

*This study paper, prepared by the Evidence  
Project of the Law Reform Commission of Canada,  
is circulated for comment and criticism.  
The proposals do not represent the views  
of the Commission.*

## **EVIDENCE**

### **10. THE EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE**

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## **EVIDENCE**

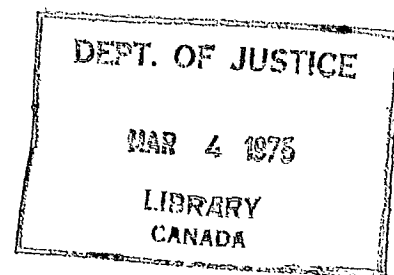
### **10. THE EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE**

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Law of Evidence Project

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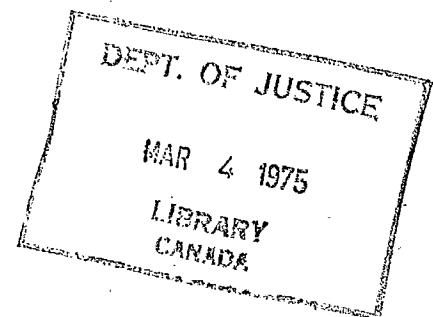
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## INTRODUCTION

The question of whether illegally obtained evidence should be admissible has been debated at length, yet remains controversial.<sup>1</sup> There are good arguments for what can be called the American position: the exclusion of both illegally obtained evidence and all other evidence derived from it. There are equally good arguments for the traditional English and Canadian positions: that evidence should not be excluded simply because it has been illegally obtained.

The conflicting positions of judges and commentators, some tinged with emotion, demonstrate that no legislative solution can satisfy everyone or discourage spirited debate. This is so because the problem cannot be severed from the criminal justice system as a whole. In solving the problem, the orientation of the entire system is at stake.

It is often said that in criminal law, especially in matters of evidence, the legislator must find the proper balance between the imperatives of suppressing crime and guaranteeing fundamental human rights, between efficiency and fairness, between crime control and respect for individual freedom, and between the need to search for the whole truth and the need to safeguard certain basic values. The problem of admissibility of illegally obtained evidence raises these issues. Any solution to the problem reflects an inevitable choice between sets of apparently contradictory values.

A further difficulty arises because the question of the admissibility of illegally obtained evidence is often considered through the limited experience of particular applications of the existing rule. As a result, positions are taken for or against a general rule of exclusion on the basis of a limited analysis of specific situations such as illegal search and seizure, illegally obtained confessions and illegal arrests. There is always the temptation to generalize without keeping in mind the problem in its entirety.

The general reader may be helped in understanding this difficulty if the problem is situated in relation to the primary purpose of the rules of evidence. That purpose is to place before the courts sufficient information to allow factual conclusions to be made from which legal consequences may be drawn. Therefore, it follows that all evidence that is relevant to an issue in dispute should be admitted. Relevance, therefore, becomes a basic condition for admissibility. But there are others. The search for truth in the criminal law process where guilt and innocence are determined is not made without some sacrifice. Other values of a social or moral nature deemed more important by the law and the courts may override this search. For example, discussions between an accused person and his lawyer may

result in relevant information being revealed that could bear on the accused's guilt or innocence. Yet in order to protect the fundamental rights of the defendant and to allow free and open discussion between an accused person and his lawyer, the law protects these communications from public disclosure.

Credibility may also be an important condition for admissibility. Relevant evidence may be excluded because it is untrustworthy. For example, the most commonly accepted rationale for the exclusion of confessions obtained as a result of threats or promises is that they are untrustworthy. But other rationale may be found for this rule. If a court should accept as admissible evidence, a confession made in such circumstances, would not the court be acting as an accessory to the illegality? By admitting an illegally obtained confession, would not the court be legalizing or at least tacitly approving an illegality? Moreover, would not this be tantamount to a judicial rejection of the privilege against self-incrimination?

The problem of illegally obtained evidence concerns both testimonial and real evidence. For testimonial evidence, notably confessions, exclusion may be justified for other reasons (privilege against self-incrimination, or untrustworthiness) than the illegal manner in which the evidence was obtained. The rules laid down by *Ibrahim v. Rex*<sup>2</sup> and *Boudreau v. The King*<sup>3</sup> reflect this phenomenon.

But for real evidence, the illegality that has accompanied its gathering does not make the evidence any less reliable or relevant. There is in fact no difference in the evidentiary reliability or relevance of the discovery of a stock of illicit drugs whether the police seized it illegally and violently or in conformity with applicable law and procedure when the question to be answered is whether the accused had the stock in his possession. The case of the *Attorney-General of the Province of Quebec v. Bégin*<sup>4</sup> illustrates this distinction.

Where the illegality committed in obtaining evidence directly affects its credibility, the problem could be avoided by basing exclusion on reliability. Here, the quality and credibility of the evidence justify exclusion rather than approbation of the illegal act by which it was gathered. However, the problem in its entirety is not so easily resolved, for evidence obtained indirectly through an illegal act may not lack reliability. If, as a result of a forced confession, the police discover incriminating real evidence, for example, the murder weapon, should this weapon be admissible as evidence? And since the discovery of the weapon corroborates at least part of the confession of the accused, should this part be admissible as well?<sup>5</sup>

To summarize at this point, this paper attempts to provide the elements of a solution to the following problem: where illegally obtained evidence is deemed to be relevant and trustworthy, should it be admissible, leaving the task of repressing the illegal acts involved to other techniques (criminal, tortious or disciplinary sanctions)? Or should such evidence be excluded even though it is relevant and reliable, placing loyalty to the rule of law above considerations of efficiency, clearly indicating on the one hand disapproval of the illegal acts involved, while on the other hand confirming the supremacy of certain fundamental rights over the search for truth?



## THE PRESENT STATE OF CANADIAN LAW

Canadian law has followed English law: the illegality of the means used to obtain evidence generally has no bearing upon its admissibility. If, for example, a person's home is illegally searched—without a search warrant or reasonable and probable cause for a search—the person may sue the police for the damages incurred, complain or demand disciplinary action or the laying of criminal charges. But, the evidence uncovered during this search together with all evidence derived from it is admissible. Similarly, if an accused person, threatened with violence, confesses to a murder and tells the police where the murder weapon can be found, his statements indicating the location of the weapon as well as all evidence that tends to prove that this weapon is the murder weapon are admissible, even though the confession itself is inadmissible because it was made involuntarily, and was thus illegally obtained. In short, the Canadian position is that real evidence, however it is gathered as well as evidence derived from it, is admissible despite any illegality committed by the police in obtaining it.

This rule of Canadian law has evolved through a number of judicial decisions culminating in the decision of the Supreme Court of Canada in *R. v. Wray*<sup>6</sup> in 1970. It is significant that, in this decision, the Supreme Court examined the English common law in some detail, particularly as expressed by the English courts in *Kuruma v. The Queen*<sup>7</sup>, *Noor Mohamed v. The King*<sup>8</sup>, and *Callis v. Gunn*<sup>9</sup>, but almost completely ignored American cases that have dealt with this topic.

The traditional Canadian position was first stated in 1886 in the *Doyle* case<sup>10</sup>, a decision of the Ontario Court of Appeal. In that case, the accused alleged that an illegal search of his house had been made during which a number of alcoholic beverages were found—the possession of which was against the law. But the Ontario Court of Appeal, following an English precedent, refused to reverse the decision of the trial court which had convicted the accused solely on the basis of the objects found during the illegal search.

Over the years, a number of other decisions have reaffirmed this principle of the admissibility of relevant evidence whether or not it has been obtained illegally.<sup>10a</sup> In 1949, McRuer J. of the Ontario High Court held in *R. v. St. Lawrence*<sup>11</sup> that evidence uncovered as a result of an involuntary (and hence inadmissible) confession was, itself, admissible in evidence. Then in 1959 in a case concerning the legality of a blood test, *Attorney-General of the Province of Quebec v. Bégin*<sup>12</sup>, the Supreme Court of Canada followed the English precedent of *Kuruma*<sup>13</sup> holding that relevant evidence, even if illegally obtained, may be admitted, thus adopting the rule laid down by the Privy Council. In the *Bégin* case, a specimen of the accused's

blood had been taken, without violence or force, and without the accused being told that he was not legally obligated to provide such a specimen. In his judgment, Fauteux J. held:

Without doubt, the method used in obtaining certain of this evidence can, in certain cases, be illegal and even give rise to appeals of civil or even criminal order against those who have used it, but the proposition will not be discussed further, since in this case, illegality tainting the method of obtaining the evidence does not affect *per se* the admissibility of this evidence in the trial.<sup>13a</sup>

Prior to *Wray*, it could be said that Canadian law allowed the admission of real evidence discovered as a result of a non-admissible confession as well as those parts of the confession corroborated by the discovery, in spite of any illegalities that might have been present in the means used to obtain this evidence. The *Bégin* case provided some needed guidance in dealing with the admissibility of illegally obtained evidence and related involuntary confessions. Expert evidence on blood specimens in *Bégin* was considered to be testimony concerning real evidence—consequently, the rule stated in the case applies only to real or physical evidence.

In 1970 in *Wray*<sup>14</sup>, the subject of numerous commentaries and criticisms<sup>15</sup>, the Supreme Court faced the problem. *Wray*, charged with murder, had made a confession, ruled inadmissible at trial, and told the police that he had thrown the murder weapon into a swamp. The police, led by *Wray*, found a rifle which was introduced as an exhibit at the trial. As well as the rifle, the prosecution sought to have admitted as evidence that part of *Wray*'s confession corroborated by the discovery of the rifle. In upholding the decision of the trial judge excluding both the rifle and the involuntary confession, the Ontario Court of Appeal held that a court can reject relevant evidence if its admission would be unfair to the accused or would bring the administration of justice into disrepute<sup>16</sup>. However, this decision was reversed by the Supreme Court of Canada which ruled that discovery of the murder weapon was admissible evidence. Also ruled admissible was that part of the accused's confession which described throwing the rifle into the swamp where the police found it. The majority judgment by Martland and Judson JJ., re-affirmed the ruling in *R. v. St. Lawrence*<sup>17</sup>, reviewed at length the *Kuruma* case<sup>18</sup>, then reached the conclusion that a trial judge does not have the authority at common law to exclude evidence otherwise admissible solely because its admission would bring the administration of justice into disrepute.

This development of the idea of a general discretion to exclude admissible evidence is not warranted by the authority on which it purports to be based. The dictum of Lord Goddard, in the *Kuruma* case, appears to be founded on *Noor Mohamed*, and it has, I think, been unduly extended in some of the subsequent cases. It recognized a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused. Even if this statement be accepted, in the way in which it is phrased, the exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. *It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling which can be said to operate unfairly.*<sup>19</sup>

Judson J., in a separate judgment, agreed that illegally obtained evidence was admissible but preferred a narrower application of any general rule of

admissibility.<sup>20</sup> He was of the opinion that the decision in *R. v. St. Lawrence* was applicable, that illegally obtained evidence should be excluded if it was untrustworthy. Judson J. reasoned that all real evidence or parts of a confession corroborated by real evidence should be legally admissible because they are trustworthy. He did refuse, however, to admit as evidence that part of Wray's confession that described the accused as having himself thrown the weapon to the spot where it was found by the police, because he felt that the truth of this statement was not definitely confirmed by the discovery of the rifle in the same spot.

The *Wray* decision occasioned strong dissenting opinions by Cartwright C.J. and Hall and Spence JJ.<sup>21</sup> The Chief Justice based his dissent on a different rationale for the exclusion of an involuntary confession, favoring the approach in *Declercq v. The Queen*<sup>22</sup>. In his view, a confession is not inadmissible simply because it is untrustworthy for, once it is confirmed by other evidence, it should be admitted.<sup>23</sup> The true rationale of the exclusionary rule lies in the rule against self-incrimination (*memo tenetur seipsum accusare*). If a confession is coerced and must be rejected, the discovery of evidence confirming the truth of part of the confession should not render it admissible either in whole or in part.

The result which would seem to follow if the exclusion is based on the maxim (*memo tenetur seipsum accusare*) would be that the involuntary confession even if verified by subsequently discovered evidence could not be referred to in any way.<sup>24</sup>

The Chief Justice was also of the opinion that there existed in common law a discretionary power to exclude evidence, even if the evidence had a substantial probative value, following the decision below of the Ontario Court of Appeal.

Hall J. questioned the reasoning in *R. v. St. Lawrence*. He suggested, without giving a definitive opinion, that it is unreasonable to break apart a confession, admitting one part in evidence because it is corroborated, if during the voir-dire the entire confession was ruled inadmissible because it was involuntary.<sup>25</sup>

Legal commentators in analyzing the Supreme Court of Canada's decision in *Wray* have agreed on three criticisms.<sup>(25a)</sup> The first concerns the Privy Council's decision in *Kuruma* which the majority opinion follows. This should not have been relied upon as a basis for a general principle because of the rather exceptional facts and circumstances surrounding the case.<sup>26</sup> The second criticism suggests that the Supreme Court of Canada should have considered other decisions such as *R. v. Barker*<sup>27</sup> in which the English Court of Criminal Appeal rejected the prosecution's attempts to submit certain incriminating documents obtained as a result of an inadmissible confession. The third criticism considers that *Wray* almost completely eliminates the judge's discretionary power to exclude evidence, without getting to the root of the problem, without assessing the framework for discretion proposed by the Ontario Court of Appeal, and without formulating other criteria.<sup>28</sup> Quite understandably, however, lower courts have followed the *Wray* decision: most recently the Ontario Court of Appeal in *R. v. Lafrance*<sup>29</sup>, and the British Columbia Court of Appeal in *R. v. Pettipiece*<sup>30</sup>.

Early in 1974, the Parliament of Canada enacted as law Bill C-176 concerning the protection of privacy through the control of wire tapping and electronic eavesdropping generally.<sup>31</sup> Several provisions of this legislation must be examined

here since they affect Canadian law on illegally obtained evidence. But first, two preliminary observations are necessary. This legislation deals only with certain specific and limited aspects of the problem of admissibility of illegally obtained evidence. And, as several commentators have demonstrated,<sup>32</sup> the problems raised by gathering evidence through illegal wire tapping are quite different from those engendered by illegal seizures, searches, and confessions. In fact, enforcement authorities are not as concerned with wire tapping and the admissibility as evidence of a tape recorded conversation as they are with the information contained on the tapes which might lead to further enforcement or crime prevention activities. In other words, it is often more important to the police that evidence discovered as a result of intercepted conversations be admissible rather than the conversation itself. In allowing legal telephone interceptions, the legislation in effect "neutralizes" the telephone as a tool or instrument for criminal purposes, thus making crime more difficult for the professional criminal.

The major impact of the legislation on admissibility arises from the amendment to section 178 of the Criminal Code by adding subsection 16, paragraphs 1 and 2 of which follow:

**178.16 (1)** A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

(a) the interception was lawfully made, or

(b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.

(2) Where in any proceedings the judge is of the opinion that any private communication or any other evidence that is inadmissible pursuant to subsection (1)

(a) is relevant, and

(b) is inadmissible by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted or by means of which such evidence was obtained, or

(c) That, in the case of evidence, other than the private communication itself, to exclude it as evidence may result in justice not being done,

he may, notwithstanding subsection (1), admit such private communication or evidence as evidence in such proceedings.

These provisions establish inadmissibility as the general rule for all illegal interceptions of private communications as well as all other evidence obtained directly or indirectly from such illegal interceptions. At first glance, the rule as enunciated in subsection 178.16(1) appears to be contrary to the traditional common law position since it would exclude all illegally obtained evidence. But given the wording of this section, it would appear that inadmissibility affects only the author of a communication and the person for whom it was intended. As a result, information or evidence obtained from an illegal interception of a conversation between A and B would seem to be admissible as evidence in a case against C. Furthermore, subsection 178.16(2) seems to restrict even further the general rule of inadmissibility. This provides that even if a conversation is illegally intercepted, it may be admitted as evidence if the judge deems it relevant and considers that the legality is only a "defect in form" or an "irregularity in procedure" and not a

substantive or fundamental defect or irregularity. The legislators have attempted to balance society's need for law enforcement against the individual's right to privacy. A fundamental irregularity is treated as important enough to justify the exclusion of tape recorded conversation as evidence, but irregularities in form or procedure are regarded as too trivial to justify the exclusion of relevant evidence from the trial process.

Lastly, subsection 178.16(2) (b) grants a broad discretionary power to the individual judge. He may admit evidence obtained as a result of an illegal interception if he believes that "to exclude it . . . may result in justice not being done." A close reading of this Act demonstrates that our legislators continue to stress the importance of relevance as the primary criterion in admitting evidence—an approach consistent with the traditional Canadian common law position. The exceptions mentioned previously indicate that an illegality or irregularity in obtaining evidence can be overlooked when two conditions are fulfilled, and relevance is the first of these conditions.

One could fairly conclude that this legislation favours the discovery of evidence by illegal means over the absolute protection of the right to privacy. However, the legislators, at least in stating a general rule of inadmissibility, have reversed the traditional Canadian position. The exclusion of evidence has become the rule, its admissibility the exception. Nevertheless, how the exceptions to the rule are defined in practice could very well undermine its force and effectiveness.

Take, for example, the expression used in subsection 178.16(2) (c): "to exclude it as evidence may result in justice not being done." Is it possible that this statement has the same thrust as the formula for judicial discretion proposed by the Ontario Court of Appeal in *Wray*? Does being "just" mean avoiding being unjust to the accused or rather avoiding the discrediting of the administration of justice? Could not the expression be interpreted in other ways—for example, as allowing the judge to admit illegal evidence if he believes that without it the prosecution could not begin to establish the essential elements of the offence of which the accused is charged and probably guilty, and thus without it, justice would not be done?

It is obviously too soon to know how the courts will interpret these provisions and the breadth of the judicial discretion they confer. But two important points can be made. Canadian legislators now recognize that relevance, at least in the narrow area of wire tapping, should not be the only condition of admissibility. And furthermore, the courts should exercise certain discretionary powers in determining the admissibility of evidence. Thus, Canadian law has not been fixed in either of the polar positions on illegally obtained evidence in which some other jurisdictions now find themselves.

To summarize briefly, the present position of the law in Canada follows the decision of the Supreme Court of Canada in *Wray* and admits all evidence even though illegally obtained, provided the evidence is relevant to the issues in dispute and not excluded for some other reason (as in the case of involuntary or coerced confessions). Thus the illegality or irregularity of the means used to obtain evidence does not affect its admissibility. A judge, if *Wray* is followed, would only have a

narrow discretionary power to refuse to admit relevant and credible evidence. Moreover, evidence derived from inadmissible evidence can be admitted if it conforms with the general conditions for admissibility. But the wire tapping situation differs somewhat, at least in the stating of rules and exceptions. The exclusionary rule is entrenched legislatively but in certain special cases, where evidence is relevant, the rule may be abandoned even though the evidence is directly or indirectly the result of an illegality.

## ELEMENTS OF COMPARATIVE LAW

At this point, it is enlightening to glance briefly at the solutions adopted by a number of other countries. However, variations in social philosophies and judicial traditions must be remembered when assessing the relevance of foreign solutions to the Canadian context.

### American Law

After long controversy, the evolution of American common law culminated in the acceptance of an exclusionary rule for illegally obtained evidence.<sup>33</sup> This position was established in a number of very important decisions such as *Weeks v. U.S.*<sup>34</sup>, *Wolf v. Colorado*<sup>35</sup> and notably *Mapp v. Ohio*<sup>36</sup>. The American rule excludes all evidence gathered directly or indirectly as the result of an illegality or a violation of the fundamental human rights guaranteed by the Constitution of the United States. Starting from the same point as Canadian law—that all relevant evidence, even if illegally obtained, is admissible<sup>37</sup>—American law overcame the first obstacle in *Weeks v. U.S.*<sup>38</sup>. Here, the Supreme Court of the United States held that evidence obtained in violation of the Fourth Amendment to the United States Constitution could not be admitted because to do so would eliminate the protection which this Amendment was intended to confer on all Americans. The rule excluding illegally obtained evidence gathered in searches and seizures extended not only to directly obtained evidence but also to all evidence that indirectly resulted from information discovered in an illegal search or seizure.

A second important step in the development of American law occurred in *Wolf v. Colorado*<sup>39</sup>. In this case, the fundamental liberties guaranteed by the first eight amendments to the United States Constitution were held to be protected by the Fourteenth Amendment which forbids the individual states from depriving a person of his life, liberty, and property without “due process of law”.

Finally, in 1961, the well known decision in *Mapp v. Ohio*<sup>40</sup> extended the general application of the exclusionary rule to all American courts including State Courts. Doubts had arisen prior to this decision because in *Wolf* the Supreme Court of the United States had appeared to allow individual States to use other techniques to enforce the Fourteenth Amendment.

At present then, in the United States, evidence directly obtained by an illegal method is excluded as too is evidence derived from it—what American jurists call “the fruit of the poisoned tree”. Moreover, the American rule applies to material or real evidence as well as testimonial evidence.<sup>41</sup>

Legal commentators have noted three important exceptions to the application of the American exclusionary rule. It is not applicable, first, when evidence is admitted not to show the guilt of the accused but on a collateral question; second, when a violation has taken place at the expense of a person other than the accused; and finally, when evidence has been gathered by an individual on his own initiative rather than by a public official.<sup>42</sup>

It is particularly interesting to note that the development of the American exclusionary rule is directly tied to judicial interpretation of the Constitution of the United States and the problem of guaranteeing individual liberties and fundamental human rights. American courts have held that the exclusion of illegally obtained evidence and all evidence derived from it constitutes a reasonable protection of fundamental liberties at two levels. First of all, it has an exemplary value for police officers. By excluding all evidence they may obtain illegally, it is hoped that the police will be discouraged in the future from using such tactics and that in the long term, the entire criminal investigation system will be improved. Secondly, excluding evidence indicates that American law truly respects the need for "due process", ranking it above all other considerations including law enforcement. In essence, the American position rests on the belief that fundamental liberties guaranteed by the United States Constitution are undermined if the rule of law is not respected.

Currently, however, perhaps sparked by the absolute nature of the exclusionary rule, there is a substantial current of opposition.<sup>43</sup> A number of legal commentators foresee either a return to the former position of admissibility, or some relaxation of the present rule. A more extensive discussion of the merits of the American position appears in the third part of this study.<sup>44</sup>

#### English Law<sup>45</sup>

In England, the decision in *Kuruma v. The Queen*<sup>46</sup> has determined the direction of the common law on the admissibility of illegally obtained evidence. In this case, which took place during the Kenyan uprisings, the accused was stopped at a military control point after he had cycled down a road controlled by military authorities. He was searched by two low-ranking officers who found a knife and some ammunition. Sentenced to death, he appealed to the Privy Council, arguing that the search was illegal and thus the evidence obtained from the search should be considered as inadmissible. Under the Emergency Regulations of Kenya, the search could only be made by higher ranking officers. In dismissing the appeal, the Privy Council held that:

In their Lordships' opinion, the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.<sup>47</sup>

The English position is that evidence is admissible even if obtained through contraventions of the common law, statutes or rules of a constitutional nature. But in the same decision, the Privy Council acknowledged that a judge has the discretionary power to exclude evidence which would unfairly prejudice the accused if the rules of admissibility were strictly followed.

No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of inadmissibility would operate unfairly against the accused.<sup>48</sup>

The example provided by the Privy Council concerned evidence obtained by deceitful or fraudulent means. Unfortunately, however, the language used was vague and does not indicate what meaning should be given to the word "unfair". Furthermore, no real guidance was given that would aid in determining whether or not unfairness would result to the accused by admitting certain kinds of evidence.

It may also be noted that the Privy Council in *Kuruma* was aware of the full effect of its ruling on the admissibility of illegally obtained evidence, pointing out that this rule would not apply to confessions.

It is right, that it should be stated that the rule with regard to the admission of confessions, whether it be regarded as an exception to the general rule or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever.<sup>49</sup>

Yet, as a result of *Kuruma*, the scope of the judge's discretionary power to exclude is much more limited than the generality of the language in the decision indicates on first reading. The power only operates in marginal cases. The English Courts have only excluded illegally obtained evidence when it has been obtained by false representation or a deception of a particularly serious nature in the light of the circumstances surrounding the case.<sup>50</sup> It is in this sense that *Kuruma* has been compromised by the Supreme Court of Canada in *Wray*.<sup>51</sup>

Without going further, the English and American positions can be considered to be diametrically opposed. English law, contrary to American law, does not see the problem of admissibility of illegally obtained evidence in the terms of individual rights and liberties. English judges appear not to share the aspirations of their American counterparts that an exclusionary rule can be dissuasive and help prevent violation of an individual's civil rights. Instead, the English common law adheres to a sole condition for admissibility—the relevance of the evidence. An English court expressed it in *R. v. Leatham*:

It matters not how you get it; if you steal it, it will still be admissible in evidence.<sup>52</sup>

In striking contrast to the situation in the United States, there has been little discussion in England of the merits of the English position and the policies underlying it. Justification for the English rule, when expressed, is based on the fear that adopting a general exclusionary rule would paralyse the criminal justice system.

### Scottish Law<sup>53</sup>

Scottish law differs markedly from the English common law in several important respects. The leading case in the area is *Lawrie v. Muir*<sup>54</sup>, decided in 1950. In this case, Lord Cooper, stressing the importance of reconciling the interests of the State and the individual, was of the opinion that the rule need not be absolute. It should recognize on the basis of the facts in each case, the prevailing interests of one or the other. All relevant evidence need not be admitted in every case, whether illegally obtained or not, nor should relevant evidence tainted by the slightest irregularity be rejected automatically.

Scottish law, as does English law, recognizes the need for admissibility of relevant evidence. However, the discretionary power of the judge to exclude relevant evidence is not limited by the test of "unfairness" to the accused. A recent study on the question<sup>55</sup> indicates that the Scottish and Irish courts use the following criteria when exercising their powers of discretion:

1. Was the illegality part of a deliberate plan to obtain evidence?
2. Is the illegality serious?
3. Was quick action necessary to avoid destruction or loss of evidence?
4. Were the perpetrators of the illegality law officers or private citizens?
5. Under the circumstances, was it reasonably possible to conform to the requirements of the law?
6. Is the crime of which the defendant stands accused a serious crime?
7. Were the means used to obtain the evidence the only practical means available for the effective detection of the crime?

Thus, Scottish law has tempered the English position by increasing judicial discretion. Located about half-way between the English and American positions, Scotland's situation is interesting to law reform, for this jurisdiction has made tangible progress in resolving the traditional conflict between exclusion and admissibility. In Scotland, admissibility or exclusion is not the inevitable consequence of an all-encompassing and arbitrary position. Rather, it is the concrete result of a judicial determination in each case of the values that ought to prevail in that setting.

#### **French Law<sup>56</sup>**

In France, the development of the law in this area is not easily explained because of the considerable differences between the French and the Canadian legal systems. The presence of a *juge d'instruction* (best translated as "examining magistrate") responsible for gathering and compiling evidence, the various controls on this judicial officer, the regulation of police investigations, the concept of the *intime conviction* are some of the factors which make a comparison difficult.

In brief, and very generally, a judge in France cannot found an *intime conviction* (ie., his opinion on whether to convict or not) on an irregular act because of Article 173 of the French Code of Criminal Procedure. Moreover, French jurisprudence indicates that the *juge d'instruction* while investigating must respect the provisions of the law and the principle of conformity (*loyauté*) in his search for evidence. Evidence revealed by illegal or unjust procedures against the accused are excluded. In this respect, however, French law distinguishes between "textual" and "substantial" irregularities. The former are violations of legislative provisions. The latter occur by violating or disregarding the rules of public order and the rights of the defence. Thus, evidence illegally obtained during the *instruction* or examination is, in principle, inadmissible. An irregularity in some instances may invalidate all related evidence.

It would appear that the same rules would apply to evidence resulting from a police inquiry, for example, at the time of the preliminary investigation and hearing. Nevertheless, there are in France, as in other countries, certain penal and disciplinary sanctions against those using illegal or unfair techniques to compile evidence.

In general, the administrative and judicial control of police forces appears to be effective.

There are many other foreign solutions. But two other jurisdictions outside the common law tradition deserve mention mainly because they are often cited as examples in Anglo-American legal writings—Germany and Israel. In principle, German law does not exclude illegally obtained evidence except when in a judge's opinion it has been obtained by a serious violation of basic rights. As in Scottish law, the nature of the illegality that has been committed is taken into consideration.<sup>57</sup> Israeli law deems the exclusionary rule to be useless and unjustified. It provides that when faced with an illegality committed in the search for evidence, the court can cite the responsible individual, convict him immediately or send him to another court for trial.<sup>58</sup> This solution is apparently applied to admissions, to confessions gained by illegal means and also to illegal searches and seizures.



## **ANALYSIS OF THE MAIN ARGUMENTS IN FAVOUR OF THE EXCLUSIONARY RULE**

Numerous arguments have been advanced for and against a reform adopting an exclusionary rule.<sup>59</sup> This study has merely attempted to review very briefly a number of these. It would be pretentious to attempt a detailed study of them all in such a short space and do justice to their authors.

Wigmore advanced three fundamental arguments in favour of the exclusionary rule for illegally obtained evidence:<sup>60</sup>

1. In the absence of other remedies, such a rule is necessary to deter illegal methods for obtaining evidence;
2. By eliminating the apparent condonation of illegal police practices, it contributes toward respect for the legal system; and
3. An exclusionary rule frees judges from what is felt by some of them to be a repugnant complicity in "dirty business".

However, Wigmore also suggested responses to these arguments:

1. That an exclusionary rule makes justice inefficient by impairing the main function of a trial—to find the truth of the criminal allegation;
2. That it coddles criminals by serving neither to protect potential victims nor to punish the offending officer, since it results in the acquittal of the guilty and the punishment of society by the release of criminals in their midst;
3. That it introduces additional complications into a system of criminal justice that is already over-burdened with technicalities.

A perusal of modern doctrines and the major legal decisions concerning this problem indicates that the arguments fall into two broad categories: one factual and practical, and the other theoretical and normative.

### **Factual Arguments**

The first practical or factual argument in favouring exclusion of illegally obtained evidence is the dissuasive and long term preventive effect on abusive acts and practices by police forces. If the prosecution cannot submit illegally obtained evidence, it will affect the conduct of the police because they will become conscious of the futility of not respecting the law. In the long run, the dissuasive effects of the rule would improve the conduct of those responsible for controlling crime.

This argument was best expressed in *Mapp v. Ohio*<sup>61</sup> which made the exclusionary rule generally applicable to cases brought before American State courts. The impact of the dissuasive powers associated with the exclusionary rule has been the subject of extensive and bitter debate in the United States. The question is

indeed difficult to answer. Opinions are divided although currently, many commentators attach only relative importance to this argument. For example, one American author in a long article on the exclusionary rule and illegal searches and seizures, concluded that the exclusionary rule's dissuasive powers alone do not justify keeping the rule.<sup>62</sup> Statistical analysis and research into the impact of the exclusionary rule on police conduct in the United States seems to indicate that the expansion of the rule by *Mapp v. Ohio* has not contributed to any appreciable decrease in illegal police practices.<sup>63</sup>

The argument, frequently made against the existence of any dissuasive effect, reasons that no real impact on police behaviour is possible since the primary concern of the police is to gather evidence which will bring the accused to trial, police behaviour being dictated predominantly by the desire to convict. But, it is also argued that the role of the police is not only to charge and convict criminals but also to prevent crime.

The effect of the rule, so the earlier argument runs, must be limited since it has not prevented the police from making searches, seizures or other illegal investigations when their purpose is to harass an individual or suspect, to destroy or seize certain objects like drugs, or simply by preventive or intimidating measures to stop certain crimes from being committed. Indeed, the argument can be stretched further—the very existence of the exclusionary rule tending to encourage the police to use harassing tactics or other manoeuvres rather than searching for evidence to convict criminals at trial.<sup>64</sup>

Doubt about the dissuasive effects of the exclusionary rule has led to an examination of other measures that might operate to control or prevent illegal police activity, such as disciplinary sanctions and civil actions. But here too, controversy is rife. Many observers of the American system have concluded that the costs of a damage suit, the uncertainty of the chances of success, the relatively small amounts awarded as costs by the courts, the rather modest resources of most police officers, and the difficulty in some instances of holding the employer responsible for the actions of the employee, cast serious doubt on the effectiveness of a civil claim for damages as a means of controlling police practices. It is also observable that in practice a guilty party rarely sues, that his chances of success before a jury are slim, but that the innocent party is reluctant to sue because he seldom finds such an action profitable.

Faced with these obstacles and in order to improve the effectiveness of a civil suit, some modifications to the basic rules of civil responsibility have been suggested. For example, it has been proposed that the State be responsible for the results of any illegal acts by the police, that minimal compensation be awarded, and that a suit for damages not be limited to the person who committed the illegality but extended to cover his superiors.<sup>64a</sup> Most of these suggestions aim at providing adequate and speedy indemnity to the victim without excessive expense, and at penalizing not only those persons found guilty of illegal activity but also their superior officers. This, it is argued, should encourage superior officers to improve and to control the behaviour of their subordinates.<sup>65</sup>

The situation in Canada differs from that in the United States. As Arthur Martin describes it:

The remedy in tort has proved reasonably effective; Canadian juries are quick to resent illegal activity on the part of the police and to express that resentment by a proportionate judgment for damages.<sup>66</sup>

An excellent analysis by Professor Paul Weiler<sup>67</sup> of police arrest practices indicates that in Canada an action for civil damages is likely to be more effective in preventing and deterring illegal police activities than a similar action in the United States. A recently published study in the United States under the auspices of the National Institute of Law Enforcement and Criminal Justice<sup>67a</sup> shares this view. The Canadian and American approaches to the exclusion of illegally obtained evidence were compared using statistics derived from experiences in controlling police practices in Toronto and Chicago. The study concluded that:

The empirical studies showed not only the inequitable character of the exclusionary rule, but also the fact that the argument of its dissuasive effect does not seem to be justified. Canadian experience in the matter of action in civil responsibility suggests that another viable response exists . . .<sup>68</sup>

Even though the preciseness of data and sources of information for this study may be open to some criticism, it appears that Canadian courts do not hesitate to find police officers liable for substantial damages due to illegal practices constituting civil wrongs performed while acting in the course of their employment.<sup>69</sup>

To conclude, in the light of American experience on the one hand and Canadian tradition on the other, it would seem that the dissuasive effect of the exclusionary rule is not sufficient alone to warrant its recognition. The effect appears to be too remote, too problematical and uncertain, and too superficial to serve as a sound basis for reform proposals for these reasons:

1. It has limited scope, dealing merely with one aspect of police activity: collecting evidence in order to obtain convictions. It has no impact on crime prevention. As the Chief Justice of the United States Supreme Court observed in *Terry v. Ohio*:

Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving other goals.<sup>70</sup>

2. The person who feels the real impact of the dissuasive effect is not the police but rather the prosecutor—the Crown Attorney—who is directly influenced. It is rather artificial despite the close relationship between prosecutors and the police to put them “in the same bag” and to refuse to recognize that the prosecution does not have any legal or real control over police activities. At best, the dissuasive effect on the policeman occurs by ricochet—he does not feel the immediate effect of having evidence excluded that the Crown Prosecutor does. In order to improve police activity through dissuasion, the penalties involved should personally or financially affect the very police officer who has committed a violation of the law. Disciplinary action and civil suits are likely to have a more direct and certain result.

3. The fact that the present means of control can be criticised does not in itself justify exaggerating the dissuasive effect of an exclusionary rule. The best answer would be to seek reform or rearrangement of civil and disciplinary controls. At best, the adoption of the rule of exclusion serves merely as a weak support for other forms of control. It would appear that the price paid by society for such a rule is too high, given the indirect and uncertain benefits that perhaps may be derived from its effect on police activities.

4. The few empirical studies based on American experience fail to demonstrate any positive preventive and dissuasive impact on police conduct flowing from the use of the exclusionary rule.

### **Normative Arguments**

The second group of basic arguments favouring a rule of exclusion are normative rather than factual. They focus essentially on philosophies underlying the criminal justice system despite the different ways in which they are expressed.<sup>71</sup> It can be argued that since the State recognizes a certain number of fundamental rights protected by law (for example, the right not to incriminate oneself), it should neither tolerate their violation nor allow tacit acceptance of violations by the courts.<sup>72</sup> Similarly, respect for the rule of law obliges the courts to reject unhesitatingly all evidence obtained through violations of the rule of law. Another argument points that in any given society, the State should make every effort to encourage and promote respect for laws and the fundamental principles of social organization which they embody. It should set the example itself. To permit the courts to receive evidence obtained in violation of the rule of law weakens the very foundations of justice, projects a bad image of the administration of justice and consequently erodes public confidence in it.

As these arguments have been expressed, consistent application of the law (due process) requires that the methods used in discovering the truth must conform to the fundamental principles and values which society wishes to protect. A democratic society recognizes that in criminal justice there are more important values than strict crime control and the punishment of criminals. Efficient crime control is secondary to maintaining these values. To force the courts to exclude evidence illegally obtained strengthens the importance of these values and exemplifies the moral and educative force of the law. Excluding illegally obtained evidence demonstrates that the role of the courts is not limited to the repression of criminal acts and stresses their role as a guardian of the rule of law and of fundamental liberties and human rights. Allowing the courts to reject illegal evidence promotes public denunciation not only of illegal acts by police officers, but also of police practices and reprehensible standards of conduct. And as this publicizes the issues, the public becomes more sensitive and aware of the issues involved. In the long run, the whole of society benefits from the effects of exclusion even though in the short run, concessions are made to efficiency and some guilty parties may well be acquitted.

There is no doubt that these various arguments are by far the most solid and convincing basis for an exclusionary rule. Perhaps they are the only real grounds

for discussion and reform initiatives. The basic philosophies of the criminal justice system are questioned because of them. A stand either for or against the rule of exclusion presupposes supporting the fundamental values of the system, at least indirectly, and opting for one or other of the two basic alternatives.

For those who feel that the main purpose of the system is crime control and the punishment of criminals, the exclusionary rule inherently contradicts such an objective. In fact, it may well permit the guilty person to escape conviction. Moreover, the person who committed the illegality (i.e. the policeman) does not have to answer directly for the consequences of his error. The net result is that society and the public pay for this double transgression of the law. Some say that large segments of the population, perhaps less aware of the fundamental nature of the problem, will lose confidence in the administration of justice if a criminal is seen to profit from the rule and is released for reasons which may be seen as no more than violations of simple technicalities. As well, the police might also be frustrated if relevant evidence, sufficient to prove the guilt of a criminal, is nullified because of a violation of a technical rule of procedure.

If, on the other hand, respect for constitutional guarantees, fundamental human rights and due process are held to be the most important values in society and thus all the rules of criminal law must not infringe on them, the perspective is very different.<sup>73</sup> Long term social interests must prevail and the price to be paid cannot be considered to be excessive. The State, like Caesar's wife, must be above suspicion and its courts must not lend their support even indirectly to disrespect for basic priorities. They must, as the justices of equity have said, "come to justice with clean hands". To do otherwise leaves the State in an untenable position. Having once guaranteed certain fundamental rights and encouraged respect for the law, the State could not permit the results of a violation of these rights to be used as evidence in the courts.

This aspect is especially apparent to the public when the police use distasteful and shocking methods, for example, when evidence has been extricated by severe physical brutality. In such extreme cases, the public begins to lose confidence in the judicial system and in the way it perceives fundamental constitutional rights.

These are in summary form the two principal sides of the controversy over admissibility of illegally obtained evidence. If their logical extensions are translated into proposals for reform, several positions can be taken.

1. The first is obviously the complete rejection of the rule excluding illegally obtained evidence and the maintenance of the *status quo*. The relevance of the evidence would remain the sole criterion for admissibility regardless of how the evidence was obtained. However, this position does not exclude the development of measures designed to discourage illegal practices by police officers such as suits for civil damages, disciplinary proceedings, criminal sanctions, and so on.
2. The second approach is the opposite and would begin with the legislative recognition of a rule excluding illegally obtained evidence. The scope of such a rule would be limited to evidence directly obtained or extended to cover evidence derived or resulting from illegally obtained evidence. Of

course, the measures previously mentioned to reinforce the control of illegalities could also be introduced here.

3. Finally, between these two extremes are certain intermediary solutions such as those found in Scotland, Germany, and Israel. It is, in our view, on this middle ground that Canadian law should base a solution.

## CRITICISMS AND RECOMMENDATIONS

It may be noted, in reading the major writings on the subject, that the positions for and against the exclusionary rule are often supported by extreme examples. In support of the exclusionary rule, authors have referred to cases where police conduct is profoundly offensive and shocking even to the most rudimentary notions of justice. There are, for example, cases fortunately rare, where the police have pumped a suspect's stomach to recover a drug capsule swallowed when it became evident that a search was inevitable. There are also cases where the police have obtained confessions from a suspect by resorting to violence or threats repugnant to any civilized society. On the other hand, to justify the opposing position, it is easy to quote examples of a search rendered illegal because of a defect of form in the search warrant, but because of which the police had seized a large quantity of drugs and obtained evidence against a trafficker. Such cases exist and will continue to exist. It would be unrealistic to base a solution or proposals for reform on such extreme examples.

The traditional argument based on the preventive or dissuasive effect of the exclusionary rule does not appear to be persuasive in any direction. American experience does not conclusively establish that widespread adoption of the exclusionary rule has had any substantial effect on reforming police practices.<sup>74</sup> Moreover, all things being equal, one should consider that Canadian police forces have their own traditions, rules, practices and customs, and operate in a social milieu quite different from those of our neighbour to the south. Consequently, they are not prey to the same criticisms.

If the problem is studied from the perspective of due process, and the rule of law, the adoption of the exclusionary rule can easily be justified since it appears to be a logical and inevitable consequence of recognizing these principles. Yet it is important to clarify this argument because it might lead the legislator to seek a compromise between the two extremes. The illegalities committed in the search for evidence rarely transgress these principles. As noted in *Breithaupt v. Abram*<sup>74a</sup>

Due process is not measured by the yardstick of personal reaction . . . but by that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct.

Thus, if this is so for a case of police brutality or a confession obtained through violence, the case of mere technical defaults in procedure or in the form of search warrants is quite different. Is it reasonable to argue that such defects constitute real violations of the principle of due process? Even if one does, the question remains unresolved because one still must consider whether such a violation by itself

justifies the application of the exclusionary rule. If it is reasonable for society to consider all violations of constitutional guarantees and fundamental rights as serious and subject to severe sanctions, is it reasonable to apply the sanctions in every case, non-selectively and without regard to the impact on social imperatives? The fundamental rights of citizens must be respected though, even in theory, such rights are not absolute. They are subject to other social imperatives even though the ideals which they embody are high on the scale of values important to democratic societies. The legislator himself at times has had to limit the exercise of these rights. The general rule stating that no one must incriminate himself has not stopped Canadian legislators from making motorists take mandatory breathalyzer tests.

As well, this notion of respect for the rights of the individual must be seen in the general context of the criminal law which does not hesitate to justify or even to encourage violation of those rights in the name of other values. As an illustrative example, take the general principle in criminal law that everyone has the right to maintain his physical integrity and anyone who harms him commits a criminal act. Contrast this with the principle that everyone has a right to protect his right to ownership and an infringement of this right is an offence. But criminal law allows the police to use force if necessary to carry out a "legal" arrest, authorizes the police to destroy certain objects belonging to others, or "legally" to enter on property in order to search, seize and investigate. Therefore, there are within the law itself many authorized intrusions of force and thus many situations where the law has interfered with the exercise of fundamental rights.

In our opinion, the argument based on the rule of law is only effective if the illegality committed does in fact seriously offend the fundamental values recognized by society and thus shocks the public conscience. It appears neither fair nor realistic to exclude evidence indiscriminately, without any bending of the rule of law. To do so ignores the other side of the problem. The State has the right and the duty to protect and promote respect for the security of social life. Can it afford, without infringing the individual's right to live freely and securely, to let a socially dangerous individual go free merely because the evidence for one part of a crime is not admissible, when the illegality committed by the police force is a minor encroachment upon the rights of the accused? An acceptance of the exclusionary rule, without restriction and discretion, does not appear realistic to us because it would indiscriminately nullify all evidence tainted by the most trivial illegality. If the illegality does not seriously contravene a rule of law embodying a fundamental value, and if it is not the result of a deliberate offence or dishonesty, but rather is the consequence of an honest error committed in good faith, or of non-compliance with a technical rule of procedure, then the exclusion of this evidence is too high a price to pay. But in contrast, its exclusion should be the rule if the circumstances point to a serious violation of fundamental human rights, a scornful and a deliberate act by the police force or a serious violation of the free exercise of constitutional liberties and freedoms.

To make the rule absolute is to ignore the balance which hopefully exists between the citizen's right to be protected against violations of his fundamental rights and the State's interest in guarding public security by detecting and punish-

ing crime. It demonstrates a lack of perspective in approaching this problem by attaching more importance to the slightest infringement by the police of the rules of the game than to more serious violations of public order by criminals.

Thus, the exclusionary rule should always be considered in light of the nature of a violation and what it means for social values. The adoption of an arbitrary and general rule of exclusion for all illegally obtained evidence would encourage two sorts of reactions which would seriously outweigh the very advantages sought.

First, it would lead to a loss of public confidence in the administration of justice. The public might accept a guilty party getting "off the hook" because the police have seriously contravened the rule of law but it will lose faith in the administration of justice if the acquittal is due to breaking a minor technical rule. Second, the police may in many cases feel unable to perform their role of helping to convict criminals, will lose confidence in their performance and resort to other tactics such as harassing suspected persons or imposing illegal controls or punishments.

In our opinion, the public's confidence in the exercise of the judicial function relies more on the enlightened application of discretionary power than on a simple application of an absolute rule. The practical inconveniences—so evident in the United States surrounding the adoption of the exclusionary rule—can only be put up with in the cases where the illegality seriously violates basic rights and interests. It is therefore by taking several special factors into account that the choice between exclusion and admission of evidence should be made, the most important one being the seriousness of the right violated by the illegal act. To achieve this objective, it is absolutely necessary to make the rule relative and to give discretionary power in its application to the courts.

In the past, when this kind of suggestion was put forward, for example in the Ouimet Report<sup>75</sup>, several objections were raised. The strongest of these avered that granting such discretionary power to a judge would lead to arbitrariness, to legal chaos, contradictory decisions, and thus to uncertainty.<sup>76</sup> However, this objection does not appear to be all that serious. Past experience indicates that the legislator has often trusted the capacity of judges to exercise discretionary power and the uniformity of application of legal rules has not been visibly undermined. In fact, there is an undeniable advantage in granting judges discretionary power, since it keeps the courts continually in touch with current social attitudes and may lead to the eventual evolution of the rules as the courts adapt them to changing social realities. It gives to the courts the role of guardians of the public's freedom. Evidently there are disadvantages in the slow pace of legal evolution and in the almost reverential attitude towards precedents; but it may be possible to overcome this by improving the manner in which discretionary powers are exercised.

Another objection to this solution is that society's desire to punish criminals and control crimes can only be translated into real events by abolishing the exclusionary rule.<sup>77</sup> However, this argument is simplistic, based as it is on the view that society places the repression of crime above all other values. Even without an exclusionary rule, our courts throughout their history have never hesitated to

denounce abuses and to maintain a high standard of justice, although the solutions they have reached have not always been popular.

A further objection is that judicial discretion would harm the administration of justice because, when preparing for a trial, the prosecution would be able to predict more or less what evidence would be allowed and what would not.<sup>78</sup> However, we do not think this is a compelling argument.

In order, however, to reduce the inherent difficulties in the exercise of any legal discretionary power and to a certain extent avoid the danger of too great a disparity between legal decisions, the legislator should indicate the criteria that should be applied in the exercise of discretion and set out guidelines for general use of such powers. Proposals in Canada<sup>79</sup>, the United States<sup>80</sup>, and other countries<sup>81</sup> have endorsed this approach and described the criteria which should be involved. The first of these focuses on the nature and degree of the illegality committed—the more serious the illegality, the more the court should be strict in not admitting it as evidence. To distinguish between an illegality resulting from a failure to comply with a substantive rule and one resulting from a violation of a rule of form or procedure does not appear to us to be appropriate. Although it is likely that, in most instances, infringements of the rules of form or procedure are less serious than violations of substantive rules, it need not be so in all cases. Moreover, negligible violations of a substantive rule may also exist. Here, the court should ask itself if, objectively, the illegality is serious because it infringes a fundamental right or the principle of due process or because it contravenes a recognized constitutional right.

The second criterion concerns the conduct of those gathering the illegally obtained evidence. The supporters of judicial discretionary power differentiate between illegal conduct in good faith and illegal conduct in bad faith. This criterion is especially appropriate in considering the dissuasive effect of an exclusionary rule. However, it is necessary to recognize, strictly on an evidentiary level, that good or bad faith is difficult to establish since it is above all a question of an individual's intentions. It is easier instead to consider the voluntary or deliberate nature of the act and thus separate excessive, conscious and voluntary illegal conduct from "innocent" and frank omission or failure to obey a rule of law. Measuring the extent of deviation from required legal conduct in the circumstances of the case may also determine the degree of illegal behaviour. As the Ouimet Report suggests<sup>82</sup>, perhaps one ought to take into account the circumstances at the moment when the act was committed. Thus, if the situation were urgent and measures requiring action to avoid the destruction of evidence were called for, the judge should be more lenient when evaluating the illegal conduct.

A third factor deserving the attention of the court is the nature of the criminal charge. Indeed, given an equal degree of illegality, the more serious the crime of which a person stands accused, the more the court should hesitate to exclude illegally obtained evidence. The judge should be aware of the consequences for society of freeing a person charged with committing an offence of a serious nature.

A combination of these different criteria is a sound basis for a judge's exercise of discretionary power. Legislative reform should include, first of all, a general

provision enunciating the rule laid down by the Ontario Court of Appeal in *Wray*; the scope of which has been considerably narrowed by the Supreme Court of Canada's decision on appeal. In our opinion, the opportunity should be taken to reinstate the rule (as it was thought to exist at common law before the Supreme Court decision in *Wray*) that the judge can always exclude evidence regardless of its nature and the other criteria for exclusion, provided its admission would cause serious injustice to the accused, or discredit the administration of justice besides having tenuous relevance as evidence. It seems to us, given the technicality of the law of evidence in general, that such a measure can only reinforce the fairness and justice of the criminal law.

To summarize, in our opinion, reform proposals should have the following objectives:

1. To recognize as a basic principle that an irregularity in obtaining evidence is not in itself a reason for exclusion if the evidence in question meets the other conditions for admissibility such as relevance and credibility;

2. To advocate legislation which allows a judge to exercise a discretion to depart from this basic principle and refuse to admit evidence obtained through a serious violation of a substantive law or fundamental right if, considering the circumstances and the gravity of the charge against the accused, the violation is the result of a deliberate voluntary act committed in bad faith, its admission would constitute a serious injustice to the accused or bring the administration of justice into disrepute; furthermore, as a possible expansion to this judicial discretion, to give the judge the power simply to dismiss the charge against the accused.

These suggestions could be accompanied by general measures reinforcing disciplinary procedures and civil actions in order to ensure that the citizen is better protected from harm or damages caused by the illegal acts of enforcement agencies.



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- Gibson, R. C., *Illegally Obtained Evidence*, (1973) 31 U. of T. Fac. L. Rev., 23.
- Groom, R. G., *The Admissibility of Evidence Illegally Obtained*, (1964) 13 Chitty's L. J. 54.
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- Patenaude, P., *De l'admissibilité devant les tribunaux civils des preuves obtenues illégalement*, (1973) 33 R. du B. 27.
- Roberts, D. W., *The Legacy of Regina v. Wray*, (1972) 50 Can. Bar Rev. 19.
- Sheppard, A. F., *Restricting the Discretion to Exclude Admissible Evidence—an Examination of Regina v. Wray*, (1971-72) 14 Crim. L.Q. 334.

## ENDNOTES

1. In light of the abundance of legal literature on this topic the reader is referred to the selective bibliography given at the end of the present study.
2. *Ibrahim v. Rex*, (1914) A.C. 599.
3. *Boudreau v. The King*, (1949) S.C.R. 262, (1949) 7 C.R. 427, (1949) 96 C.C.C. 1, [1949] 3 D.L.R. 81.
4. *Attorney-General for the Province of Quebec v. Bégin*, (1955) R.C.S. 593, 21 C.R. 217.
5. See: *R. v. Wray*, [1971] S.C.R. 272, (1970) 4 C.C.C. 1, (1970) 11 C.R.N.S. 235, (1970) 11 D.L.R. (3rd) 673. On the specific problems raised by confessions: Freeman, S., *Admissions and Confessions in Studies in Canadian Criminal Evidence* (Toronto, 1972) and Roberts, D., *The Legacy of Regina v. Wray*, (1972) 50 Can. Bar Rev. 19.
6. *R. v. Wray*, [1971] S.C.R. 272, (1970) 4 C.C.C. 1, (1970) 11 C.R.N.S. 235, (1970) 11 D.L.R. (3rd) 673.
7. *Kuruma v. The Queen*, (1955) 1 All E.R. 236, (1955) A.C. 197.
8. *Noor Mohamed v. The King*, (1949) A.C. 182.
9. *Callis v. Gunn*, (1964) 1 Q.B.R. 495.
10. *R. v. Doyle*, (1886) 12 O.R. 347.
- 10a. For example: *R. v. Gibson*, (1919) 1 W.W.R. 614 (S. Ct. Alta.); *R. v. Kostachuck*, (1930) 2 W.W.R. 469 (S. Ct. Sask.); *R. v. Paris*, (1957) 118 C.C.C. 405 (Qué. C.A.).
11. *R. v. St. Lawrence*, (1949) O.R. 215, (1950) 7 C.R. 464.
12. *Supra*, note 4.
13. *Supra*, note 7.
- 13a. *Attorney General of Quebec v. Bégin* (1953) S.C.R. 593, 602.
14. *Supra*, note 5.
15. Notably: Jodouin, A. (1970) 1 Rev. Gén. Dr. 390; McDonald, B. (1971) 29 U. of T. Fac. Rev. 99; Roberts, D. (1972) 50 Can. Bar Rev. 19; Sheppard, A. (1972) 14 Crim. L. Q. 334.
16. *R. v. Wray*, (1970) 9 C.R.N.S. 131, 133: "... 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 into disrepute the administration of justice ..."
17. *Supra*, note 11.
18. *Supra*, note 7.
19. *R. v. Wray*, (1971) S.C.R. 272, 292-293.
20. *Id.*, 300-301.
21. *Id.*, 275, 301-304.
22. *DeClercq v. The Queen*, (1968) S.C.R. 902, (1969) 1 C.C.C. 197, (1969) 70 D.L.R. (2d) 530.
23. *R. v. Wray*, (1971) S.C.R. 272, 279 ff.
24. *Id.*, 280.
25. *Id.*, 304.
- 25a. See note 28 *infra*.
26. See in this regard the criticism made by Martland J., in the *Wray* case, *supra* note 19 at 294 ff. In the *Kuruma* case, in fact the knife allegedly found on the accused was never produced in evidence, no witness was present when the search was ordered, and the magistrate who had pronounced judgment had not taken into account the advice of the assessors with whom he sat.

- See also the criticism by Williams, G., *The Exclusionary Rule under Foreign Law: England*, (1961) 52 J. Crim. L.C. & P.S. 272, 273ff.
27. *R. v. Barker*, (1941) 2 K.B. 281. See McDonald, B., *supra* note 15, 100.
  28. See *supra* note 15, Sheppard, A., 349ff; Roberts, D., 29ff., Jodouin, A., 394.
  29. *R. v. Lafrance*, (1972) 19 C.R.N.S. 80.
  30. *R. v. Pettipiece*, (1972) 7 C.C.C. 133. On a second appeal, 17 Apr. 1973, the B.C. Court of Appeal considered itself bound by *Wray* (decision unreported). See also *R. v. Delco*, (1972) 18 C.R.N.S. 261 (Ont. County Ct.).
  31. "Law modifying the Criminal Code, the Law on Crown Liability and the Law on Official Secrets."
  32. See Beck, S., *Electronic Surveillance and the Administration of Criminal Justice*, (1968) 46 Can. Bar Rev. 643, 649 where the author cites in addition to this subject an extract from the work of Dash, S., *Eavesdropping*, to this effect.
  33. Legal literature on the question is profuse. Apart from the classic texts on the subject such as McCormick, E., *Evidence* (4th ed.), 982-1082; Wigmore, *Evidence* (vol. 8), no. 2183-2189; for a comprehensive view of the question the reader is referred to the following: Sowle, C., *The Exclusionary Rule Regarding Illegally Seized Evidence*, (Chicago, 1962); Allen, A., *The Exclusionary Rule in the American Law of Search and Seizure*, (1961) 52 J. Crim. L.C. and P.S. 246; Oaks, J., "Studying the Exclusionary Rule in Search and Seizure", (1969-70) 37 U. of Chi. L. Rev. 665; Paulsen, M., *The Exclusionary Rule and Misconduct by the Police*, (1961) 52 J. Crim. L.C. & P.S. 255; Pitler, R., *Fruit of the Poisonous Tree: A Plea for a Relevant Criteria*, (1967) 155 U. Pen. L. Rev. 1136; *Fruit of the Poisonous Tree Revisited and Shepardized*, (1968) 56 Cal. L. Rev. 579; *Exclusionary Rule in Search and Seizure: Examination and Prognosis*, (1972) 20 Kan. L. Rev. 768. See also for a short but precise résumé of the state of the American law on the subject; Heydon, J., *Illegally Obtained Evidence*, (1973) Crim. L. Rev. 603, 610 ff.; Gibson R., *Illegally Obtained Evidence*, (1973) U. of T. L. Rev. 23.
  34. *Weeks v. U.S.*, 232 U.S. 383 (1914).
  35. *Wolf v. Colorado*, 338 U.S. 25 (1949).
  36. *Mapp v. Ohio*, 367 U.S. 643 (1961).
  37. *Boyd v. U.S.*, 116 U.S. 616 (1886); *Adams v. New York*, 192 U.S. 585 (1904).
  38. *Supra*, note 34.
  39. *Supra*, note 35.
  40. *Supra*, note 36.
  41. See *Silverman v. U.S.*, 365 U.S. 505 (1961); *Wong Sun v. U.S.*, 371 U.S. 471 (1973).
  42. See *supra* note 33, Heydon, 611; Wigmore; McCormick.
  43. See Among others: McGarr, F., *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, (1961) 52 J. Crim. L.C. & P.S. 266; La Fave, R., *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, (1965) 63 Mich. L. Rev. 987; Oaks, J., *Studying the Exclusionary Rule in Search and Seizure*, (1970) 37 U. Chi. L. Rev. 665; Wingo, H., *Growing Dissillusionment with the Exclusionary Rule*, (1971) 25 S.W.L.J. 573; Wright, J., *Must the Criminal go Free if the Constable Blunder?*, (1972) 50 Tex. L. Rev. 736; Hoening, R. and Walker, L., *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, (1972) 63 J. Crim. L. 256. One must also note the opposition of Chief Justice Burger of the United States Supreme Court: *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).
- Cf: Little, C.D., *The Exclusionary Rule of Evidence as Means of Enforcing 4th Amendment Morality on Police*, (1970) 3 Ind. Legal Forum 309; Pitler, R., *Decline of the Exclusionary Rule: An Alternative to Injustice*, (1972) Sw. U.L. Rev. 68; Spiotto, J., *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, (1973) U.C.L.A. L. Rev. 1129; See also: *infra* note 80.
44. *Infra*, at 11ff.
  45. On the topic in English law see among others: Cross, R., *Evidence*, (3rd ed.) 262; Williams, G., *Evidence Obtained by Illegal Means*, (1955) Crim. L. Rev. 339; *The Exclusionary Rule Under Foreign Law: England*, (1961) 52 J. Crim. L.C. & P.S. 272; Heydon, J., *Illegally Obtained Evidence*, (1973) Crim. L. Rev. 603; Gibson, R., *Illegally Obtained Evidence*, (1973) U. of T. L. Rev. 23 at 26ff.

46. *Kuruma v. The Queen*, [1955] All E.R. 236; [1955] A.C. 197. See also *R. v. Warickshall*, 168 E.R. 234.
47. *Kuruma v. The Queen*, *id.* at 239.
48. *Id.*, at 236.
49. *Id.*
50. See *Callis v. Gunn*, [1949] 1 Q.B. 495.
51. *Supra*.
52. *R. v. Leathan*, (1861) 8 Cox. C.C. 498, 501.
53. On Scottish and Irish law, see among others: Cross, R., *Evidence* (3rd ed.) 262; Heydon, J., *Illegally Obtained Evidence*, (1973) *Crim. L. J.* 603, 607; Gray, J., *The Admissibility of Evidence Illegally or Unfairly Obtained in Scotland*, (1966) 11 *Jur. Rev.* 89; Murray, L., *Admissibility of Evidence Illegally Obtained*, (1958) *Scot. L. Rev.* 73.
54. *Lawrie v. Muir*, [1950] S.L.T. 19.
55. Heydon, J., *Illegally Obtained Evidence*, (1973) *Crim. L. J.* 603, 608 ff. and cases cited therein.
56. Bouzat, P., *La Loyauté dans la recherche des preuves*, in *Mélanges Hughency* (1964) 155; Levasseur, G., *Les nullités de l'instruction préparatoire* in *Mélanges Patin* (1962), 469; Chambon, L., *Les nullités substantielles ont-elles leur place dans l'instruction préparatoire?* D-1959-1170; Robert, J. M., *Nullités de procédure pénale et bonne administration de la justice*, D-1971, Chr. 85; Vouin, R., *The Exclusionary Rule Under Foreign Law: France*, (1961) 52 *J. Crim. L.C. & P.S.* 275; Bouzat, P. and Pinatel, P., *Traité de droit pénal et de criminologie*, (2 éd. 1970), vol. 2, 1241 ff, no. 1301 ff; Merle, R. and Vitu, A., *Traité de droit criminel*, (1967) no. 1055, 991 ff.
57. Clemens, W., *The Exclusionary Rule Under Foreign Law: Germany*, (1961) 52 *Crim. L.C. & P.S.* 277.
58. Cohn, H., *The Exclusionary Rule Under Foreign Law: Israel*, (1961) 52 *J. Crim. L.C. & P.S.* 282.
59. Among the numerous documents on the subject one must point out the following studies in particular: Gunther, M., *The Exclusionary Rule in Context*, (1972) 50 *N. Car. L. Rev.* 1049; Hoenig, R. and Walker, L., *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, (1972) 62 *J. Crim. L.* 256; McGarr, F., *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, (1961) 52 *J. Crim. L.C. & P.S.* 266; Nagel, F., *Testing the Effects of Excluding Illegally Seized Evidence*, (1965) *Wisc. L. Rev.* 283; Oaks, J., *Studying the Exclusionary Rule in Search and Seizure*, (1969-70) *U. Chi. L. Rev.* 665; Paulsen, M., *Exclusionary Rule and Misconduct by the Police*, (1961) 52 *J. Crim. L.C. & P.S.* 255; Patenaude, P., *De l'admissibilité devant les tribunaux civils des preuves illégalement obtenues*, (1973) *R. du B.* 27; Pitler, R., *Fruit of the Poisonous Tree; A Plea for Relevant Criteria*, (1967) 115 *U. Pen. L. Rev.* 1136; Spiotto, J., *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, (1973) 20 *U.C.L.A. L. Rev.* 119; *Search and Seizure, an Empirical Study of the Exclusionary Rule and Its Alternative*, (1973) 2 *J. Legal Studies* 234; Wingo, H., *Growing Disillusionment with the Exclusionary Rule*, (1971) 25 *Sw. L.J.* 573.
60. Wigmore, *supra* note 33, no. 21849.
61. *Mapp v. Ohio*, 367 U.S. 693 (1961).
62. Oaks, J., *Studying the Exclusionary Rule in Search and Seizure*, (1969) *U. Chi. L. Rev.* 665.
63. Oaks, J., *id.*, 678ff. Spiotto, J., *The Search and Seizure Problem: Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, (1973) 1 *J. of P.S. & A.* 36; *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, (1973) 2 *J. Legal Studies* 243. See also Kate, L., *The Supreme Court and the State: an Inquiry into Mapp v. Ohio in North Carolina*, (1966) 45 *N. Car. L. Rev.* 119; Nagel, R., *Testing the Effects of Excluding illegally Seized Evidence*, (1965) *Wisc. L. Rev.* 283.
64. In this regard see particularly Wingo, H., *Growing Disillusionment with the Exclusionary Rule*, (1971) 25 *Sw. L. J.* 573, 577ff. Also Paulsen, M., *The Exclusionary Rule and Misconduct by the Police*, (1961) 52 *J. Crim. L.C. & P.S.* 255, 257.
- 64a. See the opinion of Chief Justice Burger, in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) at 422ff.
65. See among others Oaks, J., *supra* note 59 at 665; Paulsen, M., *The Exclusionary Rule and Misconduct by the Police*, (1961) 52 *J. Crim. L.C. & P.S.* 225, 260; Wingo, H., *Growing Disillusion-*

- ment with the Exclusionary Rule, (1971) 25 Sw. L. J. 573, 581ff; Hoenig, R. and Walker, L., *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, (1972) 63 J. Crim. L. 256; Gunther, M., *Comment: The Exclusionary Rule in Context*, (1972) 50 N. Car. L. Rev. 1049; La Fave, W., *Improving Police Performance through the Exclusionary Rule*, (1955) 30 Mo. L. Rev. 391, 566.
66. Martin, A., *The Exclusionary Rule Under Foreign Law: Canada*, (1961) 52 J. Crim. L.C. & P.S. 271.
  67. Weiler, P., *The Control of Police Arrest Practices: Reflections of a Tort Lawyer*, in *Studies in Canadian Tort Law*, (1968) at 416.
  - 67a. Of the law enforcement Assistance Administration of the United States Department of Justice.
  68. Spiotto, J., *The Search and Seizure Problem: Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, (1973) 1 J. P.S. & A. 36 at 49.
  69. *For Example, Chaput v. Romain*, [1955] R.C.S. 834; *Lamb v. Benoit* [1959] R.C.S. 321. *See also* Giroux, L., *Municipal Liability for Police Tort in the Province of Quebec*, (1970) 11 Ca. de Dr.
  70. *Terry v. Ohio*, 393 U.S. 1, p. 14 (1968) also Burger, W., *Who Will Watch the Watchman?*, (1971) 14 Am. U.L. Rev. 1.
  71. In this regard see especially Oaks, J., *supra* note 59 at 665 and McGarr, F., *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy* (1961) 52 J. Crim. L.C. & P.S. 266; Paulsen, M., *supra* Note 64 at 255; Patenaude, P., *De l'admissibilité devant les tribunaux civils des preuves obtenues illégalement*, (1973) 33 R. du B. 27.
  72. This argument, defended in the United States by reference to 5th and 14th Amendments to the American Constitution, may be transposed to Canada because of the existence of the Canadian Bill of Rights, R.S.C. 1970 c. 44.
  73. As one author notes, Rawls, J., *A theory of Justice*, (1972) at 239: "The principle of legality requires the regular application of the law in a manner which conforms to other ends, that of pure and simple discovery of the truth".
  74. *Supra*, at 27 ff.
  - 74a. *Breithaupt v. Abram*, 352 U.S. 432, at 436 (1957).
  75. *Report of the Committee on Corrections*, (1969) at 79ff.
  76. For this see, Pitler, A., *Fruits of the Poisonous Tree, a Plea for Relevant Criteria*, (1967) 115 U. Pen. L. Rev. 1136, at 1148; *Fruits of the Poisonous Tree Revisited and Shepardized*, (1968) 56 Cal. L. Rev. 579, at 583 ff.
  77. See Pitler, (1967) 115 U. Penn. L. Rev. 1136 at 1148.
  78. See the analysis of Mewett, A., *Law Enforcement and the Conflict of Values*, (1970) 16 McGill L.J. 1, at 5.
  79. For Canada see in particular, Beck, S., *Electronic Surveillance and the Administration of Criminal Justice*, (1968) 46 Can. Bar Rev. 643; MacDonald, B., (1971) 29 U. of T. L. Rev. 99; Sheppard, A., *Restricting the Discretion to Exclude Admissible Evidence, an Examination of R. v. Wray*, (1971) 14 Crim. L.Q. 334; Mewett, A., *Law Enforcement and the Conflicts of Values*, (1970) 16 McGill L.J. 1, 17; Gibson, R., *Illegally Obtained Evidence*, (1973) U. of T. Fac. L. Rev. 23, 36ff.
  80. For the U.S., see Wingo, H., *Growing Disillusionment with the Exclusionary Rule*, (1971) 25 Sw. L.J. 573. This is the solution proposed elsewhere: see Model Code of Pre-Arrestment Procedure, s.8-02 (1971-Tentative Draft), S-881, 93rd Cong., 1st Session (1973). *See Exclusionary Rule Wins Approval*, (1973) 59 A.B.A.J. 387 which contains a criticism by the American Bar Association of this model code.
  81. *Supra* at 23.
  82. *Report of the Committee on Corrections*, (1969), 80.