McGILL LAW JOURNAL
REVUE DE DROIT DE McGILL
Montréal
Volume 29 1984 *No 4*

The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What To Do and What Not To Do

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The enactment of the *Canadian Charter of Rights and Freedoms* changed fundamentally the law governing the exclusion of illegally obtained evidence. The actual effect of the constitutional guarantee contained in section 24(2) however will depend upon the interpretation accorded to this provision. After a brief review of the law prior to the *Charter*, the author isolates the three key issues to be addressed when applying section 24(2): causation; the factors to consider in deciding whether to exclude evidence; and the meaning of the phrase to "bring the administration of justice into disrepute". Critically considering a wide selection of case law and doctrinal commentary on the exclusionary principle, the author urges Canadian lawyers and judges to examine and profit from the experience of other jurisdictions. He draws a number of conclusions which in his opinion lead to a correct interpretation of section 24(2). The author rejects public opinion analysis as a useful method of deciding when to exclude evidence, and considers the logic of deterrence not to be highly relevant in the Canadian context. Finally, concerned to ensure an element of judicial discretion, the author cautions against adopting a narrow or literal view of section 24(2).

L'entrée en vigueur de la *Charte canadienne des droits et libertés* a changé le droit de manière fondamentale quant à la recevabilité d'une preuve illégalement obtenue. L'effet réel de cette nouvelle garantie constitutionnelle dépendra toutefois de l'interprétation qu'accordera la jurisprudence à l'article 24(2). Après un bref historique du droit au Canada avant l'entrée en vigueur de cet article, l'auteur se penche sur les questions fondamentales que soulèvent son application, telles que le principe de causalité, l'évaluation des facteurs pertinents, et le sens de l'expression « déconsidérer l'administration de la justice ». L'auteur nous encourage à examiner et à profiter de l'expérience acquise dans d'autres juridictions. D'un oeil critique, l'auteur n'hésite pas à se référer à la jurisprudence étrangère et aux motifs évoqués par la doctrine. Il en tire des conclusions importantes qui constituent selon lui la base d'une interprétation juste de l'article 24(2). Il rejette, par exemple, l'analyse de l'opinion publique comme façon de décider de l'exclusion d'une preuve, et il prétend que l'argument de dissuasion n'est pas aussi pertinent au Canada que dans d'autres pays. Soucieux de la nécessité d'un élément de discrétion judiciaire, l'auteur conclut finalement qu'il est indispensable d'éviter une interprétation étroite ou littérale de l'artiele 24(2).

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Synopsis

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Introduction

Some constitutional safeguards have origins lost in the mist of time and serve mostly as reminders of ancient feuds. Others are creatures of a recent past and look to the future. The exclusionary principle in section 24(2) of the *Canadian Charter of Rights and Freedoms* falls in this latter category.[1]

The courts of Anglo-American jurisdictions long regarded the admissibility of evidence and the propriety of its obtainment as two entirely separate issues. There was only one notable exception to this practice. For well over two centuries, the common law treated confessions with a good dose of skepticism and this sentiment inspired much discussion on their

[1]Part 1 of Schedule B, *Canada Act 1982*, c. 11 (U.K.) [hereinafter cited as the *Charter*]. Section 24 of the *Charter* states:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

admissibility.[2] Criminal courts to this day spend considerable time probing the circumstances in which an accused made the statements tendered against him at his trial. The admissibility of these statements depends, and will no doubt continue to depend, on how they were obtained. The "how" refers primarily, but not exclusively, to the *Ibrahim* rule.[3] From this rule, any reasonably competent police officer can infer that it is generally pointless, though perhaps not illegal, to make threats or promises to a suspect.

At common law, however, real evidence was never worthy of such a particularized treatment. This distinction made some sense in a system which conceived of itself as an elaborate machinery for the discovery of "truth", that is, all the facts relevant to the charge. In most cases, there existed no apparent connection between the inherent value of real evidence and the propriety or legality of the means by which it had been procured. Punch a suspect until he confesses; his statement is just as likely to be a lie, and a plausible one at that, for the more believable is the lie, the greater is the probability that the punching will stop; the statement is apt to mislead and should therefore be excluded. Knock a suspect senseless and pump his stomach until he regurgitates stolen diamonds; diamonds do not speak and so they cannot lie; the diamonds and evidence of where they came from should therefore be admissible. The matter was, of course, a great deal more complicated, and the authorities never so simplistic. But the notion that a court should exclude real evidence because it was improperly obtained appeared, by and large, heretical.

It is against this background that the Supreme Court of the United States decided in 1914 the case in which this heretical doctrine would first receive high-level recognition.[4] *Weeks* v. *United States*[5] had begun with a banal, warrantless search and the seizure of various objects, some of which were relevant to a gambling charge. Weeks brought a pre-trial petition for the recovery of his property, the petition was denied in part and he was convicted. He persevered and challenged the pre-trial ruling in the Supreme

[2]See F. Kaufman, *The Admissibility of Confessions*, 3rd ed. (1979) ch. 1, on the history of the rule. The modern doctrine of admissibility has been traced back to *White's trial* (1741) 17 How. St. Tr. 1079, 1085: see Wigmore, *Evidence* (1970) vol. 3, § 819, fn. 2.

[3]*Ibrahim* v. *The King* [1914] A.C. 599, [1914-15] All E.R. 874.

[4]The exclusion of evidence as a means of enforcing constitutional safeguards had been considered in *Boyd* v. *United States*, 116 U.S. 616 (1886), a case involving the compulsory disclosure of real evidence under a customs statute and where the decision rested primarily on the Fifth Amendment. Prior to *Weeks* v. *United States*, *infra*, note 5, only one state court had extended the reasoning to cover improperly seized evidence. In *Iowa* v. *Sheridan*, 96 N.W. 730 (1903), the defendant, an ice dealer, had allegedly destroyed a large quantity of ice belonging to a competitor by pouring on it a barrel of salt. The evidence was the empty barrel, seized illegally and produced at the trial. The Iowa Supreme Court excluded it.

[5]232 U.S. 383 (1914).

Court. The Court, narrowly distinguishing an earlier decision in a manner promptly denounced by Wigmore,[6] upheld the "seasonable application"[7] for the return of letters that incriminated the defendant. These letters were not yet evidence in a trial at the time of the petition, nor were they contraband. But their recovery before trial (or *ex post facto* on appeal) obviously had the same practical result as excluding evidence at trial. Wigmore saw the decision as an aberration and wrote, in a purple yet somewhat vacuous passage, that it "exemplifie[d] an inveterate trait of our Anglo-American judiciary peculiar to the mechanical and unnatural type of justice."[8] The inveteracy must have been in the mechanicalness and nowhere else, for *Weeks* was unquestionably an atypical decision. It was also, as Anglo-American lawyers would eventually discover, the thin but cutting edge of a very large wedge.

Fifty years later, all the American federal and state courts were bound under *Mapp* v. *Ohio*[9] by an unusually controversial doctrine known as the Exclusionary Rule. Scotland had innovatively opted for a policy of discretionary exclusion[10] and several other Commonwealth jurisdictions would soon follow this example.[11] Some English decisions also supported a similar view.[12] But Canadian courts seemed altogether opposed to it; indeed, as late as 1970, the Supreme Court of Canada, in *The Queen* v. *Wray*,[13] decided by a majority that the *Kuruma*[14] principle would prevail in this jurisdiction. The severe deficiencies of *Kuruma* had gone largely unnoticed.[15] The Canadian

[6]The case was *Adams* v. *New York*, 192 U.S. 585 (1904), the basis of the distinction was, *semble*, the timeliness of the application, and Wigmore's short but vigorous critique is published at (1914) 9 Nw. U.L. Rev. 43.

[7]*Supra*, note 5, 398.

[8]*Supra*, note 6, 43.

[9]367 U.S. 643 (1961).

[10]*Lawrie* v. *Muir*, [1950] S.C. 19 (H.C.J.), [1950] S.L.T. 37, [hereinafter cited to S.C.].

[11]See, *infra*, notes 121-4.

[12]See *R.* v. *Court* [1962] Crim. L.R. 697 (C.C.A.), *R.* v. *Payne* [1963] 1 All E.R. 848 (C.C.A.) and *Callis* v. *Gunn* [1964] 1 Q.B. 495 (C.A.); the subsequent cases of *R.* v. *Foulder* [1973] Crim. L.R. 748 (Cent. Crim. Ct.) and *R.* v. *Ameer and Lucas* [1977] Crim. L.R. 104 (Cent. Crim. Ct) are also worth considering, but *Ameer* was overruled and the doctrine greatly curtailed in *R.* v. *Sang* [1980] A.C. 402, [1979] 2 All E.R. 1222.

[13][1971] S.C.R. 272.

[14]*Kuruma* v. *The Queen* [1955] A.C. 197, [1955] All E.R. 236 [hereinafter cited to A.C. as *Kuruma*].

[15]In *Wendo* v. *The Queen* (1963) 109 C.L.R. 559 (Aust. H.C.), Sir Owen Dixon C.J. had written: "I do not think that in this or any other jurisdiction the question [whether evidence which is relevant should be rejected on the ground that it is come by unlawfully or otherwise improperly] has been put at rest by *Kuruma*." The case of *Kuruma* did exactly that in Canada, even though it was an extremely weak decision. The authorities cited therein were, at best, of minimal relevance: *R.* v. *Leatham* (1861) 8 Cox C.C. 498 (Q.B.), involved evidence produced under compulsion of statute and contained an *obiter dictum* perhaps eloquent but hardly significant; *Lloyd* v. *Mostyn* (1842) 152 E.R. 558, (1842) 10 M. & W. 476 (Exch.), and *Calcraft*

practice thus remained for some time the exact opposite of its American counterpart, perhaps because the fear of total contamination had increased judicial resistance to American influence.[16] In the end, it took a constitutional reform to set Canadian law on a different course. With the advent of the *Charter*, all evidence, whether real or in the form of out-of-court statements, can be excluded for reasons of extrinsic policy.

I. Identifying the Real Issues

In the first two years of its existence, the exclusionary principle contained in section 24(2) of the Charter[17] elicited a good measure of doctrinal commentary.[18] It also supplied defence counsel with an adaptable tool now used by them with considerable industry, as can be seen from the plethora of cases on the point.[19] Several issues emerged in the process. One of these — whether section 24(2) operates retroactively — will soon become moot.[20] Others will be resolved in a manner which might subject the exclusion of evidence in all cases to the single test of section 24(2) or, alternatively, might

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v. *Guest* [1898] 1 Q.B. 759, [1895-9] All E.R. Rep. 346; both dealt with the legal professional privilege instead of rules applicable to the *obtaining* of evidence; *Noor Mohamed* v. *The King* [1949] A.C. 182, [1949] 1 All E.R. 365, and *Harris* v. *Director of Public Prosecutions* [1952] A.C. 694, [1952] 1 All E.R. 1044, concerned similar fact evidence, a problem of intrinsic, not extrinsic policy. No mention was made in *Kuruma* of *Jones* v. *Owens* (1870) 34 J.P. 759, the only truly relevant precedent, decided at a level and in a manner which made it clear that the issue had to be considered anew and on principle. The treatment of Scots and American cases in *Kuruma, supra*, note 14, 204-5, is positively inadequate, the law of these jurisdictions being summarized in twenty lines and cast aside with barely comprehensible or unconvincing distinctions. Finally, as will be discussed, *infra*, p. 549, the actual outcome of the appeal is at odds with the law laid down in Lord Goddard's speech.

[16]The influence, however, could be felt at another level, and it did cause some discomfort: see the *Protection of Privacy Act*, S.C. 1973-74, c. 50, s. 2 (which amends the *Criminal Code*, R.S.C. 1970, c. C-34, to add the special exclusionary rule of s. 178.16(1)) and the *Criminal Law Amendment Act, 1977*, S.C. 1976-77, c. 53, s. 10 (which restricts the scope of the exclusionary rule contained in s. 178.16(1), thereby almost providing an affirmative answer to Herbert's question, "Couldst thou both eat thy cake and have it?").

[17]*Supra*, note 1.

[18]See, in particular, McLellan & Elman, *The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24* (1983) 21 Alta. L. Rev. 205; Gibson, *Shocking the Public: Early Indications of the Meaning of "Disrepute" in Section 24(2) of the Charter* (1983) 13 Man. L.J. 495, fn. 3, where several other sources are cited. Additional materials will be referred to elsewhere in this article.

[19]Anyone doubting the correctness of this unsupported statement will be reassured by glancing at the Weekly Criminal Bulletin.

[20]Despite occasional hesitations, the prevailing view is that s. 24(2) does not operate retroactively: see *R* v. *Hynds* (1982) 1 C.R.R. 378, (1982) 70 C.C.C. (2d) 186 (Alta Q.B.); *R.* v. *Kevany* (1982) 1 C.C.C. (3d) 511 (Ont. Co. Ct); *R.* v. *Steube* (1982) 38 O.R. (2d) 168 (Dist. Ct); *R.* v. *Esau* (1983) 147 D.L.R. (3d) 561, (1983) 4 C.C.C. (3d) 530, (1983) 20 Man. R. (2d) 230 (C.A.); *R.* v. *Longtin* (1983) 147 D.L.R. (3d) 604, (1983) 5 C.C.C. (3d) 12 (Ont. C.A.). Compare, on the American Rule, *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

open up other remedial channels leading to exclusion by a different itinerary. Motions for the recovery of property illegally seized[21] and motions for the discretionary exclusion of evidence under section 24(1)[22] are examples of such alternatives; the granting of a stay of execution could also have a comparable effect.[23] These questions, however, are almost peripheral. Closer to the core of section 24(2), and probably richer as well, are three other issues: causation, the range and kind of factors one may consider in deciding whether to exclude evidence, and the meaning of disrepute.[24] The first two will be summarized in the following pages. The third, probably the most important, will be discussed throughout the other parts of this article.

Causation creates analytical difficulties everywhere in the law and was bound to do so under a provision that allows for the exclusion of evidence only where it "was obtained *in a manner* that infringed or denied [a *Charter* guarantee]".[25] What is the "manner"? The very act that uncovers the evidence, the successive steps that lead to it or the entire investigation phase in the case — the shot, the scene, the sequence, or the whole film? "In a manner" that infringes is certainly looser than "by reason of an infringement", and the provision does not appear to require an exacting causation

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[21]*R.* v. *Taylor* (1983) 35 C.R. (3d) 80 (Sask. Q.B.); *Batsos* v. *Laval* (1983) 5 D.L.R. (4th) 180, (1983) 35 C.R. (3d) 338 (Que. S.C.); see also *Re Gillis and The Queen* (1982) 1 C.C.C. (3d) 545, (1982) 2 C.R.R. 369 (*sub nom. Gillis* v. *Breton*) (Que. S.C.). *Re Trudeau and The Queen* (1982) 1 C.C.C. (3d) 342, (1982) 2 C.R.R. 345 (*sub nom. Trudeau* v. *Melançon*) (Que. S.C.); *Lambert* v. *A.-G. Quebec* (1982) 31 C.R. (3d) 249 (Que. S.C.).

[22]The leading case on this point, *R.* v. *Therens* (1983) 148 D.L.R. (3d) 672, (1983) 5 C.C.C. (3d) 409, (1983) 33 C.R. (3d) 204 (Sask. C.A.), now before the Supreme Court of Canada, (1983) 148 D.L.R. (3d) 672n, (1983) 5 C.C.C. (3d) 409n, (1983) 36 C.R. (3d) xxiv, was relied upon in *R.* v. *Ahearn* (1983) 4 C.C.C. (3d) 454 (P.E.I.S.C.), reversed on other grounds, (1983), 8 C.C.C. (3d) 257, in *R.* v. *Lajoie* (1983) 4 D.L.R. (4th) 491, (1983) 8 C.C.C. (3d) 353 (N.W.T.S.C.), in *R.* v. *Santa* (1983) 6 C.R.R. 244 (Sask. Prov. Ct), and in several other cases cited by Professor Don Stuart in his annotation on *R.* v. *Gibson* (1983) 37 C.R. (3d) 175, 178 (Ont. H.C.). See, *contra*, *R.* v. *Simmons* (1984) 11 C.C.C. 193 (Ont. C.A.).

[23]See, for example, *R.* v. *Engen* (1982) 17 M.V.R. 270 (Alta Prov. Ct), reversed on other grounds (1983) 23 M.V.R. 144'(Alta Q.B.), affirmed (1984) Alta R. (2d) 304, [1984] 2 W.W.R. 590 (Alta C.A.).

[24]Obviously, other issues, such as standing under s. 24(2), or the use of evidence improperly obtained by private parties, will sooner or later come to the fore.

[25]*Charter*, *supra*, note 1, s. 24(2) [emphasis added]. See Gibson, *supra*, note 18, 501. Causation preoccupied American lawyers ever since the appearance of the Exclusionary Rule, but it is known in the United States under a different and metaphorical appellation as the "Fruit of the Poisonous Tree" doctrine: see W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, (1978) vol. 3, 612-80, where the matter is discussed in all its intricate details. Much of the American case law proceeds from the assumption that exclusion cannot be justified where it is unlikely to deter future illegal searches, an assumption which permeates the discussion on causation. Deterrence is not the aim of s. 24(2), which apparently exists for the purpose of *enforcing* constitutional safeguards. Therefore causation ought perhaps to be seen here in a different light.

test. Suppose, however, that a suspect makes a confession and immediately thereafter is denied the opportunity to retain counsel, is locked up for a fortnight and subjected to cruel treatment in the process. Should or can the court exclude the confession? It is probably better to remedy this sort of situation at another level, for example with a stay of prosecution under section 24(1). The exclusionary principle, after all, is an evidentiary mechanism and by its nature ought to relate to infringements that somehow account for the availability of the impugned evidence. The infringement, in other words, must precede chronologically the obtaining of the evidence. But should it coincide so closely in time with the discovery that the infringement, the manner and obtaining are in fact one and the same act? For the time being, search and seizure cases provide no firm guidelines; the courts simply ask, in the familiar terminology of causation, whether or not, on the facts, there was "one transaction".[26] Breathalyzer cases are slightly more revealing and there are signs that the *Brownridge*[27]/*Hogan*[28] dichotomy may reappear under the *Charter*.[29]

The courts have frequently been reluctant to enumerate the factors relevant in making a decision under section 24(2). In *R* v. *Manninen*,[30] for instance, MacKinnon A.C.J.O. remarked: "I do not think it is either wise or helpful to attempt to outline in any exhaustive detail the circumstances that are to be considered [under section 24(2)]."[31] This reluctance to articulate guidelines seems odd when one notes the insistence with which the same Court reiterates that the provision operates as a rule, not as a discretion.[32] Many decisions are surprisingly succinct when the time comes to characterize and weigh the pertinent circumstances of the case.[33] The most

[26]See *R.* v. *Cohen* (1983) 148 D.L.R. (3d) 78, 79 (trial judge), 82 (Traggart J.A.) 90 (Craig, J.A.) and 93 (Anderson J.A., dissenting), 5 C.C.C. (3d) 156 (B.C.C.A.), and *R.* v. *Cuff* (1983) 6 C.C.C. (3d) 311, 324 (B.C. Co. Ct).

[27]*Brownridge* v. *The Queen* [1972] S.C.R. 916, (1972) 28 D.L.R. (3d) 1.

[28]*Hogan* v. *The Queen* [1975] 2 S.C.R. 574, (1974) 9 N.S.R. (2d) 145, (1974) 48 D.L.R. (3d) 427.

[29]See *R.* v. *Engen, supra*, note 23; *R.* v. *Farrell* (1982), 17 M.V.R. 223 (Ont. Prov. Ct); *R.* v. *Anderson* (1983) 19 M.V.R. 33 (Ont. Co. Ct) and *R.* v. *Watchell* (1983) 32 C.R. (3d) 264 (B.C. Prov. Ct). In *R.* v. *Messier* (1983) 22 M.V.R. 34 (Que. S.C.), Hugessen A.C.J. rejected the evidence on a charge of failure to provide a breath sample because the accused had been denied his right to counsel. He observed at page 36: "le déni de son droit, garanti par l'article 10(b), est devenu, en quelque sorte, un piège pour M. Messier, l'incitant à commettre l'infraction dont il est accusé. A mon point de vue, cela constitue certainement une circonstance de nature à déconsidérer l'administration de la justice."

[30](1983) 8 C.C.C. (3d) 193, 37 C.R. (3d) 162 (Ont. C.A.).

[31]*Ibid.*, 202.

[32]See note 135, *infra*, and accompanying quotation.

[33]See however *Re T.L.W.* (1982) 5 C.R.R. 241 (Ont. Prov. Ct), a child welfare case where the competing policies of the applicable legislation and the protection against illegal searches are carefully considered.

comprehensive judgment in this regard probably remains that of Borins Co. Ct J. in *R* v. *Samson*.[34] This case did not involve section 24(2) of the *Charter* but section 178.16(2) of the *Criminal Code*,[35] whose wording, though not identical, is similar to that of the *Charter*. The nature of the infringement (whether it was brutal or innocuous, substantial or technical, deliberate or in good faith) and the gravity of the offence investigated (essentially, how serious it is, or threatening to others) form part of the factors listed by Borins Co. Ct. J. Both come from Scotland where the High Court of Judiciary, in the early nineteen-fifties, identified them as significant in the exercise of an exclusionary discretion.[36] They have now been picked up by Canadian courts[37] and may well become determinative under section 24(2). The second factor would appear more problematic than the first, partly because it reinstates from within the system of criminal justice an issue which is essentially legislative. Of course, objective criteria do exist for classifying offences according to their gravity. Public welfare offences, defined along the lines of *The Queen* v. *Sault Ste-Marie*,[38] arguably form a category of their own;[39] summary conviction offences are presumably less

[34](1982) 37 O.R. (2d) 237, (1982) 29 C.R. (3d) 215 (Ont. Co. Ct), reversed on other grounds by the Ontario Court of Appeal at (1983) 36 C.R. (3d) 126.

[35]R.S.C. 1970, c. C-34.

[36]*Lawrie* v. *Muir*, *supra*, note 10, 27 and *Fairley* v. *Fishmongers of the City of London* [1951] S.C. 14, 24 (H.C.J.), [1951] S.L.T. 54. Other factors considered relevant by Scottish courts, such as the surreptitiousness of the offence (*Hopes and Lavery* v. *H.M. Advocate* [1960] S.C. 104 (H.C.J.), [1960] S.L.T. 264), the risk of removal of the evidence (*H.M. Advocate* v. *Hepper* [1958] S.C. 39 (H.C.J.), [1958] S.L.T. 160) or the perishable nature of the evidence (*Bell* v. *Hogg* [1967] S.C. 49 (H.C.J.), [1947] S.L.T. 290, and *Hay* v. *H.M. Advocate* [1968] S.C. 40 (H.C.J.), [1968] S.L.T. 334) might also be significant in Canada, but should logically pertain to the reasonableness of the search rather than the justification for exclusion.

[37]*R.* v. *Burton* (1982) 40 Nfld & P.E.I. R. 335 (Nfld Prov. Ct), reversed on other grounds (1983) 7 C.C.C. (3d) 87 (Nfld C.A.); *R.* v. *Hynds*, *supra*, note 20; *R.* v. *Chapin* (1983) 7 C.C.C. (3d) 538, 43 O.R. (2d) 458 (Ont. C.A.); *R.* v. *Collins* (1983) 33 C.R. (3d) 130, (1983) 5 C.C.C. (3d) 141, (1983) 148 D.L.R. (3d) 40 (B.C.C.A.) [hereinafter cited to C.R. as *Collins*]; *R.* v. *Esau*, *supra*, note 20; *R.* v. *Gibson*, *supra*, note 22; *R.* v. *Lajoie*, *supra*, note 22; *R.* v. *Manninen* (1983) 8 C.C.C. (3d) 193, (1983) 37 C.R. (3d) 162 (Ont. C.A.); *R.* v. *Singh* (1983) 8 C.C.C. (3d) 38 (Ont. C.A.); and *The Queen* v. *Rao* (16 May 1984) unreported (Ont. C.A.).

[38][1978] 2 S.C.R. 1299, (1978) 85 D.L.R. (3d) 161.

[39]Are they "less serious" or "more serious"? *Lawrie* v. *Muir*, *supra*, note 7, involved a milk marketing offence and it is implicit in the decision that the Court saw it as comparatively less serious. On the other hand, in the United States, the Supreme Court has been prepared to relax the Fourth Amendment probable cause standard in cases of administrative searches, which consequently restricts the scope of the Exclusionary Rule and allows for the introduction of more "windfall" evidence in public welfare cases than in criminal cases: see *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967) especially at 538, and LaFave, *supra*, note 25, 178 *et seq.* The American view is predicated on eminently rational considerations, such as the fact that administrative appraisals of whole urban areas are often the only practical way of determining where inspections should be conducted; the Exclusionary Rule, having no discretionary content, simply responds to this assessment. In Canada, a court could logically come to a similar conclusion under s. 8 of the *Charter*, in which case, of course, s. 24(2) could not be invoked.

serious than indictable offences, some of which attract greater penalties than others; in principle, and subject to various factual qualifications, victimless offences are less serious than others. The seriousness of an offence depends also on a range of subjective elements which the courts assess as a matter of course whenever they hear representations on a sentence. Procedurally, it is difficult to see how this last information can be made available to the court at the stage when the defence raises an objection to the admission of evidence. But, apart from these difficulties of interpretation, this factor also raises a more basic question. How can the extent of the constitutional protection to which one is entitled depend on the nature of the charge one faces? Is not such a notion abhorrent to the legal order? Since when do accused murderers have fewer procedural rights than accused traffic offenders?

The argument against the use of this factor was developed eloquently by Merredew P.J.O. in *R.* v. *Texaco Canada Incorporated*[40] and is cited by Professor Don Stuart in a recent annotation.[41] Judge Merredew concludes: "if the *Charter* is to protect rights, if Section 8 is a prospective right to keep one 'secure against unreasonable searches' how can the seriousness of the offence be a relevant circumstance? Do we have rights only if a matter proves in retrospect to be trivial?"[42] Expressed in this fashion, the question almost irresistibly calls for a negative answer. One should bear in mind, however, that the exclusion of evidence is an enforcement mechanism, as suggested by a sub-title in the *Charter*. Given the wording of section 24(2), it cannot be said that there exists in any meaningful sense a constitutional right to the exclusion of evidence. The factor which is discussed here conditions the entitlement to exclusion, not the right to be secure against unreasonable searches. This right, at any rate and *ex assumptio*, already has been violated. It is practically impossible to remove from the discussion of this question any consideration of the seriousness of the offence. Even the Supreme Court of the United States occasionally alludes to it in interpreting the Fourth Amendment's reasonableness requirement, an approach which in that jurisdiction amounts to calibrating the Exclusionary Rule in accordance with the seriousness of the offence.[43] Australian courts regard it as relevant in the exercise of their jurisdiction to exclude evidence; as a result, exclusion

[40](10 November 1983) unreported (Ont. Prov. Ct).

[41](1983) 37 C.R. (3d) 175, 177.

[42]*Supra*, note 40, 31.

[43]See *Payton* v. *New York*, 445 U.S. 573, 602 (1980) and *Welsh* v. *Wisconsin*, 52 L.W. 4581, 4584 (1984) where Justice Brennan, delivering the opinion of the court in a warrantless home-arrest case, says: "When the government's interest is only to arrest for a minor offence, that presumption of unreasonableness [in cases of warrantless entry] is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate."

will occur for the most part in cases of intoxicated driving, gambling, possession of drugs and similar offences.[44] Experiences in other jurisdictions, and not only within the Commonwealth, indicate that this position has coherence as a legal doctrine.

One such experience is the German exclusionary doctrine, based on two distinct principles.[45] The *Rechtsstaatsprinzip* (or Rule of Law) requires the exclusion of evidence, regardless of its weight or value, in cases of police brutality or other aggravated illegality.[46] The *Verhältnismassigkeit* (or principle of proportionality) calls for the exclusion of probative evidence where the means by which it was obtained are excessively intrusive in view of the triviality of the offence investigated and the particular sphere of privacy thus invaded. According to one fitting metaphor, the principle of proportionality means that one should not shoot sparrows with a cannon.[47] The principle pervades continental European administrative law[48] and is conceptually analogous to the private law doctrine of abuse of right in civilian jurisdictions: finality determines whether the exercise of a power or a right is legally acceptable in any given case.

Proportionality and finality can prove useful concepts in articulating a coherent doctrine of exclusion. Police officers may enter a private house and ransack the premises to investigate a minor statutory offence, or they may do so to uncover evidence of a grave crime. The tolerance of the legal system for these actions will vary accordingly, and in the former case the courts will go to greater lengths in restoring the *statu quo ante*; not only will they award damages when the aggrieved party makes a claim but they will also exclude the resulting evidence as if the search had not taken place. Along the same line of thought, the courts may accept that the enforcement of the right to be secure against unreasonable searches (and the subjacent

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[44]The High Court of Australia considered the question twice in recent years, first in *Bunning* v. *Cross* (1978) 19 A.L.R. 641 and subsequently in *Cleland* v. *The Queen* (1982) 43 A.L.R. 619. See also, among other cases, *R.* v. *Padman* (1979) 25 A.L.R. 36 (Sup. Ct Tasmania), *Shervill* v. *Shearer* (1979) 26 A.L.R. 454 (Sup. Ct Northern Territory), *Phillips* v. *Cassar* [1979] 2 N.S.W.L.R. 430 (C.C.A.), *French* v. *Scarman* (1979) 20 S.A.S.R. 333 (Sup. Ct), *R.* v. *Conley* (1979) 21 S.A.S.R. 166 (Sup. Ct), *R.* v. *Killick* (1979) 21 S.A.S.R. 321 (Sup. Ct), *McMahon* v. *Casey and McMahon* [1980] Qd. R. 230 (Sup. Ct), *R.* v. *Migliorini* (1981) 38 A.L.R. 356 (Sup. Ct of Tasmania), *R.* v. *Clune* [1982] V.R. 1 (Sup. Ct Victoria), *R.* v. *Tilev* (1983) 33 S.A.S.R. 344 (Sup. Ct) and *R.* v. *Curran and Torney* [1983] 2 V.R. 133 (Sup. Ct Victoria).

[45]See generally Bradley, *The Exclusionary Rule in Germany* (1983) 96 Harv. L. Rev. 1032, where all the relevant primary sources are reviewed.

[46]Bradley, *ibid.*, 1040, fn. 33, draws a parallel between the *Rechtstaatsprinzip* and the doctrine developed in *Rochin* v. *California*, 342 U.S. 165 (1952), discussed *infra* at p. 541.

[47]Attributed to Professor Walter Jellinek by Ernst Forsthoff, *Lehrbuch des Verwaltungsrechts* (München: Beck, 1973) vol. 1, 70.

[48]See G. Braibant, "Le principe de la proportionalité " in *Mêlanges offerts à Marcel Waline* (1974) t. 2, 297.

"right to privacy") results in the suppression of evidence that would otherwise prove a minor statutory offence; they will show no such tolerance if the evidence proves guilt in a serious crime. The power to search does not embody a power to search unreasonably conditional upon the gravity of the offence being investigated. The right to be secure against unreasonable searches does not embody a "right not to get caught" conditional upon the degree of secretiveness of one's actions. When a court is faced with abuses of both the power and the right, it is entitled to look for the greater disproportionality and to dispose of the case accordingly. This is not to say that there exists a conditional power to disregard procedural requirements or, conversely, a conditional right not to get caught. The courts simply take the view that they must remedy to the fullest possible extent the abuses which they regard as more detrimental to the legal order. They then implicitly accept that it is sometimes necessary to fight fire with fire, a proposition which works both ways. Once the courts are prepared, as was long the case in Canada, to overlook police illegalities for the purpose of convicting the guilty, they should also be prepared, on occasion, to overlook evidence of guilt for the purpose of obliterating police illegalities. Naturally, the right to be secure against unreasonable searches may be seen at times as protecting the offender's interest in avoiding punishment, but this interest is not always more objectionable than the interest of the police in enjoying in their investigations total freedom from legal restraints.[49]

The future will tell whether this angle of approach is suitable under section 24(2). There are, however, other and more fundamental questions which center on the meaning of disrepute and the manner in which section 24(2) should be interpreted. These aspects of the Canadian exclusionary principle will now be discussed.

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[49]Posner writes in *Rethinking the Fourth Amendment* [1981] Sup. Ct Rev. 49, 51: "What is important is that the Fourth Amendment not be seen as protecting the criminal's interest in avoiding punishment." He then proceeds to explain that an efficient tort remedy protecting *lawful* Fourth amendment interests (such as privacy and mental tranquility) would constitute a more adequate enforcement mechanism, particularly from the point of view of deterrence. The argument has some force when it is presented to highlight the demerits of a strict exclusionary rule. Yet, whatever value a tort might have as a deterrent, it would have been qualitatively inadequate in a case like *Mapp* v. *Ohio*, 367 U.S. 643 (1961), where the petitioner's interest in avoiding conviction for having knowingly had in her possession certain lewd and lascivious items — namely "four little pamphlets, a couple of photographs and a little pencil doodle" (p. 668) — certainly was not as detrimental to law as the police's interest in validating with a conviction a massive and warrantless raid carried out on the flimsiest suspicion. Damages are no substitute for an acquittal, a factor which ought to be given weight where the method of investigation is grotesquely out of proportion with the charge resulting from the investigation. If all citizens were constantly subjected in every facet of their lives to the permanent scrutiny of countless law enforcement officials, how many could never be charged with anything?

II. Resisting the Lure of Empiricism

In June 1960, Mr Justice Potter Stewart wrote in *Elkins* v. *United States* that the American Exclusionary Rule was "calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it."[50] This *dictum*, with which four other members of the Court agreed, can only have meant that over the years the understanding of the Rule and its rationale had changed significantly: there is not a word about deterrence in the case that created the rule, *Weeks* v. *United States*,[51] and for thirty-five years after *Weeks* American courts simply did not discuss the preventive value of the Rule.[52] Yet the assertion that the Rule was a deterrent became in the nineteen-sixties the principal premise of a substantial amount of legal literature and case law. The evolution in the justification of the Rule coincided, of course, with the growing popularity in legal academic circles of empirical studies and the methodology of social sciences. The Rule had always been controversial. Right from the outset, Wigmore had attacked it with a stylistic impetuosity reminiscent of Bentham and rarely equalled in modern legal literature.[53] Now, at last, it looked as if issues would be joined and the debate settled. Either the Rule did or did not deter. If it did not, its failure in this regard would finally discredit it.

Several empirical studies were conducted and published throughout the decade and later.[54] Field observations, multiple area studies and the before-after research methodology were used in turn, different cities and different law enforcement agencies were compared, various testing variables such as

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[50]364 U.S. 206 (1960) 217.

[51]232 U.S. 383 (1914).

[52]Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?* (1982-83) 16 Creighton L.R. 565, 598.

[53]See Wigmore, *Evidence*, 3rd ed. (1940) vol. 8, § 2184. The well-known Titus and Flavius passage is cited by Seaton J.A. in *R.* v. *Collins* (1983) 148 D.L.R. (3d) 40, 53, (1983) 5 C.C.C. (3d) 141 B.C.C.A. [hereinafter cited to D.L.R.].

[54]See, for example, Nagel, *Testing the Effects of Excluding Illegally Seized Evidence* [1965] Wisc. L. Rev. 283; J. Skolnick, *Justice without Trial: Law Enforcement in Democratic Society*; *Effect of Mapp* v. *Ohio on Police Search-and-Seizure Practices in Narcotics Case* (1968) 4 Colum. J.L. & Soc. Prob. 87; Oaks, *Studying the Exclusionary Rule in Search and Seizure* (1970) 37 U. Chi. L. Rev. 665; Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives* (1973) 2 J. Legal Stud. 243; *On the Limitations of Empirical Evaluations of the Exclusionary Rules: A Critique of the Spiotto Research and United States* v. *Calandra* (1974) 69 Nw. U.L. Rev. 740; Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion* (1974) 62 Ky L.J. 681; Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule* (1977) 5 Am. Pol. Q. 57.

the contents of police reports, the frequency of successful motions to suppress; the number of police raids or convictions for drug offences and the rate of recovery of stolen property emerged from a haze of facts and figures.

Today, with the unfair advantage of full hindsight and extensive literature on the subject, an outside observer can only remark that these studies reveal much more about the limitations of empirical methodology than they do about the Exclusionary Rule itself. Despite fifteen years of sustained discussion with statistics in hand, we still do not know the answer to the question "does it or does it not deter?" What was originally intended as a scientific inquiry into the efficacy of the Exclusionary Rule became in fact the basis of a separate controversy on the feasibility and the relevance of empirical investigations. This is not surprising, for as early as 1973 some supporters of the Rule were denouncing the manner in which its detractors had put the question. One commentator, for example, wrote:

> Chief Justice Burger states that we lack sufficient evidence to determine the deterrent effect of the exclusionary rule, which, of course, is true. The very existence of the rule prevents making a controlled study to provide the evidence. The Chief Justice then places the burden of demonstrating the deterrent efficacy of the rule on its proponents. Obviously, the assignment of the burden of proof on an issue where the evidence does not exist and cannot be obtained is outcome determinative. The Chief Justice's assignment of the burden is merely a way of announcing a predetermined conclusion. So, of course, would be the opposite choice — imposition of the burden on opponents of exclusion.[55]

After a lively but occasionally aimless excursion into the world of field research, the participants in the Fourth Amendment polemics returned almost to their point of departure, made reluctant use of empirical data (which they regarded as inconclusive but nevertheless somewhat favourable to their own thesis)[56] and resumed a vigorous exchange of ideas on what ought to be the policy of the Rule.[57]

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[55]Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering* (1972-73) 48 Ind. L.J. 329, 332.

[56]See, for example, LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"* (1982) 43 U. Pitt. L. Rev. 307, 317-19.

[57]A series of articles published in Judicature conveniently incapsulates the main arguments in this debate and shows that the empirical branch of the controversy has come to a stalemate: see Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment* (1978-79) 62:2 Judicature 66 (August); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* (1978-79) 62:5 Judicature 214 (November); Kamisar, *The Exclusionary Rule in Historical Perspective: the Struggle to Make the Fourth Amendment more than 'an Empty Blessing'* (1978-79) 62:7 Judicature 336 (February); Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak* (1978-79) 62:7 Judicature 351 (February); Canon, *The Exclusionary Rule: Have Critics Proven that It Doesn't Deter Police?* (1978-79) 62:8 Judicature 398 (March); Schlesinger, *The Exclusionary Rule: Have Proponents Proven that It Is a Deterrent to Police?* (1978-79) 62:8 Judicature 404 (March); Canon, *A Postscript on Empirical Studies and The Exclusionary Rule* (1978-79) 62:9 Judicature 455

The question that now needs to be resolved is the "Good Faith" exception to the Rule.[58] Lately, much prose, but few, if any new statistics, has appeared on the subject in legal periodicals.[59] At least one leading Fourth Amendment scholar now takes the view, despite his earlier advocacy of the deterrence rationale, that the true justification of the Rule is its unique effectiveness in the enforcement of constitutional safeguards.[60] Even Mr Justice Stewart, who had provided the essential premise and starting point for this long drawn-out debate, recently implied in his Harlan Fiske Stone Lectures that, regardless of the data, he still believed in deterrence.[61] In a sense, one should be thankful that the facts, whatever they are, did not disclose a final answer. The Exclusionary Rule has provoked over the years a great deal of intense thinking and much scholarly creativity: the aims and achievements of the system of constitutional safeguards are continuously re-examined through the scrutiny of one of its parts. It would be unfortunate if some of these safeguards receded into near invisibility because the Rule does not fulfill the expectations of its pavlovian apologists.

Deterrence, whether real or imaginary, does not appear to be an important consideration under section 24(2) of the *Charter*. It is sometimes thought, and there is at least one pronouncement to this effect in a recent Canadian judgment, that the standards of police practices are "high", perhaps higher, on this side of the border.[62] If this were true, a strict exclusionary

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(April); Schlesinger, *A Reply to Professor Canon* (1978-79) 62:9 Judicature 457 (April). Professor Canon sums up the debate on empirical research in a succinct but most insightful article, *Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention* (1982) S. Tex. L.J. 559. He correctly points that those critics of the Rule who assert that it does not deter have themselves failed to support empirically their claim that many guilty persons escape conviction because of the Rule.

[58]Although the Supreme Court did not decide the point, which had been argued, in *Illinois* v. *Gates*, 103 S. Ct 2317 (1983), other appeals, such as *United States* v. *Leon*, 701 F. 2d 187 (1983), *certiorari* granted 103 S. Ct 3535 (1983), are pending before the court and raise the same issue. See H. Stone, *The Exclusionary Rule Revisited: Good Faith in Fourth Amendment Search and Seizure* (1981-82) 70 Ky L.J. 879.

[59]See, for example, the proceedings of the *Exclusionary Rule Symposium* (1982) 23 S. Tex. L.J. 527-685.

[60]*Supra*, note 52, 618-9, fn. 300.

[61]Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases* (1982) 83 Colum. L. Rev. 1365, 1394-6. Most of the views expressed on the Exclusionary Rule depend, in the end, on an act of faith or on ideological considerations: see Sunderland, *Liberals, Conservatives and the Exclusionary Rule* (1980) 71 J. Crim. L. & Criminology 343, 375-7.

[62]See *R.* v. *Collins*, *supra*, note 37, 142, where the trial judge is quoted as saying: "with the historical Anglo-Canadian tradition of high standards of conduct of the vast majority of our police officers, cases where the admissibility [*sic*] of evidence would be calculated to bring the administration of justice into disrepute will be rare". See, similarly, Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch* (1973) 51 Tex. L. Rev. 1325, 1348.

rule might conceivably be more effective in Canada than it has been in the United States. One may even conjecture that, after a while, exclusion would become a very rare occurrence because the police would never blunder. However, the underlying assumption here is a dubious one. It is equally, if not more, plausible that the frequency of illegality in police investigations never really came to the attention of the courts or of the public because Canadian courts, until 1982, did not exclude improperly obtained evidence. The large number of reported cases which in recent months have involved illegalities, some rather serious, in routine police investigations, offers an indication of what reality actually held in store. Since it does not appear likely that Canadian law enforcement personnel intentionally began to perform illegal searches after April 1982 for the purpose of testing the effect of the *Charter*, the irregular methods must have existed on a similar and perhaps even greater scale before that date. In this regard, the *Charter* has been an eye-opener. Paradoxically, it may itself bring a branch of the administration of justice into disrepute by confronting the Canadian public with the fact that police improprieties are not as rare an occurrence as they were once thought to be. Now that the spotlight is on them, it will be interesting to see if peace officers can live up to their reputation of professionalism.

Meanwhile, at the judicial level, the logic of deterrence does not elicit much support. In *R.* v. *Collins*, Seaton J.A. remarked: "It [deterrence] is the consideration that has led others to exclude evidence. But is is not open to a court in Canada to exclude evidence to discipline the police."[63] On the other hand, in his carefully considered opinion in *R.* v. *Samson*, Judge Borins of the Ontario County Court did suggest that deterrence had some relevance. Among other factors in exercising the exclusionary jurisdiction under section 178.16(2) of the Criminal Code: "[i]t would be important", he said, "to know whether the method of surveillance used was a result of a deliberate policy to employ that method and whether the reception of the evidence would tend to encourage such a policy."[64] Whether reception would encourage illegality or whether exclusion would induce respect for the law is really one and the same question. But it is true that for the moment in Canada deterrence remains buried under the surface, as it once was in the United States. The implementation of section 24(2), therefore, does not require extensive surveys of police response to exclusion.

Yet the temptation of empiricism exists also in Canada, but under a different form. In an article published last year in the Canadian Bar Review,[65] Professor Dale Gibson of the University of Manitoba expressed the

[63]*Collins, supra*, note 37, 144.

[64](1982) 37 O.R. (2d) 237, 251, (1982) 29 C.R. (3d) 215 (Co. Ct).

[65]Gibson, *Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms* (1983) 61 Can. Bar Rev. 377.

view, which he articulated very well, that public opinion polls can and should assist the courts in determining the meaning of "disrepute" for *Charter* purposes. Faced almost immediately with frequent motions for exclusion under section 24(2), the courts, predictably enough, did not wait for the polls. Nor will they necessarily be inclined to consider them: there already is a *dictum* on record in which an appellate judge points out, after discussing the significance of a community views test, that he does "not suggest that the courts should respond to public clamour or opinion polls."[66] At the same time, however, the courts have said that the matter of disrepute must be seen (and I quote from a selection of cases) not through the eyes of a policeman, a law teacher, a judge, a jurist or an idealist, but through the eyes of the community at large, including these various categories but consisting for the most part of concerned and thinking citizens, or ordinary persons who are practical, fair-minded and right-thinking.[67]

This approach is precarious. There is nothing in section 24(2) itself that requires collective judicial speculation about community views. Apart from the shock to the community doctrine, about which more will be said in a moment, there is nothing in the recent, or for that matter distant, origins of our exclusionary principle, nor in related commonwealth doctrines, that calls for this kind of divination. Furthermore, there appears to be something of an inconsistency here. To say and repeat that community views must prevail but to engage at the same time in the complex exercise of weighing, among other variables, the relative gravity of the offence and its more or less surreptitious nature, the greater or lesser technicality of the breach, the changeable constraints of investigation work and the degree of good faith, deliberateness, intrusiveness, deception and physical force displayed in the case is unrealistic. It amounts to saying that community views are decisive on a question that the community of average, untrained laymen could not possibly decide in this fashion.

Mere figures of speech in a cluster of decisions should not cause great concern. But unfortunately, the language used to express this fiction, the "views of the community at large", really invites empirical challenge, while the question itself is singularly ill-suited for empirical resolution. Professor Gibson reminds us in his article of a remark once made by Mr Justice Dickson, as he then was, in the Court of Appeal of Manitoba: "The state of mind or attitude of a community is as much a fact as the state of one's

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[66]Seaton J.A. in *R.* v. *Collins, supra*, note 37, 50.

[67]*Ibid.*, 144-5, *R.* v. *Nelson* (1982) 32 C.R. (3d) 256, 263 (Man. Q.B.), *R.* v. *Cuff, supra*, note 26, 323, and *R.* v. *Gibson, supra*, note 22, 187; see also Gibson, *supra*, note 65, 378, fn. 4.

health."[68] No one would dispute this proposition, and to rely on the results of scientific surveys seems perfectly reasonable if the variables, even though subjective, are easily circumscribed. The likelihood of confusion between particular trademarks or labels, the obscenity of a particular passage in a book or a film, or even, arguably, the need for a change of venue in a particular trial, lend themselves in varying degrees to polling techniques.[69] Of course, larger and more diffuse variables have also been tested by social scientists, such as the visibility of a court, the goodwill towards the police or public confidence in the criminal justice system.[70] But surveys falling in this latter category, while they may be useful to politicians and law reformers, have not been used by courts for the purposes of adjudication.

How, then, might polls be employed to determine what disrepute is under the *Charter*? Practical but self-evident reasons, such as costs and delays, would seem to rule out these techniques in all but the most extraordinary or notorious cases; and even if the introduction of this survey evidence occurs only in cases of this sort, are we not then, and to a specific end, opting for trial by mob? At the other extreme, general surveys administered on a decennial basis to a large cross-section of the Canadian public would be too far removed from the circumstances of individual cases to provide anything but the crudest information on public attitudes. If attempts were made, as they should, to render surveys of this type more specific, what sampling of cases would serve to illustrate the inherent difficulty of decisions on admissibility? What circumstantial correlations would be used to focus the questions — a first-degree murder case, like *Nelson*,[71] where the suspect was intoxicated and mentally disturbed, where there had been a clear denial of the right to counsel and where the impugned evidence, a statement, was excluded partly because there was other sufficient evidence of guilt — or a possession of weapons case, like *Singh*,[72] where a Sikh dragnet

[68]*R.* v. *Prairie Schooner News* (1970) 1 C.C.C. (2d) 251, 261, cited in Gibson, *supra*, note 65, 381. Dickson J.A., with the concurrence of Monnin J.A., ruled that the results of an opinion survey were inadmissible in evidence but stated that such surveys might be admissible subject to certain tests not met in the case at bar.

[69]See *Baumholser* v. *Amax Coal Co.*, 630 F. 2d 550 (1980) and the authorities cited by Gibson, *supra*, note 65, 380-2.

[70]See, for example, Murphy & Tanenhaus, *Public Opinion and the Supreme Court: The Goldwater Campaign* (1968) 32 Pub. Opinion Q. 31; Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes* (1968) 2 L. and Soc. Rev. 357; see also Alberta Bureau of Statistics, *Residents' Attitudes Towards the Police* (1976); United States Government, House Subcommittee on Government Information and Individual Rights, *Public Reaction to Privacy Issues* (1980), and finally, closer to our concerns, the very revealing text of R. Lévy and R. Zauberman, *L'image du système pénal au Québec* (1977).

[71](1982) 3 C.C.C. (3d) 147, (1982) 32 C.R. (3d) 256 (Man. Q.B.).

[72](1983) 8 C.C.C. (3d) 38 (Ont. C.A.).

of questionable legality led to the discovery of a weapon admitted under section 24(2)? How many members of the Canadian public have even heard of section 24(2)? Can the pollster expect meaningful answers if he does not first convey a modicum of information about the rule? Why not simply ask "Did you see the film The Star Chamber? If so, who in your opinion were the good guys?" In all likelihood, opinion polls would raise methodological problems different from those experienced in the United States but equally difficult to solve. The polls themselves would become the object of controversy.

In fairuess to Professor Gibson, who presented an original and thoughtful argument for the use of opinion polls, it should be added that he himself acknowledges the limitations of this kind of evidence, particularly as regards its lack of specificity. He concludes that the "ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion".[73] Once this point is conceded, the case for opinion poll evidence seems significantly weakened.

Instead of reiterating unconvincing appeals to evanescent community views, Canadian judges should concentrate on what they do best: finding within themselves, with cautiousness and impartiality, a basis for their own decisions, articulating their reasons carefully and accepting review by a higher court where it occurs. A convenient and longstanding legal fiction exists for the purposes of judicial dialectics: the reasonable man, whether it be the man on the Clapham omnibus or, perhaps today in Canada, the career-woman on the Voyageur bus. One commendable feature of this concept is its coherence. Judges may disagree among themselves on what the reasonable man would do in any given case, but in the end the courts never disagree *with* the reasonable man. They are, in reality, the reasonable man. The question should be: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?" If in due course the reasonable man takes into account the findings of opinion polls, so be it, but for the time being section 24(2) should remain entirely within the control of the courts.

III. Shaking Off the Hold of Precedent

The phrase "bringing the administration of justice into disrepute" has an ominous flavour to it. At first blush, it evokes events such as the *Dreyfus* trial or the *Sacco and Vanzetti* case, events on a scale not at all commensurate with the everyday reality of Canadian courtrooms. Obviously, much elucidation and creative exegesis will be needed here to understand what

[73]Gibson, *supra*, note 65, 390.

we meant when we finally agreed on the phrasing of our Constitution. Meanwhile, certain patterns of thought and favourite formulations already recur in the case law generated by section 24(2).

Perhaps the most frequently quoted authority in these cases is the separate opinion of Mr Justice Lamer in *Rothman* v. *The Queen*.[74] This case revolved around the common law rule on confessions. The opinion in question, although concurring in the result of the appeal, was distinctly at odds with several elements of the more restrictive majority judgment. For six members of the Court, the confession rule remains primarily an instrument of intrinsic policy and should be interpreted in this light. For Mr Justice Lamer, the rule ought to incorporate considerations of extrinsic policy. To quote from the judgment, the trial judge should exclude a statement "if its use in the proceedings would, as a result of what was said or done by any person in authority in eliciting the statement, bring the administration of justice into disrepute".[75]

It should surprise no one that this opinion soon became the principal source of inspiration for judicial interpretations of section 24(2). In wording, if not otherwise, the construction bears great resemblance to the *Charter* provision, hence its instant appeal to the harassed practitioner. It is set forth in what has been called, perhaps not entirely accurately, a "majority judgment",[76] but certainly the only judgment which is not a dissent and which discusses the notion at the highest court level. Furthermore, although section

[74][1981] 1 S.C.R. 640, (1981) 121 D.L.R. (3d) 578, (1981) 59 C.C.C. (2d) 30. The following cases adopt expressly or by implication the *Rothman* test: *R.* v. *Caron* (1982) 31 C.R. (3d) 255 (Ont. Dist. Ct); *R.* v. *Engen supra*, note 23; *R.* v. *Hynds* (1982) 70 C.C.C. (2d) 186, (1982) 1 C.R.R. 378 (Alta Q.B.); *R.* v. *MacIntyre* (1982) 139 D.L.R. (3d) 602, (1982) 69 C.C.C. (2d) 162 (Alta Q.B.); *R.* v. *Phillips* (1983) 7 C.C.C. (3d) 436, (1983) 35 C.R. (3d) 330 (B.C. Co. Ct); *Re T.L.W.* (1982) 5 C.R.R. 241 (Ont. Prov. Ct); *R.* v. *Chapin* (1983) 43 O.R. (2d) 458, (1983) 7 C.C.C. (3d) 538 (C.A.); *R.* v. *Cohen* (1983) 148 D.L.R. (3d) 78, (1983) 5 C.C.C. (3d) 156 (B.C.C.A.); *R.* v. *Collins* (1983) 148 D.L.R. (3d) 40, (1983) 5 C.C.C. (3d) 141 (B.C.C.A.); *R.* v. *Cuff* (1983) 6 C.C.C. (3d) 311 (B.C. Co. Ct); *R.* v. *Esau* (1983) 147 D.L.R. (3d) 561, (1983) 4 C.C.C. (3d) 530 (Man. C.A.); *R.* v. *Gibson* (1983) 37 C.R. (3d) 175 (Ont. H.C.); *R.* v. *Longtin* (1983) 147 D.L.R. (3d) 604, (1983) 5 C.C.C. (3d) 12 (Ont. C.A.); *R.* v. *Stevens* (1983) 7 C.C.C. (3d) 260, (1983) 35 C.R. (3d) 1, (1983) 58 N.S.R. (2d) 413 (C.A.); *R.* v. *Watchel* (1983) 32 C.R. (3d) 264 (B.C. Prov. Ct). At least one of these decisions apparently widens the test without saying so explicitly: see *Phillips*. On the other hand, Howland C.J.O., in *R.* v. *Simmons, supra*, note 22, 218, wrote, with the concurrence of three other members of the Court:

> There may, however, be instances where the administration of justice is brought into disrepute within s. 24(2) without necessarily shocking the Canadian community as a whole. In my opinion it is preferable to consider every case on its merits as to whether it satisfies the requirements of s. 24(2) of the *Charter* and not to substitute a "community shock" or any other test for the plain words of the statute.

[75]*Rothman, ibid.*, 696.

[76]Ewaschuk, *The Charter: An Overview and Remedies* (1982) 26 C.R. (3d) 54, and *Search and Seizure: Charter Implications* (1982) 28 C.R. (3d) 153.

178.16(2) of the *Criminal Code* had been in existence for some time when the *Charter* provision acquired its definitive form, no court had yet considered its import in a reported decision;[77] therefore, while the thought may seem inapposite to the purist, one can imagine without excessive exertions that the drafters of the *Charter* had read Mr Jusice Lamer's opinion and had found it sufficiently inspiring to quote it in the *Charter.*

What makes the opinion of Mr Justice Lamer so attractive to the practitioner is probably that it attempts to unravel the meaning of "bringing the administration of justice into disrepute" with a catchy phrase and a few sharp examples. It contains a suitable dose of general language (for example, what is to be repressed is what "is done in a way that offends our basic values";[78] sometimes, a statement should "be excluded as seriously damaging the system's respectability"[79]), but the passage most frequently referred to is, of course, the one which speaks of the "shock to the community":

> The judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detention of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rnle be hampered in their work. What should be repressed vigourously is conduct on their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal-aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting Pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.[80]

Where does this doctrine come from? Can it be traced back to any known line of precedents?

The choice of words, particularly "shock to the community", the mention of Pentothal injections and the allusions to societal and systemic values

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[77]The elaborate and careful judgement of Judge Borins in *R.* v. *Samson (No. 7), supra,* note 34, was the first to consider the application of s. 178.16(2) and came after *Rothman.*

[78]*Supra,* note 74, 689.

[79]*Supra,* note 74, 695.

[80]*Supra,* note 74, 697.

make the analogy with *Rochin* v. *California*[81] very tempting. It appears that, once again, the Americans have been there before.

Rochin preceded *Mapp* v. *Ohio*[82] by approximately ten years. It is occasionally referred to as the stomach-pump case. Police officers had entered Rochin's house without a warrant, forced open his bedroom door and seen him swallow two capsules. They handcuffed Rochin, took him to a hospital and directed a doctor to introduce a tube into his stomach. The procedure, which was done against Rochin's will, induced vomitting and the officers recovered two capsules containing morphine. Rochin was then prosecuted and convicted under California state law, which law at the time did not require the exclusion of improperly obtained evidence.

Rochin's petition came before the United States Supreme Court almost exactly three years after *Wolf* v. *Colorado*.[83] In this last case, Mr Justice Frankfurter, writing for the Court,[84] had held that the *Weeks* doctrine and the Fourth Amendment exclusionary rule originally developed in federal courts would not be imposed on all American states by means of the Fourteenth Amendment.[85] *Rochin* now raised the same issue and the question, simply put, amounted to this: Does the Due Process Clause of the Fourteenth Amendment incorporate a standard of exclusion, other than the Fourth Amendment's unreasonableness standard, requiring state courts to exclude improperly obtained evidence? The Court, by a majority and again under Mr Justice Frankfurter's pen, gave an affirmative answer.

> [W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and to remove what was there, the forcible extraction of his stomach's contents — this course of proceedings by agents of government to obtain the evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation."[86]

Both the tone and tenor of this judgment facilitate the analogy with Mr Justice Lamer's opinion in *Rothman*. References in *Rochin* to "methods that offend 'a sense of justice' ",[87] to "the community's sense of fair play

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[81] *Supra*, note 46. The analogy was noted by Ewaschuk, *supra*, note 76, 56.

[82] *Supra*, note 9.

[83] 338 U.S. 25 (1949).

[84] Justice Black wrote a separate opinion concurring with the majority; Justices Douglas, Murphy and Rutledge dissented.

[85] *Rochin* v. *California*, *supra*, note 46.

[86] *Ibid.*, 172.

[87] *Ibid.*, 173, citing *Brown* v. *Mississippi*, 297 U.S. 278 (1935).

and decency"[88] and to circumstances "calculated to discredit law and thereby brutalize the temper of a society"[89] all point to the conclusion that the concern really must have been the same: finding a sub-standard, an absolute bottom line, a point of demarcation beyond which judges, regardless of legality, will turn their heads away in disgust. This explanation of *Rochin* may sound excessively subjective, but that is precisely the point.

A distinction might be attempted between the *Rochin* test and the *Rothman* formula, on the ground that the former focuses on the violation of a procedural safeguard while the latter concentrates on the admission of the evidence. This view, as will be argued later, is unconvincing and it amounts to hair splitting. Besides, even if it had substance, it would rather bear out the point made here, for the implication would necessarily be that the *Rothman* formula is even narrower than the *Rochin* test. Nor can an acceptable distinction be made because one case speaks of "shock to the conscience" and the other of "shock to the community". A perusal of Mr Justice Black's dissent, in which he closely analyzes the majority's terminology, shows that the test purports to incorporate the traditions and conscience of the people, not the merely personal and private notions of the court.[90] The key here is the concept of "shock", recently examined by an Ontario court in an unreported case:

> The concept of "shock" is that of an immediate, sudden, unreflective, possibly emotional and almost certainty uninformed response: it smacks of the response we have to a startling headline, or a sudden tragedy, or seeing or hearing, without warning, something tragic, disgusting or degrading. I am not sure that is the appropriate test if it is the long term repute of our system of justice which is in question.[91]

These remarks could apply with equal felicity to the *Rochin* test, itself almost certainly the origin of the "shock to the community" doctrine.

The fate of the *Rochin* test is interesting and may afford a good indication of where Canadian law will be heading if the courts persist in placing much reliance on *Rothman*. In the twenty years that followed it, *Rochin* was frequently cited (often in dissents), referred to, explained, distinguished and written about. There are well over five hundred reported American cases in which it received a mention. It was followed as controlling precedent only once, in a federal District Court, at trial level, where a penis swab had been forcibly obtained from a defendant, after some preliminary beating

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[88] *Ibid.*, 173.
[89] *Ibid.*, 174.
[90] *Ibid.*, 175.
[91] Merredew P.J.O. in *R.* v. *Texaco Canada Inc.*, *supra*, note 40, cited at 37 C.R. (3d) 177.

up.[92] The evidence in this case (a blood stain) was not even reliable because nobody had seen fit to identify the blood group. In other words, the *Rochin* exclusionary rule operated *par dessus le marché*, as a kind of eager latecomer tired of years of idleness. The potential for the application of the *Rochin* doctrine certainly continued to exist on a large scale until *Mapp* v. *Ohio*.[93] Approximately one half of the American states retained the common law regime of admissibility until the early sixties;[94] therefore the ground for excluding improperly obtained evidence in these states could only be the *Rochin* doctrine. Furthermore, under the so-called Silver Platter doctrine, abolished only in 1959,[95] evidence improperly obtained by state agents was admissible in federal prosecutions despite the Fourth Amendment safeguards, because no federal agent had taken part in the violation. Surely, however, one could argue in these cases that, where it applied on the facts, the *Rochin* bottom line prevented the reception of the evidence. Despite these openings, the doctrine of the shock to the conscience never blossomed. Not only did it fail to influence the overall orientation of the case law, but it was also repeatedly attacked by members of the Supreme Court from 1952 onwards until *Mapp* v. *Ohio*. For Mr Justice Clark, speaking in *Irvine* v. *California*,[96] the test

> makes for such uncertainty and unpredictability that it would be impossible to foretell — other than by guesswork — just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free.[97]

With *Mapp*, the Fourth Amendment standard of unreasonableness became the common exclusionary denominator throughout the United States. The threshold of the debate having moved forward, developments in the ongoing controversy which would recently have appeared far-fetched now became predictable. In particular, the applicability of the exclusionary rule in cases involving foreign investigations would inevitably arise. Would there be, in other words, a surrogate Silver Platter doctrine where foreign officials had carried out an unreasonable search outside the American territory? *Mapp* could be read as suggesting that deterrence constituted the primary

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[92] *United States* v. *Towsend*, 151 F. Supp. 378 (1957); but see *Use of Stomach Pump Vitiates Due Process* (1951-52) 4 Stanford L.R. 591, 594, fn. 21.

[93] *Supra*, note 9.

[94] See *Elkins* v. *United States*, 364 U.S. 206, 224 (1959) and *Mapp* v. *Ohio*, *supra*, note 9, 651.

[95] First acknowledged by the Supreme Court in *Byars* v. *United States*, 273 U.S. 28 (1927), the Silver Platter doctrine disappeared with *Elkins*, *supra*, note 94.

[96] 347 U.S. 128 (1954).

[97] *Ibid.*, 138. See Mr Justice Black's review of this evolution in *Mapp* v. *Ohio*, *supra*, note 9, 663 *et seq.*

purpose of the exclusionary rule. Working with this rationale, there could not be much point in extending the scope of the rule to cases involving improprieties by foreign officials. Deterrence, after all, could hardly be seen as an exportable commodity. A California case,[98] decided by a circuit Court of Appeals, soon dealt with the issue in authoritative terms. The case had resulted from a warrantless search in Tijuana, Mexico. "Neither the Fourth nor the Fourteenth Amendments", said the Court, "are directed at Mexican officials and no prophylactic purpose is served by applying an exclusionary rule here since what we do will not alter the search policies of the sovereign Nation of Mexico".[99] Again, one could easily anticipate the next step in the growth of this side issue: what would happen if the unreasonable search in a foreign jurisdiction had been carried out on behalf or with the assistance of American law enforcement agents? The Silver Platter doctrine itself offered an answer. Although before *Elkins*[100] federal officials had been allowed to take advantage of evidence obtained illegally under state law, this loophole availed only where the reprehensible investigation methods were not "a joint operation of the local and federal officers".[101] Obviously, the same reasoning could apply, *mutatis mutandis*, to cases of foreign searches. *Stonehill* v. *United States*[102] stands for this proposition, later reformulated as follows: "if it is shown that American agents are in privity with the search through direct participation or procurement, the rule of exclusion may be invoked".[103]

But there remained one further difficulty. Suppose that foreign police officers obtain evidence outside the United States through brutally abusive methods of the *Rochin* or the *Mapp* type. The evidence then finds its way into the hands of an American prosecutor who introduces it into court, knowing that American law enforcement agents are totally blameless. Can the court consider the manner in which foreign police officers secured the evidence and exclude it on that basis? Apparently, no reported case has yet produced this result. But several appellate courts have addressed the issue and reached in the abstract the conclusion that the evidence ought to be discarded "if the circumstances of the foreign search and seizure are so

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[98] *Brulay* v. *United States*, 383 F. 2d 345 (1967) *certiorari* denied, 389 U.S. 986 (1967).

[99] *Ibid.*, 348.

[100] *Supra*, note 94.

[101] *Byars* v. *United States*, *supra*, note 95, 33. See also *Lustig* v. *United States*, 338 U.S. 74 (1949).

[102] 405 F. 2d 738 (1968), *certiorari* denied, 395 U.S. 960 (1969).

[103] *United States* v. *Phillips*, 479 F. Supp. 423, 431 (1979), a case resulting from an investigation by the Royal Canadian Mounted Police and the Edmonton City Police.

extreme that they "shock the judicial conscience".[104] The adjective judicial is actually a gloss on the original phrase, as it first appeared in 1965.[105]

One might have expected American courts to show greater sensitiviy than Canadian courts in cases involving improperly obtained evidence. For more than two decades, American law proceeded on its own separate course and became hyper-allergic to Fourth Amendment violations. Should not this factor have increased the judicial capacity to be shocked by illegal investigations? Apparently, it did not. The revived "shock to the conscience" test has had very little practical effect on the admissibility of improperly obtained evidence. In several cases, it has lengthened the discussion, but it has never changed its outcome. The American Bench draws the dividing line between shock and peace of mind where deliberate brutality or wicked deception occurs. The dictates of the Canadian judicial conscience are not likely to be significantly different. As long as the shock to the community remains the test, the Canadian exclusionary rule will rarely interfere with the free intake or improperly obtained evidence: one imagines that Canadian citizens will not often shock themselves into the protective arms of section 24(2).

A less demanding and more rational test, based on the notion of effective enforcement, would seem more suitable. In *Rothman*, Mr. Justice Estey, who dissented with Chief Justice Laskin, observed that bringing the administration of justice into disrepute means, in effect, "prejudic[ing] the public interest in the integrity of the judicial process".[106] What integrity does the judicial process retain if, consistently, the denial or infringement of a particular *Charter* guarantee does not give rise to any effective remedy? How much integrity is there in a system which places upon investigation methods certain explicit limitations but makes no attempt to enforce them, uses evidence which would not have been obtained at all if the system's own rules had been complied with, proclaims certain rules in the abstract

[104]*United States* v. *Morrow*, 538 F. 2d 120, 139 (1976), *certiorari* denied, *sub nom. Martin* v. *United States*, 430 U.S. 956 (1977). See also *United States* v. *Hensel*, 699 F. 2d 18 (1983), and *Commonwealth* v. *Gagnon*, 449 N.E. 2d 686 (1983).

[105]The use of this concept in connection with foreign searches can be traced back to *Birdsell* v. *United States*, 346 F. 2d 775, 778, fn. 10 (1965), in which Judge Friendly, writing for the Court, had observed (p. 782, fn. 10): "We do not mean to say that in a case where federal officials had induced foreign police to engage in conduct that shocked the conscience, a federal court, in the exercise of its supervisory powers over the administration of federal justice, might not refuse to allow the prosecution to enjoy the fruits of such action." Apparently, what was originally perceived as a single exception (American participation in foreign investigations that shock the conscience) later became a double-barrelled exception (American participation in foreign investigations unreasonable under the Fourth Amendment *or* foreign investigations which, regardless of any American participation, shock the conscience): see *United States* v. *Phillips*, *supra*, note 103, 431.

[106][1981] 1 S.C.R. 640, 649, (1981) 121 D.L.R. (3d) 578.

and then ignores them in practice, says one thing and does the opposite? This kind of argument, intellectually dishonest when carried this far, has merit when it is kept in perspective and weighed against other considerations. It persuaded the majority of the Saskatchewan Court of Appeal in *R.* v. *Therens*.[107] Why could it not be made under section 24(2) if the courts finally discard the emotional "shock to the community" test? A reasonable man might be prepared to compromise with search warrant requirements when a Clifford Olson is on the loose. He will be less prepared to compromise when the police use road blocks for random breathalyzer testing the night the Oilers win the Stanley cup. To tolerate the former is to accept that there are limits to search and seizure safeguards. To tolerate the latter is to accept that, despite what the *Charter* says, these safeguards do not exist at all. One is a concession to law enforcement, the other is a full surrender. Neither would satisfy the *Rochin/Rothman* test. Only the second, I suggest, could bring the administration of justice into disrepute, were the courts to admit the evidence without batting an eyelash.

IV. Avoiding the Pitfalls of Literalism

In its first decision on the *Canadian Charter of Rights and Freedoms*, *Skapinker* v. *Law Society of Upper Canada*,[108] the Supreme Court of Canada adopted a surprisingly narrow and literal line of interpretation to rule on the applicability of sub-section 6(2)(b). The right "to pursue the gaining of a livelihood in any province" is really a mobility right, said the Court, and not a separate and distinct right to pursue the gaining of a livelihood in any province. Why? To a large extent because it is included under the heading "Mobility Rights". The Court did not deal with the fact that, in the French "Mobility Rights" reads "Liberté de circulation et *d'établissement*".[109] Whatever the merits of this decision — and one can accept that it actually coincides with the intent, if not the letter, of the provision, even though in fact the judgment purports to do the reverse — the manner and form of the opinion augurs a period of dry literalism in *Charter* interpretation cases.

Section 24(2) specifically states that evidence shall be excluded if "the *admission* of it in the proceedings would bring the administration of justice into disrepute". A literal reading of the provision leaves no choice: the focal point in the analysis must be the admission of the evidence, not the manner in which it was obtained. The latter, it seems, will only qualify as one of the various circumstances which the court can consider in exercising its

[107] *Supra*, note 22, 225-7.
[108] (1984) 53 N.R. 169 (S.C.C.).
[109] *Supra*, note 1, s. 6 [emphasis added].

jurisdiction to suppress. Because of this somewhat tortuous phrasing, punctilious adherence to the letter of the provision might substantially weaken the power to exclude evidence. Doctrinal commentary has not yet underscored this feature of section 24(2); in fact the steps in the analysis are sometimes collapsed in order to ask the question "would the violation of a *Charter* right bring the administration of justice into disrepute?"[110]

On the other hand, some appellate decisions do emphasize that the section centers on the effect of admission, not the effect of the infringement. In a case now before the Supreme Court of Canada, *R.* v. *Trask*,[111] the Court of Appeal of Nova Scotia observed that in the circumstances at hand, the exclusion of the evidence, rather than its admission, would bring the administration of justice into disrepute, and that consequently the evidence should not be excluded. Similar *dicta* are found in judgments of the Ontario[112] and the British Columbia[113] Courts of Appeal. Section 24(2), on its face, lends itself to this reading and supports the distinction made in these cases. Regrettably, however, the distinction, should it take hold, will further restrict the scope of the Canadian exclusionary principle and will produce a conceptual hotchpotch unique to Canadian law. Another Court of Appeal case, this one from Manitoba,[114] may be the harbinger of this evolution. Evidence in the form of drugs was admitted in this case because "[t]here was no trickery, no forced confession *and no situation where the evidence sought to be admitted is highly prejudicial but of tenuous probative value*".[115] The latter phrase, of course, is a reference to the *Wray*[116] conundrum which two judges of the Court do in fact treat as a relevant precedent.

The notion that the admission of evidence can bring the administration of justice into disrepute, and the words used to express this notion, come from Mr Justice Aylesworth's judgment in *Wray*. The complete passage reads as follows:

> In our view, a trial Judge has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute... .[117]

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[110]See, for example, Ewaschuk, *supra*, note 76, 52.

[111](1983) 6 C.C.C. (3d) 132, 137. (N.S.C.A.).

[112]*R.* v. *Singh*, *supra*, note 37, 44. See also *R.* v. *Simmons*, *supra*, note 22, 219 (*per* Howland C.J.O.).

[113]*R.* v. *Collins*, *supra*, note 37, 144.

[114]*Esau*, *supra*, note 20.

[115]*Ibid.*, 238 [emphasis added], Huband J.A. with the concurrence of Monnin J.A. See also *R.* v. *Dixon* (1983) 11 W.C.B. 401 (B.C.S.C.).

[116]*Supra*, note 13.

[117][1970] 2 O.R. 3, 4, (1970) 3 C.C.C. 122, (1970) 9 C.R.N.S. 131.

Clearly, the exclusionary principle contemplated here incorporates a substantial element of extrinsic policy. "Unfairness" could be interpreted as something that hinges on reliability, but if this had been the intent, the Ontario Court of Appeal would have declared the evidence admissible in *Wray*. As we know, it decided that the trial judge, on the facts, had correctly excluded the evidence. The decision was then reversed by the Supreme Court of Canada,[118] which reaffirmed what it took to be the common law rule: no exclusion unless it is on grounds of intrinsic policy. But the formulation "admission of evidence which [will] [would] [is calculated to] bring the administration of justice into disrepute" lingered on, became a part of our wiretapping legislation and remains to this day uniquely Canadian. No comparable formulation or construct appears in the leading cases which have estblished an exclusionary rule or discretion in England,[119] Scotland,[120] Ireland,[121] Northern Ireland,[122] Australia,[123] New Zealand[124] or the United States.[125] The phrase "imperative of judicial integrity" which occasionally appears in American cases refers to something else, more consistent with a strict exclusionary rule. The Canadian test, therefore, is truly indigenous. It is also confusing; in saying this, one must of course be fully aware that the issue becomes the drafting of the *Charter* rather than its interpretation.

It is very difficult to see how the admission of evidence, *in and of itself*, can ever bring the administration of justice into disrepute. The problem may perhaps arise where there exists a well-established rule of extrinsic policy (such as the legal professional privilege) and a court admits evidence despite a manifestly valid claim of privilege. The problem, more likely, can arise if the evidence itself is of manifestly insufficient relevance, weight or reliability (all three of which pertain to intrinsic policy). But to say that evidence shall be excluded when, having been obtained improperly, its admission would bring the administration of justice into disrepute, and to mean it literally, is to confine the operation of the exclusionary principle to an exceedingly small class of cases. It will arise in confession cases, for which, however, there already exists a common law rule that fully satisfies the requirements of intrinsic policy and occasionally exceeds them. But where else?

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[118]*Supra*, note 13.

[119]*Kuruma*, *supra*, note 14, and more recently, *Sang*, *supra*, note 12.

[120]*Lawrie*, *supra*, note 10.

[121]*The People* v. *O'Brien* [1965] I.R. 142 (C.C.A.).

[122]*R.* v. *Murphy* [1965] N.I. 139 (Courts-Martial App. Ct).

[123]*R.* v. *Ireland* (1970) 126 C.L.R. 321 (Aust. H.C.) and *Bunning* v. *Cross* (1978) 141 C.L.R. 54, (1978) 19 A.L.R. 641 (H.C.).

[124]*R.* v. *Capner* [1975] 1 N.Z. L.R. 411 (C.A.) and *Police* v. *Hall* [1976] 2 N.Z.L.R. 687 (C.A.).

[125]*Weeks* v. *United States*, 232 U.S. 383 (1914) and *Mapp* v. *Ohio*, *supra*, note 9.

Two cases might fit the description. The first, paradoxically, happens to be the common law monument to indiscriminate admissibility, the very foundation of *Wray*, *Kuruma* v. *The Queen*.[126] This case, it will be recalled, began with a search performed under Emergency Regulations applicable in Kenya. Two officers who, not being of the rank of Assistant Inspector, lacked the authority to carry out warrantless searches, had subjected Kuruma to a personal search. They testified at the trial that they had found on him two rounds of ammunition and a pocket knife. Kuruma was a rural worker of good reputation. At the time of the events, he knew that a road block had been set up down the road and he could therefore have avoided the search. He denied throughout his trial that he had been found in possession of these items. They were admitted nonetheless and he was sentenced to capital punishment. The Privy Council upheld this ruling on admissibility.

But more facts are needed to complete the picture. First, despite the appearances, the illegality here was more substantive than procedural. As one Canadian commentator wrote: "It is entirely likely that the ordinary Kenya policeman has a lively hatred of the Mau Mau and would be just as ready to invent the finding of two bullets as would a tormented prisoner to invent a confession".[127] And indeed, some time before Kuruma's appeal reached the Privy Council, the Court of Appeal for Eastern Africa heard a remarkable case from the same area involving the same emergency regulations, *Chege s/o Kamau* v. *The Queen*,[128] and acquitted two police officers below the rank of Assistant Inspector who had been charged with unlawful possession of weapons. The acquittal was based on a technicality: the Court found that the officers should have been charged with a different offence, namely extracting money by false pretence. They had been caught planting rounds of ammunition on passers-by and threatening to lay capital charges against them if they did not hand over a certain sum of money. Real evidence does not speak and cannot lie, but he who claims to have found it can certainly lie through his teeth. Second, in *Kuruma*'s case, third parties who had witnessed the search never testified; some of the real evidence allegedly found on the accused (a pocket knife) disappeared and was never produced at the trial. Third, a factor which, of course, could not have entered into the calculation on the issue of admissibility at the relevant time, shows the hiatus between the actual outcome of the case and the juridical proposition it supports: the Privy Council upheld the conviction, but stated that there were certain "matters of fact in the case which caused [their Lordships]

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[126]*Supra*, note 14.

[127]Franck, *Comment on Kuruma v. The Queen* (1955) 33 Can. Bar Rev. 721, 730. The same point is made persuasively by Kasunmu, *Admissibility of Illegally Obtained Evidence in Nigeria — Based on Sadau and Another* v. *The State*, (1969) 3 Nigerian L.J. 83, 89.

[128](1954) 21 E.A.L.R. 363.

some uneasiness" and recommended that the mandatory sentence of death passed on Kuruma should not be carried out until the Secretary of State had considered the case.[129]

The illegality in *Kuruma* was not, in the absence of further evidence of impropriety, of a kind that could bring the administration of justice into disrepute. It had involved no violence and the degree of instrusiveness of the search did not make it offensive. However, the admission of the evidence, in all the dubious circumstances of the case, could bring the administration of justice into disrepute.

City of Montreal v. *Lacroix*,[130] decided in 1909 by the Quebec Court of Appeal, is not nearly as well known. As a result of an unexplained suburban feud, the police had placed a prostitute in a house for the purpose of charging the owner with keeping a house of "ill-fame". The owner was convicted. The Court of Appeal decided, among other points, that the evidence had been properly admitted despite the method for obtaining it. In a lengthy and vocal dissent, Mr Justice Lavergne observed that this method was [translation] "one of fraud and horror", "monstrous [and] unworthy of a civilized country".[131] Had he considered the question from another angle, he might have reached the conclusion that the very admission of the evidence brought the administration of justice into disrepute.

In the end, both of these cases amount to oddities: they present highly unusual fact patterns (the second perhaps slightly less so than the first) and they could have been resolved satisfactorily by giving no weight to the evidence. They cannot possibly be treated as representative of the sort of situation section 24(2) was intended to cure. But in arriving at this conclusion, one does shift the emphasis from the *admission* of the evidence to the *infringement* committed in obtaining it and one rewrites the provision *sub rosa*. The trouble is that it needs rewriting if it is to be effective. Judicial reminders that the subsection contemplates, and contemplates only, the effect of admission, will, if they are taken seriously, stultify the exclusionary principle and resuscitate the *Wray* formula.

Another conceptual jumble produced by an excess of literalism is the theory according to which section 24(2) created a *duty* to exclude evidence,

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[129]*Supra*, note 14, 205.

[130](1909) 19 B.R. 385, (1909) 16 C.C.C. 395 [hereinafter cited to B.R.].

[131]*Ibid.*, 417.

whereas section 24(1) encompasses among other appropriate and just remedies a *discretion* to do so. *Therens*,[132] decided by the Saskatchewan Court of Appeal, makes use of this distinction, a development easily explicable in this particular case. In order to avoid what he probably perceived as the unnecessarily narrow test of section 24(2), the trial judge had reintroduced the issue of exclusion under section 24(1). A majority of the Court of Appeal approved of this reasoning and several cases have followed its lead. It is difficult not to have sympathy for this view but it may not survive the final appeal in *Therens* to the Supreme Court of Canada. Although the interpretation is deft, it fails ultimately to convince. When, all other things being equal, a specific provision deals explicitly with a fraction of the whole and another, general provision deals open-endedly with the whole, the specific should have precedence over the general if the issue concerns the fraction and not the whole. Canons of statutory interpretation rarely provide compelling solutions but they do rest on plausible assumptions. Here, the assumption seems a sensible one. The Canadian exclusionary principle almost never saw the light of day. When it finally appeared in the Constitution, it did so as a discrete entity, worthy of its own provision. The circumstances of its birth indicate that it is not to be treated like any other member of the family of remedies. Moreover, the *Therens* interpretation would set up two regimes of exclusion side by side, something which can only generate confusion and which seems a curious result in a jurisdiction that resisted for so long any policy of exclusion.

A simpler solution would have been to reject from the outset the "collective concussion" test now tied to section 24(2) and to state the matter slightly differently. Failure by the police to comply with section 10 of the *Charter* can only be cured *ex post facto* (this goes almost without saying). Damages could hardly serve any useful purpose in this case: the prejudice is not quantifiable. A stay of prosecution, on the other hand, is overkill; used indiscriminately in lieu of exclusion, it might in some cases preclude the use by the prosecution of other properly obtained and sufficient evidence of guilt. Excluding evidence, which incidentally might not have been available had section 10 been complied with, seems a more suitable remedy. It cures the infringement by removing its effect. Conversely, the admission of the evidence translates into a denial of any adequate remedy, which amounts to obliterating a *Charter* right. Why have such a right, then, if it can be violated and the violation quickly forgotten? Why make the *Charter* lie if

[132](1983) 148 D.L.R. (3d) 672, (1983) 5 C.C.C. (3d) 409. See also *R.* v. *Cohen* (1983) 148 D.L.R. (3d) 78, 93, (1983) 5 C.C.C. (3d) 156 (B.C.C.A.); *R.* v. *Gibson* (1983) 37 C.R. (3d) 175, 186 (Ont. H.C.); *R.* v. *L.A.R.* (1983) 4 D.L.R. (4th) 720, 723-4, (1983) 9 C.C.C. (3d) 144 (Man. Q.B.); and *R.* v. *Manninen* (1983) 43 O.R. (2d) 731, 740, (1983) 3 D.L.R. (4th) 541, (1983) 8 C.C.C. (3d) 193 (C.A.).

it is so easy to ensure that it speaks the truth? In a case such as this, involving a victimless offence, the judicial refusal to sanction section 10 would bring the administration of justice into disrepute in the eyes of a reasonable man.

The characterization of section 24(2) as a "duty" to exclude evidence can also serve a more questionable purpose, as in *R.* v. *Collins*, where the judgment of Seaton J.A. contains the following passage:

> Nothing in section 24(2) suggests a discretion. If it is *established* that admission of the evidence would bring the administration of justice into disrepute, "the evidence *shall* be excluded". There is only the one test. When it is passed, the evidence is excluded. If it is not passed, the evidence is admitted. There is no basis for any other test, or for the exercise of a discretion.[133]

On a first reading, this interpretation seems innocuous enough, though perhaps needlessly rigid. But, one wonders, why is the point being made at all? Probably as a rhetorical ploy, to commend to the reader the notion that a very demanding test should govern the application of section 24(2). If the Canadian exclusionary principle operates as a strict or blind rule, of the on/off, circuit-breaker type, then beyond a certain point the court has no choice in the matter and must exclude the evidence, regardless of the equities of the case. It follows that one should place the threshold of exclusion as high as possible, in order not to be compelled to exclude evidence against one's wishes: otherwise, *Coolidge* v. *New Hampshire*[134] and comparable cases might repeat themselves in Canada, much to the chagrin of right-thinking citizens.

The characterization *in terrorem* of the Canadian exclusionary principle as a "rule", introduced in an opinion which contains several critical comments on the American Exclusionary Rule, is a plea for a narrow or ultra-cautious interpretation of section 24(2). As was pointed out by Professor Don Stuart, "[i]t seems curiously blinkered to seize on the phrase 'evidence shall be excluded' in s. 24(2) for the view that there is no discretion to exclude in Canada when the basis for exclusion — bringing the administration of justice into disrepute — surely requires a large measure of judicial

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[133]*Supra*, note 37, 145 [emphasis added].

[134]403 U.S. 443 (1971). Detractors of the American Exclusionary Rule often mention this case, which involved a gruesome child murder, as an example of the brand of injustice generated by the Rule. The appeal raised an important question: can the prosecutor who personally assumes the direction of the investigation issue a warrant to the police? It was decided by a narrow majority in favour of reversing the conviction, but nothing indicates that Coolidge was ultimately acquitted in the subsequent proceedings. There are, of course, other instances of the harshness of the Rule: See *Davis* v. *Mississippi*, 394 U.S. 721 (1969), (rape involving grievous bodily harm) and *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), (double rape and attempted murder).

discretion. . . .Given that s. 24(2) *does* involve discretion, the analogy to the United States experience with the exclusionary rule seems inappropriate".[135]

The range of factors and circumstances which the court can consider under section 24(2) necessarily denotes a discretion. So does the generality of wording of section 24(2) and the lack of any guidance in the *Charter* itself as to the respective weight or significance of these factors and circumstances. The provision manifestly calls for individualized solutions in response to the specific factual features of each case ("having regard to all the circumstances"), something more easily achieved by preserving a good measure of discretion at trial level.[136] The very lay-out of section 24(2) recalls a similar provision in the 1975 draft *Evidence Code*, which provision was understood at the time as discretionary in nature.[137] It is of course true that the power vested in the courts by section 24(2) does not fall in the category of unfettered discretions. It will be exercised judicially, according to reason and, eventually, precedent; furthermore, appellate courts will continue to supervise closely its use by trial courts. In essence, however, it remains a discretionary power, an instrument of judicial wishes and, as such, one which could hardly produce results similar to *Coolidge* v. *New Hampshire*. Why then stare at the word "shall" and call the provision a rule, as if it operated mechanically or *fata obstant*?

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[135]*R.* v. *Collins*, *Annotation*, *supra*, note 37, 133 [emphasis in original].

[136]D.M. Walker notes in *The Oxford Companion to Law* (1980) 363: "Vesting discretionary power in judges is one of the commonest ways of individualizing the application of law and making it flexible and adaptable to circumstances; without it law would be much more often criticized as harsh, unfeeling, and unjust." Section 24(2) cannot have been intended to produce universal and rigid rulings, oblivious of all but a few "relevant" circumstances; unlike the American rule, it places a higher premium on flexibility and popularity than on uniformity and predictability of result.

[137]Law Reform Commission of Canada, *Report on Evidence* (1975) 22:

> 15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.
>
> (2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.

Commenting on this exclusionary principle and the guidelines of 15(2), the Commission stated at page 62: "From these it is evident that the intent of the section is not to incorporate an absolute exclusionary rule into Canadian evidence law, but to give judges the right in exceptional cases to exclude evidence unfairly obtained, and thus restore what many believe to be the English common law *discretionary* rule" [emphasis added]. This " right" to exclude was thus seen as discretionary despite the use of the word "shall" in s. 15(1).

Conclusion

It is said that one learns from one's mistakes. The advice is not meant as an encouragement to make mistakes for the purpose of learning. In approaching section 24(2) of the *Charter*, Canadian lawyers and judges are fortunate in that they can learn from the mistakes of many others. They can learn from their forefathers' mistakes: England, Scotland and Ireland tried for two or three decades different policies of discretionary exclusion which shaped in varying degrees the current Canadian principle. They can learn from their neighbours' mistakes: American law has carried to an extreme the logic of deterrence through exclusion, but the proximity of this experience should not deter Canadian courts from excluding evidence in cases that are neither extreme nor notorious. They can learn from their cousins' mistakes: Australia and New Zealand have already spent several years testing a discretion to exclude whose similarity with the Canadian principle cannot be ignored. Less judicial reluctance and more sensitivity to comparative law by the legal profession can bring out the best of section 24(2): a balanced principle of discretionary enforcement rather than an eccentric rule for the mechanical unshocking of a fictitious public opinion.

Postscript

The subject of this paper is dangerously topical, and the author congratulates himself for having expressly disclaimed any gift of clairvoyance at the time of presentation. At least one major development occurred in the summer of 1984 and now requires a short postscript.

On July 5, the United States Supreme Court rendered two decisions of great significance, *United States* v. *Leon*[138] and *Massachusetts* v. *Sheppard*,[139] which noticeably increase the angle of convergence between American and Canadian law. In these two cases, the Court adopts by a majority a "reasonable mistake" exception to the Exclusionary Rule, applicable to searches under warrant. The notion is perhaps not as amorphous as a full-fledged "good faith" exception, which one participant in the C.A.L.T. convention described as a "black hole" in legal reasoning, capable of swallowing

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[138]52 L.W. 5155 (1984).

[139]*Ibid.*, 5157. Two other cases, *Immigration and Naturalization Service* v. *Lopez-Mendoza*, *ibid.*, 5190, and *Segura* v. *United States*, *ibid.*, 5128, decided on the same day, also restrict in other respects the scope of search and seizure safeguards.

up Fourth Amendment safeguards. Stevens J., however, does observe that *Leon* and *Sheppard* promulgate a good faith exception.[140] For Brennan J. (dissenting in both cases with Marshall J.), *Leon* is the *pièce de rêsistance* in a process of "gradual but determined strangulation of the [exclusionary] rule. It now appears that the Court's victory over the Fourth Amendment is complete."[141]

The majority opinion, delivered in both cases by White J., relies on recent empirical data and suggests that, in the end, the efficacy of exclusion as a deterrent is proportional to the flagrancy of the police's misconduct.[142] The Court treats as speculative the argument that exclusion in cases where a warrant should not have issued will deter future "magistrate shopping" and unsubstantiated warrant applications. Judges must now examine each case on its merit, bearing in mind that there can be no deterrence where the police have no reason to know that their conduct is unconstitiutional.

Stevens J. writes a single separate opinion. Distinguishing the two cases on precise factual grounds, he concurs in the result of *Sheppard*, but dissents in *Leon*, which he would have remanded to the Court of Appeal for reconsideration. In a penetrating analysis of the majority's reasons, he points to a central conceptual flaw: " We cannot intelligibly assume *arguendo* that a search was constitutionally unreasonable but that the seized evidence is admissible because the same search was reasonable."[143] A search is either reasonable or not. It makes no sense to ask whether the police had reasonable grounds to rely on the magistrate's finding of probable cause. The new rule will encourage police officers to present insufficiently supported warrant applications in the hope that the magistrate "may take the bait".[144] The solution, already envisaged in *Illinois* v. *Gates*,[145] consists in adopting more practical standards of probable cause (for searches under warrant) and reasonableness (for warrantless searches). For, "when probable cause is lacking, then by definition a reasonabnle person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime".[146]

In short, the question in these cases was whether the Exclusionary Rule can be made to respond to slightly more flexible criteria than those of the Fourth Amendment. In Canada, the question would not arise: the *Charter*

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[140]*Ibid.*, 5172.
[141]*Ibid.*, 5163.
[142]*Ibid.*, 5158.
[143]*Ibid.*, 5172.
[144]*Ibid.*, 5175.
[145]*103 S. Ct. 2317 (1983).*
[146]*Supra*, note 138, 5176.

already separates safeguards, such as section 8, from the enforcement mechanism in section 24(2). But, under the new rule, American courts will now have to articulate notions of "flagrancy" and "technicality" of misconduct. While in the United States these notions will be used specifically to identify "deterrable" misconduct, they should still provide useful insights for Canadian lawyers. *Leon* and *Sheppard* are fine pieces of judicial craftsmanship in which the Canadian Bench and Bar will find a convenient summary of powerful and irreconcilable arguments.

Some Comments on Subsection 92(10) of the *Constitution Act, 1867*

I.H. Fraser*

Beneath a deceptively simple appearance, subsection 92(10) of the *Constitution Act, 1867* conceals a scheme for the distribution of legislative power which is subtle, sophisticated, and powerful. The author examines some of the leading decisions from the large body of case law and finds that confusion and conceptual uncertainty have long been obstacles to a clear understanding of the provision. A fundamental distinction, for example, must be made between "works" and "undertakings". Jurisdiction over the one does not necessarily give jurisdiction over the other. The author argues that distinctions between intra- and inter-provincial *undertakings* should be drawn by examining the nature of the undertaking's function. On the other hand, a functional analysis is not an appropriate method for dividing intra-provincial *works* from inter-provincial ones. While the conceptual distinctions enunciated are at times subtle, the author concludes that they are fundamental to a clear analysis of subsection 92(10), and unless they are carefully understood and applied, confusion and inconsistency will continue to plague discussion of this basic constitutional provision.

Derrière une apparente simplicité, l'article 92(10) de la *Loi constitutionnelle de 1867* cache un mécanisme de distribution du pouvoir législatif subtil, complexe et puissant. L'auteur examine la jurisprudence et y découvre une certaine confusion et un manque de clarté conceptuelle qui empêchent une compréhension juste de cette disposition. Une distinction fondamentale, par exemple, doit être faite entre les « travaux » et les « entreprises ». La juridiction sur les uns ne comprend pas nécessairement la juridiction sur les autres. L'auteur prétend que la distinction entre les *entreprises* intra- et inter-provinciales doit se faire selon la fonction d'une activité donnée. Par contre, cette analyse fonctionnelle ne constitue pas une méthode adéquate pour différencier les *travaux* intra- et inter-provinciaux. Bien que l'auteur reconnaisse le caractère parfois subtil de ces distinctions, il conclut qu'elles forment la base d'une analyse claire de l'article 92(10). A moins que ces distinctions ne soient comprises et appliquées de façon rigoureuse, la confusion et l'illogisme seront la règle plutôt que l'exception sous cet article.

*LL.B. (McGill). The author is indebted to Professor Stephen A. Scott of McGill for his instruction and assistance throughout the author's studies at McGill. In particular, this essay could not have been written without Professor Scott's patient criticism and encouragement. Any errors, of course, are those of the author alone.

Synopsis