Law Reform Commission of Canada
Commission de réforme du droit du Canada

REPORT

questioning suspects

23

Canada

REPORT 23

QUESTIONING SUSPECTS

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REPORT

ON

QUESTIONING SUSPECTS

September, 1984

The Honourable John Crosbie, P.C., Q.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada.

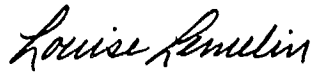
Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this report, with our recommendations on the studies undertaken by the Commission on the questioning of suspects.

Yours respectfully,

Allen M. Linden
President

Jacques Fortin
Vice-President



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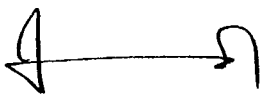

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Introduction

In Working Paper 32 the Commission published tentative recommendations for reform of the law relating to the questioning of suspects by police officers. After further reflection and consultation, we have finalized our proposals with regard to this matter. In the main we have adopted the position that we took in the earlier Working Paper, subject to certain modifications in both form and substance. Accordingly, this brief Report should be read together with the earlier paper. Where the Report differs significantly from the recommendations proposed in the Working Paper, the salient differences are noted in the text.

But this Report contains more than proposals for procedural regulation of police interrogation. It provides a preliminary statement of the central principles and themes that the Commission will pursue in future reports on investigative powers, and it provides a sketch of the form in which those principles might be accommodated in further work toward a code of criminal procedure. In future publications we will articulate in greater detail the principles that should guide the reform and the development of the law of criminal procedure. We are now preparing a statement on the general principles of criminal procedure, and as a result the statement of principles in this Report should not be construed as complete or final.

CHAPTER ONE

The rationale for the proposals

I. Questioning suspects

The interrogation of suspects is one of several investigative techniques available to the police for the acquisition of evidence. Foremost among other techniques are the powers of electronic surveillance and search and seizure. All of these activities, which can be described compendiously as investigative powers, share a common characteristic. When exercised by an officer who has reasonable and probable grounds to believe that an offence has been committed, each power implies a measure of intrusion against the private interests of the subject in order to confirm or dispel that belief. Conspicuous among the interests affected are the right to remain silent, bodily integrity, the security of property and the expectation of privacy in communications.

In our approach to reform of the law on investigative powers, we interpret our mandate as the need to define the limits of permissible intrusion by agents of the state upon the private interests of its subjects for the purpose of investigating and prosecuting crime. We advocate procedural regulation as the means by which to translate this mandate into law. With regard to the law of investigative powers, and indeed with regard to all of our work in criminal procedure, we strive for rules that will promote fairness and efficiency in the administration of justice. The coexistence of these aims, which are often antithetical, reflects an awareness that a just measure of intrusion is necessary for the preservation of public order.

Given this mandate, we find that current Canadian law on the questioning of suspects is inadequate. Its signal deficiencies are that it

provides no effective protection of the right to remain silent and that it affords no general authority for judicial supervision of the manner in which statements are obtained. The reasons for these deficiencies are plain. The law governing the interrogation of suspects is not procedural law: it consists of a single rule of evidence, encrusted by ancillary rules, that determines the permissible uses of a statement in court. It is a rule of admissibility that permits the introduction by the prosecution of a statement by the accused upon proof that a person in authority did not induce the statement by suggesting to its maker any cause for hope or fear. Where statements by persons accused of crime are concerned, the relationship between the accused and a person in authority resembles that between opposing parties. The state, as a party in a prosecution, will only use the evidence of a statement to assist in establishing the guilt of the accused; and it is chiefly for this reason that proof of voluntariness is imposed upon the prosecution as a means to purge the taint of unreliability that naturally adheres to such statements as a result of the fact that the accused is not a compellable witness. This rule of admissibility affords no authority for direct supervision or regulation of the manner in which statements are obtained. Although the concept of voluntariness and the standard of proof can provide some leverage for indirect regulation, the orthodox interpretation of the voluntariness rule in Canadian courts is that admissibility inheres in the absence of an inducement and not in compliance with positive standards or norms of procedural regularity.

Nor does the *Canadian Charter of Rights and Freedoms* provide direct procedural regulation of the questioning of suspects by guaranteeing the right of a suspect to remain silent or by imposing an obligation on the state to produce a complete record of an interrogation. The Charter affects statements only to the extent that the breach of an enumerated right may justify the exclusion of evidence under subsection 24(2). Its effect, then, is indirect and unrelated to the principles and policies that support direct procedural regulation of interrogation.

In our view the manner in which evidence is obtained is a matter of sufficient importance to justify the imposition of procedural rules that would complement the evidentiary rule of reliability and merge with it on the issue of admissibility. In this regard the law governing extra-judicial statements should formally consist of a procedural and an evidentiary dimension. The former would comprise rules defining the manner in which police officers may question suspects, the latter would comprise limitations upon the use of extra-judicial statements by accused persons in judicial proceedings, and both aspects would intersect in a presumption of inadmissibility. Quite apart from proof of

voluntariness, which may be a necessary and sufficient protection against the admission of unreliable evidence before the trier of fact, we propose a presumption of inadmissibility that could only be dislodged by proof of compliance with procedural rules for the questioning of suspects or by proof that the admission of the evidence obtained in contravention of the rules would not bring the administration of justice into disrepute.

The rules we propose seek to give form to two postulates or principles: the right of an accused to remain silent, and the need for a complete and accurate record of a statement and the circumstances in which it was made. The law should require that a suspect, that is a person who is in jeopardy of prosecution or conviction, is apprised of his right to remain silent before being questioned by a police officer. Although Canadian law recognizes the right of a suspect to remain silent, nothing in the law requires that the police issue a warning to this effect before asking questions. If a police officer suspects a person of an offence, anything he asks about that offence during the investigation is calculated to confirm or dispel his suspicion. It is only a matter of common sense that for as long as that person is suspected he is certainly not presumed innocent by that officer. To say that a suspect is presumed innocent by an investigating officer is simply a misstatement of reality and an abuse of language. The presumption of innocence prohibits the state from convicting or punishing any person until the prosecution proves his guilt beyond reasonable doubt according to the due process of law. A corollary of the presumption is that agents of the state, including police officers and prosecutors, cannot compel the assistance of the suspect in proving their case against him. As a statement given by a suspect to the police may well be crucial to the proof of his guilt, a society that constitutionally proclaims a presumption of innocence would surely accept that suspects should be given a warning of their right to remain silent. Accordingly, the Commission recommends that, before asking any question, a police officer must warn the accused of his right to remain silent. When a statement is given, the law should demand the production of a record that will diminish or eliminate the margin for doubt as to the reliability of the evidence. These principles are unimpeachable and we are confident that our rules would secure the interests of the prosecution, the defence and the public in the fair and efficient administration of criminal justice.

Our recommendations do not proceed on an assumption of misconduct among police officers, and in this regard they are not remedies for specific abuses. Respect for the right to remain silent and the need for a complete record provide intrinsic and sufficient

justifications in principle for procedural regulation of police interrogation. In this respect we believe that our proposals define and protect the interests of all parties to the process of investigation and prosecution. At the same time, however, an important secondary objective of our recommendation to constrain agents of the state to act in accordance with prescribed standards is to maximize accountability in the investigative process.

II. The broader context

It is at this point in the argument, of course, that partisan and ideological divisions emerge with respect to the administration of justice and the proper course of law reform. Accordingly, it is appropriate at this juncture in the Report to sketch briefly some of the broader premises that support our work on police powers and criminal procedure.

The balance between effective law enforcement and effective protection of individual interests is, ultimately, a working definition of justice, and the prospect of agreement on this aspect of social policy is always elusive. The position we take on reform of the law on questioning suspects, and other investigative powers, reflects a position with regard to the process and the objectives of law reform. As part of our commitment to a fundamental and comprehensive review of the criminal law in Canada, and irrespective of specific concerns for the rectification of particular problems, we are committed to a thorough and principled reformulation of the law on criminal procedure, of which the law on investigative powers is an essential part. An enterprise of this kind requires that specific rules governing the criminal process should be subordinated to principles of general application. We do not believe that the sole cause of reform is the correction of an existing evil, for to do so would be to assert that the *status quo* is necessarily or presumptively right. The argument that reform is needed only where a specified evil or abuse cries for correction is an unacceptably narrow view of social policy and of the mandate for reform, just as it is intolerably vapid to argue that the law should be made over in the image of unarticulated abstractions such as "crime control" or "due process".

The cause for reform is the quest for higher quality in the administration of justice, which requires a notion of generality and neutrality in the definition of guiding principles. This is not to say that practical problems and ideological commitment are foreign to the process of law reform but too often, it seems, isolated practical problems or ideological arguments of a rhetorical nature are mistakenly construed as the stuff of principle. The challenge lies in ascertaining general and acceptable principles and then in translating those principles into rules of practical application.

Our statutory mandate obliges us to focus our critical attention upon the laws of Canada in an attempt to ensure that the law remains modern and effective. From its inception the Commission has committed itself to a fundamental and systematic renewal of the criminal law. Lately we have been joined in this enterprise by the Government of Canada, and our combined efforts are now generally known as the Criminal Law Review. This process necessarily involves us in extensive consultation with the legal community and more generally with the public.

In approaching the reform of the criminal law we are quite aware that the process of doing justice in our system of government is an approximation of social values, what they are and what they ought to be. The process of legislative reform is a self-conscious attempt to introduce a greater measure of clarity and precision in that approximation. This exercise necessarily defies unanimity but disagreement on particular questions need not imply discord on fundamental postulates of principle. The translation of principles into specific provisions of law opens the scope for disagreement, as does the particularity of the principles involved, but, apart from discrepancy on discrete points in substantive policy, it should be the first task of participants in the process of law reform to define collectively their field of vision and the manner in which they propose to approach it. This implies a process of deduction, commencing with principles of general application and progressing through increasingly particular interpretations of those principles until, by a dialectical process of argument and choice, recommendations for legislative reform can be made.

Ascertaining general principles may itself be an approximative process that defies unanimity, but it does not defy broad consensus. Indeed, despite this approximation, the elaboration and definition of general principles by which to approach reform of the law marks the commencement of a principled approach to reform. Those principles are by definition the standards by which the exercise is conducted and

measured, irrespective of the particular result that may follow when they are tested against specific exigencies. Those principles are the touchstones of utility and integrity in the process of reform because they provide the criteria by which to distinguish a comprehensive and systematic approach from a fleeting expression of political strength. Even if principles are sometimes embattled in the debate on a proper course of action, or sacrificed to expediency in partisan arenas of the legislative process, the paramount objective of those involved in the process of reform should be that their advocacy and the objects of their advocacy "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[1] An expectation of unanimity in this endeavour would be naive and it would be equally wrong-headed to think that principles are immutable or incapable of exception. But the central function of principles is to guide the process of reforming laws by general postulates that groom specific decisions in such a fashion as to reveal the subordination of the particular to the general.

The criminal law rests on the fundamental premise that the maintenance of social order and the protection of freedom require a limitation of the state's power to intrude upon the liberty of its subjects and a limitation of the subject's freedom from intrusion. An acceptance of the need for such limitations is the essence of the rule of law in a free and democratic society. The technique for defining such limitations is regulation by law. It is the essence of social discourse, including law reform, to fix the content of those limitations.

Thus, as noted previously, it is our objective in making recommendations on questioning suspects and other investigative powers to prescribe procedural rules that define the limits of permissible intrusion by agents of the state against the private interests of the citizen. This cardinal principle is synonymous with the principle of restraint that this Commission has advocated for many years and that the Government has recently adopted in its policy on reform of the criminal law.[2] The attempt to translate this principle in practical terms implies an attempt to achieve consensus on the balance of interests between intrusion by the state and the permissible limits of intrusion.

1. H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959), 73 Harv. L. Rev. 1, p. 15.

2. Government of Canada (Dept. of Justice), *The Criminal Law in Canadian Society* (Ottawa: Supply and Services, 1982).

Some private interests of the citizen find expression in the *Canadian Charter of Rights and Freedoms*. Whether there is such expression in the Charter or not, it is our view that the Constitution does not define exhaustively the limits of permissible intrusion by its agents. Indeed, if for no other reason than the generality of its language, it would seem more exact to describe constitutional protections as a statement of specific interests rather than a definition of the limits of permissible intrusion. Accordingly, saving inconsistency with the Charter, there can be no bar to defining such limits by ordinary legislation. It is our intention in this and other reports on investigative powers to pursue that objective by this approach. In some instances, as in arrest or search and seizure, this endeavour may imply an indirect interpretation of ambiguous constitutional language. In other instances, as with the right of a citizen to remain silent upon investigation by the state, our proposals would govern matters not covered in the Constitution.

We advocate ordinary legislation as a means of regulating the interrogation of a suspect for the same reasons we advocate it as a means for regulating the use of other investigative powers. As these powers must define the limits of permissible intrusion by agents of the state upon the private interests of citizens, it is in our view imperative that such a definition be fixed by the highest rule-making body in our system of government. Ordinary legislation, as opposed to subordinate legislation or informal guidelines, is the most effective mechanism with which to prescribe standards for the exercise of these powers. Unlike constitutional protections, which suggest concepts of immutability, ordinary legislation is subject to revision by debate and action in the Houses of Parliament. Neither subordinate legislation nor informal guidelines, by contrast, are subject to public scrutiny, except upon promulgation. Moreover, informal guidelines are typically unenforceable at law. Thus, subject only to the Constitution, it is our view that ordinary legislation is the most effective touchstone of stability, uniformity, publicity and, therefore, accountability in the law on investigative powers.

As will be seen in the pages that follow, this Report is a preliminary sketch for the codification of the law on investigative powers. Lest there be any confusion, however, we should make plain that the position taken in this paper marks the commencement of the Commission's formulation of a position with respect to the recodification of investigative powers in current Canadian law and in an anticipated code of criminal procedure. It is well known that the Government and the Law Reform Commission are jointly committed in

the enterprise known as the Criminal Law Review, which contemplates a comprehensive revision of the substantive law of crime and the law of criminal procedure. An undertaking of this magnitude poses difficult challenges not only with respect to the substantive decisions governing the policy of the law, but the process by which reform will be achieved. Taken in the abstract, this exercise could proceed on the basis of incidental, random or *ad hoc* amendments to current law, which has been the practice of Parliament since its enactment of the *Criminal Code* in 1892. Alternatively, at the opposite extreme, we could adopt a purely principled or deductive approach that would imply legislative inaction until all interested parties could reach a consensus with respect to a new code of substantive law and a code of criminal procedure.

Neither extreme, in our view, is satisfactory. While we subscribe to the objective of codification, and thus to a fundamental overhaul of Canadian criminal law, we cannot afford to suppress recommendations for reform until we have formulated our views with respect to an entire code. Nor can we endorse a process of reform consisting of occasional or incidental pronouncements that have no other aim than picayune modifications to current law. We agree with the Government of Canada that the cause for fundamental reform of Canadian criminal law will best be advanced by incremental reform. But to achieve a sensible balance between random amendment and a comprehensive and principled approach to reform, it follows that the success of an incremental approach depends entirely upon the coherence of the increments proposed. In this Report we focus upon the investigative power of questioning suspects, but we do so in a fashion that opens, without restriction or obligation, a possible course with respect to reform of other aspects of the law on investigative powers. Whether the increment contemplated by the proposal that we now advance can be sustained, both with respect to its broad contours and its specific contents, will be the stuff of further debate and consultation. We are, however, convinced that the technique and the form that we adopt in this Report are sound and can provide a grid on which to map future recommendations.

CHAPTER TWO

Recommendation and commentary

The Commission recommends that the following Part be added to the *Criminal Code:*

PART XIII.1

INVESTIGATIVE POWERS

Interpretation

447.1 In this Part

"police officer" [means any person whose duties as an agent of the state include the investigation and prosecution of offences;]

"questioning" includes any utterance or gesture that is calculated to elicit, or is reasonably likely to elicit, a statement from a person with respect to the investigation of an offence;

"statement" does not include any utterance that of itself constitutes the gravamen of an offence;

"suspect" means any person who a police officer has reasonable and probable grounds to believe has committed an offence and, notwithstanding the generality of the foregoing, includes any person under arrest or detention, any person who is an accused within the meaning of section 448 of this Act, and any person charged with an offence.

Questioning Suspects

447.2 (1) A police officer shall not question a suspect with regard to any offence for which that person is a suspect unless he has given that person a warning in the following terms:

> **You have a right to remain silent, and you are free to exercise that right at any time. If you wish to make a statement or answer questions, anything you say may be introduced as evidence in court. Before you make a statement or answer any questions you may contact a lawyer.**

This warning shall be given orally and may also be given in writing.

(2) A warning need not be repeated if a warning has recently been given or in other circumstances where repetition would be self-evidently unnecessary.

(3) Subsection (1) does not apply where the police officer is acting under cover and the suspect is not under arrest or detention.

447.3 Where a suspect makes an unsolicited or spontaneous statement in the presence of a police officer, the police officer shall, at the first reasonable opportunity, give a warning in the form required by subsection 447.2(1), and reduce the statement to writing as soon as possible in the circumstances.

447.4 (1) Each police officer who participates in the questioning of a suspect shall, as soon as possible and to the fullest extent possible, make a record of all questions put and statements made.

(2) The record prepared under subsection (1) may be made in writing or by electronic recording and shall include

(*a*) a note of the time at which questioning began and concluded, including a note of any interruptions in the questioning;

(*b*) a note of the place or places in which the questioning occurred;

(*c*) a note of the identity of all persons who were in attendance during the questioning;

(*d*) a note of the time at which the record was made; and

(*e*) the signature of the officer who prepared the record.

(3) Where questioning is electronically recorded, the record contemplated by this section may be made by one police officer who was in attendance throughout the questioning.

Admissibility of Evidence

447.5 Evidence obtained in contravention of this Part is not admissible at the instance of the prosecution at a preliminary inquiry or trial unless the prosecution establishes that the admission of the evidence would not bring the administration of justice into disrepute.

I. General remarks

Our position, briefly stated, is that wherever a police officer has reasonable and probable grounds to believe that a person has committed an offence, that officer has a *quantum* of suspicion that warrants compliance with procedural rules on questioning suspects because that

person is in jeopardy of prosecution and conviction. Accordingly, the duties of the police officer in these circumstances should be to provide a warning of the right to remain silent and, if any statement is made, to make a complete record of it and the circumstances in which it is given. A presumption of inadmissibility should attach to any statement made in these circumstances, subject to proof of compliance with the rules that we propose.

The scheme that we propose is related to the voluntariness rule of admissibility but is conceptually distinct from it. As a police officer is unquestionably a person in authority, statements made to such an officer will have to be proved voluntary. We do not propose recommendations with regard to the voluntariness rule. In addition to proof of voluntariness, however, the prosecution will have to demonstrate compliance with the proposed procedural rules. It must be emphasized that the two regimes are quite distinct, although complementary. Proof of voluntariness can succeed where there has been flagrant non-compliance with the rules and vice versa, but the two together satisfy the evidentiary and procedural interests of fairness and efficiency at the point of intersection between the two regimes, that is in the presumption of inadmissibility.

We should note that the threshold for the application of our rules would be belief that a person *has committed* an offence, whereas in Working Paper 32 we recommended that the application of the rules should be tied to the belief that a person is *implicated* in the commission of an offence. This change is intended to restrict the application of the rules to instances in which the officer has the *quantum* of suspicion that would justify an arrest of the suspect, whether or not an arrest is made. (We would note, however, that our rules would apply to offences triable on indictment or summarily.)

As for the definition of "police officer", it is incomplete but the thrust of it is that these rules should apply to all persons whose professional employment involves the investigation and prosecution of crime on behalf of the state. We cannot in this Report be more exact in our definition because this definition has broad ramifications with regard to the reform of section 2 of the *Criminal Code* as it is now written and further ramifications with regard to the prescription of procedural rules to govern the exercise of other investigative powers. Thus, given the range of implications involved, we do not think that this Report is an appropriate forum in which to venture a specific definition of "police officer". The matter is plainly one that will have to be deferred for

further consideration, but we are satisfied that the tentative definition captures the principle that is appropriate for the rules proposed in this paper.

II. Specific issues

A. *Form and structure*

Our proposal for the creation of a new Part in the *Criminal Code* is a deliberate attempt to provide a container with which to deal discretely with questioning suspects and other investigative powers in current Canadian law. This proposal can also serve as an architectural plan for future work on a code of criminal procedure. Thus, there are three dimensions in which this proposal should be viewed: questioning suspects, investigative powers generally, and a code of criminal procedure.

First, with regard to questioning suspects, our proposal for a new Part represents a firm decision with regard to the forum for ordinary legislation on the topic. We were deliberately ambivalent in this point in our previous Working Paper but we are now convinced that as a matter of procedural regulation it is best accommodated in the Code. Questioning suspects, of course, does not necessarily imply arrest and for this reason we think that the introduction of a Part dealing with the investigative process is most appropriate before that Part of the Code that deals with arrest and the commencement of a prosecution.

On the premise that investigative powers are conceptually unified by the need to define limits of permissible intrusion by agents of the state in the investigation of crime, the structure of our proposal contemplates a Part of the Code in which questioning suspects and other investigative powers could be accommodated together. Thus, section 447.1 could be expanded by the addition of further interpretive provisions as we complete our work on the investigative powers of search and seizure and electronic surveillance. Whether arrest should be included with these remains an open question for two reasons. First, arrest is often the first stage in the process of compelling the

appearance of an accused in court, and, second, arrest is categorically different from the other four powers that have been described above in that it is not specifically directed toward the acquisition of evidence. For this latter reason in particular, it might be best if arrest were dealt with in the Part in which it is now found, especially if we should later decide that remedies for the contravention of Part XIII.1 should be uniform.

Finally, in the broader context of our work on reform of the criminal law, the proposal for a new Part offers several possibilities for future development. As mentioned, it provides a convenient vehicle for review of the current law on investigative powers, but it can also be adapted in the development of a code of criminal procedure. Such a code would include several parts, of course, including a discrete Part on investigative powers. In this sense we are using this *Report on Questioning Suspects* as an opportunity to suggest a structure for the development of a code of criminal procedure. Despite incidental variations, it is our view that investigative powers cohere by virtue of several thematic principles and thus provide a coherent and self-contained increment that is susceptible of early reform.

B. *Questioning under cover*

Section 447.2 requires that all police officers who question suspects should alert them to their right to remain silent. Subsection 447.2(3), however, exempts from this requirement police officers in the field acting under cover. Here we have departed slightly from the principles underlying our scheme, in the interests of public policy. In principle we believe that all suspects should be warned of their right to silence. It is obvious, however, that without this exemption undercover investigation could not be conducted where the police officer has reasonable grounds to believe the suspect had committed an offence. We are persuaded that to follow general principles with absolute fidelity, and thus to preclude this form of investigation, would impose a burden on the police, and upon society, that is disproportionately high, compared with the interests that would be served by strict adherence to principle. We stress, however, that because field questioning is typically conducted by officers not acting under cover, the exception departs from our silence in only a limited way.

At the same time we object strenuously to a policy that would condone the exploitation of deceptive practices against persons who have been taken into custody, especially where such persons have been charged with an offence or have invoked their right to remain silent. We feel fortified in this opinion by the Constitution, which provides for a notice of certain fundamental rights upon the arrest or detention of a suspect. Those who do not share our view will object that the position of a person in custody who makes a statement to someone who, by objective standards, is not a person in authority, should be treated at law in the same way as the position of one who, by objective standards, was not speaking to a person in authority; accordingly, they will deny that the more appropriate analogy would be to the position of an accused in the dock. In our opinion, however, once a person is taken into custody the essential elements of a prosecution are present. The law must impose measures to ensure that any statement given by a suspect is voluntary in the sense that it was given by conscious choice after a warning of the right to remain silent and with knowledge of the ramifications that may follow.

Finally, it should be noted that in order to fall within the exemption from subsection 447.2(1) the Crown will bear the onus to demonstrate that the questioning was conducted by a police officer acting under cover.

C. *Recording*

The premise informing our proposals on the recording of statements is simple. The interests of fairness and efficiency require that the police should have an obligation to prepare the most accurate and thorough record possible of a statement and the circumstances in which it was made. The policy of the law should reflect a demand for the best evidence and we believe that the proposals in section 447.4 define the minimal standards of an adequate record. The factors enumerated in subsection 447.4(2) represent no more than a list of the salient points elicited in examination and cross-examination at a *voir dire*.

It is an elementary point of practice for police officers and lawyers alike that a statement given by a suspect should be recorded as accurately and completely as possible. The quality of the record measures the quality of evidence available to a court. If the record is

incomplete and approximative, the chances that the evidence will be excluded are greater. Indeed, many statements are now excluded simply because the quality of the record leaves the judge in some doubt about the quality of the evidence and not because the statement was involuntarily made.

The traditional tools available to the police officer for the recording of a statement are the memory and a notebook. The technique for using both can be practised and refined, but neither can provide the best possible record of events. It is for this reason, we believe, that technology for the electronic recording of statements can provide another tool to assist the police and the courts in the administration of criminal justice. Recording equipment has already proved to be of immense assistance in undercover activities (including wire-tapping and so-called "sting" operations) and in identification procedures. The adaptation of recording equipment for the purpose of taking statements would represent no more than the introduction of a new and more efficient technique for accomplishing a routine task.

In the Working Paper on *Questioning Suspects* we specifically proposed that electronic recordings should be made, wherever possible, when questioning takes place in a police station or prison. We have decided to suspend our recommendation for the enactment of a requirement for electronic recording, but we remain convinced that such recordings will provide the best possible means of reconstructing and thus accounting for the questioning of a suspect. The electronic recording of statements is not an end in itself but an improved mechanism or technique for achieving a specified objective. Provided that the recommendations we propose, and the law, reflect a clear bias in favour of the best possible evidence, we see no need to legislate at this time the means of obtaining that evidence. If in our opinion the police are not providing the courts with the best possible record of questioning, we may in the future recommend that Parliament demand an improvement in the quality of evidence by enacting a requirement for electronic recording.

Improved quality in the record of a statement should have several corollary effects. First, it should eliminate almost all doubt about the accuracy of the record and the content of the statement at issue. Second, it should reduce the margin for doubt with regard to the circumstances at the time that the statement was made. Third, general use of electronic recordings should reduce the length and the incidence of the *voir dire*, and it should even increase the incidence of admissions of voluntariness and waivers of the *voir dire*. Fourth, there should be a

corresponding increase in guilty pleas. Fifth, there should be a reduction in the amount of time spent by officers giving evidence in court. Sixth, there should be a reduction in the incidence of allegations of police misconduct.

Although the quality of an electronic recording quite obviously surpasses that produced by memory and notes, the introduction of recording equipment for general use would raise some novel issues. Among these would be allegations of tampering, allegations of misconduct before the commencement of a tape, reproduction of the tape, the relative merits of audio and audio-visual recordings, and the capital cost of introducing such technology. It is our view that none of these difficulties provides an insurmountable obstacle to the use of recording equipment for the taking of statements, especially if the advantages of such a practice can be proved to outweigh the disadvantages. For this reason the Commission is now studying empirically the viability of electronic recordings. We are undertaking this analysis in co-operation with the Canadian police community, and in particular with police forces in Ottawa, Montréal and Toronto.

D. *Enforcement*

This aspect of our recommendation, like the proposal for a new Part, has potential application to investigative powers other than questioning suspects, and for this reason our commentary will focus both on the use of an exclusionary mechanism with regard to police interrogation and to those other powers. It is our intention that the form of the exclusionary rule proposed in this paper should apply to the questioning of suspects, and though we are not yet certain whether this formulation should apply to the other investigative powers we are prepared to offer it provisionally as a rule of general application in the law on investigative powers. As we progress through our work on other investigative powers we may choose to apply this test to the other powers that contemplate the acquisition of evidence, just as we might recommend the inclusion of other remedies with regard to the powers contained in the proposed Part XIII.1. For present purposes, however, we should explain the rudiments of the exclusionary sanction proposed here and thereafter explore the function of this sanction in the broader context of evidentiary rules, with some discussion of further applications.

Our premise is that the exclusion of evidence is the most appropriate mechanism for enforcing procedural rules of the kind that we propose. The most effective way to fix the permissible limits of investigative power is to supervise the manner of acquiring evidence by threatening the denial of its use if evidence is obtained in contravention of procedural standards. In this regard the jeopardy of the evidence should vary directly with the jeopardy of the accused. The only way to accomplish this equilibrium is rejection of evidence for failure to comply with procedural rules. On this basis the form of exclusion must evince a presumption of inadmissibility and a presumption that the admission of evidence obtained in contravention of specific procedural rules would bring the administration of justice into disrepute.

It is a fundamental principle of the way we do justice that information relevant to the allegations in issue is admissible evidence unless it is specifically excluded by law. The justifications for excluding relevant information are twofold. First, it is the policy of the law that the trier of fact should be prevented from hearing and considering unreliable evidence simply because the admission of such evidence would jeopardize the reliability and credibility of the fact-finding process. For these reasons, for example, our law denies the admission of hearsay or the evidence of children unless the unreliability inherent in these forms of evidence can be dispelled by the proponent party. The exclusion of evidence for reasons of unreliability is part of the orthodox doctrine of our law on evidence: anything relevant to determining the truth or falsity of particular allegations should be admissible as evidence unless the reliability of the determination would be jeopardized by the admission of evidence that is unsafe. This theory is based upon the view that evidence consists of facts that speak for themselves, subject to argument by counsel and an assessment of their probative value by the trier of fact. An important corollary of this orthodox view is that the law of evidence is concerned not with the manner in which it was obtained but its probative value in court.

Second, it is the policy of the law to exclude relevant and reliable evidence in circumstances where the determination of truth should be subordinated to protection of ulterior values. This is the case, for example, where constitutional rights have been infringed, and in other circumstances, such as the violation of privacy in communication for purposes of electronic surveillance. The exclusion of evidence for reasons unrelated to relevance or reliability is thus an exception to the orthodox view of litigation as a mechanism for ascertaining the truth of specific allegations. The premise of this exceptional notion is that exclusion is the cost paid at the expense of truth for the protection of

specified interests. When considered in relation to investigative powers, the distinguishing characteristic of the concept of exclusion is that the interests protected are necessarily infringed by the manner in which evidence is obtained.

The two justifications for the exclusion of evidence are not mutually exclusive and both reasons share the objective of promoting the public interest in the fair administration of justice. As noted before, there is a margin of overlap between the orthodox and exceptional theories of admissibility where the concept of exclusion is applied to investigative powers. In general the margin is quite narrow and the scope for exclusion for reasons related only to reliability in relation to investigative powers is quite slight because, unlike the questioning of suspects, the power to conduct search and seizure, electronic surveillance and investigative tests contemplates the acquisition of real evidence or evidence that is typically reliable, subject only to forensic confirmation. In sum, however, the principal thrust of an exclusionary sanction used for the supervision of investigative powers is by definition concerned with the manner in which that evidence was obtained, and the manner in which that power was exercised, and not with the forensic reliability of evidence, although reliability and probative value will often be a secondary factor upon the admission of the evidence.

This characterization of the exclusionary sanction is what makes it an appropriate mechanism for ensuring procedural regularity in the exercise of investigative powers. Indeed, it is possible at this point to see an equation between the premise for the exclusionary sanction and the guiding premise of our work on investigative powers: the need to define the permissible limits of intrusion upon the private interests of the citizen by agents of the state for the investigation of crime. (This equation, of course, does not preclude the adoption of other remedies appropriate for the purpose of securing this objective.) Our adherence to the exclusionary sanction is predicated, then, on the simple notion that in instances where agents of the state have exceeded the permissible limits of intrusion the state shall be denied the use of evidence so obtained because that intrusion brings the administration of justice into disrepute. On this analysis the exclusionary sanction is a neutral concept: the substantive issue with regard to the policy of the law is not the power of exclusion but the calibration of permissible intrusions by the definition of protected interests through procedural regulation.

Recognizing that the exclusion of evidence is an exceptional mechanism for protecting specific private interests, and accepting that it

is an appropriate mechanism for controlling the exercise of investigative powers, there are three possible models for the use of that sanction: the rule of automatic exclusion for procedural non-compliance, a qualified rule of exclusion, and an exclusionary discretion. We will consider briefly, and reject, the first and third alternatives because of the three they represent opposing extremes. In considering those and the qualified rule of exclusion, which we favour, it is important to examine two corollary issues. Is the same form of exclusion appropriate for each investigative power? Even assuming that the exclusionary sanction is appropriate with regard to the questioning of suspects, search and seizure, investigative tests, and electronic surveillance, does it follow that it is the most appropriate sanction for any abuse or violation of prescribed procedural rules? Our answers to these questions will emerge in the position of our statement in favour of a qualified rule of exclusion.

As mechanisms for the enforcement of procedural rules governing the exercise of investigative powers, an automatic rule of exclusion and an exclusionary discretion can be distinguished. The former proceeds from a presumption of inadmissibility in the absence of proof of compliance, without a margin for exceptional inclusion; the latter proceeds on a presumption of admissibility with allowance for exclusion where non-compliance offends the sensibility of the presiding judge with respect to permissible deviations from the prescribed procedural norm. An automatic rule of exclusion is unacceptable because it allows no appreciation of the magnitude of the intrusion and implies that exclusion is warranted even when non-compliance might not compromise the interests protected by procedural rules. An exclusionary discretion is likewise unacceptable because the presumption of admissibility would deflect concern away from the intent to secure respect for particular private interests, and would imply that the presiding judge is entitled to decide whether compliance or non-compliance better serves the fair administration of justice on the facts of the case before him.

A qualified rule of exclusion of the type that we propose is predicated upon a presumption of inadmissibility that could only be dislodged by proof of compliance with prescribed procedural rules or by proof that the admission of evidence taken in contravention of those rules would not bring the administration of justice into disrepute. The presumption thus includes the notion that non-compliance brings the administration of justice into disrepute because it is by definition a transgression by the state of the permissible limits of intrusion.

What, then, is the relationship between the qualified rule of exclusion that we propose and subsection 24(2) of the *Canadian Charter of Rights and Freedoms*? In some respects the two are quite different in form and effect but, for the reasons that follow, we believe that when the two are viewed together they are entirely complementary.

The signal difference between the rules is the different premises upon which each is based. The Charter, of course, is predicated upon a presumption of admissibility that endures until the applicant can establish to the satisfaction of the judge that, having regard to all the circumstances, the admission of the evidence in the proceedings would bring the administration of justice into disrepute. There are two striking characteristics in this formulation. The first is that the presumption of admissibility subsists despite evidence of constitutional violation until satisfactory proof is made of the deleterious effect of admission. This posture, which is consistent with the orthodox view of evidence, implies that the power of exclusion is not available primarily for the vindication of individual liberties or the control of investigative powers, but for the protection of the integrity of the court and its judges. The second noteworthy characteristic is that, despite contrary appearances, subsection 24(2) is a discretionary remedy in the sense that it consists of a finding of fact (a constitutional violation), an assessment of the circumstances and an opinion as to the effect that the admission of the evidence would have on the integrity of the judicial system. The factors that the judge must consider are virtually unlimited, and when combined with the exigencies of a particular case, the prospects for consistent jurisprudence in the lower courts are remote.

Our qualified rule, by contrast, proceeds on a presumption of inadmissibility that attaches to any evidence obtained in contravention of procedural rules prescribed for the exercise of intrusive or investigative powers. The scope for exclusion is thus narrowly defined by specific criteria because the rules of themselves define conduct that would bring the administration of justice into disrepute. As stated before, however, we recognize that a rule of exclusion would make bad law if it did not admit of exceptions that fall outside its premises and objectives. Accordingly, we would qualify the presumption of inadmissibility by saying that evidence obtained in contravention of the rules would be excluded unless the prosecution established that the admission of the evidence would not bring the administration of justice into disrepute. The presumption must allow that failure to comply may, upon careful analysis of the circumstances, be insignificant and comparatively harmless. The rules are themselves the criteria for exercising the exception to the presumption of inadmissibility. Careful

evasion of the rules or negligent deviation from them will therefore not justify the invocation of this inclusionary exception. The rules seek to ensure a complete record of the circumstances of an interrogation and of any statement given. Non-compliance in small or large measure would subvert their purpose and must, of itself, weaken the case for admissibility. As we have said, however, only those breaches that by their nature and seriousness are substantive should be sanctioned by exclusion.

It might, of course, be argued that the exceptional discretionary inclusion available under the rule that we propose is as devoid of substantive criteria as the criterion of exclusion in the Charter. The short answer to this objection is that, provided the rule is predicated on a presumption in favour of specifically defined private interests, the courts should be perfectly competent to develop sound exceptions.

In general, then, there are significant differences between the rule we propose and the Charter. Apart from the different presumptions that lie at the heart of each provision, the foremost distinction is that our rule would be a legislative provision, whereas subsection 24(2) delegates to the judiciary the competence to decide whether the admission of evidence would bring the administration of justice into disrepute. We propose that exclusion should be tied to the exercise of specific powers, compliance with specific rules and respect for the private interests protected by those rules. Moreover, we feel that if the state wishes to avail itself of evidence obtained by a violation of the permissible limits of intrusion the state's agents should have the obligation to justify an exception to the rules prescribed for obtaining evidence.

The theoretical ramifications of the qualified rule that we propose are, of course, quite radical. Acceptance of the proposal would imply a reversal of the orthodox theory of admissibility, at least with respect to evidence obtained in contravention of procedural rules. Ultimately, the acceptance or rejection of this proposal will be an ideological decision predicated on a theory for regulating the economy of rights, powers and obligations in the relationship between the state and its subjects. For our part, however, we are convinced that the orthodox concerns for reliability provide insufficient protection of private interests and no foundation for judicial supervision of the manner in which evidence is obtained. Accordingly, it is our view that an exception from the orthodox theory is warranted for the contravention of procedural rules. We would only emphasize again that the principal function in defining the permissible limits of intrusion is not the viability of exclusion as a mechanism of control but the content of the procedural rules.

Finally, we would note that, like the procedural format of the rules we propose, the exclusionary sanction is also applicable to other investigative powers. The core of that sanction is the presumption of inadmissibility and we are convinced that such a presumption should attach to any evidence obtained by a police officer who exercises a power of search and seizure, investigative testing, electronic surveillance or interrogation. The inclusionary exception in that sanction should carry sufficient flexibility with regard to particular exigencies that may arise in connection with each of these powers.