Minister of Justice and
Attorney General of Canada

Ministre de la Justice et
procureur général du Canada

Statement by the Honourable Jean Chrétien
Minister of Justice to the Special Joint Committee
On the Constitution

January 12, 1981

Since I last appeared before this Committee on November 13, you have spent more than 175 hours studying the proposed Resolution on the Constitution. You have heard from about 300 witnesses speaking for about 100 groups from all parts of Canada. Four provincial Premiers have appeared to state the positions of their governments. In addition, you have received a large number of constructive written submissions.

I have studied with great care both the written briefs and the oral testimony of all of the witnesses and I have taken into account the points which have been made by all members of this Committee during your deliberations.

In addition, I have had the benefit of the advice of the government members of this Committee, of members of the Liberal caucus and of the Cabinet. The government has listened to the views of Canadians as expressed before this Committee.

I am tabling today a document which sets out, for convenience of members of the Committee, changes to the Resolution which I would be prepared to support at this time.

The Charter of Rights and Freedoms

You have been told over and over again that Canadians want a strong Charter of Rights and Freedoms. You have heard

Ottawa, Canada
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this from the Canadian Civil Liberties Association and other human rights and civil liberties groups, from the Canadian Bar Association, from the Advisory Council on the Status of Women, from the Canadian Consultative Council on Multiculturalism, from representatives of church groups, from the Canadian Jewish Congress, from representatives of official language minorities and from representatives of the many ethnic groups making up our country.

I was most impressed by the eloquent and moving testimony of the National Association of Japanese Canadians and of the National Black Coalition of Canada who spoke on behalf of those who have experienced discrimination in Canada.

The draft Charter which you have been studying was the result of compromises achieved last summer in negotiations between the federal government and the provinces. You have been told by many witnesses that Canadians are not satisfied with the type of compromise which weakens the effectiveness of constitutional protection of human rights and freedoms. I accept the legitimacy of that criticism.

Today I want to announce that the government is prepared to make major changes to the draft Resolution so as to strengthen the protection of human rights and freedoms in the Charter.

Section One

Many witnesses and most members of the Committee have expressed concerns about Section 1 of the Charter of Rights and Freedoms. These concerns basically have to do with the argument that the clause as drafted leaves open the possibility that a great number of limits could be placed upon rights and freedoms in the Charter by the actions of Parliament or a Legislature.

The purpose of the original draft was to ensure that the people, the legislatures and the Courts would not look upon rights as absolute, but would recognize them as subject to reasonable limitations. While some believed no limitation clause was necessary, many witnesses agreed such a clause is desirable but argued that a more stringent formulation is necessary.

You have received a number of constructive suggestions. I am prepared on behalf of the government to accept an amendment similar to that suggested by Mr. Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission and by Professor Walter Tarnopolsky, President of the Canadian Civil Liberties Association. The wording I am proposing is designed to make the limitation clause even more stringent than that recommended by Mr. Fairweather and Professor Tarnopolsky. I am proposing that Section One read as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This will ensure that any limit on a right must be not only reasonable and prescribed by law, but must also be shown to be demonstrably justified.

Section Two

With respect to fundamental freedoms, the government is prepared to accept the recommendation of the Canadian Bar Association to separate in section 2 freedom of peaceful assembly from freedom of association to ensure that they are looked upon as separate freedoms.

Legal Rights

There have been numerous representations made with respect to the legal rights in sections 8 and 9. The government is prepared to accept the recommendation of Premier Hatfield of New Brunswick and of organizations such as the Canadian Civil Liberties Union, the Canadian Jewish Congress, the United Church, the Canadian Bar Association and others that these clauses be changed to read:

8) Everyone has the right to be secure against unreasonable search and seizure.

9) Everyone has the right not to be arbitrarily detained or imprisoned.

In other words, the fact that procedures are established by law will not be conclusive proof that search and seizure or detention is legal. Such procedures and the laws on which they are based will have to meet the tests of being reasonable and not being arbitrary.

Some witnesses have made the point that while Section 10 guarantees the right on arrest or detention to retain and instruct counsel without delay, there is no explicit requirement for an individual to be informed of that right. I am prepared to accept an amendment so that the section would state that:

Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.

A number of suggestions have been made with respect to clause 11 which deals with the rights of anyone charged with an offence.

Mr. Svend Robinson, NDP member for Burnaby, British Columbia, has made strong representations to guarantee the right in serious criminal matters to trial by jury. I welcome his representations as being very constructive and would be prepared to accept the following amendment:

> Except in the case of an offence under military law tried before a military tribunal, anyone charged with an offence has the right to the benefit of trial by jury where the maximum punishment for the offence of which the person has been charged is imprisonment for five years or a more severe punishment.

I want to stress that this, like many rights, represents a minimum standard. The Criminal Code will continue to provide for jury trials in many cases where the maximum punishment may be less than five years imprisonment. Jury trials in cases under military law before a military tribunal have never existed either under Canadian or American law.

The Canadian Bar Association and the British Columbia Civil Liberties Association have argued that the proposed Resolution should clearly constitutionalize the right of an accused not to be required to testify against himself in criminal proceedings. This longstanding right in our system of justice against self-crimination should be explicit in the Charter. An amendment to Section 11 which would make this clear is included in the material I am tabling.

Representations have been made by the Canadian Jewish Congress and the North American Jewish Students Association and by members of the Committee to ensure that Sections 11(e) and (f) do not preclude the possibility of prosecuting those who are alleged to have committed crimes recognized under international law. The International Covenant on Civil and Political Rights recognizes the right of a country to try

and punish a person for an offence that was, at the time of its commission, recognized as such under international law even if not so recognized at the time under domestic law. The Covenant also permits the trial and punishment of a person for an offence of which he has not been tried and punished in another country.

To reflect these principles in the Charter the government is prepared to accept an amendment so as to provide that:

> Anyone charged with an offence has the right not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence under Canadian or international law; and has the right if finally convicted or acquitted of the offence in Canada, not to be tried for it again and, if so convicted, not to be punished for it more than once.

Having mentioned the International Covenant, I want to make one point to correct a misinterpretation that is now widespread. The fact that the Charter does not entrench every provision of the Covenant does not mean that Canada is "violating" it. The Covenant merely requires states to protect or not violate certain rights. It does not require these rights to be entrenched in the Constitution.

There have been many representations made regarding Section 11(d). It has been suggested that the right not to be denied reasonable bail should be subject only to "just cause" rather than "procedures established by law". I am prepared to accept an amendment to read that:

> Anyone charged with an offence has the right not to be denied reasonable bail without just cause.

This reflects the wording now found in the Canadian Bill of Rights.

Section 13 of the proposed Charter as drafted does not protect an accused or other witness who voluntarily gives evidence from having the evidence so-given used to incriminate him in subsequent proceedings.

I would propose an amendment to ensure that this clearly recognized principle in the law of evidence be reflected in the constitutional protection against self-crimination. Appropriate wording is found in the material I am tabling.

Equality Rights

There has been much discussion of the non-discrimination provisions of the Charter as found in Section 15. I want to deal with this in some detail. First, I want to state that I agree with the proposal made by the Advisory Council on the Status of Women and the National Association of Women and the Law that the section be entitled "equality rights" so as to stress the positive nature of this important part of the Charter of Rights.

I want to take this opportunity to congratulate all of the witnesses who testified on this section. I want specifically to compliment the Advisory Council on the Status of Women for a particularly fine brief as well as for an impressive presentation before you. The work of the Council has greatly influenced the government as have the presentations of the many witnesses who have spoken on this subject on behalf of women's groups, the handicapped, and others.

A provision on "Equality Rights" must demonstrate that there is a positive principle of equality in the general sense and, in addition, a right to laws which assure equal protection and equal benefits without discrimination. To ensure the foregoing and that equality relates to the substance as well as the administration of the law, I would be prepared to accept an amendment to Section 15(1) so that it would read:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination

and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex or age.

I know that many witnesses have recommended either that the grounds for non-discrimination be widened to include handicapped persons or others or that there be no specific enumeration and that more discretion be left in the hands of the courts. The government has studied these representations with great care.

The position of the government is that certain grounds of discrimination have long been recognized as prohibited. Race, national or ethnic origin, colour, religion and sex are all found in the Canadian Bill of Rights and are capable of more ready definition than others.

I want to make clear that the listing of specific grounds where discrimination is most prohibited does not mean that there are not other grounds where discrimination is prohibited. Indeed as society evolves, values change and new grounds of discrimination become apparent. These should be left to be protected by ordinary human rights legislation where they can be defined, the qualifications spelled out and the measures for protective action specified by legislatures.

For example, it was only four years ago that federal human rights legislation specifically provided protection for the handicapped in the area of employment.

Recently the Special Parliamentary Task Force on the Handicapped chaired by David Smith has recommended changes and improvements in the Human Rights Act with respect to the handicapped. The government will be acting on some of the

recommendations of the Task Force. The government is also proposing to act on some of the recommendations made by the Canadian Human Rights Commission in this area and will propose amendments to the Human Rights Act.

But if legislatures do not act, there should be room for the courts to move in. Therefore, the amendment which I mentioned does not list certain grounds of discrimination to the exclusion of all others. Rather, it is open-ended and meets the recommendations made by many witnesses before your Committee. Because of the difficulty of identifying legitimate new grounds of discrimination in a rapidly evolving area of the law, I prefer to be open-ended rather adding some new categories with the risk of excluding others.

Section 15(2) of the draft Resolution permits affirmative action programs to improve the conditions of disadvantaged persons or groups. I am proposing an amendment to read:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex or age.

This section permits programs designed to achieve equality which might otherwise be precluded by the rules against discrimination in subsection 15(1). As such, it must be related back to those grounds of non-discrimination, since otherwise it makes no sense in the context of Section 15.

The clause will not preclude other programs to assist the disadvantaged -- be it on grounds such as handicap, marital status or other bases of discrimination identified by the courts. It is simply an assurance that an affirmative action program based on a recognized ground of non-discrimination will not be struck down only because it authorizes "reverse discrimination" for the purpose of achieving equality.

Language Rights

Language rights have been a topic for much discussion and debate before this Committee and indeed in many other forums across the country. Let me state clearly the position of the government.

First, our objective is to enshrine in the Constitution at the federal level the provisions of the Official Languages Act. This means that there will be constitutional guarantee that English and French are the official languages of Canada and have equality of status in all institutions of the Parliament of Canada and the Government of Canada. In addition, it means that there will be equality of status of English and French in the courts established by the Parliament of Canada and in the proceedings and statutes of Parliament. Finally, it means that Canadians will have a constitutional guarantee of their rights to receive services from and communicate with their federal government in the official language of their choice.

Second, the policy of the government is to give a constitutional guarantee to all Canadian citizens of the French or English speaking minority in each province to have their children educated in that minority language wherever there are sufficient numbers to warrant the provision of such minority language education.

By so doing, the government is giving effect to the principle agreed to by the Premiers in St. Andrews in 1977 and in Montreal in 1978. The Premiers agreed, and, I quote:

> "Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or the secondary schools in each province wherever numbers warrant."

It is this principle which the government is enshrining. Our position is that in the area of language rights we will not impose anything on the provinces in which they live.

Third, the policy of the government is to encourage and expand the protection of both official languages in every province with the support of provincial governments. It has never been the policy of the government to impose institutional bilingualism on any province.

Much as I would like to see Ontario become officially bilingual, I have to agree with the view Claude Ryan expressed in Toronto last Thursday. He said, and I quote "I would never impose it on the province of Ontario. It must come from the province of Ontario. This must be crystal clear."

Fourth, it is the policy of the government to protect the acquired rights of Canadians to have their children educated in English or French if that is the language in which they received their own instruction in Canada and if that is the minority language of the province in which they live.

These policies have not changed. It is in this context that I would like to explain the amendments which the government is prepared to accept to the language provisions of the Charter of Rights.

First, Premier Hatfield had, in his appearance before this Committee, requested on behalf of the Government of New Brunswick that the Charter confirm that English and French are the official languages of New Brunswick, that the use of both languages in the courts and legislatures and statutes of New Brunswick be

guaranteed, and that the right of the people of New Brunswick to communicate with and receive services from their government in either official language be guaranteed.

I am very pleased to be able to table amendments to Sections 16-20 giving effect to the proposals of the Premier of New Brunswick. I want to take this opportunity to congratulate Premier Hatfield on his statesmanlike approach to Canada. When other provinces are prepared to emulate Premier Hatfield, the amending formula as presently drafted will allow them upon resolution of their legislature and of the Parliament of Canada to give constitutional protection respecting the use of the English and French languages in their provinces.

The second amendment with respect to language rights deals with the rights of Canadians to communicate with and obtain services from the federal government in either English or French. The amendment meets the concerns expressed by the Commissioner of Official Languages that Section 20 should ensure that the right to communicate with and receive services from any federal office in either official language is based, not on the number of persons in an area using the languages, but on their being a significant demand for communications with and services from any office in the language. In addition, as suggested by the Canadian Bar Association, the amendment would leave to the courts rather than to Parliament the ultimate determination of where other federal offices should provide bilingual services.

The text of the proposed amendment to Section 20 is included in the material I am tabling.

I have said that the provision for minority language education rights in Section 23 is based on the agreement of the provincial Premiers at St. Andrews and at Montreal. You have heard many representations on this section. All representatives of official language minorities agree with the principle of guaranteeing minority language education rights in the Constitution although many suggestions for improvements have been made.

Senator Rizzuto in particular has pressed for a guarantee for acquired rights. The amendment I am prepared to accept provides for such a guarantee. Basically, the amendment provides the following:

a) there will be two alternative qualifications for minority language education rights. Under the first alternative, if a citizen has received his primary instruction in Canada in one of the official languages, he may send his child to school in that language if it is the minority language of the province in which he lives. Under the second alternative, a citizen whose mother tongue is English or French may educate his child in the language of his mother tongue if it is the minority language in the province where he lives.

b) All children of a Canadian citizen will be able to receive their primary and secondary education in the minority language in which any one of the children has commenced his education in Canada.

The present Section 23(2) deals with the provision out of public funds of minority language educational facilities in an area of the province where there are sufficient numbers to warrant it. This section has been criticized as being too restrictive.

Therefore, I am proposing an amendment which will not refer to the provision of "educational facilities" but rather to "the provision out of public funds of minority language instruction". This avoids the implication that the obligation is limited to physical facilities, but rather it extends to that obligation to provide instruction by whatever method is appropriate and can therefore take into account technological advances as talked about by the Commissioner of Official Languages.

Native Rights

There have been many groups representing native peoples who have appeared before you. I am pleased that they have had a full opportunity to be heard. As a government, we have been impressed by the testimony which has been presented to you. Of course, it is not possible to agree to everything that has been proposed.

Most of the matters raised before the Committee remain subject to negotiation between governments and the native peoples. The Prime Minister have made a commitment that these negotiations will take place immediately after patriation.

Yet it is possible to state in greater detail the kinds of native rights which are not to be adversely affected by the Charter and it is possible to set these rights apart from other undeclared rights and freedoms. Therefore, I am proposing somewhat along the lines suggested by Premier Blakeney that Section 24 be re-worded to read as follows:

> The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of:
>
> a) any aboriginal, treaty or other rights or freedoms that may pertain to the aboriginal peoples of Canada including any right or freedom that may have been recognized by the Royal Proclamation of October 7, 1763;
>
> or
>
> b) any other rights or freedoms that may exist in Canada.

In addition, as requested by the Inuit Council on National Issues the Order-in-Council of June 23, 1870 admitting Rupert's Land and the North Western Territory to the Union will be added to Schedule 1 of the Constitution Act.

Multiculturalism

You have received submissions from witnesses representing ethnic groups, be they Canadians of German, Italian, Polish or Ukranian origin making up part of the Canadian mosaic. You have also heard from the Canadian Consultative Council on Multiculturalism. They have all supported the enshrining of a strong Charter of Rights. They have also asked that some provision be made to protect the multicultural nature of Canada.

I would like to see an amendment which would provide a new section which would state:

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Evidence

The Canadian Bar Association, the Canadian Civil Liberties Association, the Chief Commissioner of the Canadian Human Rights Commission and others have expressed their

opposition to Section 26 of the draft Resolution which states that the Charter will not affect laws respecting the admissibility of evidence. In light of the criticisms, the government is prepared to drop the section.

Remedies

The Canadian Civil Liberties Association and the Canadian Jewish Congress and other witnesses expressed the strong view that the Charter requires a remedies section. This would ensure that the Courts could order specific remedies for breach of Charter rights.

I would be prepared to see a new section stating that:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers just and appropriate in the circumstances.

This would ensure that an appropriate remedy as determined by the Courts would be afforded to anyone whose rights have been infringed whether through enactment of a law or by an action of a government official.

Equalization

Before turning to the amending formula, I would like to speak for a moment about Section 31 dealing with the principle of equalization.

Both Premiers Hatfield and Blakeney have made representations to the effect that section 31(2) should state clearly that equalization payments must be made to provincial governments.

I am prepared to accept wording somewhat along the following lines:

> "Parliament and the Government of Canada are further committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

The Amending Formula

Many representations have been made to you with respect to Parts IV and V of the draft Resolution respecting the amending formula. Concerns have been expressed in a great number of areas. The government has given careful study to the representations that have been made to you and is prepared to make significant modifications to the original proposal in order to meet many of the concerns.

First, I am prepared to propose three changes to Section 38. The first would provide that an alternative amending formula could be put forward by seven provinces which have 80% of the population rather than eight provinces. This will give increased flexibility to the provinces. The second would require the approval of any such alternative by the legislatures rather than merely the governments of the provinces concerned. The third change would require any alternative federal formula to be approved by Parliament rather than merely put forward by the federal government. I believe that this last change meets some of the objections raised in Committee by Mr. Nystrom and others.

Second, as I have already told the Committee, I will accept Mr. George Henderson's amendment, MP for Egmont, Prince Edward Island, to Section 41 which would provide that an amendment to the Constitution require the approval of any two Atlantic provinces rather than two provinces with 50% of the population of the Atlantic region. This amendment will respond to the representations of Premiers MacLean, Buchanan, Hatfield and Blakeney before this Committee.

Third, I want to outline amendments which will ensure that a referendum is to be used only as a deadlock breaking mechanism. When he appeared before you, Premier Blakeney stated, and I quote:

> "There must be opportunity for adequate public debate, in Parliament and in provincial legislatures, on the precise terms of a proposed constitutional change before the public is asked to vote."

He objected to the possibility, even if only theoretical, of an "instant referendum".

The amendment I am proposing will make it clear that a referendum may only be called if twelve months after the passage of the required Resolution by the Senate and the House of Commons, the required number of provincial legislatures has not approved the proposed constitutional amendment.

Since it is highly unlikely in practical terms that any Resolution would be introduced in Parliament before negotiations had been carried out with the provinces and since a further time delay of one year is imposed, there can be no such thing as an "instant referendum".

Premier Blakeney also stated that "the referendum vote must take place within a reasonable and specified time of the amendment's endorsement by the legislative body commencing the process". I agree with him and I am proposing that any referendum must be held within two years after the expiration of the time period required for approval of the constitutional amendment by provincial legislatures. In other words, no referendum could be held more than three years after the Resolution proposing an amendment is first approved by the Senate and the House of Commons.

Premier Blakeney also stated that:

> "Provision must be made for impartial referendum rules developed and supervised by an appropriate referendum committee. In the federal proposal, all the rules respecting referenda are to be 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. What we propose is a federal-provincial body to establish rules for a referendum".

Premier Blakeney's suggestion is constructive and is one which I welcome. I am therefore proposing an amendment to create a Referendum Rules Commission, as suggested by Premier Blakeney, composed of the Chief Electoral Officer of Canada as chairman and two other members, one nominated by the Government of Canada and one nominated by the provinces. The role of the Commission would be to recommend to Parliament rules for the holding of a referendum.

Further concerns have been raised that the present drafting could allow for amendments to the Constitution affecting one or more, but not all, provinces to be made through the general amending formula rather than with the consent of the provinces to which the provision relates.

In order to clarify this point and meet the representations made to you last Friday by your final witness, the Denominational Education Committee of Newfoundland, I would be prepared to accept an amendment to Section 47 which would state:

> "The procedures prescribed by Section 41 or 42 do not apply in respect of an amendment referred to in Section 43".

General

I turn now to one general point before I conclude. The present Section 25 states that "any law that is inconsistent with the provisions of the Charter is, to the extent of such inconsistency, inoperative and of no effect". We believe that it would be better for such a provision to come at the end of the Act and to be more all-encompassing so that it applies to all of the Constitution and not only to the Charter. This would avoid the possible interpretation that the Charter could over-ride other parts of the Constitution. I would propose a section stating that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This would also prevent any construction that Charter provisions such as freedom of religion or non-discrimination on the basis of religion might be construed as impairing denominational school rights under Section 93 of the BNA Act or Term 17 of the Terms of Union with Newfoundland.

There are some more technical amendments with no policy implications which I have not discussed. These are included in the material which I have made available to you. I will be glad to discuss each of them with you as you study each clause.

In addition, I want to reiterate that the government will accept an amendment regarding resources in conformity with the exchange of letters between the Prime Minister and Mr. Broadbent in October.

I will remain at the disposal of the Committee for the period of clause-by-clause study. My officials will be available to all members of the Committee at all times.