

CHARTER OR CHIMERA?
**A COMMENT ON THE PROPOSED CANADIAN
CHARTER OF RIGHTS AND FREEDOMS†**

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In June 1978, the Government of Canada introduced in Parliament Bill C-60, a proposed *Constitution of Canada Act*. Among the several controversial features of the Bill was a new *Canadian Charter of Rights and Freedoms*, comprising Sections 5 to 29. This comment addresses that aspect of the proposal.

The usefulness of such a comment may well be questioned in view of the subsequent defeat at the polls of the government that introduced the proposal. However, although the *Charter* did not become law, it will likely be treated as at least a point of departure by the next government, of whatever political stripe, that sets out to deal with the perennial constitutional problem of entrenching civil liberties. The proposal therefore deserves careful study.

My commentary will be in two parts; a few general observations about the significance and form of the proposed *Charter* will be followed by a more detailed section-by-section examination. Although my comments will be directed primarily at the text of the *Charter* incorporated in Bill C60, reference will also be made to certain tentative suggestions for amendment of the *Charter* made by representatives of the Government of Canada during inconclusive discussions of the subject at the Federal-Provincial Conference of First Ministers on the Constitution in February 1979.¹ It is difficult to know how seriously to treat the 1979 proposals. Some of them constitute obvious improvements to the *Charter*; but others seem to be concessions designed more to appease provincial politicians in the political climate that prevailed at the time than to advance the cause of civil liberties in Canada.

General Remarks

The federal Government began its public advocacy for improved constitutional protection of Canadian civil liberties with the publication of its pamphlet *A Canadian Charter of Human Rights* in 1968. At the ill-starred Victoria Constitutional Conference in 1971, provincial objections to the breadth of the federal proposal resulted in the tentative adoption of only a rather truncated human rights

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1. Federal-Provincial Conference of First Ministers on the Constitution, Document #800-010/037, "Federal Draft Proposals Discussed by First Ministers," Ottawa, Feb. 5-6, 1979 (hereinafter referred to as 1979 Federal Proposals).

document,^{1a} and even it died aborning when the *Victoria Charter* failed to receive ratification of all provincial governments. The 1972 *Report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada* recommended constitutional guarantees extending well beyond those included in the *Victoria Charter*, and in some respects even beyond those of the original federal proposal.² The new *Charter* represented a substantial return, with significant modifications, to the earlier position of the Government of Canada. Since its introduction it has received general support from the reports of the Task Force on Canadian Unity,³ the Canadian Bar Association's Committee on the Constitution,⁴ and the 1978 Special Parliamentary Committee on the Constitution.⁵

What impact would the *Charter* have, if finally enacted, on civil liberties in Canada? Unfortunately, the answer to that question depends in large measure on the outcome of a much more difficult issue, which Bill C-60 side-stepped: would the *Charter* ever be constitutionally entrenched?

Constitutional entrenchment would require enactment of the *Charter* in a form that would be judicially enforceable, even against the express wishes of Parliament and the provincial Legislatures, and would be incapable of change except by formal constitutional amendment. Without constitutional entrenchment, the *Charter* would constitute nothing more than a slightly improved edition of the present *Canadian Bill of Rights*.⁶ The *Bill of Rights* is an ordinary statute of the Parliament of Canada, which provides significant shelter against *non-legislative* interference with civil liberties by police, civil servants and others,⁷ but which as currently interpreted offers little protection against *legislative* encroachments on human rights by Parliament or the provincial Legislatures.⁸ Without constitutional entrenchment, the proposed new *Charter* would inherit this fundamental weakness.

It is true that the *Charter* contemplates constitutional entrenchment. Section 5 states that: "... certain rights and freedoms ... must, if they are to endure, be incapable of being alienated by the ordinary exercise of ... legislative or other authority" However, as the explanatory notes to Bill C-60 made clear, it was proposed that for the time being the *Charter* would be enacted, like the *Canadian Bill of*

1a. *Canadian Constitutional Charter*, Victoria Constitutional Conference, June 1971, Arts. 1-19. Referred to in text as the *Victoria Charter*.

2. *Final Report, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada* (1972) Recommendations 6-28. Referred to in text as the *1972 Report of the Joint Parliamentary Committee*.

3. The Task Force on Canadian Unity, *A Future Together* (1979) Chaps. 5, 7.

4. Committee on the Constitution, Canadian Bar Assn., *Towards a new Canada* (1978) Chaps. 4, 5.

5. *Report to Parliament of Special Joint Committee of the Senate and House of Commons* (October 1978). Referred to in text as the *1978 Report of the Joint Parliamentary Committee*.

6. S.C. 1960, c. 44.

7. See W. Tarnopolsky, *The Canadian Bill of Rights* (2nd ed. 1975).

8. See *Id.*, at 87ff.

Rights, as an ordinary statute of the Parliament of Canada, with no entrenched status. "The Charter would only become entrenched," we were told, at such "appropriate" time as a formal amending procedure for the Constitution of Canada should be agreed upon.⁹ Inasmuch as the search for a satisfactory amending formula has now been under way for about 50 years, the prospect of early entrenchment by that process does not appear bright. There was a suggestion in the explanatory note that if agreement on a new formula were not achieved by the "relevant time" (which was described with unabashed ambiguity as "presumably when all or most of the provinces have approved the Charter") entrenchment of the *Charter* would be achieved in the same manner as that of the original *British North America Act*: by a statute of the British Parliament. It is very difficult, however, to imagine Canadian politicians approving such an approach to entrenchment in the current state of the constitutional crisis. Yet if constitutional entrenchment of the *Charter* is not a possibility in the foreseeable future, one wonders whether it is justifiable to devote further political and academic time to it; a similar result could be achieved by means of a few modest alterations to the present *Bill of Rights*.

Should constitutional entrenchment ever be achieved, it is the writer's opinion, subject to a number of remarks to be made in the section-by-section commentary, that the *Canadian Charter of Rights and Freedoms* would be a reasonably effective constitutional safeguard. Do we need such a safeguard? Here, of course, opinions differ sharply.¹⁰ Space limitations preclude a re-examination of that classic debate in this paper. I should indicate, however, that the writer, influenced by such events as the denial of basic procedural rights to the defendants in Canada's notorious 1946 spy trials, the attempted abolition of minority language rights in Manitoba and Quebec, the callous discrimination against our native population over the years, and the appalling treatment of Japanese Canadians during World War II, is one of those who strongly favour constitutional entrenchment of human rights. The 1972 *Report of the Joint Parliamentary Committee* recommended entrenchment,¹¹ as did the recent reports of the Canadian Bar Association's Committee on the Constitution,¹² the Ontario Advisory Committee on Confederation,¹³ and the Task Force on Canadian Unity.¹⁴

9. Government of Canada, *The Constitutional Amendment Bill - Text and Explanatory Notes* (June 1978) iv.

10. The literature is vast. Two brief discussions favourable to entrenchment are: P. Trudeau, *A Canadian Charter of Human Rights* (1968); and Manitoba Law Reform Commission, *Report #25 - The Case for a Provincial Bill of Rights* (1976). Contrary views will be found in: P. Russell, "A Democratic Approach to Civil Liberties" (1969), 19 U.T.L.J. 109; and Lord Lloyd of Hampstead, "Do We Need a Bill of Rights?" (1976), 39 Mod. L. Rev. 121.

11. *Supra* n. 2, at Recommendation 13. This was re-affirmed in the 1978 *Report of the Joint Parliamentary Committee*, *Supra* n. 5.

12. *Supra* n. 4, at Chap. 4, Recommendation 1.

13. Summarized by the Task Force on Canadian Unity in Volume 2 of its Report, *Coming to Terms* (February 1979) 105-07.

14. *Supra* n. 3, at Chap. 9, Recommendations 1 and 71-75.

The *Charter* purports to be applicable to provincial as well as to federal institutions. Section 131 of Bill C-60 provided, however, that matters within provincial jurisdiction would not be covered by the *Charter* until such time as either: the Legislature of the province in question so enacted, or full entrenchment were achieved. As an incentive to the adopt the *Charter* the provinces were offered the abolition of the federal power to disallow the legislation of participating provinces.¹⁵ Since the federal disallowance power, though legally extant, has been politically unexercisable for many years, the provinces did not regard this as a very tempting carrot.

Section 131 did not necessarily mean that the *Charter* could have no effect on provincial laws before a province opted in. It is arguable that it is within the legislative competence of the Parliament of Canada to provide unilaterally for the protection of such rights as, for example, the rights of every citizen under Section 8 to reside, acquire property, and pursue a livelihood in any province or territory. It would require a judicial determination to decide whether Section 8 and other similar provisions would be enforceable in the absence of provincial ratification.¹⁶

Several provinces already have their own bills of rights.¹⁷ If such provinces decided to opt in to the *Canadian Charter of Rights and Freedoms*, how would their own bills of rights be affected? The simplest solution would be to repeal the provincial legislation when adopting the federal *Charter*, but there may well be aspects of the provincial bills that are not duplicated in the *Charter* and deserve preservation. It would be important for such provinces to compare the two documents carefully and to make express provision for their interrelationship.

A final word should be said about the language of the *Charter*. The French text is for the most part preferable to the English. The French version is generally briefer, and considerably more graceful. While pragmatic common lawyers may sneer at such things, graceful expression is an important quality for a constitutional instrument, whose function is to be educational as well as juridical. There are, moreover, a few significant discrepancies in substance between the English and the French texts. Examples will be referred to in the more detailed commentary which follows.

Section by Section Commentary

Section 5 — Canadian Charter of Rights and Freedoms

5. The provisions of this division, which may be cited collectively as the *Canadian Charter of Rights and Freedoms*, are founded on the conviction

15. Bill C-60, s. 131(3).

16. See n. 31 below.

17. *The Alberta Bill of Rights*, S.A. 1972, c. 1; *Quebec Charter of Human Rights & Freedoms*, S.Q. 1975, c. 6; *The Saskatchewan Bill of Rights Act*, 1947, S.S. 1947, c. 35.

and belief, affirmed by this Act, that in a free and democratic society there are certain rights and freedoms which must be assured to all of the people of that society as well as to people within that society individually and as members of particular groups, and which must, if they are to endure, be incapable of being alienated by the ordinary exercise of such legislative or other authority as may be conferred by law on its respective institutions of government.

This introductory section lacks the elegance commonly found in preambles and introductions to documents of this kind. It is, however, preferable to the introduction to the present *Canadian Bill of Rights* which, although more eloquent, contains certain provisions, such as the reference to "a society of free men" and to "the supremacy of God," that some regard as intruding on the very liberties the *Bill* is intended to protect. In any event, a generally well-expressed declaration of fundamental values will be found in Section 4 of Bill C-60. This "statement of aims of Canadian federation," while not strictly a part of the *Charter*, provides a good introduction to it. It would be desirable to incorporate this or a similar statement within the actual text of the *Charter* in future incarnations.

The French text, which is more straightforward than the English, omits any reference to the rights of "all of the people" collectively. Since the purpose of a bill of rights is primarily to protect individuals and minority groups from oppressive actions by the majority, the French text is preferable.

Section 5 refers to the need for constitutional entrenchment of human rights. As pointed out above, Bill C-60 did not in itself provide such entrenchment, and left that important step to future negotiations. That was the central weakness of the 1978 proposal.

Section 6 — Fundamental Rights and Freedoms

6. It is accordingly declared that, in Canada, every individual shall enjoy and continue to enjoy the following fundamental rights and freedoms:

- freedom of thought, conscience and religion;
- freedom of opinion and expression;
- freedom of peaceful assembly and of association;
- freedom of the press and other media for the dissemination of news and the expression of opinion and belief;
- the right of the individual to life, and to the liberty and security of his or her person, and the right not to be deprived thereof except by due process of law;
- the right of the individual to the use and enjoyment of property, and the right not to be deprived thereof except in accordance with law; and
- the right of the individual to equality before the law and to the equal protection of the law.

The February 1979 Federal Proposals suggested a re-wording and re-ordering of the initial freedoms:

- freedom of conscience and religion;
- freedom of thought, opinion and expression; including freedom of press and other media;
- freedom of peaceful assembly and of association.

This section involves several improvements to Section 1 of the *Canadian Bill of Rights*. The awkward linking of these fundamental freedoms to the question of discrimination, which created problems for the interpretation of the *Bill of Rights*, has been remedied, for example. The concepts of freedom of religion, freedom of speech, and freedom of the press have been somewhat expanded, and freedom of assembly has been limited to "peaceful assembly." A number of questions remain, however.

All these rights are now described as belonging to "every individual." In Section 1 of the *Canadian Bill of Rights* only sub-sections (a) and (b) are restricted to "individual"; the other fundamental freedoms are not so limited.¹⁸ Does the wording of the *Charter* signify that corporations and other group entities would have no guaranteed freedom of expression or the right to enjoy property? If so, is that desirable? The 1979 Federal Proposals suggested that the right to use and enjoy property should be extended to "groups," but the term was not defined, and the reason for making such an extension only in the case of property rights was not explained.

The use of the curious expression "shall enjoy and continue to enjoy" in the English text is open to question. The French version employs the simpler term "jouit." The *Canadian Bill of Rights* states: "... in Canada there have existed and shall continue to exist ... the following human rights and fundamental freedoms ..." ¹⁹ This reference to the past existence of the listed rights has caused some interpreters of the present *Bill of Rights* to claim that the only rights protected by it are those which existed in 1960, when the *Bill* was enacted, and accordingly that no law or situation existing at that time can be regarded as contravening the provisions of the *Bill*.²⁰ Although this restrictive view is by no means shared by all Canadian constitutionalists, it has created sufficient confusion to justify clarification in the new *Charter*. It is doubtful that the new formulation "shall enjoy and continue to enjoy" will do the job. While it omits any express reference to the past, its use of the words "and continue to enjoy" seems to imply such a link. Otherwise, they would be meaningless, since continued future application of the section is already included in the expression "shall enjoy." Much potential confusion could be avoided by using only that simple and well understood formulation, and deleting the words "and continue to enjoy."

18. The use of the term "individual" in s. 1 (a) of the *Canadian Bill of Rights* was held to exclude corporations from its protection in *R. v. Colgate Palmolive Ltd.* (1971), 8 C.C.C. (2d) 40, at 43 (Ont. Cty. Ct.). Doyle, C.C.J., seemed to indicate that this would also be the case for those parts of s. 1 which do not employ the term "individual." The same view is expressed by Tarnopolsky, *Supra* n. 7, at 174. The question is far from settled, however; a strong argument can be made for extending to corporations those parts of s. 1 which do not expressly refer to "individual," and which can appropriately be exercised by a corporation. The same argument would apply, with even greater force, to s. 2, which employs the term "person" in several contexts, some of which would be appropriate to corporations.

19. S.C. 1960, c. 44, s. 1.

20. See *Supra* n. 7, at 171ff.

The *Canadian Bill of Rights* offers protection against interference with life, liberty, security of the person, and enjoyment of property, except by "due process of law." The phrase "due process of law" derives from the American Constitution, where it has acquired a substantial judicial gloss. The extent to which Canadian courts should look to the American experience when interpreting the phrase has yet to be answered conclusively.²¹ The 1972 Joint Parliamentary Committee recommended that the phrase be dropped and replaced by "principles of fundamental justice" in the case of life, liberty and security of the person, and by "for the public good and for just compensation" in the case of enjoyment of property.²² The drafters of the *Charter* have chosen to retain the phrase "due process of law" in reference to life, liberty and security of the person, but to substitute "in accordance with law" in the case of enjoyment of property. The absence of any requirement that compensation be paid for property taken in accordance with the law seems difficult to defend in a document designed to improve the protection of fundamental rights. The 1979 Federal Proposals seemed to acknowledge the need for a compensation guarantee by suggesting that the right to enjoy property should not be deprivable "except in accordance with law that is fair and just." On the other hand, the proposals also called for specific articulation of the right of governments to make laws "which control or restrict use of property in public interest or for collection of taxes and penalties."

The retention and expansion of "freedom of the press" may be a cause of concern to some. Does its separate inclusion signify that the media have certain rights extending beyond the ordinary freedom of expression which every person has? Does it imply, for example, that a reporter may refuse to disclose his sources when called upon to do so in a judicial proceeding? Does it mean that the media have special immunity from liability for defamatory statements, as is the case in the United States? Those who drafted the legislation would probably respond negatively to both of the above questions and to others of a similar kind. Why then, it may be asked, is there any need for a special reference to "freedom of the press"? Unless it can be shown that the members of the media ought to enjoy certain privileges in addition to those which are enjoyed as part of the freedom of expression by all individuals, inclusion of "freedom of the press" would seem to be productive of nothing but confusion.²³ The 1979 Federal Proposal to treat freedom of press as a form of freedom of expression would reduce the confusion somewhat, but it would not solve the problem completely.

21. *See Id.*, at 222-35.

22. *Supra* n. 2, at 18, Recommendations 16 and 17.

23. Tarnopolsky, *Supra* n. 7, at 180, describes freedom of speech and freedom of the press as "variations of the same liberty." The report of the Canadian Bar Association Committee, *Supra* n. 4, at 17-18, omits any reference to freedom of the press.

The phrase "freedom of opinion and expression" used in the English text would seem to be considerably more sweeping than the equivalent French phrase "*liberte d'opinion et liberte de parole*." Whereas "freedom of expression" would probably include photography, painting, sculpture, ballet, mime, etc., the French term might be interpreted much more restrictively. The writer is of the view that the English formulation is preferable to the French in this case because it covers a broader range of communications. In any event, the discrepancy between them ought to be eliminated.

The Canadian Bar Association's Committee on the Constitution has recommended constitutional protection for two rights not included in the list of fundamental rights and freedoms set out in Section 6:

The Bill of Rights should recognize the right of every person to reasonable access to all public information in the possession of federal, provincial and municipal departments and agencies.²⁴ The Bill of Rights should provide that individual privacy should not be subjected to unreasonable interference.²⁵

Both proposals, which originated in a working paper of the Manitoba Law Reform Commission,²⁶ seem worthy candidates for inclusion in any improved constitutional guarantee of fundamental rights and freedoms. The 1979 Federal Proposals accepted the desirability of including a "right against unreasonable interference with privacy" as one of the "legal rights," but did not deal with the question of access to public information.

Finally, it seems to the writer that the arrangement of these fundamental rights and freedoms in both the English and French versions of Section 6 leaves something to be desired. Would it not be more logical, rhythmic, and memorable to express the freedoms as a series of couplets:

freedom of thought and opinion;
 freedom of conscience and religion;
 freedom of speech and other expression;
 freedom of association and peaceful assembly.

These would then be followed by the three "rights" with which the Section now concludes, and any others that might be added to the list. It seems to me that this simpler and somewhat more logical arrangement would be easier to impress upon the memory of school children, and perhaps even of judges.

Section 7 — Individual Legal Rights

7. In addition to the fundamental rights and freedoms declared by section 6, it is further declared that, in Canada, every individual shall enjoy and continue to enjoy:

— the right to be secure against unreasonable searches and seizures;

24. *Supra* n. 4, at Chap. 4, Recommendation 7.

25. *Id.*, at Chap. 4, Recommendation 10.

26. *Report #25 - The Case for a Provincial Bill of Rights*, *Supra*. n. 10.

- the right not to be arbitrarily detained, imprisoned or exiled;
- the right, as an individual who has been arrested or detained,
 - (i) to be informed promptly of the reasons for his or her arrest or detention,
 - (ii) to retain and instruct counsel without delay, and
 - (iii) to the remedy by way of *habeas corpus* for the determination of the validity of his or her detention and for his or her release if the detention is not lawful;
- the right not to give evidence before any court, tribunal, commission, board or other authority, if the individual is denied counsel, protection against self-crimination or other constitutional safeguards;
- the right to the assistance of an interpreter in any proceedings before a court, tribunal, commission, board or other authority in which the individual is involved or is a party or witness, if he or she does not understand or speak the language in which the proceedings are conducted;
- the right to a fair hearing, in accordance with the principles of fundamental justice, for the determination of the individual's rights or obligations;
- the right, as an individual who has been charged with an offence, to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial tribunal, not to be denied reasonable bail without just cause having been established, not to be found guilty of the offence on account of any act or omission that at the time of such act or omission did not constitute an offence, and, if found guilty of the offence, not to be subjected to a punishment more severe than that applicable at the time the offence was committed; and
- the right not to be subjected to any cruel and unusual treatment or punishment.

The same questions associated with the use of the terms "individual" and "continue to enjoy" in Section 6 arise in this Section also.

The Section is modelled on Section 2 of the *Canadian Bill of Rights*, but there have been some significant additions. The provisions relating to "searches and seizures" and to *ex post facto* crimes, both of which were recommended by the 1972 Joint Parliamentary Committee, are new. Another new feature is the extension of the right to an interpreter to proceedings before "other authority," which would presumably include police investigations.

A surprising omission from the *Charter*, as well as from the existing *Canadian Bill of Rights* and the Parliamentary Committee and Bar Association Committee proposals, is protection against double jeopardy. While this right not to be tried more than once for a given crime is generally well guarded by existing provisions of the criminal law, it is difficult to understand why it should not also merit recognition in the *Canadian Charter of Rights and Freedoms*.

The 1978 *Report of the Joint Parliamentary Committee* made the following comment about this Section of the *Charter*: "We . . . heard evidence to the effect that the legal civil liberties protected [under clause 7] are selective and incomplete. We share this concern, but we have some confidence that the appropriate expression of these rights

will take place through the courts. . . .'²⁷ This rather complacent attitude may have been justified by the severe time constraints under which the Committee was working at the time. Now that enactment of the *Charter* is no longer imminent, there is an opportunity to examine Section 7 more carefully, in light of the concerns to which the Committee referred, and to ensure that it enshrines, as carefully as legislative language can, the fundamental protections for civil liberties in the legal arena. Those protections would be incomplete if the problem of double jeopardy were overlooked.

Several significant suggestions for change were included in the 1979 Federal Proposals. "Protection against double jeopardy" was proposed to be added, as well as several other new rights: "right against unreasonable interference with privacy," "benefit of a lesser penalty where law is changed," and the right of an accused person to be informed of the "specific charge" and to be tried "in reasonable time." Not all the suggested amendments will be cheered by libertarians, however. The proposed change of "right not to be arbitrarily detained, imprisoned, or exiled" to "right against detention or imprisonment except in accordance with prescribed laws and procedures" could fairly be regarded as a weakening of protection, for example. The right not to testify in court if denied counsel or protection against self-incrimination and other constitutional safeguards was proposed to be re-cast as protection available "*when compelled*" to testify. The protection against "cruel and *unusual* treatment or punishment" was suggested to be changed to "*cruel or inhuman* punishment or treatment." Finally, whereas the legal rights stated in Section 7 of the *Charter* are expressed in absolute terms (subject to Section 25, which will be discussed later), the 1979 Federal Proposals would treat them all as instances of the general "right to life, liberty and security of the person," and as such subject to deprivation by "due process of law." In view of the prevailing uncertainty by Canadian courts as to the meaning of "due process of law," and the possibility that it may be interpreted as meaning no more than "by law," this added limitation on Section 7 legal rights could prove to be unduly restrictive.

Section 8 - Rights of Individuals as Citizens

8. Every citizen of Canada wherever, the place of his or her residence or domicile, previous residence or domicile, or birth, has

—the right to move to and take up residence in any province or territory of Canada, and in consequence thereof to enjoy the equal protection of the law within that province or territory in the matter of his or her residence therein; and

—the right to acquire and hold property in, and to pursue the gaining of a livelihood in, any province or territory of Canada;

subject to any laws of general application in force in that province or territory but in all other respects subject only to such limitations on his or

27. *Supra* n. 5, at 11 (emphasis added).

her exercise or enjoyment of those rights as are reasonably justifiable otherwise than on the basis of the place of his or her residence or domicile, previous residence or domicile, or birth.

These important rights are new. They were no doubt prompted by recent provincial attempts to regulate property ownership by non-residents, and to play a larger role in regulating immigration to the provinces.²⁸ It is not surprising that there has been considerable provincial opposition to the proposals, and in the case of property ownership this opposition may be well founded. It is, perhaps, justifiable in the interest of provincial autonomy to permit provinces to restrict non-resident landholding. Surely, however, it would be intolerable to prevent the free movement of citizens to all parts of the nation, or to restrict their right to seek employment wherever they can find it. Freedom of movement and the right to work are matters too fundamental to be omitted from a national charter of basic rights and freedoms.

Unlike most other rights and freedoms covered by the *Charter*, which are stated to be available to every individual in Canada regardless of status, these rights are applicable to citizens only. Why should aliens be discriminated against in these matters? Perhaps, again, it is acceptable to limit the landholding rights of such persons, at least where they are non-residents. But should rights as fundamental as freedom of movement and the right to earn a living be capable of being denied to all non-citizens, including landed immigrants? How could any but the most wealthy of landed immigrants survive if they were refused the right to hold employment while establishing citizenship? During the course of British Columbia's lengthy governmental campaign to restrict the rights of oriental immigrants early in the century, the courts developed certain minimal protections based chiefly on the federal power over "naturalization and aliens."²⁹ Such protections are very limited in extent however, and require supplementation by the proposed *Charter* if the basic rights of aliens in Canada are to be satisfactorily safeguarded. The *1978 Report of the Joint Parliamentary Committee* recorded its "grave reservations" about the wording of Section 8, and stated that while there may be some justification for placing certain geographic limitations on immigrants as a condition of their admission to Canada, "we would not wish to engrave in the constitution a permanent distinction between the rights of citizens and landed immigrants even to gain for citizens... expanded liberty..."³⁰

It is uncertain whether this Section could be made operative with respect to a province that did not legislatively adopt the *Charter*. It is

28. These provincial initiatives received considerable encouragement from the decision of the Supreme Court of Canada in *Morgan v. A.-G. for Prince Edward Island* (1975), 55 D.L.R. (3d) 527.

29. See D. Schmeiser, *Civil Liberties in Canada*, (1964) 257ff.; I. Head, "The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada," [1964] Can. Y.B. Int'l L. 107.

30. *Supra* n. 5, at 12.

possible to argue that the Parliament of Canada has, pursuant to its jurisdiction over "citizenship" and matters of "peace, order and good government," the authority to enact such a provision without provincial collaboration. In view of the uncertainty as to the meaning of the "peace, order, and good government" power created by the *Anti-Inflation Case*,³¹ it is difficult to offer a confident opinion on the question.

It should be noted that the 1972 Parliamentary Committee recommended the entrenchment of a further citizenship right: "[t]he right to citizenship, once legally acquired, should be made inalienable"³²

Judging from the 1979 Federal Proposals, the federal Government took to heart several of the criticisms made about Section 8. The Proposals suggested the creation of a "right of citizen to enter, remain in and leave Canada," and the extension of other rights under the Section to "landed immigrants," as well as to citizens. Important restrictions of the protections were also proposed, however. The right to hold property was to be dropped, and the other rights protected by the Section were to be subject, in addition to the general limitations under Section 25, to such laws as are reasonably justifiable in the interests of "overriding economic or social considerations."

Section 9 - Rights and Freedoms to be Enjoyed Without Discrimination.

9. The rights and freedoms declared by sections 6, 7 and 8 of this Charter shall be enjoyed without discrimination because of race, national or ethnic origin, language, colour, religion, age, or sex.

This Section improves upon the non-discrimination feature of Section 1 of the *Canadian Bill of Rights*. Besides being moved to a separate section of its own, it has been broadened to refer to some additional prohibited criteria: ethnic origin, language and age. Arguments can be made for expanding the list even further, to include such factors as political belief, handicap, sexual orientation and marital status.³³

It should be noted, moreover, that this section refers only to discrimination in the enjoyment of rights granted by the *Charter* itself. There is no recognition of a right to be free from discrimination in employment, public accommodation, etc., as recommended by the 1972 Joint Parliamentary Committee. Such rights would be left to be

31. The famous "citizenship dictum" of Rand, J. in *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, at 918-20; [1951] 4 D.L.R. 529, at 557-59, suggests that the federal Parliament could enact such provisions unilaterally under the authority of its "peace, order and good government" power. However, the question was cautiously side-stepped by Laskin, C.J.C. in the *Morgan* case, *Supra* n. 28, at 531-32. Possible disagreement with the Rand dictum can be inferred from the remarks of Martland, J. in *Canadian Indemnity Co., v. A.-G. for British Columbia*, [1977] 2 S.C.R. 504, at 510-11; 73 D.L.R. (3d) 111, at 116, and the scope of the "peace, order and good government" power has been left in considerable doubt by the Supreme Court's ruling in *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 372; 68 D.L.R. (3d) 452.

32. *Supra* n. 2, at 18, Recommendation 15.

33. The 1978 Report of the Joint Parliamentary Committee recommended adding marital status, *Supra* n. 5, at 13.

determined from time to time by ordinary federal and provincial legislation.

The 1979 Federal Proposals appear to have called for a substantial revision of Section 9, replacing the various specific criteria with a much more general statement:

Right to equality before the law and to equal protection of the law without distinction or limitation other than one which is provided by law and fair and reasonable having regard to object of law.

While the generality of this proposed revision would certainly avoid the problem of too narrowly stated criteria, the requirement that the fairness and reasonableness of any discriminatory law be judged in light of the object of the law might well destroy the value of the entire Section, since it would seem to allow legislation whose open object is to discriminate. The 1979 Proposals also called for an exemption in the case of "justifiable" discrimination "in furtherance of affirmative action programs," an addition that may not be necessary in light of the general exemption already set out in Section 25.

Section 10 - Democratic Rights of Citizens

10. The principles of free and democratic elections to the House of Commons of Canada and to the legislative assembly of each province, including the principle of universal suffrage for that purpose, are fundamental principles of the Constitution of Canada; more particularly no citizen of Canada shall, because of his or her race, national or ethnic origin, language, colour, religion, or sex, be denied the right to vote in an election of members of the House of Commons of Canada or of the legislative assembly of a province, or be disqualified from membership therein.

The origin of this provision is Articles 4 and 5 of the *Victoria Charter*, 1971.

It will be noted that the prohibited grounds of discrimination parallel those in Section 9 except for "age," which is not repeated here. There would therefore be nothing to prevent the imposition of minimum or maximum age limitations on the right to vote.

As in the case of Section 9, some would argue to expand the list to include sexual orientation and political belief. At least in the case of political belief, the argument would seem to be quite strong. Denial of the right to vote on the ground that a person has professed Marxist beliefs, for example, should not be permissible in any democratic society, yet it would be permitted by Section 10.

The 1972 Joint Parliamentary Committee recommended adding a further political right which has not been included in the new *Charter*: "A provision requiring fair and equitable representation in the House of Commons and in the provincial legislatures." In light of the success with which American courts have administered such a provision,³⁴ this proposal seems worthy of serious consideration.

34. See *Baker v. Carr* (1961), 369 U.S. 186.

The 1979 Federal Proposals would, as in the case of Section 9, replace the specific prohibited discrimination criteria with a more generally stated right to vote and run for election "without unreasonable distinction or limitation."

Section 11 - Duration of Elected Legislative Bodies

11. Every House of Commons of Canada and legislative assembly of a province shall continue for five years, or in the case of a legislative assembly of a province for five or such lesser number of years as is provided for by the constitution of the province, from the date of the return of the writs for the choosing of its members and no longer, subject to its being sooner dissolved in accordance with law or the procedure recognized by accepted usage therefor.

(2) Notwithstanding subsection (1), in time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by the Parliament of Canada and a legislative assembly of a province may be continued by the legislature thereof beyond the time limited therefor by or under subsection (1), if such continuation is not opposed by the votes of more than one-third of the members of the house of Commons or the legislative assembly, as the case may be.

This is a consolidation of provisions in Section 50 and Section 91(1) of the *B.N.A. Act*, together with equivalent provincial provisions. As will be explained in the commentary on Section 27 below, however, the *Charter* offers significantly less protection for this important right than the existing provisions.

Section 12 - Annual Sessions of Elected Legislative Bodies

12. There shall be a session of the Parliament of Canada and of the legislature of each province at least once in every year, so that twelve months shall not intervene between its last sitting in one session and its first sitting in the next.

Again, this is a repetition of existing constitutional provisions, but with reduced legal protection. See the comment on Section 27.

Section 13 - Purposes for which English and French Declared to be Official Languages

13. The English and French languages are the official languages of Canada for all purposes declared by the Parliament of Canada or the legislature of any province, acting within the legislative authority of each respectively.

On its face, this provision would not give the official languages the constitutional entrenchment called for by both the *Victoria Charter* and the 1972 Joint Parliamentary Committee, since it would permit Parliament and the provincial legislatures to declare from time to time the extent to which French and English should be official. A degree of entrenchment would have been provided by another provision of Bill C-60. Section 69, which would have required a "double majority" in the "House of the Federation" before any legislation "of special linguistic significance" could be passed at the federal level, would have stood in the way of any alteration of the present *Official Languages*

Act,³⁵ Section 2 of which declares that: "The English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada...." If future versions of the *Charter* are not accompanied by similar devices, the equivalent of Section 13 should either be strengthened or dropped. It has no constitutional significance of its own in the present form. From a legal point of view, Section 22 is probably much more significant.

It is not entirely clear whether the re-phrasing of Section 13 suggested by the 1979 Federal Proposals ("English and French declared official languages of Canada with status and protection set forth in the *Charter*") would strengthen the provision. On the one hand, such a provision would be question-begging, depending on other sections of the *Charter* for substantive meaning, but on the other hand it would appear to remove the ability of Parliament and the Legislatures to alter the status of the languages from time to time. This, plus the fact that the 1979 Proposals suggest removing even Section 25 limitations from the language rights stipulated by the *Charter*, would appear to constitute a significant strengthening of language rights. It will be necessary, however, to examine the detailed provisions in subsequent Sections before a sharp picture will emerge.

Section 14 - Proceedings in Parliament and Legislatures

14. (1) Any individual has the right to use English or French, as he or she may choose, in any of the debates or other proceedings of the Parliament of Canada.

(2) Any individual has the right to use English or French, as he or she may choose, in any of the debates or other proceedings of the legislative assembly of any province.

Insofar as the Parliament of Canada is concerned, this is largely a repetition of Section 133 of the *B.N.A. Act*, although the reference to "other proceedings" is new. The extension of the provision to provincial legislatures is, with the exception of Quebec and Manitoba, new however. This extension is in accordance with the recommendation of the 1972 Joint Parliamentary Committee, and goes a little further than the *Victoria Charter*, which would have restricted it to six provinces. The 1979 Federal Proposals would remove the reference to "other proceedings" so far as the provincial Legislatures are concerned, which would presumably permit unilingual proceedings in legislative committees.

The right "to use" French or English in debates probably does not assure a comprehending audience. There are no provisions for simultaneous translation during debate, unless one can squeeze such an implication from the word "use," which is doubtful. The question of whether the Constitution should require the availability of adequate translation services is controversial. On the one hand, meaningful bilingual debate cannot take place without simultaneous translation.

35. R.S.C. 1970, c. 0-2.

On the other hand, it would be wasteful to provide such a service in situations where a single language is used, and is fully understood, most of the time. So far as the Parliament of Canada is concerned, a constitutional guarantee of translation services seems entirely appropriate. At the provincial level, it is the writer's opinion that the Constitution should require such services to be provided *at the request* of any member of the Legislature. This would ensure that the necessary physical equipment would be available in every provincial legislative chamber, and that whenever a bilingual debate were contemplated, notice could be given and translators made available. Appropriate notice periods and other procedural matters could be left to the rules of each Legislature.

Section 15 - Statutes and Records of Parliament and Legislatures

15. (1) The statutes and the records and journals of the Parliament of Canada shall be printed and published in English and French.

(2) The statutes and the records and journals of the legislatures of Ontario, Quebec and New Brunswick shall be printed and published in English and French, and all or any of the statutes and the records and journals of the legislature of any other province shall be printed and published in both of those languages or in either of them, accordingly as its legislature may prescribe.

(3) Where the statutes of any legislative body described in subsection (1) or (2) are printed and published in English and French, both language versions thereof shall be equally authoritative.

The requirement that both languages should be used for the statutes, records and journals of the federal Parliament is essentially the same as the present requirement under Section 133 of the *B.N.A. Act*. The provision that both versions should be equally authoritative is new.

The application of this requirement to the provinces has been altered significantly. At the moment, Section 133 requires only the Legislatures of Quebec and Manitoba to comply. Attempts by both provinces to escape this obligation are currently under review by the courts.³⁶ The new *Charter* would remove Manitoba's obligation (which would undoubtedly cause much concern among Franco-Manitobans), and would extend the obligation to the provinces of Ontario and New Brunswick (as well, of course, as to any other province which so chose). This extension is in line with the recommendation of the 1972 Joint Parliamentary Committee (except that it called also for the extension of all bilingual features to the governments of the federal territories). It is a considerable retreat however, from the position of the *Victoria Charter*, which called for the statutes of all provinces to be in both languages, with the federal government taking the responsibility of

36. For Manitoba, see *R. v. Forest* (1977), 74 D.L.R. (3d) 704, [1977] 1 W.W.R. 363, 34 C.C.C. (2d) 208 (Man. Cty. Ct.); *Forest v. A.-G. of Manitoba* (April 25, 1979) (Man. C.A.), as yet unreported. For Quebec, see *Protestant School Board of Greater Montreal v. Minister of Education of Quebec* (1978), 83 D.L.R. (3d) 645 (Que. S.C.); *Blaikie v. A.-G. for Quebec* (1978), 85 D.L.R. (3d) 252 (Que. S.C.). The *Forest* and *Blaikie* cases were under appeal to the Supreme Court of Canada at the time of writing.

preparing the alternate language version whenever a province declined to do so.

It will be noted that this Section, like Section 133 of the *B.N.A. Act*, requires only that the documents be "printed and published" in both languages; there is no requirement that they be *passed* by the Legislature in both languages. In the light of the new provision that both language versions are of equal legal significance, this would seem to be an important oversight. Surely the courts should not be asked to give legal significance to a version of a statute prepared by some government translator, and never examined by the legislators themselves.

The full extent of this constitutional guarantee was never clear under Section 133 of the *B.N.A. Act*, and little has been done in the new version to clarify its meaning. Does it include regulations, for example? Does it include verbatim reports of legislative debates? The English version, by retaining the language of the *B.N.A. Act*, leaves these questions unanswered. The French version, by both deviating from the language of the original *Act* and using somewhat broader language than the English text, raises the possibility that both regulations and verbatim reports of debates might fall within the ambit of Section 15.

Another question for which no answer can easily be found in either the *B.N.A. Act* or the new *Charter*, is the consequence of failing to comply with the provision. Suppose a federal statute is passed, printed, and published in only one language. Is it thereby deprived of legal validity? Or is the requirement merely a "directory" one, which does not affect the legality of legislation? Some may regard this as a merely academic question; but in Manitoba, where the failure ever since 1890 to publish statutes in French is now being challenged in the courts,³⁷ it could be a matter of considerable importance. See the discussion of Section 27.

Section 16 - Proceedings in Courts

16. (1) Either English or French may be used by any person in, or in any pleading or process in or issuing from, the Supreme Court of Canada or any court constituted by the Parliament of Canada.

(2) Either English or French may be used by any person in, or in any pleading or process in or issuing from, any court of Ontario, Quebec or New Brunswick.

(3) In proceedings in any court in Canada

—in which, in a criminal matter, the court is exercising any criminal jurisdiction conferred on it by or pursuant to an Act of the Parliament of Canada, or

—in which, in a matter relating to an offence for which an individual charged with that offence is subject to be imprisoned if he or she is convicted thereof, the court is exercising any jurisdiction conferred on it by or pursuant to an Act of the legislature of any province,

37. *Ibid.*

any individual giving evidence before the court has the right to be heard in English or French, as he or she may choose, and in being so heard, not to be placed at a disadvantage by not being heard, or being unable to be heard, in the other of those languages.

Like Section 15, this requirement is based on Section 133 of the *B.N.A. Act*, but excludes Manitoba from its ambit, and adds Ontario and New Brunswick. The 1979 Federal Proposals would weaken the impact of Sub-section 2 somewhat by stating that the provinces listed need only comply "as soon as practicable, and in any event not later than five years after the adoption of the *Charter*. Sub-section 3, which involves a significant extension of linguistic rights in criminal and quasi-criminal matters, is new.

The protection given by the first two sub-sections is not very sweeping. Since it is unlikely that the phrase "may be used" would be interpreted to include the right to a judge and jury who understand one's language, the assertion of this right may in certain circumstances be to one's disadvantage. It is difficult to understand why the concluding words of sub-section 3 were not made applicable to sub-sections 1 and 2 as well. Moreover, it will be noted that the courts are not compelled to use *both* languages; they may use *either* English or French as they choose. The Manitoba gentleman who objected to being issued a parking ticket in English only can find no constitutional support in either this Section or the present Section 133 of the *B.N.A. Act*.

The Report of the Canadian Bar Association's Committee on the Constitution recommended restricting language rights in the courts to persons "whose ordinary language" is the language in question.³⁸ Presumably this was intended to prevent the use of language guarantees for purely obstructive tactical purposes rather than for legitimate reasons. In the writer's view the difficulties involved in determining a person's "ordinary language" would be unduly productive of delay in itself. The courts are well equipped to deal with obstructionism, and would have little difficulty ensuring that the rights referred to in Section 16 of the *Charter* would not be abused.

Considering the large number of administrative tribunals which now deal with important legal rights, one wonders why the protections offered by Section 16 are restricted to courts. Section 19 provides the right to communicate with the office of certain administrative bodies in both languages. It would seem to follow that one should also be able to use either language when actually appearing before the administrative tribunal. The 1972 Joint Parliamentary Committee so recommended.

Section 17 - Application of Procedural Rules

17. Nothing in section 16 shall be held to preclude the application, to or in respect of proceedings in any court described in subsection 16(2), or to or

38. *Supra* n. 4, at 24-25.

in respect of any proceedings described in subsection 16(3), of such rules for regulating the procedure in any such proceedings, including rules respecting the giving of notice, as may be prescribed by any competent body or authority in that behalf pursuant to law for the effectual execution and working of the provisions of either of those subsections.

This section is a necessary adjunct to Section 16, and does not appear to pose any problems.

Section 18 - Existing Rights not Abrogated

18. Nothing in sections 14 to 17 shall be held to abrogate, abridge or derogate from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

This would ensure, among other things, that the language guarantees imposed on the Manitoba Legislature by Section 133 of the *B.N.A. Act* would (to the extent that they may be held by the courts to remain operative) continue to apply until the *Charter* received constitutional entrenchment. Section 131(4)(d) of Bill C-60 provided that they would be repealed upon entrenchment.

Section 19 - Communication with Government

19. (1) Any member of the public in Canada has the right to use English or French, as he or she may choose, in communicating with the head or central office of any department or agency of the executive government of and over Canada, or of any judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to a law of Canada, wherever that office is located, or in communicating with any other principal office of any such institution where that office is located within an area of Canada in which it is determined, in such manner as may be prescribed or authorized by the Parliament of Canada, that a substantial number of persons within the population use that language.

(2) Any member of the public in any province has the right to use English or French, as he or she may choose, in communicating with any principal office of a department or agency of the executive government of that province, or of a judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to a law of that province, where that office is located within an area of that province in which it is determined, in such manner as may be prescribed or authorized by the legislature of that province, that a substantial number of persons within the population use that language.

With respect to the federal Parliament this provision adopts the recommendations of the *Victoria Charter* and 1972 Parliamentary Committee. With respect to provincial institutions, however, it represents a step backwards from both those documents, in as much as it would leave the question entirely in the hands of the provincial Legislatures. A further step backwards was recommended by the 1979 Federal Proposals, which would permit the provinces to define not only the *areas* in question, but also the *extent* of bilingual services available "on the basis of practicability and necessity for such services." The Report of the Canadian Bar Association's Committee called for the

right to use either language in communicating with "the head office of provincial departments and agencies in every province."³⁹

Section 20 - Rights Not to Be Limited

20. Nothing in sections 13 to 19 shall be held to limit the right of the Parliament of Canada or the legislature of a province, acting within the authority of each respectively pursuant to law, to provide for more extensive use of both the English and French languages; and nothing in those sections shall be held to derogate from or diminish any right, based on language, that is assured by virtue of section 9 or 10, or to derogate from or diminish any legal or customary right or privilege acquired or enjoyed either before or after the commencement of this Act with respect to any language that is not English or French.

This Section is based upon provisions of the *Victoria Charter*. Its significance is, to the writer at least, rather obscure.

It should be noted that the first part of this Section refers to more extensive use of *both* the English and French languages, not to *either* of those languages. What then, would be the status of a statute calling for greater use of only one of the languages? Suppose, for example, that a statute were passed requiring all evidence given in any court in Quebec to be translated into French if originally given in some other language, with no equivalent provision for the translation of evidence into English. Section 20 would not be applicable, since it would not be a law dealing with *both* languages. Yet it is unlikely that the law would be invalid, since nothing in the *Charter* would seem to prohibit such legislation in any event.

The meaning of the portion of the Section referring to third languages is also unclear. It is difficult to imagine a "legal or customary right or privilege" relating to a third language that could possibly be inconsistent with the other provisions of the *Charter*. It might mean that if, for example, court cases tried on Indian reservations were customarily heard in an Indian language this custom would be protected. However, Section 20 does not directly legitimize such customs; it simply says that nothing in Sections 13 to 19 should be held to derogate from them. It does not seem to prevent derogation by laws stemming from other sources.

In any case, these questions are largely hypothetical, since Section 27, to be discussed below, would deprive Section 20 of any legal significance it might otherwise have had.

Section 21 - Language of Instruction

21. (1) Where the number of children in any area of a province in respect of whom notice has been given as contemplated by this section, warrants the provision of the facilities required to give effect to the right provided for by this section, any parent who is a citizen of Canada resident within that area and whose primarily spoken language is not that of the numerically larger of the groups comprising those persons resident in that province whose primarily spoken languages are either English or French, has the

39. *Id.*, at Chap. 5, Recommendation 6.

right to have his or her children receive their schooling in the language of basic instruction that is the primarily spoken language of the numerically smaller of those groups, in or by means of facilities that are provided in that area out of public funds and that are suitable and adequate for that purpose.

(2) The exercise by any parent of the right provided for by this section shall be subject to such reasonable requirements respecting the giving of notice by that parent of his or her intended exercise thereof as may be prescribed by the law of the province in which that parent resides.

(3) Nothing in this section shall be held to limit the authority of the legislature of any province to make such provisions as are reasonable for determining, either generally or in any particular case or classes of cases, whether or not the number of children in any area of that province in respect of whom notice has been given as contemplated by this section, warrants the provision of the facilities required to give effect to the right provided for by this section.

(4) Nothing in this section shall be held to derogate from or diminish any legal or customary right or privilege acquired or enjoyed in any province either before or after the commencement of this Act to have any child receive his or her schooling in the language of basic instruction that is the primarily spoken language of the numerically larger of the groups referred to in subsection (1) within that province, or to limit any authority conferred or obligation imposed either before or after that time by the law of that province to require any child, during any period while that child is receiving his or her schooling in any language of basic instruction that is not that primarily spoken language, to be given instruction in the use of that primarily spoken language as part of his or her schooling in that province.

(5) The expression "parent" in this section includes a person standing in the place of a parent.

This provision is based upon a recommendation of the 1972 Joint Parliamentary Committee. It is generally supported by the reports of both the Canadian Bar Association Committee⁴⁰ and the Ontario Advisory Committee on Confederation.⁴¹ The writer's only quibble is with some expressions used in the English version. The term "spoken language" is used several times in this and other sections. This seems to suggest that the language of reading and writing should not be taken into account. The French text does not trouble itself with such a distinction. The use of the adverb "primarily" to modify "spoken language" is also difficult to understand. The Section would be improved if the English version borrowed a little from the French, and referred simply to the "principal language."

Section 22 - Preservation of English and French Languages

22. In furtherance of

- the appreciation by Canadians that the preservation of both English and French as the principal spoken languages of Canadians is vital to the prospering of the Canadian federation within the larger North American society, and
- the resolve of Canadians that none of the institutions of government of

40. *Id.*, at Recommendation 7.

41. *Supra* n. 13, at 107.

the Canadian federation, acting within the legislative authority of each individually pursuant to law, should act in such a manner as to affect adversely the preservation of either English or French as the language spoken or otherwise enjoyed by any group of individuals constituting an identifiable and substantial linguistic community in any area of Canada within its jurisdiction,

it is hereby proclaimed that no law made by any such institution after this Charter extends to matters within its legislative authority shall apply or have effect so as to affect adversely the preservation of either English or French as the language spoken or otherwise enjoyed by any such group of individuals.

This Section places an important restriction on the law-making powers of Parliament and the provincial Legislatures. Although the enforcement provisions of Sections 23 and 24 do not apply to it (see discussion of Section 27) it probably authorizes judicial enforcement itself.

Section 23 - Laws not to Apply to Abrogate Declared Rights and Freedoms

23. To the end that full effect may be given to the individual rights and freedoms declared by this Charter, it is hereby further proclaimed that, in Canada, no law shall apply or have effect so as to abrogate, abridge or derogate from any such right or freedom.

This essential Section gives the courts their authority to apply the *Charter*. It is based primarily on Section 2 of the *Canadian Bill of Rights*, although there have been slight improvements made in the terminology. The 1979 Federal Proposals suggest strengthening the provision by extending its ambit to embrace "administrative acts," as well as "laws." In the view of the 1978 Special Joint Parliamentary Committee on the Constitution, further improvements are called for: "the remedial provision in clause 23 is still too weak to remove all doubt that Parliament intends the Charter to be an *overriding* statute."⁴²

Section 24 - Definition and Enforcement of Rights and Freedoms

24. Where no other remedy is available or provided for by law, any individual may, in accordance with the applicable procedure of any court in Canada of competent jurisdiction, request the court to define or enforce any of the individual rights and freedoms declared by this Charter, as they extend or apply to him or her, by means of a declaration of the court or by means of an injunction or similar relief, accordingly as the circumstances require.

This is a new provision which provides a valuable supplement to the powers given to the courts under Section 23.

Although it is commendable as far as it goes, the Section could be improved materially by adding to the list of sanctions. The power to grant damages, and to grant an acquittal or a new trial in a criminal proceeding, should be available, for example. It is possible that such remedies would be available in any event, under ordinary principles of

42. *Supra* n. 5, at 10 (emphasis added).

law, but it would, in the writer's opinion, be wise to remove any doubt about the matter by specifying the availability of all appropriate remedies. One sanction that should certainly be mentioned is the exclusion of any evidence acquired as a result of a violation of the *Charter*. The *Charter* would have a hollow ring if it prohibited certain forms of evidence to be gathered, but did nothing to prevent its use, once gathered.

The Section would be considerably improved if the 1979 Federal Proposals were adopted: "Where no other effective recourse or remedy exists, courts empowered to grant such relief or remedy for a violation of *Charter* rights as may be deemed appropriate and just in the circumstances."

Section 25 - Justifiable Limitations

25. Nothing in this Charter shall be held to prevent such limitations on the exercise or enjoyment of any of the individual rights and freedoms declared by this Charter as are justifiable in a free and democratic society in the interests of public safety or health, the interests of the peace and security of the public, or the interests of the rights and freedoms of others, whether such limitations are imposed by law or by virtue of the construction or application of any law.

Both the *Victoria Charter* and the 1972 Joint Parliamentary Committee recommended the inclusion of such a qualification, although the particular wording recommended differs somewhat from that employed in Section 25. The 1979 Federal Proposals suggested adding a provision that all such limitations must be "prescribed by law," a commendable idea. They also proposed the more questionable addition of "national security" and "morals" as interests justifying limitations.

Inevitably, many observers will regard this Section with acute suspicion. It is included for the purpose of ensuring that no judge will make the mistake of believing that any of the rights and freedoms declared in the *Charter* is absolute. In many situations the rights of one person, if exercised to their full extent, would intrude upon the rights of another individual or group, or of society generally. A degree of compromise is unavoidable. The opponents of Section 25 are unlikely to deny that fact. They can be expected to point out, however, that it would be highly unlikely that a Canadian judge would fall into the error of treating any right as absolute,⁴³ and that by openly inviting the courts to avoid the *Charter* whenever any of the interests enumerated in the Section are at stake, Section 25 may unduly encourage an already conservative judiciary to become even more cautious in the enforcement of civil liberties. This is the position taken

43. See the comment of Ritchie, J. in *Robertson & Rosetanni v. The Queen*, [1963] S.C.R. 651, at 655, 41 D.L.R. (2d) 485, at 492:

the human rights and fundamental freedom recognised by the Courts of Canada before the enactment of the *Canadian Bill of Rights* and guaranteed by that statute were the rights and freedoms of men living together in an organized society subject to a rational, developed and civilized system of law which imposed limitations on the absolute liberty of the individual.

by the Canadian Bar Association's Committee on the Constitution.⁴⁴

The writer can see virtue, in the interests of both thorough drafting and effective public education, in acknowledging somewhere in the *Charter* that the rights established by it may on occasion have to yield to other factors of equal legitimacy and greater weight. There may be better ways of expressing that fact than the language of Section 25, however.

For one thing, the Section should stipulate more clearly than it now does that no judge should permit other interests to prevail over the rights and freedoms declared in the *Charter* unless there is a very great need to do so. The Section would be improved considerably if it referred to: "such limitations. . . as are *essential* to the preservation of public safety, etc."

There are some rights that ought to be absolutes, or almost so. Whereas it is easy to accept that the more general rights, such as "freedom of expression," set out in Section 6 frequently conflict with other important considerations, it is more difficult to conceive of circumstances in which some of the specific rights in Section 7, such as the right to "a fair trial in accordance with the principles of fundamental justice" would ever be properly abandoned. Perhaps, therefore, the language should be modified to either exempt certain rights from Section 25 altogether, or to indicate that they should be treated as less easily violable than others.

treated as less easily violable than others. This approach seems to have been adopted in the 1979 Federal Proposals, although not expressed as clearly as would have been desirable. The Proposals appear to have suggested a complete exemption from the operation of Section 25 for all language rights, and for the following legal rights: "right to life, right to counsel, protection against *ex post facto* laws, protection against self-incrimination, protection against cruel or inhuman punishment or treatment, and right to interpreter." Other legal rights, it was proposed: "may be overridden in times of serious public emergency. Limits on public proceedings may be placed in normal circumstances." While this new approach may be applauded in general, the specific proposals give rise to serious questions. Would not an absolute prohibition on *ex post facto* laws create an unjustifiable obstacle to the remedy of past errors and longstanding problems in certain situations? Is not the right to a fair trial at least as important? Of what value is an absolute right to counsel if the counsel may only sit by and watch the client subjected to an unfair trial? Is the requirement of "serious public emergency" to override certain legal rights to be the *sole* criterion, or is it to be in addition to the other criteria listed in Section 25? What is the meaning of the provision about "limits on public proceedings" that may be placed "in normal circumstances"? It would appear that much more discussion will be

44. *Supra* n. 4, at 17.

required before a satisfactory version of Section 25 is produced.

What some critics find most offensive about Section 25 is that it is one of the operative provisions of the *Charter*, having equal weight with all other provisions. If it were a mere preambular declaration, which could be used as an aid to the interpretation of the *Charter*, but lacked independent authority, some of those who are concerned about Section 25 would breathe a little more easily.

Other opponents prefer the rather different technique for recognizing competing interests which the present *Canadian Bill of Rights* employs. Section 2 of that document provides that Parliament may override the *Bill of Rights* by simply declaring that a particular statute is passed "notwithstanding the *Canadian Bill of Rights*." This technique has much to recommend it in ordinary times. Because the inclusion of such a "flag" in any piece of legislation would inevitably stir up great debate and controversy both in and out of Parliament, no government would employ the device lightly.

On the other hand, it is very easy in times of perceived national emergency for a government to suspend the rights of unpopular minorities. At such times public opinion is little interested in civil liberties. It is probable, therefore, that a somewhat more restrictively phrased version of Section 25 (perhaps in preambular form only) would involve a little less risk for the protection of human rights in emergency conditions than the "flagging" provision of the present *Bill of Rights*.

The absence of a "flagging" provision in the new *Charter* may create other problems, of a rather different nature, however. Its absence might possibly restrict the applicability of the *Charter* to legislation passed after its adoption, but before its constitutional entrenchment. In the view of some constitutionalists, even a purely statutory instrument, such as the *Canadian Bill of Rights* or the new *Charter* in its pre-entrenchment state, can be employed to invalidate offensive provisions in statutes passed after their enactment. This point of view is based upon a principle known as the "manner and form theory." According to that theory Parliament, though supreme and able to change the law whenever it sees fit, is bound by the rule of the law to obey all existing laws while they remain in existence. If, therefore, Parliament establishes a "manner and form" by which future amendments are to be made by it, it must abide by that specified manner and form until it is itself altered in the prescribed manner. Professor Walter Tarnopolsky has argued very persuasively that the "flagging" provision in Section 2 of the *Canadian Bill of Rights* operates as a "manner and form" provision, restricting the manner in which any future law inconsistent with the *Canadian Bill of Rights* is to be passed. In other words, no future "amendment" of the *Canadian Bill of Rights* would be possible unless the appropriate

“flag” were used.⁴⁵ The absence of a “flagging” provision in the proposed *Charter* would make it difficult to employ such an argument to support the *Charter*’s applicability to subsequent legislation prior to entrenchment. Given the probable delay in achieving a constitutionally entrenched status for a new *Charter*, it might well be desirable to provide, for the interim, some other “manner and form” (such as a required two-thirds majority in the House of Commons, for example) that must be followed before the *Charter* can be amended.

The 1979 Federal Proposals did recommend a “flagging” provision, at the provincial level only, in two areas: legal rights, and the prohibition against improper discrimination. In both areas it was suggested that the provinces could “opt in” to the protections stated in the *Charter*, with the power to “override” any of the protections by appropriate legislation. The nature of the legislative “flag” necessary to effect an override of the *Charter* was not stated. Nor was it explained why rights important enough to be designated as absolute at the federal level should be capable of a simple override by provincial legislatures.

Section 26 - Rights Not Declared by Charter

26. Nothing in this Charter shall be held to abrogate, abridge or derogate from any right or freedom not declared by it that may have existed in Canada at the commencement of this Act, including, without limiting the generality of the foregoing, any right or freedom that may have been acquired by any of the native peoples of Canada by virtue of the Royal Proclamation of October 7, 1763.

This provision parallels Section 5(1) of the *Canadian Bill of Rights*, with the exception that the express reference to the *Royal Proclamation of 1763* has been added. The 1979 Federal Proposals suggested a more general reference to native rights instead of the express inclusion of the *1763 Proclamation*: “Protection of any undeclared rights existing at any time, including those that may pertain to native peoples.” This would enable other native rights, such as any that may arise from treaties, or from aboriginal title, to be protected.

Section 27 - Identification of Declared Individual Rights and Freedoms

27. For greater certainty for the purposes of this Charter, the individual rights and freedoms declared by this Charter are those assured by or by virtue of sections 6 to 10, 14, 16, 19 and 21.

This remarkable Section, which has no parallel in any of the previous documents, would limit a number of the rights previously declared, and would even undermine certain existing constitutional protections.

To understand its significance it is necessary to note that the term “the individual rights and freedoms declared by this Charter,” which

45. *Supra* n. 7, at 92-112.

it defines, is the operative term in both Sections 23 and 24. Since Sections 23 and 24 are those which grant the courts the power to enforce the *Charter*, Section 27 operates in effect as a catalogue of those rights which are legally enforceable.

The rights which are excluded from enforceability by Section 27, and would therefore become mere window dressing, are:

- s. 11 -duration of Parliament and Legislatures,
- s. 12 -annual session of Parliament and Legislatures,
- s. 13 -official status of French and English,
- s. 15 -bilingual requirements for parliamentary and legislative documents,
- s. 20 -protection of third language rights,
- s. 22 -preservation of French and English language rights of minority groups (though this Section is to some extent self-enforceable)

It will be recalled that the guarantees covered by Sections 11, 12, and 15 have, in part, existed since 1867. It has always been assumed that they were legally enforceable. To relegate them in a new *Charter* to the category of pious proclamations, with no enforceability, would be a major step backward for Canadian civil liberties.

In an attempt to answer anticipated criticism of section 27, the Minister of Justice issued the following statement:

It may be asked why the enforcement provision of sections 23 and 24 are not extended to the collective rights. (Here it might be noted that the group right respecting preservation of the English and French languages in section 22 has its own enforcement provision). The first answer is, perhaps, that these rights if violated are more effectively remedied through the political process. Secondly, collective rights are not subject to the provisions of section 25 which permit justifiable limitations to be placed upon individual rights. Thus, it is more essential that specific remedies be set forth for protection of individual rights because laws are authorized which may limit them. In any case, sections 23 and 24 do not rule out legal recourse for protecting collective rights. For example, if a government refuses to publish the statutes in both languages, one may seek a declaration from the courts that this action is unconstitutional.⁴⁶

In the writer's view, this explanation is utterly unsatisfactory. In the first place, the distinction between "individual" and "collective" rights is deceptive. At least some of the rights described as "collective" have entirely as much personal significance to the individuals they affect as those which bear the label "individual rights." If, for example, Parliament failed to produce an English language version of some federal statute, I and all other English-speaking Canadians affected by the statute would be as individually aggrieved as we would be if we were forbidden to express our political views in public. Yet we are told that freedom of speech is an individual right, while the right to understandable laws is not. For most Canadians, the only really meaningful opportunity to express their political opinions as individuals comes when they cast their ballots as voters; yet the right to

46. O. Lang, *Explanatory Notes on the Canadian Charter of Rights and Freedoms*, (1978) 27.

do so at least every five years, which is presently guaranteed by the Constitution, has been branded as a mere "collective" right, and rendered legally unenforceable under the proposed *Charter*.

The assertion that "these rights if violated are more effectively remedied through the political process," while generally true, is no answer to the question: "Why has judicial enforceability been denied?" Why need there be only a single remedy? The existence of judicial relief would not impede a political solution in appropriate cases, and it would offer a possibility of protection in those cases where the majority political opinion were strongly biased against an unpopular minority. After all, one of the most important functions of bills of rights is to shield individuals from the wrath of tyrannous majorities.

The argument that the excluded rights are denied legal enforceability because they are also excluded from the limitations placed on their exercise by Section 25 does not advance the debate very far. They were probably deleted from Section 25 because, lacking enforceability, they were considered innocuous. In any event, it would be a simple matter to make them subject to that Section if they became enforceable.

The most startling aspect of the Minister's explanation is the claim that the excluded rights would be judicially enforceable without the benefit of Sections 23 and 24. If so, why were Sections 23 and 24 included in the *Charter* in the first place? It cannot be denied that a sympathetic court might *possibly* grant relief against a violation of the excluded rights, as the statement contends. However, that possibility is very slight indeed. Most courts, faced with a statute that declares two groups of rights to exist, and states that one group is legally enforceable, would conclude, in accordance with the principle *expressio unius est exclusio alterius*, that the other group is not. If the Government of Canada really believes that the excluded rights should be judicially enforceable, why did it exclude them from the operation of Sections 23 and 24? The best way to convince critics that Section 27 was not intended to emasculate the excluded rights would be to delete it.

An interesting pattern can be seen in the rights excluded from enforceability by Section 27. They are almost all rights which impose some kind of obligation on Parliament or the provincial Legislatures. The drafters of the *Charter* were apparently of the view that Parliament and the Legislatures should be above the law. This is to disregard the concept of the rule of law, which until this point in Canada's constitutional history has always ensured that a failure by Parliament or a provincial Legislature to abide by their legal obligations under the Constitution was subject to judicial review.⁴⁷ If

47. *Temple v. Bulmer*, [1943] S.C.R. 265; [1943] 3 D.L.R. 659, can be interpreted as a refusal to subject legislative bodies to legal controls, but it is better explained as a decision based on the language used in the particular statute in question.

legislative bodies are recognized to be above the law in these few matters now, what further immunity will be claimed as time goes by?

Section 28 - Application to Territories and Territorial Institutions

28. A reference in any of sections 10 to 22 to a province or to the legislative assembly or legislature of a province shall be construed as including a reference to the Yukon Territory or the Northwest Territories or to the Council or Commissioner in Council thereof, as the case may be.

By placing the territories in the same position as the provinces the *Charter* takes a step back from certain recommendations of the *Victoria Charter* and the 1972 Joint Parliamentary Committee, which called for a number of bi-lingual guarantees within the territories.⁴⁸ There may be persuasive demographic arguments available to support this provision, but if there are they were not included in the Minister's explanatory remarks about the *Charter*.

Section 29 - Legislative Authority Not Extended

29. Nothing in this Charter shall be held to confer any legislative authority on any competent body or authority in that behalf in Canada, except as expressly contemplated by this Charter.

A similar provision exists in all previous documents.

Conclusion

Since the passage of the *Canadian Bill of Rights* by the Diefenbaker Government in 1960, much effort has been expended by many officials, advisors and committees to devise improved constitutional guarantees for the civil liberties of Canadians. The *Canadian Charter of Rights and Freedoms* proposed in 1978 reflects some of that effort, but it must not be regarded as a pinnacle of achievement. It proposes several important improvements over the existing *Bill of Rights*, but there are many more required. Moreover, unless the provisions of the *Charter* which would actually diminish existing protections were eliminated, it is doubtful that substitution of the *Charter* for the *Bill* would bring about a net improvement in the civil liberties picture.

And without constitutional entrenchment it would be very difficult to justify the expenditure of any further Parliamentary energy on the subject. The title of this commentary asked whether the document should be regarded as a true charter or a mere chimera. A chimera is an imaginary composite monster, fierce and fire-breathing, that is sometimes used for decorative purposes, but fulfills no other practical function. The Diefenbaker *Bill of Rights* is largely chimerical. The proposed *Charter* might have a slightly longer tail and it might snort a little more smoke, but without constitutional entrenchment it would be just another chimera.

48. *Supra* n. 2, Chap. 10, Recommendation 23.

