BRITISH COLUMBIA FEDERATION OF LABOUR

PRESENTATION TO THE

SPECIAL JOINT COMMITTEE

ON THE CONSTITUTION OF CANADA

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The B.C. Federation of Labour (CLC) represents over 270,000 working people in the province of British Columbia. Unions affiliated to the Federation represent people in every industry in the province, and the overwhelming majority of workers in many major sectors. We represent a strong and militant tradition of defending and advancing the rights of working people in our province. Over the years, we have learned well the lesson that our economic and political strength is built on the unity of our affiliated unions and their members.

The constitutional debate raging in this country has taken directions and created divisions that deeply concern our members, and we would be remiss if we did not preface our remarks by stating those concerns. There are two basic issues that trouble us.

First, we feel that governments at all levels have devoted excess time and energy to the constitutional debate at the expense of their other responsibilities. We come from a region of this country that is fortunate, by relative standards, in that unemployment has been declining for the past year. It is at a level still

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higher than we find acceptable, but low relative to eastern regions. On a national level, unemployment has hovered around the million mark for the past two years and is a tragic waste and neglect of human resources. At the same time, inflation is above eleven per cent and still rising, constantly cutting into the purchasing power of workers' wages. Interest rates have rocketed to levels that threaten to destroy our economy, and have pushed affordable housing beyond the reach of most of our members. The time and resources allocated to this constitutional debate must be devoted to those issues more relevant to working people - solving the problems of unemployment, inflation and affordable housing.

Second, the debate has created divisions within our country that we perceive as both dangerous and inimical to the interests of working people. Talk of Quebec separation has been replaced by talk of western separation, fueled largely by irresponsible positions taken by our own provincial government among others. Working people in British Columbia have learned the value of unity and we want one country on the Northern part of this continent, not a number of small, sovereign fiefdoms.

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PATRIATION AND AMENDING FORMULA

The patriation of Canada's constitution is a step we strongly favour. It is both antithetical to Canada's sovereign status in the international world and demeaning for this country to have to seek amendments to its constitition by petitioning the British Parliament. It is time Canadians were given control of their own destiny.

Hand in hand with the need to eliminate the role of the British Parliament comes, of course, the need to prescribe a new method of constitutional amendment for those parts of our constitution that at present require British legislation. In general we are satisfied with the provisions of the Resolution that deal with this important matter. We do, however, have some misgivings about them. First, we would prefer not to see any province given a veto power. The amending formula proposed by the present government and set forth in s. 41 of the Resolution effectively guarantees both Ontario and Quebec a veto power for all time. It also anticipates the possibility that demographic shifts might result in other provinces obtaining a veto as well. The problems with a provincial veto power are that it creates two classes of provinces in Canada, and it could easily be abused by the provincial

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governments that possess it. It would be very easy for such a government to demand special favours in return for not using its veto.

If, as we suspect is the case, the provision for a provincial veto power stems from a concern about Quebec's position within Canada, a concern we acknowledge and share, would it not be possible to give Quebec a veto power limited to those amendments which can be said to directly affect that position? In any case, we have great difficulty seeing how such a concern justifies a veto power for Ontario or any other province that eventually garners twenty-five per cent of Canada's population. At best the formula might allow for a requirement that a majority of the English-speaking provinces, having themselves a majority of the residents in those provinces, must approve of the amendment. Such a requirement would be designed to give expression to the theory of "deux nations" that underlies the concern about Quebec.

Our second misgiving relates to the use of referenda in the constitutional amendment process. It is our view that the use of referenda is inconsistent with the theory of parliamentary government to which we in this country subscribe. That theory holds that those who are elected to public office are elected to govern. If they fail to do so in accordance with the wishes of

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the electorate, they will be defeated. We see no reason for making an exception in this regard for decisions relating to amendments to the constitution. We would also point out that the use of referenda might well be positively dangerous in the area of amendments to the Charter of Rights and Freedoms. Is it safe to leave the status of minority rights in the hands of a majority of Canadian voters? We think not.

Our third and final concern involves the role of native peoples in the process of constitutional amendment. At present the Resolution gives our native peoples no role in this process. We believe that they should have a role, at the very least where the proposed amendment can be said to directly affect their position within Canada. Without the protection such a role would be designed to give, the status of native rights would be extremely vulnerable. The track record of Canadian governments in the area of native rights demonstrates this vulnerability all too well.

ENTRENCHMENT OF RIGHTS AND THE JUDICIARY

The B.C. Federation of Labour agrees with the concept of entrenched rights, and it recognizes that a Charter provides a new role for the courts as a protector of fundamental rights and freedoms from governmental

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encroachment. Under the Charter the courts will become a much more potent branch of government as our system of government moves from the classic parliamentary supremacy model towards a more "checks and balances" system. Implicit in this new role of the courts is the removal of many issues from the political to the judicial forum.

The B.C. Federation of Labour is concerned about the manner in which our judges are currently appointed. We see a male-dominated Supreme Court that is not representative of Canadian society. The composition of this court must change if it is to assume its new role. We are convinced that judicial appointments should be opened up to allow for:

1. far more public scrutiny and input into the selection process; and
2. acceptable criteria upon which candidates for the judiciary can be appraised.

Only when Canadians are confident of representativeness on the Bench will they feel comfortable with the new power to be exercised by the judges enforcing the Charter. Once appointed, of course, their independence must be guaranteed along the lines currently provided for in Sections 96-100 of the B.N.A. Act.

Finally, the B.C. Federation of Labour is concerned that the Supreme Court of Canada as the court of final

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Rights without a constitutionally enshrined Supreme Court.

LIMITATION CLAUSES

Finding the appropriate balance between the interests of the individual and other countervailing interests - for example, the rights of others, national security, and public safety - lies at the very heart of good government. It also lies at the very heart of an entrenched Charter of Rights and Freedoms. How best to accommodate this need for balance is perhaps the most difficult problem the draftsperson faces. If nothing is said and the courts are left to work it out, there is the risk that the courts will feel compelled to tilt the balance too far in favour of the individual, with the result that governments will be hamstrung in their ability to act for what they, as the embodiment of the majority, will see as the public good. If, on the other hand, the draftsperson tries to make provision for it, particularly in one all-encompassing clause, there is the risk that the courts will feel compelled to tilt the balance too far in the other direction, with the result that the Charter ends up setting back, rather than advancing, the cause

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of civil liberties.

It is our view that this need for balance can best be accommodated in this Charter by adopting the approach taken by the drafters of the International Covenant on Civil and Political Rights. That approach entails first, making express provision for emergency situations in which the life of the nation is clearly put at risk. During the existence of such an emergency, the existence of which must be officially proclaimed, the state is empowered to limit at least some of the rights and freedoms spelled out in the Charter, although only to the extent required by the emergency. Those rights and freedoms which can and should continue to be protected during the period of the emergency - for example, the right of an accused to a fair trial - are excluded from the scope of such a provision. We must be protected against the convenient imposition of insidious legislation such as the War Measures Act.

That approach also entails devising, for non-emergency or normal times, special limitation clauses for those rights and freedoms that require them. These clauses, which would be drafted in such a way as to embody the particular balance sought to be achieved in that area, would be in place of a general limitation clause like s. 1 of the present Charter. In our view they would be few in

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number, either because the rights and freedoms in the Charter have been drafted in such a way as to ensure that the countervailing interests will be duly weighed by the courts - for example, the mobility rights of s. 6(2) and (3) as well as all those that use terms like "unreasonable" or "arbitrary" - or because they should not be subject to limitation at all. In fact, the only obvious candidates for such limitation clauses are the s. 2 fundamental freedoms. In their case it may be possible to devise one limitation clause for the entire group.

Whether or not this approach is adopted, it is our view that the present s. 1 cannot remain part of the Charter. The test of "generally accepted in a free and democratic society with a parliamentary system of government" tilts the balance much too far in favour of the majority will. In fact, it may go so far as to entrench the majority will and thereby render the Charter totally meaningless. If there is to be a single, all-encompassing limitation clause, it must be formulated in such a way that the courts are encouraged to prefer the rights and freedoms to the countervailing interests unless there is very good reason for not so doing.

SOCIAL AND ECONOMIC RIGHTS

In 1976 Canada became a signatory to two

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international covenants in the field of human rights and freedoms, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. While many of the provisions of the former find expression in the Charter of Rights and Freedoms, one looks in vain for embodiments of the provisions of the latter. Nowhere does one find reference to a general right to employment, the right to the enjoyment of just and favourable conditions of work, the right to form trade unions, the right to social security, the right to protection of the family, the right to an adequate standard of living, the right to the enjoyment of the highest attainable standard of physical and mental health, or a general right to education.

It is our opinion that the failure of the Charter to make provision for this category of rights is its single most important shortcoming. By becoming a signatory to the International Covenant on Economic, Social and Cultural Rights Canada undertook "to take steps. . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." What better legislative measure can there be than constitutional entrenchment?

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It certainly cannot be argued today, if it could ever have been argued, that social and economic rights are of less importance to the well-being of the nation, or of the individuals in it, than the traditional civil and political rights. The fact that Canada signed both Covenants in the same year is the best possible proof of this. As a practical matter it must be noted that the traditional civil and political rights mean very little to a person who is without the wherewithall to take advantage of them. It is also true that, to the vast majority of Canadians, social and economic concerns are significantly more real on a day to day basis than are those which underlie the traditional civil and political rights.

The Prime Minister and his government would do well now to remember what he wrote in an article entitled "Economic Rights" that appeared in 1961 in the pages of the McGill Law Journal. The purpose of the article was to call for greater recognition of and respect for economic rights, in particular a person's right "to demand from society that it offer [them] a market for [their] useful labour and produce" and a person's right "to a share of the total production of society, sufficient to enable [them] to develop [their] personality to the fullest extent possible." The article was short and very much to the

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point. It closed with the following paragraph:

> "Yet if this society does not evolve an entirely new set of values, if it does not set itself urgently to producing those services which private enterprise is failing to produce, if it is not determined to plan its development for the good of all rather than for the luxury of the few, and if every citizen fails to consider himself as the co-insurer of his fellow citizen against all socially-engineered economic calamities, it is vain to hope that Canada will ever really reach freedom from fear and want. Under such circumstances, any claim by lawyers that they have done their bit by upholding civil liberties will be dismissed as a hollow mockery."
> (emphasis added)

What better way to ensure freedom from fear and freedom from want than by entrenching in the new Charter of Rights and Freedoms the right to employment, the right to the enjoyment of just and favourable conditions of work, the right to form trade unions, the right to social security, the right to protection of the family, the right to an adequate standard of living, the right to the enjoyment of the highest attainable standard of physical and mental health and the right to education?

As an organization which is representative of trade unions, we see first-hand the sorts of actions taken by Canadian governments to abrogate the rights of workers with respect to their trade unions. Political rights are often taken away from public sector workers. The right to strike is the basic defence of working people, yet governments in several jurisdictions have arbitrarily removed that right for their public employees.

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Without that right, there can be no social and economic justice for working people.

The arguments against entrenching social and economic rights are, to us, unpersuasive. In response to the contention that it is wrong to entrench rights that require positive action rather than mere forbearance on the part of governments (here we are obviously not speaking of the right to form trade unions) it must be noted that the Charter in its present form includes a number of such rights already. Thus s. 18 imposes on Parliament the obligation to print and publish its statutes, records and journals in both English and French; s. 20 implicitly imposes on the federal government the obligation to make available minority language services at the head or central offices of all federal institutions; and s. 23 imposes, presumably on the provincial governments, the obligation to provide minority language educational facilities where numbers warrant. Can it be said that there is a meaningful qualitative difference between the rights given by these provisions and the rights for which we are asking? We think not.

It has also been argued that social and economic rights cannot be entrenched because it is difficult to reach agreement on the specific rights to include. If

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it is meant by this that it is difficult to agree on some of the rights then at best the argument is only justification for excluding those on which agreement cannot be reached. It is certainly no justification for excluding those upon which agreement can be reached. If, on the other hand, it is meant by this that agreement can be reached on none of the rights the argument has even less merit. There is broad support among the working people of this country for the inclusion of these rights, even if politicians are reluctant to include them.

There is a more fundamental objection to the argument against inclusion of social and economic rights. That argument is based on a false premise that only those rights upon which everyone can agree are deserving of the protection that entrenchment would give them. First, the present government has obviously not operated consistently on the basis of this premise in putting together this document. As the government well knows, several of the rights in the present Charter are highly controversial, most notably the mobility rights of s. 6(2) and the minority language educational rights of s. 23. Even so, they have been entrenched. And, we believe, properly so (although, as will be noted, we have some qualms about the scope of the former).

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Above all else, a Charter of Rights and Freedoms represents a statement of, and commitment to, the fundamental values of our society. That is the basis upon which one decides whether or not to entrench a particular right, not unanimous agreement. And on that basis we believe that each and every one of the social and economic rights mentioned above is entitled to inclusion in the Charter. They, too, represent values that we believe are fundamental.

Precedents for the inclusion of social and economic rights in a document of this sort are not lacking. Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms incorporates the right "to form and to join trade unions for the protection of [one's] interests" in the right to "freedom of association with others." Article 2 of the First Protocol to that Convention provides that "No person shall be denied the right to education." The Constitution of India contains a statement of "Directive Principles of State Policy" which is designed to protect the economic rights of its citizens. And the Charter of Human Rights and Freedoms enacted by

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the Province of Quebec contains an entire chapter, incorporating ten sections, devoted to social and economic rights. While we do not necessarily agree with the exact form of such examples, we urge the federal government to follow the lead that these examples provide in entrenching social and economic rights.

MOBILITY RIGHTS

Existing Canadian constitutional jurisprudence provides meagre support for a right of mobility flowing from citizenship status. One judge in the Supreme Court of Canada, Mr. Justice Rand, in the case of Winner v. S.M.T. (Eastern) Ltd., recognized the right of mobility to earn a living as an inherent aspect of citizenship. However, this right to free movement as an attribute of citizenship was not affirmed in two more recent Supreme Court of Canada decisions, Morgan v. P.E.I. and Canadian Indemnity v. A.G.B.C.

Section 6(2)(b) of the Charter guarantees to Canadian citizens and to permanent residents of Canada the right "to pursue the gaining of a livelihood in any province." It is difficult to dispute the value of this right. Coupled with the right "to move to and take up residence in any province" provided for in Section 6(2)(a), it will for the first time give Canadians rights of

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protected by their Constitution.

We support the view that all Canadians should be immune from parochial laws which restrict their movement within this country where such restrictive laws are based solely on a worker's province of present or previous residence. The evidence is clear that some provinces, notably Quebec and Newfoundland, have seen the need to erect legal barriers to the free movement of "out of province" workers seeking employment within their boundaries. One need only point to the Petroleum and Natural Gas Act of Newfoundland or the Quebec Construction Industry Labour Relations Act as examples of legislation which either favour provincial residents or prohibit extra-provincial workers from free competition in the job market. The Government of Quebec in the Construction Industry Labour Relations Act has seen fit to create a three-tiered system of construction worker classification which gives preference in employment to Quebec workers within thirteen construction regions in that province. Whatever the merits of this statute from a Quebecer's point of view, these legal barriers place severe restrictions on job mobility and are totally incompatible with the idea that a Canadian worker has a right to move about in this country and seek employment

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wheresoever he or she chooses. It might be added that this type of legislation seems to us totally unnecessary, since the system of hiring halls in the organized construction industry serves to protect local workers' job security without the need for legislative intervention. The trade union movement can provide the job protection needed by local workers without the need for rigid legislated barriers to job mobility.

The government of Quebec maintains that French-speaking Quebec workers need legislated job protection because they are not desirous of leaving their French cultural homeland to seek jobs in the free Canadian job market. The evidence does not support this claim. Witness the Quebecois tradesperson working on the pipeline in western Canada, and contrast this job mobility with the denial of construction jobs to extra-provincial workers at the Olympic Games site in Montreal, the James Bay Power Project or even the federal government's office complex in Hull. The idea that federal tax money can go to finance projects in Quebec on which no non-Quebecer can work is clearly inconsistent not only with our view of an economic union but also the rights that should flow from being a Canadian worker.

In an ideal world, the B.C. Federation of Labour would have preferred the approach to job mobility

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suggested in the government of Saskatchewan's brief dated July 23, 1980 to the Continuing Committee of Ministers on the Constitution. Under this view, the federal and provincial governments were encouraged to replace the negative instrument of constitutional prohibition with a positive commitment on the part of responsible governments to come to some agreement on the mechanics of an economic union including the abolition of barriers to mobility in the job market. Enlightened self interest, rather than destructive competition among provinces, was to be the guiding principle of managing our economic union. The sad fact of the Canadian federation is, however, that too often our governments are motivated by short-term political gains at the expense of guiding principles. Regrettably, we cannot rely on the Saskatchewan government's high hopes to prevent our regional governments from stratifying our country into employment enclaves. If we want to prohibit legal barriers to job mobility, the B.C. Federation of Labour is convinced that some constitutional protections are required.

Having stated our preference for the principle of entrenching job mobility rights in the Charter, how does one go about drafting the appropriate provisions? Our preferred approach is along the lines of that

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suggested by the Ontario government in its position paper to the Continuing Committee of Ministers on the Constitution. Under this approach the principle of the right to earn one's living throughout the country would be enshrined in the constitution yet this right might be qualified in certain circumstances or for certain valid purposes. Our difficulty is to identify these "exceptions to the rule". Our concern is that these exceptions if too loosely worded or too widely interpreted will distort the principle beyond recognition. We would, however, like to see this approach given further consideration.

How well is the right to job mobility provided for in Section 6? Does the Charter achieve its goal of prohibiting the legal barriers to earning a livelihood throughout this country? We are concerned about some aspects of the drafting of Section 6(2)(b). In particular:

1. Will the "escape hatch" of Section 1 of the Charter render Section 6(2)(b) meaningless? Our country has experienced many types of legal barriers to job mobility and these might be held to be "generally accepted in a free and democratic society with a parliamentary system of government."

2. How will the courts interpret "primarily" in Section 6(3)(b)? When does discrimination based on province of residence cease to be "primary" and become "incidental"? What guidelines do we give the judiciary in their task of interpreting these phrases?

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3. How will Section 6 be interpreted in the context of Section 15(2) which allows for affirmative action programs for "disadvantaged groups"? Likewise, how does Section 6 relate to Section 31 which allows for regional economic programs designed to assist in development?

It is our view that these questions should be dealt with by the draftspeople so that Canadians will know what protection Section 6(2) purports to provide. Until these clarifications are effected the B.C. Federation of Labour cannot give its full-fledged support to the promises provided by the Charter to workers. But, in principle, we agree with what appears to be the essential thrust of the constitutional right of Canadians to earn a living without legislative interference based on one's province of residence.

NON-DISCRIMINATION RIGHTS

The concerns we have with s. 15(1) are of two orders, general and specific. The former relates to the general scope of the right to equality given by s. 15(1). The latter relatesto the consequence of s. 15(1) for two types of discrimination that have particular significance to the working people of Canada, sex discrimination and age discrimination.

The disappointing record of the Supreme Court of Canada in the area of equality is probably, by now,

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well known to the members of this Committee. Prior to the advent of the Canadian Bill of Rights in 1960, the court upheld as valid provincial legislation that denied Chinese employers the right to employ Caucasian women in their businesses, and regulations under the War Measures Act that deprived Japanese-Canadians of both their property and their freedom of movement. In neither case did the court show much sympathy for the minority in question. During this period the court also construed the word "persons", in the provision of the British North America Act dealing with eligibility for the Senate, to exclude women (although the Judicial Committee of the Privy Council fortunately overruled them on this). And the record has not improved since 1960. Apart from the landmark decision in the Drybones case a decade ago, the court has shown no enthusiasm whatsoever for the right to equality defined by s. 1(b) of the Bill of Rights. On the contrary, it appears to have done its level best, through a variety of techniques, to give that right as little scope as possible.

The reason we remind the members of the Committee of this disappointing record is that it bespeaks a need to be very careful in the drafting of the equality provision(s) of the Charter. If it is the intention of the drafters, as we certainly hope it is, to entrench

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a meaningful right to equality in our constitution, then they must make that intention known in clear and unambiguous terms. Have they done so? Is it clear, for example, that the courts are to use s. 15(1) to scrutinize and control not only the way in which laws are administered, but also the content of the laws themselves? Is it clear that s. 15(1) can be invoked by persons other than those who are discriminated against on one of the named grounds? Is it clear that the courts are to be especially reluctant to allow governments to discriminate on particularly invidious grounds like race, national origin and sex?

We are by no means convinced that any of these important objectives of a constitutional right to equality have been made clear in your government's proposals. We are particularly concerned about the latter two in that list - age and sex. The presence of a list of proscribed grounds of discrimination will make it very difficult for the courts to extend s. 15(1) protection to persons who are discriminated against on an unnamed ground like political belief, membership in a trace union, marital status or physical handicap, <u>even where the discrimination is completely arbitrary</u>. And the inclusion of age in the list of proscribed grounds of discrimination will make it very difficult for the

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courts to be especially vigilant against discrimination on particularly invidious grounds like race, national origin and sex. Age discrimination, about which more will be said later, often makes eminent sense, and because of that it is an acknowledged part of our life. As such the courts will have to devise an approach to it that will let most if not all of it stand. But will the courts then not also be obliged, because age is included in the special list, to use the same approach for discrimination on the other, truly invidious grounds, with the result that those types of discrimination will also be permitted?

It is our view that s. 15(1) needs redrafting. If it is not, it is conceivable that none, and highly possible that only one, of the three objectives set forth above will be met. If either of these results were to obtain the right to equality would mean very little.

Let us turn now to the concerns we have with s. 15(1) that are more specific in nature, those relating to age and sex discrimination. Our concern about age discrimination involves the implications of a constitutional right to equality, however it is drafted, for the question of mandatory retirement.

The B.C. Federation of Labour believes that

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mandatory retirement is an element of the broader issue of retirement income. We are concerned that Section 15 could in one broad stroke upset the applecart by prohibiting any statute which allows mandatory retirement, and this involves many public sector pension plans as an immediate example. We believe that before mandatory retirement is prohibited the following should occur:

1. A thorough analysis ought to be made by the federal government of the entire issue of pensions and income security;

2. The federal government should analyse the systems developed in other countries which effectively integrate the elderly both economically and socially into the mainstream of society, and develop a comprehensive program to meet Canadian needs;

3. The effects of a ban on mandatory retirement on collective bargaining rights and existing pension schemes should be thoroughly examined and publicized;

4. Pre-retirement planning programs ought to be available to all employees;

5. Retirement income should be adequate for all Canadian retirees.

These issues are too sophisticated, too polycentric and too complex to be swept aside by one judicial decision interpreting Section 15(1) on the issue of the legality of mandatory retirement, particularly when this issue is divorced from the matter of retirement income. These matters are properly dealt with through

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collective bargaining or the political process, but not in the courts. We see this as a particularly severe problem in the absence of any social and economic rights in the Charter.

With respect to the matter of sex discrimination, we, like other groups that have appeared before you, are deeply concerned that the protection accorded women's rights by s. 15(1) might well prove totally inadequate. If, as was demonstrated above, the Supreme Court has left a good deal to be desired in its handling of equality cases generally, it has been particularly disappointing in its treatment of cases involving women's rights. The "persons" case mentioned earlier, as well as cases like Lavell and Bliss, in which the court failed to apply s.1(b) of the Bill of Rights to protect women from discriminatory legislation, indicate a profound lack of sympathy for the problems women face. The need to be careful in drafting is therefore particularly acute when it comes to the matter of protecting women's rights in the Charter. This would be so even if women were not in the throes of a struggle for equality in our society.

We would suggest that the Committee give consideration to making special provision for women's rights in s. 15. Such a section, on its own or read in

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conjunction with social and economic rights, should provide a framework that will allow equality in the workplace to become a reality. A woman's right to care for and control her own body should also be explicitly stated in order that s. 7 - regarding the "right to life" - is not judicially interpreted to remove a woman's right to an abortion. Exact wording is a matter we leave to legal experts, but the objective should be clear - to give the courts the clearest possible indication that women and men are to be treated equally in all respects.

The B.C. Federation of Labour agrees with the approach taken by the Charter in Section 15(2) whereby the potential for reverse discrimination litigation is largely removed for programs designed to assist "disadvantaged groups". Our concern is with the question of which groups are to be classified as "disadvantaged", and how this will be interpreted by the courts. Are women and native Canadians "disadvantaged"? What yard-sticks or interpretive tools are to be provided to the courts to determine which groups are "disadvantaged"? We see the need for some re-drafting here to clarify these issues, recognizing that over a period of time some groups might move to or from the ranks of the "disadvantaged". We would consider, for example, that women in this country are currently a disadvantaged group, but would hope that this is a condition that will be rectified in the immediately foreseeable future and will not continue for all time.

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NATIVE RIGHTS

The failure of the present government to allow the native peoples of this country the opportunity to participate fully in the process of constitutional reform now underway, in defiance of promises made to them, is well known to the members of this Committee. So too is the failure of the Charter to entrench in our new constitution the rights of our native peoples.

We decry both of these failures, and we urge the present government and the members of this Committee to do everything within their powers to see that they are remedied. It is, of course, too late now, given the stage in the process that has been reached, to fully remedy the former. However, there is certainly still time to allow for further input on the part of our native peoples. Whatever steps are open to either the government or this Committee to ensure that such input is received are steps that must be taken.

The case for inclusion of native rights in the Charter has already been made by the native organizations that have appeared before you, and it would be presumptuous of us to try to remake it. Let us simply say that we share the sense of alarm our native peoples feel at the prospect that, if the present Charter is enacted, they may lose even the

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believe that other Canadians and their governments have a special obligation at this time to ensure that aboriginal and treaty rights are reaffirmed and secured in the new constitution. It is not sufficient, as the present government argues, to leave the entrenchment of native rights until after the constitution is patriated. If that is done, there is every likelihood that nothing will be done to ensure that native rights receive the protection entrenchment now would give them. One has only to examine the record of our governments in the matter of land claims to realize that the prospect of subsequent amendments to entrench native rights is very slim if the matter is left in their hands.

LEGAL RIGHTS, AND REMEDIES

Legal Rights

We would now like to turn briefly to the section dealing with proposed legal rights. We, like the civil liberties organizations that have appeared before you, have a number of misgivings about the adequacy of the provisions in the category of "Legal Rights". We do not feel that the rights provided

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for in Sections 8, 9, and 11(d) - freedom against search and seizure, arbitrary imprisonment, or unreasonable bail - are given sufficient protection. The phrase "except on grounds, and in accordance with procedures, established by law" would appear to allow for the almost complete erosion of these rights by ordinary legislation. We would prefer to see these sections reformulated in the terms in which they appeared in the Discussion Draft Charter that was sent to the provinces in August.

We are also of the view that s. 12 requires tightening. It is our understanding that the term "cruel and unusual" is likely to be read conjunctively, with the result that s. 12 in its present form will provide little protection to those invoking it. The word "unusual", which is the real problem here, should not appear in whatever reformulation is chosen, if meaningful protection is to be given.

With respect to the matter of representation by counsel in criminal proceedings we consider it essential that the Charter include a provision guaranteeing the right of an accused to be provided with counsel at no cost if the person is not in a position to pay for counsel of his or her own choosing. Without such a provision, which appears in both the

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International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, the goal of "equal justice for all" will remain out of reach to many Canadians.

Another provision which we would like to see added to the list of legal rights is the right to remain silent. In particular, once a person has been charged with an offence, he or she should have the right not to be compelled to testify against themselves or to confess. The right to remain silent is a hallmark of the Anglo-Canadian criminal justice system and deserves recognition as such in the Charter.

Turning to the non-criminal sphere, we look in vain for a provision that would guarantee Canadians the right to have quasi-judicial and administrative decision-makers act fairly and, where appropriate, in accordance with the principles of natural justice. The number of such decision-makers and the importance to Canadians of the decisions they make - for example, the denial of unemployment insurance benefits, worker's compensation, welfare payments - combine to make such a provision a necessity. We note that such a provision is presently included in the Canadian Bill of Rights and was proposed in Bill C-60. It should also be a

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constitutional guarantee.

Remedies

However carefully crafted the right-granting provisions in the Charter are, they will not advance the cause of civil liberties in this country if they are not accompanied by equally carefully crafted provisions ensuring that the rights are enforceable. The need for such provisions is clearly recognized in the International Covenant on Civil and Political Rights, Article 2(3) of which provides

> "(3) Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted."

As now drafted, the Charter falls far short, in our view, of living up to the undertaking Canada gave in 1976 when it became a party to that Covenant. The only remedy for which express provision is made

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is that of holding "inoperative and of no force and effect" a law that is inconsistent with the Charter. That remedy is, of course, an important one, as it serves to ensure that the Charter, as part of Canada's basic constitutional instrument, is given primacy over the ordinary laws of both Parliament and the provincial legislatures. However, holding an offensive law "inoperative and of no force and effect" is by no means going to satisfy everyone whose rights and freedoms are violated by the state. In particular, it is not going to satisfy a person whose rights are violated not by a law but by a public official, for example, a police officer who commits an illegal search or seizure. In addition, therefore, to making provision for the primacy of its rights and freedoms over positive law, the Charter should include a section authorizing the courts to make use of whatever remedies they deem appropriate to ensure that the rights and freedoms are given effective protection.

The question of whether or not evidence that is obtained in violation of a person's rights and freedoms should be excluded in subsequent criminal proceedings against that person, a question that s. 26 of the present Charter appears to answer in the negative, is an extremely problematical one. The proposed provision represents an

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open invitation to law enforcement personnel to ignore the Charter when it serves their purposes to do so, and it also means that the courts are deprived of a potentially very useful weapon against law enforcement personnel if the latter should ever, through their illegal practices, bring the due administration of justice into disrepute. There must be an allowance made in the Charter for adequate remedies to be devised.

CONCLUSION

The B.C. Federation of Labour has dealt with those issues in the proposed constitutional Resolution with which we have most concern. Our brief has been prepared quickly to meet the hasty timetable drawn up by your government. However, the issues dealt with in that brief have been repeatedly raised at our Annual Conventions for many years. They are issues of constant concern to the unions affiliated to the B.C. Federation of Labour.

Our presentation to your Committee deals with issues of general concern - patriation, amending formula, the courts and limitation clauses - as well as those specific issues which we feel need elaboration. As a major priority, we see a need to include social and economic rights, especially those regarding trade unions,

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in any new Canadian Constitution. The issues of Mobility Rights and Non-discrimination Rights, including Women's Rights, are also of paramount concern. We have comments regarding Legal Rights and the lack of remedies, but appreciate that we have by no means dealt with that section in any great detail. We will leave that to organizations that are primarily civil libertarian, in the knowledge of the briefs that have already been submitted to your Committee. Similarly, the demands of our native peoples have been more eloquently put forward by their own organizations, and we support their demands. We hope that our concerns will be addressed in any final drafting of the Constitution Resolution, and that the final Charter of Rights and Freedoms will truly ensure that enforceable rights and freedoms are granted.

RESPECTFULLY SUBMITTED

ON BEHALF OF THE

B.C. FEDERATION OF LABOUR

JIM KINNAIRD
PRESIDENT

DAVE MacINTYRE
SECRETARY-TREASURER

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