SUBMISSIONS TO - Special Joint Committee on Immigration Policy of the Parliament of Canada

FROM - Canadian Civil Liberties Association

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INTRODUCTION

Terms of Reference

The Canadian Civil Liberties Association is a national organization with a cross-country membership of more than three thousand individuals, eight 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.

There are many facets of the current immigration controversy which are beyond the terms of reference of the Canadian Civil Liberties Association. It is not our role, at this stage, for example, to comment upon how much immigration should take place, how economic and humanitarian considerations should be balanced, and how far immigration policy should be tied to foreign policy. One aspect of current interest which does fall within our purview, however, is the Government's stated desire to pursue a non-discriminatory policy of immigration. This approach accords completely with the CCLA commitment to promote the observance by public authority of fair procedures in the determination of people's rights, privileges, obligations, and opportunities. What is of immediate concern to us in the present controversy, therefore, is how far and how well the present legislation and administration serve the stated policy of non-discrimination and the general objectives of procedural fairness.

Even within these limited boundaries, we have found it difficult to prepare for this hearing. The severe time limits initially imposed for the filing of briefs prevented us from undertaking the kind of study and analysis which this important subject warrants. Unfortunately, even the subsequent extension did not adequately relieve the problem. No one was able to indicate whether, if we missed this meeting, it would be possible to arrange an appointment for a subsequent public hearing. In these matters, an incomplete dissertation discussed in public is far superior to a comprehensive analysis confined to the mails. We would hope, however, that in respect of those areas which are ommitted or inadequately covered, we might make supplementary submissions in the months to come.

The Green Paper Exercise

The Canadian Civil Liberties Association submits that the Government's professed policy of non-discrimination is imperilled by the very publication of the Green Paper. In the Ministerial statements and ritual fanfare with which the Green Paper was launched, Canadians were invited to review immigration policy in the context of the kind of Canada they want.

Inevitably, this exercise was interpreted as an invitation to question the policy of non-discrimination. How could it have been otherwise? The most conspicuous and controversial feature of recent immigration has been the increase of non-white people in this country. In its explicit avoidance of recommendations, the very format of the Green Paper throws open the whole issue. It legitimizes alternative viewpoints and policies.

While many opinions may be entitled to a hearing, they are not all entitled to a blessing. But this is the risk when Government renounces its role of leader in exchange for the role of pollster. Virtually all points of view, no matter how mutually antagonistic, acquire an instant respectability. Thus, at one and the same time, the Government officially opposes but effectively dignifies the idea of racial quotas.

The Green Paper exercise is particularly regrettable in the context of the increased racial and ethnic tensions of the past several months. In such a climate especially, the role of Government is to lead. If change is perceived as desireable, Government should introduce amending legislation, promulgate new regulations, or at least make affirmative recommendations. This is not, of course, to discourage the exercise of community discussion. It is, rather, to encourage the exercise of Government leadership. There is no contradiction. Indeed, wise governments have been known sometimes to initiate, and then to modify certain policies in the light of the resulting debate. It is possible both to lead and to listen.

But the essence of leadership is the attempt to persuade. We regret that the Government did not see fit to champion its own stated policy of non-discrimination. Its failure to do so may well have exacerbated these unfortunate tensions.

While the Green Paper is now a fait accompli, The Canadian Civil Liberties Association expresses the foregoing views in the hope that Government in future will adopt procedures more worthy of its crucial and delicate position. Moreover, this discussion serves also as a convenient springboard for our ensuing submissions. Identifying ourselves, as we do, with the Government's stated policy of non-discrimination, it is now our intention to delineate a number of measures, the adoption of which should strengthen both the administration of that policy and the general fairness of immigration procedures.

NON-IMMIGRANT ALIENS

Admission at Port of Entry

One aspect of the easy access policy is that visitors from most countries do not require non-immigrant visas or other pre-clearance prior to arrival. The decision to admit as a non-immigrant or deny entry on the basis of the prohibited classes set out in the Immigration Act is made at the port of entry. Great stress is placed upon the border control system, due to the tremendous volume and the duty to screen out undesirables. The major problem lies in the identification of those persons who are not bona fide non-immigrants but who seek to gain entry to live or work in Canada illegally, on the pretext of being visitors or students. Such persons are presently prohibited by paragraph 5 (p) of the Immigration Act, as persons who are "in the opinion of a Special Inquiry Officer" not bona fide non-immigrants.

A person suspected of being non-bona fide is reported for a further examination or inquiry and if the opinion of the reporting officer is confirmed at such a hearing, deportation from Canada is the result. We would submit that it is dangerous to base the exercise of such a drastic sanction upon mere opinion, especially since the decision of the entry officer is no longer subject to an appeal on the merits (although an appeal based on an error of law or capricious finding of fact may be taken to the Federal Court). The complaints directed against this potentially arbitrary system are legion. Many charges of racial bias have been levelled at the Department, particularly in the cases of persons from those non-white countries whose citizens are consistently deported.

From an admissions policy which may have been high-minded, the Government has gone to an admissions policy which appears high-handed. Under the current legislation, the complete power to admit or reject visitors is 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, such suspicions are wide-spread in many sectors of Canadian society, particularly among non-whites. Blacks, Asians, and Latin Americans, for example, frequently voice the fear that the Immigration Department discriminates against their countrymen in deference to what is perceived as a growing Canadian prejudice against "Third World" immigration.

The actual experience strengthens the suspicions. Some time ago, for example, the Canadian Civil Liberties Association took an affidavit from a Toronto lawyer who handles many immigration cases. The lawyer swore that, during the 26 month period preceding his deposition, he saw, at the Toronto Airport, approximately 2000 persons whose attempt to enter Canada was made conditional upon the posting of a cash bond According to his affidavit,

> "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....".

In the summer of 1974, the Parkdale Legal Services Community Clinic staffed a programme at the Toronto International Airport to provide free counsel for visitors facing rejection and deportation. The leader of the project, Steven Price, estimates that 95% of the persons in this predicament were from Asian, Carribean, African, or Latin American countries.

These experiences, together with a raft of newspaper stories dealing with the rejection of non-white visitors, could seriously undermine the credibility of the Immigration Department. How, then, to resolve the resulting dilemma? The Department has the duty of preventing non bona fide visitors from entering Canada. Yet it must exercise this duty in a manner which does not discriminate or appear to discriminate against non-white persons.

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 should 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 full 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 non-bona fide or if they were in doubt about his bona fides , they would advise him that his admissibility would be guaranteed if both he and a Canadian resident sign a surety bond.

As a protection against the risk of admitting non-bona 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 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 told that, before any detained visitor is deported for lack of bona 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 non-bona 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 discovery, arrest, and deportation. 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 resentment 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 adoption of such a surety system was first suggested by the Canadian Civil Liberties Association in our brief to the Minister, January 1974. The Minister responded that the Government would not wish to cause hardship to those persons who defaulted on such bonds, by getting involved in collection procedures. In our view, the Government should have no more qualms about enforcement of a surety bond under the Immigration Act than it has about enforcement of surety devices under the Criminal Code. The surety system works well to secure the release of persons awaiting criminal proceedings and there is no reason to suppose that immigration proceedings would not be amenable to such a device.

The Minister further responded that a surety system discriminates in favour of wealthy persons. This reply appears to overlook our recommendation that no cash be required. Moreover, the financial criteria proposed above are sufficiently modest to avoid any serious problems of financial discrimination. In any event, while it can readily be admitted that the surety proposal is not without problems, we submit that the problems it creates are preferable to the problems which inhere in the present system. That should be sufficient to recommend it.

Pre-clearance Overseas

As the Green Paper acknowledges, our present legislation, coupled with the fact that visitors from most countries do not require overseas clearance documents, requires that a "once and for all decision" as to admissibility be made upon arrival in Canada. Our lack of pre-clearance requirements is not only a liberal approach to international travel, it means a lively tourist trade and a relatively inexpensive immigration system of boarder control.

For the vast majority of visitors, our system entails no hardship; indeed, it results in a convenient lack of red tape. However, for the relativley small percentage of visitors who are denied admission, the potentially arbitrary "once and for all decision" can mean frustration, humiliation, and severe financial hardship.

In order to minimize such problems, we believe that Canada should provide a means of pre-clearance to those who wish to avail themselves of the opportunity, especially in those countries whose non-white nationals are frequently refused entry to Canada. The operative decision would still remain with the port of entry officials; however, an application for a non-immigrant visa from an overseas office would at least be an indication to the prospective visitor whether entry to Canada would be allowed. The overseas visa approach would have a pre-screening effect, sorely lacking in our current system. Many prospective visitors in the past have come to Canada ill-prepared for a visit, perhaps because they did not have financial resources sufficient to maintain them during their intended stay; such persons might better have been advised never to attempt to come to Canada under such circumstances.

The present legislation requires the prospective visitor to demonstrate his bona fides. We would recommend the adoption of an optional overseas pre-clearance system, which would require that the visitor demonstrate his admissibility to an overseas official. Upon the arrival of a pre-cleared visitor in Canada, should his admissibility be challenged, the burden of demonstrating lack of bona fides would be shifted to the Department.

Employment Visas

The employment visa or work permit system was instituted to ensure that jobs did not go to aliens when Canadians were available for those positions. Unfortunately, the present system creates some needless hardships for those aliens.

Permission to work and thereby permission to remain here are automatically lost upon the loss of the job for which the visa was granted. While extensions are possible in such circumstances, the visa holder could not know in advance whether the Department would look favourably on his case. In consequence, he could find himself in a position of relative servitude in respect of his employer.

One way to overcome this difficulty would be to provide that permission to remain in Canada would not automatically be lost upon the loss of employment. A period of grace should be introduced sufficient to allow the non-immigrant alien to arrange his affairs or to seek a new job should he lose the job prior to the expiration of the original period of entry or to any subsequent extension thereof. Moreover, we would recommend that aliens awaiting the outcome of judicial proceedings in this country be allowed the right to work during such period at least in those cases where they originally held an employment visa.

In view of the fact that the Department might still exert control as to which jobs might be occupied by the aliens, such a measure could not undermine the economic objectives of the visa system But it would endow it with a greater level of fairness.

IMMIGRANTS

The Evaluation of Applicants

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 the public to scrutinize 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". And the Report is an internal document "not for public release".

Governmental secrecy encourages public suspicion. In our respectful opinion, the canons of democratic due process 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 information could be made available at intervals subsequent to the currency of any particular report, to meet the objection that advance knowledge would permit applicants to falsify their occupations in order to satisfy current demand criteria. The possibility of subsequent public review would enhance both the reality and the appearance of non-discrimination and fair play.

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 "adaptibility, 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, whose sponsors are citizens.

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 Cabinet 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 suspicions of political influence and racial discrimination.

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 or a sponsored dependent of a citizen or a 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 their instigation, we submit, a right of appeal should arise. Even if the applicant is abroad and the appellate tribunal is here, the resident 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.

The Expansion of Sponsorship

The Government has long recognized the right of Canadian residents to bring their loved ones with them to Canada. Under the present system, high priority is assigned to sponsored dependents (e.g. children and spouses). Such categories are not subject to the assessment system.

We believe, however, that the Government should take steps to broaden the category of sponsored dependents to include cases of de facto family relationship. For example, certain immigrants may come from areas of the world where legal marriage is not as central an institution as it is in Canada. While the mothers of illegitimate children may sponsor their offspring to Canada, the putative fathers are precluded from doing so. In other cases, a child may have been raised from infancy by a foster mother; yet, unless a legal form of adoption has been completed prior to the child's eighteenth birthday, the foster mother may not sponsor her foster child under our law. Neither legitimacy norconsanguinity has any magic in itself. They are merely evidentiary devices to identify the kind of intimate relationships we seek to protect.

Canadian Civil Liberties Association recommends, therefore, that a forum be provided, whereby Canadian residents may establish that certain individuals should be treated by the immigration law as a son or daughter or whatever the case may be.

In addition, we recommend that such a forum allow Canadian residents to sponsor any individual to Canada, whether or not any familial relationship exists. There are cases where Canadian residents have dependants in their homeland in circumstances which would indicate that they be allowed to join their sponsors in Canada on humanitarian grounds. At present, such persons fall outside the narrowly defined classes of sponsored dependants and, in addition, may be inadmissible on medical or other grounds, notwithstanding the fact that the sponsors are quite prepared to undertake complete financial responsibility for such persons. We would submit that the guiding principle underlying the sponsorable classes is dependancy, and we recommend that a discretionary class of sponsored dependant be created to allow for cases falling outside the usual categories, where humanitarian and compassionate circumstances dictate relief.

The Deployment of Facilities

During the past number of years, the Canadian Civil Liberties Association has received a number of complaints that the Department has been inordinately slow in processing immigration applications from non-white people and countries. Among the more recent cases, for example, were two rejections which emanated from the Jamaica office of the Immigration Department in March and April of this year. The initial applications on behalf of these two people were filed in Toronto as early as November 1973.

We are unable to square cases like this with the Minister's assurance to us in July 1974 that the average time it was taking to process applications from some of the non-white countries was not far out of line with the situation in the United Kingdom. Perhaps averages are not a valid barometer of practices? In any event, the persistence of such complaints will lead inevitably to suspicions of racial and national discrimination. The wisest response would be to take steps to reduce such 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 facilities throughout the world, in order to ensure that all applications can be processed within a reasonable period of time. Like justice, landed status delayed can become landed status denied.

SAFEGUARDS

Arrest and Detention

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".

As regards many persons who have merely stepped into the country, 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 more serious objection must arise in respect of those aliens who have cleared admissions and/or launched appeals. An admission raises a presumption of lawful presence. An appeal creates a risk of lengthy delay. In such cases, the existence of so substantial a power of incarceration in the hands of politicians and civil servants is an affront to the democratic principles of due process.

This is not to say that detention powers should be unavailable against such people. 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 the categories of aliens designated above 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 alien'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

suspect 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 absconds. The detained alien 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 a letter to us last summer, the Minister declared that "the policies adhered to by the Department conform very closely with those enunciated in the (Bail Reform) Act." It reveals no disrespect to insist that Ministerial assurances are no substitute for legislative safeguards.

Deportation

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 proceedings. 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 undesirable 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 undesirable 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 at the time to accept the deportee, this country should be willing to accomodate 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 morning 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 had 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, once admitted, be deportable until his rights of appeal have been exhausted or until the prescribed time limits have expired without an appeal being filed.

Right to Counsel

Periodically, immigration proceedings in Canada could lead to harsh consequences elswhere. Not long ago, a Greek Jehovah's Witness, subject to deportation for alleged misstatements 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 deprivation 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 the Toronto lawyer there is an allegation that, several months ago, the immigration authorities denied him permission to interview a group of more than 200 Asian visitors who were seeking entry at the Toronto airport. According to the lawyer, the Department officials justified their refusal on the basis that none of the visitors had requested to see him in particular or a lawyer in general. His 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.

Such unfortunate experiences impel the Canadian Civil Liberties Association to request the adoption of a precautionary safeguard. Department officials should be instructed that, before the right to a special inquiry is waived, they must advise the person concerned of his right to counsel and the availability, if any, of free legal aid.

Bewildered, weary travellers, unfamiliar with Canadian law and custom, are in no position to protect their best interests. Whether improper pressure, in fact, is exerted upon them, it will be suspected. The very appearance of fair play requires, therefore, that before these people renounce their rights, they receive advice.

Review of Decisions

From time to time, the admissibility of prospective visitors and immigrants involves difficult and fundamental 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 to appeal, the Department will frequently enjoy, therefore, an unchallengeable power to resolve not only the 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 fundamental 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 creation of a power similar to the one recently conferred upon the Supreme Court of Canada. 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 fundamental 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 deportation, 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 existance 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.

Public Participation

Traditionally, the effective right of the public to participate in the legislative process has served as a vital safeguard for the rights of the citizen. Traditionally, the citizen could count on preserving whatever rights he enjoyed until and unless Parliament abrogated them. This meant that any abrogation of his rights would have to be enacted and debated in an open public session. This was the procedure that enabled the citizen to protect his interests. It gave him the opportunity to write, speak, advertise, organize, and demonstrate in order to influence his representatives before he faced a fait accompli.

To a very great extent, however, the Immigration Act, like much other legislation in modern times, delegates to secret Cabinet meetings the power to make the relevant law. This development is attributable presumably to the growing complexity of immigration issues and the speed with which such issues change. No piece of immigration legislation could possibly anticipate all the problems which might be created in the wake of its enactment. If the resolution of every issue had to undergo the full trappings of Parliamentary debate. Government would simply be unable to respond in a number of situations.

It is our view, however, that the interests of speed and efficiency do not require so complete a surrender of the traditional legislative safeguards. As one improvement in the present procedures, we would recommend that before any new Cabinet-made regulation could be enacted, the substance of it would have to be published in the mass media at least one month in advance. This would enable affected members of the public to generate a political debate before they suffered any encroachment on their rights and interests. Such a measure would restore to the law-making process some of the lost elements of public participation while simultaneously retaining some of the present executive flexibility.

At a time of growing suspicions of Departmental discrimination, it would be wise to open and broaden the law-making process.

CONCLUSIONS
and
SUMMARY OF RECOMMENDATIONS

Commenting on the relative increase in Asian and Carribean immigration to Canada, the Green Paper makes the following statement.

> "In the circumstances it would be astonishing if there was no concern about the capacity of our society to adjust to a pace of population change that entails after all, as regards international migration, novel and distinctive features. What is perhaps more surprising, when our experience is set against that elsewhere, is the resilience Canadian society has demonstrated in accommodating so many foreign migrants during this period with so little social stress."

Quoting an unnamed official on this comment, Time Magazine expressed the matter in a more straightforward fashion.

> "What this means in plain language is that we are worried like hell about the influx of coloured people and want to clamp down."

Despite a number of ritual statements about non-discrimination, the Green Paper contains a dearth of clear language which could forestall such interpretations of the immigration debate. Indeed, as indicated earlier, the failure to provide affirmative leadership has virtually assured such interpretations.

Whatever the intentions of the Government or the authors of the Green Paper, Canadians are perceiving this debate as involving primarily the issue of race. It is incumbent on all responsible citizens, therefore, to register clearly on this issue.

Accordingly, the Canadian Civil Liberties Association urges this Committee to recommend unequivocally against the use of racial and ethnic criteria in the selection of immigrants and the admission of aliens to Canada. While it might be appropriate to make selections on the basis of economics, humanitarianism, and even foreign policy, it is not appropriate to make selections on the basis of skin colour and ethnic origin. The Committee should also include in its recommendations a plea for the adoption of the sine qua non of a successful non-discrimination policy - a contingent of immigration officers properly chosen, trained, and supervised to implement the policy.

In order to support further this policy and to ensure generally the observance of fair procedures, the Canadian Civil Liberties Association urges the adoption of the many measures advocated above, which, for convenience, we now reiterate in summary form.

On Non-Immigrant Aliens

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 surety bond, without cash, guaranteeing his timely departure.
2. Canada should provide an optional overseas pre-clearance system in order to minimize border-crossing problems.
3. Employment visa holders, who lose their jobs prior to the expiry of their permissible stay here, should acquire
   (a) a period of grace to arrange their affairs and/or to seek new employment and
   (b) a right to work pending the outcome of judicial proceedings in which they are involved here.

On Immigrants

4. The "Occupational and Area Demand Report" together with information sources, assignable units, and methods of analysis should be made public at least during intervals subsequent to the currency of any report.
5. The category "personal assessment" should be permitted only to grant and not to deny landed immigrant status.
6. Canadian citizens and landed immigrants should enjoy the right to appeal the denial of landed status to their sponsored dependants and their nominated relatives.
7. Canadian citizens and landed immigrants should be given an opportunity to establish both the equivalent of familial intimacy and the reality of financial dependancy for the purpose of increasing fairly the range of their potential sponsored dependents.
8. Subject to the existence in any situation of stated policy considerations to the contrary, the Department should deploy its facilities throughout the world in order to ensure that all applications can be processed within a reasonable period of time.

On Safeguards

9. The safeguards of the Bail Reform Act should be applied to the pre-hearing detentions of those aliens who have cleared admissions and/or filed appeals.
10. In deportation situations, the deportee, rather than the Department, should be able to choose the country of destination.

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

12. 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 losses of liberty elsewhere.

13. Before the right to a special inquiry is waived, the Department should be required to advise the persons concerned of their right to counsel and the availability, if any, of free legal aid.

14. 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 fundamental question of law.

15. Before any Cabinet regulation on immigration may be enacted, there should be a requirement that the substance of it be published in the mass media at least one month in advance.