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SUBMISSIONS TO

Special Joint Parliamentary Committee

on

The Constitution

*Bobines
Schiffman*

RE

Charter of Rights and Freedoms

FROM

Canadian Civil Liberties Association

DELEGATION

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

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A Precautionary Note

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

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

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Overriding Impact

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The Limitations

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

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

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

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

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

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

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

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

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

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

The Remedies

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

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

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

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

The Substantive Protections

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Democratic Rights

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

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

Legal Rights

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

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

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

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

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

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

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

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

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

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

Non-Discrimination Rights

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

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

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

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

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

Summary of Recommendations

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

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

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

- 2. The current section 26 should be removed and replaced by a provision endowing the courts with comprehensive power to rectify violations of the Charter. At the very least, such remedies should include the power to issue corrective orders, enjoin certain acts, make declarations, exclude evidence, and award damages. They should be made specifically applicable not only to any laws but also to administrative practices and common law precedents which violate the Charter.
- 3. For a Parliament or Provincial Legislature to perpetuate its own existence beyond the constitutional limits, the minimum prerequisite should be, not an "apprehended", but an imminent war, invasion, or insurrection. And such determination should be judicially reviewable on the basis of reasonable and persuasive grounds.
- 4. There should be an immunity not only to unlawful but also to unreasonable searches and seizures. This protection should extend also to surveillance and the interception of communications.
- 5. There should be an immunity not only to unlawful but also to arbitrary detention and imprisonment.
- 6. There should be a requirement that the denial of reasonable bail not only be lawful but also that it be reasonable and in accordance with fair procedures.

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

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

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

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

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