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Citation Information

Hogg, Peter W. and Wang, Annika. "The Special Joint Committee on the Constitution of Canada, 1980-81." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 81. (2019).
<https://digitalcommons.osgoode.yorku.ca/sclr/vol81/iss1/2>

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The Special Joint Committee on the Constitution of Canada, 1980-81

Peter W. Hogg and Annika Wang*

I. INTRODUCTION

The patriation of the Canadian Constitution and the entrenchment of the *Canadian Charter of Rights and Freedoms*¹ in 1982 are, in some ways, the story of one man and one party. The constitutional package was drafted by Prime Minister Pierre Trudeau's Liberals and approved by two Houses both controlled by the Liberals. The project was marked by Liberal control pitted against Conservative (and sometimes NDP) resistance, political gamesmanship, and partisan acrimony. But there is at least one chapter in this story where the Liberals lost their grip on the narrative, the parties set aside petty partisanship, and the Canadian public became the author of its own history. For three months in 1980 and 1981, a Special Joint Committee of the House and Senate provided a platform for the voices of hundreds of individuals and organizations that represented an extraordinarily diverse cross-section of Canadian society. For the first time in Canadian history, television shined the spotlight on a committee's work and captured the attention of the nation. The engagement of the broader public, combined with the ideas and passions of the witnesses who spoke to the Committee, softened a process that would otherwise have been partisan, and the end result was a stronger Charter of Rights.

The Special Joint Committee on the Constitution of Canada, 1980-81 was conceived as a Liberal strategy to shield the party from criticism from its political opponents: the hope was that a bipartisan committee would expedite the process. The Conservatives initially hoped that they could use the Committee to obstruct the process in an attempt to shame the Liberals into delaying their plans and negotiating with their

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

opponents. In the end, both parties lost control of the narrative and the Committee took on a life of its own. Unprecedented public attention forced a détente that led both these parties and the NDP to come together to create a stronger Charter. Although it would take another year before the Constitution would be brought home to Canada, the draft of the Charter that emerged from the Committee would remain largely in place.

The purpose of this article is to explore this obscure yet significant step in the drafting of the Charter and the patriation of the Constitution. To that end, this article will describe the history and proceedings of the Committee, focusing on how Liberal and Conservative strategies shaped its formation; the recommendations made by the Committee, showcasing how all three parties made substantive contributions with an eye to strengthening the Charter; and the development of non-partisanship on the Committee, made all the more remarkable by the bitter partisanship that had characterized the process before the Committee went to work.

II. ORIGINS OF THE COMMITTEE

On October 6, 1980, the Prime Minister Trudeau's government moved in the House of Commons the motion for the establishment of a special joint committee, as follows:

That a Special Joint Committee of the Senate and of the House of Commons be appointed to consider and report upon the document entitled "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" published by the government on October 2, 1980, and to recommend in their report whether or not such an address, with such amendments as the committee considers necessary, should be presented by both Houses of Parliament to Her Majesty the Queen.²

Notice of the motion had been published on October 2, 1980, which was the first time that the government had made the constitutional package contained in the Resolution public.³ Prior to that date, the constitutional package had only been made available to provincial and federal officials in the course of discussions between the two levels of government.⁴

² House of Commons Debates, 32nd Parl., 1st Sess., No. 3 (October 6, 1980), at 3274 [hereinafter "House Debates No. 3"].

³ Roy Romanow, John Whyte & Howard Leeson, *Canada...Notwithstanding: The Making of the Constitution 1976-1982* (Agincourt, ON: Carswell/Methuen, 1984), at 248 [hereinafter "Romanow, Whyte & Leeson"].

⁴ This is not to say that there were no public antecedents to the Charter prior to this date. The October 6, 1980 draft of the Charter took inspiration from many sources, including

On September 8-13, 1980, Prime Minister Trudeau and the provincial Premiers met at a First Ministers' Conference to negotiate the proposed constitutional package, including an entrenched Charter of Rights and Freedoms drafted by the Trudeau government. The Conference was the capstone to an intensive summer of private negotiations between federal and provincial government officials. The Conference failed to reach agreement on the package.⁵ On September 17, 1980, Trudeau gathered his caucus to contemplate their next step. Though he warned them that unilateral patriation would be "the fight of our lives", the caucus agreed.

Having decided by September 17, 1980 to act unilaterally, it is not altogether clear why the Trudeau government chose to establish a special joint committee. Some scholars argue, and perhaps this is the better view, that the Liberals used the committee as a "Machiavellian power play" to lend legitimacy to their unilateral action and shield themselves from criticism by the provinces.⁶ Others argue that the Progressive Conservatives, the official opposition, had forced the Liberals' hand in an attempt to delay and obstruct the passing of the Resolution.⁷

The New Democratic Party ("NDP") was on-board with the Liberals. Although some members expressed regret that the government was acting unilaterally,⁸ Ed Broadbent, leader of the NDP, accepted the

Diefenbaker's Bill of Rights, Trudeau's paper "A Canadian Charter of Human Rights" from 1968, and the failed Bill C-60 from 1978, among others. See Roger Tassé, *A Life in the Law – The Constitution and Much More*, translated by Jack MacDonald (Toronto: Thomson Carswell, 2013), at 192-194 [hereinafter "Tassé"].

⁵ "Highlights of the Kirby Memorandum" (August 30, 1980), online: <<http://faculty.marianopolis.edu/c.belanger/quebechistory/docs/1982/17.htm>> [hereinafter "Kirby Memorandum"]; Tassé, *supra*, note 4, at 211-212, 239.

⁶ See Adam Dodek, "Where Did (Section) 1 Come From? The Debates over the Limitations Clause at the Special Joint Committee of the Senate and the House of Commons on the Constitution, 1980-81" (2010) 27 NJCL 77, at 81-82: "By one account, the establishment of the Joint Committee was a Machiavellian power play by the federal government to strengthen its hand against the recalcitrant provinces".

And see Christopher Page, *The Rules of Public Opinion Research in Canadian Government* (Toronto: University of Toronto Press, 2006), at 89: "With federal-provincial negotiations stalled, the federal government laid the groundwork for acting unilaterally, and in October 1980 it established a joint parliamentary committee to help legitimate the action".

⁷ See Lorraine Weinrib, "The Canadian Charter's Override Clause: Lessons for Israel" (2016) 49 Israel L.R. at 76: "The federal Conservative Party turned to the national Parliament to further obstruct Trudeau's plans, insisting upon the creation of a Special Joint Committee of the national Parliament to consider the draft text of the Charter. Trudeau reluctantly complied".

And see Romanow, Whyte & Leeson, *supra*, note 3, at 247: "Largely through the efforts of the Conservatives, the government was forced to support the establishment of a Joint Parliamentary Committee to consider the report on the proposed resolution".

⁸ For example, House of Commons Debates, 32nd Parl., 1st Sess., No. 4 (October 15, 1980), at 3709 (Bill Blaikie) [hereinafter "House Debates No. 4"].

Liberals' timeline as having been established in good faith and affirmed his party's support for the substance of the Resolution.⁹ The support of the NDP was crucial to the Liberals' sense of legitimacy, as the NDP and Conservatives controlled the West, where the Liberals had failed to secure a single seat.¹⁰

With the Liberals commanding a majority in both Houses, the Conservatives' only option was to delay the Resolution and increase public and press scrutiny, thereby pressuring the Liberals into returning to the negotiating table with the provinces. For two weeks, the Conservatives attempted to filibuster the motion. Then on October 22, 1980, the Liberals moved for closure, a rarely-used procedural device that brings a debate to a close. On October 23, the final day of debate, an explosive argument ensued in the early hours of the morning as the Speaker attempted to call the vote for the motion to establish the committee. Members angrily demanded the right to be heard, engaged in shouting matches, and accused the Liberals of acting like Nazis.¹¹ The final vote took place at 2:00 a.m. on October 24, 1980, and the motion was carried 156 to 83.¹²

The Senate began its deliberation on October 27, 1980. Several senators expressed concern regarding the entrenchment of the Charter in the Constitution, arguing that it would force impartial courts to wade into the political arena and expand judicial power over traditional domains of Parliament.¹³ Another frequent concern was the Liberals' decision to seek permission from Westminster, which some senators argued was unacceptably reminiscent of the country's colonial past.¹⁴ The Honorable Jacques Flynn, Leader of the Opposition, repeated the House Conservatives' concern that the constitutional package was being pushed

⁹ House Debates No. 3, *supra*, note 2 (October 6, 1980), at 3297, 3299 (Ed Broadbent): "If you [Prime Minister Trudeau] say there is a mood in the country that we ought to deal with it now, then I say, with respect, to the Leader of the Opposition that we have to act now.... [T]here is much in this proposal that is attractive to us, not because it comes from a Liberal Prime Minister but because it reflects resolutions and motions passed by my party over the years. If the government will show flexibility in committee and accept some amendments, we can have a decent piece of legislation".

¹⁰ Natural Resources Canada, "Results of the 32nd Federal Election, February 18, 1980", online: <<http://geogratis.gc.ca/api/en/nrcan-mcan/ess-sst/15629d81-5020-5932-957f-afda9befa669.html>>.

¹¹ Robert Sheppard & Michael Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Macmillan of Canada, 1984), at 138; and Hansard, 4050-4051.

¹² House Debates No. 4, *supra*, note 8 (October 23, 1980), at 4052-4053.

¹³ *See, for example*: Debates of the Senate, 32nd Parl, 1st Sess., No. 1 (October 28, 1980), at 991-992 (Senator Walker) and at 1031 (Senator Nurgitz) [hereinafter "Senate Debates No. 1"].

¹⁴ *See, for example: Id.* (October 29, 1980), at 1020 (Hon Duff Roblin); (October 30, 1980), at 1070 (Senator Wood) and at 1078 (Senator Donahue).

too quickly and with too little consultation, and accused the Liberals of plotting the failure at the September Conference so that they could move ahead unilaterally.¹⁵ Nevertheless, after six days of debate, the motion carried in a vote of 45 to 29.¹⁶

Thus, the Special Joint Committee on the Constitution of Canada was born.

III. PROCEEDINGS OF THE COMMITTEE

1. Composition

The Committee was composed of 15 MPs and 10 Senators, along the following party divisions: eight Liberals, five Conservatives and two NDPs from the House; and seven Liberals and three Conservatives from the Senate. This reflected the composition of the House and Senate at the time.¹⁷ Twelve members could form a quorum (in effect giving the Liberals a veto, should they vote as a bloc). MP Serge Joyal and Senator Harry Hays (both Liberals) were chosen by the Committee as co-chairmen.

2. Work of the Committee

The Committee met 106 times over 56 sitting days, from November 6, 1980 to February 9, 1981, spanning a total of 267 hours. Advertisements were published in major newspapers to invite the public to submit written briefs; from these submissions, the Committee chose who to invite to make oral presentations. The Committee received briefs, telegrams and letters from 914 individuals and 294 groups,¹⁸ and heard oral presentations from 104 individuals and groups, four Premiers (Nova Scotia, New Brunswick, Prince Edward Island, and Saskatchewan), and representatives of two territories (Yukon and Northwest Territories). The vast majority of the

¹⁵ *Id.* (October 27, 1980), at 967-972 (Hon. Jacques Flynn).

¹⁶ *Id.* (November 3, 1980), at 1147.

¹⁷ The composition of the House as at September 30, 1980 was 145 Liberals, 102 Conservatives and 32 NDPs; and the composition of the Senate as at October 25, 1980 was 64 Liberals, 26 Conservatives, 0 NDPs, and four others. See: Library of Parliament, "Party Standings (1867 to Date)", online: <<http://www.loppar.gc.ca/parlinfo/lists/PartyStandingsHistoric.aspx?>>.

¹⁸ The Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (February 13, 1981) at 57:5 [hereinafter "Committee"].

briefs and presentations addressed the Charter, which quickly became the central focus of the Committee's work.

The stages of the Committee were as follows:

Dates	Committee Actions
November 6, 1980	Discussion of procedural rules.
November 7-13, 1980	Presentations and questioning of Minister of Justice Jean Chrétien, Deputy Minister of Justice Roger Tassé, and Assistant Deputy Minister of Justice Barry Strayer.
November 14, 1980- January 9, 1981	Presentations from individuals, groups and government representatives.
January 12-February 13, 1981	Clause-by-clause consideration of the Resolution, including questioning of Chrétien, Tassé and Strayer.

3. Televising the Proceedings

Broadcasting of committee proceedings had been legal since 1977, but no committee as yet had its proceedings broadcast.¹⁹ The Liberals were initially not keen to make this committee the first. The Conservatives, supported by the NDP, in the House pushed repeatedly for broadcasting — a debate one Conservative MP described as a “tremendous” battle.²⁰

The Liberals' position began to falter by November 12, 1980, when Trudeau indicated that, after private discussions with his cabinet, the Liberals were willing to meet the House leaders of the other parties to negotiate the matter.²¹ On November 13, 1980, the Liberals moved in the House and the Senate to introduce television to the Committee's proceedings.²² On November 17, 1980, the Committee became the first in Canadian history to have its proceedings broadcast to the public.²³

¹⁹ Library of Parliament, *Television and the House of Commons*, BP-242E (2005), at 8, online: Library of Parliament <<http://www.lop.parl.gc.ca/content/lop/ResearchPublications/bp242-e.pdf>>.

²⁰ House Debates, 32nd Parl., 1st Sess., No. 7 (March 4, 1981), at 7904 (John Fraser) [hereinafter “House Debates No. 7”].

²¹ *Id.* (November 12, 1980), at 4583 (Pierre Trudeau).

²² *Id.* (November 13, 1980), at 4647-4648; and Senate Debates No. 1, *supra*, note 13 (November 13, 1980), at 1226.

²³ Committee, *supra*, note 18 (February 13, 1981), at 57:4.

4. Timeline

A second battle concerned the timeline for the Committee to complete its work. The Liberals had hoped that the Committee would submit its report by December 9, 1980—just over a month from the date of its first meeting. However, after pressure from the Conservatives and NDP the Committee extended the deadline to February 13, 1981.

5. Public Input

Thanks to television coverage and the prolonged timeline, the Committee's work captured the public's attention, reaching over three million people and generating widespread enthusiasm for a stronger Charter.²⁴ This public engagement was due largely to pressure from the Conservatives, as part of their strategy to delay and publicize the government's actions. There was always a risk that this strategy could backfire, and that seemed to be exactly what happened. Rather than stoking public outrage against the Liberals' disregard for federalism, the work of the Committee garnered strong public support and lent credence to the Liberals' portrayal of the recalcitrant provinces as power-hungry nay-sayers. Strayer would later say that this public support ultimately allowed the Liberals to realize their original vision for a strong Charter rather than the diluted one that they had been forced to table in October 1980 as a result of provincial compromise.²⁵ All this is not to say that the Conservative strategy was a complete failure — although they continued to push for provincial participation even to the very end, increasing public engagement and consultation should have been as much an end of itself as a means, and in that they were undoubtedly successful.

IV. RECOMMENDATIONS OF THE COMMITTEE

In response to suggestions made by various individuals and groups before the Committee, the Department of Justice tabled an amended draft of the Resolution before the Committee on January 12, 1981, the first day of the Committee's clause-by-clause consideration. The Committee then analyzed the amended draft and made further recommendations,

²⁴ House Debates No. 7, *supra*, note 20 (February 19, 1981), at 7471-2 (Serge Joyal).

²⁵ Barry Strayer, *Canada's Constitutional Revolution* (Edmonton: The University of Alberta Press, 2013), at 252.

which it submitted in its report dated February 13, 1981. Below is a review of certain significant amendments.

1. Limitation Clause (Section 1)

Section 1 underwent numerous changes from its first draft dated August 22, 1980 to the final version we know today. The first draft was presented by the Liberal government to the provincial Premiers on August 22, 1980.²⁶ The Premiers proposed an amended version on August 29, 1980 that, in their opinion, was more respectful of parliamentary supremacy. The draft that survived in the October 6, 1980 Resolution partly reflected their wishes.

August 22, 1980 draft	August 29, 1980 draft	October 6, 1980 draft
The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society.	The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free society living under a parliamentary democracy.	The Canadian Charter of Rights and Freedoms recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

More than any other section, section 1 was the target of virulent criticism by human rights groups. Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission, called section 1 “seriously flawed” and entreated the members of the Committee “not to let this bill into Parliament with Section 1 in its present form”.²⁷ The Canadian Bar Association proposed the complete elimination of section 1, fearing that “it might destroy the entire purpose” of the Charter.²⁸ The National Action Committee on the Status of Women

²⁶ Strayer, *id.*, at 252-255.

²⁷ Committee, *supra*, note 18 (November 14, 1980), at 5:24.

²⁸ *Id.* (November 28, 1980), at 15:7.

famously dubbed section 1 “the Mack truck clause” for being so broad as to allow a Mack truck to drive right through the Charter.²⁹ In total, 46 groups and 26 individuals made written submissions on section 1, with 38 groups and 17 individuals rejecting it.³⁰

The central fear of human rights groups was that any legislation passed by Parliament would be “generally accepted”, since Parliament is the representative of the people. As Fairweather argued before the Committee, both the internment of Japanese Canadians during WWII and the Chinese head tax were generally considered acceptable at the time they were passed.³¹

Minister Chrétien, responding to the outpouring of criticism, agreed to adopt an amendment (January 12, 1981) similar to the ones proposed by the Canadian Human Rights Commission and the Canadian Civil Liberties Association.

Comparison between October 6, 1980 and January 12, 1981 drafts

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits ~~as are generally accepted~~ prescribed by law as can be demonstrably justified in a free and democratic society ~~with a parliamentary system of government~~.

Section 1 was thus adopted by the Committee without further amendment, and remained the same into the final draft.

2. Property Rights (Section 7)

Section 7 was ultimately adopted into the Charter unchanged from the October 6, 1980 draft, but it bears noting the partisan controversy that the fight over property rights stirred in the Committee. Citing the need to protect the “family farm, family business and family home”, Conservative MP Perrin Beatty moved to add property rights into section 7, as follows:

Everyone has the right to life, liberty, ~~and~~ security of the person and enjoyment of property and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The NDP protested what they saw as the inappropriate addition of economic rights designed to protect large corporations in a Charter meant

²⁹ *Id.* (November 20, 1980), at 9:58.

³⁰ *Id.* (February 13, 1981), at 57:94.

³¹ *Id.* (November 14, 1980), at 5:12.

to protect individual freedoms.³² MP Svend Robinson asked why the right to property should supersede other economic and social rights, like the right to clean air and the environment. Backed by submissions from the Canadian Bar Association and Professor Tarnopolsky (a member of the United Nations Human Rights Commission), Robinson argued that entrenched property rights could have unintended consequences, such as prohibiting the collection of taxes.³³ Robinson further lambasted the Conservatives as hypocrites for attempting to “ram” the provision “down the throats of provincial governments”, which hold jurisdiction over property rights under the Constitution.

The Liberals initially appeared sympathetic to the addition of property rights to section 7, but eventually Minister Chrétien, who had been absent during an illness, returned to the Committee and insisted that the Liberals could support no such addition, on the basis that the provinces had vehemently rejected the idea.³⁴

Without evidence either way, it is impossible to say for certain whether the Liberals’ abandonment of entrenched property rights was motivated by concern for provincial rights, NDP support, or the testimony of groups like the Canadian Bar Association. Though the motive may be unclear, the outcome was the exclusion of property rights from the Charter.³⁵

3. Legal Rights (Sections 7-14)

A number of important changes were made in the January 12, 1981 draft of sections 7-14, again directly reflective of testimony from various groups and individuals before the Committee. In summary, some of the most important ones were:

1. the removal of the qualifier “except on grounds, and in accordance with procedures, established by law” from sections 8, 9, and 11(e). The qualifier, which is a standard of “legality”, was replaced with the standard “unreasonable” in section 8, “arbitrarily” in section 9, and “without just cause” in section 11(e);
2. the addition of the right to be informed of one’s right to retain counsel in section 11(b);

³² *Id.* (January 23, 1981), at 44:17-22.

³³ *Id.*, at 44:27-28.

³⁴ *Id.* (January 26, 1981), at 45:9-10. *See also* Tassé, *supra*, note 4, at 204.

³⁵ The Conservatives’ motion to add property rights was defeated 15-8, by 13 Liberals and two NDPs against eight Conservatives (Committee, *supra*, note 18 (January 27, 1981), at 46:4-5).

3. the addition of the right not to be compelled as a witness against oneself in section 11(c);
4. the addition of the right to a trial by jury for offences with a maximum punishment of five or more years in section 11(f); and
5. the addition of the right not to have voluntarily-given evidence be used to incriminate oneself in subsequent proceedings in section 13.

It is worth noting that, despite the animosity between the Conservatives and NDP as a result of the fight over property rights, the two parties became aligned against the Liberals on two interesting matters regarding legal rights to which the Committee turned its mind: the deportation of non-citizens and the right to legal aid.

The Conservatives, supported by the NDP, moved to add protection against arbitrary deportation to section 9. Minister Chrétien opposed the motion on the basis that Canadian citizens were already protected against removal from the country by section 6(1) (mobility rights), and the government didn't want to be entangled in years of court battles for deporting illegal aliens.³⁶ The Conservatives protested that protection against "arbitrary" deportation is a low standard which even illegal aliens should be afforded, and that such a standard would not impact the normal course of the immigration department's work of legally deporting aliens.³⁷ The Conservatives and NDP then pressed Chrétien on two issues. First, they argued that section 6(1) does not protect landed immigrants from deportation. Chrétien first countered that section 6(1) would protect landed immigrants, then changed course by claiming that landed immigrants would be protected by the *Immigration Act*.³⁸ Second, the Conservatives and NDP recalled the denationalization and internment of Japanese-Canadians during WWII, and argued that the Charter as drafted would not protect Canadian citizens from being first denationalized and then deported. Chrétien first responded that denationalization would be illegal, and then argued that denationalized citizens could bring a case under sections 1 and 6(1) to protest their denationalization.³⁹ The motion was ultimately voted down along party lines (10-14), with the end result being that the right against arbitrary deportation for both legal immigrants and illegal aliens was not entrenched in the Charter.⁴⁰

³⁶ Committee, *supra*, note 18 (January 27, 1981), at 46:111-113.

³⁷ *Id.*, at 46:112.

³⁸ *Id.*, at 46:115-116.

³⁹ *Id.*, at 46:119-122.

⁴⁰ *Id.*, at 46:111-124.

The NDP, supported by the Conservatives, moved to add the right to retain counsel regardless of financial circumstance to section 10. Mr. Robinson argued that, for those who could not afford to hire counsel, the right to retain counsel was “a hollow right”. “If this is to be a Charter for all people in Canada and not just for those who can afford to retain a lawyer”, Mr. Robinson argued, “if there is to be any justice for the poor”, then the right to retain counsel cannot be discriminatorily applied based on wealth.⁴¹ Liberal MP Jean Lapierre responded that determining the eligibility criteria for legal aid would be an intrusion into provincial rights, and that the current system of legal aid was sufficient.⁴² At the least, the Conservatives felt, there should be a right to be informed that one has the right to access legal aid. Chrétien responded that it was inappropriate for the Charter to direct provinces on how to administer legal aid.⁴³ Liberal Senator Jack Austin, seemingly torn, equivocated that “there must surely come a time, I do not believe it is at this moment, but surely there is a time in the constitutional amendment process when this particular provision must be implemented by our successors”.⁴⁴ The motion was defeated 9-13 along party lines, and the phrase “regardless of financial circumstances” was never added to the right to counsel.

4. Equality Rights (Section 15)

Changing the prohibited grounds of discrimination from a closed-off list to an open-ended one was the most significant change to section 15 in the January 12, 1981 draft.

Comparison between October 6, 1980 and January 12, 1981 drafts

- (1) ~~Everyone has the right to equality~~ Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination ~~because of and, in particular, without discrimination based on~~ race, national or ethnic origin, colour, religion, ~~age or sex or age~~.
- (2) ~~This section~~ Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged ~~persons or groups~~ individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex or age.

⁴¹ *Id.*, at 46:134.

⁴² *Id.*, at 46:129.

⁴³ *Id.*, at 46:131.

⁴⁴ *Id.*, at 46:133.

This was a change that had been recommended by the Canadian Human Rights Commission, as well as other witnesses, and a welcome one that passed without much debate in the Committee.

The only subsequent addition by the Committee was “mental or physical disability” to the enumerated grounds, which the Conservatives and NDP supported but which the Liberals had initially resisted. Though Minister Chrétien felt that disability would be captured by the open-ended list, he expressed hesitation in enumerating grounds that were “in the process of maturing”.⁴⁵ Whereas grounds of discrimination based, for instance, on race and sex were well-established and “mature”, other grounds had yet to reach that stage. But, by the time that the Committee had reached section 15 in its clause-by-clause consideration, Mr. Chrétien had apparently changed his mind and the Conservative motion to add “mental or physical disability” passed unanimously without debate.⁴⁶

The NDP attempted to expand the list of enumerated grounds further to include marital status, sexual orientation and political beliefs, as suggested by the National Action Committee on the Status of Women (“NAC”), but these were roundly rejected by the Conservatives and Liberals for being either too vague or unnecessary.⁴⁷ Conservative MP Jake Epp grouched that the NDP was trying “to hang every barnacle and every eavestrough and every coat of paint” on the Charter.⁴⁸

Women’s groups, led by NAC, had unsuccessfully pushed for a two-tiered section 15, which would provide that enumerated grounds of discrimination (which are based on “immutable characteristics”) would never be subject to “reasonable limits” or “reasonable distinctions”, while all other grounds would be subject to such limits. The desire for an untouchable tier arose out of a deep sense of distrust of and disappointment with the courts, which had for years interpreted non-discrimination provisions detrimentally to women. There is some suggestion that this initiative was ultimately defeated because of the enumerated ground of “age”.⁴⁹ Neither women’s groups nor the Department of Justice felt it appropriate to delete “age” from the enumerated list, yet some legislation must necessarily make distinctions based on age.

The recommendation of the Committee on section 15 was ultimately adopted into the final draft unchanged.

⁴⁵ *Id.* (January 12, 1981), at 36:30-31.

⁴⁶ *Id.* (January 28, 1981), at 47:90-91.

⁴⁷ *Id.* (January 29, 1981), at 48:34.

⁴⁸ *Id.* (January 29, 1981), at 48:32.

⁴⁹ Romanow, Whyte & Leeson, *supra*, note 3, at 254-255.

5. Enforcement (Section 24)

October 6, 1980 draft	January 12, 1981 draft	February 13, 1981 Committee's recommendation
<p>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.</p> <p>26. No provision of this Charter, other than section 13, affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto.</p>	<p>24. Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.</p>	<p>24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.</p> <p>(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.</p>

Section 24, the enforcement and remedy provision, was not included in the October 6, 1980 draft. Section 25 of that draft, known as the

“primacy of the Charter” clause, was removed and replaced by section 24 of the January 12, 1981 draft, which would eventually become section 24(1) of the final draft. With respect to the admissibility of evidence, the October 6, 1980 draft contained a provision that the Charter could not affect laws “respecting the admissibility of evidence in any proceedings”, which was presumably an olive branch to the provinces. In the face of criticism from groups including the Canadian Civil Liberties Association and the Canadian Human Rights Commission, the January 12, 1981 draft dropped this provision. Section 24(2), the evidentiary remedy provision, was added by a Liberal motion in the Committee. Following the recommendation of the NDP, the Liberal motion to add 24(2) was amended by replacing the permissive “may” with the mandatory “shall”, which obligates courts to exclude evidence whose admission would bring the administration of justice into disrepute. Aside from a minor grammatical change in section 24(2), section 24 carried into the final draft unchanged from the Committee’s recommendation.

6. Aboriginal Rights (Sections 25, 35)

Aboriginal rights were conspicuously missing from the October 6, 1980 draft, aside from a brief mention in section 24 (undeclared rights) that the Charter should not be construed as denying the existence of any undeclared rights, “including any rights or freedoms that pertain to the native peoples of Canada”. Prime Minister Trudeau indicated that section 24 was intended as a negative safeguard for Aboriginal rights, and that the entrenchment of positive rights would be an item of priority in the next phase of constitutional amendment after patriation was complete.⁵⁰ The reasoning for delaying work on Aboriginal rights appeared to be that the Liberals wanted more time to achieve consensus among disparate Aboriginal groups over the definition of Aboriginal rights. However, Aboriginal groups protested that the government had shown little initiative in actuating this worthwhile goal.⁵¹ The Native Council of Canada (“NCC”) also pointed out, despite the government’s ostensible optimism that entrenching

⁵⁰ House Debates No. 4, *supra*, note 8 (October 17, 1980), at 3778 (Pierre Trudeau); Committee, *supra*, note 18 (December 2, 1980), at 17:8 (quoting a letter from Trudeau to Aboriginal groups).

⁵¹ See, for example, National Indian Brotherhood, “Brief of the National Indian Brotherhood” (November 11, 1980), at 8, online: History of Rights <<http://historyofrights.ca/wp-content/uploads/committee/nib.pdf>>; and Committee, *supra*, note 18 (December 2, 1980) 17:107-109 (presentation of the Native Council of Canada).

Aboriginal rights “will become easier rather than harder” after patriation,⁵² the Kirby Memorandum had been starkly forthright that “[e]ntrenching [native] rights will be enormously difficult after patriation”.⁵³ The NDP led the charge in the House against the government for relegating Aboriginal rights to an afterthought in the constitutional amendment process.⁵⁴

The Committee heard from 37 witnesses recommending the entrenchment of Aboriginal rights, including 16 or 17 that represented Aboriginal peoples.⁵⁵ Witnesses asked for, among other things, positive recognition of Aboriginal rights, treaty rights, right to self-government, and rights created by the Royal Proclamation of 1763; and a participatory role for Aboriginals in the amending formula on issues pertaining to them.⁵⁶ The three largest national Aboriginal groups (the NCC, the National Indian Brotherhood (“NIB”), and the Inuit Committee on National Issues (“ICNI”)) aligned on all these recommendations.⁵⁷

Aboriginal groups continued their lobbying efforts, including the dispatch of a “constitutional train” that carried Aboriginal delegates thousands of miles from across the country to speak to the prime minister on November 28, 1980.⁵⁸ In mid-January, Mr. Broadbent informed Prime Minister Trudeau in private that the NDP might withdraw their support unless the government moved on the issue of Aboriginal rights.⁵⁹ By January 30, 1981, the government had reached an agreement with the NIB, the NCC and the ICNI⁶⁰ on a rephrased section 24 (now section 25) that makes explicit reference to the Royal Proclamation of 1763, as well as the introduction of a new section 33 (now section 35) affirming Aboriginal and treaty rights. The amendments

⁵² House Debates No. 4, *supra*, note 8 (November 13, 1980), at 4688 (Jim Manly, quoting a letter from Trudeau to Aboriginal groups).

⁵³ Committee, *supra*, note 18 (December 2, 1980), at 17:111; House Debates No. 5, *infra*, note 58 (November 20, 1980), at 4912 (Lorne Greenaway, quoting the Kirby Memorandum).

⁵⁴ See, for example: House Debates No. 4, *supra*, note 8 (October 21, 1980), at 3888-3890 (Peter Ittinuar).

⁵⁵ Committee, *supra*, note 18 (January 30, 1981), at 49:90.

⁵⁶ See, for example: National Indian Brotherhood, *supra*, note 51, at 14-15.

⁵⁷ Committee, *supra*, note 18 (December 2, 1980), at 17:116; National Indian Brotherhood, *supra*, note 51, at appendix p.1-7.

⁵⁸ House Debates No. 5 (November 28, 1980), at 5146 (F. Oberle) and (December 1, 1980), at 5185 (Albert Cooper and Ed Broadbent).

⁵⁹ Tassé, *supra*, note 4, at 261.

⁶⁰ Committee, *supra*, note 18 (January 30, 1981), at 49:88-89 (the text refers to the “Inuit Tapirisat of Canada”, which is the organizing force behind the ICNI).

were introduced on behalf of the government by NDP MP Peter Ittinuar, the first Inuk MP, and were approved unanimously.⁶¹

V. PARTISANSHIP IN THE COMMITTEE

One remarkable characteristic of the Committee was the level of non-partisanship displayed by its members. This was particularly striking given that the debate in the House of Commons had been ludicrously partisan. Conservative members had invoked Nazi Germany and the Soviet Union to describe the Liberals' actions; Prime Minister Trudeau had variously been called a "dictator", a "fanatic", and even "Hitler".⁶² The Conservatives came into the Committee unsure whether they even wanted to participate. Conservative MP James McGrath expressed to the Liberals in no uncertain terms that the Resolution would remain "totally unacceptable to us, despite any improvements which might be made".⁶³ Yet, despite the discouraging words, the Conservatives never acted to obstruct the clause-by-clause deliberations on the Committee. All three parties put forward proposals to improve and expand the Charter, often recalling and championing the suggestions that had been made by the witnesses that had appeared before them.

The members of the Committee expressed gratitude and gratification at the collegiality on the Committee. Mr. McGrath, perhaps the foremost agitator on the Committee, proclaimed that he was "touched by the degree of collegiality and the spirit of cooperation that had developed in this Committee". He praised the "cooperation and the fellowship" of the members, calling it one of the most outstanding experiences of his political career. NDP MP Lorne Nystrom contrasted his frustration with party discipline in the House, which rendered individual members into mere "rubber stamps for party establishments". He hoped that the Committee could be the start of "a new chapter in the evolution" of Parliament.

This is not to say that the Committee was a haven of co-operation in which party politics never played a role. Noticeably, the voting patterns were often along party lines. The Liberals made 58 motions and all 58 were approved; the Conservatives made 22 and seven were approved; and the NDP made 43 and two were approved. The greatest strain on the

⁶¹ *Id.*, at 49:9-10. Lest this account leave the reader with the impression of complete consensus, it bears mention, though it is beyond the scope of this article, that these sections remained a source of controversy long after the Committee stage had ended.

⁶² House Debates No. 4, *supra*, note 8 (October 22-23, 1980), at 3948, 4050.

⁶³ Committee, *supra*, note 18 (January 12, 1981), at 36:26.

continued co-operation of the Committee members came during the property rights debate, after which Mr. Epp accused the Liberals and NDP of conspiring to defeat any and all Conservative motions. The strain was subsequently diminished somewhat when the NDP and Conservatives allied together against the Liberals on certain legal rights, then diminished further when the Liberals agreed to accept the Conservatives' amendments on sections 14 and 15. Mr. McGrath proclaimed that he was "speechless"⁶⁴ and Conservative MP David Crombie jokingly exclaimed, "I am not sure we can take this prosperity any longer!"⁶⁵

Nevertheless, political gamesmanship was noticeably absent. Despite the Conservatives' accusation, the NDP and Liberals never appeared to mount a co-ordinated effort to shut out the Conservatives. The Conservatives never attempted to derail the discussions, instead making genuine and substantive contributions with a goal to strengthening the Charter. Furthermore, it is worth considering that a small degree of adversity in a system designed to be adversarial is not necessarily a negative thing; to the contrary, pushback by the NDP and Conservatives against the Liberals did manage to achieve some important gains for the Charter, such as the expansion of equality rights and Aboriginal rights.

There are a few possible reasons why the Committee was able to avoid the stratagems that seem to characterize party politics. First, the monumental importance of the Constitution seemed to imbue members with a sense of duty and solemnity. Many members acknowledged that this was no run-of-the-mill debate, but rather, an historic moment for Canada and a humbling experience for those involved in its making. Members often described their work as a "duty", a "responsibility", and an "obligation" owed to the people of Canada. For instance, Liberal MP Ron Irwin recalled the members of the caucus reminding him, "we are not Liberals going in there; we are Canadians. This is your first obligation, not to your party, not to your government, not to the Leaders, but to the people of Canada". That sense of patriotic duty may have suppressed some of the urges towards partisan one-upmanship.

Second, the structure of the Committee itself, with its focus on the substance of the Resolution rather than the procedure, seems to have distinguished it from debates in the House. While the Conservatives continued to bristle against the Liberals' unilateral decisions in the House,

⁶⁴ Committee, *id.* (January 28, 1981), at 47:89.

⁶⁵ *Id.*, at 47:90.

the Committee's work focused on making substantive amendments, particularly to the Charter. This was an important distinction, as all three parties were aligned on the concept of a strong Charter, and the majority of the partisanship arose regarding the method of patriation.⁶⁶ Mr. Irwin expressed this feeling by analogizing it to the flag debate: "[w]e are past the point on whether we were going to have a flag or not; we are talking about what colour it is going to be or what the sign is going to be. I think that is marvellous for Canada." His sentiments were likely a sliver too optimistic, since the Conservatives had not yet conceded the debate on whether there would be unilateral patriation in the first place, but, at least within the Committee, Mr. Irwin's analogy was instructive — the members of the Committee were not there to debate whether they should have patriation, but rather what would be the substance of the constitutional package to be patriated. To this end, the strict objectivity and rigid adherence to rules displayed by the co-chairmen were also important in keeping the Committee focused on its substantive task. Conservative MPs recognized that the co-chairmen were largely responsible for setting the deliberative tone of the Committee and expressed their gratitude both in the Committee and the House.⁶⁷

Third, the influence of television cannot be underestimated. Senator Austin would later reflect that the public scrutiny created by television forced the Committee members to be more thoughtful and reasoned policymakers, rather than the shallow showmen that the Liberals had initially feared. He recounted:

The television eye raised the stature of the whole proceedings.... All of us began to feel that with the country watching, truly watching, at a level that was serious and intimate, we had to be better than we ever had been before in bringing forth our own view of things. Well, to be better means to think more deeply, to be more careful, to be more analytical.... So TV turned out to be the best discipline.⁶⁸

The television scrutiny that the Conservatives fought for likely also constrained their ability to be obstructionist. It became obvious that the people wanted a strong Charter.⁶⁹ The witnesses who appeared before the

⁶⁶ Nathan Nurgitz and Hugh Segal, *No Small Measure: The Progressive Conservatives and the Constitution* (Ottawa: Deneau Publishers, 1983), at 74-75.

⁶⁷ See House Debates No. 7, *supra*, note 20 (March 4, 1981), at 7904 (John Fraser); Committee, *supra*, note 18 (January 9, 1981), at 35:78.

⁶⁸ Sheppard and Valpy, *supra*, note 11, at 142.

⁶⁹ A Gallup poll conducted in April 1981 showed that 80 per cent of respondents wanted an entrenched Charter of Rights. See: Gallup, "Public Opinion Polls" (1981), online: <<http://odesi1.scholar>

Committee, by and large, wanted a strong Charter. Deputy Justice Minister Roger Tassé would later recall the unexpected boon that television coverage presented to the Liberals, boosting public demand, not only for a Charter, but for the entire patriation process.⁷⁰ The Conservatives became aware of this public sentiment, and perhaps made the strategic decision to restrict the fight over patriation to the House, leaving the Committee for substantive debate.

VI. AFTERMATH

The draft recommended by the Committee in its report would be largely adopted into the final draft of the Charter unchanged. Nevertheless, there were a few subsequent changes; for instance, a preamble recognizing the “Supremacy of God” was added at the insistence of the Conservatives, an ameliorative provision was added to qualify mobility rights, and section 28 guaranteeing equality for men and women was added thanks to the continued advocacy of women’s rights groups. Perhaps the most significant addition was section 33, the notwithstanding clause. The clause was added as a last compromise between the Liberals and the provinces in an attempt to reach a “substantial degree of provincial consent” as required by a Supreme Court decision regarding the legality of unilateral patriation, rendered on September 28, 1981.⁷¹ Section 33 would remain “an enduring source of regret” for Trudeau.⁷² *The Constitution Act, 1982*, with the support of the federal government and every province except Quebec, was approved by the United Kingdom Parliament on March 25, 1982 and proclaimed in force by Queen Elizabeth II in front of Parliament Hill in Ottawa on April 17, 1982.⁷³

VII. CONCLUSION

Though now relegated to obscurity, the work of the Committee and its contribution to the patriation of the Constitution was very important

portal.info/webview/>. Other opinion polls also consistently showed strong support for the Charter. See: Page, *supra*, note 6, at 88-89 and 197-198.

⁷⁰ Page, *id.*, at 90; Tassé, *supra*, note 4, at 267.

⁷¹ *Re: Resolution to Amend the Constitution*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753 (S.C.C.), online: <<https://scc-csc.lexum.com/scc-csc/en/item/2519/index.do>>.

⁷² Strayer, *supra*, note 25, at 270.

⁷³ James Ross Hurley, *Amending Canada’s Constitution: History, Processes, Problems and Prospects* (Ottawa: Canada Communication Group - Publishing, 1996).

indeed. Deputy Minister of Justice Roger Tassé, would later reflect that, without the public enthusiasm generated by the Committee's proceedings, the patriation of the Constitution in 1982 might well have failed entirely, mired in intractable disputes between the federal parties and the provinces. The intense public scrutiny breathed new life into the patriation debate, and changed the terms of the debate from the oft-inaccessible subject of federalism to the comprehensible and popular one of human rights. Furthermore, the Committee's work not only resulted in an unprecedented and candid role for the public, but also encouraged an air of intellectual deliberation among the members of the Committee that was reflected in the thoughtful and congenial atmosphere of its proceedings.

However, it is also worth noting that while the Canadian public did reap the rewards of this process, both the Liberals and the Conservatives succeeded in using the Committee to achieve certain political victories. The Conservatives were able to prolong the Committee's proceedings and frustrate the expedited timeline that the Liberals had hoped for, ultimately forcing the Liberals to submit to a Supreme Court reference and a further round of negotiations with the provinces. The Liberals were able to capitalize on populist sentiment for the Charter, allowing them to realize a stronger Charter that was more faithful to Trudeau's initial vision and to use the Charter as political leverage in the broader patriation debate.

