Written Briefs

IN THE MATTER OF THE PUBLIC HEARINGS ON CONSTITUTIONAL REFORM Winnipeg, Manitoba November 17 and 18, 1980

Presented by the Four Nations Confederacy

Mr. Chairman and Members of the Committee:

Indians in Manitoba as well as across Canada are most concerned as to what will transpire as a result of the British North American Act patriation proceedings presently under consideration.

Historically it appears that each time there is some major change in legislation, in particularly in the last century, Indians have suffered as a result thereof and unfortunately the relationships have continued to deteriorate.

It may be true that various authorities including the Prime Minister of Canada are endeavouring to assure the Indian people that their rights will be protected, however, past performances certainly do not substantiate this claim. The Indian people have every reason to be most deeply concerned about their present as well as future rights. One has only to look at some of the appalling facts that presently exist:

-Indians have a life expectancy ten years less than the Canadian average;
-Indians experience violent deaths at more than three times the national average;
-approximately 60% of Indians in Canada receive social assistance;
-only 32% of working-age Indians are employed;
-less than 50% of Indian homes are properly serviced;
-in Canada as a whole the prison population is about 9% Native, yet Native Peoples make up only 3% of Canada's population. In 1977 there were 280 Indians in jail per 100,000 population, compared to 40 for the national average.

This hardly speaks of fairness and equality, in fact, one of denial and oppression.

Indian leaders have focused their attention on the issue of Indian rights. They believe that inadequate legal and constitutional protection for their indigenous ways of life, lands and resources, can largely account for their problems

Having adopted this orientation towards rights, Indian leaders would like to achieve goals in the patriation process which are similar to those of the federal government vis-a-vis the Canadian people as a whole. Indian leaders realize that entrenching their rights will be enormously difficult after patriation, especially since a majority of the provinces would have to agree to changes which might benefit Indian People at the expense of provincial power. They therefore demand an entrenchment of treaty and aboriginal rights as well as the rights to Indian self-government before patriation. The legitimacy of our demand resides in the fact that we are the descendants of sovereign nations. In the case of our people their existence was recognized by the British Crown when Royal proclamations and treaties were made. Indian and other leaders maintain that governments in Canada have not respected the spirit and substance of those proclamations and Treaties.

The Indians must oppose patriation unless the entrenchment of Indian rights is appropriately secured in either the new Constitution or a part of the amending formula in order that the said Indian rights cannot be altered unilaterally. If this cannot be achieved then the entrenchment will be required to be made in England prior to repatriation. The Indian people have all too often accepted promises that on the face of them appear reasonable only to find later to their regret that legislation of their enactment was not in keeping with the original understanding and/or made subject to their overriding powers of other authorities.

Indian leaders base some of their case on international law. Articles 1(2) and 55 of the U.N. Charter are pointed to as articles which support self-determination and human rights. Article 27 of the U.N. Covenant on Civil and Political Rights is cited as evidence that the world community intends for ethnic minorities to enjoy rights to their own cultures, religions, and languages.

The following material facts should be carefully noted:

- the Indians did not invite the white man to come to this land;
- the Indians befriended them on the basis of humanitarian goodwill and commenced a modest fur trade business which greatly expanded;
- the Indians were co-operative and, appeared to in formal documentations as well as thereafter, assumed that the white man would co-operate and conform to his undertakings;
- the Indians were never conquered nor did they surrender their lands or any rights;
- the Indian nations and Tribes as a result of increased Treaty and commencement of settlements entered into agreements and understandings which have a unique relationship with the Imperial Crown.

This unique relationship is evidenced in provisions of certain Treaties between the Imperial Crown and non-Indian nations such as the Treaty of Utrecht of 1713, the Jay Treaty of 1794 and the Articles of Capitulation of Montreal in 1760 in which the rights of Indian Nations or Tribes were recognized and protected.

On October 7, 1763, the Imperial Crown issued a Proclamation which stated in part: "... it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations of Tribes of Indians, with whom we are connected, and who live under Our Protection should not be molested or disturbed in the Possession of such Parts of Our Dominion and Territories as not having been ceded to, or purchased by Us, are reserved to them or any of them, as their Hunting Grounds."

The Royal Proclamation of 1763, provided that all dealings with the Indian Nations or Tribes in relation to land were the exclusive prerogative of the Imperial Crown, and confirmed and described the procedure to be applied in making Treaties between the Imperial

Crown and the various Indian Nations or Tribes. These provisions in relation to the role of the Imperial Crown and the procedures for Treaties have never been repealed and continue in force. In addition, the provisions of the said Royal Proclamation, treaty commissioners were appointed at various times between 1763 and 1867 to negotiate Treaties with various Nations or Tribes of Indians and continued from 1867 to 1956.

In 1837 the Select Committee of the English House of Commons on Aborigines in British Settlements stated that the duty to protect the Indian Nations or Tribes should continue to rest with the Imperial Crown and should not be delegated to local legislatures.

In 1845 the Report on the Affairs of the Indians in Canada prepared for the Legislative Assembly of the Province of Canada concluded that the existing arrangement whereby Indians were "under the immediate control of the Representative of the Crown within the Province, and not under the Provincial Authorities" should continue.

Section 91, subsection 24, of the British North America Act of 1867 confirmed a constitutional position with the Indian Nations or Tribes in relation to governments within Canada, while not altering the rights of the Indian Nations or Tribes nor ending their unique relationship with the Imperial Crown.

The Indian Nations or Tribes had and continue to have their distinctive legal and political systems: In accordance with those legal and political systems the Indian Nations or Tribes, in their dealings with representatives of the Crown, acted with the intention and purpose of establishing relationships directly with the Imperial Crown.

The unique relationship of the Indian Nations or Tribes with the Imperial Crown and the prerogative acts of the Imperial Crown including the appointment of Treaty commissioners and the issuance of the Royal Proclamation of 1763 confirm that the alteration of relations between the Imperial Crown and the Nations or Tribes of Indians is to occur only at the request and with the consent of the Indian Nations or Tribes. The request and consent so required cannot be given, on behalf of the Indian Nations or Tribes, by the Crown in right of Canada or the Queen's Privy Council for Canada or the Parliament of Canada. The requirement of request and consent, above described, is parallel to and of at least equal authority to the convention described in the preamble and section 4 of the Statute of Westminister of 1931.

In addition to the events here and before mentioned, additional factors should be considered:

- as trade and settlement grew numerous Treaties were entered into between the various Nations and Bands with the British Crown;
- At all times the various Nations and Bands honoured their undertakings whether verbal or by Treaty obligations;
- with the passing of time and gradually the Indian lands and rights were diminished by various Acts, Regulations and political pressures;
- in more recent times there has been gross exploitation of Indian lands, water rights, aboriginal and cultural assets thereby causing grevious harm and injustice to the socio-economic life of the Indian people.

The recent report prepared by Environment Canada is alleged to be so embarassing regarding living conditions in some areas of Northern Manitoba that it is not readily available to the public. The phrase of "African Technology" is used with respect to drinking water facilities.

The above examples certainly indicate the most serious denial to the Indian population of the basic elements of natural justice as well as the rights and privileges enjoyed by other sectors of our society.

It is therefore obvious that entrenchment of treaty, aboriginal economic, health, and social as well as all other rights be entrenched in the amending formula or in The B.N.A. Act prior to its patriation to Canada.

It is with deep regret that our Premier is either insensitive to the problems or is deliberately ignoring them. His pathetic attitude is inexcusable and borders on irresponsibility.

The Provincial Government of Manitoba should not speak on behalf of Treaty and Aboriginal peoples as they are under federal government jurisdiction. The presence of the Four Nations Confederacy today should not be interpreted as consultation with the Indian people of Manitoba but rather as an opportunity to deliver a clear message understood by all that we do not want the Provincial Government of Manitoba to represent us.

A representative of our Confederacy as well as those of other parties, organizations and individuals are more than willing to publicly debate the issues involved in any forum and media. We trust that the Premier's attention and positive reactions will be forthcoming immediately in view of the time frame involved in this matter.

Yours in recognition of Treaty and Aboriginal title.
On behalf of Four Nations Confederacy,
(Signed) Per Grand Chief Lyle Longclaws.

MANITOBA ASSOCIATION FOR RIGHTS AND LIBERTIES NOVEMBER 18, 1980 ADDENDUM TO BRIEF ON THE CONSTITUTION

We recognize of course that last summer's public opinion poll could by now be somewhat dissipated in the dissent that has been created by the autumn controversy between the federal and provincial governments. This demonstrates that a majority can indeed be transitory and underlines the need to place some of our fundamental rights and freedoms beyond the easy reach of the majority.

It's just not satisfactory for a provincial government to say to the federal government: "Our human rights act is good enough for us and better than your proposed charter." If we want to demand that other countries honor human rights we ought to set a better example in our own country.

No one political party can claim to have a better answer than another party for the protection of human rights and fundamental freedoms. The best approach has probably been devised by the national unity task force headed by Jean luc Pepin and John Robarts. The positive recommendations of the task force are regrettably being ignored on all sides. If every political party could heed the civil libertarians in its own ranks we would more likely achieve a consensus in favor of an entrenched charter of rights. That charter should

not just be a vacuum packed educational symbol but a document that does the following:

1. takes cogniscance of what we have already achieved in human rights protection in Canada,
2. recognizes those rights we must now enshrine for guaranteed protection,
3. gives clear direction to the Courts on the primacy of rights protection,
4. provides guidelines to parliament and our legislatures on the need for further statutes to extend the protection of fundamental freedoms and human rights in accordance with the provisions of the international convenants on civil and political rights and on economic, social and cultural rights to which Canada is committed.

In addition to our presentation to the Manitoba legislature, the Board meeting of Manitoba Association for Rights and Liberties which dealt with this vital question also recommended that we address ourselves to the Parliamentary Committee on the Constitution in Ottawa regarding the deficiencies in the proposed charter which concern us, and this further submission is now in preparation.

Dr. Ralph James
Paul Walsh
Jill Oliver
Abraham J. Arnold.

BRIEF — MANITOBA COMMITTEE ON THE CONSTITUTION OF CANADA

Regarding the repatriation of the constitution of Canada being put forward by the Trudeau Government.

We would all like to have our constitution brought home to Canada, but I, and most people I have spoken to on the subject do not want human rights or minority language rights entrenched in the constitution.

Our human rights legislation has served Canada very well in the past, and will continue to serve us well in the future.

Any changes needed in the future can be taken care of by our elected representatives.

Human rights entrenched in the constitution would be continually coming before the courts for interpretation by the judges of our courts as happens in the United States.

Russia has one of the best human rights legislation in the world entrenched in their constitution, and it is not worth the paper it is written on.

I think it is better that human rights be taken care of by our elected representatives.

Regarding minority language rights which under the Trudeau Government's plan would mean that the provinces would have to supply French language schools for children of French origin.

The French should get no special privileges over people of other racial origins.

English is the language of Western Canada, and we should keep it that way. The French Canadians here can all speak English, and should get no special privileges.

If the Trudeau Government gets the Official Languages Act and minority language rights entrenched in the constitution, it would mean that graduates of these French language schools, living in English speaking provinces, and being bilingual would qualify for the pick of Government jobs, under the provisions of the Official Languages Act, as a preference is given to bilingual applicants.

The French in another generation would become the elite group in Canada, while English speaking people would become second class citizens in their own country. English speaking people would not qualify for a high percentage of jobs, and prospects of promotion would be low in the civil service, the armed forces, the RCMP, Air Canada, CNR and all the crown corporations like Polymar and Petrocan because they could not speak French.

In fact I understand that it is getting that way already.

The hiring of bilingual men and women by the Quebec controlled Liberal Government in Ottawa has been overdone. For example, a couple of months ago there was an ad in the Winnipeg newspapers for men for the RCMP. It said a preference will be given to bilingual applicants.

Why does the RCMP need bilingual men. Quebec and Ontario have their own provincial police. Most of the RCMP are in the west where French is not needed. This is just one example of Government policy.

Our constitution should be brought home to Canada as it is, when an amending formula acceptable to all the provinces can be worked out, and any changes could be made in Canada, after consultation between the federal government and the provincial governments.

I don't know why Prime Minister Trudeau is in such a hurry to bring the constitution home, and his demand for human and language rights entrenched the way he wants is unreasonable. He acts like a dictator.

Actually I think the old BNA Act has served us pretty well for 113 years, and I don't see any great need for a quick change, until a suitable arrangement for changing the constitution can be worked out.

I do not agree with Prime Minister Trudeau's plan that free movement of people to live and work together anywhere in Canada should be entrenched in the constitution. Provinces with high rates of unemployment should be able to give a preference in employment to their own people.

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CONSTITUTIONAL PROBLEMS

Remarks by
The Honourable J. V. Clyne, C.C.
Chancellor
to the
Law Students
University of British Columbia
October 16, 1980

I am going to talk to you today about the Canadian constitution and the resolution which Prime Minister Trudeau placed before Parliament a week or so ago in regard to its amendment. There are probably other subjects which are more important to our society today, such as those involving energy and inflation, but promises by some of our political leaders before the Quebec referendum rendered it necessary that an effort be

made to produce a new or revised constitution. The attempt to do so at the conference of first ministers held in Ottawa last month failed and Mr. Trudeau now proposes unilaterally to ask the British Parliament to amend the B.N.A. Act. He is asking the Canadian Parliament to pass a resolution addressed to the Queen requesting her to lay before the Parliament of the United Kingdom a measure which would be known as the Canada Act. In a schedule to that Act is another Act known as The Constitution Act 1980 which would become law in Canada when passed by the British Parliament and would only be capable of amendment in Canada in a manner which I will deal with later in my remarks.

The proposed Constitution Act is a lengthy document consisting of 59 sections and numerous sub-sections. It starts out in part 1 with the Canadian Charter of Rights and Freedoms. It provides for occupational and mobility rights for all Canadian citizens; it contains the usual provisions relating to life and liberty and all those rights presently encompassed in the Canadian Bill of Rights Act and the Official Languages Act. It is drawn in very general terms such as those contained in clauses 24 and 25: "24. The guarantee in this charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada."

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

I think that you as law students will readily see that such provisions will provide a ready income for lawyers for many years to come and will need still more judges on the Bench. Whether or not they are in the general interests of the public remains a matter for discussion.

The proposed Act then goes on to deal, again in very general terms, with principles of equalization between provinces and the prevention of regional disparities. The next part provides for constitutional conferences between first ministers to be held once a year and then come the sections dealing with the method whereby the constitution may be amended. These are highly important sections because, in my view, a constitution which is inflexible will lead a country such as Canada into grave difficulties.

Upon the Constitution Act being proclaimed it can only be changed by unanimous agreement between the federal government and all the provinces. They are given two years to agree upon an appropriate amending formula, something which they have been incapable of doing for the past fifty years. If they all cannot agree but eight or more provinces with 80 percent of the population of Canada do agree then that amending formula will be put by rererendum to the people of Canada within four years from the date of proclamation of the Constitution Act. The Federal government would also have the right to submit a proposal of its own choice by way of referendum but in that case a double majority would be required to authorize the proposed amendment, that is to say, a majority of all votes cast throughout the nation and a majority of votes cast in each of the Maritime, Central and Western Regions. If no agreement can be reached by those means then Section 41 comes into effect and in view of the difficulty of the above alternatives this is what is likely to be the result.

Under Section 41 any two of the four Atlantic provinces with populations of 50 percent of the total population of all four provinces could veto any proposed amendment to the constitution and the same principle applies to the four western provinces. More significantly, however, any proposed amendment would require the approval of any province which had, at the time of the proclamatio of the Act, 25 percent of the total population of Canada. In effect the Act would give either the Province of Quebec of the Province of Ontario each a permanent veto on constitutional amendments for all time. If the population of either purovince fell to say 15 percent, which is not inconceivable over a period of say one hundred years, and constitutions are supposed to last for a long time, it would be able to prevent the wishes of 85 percent of the population of Canada from being carried into effect. In my view the proposed Act with its alternatives for amendment would provide constitutional stagnation for Canada for all time to come.

The proposed Act does not in any way deal with any alteration in the powers of the federal and provincial governments as presently contained under sections 91 and 92 of the B.N.A. Act. A revision of such powers must be regarded as long overdue and in this respect The Canada Act should be considered as only a futile gesture. I say that it is futile in that it does not represent any effective or realistic way to amend the constitution in the future in regard to distribution of powers between the Federal and Provincial governments.

You may say that any act which entrenches human rights cannot be described as futile and Prime Minister Trudeau has, for some time, been urging that a charter of human rights should be entrenched in a Canadian constitution. His arguments, like those in favour of motherhood, may have a strong appeal, but their implications should be studied carefully in the light of experience in other jurisdictions. It must be remembered that such rights as freedom of religion, of conscience, of opinion, of assembly and other human and civil rights are expressed in general terms and are subject to frequent interpretation by the courts. When these rights are contained in an ordinary statute such as the Canadian Bill of Rights as they are now they can be readily changed by parliament but if they are entrenched in a constitution and are given an unanticipated interpretation by a court it may take years before a change can be made.

A bill of rights entrenched in the constitution may very well interfere with the rights of provinces to legislate on matters within their jurisdiction. The Honourable J. C. McRuer, in speaking two years ago before a Senate Committee which was investigating the proposed entrenchment of powers as contained in Mr. Trudeau's former Bill 60, pointed out that in the United States individual state legislatures were denied for at least thirty years the opportunity to legislate on hours of work because such legislation interfered with the constitutional right of free of contract. Numerous other instances could be cited. In the recommendations of a royal commission in Ontario conducted by Chief Justice McRuer some years ago, it was said, "It would be unwise for a government to lock itself into a constitutional straight-jacket where the making of new laws to meet changing social conditions would be almost impossible by reason of the difficulty in obtaining relief through amendment to the consjtitution."

The enactment of a constitutional Bill of Rights puts judges in the position of making political decisions rather than the legislators. The Master of the Rolls in

England, Lord Denning, who normally has not been reluctant to be innovative, said in a speech in the House of Lords that if judges were given power to overthrow acts of parliament they would become politicized; their appointments would be based on political grounds and their reputations would suffer accordingly. In deciding whether or not any federal or provicial statute is constitutional the judges do have the power to overthrow individual statutes. Lord Denning went on to say: "One has only to
see in the great constitutions of the United States of America and of India the conflicts which arise from time to time between the judges and the legislatures. I hope we shall not have such conflicts in this country." I respectfully agree with Lord Denning in that the judge's duty is to interpret law and not to make law. In a democratic society the duty to make law should remain with members of parliament and provincial legislatures.

There is no doubt that the B.N.A. Act is out of date and should be revised but before doing so there are one or two details in regard to its origins which should be clarified. It is true that it is an extraordinary example of political ineptitude on the part of the Canadian people that in over one hundred years we have not been able to create or amend our constitution ourselves. It is not true, however, to imply that it is the fault of anybody else. Prime Minister Trudeau is reported to have said at the Liberal convention in Winnipeg that it is shameful that the Canadian constitution should remain under the control of the parliament of a foreign country. It is somewhat surprising to hear Great Britain referred to as a foreign country, especially as we share the same Queen, and the Prime Minister should have made it clear that the fault lies with Canadians and not the British that our constitution has not been transferred to Canada.

The B.N.A. Act is often referred to as an English statute and that, of course, is correct but it is in fact based entirely upon a document prepared in Canada by Canadians. In the Beige paper published last January containing the constitutional proposals of the Quebec Liberal Party it is stated, "One of the faults of the present constitution is that is originated in a foreign country and was never properly approved by the Canadians." As Senator Eugene Forsey has pointed out, this statement is not correct. The present constitution originated in Charlottetown and later in Quebec City. The Quebec Conference consisted exclusively of delegates from the Canadian provinces and the colony of Newfoundland. There was no one present representing the British Government The Conference drew up seventy-two resolutions to form the constitution of Canada. When Newfoundland and Prince Edward Island refused to participate, delegates from the provinces of Canada, (formerly Upper and Lower Canada) Nova Scotia and New Brunswick, met in London for final consideration of the resolutions. Once again there were no representatives of the British Government present physically or by remote control. At this meeting there were a few minor changes made to the Quebec resolutions reducing the number from seventy-two to sixty-nine.

When the resolutions became the subject of discussion with the British Government there were two objections taken. The Canadian Fathers of Confederation wanted to call the country, "The Kingdom of Canada," but the British Government did not like the title, apparently because of some concern it might cause in the United States. Also, in the resolutions no provision had been made to break a deadlock between the Senate and House of Commons and the British Government pointed out the need for this. As a result the Fathers produced the word, "Dominion" which is the title of our country as set out in Section 3 of the B.N.A. Act and also provided for the breaking of a deadlock by sections which in fact have never been used.

That is the extent to which the British Government was involved in the B.N.A. Act. The Act was not imposed on Canada but it was a convenient method of creating Canada as an independent country. It is important to note that during the confederation debates Sir Johna A. Macdonald emphasized strongly that the delegates, in creating a new constitution, were absolutely free to sever the tie with Great Britain and this the delegates unanimously refused to do. Canada at that stage could have followed, without any revolution, the example of the United States but it did not choose to do so. Great Britain has always been ready and more than willing to do anything in its power to place the constitution in Canadain hands but Canadians have been unable to find a means of doing so.

At this point it might be useful to make a brief reference to the manner by which the American Constitution was created. The first draft of the Articles of Confederation between the States was drawn in the early summer of 1776 and it provided for a continental congress consisting of delegates appointed by each state. The continental congress did not correspond to the
present elected body known as the United States Congress which, of course, at that time did not exist. It was a body of members appointed by the various states. Numerous disputes then ensued between the individual states and the First and Second Continental Congresses and eventually a constitutional convention was called in May 1787 consisting of 55 clear minded, moderate men such as Washington, Madison, Franklin, Hamilton and others. The convention adjourned in September 1787, having adopted the constitution which commenced with the words, "We, the citizens of the United States," and which provided in its first article, "That all legislative process herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." The constitution was subsequently ratified by individual states and became law at the beginning of 1789. The great English constitutional scholar, A. V. Dicey, wrote in his Law of the Constitution: "But if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in the history of the world formed a constitution which should in strictness be 'the law of the land', and in so doing created modern federalism. For the essential characteristics of federalism — the supremacy of the constitution — the distribution of powers — the authority of the judiciary — reappear, though no doubt with modifications, in every true federal state."

I mention the creation of the American Constitution in order to raise the question as to whether wemight well follow that example now. Mr. Trudeau's method of creating a Canadian constitution is still by a British Act capable of repeal by the British Parliament. He is also seeking to create a new federation without the consent of its existing constituent parts which certainly would be unique in history. A government which has no representation in the House of Commons west of

Winnipeg cannot be said to be speaking for the whole of Canada. In asking the British Parliament to pass The Canada Act with its accompanying schedule, Mr. Trudeau is seeking to have the British Parliament forsake a constitution tradition in that it has never amended the B.N.A. Act on subjects which vitally affect the interests of the provinces without the consent of the provinces concerned and it cannot be said that the proposed acts do not affect the provinces' vital interests.

Apart from amending the constitution the only other course open to the British Parliament would be to repeal the B.N.A. Act and this would, of course, cause the dissolution of Canada as a nation unless there were a Canadian substitute immediately ready to replace it. I suggest that the only reasonable course which is open to pursue would be to prepare a Canadian constitution in Canada which could be put in place at the same time as the B.N.A. Act is repealed by the British Parliament. This is obviously what Mr. Trudeau had in mind when he attempted to enact Bill 60 in 1978 and this brings me to one of the main points which I wish to make. I do not believe that any constitution which is imposed upon the provinces by the Federal Parliament will ever be viable or acceptable. There must be agreement. I am a Canadian first and then a British Columbian but I believe that an attempt by the Federal parliament to impose a constitution on the provinces simply will not work.

Since meetings of First Ministers have taken place over the years and have consistently failed, it appears reasonable to try another method. Professor Edward McWhinney of Simon Fraser University and other constitutional scholars both here and in Eastern Canada have recommended the calling of a constitutional convention. Some years ago I strongly recommended the creation of a commission consisting of experts drawn from all walks of life to examine the subject thoroughly in the light of evidence taken in all parts of Canada and to make recommendations to parliament and to the legislatures as to a new or revised constitution. The Pepin-Robarts Task Force did indeed perform a somewhat similar function on the subject of Canadian Unity but its recommendation have never been placed in statutory form for consideration by parliament and the legislatures. The findings of the Task Force would be extremely helpful to a future constituent assembly.

Instead of allowing the matter to become the subject of litigation as now appears likely as a result of the meeting of the provincial premiers two days ago, I suggest that the First Ministers call a meeting forthwith to discuss the formation of a constitutional assembly consisting, say, of sixty members which would be instructed to draft a new constitution or a revised B.N.A. Act within a period of not more than one year and then would report to the federal government and the provincial legislatures. This would be much more simple than the tortured procedures advocated by Mr. Trudeau in the provisions of the Constitution Act 1980. Members of such an assembly would not be subject to the inevitable political pressures suffered by First Ministers as they would not be looking to any re-election or reappointment. It is not likely that the federal parliament or the provincial legislatures would reject a well considered document prepared by a group of experts and men of experience even though it might not be entirely to their liking. This was the experience in the formation of the American constitution. The various issues would then come to a head instead of being prolonged by referenda and meetings of first ministers which, as I have said, have been going on for upwards of fifty years. Moreover a complete constitution would be then prepared dealing with the distribution of powers between the federal and provincial legislatures, the function of the Houses of Parliament and all other matters which should be embodied in a modern constitution rather than the proposed Act which really deals only with the Charter of Rights and method of amendment. The assembly would have the benefit of the many articles prepared in recent years such as the one on residual and emergency law-making authority written by Professor Lysyk, the Dean of our Law School, published last year in the Canadian Bar Review, which I recommend for your reading.

One of the agreed objectives of the constitutional assembly would be to place all such powers as would be necessary to maintain the integrity of Canada as a nation in the hands of the Federal Government. Such powers would include subjects such as External Affairs, National Defence, Banking and Currency, Transportation, Copyright, Criminal Law and similar matters. The provinces should be awarded the powers which they could most efficiently manage in the interests of the national economy.

It must be remembered that the B.N.A. Act was drawn at a time when Canada, as we know it, did not exist. One must throw one's mind back to 1867 and think of the social and econsomic conditions which existed then coimpared to what they are today. Canada consisted of Ontario, Quebec, New Brunswick and Nova Scotia. Sir John A. Macdonald's intention was to unite them into a strong nation in the light of conditions existing at that time but he could not foretell the growth and strength of those provinces and the provinces which would eventually be added to the nation. He said during the confederation debates in 1865: "The true principle of confederation lies in giving to the general government all the principles and powers of sovereignty. We should thus have a powerful central government, a powerful central legislature, and a decentralized system of minor legislatures for local purposes." Since that time the face of Canada has vastly changed in a way that Sir John A. Macdonald could not possibly have imagined. New provinces have been added and they have all grown in numerical, political and economic strength. It is therefore necessary to take a new look at the distribution of powers between the Federal government and the provinces as contained in sections 91 and 92 of the B.N.A. Act. Giving the provinces more power in their economic and geographic areas should not derogate from the strength of the Federal government. Gladstone once said during a debate in the British Parliament in 1840, "Invariably in history the strength of a union was increased by granting greater local autonomy and was weakened if not destroyed by too great a centralized power."

The strength of the provinces lies in the development of their natural resources and it may well be argued that the development of such resources can be conducted by the provinces themselves more efficiently than by Ottawa. However, in some cases a constitutional convention might find ways and means of dividing power between the Federal and Provincial governments in the interest of the nation as a whole. Let us take, for instance, the jurisdiction over fisheries which lies at present with the Federal

government. Since the passing of the B.N.A. Act the development of fisheries in Canada has increased enormously, especially in the West which was, at that time, practically non-existent as far as commercial fisheries are concerned. It is argued that jurisdiction over fisheries now could be much more efficiently administered by the provincial governments. The fishermen live on the coast in British Columbia, they fish in coastal waters and the canneries and other facilities are located on the coast in provincial jurisdiction. On the other hand, it is said that jurisdiction should be left in federal hands because of international implications and also if the jurisdiction became provincial there would inevitably be ceaseless friction between the eastern maritime provinces individually. A constitutional assembly might find a way of dividing the jurisdictions so as to give primary jurisdiction over fisheries to the provinces but in case of a dispute between them the federal government should act as final arbiter. In the case of an international dispute between a province and foreign government provision would be made in the constitution for the federal government to step in and act on behalf of the province. Giving primary jurisdiction to the provinces owuld enable the recent dispute between Alcan and the Federal Department of Fisheries over building a large power plant on a river in northern British Columbia to be settled by the province on the basis of economic and environmental interests rather than being left to an issue of constitutional law as it has been at present.

A constitutional assembly might find a means of combatting inflation by inserting in the recommendations for a new constitution a provision for providing balanced budgets in a similar way to that which has been suggested in the United States. It would become unconstitutional for a federal government to produce a deficit budget unless approval were given by a two-thirds majority in both Houses. Without denigrating the attitudes of politicians who frequently devote a large part of their lives in the service of the state, it is unlikely that such a suggestion would emanate from a meeting of First Ministers. Alexis de Tocqueville said a long time ago, after visiting the United States, "The American Republic will endure until its politicians find they can bribe the people with their own money." If our economy is going to survive some means must be found to reduce government spending which in the case of Canada exceed 40 percent of the gross national product.

It is to the interest of the country as a whole that the development of resources such as energy should take place as quickly as possible without constitutional arguments and hindrances. It is, of course, necessary in the interests of national unity that the provinces which are rich in natural resources should help the others which are presently not so fortunate. This principle must be taken for granted. Our equalization system is attempting to do so but is working badly. Twenty-nine different provincial taxes, that is, tax charges and miscellaneous revenue sources are recognized for the purpose of equalization. Ottawa then works out how much each provincial government receives from such sources on a per capita basis. It then determines the average between provinces and it simply pays out of federal national revenue to each province which falls below the national average a sum large enough to bring it up to that level. The provinces whose revenues from such sources are above the national average pay or receive nothing. Currently these calculations result in equalization payments being made to every province except Alberta, British Columbia and Ontario.

Provincial government resource revenues are subject to a great deal of variance. In 1913 they were about 30 percent of the total and fell over the years to 5 percent in 1970. Since 1970 they have risen again rapidly in ten years to 24 percent. The result of including resource revenues in the calculation of equalization means a very large increase in the ordinary tax which Canadfians must pay to the federal government and a substantial contribution to the federal deficit. The payments are made to the so-called have-not provinces regardless of their actual needs. In one respect such payments may be regarded as an encouragement to spend.

I suggest that the principle of equalization should be embodied in the constitution but the method of achieving its objective should be carefully considered. Professor Scott of this University, in an address to the Royal Society, has suggested that revenue from all kinds of natural resources should be removed from the equalization scheme; thereafter Ottawa would be concerned only with the equalization of the shorter list of more stable provincial revenue sources, thus removing a serious drain on federal funds. Provinces would continue to contribute to a natural resource pool which would be subject to interprovincial administration. Professor Scott's proposal is somewhat similar to one contained in the Tremblay Commission Report in Quebec and I recommend it to your study.

Discussion has recently been taking place in Ottawa and elsewhere in regard to electoral reform. There is no doubt that our present voting system is archaic and does not give effect to the will of the majority of voters. Lord Hailsham, the present Lord Chancellor of England, has described the English voting system which is the same as ours as, "an elective dictatorship." A year ago Prime Minister Trudeau said, "We have to change our electoral procedures in order to ensure that the government is clearly identified with all regions. I would support a system of proportional representation." On November 12th last, the Honourable Jean-Luc Pepin introduced a private member's motion wherein he advocated proportional representation but it died on the order paper. Over the years members of parliament both here and in England have been unwilling to change the electoral system for fear of losing their own seats. While a constitutional amendment is not necessary to bring about electoral reform, a constitutional assembly whose members have no seats to lose in parliament would be an excellent place to make recommendations to bring our electoral system up to date.

I am dealing with these subjects very briefly due to shortage of time but I am putting them before you as students-at-law for purposes of discussion. As I said at the outset there are probably more important matters than the constitution which require solution at the present time and the creation of a constitutional assembly would give the parliament more time to turn its attention to them. We certainly have plenty of problems to solve and while I hesitakte to make a pun I might say that, using the word in its medical sense, problems in Canada have become constitutional.

SUBMISSION ON CONSTITUTIONAL REFORM

Presented by The Canadian Chamber of Commerce September, 1980

PREFACE

Quite apart from its role as Canada's general business association, the Canadian Chamber of Commerce is also a unique assembly of Canadians from many walks of life and from all parts of the nation.

The will to strengthen the understanding and co-operation between the citizens of various regions was a principal reason why representatives of a score of community Chambers met in Winnipeg in 1925 to form "the Dominion Board of Trade." Today, our organization comprises some 600 community Chambers of Commerce and Boards of Trade, over 3,000 companies and 70 trade and professional associations.

For more than a half-century, the strengthening of the economic and political union in Canada has been a principal preoccupation of the National Chamber.

The objectives of our organization, as enunciated in 1927, were predicated on the belief that "we exist because we believe that we can be useful in securing a more united and a more prosperous Canada." Furthermore, the Chamber has always endeavoured to take an objective view of the national interest. At one of its earliest meetings, the Chamber's President urged members "to think and talk in terms of Canada, putting aside all provincialism — if Canada as a whole is prosperous, then individually and provincially we will all share in that prosperity."

The Canadian Chamber has been in the vanguard of Canadian institutions working towards a greater sense of economic, political and social cohesiveness in the ensuing years. Through conferences, exchanges, publications, advertising and promotional campaigns, national programs, public pronouncements and other means, it has attempted to contribute positively to Canadians' understanding of their heritage, their common interest in a strong and progressive nation, and Canada's potential.

In the past decade, the Chamber has increased the priority (and the resourcess) accorded to this area of activity. The federal government, the Task Force on Canadian Unity, and the Council for Canadian Unity have all recognized the pre-eminent role played by the National Chamber during the "unity debate" throughout the seventies.

Consequently, in light of its composition as a broadly-based association, and its long record of involvement in matters related to national unity (both politically and economically), the Chamber is acutely aware of the diversity of viewpoints in Canada on the question of constitutional reform, and of the complexity and sensitivity of the task facing the nation's legislators.

We hope that this submission will be viewed as a thoughtful and constructive contribution to the present series of consultations concerning the options for Canada's future constitutional framework.

INTRODUCTION

The Chamber has taken note of the priority list of twelve items for a new Constitution designated for examination by federal and provincial officials during 1980, they being:

1. a new statement of basic principles
2. a charter of rights
3. language rights guarantees
4. revenue-sharing, or "equalization"
5. patriation of the Constitution
6. resource ownership and interprovincial trade
7. offshore resources
8. powers affecting the economy
9. communications
10. family law
11. the Senate
12. the Supreme Court

The Chamber is conscious of the many social and political dimensions of these and other constitutional issues. However, for the purposes of this presentation, it has chosen to provide commentary based on its principal area of expertise, namely the field of economics. Accordingly, this document presents a business viewpoint on several of the major economic questions related to constitutional reform.

In the months to come, the Chamber will be considering the development of further commentary touching on other fundamental issues less directly related to the economic field.

The comments expressed in the following pages represent the considered opinion of the Chamber resulting from discussion and debate. In the process of preoaring this document, we have learned that business peoplle in Canada clearly favour a brief set of basic rules by which Canadians are willing to abide, with pride and understanding, rather than a complicated and relatively incomprehensible example of constitutional penmanship.

As a result, our proposals are neither all-embracing nor detailed, since they are advanced as general principles rather than specific constitutional provisions. They deal with the following topics:

The Process of Constitutional Remorm
Free Movement of Goods and Services, Labour and Capital
Economic and Political Union
Co-ordination of International Efforts
Establishment of National Economic Goals
Transfer Payments
Provision of Basic Services to all CKanadians
Allocation of Powers
Jurisdiction over Certain Natural Resources
Assignment of Powers of Taxation
Not a New but a Renewed Constitution

OBSERVATIONS AND RECOMMENDATIONS

A. THE PROCESS OF CONSTITUTIONAL REFORM

At a time when the world economy is plagued with growth and structural problems, it is a very delicate endeavour to reopen for discussion the trade-offs which have, for more than a century, made Canada a prosperous country. The uncertainties which always result from such an exercise may be very detrimental to our economy especially if discussions last for a number of years. Accordingly, it is vital that the planning and execution of the revision process be carried out as efficiently and expeditiously as possible, in order to beest serve both the immediate and longer-term interests of Canadians.

The Canadian Chamber of Commerce recommends that Canada's legislators do their utmost to ensure a speedy and efficient discussion aimed at identifying issues clearly before amending a constitution which, on the whole, has served the interests of the Canadian people very well.

B. FREE MOVEMENT OF GOODS AND SERVICES, LABOUR AND CAPITAL

The Chamber supports a federal authority vested with the necessary powers to avoid economic balkanization, and to remove limitations, imposed by provinces, to the free circulation of goods and services, labour and capital. Such restrictions should be a concern of the courts rather than becoming intergovernmental conflicts. While the Chamber is opposed to state planning of the economy, it does advocate a national economic and industrial strategy and a strong federal power on interprovincial and international economic and trade policies.

The Canadian Chamber of Commerce supports a federal power sufficient to ensure the free circulation of goods and services, labour and capital across the country, to the end that all Canadians will be dealt with and treated equitably wherever in Canada they may be.

C. ECONOMIC AND POLITICAL UNION

The constitutional review process should lead to the strengthening of economic and political union in Canada while allowing each province to ensure its cultural and social development, and economic growth. This requires a national authority entrusted with responsibilities and powers sufficient to maintain the economic and political union within Canada.

The Canadian Chamber of Commerce believes that the distribution of powers and the nature of our institutions should reflect the objective of the various governments to create a strong and fully integrated economic and political union.

D. CO-ORDINATION OF INTERNATIONAL EFFORTS

Emphasis must be placed on establishing and maintaining a competitive advantage abroad through the co-ordination of Canada's international sales and marketing efforts. The achievement of this objective will necessitate very close consultation between governments at all times, and should result in the reduction of confusion and cost flowing from the multiplicity of parallel efforts by both levels of government in various areas.

We believe that, through consultation, governments must better co-ordinate trade and other initiatives abroad while speaking with one voice in international affairs.

E. ESTABLISHMENT OF NATIONAL ECONOMIC GOALS

The Chamber acknowledges the primacy of the federal power in formulating economic policy for the nation. Nevertheless, we believe that economic goals for Canada should result from an ongoing consultative process that will bring into focus the perspectives of both the provinces and the federal administration.

The Canadian Chamber of Commerce supports a strong federal power that will allow the indentification and pursuit of national economic goals through ongoing formal consultation with the provinces.

F. TRANSFER PAYMENTS

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

The Canadian Chamber of Commerce recommends the maintenance of a system of transfer payments designed to ensure the availability of basic services in all regions, but to an extent which would not lead to artificial economic structures nor discourage the movement of people. Transfer payments should, on the other hand, be given to provinces in accordance with broad general objectives for their use, predetermined between the federal government and the recipient provinces.

G. PROVISION OF BASIC SERVICES TO ALL CANADIANS

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

The Canadian Chamber of Commerce recommends that minimum norms and standards for such basic services be set through consultation between the federal government and the provinces for implementation in the provincial jurisdictions. Provision should be made for periodic review of such minimum norms and standards with a view to ensuring that they do not deny the exercise of individuals' responsibilities, nor eliminate consequences normally associated with the choices made.

H. ALLOCATION OF POWERS

The business community holds the view that powers should be allocated in accordance with functional criteria which, inter alia, would attribute responsibilities to the level of government best suited to exercise them. In general terms, provincial governments because they are closer to the people, can best provide services to individuals and regulate the relationships between citizens in society and, more specifically, with regard to their rights, duties and obligations. In all areas, a very critical assessment should be made of duplicate services and programs and of the most effective ways to eliminate duplication where it occurs.

The Canadian Chamber of Commerce recommends that, in general terms, powers relating to the provision of services to individuals, or to the relationships between individuals, be allocated, to the extent practicable, to provincial governments and that no areas should be consciously left to the concurrent intervention of two levels of government without a clear definition of the extent and nature of such intervention. Residual powers should be placed in the hands of the federal government; however, the renewed Constitu-

tion should contain appropriate safeguards, judicial or otherwise, in order to protect designated provincial powers from federal encroachment.

I. JURISDICTION OVER CERTAIN NATURAL RESOURCES

The Canadian Chamber of Commerce believes that the natural resources of our country are partr of the national heritage of all Canadians. While jurisdiction should continue to rest with the provinces, the control of these resources should be exercised for the good of the nation as a whole and, in determining conditions of export, should be subject to a national agency. The federal government, however, should possess the ultimate authority, subject to certain safeguards, in cases of national emergency to assume temporarily all powers over natural resources. In any event, regardless of jurisdictional responsibility, the law of supply and demand should be a principal consideration in matters relating to pricing and distribution.

The Canadian Chamber of Commerce acknowledges that jurisdiction over natural resources should continue to be in the hands of the provinces which have responsibility for conserving and pricing such resources within, and for, the benefit of Canada. Conditions of export of critical natural resources should be subject ot control by a national agency and, under special circumstances of national emergency, the federal government be empowered to assume temporarily provincial responsibilities in this field.

J. ASSIGNMENT OF POWERS OF TAXATION

Since 1867, a sizeable gap has emerged between the responsibilities of the senior levels of government and their ability or willingness to generate adequate revenues through their assigned powers of taxation. Above and beyond this development, certain provinces have experienced even greater difficulty due to their economic limitations (population, resources, industrial base). It seems appropriate that, at the time of constitutional reform, steps should be taken to bring into balance the new responsibilities accorded to the senior governments and their assigned powers of taxation.

The Canadian Chamber believes that, pursuant to the allocation of jurisdictions and responsibilities under a renewed constitution, powers of taxation be re-assigned in accordance therewith.

K. NOT A NEW BUT A RENEWED CONSTITUTION

The Canadian Chamber of Commerce believes that it is important for the replatriation and amending process that has already started to continue to its conclusion. The Canadian Constitution should not create a country based solely on rights, powers and privileges conferred by a benevolent government. It should provide for the simplest form of government, leaving as much as possible to the dynamism and personal effort of individual Canadians. In this respect, it is not necessary to create a new Constitution but to introduce amendments to the existing one. These amendments should curb the continuing growth of government presence in the everyday lives of individual citizens and businesses. They should also redress the concentration of power which has occurred in the past several decades into the hands of the cabinet and civil servants at the expense of the importance of the legislature.

The Canadian Chamber of Commerce recommends that the present Constitution serve as the basis for a renewed Constitution for Canada, subject to the amendments necessary to fulfill the objectives set out above.

A BRIEF: SUBMITTED TO THE MANITOBA SPECIAL COMMITTEE ON THE CONSTITUTION

by
PAUL C. THISTLE
1980/10/07

Please note that this submission was originally made (and apparently "lost") some time ago and must be read in the context of the discussions at the First Minister's Conference.

Events in the meantime would cause me to the critical of the federal government as well — along the lines voiced by those such as Warren Allmand the Gordon Fairweather.

The following is a personal viewpoint concerning the present discussion on constitutional repatriation and reform in Canada.

I feel compelled to make some formal public contribution to this process primarily because the majority of positions assumed by Premier Lyon and the Manitoba provincial government do not in the slightest reflect my views on many of the issues.

I make no particular claim to be a constitutional expert or a student of Canadian history. However, as a Canadian, I do have certain strong beliefs about what this country has been, is, and should be in the future. Quite frankly, I deplore not only the substance, but the tone and unjustifiably self-righteous attitude taken in the representations made on my behalf, particularly those of Premier Lyon.

The Premier certainly does have the responsibility of representing the interests of this province as he perceives them. However, I seriously question his perceptions, especially in the areas where he has no true mandate from the people of this province to maintain the intransigent positions he has done to date on such questions as the entrenchment of a Bill of Rights for example.

I will begin my comments with a general statement on the federal/provincial power struggle.

For my part, I am a Canadian first and foremost and any specific Manitoba-based concerns are only secondary. Having lived not only in Manitoba, but in British Columbia and Ontario as well, I believe, especially as Canadians desire and indeed are economically forced to become more mobile, that a national identity as opposed to regional foci will become much stronger in the future. I see a Canada that will become much less regionally segmented (as it has been historically), by becoming not more homogenous, but heterogenous in nature. It is this heterogeneity which is evolving into the Canadian identity, not the segmental model of the past.

By way of example, provinces such as Alberta and British Columbia which are presently receiving heavy migration from other areas in the country will no longer be able to rely on the strength of purely segmental identifies, since ever increasing proportions of their populations will have regional ties elsewhere.

I therefore believe strongly that in order to survive as a unified nation, Canada must maintain a strong central presence to serve as a focus for identity.

My reading of the original Constitutional Debates and the B.N.A. Act itself has convinced me that the Fathers of Confederation stressed the "centralist" concept and framed the Constitution (in contra-distinction to the American case) so that provincial powers — powers of a strictly "local or private nature" — were clearly limited and defined, and so that all residual powers rested with the federal government.

The current trend toward the attrition (so-called "devolution") of federal powers is diametrically opposed to this original and fundamental concept. Indeed, I maintain that the provinces already have too much conflicting influence in many areas: human rights and economics/taxation among them.

In my view the field of human and civil rights is not one of a purely "local or private nature". It seems to me that it is not only illogical, but immoral for one country to have differential rights recognized by the various provinces.

In terms of financial matters, and on a personal level, my 1979 Revenue Canada Notice of Assessment indicated that my contributions to the provincial government were fully sixty times greater than my contributions to the federal government. I do not begrudge any of this money. However, I do feel that the provincial tax bite should more closely approach the 60/40 percent provincial/federal expenditures of tax revenues. As it stands, particularly as it is manifested in the lowest income levels on the taxation tables, it is my opinion that the provincial government already has too many tax points in relation to the senior government. This is particularly disturbing to me since The Hall Report indicates that, in the case of health care, federal contributions are increasing while provincial contributions are declining. It is interesting that Premier Lyon is able to ignore this trend while criticizing the federal deficit.

Premier Lyon also talks about the federal government's conspiracy to change the "fundamental nature of this country". However, it is the provinces which, with their demands for more powers, are attempting to radically change the fundamental centralist structure of Canada. I believe strongly that this original constitutional concept must be maintained.

Provincial governments are exactly that; "provincial" in the sense of being concerned primarily (and quite rightly so) with local, even parochial interests. To give them more powers and to assume that ten such disparate and self-interested segments of the country (or more properly the elected politicians of these segments) can be expected to act firstly with a concern for the interests of the whole nation seems to me to be totally irrational.

Indeed, as I read it, the major impetus behind the original movement toward Confederation was the fact that after 1841 the United Canadas could not solve the problems brought on by their often mutually exclusive self-interests. This impass resulted in the design of a superior level of government which was to assume the burden of overriding national concerns, leaving local issues to the provinces. We must not subvert this fundamental character of Canada by acceding to all the demands of the provinces for increased powers, however well-intentioned they may be.

The above argument of course is why Premier Levesque's idea of political sovereignty and economic association (and other premiers' demands for the converse) is so ludicrous. Such a concept takes Canada back to the 1840's and constant political "deadlock". The self-interested economic priorities of the partnership thus created would not necessarily coincide for the overall good.

There "must" be a strong central power overriding provincial (in both senses) interests and we must avoid unwarranted increases in the powers of the provincial governments in economic and other areas. Otherwise, incompatible local self-interest will again paralyze the Canadian nation.

I will now turn to some of the specific positions taken by Premier Lyon and Manitoba's government with which I most take issue.

First, however, I would like to comment on one of Manitoba's positions with which I heartily agree (i.e. on Family Law). I heard Mr. Mercier speaking on behalf of the province, and he it seems to me made it quite clear that family law should be under federal jurisdiction in order to ensure enforcement across the country. It seems blatantly obvious to me however that nearly identical arguments can be made refuting most of the claims for increased provincial power.

Already as far as I am concerned Canada is too fragmented by provincial (in both senses) laws restricting the desires of citizens to move freely throughout the country. Again, on a personal level, as a prospective teacher I was limited to two provinces (British Columbia and Manitoba) which would accept my particular Bachelor of Arts degree as a qualification for teaching secondary school. I am not arguing the specifics of whether a degree in anthropology is or is not an acceptable qualification for teaching; I am arguing the broader issue that if it indeed "not" an acceptable qualification, how can British Columbia and Manitoba accept it when other provinces (ostensibly in the same country) do not? The quality of education and not regional differences is the issue here. Why should Canadians be forced to accept differential standards in an area so fundamental to the national interest and to the ideal of ending regional disparity? This problem is not a narrow one. As a certified teacher, there are further absurd blockages to my free movement around this country in terms of a marked reluctance to accept at face value certification credentials earned in another province.

I find such "balkanization" of Canada not only unnecessarily restrictive to my personally, but also repugnant to my sense of what a nation really should be. I cannot accept the many other examples of this fragmentation found in different provinces recognizing different human rights, different ages of majority, differential access to health care (some by charging health insurance premiums and/or allowing direct billing). The list probably could be continued. The point is however that such a model is hardly a country at all, but merely a conglomeration of provincial (in both senses) principalities. A unitary state of course is not possible or desirable in a country as diverse as Canada is. However, proliferation of provincial powers must not be allowed to frustrate and restrict Canadian citizens purely on geopolitical grounds.

The position of Premier Lyon's to which I object most strongly is his inflexibility on the question of entrenching human and civil rights in the Constitution.

The Premier is fond of stating that it is the provinces which can best protect the rights of Canadian citizens. On national television he was able to get no response from journalists to his challenge demanding examples

of how the provinces have failed to do their duty here. By their silence the particular journalists involved gave the impression that there have been none. Contrary to Premier Lyon's contention, the Canadian system as it stands now does not in fact protect the rights of its citizens well enough. Demonstrably over the course of Canadian history they have been arbitrarily and capriciously abrogated by both provincial "and" federal governments. To argue differently is to do so in ignorance of the facts.

Even though not primarily a student of Canadian history, even I can cite the examples of British Columbia's refusal to negotiate settlement of Indian aboriginal rights. Alberta's "Press Act", Quebec's "Padlock Law'" and "Bill 101", the disenfranchisement of Canadian citizens on the basis of their ethnic origin, and the unconscionable delays in allowing status Indians to vote in provincial elections. I suspect the list could go on.

Whether or not Canada's record in this regard is "the best in the world" (a debatable point, not a given), the fact remains that our record can indeed be improved. To couch resistance to reform in this type of argument as the Premier does is nothing more than self-satisfied nonsense.

Incredibly, the Premier sees fit to ignore perhaps the most blatant example of provincial encroachment on civil rights. In fact, it was his own government that has recently been forced to reverse Manitoba's abrogation of French language rights after a period of ninety years. What other evidence does the Premier need to convince him that the provinces have not been competent guardians of Canadians' rights?

Of course, the federal government has no better record here in light of such actions as the invocation of the War Measures Act in 1970. It is precisely for these reasons that we need entrenchment of human and civil rights in an unassailable constitutional form.

Notwithstanding the Premier's valid contention that entrenched rights may end up having the effect of judicial reversal of government policy directions (such as that against "affirmative action" engendered in the U.S. Supreme Court decision in the Bakke case for example), even without entrenchment, it is not unknown here in Canada for the courts to rule against the thrust of government policy. Indeed, as we have witnessed in the case of Manitoba's 1890 Language Act, some government policy directions are in dire need of reversal]

I believe strongly that rights are bests protected, not by either provincial or federal legislatures, but by the Constitution. Indeed, rights must be entirely out of reach of the whims of politicians who can be expected to waiver in the winds of every passing political storm. Human rights must no longer be determined by current political pressures as they have been in the past.

With a workable amending formula which the provinces are demanding, the Constitution will not be immutable as Premier Lyon likes to imply, but will in fact be malleable in the hands of politicians. However, this will be so only in the context of the same serious thought and intense debate we are seeing now. Changes in the scope of fundamental human and civil rights recognized in this country will then be allowed to evolve naturally, not to be cataclysmically destroyed in the heat of some prospect for immediate political gain, or some apprehended crisis.

Contrary to the Premier's spurious association of entrenchment with the Soviet system and the dreaded American "republicanism", an entrenched Bill of Rights does not take necessary power away from the legislative system, it merely prevents legislators from unnecessarily abusing their power to arbitrarily removing rights on political grounds. I say again that it is absolutely critical to keep human and civil rights out of the immediate political area and secured in a Constitutional form.

It almost seems as if Premier Lyon despairs of our own competence as a nation for the task of drafting a new Constitution including a Bill of Rights. However, even I can see at least one solution to some of the difficulties which have been presented by the Premier.

Drafting an entrenched Bill of Rights in light of the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination (A. 2 s.2) (to which Canada ascribes) would assure that government policy directed at helping ethnic and social minorities through affirmative action would not be endangered by any ham-handed construction or application of a constitution. We can learn from the American experience and avoid their type of constitutional law which erroneously assumes that equality of treatment automatically results in equality in fact. Of course, equality of result demands inequality of treatment (that is, positive discrimination or affirmative action). It is imperative in my view that a new Constitution recognize this internationally accepted tenet. The Constitutional solidification of such principles should distress the Premier.

Another of my coincerns is the exclusion of Native peoples from the present constitutional discussions. I urge the government of Manitoba to seek the inclusion of the National Indian Brotherhood, the Native Council of Canada and the Inuit Tapirisat of Canada in any further negotiations on a level beyond that of observer status. This is entirely an appropriate position for the government of Manitoba, since it was in fact Native people who were in large part instrumental in the development of Manitoba's own segmet of our present Constitution.

The concept of "two founding peoples" is indeed a historical fallacy in consideration of the important role of Native peoples and the contributions of later immigrant peoples. Nevertheless, it is true that Canada as it is presently constituted has a limited number of "charger" groups.

The commonly held idea that we have only two charter groups — the English and the French — however, is also patently false. In fact, Canada has three charter groups, being that the only other ethnic category identified in The BNA Act is that of Canada's Native people.

I feel that it is morally if not legally incumbent on governments undergoing the process of Constitutional change to include this third charter group in the discussions. This is particularly important since so much of Canada's territory and resources (which are central contentious issues in the present discussions) are still encumbered by the legitimate statutory, treaty and aboriginal claims of Native peoples.

In conclusion, I must say in the strongest possible terms that, although perhaps not couched in an expert's knowledge of constitutional law, the above ideas are not the result of "silly" "cornflakes hucksterism",

nor ideas emanating from "cloud cookoo land" as Premier Lyon would like to suggest. They are firmly held beliefs founded on my experience as a Canadian (for which I need apologize to no one) and on my personal concept of a country which I want to be more than the sum of its parts. I strongly resent any other implications regardless of whether or not it is the Premier of my own province who makes them.

Further, I deplore the Premier's unjustified contention that he "speaks for Manitobans and the majority of Canadians" when he has not consulted them on the issues.

He certainly does not speak for me on these matters.
Respectfully submitted
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BRIEF IN REGARD TO THE CANADIAN NATIVE AND CONSTITUTIONAL REFORM

Whereas Canada today consists of two founding peoples, the French and the Engoish; of (founded — unfounded?) Aboriginals and half-such; and of the immigrants and offspring of many non-founding people(s).

Whereas at present Canada's Constitution is vested in Britain; this investitute, I opine, is of little threat to the equanimity of me and many other Canadians, yet I concur with the government's view that it be salubrious to self possess it — and to change it?

Inasmuch as this committee is set up to receive briefs relating to such matters, therefore, do I submit these reflections.

In my view by many parameters the Canadian Native and Metis lie below the national mean, as measured by health indices, economic indices, social indices of maladaption, and of educational status. (This generalization is given without references, but, if pressed I believe I could substantiate this notion by the literature.) If this be so, it is relevant to question why it be. Do they lack self-will to improve their lot? Are they being exploited? Are they biologically inferior? Or, is this so because of a combination of forces? Can an improvement be expected?

I submit that Canada's political heritage is repressive — not necessarily calculatedly, but unintentionally; nonetheless, Canada's political h eritage is repressive to the Indians and Metis self-actualization, and it will remain so unless consciously countered.

If I were to take secret bets on who is most likely to succeed the average Pole, Swede, Hungarian, Ukrainian, or other immigrant, or an Indian or Metis — where would you place your bet?

From the record of performance in economic viability (non-viability); or rates of illness such as diarrhea, respiratory infection, of alcoholism, does the Indians and Metis morale get uplifted or depressed? I am wanting to wager that the average Indian and Metis does not believe in himself/herself. I suspect from this historical record that their ego has been dealt a shattering blow.

The Indians options are somewhat like having to choose between the Devil and the deep blue sea.

Whereas Quebec might aspire to independence realistically, for the Natives as a small minority spread throughout the land such aspirations are beyond realistic reach. Whereas French is adequately modern language with a sufficient literary base, the Native language(s) and its literary base is likely inadequate to serve alone to hold its people at par with a technologically sophisticated societies of the world. Unless the Natives are coalesced into a single geographic area they even lack effective noting clout within the Canadian State.

What bargaining leverage does the Native have? He has moral leverage] White man came into this land and wrested it from the Natives and attested to his guilt by Treaties. In restitution and as appeasement to his burning conscience the white man must wait hand and limb on the Indian, provide him with food, clothing and shelter, and whatever other modern amenities the Native lacks? If Kings were born to be Kings by Divine decree, then by the same Divine decree the Native is hapless, helpless, and hopeless?

I wish to warn against permanently locking into past Treaties without examining the costs to the Native. A free democratic society does not favor a politician to attempt philosophical confrontation for common good, rather it favors a politician who proffers superficial handouts. It is unthinkable that a politician wanting to be elected would approach a community declaring he would advocate taking something away for their own good.

What do I advocate for the Native to deprive herself/himself of by his own volition for her/his own good? I submit that if the Native be willing to assume a higher level of self-reliance and of a more positive self-image he/she must sever emotional and mental reinforcers that condition him/her into a negative mind set favoring a resentful parasitic existence, and low self-esteem. You cannot simultaneously have it both ways — if you see

non-performance and coddling by Society as your natural birthright, then can you not be equal. You cannot simultaneously integrate a self-image of self-reliance and of capability with that of helplessness and victimization. Doesn't this mean that for me, as a first generation Canadian, and for you, whose forefathers have always been here, that fate is only a partial determinant, and of which, ideally, from this juncture we ask only that we have an equal opportunity to apply ourselves? Such self application is called doing by free will.

This is not a plea against conceding a handicap to you the Native. But, using phrases from the S.T.E.P., can we read from your behaviours a call for attention; a need for more self-determining power; a feeling of revenge; and a display of inadequacy?

If you could send all non-aboriginals out of the country would you aspire to acquire the amenities of a technologiclaly developed modern society? Would that come about without applying yourselves? Is the undue aggrandization of the past not a partial substitute for a spiritual void for the present?

As one example of what Natives might choose to negotiate in realization that it is unrealistic for them to establish their own Universities is to acquire specific student space allotments within the faculties at the University, without having to compete or outperform the rest of society for admission. Such right is meaningless if the Native is unwilling to apply himself/herself as the granting of phoney degrees wouldn't really boost his self-image.

I will not explore many options. The primary intent is to alert to a need for a hard-nosed look before en-

shrining "old virtues" by superficial political expediency. Self analysis is painful, and Canadians's self-analysis must occur at the grass roots and be partly a political, that the enigma(s) will not solve by dictatorial Government edict, or of pundit propositions, I subscribe to. That the Government is doing a great service by forcing reflection on these matters by threat of imminent (?) change I agree with. But, to ask for grass-root self-analysis of the adverse psychological impact of certain deeply engrained negotiation postures and to hope for insights allowing evolution to a new stance with impacts towards a more positive self-image and equality, and expect it to happen within months or even a year or two, is like a parent to ask his child to be independent at two. Such is an abhorence, I submit.

Respectfully submitted,
David Penner, M.D. D.P.H.

1) S.T.E.P.- Systematic Training for Effective Parenting, Don Dinkmeyer, Gary McKay

Copy: Frank White, Education Services
The Pas Indian Band

Addendum

Though I seek to caution against entrenching the Natives into a parasitic association with the rest, yet, would I seek to recognize adverse circumstance. Namely, the modern technological advancement occurred in the Temperate Zone and spilled over into the Torrid and Frigid Zones. Also, history has record of highly developed Nations in the long past in the Torrid Zone, but non of such Nations in the Frigid Zones, I believe. Perhaps mere survival in the Frigid Zones is a sine Qua non of greatness here. If territorial coalescence be a prerequisite for greater Native self-determination, then does logic allow thata climate be a compnent of reckoning in the negotiation. It is cheaper to accommodate oneself in California's climate than at the North Pole. And, a given quantum of the same earth is of far lessor intrinsic vaolue at the North Pole than it is at the 50th parallel. In short, amenity should allow that the south subsidize the north.

BRIEF FROM MANITOBA LEAGUE OF THE PHYSICALLY HANDICAPPED INC.

The Manitoba League of the Physically Handicapped Inc.
825 Sherbrook Street
Winnipeg, Manitoba R3A 1M5

PROPOSED FEDERAL CONSTITUTION

November 18, 1980

An Open Letter to: the Standing Committee on Statutory Regulations and Orders, Government of Manitoba
Members of the Manitoba Legislature

The Manitoba League of the Physically Handicapped Inc. (MLPH) recognizes the need for the constitutional patriation endeavour. We are fearful however of the disastrous implications for the rights of disabled Canadians embodied in the present draft of the Charter of Rights and Freedoms, 15(1), intended to be entrenched in the patriated Canadian constitution.

To include all legal protection from discrimination from the Canadian Rights Act which is similar to the Manitoba Act and to only leave out "physical handicap" is a flagrant backward step.

To fail to prohibit discrimination on the grounds of disability in any constitutionally entrenched Charter of Rights and Freedoms which does prohibit discrimination on the grounds of race, national or ethnic origin, colour, religion, sex or age is also tantamount to rejecting the fundamental humanity of "disabled" Canadians.

This omission does tremendous damage to a decade of progress in the endeavour to achieve legislative protection from discrimination for disabled Canadians. In our struggle for equal protection of the law, we have achieved expanded protection from discrimination in the human rights acts of seven provinces, three of these having amended their legislation in the past year. The Federal Government, in the last speech from the throne, has also promised to amend the Canadian Human Rights Act to provide us with this comprehensive protection.

If the Charter of Rights and Freedoms is entrenched as it is presently written, people who bring complaints of discrimination on the grounds of sex, age, race, religion and other grounds listed in 15(1) to human rights commissions at the federal or provincial levels, will also be able to appeal to higher courts on constitutional grounds if they are not satisfied that they have been protected from discrimination by the Commission. Complaints of discrimination on the grounds of disability, however, will not have a similar constitutional back-up and therefore obviously will not be given the same priority by human rights commissions when allocating limited staff resources. This will set off a whole new chain reaction in legislative planning, implementation and throughout our entire society.

In fact, it will become quite clear that discrimination against a person because he or she is disabled, while prohibited, is not as prohibited as discrimination against a person because of sex, age, race, religion and other grounds listed in the constitution. We would like to celebrate the patriation of the constitution of our country as a basic statement of the fundamental guidelines of our country upon which legislative policy can be built upon, but find the loss of rights it would entail for unnecessary and wrong. The Charter, if not amended from its present form, will, for all practical working purposes, wipe out equal human rights protection of disabled Canadians.

We are pleased to note that representatives from all Federal political parties on the Special Committee on the Disabled and the Handicapped have officially agreed in their first public report "should it be the will of Parliament to entrench human rights in a patriated constitution, your Committee believes that full and equal protection should be provided for persons with physical or mental handicaps".

We call on all MLA's and all Parties in Manitoba to support our plea for an amendment of profound significance to the proposed Charter through the simple device of adding the one word "disability" to 15(1) thereof — if the proposed constitution is to be adopted by the Federal Parliament. This does not bind you to the principle of supporting the new constitution or Charter of Rights — only that it must be fair to disabled Canadians if indeed it does become law]

Frank Rogodzinski
Provincial Chairman, MLPH