APPENDIX "A"

(*See p. 2110*)

THE CONSTITUTION

CHARTER OF RIGHTS AND EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE

In his article in the *Globe and Mail* of March 11, 1981, Mr. Roderick McLeod, speaking for the Canadian Association of Crown Counsel, contends that the provision in the Charter of Rights (clause 24(2)) empowering the courts to exclude illegally obtained evidence in certain circumstances will result in the adoption by Canadian courts of the American rule of automatic exclusion of illegally obtained evidence. This is simply not the case.

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.

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 (eg., 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, the underlying principles of the proposed Charter "exclusionary rule" are two-fold.

(1) to ensure a proper balance between effective law enforcement activities and the fair administration of justice

(2) to avoid the court 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.

Mr. McLeod quotes the dissenting opinion of Chief Justice Burger 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 *Bivens* case (1971), 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, J. remarked in his dissenting judgment in *Hogan v. The Queen* (1975):

> 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 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* (1970), 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.
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> 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.
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> 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.
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> 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 basis 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 might be said.

1. 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.

2. 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.

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

4. 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.

5. 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.

6. The wording of the proposed exclusionary rule is not inconsistent with any provision of the U.N. Covenant on Civil and Political Rights which does not deal with admissibility of evidence.

7. The report of the McDonald Commission on the R.C.M.P. is not relevant to rules relating to admissibility of evidence.

8. 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.

9. 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 who 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 interest 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.