SPECIFIC CHANGES PROPOSED TO CANADIAN CHARTER OF RIGHTS AND FREEDOMS BY BRITISH COLUMBIA AND SOUTHERN ALBERTA CIVIL LIBERTIES SUBSECTIONS OF THE CANADIAN BAR ASSOCIATION AND THE CALGARY CIVIL LIBERTIES ASSOCIATION PREPARED BY PROFESSOR ROBIN ELLIOT, FACULTY OF LAW, UNIVERSITY OF BRITISH COLUMBIA AND SHELDON M. CHUMIR, LECTURER ON CIVIL LIBERTIES (1978 AND 1979), FACULTY OF LAW, UNIVERSITY OF CALGARY

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1. Everyone shall have the following fundamental freedoms:

   (a) freedom of conscience and religion;

   (b) freedom of thought, belief, opinion and expression;

   (c) freedom of the press and other media;

   (d) freedom of peaceful assembly;

   (e) freedom of association

   subject only to such limitations as are reasonably necessary in a free, democratic and pluralistic society.

2. Everyone shall have the following rights:

   (a) the right to life, liberty and security of the person and the right not to be deprived thereof without due process of law;

   (b) the right to be secure against unreasonable invasion of privacy;

   (c) the right to property and the right not to be deprived thereof arbitrarily or without fair compensation.

7. All courts, quasi-judicial and administrative bodies must act fairly.

Alternative (7. Everyone shall have the right to have his or her rights
( and obligations determined fairly and in accordance with
( the principles of fundamental justice.

8. Everyone shall have the right not to have his or her person or property subjected to unreasonable search or seizure.

9. Everyone shall have the right not to be unreasonably imprisoned or detained.

10. Everyone shall have the right on arrest or detention

(b) to retain and instruct counsel without delay and the right to be informed promptly thereof.

11. Anyone charged with an offence shall have the right

(bb) to defend himself or herself in person or through legal assistance of his or her own choosing and, if he or she has not sufficient means to pay for legal assistance, to have legal assistance provided when the interests of justice so require;

(c) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, unless compelling cause exists for excluding the public;

(d) not to be denied reasonable bail without just cause;

(e) not to be found guilty on account of any act or omission that at the time of the act or omission did not consitute an offence under domestic or international law;

(f) not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted in Canada;

(h) not to be compelled to testify against himself or herself or to confess guilt.

12. Everyone shall have the right not to be subject to cruel, inhuman or degrading treatment or punishment.

15.(1) Everyone shall have the right to equality in both the content and administration of the law without unreasonable distinction.

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( equality before the law without unreasonable distinction.

15.(2) Without limiting the generality of subsection (1), no distinction shall be made on the basis of race, national or ethnic origin, colour, religion or sex unless such distinction is necessary to promote a compelling public purpose.

15.(3) This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups provided that

(a) the law, program or activity is undertaken pursuant to an express declaration by Parliament or a legislative assembly that the protection of this subsection is being sought; and

(b) the law, program or activity is reasonably related to the object of ameliorating conditions of disadvantaged persons or groups.

26. A Court of competent jurisdiction shall have power to issue such prerogative writs, equitable remedies, directions and orders, including orders for the payment of compensation and for the exclusion of evidence, as may be appropriate in a given case for the enforcement of any of the rights or freedoms conferred by this Charter.

29.(2) The term "government" includes all public authorities, officials, employees, tribunals and other public bodies and persons, including for the purposes of s.29(1)(b), those at the municipal level of government.

29.(3) The term "law" in this Charter includes an act of the Parliament of Canada or of a legislative assembly including any order, rule or regulation thereunder, enacted before or after the coming into force of this Charter,and any law in force in Canada or in any part of Canada on the coming into force of this Charter that is subject to be repealed, abolished or altered by the Parliament of Canada or a legislative assembly.

29.(4) Notwithstanding subsection (1), section 15 shall not have application until three years after this Act, except Part V, comes into force.

Emergency Provision

(1) In time of public emergency which threatens the safety of the nation or any part thereof and the existence of which is proclaimed by Parliament or a legislative assembly the rights and freedoms set out herein may be limited but only to the extent strictly required by the exigencies of the situation and provided that in no event shall such limitation involve discrimination solely on the ground of race, colour, national or ethnic origin, religion or sex.

(2) No derogation from sections 2(a), 3,4,5, 11(e),(f) and (g), 12,15,16,17 and 18 may be made under this provision.

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## Introduction

Let us start this brief by stating that we firmly support the concept of an entrenched Charter of Rights and Freedoms. We recognize that we live in a free and democratic country and that Canada's record in protecting human rights and civil liberties compares very well with that of other nations, past and present. Nevertheless, our slate is by no means a clean one. There have been numerous occasions in our past when Canadian governments, particularly those at the provincial level, have made serious incursions into the domain of rights and freedoms. Over the past century we have seen orientals denied the right to vote and the right to work; we have seen an attempt to require newspapers to publish government statements, provide the government with sources of information and even to accede to government demands to cease publication altogether; we have seen Jehovah's Witnesses denied the right to distribute religious pamphlets on public thoroughfares; we have seen Hutterites restricted in their ability to purchase land for their colonies; we have seen Japanese-Canadians suffer internment and loss of property during wartime.

Unfortunately, we cannot assume that these examples are nothing more than historical accidents and that similar incidents could not occur today. It was only ten years ago that the War Measures Act was used to round up hundreds of innocent people in the province of Quebec; it is still true that the Indian Act discriminates against women; conditions in some prisons are still unacceptably bad; our criminal process still sometimes

denies an arrested person the opportunity to consult counsel and results in illegal searches and seizures.

While an entrenched Charter of Rights and Freedoms would not in and of itself guarantee that the rights and freedoms of Canadians would be immune from the tyranny and bad judgment of legislative majorities and public officials, it would in our view provide those rights and freedoms with the best form of protection available. The techniques now available to the courts to protect rights and freedoms against governmental incursions- the division of powers approach, the restrictive interpretation technique, the implied bill of rights and even the Canadian Bill of Rights - have clearly shown themselves to be inadequate to the task. Rights and freedoms require the firm footing in our constitution that an entrenched Charter would give them.

An entrenched Charter of Rights and Freedoms would also represent an important step towards the fulfilment of the obligations that Canada agreed to assume as a signatory to the International Covenant on Civil and Political Rights, 1966. Article 2 of the Covenant states:

> "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

We believe that the Charter should at a minimum guarantee those rights provided for in the International Covenant. But we also believe that the Charter should go beyond the minimum international standards established by the Covenant. It is proper, therefore, that the Charter include other rights such as language rights that are especially suited to Canadian standards and needs.

Although we support the concept of an entrenched Charter of Rights and Freedoms, we have very serious concerns about the Charter included in the Resolution introduced in Parliament in October. Broadly speaking, these concerns are as follows:

(1) some rights have been omitted altogether;

(2) some rights have been so qualified as to be virtually meaningless;

(3) some rights have been too narrowly defined;

(4) the drafting of some rights requires improvement;

(5) the "reasonable limitation" provision (s. 1) is far too broadly worded.

These defects in the proposed Charter are so substantial that we do not believe it would fulfil the aims of an entrenched Charter nor would it satisfy the international obligations that Canada has assumed.

The remainder of this submission comments on the deficiencies in the Charter introduced in October and proposes alternative provisions which we feel would more effectively assure basic protection of the rights and freedoms which are consistent with a free society and with our international obligations. We hope that our comments will provide assistance in preparing amendments that are proposed by others.

1. Fundamental Freedoms (s. 2)

Our concerns here are of two different kinds. First, we feel that a list of "fundamental rights" should be added to the list of "fundamental freedoms." Second, we feel that the drafting of the "fundamental freedoms" provisions needs improvement.

(1) Additions

The "fundamental rights" that we believe require recognition alongside the "fundamental freedoms" are (a) a modified version of the present s. 7, (b) the right to privacy and (c) the right to property.

(a) Modified s. 7

Given the importance of symbolism in an entrenched bill of rights, it is our view that the right to life, liberty and security of the person defined by the present s. 7 should be given special recognition alongside the "fundamental freedoms" at the beginning of the Charter. While we agree that it is difficult today to argue that any particular right or freedom is more "fundamental" than another, if there is to be a special category of "fundamental" rights or freedoms - and it appears that there is - then surely the right defined by s. 7 is deserving of inclusion in it. Certainly if the test of "fundamentalness" is the length of time the right or freedom has been recognized in Anglo-Canadian jurisprudence, the right defined by s. 7 must be considered "fundamental" for it was recognized as far back as the Magna Carta in 1215. It is also to be noted that the right defined by s. 7 was included in the "fundamental rights and freedoms" categories of both the Canadian Bill of Rights and the Constitutional Amendment Bill, 1978 (Bill C-60).

The modification that we would like to see made in s. 7, if this transfer is made, is the substitution of the phrase" without due process of law" for the phrase "except in accordance with the principles of fundamental justice." Such a reformulation would not only bring the right into line with its counterparts in the Canadian Bill of Rights and Bill C-60, it would also arguably serve to broaden the scope of the right.

(b) Right to privacy

In arguing for the inclusion here of a right to privacy we draw to your attention the following considerations:

(i) In the "Discussion Draft" Charter dated August 22, 1980 special provision was made for the right to privacy. Section 9 of that draft read as follows:

> "9. Everyone has the right to be secure against arbitrary invasion of privacy."

This is a clear indication that the federal government recognizes the importance of this right.

(ii) The right to privacy is given explicit recognition in Article 17(1) of the International Covenant on Civil and Political Rights. Canada, as a signatory to the Covenant, is duty bound to ensure that proper protection is accorded this right in domestic law. We can think of no better way to meet this obligation than to include a right to privacy provision in the Charter.

(iii) If it could be said sixty years ago, as it was by Mr. Justice Brandeis of the United States Supreme Court, that "the right to be let alone" was "the right most valued by civilized men," the same could be said with even more justification today. The power of the state to invade the privacy of the citizen has never been greater than it is today and promises to continue to grow as technology continues to develop. The need for protection on the part of the citizen is therefore acute.

(iv) If recognition is to be given to the right to privacy such recognition should not be limited by incorporating the right in the category of "legal rights." Invasions of privacy are not restricted to the sphere of criminal investigation but can occur in any context. For this reason, provision should be made for this right in s. 2.

As far as the wording of a right to privacy is concerned, we would recommend adoption of the following:

> "Everyone shall have the right to be secure against unreasonable invasionof privacy."

It is our view that "unreasonable" is to be preferred over "arbitrary," not only because "unreasonableness" is the test used in several other provisions (e.g. s. 3, s. 6(3)(b), s. 11(b)) but also because "unreasonable" provides a higher, and we feel more appropriate, level of protection than "arbitrary."

(c) Right to Property

With respect to the right to property, we note the following considerations:

(i) The right of the individual to "the enjoyment of property and the right not to be deprived thereof except by due process of law" is protected by s. 1(a) of the Canadian Bill of Rights.

(ii) Recognition of the right to property was given in the proposed Constitutional Amendment Act, 1978 (Bill C-60).

(iii) The right to property has been a cornerstone of all Western liberal democracies and is still, even with the advent of the welfare state, an integral part of our society.

(iv) The importance of private property is recognized even in the constitutions of socialist countries such as the People's Republic of China. Although the focus in such constitutions is on personal rather than real property, this may change if, as is occurring now in the People's Republic of China, private ownership of homes is encouraged.

(v) If the reluctance to incorporate a provision regarding property stems from a concern that the courts might develop an economic due process doctrine similar to that developed by the U.S. courts and thereby prevent the state from intervening in the market place, such a concern is surely unfounded. Not only has that doctrine long since been abandoned in the U.S., it is also the case, as the courts well know, that such intervention is an accepted part of Canadian life today.

How should the right to property be worded? We are by no means all in agreement on this but would suggest that consideration be given to the following:

> "Everyone shall have the right to property and the right not to be deprived thereof arbitrarily or without fair compensation."

We have chosen the word "arbitrarily" here so as to minimize the possibility of the courts using the provision to prevent governments nationalizing sectors of the economy. In this instance, we feel, there is reason to deviate from the practice of using the word "unreasonably" to provide the test.

(2) Redrafting

Turning to our second basic concern, that the drafting of the existing provisions needs improvement, we would suggest that, subject

to our recommendation regarding a special limitation clause for this category (see 6 infra), the present s. 2 be recast as follows:

"Everyone shall have the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression;

(c) freedom of the press and other media;

(d) freedom of peaceful assembly;

(e) freedom of association."

In all this represents four changes. Each of these will be explained in turn.

By using the word "has" in s. 2 (and most of the other right-granting provisions in the Charter) the drafters run the risk of having the courts utilize the notorious "frozen concepts" theory when they come to interpret it. That theory, which perhaps as much as anything else has been responsible for the sorry fate of the Canadian Bill of Rights, would, when applied to s. 2 (and the other similarly worded provisions), reason as follows: (1) if the Charter states that everyone "has" the fundamental freedoms listed in s. 2 then no law, order, regulation, etc. in existence at the time it is enacted could be said to infringe upon any of those freedoms (if this were not the case then it would not be true to say that we "have" those freedoms); (2) if no law, order, regulation, etc. in existence at the time the Charter is enacted can be said to infringe upon any of those freedoms then the scope of the latter can be no greater than the laws, orders, regulations, etc. then in existence permit. The implications of this reasoning would be dramatic. First, all laws, orders,

regulations, etc. in existence at the time the Charter is enacted would be immunized from judicial review. Second, the ability of the courts to scrutinize legislation enacted thereafter would be severely hampered.

We appreciate that such a theory is by no means a necessary consequence of using "has" in s. 2, particularly because the Charter uses the same word when it grants wholly new rights, such as the minority language educational rights spelled out in s. 23. However, the Canadian Bill of Rights also granted new rights (e.g. s. 2(g)) and that was apparently not a sufficient bar to the development of the theory there. Nor was s. 5(2) of the Bill which provided that it was to apply to legislation enacted before as well as after the coming into force of the Bill. To be safe, therefore, we feel it would be better to substitute "shall have" for "has" in s. 2 (and all of the other right-granting provisions). Such a change would entail no costs and would serve to eliminate the possibility of the "frozen concepts" theory being revived. It would also bring the Charter into line with the International Covenant on Civil and Political Rights, which uses "shall have" in its right-granting provisions.

The deletion of the adjectival phrase "of information" in "freedom of the press and other media" stems from a concern on our part that the phrase might be interpreted to limit the protection accorded the media to the imparting of information only. This, in our view, would be unacceptable. Since we cannot see anything to be gained from including the phrase we would prefer not to take this risk. We note in this regard that the words "of information" did not appear in the "Discussion Draft" Charter of August 22, 1980.

The reason behind giving "freedom of the press and other media" its own provision is that we are reluctant to see this freedom defined as a subset of freedom of expression. Because of the important role the media play in any western democracy there may be times when the courts will want to provide them with a special type of protection - for example, in connection with the law of defamation, the law of contempt, the ability to protect one's sources, freedom from search and seizure, etc. As presently drafted s. 2(b) would not permit such protection to be accorded. We would prefer not to have the courts' hands tied in this regard. We would point out that separate recognition is given "freedom of the press" in the Canadian Bill of Rights and was proposed in Bill C-60.

The final change, that of giving "freedom of peaceful assembly" and "freedom of association" separate provisions, stems from a concern that the juxtaposition of the two in one provision might in some way be construed as limiting one or both rights. This concern is made all the more real by the recent decision of the Supreme Court of Canada in the Dupond case, in which a very limited view of freedom of assembly was adopted. We note that the International Covenant on Civil and Political Rights has separate provisions (Articles 21 and 22) for these two freedom.

2. Democratic Rights (ss. 3-5)

(1) Section 3

We have two suggestions to make in respect of this provision. First, we would like to see explicit mention made of the right to stand for election. This right, which is included with the right to vote in

Article 25 of the International Covenant on Civil and Political Rights, is not subsumed under the right to be qualified for membership. In fact it is the latter which is subsumed under the former.

Second, we can see no reason whatsoever in principle for not extending the rights in s. 3 to the municipal level of government. We cannot understand why the distinctions and limitations at that level should not also be required to be "reasonable." We would point out that the International Covenant allows for no exceptions such as this.

(2) Section 4

We would prefer to see s. 4(1) rephrased so as to require an election within five years. While such a change would have more symbolic than real value, symbolism is of tremendous importance in a document such as this. Our Charter should not leave open the possibility that a government might try to remain in power for a number of months after the legislature has been dissolved before calling an election.

We do not like the phrase "real or apprehended" in s. 4(2). Our experience in 1970 with the War Measures Act shows us that the word "apprehended" invites abuse. Deleting the phrase altogether would probably not make much difference as a matter of law, since the courts would undoubtedly give governments a certain amount of leeway, but it would have a beneficial effect on the political and symbolic levels. If it is not possible to delete the phrase then we would strongly recommend substituting "imminent" for "apprehended." The latter is too subjective a word and provides no true basis for judicial review.

We would also like to see s. 4(2) require that the vote to continue the life of Parliament or a legislative assembly be re-affirmed periodically, with a year or perhaps six months being an appropriate length of time between votes. Again our concern is more on the symbolic than the real level. Nevertheless we think it important that the Charter not recognize the possibility that Parliament or a legislative assembly might be able to extend its life beyond what is reasonably necessary.

3. Legal Rights

While we applaud the government for expanding the list of rights accorded an accused in criminal proceedings, we do have a number of concerns about this category. These concerns are as follows:

(i) Protection in the Non-criminal Sphere

In its present form this category of rights would not, in our view, provide Canadians with any protection whatsoever in the vast majority of proceedings in the non-criminal sphere. There is no provision that would ensure that the general right defined by s. 2(e) of the Canadian Bill of Rights - the right "to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" - will be protected. Certainly there is no direct counterpart in ss. 7-14, as there was in Bill C-60, to s. 2(e). Nor is s. 7, the general provision, broad enough to protect this right. The fact that it appears at the head of a long list of rights that are obviously tailored to the criminal sphere suggests that it was designed to be applicable only in that sphere. This

is confirmed by the manner in which it is worded. By focusing on the rights to "life, liberty and security of the person and the right not to be deprived thereof. . ." it speaks directly to the criminal sphere for it is there that "life, liberty and security of the person" are put at risk. At best it might be taken to provide protection to those involved in deportation proceedings and committals to mental institutions. But it would almost certainly not provide the more general protection afforded by s. 2(e).

Given the growth of administrative tribunals over the last few decades and the importance to citizens of the questions they decide, we believe it is absolutely essential that the Charter make express provision for procedural rights in the non-criminal sphere. We would therefore recommend that a new section be added along the lines of s. 2(e) of the present Bill of Rights. We say "along the lines of" for two reasons. First, we think that any such provision should include the concept of "fairness" introduced by the Supreme Court in the recent Nicholson and Martineau cases. This would encourage the courts to use the provision to control administrative as well as quasi-judicial decision-makers. Second, we would prefer, if possible, not to see the term "rights and obligations" used. It is possible that the word "rights" would be taken by the courts as an indication that the right is only to be available where the decision-maker is exercising a quasi-judicial, as distinct from an administrative, function. The danger of this occurring would exist, we feel, even if the concept of "fairness" is expressly mentioned. In sum, we believe a modified version of s. 11(1) of the draft Manitoba Bill of Rights merits consideration:

> "All courts, quasi-judicial and administrative bodies must act fairly."

As an alternative to this formulation, albeit one which includes the term "rights and obligations," we would offer the following:

> "Everyone shall have the right to have his or her rights and obligations determined fairly and in accordance with the principles of fundamental justice."

Either of these formulations would, in our view, be preferable to s. 2(c) of the Bill of Rights.

(2) Sections 8, 9 & 11(d)

Sections 8, 9 and 11(d), as they now read, are clearly inconsistent with the assertion in the explanatory notes that "[t]he entrenchment of the rights contained in this Charter would place these rights beyond the ordinary reach of Parliament or a single provincial legislature." The qualifying clause " except on grounds, and in accordance with procedures, established by law" means that these rights can be severely limited, if not eliminated altogether, by carefully worded legislation. It is at least arguable that these rights would be better protected if they were not even mentioned in the Charter - in that case they might be protected by s. 7 which, whatever "the principles of fundamental justice" means, at least imposes a qualitative test for legislation to meet.

In our view it is essential that these rights be [illegible] read at least as broadly as they did in the August 22nd "Discussion Paper." Ideally we would like to see them read as follows:

> "8. Everyone shall have the right not to have his or her person or property subjected to unreasonable search or seizure."
>
> "9. Everyone shall have the right not to be unreasonably imprisoned or detained.
>
> "11. Anyone charged with an offence shall have the right
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> . . .
>
> (d) not to be denied reasonable bail without just cause."

Not only would these changes bring Canada more into line with its obligations under the International Covenant on Civil and Political Rights, it would also provide real protection to the rights without unduly hampering effective law enforcement.

(3) Rights on Arrest

The right "to retain and instruct counsel without delay" is obviously meaningless to a person who does not know that such a right exists. It is our view that, in order to put everyone on the same footing, provision should be made in s. 10(b) for the right "to be informed promptly" of the right "to retain and instruct counsel without delay." Thus s. 10(b) might be amended to read "the right to retain and instruct counsel without delay and the right to be informed promptly thereof."

(4) Rights in Criminal Proceedings

(a) Guarantee of Counsel

In our opinion, s. 11 should be further expanded to include a provision guaranteeing everyone charged with an offence the right to

counsel. We would endorse the following wording, which is modelled on Article 6(3)(c) of the European Covenant for the Protection of Human Rights and Fundamental Freedoms:

> "11. Anyone charged with an offence has the right
>
> . . .
>
> (b) to defend himself or herself in person or through legal assistance of his or her own choosing and, if he or she has not sufficient means to pay for legal assistance, to have legal assistance provided when the interests of justice so require."

It is to be noted that similar wording is found in Article 14(3)(d) of the International Covenant on Civil and Political Rights. The right to counsel is also recognized in th Sixth Amendment to the U.S. Constitution.

(b) Right not to Testify Against Oneself

Given the importance in Anglo-Canadian jurisprudence of the right to remain silent, we believe that s. 11 should include a provision guaranteeing an accused the right not to be compelled to testify against himself at his own trial (a right not protected by s. 13). The wording of this right could be taken directly from Article 14(3)(g) of the International Covenant, which provides for the right "not to be compelled to testify against himself or to confess guilt."

(c) War Crimes

Section 11(e) provides for the right "not to be found guilty on account of any act or omission that at the time of the act or omission

did not constitute an offence." Section 11(f) provides for the right "not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted." These provisions have particular significance in so far as war crimes committed during World War II are concerned. As presently worded they would appear to guarantee immunity from prosecution in Canada to war criminals resident here, those who have never been prosecuted for their crimes as well as those who, although prosecuted, were acquitted in European or other courts on technical grounds or because of the unavailability of witnesses. Regardless of what action is actually taken against these individuals it is our view that they must never be allowed to feel totally secure from prosecution. We would therefore suggest that s. 11(c) be amended by adding the phrase "under domestic or international law" after the word "offence" and that s. 11(f) be amended by adding the phrase "in Canada" after the word "acquitted." These changes would, it should be noted, bring Canada into line with its obligations under the International Covenant on Civil and Political Rights as defined by Article 15(1) and Article 14(7).

(5) Section 12

This section cannot be left in its present form if it is to have any real significance. According to the majority of the Supreme Court in R. v. Miller and Cockriell the term "cruel and unusual" is to be read conjunctively. The result of that is that one must show that a particular type of treatment or punishment is both cruel and unusual in order to have it declared a contravention of the right. Such a test is almost impossible

to meet. In order to ensure that this provision does have real significance we would strongly recommend that it be reformulated along the line of Article 7(1) of the International Covenant on Civil and Political Rights, which speaks in terms of "torture or cruel, inhuman or degrading treatment or punishment." Whatever formulation is chosen, however, it should not contain the word "unusual."

4. Non-Discrimination Rights (s. 15)

This is perhaps the most complicated category of rights in the Charter. As a result, we have decided to approach it from the standpoint of the objectives that we feel should be uppermost in the mind of the draftsman. These objectives, in our view, are as follows:

(1) to ensure that the courts are given a clear and unambiguous mandate to scrutinize and control not only the way in which laws are administered but also the content of the laws themselves;

(2) to ensure that no type of discrimination is totally immune from judicial review - in other words, that there is a general right to equality that precludes discrimination on any ground unless such discrimination can be justified; and

(3) to ensure that the courts are encouraged, or at least free, to apply especially rigourous standards in considering distinctions on such grounds as race, national or ethnic origin, religion, colour and sex - for example, by requiring the government to show that such discrimination is "necessary" to promote a "compelling" public purpose.

Does s. 15(1), as now drafted, meet these objectives? Given the reluctance of the Supreme Court to use s. 1 (b) of the Canadian Bill of Rights to scrutinize and control the content of federal legislation we

cannot be sure that the mandate to use s. 15(1) for this purpose is sufficiently clear and unambiguous. We would prefer either to see s. 15(1) say exactly what we assume it is intended to mean and grant the right "to equality in both the content and the administration of the law" or to use the term "equality of rights under the law" in place of "equal protection of the law." This latter formulation, it is to be noted, is borrowed from the Equal Rights Amendment presently being discussed in the United States.

We have grave misgivings about the ability of s. 15(1) to meet the second objective. The list of enumerated grounds of discrimination might well be interpreted by the courts as exhaustive, with the result that no protection at all would be afforded to those discriminated against on grounds such as language, province of residence (subject, of course, to s. 6), political belief, marital status, physical handicap, etc., even where the discrimination was completely arbitrary.

We are also concerned about the third objective. Our worry here stems from the inclusion of age in the list of enumerated grounds. Discrimination on the basis of age is an accepted part of our life - special provision for children in the sphere of criminal law, prohibitions against children voting, drinking, driving, etc., special rules with respect to their liability in contract, etc. - and no court will want to strike such legislation down. In order to preserve such legislation, however, the level of scrutiny applied to it will have to be lower than that which is appropriate for legislation that discriminates on the basis of a truly invidious ground such as race. For example, instead of requiring the government to show that the discrimination is "necessary" to promote a "compelling"

public purpose, it may be sufficient to require that the government show that the discrimination is "reasonable" in light of a "legitimate" governmental purpose.

The problem, of course, is that age is treated no differently than race in s. 15(1). The result is therefore likely to be that all the grounds of discrimination listed in s. 15(1), including the highly invidious, will be subject to the same lower level of scrutiny that age discrimination deserves. To put it in simple terms, the inclusion of age in s. 15(1) might well produce a lowest common denominator level of scrutiny - and that would, in our view, be unfortunate. We would therefore suggest that, if a list is to be a part of s. 15, age not be included in it.

Apart from this specific suggestion relating to age discrimination, how does one ensure that the second and third objectives are met? We ourselves are by no means ad idem on this but would suggest that consideration be given to the following two alternatives:

(i) break s. 15(1) into two parts, to read as follows:

> "15(1) Everyone shall have the right to equality in both the content and the administration of the law without unreasonable distinction.
>
> (2) Without limiting the generality of subsection (1), no distinction shall be made on the basis of race, national or ethnic origin, colour, religion or sex unless such distinction is necessary to promote a compelling public purpose."

(ii) leave out any list, thereby leaving it to the courts to develop the test(s) in this area on their own:

> "15(1) Everyone has the right to equality in both the content and the administration of the law."

sense. In law, therefore, the words are interchangeable. However, in general usage the word "discrimination" tends to be understood in its pejorative sense and the implication that some forms of discrimination might be considered reasonable would probably be distasteful, and would certainly be confusing, to the layman. From the standpoint of the layman, therefore, "distinction" would be preferable to "discrimination." It is also to be noted that the term "distinction" is used in the International Covenant on Civil and Political Rights.

As far as the present s. 15(2) is concerned, we agree in principle with the concept of affirmative action. However, it is our view that the wording of that subsection requires tightening to ensure that neither the governments nor the courts are in a position to abuse it. The potential for abuse on the part of the courts arises out of the looseness of the words "the amelioration of conditions of disadvantaged persons or groups." Given the track record of the Supreme Court in the area of equality it is not unreasonable to suggest that some judges might make use of these words to preserve intact what they consider to be "beneficial" discrimination. For example, they might use s. 15(2) to uphold much longer prison sentences for offenders between certain ages on the ground that such sentences are designed to improve the chances of rehabilitation for such offenders and thereby "ameliorate" their "conditions." In order to prevent this occurring we would recommend that s. 15(2) include a proviso that it is to operate

make clear that a law, program or activity in question has received official sanction as a law, program or activity that has as its object the amelioration of conditions of a particular disadvantaged group or particular disadvantaged persons.

The potential for abuse on the part of the governments stems from the words "which has as its object." By adding a preamble stating that the object of a piece of legislation is "the amelioration of conditions" of a particular "disadvantaged group," a government would, it would appear, be able to immunize that legislation from judicial review under s. 15(1). To eliminate the possibility of such abuse we would suggest the addition to s. 15(2) of a requirement that the law, program or activity in question be "reasonably related" to the object of "ameliorating the conditions of disadvantaged persons or groups."

We, like other groups, are concerned that the courts might exclude from the protection of s. 15(2) certain groups that deserve to be included. We have difficulty, however, seeing how one can draft one's way around this concern. It is impossible to name specific groups in s. 15(2) because those that are now "disadvantaged" will hopefully not remain so forever. It would appear that we have no choice but to trust the courts in this matter.

In sum, we would like to see s. 15(2) reformulated along the following lines:

> "This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups provided that

(a) the law, program or activity is undertaken pursuant to an express declaration by Parliament or a legislative assembly that the protection of this subsection is being sought; and

(b) the law, program or activity is reasonably related to the object of ameliorating conditions of disadvantaged persons or groups."

5. Remedies (ss. 25-26)

(1) General Provision

Section 25 is certainly an improvement on the existing Bill of Rights. However, it provides protection only when the violation is due to the wording of a statute. If the violation is due to the conduct of a public official - as it would be, for example, where a police officer fails to inform a person of the reason for his arrest - no remedy is provided. We think it should be expressly stated in the Charter in a separate provision that the courts have the power to make use of whatever remedies they deem appropriate, including the principle of vicarious liability, to ensure that the rights and freedoms in the Charter are protected. We note in this regard that the International Covenant on Civil and Political Rights, in Article 2(3), makes express provision for effective remedies. This was also true of Bill C-60 and the August 22 "Discussion Draft."

(2) Exclusion of Evidence

Section 26, the effect of which is to constitutionally entrench the common law position with respect to the admissibility of improperly obtained evidence, must, in our view, be deleted. No charter of rights should include a provision which represents an open invitation to law

enforcement officials to ignore its provisions. At the very least the Charter should indicate that the courts have the option, in an appropriate case, to exclude evidence obtained in violation of its provisions. Such indication could be given in the general provision dealing with remedies as follows:

> "A Court of competent jurisdiction shall have power to issue such prerogative writs, equitable remedies, directions and orders, including orders for the payment of compensation and for the exclusion of evidence, as may be appropriate in a given case for the enforcement of any of the rights or freedoms conferred by this Charter."

It is to be noted that the "Discussion Draft" Charter did not include a counterpart to s. 26.

C. Limitations Clause (s. 1)

The present s. 1 must be deleted. While we agree that entrenched rights and freedoms cannot all be absolute and that there must be room for limitations of some in certain circumstances (e.g. wartime emergency) and for certain reasons (e.g. to protect the rights of others), s. 1 goes far beyond what is required. In fact it undermines the very essenceof entrenchment. It is to be noted that even the Canadian Bill of Rights by providing for the non obstante clause in s. 2, requires Parliament to take responsibility for encroachments on the rights and freedoms it spells out.

The question, of course, is what, if anything to substitute for s. 1. Our preferred response to this question, which borrows from the approach taken in the International Covenant, would entail the following:

(a) a careful examination of each of the rights and freedoms provided for in the Charter to see whether or not it requires a limitation provision;

(b) providing a special limitation provision for each right or freedom that qualifies under (a);

(c) incorporating a carefully worded emergency provision allowing for limitations on at least some of the rights and freedoms in the Charter for the duration of an emergency.

Dealing with each of these steps in turn, it is our view that very few of the rights and freedoms provided for in the Charter do in fact require a limitation provision. Many of the rights and freedoms have built-in qualifications that allow ample scope for the governmental interest to be served. Into this category would fall, from the proposed Charter, s. 3, s. 6(2), s. 8, s. 9, s. 11(b), s. 11(d), s. 15(1) (at least if re-drafted), s. 20 and s. 23, and from our suggested additions, the right to privacy, the right to property and the right to be provided with counsel. Most of the remaining provisions, by their very nature, need no limitation clause (other than, in the case of some, an emergency provision). Into this category would fall, from the proposed Charter, s. 4, s. 5, s. 7, s. 10, s. 11(a), s. 11(e), s. 11(f), s. 11(g), s. 12, s. 13, s. 14, ss. 16-19, s. 21 and s. 22, and from our suggested additions, the right to fair procedures in the non-criminal sphere, the right to be informed of the right to counsel and the right not to be compelled to testify against oneself. This leaves us with the s. 2 freedoms, s. 6(1) and s. 11 (c). Each of these, it seems to us, requires a limitation provision.

With respect to the s. 2 freedoms, we would like to see a limitation provision that read along the following lines - "subject only to such limitations as are necessary in a free, democratic and pluralistic society."

Such a formulation would not only reflect the importance we attach to these fundamental freedoms, and in particular to the right to dissent, it would also bring us closer to the wording used in the International Covenant (see Articles 18, 19, 21 and 22, all of which use the word "necessary"). The limitation clause for s. 6(1) might be modelled on Article 12(3) of the International Covenant which only allows limitations "which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights or freedoms of others, and are consistent with the other rights recognized in the present Covenant." As far as s. 11(c) is concerned, we would suggest adding something like "provided that the public may be excluded if compelling reason exists for so doing."

The emergency provision we would word in much the same fashion as Article 4(1) and Article 4(2) of the International Covenant. Thus it would read approximately as follows:

> "(1) In time of public emergency which threatens the safety of the nation or any part thereof and the existence of which is proclaimed by Parliament or a legislative assembly the rights and freedoms set out herein may be limited but only to the extent strictly required by the exigencies of the situation and provided that in no event shall such limitation involve discrimination solely on the ground of race, colour, national or ethnic origin, religion or sex.
>
> (2) No derogation from sections 2(a), 3, 4, 5, 11(c), (f) and (g), 12, 15, 16, 17 and 18 may be made under this provision."

The list of sections in subsection (2) of this provision represents an attempt on our part to enumerate those rights and freedoms that we believe should not be subject to limitation under the emergency provision. It ...

be that we have included one or two that cannot be included and/or excluded one or two that should not be excluded. However, the basic principle underlying subsection (2) is one we very much believe in.

7. Application (s. 29)

With respect to the application of the Charter, we are of the view that it should be made clear that "government" in s. 29(1) includes all public officials, tribunals, etc. including those at the municipal level. This s. 29 might be amended to add a subsection defining "government" to include "all public authorities, officials, employees, tribunals and other public bodies and persons, including for the purposes of s. 29(1)(b), those at the municipal level of government." We also think it would be wise to include as another subsection a provision like s. 5(2) of the Canadian Bill of Rights to ensure that there is no misunderstanding about the meaning of the word "law(s)." Such a provision might read as follows:

> "The term 'law' shall mean an act of the Parliament of Canada or of a legislative assembly, including any order, rule or regulation thereunder, enacted before or after the coming into force of this Charter, and any law in force in Canada or in any part of Canada on the coming into force of this Charter that is subject to be repealed, abolished or altered by the Parliament of Canada or a legislative assembly."

Conclusion

Let us close by saying that the importance of remedying at least the most significant of the defects in the Charter cannot be over-emphasized.

It seems highly unlikely, given the reluctance of many of the provinces to accept the notion of entrenched rights, that the Charter will ever be improved by the process of constitutional amendment. And, because the very existence of a Charter could well undermine the use of alternative means of protecting rights and freedoms, such defects may not be remedied by statute or other ordinary means. This is a situation in which it is important to be right the first time.