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SUBMISSIONS TO----------THE HONOURABLE OTTO LANG
Minister of Justice and Attorney General
of Canada

RE----------THE RIGHT TO COUNSEL

FROM----------THE CANADIAN CIVIL LIBERTIES ASSOCIATION
(on its own behalf and on behalf of its
affiliates: The Nova Scotia Civil Liberties
Association, The Fredericton Chapter C.C.L.A.,
The Hamilton Region Civil Liberties Association,
The Manitoba Branch C.C.L.A., and
The Regina Civil Liberties Association)

and

LA LIGUE DES DROITS DE L'HOMME
(Quebec Civil Liberties Union)

DELEGATION---------- FOR THE CANADIAN CIVIL LIBERTIES ASSOCIATION

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Pierre Jasmin
(Director General)

Ottawa

May 30, 1972 .

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INTRODUCTION

The Canadian Civil Liberties Association is a national organization with a cross-country membership of more than 3000 people and five affiliated chapters - the Nova Scotia Civil Liberties Association, the Fredericton Civil Liberties Association, the Hamilton Civil Liberties Association, the Manitoba Civil Liberties Association, and the Regina Civil Liberties Association.

The other participating organization in this delegation is La Ligue des Droits de l'Homme, an independent Quebec-based organization, which has been heavily involved in Quebec civil liberties issues since its inception in 1963. The membership roster of both the C.C.L.A. and La Ligue 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 these civil liberties organizations 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 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 criminal law of Canada that we present the ensuing submissions.

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Nowhere is legal counsel more indispensable than in the arena of criminal law. A person accused of a criminal offence is in conflict with the whole of society. All at once, the awesome power of the police and the mighty resources of the state are marshalled against him. In addition to these overwhelming odds, he faces dire consequences. The price of defeat could mean the loss of his freedom.

It is the lawyer, trained in the art of advocacy and steeped in the complexities of law, who can bring equity to the conflict between the state and the accused. The lawyer is the one who can breathe vitality into the sacred safeguards which we have established to protect the beleaguered accused. It is the lawyer whom we count on to effectuate the presumption of innocence, the right against self-incrimination, the right to cross-examine adverse evidence, the right to produce favourable evidence, and the right to a fair trial.

Small wonder, then, that the Canadian Bill of Rights has sanctified the right of arrested persons "to retain and instruct counsel without delay".

In January of 1970, our associated research and educational organization, the Canadian Civil Liberties Education Trust, conducted an investigation into the administration of criminal justice in the provincial courts of five cities across Canada - Halifax, Montreal, Toronto, Winnipeg, and Vancouver.[1] High in priority of issues under exploration were those matters bearing on the right to counsel.

The survey findings on this issue are disappointing indeed. Of the 553 surveyed accused persons whose cases were disposed of during the survey month, as large a number as 240 or 43.4% went through the provincial courts without legal counsel.[2] These cases include some of the most serious offences that were handled in the provincial criminal courts. Of the 121 unrepresented accused who were investigated as to the final results, over 60% went to jail for longer than 6 months and over 19% for longer than two years.[3]

Of course, since the survey many provinces have expanded their legal aid programs. It would be instructive to investigate today how far they have succeeded in reducing the rate of unrepresented accused before the provincial courts.

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But representation in court is only part of the problem concerning legal counsel. Many accused people require 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 to know what they should say or refrain from saying to their captors. Accordingly, the survey investigated their access to counsel during pre-trial custody.

We produce herewith a summary of the survey's findings concerning this issue.

1. More than 30% of the arrested persons who requested it were denied the opportunity to make a telephone call from custody.[4]
2. For those arrested persons who consulted lawyers during their confinement, the length of time in custody prior to such consultation was more than 12 hours for 79.7%, more than 24 hours for 68.8% and more than 3 days for 42.4%.[5]
3. 76% of the arrested persons were questioned by the police prior to consultation with counsel. Of the statements made, more than 96% preceded such consultation and less than 4% followed consultation.[6]
4. Almost 55% of the arrested persons gave statements to the police. More than 80% of the statements were self-incriminating.[7]

Thus, even for those who managed to secure counsel, it was often too late to help. By the time of counsel's arrival, police interrogation had already produced self-incriminating admissions from many accused people regarding the charges against them. Faced with such admissions, most of these accused people pleaded guilty in court.

In this way, so crucial a safeguard as the public trial became for so many a rather hollow ritual. For them, the effective trial was not the model envisioned by the Bill of Rights - a public hearing conducted, with the assistance of counsel, by an impartial judge. It was a private interrogation conducted, in the absence of counsel, by the very partial police.

Regrettably, there has been little indication of change in such police practices since the survey. It does not appear that many measures have been adopted to increase custodial access to counsel.

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Moreover, the present state of Canadian law provides little help. There is almost no way, in law, to compel the observance or redress the non observance of the right to counsel.

Although the Bill of Rights proclaims the right to counsel, there is no corresponding obligation on any government to supply the funds to make it possible. Indeed, there appears to be no obligation on anyone even to inform the accused of his right to counsel.[8] A police refusal to permit the attendance of counsel at an interrogation will not vitiate the subsequent trial.[9] Indeed, the police refusal to permit consultation with counsel before the interrogation may not even preclude the subsequent admission of the interrogation's incriminating results. A number of years ago the Saskatchewan Court of Appeal set aside an acquittal because a trial judge had rejected a confession where police had refused appellant permission to see her lawyer. In the words of the Appellate Court, "the fact that her request was ignored was, in our opinion, but one of a number of circumstances requiring consideration...".[10] Moreover, there is reason to doubt whether the denial of the right to counsel could lead to a lawsuit for damages or a criminal prosecution.[11]

In short, this fundamental safeguard has been reduced to legal vegetation. To be rendered animate, it must be injected with the adrenalin of remedial legislation.[12]

As we have seen, there is no necessary connection between the right and the means to retain legal counsel. The survey disclosed that, notwithstanding the Bill of Rights, a large number of accused persons was travelling through the criminal courts without legal representation. Although this situation has undoubtedly improved since the survey, we are still a long distance from providing universal legal representation in Canada. Some provinces provide substantial subsidization, others provide a more token level, most are somewhere in between. In our respectful opinion, this situation is most unsatisfactory. Indigence is not a sufficient basis for the failure to enjoy fundamental legal rights. Moreover, effective recourse to the right of counsel should depend upon the character of the deed which is impugned rather than the location of the place where it occurred. We submit, therefore, that the role of the Federal Parliament is to provide sufficient funds to guarantee in every province that all persons accused of federal offences will have practical access to legal counsel.

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The level of subsidization must secure not only representation in the courtroom, but also consultation in the jailhouse. A number of provinces now provide for duty counsel when the accused first appears in court. But, as we have seen, by the time so many cases reach the courtroom, the issues have been effectively resolved. The accused have already made statements irreparably prejudicial to their cases.

It is in the station and in the jailhouse that so many rights are irretrievably lost. Those are the places, therefore, where counsel must be available, either in person or by telephone. The whole point of the right to retain and instruct counsel without delay is defeated if there is no opportunity for consultation during the first few hours of pre-trial incarceration. This is the period in which most of the interrogations are conducted and most of the confessions are extracted. We recommend, therefore, that the Federal Parliament allocate sufficient funds to provide for the immediate accessibility of counsel at or on call to every place of pre-trial custody.

But the right and the funds to retain counsel are of very little value unless the accused has the knowledge that he may utilize them. It is significant to note in this respect that in the survey, 30% of the unrepresented accused claimed that they were not even advised that they had the right to counsel. And of those who were so advised, only 10.93% were advised by the police![13] Thus, only a small proportion of the accused who were ignorant of their rights would have acquired the knowledge in time to benefit from it. At the very least, therefore, the Criminal Code should contain a requirement that the police notify the accused of those rights and resources at the earliest practicable opportunity.

We have also seen that many accused who may have known these rights and wanted to exercise them were denied access to the telephone. Obviously, it is impossible to retain and instruct counsel without delay unless one has the opportunity to contact counsel without delay. A necessary concomitant of the foregoing, therefore, is a legislative requirement that the police take all reasonable steps to effectuate communication between the accused and counsel as soon as is practicable following arrest.

However, as we have also seen, the creation of rights and the imposition of duties do not, by themselves, ensure a satisfactory level of compliance. What is needed is what has been missing - an effective sanction. There would be no objection, of course, to a legislative enactment which would make the police failure to abide by these requirements a prosecutable offence and, if constitutional jurisdiction permits, a compensable tort. But we do not believe such retaliatory measures will suffice. Accused people rarely take such initiatives. In the Canadian Civil Liberties Education Trust survey, for example, over 89% of those who claimed to have been assaulted by the police resolutely refused to take action for the redress of their grievances. When asked why, most of them contended that it would not do any good.[14]

Indeed, there would appear to be some basis for this skepticism. Criminal prosecutions in court are handled by the same Crown Attorney who is in daily co-operation and association with the police. This would generate the fear that prosecution of the police will not be as vigorously pursued as prosecution by the police. When the accused is a police officer, the complainant would not expect fellow officers to perform the kind of conscientious investigation that characterizes their other work. Nor does civil court action for damages appear as a very satisfactory avenue. Civil litigation is expensive, time-consuming, emotionally taxing,and seemingly interminable.

We believe that a more workable sanction would make police compliance with the foregoing duties a condition for the admissibility of incriminating statements. If the police failed to permit and provide for consultation with counsel, they should be precluded from tendering custodial confessions.

In our view,such a sanction would suit such breaches. The incriminating statement represents 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.

Moreover, this proposal is a corollary of the present law which requires that custodial statements be voluntary in order to be admissible. In our view, very few custodial statements by the accused qualify for the adjective "voluntary".

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 this 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 someone, anyone. Often, the only ones available will be the police![15]

No doubt, it was an appreciation of these realities that led the United States Supreme Court to impugn the voluntary character of custodial interrogation, even in the absence of brutality, the third degree, or other manipulative strategems. According to the American Court, prisoner propensity to talk is largely attributable to "the compulsion inherent in custodial surroundings"![16]

Not only is the voluntariness of the custodial statement suspect, but so also is its reliability. Sometimes the emotional condition of the accused in this intimidating situation propels him to make statements which exaggerate, distort, or even falsify the events connected with the offence.

> " In an extreme case, the feeling of shame at being brought into an arrest situation might lead to a false confession. ...Spontaneous but false confessions are known to result from mental illness, especially neuroses where the individual develops an illusory memory of past conduct...equally suspect are the confessions of healthy persons seized with hysteria"![17]

In order, therefore, to make more viable the right of counsel, we would recommend that no self-incriminating statement made in custody after arrest be admissible as evidence unless, in addition to proving its voluntariness, the Crown also proves the following:

1. The accused consulted with counsel before the interrogation or
2. counsel was present during the interrogation or
3. the interrogators first advised the accused of his rights to silence, to counsel or legal aid, and provided a reasonable opportunity to effectuate this right of consultation, and the accused expressly waived such rights in writing.

Would such additional safeguards for the accused mean less efficiency for the police? How vital to crime resolution is custodial interrogation?

In the United States where the famous case of Miranda v Arizona[18] insinuated into American law protections comparable to the ones we are advocating expert opinion seems to be quite divided. What is significant, however, is the number and stature of the experts who minimize the value of interrogations and confessions in the control of crime.

Consider, for example, the statistical survey of Miranda in Pittsburgh.[19] In comparing conviction rates, Seeburger and Wettick found that the pre Miranda rate was 66.8% and the post Miranda rate was 66.4%. This led to the conclusion that, notwithstanding the additional protections afforded by Miranda and a significant decline in the confession rate since Miranda, "the conviction rate has remained steady". In comparing clearance rates,[20] the authors found that the post Miranda rate actually exceeded the pre Miranda rate by 1.4%

Consider also the New Haven study on interrogations.[21] A group of researchers from the Yale Law School spent a summer in the mid 1960's investigating and analyzing 120 police interrogations in a New Haven jail.

In a Yale Law Journal article, these researchers expressed the following opinion about the need for interrogations:

> "In almost every case...the police had adequate evidence to convict the suspect without any interrogation. Interrogation usually just cemented a cold case or served to identify accomplices".[22]

The article went on to summarize a surprising trend which had developed among some law enforcement officials in the United States.

> 'In the year since the decision (Miranda), however, a small but growing number of officials... have come to the conclusion that 'the value of confessions in law enforcement has been grossly exaggerated'. They argue that most cases can be solved by other investigative techniques.[23]

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.[24]

Indeed, some law-enforcement authorities believe that the less recourse the police have to interrogation techniques, the more likely they are to improve their professional competence.

Commenting on Miranda, no less an authority than Ramsey Clark made the following remark:

> "In fact, Miranda can help the police. It will force professionalization if it is implemented. No longer permitted to sit around in station houses asking endless questions, police will be compelled to use scientific methods of crime resolution".[25]

In the words of former Los Angeles District Attorney Evelle Younger,

> "It begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient, and professional level of law enforcement".[26]

A similar view has also been expressed by some Canadian experts. The Canadian Committee on Corrections remarked that excessive reliance on questioning may "actually be detrimental to law enforcement by removing the incentive to develop more imaginative and effective investigation techniques..."[27]

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 it is not the police interrogation per se to which we have taken exception. It is the custodial interrogation without the benefit of legal advice. In view of all these considerations, we believe that the safeguards we have advocated would strike a fair balance between the goal of personal liberty and the goal of legal enforcement.

A few years ago in the Harvard Law Review, an article on confessions made the following observations, "on the whole there is probably little question that the police in Canada are less restricted than in many other common law countries".[28]

The Canadian Civil Liberties Association respectfully submits that there is no valid basis for such a state of affairs. Crime in Canada is no greater a problem than it is in these other countries and the police in Canada are no less efficient than they are in these other countries.

For what reason, then, do we endow Canadian police with greater powers and Canadian accused with fewer safeguards? In the face of the specific provisions of the Bill of Rights, this will appear inconsistent at best and hypocritical at worst. In view of the increasing alienation of large segments of our population from our democratic institutions, it is imperative that we make a more impressive effort to close the gap between our practical performance and our philosophical pretensions.

Accordingly, the Canadian Civil Liberties Association requests the Government of Canada to introduce into Parliament legislation to provide for the following:

1. Sufficient funds to guarantee in every province and territory that all persons accused of federal offences have practical access to legal counsel both in the courtroom and in the station house.
2. A police requirement to inform accused people, at the earliest practicable opportunity following arrest, of their rights to silence, counsel or subsidized legal aid.

3. A police requirement to take all reasonable steps for the effectuation of communication between the accused and counsel at the earliest practicable opportunity following arrest.

4. The inadmissibility of all self-incriminating statements made in custody unless, in addition to proving their voluntariness, the Crown proves the following:
   a) the accused consulted with counsel before the interrogation; or
   b) counsel was present during the interrogation; or
   c) the police complied with requirements 2 and 3 (above) before the interrogation, and the accused expressly waived these rights in writing.

It is our respectful submission that these proposed amendments represent the minimum of additional legislation which must be enacted if we are to invest, with substantive value, our declarations on the right to counsel.

Respectfully submitted,

Canadian Civil Liberties Association
(on its own behalf and on behalf of its affiliates)
and
La Ligue des Droits de l'Homme

FOOTNOTES

1. Canadian Civil Liberties Education Trust, Due Process Safeguards and Canadian Criminal Justice - A One Month Inquiry; published October 1971.

2. Ibid. pp.37, 84 (Table #35). It would appear that there is a direct link between the amount of subsidized legal aid and the level of legal representation. Compare, for example, the survey findings for representation in Toronto (73.39%) and in Winnipeg (45.49%). At the time of the survey, the Ontario budget for legal aid was substantially higher than in any other part of the country. Manitoba, on the other hand, had a comparatively small legal aid budget.

3. Ibid. p. 37

4. Ibid. pp.26, 65 (Table #14).

5. Ibid. pp. 27-28, 67 (Table #15).

6. Ibid. pp. 28, 68 (Table #16).

7. Ibid. pp. 29, 68 (Table #16).

8. Regina v. Piper (1965), 51 D.L.R. (2d) 534 (Man. C.A.); Regina v. DeClerco, [1966] 2 C.C.C. 190 (Ont. C.A.).

9. Regina v. Steeves, [1964] 1 C.C.C. 266 (N.S.S.C.).

10. Rex v. Emelo (1940), 74 C.C.C. 76 at 81 (Sask. C.A.) see also: Brian A. Grosman, "The Right to Counsel in Canada," (1967) 10 Can. Bar J. 199. "The denial of the right to counsel is not, in Canada, considered such an unfair practice or fundamental violation of an accused's rights as to result in the exclusion of evidence obtained in violation of that right." (p.203)

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

12. A Canadian case which expressed a view somewhat contrary to the foregoing line of cases is Regina v. Ballegeer, [1969] 1 D.L.R. (3d) 74 (Man. C.A.). In that case the sanction for the denial of counsel was permission for the accused to change his plea from "guilty" to "not guilty". In view of the flexible attitude of our courts to changing pleas, this case may be distinguishable on its facts. In any event, affirmative legislation could resolve whatever ambiguities exist in the present law.

13. C.C.L.E.T., op. cit., p.84 (Table #36).

14. Ibid., pp. 32, 73 (Tables #21, #22).

15. Driver, "Confessions and the Social Psychology of Coercion", 82 Harvard Law Review 42 (1968).

16. Miranda v. Arizona, 384 U.S. 436 at 458 (1966).

17. Driver, op. cit., pp. 58-59.

18. Supra, note 16. 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.

19. Seeburger and Wettick, "Miranda in Pittsburgh: A Statistical Study", 29 Univ. Pittsb. Law Rev. 1 (1968).

20. A case is considered "cleared" once the police have apprehended the persons they believed to be responsible for the crime regardless of whether the persons are eventually convicted. The clearance rate is considered some measure of crime solution.

21. "Interrogations in New Haven: the Impact of Miranda". 76 Yale Law J. 1519 (1967).

22. Ibid. p. 1585.

23. Ibid. p. 1579.

24. New York Times, May 18, 1966, at p. 27, col.1; New York Times, May 1 1967, at p. 24, col. 4; U.S.News and World Report, June 27, 1966, at p. 32.

25. Ramsey Clark, Crime in America, Simon and Schuster, (New York: 1970), page 325.

26. Los Angeles Times, October 2, 1965, p.1.

27. Supra, note 11.

28. "Developments in the Law of Confessions," 79 Harvard Law Rev. 935 at 1106 (1966).