Federal-Provincial Relations Office

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Fred Jordan asked me to prepare ~~this paper on~~ Property Rights for you

Jim

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Some Comment on representations Civil Lib. vs. Police Chiefs of Can. Canada

CHARTER OF RIGHTS AND FREEDOMS

LEGAL RIGHTS -- SECTIONS 7-14

The series of rights set forth in these sections are a statement of basic legal protections which must be afforded to the people in the course of their legal relations with the State and its machinery of justice. They prescribe a series of safeguards designed to ensure that the individual is treated with elemental fairness and humanity when he or she is subjected to the legal processes, particularly in criminal and penal proceedings.

These legal rights are an expansion on those already stated in the 1960 Canadian Bill of Rights, incorporating a number of others found in the International Covenant on Civil and Political Rights to which Canada became a party in 1976.

While these rights are ones already reflected in our common and statute law, as rights enshrined in the Constitution, Canadians will now be ensured that they cannot be taken away or infringed by law-makers or law enforcement authorities by ordinary laws, orders or regulations. Equally, where there is an infringement of the legal rights, the individual will be able to obtain an effective remedy from the courts, by way of a declaration, injunction, order for damage or other penalty imposed on the violator. This is by virtue of the enforcement provisions under section 24 (discussed later).

1. Section 7 -- Right to Life, Liberty and Security of Person

This states the general principle of our legal rights that the authorities of the State cannot deprive us of our basic rights to life, liberty and security except by laws and procedures that conform with the principles of fundamental justice.

To a large degree, this is essentially a statement of the general proposition which is particularized in the specific legal rights enumerated in following sections.

What it means is that any deprivation of a person's life or liberty or of his personal security can only be effected by duly specified legal procedures that are inherently fair in the sense that they meet all the requirements of natural justice — the right to know the reasons for the action being taken, the right to make a full answer and defence to the charges or claims, the right to have the matter determined by a fair and impartial tribunal.

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It does not mean, as some have contended, that the State is precluded from enacting laws dealing with abortion, euthanasia or capital punishment. The right to life is not absolute: section 7 makes it clear that it is a right subject to deprivation according to principles of fundamental justice. Thus Parliament will remain free, as it should, to enact laws respecting these important social and moral issues where public opinion is much divided and shifts from time to time.

2. Section 8 -- Unreasonable Search or Seizure

This ensures that no person or his property may be subjected to a search or a seizure that is unreasonable. Thus, even though a law may authorize a search or seizure in a particular manner or procedure, that law still may be tested in the courts to determine if it is reasonable. Hence, the present law authorizing the issue of Writs of Assistance in general terms may be considered to be unreasonable.

In addition, even where the law authorizing the search or seizure may be reasonable in itself, the manner in which it is executed by the police may be challenged as unreasonable in the circumstances, eg. the recent police raids on the Toronto "bath houses", or some of the activities carried out by the RCMP now under study by the MacDonald Commission.

3. Section 9 -- Arbitrary Detention or Imprisonment

This ensures that no person may be detained or held in prison in an arbitrary manner. Thus any law that authorized a detention or imprisonment in a manner that was capricious or wholly without justification (i.e. detention "without reasonable and probable grounds" or imprisonment without a proper trial) would be considered arbitrary and consequently invalid.

Likewise, the manner in which law enforcement authorities administer laws governing detention and imprisonment will be subject to the same test. Hence, a police officer will have to show reasonable cause for detaining a person, and a custodian of an institution will have to demonstrate that a person is being lawfully and properly held in prison.

4. Section 10 -- Rights on Arrest or Detention

These provisions are the same in substance as those now found in section 2(c) of the Canadian Bill of Rights with the important addition of the right to be informed of the right to counsel. They are all designed to protect the rights of a person against arbitrary or unlawful actions by law enforcement authorities. Thus anyone who is held or arrested by any authority has the right to be told the legal reasons for his being taken into custody, the right to be informed of his right to contact and consult a lawyer forthwith to obtain legal advice, and the right to have a court determine expeditiously whether the detention is lawful.

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These rights would apply both to civil and penal matters (as would all the legal rights). Thus, for example, a person detained in a mental institution under a provincial law would have the right to know the reasons or grounds for his detention. However, if he were incapable of understanding, or if the doctor believed that telling him the reasons might harm his condition, then it would be sufficient to tell the reasons to his guardian who could, if he wished, then exercise the rights of the detainee to retain counsel and determine the validity of the detention.

The addition of the obligation on the police to inform a detainee of his right to consult counsel is important, since this should ensure that a detained or arrested person will know of his right to consult counsel and not to submit to interrogation until he has exercised that right.

5. Section 11 -- Rights When Charged with Offence

This section sets forth a series of important protections for any person charged with and being held or tried for a criminal or penal offence under federal or provincial law.

(a) The accused must be told of the specific offences with which he is charged without unreasonable delay. This means that the police, the prosecutor or the court cannot delay telling the accused of the specific charges, so that the accused will have sufficient time, before his trial, to consult his lawyer and prepare his defence.

(b) The accused must be tried within a reasonable time after being charged. This will mean that the prosecution can no longer seek endless adjournments from the courts. What will constitute a reasonable time will be a matter for the courts to determine in a particular case. However, where the delays have been occasioned by the accused himself or have not worked to his detriment, then he will not be able to complain about the delays. Nevertheless, this provision will no doubt force the legislators and the courts to adopt new rules and procedures designed to expedite the trial processes.

(c) The accused cannot be forced to testify against himself. This is a codification of the traditional protection against self-crimination, whereby an accused cannot be required to "take the stand" at his own trial or be required to confess his guilt. However, it does not preclude an accused from voluntarily "taking the stand", but when he does so he must answer all questions put to him including those that may establish his guilt.

(d) The accused has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. This is the same provision as now found in the Canadian Bill of Rights and reflects basic principles of our

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criminal justice system. It places the onus on the prosecution to establish guilt, but does not preclude the so-called "reverse onus" rules whereby the accused may be required to rebut certain factual presumptions. The trial must be fair (including the right to be represented by counsel) and the adjudicator impartial and independent. The requirement for public trials does not mean that there can never be in camera proceedings, and these reasonable limits would be recognized under section 1. For example, closed hearings would be permitted as now in the interests of the accused (juveniles), the complainant or public morality (rape cases) and national security (guarding of defence information). However, it will rest with the courts to determine ultimately what the reasonable limits are.

(e) The accused cannot be denied reasonable bail without just cause. This is the same provision as now found in the Canadian Bill of Rights, and means that bail (or release) when granted must be reasonable in the circumstances (eg. it would be unreasonable to require bail of $100,000 for a charge of theft under $200). In addition, the bail must be granted unless proper reasons can be shown for its refusal. Thus, the Crown must be able to show that the accused is likely to leave the country or to commit further crimes if he is released.

(f) Except in cases of military trials, an accused will have a right to a jury trial in any case where the offence carries a maximum punishment of five years or more.

Under the present law, the right to jury trial is provided in most indictable offences, these being offences which are punishable by two or more years imprisonment. However, there are a number of two year indictable offences where there is no such right. These include such offences as theft under $200, book-making, keeping a common gaming, betting or bawdy house, etc. (offences where it is felt that a jury trial is unnecessary). There is, of course, no right to a jury trial in summary conviction offences (which carry a maximum penalty of six months imprisonment).

There is another area of the law where jury trials as such are not recognized. These are cases under military law (the Code of Service Discipline) where trials are by courts martial composed of panels of military officers. This has been a long-standing practice in many countries, that military personnel are tried for offences in special military courts without juries.

Such a practice is considered necessary for several reasons. First, the military is generally mobile and it could be difficult to assemble a jury, particularly where the accused is located in a foreign country. Second, since servicemen in a unit work together everyday, it would be difficult to assemble a panel of jurors who did not know the accused well. Third, the military operates on a hierarchical structure where judgement by "peers" is a foreign concept. In addition, it may be noted that military tribunals are precluded from trying persons charged with the most serious offenses, eg. murder, rape or manslaughter, committed in Canada.

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In light of the foregoing, provision is being made for a right to trial by jury in all cases where the maximum punishment for an offence is five years imprisonment or more, but to except from this right offences arising under military law tried by a military tribunal.

This will insure the right to a jury trial in all the most serious cases while preserving the existing military law system. At the same time the Criminal Code will continue to provide for jury trials in certain cases where the penalty is less than five years.

(g) This provision will ensure that a person cannot be prosecuted for an act which, at the time of its commission, was not recognized as an offence under Canadian or international law.

This is recognition of an important principle in our law against retroactive penal laws and punishments: that the crime alleged must have been one recognized in law when it was committed. Including crimes under international law means that Canada can only punish persons (assuming they are within Canadian jurisdiction) for offences recognized by the law of nations if they were offences so recognized at the time of their commission and if Canada has enacted a law making such offences punishable domestically. ?

(h) No person may be tried or punished twice for the same offence. This recognizes another important principle of Canadian law that no person should be exposed to being tried or punished more than once for an offence of which he has finally been tried and acquitted, or tried, convicted and punished. It does not mean that a person cannot be tried for two different offences arising out of the same facts, as long as they are distinct offences and one is not included in the other. Hence, a person committing murder during a bank robbery could be convicted of both the murder charge and the robbery charge as they are distinct and discrete offences. However, the person committing murder and assault could not be convicted of assault after having being convicted of murder because the greater includes the former, being offences of the same kind.

(i) Where the punishment for an offence has been varied between the time the accused is charged and the time of his sentencing, the accused is entitled to the benefit of any lesser penalty provided in the law.

This means that, for example, if the penalty for murder were reduced from life to twenty years imprisonment, the person charged under the earlier law, would upon conviction, be entitled to the new, lesser penalty.

This right has not been extended to cases of post-sentencing, since it would involve too many administrative problems, including the need to re-judge cases. Reductions of sentences in these cases can be better dealt with under ordinary law.

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6. Section 12 -- Cruel and Unusual Treatment or Punishment

This provision is taken from the Canadian Bill of Rights and ensures that no one is to be subjected to cruel and unusual treatment or punishment. Thus the courts will be able to assess laws or government practices to determine if the matter in question is cruel and unusual.

The Supreme Court has already ruled (Miller case 1977) that capital punishment is not cruel and unusual punishment, and this is consistent with the government's position that the issue of capital punishment is one that should be left to Parliament's judgment from time to time.

However, there are other laws (eg. some provincial laws requiring forced sterilization of mental incompetents) which could be found to be cruel and unusual treatment. Equally, as the Federal Court held in the McCann case in 1976, solitary confinement in particular circumstances, is cruel and unusual treatment.

7. Section 13 -- Protection Against Self-Crimination

This provision ensures that any witness testifying (voluntarily or involuntarily) in any proceedings has an automatic right not to have any incriminating evidence given by him used to incriminate him in subsequent proceedings against him. (The only exceptions would be where the witness was prosecuted for perjury or for giving contradictory evidence.)

The provision is basically the same as the provision of section 5 of the Evidence Act except that the protection would now be automatic rather than one that now has to be specifically claimed by a witness. This follows the recommendation of the Law Reform Commission.

The entire provision is a reflection of the principle in our law of evidence that a witness giving evidence in one case (in order to get the truth before the court) should not place himself in jeopardy by having that evidence used directly against him in later proceedings.

8. Section 14 -- Right to Assistance of Interpreter

This provision ensures that a party or witness in any proceedings has a right to the assistance of an interpreter where he does not understand or speak the language of the proceedings or where he is deaf.

It derives from the Canadian Bill of Rights and recognizes a fundamental principle that justice cannot be done if the party or witness is placed at a disadvantage because the proceedings are in a "foreign" language.

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9. LEGAL RIGHTS NOT INCLUDED IN CHARTER

(1) Right to Fair Hearing in Civil Proceedings

The Canadian Bar Association and the B.C. Civil Liberties Association both remarked on the absence from the Charter of an equivalent provision to that found in section 2(e) of the Canadian Bill of Rights: the right to a fair hearing in accordance with the principles of fundamental justice for the determination of a person's rights and obligations.

This provision was omitted because the provinces were very concerned about the broad scope that might be given to it in light of recent decisions of the Supreme Court.

Until recently, the rules of natural justice were held to be applicable only where the civil or administrative proceeding was of a judicial or quasi-judicial, but not of a purely administrative nature. However, in recent cases, the Supreme Court has held that the "fairness" doctrine applies even to administrative proceedings. This was held to be so in the Martineau case (1978) where disciplinary proceedings in a prison were in question, and in the Nicholson case (1979) where the question was dismissal of a probationary police officer was in question. The Court held that even though no legal rights were involved, the person had a right to a fair hearing.

In light of these decisions, the jurisprudence concerning rules of natural justice have become very unclear, and it would appear that any administrative proceeding involving a mere privilege, as opposed to a right, may be subject to rules of natural justice involving formal proceedings. Provinces are naturally very concerned when they see the prospect of having to hold a formal hearing on every denial of a privilege such as a driver's licence.

Since it will obviously be some time before the new jurisprudence in this area is settled, it was considered preferable to omit this particular provision from the Charter, since it may be necessary to formulate a more precise rule to reflect or modify the rule developed by the courts.

In the meantime, the courts will continue to apply the common law rules of natural justice, and at the federal level, the provision of the Canadian Bill of Rights will continue to apply.

(2) Enjoyment of Property

The Canadian Bill of Rights provides for the right to enjoyment of property and the right not to be deprived thereof except by due process of law. No such provision appears in the Charter and this omission has been criticized by the Canadian Bar Association, the Newfoundland Bar Association and others.

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The federal government in its draft Charter tabled in July 1980 made provision for the right to use and enjoyment of property, and the right not to be deprived thereof except in accordance with law and for reasonable compensation.

However, the provinces were most concerned about including such a provision and for valid reasons. They have a broad range of laws governing zoning, environmental protection, industrial development, preservation of agricultural lands and condemnation of unsafe premises, all of which affect the use and value of land. They felt that these sort of laws could be invalidated as interfering with enjoyment of property, and that the state could be forced to compensate owners for diminished values or losses.

Since such laws are essential to the social and economic development of the provinces, it was felt — by the — that the courts should not properly have a role in assessing the issues involved.

Consequently, it is considered that property rights should not be included in the Charter, but be left to the provinces to deal with by ordinary laws. At the federal level, the provision in the Canadian Bill of Rights will continue to govern federal laws dealing with enjoyment of property.