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VANCOUVER COMMUNITY LEGAL ASSISTANCE SOCIETY

BARRISTERS & SOLICITORS

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Joint Clerks,
Special Joint Committee on the Constitution of Canada,
Postal Box 1044,
South Block,
Parliament Buildings,
Ottawa, Ontario
K1A 0A7

Dear Sirs:

Re: Canadian Charter of Rights and Freedom

I write as a lawyer who has attempted to use the Canadian Bill of Rights to obviate the effects of laws I considered denied equality before the law to several of my clients and because in my view the Charter of Rights will constitute a substantial derogation from existing rights. I share what I read in the press of the concerns of such groups as the Canadian and British Columbia Civil Liberties Associations that the Charter, especially Section 1, is worse than useless.

My view too is that, Canadians are better protected by the present Bill of Rights, whittled down as it has been by the Supreme Court of Canada, than under the Charter as drafted at present. For instance there is at least a potential now that the Supreme Court of Canada may eventually adopt the definition of "equality before the law" propounded by Pratte J. in the Federal Court of Appeal judgment Attorney General of Canada v. Bliss (1977) 77 D.L.R. (3d) 609 at 614:

> *It is natural that the rights and duties in individuals vary according to their situation. But this is just another way of saying that those rights and duties should be the same in identical situations. Having this in mind, one could conceive "the right to equality before the law" as the right of an individual to be treated by the law in the same way as other individuals in the same situation. However, such a definition would be incomplete since no two individuals can be said to be in exactly the same situation. It is always possible to make distinctions between individuals. When a statute distinguishes between persons so as to treat them differently, the distinctions may be either relevant or irrelevant. The distinction is relevant when there is a logical connection between the basis for the distinction and the consequences that flow from it; the distinction is irrelevant when that logical connection is missing. In the light of those considerations, the right to equality before*

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> *the law could be defined as the right of an individual to be treated as well by the legislation as others who, if only relevant facts were taken into consideration, would be judged to be in the same situation. According to that definition, which, I think, counsel for the respondent would not repudiate, a person would be deprived of his right to equality before the law if he were treated more harshly than others by reason of an irrelevant distinction made between himself and those other persons. If, however, the difference of treatment were based on a relevant distinction (or, even on a distinction that œuld be conceived as possibly relevant) the right to equality before the law would not be offended.*

Parenthetically, as one of the counsel for the respondent referred to in that paragraph I indeed do not repudiate, I accept that definition - with the exception of "(or, even on a distinction that could be conceived as possibly relevant)". It seems to me that any distinction in the world could be conceived as possibly relevant; i.e. nothing is impossible!

Pratte J.'s definition is infinitely preferable to that of Ritchie J. of the Supreme Court of Canada propounded in Attorney General of Canada v. Lavell (1973) 38 D.L.R. (3d) 481 at 495 where His Lordship adopted the common-law Diceyian definition of equality before the law. Of course, if this definition is to be accepted the Bill of Rights is redundant and unnecessary. Which definition will the courts adopt under the Charter? Why doesn't the Charter tell the courts which definition to apply?

As may be apparent, I commend to the Committee close scrutiny of the history of the present Bill of Right's treatment at the hands of appellate courts and the Supreme Court of Canada. I submit that it has taken 20 years for the majority of the Supreme Court to work out its pat formula for dealing with any Bill of Rights problem. This formula consists of finding that the impugned legislation was enacted for the purpose of achieving a valid federal objective (which seems to mean it is constitutionally valid) and the Bill of Rights does not require that all federal statutes must apply to all individuals in the same manner (which is true but, to the extent taken by the Supreme Court, irrelevant). With Section 1 of the proposed Charter the Federal Government has already written the Supreme Court's judgment dismissing any appeal against legislation based on the Charter. Section 1 is, in my view, totally unnecessary and antithetical to any attempt to entrench rights.

It seems to me to beg for the failure of the Charter to ignore such things as the standard of scrutiny which courts must bring to bear on impugned legislation. I have in mind the Supreme Court's adoption in several recent judgments of Laskin J.'s (as he then was) remarks about "compelling reasons" at

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at page 899-900 of the [1972] Supreme Court Reports in the Curr case. The present court seems to be setting up some kind of "beyond a reasonable doubt" standard by using this phrase. I would think the finding of the existence of a denial of equality before the law, or due process, or any other freedom would of itself, constitute a compelling reason to strike down the impugned legislation.

I submit that a Charter of Rights must not just tell Courts what rights are enshrined; it must also set out standards for measuring those rights as against impugned legislation and specifically direct the Courts that it is Parliament's intent to create new rights which are to override any legislation contravening these rights. In the business of law reform, legislatures must tell the judges exactly what to do and how to do it.

Finally I suggest that Section 15 of the Charter leaves open the argument that the existence of discrimination because of race, national or ethnic origin, colour, religion, age or sex is a *sine qua non* to a finding of denial of equality before the law. Any other forum of discrimination would then be "legal". This would be another retrograde step from the present law under the Bill of Rights. Cf. contra Laskin J. in Curr v. the Queen at page 896 of [1972] Supreme Court Reports. Is the existence of these "enumerated heads" a *sine qua non* or is it an additional lever? Why doesn't the Charter say? It would be a simple matter to set out these enumerated heads in a separate subsection along the lines of "Without restricting the generality of the foregoing, discrimination because of race, national or ethnic origin, colour, religion, age or sex shall be deemed to constitute a denial of equality before the law."

I regret that I have not the time for a more detailed analysis, but I would not wish silence to indicate consent.

The more the Charter is analysed, it seems, the more it appears a sham.

Respectfully submitted,

ALLAN H. MacLEAN

sub.

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P.R.E.S.S. RELEASE

1. I enclose a copy of an article by E.A. Driedger, Q.C. entitled Statute of Westminster and Constitutional Amendments. The article was written in Vol. II, Canadian Bar Journal #4, August, 1968.

The article is important for two reasons; who wrote and what he said. The article is written by E.A. Driedger, Q.C. former Deputy Minister of Justice, Ottawa.

The article says that if the British Parliament passes a Constitutional Amendment after 1930, a provincial legislature could repeal it as far as it affects that province. In the context of the present Constitutional Resolution before the Canadian Parliament, the article has the following importance. If the British pass the resolution, the provinces could repeal the resolution, as far as it applies to the provinces.

(a) I have underlined the more important points

(b) A background sheet on the society is also enclosed.

Contact person:

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HISTORICAL BACKGROUND

VANCOUVER COMMUNITY LEGAL ASSISTANCE SOCIETY

The Vancouver Community Legal Assistance Society has its roots in the reform zeal of the 1960's. The roots were twofold.

In the late 60's a group of seminary students received government funding to deal with the social problems of the inner core of Vancouver. The Project was to last one summer but it was continued and expanded the following summer to include a law student as part of the program. The program was then put on a full-time basis and was called the Inner City Project.

The basic purpose of the Inner City Project was to foster community-based organizations to deal with the social issues. To that end, all social agencies as well as the law student, now a graduate lawyer, operated from one building and approached problems on a co-operative basis. Yet, the most important aspect of this project is that they saw their purpose as a limited one. In early 1971, the organization wound itself up and each group was told it had to make it on its own. From the law student group, with Michael Harcourt at its head, there evolved the Vancouver Community Legal Assistance Society which was incorporated in 1971. The organization has been independent ever since.

During the late60's and 70's the law students at the University of British Columbia began operating legal advice clinics. The students came to Vancouver Community Legal Assistance Society to get assistance

in obtaining volunteer lawyers to help supervise these clinics. V.C.L.A.S. began a very close relationship with the law students legal advice program. That program was and is non-credit and voluntary. On account of its roots, V.C.L.A.S. has strong connections with both the community groups and the law students.

SOME FORMER MEMBERS OF V.C.L.A.S.

MIKE HARCOURT - was our first Legal Director and is now the Mayor for the City of Vancouver.

IAN WADDELL - was our second Legal Director and is now Member of Parliament for Vancouver Kingsway (NDP).

JOHN FRASER - was a member of our Board of Directors. He is now Member of Parliament for Vancouver South and was Minister of Enviroment (P.C.).

HARRY BOYLE - was a member of our Board of Directors and then a Provincial Court Judge and now is Registrar of the B.C. Court of Appeal and Supreme Court in B.C.

CAROLYN GIBBONS, KEITH MITCHELL, LYNN SMITH AND MARIA GIARDINI have all been Chairpersons.

SOME INTERESTING CASES

Brown et al v. B.C. Hydro & Power Authority

This was a class action against the Province's public utility and the Provincial Government. It sought a declaration that the Provincial Government could not tax electricity going on to Indian Reserves.

Result: We won the case.

Chastain et al v. B.C. Hydro and Power Authority

This was a class action against B.C. Hydro and Power Authority seeking an order that the Company no longer collect security deposits from consumers of electricity and for an order that all security deposits be returned. Result: We won the case in B.C. Supreme Court. This was the first consumer class action in Canada.