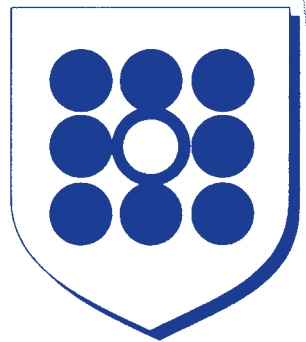


the  
**Fundamentals**  
of our  
**Fundamental**  
**freedoms**

a primer on civil liberties  
and democracy



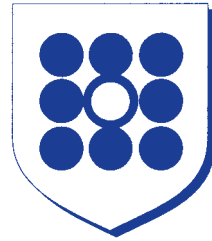
A. Alan Borovoy, general counsel  
Canadian Civil Liberties Association

# *The Fundamentals of Our Fundamental Freedoms*

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***THE FREEDOM OF NO ONE IS SAFE  
UNLESS  
THE FREEDOM OF EVERYONE IS SAFE***

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# PREFACE

Since the early nineteen-seventies, Canadians have been tested, perhaps as never before, regarding their fundamental beliefs about the democratic system.

- As a society, we have long proclaimed the centrality of civil liberties. But, in October of 1970, the overwhelming majority of Canadians approved the invocation of the War Measures Act which suspended their civil liberties. Canadians had reacted in fear to the kidnapping of British Trade Commissioner James Cross and Quebec Labour Minister Pierre Laporte by the terrorist Front de Liberation du Quebec (FLQ). In response, the government made it an offence simply to advocate FLQ policies and merely to be a "member" of the FLQ. The government also increased the powers of the police to search and seize, arrest and detain, without warrant or bail. Our belief in civil liberties came into conflict with our felt need to ensure the very survival of our system.
- Although we have always professed a belief in the importance of the rule of law, many of us rather complacently accepted what we learned in the late nineteen-seventies about the long history of unlawful misdeeds on the part of the Royal Canadian Mounted Police (RCMP). Despite the revelation that RCMP members had participated in burglary, theft, arson, mail-opening, assault, and the invasion of tax files — many of these for more than thirty years — not one officer has ever been charged outside the province of Quebec. These illegalities were regarded as vital to the interests of national security and law enforcement. Thus, our belief in the rule of law came into conflict with our felt need to be protected from spies, terrorists, and drug traffickers.
- We have long proclaimed the importance of free speech. But, since the nineteen-seventies, there has been growing support for the idea of prosecuting hate mongers. An increasing number of Canadians are not prepared to tolerate publications that deny the reality of the Nazi Holocaust against the Jews or assert the inferiority of Blacks. Our belief in freedom of speech has come into conflict with our belief in racial and ethnic dignity.
- We have long believed in the presumption of innocence: no persons should be punished unless a fair trial finds that they have committed a crime. But, in the 1990s, a new law has empowered the courts to restrict the lawful activities of those who, it is reasonably believed, *will* commit gang-related offences, even though they have not been convicted of — or even charged with — any such offence. Our belief in the presumption of innocence came into conflict with our desire to protect society from biker gang violence.
- Our society has long believed in fundamental legal safeguards. But after the terrorist calamities of September 11th, 2001, the government of Canada began to promote a number of exceptional measures:
  - a period of imprisonment without conviction or even charge;
  - a requirement to provide certain assistance to police investigations;
  - an obligation on people to tell the authorities when they come into possession of property belonging to a terrorist group;
  - a power, without trial, to label those considered to be terrorist groups and a duty on the part of everyone else to avoid certain dealings with such groups.

Our commitment to legal safeguards came into conflict with our determination to eradicate terrorism.

This is not necessarily to take sides on the above issues. It is, rather, to recognize how such issues challenge the very core of our beliefs. It is also to recognize how much more frequently than ever before, we are being required to face such challenges.

One disturbing factor has emerged from all these conflicts. As a people, we Canadians have not been adequately prepared to address such issues. Our schools and educational system have spent too little time and effort exploring the philosophical underpinnings of what democracy is supposed to be about. This realization mobilized the Canadian Civil Liberties Education Trust. Since the very purpose of our organization is to strengthen the commitment to democracy, we thought it useful to create a primer on this subject for the schools.

While there is an increase on the Canadian market today in the number of publications which attempt to explain existing legal rights under various statutes, this publication attempts to explain the philosophy of the democratic system itself. Of course, a subject as complex as the philosophy of democracy requires volumes. A primer can hope only to introduce basic concepts with the aim of stimulating its readers to further exploration and thought.

In the interests of simplicity and brevity, we have attempted to confine our subject matter to the bare bones of the democratic ideal as that ideal has evolved in the common law countries of the Western world. We examine here only the minimum relations that must exist between the individual and the state. Fortunately, most common law democracies of the Western world provide far more. But no common law democracy, worthy of its traditions, can accept much less.



#### *Acknowledgments*

This publication owes its existence to Jim MacDonald of the Canadian Labour Congress for first suggesting the idea and to the Law Foundation of Ontario for a generous grant that enabled us to act on the idea. We are profoundly grateful.

*– The Trustees of the Canadian Civil Liberties Education Trust.*

December, 2001

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# THE FREEDOM OF EACH AND THE EQUALITY OF ALL

## The Need for Freedom

If I try on a new pair of shoes, who knows better than I whether they pinch or they fit? Doctors, scientists, leather manufacturers, and sales clerks might know better whether the shoes are healthy, unhealthy, well-made, defective, durable, perishable, stylish, or gauche. But only *I* can know whether they *feel* comfortable.

Who shall decide, then, the experts or I, whether I am to buy the shoes? Which of us is to decide what weight to give to all the considerations which are involved in the decision to purchase or not to purchase? They who have the technical knowledge but who will not wear the shoes, or I who know only how the shoes feel and must wear them?

In a rather over-simplified way, this question illustrates the basic difference between an autocratic and a democratic society. In an autocratic society, the tendency is for the rulers to decide how the citizens shall live. In a democratic society, the objective, as much as possible, is for the citizens to decide for themselves. Citizens in a democracy might seek and receive the advice of others. But, as much as possible, they must be free to accept or reject such advice, in whole or in part.

Of course, this means that crucial decisions will be made by the foolish as well as the wise, the short-sighted as well as the far-sighted, the incompetent as well as the competent. Might not such freedom lead to wrong choices and perhaps even unhappiness for many people, especially the unwise? Perhaps, it might. Perhaps, it does.

Unhappy consequences are an unavoidable risk of human life. But democrats believe that, as much as possible, the one who must *suffer* the consequences is the one who should have the right to decide. Indeed, the exercise of liberty is essential to the

enhancement of dignity. While it is possible that the serf and the slave could receive adequate amounts of food, clothing, and shelter, it is unlikely that they would ever acquire an adequate amount of respect for their own unique human personalities. One's sense of self-worth and dignity requires some control of one's destiny.

Moreover, there is no guarantee that rulers will necessarily be more knowledgeable than many of their subjects and, even if they are, there is no guarantee that they will necessarily make the right decisions for their subjects. Even the most knowledgeable of rulers are human beings with human weaknesses. Despite what may be a greater knowledge of many problems faced by their subjects, the rulers, nevertheless, could be motivated by petty self-interest, prejudice, and even malice.

There is another reason for democracy's commitment to the freedom of the individual - the belief that social progress is more likely to occur in an atmosphere where differences are permitted than in an atmosphere where differences are restricted. Many of the greatest human achievements were conceived in the womb of disagreement. If, for example, the Wright brothers had not disagreed with public opinion about the possibilities of air travel, they might never have pioneered the aeroplane.

Einstein, Edison, and many of the world's greatest poets, philosophers, artists, and writers were also propelled by disagreement with the prevailing beliefs and practices of their day.

Even for strictly practical reasons, therefore, the democrat will tolerate, indeed will *encourage*, differences of opinion and lifestyle. Generally speaking, the democrat would prefer to run the risk of useless eccentricity, even some disruptive conflict, rather than stifle individual and social disagreement.

Thus, democratic societies believe that each person should have the maximum in personal autonomy. It is the individual who should decide whether and whom to marry, whether and how to worship, whether and what to read, write, watch, hear, see, or say. You should be free to determine your own life in your own way - work at what fulfils you, play at what pleases you, and pursue what intrigues you.







### The Need for Restrictions

But the freedom of the individual has its limitations. Suppose, for example, that my greatest joy comes from the thrill I feel in racing my automobile? Should my individual freedom, then, include the right to drive my car down Toronto's busy Yonge Street at 75 kilometres an hour on a Friday afternoon?

My freedom to drive in this manner immediately clashes with the freedoms of others who wish to enjoy the bounties of Yonge Street - shoppers, pedestrians, other motorists. If I pursue my freedom in the above manner, *their* freedom will be severely restricted. Obviously, our freedoms cannot co-exist. One must give way to the other.

With a little imagination, we can conceive of infinite examples of the same problem. Does the freedom of the individual include the freedom to kill, maim, rape, and assault? The perpetrator and the victim cannot *both* have absolute freedom of choice. Thus, we must face the fundamental paradox. The existence of freedom demands the imposition of restrictions. In order to accomplish this task, we have developed a system of laws. In order to make the laws work, we have harnessed our combined powers into the complex and coercive machinery of the modern state. We have a parliament to pass laws, a government to administer laws, and a police department to enforce laws. Ironically, these potent instruments for

the restriction of liberty are necessary for the enjoyment of liberty.

Thus, the only meaningful question concerns the kind and the extent of restrictions or laws we shall have. To put it even more specifically, what restrictions are appropriate in a democracy where the object is to promote the greatest possible freedom of the individual?

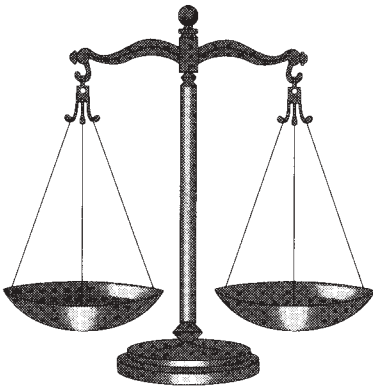
The renowned nineteenth century philosopher on liberty, John Stuart Mill, attempted to grapple with this problem. According to Mill, "... the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others."

In some of the foregoing examples, the restrictions we enact enjoy a virtually universal consensus. In order to prevent *physical* harm to others, we prohibit the individual from engaging in physical attacks upon other people. In order to prevent *economic* harm to others, we outlaw theft, robbery, forgery, etc. These kinds of examples form the basis of our criminal law.

During the 20th century, however, we have gone much further. In order to prevent the harm caused to industrial workers by the conditions of modern industry, we imposed restrictions upon the conduct of individuals engaged in business activity. We required employers to install safety equipment, pay minimum wages, observe maximum hours, and bargain collectively with unions. Employers lost the freedom to determine unilaterally the conditions of work for their employees. In order to prevent the harm

caused by racial discrimination, we imposed restrictions upon the selection of employees by employers and tenants by landlords. Employers and landlords lost their freedom to base their selections on considerations of race, creed, and colour. Indeed, the entire apparatus of the modern welfare state represents a series of intrusions upon the freedoms of some sectors of society in order to promote the welfare of other sectors of society.

The propriety or impropriety of social welfare legislation is not our concern here. Suffice it to recognize that certain restrictions imposed upon some may enhance the liberty enjoyed by others. The question at any given time is *which* freedoms to be exercised by *which* persons in *which* situations are to be given more weight. Is the harm inflicted in the absence of restrictions greater than the harm inflicted through the adoption of restrictions?



### The Idea of Equality

This balancing process brings us to the relationship between freedom and

equality. Since one person's freedom may be another's restriction, society cannot help assessing the relative importance of the interests in conflict.

Until recent times in some Western societies, certain classes of people suffered certain restrictions, essentially because, *as people*, they were considered less important than everyone else. Jews, for example, were barred from certain occupations. Blacks were held as slaves. Women, Aborigines, and poor people were denied the right to vote. The interests of white, propertied, Christian males were frankly considered to be paramount.

Such notions are repugnant to the democratic philosophy. Despite the fact that people differ in race, creed, colour, sex, wealth, talent, and ability, the democratic system deems them to be equal in *dignity*. No one is deemed to be more or less important than anyone else. Thus, while it is impossible to avoid restrictions that may benefit some and burden others, democratic societies believe in the principle of equal consideration. Even if people are sometimes subject to differential treatment, they must receive equal consideration.

Indeed, most families operate on a similar basis. Parents might permit their older children greater privileges than their younger children. They might bestow greater protection upon their sick children than upon their healthy children. Notwithstanding the different ways that parents might treat their offspring, they, nevertheless, can *love* them equally.

It is similar with the relationship between a democratic society and its citizens. Rich people may be taxed more heavily than poor people. Wheat growers may be subject to greater state regulations than bracelet distributors. Notwithstanding the different ways that a democratic society may treat these people, it, nevertheless, must *regard* them equally.

The higher taxes imposed upon the rich are justified not on the basis that the rich, as people, are less important than the poor, but rather on the basis that they are better able to bear such financial burdens. The greater state regulation imposed upon wheat growers is justified not on the basis that wheat growers, as people, are less important than bracelet distributors, but rather on the basis that, in certain societies, wheat has more economic and social significance than bracelets.

It is not the function of this pamphlet to debate the pros and cons of progressive taxation or wheat regulation. Our function, rather, is to set out the *standards* for appropriate restrictions on the freedom of the individual. The restrictions which a democracy imposes upon its citizens must reflect an *equal concern* for everyone affected. On the moral and social scales, we all weigh the same.



## THE RIGHT TO DUE PROCESS OF LAW

### The Rule of Law

Suppose, during the week of Thanksgiving Day, the mayor of Toronto ordered the large food stores in her city to give one free turkey to each needy family in their respective areas? Regardless of the eminence of the mayor's office and the benevolence behind her instructions, the food stores could disobey her with legal impunity. The police could not legally arrest the proprietors or confiscate their turkeys.

Why? Because there is no law requiring that they donate turkeys to needy people, no law authorizing the mayor to issue such orders, and no law requiring people to obey unauthorized orders. In the absence of such laws, the proprietors of the food stores have complete legal freedom of choice regarding their turkeys. They may sell, hoard, or simply devour their turkeys.

Freedom of choice is too fundamental a right in a democracy to be taken away on the whim of a public official, even a humanitarian one. A key reason for this is that if a benevolent order can deprive people of their freedom of choice, so too could a *malevolent* one. If the mayor had the power, at will, to give food to needy people, she would also have the power, at will, to *take* food from them.

Indeed, in days gone by, despotic kings ruled in just this way. By arbitrary decree, they ordered people about, appropriated their belongings, and conscripted their labour. If the king wanted something, he simply ordered his soldiers to get it. If the king's will happened to conflict with the will of his subjects, it was too bad for his subjects. The subjects who disobeyed the arbitrary orders of the king could be just as arbitrarily exiled, imprisoned, tortured, or beheaded.

In order to protect the freedom of the individual against such arbitrary use of state power, democratic societies developed the principle of the rule of law. The power of the state may encroach upon the freedom of choice only through the authorization of law. No one is above the law and everyone is subject to it - premier and pauper, constable and civilian alike. If the law is silent, each of us retains complete freedom of choice. No matter how foolish, selfish, mean, or stingy our choices may be, the power of the state may not be marshalled against us. On the contrary, we are entitled to the *protection* of the state.

As pointed out in the last section, some restrictions on our freedom are necessary and desirable. But no matter how necessary and desirable, such restrictions cannot be imposed upon us through the power of the state unless they are incorporated in law.

### **The Process by Which Law is Enacted**

How, then, does a restriction become part of the law? Generally it must be enacted by a majority of the representatives of the people - federal parliament, provincial legislatures, municipal councils. But, of course, our representatives are human beings with all the defects of human beings. What is to prevent our representatives from enacting unreasonable restrictions or establishing arbitrary powers? Theoretically, nothing but practically, a number of factors.

In democratic societies, the citizens are entitled not only to the rule of law, but also to *due process* of law. The law must be enacted in an open public session. Thus, citizens can watch their representatives in debate, discussion, and decision. New bills usually take a while to become law. They must be debated in principle and in detail. This enables the citizens to let their representatives know what they think. They may write, speak, advertise, or demonstrate in order to influence the judgment of the legislators.

Moreover, our representatives do not hold office forever. Democratic societies convene periodic elections. Various candidates and parties compete with one another for the approval of the citizenry. Ultimately, then, we the

people may approve or reject the decisions of our representatives by voting for them or for their opponents in these elections.

This open legislative process cannot, of course, guarantee us against improper restrictions on our liberty, but it can help to minimize the risk.



### **The Process by Which Law is Applied**

But due process in enacting law is one matter. There must also be due process in *applying* the law.

Consider this example. Suppose our parliament, feeling the need for additional revenue, were to impose a new tax on us? The new tax might provide, for example, that we pay an additional 5% “on all of the income earned during the year”.

Suppose, then, that I win a million dollars in the sweepstake? Is this million dollars subject to the new 5% tax? That depends upon the meaning of the new law. Does the word “income” include a prize? Is a prize which has been won the same as “income” which has been “earned”?

Unhappily, human language is capable of conflicting interpretations. Someone must have the power to settle the question. Who knows the intentions of our parliamentarians better than they

themselves? Should they, then, be empowered to resolve these thorny questions of interpretation?

If we let them settle the issue, we are again running the risk of arbitrary decision making. The members of parliament who most want revenue to flow into the government’s coffers would be tempted to decide the question against me. If, on the other hand, I was an influential citizen who had worked hard for the ruling party in the last election campaign, the parliamentarians might be tempted to decide the question in my favour. The problem with politicians in this role, is that no matter how fair they may be or try to be, the pressures on them are such that they will not appear fair.

What is true of tax laws is true of laws in all fields - wills, trusts, welfare, property, labour, crimes, etc. The danger in all these fields is that the question of liability or impunity, guilt or innocence, rightness or wrongness will appear to be decided according to the influence of the litigants rather than according to the evidence of their conduct and the provisions of the law.

If we are to be governed by the rule of law rather than by the whims of those who rule, we cannot allow politically self-interested individuals to decide how to interpret and apply the law. What is needed are decision makers who are independent of political and other social interests. The difficulty, however, is that all people have some interest or other, some bias or other, that might distort or appear to distort the fairness of their judgments.

This realization has led democratic societies to establish an independent judiciary. We have provided for the appointment of judges who must disengage from the political affairs of the community and simultaneously enjoy tenure (usually, the rest of their working lives) in the office they hold. This insulation from current controversy and the security of their jobs are designed to make our judges less susceptible than others in the community to extraneous influences on their judgment.

But even politically uninvolved judges with tenure are human beings with human faults. How can we reduce the risk that their decisions will be biased, arbitrary, or simply mistaken? Just as our political representatives were required to observe certain procedures in enacting law, so too must our judges adhere to “due process” in applying the law.

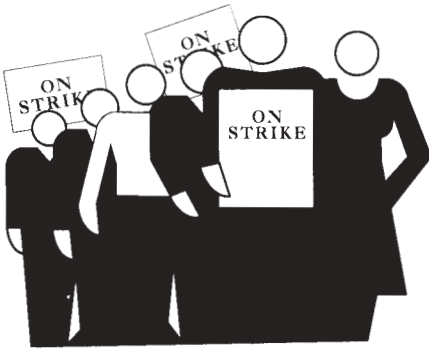
All parties who may be affected by a judgment are entitled to a fair hearing. At the very least, this means advance notice of what is to be claimed against them, the opportunity to confront and cross-examine those who are testifying against them, and an opportunity to tell their side of the story. The complexities of modern law require also the right to the assistance of trained legal counsel. As a further protection against arbitrary process and unfair decision making, hearings generally should be held in public and the subsequent judgments should be published for all to inspect.

In addition to the ordinary courts of law, our complex society has created also a network of independent administrative tribunals which adjudicate disputes in

problem areas where special expertise is required - business licensing, labour relations, workers' compensation, securities, welfare, etc. In varying degrees, the principles of tenure, disengagement from political activity, and procedural “due process” apply to these tribunals as well as to the ordinary courts of law.

### Summary

Now we have set out the minimum requirements of due process of law. The freedom of the individual may be restricted but only by law. Such laws must be enacted by a majority of the elected representatives of the people in open public sessions. The people must have the opportunity both to petition their representatives and ultimately to replace them. The law must be applied in open public sessions by adjudicators who are independent of the political and social interests in the community. Those who may be affected must have a fair opportunity to contest the claim and persuade the adjudicator.



## THE RIGHT TO DISSENT

### The Sovereignty of the People

In the fall of 1981, a meeting of the federal prime minister and provincial premiers of Canada produced a decision to dilute certain women's rights and delete certain native rights from the bill containing our country's new constitution. Within only a few days, the decision was largely reversed; there was an agreement to restore much of what had been removed.

How was it that Canada's powerful ruling elites so quickly and radically reversed themselves? Almost from the moment their initial decision was announced, it was greeted by a storm of public protest - angry demonstrations, picket lines, public meetings, newspaper editorials, radio and television commentaries. The federal and provincial politicians were subjected to a barrage of telegrams, letters, and lobbying efforts. In the face of such widespread and vigorous pressure, Canada's leaders found it prudent to retreat.

The essence of what happened is that the *people* objected to what their governments had done. In democratic

societies, the people are the ultimate authority. The machinery by which our laws are enacted (open sessions) and our governments are selected (periodic elections) is designed to ensure that no laws or governments can long survive without the consent of the people who must abide them.

However, even in autocratic societies, governments often presume to act in the name and with the consent of the people. The people's "consent" in autocratic societies is often achieved through a combination of secret police, storm troopers, concentration camps, torture chambers, and firing squads. In some of these societies, even though there are elections in which everyone may vote, there is only one party, one slate of candidates, and one set of policies from which the citizens may choose.

Coerced and contrived consent do not satisfy the standards of democratic procedure. The democrat believes that the consent of the citizens must be *freely* given.

This gives rise to one of the most vital principles of democratic society. The right of free consent necessarily implies a right of free *dissent*. Those who oppose existing government policies must have the right to compete openly and publicly with those who support such policies. The citizens must have the opportunity to choose among *alternative* parties, candidates, and policies. Without open dissent, there can be no effective consent. Without available alternatives, the people cannot effectively exercise their sovereign authority.

The right to dissent does not mean a right to disobey a duly enacted law. Rather it means the right to oppose passage of the law in the first place, the right to petition for its repeal, amendment, and replacement thereafter, the right to promote the enactment of different laws at any time, and, at the next election, the right to campaign and to vote for alternative candidates to replace the incumbent law makers.



### **Freedom of Speech, Assembly, and Association**

The chief instruments of dissent are freedom of speech, freedom of assembly, and freedom of association. Democratic theory proclaims that all people should be free to speak, write, publish, broadcast, assemble, demonstrate, picket, and organize on behalf of their beliefs, their opinions, and their points of view. A necessary complement to these freedoms is the existence of many independent mass media of communication (newspapers, magazines, radio stations, television networks) with the right freely to convey to the public news of social controversy as it occurs in our legislative bodies and in the community.

Inevitably, such vast freedom carries with it certain risks. Freedom of speech, assembly, and association can be used to propagate lies as well as truths, wrongs as well as rights, and injustice as well as justice. The underlying hope is that given adequate exposure to all sides of an issue, the people will possess enough good sense to make the proper distinctions and judgments.

The real question here is where to put your trust - in the rulers or in the people. In autocratic societies, where there is little or no right to dissent, the rulers decide what viewpoints the people may hear and see. The assumption is that the rulers are sufficiently wise and benevolent to make these decisions.

Democratic societies, on the other hand, are fearful of reposing so much trust in their leaders. It is not that democratic societies necessarily have blind faith that the masses of people will always choose wisely. It's that they have considerably *less* faith in anyone else.

Indeed, the power to remove viewpoints from public scrutiny carries with it an enormous risk of tyranny. The exercise of such power can decide the outcome of almost any social conflict. Deny tenants the right to distribute their leaflets and you ensure victory for their landlords. Stop unions from picketing and you guarantee the domination of management. Take opposition viewpoints off television and you hand the next election to the government.

Democratic societies prefer to run the risk of error through the free competition of viewpoints than to run the risk of tyranny through curtailing what the people may hear and see. If there be



error, the answer to it is not less communication, but more communication.

This explains why we will often find principled democrats fighting vigorously for the right to dissent even on behalf of those whom they personally dislike. Democrats have made a motto of the famous words of the eighteenth century French writer, Voltaire:

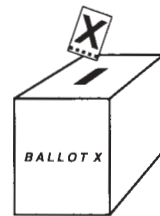
*"I may disapprove of what you say, but I will defend to the death your right to say it."*

Yet, freedom of speech, assembly, and association cannot be absolute and unlimited. Some controls under some circumstances are necessary and inevitable. As a great judge once wisely counselled us, there can be no freedom of speech falsely to shout "fire" in a crowded theatre. Moreover, freedom of assembly cannot mean the right to conduct a noisy parade in a residential neighbourhood at 4 o'clock in the morning. And freedom of association cannot include the creation of conspiracies to commit criminal offences.

As it happens, in Canadian society today, there are a number of laws which restrict freedom of speech, assembly, and association. Defamation laws enable people to sue and recover damages from those whose words and publications have falsely maligned them. Under the Criminal Code, it is unlawful to promote hatred of any group because of race, creed, or ethnicity; to counsel the commission of a criminal offence; to cause a disturbance at or near a public place by shouting, singing, swearing, etc. Moreover, in many

Canadian municipalities, permission must be secured from police authorities in order to conduct parades and demonstrations in the streets.

It is not our function here to pass judgment on these and the many other Canadian laws which regulate freedom of speech, assembly, and association. Rather, it is our function to declare how essential these freedoms are and to recognize that they must inevitably be subject to some limitations. The problem, at any point, is to decide whether the harm caused by the existence of the freedom is substantial enough to warrant an abridgement of the freedom - with all the dangers that abridgement involves. No doubt, the individual reader will wish to decide how far, if at all, the present laws in Canada encroach unduly on these vital freedoms.



### **Secret Ballot Elections**

There is one further combination of safeguards by which democratic societies sustain the right of dissent - the periodic election of our law makers through the process of the secret ballot.

Freedom of speech, assembly, and association would have limited value as merely therapeutic exercises. What makes them so important is the fact that they culminate every few years in a collective decision as to who should

make our laws. Our law makers are elected for maximum terms. At the end of these terms, the people may re-elect or replace any or all of them. The ultimate expression of the citizens' consent and dissent is the decision as to which candidates shall receive their votes. And the fact which makes the vote a reflection of the citizens' free choice is the existence of the secret ballot. Since no one can watch the citizens mark their ballots, no one can exert undue influence on the choices they make.

### **Freedom of Information**

But the right to question, challenge, and ultimately to replace the government would be rather hollow in the absence of adequate knowledge about what is going on in government. Although the existence of a free press and free public debate gives the public a large supply of information, the government has traditionally exercised a wide discretion to withhold material under its control. Throughout much of the Western world, there have been increasing pressures to restrict this discretion. The argument has been that government holds its data on behalf of the people. The principles of democratic accountability require that the people have all the facts they can get in order to judge the performance of their governments.

In consequence, most jurisdictions in Canada have enacted freedom of information laws subjecting government information to public disclosure. While there is still a need for certain exemptions, the onus is usually on *governments* to justify every attempt to withhold the flow of data.

The nature and scope of the exemptions raise difficult questions. Just what matters might be properly withheld? National security? Ongoing law enforcement investigations? Material that would invade the privacy of citizens? And who should be empowered to make the final decision? A court? The government? Or perhaps the elected legislatures themselves? And how far should such decision makers be able to look at the material that is at issue?



While it is not our function here to resolve these questions, it is our function to ask them. Just as democratic autonomy requires a right of effective dissent, so does the right of effective dissent require an adequate access to data.

### **A Perspective**

Of all the fundamental freedoms, the right to dissent may be the most crucial. The exercise of this right enables aggrieved persons to appeal for public support in their quest for redress. The assumption is that the best antidote to unjust governments and unjust policies is an atmosphere of free public controversy which culminates in secret ballot elections. In this sense, the right to dissent may be the freedom upon which our whole complex of freedoms depends.

# THE RIGHT TO SECURITY OF THE PERSON



## Punishment and Liberty

The power to enact restrictions would have little meaning unless it were accompanied by the power to punish offenders. Of what value, for example, are restrictions on murder, robbery, and theft, if people can commit such deeds with impunity?

While the power to punish is, therefore, necessary, it is also frightening. The potential powers of the state are enormous. Potentially the state could subject the offender to incarceration, deportation, execution, decapitation, or mutilation.

What greater, more irreparable encroachment could there be on the freedom of individuals than the infliction of such horrors upon them? This is one of democracy's greatest dilemmas. The punishment of the offender is at once an inevitable and terrible violation of individual freedom. How do we reconcile the two? What punishments under what circumstances

are most consistent with the democratic commitment to the freedom of the individual?

The first principle of punishment flows from what was said in the due process section. No person may be punished by the power of the state, unless such person has been found by an impartial court to be in violation of a duly enacted law. There must, of course, be a fair hearing in public including the right to counsel, the right to confront one's accusers, and the right to reply.

But democracy's concern for the individual impels the observance of additional safeguards.

## The Presumption of Innocence

The infliction of punishment is terrible enough to contemplate. But what is *intolerable* is the infliction of punishment upon an *innocent* person.

Accordingly, our legal system provides that all persons are to be presumed innocent until and unless their guilt is proved beyond a reasonable doubt. This means that the prosecution has the responsibility of proving guilt; the accused need not prove their innocence. Moreover, not any amount of proof will suffice. The suspicion, the possibility, even the probability of guilt are not enough. There must be so much proof of guilt as to extinguish all reasonable doubt.

Of course, the insistence on so heavy a burden of proof means that some guilty persons are likely to escape punishment. But that is a risk which democrats are willing to take. For democrats, the commitment to freedom and horror of

punishment are so great that they would prefer the liberation of ten who are guilty to the punishment of one who is innocent.

### **The Right Against Self-Incrimination**

A corollary of the presumption of innocence is the right against self-incrimination. No person accused of a crime is required to speak. Faced with accusations and interrogations, accused people may opt to be mute. They need not talk to their captors or testify in court. Even though the right of silence might provide a possible refuge for the guilty, it also creates an important safeguard for the innocent.

To compel the accused to speak might encourage unfair prosecutions. Even though the police had insufficient evidence, they might be tempted to lay charges against some people, in the hope that the testimony of their suspects would supply what is needed to convict them. But, as much as possible, democratic societies seek to protect innocent people not only against improper convictions, but also against improper prosecutions. Prosecution, itself, is an awesome ordeal. Even if innocent accused people were ultimately acquitted, they would be forced, in the meantime, to live in a state of considerable anxiety about the outcome. The right of silence reduces this peril for those who are innocent. Since the accused cannot be compelled to speak, the police will be less likely to prosecute, without *first* having a substantial case.

The right of silence recognizes also that, notwithstanding their innocence, some people would be poor witnesses. If such accused persons were required to speak,

they might run the risk of being convicted, not because of the deeds they committed in society, but because of the impression they created at the hearing.

Of course, accused people may speak if they wish. But, in view of the terrifying consequences they face, the choice must lie with them, not with the prosecution.

Suppose, upon their arrest, accused persons, despite the right to be mute, declare their guilt to the arresting police officers? This declaration may not be used as evidence at the trial, unless the prosecutor proves that it was made voluntarily.

In days gone by, the king's soldiers often employed the rack and the thumbscrew in order to extract confessions from hapless defendants. Though these instruments of torture may now be obsolete, the circumstances of arrest remain intimidating. In the privacy of cruiser and jailhouse, some officers may be tempted to invoke coercive pressures in order to obtain incriminating statements. In such an environment, the danger of a false confession is great indeed. As a further protection for the accused person, our law bars custodial confessions from court unless it is proved that they were made voluntarily.

### **The Right to Reasonable Bail**

Another corollary of the presumption of innocence is the right to reasonable bail. Although we permit arrests to be made on reasonable and probable belief in guilt, we don't want people to be *detained* on that basis. Detention before trial represents the infliction of punishment on those who have not been found guilty.

The presumption of innocence requires the speediest possible release of arrested persons. The chief basis for holding such people is the risk that, if released, they will not show up for their trials. Thus, many democracies permit the pre-trial release of accused persons if they post cash or property as security for their attendance in court.

The problem with this arrangement is that pre-trial release could become dependent less on acceptable conduct than on available income. Indeed, there have been many cases where, because of financial incapacity, accused people languished in prison for months only to be acquitted when their trials finally took place.

As a result, Canada has reduced substantially the situations where cash or property bail may be required. With few exceptions, accused people must now be released unless the prosecution can demonstrate to a judge or justice the likelihood that, at large, they will abscond or commit certain offences. It is still possible that release could be subject to the condition that any failure by accused persons to attend their trials will encumber them or some third party guarantors with financial debts to the Crown. But we rarely require the money in advance. The goal of the law is to reduce the obstacles to pre-trial release. Society cannot simultaneously presume pre-trial innocence and impose unreasonably upon pre-trial liberty.

### **The Writ of Habeas Corpus**

The fear of improper punishment is so great that we have developed a residual safeguard - the writ of habeas corpus. People held against their will may apply at any time to a court of superior jurisdiction for a judgment regarding the legality of their detention. If the court finds no legal basis for the incarceration, it will issue a writ of habeas corpus ordering the immediate release of the person detained.

### **The Nature of Punishment**

The issue of punishment concerns not only the safeguards for the innocent but also how much may be inflicted upon the guilty.

At one time, large crowds were entertained by the spectacle of the public flogging, decapitation, and execution of convicted felons. Today, democratic societies discourage the infliction of "cruel and unusual punishment".

The cruel treatment of human beings, even guilty human beings, is hardly compatible with our commitment to the dignity of the individual. Thus, it is inappropriate for punishment to serve the goal of amusement or vengeance.

The *only* justification for inflicting punishment on a human being is the protection of society. As a vehicle for such protection, punishment may serve only certain limited functions: to deter people from breaking the law, to remove law-breakers from situations where they can cause harm, to rehabilitate the law-breakers, and/or to denounce the law-breaking.

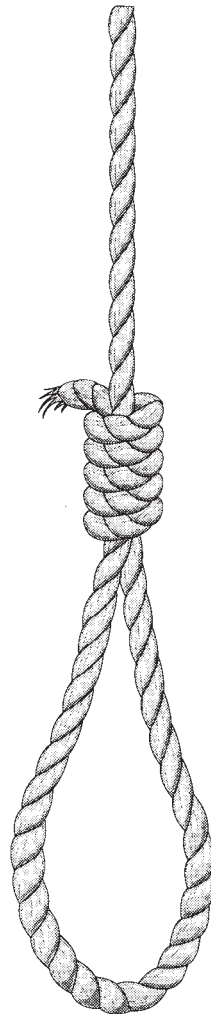
Any form or amount of punishment that goes beyond such functions is a needless assault on human freedom. This realization has propelled many modern democracies into banning all forms of capital and corporal punishment.

Increasing numbers of people are beginning to doubt whether the rope, the chair, the blade, and the whip contribute significantly to the protection of society. In fact, systematic studies suggest that execution and torture add little to the proper functions of punishment that confinement alone would not accomplish.

In many modern democracies, therefore, confinement is the most severe punishment that can be imposed upon law-breakers. Even at that, there is a growing effort to minimize the length and oppressiveness of this experience. Programs of supervised probation outside of jail are increasingly replacing incarceration inside of jail. Programs of earlier parole are reducing the length of jail sentences. Programs of training and rehabilitation are being introduced for those who remain inside. Moreover, with a growing number of minor offences, efforts are being made, through such methods as conciliation and voluntary restitution, to deal with the offender completely outside of the criminal process.

Sometimes such measures will be applied too readily and sometimes not readily enough. The mistakes in individual cases cannot alter the direction that policy must take. The goal of a democratic penal policy is to

inflict no more than the *minimum* punishment which will give society and its values the protection they need.





## THE RIGHT TO PERSONAL PRIVACY

### Privacy and Liberty

Democracy's commitment to the freedom of the individual requires that society provide special protection not only against unwarranted assaults on our persons but also against unwarranted surveillance of our affairs.

Privacy is central to human dignity and liberty. Human beings in our community require a retreat from public view. They need a secluded sector in which to ventilate their hopes and fears, their loves and hates. In short, they need an opportunity to "let their hair down", to be themselves.

How free would any of us be or feel if our homes could be readily invaded, our letters readily inspected, and our conversations readily monitored? Indeed, one of the most hideous features of George Orwell's frightening fantasy, "1984", is the provision in everyone's home of television screens where Big Brother can watch and hear everything

that takes place. As Orwell's book makes chillingly clear, there can be no liberty without privacy.

### Search and Seizure to Collect Evidence of Crime

But, like other fundamental freedoms, privacy cannot be absolute and unlimited. Some limitations under some circumstances are necessary and inevitable.

Suppose, for example, there is a new "Jack the Ripper" at large? And suppose we have a suspect? As we have already noted in the last section, if, in a proper trial, we can prove the suspect's guilt beyond a reasonable doubt, we can have him jailed for the protection of society. But what if we don't have enough evidence to prove his guilt?

Now suppose there is also good reason to believe that the murder weapon is in the suspect's house and the bodies of many of his victims are buried in his back yard? Is our belief in personal privacy so absolute and so rigid that we must under *no* circumstances enter and search his premises for the weapon and the bodies? Must

we, in other words, risk the lives of more potential victims in the hope that we will catch him in the act?



No democratic society has ever sought to impose so many handicaps on its ability to enforce the law. Sometimes, as this example shows, the need for information or evidence substantially outweighs the claim to privacy.

Sometimes, the police must have the power to forcibly enter and search the home of a suspect. The problem is to decide in which situations privacy might be so invaded and by what means the risk of abuse might be minimized.

The role of personal privacy is too great to permit such an invasion on the basis of mere suspicion that criminal evidence will be found. Democratic societies have traditionally required the existence of stronger grounds. Canadian law talks of "reasonable grounds" to believe that the premises contain the fruits or implements of a particular crime. American law talks of "probable cause" for such a belief.

Moreover, the existence of such grounds must be sufficient to satisfy not only the investigating police, but also a judge or justice of the peace who, presumably is not subject to police and community pressures to solve crimes. The pressures to solve cases are often great. Even the most honest and conscientious police officers might be tempted to resort to the most convenient, instead of the most proper, investigative tactics. In view of their tenure of office and their removal from the mainstream of community activity, the hope is that judges and justices will be less susceptible to such pressures and more independent about their judgments.

The requirement of judicial search warrants on a showing of "reasonable grounds" or "probable cause" is the way democratic societies reconcile the protection of privacy with the needs of law enforcement.

Yet Canada has adopted a number of exceptions to this safeguard. There are

many provincial statutes and municipal by-laws which empower the entry of certain inspectors on people's premises, without judicial warrant and without special suspicion, for the purpose of checking general compliance with health, safety, and fire regulations.

At the time of writing, there is virtually no power to open, read, or search undelivered first class mail without the consent of the person for whom it was intended. An important exception is national security: for such purposes, mail may be opened with the permission of a judge.

Again, it is not our function here to debate the pros and cons of Canadian law. Whether our law treats the claims of personal privacy too cavalierly, too deferentially, or just about right, the reader can be the judge. Suffice it at this point simply to examine the importance of personal privacy, the general basis for permitting intrusions upon it, and the nature of the safeguards that have been devised for minimizing the risk of abuse.

### **Requiring Disclosures to Serve Individual Justice**

Forcible entry, search, and seizure represent more extreme invasions of personal privacy. Sometimes we intrude upon privacy, not through forcible seizures, but through requiring the possessors of information to disclose it and the custodians of documents to produce them. In the interests of doing justice in particular criminal and civil cases, there is frequently felt to be a need to extract information from the private domains of people's lives. In a divorce case where adultery is alleged, a spouse may be requested to produce letters



written by a lover. In a case involving the interpretation of a will, persons close to the deceased may be requested to testify about the intimate relations between the deceased person and family members. Without all relevant information, the courts might decide their cases the wrong way.

Yet the exposure of such matters to public scrutiny may cause great embarrassment. Again, the instrument for reconciling the need to know with the claim to privacy is the impartial judge. Before people can be compelled to make such public disclosures, there must be a court order. An impartial judge, not subject to the interests of the contesting parties, must decide how relevant and necessary the evidence is to the determination of the dispute at hand.

Even at that, however, certain situations are not subject to court orders. Lawyers cannot generally be compelled to produce evidence against their clients. Our adversary system of justice would collapse if people could not confide completely in their lawyers. Moreover, many of the communications between husbands and wives are protected from compulsory disclosure. This privilege is designed to protect the sanctity of what we believe to be the most intimate relationship in our society.

In much of Canada, other delicate relationships are potentially subject to court intrusions, for example, priests and parishioners, psychiatrists and patients, parents and children. In law, these people *could* be forced to testify against one another. In fact, however, our courts have rarely exercised their power to invade these relationships. Again, the reader is left to decide to what extent the present state of Canadian law

adequately protects personal privacy. Is it sufficient to rely on our courts to exercise good judgment, or should other intimate relationships enjoy the kind of special privilege which presently characterizes the lawyer-client relationship and the husband-wife relationship? The problem is how far the interests of justice in the individual case should outweigh the general claim to personal privacy.

### **Requiring Disclosures to Serve Government Planning**

The promotion of justice in individual cases is not the only situation where privacy has been traditionally subject to compulsory violations. The social and economic interests of the community have also served as a basis for compelling such disclosures. Periodically, the federal government conducts a census wherein it requires citizens to impart a great deal of personal information. Our governments may want to know a lot about people's experience - their problems with respect to income, health, housing, education, employment, marriage, divorce, etc. Only through adequate knowledge of what is actually happening in the community can governments hope to plan intelligently for the future. Moreover, every year the income tax authorities scrutinize carefully our financial resources. Unless the government could examine our financial situation, it would be unable to levy a fair and just tax upon us.

The trade-off in these situations is that the departments which collect the information are usually bound by a legal obligation to keep confidential the contents of individual files.



### **The Special Problem of Electronic Surveillance**

The rapid progress of technology is making necessary new protections for personal privacy. Electronic bugs have advanced to the point where they can overhear conversations anywhere and everywhere. They can spy on us in our board rooms, union halls, dining rooms, parlours, and even in our bedrooms. While there has been a consensus, for some time, that electronic surveillance should not be permitted to further private interests, the difficult question is how much should be permitted, under what kind of safeguards, to serve law enforcement purposes. Police have argued that electronic eavesdropping is necessary to penetrate the otherwise invulnerable secrecy of well-organized criminal conspiracies.

Yet, unlike the relatively limited intrusions permitted by search warrants, the intrusions within the capacity of electronic bugs are literally enormous. During a given period of time, the bug catches *everyone* within earshot - not only the guilty and the suspected, but also scores of completely innocent people.

For example, in the course of making fewer than 3500 arrests in cases where electronic surveillance was used during 1969 and 1970, American police overheard more than 40,000 people in more than 550,000 conversations.

What measures, then, would be appropriate to deal with such potentially pervasive invasions of privacy? How can we most reasonably balance the competing claims of law enforcement and personal privacy in an age of such technological sophistication?

After years of public controversy and debate, the Parliament of Canada enacted a special law for this troublesome area. Generally speaking, only law enforcement authorities are allowed to bug. The permissible scope of such surveillance encompasses national security matters, certain offences involving organized crime, and a special list of more than 40 offences where organized crime is not necessarily involved. Apart from various specified emergencies, the authorities require the prior permission of certain judges. Apart from national security matters, the authorities are required, after a certain period, to notify the person bugged. In the case of evidence from unlawful eavesdropping, the courts will be required generally to exclude the recordings produced but allowed a wide latitude to admit the information obtained.

Some people have argued that the new law unreasonably encumbers law enforcement. Other people have argued that it needlessly endangers personal privacy. The public controversy has survived the Parliamentary debate. Is electronic surveillance merely helpful or

indispensable to an adequate level of law enforcement? Are the safeguards for privacy effectively workable or essentially illusory? These are the questions which Canadians will continue to ask, as they experience the law in action.



### **The Special Problem of Computers**

Another offspring of modern technology which threatens our privacy is the computer. In many sectors of the community, computers are now being employed to record information relating to millions of people on a wide variety of matters - health, employment, intelligence, aptitudes, credit, reliability, emotional disposition, personal habits, etc. Initially collected by governments, schools, employers, credit agencies, insurance companies, etc., much of this material is now co-ordinated and stored in the powerful memory banks of modern computers.

In less than a second, these machines can make co-ordinated information available and usable. Access to the

computer's memory bank can give access to substantial information on countless numbers of people.

This poses the latest challenge to privacy. Society needs to collect information in the interests of planning efficiency. The more co-ordination that takes place and the faster that information can be retrieved, the more efficiently we can function. How can we evaluate the competing claims of information collection and personal privacy? How can we prevent undue data collection and co-ordination? How can we prevent the information from being used for any purpose but that for which it was originally collected? On what basis and in what ways can we limit access to the computer's memory banks?

In the late 1970s, the Parliament of Canada took a first step in meeting this problem. It enacted legislation which gives to Canadians a measure of access to personal information about themselves which is contained in many of the data banks under federal government control. To whatever extent people dispute the information so recorded, they can require rectification or at least the recording of their objections. As might be expected, there are a number of exceptions to this right of access. Such exceptions include a power in the government to withhold information concerning national security, negotiations with other countries, federal-provincial relations, law enforcement investigations, matters which could disrupt order in the penitentiaries, and personal information concerning other people.

In the event of a conflict between the individual and the government as to whether certain data fall within the

specified exemptions, an independent official known as a privacy commissioner is available to mediate. With access to most of the material under government control, the commissioner conducts whatever examinations and makes whatever recommendations appear justified. In the event that the government does not comply within the time limits prescribed, the individual and/or the privacy commissioner may apply to the federal court which is empowered, in appropriate circumstances, to order the disclosure of all or part of the information at issue.

to spell out the problems. While a number of provinces have legislation similar to the federal law, it is nevertheless fair to note that there is relatively little Canadian legislation dealing with technological invasions of personal privacy. If we are to protect this fundamental freedom from undue erosion, it is essential that we close the gap between our lagging legislation and our galloping technology. The spectre of a self-inflicted "1984" provides us with the continuing incentive to meet this challenge.



Critics of this legislation complain about the relative absence of restrictions on what information the government may initially collect and about the failure to deal with the data banks under private control. How far such criticisms are justified and what measures should be adopted to meet them, we leave again to the reader.

The claim to privacy is in continuous competition with the need to know. Though it is not the function of this pamphlet to prescribe specific solutions to the problems raised, it is our function



## **THE PROTECTION OF OUR FUNDAMENTAL FREEDOMS**

Many, if not most, common law democracies recognize as fundamental a number of additional freedoms. But the rights to due process of law, dissent, security of the person, and personal privacy represent at least the bare bones of the democratic ideal. These civil liberties provide the minimum vehicle for securing the enjoyment of personal freedom and equal consideration.

In a democratic society, the fundamental freedoms transcend everything else. They provide the framework and the ground rules for the pursuit of our various and competing self-interests. Whatever differences people may have on any number of issues, there is a common interest in avoiding the dangers of tyranny and ensuring the blessings of

liberty. Whether, therefore, we be anglophone or francophone, federalist or separatist, conservative or radical, capitalist or socialist, indigenous or immigrant, it behoves us to promote the survival of the fundamental freedoms.

Yet, as we have seen, even the fundamental freedoms are not absolute and unlimited. Some limitations under some circumstances are necessary and inevitable.

In addition to the limitations already encountered, the Canadian Criminal Code provides that anyone, not only a police officer, may use as much force as is reasonably necessary to prevent the commission of an indictable offence that is likely to cause immediate and serious harm. We also have the common law defence of necessity which, in urgent situations, will enable anyone to commit an act, otherwise illegal, when that reasonably appears to be the only way to avert an even greater illegality. In situations of great emergency for large sectors of our society, Canada has enacted an emergency powers statute that, under certain circumstances and subject to certain safeguards, will permit the government to suspend many of our normal liberties for varying periods of time.

The need to protect - and sometimes to abridge - our fundamental freedoms creates a continuing dilemma for democratic societies. The problem is to adopt abridgements only when necessary and to ensure the abridgements adopted are no greater than necessary.

How can we minimize the risk of improper abridgements to the fundamental freedoms?

Some countries, like the United States with their constitutional bills of rights, that are difficult to amend, rely greatly on their courts to protect the fundamental freedoms. Other countries, like the United Kingdom, without written constitutions, put more faith in their elected parliaments. The Americans believe that, in the area of civil liberties, the courts should be empowered to restrain even the popularly elected legislatures. This means that the courts can actually strike down laws that, in the opinion of the courts, infringe upon constitutional rights. Supporters of the British practice, on the other hand, argue that it is undemocratic for appointed judges to exercise such veto powers over elected legislators. According to the British view, the best hope for the fundamental freedoms lies in the fair-mindedness of the parliamentary traditions.

The Canadian system represents something of a compromise between the American and the British systems. Like the United States, Canada has a bill of rights - the Charter of Rights and Freedoms - which endows the courts with special powers in the area of fundamental freedoms. But, unlike its American counterpart, the Canadian Charter is only partly "entrenched". It is part of the Constitution and as such can be used by the courts to nullify legislation. But many of the Charter's provisions can be by-passed.

Either the federal Parliament or a provincial legislature may overcome most of the Charter by enacting a resolution that any of its otherwise valid legislation will apply "notwithstanding" the Charter. This has the effect of keeping the courts from using the Charter to

overturn the legislation in question. The resolution automatically lapses if it is not re-enacted within five years. Legally, it would be easy for our elected legislatures to overcome most of the Charter's provisions. Politically, however, the exercise could be very troublesome.

The mere introduction of a bill to oust the application of any part of the Charter would likely spark an enormous controversy. Without pretty overwhelming support in the legislature and the community, a government would be very reluctant to take the heat that such action would invariably generate. And the prospect of having to endure such flak every five years afterwards can only increase the reluctance to embark on such a course in the first place. As of this moment, the only province outside of Quebec that has invoked the "notwithstanding" clause is Saskatchewan and there it was used to protect special legislation aimed at preventing a series of civil service work stoppages which were seen as particularly disruptive. (Since Quebec has never politically consented to the Charter, it must be seen as a special case.)

Unfortunately, however, the legal enshrinement of the fundamental freedoms cannot adequately guarantee their observance. Often, the victims of civil liberties violations simply don't know of their legal rights to redress. Often, even if they do know their rights, they lack the resources to exercise them effectively. Legal action and court cases can be costly, time consuming, nerve-racking, and exhausting. Frequently, it is only the very rich who have the resources to spend the money and withstand the pressures

which successful legal action requires. In the case of groups like Canada's Aboriginal people - Indians, Inuit, and Metis - financial destitution is compounded by cultural estrangement and sheer physical distance. Many Aboriginal people feel a sense of discomfort in attempting to cope with the unfamiliar institutions of the white society. Moreover, a great number of these people live far away from the centres where legal actions are conducted. Extreme poverty inhibits travel and even telephone communication.

In recent years, governments at both federal and provincial levels have begun programs to bridge the gulf between libertarian aspiration and practical realization. With the aid of federal subsidies, almost every province provides some kind of legal aid to those whose poverty prevents recourse to legal action. The range of assistance and the methods of delivery differ from province to province. What most government legal aid programs share, however, is a lack of assistance beyond certain segments of the poor and a paucity of response to the problems of ignorance, alienation, and distance.

A number of provinces have created also the special office of ombudsman with flexible powers to protect the individual citizen against abuses by government authority. Although in most cases the occupants of this office lack the legal power to make binding decisions, they can compel access to various types of official information and, through the use of publicity and the prestige of their positions, they can exert persuasive pressures on recalcitrant governments.

Consistent with our approach throughout, we leave to the reader the task of passing judgment on the various methods by which democratic governments choose to protect the fundamental freedoms. What we can say at this point, however, is that, despite the techniques employed by government, there is no substitute for a committed, intelligent, and vigilant *citizenry*. The enlightened conscience of the people remains the most effective safeguard of liberty.

Conversely, the greatest peril to liberty is a people with a blunted conscience. History has demonstrated, time and again, how tyranny feeds on apathy. Few of us, of course, are apathetic about ourselves and our own immediate self-interests. But the crucial test is how responsive we will be to the plight of *other* people. Will we insist on civil liberties for others as well as for ourselves, for our rivals as well as for our allies, for those who think differently as well as for those who think similarly? Upon the answers to these questions depends the viable survival of the democratic system.

Perhaps the most eloquent warning of the perils to freedom emerged from the ruins of World War II. Recounting his experience with the Nazi regime in his country, Reverend Martin Niemoller, a German Protestant clergyman, made the following statement:

*“First they arrested the Communists - but I was not a Communist, so I did nothing. Then they came for the Social Democrats - but I was not a Social Democrat, so I did nothing. Then they arrested the trade unionists - and I did nothing because I was not one. And then they came for the Jews and then the Catholics, but I was neither a Jew nor a Catholic and I did nothing. At last they came and arrested me - and there was no one left to do anything about it.”*

This statement, wrung from the agony of Hitler’s Germany, serves as a lesson for democrats in all countries, for all time. The freedom of no one is safe unless the freedom of *everyone* is safe.



# PROBLEMS

## ?

*The following pages contain a number of problems that have been prepared for class discussion. It should be stressed that there is no such thing as a "right" answer to these problems. Rather, they are designed to help the student think more deeply and relevantly about the kind of issues that they will inevitably have to face as citizens of Canadian democracy.*

1. Assuming that the police have reasonable grounds to believe that a bomb will soon explode in a particular house from which the owner and occupants are temporarily absent, they forcibly enter without a warrant and, instead of finding a bomb, they stumble over the corpse of a murdered man. Should they be able to use the corpse as evidence in the subsequent murder trial of the home owner?

2. The police obtain a warrant to enter a home to look for the corpse of a murdered man and find instead some stolen jewellery in a kitchen drawer. Should they be able to use the jewellery as evidence in a theft charge against the homeowner?

3. Following the arrest of the homeowner, the police question him in custody and accompany it by a severe beating. In response, the homeowner admits his involvement in the theft and even tells the police where the remainder of the stolen jewellery is located (under a certain floor board in the museum) and the police subsequently find it there. At the trial of the homeowner, how far, if at all, should

the prosecution be able to introduce into evidence the admissions which the accused man made during his interrogation?

4. During the time the homeowner is in pre-trial custody after the interrogation, the police plant an informant (a bogus prisoner) in his cell to whom the homeowner repeats his admission of involvement in the theft. How far, if at all, should the prosecution be able to introduce into evidence this admission in the homeowner's subsequent theft trial?

5. Following the homeowner's release on bail, the police equip a professional undercover man with a bodypack tape recorder and instruct him to win the accused man's confidence. How far, if at all, and subject to what safeguards, should the police be allowed to engage in this kind of spying and to what extent should they be able to use as evidence whatever comments the accused man makes in these circumstances?



6. The police also seek to plant a wiretap on the homeowner's residence telephone which he normally shares with his innocent wife and three innocent teenaged children. How far, if at all, and subject to what safeguards, should the wiretap be legally permissible?

7. Dr. Lou Natic is told by a psychiatric patient of a planned hijacking at the city's airport. If the doctor alerts the authorities, should he be subject to professional discipline or a civil lawsuit at the instigation of his patient?

8. If the doctor fails to alert the authorities and the hijacking takes place resulting in the death and wounding of several passengers, should he then be subject to such discipline or a civil lawsuit at the instigation of the injured passengers or their executors?

9. Suppose Dr. Natic is asked to testify for the accused at a robbery trial? His evidence, gleaned from a therapeutic encounter, will show that the chief witness for the crown is a pathological liar. To what extent should the doctor's evidence be compellable or admissible? Moreover, how far, if at all, should the doctor be subject to discipline if he volunteers his testimony?

10. To what extent, if at all, is it appropriate to impose involuntary confinement on prostitutes who continue at their trade despite the knowledge that they are HIV-positive?

11. To what extent, if at all, is it appropriate for school authorities to remove HIV-positive teachers and elementary students?

12. To what extent, if at all, should life insurance companies have the right to inquire whether life insurance applicants are homosexuals or intravenous drug users, and if they are, to what extent should the companies be able to require that they undergo an HIV-antibody test and disclose the results of it?

13. To what extent, if at all, is it appropriate for medical personnel who are administering blood tests for other reasons to conduct surreptitious HIV-antibody tests, without recording the persons' identities, to be used only for epidemiological purposes?

14. To what extent, if at all, should doctors be allowed - or required - to tell the spouses of those who have tested positive for the AIDS virus?

15. Aunt Sally's family wishes to have her committed to a mental institution in order to cure her of the delusion that she is the Queen of England. Apparently, certain drugs could significantly reduce such symptoms within only a few weeks. To what extent, if at all, and, subject to what safeguards, should her relatives be able to succeed?



16. Two doctors, having examined a man, recommend prostate surgery, warning that, although death is far from imminent, his condition could deteriorate seriously if the defect is not corrected soon. The patient refuses to undergo the surgery on the grounds that he has been "commanded" not to do so by his "superiors" in another galaxy. To what extent, if at all, should this man be subject to compulsory corrective surgery?

17. To what extent, if at all, should the penitentiary officials be empowered to force feed a mentally competent prisoner who has decided, because he has nothing to live for, to "fast until death"?

18. Through the use of new techniques in aversion therapy, behaviour modification experts have been experiencing some success in curing child molesters of their propensities. Among other things, the therapy involves attaching electrodes to the patient's body during periods when he is

watching pictures on a screen. When the images of children appear, the electrodes produce unpleasant shock sensations. According to the experts, consistent exposure to such treatments has been known to produce favourable results.

In view of these successes, to what extent, if at all, should such therapy be imposed - or offered - to child molesters who have been jailed because of criminal offences in respect of such behaviour?

19. The police wish to bug the telephone and hotel room for the two week period during which a Westerner, suspected of Mafia activities (drug trafficking, gambling, and prostitution), will be staying in Toronto. To what extent, if at all, would you let them do it?



20. Should it be permissible for the police to bug the telephone and the home of a person who, they reasonably believe, may know the whereabouts of a recently kidnapped child?

21. The proprietor of one of the city's leading department stores wishes to bug the store as a way of supervising his sales personnel during store hours and to identify the perpetrators of break-ins after store hours. To what extent, if at all, would you let him do it?

22. The police wish to bug the telephones and the homes, for about three months, of four local people who, they reasonably believe, to be organizing a local chapter of the violence-prone Black Panther Party. To what extent, if

at all, should such bugging be permissible?

23. A bitter but legal strike is in its fourth day at Tex Tile's, Toronto's leading manufacturer of woollen goods. Because of the heavy unemployment situation, the company is able to recruit an almost full complement of employees to replace the strikers. This recruitment has taken place among impoverished public housing tenants, despite 100 angry pickets patrolling the sidewalks adjacent to the plant.

The bitterness on the picket line is growing. Angry pickets are jeering and cat-calling every time someone crosses the picket line. Five of the pickets have been arrested and charged with common assault arising out of their attempt to stop new recruits from entering. Management, the new recruits, and the public are fearful of serious violence and injury to property.

To bolster support for the strike, the Union wishes to undertake additional action.

(a) It wishes to add an additional 50 members to its daily 100 person picket line.

(b) It wishes to stage a series of marches, once per week, of 2000 through downtown Toronto which is likely to tie up traffic on normal business days for about 3 to 4 hours.

(c) It wishes to set up a picket line in front of Toronto's largest department store. The picket lines will bear the words: "Don't Buy Tex Tile's Goods".

(d) The Union wishes to conduct a parade through the public housing area in which most of the new employees reside. The Union's placards will bear the words: "Scabs Are Rotten". The area is well known for its hostility to the strikers.

(e) The Union wishes to occupy and tie up all of the lavatory facilities at the Toronto International Airport as a protest against a civic welcome reception planned there for the impending visit of Tex Tile's American president.

Consider whether, to what extent, at what point, and in what manner such activities should, if at all, be permissible?

24. To what extent, if at all, should it be permissible for a speaker in Hide Park to tell an audience of 100 non-Jewish strangers that a "Jewish conspiracy is threatening to take over the world"? Would it make any difference if the audience were composed mainly of Jews?

25. The following is an extract of a television interview on a Toronto TV station. The interviewee is I. M. Burning, a young revolutionary.

Q:How do you intend to win social justice for the workers?

A:There is no tactic, no instrument, no weapon I would not use to liberate the workers from the capitalist system.

Q:Does this include violence?

A:Certainly, it includes everything, it excludes nothing. For centuries, the capitalists have used violence to suppress the working class. Why can't the workers use violence to liberate themselves from the capitalists?

Q:Are all capitalists bad?

A:The capitalist is the scum of the earth. The only capitalist worthy of the workers' trust is the one who would pick up a gun and help us shoot down the capitalist system.

Q: Do you mean that literally or just figuratively?

A:I mean it literally.

Under Canadian law, the crime of sedition applies to a person who "advocates the use of force as a means of accomplishing a governmental change within Canada". Is Mr. Burning guilty of a seditious offence? To what extent, if at all, should this sedition provision be changed?

26. To what extent, if at all, does the compulsory publication of major financial contributors to political campaigns encroach improperly on the secret ballot?

27. A group of 50 homosexual men gather in Nathan Phillips Square at noon. For 1/2 hour they conduct a demonstration which includes kissing



and holding hands. The police arrest them for performing indecent acts. What should be the result? Suppose one of the demonstrators is dismissed from his position as an elementary school teacher for “setting such a bad example to his students”? Should the dismissal stand?

28. A pro-government MPP is charged with a criminal offence for allegedly taking a bribe in connection with his public duties. After the charge is laid but before the case is heard, the government dissolves the legislature and calls an election. The Toronto Moon newspaper publishes an editorial setting out its investigation of the bribery episode in an effort to persuade the voters to defeat the accused MPP. The MPP charges the newspaper with contempt of court for undermining his right to a fair trial. What should be the result?

29. Believing that former Toronto mayor Paul Bearer had embezzled money, the police obtained a warrant to enter and search his home to look for certain documents linking him to the crime. In fact, however, the police found no such evidence; indeed, further investigation completely absolved Mr. Bearer of any suspicion. Two years later, someone else wound up charged with the offence. But, because of Bearer’s prominence in the community, the Toronto Moon newspaper ran a front page story on the raid. In consequence, many people believed, for two years, that he must have committed the offence in question.



In response to such situations, the government introduces a bill to prohibit the media from publishing or broadcasting the names and locations of search warrant targets unless the affected persons consent or they are charged with an offence. The leader of the opposition is determined to redress cases like those of nurse Susan Nelles who suffered terrible publicity after being wrongly charged with the murder of babies at Toronto’s Sick Children’s Hospital. Accordingly he proposes an amendment to prohibit such publications or broadcasts until and unless a conviction is registered.

How far, if at all, and why do you agree or disagree with the government and opposition proposals?

30. There is an undoubted consensus in favour of some form of freedom of information law. Most people also appear to agree that some government documents should be exempt from public disclosure. But the most difficult exercise is to determine precisely which documents should enjoy such exemption. The government requests your opinion as to whether the law should exempt the following documents:

(a) from an inspector in the Department of Agriculture, a report alleging that Slimy’s Restaurant is serving meat that, although not dangerous to health, is substandard;

(b) from the Canada Council, a list of those persons and organizations that failed in their attempt to obtain grants;

(c) the names of those people, accused of racial discrimination, who complied

with government efforts at conciliation;  
and

(d) from senior officials in the Department of Consumer Affairs, a memorandum containing the results of a survey concerning possible voter reactions to a ban on certain textile imports, an analysis of the results, and policy proposals for government action.



31. A “pro-life” organization sets up a picket line of 20 people in front of Dr. Morgan Taylor’s new abortion clinic. While scrupulously avoiding any physical obstruction, the pickets carry signs containing the words: “Abortion is Murder”. Within the first week of such demonstrating, there is evidence that, of the 60 women seeking the clinic’s abortion services, a dozen withdrew and went home. They preferred not to subject themselves to the hostile signs and facial expressions of the pickets.

In an effort to strengthen their impact, the pickets adopt the following measures:

(a) In a number of cases, they follow the women and the doctors to their homes, ascertain their identities, and subsequently write them letters admonishing them about the “mortal sin” they have committed.

(b) They set up picket lines outside the homes of a number of the doctors and of the women. Again, the picket signs say: “Abortion is Murder” but this time, the target of the picket line is identified on the signs.

(c) The pickets attempt to place full page ads in the local newspapers in which they identify the doctors who have performed the impugned abortions and the women upon whom the abortions have been performed.

(d) The pickets rent a plane and fly over the city with huge streamers in which they proclaim to the world that certain named doctors have committed abortions.

Dr. Morgan Taylor and a group of his supporters go to court and apply for injunctions restraining both the picketing and the actions in (a) to (d). How far, if at all, should they succeed?

32. The student council at Eastern University proposes a code of ethics which contains, *inter alia*, the following provision:

*During the course of extra-curricular activities, no member of the university community shall demean other members of the university community on the basis of race, creed, colour, sex, ancestry, nationality, or place of origin.*

To what extent will this provision command your support? In any event, indicate to what extent the following should be permissible:

(a) The Current Affairs Club invites psychologist Phillippe Rushton to explain how his research led him to believe that

Orientalism were intellectually the most gifted and Blacks intellectually the least gifted of the human races.

(b) The campus Arab Society pickets the Jewish Hillel Foundation with signs proclaiming that "Zionism is Racism" and "United Jewish Appeal Money Backs Zionist Racism".

(c) The university book store stocks a book showing pictures of "women's naked and mutilated bodies suspended upside down on barbed wire fences ... [and] brutal and sadistic gang rapes".

33. In safety-sensitive jobs such as airline pilots, locomotive engineers, and truck drivers, there will be mandatory urine tests for drugs administered to all new employees and random urine tests to incumbent employees. Those refusing to be tested will be subjected

to dismissal and those testing positive will be required to participate in an employee-assistance program designed to overcome the propensity to use drugs. At the completion of the program, those refusing to be tested or testing positive will be subject to dismissal. To what extent, if at all, is this program acceptable?

34. To what extent, if at all, would it be permissible to suspend or revoke licences for establishments that serve the public if the licence holder permits drug dealing to go unchecked on the premises?

35. To what extent, if at all, should tenants in apartment houses be subject to eviction in the event that they and/or their co-residents are convicted of drug related offences?

36. To what extent, if at all, should those convicted of dealing in drugs from their automobiles be subject to the suspension or cancellation of their drivers' licences?

37. To what extent, if at all, would it be permissible to amend curfew laws so that those under 16 years of age will not be allowed to wander in public places after 10 p.m. instead of after midnight as the law now provides?

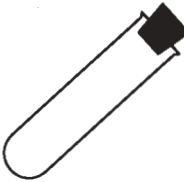
38. To what extent, if at all, should students suspended from school for drug related offences on school property be barred from returning to school unless they are participating in a treatment program?

39. If an unwed mother applies for welfare, to what extent, if at all, should she be required to disclose to the welfare authorities the identity of the child's father?

40. To what extent, if at all, should deserted wives be required to take legal action against their husbands for the support of the children as a condition of obtaining welfare?

41. Should a person be entitled to a welfare allowance if his unemployment is attributable to the fact that he is on strike from the only reasonably available job?

42. Should a person be entitled to a welfare allowance if he refuses to accept available employment on the basis that





to do so would entail crossing a picket line and “scabbing” on the jobs of other people?

43. Should the welfare administrators be entitled to require, as a condition of granting a welfare allowance, that a candidate for welfare cut his hair in order to be more attractive for job opportunities?

44. Should a Toronto bachelor be entitled to welfare assistance if he refuses to take an otherwise satisfactory job in Kenora because of his involvement in the Toronto Singles Club?

45. A regulation provides that 16 and 17 year olds who leave home can be denied welfare if the administrator believes that it is not in their best interests to live apart from their parents. To what extent do you agree with this regulation?

46. There is a complaint from a group of parents against the teaching of Margaret Laurence’s book, The Diviners, because the book allegedly contains too many four-letter dirty words. To what extent, if at all, should the school remove the book from the curriculum and even from its library because of such parental objections?

47. In the aftermath of a grade 10 English class devoted to Shakespeare’s, The Merchant of Venice, a number of students physically attack their Jewish classmates. Since the Shylock character has often provoked such anti-semitic incidents, a Jewish organization

requests the school to stop teaching The Merchant of Venice or, at least, to move it to the older grades where the presumably more mature students would be better able to handle such material. To what extent, if at all, should this request succeed?

48. A high school history teacher tells his class that the Nazi holocaust against the Jews of Europe was nothing but an enormous hoax conceived by the “international Jewish conspiracy” in order to generate sympathy and finances for the State of Israel. To what extent, if at all, should this teacher be subject to discipline for teaching such material in his classroom?

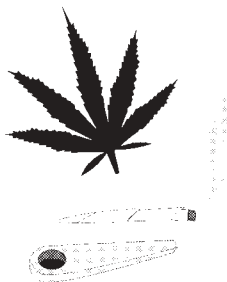
Suppose the teacher does not introduce such subjects in class but publishes several books in the community at large where he expresses these views? Would this make a difference to the way you would handle the situation?

49. A group of parents complains that Darwin’s theory of evolution is being taught in biology class as a possible explanation for human development. In order to be fair, the parents argue, the religious beliefs surrounding creation as an act of God should also be taught in the biology class. To what extent, if at all, do you agree?

50. Males of the Sikh faith are required by their religion to wear a turban and carry a kirpan or ceremonial dagger on their persons. Some schools won’t allow turbans to be worn because they wish to enforce a “no hats” rule for everyone. They fear that such exceptions would create disrespect for their rules. These schools also forbid the kirpan because it could be used as a



kirpan because it could be used as a weapon. Although there have been no instances of Sikh students attacking others with their kirpans, the schools concerned do not wish to incur such a risk. What position do you take on these issues?



proclamation “Palestine - We Fight For Our Rights”. A number of Jewish teachers in the school complain that this t-shirt offends the school’s policy on the promotion of violence and the girl is sent home to change her shirt. But the child’s parents send her back to school wearing the same t-shirt because they say it celebrates the family’s Palestinian heritage. The girl is then suspended from school until she agrees to stop wearing the t-shirt. To what extent, if at all, do you agree with this suspension?

51. In order to counteract an increase in drug dealing on the high school premises, the principal arranges for specially trained police dogs to go into every class and walk by all of the lockers, sniffing for drugs. Whenever a dog’s behaviour indicates a potential problem, the principal orders the affected students to empty their pockets, wallets, and remove their shoes and socks. The principal also searches the lockers under suspicion. To what extent, if at all, should the principal’s actions be permissible?

52. A number of Jewish and Muslim parents tell the Ontario government that elementary fairness requires the government to support their separate religious day schools in the same manner as it finances the Catholic separate schools. To what extent, if at all, do you agree?

53. A 10 year old girl in grade 4 comes to school wearing a t-shirt displaying a map of Palestine together with a hand holding a Palestinian flag and the

NOTES

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