

Brief to the
Special Joint Committee
on the
Constitution of Canada

presented by

Campaign  **Life**

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Introduction:

Campaign Life is a national pro-life organization working at all levels of government to secure full legal protection for all human life, including the unborn, the aged and the handicapped.

We regard it as our obligation to participate in this historic debate on the Constitution of Canada to speak on behalf of the citizens of Canada yet unborn, who cannot speak for themselves.

Our views represent the views of millions of Canadians, both men and women, and our concern lies with the proposed entrenched Bill of Rights, which is a sharp departure from British Parliamentary tradition. If this proposed entrenchment of rights and freedoms is endorsed, it will affect, quite literally and very directly, the lives of those generations, yet unborn.

We would like to state at the outset, however, that there would appear to be a somewhat curious inertia on the part of many Canadians in respect to the proposed entrenched Charter of Rights. We would suggest a possible explanation for this is the fact that many Canadians are simply not aware of the tremendous implications it will have, if endorsed, on all our lives.

It is our purpose, therefore, to attempt to analyse the implications of an entrenched Charter, so as to determine whether it will, in fact, safeguard our rights and freedoms as it purports to do.

I. Significance of an Entrenched Charter of Rights and Freedoms

The most important effect of an entrenched Charter of Rights would be that it would give rise to a shift in power from Parliament, which is subject to public opinion, to the Supreme Court of Canada, which is not. This shift in power would then open the door to a wide list of areas in which (for the first time) the

judiciary rather than the legislature, will have the final say. We have only to look to the United States, where the U.S. Supreme Court has the final word on any legislation passed by the U.S. Congress, to determine the tremendous consequences that would result from a transfer of this power.

It is appropriate, also, to look to the decisions of the U.S. Supreme Court on Constitutional issues, as the United States Constitution contains many of the phrases that are contained in the proposed Charter of Rights and Freedoms. Examples of this are:

- a) "right to life" which has been interpreted by the Supreme Court to exclude the unborn child. (*Roe v. Wade* 314 F. Supp 1217)
- b) "freedom of religion" has been interpreted by the U.S. Supreme Court so as to prohibit the Lord's Prayer in the Public Schools.
- c) "freedom of expression" has been used by the U.S. Supreme Court to strike down some State obscenity laws.

II. Difficulties Inherent in Transferring Final Power to the Supreme Court of Canada

(a) Supreme Court's decision may not reflect public opinion

Parliament is sensitive to public pressure, whereas the Supreme Court of Canada is not. Accordingly, the decisions of the Court may well reflect the views of the nine individuals on the Court rather than that of the general public, which will be permanently and deeply affected by the Court's decisions. The argument that it is beneficial that a decision on individual or minority rights should be made by a court rather than being left to the goodwill of the majority or the government of the day, may have been valid in the last century, when illiteracy was high and

the communications system poor. Public opinion, under those conditions, may well not have been an informed one. However, in the latter half of the twentieth century, with a high literacy rate and an almost instantaneous communications system, coupled with a majority of people with a genuine awareness of the need for civil rights, it would appear essentially undemocratic and an apparant anachronism that judges, who are appointed by the executive, who are not responsible to the people, and who are protected from removal by tenure, be given this tremendous power to impose their will on the elected Members of Parliament. It is a concern to us all that five individuals (a bare majority) could rule on the great social and political issues of the day contrary to and regardless of the wishes of the populace.

It is true that there has been legislation in the past that (as a direct result of public pressure) has been both discriminatory and a denial of civil rights. An example of this was the removal of civil rights from residents of British Columbia of Japanese ancestry in World War II. Public sentiment, at that time, because of the war, fed into latent racial prejudice which resulted ultimately in discriminatory legislation. Very few voices were raised in opposition to that legislation. However, can we be certain that the Court, if it had been seised of the matter, would have reached any different conclusions? Unfortunately, we have too many examples of court decisions which would indicate that the courts can be as subject to prejudice as the general public.

Another obvious example, in recent years, of discriminatory legislation, is the 1969 abortion amendment to the Criminal Code, which allowed the decriminalization of abortions, i.e. the deliberate killing of human life, in some circumstances. The exceptional circumstances occured when a hospital's Therapeutic Abortion Committee was of the opinion that the continuation of the pregnancy

would endanger the mother's *life or health*. These "exceptional circumstances" i.e. health reasons, have been so bent and twisted by many Therapeutic Abortion Committees that now according to Statistics Canada, 1978 (the latest figures available) over 400,000 unborn children have lost their lives in the past ten years. Unfortunately, however, when the abortion amendment was passed in 1969, the pro-life movement, as we know it today, was not in existence, and abortion itself was such an anomaly in the western world that few people had any understanding of it. As a result, neither the public nor many of the legislators were aware of the tragedy that was about to unfold through the widening of the abortion law.

This legislation, however, can and will be changed as the Canadian public, as well as many of the legislators, are now becoming very aware of the tragedy of the abortion situation. Parliament will, in the foreseeable future, amend the callous legislation passed in 1969. However, the wishes of the public and Parliament, which want to protect all members of the human family, born and unborn, may possibly be thwarted by the nine individuals who will be sitting on the Supreme Court of Canada, for there is little doubt that the right to life of the unborn child will be attacked through the courts by individuals who oppose legislation to protect the unborn child. The Supreme Court of Canada, under an entrenched Bill of Rights, will have the power to undermine the will of the people not only on abortion legislation, but on other legislation as well. This check on the power of the majority would appear to be both retrogressive and undemocratic.

(b) Finality of Supreme Court's decisions

A decision of the Supreme Court of Canada would be final. The only way it could be altered would be by the onerous procedure of amending the Canadian Constitution.

Unfortunately, at this point of time in Canada, there is not even any agreement as to how an amendment to the Constitution would be carried out. Further, amending the Constitution is inevitably, by its very nature, a very divisive and drawn-out procedure. It is clear that a proposed amendment to the Constitution will mean that Canada will fall prey to an enormous political and social upheaval that has occurred in the U.S. because of the demand for a Human Life Amendment to the U.S. Constitution. This has led to tremendous soul-searching, divisiveness and acrimony—a most unenviable situation.

Amending legislation passed by Parliament, on the other hand, is a much simpler process, and can be accomplished without the deep-seated problems that arise with the amending of a constitution. Thus, even if legislation is passed, which may be regarded as being discriminatory or a denial of civil rights, it can always be quickly and fairly expeditiously remedied by Parliament. This is not the case if the necessity to amend the Constitution may arise.

c) Appointment of Judges to the Supreme Court of Canada open to abuse

Under our present system, appointments to the Supreme Court of Canada are made by the Prime Minister and his Cabinet. Once the appointment has been made, the Judge remains on the Bench until he reaches 75 years of age, and he cannot be removed, except for grave reason. The appointment is absolute and is not subject to confirmation or rejection from any other authority, such as Parliament. Granted, revisions to a method of appointment of judges to the Supreme Court of Canada is one of the changes recommended in a new Constitution. However, agreement on this part will not be forthcoming immediately, with the result that our present method of appointing judges to the Supreme Court of Canada will remain the privilege of the majority government.

This situation differs markedly from that in the U.S. where the President

has the authority only to nominate candidates to the Supreme Court, and that nomination is subject to rejection or approval by the Senate. Even with this latter precaution requiring Senate approval, it is known that in U.S. history, Presidents have "packed" the Supreme Court so as to implement government policy. How much more likely a situation of a "packed" court would be in Canada, when there are no controls whatever over the appointments. Clearly, the awesome and absolute power to appoint Judges to the Supreme Court of Canada is open to abuse and this would most certainly be even more so if an entrenched Charter of Rights, with the resulting extension of power of the Court, were implemented. In short, the government in power, if it wished to assure the implementation of certain of its policies, could do this by simply appointing judges to the court whose views would be in accordance with that of the government.

This point may soon be a very real consideration in Canada as several of the present Supreme Court judges are now reaching compulsory retirement age. It is possible that the new appointments may well change the narrow and fine balance of the present Court.

d) Prestige of Supreme Court undermined

Historically, the function of the Courts in the parliamentary system has been to adjudicate or interpret the law, not to make the laws. As a result, our Supreme Court has, in carrying out its responsibilities during the past 113 years, remained both respected and credible. There is a very real possibility, however, that one result of the Supreme Court of Canada having final say on legislation, is that its prestige and authority will be undermined. The Court, whether it likes it or not, will become embroiled in what are essentially political decisions. Again we need only to look to the U.S. to see the result of this. The U.S. Supreme Court in 1857, in *Dred Scott v. Sanford* 60 U.S. 393 (1857) held that a black slave was

without any legal rights and was the "property" solely of the slave owner, which was essentially a political decision. It took over 40 years before that court was able to regain any kind of authority or reputation in Constitutional matters.

The same situation occurred when the Supreme Court in 1973 handed down its controversial decision in favour of abortion on demand. The Court, as a result, eight years later is still reeling under the impact of the public's reaction to that decision, and its resulting loss in both prestige and authority. A similar situation is almost inevitable in Canada if the proposed Bill of Rights is entrenched.

Summary of Entrenchment of Charter of Rights

In view of the many difficulties and problems, as mentioned above, that would arise in Canada with an entrenched Bill of Rights, it would be our view that the Bill or Rights should *not* be entrenched in our Constitution. Our present system of Parliamentary supremacy has, during the past 113 years of Confederation, served us well. Individual rights and freedoms have been, with few exceptions, preserved. It is our view that under an entrenched Charter of Rights, many of our fundamental rights and freedoms, which we now take for granted, and which have long been established in this country, may be lost, if not permanently, at least until they are restored by the onerous procedure of a constitutional amendment. It would seem to be both a retrogressive and undemocratic step to entrench a charter of rights in Canada as we head into the twenty-first century.

III. If a Charter of Rights is Implemented

If Parliament should make the final decision, in spite of our protest, that the Charter of Rights be entrenched in the Constitution, then it is necessary that the present proposed Charter of Rights be amended so as to provide protection

for the unborn child. It is our view that the present Charter is inadequate to provide this protection. In particular, we should like to draw your attention to two sections of the proposed Charter which give us grave concern:

a) Section 1 of the Charter:

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 in a free and democratic society with a parliamentary system of government.

It is our view that the expression "reasonable limits" as set out in section 1 of the Charter would give the Supreme Court of Canada unprecedented wide and sweeping powers to make political decisions. In addition, the wording of Section 1 of the Charter would have the effect of rendering the remaining sections of the Charter meaningless since it would override any of the rights and freedoms, including that of the right to life allegedly enshrined in the Charter.

b) Section 7 of the Charter:

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

As noted previously, the U.S. Supreme Court interpreted the words "right to life" in the Fourteenth Amendment of the Constitution, so as to exclude the unborn child. However, Section 7 of the proposed Canadian Charter differs somewhat from the Fourteenth Amendment, in that the latter uses the expression "every *person* has a right to life", instead of the word "everyone" as used in the Canadian proposed Charter. It is our view that the use of the word "everyone" rather than the use of the word "person" in no way assures that the right to life of the unborn child will be protected. Therefore, it is necessary that the present S.7 of the proposed Charter of Rights, when it refers to "right to life", must

specifically spell out, *in exact language*, that the "right to life" shall include the right to life of the unborn child, *conceived but not yet born*. That is, the unborn child **MUST** be protected in the Constitution from conception or fertilization onward, so that the future Supreme Court of Canada could not rule that the "right to life" in S.7 does not include the right to life of the unborn child. It is possible, of course, that a Canadian Supreme Court may reach a decision less discriminatory and arbitrary in its interpretation of the expression "right to life", than occurred in the U.S., but, Canada cannot invite even the possibility of such an event. The most reliable way to ensure this is to accordingly amend S.7 of the proposed Charter.

c) Advisory Council on the Status of Women

It is noted, incidentally, in regard to Section 7 of the proposed Charter that, in a brief presented to the Joint Committee on the Constitution by the Federal Advisory Council on the Status of Women, it was recommended that the word "everyone" as it appears in Section 7 of the proposed Charter be changed to the word "person". According to the Canadian Press story, dated November 15, 1980, the purpose of the Advisory Council's recommendation was to ensure that the "Charter rights could not be interpreted as applied to fetuses". The point is not lost, of course, of the significance of the U.S. Supreme Court interpretation in *Doe vs. Wade* (Supra).

It should be pointed out that the views of the members of the Advisory Council on the Status of Women, are their own personal views only, for the members are political appointees and they do not represent any constituency. It is indeed insulting to intelligent women in Canada that it is assumed, by some, that, simply because a few women, who are appointed by the government, express an opinion, that their opinion automatically is regarded as speaking on behalf of all

sex. Women will no more be told how to vote and think by women, than they will be told how to vote and think by men. Indeed, it is on the very issue of abortion that the majority of women are deeply and irrevocably opposed to the extremist feminists' view, as espoused by the Advisory Council, that the unborn child should be denied all civil rights, denigrated, and abandoned on the alleged ground that it is the so-called woman's "right" to do so.

IV. Conclusion: A Charter of Rights must be a symbol of unity

A much vaunted Charter of Rights, if one is to be implemented, must be a symbol of what is right and good. It must be a unifying element in Canadian society and not become a source of derision and disrespect or a symbol for confrontation and disunity. To avoid this, the proposed Charter, if implemented, must be amended so that the right to life of unborn children is enshrined in it.

Our former Fathers of Confederation have been regarded in history as being men of both compassion and vision. Let those drafting our new Canadian Constitution also be regarded as being individuals of compassion and vision. If the proposed Charter of Human Rights provides protection for all human life, born and unborn, then it will be what it proclaims to be an authentic Charter of Rights and Freedoms. Generations yet unborn will live to honour your faith in their future and that of Canada.

Further, and very importantly, the Charter must give an *absolute* right to life to all innocent persons, born and unborn. Any limitation on this right is not acceptable.

Thus, Section 7 of the Charter, which provides that the right to life be subject to "principles of fundamental justice", is not precise in meaning, and is so vague that it may not provide the absolute right to life. This is based on the fact that it is unfortunately conceivable, that a Supreme Court of Canada may subsequently, if it wished to impose abortion on the country, interpret the authorization by a Therapeutic Abortion Committee to destroy an unborn child as being in accordance with "principles of fundamental justice". This, however, would be totally unacceptable to the majority of Canadians.

V Recommendations

To insure that each innocent human being, born and unborn, is given an *absolute* right to life, Campaign Life makes the following recommendations:

Recommendation I

A Charter of Rights and Freedoms should not be entrenched in the proposed Canadian Constitution.

However, if Parliament should make the final decision that the Charter of Rights be entrenched in the Constitution, then we make the further following recommendations:

Recommendation II

Section 1 of the Charter of Rights and Freedoms be eliminated.

Recommendation III

Section 7 of the Charter of Rights and Freedoms be amended as follows:

Everyone from the moment of conception onwards, who is innocent of any crime, has the absolute right to life. Everyone has the right to liberty and security of person, and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.