

FEDERAL COURT OF CANADA
TRIAL DIVISION

B E T W E E N:

DEBORAH COYNE

Plaintiff

- and -

HER MAJESTY THE QUEEN, THE
GOVERNOR GENERAL OF CANADA, THE
ATTORNEY GENERAL OF CANADA, and
THE ATTORNEY GENERAL OF NEW
BRUNSWICK

Defendants

STATEMENT OF CLAIM

Deborah Coyne
1654 Aspen Village Circle
Orleans, ON
K1C 6T3

Tel: (613) 238-4831
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Counsel to the Plaintiff

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION

BETWEEN:

DEBORAH COYNE

Plaintiff

and

~~HER MAJESTY THE QUEEN, THE GOVERNOR~~
GENERAL OF CANADA, THE ATTORNEY GENERAL
OF CANADA, and THE ATTORNEY GENERAL OF
NEW BRUNSWICK

Defendants

STATEMENT OF CLAIM

Filed on the 15 day of February, 1993.

1. The Plaintiff is a public policy consultant living in the city of Orleans in the Regional Municipality of Ottawa-Carleton, in the province of Ontario.
2. The Plaintiff has studied and taught constitutional law, and since 1987 has been deeply involved in constitutional debates on the proposed 1987 constitutional amendments (hereinafter referred to as the "Meech Lake Accord") and the 1992 constitutional amendments (hereinafter referred to as the "Charlottetown Accord"). In both cases, the Plaintiff co-founded organizations actively opposed to the amendments, the most recent being the "Canada For All Canadians No Committee" formed during the 1992 national referendum on the Charlottetown Accord.
3. By Notice of Motion dated December 4, 1992, the Legislative Assembly of New Brunswick passed a resolution to Amend the Constitution Act, 1982 by adding thereto the following sections (hereinafter the "New Brunswick Amendment"):

- 16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.
- (2) The role of the Legislature and Government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.
4. Resolutions proposing the New Brunswick Amendment were passed by the House of Commons on February 1, 1993 and the Senate of Canada on December 16, 1992 by Notices of Motion dated December 11 and 14, 1992, respectively.
5. The preamble to the Notices of Motion set out in paragraphs 3 and 4, supra, stated that the New Brunswick Amendment was to be promulgated by the Governor General pursuant to s. 43 of the Constitution Act, 1982 (the bilateral amending formula).
6. On or about January 4, 1993, the Plaintiff wrote to all the provincial Attorneys-General requesting they institute a reference to their respective Courts of Appeal to determine the legality of proceeding with the New Brunswick Amendment under s. 43 of the Constitution Act, 1982. No provincial Attorney-General indicated an intent to make such a reference. Copies of these letters are attached hereto collectively as Appendix "A".
7. The New Brunswick Amendment is based on the provisions of An Act Respecting the Equality of the Two Official Linguistic Communities in New Brunswick, enacted by the Legislature of New Brunswick on July 17, 1981 (hereinafter referred to as "Bill 88").
8. In or about 1987, The Meech Lake Accord was put forward which among other things, provided for the following

amendment to the Constitution Act, 1867 (hereinafter referred to as the "1987 Distinct Society Clause"):

1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 1, thereof, the following section:

"2(1) The Constitution of Canada shall be interpreted in a manner consistent with

(a) the recognition that the existence of French-speaking Canadians, centered in Quebec, but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside of Quebec, but also present in Quebec, constitutes a fundamental characteristic of Canada; and

(b) the recognition that Quebec constitutes within Canada a distinct society.

(2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed.

(3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.

(4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or the legislatures or governments of the provinces, including any powers, rights or privileges relating to language."

9. In or about October, 1989, the New Brunswick Select Committee on the 1987 Constitutional Accord submitted its final report and recommended that the principles of Bill 88 be entrenched in the Constitution of Canada, possibly as a new subsection of the 1987 Distinct Society Clause, and that responsibility to preserve and promote New Brunswick's two linguistic communities be made the responsibility of both the Legislature and Government of New Brunswick, as well as the Parliament and Government of Canada. A copy of this report is attached hereto as Appendix "B".

10. Pursuant to these recommendations, on or about March 21, 1990, the Premier of New Brunswick introduced a

resolution in the New Brunswick legislative assembly proposing certain constitutional amendments to both The Meech Lake Accord and the Constitution Acts of 1867 and 1982 (hereinafter referred to as the "New Brunswick Companion Resolution"). Among other things, the New Brunswick Companion Resolution would have entrenched the principles of Bill 88 in the 1987 Distinct Society Clause as well as the promotion of Canada's linguistic duality by the Parliament and Government of Canada. The relevant provisions of the New Brunswick Companion Resolution are as follows:

1(1) Subsection 2(1) of the Constitution Act, 1867, as enacted by section 1 of the Constitutional Amendment, 1987, is amended by adding the word "and" at the end of paragraph (b) thereof and adding thereto the following paragraph:

"(c) the recognition that, within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges."

(2) Section 2 of the said Act, as enacted by section 1 of the Constitution Amendment, 1987, is further amended thereto, immediately after subsection (2) thereof, the following subsection:

"(2.1) The role of the Parliament and Government of Canada to promote the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed."

(3) Section 2 of the said Act, enacted by section 1 of the Constitution Amendment, 1987, is further amended thereto, immediately after subsection (3) thereof, the following subsection:

"(3.1) The role of the legislature and Government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the two linguistic communities referred to in paragraph (1)(c) is affirmed."

11. The New Brunswick Companion Resolution also would have extended the bilateral amending procedure by a related amendment to s. 43 of the Constitution Act, 1982, as follows:

5. Section 43 of the said Act is renumbered as subsection 43(1) and is further amended by adding thereto the following subsection:

"(2) An amendment to the Act of the Legislature of New Brunswick entitled An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, chapter 0-1.1 of the Acts of New Brunswick, 1981, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolution of the Senate and House of Commons and the Legislative Assembly of New Brunswick."

A copy of the relevant provisions of the Companion Resolution is attached hereto as Appendix "C".

12. In or about May, 1990, the Report of the Special Committee (of the House of Commons) to Study the Proposed Companion Resolution to the Meech Lake Accord made the following relevant recommendations:

4. Your Committee recommends that the clause respecting the equality of New Brunswick's two official linguistic communities is an appropriate subject for a Companion Resolution.
5. Similarly your Committee agrees with the New Brunswick proposal to affirm a role for the legislature and government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of that province's two official linguistic communities.
6. Your Committee endorses the clause in the New Brunswick Companion Resolution which calls for promotion of Canada's linguistic duality by the Parliament and Government of Canada."

A copy of the relevant provisions of this report is attached hereto as Appendix "D".

13. On or about June 9, 1990, the First Ministers' Meeting on the Constitution included proposals for further constitutional amendments in its Final Communiqué (the "Final

Communiqué"). The Prime Minister of Canada and the Premiers of every Province of Canada (collectively the "First Ministers") endorsed in its entirety the proposal in the New Brunswick Companion Resolution to amend section 43 of the Constitution Act, 1982 as set out in paragraph 10 above. But the First Ministers agreed to entrench the principles of Bill 88 as an amendment to section 133 of the Constitution Act, 1867, rather than as an amendment to the 1987 Distinct Society Clause. This particular proposal in the Final Communiqué was set out as a separate constitutional amendment for New Brunswick as follows:

1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 133 thereof, the following section:

133.1(1) the Constitution of Canada, as it relates to New Brunswick, shall be interpreted in a manner consistent with the recognition that, within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges.

(2) The role of the legislature and Government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the two linguistic communities referred to in subsection (1) is affirmed.

(3) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislature or Government of New Brunswick, including any powers, rights or privileges relating to language."

2. This amendment may be cited as the Constitution Amendment, (year of proclamation) (New Brunswick).

A copy of the Final Communiqué is attached hereto as Appendix "E".

14. On or about June 15, 1990, the legislative assembly of New Brunswick passed resolutions for amending the

Constitution Acts of 1867 and 1982 in accordance with the proposals in the Final Communiqué. No resolutions, however, were passed by the House of Commons and Senate or any other provincial legislative assembly.

15. On or about September 21, 1991, the Government of Canada put forward new proposals for constitutional change. Among other things, it proposed that a new clause be added to section 2 of the Constitution Act, 1867, which would include the following elements:

- recognition of the responsibility of governments to preserve Canada's two linguistic majorities and minorities;
- the special responsibility borne by Quebec to preserve and promote its distinct society.

In addition, the Government of Canada recommended an amendment to the Canadian Charter of Rights and Freedoms, to deal with Quebec's distinct society, as follows:

- 25.1 (1) This Charter shall be interpreted in a manner consistent with
- (a) the preservation and promotion of Quebec as a distinct society within Canada; and
 - (b) the preservation of the existence of French-speaking Canadians, primarily located in Quebec but also present throughout Canada, and English-speaking Canadians, primarily located outside Quebec but also present in Quebec.
- (2) For the purposes of subsection (1), "distinct society", in relation to Quebec, includes
- (a) a French-speaking majority;
 - (b) a unique culture; and
 - (c) a civil law tradition.

A copy of this provision is attached hereto as Appendix "F".

16. On or about January 14, 1992, the New Brunswick Commission on Canadian Federalism, appointed in September 1990, submitted its final report to the premier of New Brunswick. The relevant recommendations are as follows:

Chapter IV - Linguistic Partnership --
Canada's Distinction

16. That the foundations of our linguistic-regime be maintained.
17. That the existence of the English and French linguistic communities throughout the country constitutes a fundamental characteristic of Canada and should therefore be expressed in the proposed "Canada clause".
18. (a) That the Constitution be amended to affirm the responsibility of the Parliament and Government of Canada to preserve and promote the English and French linguistic communities throughout the country; and
(b) That the Constitution be amended further to affirm the responsibility of provincial legislatures and governments to preserve the English and French linguistic communities throughout the country.
19. That the Constitution be amended to include a clause recognizing the equality of status, equal rights and privileges of the English and French linguistic communities in New Brunswick and that this equality includes the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of these communities".

A copy of these recommendations are attached hereto as Appendix "G".

17. On or about August 28, 1992, the First Ministers issued the Final Text of a Consensus Report on the Constitution recommending a set of constitutional amendments (hereinafter referred to as the "Charlottetown Accord"). On or about October 9, 1992, a draft legal text was issued which contained the following proposals for a Canada Clause;

1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 1 thereof, the following section:
2. (1) The Constitution of Canada, including the Canadian Charter of Rights and Freedoms, shall be interpreted in a manner consistent with the following fundamental characteristics:
 - (a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;
 - (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;
 - (c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;
 - (d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
 - (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
 - (f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
 - (g) Canadians are committed to the equality of female and male persons; and
 - (h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.
- (2) The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec is affirmed.
- (3) Nothing in this section derogates from the powers, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments

of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language.

- (4) For greater certainty, nothing in this section abrogates or derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada."

18. The Charlottetown Accord also included provisions for a bilateral (New Brunswick and Canada) amendment to the Charter of Rights and Freedoms as follows:

1. The Constitution Act, 1982 is amended by adding thereto, immediately after section 16 thereof, the following section:

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

- (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed."

A copy of the relevant provisions of the Charlottetown Accord are attached hereto as Appendix "H".

19. On or about October 26, 1992, in referenda throughout Canada, the Charlottetown Accord was rejected by an overall majority of the Canadian people.

20. On or about December 4, 1992, the New Brunswick legislative assembly authorized an amendment to the Constitution Act, 1982 in exactly the same form as in the Charlottetown Accord set out in paragraph 17 above.

21. The Plaintiff claims that the New Brunswick Amendment cannot be made pursuant to the bilateral amending

formula in section 43 of the Constitution Act, 1982. Rather, it can only be made pursuant to the general amending formula in section 38(1). Accordingly, the Plaintiff seeks a declaration, pursuant to the s. 52(1) of the Constitution Act, 1982, that the Governor General has no jurisdiction, power to authority to issue a proclamation to amend the Constitution by adding thereto the New Brunswick Amendment.

22. The bilateral amending formula in section 43 of the Constitution Act, 1982, can only be used in limited circumstances for amendments "in relation to any provision that applies to one or more, but not all, provinces.", including amendments relating to "the use of the English or French language within a province." For example, a province could declare itself officially bilingual within the meaning of the Charter language provisions pursuant to section 43. In order for the bilateral amending formula in section 43 to apply, the amendment must be characterizable, in form, substance, purpose and effect, as an amendment to an existing constitutional provision that is explicitly limited in application to one or more, but not to all provinces.

23. While of limited significance with respect to Charter rights of a universal nature such as the Fundamental Rights and Freedoms, the purpose of the framers is of considerable weight in determining the meaning of those provisions of the Constitution that derive directly from a political bargain or compromise.

24. The New Brunswick Amendment cannot be characterized as an amendment to an existing constitutional provision, such as s. 133, that applies to one or more, but not all provinces. The New Brunswick Amendment amends the Charter of Rights and Freedoms which, by s. 32, applies to the

Parliament and government of Canada and the Legislatures and governments of all of the provinces.

25. In addition, the New Brunswick Amendment effectively amends parts of section 23 the Canadian Charter which apply to all provinces. Section 23, as it now stands, affords to minority language communities some measure of management and control over minority language instruction, where demographic and other factors warrant, but falls far short of an absolute guarantee of distinct educational institutions as is now proposed in the New Brunswick amendment.

26. Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method of internal balancing. By creating a different and overlapping right to minority language education to apply in a single province, the New Brunswick amendment would alter the coherence and comprehensiveness of section 23, and thereby change its very core.

27. The New Brunswick Constitutional Amendment does not amend a "provision that relates to the use of the English and French language in the province" in the sense intended by section 43(b). Rather, the amendment is in relation to the broad subject matters of education and culture, and relates to the special rights and privileges of linguistic communities, not to the use of official languages in the province.

23. The New Brunswick Amendment creates a special legislative status in affirming the role of the Legislature and government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the two

linguistic communities in New Brunswick. In so doing, the Amendment diminishes federal powers in several areas including, but not limited to, language, culture, broadcasting and communications.

29. Unlike some of the previous proposals and drafts for the New Brunswick Amendment, there is no reference to a comparable federal role in preserving and promoting the two linguistic communities, thereby raising the inference that the role of the Legislature and government of New Brunswick is to be expanded in the subject areas referred to in paragraph 28 above.

30. If those who drafted the New Brunswick Amendment had intended that governmental powers not be affected by the amendment, they could have said so. (See, for example, the non-derogation clause in previous drafts of the 1987 Distinct Society Clause (paragraph 8, supra), the Charlottetown Accord's Canada Clause (paragraph 17, supra), and the 1990 New Brunswick proposals (paragraph 10, supra).

31. The New Brunswick Amendment, if permitted to be made pursuant to the bilateral amending formula, will set a powerful precedent for future bilateral amendments such as Quebec's Distinct Society Clause, something which was always considered to have required the general amending formula in section 38(1) of the Constitution Act, 1982.

32. The New Brunswick constitutional amendment introduces, for the first time, the concept of collective rights in the Charter of Rights and Freedoms. Charter rights and freedoms, including the minority language and education rights, are clearly stated as belonging to individuals, and not to groups. Section 24 of the Charter empowers "anyone"

to seek enforcement of guaranteed rights and freedoms. Yet the New Brunswick constitutional amendment confers rights on linguistic communities and empowers the Legislature and Government of New Brunswick to promote the power of groups over individuals.

33. While section 23 of the Charter may be said to confer rights on a specific group in the narrow sense that the rights therein may only be exercised by certain classes or categories of individuals (i.e. those who belong to a minority language community) , it is the individual members of the group who bear, exercise, and may enforce the rights themselves. The New Brunswick amendment, by contrast, sets up linguistic communities as direct bearers of rights, thereby altering the structure of the Charter.

34. Section 43 should be interpreted strictly. The core of the political compromise which informed the amending formula provisions in the Constitution Act, 1982 was the requirement of a high degree of provincial consent wherever an amendment affects the structural and symbolic functions of the constitution as a fundamental framework for government and society.

35. Therefore the use of section 43 should be limited to modifications or adjustments to discrete, self-contained constitutional provisions not applying to all provinces, which do not involve the creation of new elements and basic structures in the Canadian constitutional order, such as the introduction of collective rights into the Charter.

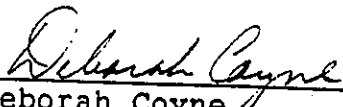
36. The Plaintiff claims as follows:

- (i) a declaration pursuant to sections 17 and 18 of the Federal Court Act and s. 52(1) of the Constitution Act, 1982 that the Governor

General has no jurisdiction, power or authority to issue a Proclamation to amend the Constitution by adding thereto the New Brunswick Amendment;

- (ii) her costs of this action; and
- (iii) such further and other relief as this Honourable Court considers just.

DATED at Ottawa, this 15 day of February, 1993.


Deborah Coyne
1654 Aspen Village Circle
Orleans, ON
K1C 6T3

- TO: Her Majesty The Queen
c/o The Attorney General of Canada
Justice Building
Ottawa, Ontario
- TO: The Governor General of Canada
c/o The Attorney General of Canada
Justice Building
Ottawa, Ontario
- TO: The Attorney General of Canada
Justice Building
239 Wellington
Ottawa, Ontario
K1A 0A6
- TO: The Attorney General of New Brunswick
Edifice Centennial
Bureau 214
Fredericton, New Brunswick
E3B 5H1

APPENDIX A

1654 Aspen Village Circle
Orleans, Ontario
January 4, 1993

The Honourable Dick Fowler
Attorney-General
Government of Alberta
423 Legislative Building
Edmonton, Alberta
T5K 2B6

Copy

Dear Mr. Fowler:

RE: Proposed New Brunswick constitutional amendment to section 16 of the Canadian Charter of Rights and Freedoms.

I am writing to ask your government to institute a reference case in respect of the above-noted constitutional amendment which is being implemented under the bilateral amending procedure in section 43 of the Constitution Act 1982. In my view, a reference case is justified in order to determine the proper scope and application of the bilateral amending formula, and whether it is appropriate to use the formula in respect of the New Brunswick constitutional amendment.

I submit that the amendment cannot be implemented bilaterally. Among other things, it is a matter of national importance affecting more than one province, and affecting major federal powers including, but not limited to, broadcasting, communications and culture. It also imports the notion of collective rights into the Canadian Charter of Rights and Freedoms, something which has implications across the country.

If I have not heard from you, by February 15, my present intention is to institute proceedings in the week of February 15 for a declaration that the amendment is of no force and effect. (This assumes that the constitutional resolution is passed by the House of Commons and then proclaimed in force by the Governor General by that time.)

Thank you for your consideration in the regard.

Yours sincerely,

Deborah Coyne
Deborah Coyne

1654 Aspen Village Circle
Orleans, Ontario
January 4, 1993

The Honourable Colin Gabelmann
Attorney-General
Government of British Columbia
Room 232, Parliament Building
Victoria, British Columbia
V8V 1X4

Copy

Dear Mr. Gabelmann:

RE: Proposed New Brunswick constitutional amendment to section 16 of the Canadian Charter of Rights and Freedoms.

I am writing to ask your government to institute a reference case in respect of the above-noted constitutional amendment which is being implemented under the bilateral amending procedure in section 43 of the Constitution Act 1982. In my view, a reference case is justified in order to determine the proper scope and application of the bilateral amending formula, and whether it is appropriate to use the formula in respect of the New Brunswick constitutional amendment.

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Thank you for your consideration in the regard.

Yours sincerely,

Deborah Coyne
Deborah Coyne

1654 Aspen Village Circle
Orleans, Ontario
January 4, 1993

The Honourable James C. McCrae
Attorney-General
Government of Manitoba
104 Legislative Building
Winnipeg, Manitoba
R3C 0V8

Copy

Dear Mr. McCrae:

RE: Proposed New Brunswick constitutional amendment to section 16 of the Canadian Charter of Rights and Freedoms.

I am writing to ask your government to institute a reference case in respect of the above-noted constitutional amendment which is being implemented under the bilateral amending procedure in section 43 of the Constitution Act 1982. In my view, a reference case is justified in order to determine the proper scope and application of the bilateral amending formula, and whether it is appropriate to use the formula in respect of the New Brunswick constitutional amendment.

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Thank you for your consideration in the regard.

Yours sincerely,

Deborah Coyne

Deborah Coyne

1654 Aspen Village Circle
Orleans, Ontario
January 4, 1993

The Honourable Edward Roberts
Attorney-General
Government of Newfoundland and Labrador
Confederation Building
St. John's, Newfoundland
A1B 4J6

Coyne

Dear Mr. Roberts:

RE: Proposed New Brunswick constitutional amendment to section 16 of the Canadian Charter of Rights and Freedoms.

I am writing to ask your government to institute a reference case in respect of the above-noted constitutional amendment which is being implemented under the bilateral amending procedure in section 43 of the Constitution Act 1982. In my view, a reference case is justified in order to determine the proper scope and application of the bilateral amending formula, and whether it is appropriate to use the formula in respect of the New Brunswick constitutional amendment.

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Thank you for your consideration in the regard.

Yours sincerely,

Deborah Coyne

Deborah Coyne

1654 Aspen Village Circle
Orleans, Ontario
January 4, 1993

The Honourable Joel R. Matheson, Q.C.
Attorney-General
Government of Nova Scotia
Bank of Montreal Building, 10th Floor
5151 George Street, Box 7
Halifax, Nova Scotia
B2J 2L6

Copy

Dear Mr. Matheson:

RE: Proposed New Brunswick constitutional amendment to section 16 of the Canadian Charter of Rights and Freedoms.

I am writing to ask your government to institute a reference case in respect of the above-noted constitutional amendment which is being implemented under the bilateral amending procedure in section 43 of the Constitution Act 1982. In my view, a reference case is justified in order to determine the proper scope and application of the bilateral amending formula, and whether it is appropriate to use the formula in respect of the New Brunswick constitutional amendment.

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Thank you for your consideration in the regard.

Yours sincerely,

Deborah Coyne

Deborah Coyne

1654 Aspen Village Circle
Orleans, Ontario
January 4, 1993

The Honourable Howard Hampton, Q.C.
Attorney-General
Government of Ontario
720 Bay Street
Toronto, Ontario
M5G 2K1

Copy

Dear Mr. Hampton:

RE: Proposed New Brunswick constitutional amendment to section 16 of the Canadian Charter of Rights and Freedoms.

I am writing to ask your government to institute a reference case in respect of the above-noted constitutional amendment which is being implemented under the bilateral amending procedure in section 43 of the Constitution Act 1982. In my view, a reference case is justified in order to determine the proper scope and application of the bilateral amending formula, and whether it is appropriate to use the formula in respect of the New Brunswick constitutional amendment.

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Thank you for your consideration in the regard.

Yours sincerely,

Deborah Coyne

Deborah Coyne

1654 Aspen Village Circle
Orleans, Ontario
January 4, 1993

The Honourable Joseph A. Ghiz
Premier and Minister of Justice
Government of Prince Edward Island
Shaw Building, 5th Floor
95 Rochford Street, Box 2000
Charlottetown, Prince Edward Island
C1A 7N8

Coyne

Dear Mr. Ghiz:

RE: Proposed New Brunswick constitutional amendment to section 16 of the Canadian Charter of Rights and Freedoms.

I am writing to ask your government to institute a reference case in respect of the above-noted constitutional amendment which is being implemented under the bilateral amending procedure in section 43 of the Constitution Act 1982. In my view, a reference case is justified in order to determine the proper scope and application of the bilateral amending formula, and whether it is appropriate to use the formula in respect of the New Brunswick constitutional amendment.

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Thank you for your consideration in the regard.

Yours sincerely,

Deborah Coyne

Deborah Coyne

1654 Aspen Village Circle
Orleans, Ontario
January 4, 1993

L'honorable Gil Rémillard
Ministre de la Justice, procureur général
Gouvernement du Québec
1200, rte de l'Église
Ste-Foy, Québec
G1V 4M1

Copy

Dear Monsieur Rémillard:

RE: Proposed New Brunswick constitutional amendment to section 16 of the Canadian Charter of Rights and Freedoms.

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I submit that the amendment cannot be implemented bilaterally. Among other things, it is a matter of national importance affecting more than one province, and affecting major federal powers including, but not limited to, broadcasting, communications and culture. It also imports the notion of collective rights into the Canadian Charter of Rights and Freedoms, something which has implications across the country.

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Thank you for your consideration in the regard.

Yours sincerely,

Deborah Coyne

Deborah Coyne

1654 Aspen Village Circle
Orleans, Ontario
January 4, 1993

The Honourable Bob Mitchell, Q.C.
Attorney-General
Government of Saskatchewan
Legislative Building, Room 355
Regina, Saskatchewan
S4S 0B3

Copy

Dear Mr. Mitchell:

RE: Proposed New Brunswick constitutional amendment to section 16 of the Canadian Charter of Rights and Freedoms.

I am writing to ask your government to institute a reference case in respect of the above-noted constitutional amendment which is being implemented under the bilateral amending procedure in section 43 of the Constitution Act 1982. In my view, a reference case is justified in order to determine the proper scope and application of the bilateral amending formula, and whether it is appropriate to use the formula in respect of the New Brunswick constitutional amendment.

I submit that the amendment cannot be implemented bilaterally. Among other things, it is a matter of national importance affecting more than one province, and affecting major federal powers including, but not limited to, broadcasting, communications and culture. It also imports the notion of collective rights into the Canadian Charter of Rights and Freedoms, something which has implications across the country.

If I have not heard from you, by February 15, my present intention is to institute proceedings in the week of February 15 for a declaration that the amendment is of no force and effect. (This assumes that the constitutional resolution is passed by the House of Commons and then proclaimed in force by the Governor General by that time.)

Thank you for your consideration in the regard.

Yours sincerely,

Deborah Coyne

Deborah Coyne

APPENDIX B



Legislative Assembly of New Brunswick

*SELECT COMMITTEE ON THE
1987 CONSTITUTIONAL ACCORD*

Final Report

on the

Constitution Amendment 1987

*Second Session
Fifty-first Legislature*

CHAPTER XV

*BILL 88 - AN ACT RECOGNIZING THE EQUALITY OF THE
TWO OFFICIAL LINGUISTIC COMMUNITIES IN NEW BRUNSWICK**(a) Responses of Presenters*

The vast majority of Acadians and Francophones who appeared before the Committee argued at length in favour of the entrenchment of what most of them viewed as New Brunswick's fundamental characteristic, the principles contained in Bill 88: *An Act Recognizing the Equality of The Two Official Linguistic Communities in New Brunswick*. In their written and oral presentations the Acadians and Francophones of our province pleaded passionately for the immediate inclusion of these principles in the Constitution.

La Société des Acadiens et Acadiennes du Nouveau-Brunswick (SAANB), in its submission to the Committee, recommended specifically that subsection 2(1) of the Accord be amended by adding to it a new paragraph (c) whose terminology would be similar to that found in Bill 88. The Acadian organization further recommended that a new paragraph be added to Section 2 of the Accord. This new paragraph would stipulate that the Legislative Assembly and Government of New Brunswick undertake to preserve and promote New Brunswick's fundamental characteristic as defined in paragraph 2(1)(c) of the Accord.

When questioned by the Committee, the majority of Anglophone presenters also indicated their support for the entrenchment of the principles of the equality of linguistic communities.

(b) *Committee's Comments*

In the past 20 years, New Brunswick has been the witness, promoter and the subject of an important evolution in the area of linguistic rights. The evolution began with a number of important declarations from our elected representatives. These statements of principle were subsequently incorporated in new and innovative legislation. Finally, they found their way into our Constitution. In matters of linguistic equality, New Brunswick can be proud of its record.

In March 1968, the Liberal government of Louis Robichaud tabled in the New Brunswick Legislative Assembly a resolution containing five principles for official bilingualism. This was followed by a Government White Paper entitled *A Statement on Language Equality and Opportunity*. This document, tabled on December 4th, 1968 was a precursor of things to come. It stated:

*The composition of the population of New Brunswick more closely resembles that of the proportions to be found in Canada as a whole than the composition of any other province. It is therefore fitting that we should, in our relations with each other, achieve in practice the goal of our nation: cultural and linguistic equality of opportunity.*⁵¹

The adoption of New Brunswick's Official Languages Act in 1969 made New Brunswick the only officially bilingual province in Canada. The Act containing 15 Sections became law over the next few years. In 1977 the last Sections of the Official Languages of New Brunswick Act [Sections 4, 8, 9, 10 and 12] were proclaimed.

⁵¹*Statement on Language Equality and Opportunity, Dec. 4, 1968, p. 1. See also Synoptic Report of the Proceedings of the Legislative Assembly of New Brunswick, same date, p. 706.*

Four years later, in 1981, the Progressive Conservative Government of Richard Hatfield introduced new legislation on collective rights. The *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick* acknowledged and affirmed the equality of status, rights and privileges of its two groups. Through this Act, the Government undertook to protect this equality and to take positive actions to promote the cultural, economic, educational and social development of the two communities. Finally the Act recognizes the right of both communities to distinct institutions. This innovative legislation received the unanimous approval of the Legislative Assembly.

In 1982, the principles contained in the *Official Languages of New Brunswick Act*, were constitutionally entrenched by their inclusions in subsection (2) of Sections 16 to 20 of the Charter. The evolution of linguistic rights in our province was achieved through the determination and goodwill of many New Brunswickers.

During our hearings, Acadians and Francophones urged New Brunswick to finish what was begun twenty years ago by entrenching this fundamental characteristic of our province.

(c) *Committee's Recommendations*

The Committee agrees that the time has come for a full constitutional recognition of New Brunswick's two linguistic communities and for the recognition of a constitutional obligation to preserve and promote them. It also believes that this should not be the sole responsibility of the Legislative Assembly and the Government of New Brunswick; responsibility should be extended to the Federal Parliament and Government of Canada.

Such a commitment from both Governments would ensure that all legislative matters are covered. It would provide a fundamental constitutional framework for the development of rational, comprehensive policies fostering further preservation and promotion of our two linguistic communities.

Therefore, the Committee recommends that the Governments of New Brunswick and Canada immediately initiate the process for the entrenchment of the principles contained in An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick.

APPENDIX C

NEW BRUNSWICK COMPANION RESOLUTION

Constitution Act, 1867

1. (1) Subsection 2(1) of the *Constitution Act, 1867*, as enacted by section 1 of the *Constitution Amendment, 1987*, is amended by adding the word "and" at the end of paragraph (b) thereof and by adding thereto the following paragraph:

"(c) the recognition that, within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges."

(2) Section 2 of the said Act, as enacted by section 1 of the *Constitution Amendment, 1987*, is further amended by adding thereto, immediately after subsection (2) thereof, the following subsection:

"(2.1) The role of the Parliament and Government of Canada to promote the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed."

(3) Section 2 of the said Act, as enacted by section 1 of the *Constitution Amendment, 1987*, is further amended by adding thereto, immediately after subsection (3) thereof, the following subsection:

"(3.1) The role of the legislature and Government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the two linguistic communities referred to in paragraph (1)(c) is affirmed."

2. Section 25 of the said Act, as enacted by section 2 of the *Constitution Amendment, 1987*, is amended by adding thereto, immediately after the word "province" wherever it occurs therein, the words "or territory".

3.(1) Subsection 101C(1) of the said Act, as enacted by section 6 of the *Constitution Amendment, 1987*, is amended by adding thereto, immediately after the word "province" wherever it occurs therein, the words "or territory".

(2) Subsection 101C(4) of the said Act, as enacted by section 6 of the *Constitution Amendment, 1987*, is amended by adding thereto, immediately after the word "province" where it occurs therein, the words "or territory,".

Constitution Act, 1982

4. Section 36 of the *Constitution Act, 1982* is amended by adding thereto the following subsection:

“(3) The Senate shall, in 1991 and every five years thereafter, carry out an assessment of the results achieved in relation to the commitments of Parliament, the legislatures, the government of Canada and the provincial governments set out in this section and a report of every such assessment shall be presented to the conference next convened under section 148 of the *Constitution Act, 1867* after the assessment is completed.”

5. Section 43 of the said Act is renumbered as subsection 43(1) and is further amended by adding thereto the following subsection:

“(2) An amendment to the Act of the Legislature of New Brunswick entitled *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, chapter O-1.1 of the Acts of New Brunswick, 1981, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of New Brunswick.”

6. The said Act is further amended by adding thereto, immediately after section 43 thereof, the following section:

“43.1 Notwithstanding paragraph 41(i), an amendment to the Constitution of Canada in relation to the establishment of new provinces in the territories may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons.”

7. The said Act is further amended by adding thereto, immediately after section 46 thereof, the following section:

“46.1 No measure relating to an amendment to the Constitution of Canada may be adopted by the House of Commons or the legislative assembly of a province pursuant to section 38, 41, 43, 43.1 or 46 unless public hearings in relation thereto are first held by the House of Commons or legislative assembly, as the case may be.”

8. Subsection 47(1) of the said Act, as enacted by section 12 of the *Constitution Amendment, 1987*, is amended by adding thereto, immediately after the reference to section 43 where it occurs therein, the following: “or 43.1”.

9.(1) Subsection 50(2) of the said Act, as enacted by section 13 of the *Constitution Amendment, 1987*, is amended by adding thereto, immediately after paragraph (a) thereof, the following paragraph:

“(a.1) constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples; ”

(2) Section 50 of the said Act, as enacted by section 13 of the *Constitution Amendment, 1987*, is further amended by adding thereto the following subsections:

“(3) The matters referred to in paragraph (2)(b) do not include issues relating to jurisdiction and are not required to be included on the agenda of conferences convened under subsection (1) after the first such conference is convened.

(4) The Prime Minister of Canada shall invite representatives of the aboriginal peoples of Canada, and elected representatives of the governments of the Yukon Territory and the Northwest Territories, to participate in the discussions on the matters referred to in paragraph (2)(a.1) at the conferences convened under subsection (1).”

Constitution Amendment, 1987

10. Section 16 of the *Constitution Amendment, 1987* is amended by adding thereto, immediately after the reference to section 27 where it occurs therein, the following: “or 28”.

Citation

11. This schedule or any provision thereof may, if proclaimed, be cited as the *Constitution Amendment, (year of proclamation) (number, if necessary)*.

APPENDIX D

REPORT OF THE
SPECIAL COMMITTEE TO STUDY
THE PROPOSED COMPANION RESOLUTION
TO THE MEECH LAKE ACCORD

May 1990

The Honourable Jean Charest, M.P.
Chairman

EMM
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Ministers move quickly to resolve the question of the timing of additional changes.

Your Committee then looked at the specific concerns of the New Brunswick, Manitoba and Newfoundland and Labrador governments keeping in mind the concerns identified by others who felt their interests were left out in the process that led to the Meech Lake Accord.

B. The Content

New Brunswick would like to see an addition in the Meech Lake Accord to the clause respecting Canada's linguistic duality and Quebec's distinct society, namely that within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges. This would entrench a principle presently stated in a New Brunswick statute.

- 4. Your Committee recommends that the clause respecting the equality of New Brunswick's two official linguistic communities is an appropriate subject for a Companion Resolution.**
- 5. Similarly your Committee agrees with the New Brunswick proposal to affirm a role for the legislature and government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of that province's two official linguistic communities.**

The Meech Lake Accord affirms the role of Parliament to preserve one of Canada's fundamental characteristics—linguistic duality. Premier McKenna has proposed in his Companion Resolution to affirm as well Parliament's role to promote our linguistic duality.

Testimony from constitutional experts is unanimous in affirming that the promotion of linguistic duality as proposed is limited to federal jurisdiction. This is also clearly understood by minority language groups who testified before the Committee.

Although the promotion role suggested by Premier McKenna is now demonstrated in law in the revised *Official Languages Act* (R.S.C. 1985, 4th Supp., 31), your Committee has been persuaded by the repeated argument made by minority language groups to the effect that even though a promotion clause may not add anything legally it would have a dynamic effect on these groups.

- 6. Your Committee endorses the clause in the New Brunswick Companion Resolution which calls for promotion of Canada's linguistic duality by the Parliament and Government of Canada.**

On this important issue other proposals have been put forward that merit the attention of First Ministers. These include the question of "where numbers warrant" and the control and management of schools in section 23 of the Charter; and an examination of the concept of a "Code of Minority Language Rights" put forward by witnesses and the Government of Quebec.

7. In any event, your Committee suggests that minority language rights require continuing deliberation and should be included on the agenda of the Annual First Ministers Conferences on the Constitution.

The Meech Lake Accord provides for provincial involvement in the appointment of Senators and Judges of the Supreme Court. The First Ministers who signed the Accord took the position that it should be passed, unchanged, unless there was some "egregious error". The body of evidence presented to your Committee is that most Canadians perceived at least one such oversight and that was the failure to include the Yukon and the Northwest Territories in the selection process.

8. The New Brunswick Companion Resolution would address the Meech Lake Accord's omission of the Yukon and Northwest Territories in the selection of Senators and Judges of the Supreme Court by involving the two territories in the selection process. Your Committee is convinced this oversight should be corrected.

The Meech Lake Accord would also change the amending formula required for the creation of new provinces from the 2/3 of the provinces with 50% of the population to unanimity. Prior to 1982 the process for admission of new provinces was the sole responsibility of the federal government. New Brunswick has proposed a return to the pre-1982 situation thereby ensuring that the two territories could aspire to provincehood under the same conditions as other provinces created since 1867. Your Committee has heard compelling evidence on this issue as it travelled throughout Canada and more particularly in the northern territories.

9. Your Committee agrees with the position of New Brunswick and the territories on the creation of new provinces and recommends this be dealt with in a Companion Resolution.

New Brunswick also proposes to add an agenda item to the Annual First Ministers Conference on the Constitution. It would deal with constitutional matters that directly affect the aboriginal peoples of Canada, including the identification of the rights of those people. Representatives of aboriginal groups testified that instead of being one of the items on the agenda of annual First Ministers Constitutional Conferences, a separate process be devoted specifically to aboriginal matters. They recommended that these conferences would be held every three years.

APPENDIX E

FIRST MINISTERS' MEETING ON THE CONSTITUTION

FINAL COMMUNIQUÉ

June 9, 1990

1990 CONSTITUTIONAL AGREEMENT

WHEREAS on April 30, 1987, the Prime Minister of Canada and the Premiers reached agreement in principle on means to bring about the full and active participation of Quebec in Canada's constitutional evolution;

AND WHEREAS on June 3, 1987, all first ministers signed the 1987 Constitutional Accord and committed themselves to introducing as soon as possible the Constitution Amendment, 1987 in Parliament and the provincial legislative assemblies;

AND WHEREAS the Constitution Amendment, 1987 has been authorized by Parliament and the legislative assemblies of Quebec, Saskatchewan, Alberta, Prince Edward Island, Nova Scotia, Ontario and British Columbia:

1. THE MEECH LAKE ACCORD

The Premiers of New Brunswick, Manitoba and Newfoundland undertake to submit the Constitution Amendment, 1987 for appropriate legislative or public consideration and to use every possible effort to achieve decision prior to June 23, 1990.

2. SENATE REFORM

After proclamation, the federal government and the provinces will constitute a commission with equal representation for each province and an appropriate number of territorial and federal representatives to conduct hearings and to report to Parliament and the legislative assemblies of the provinces and territories, prior to the First Ministers' Conference on the Senate to be held by the end of 1990 in British Columbia, on specific proposals for Senate reform that will give effect to the following objectives:

- The Senate should be elected.
- The Senate should provide for more equitable representation of the less populous provinces and territories.
- The Senate should have effective powers to ensure the interests of residents of the less populous provinces and territories figure more prominently in national decision-making, reflect Canadian duality and strengthen the Government of Canada's capacity to govern on behalf of all citizens, while preserving the principle of the responsibility of the Government to the House of Commons.

Following proclamation of the Meech Lake Accord, the Prime Minister and all Premiers agree to seek adoption of an amendment on comprehensive Senate reform consistent with these objectives by July 1, 1995.

The Prime Minister undertakes to report semi-annually to the House of Commons on progress achieved towards comprehensive Senate reform.

The Prime Minister and all Premiers, reaffirming the commitment made in the Edmonton Declaration and the provisions to be entrenched under the Constitution Amendment, 1987, undertook that Senate reform will be the key constitutional priority until comprehensive reform is achieved.

If, by July 1, 1995, comprehensive Senate reform has not been achieved according to the objectives set out above under section 41 of the Constitution Act, 1982, as amended by the Constitution Amendment, 1987, the number of Senators by which a province is entitled to be represented in the Senate will be amended so that, of the total of one hundred and four Senators, the representation of Ontario will be eighteen Senators, the representation of Nova Scotia, New Brunswick, British Columbia, Alberta, Saskatchewan, Manitoba and Newfoundland will be eight Senators each, and the representation of all other provinces and the territories will remain unchanged. In the case of any province whose representation declined, no new appointments would be made until that province's representation had by attrition declined below its new maximum. In the event of such a redistribution of Senate seats, Newfoundland would be entitled to another Member of Parliament in the House of Commons under section 51A of the Constitution Act, 1867.

3. FURTHER CONSTITUTIONAL AMENDMENTS

(1) Charter - Sex Equality Rights

- Add section 28 of the Canadian Charter of Rights and Freedoms to section 16 of the Constitution Amendment, 1987.

(2) Role of the Territories

- In appointments to the Senate and the Supreme Court of Canada.
- In discussions on items on the agenda of annual constitutional and economic conferences where, in the view of the Prime Minister, matters to be discussed directly affect them.

(3) Language Issues

- Add to the agenda of constitutional conferences matters that are of interest to English-speaking and French-speaking linguistic minorities.
- Require resolutions of the House of Commons, the Senats and the legislative assembly of New Brunswick to amend that province's Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick (Bill 88).

(4) Aboriginal Constitutional Issues

- First Ministers' constitutional conferences to be held once every three years, the first to be held within one year of proclamation; representatives of aboriginal peoples and the territorial

governments to be invited by the Prime Minister to participate in the discussion of matters of interest to the aboriginal peoples of Canada.

The Prime Minister of Canada will lay or cause to be laid before the Senate and House of Commons, and the Premiers will lay or cause to be laid before their legislative assemblies, a resolution, in the form appended hereto, and will seek to authorize a proclamation to be issued by the Governor General under the Great Seal of Canada to amend the Constitution of Canada as soon as possible after proclamation of the Constitution Amendment, 1987.

4. AGENDA FOR FUTURE CONSTITUTIONAL DISCUSSIONS

(1) Creation of New Provinces in the Territories

The Prime Minister and all Premiers agreed future constitutional conferences should address available options for provincehood, including the possibility that, at the request of the Yukon and Northwest Territories to become provinces, only a resolution of the House of Commons and Senate be required.

(2) Constitutional Recognitions

The Prime Minister and Premiers took note of repeated attempts by First Ministers over the past twenty years to draft a statement of constitutional recognitions. All such attempts were unsuccessful.

The Prime Minister and Premiers reviewed drafts submitted by the federal government and Manitoba, Saskatchewan, Ontario and British Columbia, and agreed to refer immediately the drafts to an all-party Special Committee of the House of Commons. Public hearings would begin across Canada on July 16, 1990 and a report on the substance and placement of the clause - in a manner consistent with the Constitution of Canada - would be prepared for consideration by First Ministers at their Conference in 1990.

(3) Constitutional Reviews

The Prime Minister and all Premiers agreed jointly to review, at the constitutional conference required by section 49 of the Constitution Act, 1982, the entire process of amending the Constitution, including the three-year time limit under section 39(2) of that Act and the question of mandatory public hearings prior to adopting any measure related to a constitutional amendment, including revocation of a constitutional resolution.

Pursuant to section 50 of the Constitution Act, 1982, as proposed in the Constitution Amendment, 1987, the Prime Minister and the Premiers also committed to a continuing review of the operation of the Constitution of Canada, including the Canadian Charter of Rights and Freedoms, with a view to making any appropriate constitutional amendments.

5. SECTION 2: CONSTITUTION AMENDMENT, 1987

The Prime Minister and Premiers took note of public discussion of the distinct society clause since its inclusion in the Meech Lake Accord. A number of Canada's most distinguished constitutional authorities met to exchange views on the legal impact of the clause. The Prime Minister and Premiers reviewed their advice and other material.

The Prime Minister, in his capacity as chairman of the Conference, received from the above-noted constitutional authorities a legal opinion which is appended to the final Conference communiqué.

6. NEW BRUNSWICK AMENDMENT

- Add a clause that within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges.
- Affirm an additional role of the legislature and government of New Brunswick: to preserve and promote the equality of status and equal rights and privileges of the province's two official linguistic communities.

The Prime Minister of Canada will lay or cause to be laid before the Senate and House of Commons, and the Premier of New Brunswick will lay or cause to be laid before the legislative assembly of New Brunswick, a resolution, in the form appended hereto, and will seek to authorize a proclamation to be issued by the Governor General under the Great Seal of Canada to amend the Constitution of Canada as soon as possible after proclamation of the Constitution Amendment, 1987.

Signed at Ottawa,
June 9, 1990

Fait à Ottawa
le 9 juin 1990

Canada

Ontario

Québec

Nova Scotia
Nouvelle-Écosse

New Brunswick
Nouveau-Brunswick

Manitoba*

British Columbia
Colombie-Britannique

* Subject to the public
hearing process

* Sous réserve du processus
d'audiences publiques

Prince Edward Island
Île-du-Prince-Édouard

Saskatchewan

Alberta

Newfoundland *
Terre-Neuve

* The Premier of Newfoundland endorses now the undertaking in Part I of this document and further undertakes to endorse fully this agreement if the Constitution Amendment, 1987 is given legislative or public approval following the consultation provided for in Part I.

* Le premier ministre de Terre-Neuve endosse maintenant l'engagement figurant dans la Partie I du présent document et s'engage en outre à endosser la totalité de la présente entente si la Modification constitutionnelle de 1987 reçoit une approbation législative ou publique à Terre-Neuve suite aux consultations prévues à la Partie I.

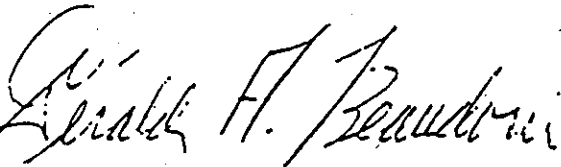
OTTAWA
June 9, 1990

Dear Prime Minister:

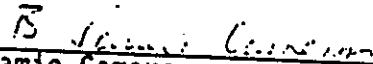
In response to certain concerns which have been expressed in relation to section 1 of the proposed Constitution Amendment, 1987 (Meech Lake Accord), it is our pleasure to confirm our opinion on the following.

In our opinion, the Canadian Charter of Rights and Freedoms will be interpreted in a manner consistent with the duality/distinct society clause of the proposed Constitution Amendment, 1987 (Meech Lake Accord), but the rights and freedoms guaranteed thereunder are not infringed or denied by the application of the clause and continue to be guaranteed subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, and the duality/distinct society clause may be considered, in particular, in the application of section 1 of the Charter.

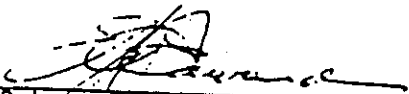
The Constitution of Canada, including sections 91 and 92 of the Constitution Act, 1867, will be interpreted in a manner consistent with the duality/distinct society clause. While nothing in that clause creates new legislative authority for Parliament or any of the provincial legislatures, or derogates from any of their legislative authority, it may be considered in determining whether a particular law fits within the legislative authority of Parliament or any of the legislatures.



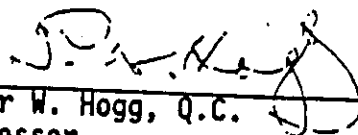
Gerald-A. Beaudoin, O.C., Q.C.
Professor of Law
University of Ottawa



B. Jamie Cameron
Associate Professor
Osgoode Hall Law School
York University



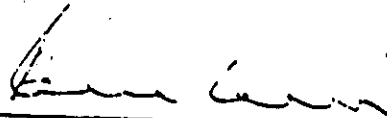
E. Robert A. Edwards, Q.C.
Assistant Deputy Attorney General
Government of British Columbia



Peter W. Hogg, Q.C.
Professor
Osgoode Hall Law School
York University



Katherine Swinton
Professor, Faculty of Law
University of Toronto



Roger Tassé, O.C., Q.C.
Barrister and Solicitor

Motion for a Resolution to authorize an amendment
to the Constitution of Canada

The (Senate) (House of Commons) (legislative assembly) resolves
that an amendment to the Constitution of Canada be authorized to be
made by proclamation issued by His Excellency the Governor General
under the Great Seal of Canada in accordance with the schedule hereto,
but only after the Constitution Amendment, 1987 comes into force.

SCHEDULE

CONSTITUTION AMENDMENT

PART I

Constitution Act, 1867

1. Section 25 of the Constitution Act, 1867, as enacted by section 2 of the Constitution Amendment, 1987, is amended by adding thereto, immediately after the word "province" wherever it occurs therein, the words "or territory".

2.(1) Subsection 101C(1) of the said Act, as enacted by section 6 of the Constitution Amendment, 1987, is amended by adding thereto, immediately after the word "province" wherever it occurs therein, the words "or territory".

(2) Subsection 101C(4) of the said Act, as enacted by section 6 of the Constitution Amendment, 1987, is amended by adding thereto, immediately after the word "province" where it occurs therein, the words ", or territory,".

3. Section 148 of the said Act, as enacted by section 8 of the Constitution Amendment, 1987, is renumbered as subsection 148(1) and is further amended by adding thereto the following subsection:

Partici-
pation of
Territories

"(2) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories."

Constitution Act, 1982

4. Section 43 of the Constitution Act, 1982 is renumbered as subsection 43(1) and is further amended by adding thereto the following subsection:

Amendment
to New
Brunswick
Act

"(2) An amendment to the Act of the Legislature of New Brunswick entitled An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, chapter 0-1.1 of the Acts of New Brunswick, 1981, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of New Brunswick."

5.(1) Subsection 50(2) of the said Act, as enacted by section 13 of the Constitution Amendment, 1987, is amended by adding thereto, immediately after paragraph (a) thereof, the following paragraph:

"(a.1) matters of interest to English-speaking and French-speaking linguistic minorities;"

(2) Section 50 of the said Act, as enacted by section 13 of the Constitution Amendment, 1987, is further amended by adding thereto the following subsection:

"(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories."

Participation of the territories

6. The said Act is further amended by adding thereto, immediately after section 50 thereof, as enacted by section 13 of the Constitution Amendment, 1987, the following section:

"51.(1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force and at least once in every third calendar year after the first such conference is convened.

(2) Each conference convened under subsection (1) shall have included in its agenda matters of interest to the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from section 35."

Constitutional conference

Participation of aboriginal peoples

Participation of territories

Non-derogation

Constitution Amendment, 1987

7. Section 16 of the Constitution Amendment, 1987 is amended by adding thereto, immediately after the reference to section 27 where it occurs therein, the following: "or 28".

PART II

Constitution Act, 1867

8. All that portion of section 22 of the Constitution Act, 1867 following item 4 and preceding the last paragraph thereof is repealed and the following substituted therefor:

"which Four Divisions shall, subject to the provisions of this Act, be represented in the Senate as follows: Ontario by eighteen Senators; Quebec by twenty-four Senators; the Maritime Provinces and Prince Edward Island by twenty Senators, eight thereof representing Nova Scotia, eight thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by thirty-two Senators, eight thereof representing Manitoba, eight thereof representing British Columbia, eight thereof representing Saskatchewan, and eight thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by eight members; the Yukon Territory and the Northwest Territories shall be entitled to be represented in the Senate by one member each."

9. Section 27 of the said Act is repealed and the following substituted therefor:

"27. In case of such addition being at any time made, the Governor General shall not summon any person to the Senate, except on a further like direction by the Queen on the like recommendation, to represent one of the Four Divisions until such Division is represented by the number of Senators provided for by section 22 and no more."

Reduction
of Senate
to normal
number

Transi-
tional
provision

10. Notwithstanding section 22 of the Constitution Act, 1867, any province that is represented in the Senate on the coming into force of this Part by more Senators than are provided for under that section may continue to be so represented, but no additional persons may be summoned to the Senate to represent that province until the number of Senators representing that province falls below the number set out in section 22, and thereafter, subject to section 26, the number representing that province shall not exceed that number.

11.(1) This Part shall not come into force if an amendment in relation to the Senate that is consistent with the objectives set out in the 1990 Constitutional Agreement signed at Ottawa on June 9, 1990 is made before July 1, 1995.

(2) If an amendment described in subsection (1) is not made before July 1, 1995, this Part shall come into force on that date.

Citation

12. This amendment may be cited as the Constitution Amendment, (year of proclamation).

Citation

Motion for a Resolution to authorize an amendment
to the Constitution of Canada

The (Senate) (House of Commons) (legislative assembly)
resolves that an amendment to the Constitution of Canada be
authorized to be made by proclamation issued by His Excellency
the Governor General under the Great Seal of Canada in accordance
with the schedule hereto.

SCHEDULE

CONSTITUTION AMENDMENT

Constitution Act, 1867

1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 133 thereof, the following section:

"133.1(1) The Constitution of Canada, as it relates to New Brunswick, shall be interpreted in a manner consistent with the recognition that, within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges.

(2) The role of the legislature and Government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the two linguistic communities referred to in subsection (1) is affirmed.

(3) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislature or Government of New Brunswick, including any powers, rights or privileges relating to language."

Citation

2. This amendment may be cited as the Constitution Amendment, (year of proclamation) (New Brunswick).

Interpre-
tation

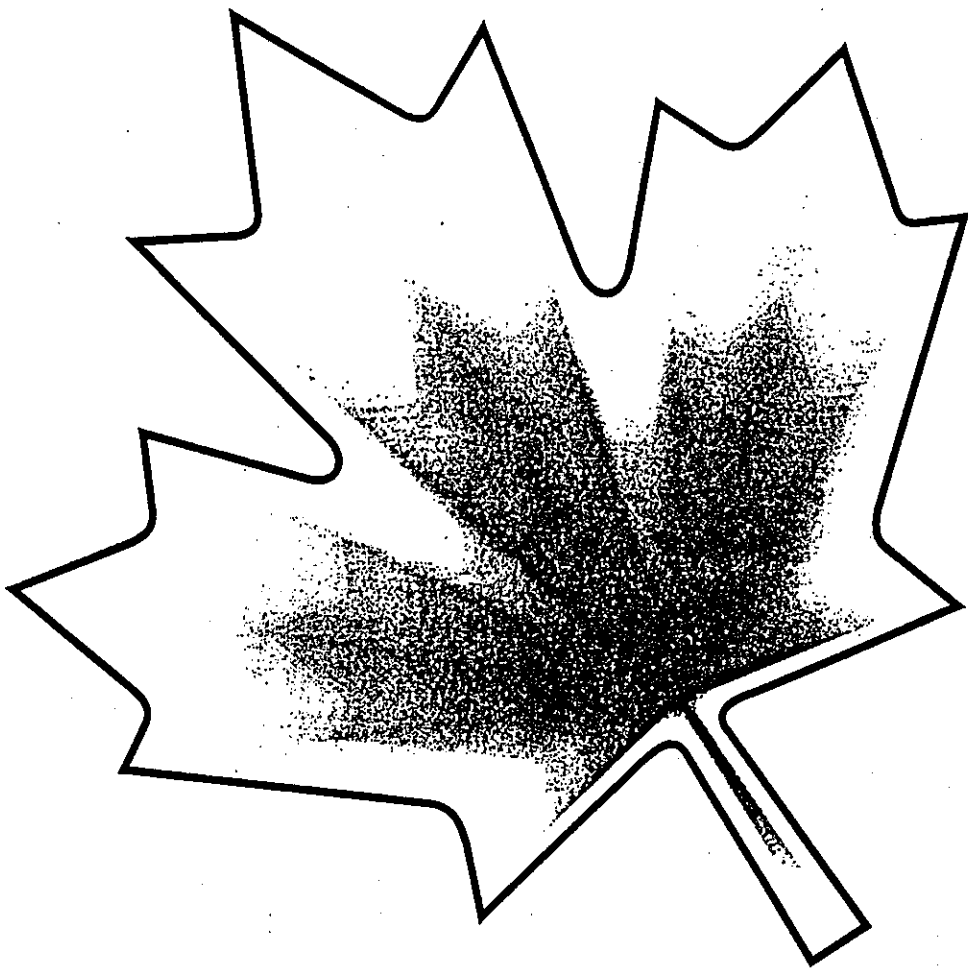
Role of
legisla-
ture and
Government
of New
Brunswick

Rights of
legisla-
tures and
govern-
ments
preserved

Citation

APPENDIX F

SHAPING
CANADA'S
FUTURE
TOGETHER
Proposals



Annex

Recognizing Quebec's Distinctiveness in the Canadian Charter of Rights and Freedoms

The following is the present sections 1, 25, 27, 28 and 31 and the proposed section 25.1:

1. 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.
25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
 - (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. (92)
- 25.1 (1) *This Charter shall be interpreted in a manner consistent with*
 - (a) *the preservation and promotion of Quebec as a distinct society within Canada; and*
 - (b) *the preservation of the existence of French-speaking Canadians, primarily located in Quebec but also present throughout Canada, and English-speaking Canadians, primarily located outside Quebec but also present in Quebec.*
- (2) *For the purposes of subsection (1), "distinct society", in relation to Quebec, includes*
 - (a) *a French-speaking majority;*
 - (b) *a unique culture; and*
 - (c) *a civil law tradition.*
27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
31. Nothing in this Charter extends the legislative powers of any body or authority.

APPENDIX 5

New
Nouveau  Brunswick

January 14, 1992


The Honorable Frank McKenna
Premier of New Brunswick
Centennial Building
Fredericton, N.B.
E3B 5H1

Dear Premier:

We, the members of the New Brunswick Commission on Canadian Federalism appointed in September 1990, have the honour, in accordance with our mandate, of submitting our report.

We express our appreciation to you for granting us the opportunity to play a role in the renewal of the Canadian Federation. We would also like to express our gratitude to all those who were interviewed, submitted briefs or who met with us during the course of our deliberations. Finally, we would like to thank the Commission staff and the Department of Intergovernmental Affairs for providing outstanding support to the Commission.

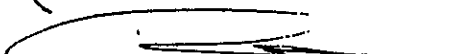
The Members,



Erminie Cohen


James Downey



Yvon Fontaine

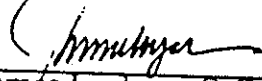

Ronald LeBreton


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CHAPTER IV

Linguistic Partnership - Canada's Distinction

The New Brunswick Commission was asked to enquire into the "status of New Brunswick's two official linguistic communities" and their future as "important elements of a strengthened province and federation." In doing this, we have consulted directly with New Brunswickers, listened to their concerns, hopes and aspirations, and weighed the options. We have been impressed with the depth of feelings expressed.

The role that language plays in our daily lives is fundamental to us - as individuals, as members of a community, and as citizens of a country. Because linguistic issues are central to the renewal of the Canadian federation, it is critical that we take stock of our policies, our achievements, and our vision for the future.

Taking Stock

The roots of Canada's French- and English-speaking communities are centuries old, long pre-dating Confederation. Both figured prominently in the development of this country from the Atlantic to the Pacific. Both have contributed to the essential make-up of Canada. While immigrants of other ethnic backgrounds have brought their own languages and traditions with them, for the most part they have had to adhere to one or both of the dominant linguistic communities. So, when we speak of English- and French-speaking, we are including almost all Canadians. Following on the aboriginal reality (which is treated in the next chapter of this report), the English and French fact is a fundamental characteristic of this country.

In earlier arrangements and at the time of Confederation, guarantees were given on the use of the English and French languages. Practices were well-established concerning their use and privileges in schools,

courts, and legislatures. In the late 1960's, the introduction of official languages policies by the federal and New Brunswick governments, as well as the entrenchment of certain constitutional guarantees, represented the acknowledgement of the long-standing existence and importance of the two major linguistic communities.

Our experience with Canada's "official language" policies has been brief in historical terms. It is scarcely more than twenty years since Canada's and New Brunswick's official languages legislation was first enacted. It is less than ten years since linguistic rights were entrenched in the **Canadian Charter of Rights and Freedoms**. Accomplishments in this period have been substantial, both in terms of advancing our ability to serve and support our official language communities, and in our progress in teaching and learning English and French as first and second languages. Increasingly, Canadians understand and accept the idea that both English- and French-speaking citizens have a legitimate right and expectation to see their communities grow and develop.

The **Canadian Charter of Rights and Freedoms** guarantees certain minimum rights in relation to the English and French languages. English and French are recognized as the official languages of Canada and of New Brunswick. Canadians have the right to use English or French in Parliament, in the New Brunswick legislature, in the courts of Canada and New Brunswick, and in dealings with government offices and institutions. Further, both English- and French-speaking Canadians have the constitutional right for their children to receive primary and secondary schooling in their mother tongue, and to receive that schooling in their own educational facilities provided for out of public funds.

These Constitutional provisions, placed as they are in the **Canadian Charter of Rights and Freedoms**, reflect the determination of Canadians to maintain values and principles that support the dignity and worth of the individual in a free and democratic society. They constitute a solid base on which to build. But the New Brunswick Commission believes it is important to breathe life into these provisions, to make them more fully and practically accessible in a way that responds to the varying needs and circumstances across the country.

This Commission proposes that we recognize two basic objectives:

That there be no erosion of existing linguistic guarantees; and

That the development of the two official linguistic communities in Canada and in New Brunswick be pursued for the greater benefit of our country and our Province.

In implementing these broad objectives, we must be guided by the knowledge that Canada is not uniform from coast to coast. The linguistic make-up of New Brunswick - approximately two-thirds English-speaking and one-third French-speaking - resembles Canada as a whole but is substantially different from that of any other province or territory.

The Commission's examination of these issues has been directed both toward New Brunswick's special circumstances and those of Canada generally. We feel there is an important concept that should underlie all our considerations, that of partnership - the kind of partnership that would allow each of our two major linguistic communities to contribute to national development by attaining its own potential. Indeed, this concept is the basis of the Commission's approach to the status of the aboriginal peoples of Canada as well as to the other partners of the federation.

Evaluating our Policies

There is clear evidence that Canadians are beginning to ask whether the current language strategy remains adequate and whether it contributes to national unity. It is reasonable, after a quarter century of experience, for the people of Canada to engage in this debate and to see what changes, if any, are needed to our laws and policies.

When linguistic issues become problematic or a source of tension, as they undoubtedly are in Canada today, there is a tendency to dismiss the progress we have made, to want to opt for simple solutions and to abandon policies which appear to be causing difficulty. One of these simpler solutions would be to move toward greater unilingualism based on the language of the majority in each province. In examining this proposition, it is instructive to return to the extensive analysis undertaken in the 1960's by the Royal Commission on Bilingualism and Biculturalism:

After studying the experiences of several countries, the Royal Commission rejected a territorial model based on provincial boundaries in favour of the principle whereby services would be provided to each person in either of the official languages wherever the minority is numerous enough to be viable as a group. It is clear that the Royal Commission rejected the territorial model because of this country's demographic realities: the territorial model would not protect Canada's mobile and scattered linguistic communities. The success of the strategy proposed by the Royal Commission depended upon a mix of different policy initiatives by both orders of government in the federation, thereby reversing the trends toward assimilation of the linguistic minorities.

Many of the goals and objectives set out in 1967 are now features of Canadian life:

- Official equality of the French and English languages is enshrined in the Constitution;
- Minority language education guarantees are entrenched in the Constitution;
- The English and French fact is much more faithfully reflected in the federal capital and institutions;
- Judicial and administrative services in both languages from Ottawa and the provinces have improved markedly;
- The concept of Canada as a nation of two official languages has taken root, and indeed is embraced by Canadians, as evidenced by the growth in immersion programs;
- New Brunswick has chosen to become legally and constitutionally a bilingual province.

This represents a substantial commitment and achievement which the majority of Canadians accept and endorse. But it would be unrealistic not to acknowledge that there are disturbing signs of difficulties with official language policies. There have been persistent voices of protest raised against bilingualism. The number of people of non-French and non-English backgrounds who feel left out of this model is growing, along with their impatience with French-

English quarrels. Furthermore, aboriginal peoples increasingly regard the two-founding peoples rhetoric as neglectful of their special place in Canada.

During our work we heard strong comments, both positive and negative, about official bilingualism. On the positive side, people equate bilingualism with tolerance, choice, freedom and equal opportunity. Some also see it as an advantage in global terms. Still others say that having two official languages makes this a more interesting country. On the negative side, people perceive bilingualism as being costly, inequitable, divisive, and imposed against popular will. There are strong feelings about what is considered preferential status for Quebec. Confusion about official language policies and their applications also contributes to negative views.

Yet, despite the challenges, Canadians continue to support the vision of Canada from which official languages policies were born. They consistently demonstrate support for a pan-Canadian approach on language matters. There is considerable evidence of progress in enhancing the viability of minority languages and acceptance of Canada as a nation of two official languages:

- The Francophone minority has been able to stem, even reverse, the forces of assimilation. The transmission of French from parents to children has increased since the mid seventies and the rate of assimilation outside Quebec has decreased.
- The number of bilingual Canadians increased by one million between 1981 and 1986. Further, bilingualism is highest among younger Canadians. In 1991, 55% of Canadian students studied French or English as a second language compared to 30% just twenty years ago. One of the best illustrations of the positive impact of these policies is the success of Canada's French-immersion program available in all regions of Canada. In 1978, immersion was offered in 237 schools. Last year there were 288,050 children registered in 1592 schools.
- Three out of four Canadians have said they want the youth of their province to learn the other official language. The increased interest in second language education is evidence of a basic change in Canada's attitude toward language.

The policies of the last two decades are working and Canadians do support the broad goals. The pursuit of simpler solutions should not cause us to turn back the clock and lose all that we have gained. Furthermore, we cannot ignore the fact that the linguistic minorities comprise nearly two million Canadians, whose rights are already recognized by the Constitution. Roughly half of them are francophones living outside Quebec and the other half are English-speaking Quebecers. Each of these two groups is as large or larger than the populations of six of our provinces taken individually. Even if, as it has been argued, languages in contact reject other languages, and vulnerable languages require an exclusive space in order to survive, there is no obvious reason why this should lead to provincial unilingualism. Why should these spaces respect or be coterminous with provincial boundaries? Indeed, modern technologies offer the freedom to create new boundary-free concepts of community which are, in effect, electronic and psychological as opposed to physical spaces.

The challenge for Canadians is now, as it has always been, to live up to our own ideals of justice and respect, in full knowledge of the profound importance of language to individuals and communities throughout Canada. The New Brunswick Commission believes that this goal should be part of our broad national purpose and we believe accordingly that both federal and provincial governments have a role to play in helping to secure this key aspect of our identity and our future.

In view of the above, the New Brunswick Commission therefore recommends:

16. That the foundations of our linguistic regime be maintained.

Reflecting Canada's Linguistic Diversity

In *Shaping Canada's Future Together*, the federal government proposes that a Canada clause be added to section 2 of the **Constitution Act, 1867**. Among the elements to be entrenched is a "recognition of the responsibility of governments to preserve Canada's two linguistic majorities and minorities." The federal proposals also recommend an amendment to the **Canadian Charter of Rights and Freedoms**, an amendment that reads in part;

25.1 This Charter shall be interpreted in a manner consistent with

- (b) the preservation of the existence of French-speaking Canadians, primarily located in Quebec but also present throughout Canada, and English-speaking Canadians, primarily located outside Quebec but also present in Quebec.

This description of Canada's linguistic duality is troubling because it speaks of majorities and minorities rather than of communities located throughout Canada. Bearing in mind that this text is a lens through which the **Charter** is to be seen, it is understandable that minority linguistic communities should fear that their linguistic rights might be seen by the courts as different or of unequal value when compared to the linguistic rights of the majority community.

Further, the reference to French-speaking Canadians "primarily located in Quebec" and "also present throughout Canada" diminishes the historic and continuing role played by French-speaking communities, including New Brunswick's. Similarly, Quebec's anglophone community, with its deep historic roots, is relegated to marginal status.

As outlined in the first chapter of this report, the New Brunswick Commission fully endorses the recognition of Quebec as a distinct society. Noting that the federal proposals would see this distinctness defined in part by reference to Quebec's French speaking majority, the Commission is of the view that the clause affirming Canada's linguistic character is inappropriately located in the proposed section 25.1 and should be located in a Canada clause.

Therefore, the New Brunswick Commission recommends:

17. That the existence of the English and French linguistic communities throughout the country constitutes a fundamental characteristic of Canada and should therefore be expressed in the proposed Canada clause.

The Development of Linguistic Communities

Given the importance this Commission attaches to the development in Canada and in New Brunswick of both our major linguistic communities, we believe this concept should be separately recognized in the body of the Constitution. Our history demonstrates that both English-speaking and French-speaking peoples have played central roles in the development of this country and traditionally have enjoyed access to their own educational, religious, and cultural institutions. The Commission firmly believes that to realize our full potential as a country, governments must support the development of the English and French communities.

Support for the continuing federal role in assisting the development of minority language communities remains very strong among those communities across the country. Francophone New Brunswickers realize that much has improved in their communities because of both Canada's and New Brunswick's official language policies. Indeed, they look forward to making further progress through collaboration with the federal and provincial governments. The New Brunswick Commission, therefore, is concerned that there is an inconsistency in the federal proposals between the responsibility of Quebec to preserve and promote its distinct society and the responsibility of other governments only to preserve "Canada's two linguistic majorities and minorities." There appears to be a legitimizing of "majoritarianism" and no assignment of responsibility to promote linguistic duality. We find this to be inconsistent with the constitutional principle of equality of the two official languages and the goal of development of the official linguistic communities. We believe that less constraining and more positive alternatives must be explored and considered.

The Commission is convinced that New Brunswick is a richer and stronger province because of the recognition of the equality of status of the francophone and anglophone communities and the establishment of distinct educational institutions. We hope that other

provinces will eventually reflect this conviction in their policies and programs. The Commission recognizes, however, that the primary aim of this Canada Round is to find an arrangement to preserve this country in a way that will allow the continuing development of our communities. Throughout this report we have tried to provide a balanced outlook on the issues we have considered. We have been guided by our belief that we have a responsibility to recommend accommodations that appear fair to each partner of the federation.

18. Therefore the New Brunswick Commission recommends

- (a) That the Constitution be amended to affirm the responsibility of the Parliament and government of Canada to preserve and promote the English and French linguistic communities throughout the country; and
- (b) That the Constitution be amended further to affirm the responsibility of provincial legislatures and governments to preserve the English and French linguistic communities throughout the country.

Partnership in New Brunswick

New Brunswick has a long and colourful history demonstrating what may well be both the best and worst of relations between English- and French-speaking communities. The Acadian population, returning from the deportation of 1755, settled in small communities in the north and east and lived in almost complete isolation from the Loyalist communities in the south. The Acadians had very little input in the political life of the province until the middle of this century. Their struggle for acceptance and place has never been easy and remains a challenge today. Achievements in the past twenty years, including the passage of the **Official Languages of New Brunswick Act** in 1969, legislative authority for the establishment of homogeneous schools and school boards, the unanimous passage of **An Act Recognizing the Equality of Status of the Two Official Linguistic Communities** (Bill 88) in 1981, and the constitutional entrenchment of linguistic rights in 1982, make up a remarkable, if belated, acceptance of the respect

for the rights of French- and English-speaking New Brunswickers. Geography and history made us partners.

The same kind of leadership and determination that overcame past adversity and differences can allow that partnership to reach its potential. In order for that to happen, both communities must have access to the means essential to their development. Within the overall Canadian linguistic framework, New Brunswick, like Quebec, requires particular kinds of solutions. The approach that New Brunswick has chosen is to recognize the equality of status of the two linguistic communities. This approach was adopted because it built upon the constitutional recognition of equality of status of the two official languages and because it provides a basis for development of both linguistic communities without reference to geographic concentration.

As we have indicated, the definitions of linguistic duality presented in the current federal proposals present a challenge to this equality concept. New Brunswickers reacted negatively to the Meech Lake definitions of duality in which they were relegated to the status of "French-speaking Canadians elsewhere in Canada" and to the lack of a commitment to promote this "existence." The status of equality which had been recognized in 1981 and 1982 was clearly being threatened. Following a specific recommendation of New Brunswick's Select Committee on the 1987 Constitutional Accord, the New Brunswick government proposed a Companion Resolution to the Meech Lake Accord that would have added to the list of Canada's fundamental characteristics "the recognition that, within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges."

Beyond this basic principle of equality, the challenge remains how best to seek constitutional expression of the elements related to achieving equality. The Commission has reviewed the content of Bill 88 and its intended effect. It has also listened to representations from anglophones and francophones who have articulated the importance of the partnership concept for New Brunswick. We believe that the purposes of Bill 88 enhance that concept. We are of the view, however, that not all of the legislative provisions are appropriate subjects for constitutional entrenchment.

The Commission favours an approach which backs up the equality objective with a commitment to ensure that the necessary tools for development are available. Experience in New Brunswick and elsewhere throughout Canada demonstrates that education should come at the head of the list of those necessary tools. The Commission understands the fundamental importance to minority language communities of access to educational facilities provided for out of public funds and controlled by those communities. Our understanding is confirmed by the Supreme Court of Canada in the Mahé case in which the crucial role played by education in the maintenance of a culture was underlined. In speaking of the nature and extent of section 23 of **Charter of Rights and Freedoms**, Chief Justice Dickson stated:

"The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. The section aims at achieving this goal by granting minority language educational rights to minority language parents throughout Canada.

My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them."

There may be other circumstances in which access to distinct institutions is necessary and justified. In the cultural field, New Brunswick's pioneering of the concept of combined schools and community centers, for communities that constitute a numerical minority within a particular region of the Province, has proven to be successful. The model has since been adopted by other provinces.

It should be understood that access to distinct institutions is not intended to apply to the apparatus of government. By virtue of the **Charter of Rights and Freedoms** and the **Official Languages Act**, the government of New Brunswick is committed to provide services to residents of the Province in the official language of their choice. In order to meet this commitment, the apparatus of government operates in both languages. But when it comes to non-governmental and educational institutions, such as the University of New Brunswick and l'Université de Moncton, which are principally intended to serve one community or the other, our experience is that both communities are better served by having access to their own institutions.

Given New Brunswick's experience in promoting its two linguistic communities, and noting that through such policies assimilation rates have been reduced, this Commission is in favour of enshrining the principle of equality of the two linguistic communities in New Brunswick and affirming that the principle of equality includes the right to distinct educational institutions and distinct cultural institutions as are necessary for the development of one or both communities.

The Commission therefore recommends:

19. That the Constitution be amended to include a clause recognizing the equality of status, equal rights and privileges of the English and French linguistic communities in New Brunswick and that this equality includes the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of these communities.

Conclusion

The New Brunswick Commission has looked at the debate over policies that determine how language issues are played out on the national scene. We note that while policies related to official languages are relatively recent, the rights on which they are based have historic foundations that are centuries old. The progress that has been made in the last two decades in recognizing and defining these rights should be retained. We have achieved a base upon which to build. But, much remains to be done in order to make rights truly meaningful and in order to allow Canadi-

ans to enjoy the benefits that flow from our being one nation with two official languages. Living in a country with two official languages does not mean that individual Canadians have to be bilingual to enjoy the benefits. Indeed, the constitutional obligation undertaken by the federal and New Brunswick governments to have the capacity to communicate and deal with individuals in both official languages is designed so as not to require citizens to be bilingual.

The benefits of a partnership between French- and English-speaking peoples will be realized only to the extent that both are able to develop and, thereby, contribute fully to the partnership. The basic network of rights is already in place. However, in order to make the enjoyment of these rights effective, the federal government must ensure that the bilingual character of national institutions is retained so that both linguistic communities may feel that these institutions represent and serve them. The government of Canada must also be responsible for promoting Canada's English and French identity internationally and through our membership in two great international communities - the Commonwealth and la Francophonie.

Because of the great variance in the demographic make-up of this country, the government of Canada must continue to exercise a responsibility for the promotion of our French and English character within Canada. Our history demonstrates all too plainly that the interests of official languages communities that find themselves in the minority have not been well served. It has proven both necessary and effective for the government of Canada to enter into funding agreements with provinces to encourage and enable them to develop and maintain services to linguistic minorities, particularly in the critical area of community access to and management of schooling in the first language.

Canada's linguistic duality cannot be satisfactorily defined on an inside Quebec/outside Quebec basis; it is much more complex than that in terms of history, present reality and future prospects. Nor would it be fair to look to Quebec to be the guardian angel of the one million francophones living outside its borders. Quebec has a special role to play with regard to its own distinctness. Other provinces will also want to tailor their efforts to the special circumstances that prevail within their boundaries while respecting the fundamental values inherent in the Canadian partnership of the two official linguistic communities.

APPENDIX A

Recommendations

Introduction

1. That a Canada clause which reflects the values and fundamental characteristics of Canada be included either in a preamble or in section 2 of the Constitution Act 1867.
 - a) A recognition of Canada's English-speaking and French-speaking communities and the responsibilities of the Federal and Provincial Governments to support the development of both communities.
 - b) A recognition of the special responsibility of Quebec to preserve and promote its distinctiveness.
 - c) An affirmation that the sharing of the country's wealth equitably among Canadians and thereby providing for greater equality of opportunity constitutes one of our nation's central values.
 - d) A recognition of the inherent rights of aboriginal peoples.
 - e) A recognition of our responsibility as a developed nation to share our wealth with less fortunate peoples of the world.
 - f) An affirmation of the rights and freedoms contained in the Canadian Charter of Rights and Freedoms.

Chapter I - Canada's Challenge - Canada's Choice

2. That Quebec be recognized as a distinct society within Canada in the manner described by the federal government in *Shaping Canada's Future Together*.
3. That flexible and functional arrangements including, where necessary, the reallocation of powers and responsibilities, be pursued to meet the needs of Quebec and the other diverse communities of Canada.

Chapter II - National Programs - Canada's Spirit

4. That the principles of equalization and equal opportunity be recognized in a Canada clause as fundamental Canadian values.
5. That section 36 of the Constitution Act 1982 be extended to identify more clearly the social goals, at least in the fields of health, education, and social security, which governments are committed to attaining for all citizens.

In expanding section 36, there should be an accommodation and a recognition of the need for economy and flexibility in program design and delivery to meet these goals.
6. That the federal spending power for new national cost-shared programs should be exercised only with the agreement of seven provinces with fifty per cent of the population and those provinces wishing to opt out of a national cost-shared program should receive reasonable compensation if they establish programs with compatible objectives.

Chapter III - Economic Union - Canada's Opportunity

7. That the economic union of Canada be strengthened by amending section 121 of the Constitution of Canada so that the Federal and Provincial Governments of Canada are obliged to ensure the free movement of goods, services, people, and capital within Canada.
8. That the Federal Government, in partnership with the Provinces, exercise its responsibility in improving the national economic infrastructure that is essential to an integrated, prosperous and competitive economic union.

9. That the transition to a strengthened Canadian economic union, via a modernized section 121, be accompanied by a plan for the management of the social and economic adjustment costs arising from an enhanced union.

10. That Federal and Provincial Governments commit themselves to developing proposals that would harmonize their fiscal and economic policies. These proposals should provide for the effective implementation of federal-provincial agreements in these areas.

11. That the Federal Government's proposal to recognize labour market training as an area of exclusive provincial jurisdiction be accepted.

That the withdrawal of the Federal Government from its current labour market training activities be subject to the successful negotiation by Federal and Provincial Governments of the terms and conditions for that withdrawal.

12. That the design and management of programs such as labour force training and unemployment insurance be harmonized wherever possible so as to ensure the highest possible levels of skill and employment in the Canadian labour force.

13. That the current federal responsibility for unemployment insurance be preserved save for special arrangements that might be struck between individual provinces and the Government of Canada. Such arrangements should not have the effect of undermining the integrity of the unemployment insurance program throughout the country and they should not diminish labour mobility in Canada.

14. That provincial governments develop a collaborative relationship with the Federal Government so that national objectives in post-secondary education can be established and pursued with special attention being devoted to those areas that are essential to the competitiveness of the Canadian economy.

15. That Federal and Provincial Governments jointly create an economic development regime that would foster the identification of shared priorities to be pursued through a rationalized system of program delivery.

Chapter IV - Linguistic Partnership - Canada's Distinction

16. That the foundations of our linguistic regime be maintained.

17. That the existence of the English and French linguistic communities throughout the country constitutes a fundamental characteristic of Canada and should therefore be expressed in the proposed "Canada clause".

18. (a) That the Constitution be amended to affirm the responsibility of the Parliament and Government of Canada to preserve and promote the English and French linguistic communities throughout the country; and

(b) That the Constitution be amended further to affirm the responsibility of provincial legislatures and governments to preserve the English and French linguistic communities throughout the country.

19. That the Constitution be amended to include a clause recognizing the equality of status, equal rights and privileges of the English and French linguistic communities in New Brunswick and that this equality includes the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of these communities.

Chapter V - Completing the Circle - Canada's Integrity

20. That the Constitution be amended to recognize and affirm the historic role and contribution of aboriginal peoples in the development of Canada, and that this amendment should be so expressed as to underline the fundamental importance of that contribution and to engender a relationship of mutual respect and equality among all Canadians.

21. That the Federal and Provincial Governments take such steps as are necessary to ensure the full participation of representatives of the aboriginal peoples in constitutional negotiations. In keeping with this principle the Constitution should be amended to ensure that no amendment to the Constitution relating to the rights of aboriginal

*Chapter VI - Working Together
- Canada's Institutions*

- peoples in Canada or to the legislative authority of Parliament in relation to aboriginal peoples, including lands reserved for them, may be made without the consent of the representatives of the aboriginal peoples.
22. That the Constitution be amended to recognize and affirm the inherent aboriginal right to self-government within the Canadian Constitution;
- that the Federal and Provincial Governments negotiate self-government agreements with representatives of aboriginal peoples;
- that such agreements enjoy constitutional protection; and
- that negotiation of self-government agreements include provisions for access to resources commensurate with the scope and nature of each self-government agreement.
23. That the Federal and Provincial Governments move in concert with the representatives of aboriginal peoples toward a just definition and implementation of the treaty rights that exist in each province.
24. That the Federal and Provincial Governments move expeditiously with representatives of the aboriginal peoples to identify and settle, in a just and equitable manner, those land claims that exist in each province or region.
25. That the Senate of Canada be reformed, and more specifically that:
- Its membership be elected in a fashion that provides for a better representation of the diverse collective identities of Canada;
 - There be equal number of Senators from each province of Canada;
 - Its power be equal to that of the House of Commons except that it could not withhold supply and it would not be a "confidence chamber";
 - It have the responsibility of ratifying or rejecting proposed appointments to national boards, tribunals and commissions; and
 - It operate under a practice of double majority rule for all measures dealing with language and culture.
26. That a Council of the Federation, composed of Federal, Provincial and Territorial Governments, be created for the purpose of fostering the high levels of cooperation required for governments to fulfill their respective constitutional responsibilities for the social and economic well-being of Canadians.
27. That federal and provincial governments agree on cost-effective means of ensuring an independent assessment of their success in meeting shared constitutional obligations for the economic and social well-being of Canadians and that assessments be tabled in Parliament and in the provincial legislatures for debate.

APPENDIX #

DRAFT LEGAL TEXT

The attached draft legal text is based on the Charlottetown Accord of August 28, 1992. It is a best efforts text prepared by officials representing all the First Ministers and Aboriginal and Territorial Leaders.

October 9, 1992

Constitution Act, 1867

1. The *Constitution Act, 1867* is amended by adding thereto, immediately after section 1 thereof, the following section:

Canada Clause

"2. (1) The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:

- (a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;
- (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;
- (c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;
- (d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
- (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
- (f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
- (g) Canadians are committed to the equality of female and male persons; and
- (h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

DRAFT

Role of legislature and Government of Quebec

(2) The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec is affirmed.

Powers, rights and privileges preserved

(3) Nothing in this section derogates from the powers, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language.

Aboriginal and treaty rights

(4) For greater certainty, nothing in this section abrogates or derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada."

2. Section 4 of the said Act is repealed and the following substituted therefor:

Construction

"4. Unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under the Constitution of Canada."

3. Section 17 of the said Act is repealed and the following substituted therefor:

Constitution of Parliament of Canada

"17. There shall be one Parliament for Canada, consisting of the Queen, the Senate and the House of Commons."

Constitution Act, 1982

(Bilateral amendment - New Brunswick and Canada)

1. The *Constitution Act, 1982* is amended by adding thereto, immediately after section 16 thereof, the following section:

English and French
linguistic
communities in New
Brunswick

"16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature
and government of
New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed."