessary, it should be carried out only after patriation in accordance with the terms of an amending procedure defined and enacted in Canada. (p. 3) To maintain that this is the last chance for entrenching rights and making important constitutional changes is to express a profound lack of faith in the Canadian people. (p. 4)

REFERENDA

Supports the notion of referenda. It is only logical that patriation should mean that the Canadian people replace the Imperial Parliament as the final custodian of the Canadian constitution. This is in accordance with Canada's move from colonial ideas to the concepts of popular sovereignty. (p. 4)

Emphasizes the word "final". A democratic society with a parliamentary tradition should not make use of referenda in the first instance. The role of the populace should be that of arbitrator. (p. 4)

Recommends that any referendum be initiated solely by a combination of Parliament plus a somewhat smaller group of provinces (any three of four) than is required for an amendment by inter-governmental agreement. (p. 5)

Maintains that it is essential to secure that the majority required for popular ratification of the constitutional proposal be more than the bare majority of persons voting. The majority should reflect regional and ethnic diversities. (p. 5)

John McDonough
Stephen Fogarty

Research Branch
Library of Parliament

7 January 1981



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Saskatchewan Human Rights Commission

Ken Norman, Chief Commissioner
Louise Simard, Deputy Chief Commissioner

DATE OF APPEARANCE:

December 5, 1980, 9:30 a.m.

SOURCE OF NOTES:

Brief telephone conversation with Mr. Norman.

BACKGROUND:

The Saskatchewan Human Rights Commission was established in 1972 to administer the Fair Employment Practices Act, the Fair Accommodation Act, the Blind Persons Act and the Bill of Rights. In 1979 a new Human Rights Code was established and the previous Acts were revoked.

Ken Norman was appointed Chief Commissioner in 1978.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 4, 1980



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Ken Norman was appointed Chief Commissioner in 1978.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 4, 1980

BASIC THEME:

Mr. Norman will review the history of anti-discrimination legislation in this country and the reasons why there has been a shift from reliance on the courts to the establishment of Human Rights Commissions.

Mr. Norman will confine his brief to an examination of section 15 (non-discrimination rights). He will argue that the language employed in this section presents both theoretical and practical concerns.

He will also propose two substantive amendments which he believes will meet these concerns.

MAJOR POINTS:

Mr. Norman will point out the potential points of friction between the potential judicial interpretation of s. 15 as presently worded and the Human Rights legislation which has established the various Human Rights Commissions in Canada.

Mr. Norman will illustrate his arguments with specific examples, the most notable will be the Stella Bliss case, in order to demonstrate the dilemma posed by s. 15.

It is the contention of the Saskatchewan Human Rights Commission that Human Rights Tribunals and Boards of Enquiry have more knowledge and experience with cases involving human rights than do the courts. They argue that when the courts come to deal with the constitutional aspects of human rights they should first listen to those agencies (Human Rights Commissions being one example) whose primary function is the protection of these rights. This reasoning stands behind the proposed new amendment for section 25(2) (Primacy of the Charter.)

RECOMMENDATIONS:

s. 15(2)

Affirmative Action Programs

The Saskatchewan Human Rights Commission wishes to give full support to the following amendment proposed earlier by Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission:

This section does not preclude any legislative distinction which is justifiably related to some bona fide amelioration of the condition of certain specified classes of persons.

It is important to enshrine protection only for those ameliorative programs that have a legislative base. It is hoped that this would be an uncontroversial amendment.

s. 25

Primacy of the Charter

Section 25 would be renumbered s. 25(1) and the present wording would be preceded by the phrase: "Subject to subsection (2)".

The Saskatchewan Human Rights Commission suggests the following for a new subsection (2):

No law or practice shall be construed as inconsistent with s. 15 unless any other remedy available and provided for by law has been sought.

COMMENTS:

The Saskatchewan Human Rights Commission has in many respects the most progressive provincial human rights and anti-discrimination legislation in Canada, both in terms of grounds and remedies. It might be particularly informative to question the Commission on the broader implications of the federal entrenched Charter on provincial human rights legislation in general. For example only the Saskatchewan Human Rights Commission can presently order the establishment of affirmative action programs without going to a Board of Inquiry.

Since the legislation establishing provincial Human Rights Commissions has been passed over a twenty-year period, is there very much variation from one province to another with respect to:

- the number and kinds of grounds of discrimination
- the remedies available to citizens

- the kind of enforcement available to the various Commissions?

Is it possible that the proposed Charter of Rights and Freedoms will set basic minimum standards of protection for all Canadians? Will a good Charter of Rights improve the protection of Human Rights in Canada or is it better to leave the process to evolving provincial standards?

Would the Charter as presently worded adversely affect the existing Saskatchewan Human Rights Legislation and remedies?

Would the Commissioners care to comment on the effect of s. 15 on existing provincial voluntary affirmative action programs, and likely future moves to mandatory programs and mechanisms such as contract compliance?



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(AS REVISED)
P.3

SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Société franco-manitobaine

DATE OF APPEARANCE: 21 November 1980, 10:15 a.m.

FORM OF SUBMISSION: Brief

BACKGROUND: The Société was founded in 1917 and recognized by statute since 1969. Its purpose is to promote the economic, political, cultural and educational interests of the Francophone population of Manitoba.

Prepared by: Paul Martin
Louis Massicotte

Research Branch
Library of Parliament

20 November 1980

BASIC THEME:

The Société supports entrenchment of minority rights. These rights are not best protected by legislatures, since legislatures are primarily responsible to the majority. The courts appear to be reliable safeguards for these rights.

MAJOR POINTS:

- a) Parents, including immigrants, should have freedom of choice as regards the language of education for their children, where numbers warrant.
- b) The amendment of constitutional provisions relating to some but not all provinces, during and after the transition period, should be made more difficult, either by requiring for that purpose the procedure set forth by sections 41 and 42, or by providing that section 23 of the Manitoba Act could be amended only by a resolution approved by the legislature of Manitoba and by a three-fourths majority in both Houses of Parliament.

LIMITATION CLAUSE

s. 1

Rights and Freedoms in Canada (p. 1)

This section should be deleted as superfluous. The Société believes the reference to limits consistent with a parliamentary system of government weakens at the outset the proposed Charter. Section 1 attempts an unharmonious reconciliation of a Court-reviewed Charter system with the theory of parliamentary supremacy that is neither desirable nor successful.

LANGUAGE RIGHTS

ss. 17, 18 and 19

Use of official languages before Parliament, the federal Courts and institutions. (p. 2-4)

Although similar rights are in force in Manitoba under s. 23 of the Manitoba Act, as interpreted by the Supreme Court in the Forest case, the Société points out that the legislature of Manitoba persists in denying to Franco-Manitobans the protection of s. 23. The Société therefore recommends that ss. 17-19 apply to the legislature of Manitoba; that s. 19 apply not

only to courts but also to statutory adjudicative agencies. Further, a new section (19A) should be added, enunciating that 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 where feasible, and having regard to the necessity to promote both official languages in Manitoba.

Comments: (1) To make ss. 17-19 binding on Manitoba would, it is submitted, not change anything (save subjecting any amendment to the procedure set out in ss. 41 and 42). The constitutional force and effect of ss. 17-19 of the Charter and of s. 23 of the Manitoba Act are identical. (Section 23 of the Manitoba Act is maintained by operation of s. 21 of the Charter. Although it is part of the Constitution of Canada (see s. 52(b)), it is not incorporated in the Charter itself.) If these constitutional rights are being allegedly denied, it has nothing to do with the locus of those rights. It results rather from a lack of enforcement powers giving the courts the authority to order compliance (as the Société points out). As it now stands (and it will probably remain that way should s. 25 be kept as drafted), the courts only strike down unconstitutional legislation; they have not yet assumed, or been given, the power to force the authorities to act. In other words, the courts, in constitutional matters, apparently recognize to themselves only negatory powers and not mandatory powers as well.

(2) The Supreme Court of Canada held, in the Blaikie case, that the word "court" as used in s. 133 of the B.N.A. Act (and, implicitly, in s. 23 of the Manitoba Act) included not only traditional courts of justice but also administrative bodies exercising judicial or quasi-judicial powers. Because of the reasons justifying that interpretation, and the close resemblance of terms in s. 133 of the B.N.A. Act and s. 19 of the Charter, it is most likely that the extensive meaning of the word "court" would stand once the Charter came into force. Therefore, the recommendation with respect to s. 19 would seem superfluous.

s. 20

Communications by public with federal institutions (p. 4-5)

Broadened access to French-language federal government services should be constitutionally guaranteed explicitly in Manitoba. Bilingual federal government services should be available where the service is rendered "out of the office".

s. 25

Primacy of Charter (p. 9)

The Charter should prevail over any law enacted before or after the coming into force of its provisions.

EDUCATION RIGHTS

s. 23

Minority Language Educational Rights (p. 6-8)

This section should be broadened.

- (1) The protection of s. 23(1) should not be limited to "Citizens of Canada" but extended to all residents.
- (2) It should be clear in that section that one parent (instead of both) of the minority's mother tongue is sufficient to qualify under its provisions. The Société disagrees more basically with the requirement of mother tongue and would delete it, so that there is freedom of choice concerning language of education.
- (3) The right to have children educated in the language of the minority should be extended to private as well as public schools.
- (4) Administrative control over minority schools should remain with the minority community.
- (5) A right should be recognized to French-language immersion education.

AMENDMENT FORMULA

s. 34

Amendment of provisions relating to some but not all provinces. (Transition Period) (p. 9-10)

This section would allow the legislature of Manitoba to reduce the guarantees given by section 23 of the Manitoba Act, provided it gets the consent of the Parliament of Canada. Section 23 should be amendable only under the procedure enunciated in sections 41 and

42 of the proposed Resolution. Alternatively, section 34 should be amended so that the consent of 3/4 of the Senate and 3/4 of the House of Commons would be necessary.

Note: There seems to be a discordance between the two versions of the brief on this point. The French version seems to present the two proposals as cumulative, while the English text presents them as alternatives. Further information might be requested on this point.

s. 43

Amendment of provisions relating to some but not all provinces (Permanent procedure). (p. 10-11)

The preceding remarks apply also to this section and the recommendations are similar. Section 23 of the Manitoba Act should be amendable only under ss. 41 and 42 of the proposed Resolution and, alternatively, a three-quarters majority would be required in both Houses of Parliament under s. 43.

Note 1: Again, there seems to be a discordance between the two texts on this point. The French version seems to present the two proposals as cumulative, while the English text presents them as alternatives.

Note 2: There is another discordance between the two versions of the brief. In the French text (p. 15), ss. 22 and 23 of the Manitoba Act would fall under the amending procedure set forth by ss. 41 and 42. Only s. 23 would do so in the English version (p. 11). Section 22 of the Manitoba Act refers to denominational rights.

ENFORCEMENT

The effectiveness of the proposed Charter would be seriously diluted by failure to include any provision for enforcement. A new section (25A) should be added conferring to every person or group whose constitutional rights are infringed by a public authority, a right to get full and effectual relief, by mandatory or restraining order of a superior court.

Comments: In the field of language rights, it is unlikely that such an enforcement provision could serve to force, for example, a legislature to pass, print and publish statutes in both official languages, or even to establish minority language educational facilities in a province.

In other cases (i.e., where action does not depend on the will of the legislative assemblies alone), an enforcement clause, to be effectual, should specify that "public authorities" includes the Crown in the right of Canada or in the right of any province as the case may be. To further ensure the efficacy of such a clause, the remedy should not be limited to injunctive relief, as recommended, but should be extended to prerogative writs (certiorari, prohibition, mandamus and, perhaps, quo warranto) and pecuniary compensation.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Ukrainian Canadian Committee
Winnipeg, Manitoba

DATE OF APPEARANCE: 27 November 1980, 19h00

FORM OF SUBMISSION: Brief

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

27 November 1980

SUMMARYMAIN THEME

Strongly supports the entrenchment of fundamental human rights and freedoms in the Constitution of Canada. Believes that certain amendments are desirable so that the Constitution will reflect the multi-cultural nature of Canada.

GUARANTEE OF RIGHTS AND FREEDOMS

s. 1 This section should be deleted. As drafted, the section is so broad in its application that it would do nothing to prevent systematic abuse by governments of those fundamental rights which the proposed Constitution is supposed to protect.

The internment of Ukrainian-Canadians during World War I and of Japanese-Canadians during World War II, demonstrates that fundamental civil and legal rights will have little protection if the government is free to limit them in a manner consistent with the principles "generally accepted" by Canadian society at that time.

NON-DISCRIMINATION RIGHTS

s. 15 Regrets the fact that the new Constitution will not contain a preamble defining Canada's identity as "multiculturalism within a bilingual framework". Remarks that the 1970-72 Special Joint Committee on the Constitution recommended that the preamble should formally recognize Canada's multicultural nature (Recommendation 27).

Proposes, therefore, that since the new Constitution (as drafted) will have no preamble, Canada commit itself to the principle of multiculturalism by adding the following subsection to s. 15:

15(3) Everyone has the right to preserve and develop their cultural and linguistic heritage.

OFFICIAL LANGUAGES OF CANADA

ss. 16-22

The Ukrainian-Canadian Committee is "truly pleased" with these sections. French-Canadians must have rights all across Canada if the federal government is also to be their government and if national unity is to prevail.

MINORITY LANGUAGE EDUCATIONAL RIGHTS

s. 23(1)

Comments that the federal government is apparently willing to concern itself with the educational rights of English-speaking persons in Quebec and French-speaking persons elsewhere, but does not appear to wish to do so for other ethnocultural minorities whose linguistic and cultural needs are equally pressing. In many regions of Canada, languages other than English or French are also of vital importance.

Recommends that the Constitution not confine itself to one linguistic combination but embrace all that are viable through the following amendment:

23(1) Citizens of Canada shall have their children receive their primary and secondary school instruction in the language of the majority of the population of the province in which they reside and in any other language(s) in accordance with the expressed desire of parents in any 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.

s. 23(2)

This subsection would no longer be necessary by virtue of the proposed amendment to subsection 23(1).



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

SUMMARY OF SUBMISSION

SUBMITTED BY: Union of British Columbia Indian Chiefs

FORM OF SUBMISSION: Brief to the Foreign and Commonwealth Affairs Committee, House of Commons, United Kingdom Parliament. The Brief also contains a detailed appendix composed of legal documents relative to the claims of Canadian Indian people.

BACKGROUND: 170 British Columbia Indian bands are affiliated with the Union representing approximately 55,000 status Indians.

SUMMARY

PATRIATION

Maintains that Great Britain should refuse patriation until the position of Indian nations within Canada has been resolved to everyone's satisfaction. The federal government's policy of relegating Indian participation in constitutional talks to the period following patriation means that the effective participation of Indians has been blocked. (p. 69)

The only section mentioning Indian rights in the Resolution (s. 24) is unsatisfactory. This section amounts to nothing more than a statement that the federal government will continue to "recognize" Indian rights in the same manner as it has done so in the past. (p. 66)

The proposed amending formula (s. 38) whereby the government of eight provinces with 80% of the population could institute constitutional change "will be a tyranny by the majority over the minority rights of Indian people." The supervisory pro-

Union of B.C. Indian Chiefs

reaction of Her Majesty's Parliament in Britain, as well as the special protections deriving from the unique position of Indians within confederation would be lost. The right of Indian people to continue to live on their lands and continue their culture and way of life would be placed in jeopardy. . (p. 68)

The Union points out that over 40% of the land comprising Canada has not been ceded. This is Indian land and resources which the various governments are dividing among themselves. (p. 68)

THE CONCEPT OF "SACRED TRUST"

The development of the "sacred trust" concept of international law is traced from the 16th century through to various instruments of the United Nations. (pp. 1-7)

Insofar as the United Kingdom is concerned, the following were said to comprise its "sacred trust" towards Canadian Indians:

1. That title to Indian land would only be extinguished by consent (pp. 10-31(a));
2. That title would be ceded through a fair and open process; once title was ceded, the parties agreed that the obligations would continue to bind them forever (pp. 31(a)-32);
3. That in dealing with the Indian Nations in Canada, the Royal Majesty agreed to continue to treat Indian nations as protected people with collective national status, amounting in modern terms, to a recognition to the right to self-determination (pp. 33-36);
4. That the treaties, entered into between the Royal Majesties and Indian Nations, are legally binding agreements with consequences in international law (pp. 37-40).

Numerous references are made to proclamations, statutes and treaties in describing these four principles.

Union of B.C. Indian Chiefs

BRITAIN'S LEGAL OBLIGATIONS TO CANADIAN INDIANS

It is maintained that the political relationship established between Her Majesty and the Indian Nations, including the Royal Proclamation of 1763 and various treaties from which specific obligations are created, is beyond the capacity of the Parliament of Canada. The treaty-making prerogative continues to rest with the Crown and no legislation has ever been passed in Canada authorizing Canadian officials to conclude treaties with the indigenous nations.

The Indian Nations have never consented to releasing the United Kingdom from her obligations under the relationship. Until such consent is given, the United Kingdom remains bound to the Indian Nations (pp. 44-45).

prepared by: Stephen Fogarty

Research Branch
Library of Parliament

December 2, 1980



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Union of New Brunswick Indians:

Graydon Nicholas, Chairman

Chief Albert Levi (Micmac), Big Cove Indian Reserve

Chief Winston Paul (Maliseet), Woodstock Indian Reserve

Daryl Paul, Research Director

DATE OF APPEARANCE:

January 6, 1981; 7:30 p.m.

SOURCE OF NOTES::

Telephone conversation with Graydon Nicholas, December 22, 1980.

BACKGROUND:

The Union of New Brunswick Indians represents 16 reserves, 15 in the province of New Brunswick and one on Lennox Island, Prince Edward Island. This includes approximately 5400 Micmac and Maliseet registered Indians.

The Board of Directors of the Union is made up of the sixteen Chiefs, one from each reserve and they appoint a Chairman.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 23, 1980

MAIN POINTS:

The Union wishes to stress the point their aboriginal rights exist and remain intact in the province of New Brunswick. These rights have never been surrendered to any government in Canada, federal or provincial.

The Union asserts that the following Treaties and Proclamations are valid, and should be recognized as part of the constitution of Canada either explicitly in section 24 or in section 51 and Schedule I:

1725 - Peace and Friendship Treaty signed in Boston with both the Massac and Nova Scotia governments.

1752 - A Micmac Treaty signed in Halifax.

1778 - The Fort Howe Treaty signed in Saint John with both the Maliseets and Micmacs.

1779 - A Treaty signed with the Micmacs in Eastern New Brunswick.

1761 - Jonathan Belcher's Proclamation.

1763 - The Royal Proclamation.

The Treaties and Proclamations dealt with the aboriginal people of Canada as Nations.

There have been a series of court decisions which recognize that the Proclamation have the force of law in New Brunswick:

Warman v. Francis et. al., 43 Maritime Provinces Reports, 197 (New Brunswick Supreme Court, Queen's Bench Division) in 1958

R. v. Isaac, 13 Nova Scotia Reports (2d) 460 (Nova Scotia Supreme Court, Appeal Division) in 1975.

R. v. Gilbert A. Smith, case no. A777-77, Federal Court of Appeal, decision rendered on June 24, 1980, as yet unreported.

The Hunting Rights of the Indians of New Brunswick have been recognized and in R. v. Paul the New Brunswick Court of Appeal recognized that their Treaty Rights apply over the laws of the province when the two conflict (New Brunswick Reports (2d) 545 in 1980).

The Union of New Brunswick Indians wish to have continued involvement in the constitutional process.

They want the constitution to recognize that they are Nations.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Union of Nova Scotia Indians:

Stanley Johnson,
President and Chief of the Millbrooke Band
Sageh Henderson, Butus (legal advisor)
Stewart Killan, Research Director

DATE OF APPEARANCE:

January 6, 7:30 p.m.

FORM OF SUBMISSION:

Brief,
Telephone conversation with Stewart Killan,
December 24.

BACKGROUND:

The Union of Nova Scotia Indians is formed by the twelve band councils of Micmacs in Nova Scotia. The Chiefs of each band make up the Board of Directors of the Union. The population of these Bands is approximately 5500.

The Grand Chief of the Micmacs who represents the traditional Grand Council is a member of the Board of Directors of the Union. The Grand Council represents the traditional leadership and is concerned with maintaining the religious traditions whereas the Indian Act Chiefs administer the reserves. There is no conflict between these two groups in Nova Scotia.

Prepared by: John McDonough

Research Branch
Library of Parliament

December 24, 1980

SUMMARY

MAIN POINTS:

The Micmacs want to explain that there are Treaties between the Crown and the Indian people who reside in Nova Scotia. These Treaties provide a special relationship between the Micmacs and the British Crown. The Treaties provided the Micmacs with a "protectorship" under the British Crown and they are to be considered as British Subjects.

They wish to tie these special relationships to the British North America Act.

The first Treaty with the Micmacs was signed in 1725. In 1749 the British Crown issued instructions to Governor Hopson of Acadia to go out and treat with the Micmacs, to bring them under the protection of the British Crown. In 1752 the Grand Chief of the Micmacs, Baptiste Cope, signed the major Treaty with the Crown and he undertook at that time to bring all the Micmacs under this British protectorship. Between 1752 and 1761 there were at least eight adhesions of other Micmac tribes to this Treaty of 1752.

RECOMMENDATIONS:

As far as the Micmacs are concerned their relationship with the Canadian state can follow three different paths:

- protectorship status with the United Kingdom
- a trusteeship relationship with the United Nations.
- local government, with expanded powers, within the Canadian Constitution.

It is this third option which they hope to achieve.

They note that under the present Indian Act the Band Councils have some powers of local government. They can pass by-laws and set up businesses. The Micmacs seek an expansion of these areas of responsibility, in particular with respect to the administration justice especially as it relates to non-criminal code matters. They also seek an expanded role with respect to educational policy-making.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS: Union of Ontario Indians as the agent for
 Anishinabek:

 Patrick Madahbee, President
 Paul Williams
 James Mason

DATE OF APPEARANCE: January 5, 1981
 7:00 P.M.

FORM OF SUBMISSION: Brief (31 pages)
 Telephone conversation with Paul Williams,
 December 23, 1980

BACKGROUND: The Anishinabek consists of the following Nations:
 Ojibway (of the Great Lakes region), Ottawa,
 Potawatoni, Algonquin (on the Ontario side of
 Ottawa River) and Delaware. The Territory of
 these Nations extends from the Great Lakes
 watershed through to the St. Lawrence and the
 Ottawa River valley. Since before the seventeen
 hundreds these Nations have lived together in a
 form of Confederacy. In 1764 they signed a Treaty
 at Niagara with the British Crown. Today the
 Union of Ontario Indians is the corporate voice
 for these Indian Nations.

Prepared by: John MacDonough

Research Branch
Library of Parliament

5 January 1981

- 2 -

SUMMARY

BASIC THEME:

The Anishinabek wish to have the Constitution reaffirm their rights as "Nations". They point out that the Royal Proclamation of 1763 refers to "Nations of Indians" as did many of the early treaties. However, in 1867 the British North America Act's only reference was to give the federal government the power to make laws for "Indians and lands reserved for Indians". This changed the perception of the relationship from an international and group-oriented political relationship to a constitutional one. Under its constitutional authority the federal government passed "Indian Acts" which narrowed the definition of who was to be an "Indian" inventing the concepts of "status" and "non-status". The perception had then passed from the constitutional to the legislative. The protection of Indian rights has come to centre too much on the Indian Act and too little on protecting the original rights of the Indian Nations. The proposed Joint Resolution goes one step further; it uses the word "native" - a racial definition. The fact that Indians are "natives", racially and culturally different from other people in Canada is not the source of Indian rights. Neither is the Indian Act or the British North America Act to be considered as the source of Indian rights. The rights of Indians, as individual people, flow from the fact that they are part of Indian Nations. As Nations the Anishinabek entered into Treaties with the Crown. But even without these Treaties, they have the right of Nations in this world. The Treaties however give these Nations a real relationship with the Crown which binds Canada and which assures, in the Crown's name, the future of these Nations.

MAIN POINTS:

The Anishinabek are opposed to any patriation of the Constitution of Canada unless their rights as Nations are recognized and protected.

If the responsibility and obligations of the Crown under all its Treaties with the Indian Nations has actually devolved to Canada, they wish to see a clear statement to that effect in the Constitution of Canada.

They wish to see a provision in the Constitution that these Treaties are binding on Her Majesty and are not subject to unilateral abrogation.

The Anishinabek ask that the following be recognized in the Canadian Constitution:

- our right to determine who our citizens are, and who are the members of our community;
- our rights to determine our own forms of government, and to control our governments;
- our right to control our lands and the resources of those lands;
- our right to use our own languages in all ways, and to practice our religions, and to preserve and practice our own cultures;
- our right to control and determine the education of our children.
- our right to determine our relationships with the other governments of this land.

They wish to clarify that any rights which they have as Nations, and which have not been given up by Treaty, are retained.

These rights under a new Canadian Constitution must not be changed without the consent of the Indian Nations.

The laws promogated by the Indian Nations under the above constitutional provisions must take precedence over provincial laws.

The recommendations of the Anishinabek are made in a spirit of helpfulness and cooperation.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

The United Church of Canada

Reverend Clarke MacDonald, Deputy Secretary,
Division of Mission in Canada
Reverend Robert Lindsey, Associate Secretary
Mrs. Bonnie Greene, Staff Officer, Human Rights
and International Affairs

DATE OF APPEARANCE:

Thursday, 18 December 1980
3:30 P.M.

SOURCE OF INFORMATION:

Letter and brief.

BACKGROUND:

An "overwhelmingly Anglophone middle-class church" (brief, p. 7), "... national in scope, with congregations in substantial numbers in every Province and territory [The] Church Government is of a Federal nature with regional bodies, each with its own responsibility, joined together through the unifying body of a General Council" (letter, p. 2).

Prepared by: Amos Shlosberg

Research Branch
Library of Parliament

17 December 1980

SUMMARY

BASIC THEME:

While patriation is not opposed, haste in this regard is deplored. More Canadians must be heard and a broad ranging enquiry is desirable. The proposed resolution in its present wording is too narrow. It should be broadened to include protection for Canada's native peoples, refugees, immigrants, inmates of penal and mental institutions, and the physically and mentally disabled. Discrimination on the basis of sexual orientation should be prohibited. Basic rights to a minimum standard of housing, nutrition, income and services, and of workers to join unions and to take collective economic action ought to be incorporated.

RECOMMENDATIONS:

s. 12

Right not to be subjected to cruel and unusual punishment.

With respect to offenders of the law and the mentally disturbed, this section needs to be strengthened by adding the following rights:

- to normal levels of health care
- to exercise and sanitation
- to communicate with family
- of access to legal counsel and to members of Parliament or provincial legislatures.

s. 15

Non discrimination rights

Mental or physical handicap and "sexual orientation" should be included as prohibited grounds of discrimination.

s 24

Undeclared rights and freedoms

With respect to the native people of Canada, the Canada Act threatens to preserve the status quo and freeze what are presently diminished rights. This is unsatisfactory as it does not recognize aboriginal nationhood.

Therefore, this section ought to be amended to include a comprehensive statement of "aboriginal and treaty rights of native peoples as understood by them" (brief, p. 16).

2

Constitutional Conferences

Representatives of aboriginal nations should be full members of all future constitutional talks.

Refugees and
Immigrants:

The Charter or other Canadian human rights legislation should create in Canada the right of asylum for bona fide refugees, and confer upon immigrants the same rights accorded to citizens.

Social and Economic
Rights:

In addition, the Charter ought to include a section on the rights of individuals and families to a basic standard of living and social security as well as the right of workers to join unions and take collective economic action.



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SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

BRIEFING NOTES

WITNESS:

Vancouver Peoples' Law School Society:

Diana Davidson, President

DATE OF APPEARANCE:

January 6, 1981: 2:30 p.m.

SOURCE OF NOTES:

Opening Remarks, testimony

BACKGROUND:

The purpose of the law school is to teach law to interested lay people free of charge. This objective is assisted by many organizations and individuals who provide services also free of charge. The school provides free lectures in law in 70 communities throughout British Columbia, and there are weekly columns which appear in approximately 120 newspapers on a weekly or periodic basis. The law school has held seminars on the basis of the proposed Joint Resolution.

Prepared by: John McDonough

Library of Parliament
Research Branch

January 13, 1981

MAIN POINTS:

The Charter of Rights and Freedoms has been difficult to obtain and it is difficult for the ordinary citizen to inform himself or herself as to its implications in order to respond to it.

If there were more time and information Canadians could end up with a noble and inspiring document.

Ms. Davidson indicates that it is her understanding that it is the provincial governments which wish a restrained Charter and she feels that there is a lack of public sympathy with their position.

Because individual rights are at the heart of this struggle for a Charter, it is imperative to fully take the opinion of the people themselves.

Not only are the provisions of the draft Charter inadequate, but the language falls far short of the magnificence of spirit and intent which it could achieve.

The Charter is relatively toothless. It provides some remedies for those with time and money, but not effective access for those situations which are not urgent or for those who do not have a lot of money. There are no affirmative remedies provisions.

RECOMMENDATIONS:

Process:

The Vancouver Peoples' Law School Society recommends a lengthy extension of this debate and that there be a constituent assembly.

Alternatively this Special Joint Committee should travel throughout Canada.

s. 1

The Limitations Clause

There is a real risk that s. 1 poisons the entire document and it should be deleted.

s. 2

Fundamental Freedoms

Freedom of the press and other media should be enumerated separately from thought, belief, opinion and expression.

The phrase "of information" in s. 2(b) and the word "peaceful" in s. 2(c) should be deleted.

s. 4(2)

Continuation of Parliament in Special Circumstances

The phrase "real or apprehended war or insurrection" should be deleted. There is little support for the suspension of the right to vote.

s. 7

Life, liberty, security of person

This omnibus clause leaves out many rights which should be included such as: the right to a fair hearing, the right to a public hearing, the right to a jury, the right to the use and enjoyment of private property or, in lieu of same, fair compensation for its loss.

This section should include freedom to organize, freedom from economic deprivation and freedom to a clean environment.

s. 8

Search or Seizure

This should read: "Everyone has the right not to be subject to unreasonable search or seizure."

s. 9

Detention or Imprisonment

This should read: "Everyone has the right not to be arbitrarily detained or imprisoned."

s. 10(b)

Arrest or detention

There should be a provision that those without funds will have independent counsel provided for them.

s. 11(d)

Bail

This should be modified to read "not to be denied reasonable bail without just cause".

s. 12

Cruel or Unusual Treatment

This should read: "Everyone has the right not to be subjected to any cruel treatment or punishment."

s. 26

Laws respecting evidence

The courts should be able to exclude evidence, if illegally obtained, as they see fit.

It is important that clear guidelines be set for the police and other enforcement agencies in order to maintain public order by avoiding placing the police in unclear situations. It is important not to give the police a document which in effect says that they may violate human rights with impunity.

s. 15

Non-Discrimination Rights

The right to equality before the law and to the equal protection of the law without discrimination should be separated from the list enumerating proscribed forms of discrimination.

The list should be expanded to include political affiliation, physical or mental handicap, sexual orientation, belief, opinion, expression and from discrimination on the basis of lack of means.

This section should be clear in that the Charter applies equally to men and women.

s. 6

Mobility Rights

Some compromise is required between the interests of outlying areas and the interests of persons seeking to move to find employment. The proposal by the Government of Yukon is suggested here.

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Undeclared Rights and Freedoms

This offers totally inadequate protection for
the native people.



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BRIEFING NOTES

SUBMITTED BY: World Federalists of Canada
Francis Leddy, National Director, World Federalists
James Stark, Director, "Operation Dismantle"

DATE OF APPEARANCE: 12 December 1980

FORM OF SUBMISSION: Brief (2 pages). The text of a House debate (9 November 1979) related to topic of brief is also enclosed.

BACKGROUND: World Federalists associations began to be formed during the years immediately following World War II. At present there are national World Federalists associations in 30 countries. The motto of the World Federalists is "World Peace Through World Law".

"Operation Dismantle" is an international program of the World Federalists. The goal of this program is to achieve world disarmament by having the United Nations sponsor a global referendum.

Prepared by: Stephen Fogarty

Research Branch
Library of Parliament

11 December 1980

SUMMARY

D GOVERNMENT AND INTERNATIONAL PEACE

Recommends that the Canadian Constitution contain commitments to the following principles:

- (1) Canada declares its unqualified acceptance of the compulsory jurisdiction of the International Court of Justice.
- (2) Canada condemns war as an instrument of aggression, and commits itself to ban the production, presence and possession of all weapons of mass destruction, including and especially nuclear weapons, on Canadian soil.
- (3) Canada declares its willingness to transfer by legislation certain sovereign powers to a world authority (e.g. The United Nations or a Federal World Government) on those occasions when such transfer would facilitate world peace.
- (4) Canada declares its support for the formation of a democratic world government.

Notes that the Constitutions of the Federal Republic of Germany, Luxembourg, Italy, India and Japan contain commitments to one or more of the aforementioned principles.