

SUBMISSIONS TO THE SENATE  
HOUSE OF COMMONS  
SPECIAL JOINT COMMITTEE  
ON THE CONSTITUTION OF CANADA

BY

THE CANADIAN ASSOCIATION OF CROWN COUNSEL

REPRESENTED BY

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" AND

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OTTAWA

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THE CANADIAN ASSOCIATION OF CROWN COUNSEL REPRESENTS CROWN ATTORNEYS, AND OTHER CROWN COUNSEL EMPLOYED THROUGHOUT CANADA BY BOTH PROVINCIAL ATTORNEYS GENERAL AND DEPARTMENTS OF JUSTICE AND BY THE ATTORNEY GENERAL OF CANADA.

OUR SUBMISSIONS REFLECT A CONSENSUS OF CANADIAN CROWN COUNSEL AND ARE MADE IN OUR OWN RIGHT AS CROWN COUNSEL WHO WILL OBVIOUSLY BE VERY INVOLVED WITH ANY PART OF A CHARTER OF RIGHTS WHICH AFFECTS CRIMINAL PROSECUTIONS. WE DO NOT SPEAK ON BEHALF OF OUR RESPECTIVE MINISTRIES NOR ON BEHALF OF THE GOVERNMENTS OF WHICH OUR MINISTERS ARE A PART.

THE CANADIAN ASSOCIATION OF CROWN COUNSEL IS CONCERNED THAT IN A CHARTER OF RIGHTS WHICH INCLUDES LEGAL RIGHTS CARE BE TAKEN TO ENSURE THAT, IN DECLARING AND ENSHRINING LEGAL PRINCIPLES WHICH ARE FUNDAMENTAL TO OUR CRIMINAL JUSTICE SYSTEM, WE DO NOT IMPAIR THE FAIRNESS, THE FLEXIBILITY, AND THE EFFECTIVENESS OF THAT SYSTEM BY STRANGLING IT WITH ENDLESS ARGUMENTS IN THE COURTROOM BASED ON FIXED (ENTRENCHED) BUT VAGUE CONSTITUTIONAL PROVISIONS.

THERE IS MERIT IN MAKING A DECLARATION OF PRINCIPLE AND EMPHASIZING THE IMPORTANCE OF THAT PRINCIPLE BY INCLUDING A STATEMENT OF IT IN THE CHARTER OF RIGHTS. THERE IS LITTLE MERIT, IF ANY, IN ATTEMPTING TO DISTILL, INTO LANGUAGE SUITABLE FOR A CONSTITUTION, THE DETAILED PROVISIONS OF THE EXISTING SUBSTANTIVE AND PROCEDURAL CRIMINAL LAW ONLY TO REALIZE LATER, AFTER IT IS TOO LATE, THAT BOTH THE SUBSTANTIVE CRIMINAL LAW AND THE LAW OF CRIMINAL PROCEDURE, AND THE METHODS OF THEIR APPLICATION, ARE SIMPLY NOT CAPABLE OF COMPREHENSIVE AND ACCURATE STATEMENT IN LANGUAGE THAT COULD POSSIBLY BE INSERTED IN A CONSTITUTION.

WE SUBMIT MOREOVER THAT IT IS NOT POSSIBLE, IN CONSTITUTIONAL LANGUAGE, TO FORESEE AND ALLOW FOR THE DEGREE OF EVOLUTION THAT WILL INEVITABLY OCCUR IN YEARS TO COME IN NOT ONLY THE APPLICATION OF THE CRIMINAL LAW AND PROCEDURE BUT ALSO IN SOME OF THAT SUBSTANTIVE AND PROCEDURAL LAW ITSELF.

WE OFFER THE FOLLOWING COMMENTS WITH RESPECT TO THE "LEGAL RIGHTS" SECTION OF THE CHARTER AND WITH RESPECT TO SECTIONS 1, 2 AND 26 WHICH ARE RELEVANT TO THE ADMINISTRATION OF CRIMINAL JUSTICE. FOR CONVENIENCE, WE DEAL WITH THOSE SECTIONS IN THE ORDER IN WHICH THEY APPEAR IN PART 1 OF THE PROPOSED CONSTITUTION ACT 1980.

SCHEDULE B  
CONSTITUTION ACT, 1980

PART I

CANADIAN CHARTER OF RIGHTS AND  
FREEDOMS

*Guarantee of Rights and Freedoms*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

Rights and  
Freedoms in  
Canada

*Fundamental Freedoms*

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of information; and
- (c) freedom of peaceful assembly and of association.

Fundamental  
freedoms

*Democratic Rights*

3. Every citizen of Canada has, without unreasonable distinction or limitation, the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Democratic  
rights of  
citizens

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Duration of  
elected  
legislative  
bodies

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House

Continuation in  
special  
circumstances

Submitted by The Canadian Association  
of Crown Counsel - November 27, 1980.

Section 1.

Add to the end of section 1 the following:

"... including such limits as are or may be prescribed by statutes which clarify or define such rights or freedoms."

Comment:

This may already be envisaged by the existing section 1. To add it would be to clarify and would perhaps assist in answering the criticisms of those who say that an entrenched Charter of Rights is contrary to the principle of Parliamentary supremacy. At the same time it would not be inconsistent with the concept of entrenchment. It may arguably be a lesser form of entrenchment but it is still entrenchment because Parliament could not abrogate or remove a fundamental right or freedom. At the same time Parliament could at least share with the Courts the role of clarifying and defining such rights or freedoms.

Section 2.

We question the necessity and the wisdom of including the word conscience in s.2 and particularly its placement as an equivalent of religion in s.2(a). If it belongs anywhere, it is in s.2(b) and yet an analysis of the other words in s.2(b) shows that it is not necessary there either.

Sections 3 to 6.

No comment.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Annual sitting of legislative bodies

*Mobility Rights*

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights of citizens to move

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

Rights to move and gain livelihood

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

Limitation

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

*Legal Rights*

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Life, liberty and security of person

Section 7  
Satisfactory.

8. Everyone has the right not to be subjected to search or seizure except on grounds, and in accordance with procedures, established by law.

Search or seizure

Section 8.  
Satisfactory.

9. Everyone has the right not to be detained or imprisoned except on grounds, and in accordance with procedures, established by law.

Detention or imprisonment

Section 9.  
Satisfactory.

10. Everyone has the right on arrest or detention

Arrest or detention

Section 10.

(a) to be informed promptly of the reasons therefor;

(a) The word "promptly" should be replaced with some wording which does not demand as much immediacy. The existing Bill of Rights uses the same terminology in the same connection but the existing Criminal Code wording in this connection is "... give notice where it is feasible to do so ..." (s.29). Wording such as "as soon as practicable" would therefore be preferable to the word "promptly".

(b) to retain and instruct counsel without delay; and

(b) Satisfactory.

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

(c) Satisfactory.

proceedings in  
criminal and  
civil matters

11. Anyone charged with an offence has the right

(a) to be informed promptly of the specific offence;

(b) to be tried within a reasonable time;

(c) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(d) not to be denied reasonable bail except on grounds, and in accordance with procedures, established by law;

(e) not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence;

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

(g) to the benefit of the lesser punishment where the punishment for an offence of which he or she has been convicted has been varied between the time of commission and the time of sentencing.

Section 11.

(a) Same comment as with s.10(a) with respect to the word "promptly."

The words "specific offence" should be replaced with "offence with which he is charged".

(b) Satisfactory.

(c) Satisfactory.

(d) Satisfactory.

(e) Satisfactory.

(f) Satisfactory.

(g) Satisfactory.

Treatment or  
punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Section 12.  
Satisfactory.

Self-crimina-  
tion

13. A witness has the right when compelled to testify not to have any incriminating evidence so given used to incriminate him or her in any other proceedings, except a prosecution for perjury or for the giving of contradictory evidence.

Section 13.  
Satisfactory.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted has the right to the assistance of an interpreter.

Section 14.  
Satisfactory.

*General*

25. Any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

26. No provision of this Charter, other than section 13, affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto.

27. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

28. Nothing in this Charter extends the legislative powers of any body or authority.

*Application of Charter*

29. (1) This Charter applies  
(a) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and  
(b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.

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

Section 26.  
Satisfactory.

Contrary to the suggestion of some others, this section does not enshrine nor entrench the admissibility of illegally obtained evidence any more than it enshrines the inadmissibility of such evidence. It leaves the continued evolution of the law of evidence to Parliament and the Legislatures and judicial interpretation of such laws as they may pass.