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SUBMISSIONS TO---------- The Honourable George A. Kerr, Q.C.,
Provincial Secretary for Justice

The Honourable Dalton Bales, Q.C.,
Attorney General

The Honourable John Yaremko, Q.C.,
Solicitor General

RE---------- THE EFFECTIVE RIGHT TO COUNSEL
IN ONTARIO CRIMINAL CASES

FROM---------- THE CANADIAN CIVIL LIBERTIES ASSOCIATION

DELEGATION---------- J. S. Midanik, Q.C., (President) — A. Alan Borovoy (General Counsel)

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(Chairman, Hamilton Branch)

Toronto — November 30, 1972

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INTRODUCTION

The Canadian Civil Liberties Association is a national organization, many of whose members live in the Province of Ontario. Our membership includes a wide variety of callings and interests - lawyers, writers, professors, businessmen, trade unionists, minority group leaders, television personalities, actors, etc.

Among the objectives which inspired the creation and growth of the Canadian Civil Liberties Association is the desire to promote legal protections against the unreasonable invasion by society of the freedom and dignity of the individual. It is not difficult to appreciate the relationship between these goals and the subject matter of this brief - the effective right to counsel in criminal cases.

Inherent in the criminal process is the potential for substantial invasions of individual liberty. One of the most fundamental safeguards which stands between the freedom of the individual and the power of the state is the right of the individual to avail himself of competent legal counsel.

It is to make this right more viable in the Province of Ontario that we present the ensuing submissions.

The participation of legal counsel is one of the fundamental requirements of a fair trial. Nowhere is this more true than in the case of the criminal trial. The person accused of a criminal offence finds himself in conflict with the whole of society. All at once, he becomes the target of our collective powers and resources. In addition to such staggering odds, the accused faces dire consequences. The price of defeat could mean the loss of his freedom.

The lawyer is the indispensable instrument of equity between the powerful state and the beleaguered accused. Though the law clothes the accused with many safeguards, it cannot endow him with the ability to use them. Trained in the art of advocacy and the complexities of law, the lawyer is the one, perhaps the only one, who can transform theoretical safeguards into practical protections.

In Ontario, recognition of these truths is reflected in the ambitious character of our legal aid plan. By subsidizing the legal fees of those without means, the plan has succeeded in reducing the number of accused who are tried without counsel.

But representation at trial tells only part of the story. The canons of due process require also representation before trial. Many accused people need and seek legal counsel at a much earlier stage of the proceedings. If they are arrested, they may want to know how to secure their pre trial release. They may also want and need to know what they should say or refrain from saying to their captors. The provision or lack of competent legal advice at the early stages of the criminal process can substantially influence the outcome of the subsequent proceedings.

Where we can be increasingly satisfied with the progress of this Province in ensuring counsel at trial, we do not know enough about representation before trial. Involvement at trial is visible and public. Involvement before trial is confidential and private.

These considerations prompted the Canadian Civil Liberties Association to conduct a fact-finding inquiry into the issue of access to counsel during pre-trial custody.

In order to obtain this information, we interviewed 162 persons who had been arrested and who were making Provincial Court appearances during the months of September and October 1972 in 7 Ontario communities - Toronto, London, Kitchener-Waterloo, Ottawa, Hamilton, Kenora, and Sudbury. In the interests of preventing a distorted sample, our interviewers selected their informants at random. Indeed, they approached every accused person within reach who was being processed or remanded by the courts on the days in question. Apart from some 12 to 15 people who refused to be interviewed, the only reason some were missed is because they appeared and departed while our interviewers were already occupied. Thus, there is no basis for attributing any special characteristics to those we were able to interview as distinct from those who slipped away.

Because of the one-sided nature of our sources, we do not claim that our survey delineates the precise dimensions of this problem. But, because of the degree to which our material harmonizes with the findings of previous research and the experience of experts in the field[1], we believe that it reliably distinguishes the the recurring patterns from the isolated phenomena.

Of the 162 arrested persons in our survey, only 11 or 6.79% claimed to have consulted counsel during the period of their pre-trial confinement.[2] The remainder of our sample denied any custodial consultation. It is true, of course, that because of the new Bail Reform Act,[3] accused people spend substantially less time than ever before in pre-trial custody. This might trigger speculation that the failure to consult counsel was attributable primarily to the shorter duration of pre-trial incarceration.

For this reason, we investigated also what happened to our informants during the time of their arrest. 112 or 69.13% of our interviewees told us that the police questioned them during this period.[4] It appears that despite the relative shortness of pre-trial confinement, there was enough time for a stationhouse interrogation. Indeed, there was also enough time for 81 or 72.32% of those questioned to make statements to the police concerning their involvement in the alleged offences for which they were charged.[5]

Moreover, there was apparently time for a good number of the arrestees to give self-incriminating statements to the police. According to our informants, 52 or 69.33% of the 75 whose statements we could record made prejudicial admissions regarding the charges against them.[5]

It is not difficult to anticipate that in a great many of these cases, the subsequent involvement of legal counsel will be reduced to ritualistic significance. Apart from the few situations where there is evidence of police coercion, most of the confessions can be admitted as evidence at trial. Indeed, the impact of a confession is so great that many lawyers will feel obliged to advise their clients simply to plead guilty in court.

Thus the effective trial for a great many of these people is not the model envisioned by the Bill of Rights----a public hearing conducted, with the assistance of counsel, by an impartial judge. It is a private interrogation conducted, in the absence of counsel, by the very partial police.

Why, it must be asked, would so many talk when they had a right to be mute? Would the lawyer's earlier involvement effectively prevent the irreparable damage that so many accused inflict upon themselves?

One reason that many accused people talk is because they don't know their legal rights. We asked our informants whether, prior to the interrogation, the police advised them of their right to remain silent. 70 or 67.96% claimed they were not so advised.[7]

This seems to contradict the general impression of police conduct in our society. When testifying in court, police officers frequently swear that they have cautioned the accused people who made statements.

What we suspect is that a great many police officers do advise the accused of their right to silence but do so in rather a ritualistic and mechanistic manner. In other words, it seems likely that whatever advice the interrogators may have imparted was not clear enough actually to be understood by the accused.

In this connection, we can expect that a lawyer is not likely to be as mechanistic as a constable in conveying to the accused his legal rights. The lawyer is interested solely in the protection of the accused; the constable is interested also in obtaining a conviction.

We cannot assume, of course, that the failure to advise these accused people in clear terms of their right to silence means that many of them would not otherwise know their rights. As a matter of fact a number of the accused (33 or 32.04%) admitted that the police had informed them, before embarking on the interrogation.

But a large number even of this group made statements to the police (24 or 72.72%).[8] Of those making statements who received prior advice, 16 or 66.67% said that they made self-incriminating admissions.[9]

How, then, can we account for this self-destructive impulse on the part of people who knew they could legally avoid it?

As regards some of the accused who made statements (21 or 25.93%), their answer is that their statements were extracted through coercive police pressure.[10] For example, one man alleged that 4 police officers had punched him in the head, chest and groin. They stopped only after he made a self-incriminating statement. Another accused said that he was "beaten on the head" and "thrown all over for 4 hours until I admitted it...I would have told them anything to get them to leave me alone". One of the confessors claimed that he talked because the police had doused his head in a sink of water and had punched him in the face several times.

To whatever extent, of course, that a court were satisfied about the involuntary nature of pre-trial statements, it would exclude them from the evidence. But subsequent inadmissibility cannot effect retroactive prevention. In whichever of these situations the stories are true, the accused have already suffered substantially. The mere involvement of counsel earlier in the process might have deterred police misconduct. Alternatively, counsel might have been able to secure faster release from custody for at least some of these people. In that way they might have avoided completely incustodial interrogation.

But most of the statement-givers conceded that their statements had not been extracted forcibly and many admitted that they had been advised of their rights to silence. How, then, can we explain the confessions that emanated from these people?

Perhaps the most plausible explanation is found in what the United States Supreme Court described as "the compulsion inherent in custodial surroundings". From the moment of arrest, the accused experiences a sudden isolation from his normal sources of psychological support. All at once he is in a hostile atmosphere. His sole companionship is provided by those who arrested him and by those who are guarding him. Frequently his instant change of environment will precipitate an acute sense of anxiety. Anxiety requires relief. The accused will feel, therefore, a great psychological need to talk to some one, anyone. Often the only ones available will be the police.

Regardless of their rights and the cautions they may receive, some of the accused may be tempted to confess in order to curry favour with the police. From their point of view, however misguided, a confession might be an instrument of counter strategy designed to enhance their position. Sometimes the confession is less intentional. Emotionally distraught prisoners have been known to make statements which neurotically distort and even falsify the events in question.[12] The early introduction of the lawyer could relieve much of the intimidating character of the custodial situation. It could provide intelligent strategy and psychological support in a setting so devoid of emotional foundations.

None of the foregoing, of course, should be taken as precluding the possibility that in some situations the custodial confession might serve the interests of the accused and, indeed, the processes of justice. What we are saying is that custodial interrogations are sufficiently fraught with danger that the accused should have effective access to competent advice before he commits any irreparable injury to himself.

The dichotomy between the importance of early consultation and the fact that so few exercise it, led us to investigate the machinery for facilitating custodial communication between counsel and accused.

In the first place, we wanted to learn what provisions are made to inform arrested people of their custodial rights to counsel. As indicated above, we simply cannot expect people to know their rights. Moreover, even those who know their rights, might be intimidated about asserting them in the frightening climate of a jail or station-house.

Accordingly, we asked what steps the police took to advise the arrested persons of their right to counsel and/or legal aid. 127 or 78.40% of our informants maintained that at no stage of their confinement did the police advise them of this fundamental safeguard.[13]

Another relevant factor in facilitating consultation concerns the issue of access to the telephone. The telephone is virtually the only practical avenue of custodial contact between accused and counsel.

Of our 162 informants, only 65 requested access to the telephone.[14] And, of the 65 who made this request, 21 or 32.31% claimed that the request was denied.[15] But the granting and denial of telephone privileges does not reveal the full range of the problem involved. Another important consideration concerns the time at which the request was granted. 17 or 41.46% of the people whose requests were granted, were allowed to exercise the telephone privileges immediately upon request.[16] By contrast, however, 19 or 46.35% of those whose requests were granted, had to wait 1 hour or more before they could exercise the privilege.[17] Significantly, 12 or 29.2% of this group had to wait two hours or more.[18]

Another reason for the small number of accused who consulted counsel at this stage of the proceedings probably arises from the fact that the greatest number of them do not know precisely whom to call. Most accused people have neither the means nor the connections to comandeer a consultation immediately upon requesting it. This is borne out by another finding of our survey.

Despite the fact that 17 people were given immediate telephone calls and despite the fact that 11 had a consultation during their period in custody, not one of the 112 arrestees who were questioned by the police experienced such consultation before the police interrogation![19]

The canons of due process and the integrity of our present legal aid plan require that the Province of Ontario take affirmative steps to ensure effective access to counsel during pre-trial detention.

The Ontario Government should instruct all police departments and police officers to inform arrested persons in clear terms of their right to silence, counsel, and legal aid at the earliest practicable moment after the arrest is effected. The idea is to universalize and legitimate the assertion of the right to counsel. Prisoners will be less intimidated about seeking contact with counsel if those in authority advise them that it is proper to do so.

In order to make this measure workable, the Government must also instruct police departments and police officers to take all reasonable steps for the effectuation of communication between accused and counsel at the earliest practicable opportunity following arrest. There is no point in having and knowing of the right of immediate consultation if access to communication is denied or delayed. This implies immediate access to the telephone in an area sufficiently private where the conversation cannot be overheard. It may mean also the allocation of a private room for counsel and accused to meet personally if they choose to do so.

We have had enough experience to know, however, that the imposition of instructions from above are not always translated into reality down below. The implementation by some police officers may be half-hearted; the responses by some accused may be non assertive. As a way of minimizing such problems, the Government should instruct the police to desist from all custodial interrogation until the consultation with counsel has occurred or, in the alternative, until the accused has specifically waived his right to consultation.

The custodial interrogation and the incriminating statement represent the most prevalent and prejudicial consequence of the failure to consult immediately with counsel. It represents also what so often motivates the police to "cut corners" in their arrest and investigative procedures.

Thus, it might help if the police were placed under a specific duty to facilitate the consultation as a condition of their right to conduct the inquisition.

As we have already noted, however, the prisoner may not know what lawyer to consult. Unless he has the means or a past relationship with a particular lawyer, the advice of the police and the availability of a telephone may be of little value to him.

This impels us to recommend a system of duty counsel assignable to the lock-ups and to the jail houses. Just as the Government recognized the importance of duty counsel at the time of the accused's first appearance in court, so too it must now recognize the importance of duty counsel at the point when the accused enters the custodial situation. This does not mean necessarily that duty counsel must be physically present 24 hours a day in all stations and lock-ups. But it does mean that they must be available 24 hours a day for immediate consultation. The decision to appear in person at the lock-up or station could depend upon the exigencies that are conveyed in the initial telephone conversation. What this would require of Government is the provision of funds so that an adequate contingent of lawyers would be on call to all these places at all times on a rotating basis. It might require also the cooperation of the Law Society and bar associations to act as agencies of lawyer recruitment.

Just as emergency medical and dental services are available in many places on a 24-hour-a-day basis, so too must legal services be available. Arrests occur at all times of the day and night. The custodial situation is pregnant with opportunities for irreparable prejudidice to those in its grasp. The fairness of the subsequent trials depends heavily upon what happens at this point in the process.

Society must allocate the resources and recruit the lawyers. A 24-hour-a-day duty counsel service for custodial consultation is vital to the fairness of our criminal proceedings.

Of course, the adoption of such measures could result in fewer confessions. This realization gives rise to a consideration of the implications for law enforcement. To what extent would fewer confessions undermine crime resolution? How dependent is the control of crime on the results of jail-house interrogation?

The American experience may provide some useful insights into this problem. For a number of years, the Americans have lived with a legal rule which makes custodial access to counsel a condition of admitting custodial confessions in court.[20] Although this rule has led in many places to a reduction in the confession rate, competent surveys disclose no significant reductions in the conviction or crime solution rate.[21] Moreover, as the Yale Law Journal observed, the practical experience under the new rule has persuaded a number of top level U.S. law enforcement experts that "the value of confessions has been grossly exaggerated".[22] The officials expressing such views include former U.S. Attorney General Ramsey Clark, former U.S. Attorney General Nicholas Katzenbach and California Attorney General Thomas C. Lynch.[23]

A similar opinion has been expressed also by a group of Canadian experts. A comparative survey on how a number of countries handle the problem of custodial confessions led the Canadian Committee on Corrections to remark that excessive reliance on jail house questioning may "actually be detrimental to law enforcement by removing the incentive to develop more imaginative and effective investigation techniques...".[24]

Thus it is not at all clear that the enforcement of law is the beneficiary of custodial interrogation. But it is quite clear that the presumption of innocence is its victim. The easier it is to make accused people talk, the greater might be the number of arrests on inadequate evidence. The police will be increasingly tempted to arrest on mere suspicion in the hope that the interrogation will produce the missing link in their case. Surely, however, our legal tradition seeks to protect innocent people not only against criminal convictions, but also against criminal prosecutions. Prosecution, itself, is an awesome ordeal. As much as possible, the objective is to spare innocent people this ordeal. That is why police should have substantial evidence before they arrest and prosecute.

interrogations made easy undermine this objective. If the interrogation is necessary to make the case, it is better not to make the arrest. On the other hand, the less necessary the interrogation is to the case, the less risky it is to dispense with it.

Even at that, however, it is not the police interrogation per se to which we have taken exception. It is the custodial interrogation without the effective opportunity for legal advice. In view of all these considerations, we believe that the recommendations we have made would strike a fair balance between the goal of personal liberty and the goal of legal enforcement.

Indeed, the Canadian Bill of Rights appears to have struck the same balance. The Bill of Rights propounds the right of all arrested persons to"retain and instruct counsel without delay" (underlining ours).[25] We believe that, within their respective jurisdictions, the provinces have a vital role to play in transforming this noble aspiration into practical reality.

Accordingly, the Canadian Civil Liberties Association requests the Government of Ontario to adopt the following measures:

1. Instruct all police departments and police officers to inform accused people in clear terms, at the earliest practicable opportunity following arrest, of their rights to silence, counsel, or subsidized legal aid.
2. Instruct all police departments and police officers to take reasonable steps for the effectuation of communication between the accused and counsel (including immediate telephone privileges in a situation of privacy) at the earliest practicable opportunity following arrest.
3. Instruct all police departments and police officers that they should conduct no custodial interrogations unless:
   a) the accused has consulted counsel or
   b) the accused has affirmatively waived his right to consult counsel
4. Establish a system of duty counsel assignable to all lock-ups and jail houses on a 24-hour-a-day rotating basis.

Respectfully submitted

CANADIAN CIVIL LIBERTIES ASSOCIATION

FOOTNOTES

1. Canadian Civil Liberties Education Trust, Due Process Safeguards and Canadian Criminal Justice - A One Month Inquiry; published October 1971.
2. See Appendix (Table #2)
3. R.S.C. 1970, c.2 (2nd Supp.)
4. See Appendix (Table #3)
5. See Appendix (Table #4)
6. See Appendix (Table #5)
7. See Appendix (Table #6)
8. See Appendix (Table #7)
9. See Appendix (Table #7)
10. Of 81 statements made, 60 claimed they were voluntary and 21 involuntary.
11. Miranda v. Arizona, 384 U.S. 436 at 458 (1966)
12. Driver, "Confessions and the Social Psychology of Coercion", 82 Harvard Law Review 42 (1968), at pp. 58-59
13. See Appendix (Table #8)
14. See Appendix (Table #9)
15. See Appendix (Table #9)
16. See Appendix (Table #9A)
17. See Appendix (Table #9A))
18. See Appendix (Table #9A)
19. See Appendix (Table #3)
20. Miranda v. Arizona (Supra, note 11). The United States Supreme Court held that any statement obtained from a suspect as a result of a police interrogation was not admissible in evidence against him unless the following safeguards were complied with:
    1. The suspect must first be told that he has the right to remain silent, and that anything he says may be given in evidence against him at his trial.
    2. The suspect must also be told that he has the right to obtain the assistance of counsel, and that, if he cannot afford to retain counsel of his choice, counsel will be appointed for him. Furthermore, he may not be interrogated in the absence of counsel unless he has given a clear and intelligent waiver of this right, and that such a waiver may be withdrawn at any time during interrogation, at which point the interrogation must cease until counsel is present or until the waiver is renewed.

21. Seeburger and Wettich, "Miranda in Pittsburgh: A Statistical Study" 29 Univ. Pittsb. L. Rev. (1968); "Interrogations in New Haven: the Impact of Miranda", 76 Yale L.J. 1519 (1967).

22. 76 Yale L.J. 1519 at 1579

23. New York Times, May 18, 1966, p. 27; New York Times May 1, 1967, p. 24; U.S. News and World Report, June 27, 1966, p. 32.

24 Report of the Canadian Committee on Corrections, March 1969, p. 143, n.

25 R.S.C. 1970, Appendix III, S. 2(c) (ii).

APPENDIX - Tables 1 - 10

Table #1. Total Accused

All Cities	Toronto	London	Kitchener-Waterloo	Ottawa	Hamilton	Kenora	Sudbury
162	49	20	20	15	22	18	18

Table #2. Accused Who Consulted Counsel While In Custody

	Total Accused	Consulted Counsel
All Cities	162	11 6.79%
Toronto	49	4 8.16%
London	20	1 5.00%
Kitchener-Waterloo	20	4 20.00%
Ottawa	15	0 0.0%
Hamilton	22	2 9.09%
Kenora	18	0 0.0%
Sudbury	18	0 0.0%

Table #3. Accused Questioned By Police While In Custody

	Total Accused	Questioned	Questioned Before Consulting Counsel
All Cities	162	112 69.13%	112 100.00%
Toronto	49	41 83.67%	41 100.00%
London	20	15 75.00%	15 100.00%
Kitchener-Waterloo	20	13 65.00%	13 100.00%
Ottawa	15	9 60.00%	9 100.00%
Hamilton	22	11 50.00%	11 100.00%
Kenora	18	11 61.11%	11 100.00%
Sudbury	18	12 66.67%	12 100.00%

Table #4. Statements Given By Questioned Accused

	Total Accused Questioned	Total Accused Who Gave A Statement
All Cities	112	81 72.32%
Toronto	41	24 58.54%
London	15	13 88.66%
Kitchener-Waterloo	13	10 76.92%
Ottawa	9	9 100.00%
Hamilton	11	9 81.81%
Kenora	11	8 72.72%
Sudbury	12	8 66.67%

Table #5. Accused who Gave Incriminating Statements

	Total Accused Who Gave Statements	Accused Who Gave Incriminating Statements
All Cities	75 (u/k -6)	52 69.33%
Toronto	18	13 72.22%
London	13	11 84.61%
Kitchener-Waterloo	10	5 50.0%
Ottawa	9	6 66.67%
Hamilton	9	3 33.33%
Kenora	8	7 87.50%
Sudbury	8	7 87.50%

Table #6. Questioned Accused Advised of Right to Remain Silent

	Total Questioned Accused	Not advised	Advised
All Cities	103 (u/k-9)	70 67.96%	33 32.04%
Toronto	35 (u/k-6)	30 85.72%	5 14.28%
London	15	6 40.00%	9 60.00%
Kitchener-Waterloo	11 (u/k-2)	4 36.36%	7 63.64%
Ottawa	8 (u/k-1)	6 75.00%	2 25.00%
Hamilton	11	7 63.64%	4 36.36%
Kenora	11	11 100%	0 0.0%
Sudbury	12	6 50.00%	6 50.00%

Table #7. Statements Given By Questioned Accused Advised of Right to Remain Silent

	Total Questioned Accused Advised	Total Statements	Incriminating Statements
All Cities	33	24 72.72%	16 66.67%
Toronto	5	4 80.00%	1 25.00%
London	9	8 88.88%	7 87.50%
Kitchener-Waterloo	7	4 57.14%	3 75.00%
Ottawa	2	2 100.00%	2 100.00%
Hamilton	4	3 75.00%	1 33.33%
Kenora	0	0	0
Sudbury	6	3 50.00%	2 66.67%

Table #8. Accused Advised of Right to Counsel or Legal Aid

	Total Accused	Advised	Not Advised
All Cities	162	35 21.60%	127 78.40%
Toronto	49	4 8.16%	45 91.84%
London	20	9 45.00%	11 55.00%
Kitchener-Waterloo	20	9 45.00%	11 55.00%
Ottawa	15	2 13.33%	13 86.67%
Hamilton	22	9 40.90%	13 59.10%
Kenora	18	1 5.55%	17 94.45%
Sudbury	18	1 5.55%	17 94.45%

Table #9. Access to Telephone

	Total Accused	Calls Requested	Calls Granted
All Cities	162	65 40.12%	44 67.69%
Toronto	49	30 61.22%	22 73.33%
London	20	4 20.00%	3 75.00%
Kitchener-Waterloo	20	8 40.00%	6 75.00%
Ottawa	15	5 33.33%	2 40.00%
Hamilton	22	11 50.00%	7 63.63%
Kenora	18	1 5.55%	1 100.00%
Sudbury	18	6 33.33%	3 50.00%

Table #9A. Time (After Request) of Phone Calls Granted

	Total Calls Granted	Immed.	One half hour up to one Hr.	One Hour	2 Hours or More
All Cities	41 (u/k-3)	17 41.46%	5 12.19%	7 17.08%	12 29.27%