SUBMISSIONS TO - Commission of Inquiry
Concerning
Certain Activities of the
Royal Canadian Mounted Police

RE - Submissions
of
Commission Counsel

FROM - Canadian Civil Liberties Association
per
A. Alan Borovoy
General Counsel
Allan Strader
Research Director

Ottawa July 24, 1980

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The Need for Prosecutions

While there are many difficulties of interpretation and application, the submissions of Commission counsel make it clear that members of the RCMP have committed a wide range of unlawful acts. With this misconduct so indelibly impressed upon the public record, it is now more necessary than ever to invoke the normal processes of law enforcement against the impugned officers and officials. Subject to the exercise of normal prosecutorial discretion, charges should be laid and disciplinary measures should be launched at least in those cases where there is a reasonable basis to believe that the law and its rationale apply.

The failure to adopt such a course of action could incur some serious risks. It could persuade large sectors of the public that there are double standards in this country, that civilian law breaking is punishable but RCMP law breaking is not. The most likely result would be an erosion of confidence in the administration of justice. To whatever extent some constituencies can break the law with impunity, others may be encouraged to believe they should be able to do likewise.

The failure to apply a single standard would threaten to unravel our voluntary infrastructures. Consider, for example, the position of the Canadian Labour Congress during the last strike of the Canadian Union of Postal Workers. Despite a common and bitter opposition to the special act of Parliament terminating the strike, the CLC declined to support CUPW at the point when the latter's action became unlawful. As the public knows, CLC President Dennis McDermott was vigorously attacked for his stand by significant elements of his own constituency. What will this country say to its Dennis McDermotts the next time they face such movements to defy the law? Indeed, so long as RCMP wrongdoers remain immunized, what <u>can</u> anyone say?

Moreover, a firm policy of prosecution may be necessary to ensure public confidence in whatever reforms are recommended by this Commission and ultimately enacted by Parliament. So long as these wrongdoers avoid the processes of justice, why should anyone trust that amended laws would be enforced more conscientiously than the existing ones?

The Relevance of Possible Defences for the Accused

In view of the need to treat RCMP wrongdoers as much as possible the same as their civilian counterparts, the Commission should dismiss as irrelevant much of the speculation about possible defences for the impugned officers. It is one thing, of course, for the authorities to desist from prosecution when they are satisfied in advance that the impugned person has a valid defence. In such circumstances, there might well be misgivings about forcing the person through the ordeal of a prosecution. But surely different considerations must apply when the impugned person has a merely arguable defence. Given a prima facie case of law breaking, it would be rare indeed for the authorities to desist from prosecuting civilians simply because there was a possibility of a defence. This Commission has been mandated to advise the Government with respect to the policy of prosecution. Its role is not to advise the courts as to the ultimate disposition of the cases.

On this basis, most of the matters raised by RCMP counsel Claude Thomson, Q.C. are beside the point. In the main, his litany of defences refers to what is arguably possible, not to what is substantially settled. To some extent at least, he admits the unsettled nature of the defences he has raised. On the applicability of Crown immunity, for example, he makes the following statement.

> "It is submitted that there is a need in Canada to clarify the extent to which, and the circumstances under which, all or some members of the RCMP may be entitled to assert Crown immunity in the context of a prosecution for a reasonably necessary act committed in the course of duty."

If such issues are yet to be clarified, they ought not to trigger a Commission recommendation against prosecution. Most of the other defences to which Mr. Thomson refers are similarly unsettled, highly controversial, or at least very restricted in their application.

Some Other Factors Concerning Prosecutorial Discretion

While there has been some acknowledgment that a mistake of law is no defence, there has nevertheless been an implication that reasonable mistakes should militate against a decision to prosecute. It has been suggested, for example, that such a factor might well be applied to the the bulk of the surreptitious entries.

Even if this were an acceptable basis to resist prosecution, it could hardly apply so widely. At most, perhaps, such an argument might be made for the earlier post 1974 surreptitious entries to plant bugs where there were judicial authorizations and solicitor general warrants. But no such considerations could be involved in the pre 1974 surreptitious entries. Unlike the later period, there was no law at that time authorizing electronic bugging. The law simply failed to prohibit the practice. Thus, there could be no reasonable basis to believe that electronic bugging could justify surreptitious entry. Indeed, if police officers could enter people's property with such impunity why would the law almost always require judicial warrants in the absence of the occupant's permission? While there may be reasonable arguments as to precisely what statutory prohibitions apply, there can be no such reasonable arguments about the impugnable nature of the conduct itself.

It has been suggested that the milieu in which RCMP officers worked during the pre 1974 period could well have induced in them the belief that the surreptitious entries were permissible. It was mentioned, for example, that the fruits of these intrusions often became evidence in criminal trials against RCMP targets. Since the courts did not criticize them and crown attorneys did not charge them, these officers would have had some basis to believe that their activities were acceptable. This belief would have been reinforced by the fact that the growing resort to electronic bugging was apparently well known in upper echelon government circles.

In our view, these factors do not suffice to create a reasonable belief that the activities in question were lawful. It is possible to conduct electronic surveillance, particularly telephone taps, without entering the affected premises. Thus, knowledge of the surrveillance cannot as readily be translated into knowledge of the entries. Moreover, even where the entries were suspected, this may suggest nothing more than a situation of tolerated illegality. How often, for example, do crown attorneys and senior police officials lay charges against officers whose improper methods are revealed during the course of criminal trials? And, as far as the courts are concerned, they may have had too little occasion for adverse commentary. Unlike the situation in the United States, the evidence which the police obtained from unlawful entry would nevertheless be admissible against the suspects they were

prosecuting. Thus, there would be no basis for a judicial ruling on the propriety of the entries. Indeed, the argument has so often been made in this country that the proper response to police law breaking is not the suppression of the evidance so acquired but the prosecution and disciplining of the impugned police officers.

It is significant to note also the memoranda and discussions which occurred around this subject at the time of the 1974 bugging law. The issue to be resolved was whether or not it would be necessary to enact a specific provision for surreptitious entry. If this practice had been permissible before the advent of the bugging law, there would have been no question of its permissibility afterwards. The most plausible inference, therefore, is that there was no general belief as to the legality of the pre-1974 entries.

Another factor which was cited as militating against prosecutions was the risk of acquittals by juries who may be sympathetic to the officers in question. Presumably, unsuccessful prosecutions might damage the administration of justice and create improper precedents. In our view, the <u>failure</u> to prosecute those who should have known better would be much <u>more</u> damaging to the administration of justice. It would create the very double standard to which earlier parts of this brief were addressed. Moreover, precedents are not likely to be created by juries who are making findings of fact. They are more likely to come from judges who are ruling on questions of law.

It was also argued that it might be unfair to prosecute individual officers in those cases where law breaking was a matter of official RCMP policy. According to this argument, what is primarily at issue is not the personal guilt of those who performed the acts but the official policies upon which they were based. In our view, it is not an either/or proposition. One of the effective ways to secure a change in these policies is to prosecute those who unlawfully implemented them.

There was also a suggestion that procedures other than prosecution might be more likely to achieve the desired ends, for example, the public announcement that the impugned conduct is now regarded as unlawful and will be prosecuted in the future. But why should anyone believe that tomorrow's misconduct would be treated differently from today's? Moreover, such an approach would fail completely to achieve another desired end - a single standard for the administration of justice.

There was some suggestion that it might be unfair to prosecute those officers whose law breaking was representative of a more general practice. Since they were unlucky enough to be identified, why should they be singled out when presumably their conduct was no worse than that of many others? To desist from prosecution on the basis of such reasoning would amount to the adoption of the very double standard which should be avoided. Civilian wrongdoers are rarely excused because of the knowledge that undiscovered others are just as guilty.

While most counsel have conceded that in general good motives are no defence, there has been some suggestion that such a factor should restrain the laying of charges. But good motives have frequently been pleaded by civilians as well. Many political dissidents, for example, have invoked such justifications when they were accused of law breaking. They too have argued that their offences have been motivated by altruism, not self-interest; they too have maintained that a "higher interest" should excuse their misconduct. Time and again, however, these civilian law breakers have been told that idealistic motives cannot excuse illegal behavior.

Let us return to the example cited above - CUPW's violation of the special statute terminating its fall 1978 postal strike. CUPW President Jean Claude Parrot was not saved by the fact that his conduct was motivated apparently by a concern for his members' welfare rather than by considerations of personal enrichment. Perhaps his arguable altruism might have been a mitigating factor in the punishment imposed by the court. But it did not stop the government from prosecuting him. To decline prosecution of RCMP officers on such grounds would be to legitimate the most unwarranted of double standards.

The Duty to Transmit Evidence

In any event, the final decision as to the laying of charges resides in the prosecutorial authorities themselves - the Federal Minister of Justice and the Provincial Attorneys General. It is crucial, therefore, that this Commission do what it can to ensure that they obtain the evidence they will need to perform their respective functions. While they may or may not wish to delay their decisions pending receipt of the Commission's recommendations, they ought to be enabled to act at once.

According to recent reports, it appears that the Federal Government has indicated a willingness "to discuss", with the relevant Provincial Attorneys General, the possible transmission to them of evidentiary details beyond what appears in the public transcripts of this Commission. Apparently, however, this offer has been confined to circumstances which are reported in these transcripts and it seems that the initiative must come from the concerned provinces. Beyond what is available to the general public, the federal authorities have not been routinely supplying their provincial counterparts with such material. Indeed, to some extent, the Federal Government has invoked the ground rules of this Commission as some basis for its policy.

Without necessarily exonerating any of the provincial governments for possible omissions on their part, we believe that a different approach is called for. In our view, all responsible parties must do everything they can to activate the normal processes of law enforcement. As far as the Commission is concerned, this means the transmission of all the propar evidence to the competent authorities. This could include not only evidence that the Commission has publicly processed, but also what it has not yet heard, what it may never hear, and even what it has chosen to withhold. Moreover, there is no need to wait for the Commission's report or a provincial request. The Commission, like any good citizen, has a duty t see that evidence of crime is reported to the proper authorities.

SUBMISSIONS TO

Special Joint Parliamentary Committee
on
The Constitution

RE

Charter of Rights and Freedoms

FROM

Canadian Civil Liberties Association

DELEGATION

Professor Walter Tarnopolsky
(President)

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(Past President)

This is a written memorandum following the oral presentation of November 18, 1980 in Ottawa

A Precautionary Note

The following comments are based upon the assumption that Parliament has already expressed its intention to entrench our fundamental freedoms in the constitution. For purposes of its testimony on the Charter, the Canadian Civil Liberties Association has avoided addressing itself to the abstract issue of whether such entrenchment is philosophically desireable. What we do address, however, is the more concrete issue of whether <u>this</u> Charter should be entrenched. On this matter, our conclusion is clear and unequivocal. In the absence of substantial amendments along the lines indicated hereafter, we believe that Canadians would be better off without this Charter. Its present defects are too serious and too numerous. A document as severely flawed as this one does not deserve to be enshrined in our constitution.

Undoubtedly, some of the defects are attributable to the speed with which this matter is being pushed through the parliamentary process. History will not take kindly to the disquieting paradox of allotting a mere few weeks of hearings to the enshrinement of our society's most enduring values. The most delicate balances must be struck; the most careful language must be employed. It is obvious that this task cannot be performed within the deadline that has been rather arbitrarily foisted on the deliberations of this Committee. In view of how long Canadians will have to abide by the outcome of this debate, we urgently request that Parliament take steps to ensure that sufficient time is accorded to these deliberations.

Overriding Impact

The Limitations

With the limitation provision in section 1, the government is attempting, at one and the same time, to eat and have its constitutional cake. The whole idea of an entrenched bill of rights is to subject even the authority of Parliament to a certain range of judicial scrutiny. But this limitation would unduly restrict the courts in the exercise of that function.

Indeed, the language of section 1 appears to encourage judicial abdication of this review function. Just what are the "reasonable limits" which are "generally accepted" in parliamentary democracies? Could not such terminology serve to validate whatever limits exist at any point in Canadian society? What better measure is there of what is "generally accepted" than the decisions of Parliament and the Provincial Legislatures? Thus this Charter might well have been impotent against the internment of the Japanese Canadians and the harassment of the Jehovah's Witnesses.

Alternatively, should the courts examine all the world's parliamentary democracies and attempt to glean some consensus as to what is "generally accepted" in those countries? The differences in culture, custom, tradition, and circumstances could well render this an impossible exercise. Moreover, to what extent are the courts equipped to conduct such surveys and draw the vital distinctions? For such purposes, may they depart from or will they be restricted to the canons of judicial notice? What is the risk that the doctrine of parliamentary supremacy might be considered one of the more common features of parliamentary democracies? In its present form, therefore, section 1 imperils the whole enterprise of a human rights charter.

Surely the government cannot believe that, in the absence of such a limitation, the courts will interpret the Charter as a recitation of absolutes. Nothing in Canadian history would suggest that such doctrinaire adjudication would be a significant possibility. Even the balder language of the American Bill of Rights did not produce such extremist jurisprudence. Notwithstanding the

apparently unqualified nature of its free speech provision, ("Congress shall make no laws abridging freedom of speech"), the American Constitution was read subject to a "clear and present danger" test. The U.S. courts also managed to sustain libel and slander laws.

In the opinion of the Canadian Civil Liberties Association, Parliament must either fish or cut bait. Legislative supremacy and the entrenchment of human rights cannot co-exist in this way. It is imperative, therefore, that the issue of limitations be handled much differently.

A proper limitation provision should contain, at the very least, a "necessity" test. The Charter might provide, for example, that certain designated rights and freedoms are subject only to those limits that are "demonstrably necessary" to the achievement of certain valid governmental objectives. The idea is to emburden the government with the onus of demonstrating the necessity for whatever limitation might be at issue. In this connection, perhaps the Charter should enumerate those governmental objectives which might be considered as potentially overriding.

But not all the rights and freedoms can be treated alike for such purposes. Some of them might be vulnerable to certain limits during normal times. Others might not be subject to any limits unless the most extraordinary circumstances prevailed. Still others might remain immune even then. Freedom of speech, for example, might arguably undergo certain impediments during normal times in the interests of personal reputation (libel and slander) or the right to a fair trial (sub judice contempt of court). But any restriction on the legal rights such as habeas corpus should require the most overwhelming of emergencies - an imminent peril to the life of the nation itself, for example, an actual war, invasion, or insurrection. Some fundamental rights, however, should not be susceptible to intrusion even in such emergencies - for example, the right to be immune from

cruel and unusual punishment. Thus the Charter should specify which of the rights and freedoms are subject to which category of limitations. It should further specify that no right or freedom may be limited beyond the point of such necessity.

Whatever the case for certain restrictions, the opening section of the Charter should explicitly affirm the breadth of the rights and freedoms it seeks to protect. In specific language, the Charter should enunciate an intention to depart from the kind of restrictive interpretations which effectively eroded the 1960 Bill of Rights. To whatever extent similar language is employed in this Charter, similar constructions are likely to recur. While some of our subsequent comments will propose changes in that language, we believe the courts should receive an unambiguous signal that Parliament has higher expectations for this Charter.

The Remedies

The potential remedies for violations of the Charter seem unduly narrow. They are confined to rendering "inoperative" "any law" which is inconsistent with the Charter. Suppose, however, the violation has caused substantial injury? In the absence of compensation, the invalidation of the offending law may appear very hollow to the aggrieved parties and the public.

Moreover, to what extent will the words "any law" embrace administrative practices? Suppose, for example, the police were to violate the right to "retain and instruct counsel without delay"? Such a police practice might be unchallengeable because it is not authorized by "any law". This could create an unacceptable paradox. In its present terms, section 25 might be capable of challenging an act of Parliament but not an act of a police officer. Moreover, what would be the status of the judge-made common law? To what extent might this too remain immune from the ambit of the Charter?

Unfortunately, not only does the Charter fail to provide enough remedies; it makes a point of denying some. On the basis of section 26, the courts would be unable to use the suppression of evidence as a sanction against unconstitutional government behavior. Yet, such a sanction might well represent one of the few practical methods available to a court for vindicating a right which has been violated. As Chief Justice Laskin once noted, unless the courts resorted to the exclusion of evidence, their remedial powers might be reduced to "words of reprobation". While we recognize that this matter is truly controversial, we consider it again inconsistent with the notion of entrenchment to deny the judiciary the right to make the choice. If entrenchment is to mean anything, the courts should be empowered to determine such issues on the evidence and arguments before them. Their ability to deal with these matters should not be foreclosed a priori.

Accordingly, we believe an additional section should be added specifically endowing the courts with a wide range of powers to remedy violations of the Charter. Such remedies should include the power to issue corrective orders, enjoin certain acts, make declarations, exclude evidence, and award damages. The remedies section should clearly apply not only to any laws which violate the Charter but also to administrative practices and common law precedents which conflict with its provisions. If the Charter is to enjoy the respect of the Canadian people, it must be capable of effectively vindicating the rights it creates.

The Substantive Protections

Democratic Rights

Like section 1, section 4(2) contains a potentially self-serving exemption to the requisite judicial scrutiny. On the basis of a "real or apprehended war, invasion, or insurrection", our legislative authorities may perpetuate their existence beyond the proposed constitutional limits. In another forum, we have already argued that the notion of "apprehension" is unduly subjective. Moreover, since the language here is the same as that found in the War Measures Act, the likelihood is that the same definition would apply in both cases. On this basis, a governmental declaration that such an "apprehended" state exists might well give rise to a conclusive legal presumption that the government was correct. This, of course, could preclude judicial review.

Again, it is our view that this approach is fundamentally inconsistent with the notion of an entrenched charter. In line with our submissions on the War Measures Act, we would suggest that more objective language be used in both places and that the government's declarations be clearly denuded of any automatically binding effect. In our view, the word "imminent" might well be substituted for "apprehended". And the courts should be free to satisfy themselves that there are at least reasonable and persuasive grounds for any such legislative or governmental determination.

Legal Rights

On its face, section 8 appears to be redundant. Under existing law, people cannot be subjected to search or seizure unless it is done "in accordance with procedures established by law". What, then, could section 8 possibly contribute? Once again, the problem may well concern the propriety of certain legal procedures authorized by Parliament and the Provincial Legislatures. Consistent with the inconsistencies which we have already identified, this section would preclude judicial review of the legislation at issue.

A few years ago, for example, during the course of a drug raid the police conducted body searches of the more than one hundred patrons they found in the lounge of a small Fort Erie hotel. More than thirty women were herded into washrooms, stripped and subjected to vaginal and rectal examinations. Apart from a few grains of marijuana which appeared not in body orifices but on the floor of the lounge, the police apparently found no trace of illicit drugs. Moreover, it appears that they had no special basis to suspect that everyone they searched would be harbouring such drugs. But, since the courts might well agree with the Pringle Royal Commission that these searches were conducted "in accordance with procedures established by law", i.e. the Narcotic Control Act, that would end the matter.

For the reasons indicated earlier, such a result would represent a departure from the rationale of an entrenched bill of rights. In a case of such needless and intrusive encroachments, the law which authorizes them should itself be challengeable. We would recommend, therefore, an amendment to correct this defect. Perhaps, like the U.S. Bill of Rights, section 8 ought also to prohibit <u>unreasonable</u> searches and seizures. Moreover, the right of privacy should be more comprehensively protected here. This might be done by the addition of "surveillance" and "the interception of communications" to the prohibited conduct.

The same problem obtains with section 9 - both redundancy and foreclosure of judicial review. Again, we would ask that the section be amended to correct these weaknesses. Perhaps it might be done by providing simply that everyone has the right not to be <u>arbitrarily</u> detained or imprisoned. Such an amendment might allow the judiciary to consider both the reasonableness of our various detention laws and the fairness of any hearings which result in detentions.

Section 11(d) raises the identical issue. Our previous comments, of course, apply again. Perhaps this section might be improved by requiring the denial of reasonable bail to be based upon reasonable grounds and in accordance with fair procedures.

The section 13 right against self-incrimination is welcome but not adequate. To the extent that its exercise may continue to require that the affected witness affirmatively invoke such protections, the Charter should also require that such witness be advised of this right and the means for exercising it. Where accused people are concerned, the proposed Charter appears remarkably devoid of any right against self-incrimination. In our view, this omission should be corrected. At least in the context of strictly criminal charges, the Charter should explicitly provide that accused people are not compellable witnesses; indeed they have a right to remain silent.

In order that the section 10 rights on arrest and detention acquire more practical significance, there ought to be some additions. Suddenly denied the psychological supports of normal life,arrested people are quite likely to be nervous, frightened, and bewildered. In such circumstances, they may very well behave so as to make themselves look guilty when they are not or guiltier than they are. We believe it is important, therefore, that arrested people should have a right also to be informed promptly of their custodial rights including and especially the right to counsel and the right of silence.

And, in order to make this workable, there is need for a further protection. In the absence of some imminent peril to life or limb, arrested people should be immune from custodial interrogation until and unless they have either consulted counsel or, upon being advised of this right, have declined to exercise it. Studies of the experience in other countries suggest very strongly that such additional safeguards for arrested people need not undermine the effectiveness of law enforcement. Indeed, following the tough protections introduced into American law by the Supreme Court decision in the Miranda case, it was discovered that, notwithstanding the drop in confession rates, the police were managing to sustain their conviction and crime solution rates.

Another deficiency in the Charter is the failure to entrench a right to trial by jury. In recent years, there have been rumblings from Ottawa to the effect that legislation would be introduced reducing the existence of this right in the context of certain criminal cases. Arguably, there are some situations where a right to trial by jury would constitute a needlessly costly encumbrance - regulatory offences, many civil lawsuits, labour arbitrations, etc. In the more serious criminal cases, however, it is important that such a right be available. It is the ultimate safeguard against the prospects of jaded adjudication by professionals leading to a serious loss of liberty. In our view, therefore, the Charter should enshrine the right to trial by jury at least in such criminal cases.

If the foregoing changes were made, it may be that section 7 will no longer appear as necessary as it does now. If the Charter provided tougher safeguards with respect to search, seizure, arrest, detention, the treatment of people in custody, along with habeas corpus and a right against cruel and unusual punishment, it might be possible, without undue jeopardy, to withdraw section 7. As we suggested at the hearing, the present section 7 might arguably impede the right to an abortion ("everyone has the right to life...."). Moreover, since other sections refer to arrest and detention, the "liberty" referred to in section 7 might be capable of some unintended interpretations, for example, liberty of contract. To what extent, in short, could section 7 empower the courts to strike down labour and social welfare laws on the basis of the kind of interpretations earlier American courts gave to the 14th amendment of the U.S. Constitution? While we do not unreservedly predict that this would happen in Canada, we simply point out that, if the other sections were amended as proposed, there would be no need to incur such a risk with section 7.

Non-Discrimination Rights

One of the problems with the current section 15 concerns the likely interpretation of the word "discrimination". It will be remembered that in Regina v McKay and Willington, a sixteen year-old boy was convicted as an adult for contributing to juvenile delinquency because he had sexual intercourse with a sixteen year-old girl. Pursuant to the Juvenile Delinquency Act, girls of sixteen and seventeen in the Province of Alberta were designated as "juveniles" but boys were considered adults. The Alberta Court of Appeal held that the word "discrimination" in the 1960 Bill of Rights must be construed as having a negative impact. In the Court's view the declaration which took place in the Province of Alberta was not an act against sixteen and seventeen year-old boys; it was a benefit conferred upon sixteen and seventeen year-old girls. On this basis, the Bill of Rights prohibition against "discrimination" did not apply to the circumstances in question.

In our view, section 15 should be amended in order to reduce the risks of such adjudication. Perhaps the section might be broadened to prohibit certain kinds of "distinctions" as well as "discrimination".

But even if such a change were made, section 15 would remain deficient. The non-discrimination rights it purports to create are potentially both too wide and too narrow. They may be seen as too narrow on the basis of the expressio unius canon of statutory construction. Having specifically prohibited certain kinds of discrimination, the Charter might be interpreted as permitting all other kinds. Such a selective "equal protection" clause is demonstrably inadequate. The grounds specified in the Charter hardly begin to address the spectrum of unacceptable discrimination.

Conversely, there may be occasions when the grounds which are specified appear too wide. To what extent, for example, could the prohibition against age discrimination nullify old age pensions and the juvenile court system? And how far might the argument be made that Indian reserves represent "discrimination because of race"? It may very well be that these examples are not covered by the exceptions in sections 15(2) and 24. In pointing out such possibilities, we are not necessarily saying that under the present Charter the courts would be obliged to strike down such government programs. What we are saying is that, in its present terms, the section might create such a risk Alternatively, in order to sustain these government programs, there is some risk that the courts would develop some doctrine or distinction which could become a mischievous precedent. In any event, the present section 15 may wind up dumping too many problems on the courts.

In order to resolve these problems, we would suggest that the section be redrafted to ensure equal protection without <u>any</u> unreasonable distinction or discrimination. The determination of "unreasonable" should refer explicitly to valid governmental objectives. The section should go on to provide that, without restricting the generality of the foregoing, certain grounds of distinction and discrimination would be considered presumptively unreasonable. Such grounds should be limited to what is almost always repugnant e.g. race, colour, religion, sex, ethnicity, and national origin. In this way, section 15 would widen the range of effective protection, enshrine some of our most fundamental values, and avoid rigid absolutism. All this without excessive judicial second guessing of the legislative policy choices.

Summary of Recommendations

The Canadian Civil Liberties Association recommends that the proposed Charter not be entrenched in the Canadian Constitution unless amendments are made along the following lines.

1. The limitation clause in section 1 should be removed and replaced at various points in the Charter by specific limitations addressed to specific rights and freedoms.
   a) Certain rights and freedoms would be subject to limitations during normal times.
   b) Certain rights and freedoms would be subject to limitations only in overwhelming emergencies.
   c) Certain rights and freedoms would not be subject to limitations even in emergencies.

   Such limitation clauses should provide that the government has the onus of demonstrating that the limitation at issue is necessary to the achievement of valid governmental objectives and that it extends no further than necessary.

2. The current section 26 should be removed and replaced by a provision endowing the courts with comprehensive power to rectify violations of the Charter. At the very least, such remedies should include the power to issue corrective orders, enjoin certain acts, make declarations, exclude evidence, and award damages. They should be made specifically applicable not only to any laws but also to administrative practices and common law precedents which violate the Charter.

3. For a Parliament or Provincial Legislature to perpetuate its own existence beyond the constitutional limits, the minimum prerequisite should be, not an "apprehended", but an <u>imminent</u> war, invasion, or insurrection. And such determination should be judicially reviewable on the basis of reasonable and persuasive grounds.

4. There should be an immunity not only to unlawful but also to <u>unreasonable</u> searches and seizures. This protection should extend also to surveillance and the interception of communications.

5. There should be an immunity not only to unlawful but also to <u>arbitrary</u> detention and imprisonment.

6. There should be a requirement that the denial of reasonable bail not only be lawful but also that it be <u>reasonable</u> and in accordance with <u>fair procedures</u>.

7. Where the right against self-incrimination is concerned, the following should be added:
   a) a requirement that witnesses be advised of the protection and the means for exercising it
   b) a provision that, at least in the context of strictly criminal cases, the accused have a right to remain silent.

8. In the absence of imminent peril to life or limb, arrested people should be entitled to the following additional rights:
   a) to be informed promptly of their custodial rights including and especially the right to counsel and to remain silent
   b) to be immune from custodial interrogation until and unless they have exercised their right to counsel or, upon being advised of it, have declined to do so.

9. In serious criminal cases, there should be a right to trial by jury.

10. If the foregoing changes are made with respect to search, seizure, privacy, arrest, and detention, the present section 7 should be withdrawn.

11. There should be equal protection of the law without any unreasonable distinctions or discrimination. Without limiting the generality of the foregoing, the following categories of distinction and discrimination should be considered presumptively unreasonable: race, colour, religion, sex, ethnicity, national origin.