Department of Justice / Ministère de la Justice

MEMORANDUM/NOTE DE SERVICE

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TO/A: MINISTER OF JUSTICE

1050 253

FROM/DE: DEPUTY MINISTER OF JUSTICE

SECRET

SUBJECT/OBJET: POSSIBLE AMENDMENTS TO PROPOSED RESOLUTION

Comments/Remarques

The purpose of this memorandum is to provide you with some additional background on certain of the matters related to the Memoranda to Ministers (dated November 25 and December 8) respecting possible amendments to the Proposed Resolution on the Constitution.

1. Relationship between Charter and UN Covenant on Civil and Political Rights

In Committee, a number of witnesses (notably the Canadian Bar Association) have remarked that the Charter does not encompass all the rights set forth in the UN Covenant to which Canada is a party. Thus, they suggest, Canada may be in breach of its international obligations.

This position is based on the false premise that Canada is obliged to provide in the Constitution for all the UN Covenant rights. Such is not the case. Article 2 of the Covenant simply obliges Canada to ensure that the Covenant rights are respected in this country by legislative or other measures. There is no obligation to put any of them in the Constitution; they could all be respected by simple legislative enactments or administrative measures.

Consequently, the fact that the Charter does not incorporate all Covenant rights will not put Canada in breach of its international obligations. For example, the Covenant requires that juvenile offenders be treated differently from adult offenders, that an alien not be expelled from Canada except in accordance with law and that persons shall not be required to marry without their consent. These are not contained in the Charter but there are other laws that protect such rights.

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Thus the Charter is but one instrument for giving effect to Canada's international obligations; it is not and need not be the sole mechanism.

2. Mobility Rights - Section 6

This matter has not been raised in the Memoranda to Ministers since in our view it is not necessary to make modifications in the mobility rights provisions unless there is to be a basic change in policy.

The underlying policy of the mobility rights (as discussed this summer at the CCMC meetings) is to prevent provincial boundaries from being used as barriers to the mobility of persons moving from one province to another or seeking a livelihood in one province while residing in another. Thus, the draft provides that people may do these things without discrimination based on province of present or previous residence.

Several concerns have been raised about the present provisions. First is the concern that they may prevent the control of persons seeking work from flooding into a particular area which, because of its weak infrastructure, cannot cope with a massive influx of job-seekers. Second is the concern that they may preclude preferential hiring for local job-seekers, thus permitting construction companies to bring in outside workers. Third is the concern that they do not prevent preferential hiring in a region within a province since they aim only at provincial boundary barriers.

With respect to the first concern, it would seem evident that the courts would find as reasonably justifiable limits on mobility rights those that can be demonstrated as necessary in the interests of public order, safety, health and welfare of a particular area. Thus it should not be necessary to spell out these limits in section 6 any more than it should be with respect to freedom of assembly, for example.

As for the second concern, it is quite clear that any attempt to limit jobs to residents of a province or territory would be proscribed. However, this would not mean that a requirement giving local residents equal access to jobs with persons from

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outside the province or territory was contrary to section 6. Tied in with the conditions mentioned under the first concern, one could even justify a local hiring preference as long as outsiders are also given access to the job opportunities by establishing hiring halls for them at locations outside the province.

As for the third concern, this raises a basic policy issue. During the summer it was made clear to the provinces that the mobility rights (or more broadly the "economic union") were not designed to interfere with regional development programs within a province. Thus Saskatchewan's northern development program (which gives preference to residents of the northern part of the province over those from the southern part of the province and those from elsewhere in Canada) would not be precluded by the mobility rights since the program discriminates equally against residents of southern Saskatchewan and residents outside the province. To change this policy would represent a major shift in the objective of the mobility rights (which is to break down provincial boundaries) and would generate great hostility from the provinces.

In sum, the purpose of the mobility rights is directed at preventing provincial boundaries from being used as barriers to the mobility of labour and not at preventing restrictions on mobility within a province or territory. The rights apply as against both the provincial and federal governments, and consequently the federal government cannot claim any special exemptions with respect to construction of the Northern pipeline in the Yukon. (However, in this latter instance it can likely be successfully argued that the social disruption which would be caused by a massive influx of outside job-seekers into this primitive area justifies a policy of hiring non-residents at locations outside the Territory. In addition, the affirmative action programs under non-discrimination rights would permit special hiring programs for native people and women.)

3. Legal Rights - Sections 7-14

A number of strong representations have been made by several witnesses before the Committee (in particular by the Civil Liberties Association,

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the Canadian Bar, the Canadian Jewish Congress) to strengthen or add to the "Legal Rights" provisions. Some of these are included in the Memoranda to Ministers; others are not. In considering the changes proposed, you will want to assess in particular the impact they are likely to have on provincial attitudes (especially Ontario) toward the acceptability of the Charter.

Changes being proposed that are likely to concern the provinces most are

(a) replacing the test of "established by law" with the tests of reasonableness in relation to search and seizure, of arbitrariness for detention and imprisonment, and of just cause with respect to bail;

(b) adding the right to jury trials; and

(c) adding the right of an arrested person to be informed of his right to retain counsel.

When the Association of Police Chiefs and the Association of Crown Counsel appeared before the Committee they did not make a very convincing argument for retaining the test of "established by law" with respect to the rights under (a). Indeed, their arguments likely strengthened the views of others, including Premier Hatfield, that the more stringent tests should prevail.

While the Police Chiefs and Crown Counsel did not raise the rights to jury trial and to be informed of the right to counsel, one can assume that they (and most provinces) will view these as additional fetters on the "efficient" administration of justice.

Other rights being proposed include the right of an accused not to testify against himself and the extension of protection against retroactive laws and double jeopardy to include crimes under international law. These are not likely to generate any opposition from the provinces.

The Canadian Bar Association has also pressed for the inclusion of other rights which are not recommended in the Memoranda to Ministers. These include

(a) the right of an accused to legal aid;

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(b) the right to privacy and access to government information; and

(c) the right to enjoyment of property.

With respect to legal aid, we do not feel this should go in the Charter because it would then leave to the courts the decision of when an accused does not have "sufficient means" to pay for a lawyer. While all provinces now have legal aid programs, the determination of who qualifies for legal aid is made by a provincial agency, each with different financial eligibility tests. It could cause serious problems for these programs if the courts were given a constitutional power to set the financial criteria.

As for privacy and access to government information, these are both (as the CBA itself admits) evolving areas of law where the parameters are not clearly defined. To place them in the Charter without some specific definition of what was intended would be to invite the courts to engage in law-making out of whole cloth. For example, would a right to privacy protect the citizen only against the State or would it apply in individual relationships? If the former, would it give a right to refuse to divulge information for taxation or census purposes? Equally, what would be grounds on which a government could refuse to provide access to information? The court could review any ground specified by Parliament.

Turning to property rights, a number of witnesses have remarked on the absence of this provision which is contained in the Canadian Bill of Rights. The federal government has never opposed inclusion of property rights in the Charter, but the provinces raised a number of serious concerns during the summer. They were not strongly opposed to the idea of some protection (eg. the right not to be deprived of property except in accordance with law) in cases of actual expropriation. Rather, their concern focussed on situations of "indirect" expropriation. There are many provincial laws that zone property, authorize highway construction, freeze land for agricultural purposes, condemn dangerous buildings, etc. where the consequence is to lower the value of property or to prevent persons from making a more economic use of it.

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All of these measures would be challengeable in the courts as a deprivation of the enjoyment of property, resulting in the invalidity of the laws and requirements that compensation be paid in all cases.

These are legitimate concerns, involving economic and social values that should not properly be left to the courts to determine.

4. Non-Discrimination Rights - Section 15

A number of changes have been proposed in the Memoranda to Ministers to the non-discrimination rights in an attempt to meet some of the concerns raised by witnesses before the Committee.

However, one of the central concerns of most witnesses has not been met, namely either dropping the specified grounds of non-discrimination or adding to the list without making it exhaustive. Either of these approaches results in leaving to the courts the ultimate power to create new grounds of non-discrimination over time. The UN Covenant takes the latter approach of prohibiting discrimination on "grounds such as", specifying a series of non-exhaustive grounds.

The problem with the specifying of no grounds (the U.S. approach) is that one is totally dependent on the courts to define the grounds. If the courts take a conservative approach, then protection against discrimination is slow to develop unless the legislatures act. On the other hand, if the courts are activist the result is adoption by them of grounds which society may not be prepared to accept.

The problem with a non-exhaustive list is both reaching agreement on what that list should contain and leaving to the courts the ability to add to that list.

The initial federal government position in July was to have no specified grounds, but this was opposed vigorously by the provinces as leaving too much discretion in the hands of the judiciary in an area of evolving social and economic policy. The non-exhaustive list approach was objected to on the same basis. Consequently, the "closed"

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list approach was adopted, leaving it to be expanded by constitutional amendment rather than by court interpretation. Even this is unacceptable to the provinces who feel that the whole area of non-discrimination should be left to ordinary legislation administered by human rights commissions rather than by courts. (In this regard Premier Blakeney has recently written to the Prime Minister urging deletion of the provisions.)

A satisfactory solution to this matter is very difficult to achieve. Ideally, a simple non-discrimination clause without a list would seem the best approach. However, this would be strongly opposed by the provinces for reasons given above, and the women's groups would also object for fear that "sex" would not be recognized fully as a ground were it not specified.

Going to a non-exhaustive list would open the flood-gate for inclusion of grounds such as political belief, handicap, sexual orientation, etc. for fear that they might not be recognized by the courts.

In consequence, maintaining the closed list "core" group of grounds (dropping "age") would appear to be the best route--arguing that certain limited grounds are well recognized and capable of reasonable definition by the courts, while others are not yet well defined or recognized and should not be entrenched until they are. These latter are ones that are best suited for inclusion in ordinary human rights laws where they can be given definition and be applied by human rights commissions.

5. Provincial Language Rights

The Memoranda to Ministers proposes the inclusion in the Charter of institutional language rights for New Brunswick which would parallel closely those provided for at the federal level in sections 16 to 20. Those for Quebec and Manitoba would continue as they are now found in section 133 of the BNA Act and section 23 of the Manitoba Act.

Inclusion of New Brunswick in the Charter will raise the question of why the rights in Quebec and Manitoba are not also being transposed to the

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Charter. The answer to this is that neither province has asked to have institutional language rights moved to the Charter, and the federal government's position is to maintain the status quo on provincial institutional language rights unless a provincial government requests that they be put in the Charter.

Including New Brunswick will also raise the question of why nothing is being done to include institutional language rights for Ontario in the Charter or as an addition to section 133. Again, the response is that the federal government is not forcing institutional language rights on any province that does not already have them or want them. (See separate note on language rights for Ontario.)

A further issue that has arisen in this area is the submission by the CBA and a number of minority language groups that a person charged with a criminal offence should have the right to be tried in his official language, be it English or French. Such an amendment is not proposed in the Memoranda to Ministers.

Adopting this proposal would be to transpose from the Criminal Code to the Charter those provisions which provide for gradual implementation of this right in all the provinces. The policy, when these Code provisions were adopted in 1978, was to enable the Minister of Justice to negotiate with his provincial counterparts agreed dates upon which the provisions would come into force in each province.

To date, the provisions are in force only in New Brunswick, Ontario and the Territories. To place this right in the Charter would be to create unfulfilled expectations in most other provinces since they do not have the facilities yet to conduct a trial in French.

During the constitutional negotiations this summer, it was proposed to facilitate implementation of this right by an amendment enabling judges of one province to sit in another province, but this change was contingent on agreement respecting changes in the Supreme Court.

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6. Native Rights - Section 24

In the Memoranda to Ministers, no change in section 24 is recommended to enlarge upon the possible recognition of native rights.

While it is difficult to predict what pressures there may be in Committee to include some acknowledgment of native rights in the Charter, it may be that some consideration will have to be given to this matter.

Section 24 as written is essentially a "non-prejudice" clause, stating that any rights pertaining to the native peoples are not denied simply because other rights are included in the Charter.

The normal interpretation to be given to this clause would not confer any guaranteed rights on the native peoples. However, a similar clause in the U.S. Bill of Rights has been viewed by the U.S. Supreme Court as a spring board to creating constitutional rights (eg. right to privacy) not specified in the Bill of Rights.

Consequently we have some concern that a Canadian court might some day take a similar approach to section 24. While this may be unlikely, if one were to specify in section 24 aboriginal and treaty rights, there is the possibility that the courts would look upon this as an invitation to convert such rights into constitutionally recognized rights.

Nevertheless, if it is felt essential to give some further recognition to native peoples concerns, you may wish to consider a modification to section 24 along the following lines

> "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 may exist in Canada, including any historic, treaty or other rights or freedoms that may pertain to the Aboriginal peoples of Canada."

Roger Tassé

cc Mr. Michael Kirby