SUBMISSIONS TO---------- The Honourable Robert Andras,
Minister of Manpower and Immigration

RE---------- Due Process and the Law of Immigration

FROM---------- The Canadian Civil Liberties Association

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TABLE OF CONTENTS

The Power to Deport Mala Fide Visitors----------Pages 1 - 5

The Power to Grant and Deny Landed Immigrant Status--------Pages 6 - 9

Safeguards in the Exercise of Immigration Powers----------Pages 10 - 17

Summary of Recommendations----------Pages 18 - 19

Introduction

The Canadian Civil Liberties Association is a national organization with a cross-country membership of more than three thousand individuals, seven affiliated chapters, and more than fifty associated groups which, themselves, represent several thousand people. Our membership roster includes a wide variety of callings and interests - lawyers, writers, housewives, trade unionists, minority groups, media performers, business executives, professors, etc.

Among the objectives which inspire the activities of our organization is the desire to promote legal protections against the unreasonable invasion by Government of the freedom and dignity of the individual. It is not difficult to appreciate the relationship between this objective and the subject of this brief - due process and the law of immigration. The power to deport represents a potentially substantial intrusion upon the freedom of individuals who set foot on Canadian shores. It can affect also the welfare of long standing Canadian residents whose interests are tied to the victims of deportation.

This brief is concerned with the establishment of fair procedures for the determination of these vital issues. Whatever the substantive grounds which govern immigration policy, (and these we will wish to discuss at a later date) how can we ensure at least minimum standards of procedural fairness? Democratic societies have been advised that "due process is the foundation of liberty". The law of immigration is no exception.

The Power to Deport Mala Fide Visitors

In response to what the Minister of Manpower and Immigration has referred to as the "misuse of decent, generous legislation", the Government of Canada has removed from non-visa holding visitors all rights of independent appeal against deportation orders. Since the establishment of the broad provisions for appeal to the independent Immigration Appeal Board, thousands upon thousands of people have filed appeals. According to the Department's estimates, if the appeal system had continued unabated, the backlog of cases waiting to be heard could have reached between 25,000 and 30,000 by the end of 1973.

Convinced that a great many of these people had entered the country fraudulently pretending to be visitors in the hope of subsequently becoming landed immigrants, the Government decided to crack down. Immigration applications would no longer be accepted from people who entered Canada as visitors and non-visa holding visitors would no longer enjoy a right to appeal deportation orders.

Upon introducing the new amendments to the House of Commons, the Minister admonished his fellow parliamentarians in these words:

> "...we should ask ourselves if every person, by the mere fact of setting foot on Canadian soil, should gain access to the Board and from it to the Federal and Supreme Courts".

In view of the clogging with which our appeal machinery has suffered, the Minister's comments elicited an understandably sympathetic response from many people. Yet, notwithstanding the obvious merit in the Government's case, the Canadian Civil Liberties Association harbours serious misgivings about the resulting state of affairs.

From an immigration policy which may have been excessively liberal, the Government has gone to an immigration policy which appears excessively arbitrary. Under the new amendments, the complete power to admit or reject visitors is now vested in the immigration officers and special inquiry officers. Significantly, these officials are all employees of the Immigration Department and are thereby subject to the control of a politically self-interested Minister of the Crown.

To criticize such arrangements bespeaks, of course, no disrespect for either the incumbent Minister or the incumbent officials. The essence of our concern is directed, rather, to the structural impropriety of reposing so much power in civil servants. As long as such a situation persists, the Government will be unavoidably vulnerable to the suspicion that the conduct of its officials is influenced more by the interests of political expediency than by the weight of evidence and the requirements of law.

Indeed, even during the period when recourse to independent appeal was still permissible, such suspicions were wide-spread in many sectors of Canadian society. Various non-white constituencies--blacks, Asians, Latin Americans, for example--frequently voiced the fear that the Immigration Department was discriminating against their countrymen in deference to what was perceived as a growing Canadian prejudice against "coloured" immigration.

In this regard, we cite the affidavit of Toronto lawyer Rewachand Sainaney, sworn for the Canadian Civil Liberties Association in early January, 1973. Although Mr. Sainaney's allegations concern the now abandoned practice of requiring cash bonds from prospective visitors, his affidavit retains its significance as an indication of how Departmental practices have generated community suspicions.

Mr. Sainaney swears that, during the 26 months preceding his deposition, he saw approximately 5,000 persons enter Canada at the Toronto International Airport. Here, in the very words of his affidavit, are some of this lawyer's crucial observations.

> "I personally observed approximately 2,000 cases in which the applicant for admission to Canada was required to post a cash bond as a condition of entry. In none of these cases was such a requirement made of a European. All persons subjected to this requirement were non-Europeans--mostly Asians and South Americans and West Indians..."

Mr. Sainaney's experience has extended also to immigration practices in the Montreal area.

> At the present time I am representing approximately 300 persons who entered Canada at the Montreal International Airport and who have been ordered deported on the ground that they refused to post a cash bond. All of these persons are non-Europeans."

On the basis of the foregoing evidence alone, we would not wish to conclude that the Department of Immigration was practising racial discrimination at these points of entry. It may very well be that, because of the paucity of Canadian immigration services in the Third World, the vast majority of illegal entrants are, in fact, of non-white extraction. But, regardless of this possibility and the merits of the individual cases involved, the pattern of conduct disclosed in Mr. Sainaney's affidavit appears to reflect a policy of deliberate Departmental discrimination.

In the era preceding the new amendments, this appearance could be somewhat softened by the public and independent hearings which were accorded to aggrieved persons at the Immigration Appeal Board and in the courts of law. Now, however, the entire case involving the right to visit this country can be resolved by the fiat of Government officials in the privacy of the interview rooms at airports and border crossing points. It is inevitable that this arrangement will spawn and nourish additional seeds of suspicion.

How, then, to resolve the resulting dilemma? The perpetuation in Government of these absolute powers entails the appearance of impropriety. The restoration to visitors of independent appeals entails a recurrence of inefficiency.

As one means of escaping this conundrum, the Canadian Civil Liberties Association proposes that the Departmental discretion to determine the bona fides of prospective visitors be modified by the introduction of a surety system. The Department should be obliged to admit every applicant, otherwise not prohibitable, on whose behalf a resident Canadian citizen or landed immigrant signs a surety bond guaranteeing his timely departure. No money should be required or requested in advance. But both the visitor and the surety would incur a subsequent financial debt, in the event of the visitor's failure to leave the country as promised.

Under such an arrangement, there would be less need for the restoration of appeal rights. So long as the Department officials were satisfied that the applicant were bona fide, they would admit him. But if they believed him to be mala fide or if they were in doubt about his bona fides, they would advise him that his admissibility required that both he and a Canadian resident sign a surety bond.

As a protection against the risk of admitting mala fide visitors, the Department might require that the surety be a property owner or a regularly employed person. Together with proof of identity (naturalization papers, immigration papers, or a Canadian birth certificate), the surety might be asked simply to swear an affidavit as to his place of residence, his place of employment or the location of any property he owned. In view of the fact that no money could be requested in advance, the amount of the surety bond might be made substantial, say $5,000.00 each to the visitor and the surety.

As a protection against visitor unpreparedness, the Department should undertake, both here and abroad, to promote widespread public information regarding the procedures for entry into Canada. Such a program would enable all parties to make the necessary arrangements for sureties and documents, in advance of the visitor's arrival here. For those who, nevertheless, fail to make advance arrangements, the Department should adopt certain safeguards. Immigration officials should be instructed that, before any visitor is deported for mala fides, they must advise him of the surety system and grant him at least 72 hours with reasonable access to telephone facilities, for the purpose of obtaining the necessary assistance.

In the case of the bona fide applicant planning to visit Canadian citizens or landed immigrants, these requirements should not be difficult to meet. Neither cash nor excessive "red tape" would be involved. The overwhelming number of citizens and landed immigrants can easily furnish birth certificates, naturalization papers, or immigration papers. Beyond that, there would be no need for them to provide additional documents of identification. All that would be required at that point is their signature on the affidavit and the surety bond. The visitor's timely departure would extinguish all debts and obligations.

In the case of the mala fide applicant, however, such procedures should provide a reasonably effective deterrent. If the visitor failed to depart Canada as promised, the surety would face the loss of a considerable, not a token, sum of money. Moreover, if the surety had lied as to his whereabouts, he would also face perjury charges. The visitor, of course, would be liable to the same financial losses and he would be forced to live with the continuing threat of immediate deportation without appeal. Very few prospective wrong-doers would be likely to incur this combination of unpalatable perils. Thus, Canada would

have little to lose and a measure of fair play to gain by the adoption of such a system. Arbitrary discretion could be supplanted by surety guarantees without advance money and without cumbersome appeals.

We realize, of course, that this approach would be of little help to the legitimate vacationer who has neither friends nor relatives in Canada. But the most contentious problems that have arisen in this area concern not the transient vacationer but the lengthy visitor. What we are trying to eliminate is the arbitrary rejection of the plane loads of Asians, West Indians, and Latin Americans who have travelled thousands of miles to visit with loved ones. It is the treatment suffered by prospective visitors and visitees in these situations which have created the deepest resentments and suspicions of Canadian immigration policy. In our judgment, the surety arrangement would provide the best hope for reconciling the interests of administrative efficiency with the demands of procedural propriety.

The Power to Grant and Deny Landed Immigrant Status

To its credit, the Government of Canada has attempted to minimize the exercise of arbitrary judgment in the awarding of landed immigrant status. The categories of eligibility, together with the number of units assigned to each, are spelled out in Departmental regulations. Thus, everyone concerned, applicant as well as citizen, has some opportunity to scrutinize, evaluate, and even influence both our collective priorities and the judgments which are made in individual cases.

Unfortunately, however, the regulations permit the persistence of a rather wide scope for unfettered Departmental discretion. Two categories, "occupational demand" and "employment opportunities in the area of destination" together comprise 40% of the units required for a successful application. Unavoidably, as economic circumstances change, so too will the number of units assigned to particular occupations and to the various regions of intended settlement.

The difficulty here arises from the fact that there is no way for applicants or the public to know, in advance, how the units are allocated within these broad categories. This information is contained and confined in a Departmental document entitled "Occupational and Area Demand Report". In a letter dated January 2, 1973, Sidney B. Linden, a Toronto lawyer, requested that the Department make available to him a copy of this report, then in use. On January 10, 1973, D.J. Lalonde, Ontario Region Director of Immigration Operations, replied,

> "The Occupational and Area Demand Report is an internal document not for public release".

In the course of explaining the Department's policy on these matters, Mr. Lalonde did attempt to assure Mr. Linden that "the units awarded are based on information acquired and analysed by officers of the Department". But Mr. Lalonde's letter contained no indication regarding the source of such information or the method by which it is analysed.

Governmental secrecy encourages public suspicion. In our respectful opinion, the interests of procedural fairness require the declassification of such material. The "Occupational and Area Demand Report" should be transformed into a public document. Information sources, assignable units, and methods of analysis should be open for all

to inspect. Such an approach would enable applicants better to present their cases and the public better to evaluate Government policy. Both are essential to the democratic concept of due process.

Only an overriding public interest could possibly justify a policy of secrecy in such matters. To our knowledge, no such claim has been advanced in this case.

The category "personal assessment" endows the Department with a further opportunity for arbitrary discretion. Up to 30% of the required units can be accorded for the Immigration Officer's personal impressions of the applicant's "adaptability, motivation, initiative, resourcefulness, and other similar qualities". In view of the 15 units available for this category, it is possible that many borderline applicants might be rejected because of bureaucratic bias. This is not, of course, to accuse the Department or its officers of actual unfairness in the application of this category. Rather, it is to impugn the appearance of unfairness which this category makes possible.

Inevitably, however, there will be some applicants who would be desireable immigrants, despite the fact that they scored less than what was required in the objective categories. This is a judgment that a properly trained Immigration Officer might well be able to make. How, then, can we have helpful flexibility without harmful prejudice?

In order to solve this dilemma, we propose the removal of the "personal assessment" category and its specified number of units. Instead, the Department should be empowered to grant landed immigrant status to any borderline applicant who satisfied it that he would be an asset to Canada, notwithstanding the fact that he was a few units short of the requisite number. In this way, the officer's personal impressions could only help an applicant, they could never hurt him. In our view the risk of arbitrary help is much less offensive to due process than the risk of arbitrary harm.

Even though the remaining categories are supposed to involve objective assessments, their operation is contaminated, nevertheless, with the appearance of subjectivity. The recent termination of the right to apply for landed immigrant status from within Canada has had the effect of eliminating with it the right of independent appeal against Departmental assessments. Indeed, the only cases in which assessments may now be appealed are those involving sponsored dependents.

Thus, in the vast majority of applications, the complete power to award or deny landed immigrant status resides in the Department officials who, as we have observed, are subject to politically self-interested [illegible] control. For all the reasons we discussed in the section on visitors, the exercise by civil servants of so much power is bound to generate the suspicion of political influence.

Accordingly, the Canadian Civil Liberties Association recommends at least a partial restoration of the right of appeal in matters concerning landed immigrant status. In those cases where a nominated relative of a citizen or landed immigrant has been adversely assessed, the regulations should provide a right of recourse to the Immigration Appeal Board. The Minister has already acknowledged that the right of appeal has some merit in respect of "those persons to whom Canada has some established legal or moral obligation". Surely, Canada owes such an obligation to its citizens and its landed immigrants. At <u>their</u> instigation, therefore, we submit, a right of appeal should arise. Even if the applicant is abroad and the appellate tribunal is here, the nominating relative should be able to compel an independent review of Departmental assessments. Whether the appeal is conducted orally or in writing, through hearsay evidence or direct testimony, some opportunity for independent review is better than no review at all.

According to an old adage, "justice delayed is justice denied". People experienced in immigration matters have complained to the Canadian Civil Liberties Association that East Indians usually wait from 2 to 5 years for a response to their landed status applications. By contrast, we are advised that applications from continental western Europe rarely involve a delay of more than 3 to 9 months. And, in the case of the United Kingdom, the normal waiting period is even less.

These complaints prompted the Canadian Civil Liberties Association to make inquiries regarding the immigration facilities which the Department has available in various parts of the world. On January 29, 1973, an executive assistant to the Minister provided us by letter with a geographic breakdown of immigration offices and officers. A perusal of this information quickly disclosed the reasons for the disparity in waiting periods. In London, England, alone, the Department had provided eleven officers to process immigration applications. An additional 9 officers were quartered in other cities of the United Kingdom. By contrast, in the whole of over-populated India,

there were only 4 officers and all of them were stationed in New Delhi. Small wonder, then, that Indian applicants were obliged to wait so much longer than British applicants. Small wonder, also, that so many Indians attempted to obtain landed status by coming here first.

Such enormous disparity of treatment will lead inevitably to suspicions of racial and national discrimination. Now that Canada has eliminated internal immigration applications, it is imperative that this country take steps to reduce these inordinate delays. So long as there are no policy reasons to the contrary (and if such policy reasons exist in any situation, they should be explained openly), we believe that the Department should deploy its services throughout the world, in order to ensure that all applications can be processed within a reasonable period of time.

At the moment, Parliament's articulated egalitarian objectives can be undermined by the Government's unexplained under-allocation of facilities. Landed status delayed is, indeed, landed status denied.

Safeguards in the Exercise of Immigration Powers

At present, the Immigration Act empowers the Minister, Deputy Minister, Director, or a Special Inquiry Officer to detain anyone respecting whom an examination or inquiry is to be held or a deportation order has been made. The decision as to whether to grant bail and under what conditions is conferred upon the Special Inquiry Officers. The Act imposes only one qualification on this rather substantial Departmental discretion. Upon the arrest of such a person, the Special Inquiry Officer must "forthwith cause an inquiry to be held".

Insofar as persons without right of appeal are concerned, it is difficult to quarrel with the existence of these detention powers. So long as the inquiry, in fact, is held "forthwith", very little harm will have been caused. But a rather serious objection must arise in the case of those who do have a right of appeal. The appeal may not take place for weeks or even months. In our view, to repose so substantial a power of incarceration in the hands of politicians and civil servants is to affront in the most severe way the democratic principles of due process.

This is not to say that detention powers should be unavailable against those with rights of appeal. But it is to say that the exercise of such powers should be subject to independent review. In view of the judicial protections with which the Bail Reform Act clothes the criminal accused against pre-trial detention, how can we justify the legal nakedness with which the immigration suspect must endure his pre-hearing detention?

These considerations prompt the Canadian Civil Liberties Association to recommend the adoption of the Bail Reform procedures in immigration matters. The Department's pre-inquiry and pre-appeal detention orders against landed immigrants and visa visitors should require the sanctification of expeditious independent review. The Department should bear the burden of demonstrating to either a court or a panel of the Immigration Appeal Board that the immigrant's detention is necessary to ensure his attendance at the hearing or to prevent his commission of serious offences. On the basis of an interim hearing into both sides of the question, the independent tribunal should have

a number of options at its disposal. It might elect to release the immigrant outright to detain him until the hearing, or to release him, subject to his subsequent indebtedness and/or that of a surety, in the event that he absconded. The detained immigrant should have a mandatory review by the Tribunal at least every 8 days and a right of recourse to a higher court at any time before the hearing.

If the safeguards of the Bail Reform Act are deemed adequate to protect our society from the injuries contemplated by the Criminal Code, there is no reason why they should not be deemed similarly adequate to protect us from the injuries contemplated by the Immigration Act.

In the fall of 1972, Edwin Hogan, a non-visa holding visitor to Canada, was deported to the United States. At the time of his entry into Canada, this former American Black Panther was an escaped prisoner from an Ohio jail where he had been sentenced because of his conviction there for crimes involving moral turpitude, to wit, robbery and murder. At the time that his deportation from Canada was ordered, Mr. Hogan requested that he be deported to Algeria rather than to the United States. Notwithstanding the existence of some evidence that Algeria was prepared to admit him, the Canadian Immigration authorities refused his request and deported him to the United States.

Deportation proceedings, particularly those involving non-visa visitors, frequently lack the kind of safeguards which accompany extradition proceeding . In deportation matters, the onus usually devolves upon the person concerned to demonstrate his eligibility for admission to Canada. In order to qualify, he must answer questions and provide information. In extradition matters, on the other hand, the person concerned attracts many of the safeguards normally available to the accused person in a criminal case. The onus of proof is upon the country seeking his extradition. Moreover, the person concerned may seek the shelter of the right against self-incrimination.

For these reasons, we believe that it is unfair to use the method of deportation to accomplish the goal of extradition. Deportation is designed to protect Canada from undesireable people. It is not designed to serve the justice system of a foreign state. The goal of deportation can be adequately served simply by expelling the undesireable person from our shores. Once that happens, there should be no need for concern here as to his ultimate whereabouts.

Subject, therefore, to the absence of additional cost to Canada and the presence of sufficient evidence that the chosen country is prepared to accept the deportee, this country should be willing to accommodate his choice of destination.

The Hogan case raises another issue which requires Governmental attention. The Immigration Department executed the Appeal Board's deportation order on the very day of its receipt by Hogan. Under the circumstances, there was no time for Hogan to file an appeal or even to notify his lawyer. Indeed, he was on his way to Buffalo by the time his lawyer learned what had happened.

The speed with which the Department acted in this matter effectively denied what the law has guaranteed - a right of appeal. Despite these incredible consequences, the Immigration authorities insisted there was nothing illegal in the Hogan deportation.

The Canadian Civil Liberties Association recommends, therefore, that the law be changed. It should henceforth provide that no person be deportable until his rights of appeal have been exhausted or until the prescribed time limits have expired without an appeal being filed. Even though non-visa visitors will no longer have rights of appeal, the measure we recommend should be adopted in order properly to protect those who will retain such rights.

Periodically, immigration proceedings in Canada could lead to harsh consequences elsewhere. Not long ago, a Greek Jehovah's Witness, subject to deportation for alleged mistatements in his immigration application, faced imprisonment in Greece because of his conscientious objection to service in that country's army. Numbers of American radicals subject to extradition and/or deportation, have faced long prison terms because of charges or convictions against them in their native country.

The most elementary canons of due process require that people in such predicaments have recourse to trained legal counsel. Experience reveals, however, that some of these people have arrived in Canada, utterly destitute. Though some provinces have sometimes helped, virtually no province requires the subsidization of legal assistance in immigration cases. Yet, it would be unthinkable if the fact of poverty could

effectively deny the fundamental trappings of Canadian justice where such dire consequences were involved.

In view of the federal responsibility for the conduct of immigration policy, the Federal Government must bear a heavy responsibility for the fairness of immigration proceedings. Accordingly, the Canadian Civil Liberties Association requests the Government of Canada to subsidize legal assistance for needy persons at least in those cases where the outcome of immigration proceedings in Canada could lead to substantial deprivations of liberty elsewhere.

In addition to subsidizing the appearance of counsel in extreme cases, the Government should ensure the right to counsel in all cases. Unhappily, there is some evidence that the Department periodically has frustrated the exercise of this important right.

In the aforementioned affidavit of Rewachand Sainaney there is an allegation that, toward the end of 1972, the immigration authorities denied him permission to interview 237 Asian visitors who were seeking entry at the Toronto airport. According to Mr. Sainaney, the Department officials justified their refusal on the basis that none of the visitors had requested to see Mr. Sainaney in particular or a lawyer in general. Mr. Sainaney's rejoinder that his services had been pre-arranged here by resident relatives, on behalf of the visitors but without their knowledge, apparently failed to soften Departmental resistance. In the result, these visitors waived their right to a special inquiry and departed Canada without either a hearing or an interview with counsel.

Other people have complained that the Department has insisted on convening special inquiries without granting sufficient time for persons concerned to consult counsel or for counsel adequately to prepare their cases.

These unfortunate experiences impel the Canadian Civil Liberties Association to request the adoption of precautionary safeguards. Department officials should be instructed that, before a special inquiry is held or the right to such an inquiry is waived, they must advise the person concerned of his right to counsel and the availability, if any, of free legal aid. Moreover, the officers should be required

to grant the person concerned, if he requests it, an adjournment of at least 72 hours for the purpose of retaining and instructing counsel. In view of the detention powers available in these circumstances, the Department could hardly be prejudiced by accommodating such requests for delay. The interests of due process, however, would be substantially enhanced.

From time to time, the admissibility of prospective visitors and immigrants involves difficult and structural questions of law. A Professor Meszaros, a Professor Kolko, or an Abbie Hoffman, for example, may be denied visiting opportunities or landed status, essentially because of Departmental interpretations of the prohibited classes within the Immigration Act. In view of the extreme limitations which now exist on the right of appeal, the Department will usually enjoy, therefore, an unchallengeable power to resolve not only issues of evidence and fact, but also issues of jurisprudence and law.

The experience of the past few years reveals the impropriety of such an arrangement. During the era when the right of appeal was more wide-spread, Departmental interpretations of its statutory powers suffered a number of important reversals at the hands of the independent Immigration Appeal Board. Under the Immigration Act, a conviction for a crime involving "moral turpitude" renders a person inadmissible to Canada. On the basis of Departmental interpretations of this term, deportation was ordered against persons who had been convicted of gambling, public nudity, common assault, and making false statements on immigration applications. Yet, every one of these deportation orders was reversed by the Immigration Appeal Board. In the judgment of the Board, none of these cases involved "moral turpitude". Despite these reversals, however, the Department, in most of its cases, henceforth, will be the final judge of its own statutory powers.

As an additional safeguard against fundamental misconceptions of law, the Canadian Civil Liberties Association proposes the creation of a limited and residual

possibility for appeal. In our opinion, the Immigration Appeal Board should be granted a discretionary power to permit a right of appeal in those cases where it believes a Departmental decision has involved an important and structural question of law. Under this proposal, there would be no additional opportunity to appeal on matters of fact or evidence. Indeed, there would be no additional opportunity to appeal on most questions of law. Our suggestion calls, rather, for the adoption of a practice similar to that in the U.S. Supreme Court. The Board should be empowered to select for appeal the issues of law which it considers fundamental to the operation of Canada's immigration system.

There is no reason to anticipate, therefore, that the adoption of this proposal would precipitate a recurrence of yesterday's flood of immigration appeals. Indeed, the range of potential appellants might be limited to Canadian citizens and landed immigrants who, in the opinion of the Board, have a vital interest in securing the admission to Canada of the person who has been restricted.

In order to precipitate consideration by the Board of a Departmental decision, a citizen or landed immigrant would be obliged to file, on behalf and with the consent of the restricted person, an application for leave to appeal. His application would need to include a recital of his interest and an explanation of the issue which was involved in the Department's decision. Members of the Board could be assigned on a periodic basis to review such applications. If these Board members thought that the applicant lacked a vital interest or the issue lacked structural importance, the matter could be expeditiously dismissed by an exchange of letters. If the Board members were uncertain, the Department might be requested for its views. A persuasive Departmental reply could also precipitate an expeditious dismissal of the matter by letter.

Since comparatively few of the many immigration cases raise issues of a fundamental character we can expect that the overwhelming number of matters would be subject to such expeditious resolution. In the few cases where the Board felt an important issue was involved, it could grant a right of appeal. And, at the discretion of the Board, the appeal could be conducted orally or in writing, with or without the attendance of the restricted person, before his entry into Canda, or even after his deportation.

The adoption of this proposal need not affect any of the other practices or procedures of the Immigration Act. Since we are dealing here only with a possibility and not with a right of appeal, there need be no additional revisions of the procedures regarding arrest, detention, timely deportations, etc.

Indeed, the implementation of this proposal would simply raise the possibility of an after-the-fact review of Departmental activity. A foreign resident, denied landed status, might subsequently acquire it. A person, having been deported, might subsequently gain re-admission. In any event, however, because of the discretionary nature of Appeal Board interventions, even these cases will probably be few and far between.

Essentially the system will probably contain more deterrence than reversals. The mere existence of a residual possibility for appeal will act most often as an instrument of restraint on an otherwise all powerful Department. This, in itself, should commend the idea.

But no appeal system, whether expanded or restricted, can hope to work, without Departmental co-operation. Regrettably, such co-operation has not always been forthcoming.

In June of 1971, the Immigration Appeal Board ruled that the Department could not deport J.S. Sodhi, an East Indian visitor, for his failure to post the cash bond which the Department had requested to guarantee his leaving the country. The Board declared, in this case and a number of others, that deportations could not be sustained on this basis. Although the Department dutifully refrained from deporting Mr. Sodhi, it continued, nevertheless, to deport other people for failing to post the cash bonds it requested.

On behalf of a number of clients who were facing deportations in similar circumstances, Toronto lawyer Paul Copeland protested this Departmental practice. Instead of obtaining a change of policy, however, Mr. Copeland obtained only a confirmation of existing policy. In partial defence of these deportation orders, the Minister's office made the following statement, "...The Department is considering whether the decision of the Board in Mr. Sodhi's case should be appealed."

Of course, the Department had and has a right to appeal many decisions of the Immigration Appeal Board. But pending such appeals, how could the Department presume that its view of the law should prevail over the view of a higher tribunal? If, during the period pending its appeal in the Sodhi case, the Department had simply ordered such deportations without executing them, Mr Copeland's complaint might have lacked significance. But what makes this matter so contentious is the fact that, before a higher court ruled on the issue and, indeed, even before an appeal was filed, the Department actually executed a number of deportations on the very grounds which the Board had impugned.

The eventual Court reversal of the Immigration Appeal Board on this issue can not redeem this Departmental practice. Our system of law simply can not work, unless the unreversed decisions of competent tribunals are regarded as binding statements of law. Ultimate vindication can not justify earlier circumvention.

Accordingly, the Canadian Civil Liberties Association calls upon the Governemnt of Canada to take whatever steps are necessary to prevent a repetition of this incredible development. Government policy should provide henceforth that Department officials desist from executing any order which is inconsistent with the unreversed judgments of the Immigration Appeal Board. Governmental observance of such a guideline is essential to the integrity of our appellate procedures.

SUMMARY OF RECOMMENDATIONS

On the Power to Deport Mala Fide Visitors

1. Except for those who are otherwise prohibitable, the Department should be required to admit to Canada, as bona fide, every applicant on whose behalf a resident Canadian citizen or landed immigrant signs a security bond guaranteeing his timely departure.

On the Power to Grant and Deny Landed Immigrant Status

2. The "Occupational and Area Demand Report", together with information sources, assignable units, and methods of analysis should be made public.

3. The category 'personal assessment' should be permitted only to grant and not to deny landed immigrant status.

4. Canadian citizens and landed immigrants should acquire a right to appeal a denial of landed status to their nominated relatives.

5. Subject to the existence in any situation of stated policy considerations to the contrary, the Department should deploy its services throughout the world in order to ensure that all applications can be processed within a reasonable period of time.

On the Safeguards in the Exercise of Immigration Powers

6. The safeguards of the Bail Reform Act should be applied to the pre-hearing detentions of those with rights of appeal.

7. In deportation situations, the deportee, rather than the Department, should be able to choose the country of destination.

8. No person should be deportable until his rights of appeal have been exhausted or until the prescribed time limits have expired without an appeal being filed

9. Legal assistance should be subsidized for needy persons at least in those cases where the outcome of immigration proceedings in Canada could lead to substantial loss of liberty elsewhere.

10. Before a special inquiry is held or the right to such inquiry is waived, the Department should be required

(a) to advise persons concerned, of their right to counsel and the availability, if any, of free legal aid, and

(b) to grant persons concerned, if they request it, an adjournment of at least 72 hours for the purpose of retaining and instructing counsel.

11. The Immigration Appeal Board should be empowered, at its discretion, to grant a right of appeal in those cases where it believes a Departmental decision has involved an important and structural question of law.

12. The Department should desist from executing any order which is inconsistent with an unreversed judgment of the Immigration Appeal Board.