A third cause of action should lie for non-law enforcement use or public disclosure of information in the possession of the government or its agents, employees, or law enforcement or peace officers, whether obtained by authorized or unauthorized interception of communications, where the use or disclosure was wrongfully authorized by the responsible Minister. Use or disclosure of information obtained through interception of communications should be authorized only by the responsible Minister, and only where necessary for the investigation, prevention and detection of criminal activities, and for the prosecution of persons thereby incriminated. Beyond that which must be disclosed at a trial, such information must never be allowed to be made public. A means will be recommended later in this report for a judicial determination of what matters obtained through the interception of communications may be used or disclosed pursuant to a prosecution. Judicial authorization to use or disclose such information would operate as a complete defense to this action. Any government which authorizes non-law enforcement use or public disclosure in any case where no prosecution occurs, and therefore no judicial shield is interposed, should be accountable for its actions, and should, once the fact of such use or disclosure is proved, bear the burden of proving that such use or disclosure was necessary for the investigation, detection or prevention of criminal activities within the strict meaning of the law. It must be recognized that complete compartmentalization of information obtained by interception of communications might seriously hinder effective law enforcement efforts in areas where the exchange of information and the verification of data obtained from one source by data obtained from another is required. The Committee believes that the suggested formula will allow freedom of action in this area while controlling or preventing intentional misuse of information obtained through interception of communications for purposes inconsistent with the policy of Parliament.

For the purpose of ensuring close supervision by the responsible government officials of law enforcement interception of communications, a federal peace or law enforcement officer under the operational control or direction of the federal government should be deemed to be an agent of the Crown in right of Canada in any suit under these heads, thereby rendering the Crown responsible under the Crown Liability Act.

The penalty in these matters should be substantial. The Committee recommends that recovery be without proof of damages in the amount of $100.00 per day of interception with a minimum recovery of $1,000.00 for any unauthorized interception of communications, plus costs, plus legal fees, plus general and special damages if proved. Similar substantial damages should be imposed for unauthorized disclosure or use of information obtained through the interception of communications.

CONSTITUTIONAL CONSIDERATIONS AND ALTERNATIVES

It should be pointed out that the provincial police forces of Ontario and Quebec, and the Royal Canadian Mounted Police in the other provinces, are under the operational control of the Crown in right of the province. The protection of civil liberties by means of a civil remedy against unlawful wiretapping, surreptitious electronic device surveillance, or unauthorized use or disclosure of information thereby obtained by these classes of law enforcement agencies or any provincial agents who may engage in the interception of communications cannot be constitutionally created under the enumerated heads of power assigned to Parliament. This has caused the Committee much concern.