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. In the United States, its Supreme Court, after weighing over many years whether other methods than exclusion of evidence should be invoked to deter illegal searches and seizures in state as well as in federal prosecutions, concluded that the constitutional guarantees could best be upheld by a rule of exclusion.

As for the propriety of the courts using the test of bringing the administration of justice into disrepute as a basis for excluding illegally obtained evidence, Chief Justice Cartwright and Justices Spence and Hall, dissenting in *The Queen v. Wray,* a 1970 case reported at page 272 of the Supreme Court Reports, were clearly of the opinion that this was a primary duty of the courts. As Mr. Justice Spence remarked:

I am most strongly of the opinion that it is the duty of every judge to guard against bringing the administration of justice into disrepute. That is a duty which lies upon him constantly and that is a duty which he must always keep firmly in mind. The proper discharge of this duty is one which, in the present day of almost riotous disregard for the administration of justice, is of paramount importance to the continued life of the state.

In the present case, the confession or statement of the accused and also the information given by the accused as to where the weapon could be found, as Aylesworth J.A. pointed out, were procured by trickery, duress and improper inducements and they were clearly inadmissible. Moreover, as the Chief Justice of this court has indicated in his reasons the purpose of exercise of such trickery was stated by the inspector of the provincial police to avoid taking a chance that the accused, as the result of speaking to his lawyer, would not take the police to the place where the gun was found.

● (1410)

Under these circumstances, I am in agreement with the chief justice when he characterized the description of the situation by the Court of Appeal as not any overstatement.

I am of the opinion that were the trial judge to have, as he very properly did, excluded as inadmissible the statement of the accused and yet have permitted the Crown to have adduced all the evidence as to the accused's accompanying the police officers and pointing out to them the place where the weapon had been thrown away, in accordance with the information which he had given to them in the excluding statement, it would not only have brought the administration of justice into disrepute but it would have been a startling disregard of the principle of British criminal law, *nemo tenetur seipsum accusare.* Surely no authority need be stated to establish that as the most basic principle in our criminal law.

Mr. McLeod also expresses concerns about the manner in which the government changed its position between July, 1980, and February, 1981, on how to deal with the exclusionary rule in the charter. The simple fact is that the government was searching for a provision that would strike a proper balance between the absolute and automatic exclusionary rule of the United States and the common law rule in Canada which, with the exception of involuntary confessions, allows the admissibility of relevant evidence even when it has been obtained by illegal or improper means.

In this regard, the Special Joint Committee on the Constitution received submissions from many groups that Mr. McLeod characterizes as "misinformed special-interest lobby groups" which advocated some provision that would permit courts to exclude illegally obtained evidence in proper cases. These groups included bodies such as the Canadian Bar Association, the B.C. Civil Liberties Association, the National Association of Women and the Law and the Canadian Civil Liberties Association. The only groups before the committee advocating the maintenance of the existing evidence rule was the Canadian Association of Chiefs of Police and the Canadian Association of Crown Counsel.

Finally, in response to the specific questions that Mr. McLeod poses in his article, the following points might be made. First, the charter is not adopting the U.S. exclusionary rule, but a test which will require the accused to show that admission of illegally obtained evidence would, in all the circumstances, bring the administration of justice into disrepute. There is nothing automatic or absolute about this rule.

Second, the results in the *Williams* case would not occur under the proposed charter rule since admitting Williams' statement would not have brought the administration of justice into disrepute.

Third, both disciplinary actions against the police and the prospect of excluding evidence in cases of flagrant violations of rights by the police are considered necessary to ensure respect for civil liberties.

Fourth, the Supreme Court will develop interpretations of the new exclusionary rule which will establish guidelines for the lower courts and Crown counsel for determining when evidence is inadmissible.

Fifth, while the task force on evidence may be recommending against the U.S. exclusionary rule, that is not the rule which is being adopted in the charter. The rule adopted in the charter is the same as that proposed by the Canada Law Reform Commission in its report on evidence in 1975.

Sixth, the wording of the proposed exclusionary rule is not inconsistent with any provision of the United Nations covenant on civil and political rights which does not deal with admissibility of evidence.

Seventh, the report of the McDonald commission on the RCMP is not relevant to rules relating to admissibility of evidence.

Eighth, the suggestion that rapists will be turned loose in the streets despite their guilt because of a technical error by the police is nonsense, since the test for exclusion in the charter would not apply to minor breaches of the charter rights.

Ninth, the government's flexibility in the development of the exclusionary rule is simply an illustration of its desire to develop the best charter possible, taking into account the views of the groups which appeared before the committee and the members of the committee themselves.

In sum, Clause 24(2) of the charter seeks to strike a proper balance between the interests of the effective administration of justice and the interests of the fair administration of justice.

Attempts by the police and Crown counsel to create in the minds of the Canadian public fears that the exclusionary rule will turn our cities into havens for criminals who would otherwise be behind bars is to do a serious disservice. The proposed rule is not the same as the exclusionary rule in the United States and should not be held forth as such.