NOTES FOR A PANEL PRESENTATION ON EVIDENCE OBTAINED BY ILLEGAL MEANS OR IN A MANNER WHICH INFRINGES OR DENIES ANY RIGHTS OR FREEDOMS GUARANTEED BY THE CANADIAN CHARTER OF RIGHTS & FREEDOMS

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Subsection 52.(1) of the *Constitution Act, 1982*, begins by providing that "the Constitution of Canada is the supreme law of Canada ...". It is also, I think, the supreme tribute accorded by Canadian legislature to Canadian judicature, present and future. That tribute relates principally to the *Canadian Charter of Rights and Freedoms* and it resides effectively in the selfsame subsection 52.(1) by going on to provide .

"... and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." With the *Charter* constitutionally entrenched, much more demanding tasks confront the judiciary than the already formidable job of distinguishing *intra* from *ultra vires* legislation, between the division of legislative and executive powers, in our federal state. That latter rôle remains, but now the judiciary must also determine whether legislation and executive acts which pass muster for *vires* can, in addition, pass muster for consistency with the provisions of the Constitution including the *Charter of Rights and Freedoms*.

Those responsibilities are at once heavy and delicate. Similar ones purportedly imposed by the *Canadian Bill of Rights*, have surely been evaded by the Supreme Court of Canada in declining to construe the

overriding provisions of Section 2 of the *Bill of Rights* as being entrenched by Parliament in a quasi-constitutional manner. A prime example of that approach to the *Canadian Bill of Rights* is the judgment of the majority of the Supreme Court of Canada in *Hogan v. The Queen*.[1] There, Mr. Justice Ritchie, with whose reasons four other members of the court concurred, said:

> "... whatever view may be taken of the constitutional impact of the *Canadian Bill of Rights* ... I cannot agree that, whenever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of "absolute exclusion" on the American model which is in derogation of the common law rule long accepted in this country."[2]

Hogan was the case in which it was shown that a police constable had demanded that the accused blow into the breathalyzer or simply face the alternative charge, even although the accused's counsel who had come to the police station at his request, could be heard from the next room enquiring for his client. In that same case, Mr. Justice Pigeon said:

> "I agree with Ritchie, J., that this appeal should be dismissed on the basis that, even if the *Canadian Bill of Rights* is given the same effect as a constitutional instrument, this does not mean that a rule of absolute exclusion, which is in derogation of the common law rule, should govern the admissibility of evidence obtained wherever there has been a breach of one of the provisions contained in that Bill."[3]

It is quite true that in the *Bill of Rights* there is no specifically expressed provision describing the circumstances in which otherwise admissible evidence can be excluded. With Messrs. Justices Laskin and Spence dissenting, the Supreme Court in *Hogan* effectively construed the preamble and Section 2 of the *Canadian Bill of Rights* so as not to override the common law rules of admissibility of evidence. This was the majority's conclusion even though the latter provision does go as far as exacting that "... no law of Canada shall be construed *or applied* so as to ... (c) deprive a person who has been arrested or detained (ii) of the right to retain and instruct counsel without delay ...". [My emphasis]

In diametric opposition to the majority's view, Mr. Justice Laskin (as he then was, expressed this opinion about the denial and violation of Hogan's right under Section 2.(c)(ii):

> "There being no doubt as to such denial and violation, the courts must apply a sanction. We would not be justified in simply ignoring the breach of a declared fundamental right or in letting it go merely with words of reprobation. Moreover, so far as denial of access to counsel is concerned, I see no practical alternative to a rule of exclusion if any serious view at all is to be taken, as I think it should be, of this breach of the *Canadian Bill of Rights*."[4]

There being no provision in the *Canadian Bill of Rights* which bears so specifically on the admissibility of evidence as does Section 24 of the *Charter*, the *Bill of Rights* has, in effect, been of no consequence in that regard.

So it is, that in regard simply to evidence obtained by illegal means, (one branch of our topic this morning), the law of Canada probably remains as it was before the proclamation of the *Charter of Rights and Freedoms*. I say "simply" in that regard, because infringement or denial of the rights or freedoms as guaranteed by the *Charter*, may bring about the exclusion of evidence, if and when Section 24 of the *Charter* be invoked. Therefore, before considering this new development, one ought first to examine at least the landmarks of the law on evidence obtained by illegal means.

In obtaining evidence, if a party violates the constitution, a statute or a rule of common law, the evidence is obtained by illegal means. Short of a breach of the law, evidence may also be obtained through trickery, or unfair or unethical means - even means which, if tolerated, will cast the investigator, party and the tolerant tribunal into bad odour - and the means of obtaining the evidence will be regarded as being improper. A majority of the Task Force on Evidence recommended, and a majority of the Uniform Law Conference's plenary session accepted "that no legislation be enacted to exclude evidence obtained illegally or improperly."

In casting an eye on the landmarks of pre-Charter Canadian law on evidence obtained by illegal means, the paramount jurisprudence is surely the case of *R. v. Wray*[5]

decided by a majority judgment of Supreme Court of Canada, delivered by Mr. Justice Martland. That case was preceded by the 1955 Privy Council decision in *Kuruma, Son of Kaniu v. R.*[6], which was noted and relied upon by Mr. Justice Martland in *Wray*. The *Kuruma* case was an appeal from Kenya, whose law at the time may be regarded as being the same as in England, in a prosecution under emergency regulations which were in force during the campaign of violence waged by the Mau Mau. The regulations empowered only assistant inspectors of police or superior ranks to stop and search persons suspected of committing offences against the regulations - such as being in possession of ammunition for firearms. Kuruma, was stopped while cycling and found, it was alleged, to be in possession of two cartridges and a pocket knife during an illegal search by two policemen of lesser rank than

that which was prescribed. The pocket knife was claimed to have been returned to the accused while he was in custody. Kuruma denied having the possession of both the ammunition and the knife, but he was convicted of this capital offence by a magistrate against the unanimous advice of three assessors.[7] There had been three onlookers at the scene of the search, but none of them was called as a witness. The conviction was upheld by the Court of Appeal for East Africa. In the Privy Council, Lord Goddard is reported thus:

> "In their Lordships opinion, the test to be applied in considering whether 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."[8]

The purpose of the regulation empowering police officers of no lesser rank than assistant inspector to perform the search was obvious in those troubled days of violence, tribal rivalries and false accusations in Kenya. My respect for their Lordships is most definitely not derived from this chilling decision. As Lord Goddard himself observed, the evidence of possession was tinged with "this remarkable action" of the police in returning the alleged knife to Kuruma, and the decision not to call the three onlookers as witnesses was "most unfortunate".[9] Lord Goddard also noted that Kuruma was familiar with the check-point at which he was stopped and searched and could easily have taken another route where he would not have been searched. All these factors in a capital case surely gave strong grounds for doubting Kuruma's possession of the interdicted articles. I daresay that

the Privy Council in expressing the opinion in *Kuruma* that "the court is not concerned with how the evidence is obtained" quite unintentionally uttered the rubric of the courts of totalitarian states from Star Chamber to Tsarist Russia and even more recent, lamentable parodies of judicature. Troubles or no troubles that cannot be the attitude of a judge in Canada's "free and democratic society". And yet, that attitude was only recently re-affirmed by the House of Lords in *R. v. Sang*[10], into which I shall not delve for present purposes. However, with the proclamation of the *Canadian Charter of Rights and Freedoms*, I rather think that the attitude expressed in Mr. Justice Laskin's minority dissent in *Hogan* will rightly begin to assume enhanced importance:

"It may be said that the exclusion of relevant evidence is no way to control illegal police practices and that such exclusion merely allows a wrongdoer to escape conviction. Yet where constitutional guarantees are concerned, the more pertinent consideration is whether those guarantees, as fundamentals of the particular society, should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. The contention that it is the duty of the courts to get at the truth has in it too much of the philosophy of the end justifying the means; it would equally challenge the present law as to confessions and other out-of-court statements by an accused."[11]

What seems to be taken as the definitive statement as to evidence obtained by illegal or improper means in Canada, resides in *R. v. Wray*[12], to which some detailed reference ought now to be made. Mr. Justice Martland, referring to Lord Goddard's mention in *Kuruma* of a trial judge's limited discretion to disallow admissible evidence, said:

> "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."[13]

Thus, it seems quite obvious that the majority in *Wray* was simply propounding the usual rules of evidence regarding relevance and admissibility, unqualified and unimpaired by any taint of illegality. This view is supported by the following passage, wherein Mr. Justice Martland distinguished the English cases of *R. v. Court*[14] and *R. v. Payne*[15]:

"In cases such as *R. v. Court* and *R. v. Payne*, I think that confusion has arisen between 'unfairness' in the method of obtaining evidence, and 'unfairness' in the actual trial of the accused by reason of its admission. The result of those two cases was, in effect, to render inadmissible evidence which the *ratio decidendi* of the *Kuruma* case had held to be admissible. The view which they express would replace the *Noor Mohamed* test, based on the duty of a trial judge to ensure that the minds of the jury be not prejudiced by evidence of little probative value, but of great prejudicial effect, by the test as to whether evidence, the probative value of which is unimpeachable, was obtained by

> methods which the trial Judge, in his own discretion, considers to be unfair. Exclusion of evidence on this ground has nothing whatever to do with the duty of a trial Judge to secure a fair trial for the accused."[16]

Lest one come to believe that the rule of inclusion of evidence enunciated in *Wray* and followed throughout Canada is the norm in other countries of similar social, constitutional and legal institutions, relatively recent jurisprudence in Scotland, Ireland, Australia and New Zealand ought to be considered. It is not necessary here to sift the cases in fine detail, but a few examples may be cursorily mentioned. Until 1950, Scottish courts invariably admitted evidence which had been illegally or improperly obtained. In a few cases, however, dicta were expressed to the effect that such evidence would not

necessarily be admitted under all circumstances. These were relied on in 1950, when in a firm departure from the earlier invariable rule, relevant and highly probative evidence of an offence obtained in an illegal search of premises was excluded on appeal to the High Court of Justiciary in the case of *Lawrie v. Muir*.[17] There Lord Cooper, for the court, identified two conflicting interests: the citizen's right to protection against unwarranted, wrongful and perhaps highhanded interference; and the state's interest in insuring that relevant evidence necessary for the proper prosecution of an offender be not rejected because of some technical flaw in police conduct. The *Lawrie* reasoning has been applied in a number of subsequent cases resulting in exclusion in some and reception of the evidence in others. Discretion to

exclude evidence because of deliberate and conscious violation of rights, without extraordinary excusing circumstances, seems to be the rule. It was enunciated in the Irish case of *People v. O'Brien*[18] where Mr. Justice Kingsmill Moore sought what he called an "intermediate solution" between the competing values.

The trial Judge's discretion to exclude illegally or improperly obtained evidence holds sway in Australia. In *Bunning v. Cross*[19], a 1978 decision of the High Court of Australia, it was held that an earlier case, *R. v. Ireland*[20], truly expressed the law in this way:

> "Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public

> requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."[21]

In this sequence of cases the High Court of Australia appears to have made a deliberate choice to turn its back on the *Kuruma* doctrine and to prefer its own creation of a wider discretion to reject evidence obtained illegally or unfairly.

In contrast with Canada and Australia, New Zealand has not abolished final appeals to the Judicial Committee of the Privy Council. The cases in New Zealand indicate, however, that the discretion exists even although it seems merely to have been discussed but not exercised. In that manner it seems to have been kept alive until, at last, in 1976, it was invoked in an appeal from a conviction for impaired driving. The case is *Police v. Hall*[22], in which the Court of Appeal wrote as follows:

> "We have referred to the need to avoid any unfairness by subjecting a person to a general medical examination without his consent. In this case the failure to obtain consent, particularly as the doctor described the appellant as argumentative, taken together with the other features of the case, leads us to

> think that what occurred was unsatisfactory. The other features are the refusal, for no reason, to allow this youthful defendant to telephone for the advice of his father or his solicitor; the loss of the blood sample; and the possible influence upon the whole conduct of the prosecution of the practice already discussed. The cumulative effect of these matters is such that, in our opinion, the doctor's evidence of his examination should have been excluded in the court's discretion in the interests of fairness."[23]

A second case in New Zealand in which the discretion was exercised was one in which entrapment was raised, in that a police officer had "encouraged or stimulated" the accused into assisting him in a drug purchase. The policeman's

testimony was held to operate "unfairly" and so, it was held that it ought not to be admitted in that case of *R. v. Pethig*[24], decided in 1977.

Now, I am not by these examples advocating any proximate approach to the exclusionary rule as practised in the United States as all will understand. The American rule is extreme, in my opinion, because it lacks proportionality and flexibility and because it therefore, and too often, produces grotesque results. We in Canada should seek to avoid that extreme polarity. My examples from other countries of the same or similar legal traditions demonstrate however that a wider discretion to exclude illegally or improperly obtained evidence is neither unthinkable nor unknown among those Scottish, Irish, Australian and New Zealand judges. It appears to have come into focus as part of the legal

landscape. In effect, those eminent jurists are thereby avoiding our own Canadian extreme polarity. They have declined to shackle their trial courts to the come-what-may blind-eye inclusionary rule which we have embraced in Canada. However, together with our strict rule of inclusion of relevant, probative evidence virtually no matter how obtained, we now have Section 24 of the *Canadian Charter of Rights and Freedoms*.

Finally we should turn our attention to the *Charter* and examine very carefully what it says. For as much clarity as possible, we could perform this exercise on the assumption that Section 2, Fundamental Freedoms, and sections 7 to 15, Legal Rights and Equality Rights are not overridden by express legislative declaration pursuant to Section 33. Of course that surmise can be aborted at any time, and for as long as 5 years, in regard to those enumerated

rights in part or in whole. If so, then as I read it, Section 24 will not apply to those parts or that totality despite their actually continuing to appear in the text.

Let us compare, first, the two language versions.

Let me begin by discussing with you the phrase "would bring the administration of justice into disrepute", as found in subsection 24.(2) of the *Canadian Charter of Rights and Freedoms*. In the English language text the words "would bring" exact a probability. The French language text in the Charter reads "est susceptible de déconsidérer ...". These words do not import a meaning of probability or likelihood as the English words "would bring", but rather, a mere possibility.

Both *Larousse* and its respectable cousin *Robert*, le grand and le petit, are quite eloquent in this respect when they specify that "susceptible de", used in the active sense, which we have here, means "capable of". Therefore, this speaks of just a possibility rather than a probability.

(In subsection 15.(1) of the Law Reform Commission's Evidence Code, which was the precursor of the Charter's subsection 24.(2), the English version and the French version alike can be rightly construed as meaning only a possibility. It is quite easy to retain this construction because both versions use the verb "would tend", "risquerait", thus eliminating recourse to the stricter realm of probabilities. However, the Commission's proposed Code exacts a lesser standard of certainty than the Charter and they are, thus, not comparable on that count.)

Let us now look at the rest of the phrase: "disrepute" in English, and in French, "déconsidérer". While "disrepute" clearly imports a loss or lack of reputation in the community or a discredit in the eyes of the general public, a difficult thing to prove in most instances, the French word "déconsidérer" seems to me to have a lesser scope by operating perhaps only in the view of the court or of a small circle of people. (On the other hand, "ternir l'image", expressed in the Law Reform Commission's Evidence Code, means, Robert dixit, "diminuer aux yeux d'autrui" as in "ternir la réputation, l'honneur de quelqu'un". In other words, "ternir" has a wider operation than "déconsidérer" seems to have and is thus, in my view, closer to the English "disrepute".)

To my knowledge, this is the first time the word "déconsidérer", in this context, is used in federal legislation while, since 1977, "ternir" appears in subsection 178.16(2) of the Criminal Code as follows: "... ternirait l'image de la justice." The 1977 drafter might have been influenced, indeed convinced, by the appropriateness of the wording found in subsection 15(1) of the Law Reform Commission's Evidence Code, released early in 1976. These very words "ternirait l'image de la justice" are also used by Mr. Justice Lamer of the Supreme Court of Canada in *Rothman v. The Queen* (1981) 1 S.C.R. The year before, however, in *Paul v. The Queen*, the same court preferred the expression "jeter le discrédit sur l'administration de la justice", a more elegant form than "discréditer l'administration de la justice" which was used in *The Queen v. Wray* in 1971. In my opinion, both French expressions "ternir l'image de la justice"

and "jeter le discrédit sur l'administration de la justice" have a meaning closer to the English "bring the administration of justice into disrepute" than does the new wording "déconsidérer l'administration de la justice" found in the Charter. Personally, I like "ternir l'image" for its poetic quality, but I should really prefer "jeter le discrédit" for its obvious accuracy when one is looking for the intention of the legislator.

Be that as it may, "déconsidérer" is part of the Charter just as "disrepute" is, and counsel will be in a position to invoke the Official Languages Act which gives equal force to both the French language and English language versions of our laws. In litigation, the court could therefore be invited by one party to adopt the lesser narrower standard of "déconsidérer" and, in turn, the other party could opt for the higher larger standard imported by "disrepute".

A somewhat gross comparison, therefore might have the English language saying that some particular manner of obtaining evidence would cause the public to look upon the administration of justice with a jaundiced and cynical eye; whereas the French language version might well be saying only that it could cause the court, judge or parties to look upon the administration of with diminished respect.

While contemplating the formulation of subsection 24.(2), one ought to ask what "the administration of justice" means. If it bears the same meaning in this new part of the Constitution, as the provincial head of power set out in Section 92 head 14 of the old part of the Constitution then it will and does include the courts, the police, and the whole system of justice in each province.

Now, just what is it which could or would bring the administration of justice into disrepute? Clearly it is not all illegality or impropriety of manner of obtaining, but only such as is involved in any infringement or denial of someone's "rights or freedoms, as guaranteed by this Charter" as stated in subsection 24.(1). Therefore, unless some development of our common law rules of admissibility occurs through jurisprudence, then illegality or impropriety of manner of obtaining evidence will, at large, continue to be governed by the *Wray* doctrine. However, subsection 24.(2) does require that the evidence, to be eligible for exclusion, be only such whose manner of obtaining constituted in itself the infringement or denial of any rights or freedoms guaranteed by the Charter. Of course, if evidence to be tendered for consideration in a subsection (2) proceeding were itself obtained in a manner which violated someone's rights

then a second proceeding could be thereby generated, and so on - a state of affairs which would be remotely possible, but highly unlikely.

The English language version of subsection 24.(2) employs the same rubric, already noted, as that of subsection 15.(1) of the proposed Evidence Code[25] recommended, late in 1975, by the Law Reform Commission of Canada: "bring the administration of justice into disrepute." But the Commission would have gone further in giving guidance to the courts and other tribunals by setting out what matters were to be considered in the determination of applications of that provision.

Thus, subsection 15.(2) of the proposed Evidence Code provided:

> 15.(2) In determining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence.[26]

As the Commission explained in the narrative passages of Report 1:

> "... guidelines are set out in the section to assist judges in exercising their discretion. From these it is evident that the intent of the section is not to incorporate an absolute exclusionary rule into Canadian evidence law, but to give judges the right in exceptional cases to excluse evidence unfairly obtained, and thus restore what many believe to be the English common law discretionary rule."[27]

Those guidelines, or ones very much like them, can very well be implied from other provisions of the *Charter*, although they are not literally expressed in it. For example, the rights and freedoms, whose alleged denial or infringement will be in issue, are always "subject only to such limits prescribed by law as can be demonstrably justified in a free and democratic society", according to Section 1. Again, Section 7, in declaring "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of natural justice" together with the other legal and equality rights, imply some guidelines in the exercise of the discretion inherent in the adjudication under subsection 24.(2). If those guidelines enunciated by the Commission seem proper and reasonable to you in our "free and democratic society", then I commend them to you

in your adjudications. After all, the Supreme Court of Canada, itself, has not been shy about employing the Commission's texts in support of its reasons for judgment over the past several years.

By the development of guidelines one would hope to avoid grotesque results, whether of "hawkishness" or "dovishness" in the application of subsection 24.(2) of the *Charter*. The values to be maintained are, in some senses, competing ones, and it will require more than a modicum of subtlety and, yes, wisdom in order to maintain the proper delicate balance between them. Therein resides the nation's tribute of confidence in its judiciary.

In terms of the investigation of criminal activities, one can be sure that the public whom we serve in this "free and democratic society" of ours will not wish to tie the hands of the police and thereby render them

ineffectual. That situation tends (however proximately or remotely) towards a state of anarchy, as we can always observe when the police render themselves ineffectual by going on strike. There is at bottom no freedom and precious little democracy in such a state. It goes without saying that such a situation itself very rapidly brings the administration of justice into disrepute.

On the other hand one cannot accord to Canadian police the kind of licence by which the operations of a Gestapo or a K.G.B. are characterized. It is no justification to assert that such tactics are employed only against the "scum" of society, but not against "solid citizens", because such a classification of human beings is not made by our laws in general, nor by the *Charter* in particular. In any event, the "scum" is all to often in the eye of the beholder. No blind-eye can be turned toward such tactics

on the basis that the court is just not concerned about how relevant evidence is obtained. Not any more. What is needed is a clear-eyed perception of checking the abuse of power, without unduly tying the hands of police and prosecutors. I concede that it is more easily said than done. While reasonable people can and do disagree on the niceties of margainal cases, grotesque extremes can be more readily perceived, and avoided.

It is surely obvious that the prospects of grotesque results were not greatly feared by those Senators and Members of Parliament who voted in favour of the *Charter*, and consequently demonstrated their confidence in Canadian judicature. There are some bizarre notions being mooted about on the subject of self-crimination. They relate to evidence which is obtained, or which proceeds, from the accused. There

should be no quarrel, surely, with the notion that the fundamental freedoms of thought and expression provided in Section 2.(b) carry with them the right to abstain from expressing one's thoughts, including one's knowledge. That is not a bizarre notion. It is indeed buttressed by the further rights: (i) to be secure against unreasonable search or seizure provided in Section 8; (ii) not to be compelled to be a witness in proceedings against oneself in respect of the offence with which one is charged as provided in Section 11.(c); and further (iii) not to have any incriminating evidence from testimony in any proceedings used to incriminate one in any other proceedings, except for perjury or giving contradictory evidence, as provided in Section 13. Except for search and seizure, the self-criminating evidence referred to is all testimony or that which comes from the mind. Fingerprints, nail

scrapings, hair samples and breath are not products of the mind and are for the most part independently verifiable, or not, in terms of admissible evidence. The *Charter*'s provisions point to the salutary principle of not intruding upon or invading the mind, soul or psyche of a person in order to extract verbal evidence. It is, of course, otherwise if the person speaks or writes voluntarily, or unguardedly, without compulsion. Therefore, one hopes that the provisions against self-crimination will not be contorted so as to seem to exclude objective evidence such as fingerprints or breath samples. That would be a grotesque result which would, of itself, bring the administration of justice into great disrepute. That would be a squandering of the legislators' confidence in the judiciary. That would sour the public's hopeful expectations of the *Charter*.

The *Canadian Charter of Rights and Freedoms* does not confer a freedom from naivety, nor yet a right not to be tricked by persons in authority. So, in effect, said Mr. Justice Lamer in his keenly perceptive judgment recently in *Rothman v. The Queen*.[28] But Mr. Justice Lamer did indicate that some kinds of tricks are nefarious, because they shock the conscience of society and thereby do bring the administration of justice into disrepute. He cited, for example, the passing off of a police investigator as a chaplain, or as legal aid counsel, in order to induce a confession or other derivative evidence from an accused person. With such a stinging indictment of such tactics from a judge of the Supreme Court of Canada, one would have thought that those practices would cease. And yet, we see that Mr. Justice Louis-Philippe Landry, in Québec Superior Court, District of Labelle, as recently

as last January 20th, was describing exactly the same kind of practice (here a "priest" and a "psychologist") in the case of *Sa Majesté La Reine contre Jean-Marie Clot.*[29] I may say that Mr. Justice Landry concluded that the statements obtained from the accused were not demonstrated in those circumstances to have been freely and voluntarily made, and His Lordship ruled them inadmissible. I do not doubt that such was the correct disposition.

Not all strategems will evince the grounds to produce such a result. They will not usually involve physical force and so neither the *Charter* right to security of the person, nor voluntariness, will come into play. Some such strategems will be accepted with complete equanimity, as in *Rothman*, but what *Charter* right could be invoked in regard to statements made to a fake "priest", or "duty counsel" or a "phychologist"? Although such a

strategem does not necessarily subject the suspect to cruel punishment, does it constitute sufficiently unusual treatment to render the evidence eligible for exclusion? Or does the conjunctive, "cruel *and* unusual treatment or punishment", in Section 12 demand both characteristics in order to be successfully invoked?

It seems to me that if there be no *Charter* right available to invoke as a basis for exclusion of evidence pursuant to subsection 24.(2), then one is simply confronted with the rule enunciated in the *Wray* case, and confirmed in the *Hogan* case. Indeed, one would not wish to obviate all clever, creative tactics for obtaining evidence, simply because it is not desirable in the due and proper administration of justice to bludgeon truly cerebral law enforcement techniques.

No doubt, however, occasions will arise when the court will become invested with a sense of revulsion at becoming a "party" - after the fact - to injustice, to truly nefarious enforcement techniques, or to paying too high a price for a particular prosecution. *Wray* and *Hogan* notwithstanding, can the court still squirm out of these uncomfortable and embarrassing straits by invoking the notion of abuse of the court's process, or by developing, if not creating, the defense of entrapment, for example, where appropriate?

Such stirrings are present in the minority judgment delivered by Mr. Justice Estey on August 9th, last, in the Supreme Court case of *Victor Amato v. The Queen*.[30]

To us outsiders that case looks like a squeaker, in that it evinces a 5 to 4 divergence of opinion.

It might, of course, represent an utterly immutable, pre-ordained cleavage of philosophical bent on the part of the judges. The sequence of events composing the facts of the *Amato* case is too long and too complicated to relate here. Suffice to say that entrapment was raised by the appellant and that defence failed consistently up to and including the dismissal of his appeal by the Supreme Court of Canada, on August 9th, last.

However those stirrings of judicial discomfort which I earlier mentioned are clearly and articulately manifested by Mr. Justice Estey's reasons, in which Chief Justice Laskin and Messrs. Justices McIntyre and Lamer concurred. To illustrate, an extract from Mr. Justice Estey's last paragraphs of 41 pages of reasons will suffice.

> "In the foregoing pages I have reviewed and discussed the experience of the courts of this country, of England and of the United States in their approach to the question of entrapment. I have, as well, endeavoured to isolate and state the principles

which have emerged in the cases regarding the formulation of the defence and the application of it. It is clear that the need for some element of judicial control has been recognized in the common law and that the roots of the doctrine of entrapment are to be found in the common law. I am of the view that it is open to this Court and consistent with authority to recognize a defence of entrapment and to give effect to it in proper cases.

The conduct of the investigatory authority here in my view clearly gives rise to entrapment.

That there was persistent inveigling and importuning is clear. It is also clear that the purpose of the program initiated by the police was to obtain evidence for the prosecution of the accused. It is the plain fact that the drug trafficking which occurred was promoted by the police at a time when the police had no reason to suspect, let alone believe, that the accused was in any way related to such activity. The cumulative effect of such a deliberately launched enterprise by the police would in my view 'in all the circumstances' be viewed in the community as shocking and outrageous, and such conduct is clearly contrary to the proper principles upon which justice must be done by the courts.

> For all the reasons advanced and discussed above, I would recognize the defence of entrapment and would apply that defence to the facts and circumstances of this case; and therefore would allow the appeal, set aside the conviction and direct a stay of prosecution.

There is also an intriguing notion expressed by Mr. Justice Estey in his reasons, where dealing with the defence of entrapment he said: "The root of the defence must, in my view, be the same as, for example, the exclusion of involuntary confessions."

Those reasons of the minority, written by Mr. Justice Estey, so very recently in the *Amato* case might well presage a dilution of the rigid rule enunciated by the Court in *Wray* and confirmed *inter alia* by *Hogan*. If so, then, coupled with the provisions of Section 24 of the *Canadian Charter of Rights and Freedoms*, our Canadian rules of admissibility of evidence could become very flexible indeed, and more akin to the rules of equity than

to those of law. It is always possible that the legislators will intervene with guidelines. Only clairvoyance could make it possible to know what will happen in this regard. Whatever happens, it should be remembered always that your country has paid you judges the ultiment compliment of confidence in your wisdom to create and maintain a crucial equilibrium in our country through the instrumentality of our constitutionally entrenched *Charter*.

ENDNOTES

1. [1975] 2 S.C.R. 574; 18 C.C.C. (2d) 65.
2. 18 C.C.C. (2d) 65 at 72.
3. *Ibid.*, p. 73.
4. 18 C.C.C. (2d) 65 at pp. 81-82.
5. [1971] S.C.R. 272, 11 D.L.R. (3d) 673, [1970] 4 C.C.C. 1.
6. [1955] A.C. 197 (P.C.) (Kenya), [1955] 1 All. E.R. 236.
7. Under Kenyan law at that time, Kuruma was not entitled to a trial by jury.
8. [1955] A.C. at p. 203.
9. *Ibid.*, p. 202.
10. [1980] A.C. 402, [1979] 2 All. E.R. 1222.
11. 18 C.C.C. (2d) at p. 81.
12. [1971] S.C.R. 272, 11 D.L.R. (3d) 673, [1970] 4 C.C.C. 1.
13. *Ibid.*, at p. 293.
14. [1962] Crim. L.R. 697.
15. [1963] 1 W.L.R. 637, [1963] 1 ALL. E.R. 848.
16. [1971] S.C.R. at p. 295
17. [1950] S.L.T. 37 (H.C.).
18. [1965] I.R. 142.
19. (1978), 52 A.L.J.R. 561.
20. (1970) 126 C.L.R. 321. - 44 A.L.J.R. 263.
21. *Ibid.*, at p. 335.
22. [1976] 2 N.Z.L.R. 678 (C.A.)
23. [1976] 2 N.Z.L.R. at p. 684.
24. [1977] 1 N.Z.L.R. 448.

25. Law Reform Commission of Canada, Report 1: Evidence (1975), Minister of Supply and Services Canada 1977, Catalogue No. J31-15/1975.

26. *Ibid* at p. 22.

27. *Ibid* at p. 62

28. *Rothman v. The Queen* (1981) 1 S.C.R. 640.

29. *Sa Majesté La Reine contre Jean-Marie Clot* 27 C.R. (3d) 344.

30 *Victor v. The Queen*, Supreme Court, 9 August 1982.