EVIDENCE

*S.I. Bushnell**

I. INTRODUCTION

This is the first occasion upon which the subject of Evidence has appeared in this survey, and consequently it is difficult to know where to begin, and what scope to have. In the past few years there have been what I would class as major decisions in Evidence, particularly decisions by the Supreme Court of Canada. It is therefore my intention not to attempt a survey of the entire field of evidence through the recent cases, but rather to select those areas which have been affected by the so-called major decisions. Also this survey will deal with the most characteristic aspect of our Law of Evidence, namely, the exclusionary rules.

A case with a great potential for affecting Evidence is *The Queen v. Wray*.[1] Indeed this case could have a profound affect upon the role of the judge in our criminal trial. The Supreme Court of Canada decided that an exclusionary rule based upon the illegality of the method by which evidence was obtained would not be created in Canada. In arriving at this conclusion the court made a greater decision by holding that the discretion of the trial judge to exclude admissible evidence was severely restricted. Another case, which possibly leads the field as far as the exclusionary rules are concerned, is *Ares v. Venner*,[2] in which the Supreme Court decided that further exceptions to the hearsay rule could be created by the court without resort to the legislature. The potentiality of such a decision upon the existence of the hearsay rule, and possibly all exclusionary rules can be readily seen. Also surveyed is *Regina v. Lupien*.[3] The interest in this case arises from its effect upon the rule relating to the admissibility of expert opinion evidence, in particular psychiatric evidence. As well as *Lupien* in the area of opinion evidence the recent cases dealing with public opinion surveys will be considered. Lastly, the topic of confessions is considered. The cases which have considered questions relating to the admissibility of confessions have always caused the area to appear to be in a state of flux and are difficult to rationalize. Although it is not possible to select a case dealing with confessions which is of the same order as *Wray*, *Lupien*, and *Ares v. Venner*, yet *Piche v. The Queen*[4] is of considerable magnitude. It dealt with the question of the application of the confession rule to all statements of an accused as opposed to only inculpatory statements.

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*B.S.A., 1962, University of Toronto; LL.B., 1969, Dalhousie University; LL.M., 1970, York University. Assistant Professor of Law, Faculty of Law, University of Western Ontario.

1 [1971] Sup. Ct. 272, [1970] 4 Can. Crim. Cas. 1 (1970).

2 [1970] Sup. Ct. 608, 14 D.L.R.3d 4.

3 [1970] Sup. Ct. 263, [1970] 2 Can. Crim. Cas. 193 (1969).

4 [1971] Sup. Ct. 23 [1970] 4 Can. Crim. Cas. 27 (1970).

It is readily apparent from the above summary that this survey of Evidence is concerned almost exclusively with criminal cases, and such is the trend in Evidence today. The Civil Evidence Act, 1968[5] in England provides a clear indication that there is a movement away from applying the exclusionary rules in civil trials, and sooner or later these rules could become solely a part of criminal procedure.

In summary the survey begins with a look at the existence of a judicial discretion to exclude evidence. Included is a look at the abortive attempt to establish an exclusionary rule based upon the illegality of the method by which evidence is obtained. Following this, *Ares v. Venner* is surveyed dealing with the establishment of further exceptions to the hearsay rule; and still looking at hearsay the recent cases dealing with confessions are reviewed; lastly opinion evidence is considered in two areas—expert psychiatric evidence and public opinion surveys.

II. Judicial Discretion to Exclude Evidence

It is trite law to say that the basic principle of Evidence is that all evidence which is logically probative of a fact in issue is admissible unless excluded by some exclusionary rule. In Canada there are three main exclusionary rules—one excluding evidence of character if the only purpose for tendering the evidence is to ask the trier of fact to draw the inference that because the person's character is such-and-such he is probably the person who committed the crime; two, the opinion of a witness is generally excluded in favour of testimony as to facts; and three, hearsay evidence. In the United States there is in addition to these rules another which excludes evidence which has been improperly or illegally obtained.[6] For a brief while in 1969 and 1970 this rule began to take shape in Canada. In *Wray*, the Ontario Court of Appeal held that "a trial Judge has a discretion to reject evidence, even of substantial weight, if he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute."[7] The rule as enunciated in *Wray* was made discretionary unlike its American counterpart.

In *Wray* the accused had been charged with non-capital murder, and had confessed as a result of "trickery, duress and improper inducements"[8] on the side of the police. The confession was held to have been involuntarily given; but after confessing Wray took the police to where he had said he had thrown the murder weapon. The police admitted that they had prevented a lawyer from contacting Wray so that there would be no interference with their investigation. The weapon was found in the place where he said that it would be. It was at this point that the rule in *Rex v. St. Lawrence* began to work. The rule allows the admission of parts of an involuntary confession

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[5] The Civil Evidence Act 1968, c. 64.

[6] Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961).

[7] Regina v. Wray, [1970] 3 Can. Crim. Cas. 122, at 123 (Ont. 1969).

[8] *Id.* at 123.

which have been confirmed by the discovery of subsequent facts.[9] The result of applying this rule would be that "evidence that the [accused] told the police where the murder weapon was to be found was legally admissible but evidence that he said he had thrown it there was not."[10] Now was the time that the rule giving the judge a discretion to exclude evidence entered the picture. The exercise of the discretion to exclude the evidence in *Wray* would have cancelled the effect of the *St. Lawrence* rule.

The two cases which appeared to give the greatest impetus to the creation of a discretionary rule were *Kuruma v. Reginam*[11] and *Noor Mohamed v. The King*.[12] The *Noor Mohamed* case concerned the admission of similar fact evidence which is excluded if it is only presented to establish the character of the accused, in that he would probably have committed the crime for which he is charged because he has committed similar offences. It hardly needs saying that although such evidence can be admitted for some other reason, such as showing a plan or scheme, it will inevitably greatly influence the trier of fact as it appears to show the character of the accused. A statement by Lord du Parcq in *Noor Mohamed* was generally thought to state the rule in regard to the discretion: "in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it."[13] The *Kuruma* case was also a product of the Privy Council and in this case Lord Goddard entertained no doubt that a judge has a discretion to exclude evidence "if the strict rules of evidence would operate unfairly against the accused."[14]

When *The Queen v. Wray*[15] reached the Supreme Court of Canada on appeal by the Crown Mr. Justice Martland reviewed *Noor Mohamed* and *Kuruma* and concluded that the "development of the idea of a general discretion to exclude admissible evidence [was] not warranted by the authorities on which it [purported] to be based."[16] He went on: "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 issues before the court is trifling, which can be said to operate unfairly."[17] Mr. Justice Judson held that no rule as that contended for existed, and he went on to give his opinion that judicial discretion in this

[9] Rex v. St. Lawrence, [1949] Ont. 215, 93 Can. Crim. Cas. 376 (High Ct.) (per McRuer, C.J.H.C.).

[10] [1971] Sup. Ct. at 279, [1970] 4 Can. Crim. Cas. 1, at 6, (Cartwright, C.J.C.).

[11] [1955] 1 All E.R. 236, [1955] A.C. 197 (P.C.)

[12] [1949] 1 All E.R. 365, [1949] A.C. 182 (P.C.).

[13] *Id.* at 370, [1949] A.C. at 192.

[14] [1955] 1 All E.R. at 239, [1955] A.C. at 204.

[15] [1971] Sup. Ct. 272, [1970] 4 Can. Crim. Cas. 1 (1970).

[16] *Id.* at 293, [1970] 4 Can. Crim. Cas. at 17

[17] *Id.* at 293, [1970] 4 Can. Crim. Cas. at 17

area of the law would create uncertainty. Like Martland, Judson did express an exclusionary rule although not in the sweeping terms used by the Court of Appeal. His rule was to the effect that evidence which is admissible but of slight probative value can be rejected if it would have a prejudicial tendency in the eyes of the jury.[18]

The Supreme Court of Canada rejected the creation of an exclusionary rule with respect to evidence which has been improperly or illegally obtained, even in the discretionary form stated by the Court of Appeal; but in rejecting such a rule the court narrowed what had previously been thought to be a power in the trial judge to reject admissible evidence. The court recognized only a discretionary power in the trial judge to exclude evidence if it is gravely prejudicial to an accused person, and if its probative value is trifling. Also, as added by Martland, its admissibility must be tenuous. This last requirement has its origin in *Noor Mohamed*; as used in *Noor Mohamed* and explained by Martland, it would possibly find use only in cases involving similar fact evidence and perhaps in cases involving the "state of mind" exception to the hearsay rule, for example, if in a murder case the defence is that the deceased committed suicide, evidence that the victim said that the accused was trying to kill him might be admissible to show the state of mind of the victim and to have the trier of fact draw the inference that anyone who said that someone is trying to kill him probably would not commit suicide, but is inadmissible if offered as proof of the truth of the facts stated, namely that the accused was trying to kill the deceased. The prejudicial effect of such evidence can readily be imagined.[19]

In the end, the Supreme Court of Canada allowed the appeal and a new trial was ordered. The accused had been charged with non-capital murder and acquitted. The Crown had appealed both to the Ontario Court of Appeal and the Supreme Court of Canada and a new trial followed. At the new trial the accused's counsel attempted to elicit from a Crown witness the fact that from the time of the accused's acquittal at the first trial until the second trial, a period of almost exactly one year, the accused was not under arrest and not out on bail, and consequently was free to leave the jurisdiction and did not do so, and also that he appeared at his second trial and then surrendered into custody. From this evidence the defence asked the court to draw the inference of a consciousness of innocence based on the

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[18] *Id.* at 296-98, [1970] 4 Can. Crim. Cas. at 20.

[19] *See, for example*, Shepard v. U.S., 290 U.S. 96, 54 S. Ct. 22 (1939) in which the accused was charged with murdering his wife. The defence introduced evidence from which suicide was suggested. The prosecution tendered in evidence, through the wife's nurse, a conversation between the victim and the nurse. The wife was reported as having said: "Dr. Shepherd has poisoned me." The argument by the prosecution was that the evidence showed a state-of-mind inconsistent with an intent to commit suicide. Speaking for the United States Supreme Court, Mr. Justice Cardozo said: "It will not do to say that the jury might accept the declarations for any light that they may cast upon the existence of a vital urge, and reject them to the extent that they charged the death of someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds."

analogy of the inference of a consciousness of guilt which courts have drawn from flight.[20]

The trial judge refused to admit the evidence and an appeal was taken by Wray to the Ontario Court of Appeal following his conviction at the second trial.[21] Mr. Justice Arnup, speaking for the majority of the court, held that the trial judge had a discretion to exclude the evidence because the admissibility of the proposed evidence was tenuous, and its probative force in relation to the main issue was trifling. Mr. Justice Arnup also thought that if the evidence had been admitted it would probably have been prejudicial to the accused.[22] The prejudicial effect on the accused would have been the probable leading of evidence by the Crown in answer to such evidence, for example, the Crown might have led evidence that the accused, while at large and not under arrest, was nevertheless under surveillance by the police.

The basis for the holding of the Ontario Court of Appeal is from the judgment of Martland, speaking for the majority in the Supreme Court of Canada in *The Queen v. Wray*,[23] the decision which ordered the new trial. It will be remembered that the question which faced the Supreme Court of Canada was whether a trial judge has a discretion to reject evidence if he considers that its admission would be unjust or unfair to an accused or calculated to bring the administration of justice into disrepute. The Supreme Court of Canada spoke of "tenuous admissibility of evidence", and now the Ontario Court of Appeal has used the phrase. What is "tenuous admissibility"?

In the Supreme Court the authority cited for the existence of the discretion was the statement of Lord Du Parcq in *Noor Mohamed*, but this statement, as pointed out by the Supreme Court of Canada, was made in reference to similar fact evidence. Relevant evidence of similar acts is inadmissible if the only inference which can be drawn is that the accused is the kind of person who would commit the crime, that is, evidence which goes toward proving only disposition is inadmissible; but if the evidence is relevant to another issue as well as to disposition then it is admissible, and the fact that it also proves disposition is overlooked. It may occur that the value of the evidence as far as proving the issue, other than disposition, is slight and it has far greater probative value in relation to the question of propensity. This is what Lord Du Parcq meant when he used the phrase "some tenuous ground for holding it technically admissible"; and what Martland appeared to mean when he used the "admissibility of which is tenuous." It is therefore submitted that the phrase "tenuous admissibility" is applicable only in reference to evidence which is inadmissible for one purpose but admissible for another. The fact that it is admitted creates the

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[20] See R. v. Richard, [1972] 3 n.s.2d 86 (1971).

[21] Regina v. Wray, [1971] 3 Ont. 843.

[22] *Id.* at 849.

[23] [1971] Sup. Ct. 272, [1970] 4 Can. Crim. Cas. 1 (1970).

danger that the trier of fact, particularly a jury, will consider the evidence on the issue for which it is inadmissible.

The discretion of a trial judge to exclude admissible evidence as laid down in the Supreme Court in *Wray (No. 1)* was adopted by the Ontario Court of Appeal, but the evidence before the Court of Appeal was not similar fact evidence. Counsel for the accused argued that the evidence was relevant to the state of mind of the accused as to whether or not he had a consciousness of guilt. In other words a guilty person would have made a run for it, while an innocent man would have no reason to do so. Crown Counsel on the other hand argued that it was not possible to draw this inference. It was argued that the inference of a consciousness of guilt could be drawn from the fact of flight, and the inference of a lack of a consciousness of guilt could be drawn from the fact of no flight. In answer to this argument the majority of the court was of the opinion that one could not draw the inference of a consciousness of innocence from lack of flight with the same ease as one could draw an inference of guilt from flight.[24] In fact, the drawing of an inference of a consciousness of innocence in this particular case was "extremely difficult, if not impossible."[25] Mr. Justice Jessup, on the contrary, said that "flight or abstention from flight has a clear and logical relevance in establishing [consciousness of guilt or innocence]." The state of mind was in turn probative of the identity of the criminal. Since relevant, the evidence was admissible unless excluded by a specific exclusionary rule, and none existed.[26]

In light of the majority judgment of the Court of Appeal "tenuous admissibility" has some appearance of Wigmore's concept of "legal relevancy." Evidence to be admissible under this concept must be evidence which has a minimum probative value; evidence which falls below this value is logically relevant, but not legally relevant, and thus is excluded.[27]

In both *Wray cases* there was no exclusionary rule applicable, hence admissible evidence was synonymous with relevant evidence and there are no degrees of relevancy. It is true that degree of probative value can be tied to admissibility in that evidence of extremely low probative value might be excluded in the discretion of the trial judge if its admission would cause undue consumption of time. A problem which arises when applying Wigmore's theory in this case is that the Supreme Court of Canada used three factors in phrasing the rule, namely, grave prejudice, tenuous admissibility, and trifling probative force. If "legal relevancy" is used the last two factors would merge.

The question of a judicial discretion to exclude evidence which did not fall within one of the exclusionary rules fell to be decided by the Supreme Court of Canada in another case decided shortly before *Wray*. *Draper v.*

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[24] [1971] 3 Ont. at 848.

[25] *Id.*

[26] *Id.* at 844.

[27] 1 WIGMORE, EVIDENCE § 28 (3d ed. 1940).

Jacklyn[28] was a civil case involving an action for damages sustained due to an automobile accident. The plaintiff received fractures of the jaw and cheekbone as well as various lacerations to his face. Wires were inserted into the face and these had protruded from the left cheek for about four weeks. During this period photographs had been taken of the plaintiff's face and at the trial his counsel sought to produce the photographs as exhibits. The trial judge admitted them, but on appeal to the Ontario Court of Appeal a new trial was ordered on the ground that the pictures were inflammatory and their admission was not justified to better explain the evidence. The Court of Appeal decision was reversed by the Supreme Court of Canada, which held that although there is a judicial discretion to exclude evidence otherwise admissible yet it is only when a piece of evidence is "technically admissible" and which "may be so prejudicial to the opposite side that any probative value is overcome by the possible prejudice."[29] There was therefore a need to balance probative value against possible prejudice. In the opinion of the Supreme Court any balancing in the case favoured admitting the evidence. In addition to the damages for pain and suffering and any future disability, the plaintiff was awarded damages for discomfort and inconvenience caused by the wires protruding from his face. Consequently the photographs were important in order for the jury to make an assessment of damages for that injury.

Although *Draper v. Jacklyn* was a civil case it is submitted that its ratio is equally applicable to a criminal case. The cases which were referred to by Mr. Justice Spence were in the main criminal cases, and Mr. Justice Ritchie pointed out that "My Brother Spence has also referred to a number of criminal cases.... In criminal cases where the sole issue is the guilt or innocence of the accused, it is understandable that such photographs should be excluded unless they can be shown to contain some evidence directly connecting the accused with the commission of the crime with which he is charged."[30] The inference from this statement seems to be that the probative value in a criminal case would need to be higher in order to counterbalance any prejudicial effect.

From *Draper v. Jacklyn* one could conclude that whenever evidence which is capable of having a prejudicial effect upon the accused is tendered then the trial judge must consider the probative value of the evidence in relation to its prejudicial effect. Spence spoke of evidence which is "technically admissible." This, like evidence whose "admissibility [is] tenuous," is unclear in meaning. It probably means evidence which is admissible in the sense that it does not fall within one of the exclusionary rules. The test is therefore one of balancing probative value against prejudicial effect. Such a test could also be obtained from *Wray (No. 1)* with the qualification that the probative value must be trifling and the prejudicial effect grave. This last test differs from the *Draper v. Jacklyn* test in that it involves more than

[28] [1970] Sup. Ct. 92, 9 D.L.R.3d 264 (1969).

[29] Draper v. Jacklyn, 9 D.L.R.3d 264, at 268.

[30] *Id.* at 266.

only balancing but rather the scales must be tipped in favour of "prejudice" to a considerable degree and also the probative value must be slight. If there is some probative value then the evidence is to be admitted regardless of prejudicial effect. In *Wray (No. 1), Draper v. Jacklyn* was not referred to in any of the judgments.

Another case not cited by any of the Justices of the Supreme Court was the House of Lords decision in *Selvey v. Director of Public Prosecution.*[31] The case involved a charge of buggery. The accused testified that the complainant had asked him for a loan to buy some clothing and that in return for the loan he was prepared to go on the bed and that he had already that day earned some money in the same manner. The accused said that he had not been interested. During cross-examination of the complainant, defence counsel questioned him as to the story related by the accused in order to show that the complainant should not be believed and that he was attacking the accused's character. The Crown asked for leave to put to the accused his previous sexual convictions. These previous convictions consisted of indecent assault on two boys eleven years before the charge in issue, soliciting for immoral purposes, and persistently importuning male persons. The accused refused to answer any questions relating to these previous convictions.

The Crown relied upon section 1 proviso (*f*) of the Criminal Evidence Act, 1898[32] which protects an accused from having questions put to him as a witness concerning previous offences or concerning his bad character unless the accused has sought to establish his good character through the questioning of prosecution witnesses, or has given evidence of good character, or "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." Counsel for the Crown contended that the accused lost the protection of the Criminal Evidence Act, 1898 by virtue of the questions which had been put to the complainant, a witness for the prosecution. Defence counsel contended that the witness could be asked all questions that were necessitated by the proper conduct of the defence and so long as the questions were relevant to an issue in the case the protection remained. The trial judge allowed the prosecution to cross-examine the accused about his previous convictions.

In the House of Lords Viscount Dilhorne held that the questions put to the complainant involved imputations on his character. The counsel for the defence then contended that a judge has a discretion to refuse permission to cross-examine even if it is permissible under the Act. The counter argument of the counsel for the Crown was that a judge has no discretion to refuse permission to cross-examine the accused as to his character if the conditions prescribed in section 1 of the Criminal Evidence Act, 1898 were satisfied. The point which is of interest in this survey is that the counsel for the Crown framed his contention even more broadly when he submitted that a judge at

[31] [1968] 2 All E.R. 497.

[32] 61 & 62 Vict., c. 36.

a criminal trial had no power to exclude evidence which was admissible. Viscount Dilhorne reviewed several cases and concluded that the evidence of a discretion to exclude admissible evidence was clearly established. It was "far too late in the day even to consider the argument that a judge has no such discretion."[33] Also Viscount Dilhorne referred to *Noor Mohamed* as expressing the view that such a discretion exists. Lord Hodson said that the statement of Lord du Parcq in *Noor Mohamed* was of general application.[34] Lord Guest assumed that the discretionary power "springs from the inherent power of the judge to control the trial before him and to see that justice is done in fairness to the accused."[35]

That there is a judicial discretion to exclude evidence admits of no doubt, but whether it is a discretion as exemplified by *Draper v. Jacklyn*, as involving a balancing of probative value against prejudicial effect, or by *Wray (No. 1)* as meaning that before the discretion to exclude evidence can be exercised the probative value must be trifling and the prejudicial effect must be grave, remains in some doubt. The doubt is a result of the fact that many authorities recognizing a discretion in terms much broader than in *Wray* were not referred to in that case, including the Supreme Court's own previous decision of *Draper v. Jacklyn*. The extent to which a judge has a discretion, be it to exclude admissible evidence or otherwise, is conditioned by one's view of the judge in the trial process.

III. Illegally Obtained Evidence

When considering the extent to which *Wray (No. 1)* has affected the discretion of the judge it is well to remember that the question before the court concerned illegally obtained evidence. The result of the case was the complete rejection of any move toward the establishment of an exclusionary rule for evidence obtained by questionable police practices. The discussion of the discretion could possibly be undercut by this fact.

It will be remembered that the Court of Appeal upheld the discretion of a trial judge to reject admissible evidence upon two grounds—one, that the admission of the evidence would be unjust or unfair to the accused, and two, that the admission was calculated to bring the administration of justice into disrepute. It is the latter ground which is of interest at this point. Mr. Chief Justice Cartwright, Mr. Justice Hall and Mr. Justice Spence dissented and held that a judge has a discretion to exclude evidence if the manner in which it was obtained was such that admission would bring the administration of justice into disrepute.[36] The basis for the dissent was the maxim *nemo tenetur seipsum accusare*. Mr. Chief Justice Cartwright accepted as the reason that the great weight of authority gives for the confession

[33] [1968] 2 All E.R. at 510.

[34] *Id.* at 516.

[35] *Id.* at 520.

[36] The Queen v. Wray, [1971] Sup. Ct. 272, at 285-86, [1970] 4 Can. Crim. Cas. 1, at 11-12 (1970).

rule is the danger that an involuntary confession may be untrue; but such a rationale runs counter to the *DeClercq* case which held that the issue on the voir dire to determine the voluntariness of a confession is not the truth of the statement, and if the accused admits that the confession is true this goes solely to credibility.[37] If the confession rule were based on the maxim *nemo tenetur seipsum accusare* then *DeClercq* could be rationalized with the confession rule; but the *St. Lawrence* rule cannot be rationalized by using the maxim and is based on the premise that the basis is the danger of untrustworthiness.[38] Spence spoke of the maxim "as the most basic principle in our criminal law."[39]

The problem is said to be one of balancing interests: the interest of the citizen to have the power of the state curbed to allow individual freedom against the interest of the state that the innocent should be protected and the guilty punished and removed from society so as to secure harmony and safety, and consequently that evidence of a crime should not be withheld from the courts on any formal ground.[40] Of course when one is speaking of interests, the problem of the characterization of the interest discussed as individual or social is always fraught with great difficulty; and whether the interests mentioned above which are to be balanced are individual versus social, or social versus social adds to the problem.

The majority in the Supreme Court merely stated that they were unaware of any judicial authority for the proposition that a trial judge has a discretion to exclude admissible evidence because in his opinion its admission would be calculated to bring the administration of justice into disrepute.[41] The refusal of the Supreme Court of Canada to establish, even in a discretionary form, the policy of excluding improperly obtained evidence must be considered in relation to the *Drybones*[42] case in which the Bill of Rights[43] appeared to take on a new vigour. If *Drybones* was thought to be establishing a trend then *Wray (No. 1)* could be considered to be a temporary block in that trend.

IV. HEARSAY

What the House of Lords declined to do in *Myers v. Director of Public Prosecutions*,[44] the Supreme Court of Canada did in *Ares v. Venner*,[45] that is, the creation of further exceptions to the hearsay rule without the necessity of appealing to the legislature to do it. The Supreme Court refused

[37] DeClercq v. The Queen, [1968] Sup. Ct. 902, [1969] 1 Can. Crim. Cas. 197 (1968).

[38] [1971] Sup. Ct. 272, at 280, [1970] 4 Can. Crim. Cas. 1, at 7 (1970).

[39] *Id.* at 305, [1970] 4 Can. Crim. Cas. at 27.

[40] *Id.* at 284, [1970] 4 Can. Crim. Cas. at 10 (citing Lord Cooper in Lawrie v. Muir, [1950] S.C. (J.) 19, at 26.).

[41] *Id.* at 287, [1970] 4 Can.Crim. Cas. at 12.

[42] Regina v. Drybones, [1970] Sup. Ct. 282, 9 D.L.R.3d 473 (1969).

[43] CAN. REV. STAT. Appendix III 457 (1970).

[44] [1964] 2 All E.R. 881, [1965] A.C. 1001 (1964).

[45] [1970] Sup. Ct. 608, 14 D.L.R.3d 4 (1970).

to resort to the view of the majority in *Meyers* that "this surely would be judicial legislation with a vengeance in an attempt to introduce reform of the law of evidence which, if needed, can properly be dealt with only by the legislature."[46] In the words of the Supreme Court what they would not do would be to say: "This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job".[47] Such a sentiment was repeated later in the same year by Mr. Justice Hall in *Piche v. The Queen*[48] in the Supreme Court.

The specific exception that was created by the Supreme Court of Canada was that "hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as prima facie proof of the facts stated therein."[49] Such an exception, it should be pointed out, already exists in some jurisdictions, having been brought into existence by legislation.[50]

The key question which remains is when will further exceptions be created and upon what basis will these further exceptions be made. The minority view expressed in *Myers* was adopted and followed by the Supreme Court and consequently reference to the judgments of Lord Donovan and Lord Pearce, which made up this minority, might possibly provide a clue. Lord Pearce[51] accepted the statement by Master of the Rolls Jessel in *Sugden v. Lord St. Leonards*[52] of the principle which underlies the exceptions to the hearsay rule as "the correct method of approach."[53] This part of Lord Pearce's judgment was reproduced by the Supreme Court.[54] Jessel said:

> Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases.[55]

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[46] [1964] 2 All E.R. at 893, [1965] A.C. at 1034 (per Lord Hodson).

[47] [1970] Sup. Ct. at 626, 14 D.L.R.3d at 16.

[48] [1971] Sup. Ct. 23, [1970] 4 Can. Crim. Cas. 27 (1970).

[49] [1970] Sup. Ct. at 626, 14 D.L.R.3d at 16.

[50] Ontario, The Evidence Act, ONT. REV. STAT. c. 151 § 36 (1970); British Columbia, Evidence Act, B.C. REV. STAT. c. 134 (1960), *amended* B.C. Stat. 1968 c. 16, § 43A; Nova Scotia, Evidence Act, N.S. REV. STAT. c. 94, § 22 (1967); Saskatchewan, The Saskatchewan Evidence Act, SASK. REV. STAT. c. 80 (1965), *amended by* Sask. Stat. 1969 c. 51, § 30A.

[51] Lord Donovan entirely agreed with the opinion of Lord Pearce.

[52] [1876] 1 P.D. 154, at 241.

[53] [1964] 2 All E.R. at 898, [1965] A.C. 1001, at 1041.

[54] [1970] Sup. Ct. at 626, 14 D.L.R.3d at 15.

[55] [1876] 1 P.D. at 241, *cited in* [1964] 2 All E.R. 881, at 898, and [1970] Sup. Ct. 608, at 624.

Lord Pearce also laid stress on the fact that the evidence which was being tendered was "the best evidence."[56] He referred to American authorities which had extended the exceptions to the hearsay rule of exclusion not only to those occasions on which the declarant is dead but also out of the jurisdiction or when it had become otherwise impossible to procure his testimony. Again this is an appeal to the use of "the best evidence rule." It is trite to say that the general consensus among judges and legal writers is that the best evidence rule is now restricted solely to documentary evidence. This "highly liberating principle,"[57] which was used by Lord Pearce to argue for admission of the evidence, had become soon after its creation a rule which excluded evidence to a greater extent that it allowed evidence to be admitted. From the principle that a litigant can tender the best evidence that he can find developed the principle that he must tender the best evidence that is available. The rule as stated by Lord Pearce differs greatly from the rule that was apparently abandoned in the nineteenth Century. This rule has been advanced as the main reason for the exclusion of hearsay, that is, hearsay is not the best evidence available, and now Lord Pearce was using it for the admission of hearsay in the case before him. As used by Lord Pearce it means that the court will accept the best evidence that the parties have in the particular case, but it will not exclude such evidence even though it is apparent that possibly there is better available. The word "best" is taken by Lord Pearce to mean the best that it is within the parties power to obtain in the circumstances of the case, and not the best in the sense that there is not, somewhere, some better evidence. For example, hearsay evidence could be admitted if the declarant is out of the jurisdiction and consequently out of the reach of the party offering the evidence; but if the party offering the declarant's statement has the declarant in court then such evidence could be excluded under the principle of the "best evidence."

Lord Pearce also made reference to the standard of admissibility which is, in general, either used or being advocated for use in administrative proceedings, that is, evidence which in the "eyes of any reasonable man" would prove the point sought to be proved.[58] Such a test would not only create further exceptions to the hearsay rule, but would in effect end the rule completely.

Returning to the principle enunciated by Jessel, it can readily be seen that it includes the "best evidence rule" as stated by Lord Pearce, when Jessel stated that hearsay should be admitted when "it is difficult to obtain other evidence." The word used was "difficult" and not impossible; but Jessel added that the further qualification that "the declarant must have had peculiar means of knowledge not possessed in ordinary cases"; if this means that the declarant must be qualified to have made the statement then this does not differ from the rational requirement of all witnesses. The other two requirements are similar to requirements found in other exceptions

[56] [1964] 2 All E.R. 881, at 895, 899, 900, [1965] A.C. 1001, at 1036, 1043, 1044.

[57] McCormick, Evidence 408 (1954).

[58] [1964] 2 All E.R. 881, at 895, [1965] A.C. 1001, at 1037.

to the hearsay rule which have been created when the declarant is dead, such as declarations against interest, and declarations in the course of duty, namely that the declarant must be disinterested, and the declaration must have been made *ante litem motam*, before dispute or litigation.

Lord Pearce stressed that in *Myers* the records were the result of modern business in which it would have been difficult to trace the creator of the report and even if that person were found he or she would probably not have remembered the particular entry which had been made. This point was made by Mr. Justice O'Bryne, the trial judge in *Ares v. Venner*.

Since *Ares v. Venner* was a civil case there might be some doubt as to its impact on decisions in criminal cases, and since evidentiary questions are becoming more and more the preserve of criminal procedure this doubt has a great effect on the law of evidence. It is suggested that the doubt can be removed to some degree by the fact that *Myers* was a criminal case and the adoption of the judgments in *Myers* would seem to imply the adoption of the reasons in regard to the issue before the court, that is, a criminal action.

It now becomes the difficult task of attempting to guess as to when further exceptions will be created. It is possible from *Myers* and *Ares v. Venner* to formulate several possibilities:

1. If judge-made law can be restated by the court without resorting to the legislature then it could be possible to abolish the rule excluding hearsay outright and consequently no longer debate over whether to create exceptions. Merely upon stating such a possibility, no matter how appealing, one has a difficult time envisaging it occuring, but it appears to be possible.

2. Evidence upon which a reasonable man would act is very close to number 1, but would allow the exclusion of some hearsay, particularly that of low probative value. It is probable that Lord Pearce was using this argument only to fortify his conclusion and he did not intend to formulate it as a definite possibility.

3. The best evidence which is available to the parties is to be admitted. This formulation of the hearsay rule would allow the admission of such evidence if the declarant was unavailable to the party offering his declaration without the impossibility of the declarant's attendance at the trial due to death.

4. The principle as laid down by Jessel, which includes the criterion that the declarant be uninterested and that he made his declaration *ante litem motam*, was "the correct method of approach" according to Lord Pearce and was included in the extract from his speech which was reproduced in the Supreme Court of Canada decision. This latter fact certainly adds strength to the possibility that not only Lord Pearce but also the judges of the Supreme Court of Canada have adopted this principle. The

criteria for the creation of further exceptions are that the declarant is unavailable as a witness, and the declaration is not self-serving, or made after the dispute has arisen, and finally, the witness has the knowledge required upon which to base the declaration.

O'Byrne, at the trial of *Ares v. Venner*, relied upon Wigmore in coming to his decision to admit the nurses' records.[59] Following Wigmore, exceptions to the hearsay rule have been, and more important to this discussion, could be created when necessity demands and when there is a circumstantial probability of trustworthiness about the particular declaration. It does not take much effort to fulfil these requirements by reference to the principle of Jessel.

5. The exception in the case was that hospital records made *contemporaneously* by someone having a *personal knowledge* of the matters then being recorded and under a *duty* to make the entry or record are admissible as an exception to the hearsay rule. This possibility is the narrowest. There is no doubt that this is now an exception to the hearsay rule in Alberta. In other provinces it in fact has been made an exception by legislation, but in wider terms.[60] The legislation makes a record which was created in the usual and ordinary course of any business admissible if it was the usual and ordinary course of the business to make such a record and it was made at the time of the event recorded or within a reasonable time after. There was, thusly, a clear indication to the Supreme Court that such an exception could be made without bringing about a major change in the law of evidence in Canada. In *Myers* by changing "hospital records" to "business records" in the above exception one would state the exception sought to be created in that case.

V. CONFESSIONS

A. Threats and Benefits

The law appears to be clear that a confession is inadmissible at a trial unless the Crown proves that it is voluntarily given. This test was laid down in *Ibrahim v. The King*,[61] and voluntary means that it has not been obtained from the accused "by fear of prejudice or hope of advantage exercised or held out by a person in authority." While the statement of the rule is easy enough, its application is not.

The sub-heading of this section is "Threats and Benefits," which is drawn from Lord Sumner's statement of the rule, that is, "fear of prejudice or hope of advantage"; but some recent cases have expanded on this criterion and have spoken of "inducements" or "oppressiveness." In *Regina v. McLeod*,[62] the accused, along with two other persons, was charged with

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[59] 6 WIGMORE, EVIDENCE § 1707 (3d ed. 1940).

[60] *Supra* note 50.

[61] [1914] A.C. 599, at 609 (P.C.).

[62] 5 Can. Crim. R. (n.s.) 101 (Ont. 1968).

robbery. The victim of the robbery had been knocked unconscious, but had not been seriously injured. The police, when questioning the accused, told her that the victim was still unconscious, in hospital, and on the critical list. The accused testified that when she was told this story she became frightened, started to cry and then made a statement. The Ontario Court of Appeal held that the Crown had not discharged the burden of proof resting upon it to prove that the confession was voluntary. Mr. Justice Laskin added that the issue in each case was whether the questioning technique which the authorities used was such as "to rouse hope of advantage or fear or prejudice, or by their oppressiveness...put in doubt at least whether any ensuing inculpatory statement has been properly elicited."[63] In *McLeod* it was held that the lies had induced the incriminating statement. The term "oppressivensss" used by Laskin was taken from the English Judges' Rules.

In *Regina v. Towler*[64] the British Columbia Court of Appeal used the "strict" rule of *Ibrahim* to hold that a confession obtained by a trick was voluntary. While in jail two policemen succeeded in making the accused believe that they were criminals of experience and interested him in joining them in future criminal activities once they were released. The result was that the accused boasted to them of the crime which he was suspected of having committed and in effect confessed. The court had no difficulty in holding that there were no threats or hope of advantage held out in the sense used in *Ibrahim*, and since the accused did not know that his fellow "convicts" were people in authority then they were not to be classed as such.

In *Regina v. Siniarski*[65] the same use of "voluntary" was made. This was not a case of the police using a trick, but the accused had been placed in the "hole" after being accused of non-capital murder inside a prison. The accused stated at the trial that he had made the statement "to get out of the hole...I would have signed anything to get out of there." The statement was held to be voluntary. The Court said that "the motivation for the statement came from within the appellant himself and did not emanate from anyone in authority."[66]

A case which might be called an extreme example of a decision holding that a confession was voluntary by following *Ibrahim* is *Lamoureux v. The Queen*.[67] The accused was illegally detained for three days by the police,

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[63] *Id.* at 104. *See also* R. v. Albrecht, 49 Can. Crim. R. 314, at 321 (N.B. Sup. Ct. 1965), per Limerick, J.A.: "If a statement is clearly shown by the Crown to have been given by an accused voluntarily, that is, without any inducement having been held out to such accused by a person in authority by fear of prejudice or hope of favour, or by oppression, the court should admit the statement."

[64] 65 W.W.R. 549, [1969] 2 Can. Crim. Cas. 335 (B.C. 1968).

[65] [1969] 3 Can. Crim. Cas. 228 (Sask. 1968).

[66] *Id.* at 231.

[67] Le Devoir, 16 juillet 1969; The relevant French text was "Après trois jours de détention illégale, après avoir été incapable d'accepter toute nourriture pendant ces trois jours, avoir, à cause d'un ulcère d'estomac dont il souffrait, régurgité une matière abondante et noire, s'en

and without legal counsel. During this period he was unable to eat, and he was vomiting a considerable quantity of a black substance. The detective-sergeant refused to believe and accept statements made by the accused during this time, and finally the accused confessed. The Court of Appeal of Quebec unanimously held that the confession had been made voluntarily as understood from *Ibrahim*. From what appears to be a literal application of the rule one can turn to a case such as *Regina v. McGuire*[68] in which Mr. Justice Galligan, of the Ontario High Court, spoke of the creation of an atmosphere of compulsion by the police which induced a confession from an accused person. The factors which combined to create the atmosphere of compulsion to talk were "the apprehension of the accused, the placing in custody, keeping him locked up in a cell, the absence of clothes and shoes for many hours through the day, the interrogation, the inducement or the possible inducement with respect to the request for a psychiatrist, the lack of caution."[69]

It has always been difficult if not impossible to rationalize the cases involving the issue of the admissibility of a confession and the recent cases mentioned above are no exception. In the leading case, *Ibrahim v. The King*, Lord Sumner stated what could be repeated today and which would remain equally valid:

> The...law is still unsettled, strange as it may seem since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it....Others less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements....[70]

Lord Sumner spoke of a discretion in the judges to reject a confession and in several recent cases a discretion has been referred to. All of these cases were decided prior to *Wray (No. 1)* and consequently the question of a discretion may now have to be rethought, but as has been suggested the discussion of discretion in *Wray (No. 1)* cannot be divorced from the question of illegally obtained evidence. The British Columbia Court of Appeal in *Regina v. Frank*,[71] speaking through Mr. Chief Justice Davey, spoke of "the broad discretion that a trial judge possesses"[72] when the issue of voluntariness is involved and the confession was "obtained unfairly or by a trick." Again in *Regina v. Oldham*,[73] the British Columbia Court of Appeal referred to the principle enunciated in *Noor Mohamed* as giving the trial

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être trouvé considérablement affaibli et parce que, après ces trois jours d'épreuve, le sergent-détective, refusant de croire et d'accepter comme vraies les explications 'vraies' qu'il lui offrait...."

[68] 2 Can. Crim. Cas.2d 143 (Ont. High Ct. 1970).

[69] *Id.* at 152.

[70] [1914] A.C. at 614.

[71] 8 Can. Crim. R. (n.s.) 108 (B.C. 1969). *See also* R. v. Demers, 13 Can. Crim. R. (n.s.) 338 (Que. Q.B. 1970); R. v. Wilson, 11 Can. Crim. R. (n.s.) 11 (B.C. 1970).

[72] *Id.* at 112.

[73] 11 Can. Crim. R. (n.s.) 204 (1970).

judge power to exclude a confession if "it would be unjust to admit [it]", as it might be "gravely prejudicial to the accused."[74] The uncertainty with which the rule in *Ibrahim* is applied may give the appearance of the exercise of a discretion.

B. Exculpatory or Inculpatory

Lord Sumner, in *Ibrahim*, referred to "no statement by an accused," and this had been the definition of a confession adopted by the vast majority of Canadian courts. In *Regina v. Bird* the definition was: any statement made by an accused to a person in authority which tends to prove his guilt is in law, a confession."[75] There was some uncertainty whether exculpatory statements were included within the definition of a confession and as such whether they needed to be proved to be voluntary.[76]

There were two lines of cases—the first held that if a statement was exculpatory when made then it remained so, and the Crown need not prove it to be voluntary.[77] In the second line of cases the statement was considered at the time of the trial and not when made. If at the time of the trial the statement of an accused connects him with the crime charged, by implication of guilt, or by being at all inculpatory, then it must be proved voluntary by the Crown.[78] Some cases use as a criterion whether or not the statement is tendered by the Crown.[79]

Some courts have recognized that a denial made by an accused, and as such it would be clearly exculpatory when made, would operate to his prejudice if proved false and offered in evidence by the Crown. Such a statement has been held to be a confession.[80]

The question which arises from these cases, from both lines, is basically one of definition, that is: What is an inculpatory statement? In the second line of cases an inculpatory statement is one from which an inference can be made that links the accused with the crime charged. The first line of cases obviously places a more restricted meaning on the words "inculpatory statement." In 1970, the Supreme Court of Canada was faced with the problem of choosing these two lines when an appeal was taken by the accused from the decision of the Manitoba Court of Appeal in *Regina v. Piche*.[81]

In *Piche v. The Queen*,[82] the accused was charged with the non-capital murder of her common-law husband. She admitted that she fired the rifle

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[74] *Id.* at 208.

[75] [1967] 1 Can. Crim. Cas. 33, at 43 (Sask. 1966)

[76] *See* Regina v. Black, 49 Can. Crim. R. 357, at 384 (Ont. 1965).

[77] This line traces its lineage back to the Alberta case of The King v. Hurd, 21 Can. Crim. Cas. 98, 10 D.L.R. 475 (Alta. Sup. Ct. 1913).

[78] The leading case in this line is the Nova Scotia case of The King v. Hope Young, 38 N.S. 427, 10 Can. Crim. Cas. 466 (N.S. Sup. Ct. 1905).

[79] *See* Regina v. Adams, 117 Can. Crim. Cas. 93, at 95 (N.S. Sup. Ct. 1956).

[80] *See* Rex. v. Sileski, 63 D.L.R. 146, 36 Can. Crim. Cas. 368 (Que. 1921).

[81] 69 W.W.R. 336, [1970] 1 Can. Crim. Cas. 257 (Man. 1969).

[82] [1971] Sup. Ct. 23, [1970] 4 Can. Crim. Cas. 27 (1970).

which had killed her husband, but at the trial she testified that she had decided to commit suicide due to depression and being dispirited at the situation in which she found herself; her relationship with the deceased had been stormy and quarrelsome. Before shooting herself, she decided to give her sleeping husband a farewell kiss, but as she walked toward him the gun went off. She further testifed that in a state of bewilderment and shock she had put the rifle back where she had found it, and then telephoned her mother saying that she and the child were coming to spend the night. Her defence was that the death was the result of an accident.

The Crown prosecutor attempted to place in evidence a lengthy written statement given by the accused to the police the day following the shooting. In the statement she related the fact that she had not heard of the death until after she reached her mother's house, and that her husband had been alive when she left.

At a *voir dire* the trial judge held that the statement was inculpatory and not made voluntarily. It was therefore inadmissible and never reached the jury. The wife was acquitted, and the Crown appealed on the main ground that the statement was exculpatory and the trial judge erred in ruling that it was inculpatory, and that the Crown had to prove that it had been made voluntarily.

The Manitoba Court of Appeal held that the statement to the police was exculpatory. There had been, in the words of Mr. Justic Monnin, "No admission of guilt or any essential element of the count of non-capital murder."[83] Since it was exculpatory there was therefore no necessity for a *voir dire*, and relevancy was the only test. It was the statement at the time it was made that was to be considered.

The Supreme Court of Canada rejected the distinction drawn by Wigmore between "confessions" and "admissions" and held that "the admission in evidence of all statements made by an accused to persons in authority, whether inculpatory or exculpatory, is governed by the same rule."[84] Wigmore's approach had been that a confession was "an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or some essential part of it."[85] Wigmore was of the opinion that admissions, which were not confessions, were outside the scope of the rules affecting the use of confessions.[86] Only Mr. Chief Justice Cartwright attempted to explain expressly why the "confession rule" should be applied to statements which were not an admission of guilt but rather were a denial. In his opinion it would "involve a strange method of reasoning to say that an involuntary statement harmful to the accused's defence shall be excluded because of the danger of its being untrue but that

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[83] 69 W.W.R. at 354, [1970] 1 Can. Crim. Cas. at 273.

[84] [1971] Sup. Ct. at 36, [1970] 4 Can. Crim. Cas. at 37, (per Hall, J. with Abbott, Martland, Ritchie, Spence and Pigeon, J.J., concurring). *See also* Cartwright, C.J.C., at 28-29.

[85] 3 WIGMORE, EVIDENCE § 821 (3d ed. 1940).

[86] *Id.* at 243.

a harmful involuntary statement, of which there is not merely a danger of its being false but which the prosecution asserts to be false, should be admitted merely because, considered in isolation, it is on its face exculpatory."[87]

Mr. Chief Justice Cartwright appeared to reject "truthfulness" as the basis of the confession rule and stated as its basis the maxim *nemo tenetur seipsum accusare*. Consequently, the right of the accused would, as Cartwright stated, be "equally violated whether, when he is coerced into making a statement against his will, what he says is on its face inculpatory or exculpatory."[88] The problem of what is or is not an inculpatory statement was faced by Cartwright and he made the point that it was "difficult to see how the prosecution can consistently urge that a statement forced from an accused is in reality exculpatory while at the same time asserting that its exclusion has resulted in the acquittal of the accused and that its admission might well have resulted in conviction."[89] The rule urged by the Crown that a statement which was exculpatory on its face need not be subject to a *voir dire* was "an anomaly which should be rejected from our law."[90]

An important consideration which must be taken into account is the purpose for which the Crown is introducing the prior statement of the accused as evidence at the trial. If there is a direct admission of guilt or of a material fact then the purpose is readily apparent, while if the statement put forward was totally exculpatory when made, but due to the introduction of other evidence it has lost this quality at the time it is put forward then the purpose is not as clear. Two purposes can be imagined; first, to affect the credibility of the accused, and second, to have the inference of guilt drawn by the jury from the conflicting statements. The inference could be that an innocent person need not fabricate stories and therefore the fabrication can point to guilt. It is in reality an exculpatory statement, but the fact that the accused made it is inculpatory.

C. *Volunteered Statements*

The holding in *Piche* that "all statements made by an accused to persons in authority, whether inculpatory or exculpatory, are governed by the same rule," appears to have been qualified by the Supreme Court of Canada in *Regina v. John*.[91]

In *John* the accused had been convicted of manslaughter in the death of a woman he had been living with. She had last been seen alive on August 22, 1967, when the accused took her from her sister's home. The sister had

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[87] [1971] Sup. Ct. at 26, [1970] 4 Can. Crim. Cas. at 29.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 27, [1970] 4 Can. Crim. Cas. at 30. *See also* Chief Justice Cartwright's dissenting judgment in The Queen v. Wray, [1971] Sup. Ct. 272, at 279, [1970] 4 Can. Crim. Cas. 1, at 6 (1970).

[91] 2 Can. Crim. Cas.2d 157, 15 Can. Crim. R. (n.s.) 257 (1970).

found the deceased in the bushes outside the house and had taken her in. When found by her sister she appeared to be in some fear. The police began an investigation into the disappearance of the woman and during their investigation they questioned the accused. Later, on September 7, the accused had become a definite suspect and at that time he made a statement to the effect that he had last seen the missing woman on the August 25. In the statement he repeated much of what he had earlier told the police. The accused was arrested on the September 7. Police interviews were conducted with the accused on the September 8, 9, 10, 11 and 14. On September .14, the notes of the interview of September 7 were handed to the accused and he tore them up saying at the time that they were not right. On the September 14 the accused drove with the police to a number of places and eventually to a place where the body of the deceased was found wrapped in a blanket inside a canvas covering and trussed up with rope.

At the trial, the Crown tendered the statement made by the accused as evidence and it was admitted without a *voir dire.* The trial had taken place prior to the decision of the Supreme Court in *Piche* and the trial judge had held that since the statements were exculpatory they were therefore admissible without the necessity of having a *voir dire.* The absence of a *voir dire* was one of the grounds of appeal to the Court of Appeal for the Yukon Territory and finally the Supreme Court of Canada. The decision of the Supreme Court is difficult to follow on this point. Messrs. Justices Hall, Spence, and Laskin held, in dissenting judgments, that *Piche* applied and "the failure of the Crown to establish the voluntariness of the accused's statements, albeit they were exculpatory, warrants the quashing of the conviction and a direction for a new trial."[92] Mr. Justice Pigeon held that this was a proper case to apply the provisions of section 592(1)(*b*)(iii) and to dismiss the appeal "notwithstanding what was decided in *Piche v. The Queen.*"[93] Mr. Justice Ritchie, Mr. Chief Justice Fauteux, Mr. Justice Abbott, Messrs. Justices Martland and Judson, concurring, likewise would have applied section 592(1)(*b*)(iii) but found it unnecessary. They held the statement to be admissible even though there had not been a *voir dire* since "it was volunteered by the appellant" originally and then repeated on the September 7.[94] The question of the requirement of a determination of voluntariness did not, in the opinion of Ritchie, have to be decided, since whether the statement was admissible or not the admissibility of "the all-important evidence that he led the police officers to the place where the body of Graffie George was concealed" was unaffected.

The *Queen v. Wray* and *St. Lawrence* cases would apply.

Ritchie pointed out that whether a statement is inculpatory or exculpatory and whether or not it is voluntary are two entirely different questions. He went on to say that from *Piche* it can be said that if a state-

[92] *Id.* at 183, 15 Can. Crim. R. (n.s.) at 281 (Laskin, J.).
[93] *Id.* at 178, 15 Can. Crim. R. (n.s.) at 276.
[94] *Id.* at 168, 15 Can. Crim. R. (n.s.) at 266.

ment made by an accused was not voluntarily made then it is excluded. From this statement it can be concluded that a volunteered statement is voluntary without the necessity of *voir dire*. The volunteered statement in *John* was made before the accused was charged and was made during the normal police investigation phase.

D. Voir Dire

Whenever the Crown seeks to introduce in evidence a confession, a *voir dire* is held during which the Crown must show that the statement was voluntary. The issue on the *voir dire* is as to the voluntariness of the statement and not as to its truth. Since this is the issue the truth or falsity of the statement would appear to be irrelevant, but since *Rex v. Hammond*[95]—which held that the question put to the accused as to whether the statement was true and the answer that it was true went to the accused's credibility and was admissible on that issue—there has been a feeling of a certain uneasiness. *Hammond* was approved by the Ontario Court of Appeal in *Regina v. La Plante*,[96] but until *DeClercq v. The Queen*[97] the question had not reached the Supreme Court of Canada. In *DeClercq* the Supreme Court agreed with *Hammond* and held that the truth or falsity of the statement is not necessarily irrelevant to the issue on the *voire dire*. "[T]he admitted truth or the alleged falsity of the statement could be a relevant factor in deciding whether or not [the judge] would accept the evidence of the accused regarding [the] pressure [exerted by the person in authority]."[98] "The inquiry as to its truth was related solely to the weight to be given to the evidence on the issue as to whether or not it was voluntary."[99] Mr. Chief Justice Cartwright was in the majority of the Court but rendered a separate judgment in which he further added that although "an assertion by the accused that the statement is untrue may logically have a bearing in determining whether or not it was voluntary," yet "the crown could not lead evidence...,the sole object of which was to show that the statement given was true."[100] It was Cartwright's opinion that the accused should not be asked whether his statement was true or false, and if such a question is put the judge should exercise his discretion to exclude the evidence *Noor Mohamed* was cited as authority for the existence of the discretionary power and since *Wray (No. 1)* this opinion must be held to be in question.

Messrs. Justices Hall, Spence and Pigeon dissented. Hall maintained that the truth of the statement tendered in evidence was relevant only to the issue of guilt or innocence of the accused and that it was a *petitio principii* to determine the guilt of an accused in order to decide whether to admit

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[95] 28 Crim. App. R. 84 (1941).
[96] [1958] Ont. W.N. 80 (1957).
[97] [1968] Sup. Ct. 902, [1969] 1 Can. Crim. Cas. 197 (1968).
[98] *Id.* at 911, [1969] 1 Can. Crim. Cas. at 205 (Martland, J.).
[99] *Id.* at 912, [1969] 1 Can. Crim. Cas. at 205.
[100] *Id.* at 906, [1969] 1 Can. Crim. Cas. at 200.

the confession as evidence of guilt.[101] The procedure adopted by the trial judge was an infringement on the maxim *nemo tenetur seipsum accusare.*[102]

An important issue arose with respect to the *voir dire* in *Regina v. Dietrich.*[103] The question was whether the voir dire could be dispensed with if the accused admitted that the statement which he had made and which the Crown was offering in evidence was voluntary. In *Dietrich* the Ontario Court of Appeal held that it would be unnecessary for a trial judge to embark upon a voir dire if the accused, either through himself or his counsel, agreed that the statement was obtained by the police voluntarily. The reason given for so deciding was that "it is proper and desirable for the accused or his counsel to expedite a trial by admitting that a confession was voluntary in the legal sense."[104] The law has provided safeguards for an accused against the admission of a confession which has not been voluntarily given, but the accused is thus able to waive the safeguard.[105] By holding a voir dire after such an admission by an accused would in the opinion of the Court of Appeal, endanger the administration of justice by possibly bringing it into disrepute.[106]

The issue which is thus presented involves different views of the "confession rule." Is it a rule which the accused can invoke at his pleasure or is it rather a rule of criminal procedure and evidence which has been established to protect an accused even from himself? Does the rule exist to serve in some way as a means of keeping police practices within bounds? The rule as enunciated by the Court of Appeal recognizes the possibility of pressures being brought upon an accused which force him to "confess," but does not recognize pressures, whether the same or different, which could force him to "confess" as to the voluntariness of the confession.

Another issue which arose from the *Dietrich* case was whether a plea of guilty taken at an earlier trial could be used at a new trial as an admission. The court resolved the issue by holding that the plea was admissible as a statement against self-interest, and as such was assumed to be voluntary. The defence argued that the admission of such evidence would have the result of forcing the accused to testify in order to attempt to explain the plea of guilty. This was held not to be "sufficient reason to refuse admission."[107]

VI. Opinion Evidence

A. Expert Psychiatric Opinion

Expert opinion evidence has often come under attack if the expert witness testifies on the very issue which is before the court. If the issue

[101] *Id.* at 922, [1969] 1 Can. Crim. Cas. at 217. *See also* Pigeon, J., *id.* at 928-29, [1969] 1 Can. Crim. Cas. at 224.

[102] *Id.* at 923, [1969] 1 Can. Crim. Cas. at 218.

[103] 11 Can. Crim. R. (n.s.) 22 (Ont. 1970).

[104] *Id.* at 32.

[105] *Id.*

[106] *Id.* at 34.

[107] *Id.* at 30.

which the court, either judge or jury, must decide is the intent of an accused then it has been said that the expert cannot give his opinion as to the existence of that intent. The witness, it is argued, would be usurping the function of the jury. But in 1961, the Supreme Court of Canada approved the reasons for judgment of Mr. Justice Aylesworth in the Ontario Court of Appeal in *Regina v. Fisher*.[108] Aylesworth acknowledged that the opinion evidence was received upon the very issue which the Court had to decide, and then framed the governing principle as: "expert opinion evidence will be admitted where it will be helpful to the jury in their deliberations and it will be excluded only where the jury can as easily draw the necessary inferences without it. When the latter is the situation, the intended opinion evidence is superfluous and its admission would only involve an unnecessary addition to the testimony placed before the jury."[109] The rejection of such evidence because it "usurped the function of the jury" or would be "an opinion upon the very point or issue which the jury had to decide" was expressly discarded as grounds for exclusion.[110]

The *Fisher* case involved a charge of murder. The accused maintained that because he had consumed a large quantity of beer he could not remember what had happened on the night he was supposed to have killed a woman. The killing of the woman by the accused was accepted by the court as proved, which left as the sole question the intent of the accused which would govern whether the death would result in a conviction for manslaughter or for murder. The accused maintained that he lacked the capacity to form the necessary intent to kill. Aylesworth said: "The question of appellant's capacity, of course, was for the jury, as was the question of his actual intent."[111] The Crown called as a witness a psychiatrist who testified that given the hypothetical facts which the Crown presented to him it was his opinion that regardless of what quantity of beer the appellant actually may have consumed upon the evening in question the appellant's actions, as put to the doctor, were such as to portray a capacity to form the intent to kill. Thus the test to be applied when the admissibility of expert psychiatric evidence is challenged appears to be that of "helpfulness" or "superfluousness." In *Fisher*, Mr. Justice Laidlaw, with Mr. Chief Justice Gale concurring, dissented and one of the points of departure was that the medical opinion was "not only worthless as an aid to the jury, but was misleading to such an extent as to create substantial prejudice to the appellant."[112] The worthlessness was caused by the manner in which the facts were presented to the witness; also, the jury, in the opinion of Laidlaw was just as capable as the witness of forming a correct judgment from the facts given him. Although the rule relating to expert opinion evidence can be easily framed in terms of "helpfulness" it can be seen that the application of the rule is not easy. Since

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[108] [1961] Ont. W.N. 94, 34 Can. Crim. R. 320 (1961); *aff'd*, [1961] Sup. Ct. 535.

[109] *Id.* at 94-95, 34 Can. Crim. R. at 340-41.

[110] *Id.* at 95, 34 Can. Crim. R. at 341.

[111] *Id.* at 96, 34 Can. Crim. R. at 342.

[112] *Id.* at 101, 34 Can. Crim. R. at 327-28.

the Supreme Court of Canada seemed to adopt the "helpfulness" test in *Fisher* it was surprising when they appeared to abandon it in 1969 in *Lupien*.[113]

In *Lupien* the accused was convicted of attempting to commit an act of gross indecency. The facts of the case were that the accused was observed in the company of a person dressed and made up as a woman. The two registered into a hotel under a false name and when the police entered the hotel room they found both the accused and the other person, who was a female impersonator, naked on a bed. The impersonator still wore a female wig and heavy facial make-up. The accused's head was lying a very short distance from the female impersonator's genital organs. At the trial the accused maintained that he had thought that the man was a woman, and that he had arranged to go to the hotel for normal hetero-sexual commerce, and when they arrived in the room he had fallen asleep because of utter weariness and exhaustion, aggravated by liquor which he had consumed a short while before. For the defence a psychiatrist was called to give expert testimony to the effect that the accused had a certain type of defence mechanism that made him react violently to any homosexual overtone, and consequently the jury was asked to draw the conclusion from this testimony that the accused must have believed the person to be a woman. At the trial the evidence was excluded. In the British Columbia Court of Appeal a new trial was ordered by a majority of two to one.[114] The majority held that such evidence was admissible to show capacity and state of mind. Mr. Justice Bull followed *Fisher* and relied on the principle of "helpfulness" to admit the evidence;[115] but Mr. Chief Justice Davey, in a dissenting judgment, returned to the argument which apparently *Fisher* had laid to rest and stated that such evidence should be excluded since "it comes too close to the very thing the jury had to find on the whole of the evidence."[116] Davey feared that because of the qualifications of the witness the jury might accept such testimony without question and turn over their function to the witness.

As with *Fisher* an appeal was taken to the Supreme Court of Canada but the result of the appeal was quite different. Of the five judges who heard the appeal, two held that the evidence was inadmisible and would have restored the conviction; two held that the evidence was admissible and would have dismissed the appeal; the fifth, Mr. Justice Hall held that the evidence was admissible, but applied the provisions of section 592(1)(*b*)(iii) of the Criminal Code which allows the dismissal of an appeal if the court is of the opinion that even with the rejection of the evidence there had been no substantial wrong or miscarriage of justice.[117] Hall restored the conviction since "the evidence against the accused was overwhelming."[118]

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[113] [1970] Sup. Ct. 263, 9 Can. Crim. R. (n.s.) 165 (1969).

[114] Lupien v. Regina, 64 W.W.R. 721, [1969] 1 Can. Crim. Cas. 32 (B.C. 1968).

[115] *Id.* at 729, [1969] 1 Can. Crim. Cas. at 40.

[116] *Id.* at 724, [1969] 1 Can. Crim. Cas. at 36.

[117] Can. Stat. 1953-54 c. 51, § 592(1)(*b*)(iii), *as amended*, CAN. REV. STAT. c. C-34, § 613 (1970).

[118] [1970] Sup. Ct. at 281, 9 Can. Crim. R. (n.s.) at 181.

Mr. Justice Martland, with Mr. Justice Judson concurring, accepted the arguments of Davey and then created exceptions to the rule that evidence of an expert which goes to the very issue which the jury (or judge) must decide is to be excluded. The exceptions which were created explained two previous cases of the Court, *Fisher*, which was discussed above, and *Wilband v. The Queen.*[119] In *Wilband* the Supreme Court considered the evidence of two psychiatrists heard on the issue of whether a person was a dangerous sexual offender under section 661.[120] Martland stated that by that section the court is required to hear evidence of at least two psychiatrists; and the issue is not as to guilt in respect of a crime, but rather the Court is being asked to forecast the likelihood, in the future, of a particular form of behaviour.

From *Fisher* the exception was evidence which goes to the question of capacity to form an intent. In the opinion of Martland, the testimony in *Lupien* was on the question of the intent itself and not the capacity to form the intent.[121] Also included within this exception is the issue of mental capacity whenever the plea of insanity is made.

Mr. Justice Ritchie, with Mr. Justice Spence concurring, was of the opinion that the testimony of the psychiatrist was introduced on the issue of the capacity to form an intent,[122] and as such it would have fallen within one of the exceptions created by Martland. Ritchie also pointed out that the evidence was character evidence which was tendered to have the court say that the accused had a disinclination to commit gross indecency. It was quickly noticed that if the evidence was allowed in for that purpose then it might also be tendered in other cases, for example, in a trial for murder the accused might call evidence of a psychiatrist that he was of such a makeup emotionally that he could not commit murder. Consequently the evidence in dispute in the case was ruled admissible only in cases in which there were crimes involving homosexuality. The *Thompson* case[123] was cited which described homosexuals as "a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity."[124] They were not "ordinary men gone wrong."[125] As well as the above reasons the reasons for judgment rendered by Bull in the Court of Appeal were adopted. Since Bull used the test of "helpfulness" there appears at first sight to be a certain conflict between the reasons given by Ritchie expressly and those which he adopted. Hall stressed that it is psychological factors which go toward creating a person with homosexual tendencies, and consequently evidence of psychiatrists is particularly important and relevant. If relevant, then the evidence was admissible.

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[119] [1967] Sup. Ct. 14, 2 Can. Crim. R. (n.s.) 29 (1966).

[120] CRIM. CODE, Can. Stat. 1953-54 c. 51, § 661, *as amended*, CAN. REV. STAT. c. C-34, § 689 (1970).

[121] [1970] Sup. Ct. 263, at 268, 9 Can. Crim. R. (n.s.) at 169.

[122] *Id.* at 275, 9 Can. Crim. R. (n.s.) at 176.

[123] Thompson v. The King, [1918] A.C. 221, 26 Cox. Crim. Cas. 189 (H.L.).

[124] *Id.* at 235, 26 Cox Crim. Cas. at 199 (Lord Sumner).

[125] [1970] Sup. Ct. at 278-79, 9 Crim. Cas. R. (n.s.) at 179.

The apparently clear statement of the rule in *Fisher* has been clouded over by the decision in *Lupien*, and to add to the uncertainty two of the three judges making up the majority of the Court in *Lupien* as to the disposition of the appeal were in the minority on the evidence question. It is possible that the adoption by Ritchie of Bull's judgment, combined with Hall's judgment, maintains the rule in *Fisher*, but once again it appears that one must await the next decision of the Court.

B. Public Opinion Surveys

Another form of opinion evidence which has raised questions in the courts in recent years is that of opinion surveys. *Regina v. Times Square Cinema Ltd.*[126] involved a charge of "knowingly without lawful justification or excuse exposed to public view an obscene thing, to wit: a videotape entitled 'Vixen', contrary to the Criminal Code." The defence offered in evidence two opinion surveys on the issue of community standards. As well as the surveys the defence offered witnesses who were to testify as experts and give their opinion as to community standards based upon the surveys. The Ontario Court of Appeal was of the opinion that the surveys in question had not been properly conducted and were therefore inadmissible. One survey was taken of those people who attended free showings of the film. The free showings were advertised in Toronto newspapers and the public was invited to attend and give their opinion of the film. The questions which the viewers were to answer were related to their reaction to films containing sex. The second survey was conducted by sending direct invitations to persons chosen at random from the telephone book to attend the film and give their opinion in the form of a questionnaire upon leaving the theatre.

Mr. Chief Justice Gale gave as his reasons for finding that the surveys were unsatisfactory and inconclusive that "the samples actually taken were far too few to represent any universe other than the one which would include only those paying customers who went to see the picture."[127] He specifically reserved the question of the admissibility of public opinion polls as evidence per se until it was squarely before him in an appropriate case.[128] Mr. Justice McGillivray rejected the survey because it did not attempt to survey people beyond the local area, and the jury "requires little assistance in arriving at the standard of tolerance in its own area";[129] and he was of the opinion that "subject to strict limits, expert evidence based upon a poll might be allowed...to go before a jury."[130] Mr. Justice Jessup held that experts may testify as to the community standard of tolerance and therefore they must be permitted to state the premises of their opinion, that is, the opinion poll. But the persons who actually put the questions to the public should be before the court so that their credibility can be assessed.

[126] 4 Can. Crim. Cas.2d 229 (Ont. 1971).
[127] *Id.* at 232.
[128] *Id.* at 233.
[129] *Id.* at 236.
[130] *Id.* at 235.

In the particular case such persons were not called as witnesses and consequently the survey was inadmissible. Jessup added what in his opinion should be considered when a survey is offered in evidence: "whether public opinion polling is, in fact, a science, whether approved statistical methods were used, whether adequate social research techniques and interviews were employed and whether the questions asked were scientifically evocative of a fair sampling of opinion. A further matter going to the weight of the expert's opinion is the breadth of the community reflected in the survey."[131]

The Manitoba Court of Appeal had a year earlier considered such surveys in *Regina v. Prairie Schooner News Ltd.*[132] The accused had been charged with having obscene written matter in his possession for the purpose of publication, distribution or circulation, and 237 paperback books, and twenty-nine magazines were seized. In the words of Mr. Justice Dickson, "The survey consisted of taking a page from the transcript of the preliminary hearing on the present charges, attaching it to a sheet on which a number of questions appeared and presenting this material to an adult evening class at the University of Winnipeg and to 25 persons employed at the Canadian National Railway shops in the City of Transcona."[133] It had been conducted by a graduate of law at the University of Manitoba, and a professor of sociology and criminology at the University of Winnipeg.

Dickson surveyed American cases and concluded that "no general statement of principle has emerged," although the tendency had been of late to admit such evidence, either as an exception to the hearsay rule, or because it was not hearsay at all, or with no comment.[134] Dickson accepted the admissibility of such evidence: "The Court should not be denied the benefit of evidence, scientifically obtained in accordance with accepted sampling procedure, by those who are expert in the field of opinion research." As far as the survey before the court was concerned, Dickson concluded that the surveyors were not experts in the science of opinion research, nor was the geographical area wide enough in order to establish the opinion of Canada. The sample must be representative of Canada and not drawn from a single city. There was consequently no probative value to the survey.[135]

Mr. Justice Freedman was of the opinion that any comment on the general subject of survey evidence would be *obiter* since the actual survey was not before the Court of Appeal as it had been rejected at the trial and anyway the rejection had not materially affected the ultimate result since the trial judge had permitted one of the conductors of the survey to give evidence on the results or conclusions emerging from the survey. Freedman confined his remarks only to tentative observations. With respect to the "universe," he acknowledged that it would be costly and impractical for

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[131] *Id.* at 241.

[132] 75 W.W.R. 585, 1 Can. Crim. Cas.2d 251 (Man. 1970)

[133] *Id.* at 597, 1 Can. Crim. Cas.2d at 263.

[134] *Id.* at 598, 1 Can. Crim. Cas.2d at 265.

[135] *Id.* at 600, 1 Can. Crim. Cas.2d at 266.

most accused to sample all sections of Canada and that a very small sample could still be of value, even the number used in the survey in question, that is sixty-eight persons. The sample must be fair and a prototype of Canada—"reasonably representative." He agreed that the surveyors must be experts, but then he went on to say that the term expert is elastic in meaning.[136]

The most recent case has been *Regina v. Pipeline News*[137] decided by an Alberta District Court. In this case we can see that there has been an attempt to add sophistication to these surveys in obscenity cases. The survey had been conducted by two professors at the University of Alberta. Each had recognized qualifications to conduct such a survey. The survey was done in two parts. First, forty-six photographs were chosen of women in various stages of nudity, and the photographs were shown to the Introductory Clinical Psychology class of one of the professors and each student was asked to answer several questions. From the responses the pictures were ranked according to degrees of offensiveness. Five degrees of offensiveness, from extremely pleasing to neutral to extremely offensive, were obtained. Twelve photographs were eventually chosen for the second part of the survey which was to show these photographs to seventeen males and eighteen females who were all residents of Edmonton or its environs. All were volunteers. A questionnaire was prepared using a scientifically accepted means of gathering material by asking the subject to check off one of a number of previously scaled statements. Following this a telephone poll was conducted of forty-six persons chosen randomly from the telephone book. The result was that an overwhelming majority were in favour of unrestricted sale of magazines such as Playboy and nudist magazines.

The Crown responded by calling an expert with even greater qualifications than those called by the defence who testified that in his opinion the samples taken for the surveys were not truly random samples from which a statistical inference could be drawn for the whole population of Canada. The trial judge preferred the evidence of the Crown expert to that of the surveyors and held that the surveys were of no probative value. The thinking of Jessup in the *Times Square* case was adopted.[138]

The admissibility of public opinion surveys has become generally accepted and the question now facing the court is the weight to be accorded to the surveys. Generally, experts will interpret the result of the poll for the court and the question of the admissibility per se of a poll, which was left open by Gale in *Times Square*, could rarely occur; but there seems to be no reason why the basis for admissibility should be different. Two stages must be passed before such evidence is accorded any degree of probative value: first, the persons carrying out the survey must be qualified to do so, and second, the sample tested must be representative of Canada. In the *Pipeline* case the expert who testified for the Crown and whose evidence

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[136] *Id.* at 593-94, 1 Can. Crim. Cas.2d at 259-60.

[137] 5 Can. Crim. Cas.2d 71 (Alta. Dist. Ct.).

[138] *Id.* at 86.

was accepted by the court said that the survey had to be conducted on the basis of a random sample in order for the inferences to be drawn that the defence desired. He defined random sample as a sample which is drawn in such a way that each member of the population to be studied has a chance of appearing in the sample. Mechnical means and electrical means must be used to select and human judgment must not enter into the selection.

Five requirements were set out for a good sample of a public opinion survey. There were: 1. It must be a proper size; 2. It must be representative; 3. There must be a small percentage of the subjects who refuse to cooperate; 4. The sampling frame must be adequate, accurate, complete, up-to-date and it must contain a minimum of duplication; 5. It must be a truly random sample.[139] The expert for the Crown testified that the experts for the defence had drawn too small a sample. The defence were prepared to accept an error of fifteen percent with confidence limits of ninety-nine percent. They drew a sample of forty-six persons. Using statistical theory sixty-six persons would have been required. Further, Edmonton was not the best place in Canada for a study that is representative of Canada as far as age, sex, marital status, religion and occupation is concerned. Also the refusal rate for the survey in question was 33 1/3 percent, which was too high. The witness then mentioned non-sampling errors, that is errors arising from asking incorrect questions. The sample drawn was consequently not a random sample in the *Pipeline* case.

In the *Prairie Schooner* case and also in the *Times Square* case reference was made to two earlier Canadian cases decided by Mr. Justice Cameron in the Exchequer Court. These were *Aluminum Goods Ltd. v. Registrar of Trade Marks*[140] in 1954 and *Building Prods. Ltd. v. B.P. Canada Ltd.*[141] in 1961. The 1954 case concerned a petition for a declaration that the word "Wear-Ever" had been so used as to have become recognized by dealers in and users of cooking utensils as indicating that the petitioner was responsible for their character or quality. The trade mark "Wear-Ever" could therefore be registered. A survey was conducted in 1951 by the firm of Elliott-Haynes Ltd. to ascertain the consumer and dealer knowledge of the word "Wear-Ever." A series of non-leading questions were submitted to 3,007 housewives and 505 dealers in cooking utensils in sixty-four cities, towns and rural communities across Canada. The survey was carried out independently of the petitioner, and was said by Cameron to be "a fair sampling of both consumer and dealer knowledge throughout Canada." The survey was admitted in evidence and was termed "the most important part of the evidence"[142] tendered by the petitioner. The declaration was granted. The 1961 case, *Building Prods. Ltd. v. B.P. Canada Ltd.* involved a different question. It was an action for infringement of trade mark. Public opinion surveys were tendered by both parties. The dispute arose from the use of the letters

[139] *Id.* at 84.
[140] [1954] Can. Exch. 79, 19 Can. Pat. R. 93.
[141] 36 Can. Pat. R. 121, 21 Fox Pat. Cas. 130 (1961).
[142] [1954] Can. Exch. at 82, 19 Can. Pat. R. at 97

"BP." The plaintiff, Building Products Ltd., used the letters in its three trade marks, and likewise the defendant petroleum company. The surveys were conducted by the same company as conducted the survey in 1954, but the purpose of the survey was to show whether the initials caused confusion in the minds of potential customers. The evidence was rejected as being purely hearsay. The *Aluminum Goods* case was explained on the basis that "no objection to the admissibility of the survey in that case had been made by the registrar of Trade Marks and consequently the question of admissibility had not been argued"; but Cameron went on to give another reason and it is submitted that it is the rational reason for exclusion; he said: "Another very serious objection to the receipt of such evidence is the fact that the interviewers, in going from door-to-door to submit their questions, cannot possibly create in the minds of those interviewed market conditions similar to those encountered by persons actually going to purchase the various wares in question."[143]

The complete absence of a discussion of hearsay by the courts on the question of surveys in the three recent cases has put the later case decided in the Exchequer Court in some doubt and brings the *Aluminum Goods* case to the fore. One thing which the *Aluminum Goods* case shows is the type of survey which may be necessary in order for the court to accord it some weight. The sample which was drawn in that case was vast when considered next to the surveys which were conducted by the witnesses for the accused in the obscenity cases. Although Freedman recognized the cost of a survey such as carried out by Elliott-Haynes Ltd., it could be said that anything short of such a survey will be closely scrutinized by the court and possibly result in treating it in the same manner as was done in the recent obscenity cases.

[143] 36 Can. Pat. R. at 130, 21 Fox Pat. Cas. at 139.