CONFESSIONS

Three problems confront us in this field:

1. The impact of the Charter;
2. The implications of Rothman, and
3. The proposed Uniform Evidence Act.

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No doubt, much will be said and written about section 24 of the Charter, but it already seems clear that the potential exclusion of evidence will not occur nearly as often as some might wish or others might fear.

There are two requisites for exclusion:

(a) the "evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter", and

(b) its admission "would bring the administration of justice into disrepute".

In other words -- and I repeat what I said last year at the Cambridge Seminar about Rothman -- tricks are

in, but dirty tricks are out. From that point of view, the Charter doesn't change very much, except, perhaps, for the added requirement that, as a sine qua non for exclusion, there must have been an infringement or a denial of rights. Of course, this is not to say that what was inadmissible before, will now be admissible: the old rules remain, strengthened, perhaps (but in some cases only), by the Charter.

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Rothman has many facets, but whatever else may be said about this case, one observation overshadows the rest: Ibrahim lives, though there may be some room for growth of the rule proposed by Lord Sumner.

However, it is not wihtout significance that three judges did not opt for the traditional approach, although one (Lamer, J.) arrived at the same result as the majority.

Should likelihood of truth be the test? Or should freedom from self-incrimination be the determining factor? These are but two of the questions which must be discussed.

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The Uniform Evidence Act, as proposed, deals with confessions in sections 66 to 75. It defines a "person in authority", and the test would henceforth be objective and subjective; that is new, though section 73 preserves, to some extent, the status quo. "Voluntary" is also defined, and the words come from Ibrahim; yet oppression is omitted.

DeClercq is dead, and few will mourn its passing. Boulet, too, (and other cases before), if not dead, are disabled; that, too, is as it should be. Confirmation by subsequent facts becomes "confirmation by real evidence"; that is good, too.

The most controversial change is proposed in section 67: "A statement ... is not admissible ... unless the prosecution, in a voir dire, satisfies the court on a balance of probabilities that the statement was voluntary." This defies present wisdom and practice, and the passage of this clause will not be smooth.

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So where do we go from here? Many answers can be suggested, though none with any confidence. Once again,

the law is in flux, and where it will end no one can say.

F.K.

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