

DETERMINING DISREPUTE: OPINION POLLS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

DALE GIBSON*
Winnipeg

Evidence may be ruled inadmissible under section 24(2) if it was obtained in contravention of the Charter, and the court thinks its admission "would bring the administration of justice into disrepute". Public opinion polls may help the courts to determine the likelihood of public disrepute in such matters. The hearsay rule should not prevent the use of opinion poll evidence for that purpose in appropriate circumstances. Many factors must be taken into account in assessing its reliability and relevance, however. Because it is long-range "tides" of public opinion, rather than short-term fluctuations, with which courts should properly be concerned, they should give more weight to general and cumulative opinion poll data than to that which is specific and immediate.

Des éléments de preuve peuvent être déclarés irrecevables en vertu de l'article 24(2), s'ils ont été obtenus en violation de la Charte et si le tribunal estime que leur admission "est susceptible de déconsidérer l'administration de la justice". Les sondages d'opinion publique peuvent aider les tribunaux à déterminer dans quels cas l'administration de la justice peut être déconsidérée après du public. La règle du oui-dire ne devrait pas empêcher l'emploi, selon les circonstances, de la preuve du sondage d'opinion; toutefois, il faudrait prendre en considération de nombreux facteurs permettant d'en évaluer la véracité et la pertinence. Parce que les tribunaux devraient tenir compte des courants d'opinion publique à long terme plutôt que de ceux à court terme vu leur nature fluctuante, ils devraient donner plus de poids aux renseignements généraux et cumulatifs obtenus par ces sondages qu'à ceux qui sont spécifiques et immédiats.

Section 24(2) of the Canadian Charter of Rights and Freedoms calls for the exclusion in legal proceedings of evidence obtained in a manner that contravenes the Charter if: "it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute". The section raises a number of difficult questions, some of which I have discussed elsewhere.¹ Some of the more serious of these questions relate to the techniques a court should employ to determine what would or would not bring the administration of justice into disrepute.

* Dale Gibson, of the Faculty of Law, University of Manitoba. I gratefully acknowledge the valuable research assistance of Kristin Lercher and Steven Vincent.

¹ Enforcement of the Canadian Charter of Rights and Freedoms, in W. Tarnopolsky and G.-A. Beaudoin (eds), Canadian Charter of Rights and Freedoms: Commentary (1982), Ch. 16.

I. *Whose Opinion?*

Preliminary to any attempt to examine these questions is the need to decide whose opinion the courts are required to consult. Is it disrepute in the eyes of the particular judge, or of the judiciary in general, that counts? Is the somewhat more representative estimation of a jury intended? Is it, perhaps, the opinion of persons influential in the community, or of some other special group, that should be consulted? Or is it the community in general to whom the section refers?

It is submitted that section 24(2) embodies the last of these standards: disrepute in the eyes of the general community. This view is based upon a consideration of the evident purpose the provision was intended to serve. Why were the drafters of the Charter concerned about the reputation of the administration of justice? The answer seems obvious: the efficacy of the Canadian legal system is widely believed to depend in no small measure on the respect with which it is regarded by the community it serves. Without general respect throughout the community for the institutions of justice, it is thought, public acceptance and support of the decisions and actions of those institutions would erode. Without general public acceptance of the law and public co-operation with law enforcement agencies many fear that it would be extremely difficult, if not impossible, to maintain an effective system of justice in a democratic country.² It was, I believe, to preserve public respect for the law, and thereby to encourage public compliance and co-operation with the law, that section 24(2) adopted "disrepute" as the basis for rejecting evidence obtained in violation of the Charter.³

If this assessment of the purpose of section 24(2) is correct, it becomes clear that it is the public in general whose opinion counts.⁴ The judiciary, the legal profession, juries, and community leaders, all comprise relatively small groups whose members are very likely to remain loyal to the legal

² See Dale Gibson, *Public Opinion and Law: Dicey to Today* (forthcoming).

³ Although I was unable to find anything that explicitly confirms this view in the Minutes of Proceedings & Evidence of the Special Joint Committee of the Senate & House of Commons on the Constitution of Canada, 1980-1981 (hereinafter referred to as the "Parliamentary Committee Proceedings"), a pamphlet published under the authority of the Minister of Justice of Canada, *The Charter of Rights and Freedoms: A Guide for Canadians* 1982, comments, at p. 26 that: "This power to exclude evidence in limited circumstances will permit the courts to preserve public respect for the integrity of the judicial process." This statement was quoted with apparent approval by O'Driscoll J., of the Ontario Supreme Court, in *R. v. Siegel*, July 8th, 1982 (unreported).

⁴ In *R. v. Geswein*, Dubiensi J., of the Manitoba Provincial Judges' Court, stated that the test must be the "picture . . . viewed by society", Sept. 1st, 1982 (unreported). Hope J., of the Alberta Court of Queen's Bench, applied a combined test: "my view" and the opinion of "the ordinary man", in *R. v. Hynds*, July 16th, 1982 (unreported). Veit J., of the same court, also adopted the view of "the ordinary person", although she then made the extraordinary suggestion that this should be equated with the view of "a policeman on a beat": *R. v. MacIntyre*, May 14th, 1982 (unreported). In *Rothman v. R.* (1981), 59 C.C.C.

system come what may. It is the man and woman on the street upon whose acceptance of and compliance with the law the efficacy of the justice system principally depends, if it depends on the support of anyone. They are the people whose numbers and whose potential for disaffection carry a significant threat to the legal establishment. Not even the lawyers' fictional friend, "the reasonable person", offers a reliable guide, since the acts and omissions of the reasonable person are, by definition, rationally based, and generally compliant with law; while the responses of real members of the general public are often irrational and unlawful.

Having determined whose reactions the courts must assess in applying section 24(2), it is time to consider the manner in which the assessment should be made. Two basic approaches are open to the courts.

II. Judicial Notice.

The first of these is to examine information that is already stored in the judicial cranium in the form of the judge's understanding of the values, thought processes, and behavior patterns of ordinary citizens. It involves "judicial notice" being taken by the judge of that which would bring the administration of justice into community disrepute. This is the process the early commentators on the concept generally seemed to have in mind, and it is the approach employed by the first judges to rule on the meaning of section 24(2).⁵

This approach has at least two serious shortcomings. In the first place, "judicial notice" may properly be taken only of data which is "notorious", and cannot reasonably be disputed. But no one really knows, except in extreme situations, what would or would not cause the person on the street to think less of the justice system. There is room for considerable disagreement among reasonable observers about the likely impact on

(2d) 30 (S.C.C.), at pp. 74-75, Lamer J. examined the concept of bringing the administration of justice into disrepute, used in a somewhat different context, and described it as that which "shocks the community". A Department of Justice witness before the Parliamentary Committee suggested that the test should be that which would make a judge vomit: Parliamentary Committee Proceedings, #48, p. 124, Jan. 29th, 1981. It is unlikely that this was intended to be understood as anything more than a facetious comment, however. Both the judicial focus of the remark and the very limited scope it suggests for s. 24(2) are out of line with other commentaries.

⁵ *E.g.*: remarks of Lamer J. in *Rothman v. R.*, *ibid.*; Law Reform Commission of Canada Studies: The Exclusion of Illegally Obtained Evidence (1974); Report on Evidence (1977); McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Second Report, Vol. 2: Freedom & Security Under the Law (1981), pp. 1036-1047. In *R. v. MacIntyre*, *ibid.*, Veit J. commented: "... the ordinary man would not be shocked, *in my view*, that such relevant evidence would be admitted into these proceedings." (italics added). In *R. v. Hynds*, *ibid.*, Hope J. stated: "... *in my opinion* the ordinary man presented with all the circumstances would not be shocked or disturbed." (Italics added.)

public opinion of a given Charter violation and the use of evidence obtained as a result.

The other difficulty is that it is very difficult for even the most objective judge to avoid substituting his or her personal values and reactions for those of the average citizen if the sole source of information on the subject is the judge's personal observations. As Mr. Justice Cardozo once observed:⁶

We cannot transcend the limitations of the ego and see anything as it really is. . . .
The perception of objective right takes on the color of the subjective mind.

No matter how hard they may try to set aside their own value systems, courts run a serious risk of applying the standard of judicial disrepute rather than of community disrepute if they restrict themselves to internal reflection when interpreting section 24(2). Actuality cannot be accurately determined by speculative techniques; it requires the assessment of empirical data. Therefore, if actual community opinion is to be the measure of disrepute under section 24(2), the judge must be prepared to look beyond his or her cranium.

III. *Opinion Polls.*

The other approach is to hear and assess evidence on the question. Since it would be entirely impractical to require *viva voce* testimony in the court room of a sufficiently large number of ordinary citizens to constitute a reliable cross-section of community opinion, courts attempting to consider evidence on the question must fall back on the next best evidence: scientifically conducted public opinion surveys administered and interpreted by impartial experts.

Although public opinion poll evidence is still a relative newcomer to Canadian court rooms, it has been tendered in several different types of cases in recent years. The most common of these have been trademark disputes, in which community opinion has been consulted to determine whether there would be confusion by the consuming public between the products or services to which the competing trademarks apply.⁷ Public opinion polls have also been submitted in obscenity prosecutions, with a

⁶ B.N. Cardozo, *The Nature of the Judicial Process* (1921), pp. 106 & 110. I am grateful to Assistant Chief Judge W.G.W. White of the Provincial Court of Alberta for drawing this remark to my attention.

⁷ *Aluminum Goods Limited v. Registrar of Trade Marks*, [1954] Ex. C.R. 79 (Ex. C.C.); *Building Products Ltd v. B.P. Canada Ltd* (1961), 36 C.P.R. 121 (Ex. C.C.); *Salada Foods v. W.K. Buckley* (1973), 9 C.P.R. (2d) 3 (F.C.C.); *Cochrane-Dunlop Hardware Ltd v. Capitol Diversified Industries* (1973), 11 C.P.R. (2d) 137 (Ont. H.C.); *Canadian Schenley v. Canadian Manitoba Distilleries* (1975), 25 C.P.R. (2d) 1, aff'd 30 C.P.R. (2d) 176 (F.C.C.); *Carson v. Reynolds* (1980), 49 C.P.R. (2d) 57 (F.C.C.).

view to establishing "community standards",⁸ in change of venue proceedings, to determine whether public opinion in a particular location is so biased against an accused person as to jeopardize the likelihood of a fair trial in that locale,⁹ and, in a contempt of court case, to indicate whether the public would be scandalized by a particular criticism of the judiciary in a newspaper article.¹⁰ If the admission of such evidence is appropriate in cases of that kind, it would seem to follow that it is also appropriate for the purpose of indicating the likelihood of community disrepute under section 24(2) of the Charter.¹¹

It must be acknowledged that the opinion survey evidence submitted was not accepted or relied upon in all the cases mentioned above. In fact, it was rejected more often than it was accepted. There appears, nevertheless, to be a growing acceptance by the judiciary that in cases where the state of public opinion is germane to an issue, it is proper for courts to consider scientifically designed and administered public opinion surveys, interpreted by expert witnesses.¹² As Mr. Justice Brian Dickson said, while sitting as a member of the Manitoba Court of Appeal:¹³

. . . when it becomes necessary to determine the true nature of community opinion and to find a single normative standard, 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. Such evidence can properly be accorded status of expert testimony. The state of mind or attitude of a community is as much a fact as the state of one's health. . . .

⁸ *R. v. Prairie Schooner News* (1970), 1 C.C.C. (2d) 251 (Man. C.A.); *R. v. Times Square Cinema*, [1971] 3 O.R. 688 (Ont. C.A.); *R. v. Pink Triangle Press* (1979), 45 C.C.C. (2d) 385 (Ont. Prov. Ct), rev'd on other grounds (1981), 19 C.R. (3d) 393 (Ont. C.A.).

⁹ *R. v. Lavigne*, Ont. H.C., Southey J., Sept. 13th, 1976 (unreported), described in S. Arnold & A. Gold, *The Use of a Public Opinion Poll on a Change of Venue Application* (1979), 21 *Crim. L.Q.* 445.

¹⁰ *R. v. Murphy* (1969), 4 D.L.R. (3d) 289 (N.B.C.A.).

¹¹ It is possible that polls will also be found to be useful aids in determining certain other Charter questions, such as whether particular statutory restrictions on freedom are "such reasonable limits . . . as can be demonstrably justified in a free and democratic society" under section 1 of the Charter, or whether the number of children entitled to minority language instruction in a province is "sufficient to warrant" the expenditure of public funds for the purposes set out in s. 23.

¹² See: J.M.H. Lamont, *Public Opinion Polls and Survey Evidence in Obscenity Cases* (1973), 15 *Crim. L.Q.* 135; and Arnold and Gold, *op. cit.*, footnote 9. American writing on the subject, which is considerably more plentiful, is generally to the same effect. See: R.C. Sorensen and T.C. Sorensen, *The Admissibility and Use of Opinion Research Evidence* (1953), 28 *N.Y.U.L. Rev.* 1213; Note, *Public Opinion Surveys as Evidence: the Pollsters Go to Court* (1953), 66 *Harv. L. Rev.* 498; W.H. Blum and H. Kalven, *The Art of Opinion Research* (1956), 24 *U. Chicago L. Rev.* 1; H. Zeisel, *The Uniqueness of Survey Evidence* (1960), 45 *Cornell L.Q.* 322; and Note, *Opinion Polls and The Law of Evidence* (1976), 62 *Virginia L. Rev.* 1101.

¹³ *R. v. Prairie Schooner News*, *supra*, footnote 8, at p. 266.

So far, opinion evidence has been used more often in trademark cases than in any other type. This may be because trademark issues are generally easy to express in a survey instrument. The *Carson* case¹⁴ offers a good illustration. In that case the defendant planned to market portable toilets bearing the trademark "Here's Johnny". Television star Johnny Carson understandably took exception to the proposed trademark. In ruling in favour of Mr. Carson, Mahoney J. of the Federal Court of Canada placed much reliance on the results of a public opinion poll conducted by a commercial market survey organization in Metropolitan Toronto. The survey, administered to a scientifically selected random sample, employed a simple instrument. Each interviewee was shown a card bearing only the words "Here's Johnny" and asked: "What does this mean to you?" Fifty-seven per cent of the persons interviewed mentioned Johnny Carson or his television programme first, and sixty-three per cent of them included Carson or his show somewhere in their response. Evidence of a connection in the public mind between the proposed trademark and Mr. Carson was therefore clearly established. As we will see, the use of public opinion polls in connection with section 24(2) may be considerably more complicated.

The cases in which Canadian courts have refused to consider tendered opinion polls fall into three categories. In some the evidence has been held to be inadmissible hearsay. In a second group of cases, survey evidence has been refused admission because it was unreliable, lacking technical credibility for one reason or another. The third ground has involved relevance—whether the tendered evidence was sufficiently germane to the question before the court. Each of these reasons for rejecting opinion survey evidence will be examined separately.

IV. Hearsay?

The belief that opinion poll evidence constitutes inadmissible hearsay was probably the reason for rejecting such evidence in the contempt of court case cited earlier,¹⁵ and it was certainly the reason in one of the trademark cases.¹⁶ An Australian court has also held public opinion surveys to be inadmissible hearsay.¹⁷ Although the matter is not entirely free from doubt, this view appears to be mistaken.¹⁸

To the extent that a public opinion survey presented in court purports to describe what various persons not present in court stated about their views, it certainly is second-hand or hearsay evidence. Not all survey evidence is of this type. The poll used in the *Carson* case, for example, was

¹⁴ *Supra*, footnote 7.

¹⁵ *R. v. Murphy*, *supra*, footnote 10.

¹⁶ *Building Products Ltd v. B.P. Canada Ltd*, *supra*, footnote 9.

¹⁷ *Hoban's Glynde Pty Ltd v. Firlie Hotel Pty Ltd* (1973), 4 S.A.S.R. 513 (S.A.S.C.).

¹⁸ See the thorough discussion in Lamont, *op. cit.*, footnote 12.

not hearsay, because it was not being used to establish the truth or accuracy of anything said by the persons interviewed.¹⁹ The point of the survey was to determine whether a particular term triggered a certain response from the persons interviewed, and the interviewers' evidence as to that response was direct, not hearsay. If the interviewees had been asked to express an opinion about the quality of the Johnny Carson Show, the interviewers' evidence as to their opinions would have been second-hand, but in the actual case the interviewers were merely reporting on their direct observations. It is likely that most opinion surveys designed to measure the effect on public opinion of the use in court of unconstitutionally obtained evidence would involve second-hand data to a greater extent than the poll used in the *Carson* case.

It is possible, however, to regard all public opinion evidence as direct, rather than hearsay. Surveys do not report the individual views of the persons interviewed; they merely express a community *average*, which may not correspond to the views of any particular individual. What is of significance to a court in making a ruling on section 24(2) of the Charter is not whether the admission of unconstitutional evidence would bring the administration of justice into disrepute in the eyes of Jones or Cohen or Singh, but rather whether it would create disrepute in the general community. The key information to be obtained from public opinion polls is that which indicates the average reaction, not individual reactions. Perhaps, therefore, surveys should not be regarded as second-hand evidence of the opinion of Jones or Cohen or Singh, but rather as direct evidence of average community opinion.

Even if opinion evidence is regarded as hearsay, there are many exceptions to the rule that hearsay evidence is inadmissible, and at least one of them appears to be applicable here. As the above-quoted dictum of Dickson J.A. in the *Prairie Schooner* case reminds us, hearsay evidence may be used to establish a person's state of health or state of mind. There is no better way of discovering a person's mental state than by means of his or her verbal comments about how they are feeling, so the courts will admit hearsay evidence as to such comments. Responses to an opinion poll would seem to fall within that category. Dickson J.A. also pointed out that expert evidence is often admitted when the opinion of the expert is based upon information the expert was told by someone else, and he suggested that the testimony of an expert surveyor of public opinions should be similarly treated.²⁰

¹⁹ In that case, *supra*, footnote 7, Mahoney J., at p. 60, adopted the view expressed by Cattanach J., of the same court, in the *Schenley* case, *supra*, footnote 7, at p. 9: "There would be no objection to evidence being admissible when the poll is put forward not to prove the truth of the statements it contains . . .".

²⁰ *R. v. Prairie Schooner News*, *supra*, footnote 8, at p. 266.

If existing exceptions to the hearsay rule cannot be made to accommodate opinion evidence, there would appear to be strong grounds for creating a new exception. It is well accepted that the exceptions to the rule have never been exhaustively stated,²¹ and the justification that underlies previously recognized exceptions appear also to exist here. As in the case of dying declarations or statements about one's state of health, it is impractical to obtain such evidence in any other manner. Moreover, the availability for cross-examination of the experts and their raw survey data would reduce the risk of unreliability which, after all, is the major rationale for the hearsay rule.

V. *Reliability.*

To say that opinion polls escape the clutches of the hearsay rule does not settle the question of their proper use in Charter cases, however. They may be found inadmissible for other reasons, and even if held to be admissible, their weight may be open to doubt in particular circumstances.²² Many attacks on both admissibility and weight will involve allegations that the poll in question is unreliable for one reason or another. Let us consider some of the major factors affecting reliability.

Expertise. A fundamental factor, underlined by the *Prairie Schooner* decision,²³ is the expertise of the person or persons who design, administer and interpret the survey. In that case the poll evidence submitted was rejected because it was administered by a law student to a group selected without regard to accepted sampling procedures. To ensure the greatest weight possible, those who proffer the evidence should make available for cross-examination as many of those who administered the survey as possible. It should not be necessary to call each individual interviewer if the interview procedure was relatively mechanical but those who exercised creative or discretionary roles should be available to be called. The raw data upon which summary results and averages are based should also be available for examination by other experts.

Representativeness of Sample. Also of key importance is the composition of the sample chosen for the survey. The science of sampling is well advanced, and those skilled in the craft can be of great assistance to the courts in determining whether the sample used in a particular survey was statistically sound. Ultimately, however, the courts must make the determination, and in doing so they will sometimes be faced with the need to sacrifice optimum scientific accuracy to practical considerations. Again, the *Prairie Schooner* case offers an illustration. The court was agreed in

²¹ See, for example, *Ares v. Venner* (1970), 14 D.L.R. (3d) 4 (S.C.C.).

²² In the *Times Square* case, *supra*, footnote 8, the Ontario Court of Appeal adopted the curious approach of holding opinion poll evidence to be admissible, and then ruling that it should be accorded no weight whatsoever!

²³ *Supra*, footnote 8.

that case that obscenity was to be judged by "community standards" in a national sense. For that reason, Dickson J.A. suggested that:

The universe from which the "sample", i.e., the individuals to be polled, is to be selected must be representative of Canada and not drawn from a single city.

However, Freedman J.A., in the same case, proposed a more pragmatic approach:²⁴

On the matter of the so called "universe", I perceive some danger in requiring that it be representative of the whole of Canada in a geographical sense. To insist on adequate regional representation of all sections of this large country might make a survey too costly and impractical for all but a very few. What is desired is that the survey be a fair sample or prototype of the universe in question. It should be reasonably representative of that universe. . . . Naturally the broader the scope of a representative survey the better. But "small samples can be adequate". . . . The size of survey will, of course, be a factor affecting its weight.

It is submitted that the latter approach is preferable. Even where the standard to be applied is that of a national average, local samples should be admissible, although their weight may not equal that of a national survey.

The appropriateness of local surveys involves more than weight and practicability. It is possible to argue that polls of this kind should *only* be administered at the local level because it is local opinion, not national opinion, that ought to determine the question. Both Freedman J.A. and Dickson J.A. accepted that national opinion was relevant. But were they correct? If so, would similar considerations apply to section 24 of the Charter? These difficult questions will be postponed to the concluding section of this article, in which the problem of relevance will be addressed.

Strength of Opinion. Another factor that will seriously affect the significance of poll results is the *strength* of the opinion expressed. A survey of public opinion about communism and related matters conducted in the United States at the height of the "McCarthy" era disclosed a very high percentage of opposition to employing, in educational or other sensitive occupations, persons with politically suspect backgrounds. But the same survey disclosed that very few Americans regarded the problem of communism as a serious threat.²⁵ These statistics led many observers to conclude that very few people would act on their beliefs about suspected communists in the teaching system, because the matter simply was not important enough to them. Since section 24(2) appears to have been enacted out of a concern for how people may *behave* when they learn about the use of unconstitutional evidence, it is important that any survey conducted attempt to assess not just the existence of an unfavorable opinion, but also the relative strength of that opinion. Not all surveys are designed to permit such qualitative analysis of the opinions expressed.

²⁴ *Ibid.*, at pp. 265 (Dickson J.A.) and 259-260 (Freedman J.A.).

²⁵ S.A. Stouffer, *Communism, Conformity and Civil Liberty: A Cross Section of the Nation Speaks its Mind* (1955). See the review article by Blum and Kalven, *op. cit.*, footnote 12, at pp. 58 *et seq.*

Extraneous Influences. Those who attempt to analyse survey results must always be sensitive to the possibility of extraneous influences. A recent television programme or movie, or an unusually notorious legal case in either Canada or the United States could possibly exert a deceptive short run influence on survey conclusions.

Leading Questions. The survey itself can be influential. Many commentators have noted the potential which some public opinion polls have to simultaneously inquire and inform.²⁶ The law's concern for the dangers of suggestive questioning has been clear ever since courts first began to look askance at "leading" questions. And there is no doubt that the questions included in a public opinion survey could be so framed as to be highly suggestive. Compare the likely responses to a question concerning evidence obtained in breach of the Charter phrased in the following alternative ways:

- (a) "Would it bring the administration of justice into disrepute in your estimation if the courts in criminal cases permitted police and prosecutors to use evidence obtained by breaking into private homes without consent, warrant, or other legal authority, contrary to the Canadian Charter of Rights and Freedoms?"
- (b) "Would it bring the administration of justice into disrepute in your estimation if a murderer went free because the evidence of his guilt was obtained by a search conducted without consent, warrant, or other legal authority?"

The phrasing of suitable questions will demand great objectivity and care.

VI. *Relevance.*

Only if the questions asked in a public opinion survey are germane to the issue before the court will the survey results be properly admitted. In the change of venue case referred to earlier the rejection of the evidence was probably based (although the reasons for judgment were not entirely clear) on the fact that the question asked, which related to whether the *victim* was well known in the community, was of little relevance to the issue of whether there was community antipathy toward the *accused* which would prejudice the possibility of a fair trial.²⁷ The discussion that follows will deal with three important factors that are likely to affect the relevance of particular poll results to determinations of community disrepute under section 24(2) of the Charter: time, locality, and specificity.

Time. The most fundamental of these factors is the time dimension. I refer here not just to the fact that opinions change over time, and that the vintage of survey data is therefore significant, but also to the fact that the currents of

²⁶ E.g., Blum and Kalven, *op. cit.*, *ibid.*, at pp. 11 *et seq.*

²⁷ *R. v. Lavigne*, *supra*, footnote 9.

public opinion that decisively influence institutions and events are forces that flow slowly and can only be properly assessed when plotted on a fairly long-range temporal graph. A.V. Dicey, whose classic study *Law and Public Opinion in England in the Nineteenth Century* contains insights that remain relevant today, contrasted these profoundly influential long-term currents of opinion, which he referred to as "tides", with shorter range fluctuations, comparable to waves, which are not of major significance.²⁸ Since section 24(2) of the Charter of Rights and Freedoms seems to have been designed to take account of those aspects of public opinion that would significantly affect the efficacy of legal institutions, it is the "tides" rather than the "waves" with which the courts must be concerned when applying that provision.

The importance of this distinction would be difficult to exaggerate. One of the judiciary's most important functions is to stand between individuals or minorities and the tyranny or wrath of the majority. Where constitutionally entrenched protections of civil liberties, such as our new Canadian Charter of Rights and Freedoms are concerned, this is their primary function. It is true that all laws in a democratic society must ultimately reflect the consensus of the community; but, it is equally true that they must protect the individual from ill-considered actions taken by the majority in the passion of the moment which do not conform to the community's long-term values. While politicians find it necessary to respond rapidly to the demands and moods of the moment, the judiciary must keep its eye on a more distant horizon.

The implication of this fact for courts making decisions under section 24(2) is that opinion surveys restricted to a particular moment in time ought, in themselves, to be accorded limited relevance. To get at the more fundamental attitudinal forces with which they ought to be concerned, courts should have the benefit of surveys extending over a period of months or years. This does not rule out new polls, but it means that they should be examined in the context of previous studies if courts are to avoid confusing "waves" with "tides". If this approach is taken, the risk of the poll results being influenced by extraneous influences, referred to earlier, will be largely eliminated.

Locality. In some situations it is local opinion that governs. This is obvious in change of venue applications, for example, where the point of the exercise is to remove a trial from one locality, where it is feared that public opinion may prevent a fair hearing, to another locality, where it is hoped that public passions will be less aroused and fair trial more likely. On the other hand, other legal norms that incorporate community standards,

²⁸ For an assessment of Dicey's book, see Gibson, *op. cit.*, footnote 2. While Dicey's reference to "tides" did not explicitly contrast "waves", the thrust of his arguments invites completion of the metaphor.

such as the obscenity provisions of the Criminal Code of Canada,²⁹ seem to refer to national rather than local opinion.

Is it local or national reactions to the use of unconstitutionally obtained evidence that is relevant under section 24(2) of the Charter? It could be argued that section 24(2), like the test for changing the venue of trials, involves a localized standard. I have asserted, after all, that the rationale of section 24(2) is to prevent respect for and compliance with the law being eroded by unfavorable public reaction to the use by courts of evidence obtained in breach of the Charter. Since the notoriety of most judicial proceedings is restricted to the immediate area where the court is located, it could be contended that only the opinion of persons within that area could be influenced by the admission of unconstitutional evidence and, therefore, that only local opinion should be taken into account. Plausible though this point of view might be if the court's task were to assess the immediate impact of every individual instance of unconstitutionally acquired evidence, it makes much less sense when it is understood that the court's concern should be for the "tides" rather than for the "waves". The long-range attitudinal forces that I submit are referred to in section 24(2) of the Charter tend to have national dimensions.

An even more compelling reason for concluding that a national standard should be used is that one's fundamental constitutional rights should be uniformly available wherever one happens to be in the country. While the federal and pluralistic nature of Canada dictates regional differences in many matters, the Constitution, which provides cement for the Canadian mosaic, must be of uniform strength across the country.

If any doubt on this point remains, it can be resolved by reference to the Charter itself. If the Charter were interpreted to permit a different standard of evidentiary protection to apply in various parts of the country, according to the vagaries of local opinion, it would not be possible to say that Canadians were truly "equal before and under the law" or had "equal protection and equal benefit of the law", as guaranteed by section 15 of the Charter.³⁰ Moreover, since local opinion is more likely to be biased against the accused than is national opinion, the use of a local standard might be regarded as derogating from the "fair . . . hearing by an independent and impartial tribunal" required by section 11(d), and the "principles of fundamental justice" guaranteed by section 7. It seems clear, therefore, that only national standards of "disrepute" would be consistent with the spirit of the Charter.

²⁹ In the *Prairie Schooner* case, *supra*, footnote 8, the Manitoba Court of Appeal was unanimous in holding that the standard applied to determine obscenity is national in scope.

³⁰ The fact that s. 15 of the Charter will not come into force until 1985 does not prevent its being employed as an interpretive aid before that time.

This is not to say that local polls should be rejected. As Freedman J.A. pointed out in the *Prairie Schooner* case,³¹ local polls can be indicative of a national consensus, even though they may not be as weighty as national surveys.

Specificity. The relevance of a survey may also be affected by its specificity. Should the persons interviewed be told the exact nature of the alleged offense, the type and purport of the evidence, the precise manner of obtaining it, and the specific nature of the Charter violation? Or should the circumstances be generalized to some degree? The literal wording of section 24(2) might seem to suggest the specific approach. It states that: "The evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of *it* in the proceedings would bring the administration of justice into disrepute."³² This seems, at first glance, to indicate that the relevant opinion concerns the admission of particular evidence in a specific case. It is submitted, however, that the standard imposed by section 24(2) is really more general than that.

If it had been intended by section 24(2) that evidence should be excluded only where its admission in the particular case would *of itself* bring the administration of justice across Canada into long-term disrepute, no evidence would ever be excluded. No single Charter breach, however inexcusable, would be capable, all by itself, of putting the entire system of justice across the country in long-lasting low repute in the eyes of the average Canadian. Section 24(2) would be virtually meaningless if it were interpreted to refer only to the individual impact of specific abuses.

A basic principle of legal interpretation, one which is especially applicable in constitutional situations, calls for courts to avoid construing legal language in a manner that would lead to an absurdity, even if the words are literally capable of the absurd meaning.³³ If, therefore, a meaning to section 24 can be found that would avoid the absurd conclusion that it would never be applicable, that meaning should be given preference.

Such an alternative interpretation is indeed possible: that evidence obtained in violation of the Charter should be excluded where the administration of justice would be brought into disrepute in the eyes of the average Canadian if similar evidence obtained in similar circumstances were *commonly* admitted in similar cases. It is true that section 24(2) makes no explicit reference to "common" or "general" practice, but that notion can be regarded as included in the requirement that the court's decision should be made "having regard to all the circumstances". Among the "circumstances" to be considered, if the provision is to be meaningful, must be a

³¹ *Supra*, footnote 8, at pp. 259-260.

³² Italics added.

³³ *Grey v. Pearson* (1857), 6 H.L. Cas. 61, at p. 106; *Re Human Rights Commission and Solicitor-General of Canada* (1978), 93 D.L.R. (3d) 562 (Que. C.A.).

recognition of the previously noted fact that public opinion does not respond instantaneously to single events. Public opinion of the type which legal institutions properly recognize is, rather, shaped by the cumulative effect of multiple events over time. To disregard this phenomenon would be to overlook one of the crucial "circumstances" which courts are required to take into account in arriving at a decision to admit or exclude evidence under section 24(2) of the Charter.

If the relevant issue is the general effect that abuses of the type involved would have over time on Canadians' attitudes toward the administration of justice, rather than the immediate impact of a specific violation in a given locality, the value of particularity diminishes. And since particularity raises some of the risks of built-in bias discussed above in relation to "extraneous influences" and "leading questions", it would seem that the most useful opinion polls would be those which asked, in fairly general terms, what the respondents would think of the administration of justice in Canada if courts commonly admitted evidence in circumstances roughly equivalent to those of the case at bar. Great specificity is neither necessary nor desirable.

Conclusion

The use of public opinion polls to determine "disrepute" for Charter purposes cannot be usefully discussed in absolute terms. Their admissibility and their weight both depend on the cumulative effect of the factors discussed above, and perhaps, of others as well. The ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion. Yet they would be ignoring their responsibilities under the Charter if they paid no heed whatever to the information that properly designed and administered opinion surveys can disclose about that which would or would not effect the attitudes of Canadians toward their system of justice.

If Dicey's oceanic metaphor will bear another extension, the courts may be regarded as floating drydocks, which provide shelter from sudden squalls, while continuing to rise and fall on the tides of public opinion.
