BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION:

Submission to the Parliamentary Committee
Studying the 1980 Constitutional Resolution

COMMENTS and RECOMMENDATIONS on the proposed
CANADIAN CHARTER of RIGHTS and FREEDOMS

The British Columbia Civil Liberties Association has long supported proposals for an entrenched Charter of Rights, most notably in the early 1970's when we carefully considered and, with some suggested alterations, approved the proposals suggested by Mr. Trudeau in his 1969 publication The Constitution and the People of Canada. This Association is eager to support entrenchment of a Charter of Rights which would affirm the rights and freedoms that we believe are fundamental for the Canadian people, and which would guide the legislatures and direct the courts of this country to protect and uphold those rights. We do not believe, however, that the Government's current proposal for a Canadian Charter of Rights and Freedoms can be supported in such terms.

Having examined the proposal as closely as possible in the time available before the Parliamentary hearings, the B.C.C.L.A. is convinced that the Government has so seriously compromised on the contents of the Charter that its significance as a charter of fundamental rights has been undermined and its protective power as an entrenched constitutional provision practically destroyed.

The B.C.C.L.A. is very concerned about the Government's failure to acquaint the Canadian people with the actual terms of the proposed Charter. Full public knowledge of and discussion about the provisions of the Charter have been obscured by political debates about the issue of entrenchment itself, with little attention paid to the substance of the document proposed for entrenchment. The Government's publicity documents have glossed over the contents of the Charter in a way that can only be termed misleading. The B.C. Civil Liberties

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Association does not wish to inject further hostility into present constitutional discussions that are already rife with partisan antagonisms. Nevertheless, this Association is compelled by its concern for the protection of citizens' rights to urge the Government to extend the time for Parliamentary consideration of the proposed Charter, and to make possible the revision of the Charter so that it can approximate in reality the claims that have been made for it, and meet the hopes of the Canadian people for a document of significance.

I. Illusory Protection of Fundamental Freedoms

Section 2 of the proposed Charter asserts that everyone has freedom of conscience and religion; freedom of thought, belief, opinion, and expression, including freedom of the press and other media of information; and freedom of peaceful assembly and of association. Certainly those are some of the most important fundamental freedoms that should be possessed by a democratic people, and we would want them guaranteed in any entrenched Charter of Rights. They are <u>not</u> guaranteed, however, in the present Government proposal.

The assertion of the named rights in the 1980 proposal is preceded by a limitation clause so ambiguous and general in scope that it could be used to encroach on any of the freedoms listed in Section 2, or to qualify any other provisions of the Charter. Section 1 "guarantees" the rights and freedoms set out in the Charter "subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government". This section reduces almost to nothing the concepts of entrenchment and of judicial review. It effectively hands back to Parliament the determination of how "fundamental" rights and freedoms are to be treated in Canada, and reduces the role of the courts to deciding whether any challenged limits on rights and freedoms are "reasonable" or "generally accepted".

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This section is an open invitation for legislative attempts at limiting fundamental freedoms when political hostilities are aroused; it is an equally open invitation for approval by traditionally conservative courts of legislative action that might otherwise be unconstitutional in regard to citizens' rights. Section 1 can only be read as an attempt to dis-entrench an affirmative Charter of Rights, and to entrench the doctrine of parliamentary supremacy.

The implications of Section 1 for minority rights are extremely disquieting. The rights of minorities to such basic freedoms as freedom of expression or freedom of association, for example, are subject to the will of a legislative majority. To argue that these minority rights are protected in this Charter because any limits on them must be "reasonable" is no argument at all. The courts are not asked to determine reasonableness in terms of any overriding constitutional principles; rather, what is "reasonable" is what is "generally accepted" by the majority. If this proposed Charter is to be taken seriously as a Charter of Rights by the Canadian People and their legislatures and courts, Section 1 must be deleted.

The B.C.C.L.A., by advocating the deletion of Section 1, is not arguing at this time that any limitation clause in a constitutional Charter of Rights would be unacceptable to us. We acknowledge, as we have before, that circumstances could arise which would be of sufficient threat to the life of a nation to justify temporary infringements of citizens' rights. Whether and, if so, how such circumstances and accompanying limitations on individual rights should be delineated within a constitutional Charter of Rights is a matter of continuing concern to us, and one on which we shall make a further submission to the Parliamentary Committee.* It is clear to us, however, that the limitation clause set out in Section 1 of the current proposal goes far beyond emergency powers, and would invite infringements of fundamental liberties in the ordinary life of the nation. That is unacceptable; and we cannot believe that we are alone in being concerned about such a proposition being entrenched in a Canadian constitution.

*See Appendix I.

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II. Inadequate Protection of Legal Rights

Sections 7 through 14 of the proposed Charter deal with Legal Rights, those primarily procedural rights which are often spoken of in terms such as "natural justice", "due process", or, as in the 1960 Canadian Bill of Rights, "principles of fundamental justice". Those rights are most popularly known for their application to such situations as arrest, searches and seizures, imprisonment, punishment, and so on. The B.C.C.L.A. is concerned about the wording and effect of several provisions throughout these sections of the proposed Charter; we are equally concerned about the absence of certain other provisions which we believe should be included.

A. Limitations within the Proposed Charter

Looking first at Section 8, we read that "Everyone has the right not to be subjected to search and seizure except on grounds, and in accordance with procedures, established by law" (emphasis ours). Those underlined words also qualify Section 9, which prohibits detention or imprisonment "except on grounds, and in accordance with procedures, established by law", as well as Section 11(d), which prohibits the denial of reasonable bail "except on grounds, and in accordance with procedures, established by law". We have repeated the phrase in order to emphasize how seriously it jeopardizes the rights to which it applies.

In regard to these crucial and sensitive areas of personal liberty - search, seizure, detention, imprisonment, and reasonable bail - any action by the authorities appears to be constitutional under these provisions so long as that action accords with grounds and procedures "established by law". Those words permit Parliament and provincial legislatures, and by their delegation, various administrative tribunals and agencies, to enact laws and adopt regulations and procedures covering the situations mentioned above without an overall concern for natural justice or any constitutional standard of reasonableness. The courts, in scrutinizing

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challenged activities of the police or customs officers, for example, would apparently be limited to determining whether those activities derived from some law, or regulation, etc. "established by law". If such a "law" were found, then the court scrutiny would end, and there could be no judicial determination of whether the law itself were just or constitutional.

Again, these legal rights, which Government publicity has led us to believe would be entrenched in our new Constitution, are not entrenched at all. They depend entirely on legislative enactments, and may be changed, or even deleted according to current political considerations and pressures. We urge the Government to change the provisions described above, and to give these crucial individual rights the status and protection they deserve in any free and democratic society, whatever its system of government.

B. Additions to the Proposed Charter

1. Search and Seizure on Reasonable Grounds and by Warrant Only.

The general problem discussed above in regard to the search and seizure provision of the proposed Charter has particular application because of current laws which permit search and seizure without any of the safeguards of a warrant. Canada is one of the few countries - if not the only one - that still permits the use of Writs of Assistance, documents which allow RCMP officers and others, in whose names the writs are issued, to search any person, at any premises, at any time, for any reason related to the legislation under which the writs were created, and to seize any goods related to such legislation. These powers of entry, search and seizure are created by writs still being issued under the Narcotics Control Act and Food and Drug Act, and by still extant writs under the Customs and Excise Acts.

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The B.C.C.L.A. has long advocated that such writs be abolished. The gross invasion of privacy which they permit on the flimsiest of excuses and the wide potential for their abuse make them an unjustifiable anachronism in a "free and democratic society". Entry, search and seizure are formidable powers available to the authorities. Apart from the most exceptional cases those powers should not be exercised without reasonable grounds for their use being approved by a judicial officer who permits a warrant to be issued for a particular person and/or place and time, and covering certain items. Section 8 of the proposed Charter should be worded in such a way that the privacy of a citizen's person and home can be invaded only by those officers who have warrants issued as suggested here.

2. Arrest on Reasonable and Probable Grounds Only

The provision dealing with detention and imprisonment (Section 9) requires mention again because of the ambiguity in the proposed Charter on the subject of arrest. If "detention" is read to include arrest itself (unlikely, but possible), then Section 9 is clearly inadequate to give a citizen any tangible rights regarding arrest. The Charter should include an unambiguous statement that no citizen can be arrested except on reasonable and probable grounds. It is possible that Section 7 of the proposed Charter is meant to cover arrest. That section provides that no one can be deprived of his/her liberty "except in accordance with the principles of fundamental justice". While the quoted words could be judicially interpreted to provide that reasonable and probable grounds are required for a valid arrest, our Association thinks that the power of arrest should not be left to judicial interpretation alone, especially of words that can have several meanings.

3. The Right to Remain Silent, and the Right to Counsel

As our Association interprets the provisions in the proposed Charter dealing with legal rights, there is no right

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given to the accused to remain silent either during informal proceedings prior to trial, or during the trial itself. No such right is mentioned in Section 10, which lists some rights of a person detained or arrested, nor in Section 11, which lists rights of a person charged with an offence. Compelled testimony and self-incrimination are covered in Section 13, but that section refers only to a "witness" and does not give any right to remain silent; it merely protects the witness from having compelled testimony used against him/her to incriminate him/her "in any other proceedings, except a prosecution for perjury, or for the giving of contradictory evidence". If applied to the accused, Section 13 is totally inadequate. It erodes the rights against self-incrimination that exist in Canada now. And even those current rights do not afford the protection which our Association believes should be guaranteed to the accused person in criminal proceedings.

In a society where the government truly respects the dignity and integrity of its citizens, protection against self-incrimination, or the right to remain silent, is one of the cornerstones of the system of criminal justice. In order to maintain a fair balance when the might of the state is focused on prosecuting a single individual, the justice system in democratic societies has demanded that the government seeking to punish the individual must produce the evidence against him by its own independent labours, rather than by the simpler, and often cruel expedient of compelling it from his own mouth.

The B.C.C.L.A. proposes that any entrenched Canadian Charter of Rights contain an unequivocal statement that the accused shall not be compelled to testify against himself at trial. We further propose that the right to remain silent be available from the time an individual is taken into custody or otherwise deprived of his liberty by the authorities, and that constitutional guidelines be included in the Charter to ensure that exercise of the right will be scrupulously honoured.

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Effective guidelines, which can be easily incorporated into Section 10 of the proposed Charter, would include the following procedural safeguards: prior to any questioning, a person arrested or detained must be told that he has the right to remain silent, that any statement he chooses to make may be used as evidence against him in a court of law, and that he has the right to have counsel present, either retained or appointed.

Besides adding the requirement of formal notice of the right to remain silent and of the consequences of waiving that right, these safeguards remove the ambiguity present in the proposed Section 10 regarding the right to counsel. The B.C.C.L.A. has long advocated that the law in Canada recognize the right of detained or arrested persons to have the assistance of counsel, whether or not that person has money available to "retain" such counsel. In the interests of simple justice, money should never be the determining factor when fundamental rights are at issue. If the rich or even moderately well-off have the right to counsel as soon as they are arrested or detained, this right must extend to everyone. Is it really still necessary to argue such a point?

4. The Exclusionary Rule

Not only does the Charter fail to provide a remedy for violations of certain rights, but it specifically prohibits the use of the only remedy that may sometimes be available - the exclusion of illegally obtained evidence.

The legal rights we have discussed above dealing with search and seizure, the right to remain silent and the right to counsel are fully meaningful only when they are joined together with a rule of procedure which excludes from consideration any evidence obtained when those rights have not been fully honoured.

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Canada tolerates a double standard on the part of law enforcement officials when its court system admits evidence that has been illegally or wrongfully obtained, and we believe that this double standard has been given constitutional approval through Section 26 of the proposed Charter of Rights and Freedoms. Section 26 states that "No provision of this Charter (with the exception of Section 13, discussed earlier) 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". In order to give full effect to the legal rights that we believe should be included in the Charter, the B.C.C.L.A. proposes that Section 26 be changed to include the assertion that illegally obtained evidence will not be admissible in judicial and quasi-judicial proceedings. At the very least, Section 26 should be deleted so that the Courts can,if they deem it appropriate, exclude evidence gained by means of a violation of the Charter.

The B.C.C.L.A. has long been convinced that convictions should not be based on illegally obtained evidence; such evidence is tainted, and its use discredits the whole judicial process. Prosecutions and convictions for illegal acts should not rest on grounds which are themselves tainted by illegality. The exclusionary rule, by itself, preserves a vital degree of integrity in the judicial process which is both visible and not achievable in any other way at this level of the judicial process.

We are not persuaded by those who claim that an exclusionary rule ties the hands of law enforcement officials and puts unreasonable limits on effective law enforcement; we know of no objective studies that support such claims. Are U.S. police forces, for example, any less effective than Canadian forces? We are more fearful that stricter constitutional protection of individual rights will not be reflected in police practices. It is our view, however, that court acceptance of illegally obtained evidence encourages the police to act illegally. While they perhaps would not be discouraged directly as much as we would like by the

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exclusionary rule, the rule does discourage prosecutors and judges from using the evidence, and that practical fact may have desirable effects on police methods of gathering evidence. The exclusionary rule is not perfect, and its use involves a certain cost. But the B.C.C.L.A. believes that this cost is small in comparison with the cost of leaving fundamental legal rights unprotected.

5. Right to a Fair Hearing

In his 1969 proposals regarding a Charter of Rights, Mr. Trudeau suggested that the Charter should guarantee "the right of a person to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations". Such a provision is included in the 1960 statutory Canadian Bill of Rights, but no such provision is included in the present Government proposals. The B.C.C.L.A. believes that such a provision should be included, and that its language should be changed so that statutory tribunals and administrative agencies are clearly covered by its wording. It is not only in criminal proceedings that individual rights need clarification and protection.

Citizens today face an array of governmental agencies which may reach into every aspect of their lives. In many instances, administrative decisions are made which affect a citizen directly and drastically, and which appear to him to be arbitrary, unfounded and wrong. Research by this Association has indicated that a citizen may have great difficulty in discovering the reasons for decisions which affect him adversely. Such decisions may be based on criteria which are not published, and which are available only to agency personnel. Appeal procedures are not well publicized, and when utilized, are rarely as satisfactory as independent tribunals. Appeals are usually heard within an agency by persons closely involved with the decision-making process - a system hardly conducive to unbiased, independent judgements.

Because of this proliferation of administrative and statutory tribunals and their effect on the lives of Canadian

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citizens, we believe that the "fair hearing provision as suggested by the Prime Minister in 1969 is too narrow in scope. It may be read to apply only to situations involving a dispute between two parties over pre-existing rights. Such a reading is obviously too narrow for the citizen who wishes to have his personal "rights and obligations" vis-à-vis an administrative agency clearly determined. The concept of a "fair hearing" should explicitly include all instances of decision-making where a person's rights and obligations, of any kind whatsoever, are to be determined. Only in this way will today's citizen find the traditional right to a fair hearing relevant to his circumstances and a proper safeguard of his rights.

III. Additional Problems

The B.C.C.L.A. has four additional areas of concern to draw to the Parliamentary Committee's attention.

First, this Association is not persuaded that the rights of Native People are adequately protected by the proposed Charter; in fact, it may be that those rights are eroded rather than enhanced. Native People are in the midst of negotiations for the recognition of rights not previously protected, whereas Section 24 of the proposal preserves only those rights presently established by law. In addition, the Charter as proposed may preclude the Federal Government from exercising its Constitutional powers under Section 91(24) on the B.N.A. Act to protect the rights of Native People, and may invalidate rights presently recognized in the Indian Act. For example, were the Indian Act to be declared invalid by reason of the proposed Charter, several matters which by that Act came under Federal jurisdiction, would be returned to Provincial jurisdiction.

Representatives of Canada's Native Peoples will be presenting their concerns about the proposed Charter to the

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Parliamentary Committee. The B.C.C.L.A. urges the Committee to give those submissions their most careful consideration.

Second; this Association is concerned about how the Charter would be enforced. The only remedy provided for a violation of the Charter is to declare a law inoperative under proposed Section 25. While that remedy, given a Charter with adequate guarantees of rights, is one essential ingredient of judicial review, it is not sufficent for effective enforcement of the Charter. Violations will not be limited only to laws inconsistent with the Charter; actions by public officers and agencies can also be in violation of constitutional rights, as several provisions (all those under Legal Rights, for example) imply by their working. If there is any doubt the courts' inherent jurisdiction to provide an adequate remedy for such violations, then the Charter should grant such jurisdiction in unequivocal terms.

Third; the Association believes that Section 15 should be amended to make clear that the right to equality is not limited to certain kinds of discrimination. We believe it is time to move beyond the traditional grounds now covered in the proposal. For example, discrimination on the grounds of political belief, physical disability, former criminal conviction, or sexual orientation is not consistent with existing values and should not go unprotected.

And fourth; the Association does not understand why the official languages are available only in courts "established by Parliament". We suggest extending Section 19 of the proposal to allow either official language in, at the very least, all provincial courts having the same jurisdiction as the B.C. Supreme Court and the B.C. Court of Appeal.

In closing, the British Columbia Civil Liberties Association wishes to reiterate its concern that the people of Canada and their representatives in Parliament need more

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time in which to discuss and revise these Constitutional proposals.

Our Association is aware that in the time available to us, we have not been able to discuss in detail all the issues that are raised by the Government's proposals. We are distressed, for example, that the Charter does not guarantee an accused in criminal proceedings the right to trial by a jury of his/her peers. Why has this right been ignored by the Government? We note further that the proposed Charter of Rights and Freedoms can be amended by referendum pursuant to Sections 50 and 42 of the proposals. In line with what we have said earlier, "protecting" minority rights by allowing them to be changed, limited or eliminated by the majority in a referendum is no protection whatsoever. At the very least, amendment of the Charter should be restricted to the usual amending formula set out in Section 41 of the proposals. These two items need more discussion than we can give them here. We are certain that other citizens and citizens' groups have equally grave concerns about the Charter, and are as dismayed and frustrated as we are about the minimal amount of time and public consideration that are being given over to these important issues.

Preparing a Constitution and a Charter of Rights and Freedoms is not an everyday occurence in the life of a nation And once it is done, it is meant to last. We ask the Government once more to extend the time for public and Parliamentary consideration of the Government's proposals and to make possible their revision. Only in this way can the final Constitutional proposals have the heartfelt approval of the Canadian people.

APPENDIX I.

Addendum on Emergency Powers Legislation

If the Canadian Charter of Rights and Freedoms is to contain a provision asserting the authority of the Government to abridge basic rights temporarily during periods of extreme emergency, the British Columbia Civil Liberties Association proposes that the emergency powers so granted be carefully defined so as to include the following limitations:

1. The statement of the conditions under which emergency powers could be exercised should indicate clearly that serious crisis situations such as invasion, civil insurrection or large-scale natural disaster are the only occasions during which the abandonment of civil liberties might be justified.

A Constitutional provision regarding emergency powers must maintain a clear distinction between that kind of crisis which threatens the life of the nation, and those less extreme situations involving civil conflict where the Government should rely on the usual procedures of the law which protect citizens' rights.

2. Whatever the language used to set out the preconditions for the exercise of emergency powers, the term "apprehended insurrection" should not be included. An attempt must be made to use terms which, unlike "apprehended insurrection", refer to specific observable events so as to remove the definition of such terms from the discretionary control of the Government.

3. Any emergency powers clause should include a provision that concurrence of the House of Commons is required as soon as possible, and within a specific time period, after invocation by the Government of the powers authorized by the emergency clause. If such

concurrence is not forthcoming, the Government's invocation of emergency powers would cease to have effect.

The representatives of the people of Canada must be given full details of the Government's reasons for invoking such emergency powers so that their vote on concurrence is a serious and knowledgeable response to whatever crisis faces their nation.

4. The duration of time during which emergency powers can be in effect should be set out in the limitations clause, and should be limited to an initial period of not more than four weeks from the date of their invocation and including the period prior to concurrence by the House of Commons. In order to extend this period, the Government would have to seek authorization from the House of Commons; without such authorization, emergency powers would cease to be effective as of the end of the last day of the previously authorized time period. Extensions should also be limited in time, perhaps to six weeks, and each new extension would have to be authorized in turn by the House of Commons.

5. The limitation clause should set out procedures by which a limited number of M.P.'s could move revocation of emergency powers and have that revocation debated after the emergency powers have been invoked and concurred in by the House of Commons. There may be good and sufficient reasons to justify the cessation of emergency powers prior to the end of whatever period has been previously authorized by the House of Commons, and every effort should be made to limit the abridgement of civil liberties to the shortest possible time.

6. An emergency powers provision should direct the Government to restore normal citizen's rights forthwith once the authorized period of their abridgement has

ended or the emergency powers have been revoked. The "restoration to normalcy" clause should provide for review procedures conducted by an independent tribunal, the purpose of which would be to "clear" the reputation of and restore to pre-invocation status those persons who were caught and somehow damaged by the exercise of emergency powers but were not charged with an offence.