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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 could 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

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