

According to Mr. McLeod, in the United States, the doctrine of excluding evidence obtained in contravention of the U.S. bill of rights—protection against unreasonable searches and seizures and the right to remain silent in the absence of counsel—has been developed by courts as an absolute rule designed to prevent law enforcement officers from violating a constitutionally protected right of individuals. The rule operates automatically in every case regardless of how minor the breach of the right and regardless of whether the admission of the evidence would cast doubt on the integrity of the administration of justice. This is why, in the *Williams* case referred to by Mr. McLeod, the accused was set free even though, on the facts of that case there did not appear to be a serious breach of his constitutional rights.

Mr. McLeod says that the situation in Canada, under the proposed provisions of Clause 24(2) of the charter, would be rather different. Clause 24(2) provides that a court shall exclude evidence obtained in contravention of a charter right—e.g., by an illegal search or seizure or by evidence obtained from an accused who has been denied counsel—only where it is established, having regard to all the circumstances, that admission of the evidence would bring the administration of justice into disrepute. Consequently there would be no rule of automatic exclusion of illegally obtained evidence. The accused would have to establish to the satisfaction of the court that the illegality of the manner in which the evidence was obtained was of such a serious nature that using it would bring the administration of justice into disrepute. The circumstances which the court would consider in reaching a decision would include (a), the extent to which human dignity and social values were breached in obtaining the evidence; (b), the seriousness of the case; (c), the importance of the evidence; (d), whether the harm to the accused was inflicted wilfully or not; and (e), whether there were circumstances justifying the illegal action, such as a situation of urgency where the evidence would have been destroyed or lost.

In other words, says Mr. McLeod, the underlying principles of the proposed charter “exclusionary rule” are twofold. First, to ensure a proper balance between effective law enforcement activities and the fair administration of justice; and second, to avoid the courts becoming parties to activities which are serious violations of charter rights.

By providing the test of “bringing the administration of justice into disrepute”, we are clearly signalling to the courts that we do not want the adoption of the automatic and absolute exclusionary rule of the United States, but one which operates to curtail the use of evidence where it has been obtained in flagrant violation of charter rights.

May I call it one o'clock, Mr. Speaker?

The Acting Speaker (Mr. Blaker): I take it the hon. member for Etobicoke-Lakeshore (Mr. Robinson) has not completed his remarks.

Mr. Robinson (Etobicoke-Lakeshore): No, I have not, Mr. Speaker.

The Constitution

The Acting Speaker (Mr. Blaker): Then the Chair will recognize the hon. member at two o'clock in order for him to complete his intervention.

It being one o'clock, I do now leave the chair until two o'clock this afternoon.

At 1 p.m. the House took recess.

AFTER RECESS

The House resumed at 2 p.m.

The Acting Speaker (Mr. McRae): Order, please. When the House rose at one o'clock, the hon. member for Etobicoke-Lakeshore had the floor.

Mr. Robinson (Etobicoke-Lakeshore): Before lunch, Mr. Speaker, I was in the midst of my remarks in reply to an article in *The Globe and Mail* of Wednesday, March 11, 1981, by Mr. Roderick M. McLeod, spokesman for the Canadian Association of Crown Counsel and assistant deputy attorney general of Ontario. I would like to continue those remarks at this time.

Mr. McLeod quotes the dissenting opinion of Chief Justice Berger in the *Williams* case, which condemns the absolute exclusion rule. This is, of course, the position of the Chief Justice because of the fact that the rule is automatic and absolute, being applied without regard to the seriousness of the breach. As the Chief Justice noted in the 1971 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* case, cited at 403 U.S. Reports at page 388, a United States Supreme Court case, he is opposed to the U.S. rule because it represents a “mechanically inflexible response to widely varying degrees of police error”. The proposed Canadian rule would allow for flexibility in determining when the breach of rights was serious enough to justify excluding illegally obtained evidence.

Mr. McLeod also asserts that the best means to ensure that the police observe the rights of persons is by “before-the-fact direction” or subsequent prosecution or disciplinary action for illegal conduct. The simple fact is that even if such *ex post facto* action occurs, it is of little solace to the person whose rights have been infringed. As Laskin, B. remarked in his dissenting judgment in *Hogan v. The Queen*, 1975, 2 Supreme Court Reports at page 574:

Illegalities or improprieties attending the eliciting or discovery of relevant evidence are, on the orthodox common law view, *res inter alios acta*. They are said to have their sanction in separate criminal or civil proceedings, of which there is little evidence, either as to recourse or effectiveness; or, perhaps, in internal disciplinary proceedings against offending constables, a matter on which there is no reliable data in this country.

Laskin then went on to observe with respect to constitutionally protected rights:

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