SUBMISSIONS TO THE SENATE

HOUSE OF COMMONS

SPECIAL JOINT COMMITTEE

ON THE CONSTITUTION OF CANADA

BY

THE CANADIAN ASSOCIATION OF CROWN COUNSEL

REPRESENTED BY

RODERICK M. McLEOD, Q.C.,
TORONTO, ONTARIO.

AND

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OTTAWA

NOVEMBER 27TH, 1980

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 CONCENSUS 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.

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BRIEF

CONCERNING THE PROPOSED RESOLUTION

RESPECTING THE CONSTITUTION OF CANADA

PRESENTED ON BEHALF OF

THE CANADIAN ASSOCIATION OF CHIEFS OF POLICE

LAW AMENDMENTS COMMITTEE

TO

THE SENATE/HOUSE OF COMMONS SPECIAL JOINT

COMMITTEE ON THE CONSTITUTION OF CANADA

ON NOVEMBER 27, 1980

The Canadian Association of Chiefs of Police is of the firm opinion that a Canadian Charter of Rights and Freedoms enshrined in a Constitution is neither necessary nor desirable.

GENERAL PHILOSOPHY

In its legislative function, Parliament has the responsibility to be the primary guardian of the rights of Canadian citizens. The courts have a very important role in applying these rights in individual cases, but it is Parliament's function, not that of the courts, to decide what rights all citizens should enjoy. This Charter of Rights will result in Parliament abdicating much of its responsibility to legislate in this area by transferring authority to the courts. Under the Charter, the individual Judge will have the power to over-rule Parliament on a number of matters, including such questions as the powers and duties of policemen in the enforcement of the criminal law, and we do not approve of this.

This intention of the Government is clearly indicated in Sections 2 and 7. In that respect, it is only fair to mention the words expressed by the Honourable Louis Philippe PIGEON, former member of the Supreme Court of Canada, at the third Colloque Quebecois held on May 24th last. This meeting on Administrative Justice had been organized jointly by the Research Laboratory on Administrative Justice and the Quebec Division of the Canadian Bar Association, in Quebec.

At that time, the Honourable Mr. Justice PIGEON delivered a speech entitled, "Parliament Sovereignty, the Right and Liberties Charters, and the Judiciary Power".

An excerpt on Page 3 reads as follows:

> "What I wish to underline after this historical reminder is that if we consider the foreseen effect of a Rights Charter, it is imperative to realize that this will involve transferring a large part of legislative power to the courts".

Furthermore, in an article entitled, "Constitutionalism in Canada, Legislative Power and a Bill of Rights", published in 1968 under the title, "The Fourteenth Amendment", on pages 174 and 175, Chief Justice Bora LASKIN stated:

> "The possibility of an entrenched Bill of Rights raised deep concern about what would happen to the balance struck over the years, by judicial decision and conventional practice, between national and state power promulgation of such a Bill of Rights. Even if agreement on its language and range was reached, it would, of course, flout the principle of parliamentary supremacy in a way which the mere distribution of legislative power does not. It is one thing to divide all

> law making authority (and Canada clings to a doctrine of exhaustiveness of the distribution) between two levels of government; it would be a completely different thing to deny to both levels law-making authority in certain fields".

On the other hand, at Page 11 of this speech, the Honourable Mr. Justice PIGEON mentions the views expressed by Mr. Justice DIXON of the Supreme Court of Canada, who said:

> "... Canadian courts have had little experience in weighing and balancing larger societal interests and values. Yet this is precisely what they have been asked to do by the Bill of Rights as interpreted in Drybones. The courts of this land, from the lowest to the highest, are now empowered to declare that Parliament has exceeded its jurisdiction by legislating in abrogation of a declared right. In effect, they are asked to decide whether Parliament should deal with a particular social problem and, if it should, whether it has dealt with it in a legitimate way. The Bill of Rights gave the courts a power they never before enjoyed, a power with which they had no experience and no rules upon which to draw. The Bill of Rights, as interpreted in Drybones, effected a significant transfer of power from Parliament to the Courts".

SINCE A CHARTER OF RIGHTS AND FREEDOMS HAS BEEN DRAFTED, THE CANADIAN ASSOCIATION OF CHIEFS OF POLICE BRINGS TO THE ATTENTION OF THE COMMITTEE ITS MAIN CONCERNS, NAMELY:

FUNDAMENTAL FREEDOMS

SECTION 2(a) "Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion."

The Association is of the opinion that the words "of conscience" are vague, and unnecessary, in that there is a real risk that the word "conscience" could be given so broad an interpretation by the courts as to make various sections of the criminal law inoperative, e.g. those sections relating to morals and drug offences.

LEGAL RIGHTS

SECTIONS 7, 8 and 9

The Association fully agrees with these Sections as now drafted, and would be strongly opposed to any changes thereto.

SECTION 11 "Anyone charged with an offence has the right:
(a) to be informed promptly of the specific offence".

The Association suggests that this wording is unnecessarily detailed and recommends that it be changed to read:

"(a) to be informed promptly of the offence with which he or she is charged".

SECTION 11(b) "Anyone charged with an offence has the right:
(b) to be tried within a reasonable time".

The Association is concerned with the vagueness of the words "reasonable time". Unless specific times are laid down, it is the opinion of the Association that this sub-section should be deleted.

SELF-CRIMINATION

SECTION 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".

It is the opinion of the Association that people should be required to ask for this protection under the Canada Evidence Act or relevant Provincial Evidence Act. The witness testifying knows better than anyone if he is incriminating himself.

GENERAL - LAWS RESPECTING EVIDENCE

SECTION 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".

The Association agrees with this Section as now written and would be strongly opposed to any change.

It is the understanding of the Canadian Chiefs that the Canadian Civil Liberties Association has recommended, in effect, to the Committee that it adopt the United States Exclusionary Rule, commonly known as the "Fruit of the Poisoned Tree".

In the United States, this Rule has proven to be the greatest single road-block to effective and fair law enforcement.

When murderers are set free because a police officer has made a minor mistake in the procedures he is required to follow, does society really benefit? The American experience has produced negative results. Example:

> A young couple sitting in an automobile were accosted by a man armed with a rifle. He ordered the male out of the car and shot him several times. He died immediately.
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> The man then raped the female, shot her and left her for dead.
>
> As the result of police investigations, leads were obtained to the identity of the assailant. Police officers visited his home, spoke to his mother, who stated that her son had arrived home

late on the night of the incident, was in an agitated state, had packed a bag and left, saying that his mother would never see him again.

At the request of the police, the mother, who owned the house, gave explicit permission to the police officers to search her son's room. She was aware of the reason why the police wanted to search it. A rifle was found and a ballistics check revealed that it was the murder weapon.

The man was subsequently apprehended, charged, tried and found guilty on the murder and other charges.

On appeal, the court held the Exclusionary Rule applied, in that the police should not have entered the room without the man's permission. The evidence was therefore tainted. The appeal was allowed and the murderer went free.

Another example would be police officers executing a search for drugs in a dwelling and finding firearms, munitions, offensive weapons, balaclavas or stolen properties. These items have been found during drug raids on the clubhouses of motorcycle gangs in

Ontario, and under an Exclusionary Rule, these items could NOT be submitted in evidence.

Police officers should obviously be encouraged and required to follow all procedures required by law when dealing with private citizens. But society's remedies, if a police officer fails to follow these procedures, are found in other disciplinary measures, including the laying of criminal charges against him - certainly not in having the courts let the murderer go free.

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