

The Trial Judge's Four Discretions to Exclude Technically Admissible Evidence at a Criminal Trial

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I. INTRODUCTION

For evidence to be technically admissible¹ in a criminal case, it must be relevant² and material,³ and also must not be obnoxious to any of the exclusionary rules, such as the opinion evidence rule. Where

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¹ For a general discussion of the process of the admission of evidence, see David M Paciocco & Lee Stuesser, *The Law of Evidence*, 5th ed (Toronto: Irwin Law Inc, 2008) at 26-38 [Paciocco & Stuesser].

² For evidence to be relevant, it must tend to “increase or diminish the probability of the existence of a fact in issue”: *R v Arp*, [1998] 3 SCR 339 at para 38, 166 DLR (4th) 296 [Arp]. The relevance spoken of here is that of logical relevance, as opposed to legal relevance: see *R v Powell* (2006), 215 CCC (3d) 274 at para 5 (available on WL Can), (Ont SCJ) [Powell]; *R v Mohan*, [1994] 2 SCR 9 at 10, 114 DLR (4th) 419 [Mohan]; and Paciocco & Stuesser, *supra* note 1 at 31-34. See also Section VI, below. Note that a piece of evidence need not possess any minimum amount of probative value to be relevant: *R v Morris*, [1983] 2 SCR 190 at 199-200, 1 DLR (4th) 385 [Morris]; *R v Corbett*, [1988] 1 SCR 670 at 715, 41 CCC (3d) 385 [Corbett].

³ Materiality requires that evidence be directed at a matter in issue in the case at hand. Once a piece of evidence is found to be both relevant and material, it is then considered to be admissible in principle. To be technically admissible, however, it must also not contravene any specific exclusionary rule. The materiality analysis is almost always encompassed under the rule of relevance: see Paciocco & Stuesser, *supra* note 1 at 26-27; *Powell*, *supra* note 2, at paras 5-6; *R v DD*, 2000 SCC 43 at para 9, 2 SCR 275 [DD]; *Arp*, *supra* note 2 at para 38.

evidence offends a specific exclusionary rule⁴ or is found to be irrelevant or immaterial, it must be excluded in all circumstances.⁵ Even if evidence is technically admissible,⁶ it is still subject to being excluded by the trial judge based on other considerations,⁷ through the trial judge's exclusionary discretion.⁸ This residual discretion, like the other rules of

⁴ Exclusionary rules may be found in three sources: the common law, statutes, and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]: see *R v Fitzpatrick* (1994), 90 CCC (3d) 161 at 181, 32 CR (4th) 343 (BC CA). That said, the overwhelming majority are contained in the common law.

⁵ John Sopinka et al, *Law of Evidence in Canada*, 2d ed (Markham: Buttersworth, 1999) at para 2.33 [Sopinka et al]; *Powell*, *supra* note 2 at para 6.

⁶ Where there is any doubt on the part of a trial judge as to a finding that evidence is not technically admissible for reason that a specific exclusionary rule has been violated, the exclusionary discretion can bring some finality to the matter. If the evidence's prejudicial effect is found to outweigh its probative value, a trial judge may use that finding to support an earlier decision to exclude: See, for example, *R v Welsh* (2001), 45 CR (5th) 166 at para 34 (available on WL Can) (Man Prov Ct) [Welsh].

However, a trial judge should not use such a finding to support an earlier decision to admit the evidence. The law is clear: the exclusionary discretion cannot be turned in order to save evidence that has fallen victim to any of the specific exclusionary rules: Sopinka et al, *supra* note 5 at 2.33; Paciocco & Stuesser, *supra* note 1 at 39. In the context of hearsay, this means that "no residual discretion to admit hearsay evidence exists in the absence of the requirements established by the Supreme Court in *Khan*": *R v Chahley* (1992), 72 CCC (3d) 193 at 203, 13 BCAC 213.

All that said, an "inclusionary discretion" of sorts exercisable in the hands of the trial judge, may exist to admit defence evidence. Rules of evidence, including specific exclusionary rules and the trial judge's exclusionary discretion, may be relaxed to avoid a miscarriage of justice, thus allowing otherwise excludable evidence to become receivable: *R v Smyth* (2007), 2007 CarswellOnt 3135 (WL Can) at paras 99-102, 2007 CanLII 17203 (Ont SCJ). For example, in *R v Turner*, 2005 BCSC 1119 at paras 24-25 (available on WL Can), the trial judge relies on the exclusionary discretion to support an earlier finding to admit defence evidence under the principled approach to hearsay.

⁷ See e.g. *Powell*, *supra* note 2 at paras 6-7; *Corbett*, *supra* note 2 at 714-715, 721; *R v Jabiaranaha*, 1999 BCCA 690 at para 26, 140 CCC (3d) 242 [Jabiaranaha]. See also Paciocco & Stuesser, *supra* note 1 at 38. By "other considerations", I mean those unaddressed or not adequately addressed by other exclusionary rules and which might lead to serious unfairness in the trial process.

⁸ Ron Delisle et al, *Evidence: Principles and Problems*, 9th ed (Scarborough: Thomson Canada Ltd, 2010) at 1874-1885; Paciocco & Stuesser, *supra* note 1 at 32; Sopinka et al, *supra* note 5 at 23.

admissibility mentioned here, is exclusionary in nature.⁹ In other words, to be ultimately received, evidence has to simultaneously avoid being excluded under the rules of relevance and materiality, under specific exclusionary rules like the hearsay rule, and under the trial judge's residual discretion.

The exclusionary discretion power is significant "as it has the theoretical potential to render all other rules of evidence obsolete and to undermine the role of the trier of fact."¹⁰ Reliability of evidence has traditionally been evaluated narrowly for the purpose of admissibility. It was only tested to the extent it fell under a specific exclusionary rule. The prevailing justification for this was that assessing reliability of evidence relates to weight, and questions of weight are for the trier of fact, who will be better positioned at the end of the case to assess weight in light of all received evidence. In other words, trial judges acting as triers of law were to restrict themselves to questions of admissibility.¹¹ However, with the emergence and expansion of a judicial discretion to exclude, a judge who chooses to exclude evidence is doing so based on an assessment of its reliability. In other words, he or she is weighing the evidence, albeit in a much more restrictive way than a trier of fact.

Previous literature has held that there are two general types of exclusionary discretion: that which exists at common law (which permits technically admissible Crown evidence to be excluded where its prejudicial effect outweighs its probative value) and that which exists by virtue of the *Charter*¹² and by the Supreme Court of Canada's decision in *R v Harrier*¹³ (which permits technically admissible Crown evidence to be excluded

⁹ *R v Dawson* (1997), 44 CRR (2d) 359 at 369 (available on WL Can) (OCJ Gen Div).

¹⁰ Paciocco & Stuesser, *supra* note 1 at 44. See also *R v Duguay*, 2007 NBCA 65 at para 54, 320 NBR (2d) 104, for an appellate court's recognition of this. While Paciocco and Stuesser here are speaking of a specific form of exclusionary discretion possessed (namely, the general discretion at common law to exclude Crown evidence where its prejudicial effect outweighs its probative value), the statement is equally applicable to the trial judge's exclusionary power more broadly.

¹¹ Peter K McWilliams et al, *Canadian Criminal Evidence*, looseleaf (Aurora: Canada Law Book, 2008) at 5-10 [McWilliams et al].

¹² *Charter*, *supra* note 4.

¹³ [1995] 3 SCR 562, 128 DLR (4th) 98, [*Harrier* cited to SCR].

where this is necessary to ensure a fair trial).¹⁴ This article challenges that conception.

A review of the case law in recent years confirms Delisle et al's previous claim¹⁵ that the law – the common law and the *Charter* – has come to recognize four free-standing general kinds of exclusionary discretion to which a trial judge may turn to exclude otherwise admissible evidence. This is profoundly different from affairs as late as 1970, where only one narrow form of exclusionary discretion was recognized.¹⁶ To be clear, this means that a modern trial judge, depending on the circumstances, can rely on different, independent forms of discretion to effect the same purpose: to exclude what is otherwise admissible evidence.¹⁷ Instead of a single form or type of discretion, trial judges possess a number of general exclusionary discretions, each of which has a separate juridical source. The specific form of discretion which any court relies upon (or considers) in a particular case is not always clear.¹⁸ Some of

¹⁴ See McWilliams et al, *supra* note 11 at 5-1-5-22; Paciocco & Stuesser, *supra* note 1 at 36-37. For case law support, see *R v Buhay*, 2003 SCC 30 at para 40, [2003] 1 SCR 631 [Buhay]. For further discussion, see Section VII below.

It is worth underscoring that some academic commentators view the first category of exclusionary discretion as including within it certain sub-categories of discretion. So, for example, the discretion applicable to defence evidence, which permits evidence to be excluded where its prejudicial effect substantially outweighs its probative value (see Section III below), is merely a variant of the general discretion that permits evidence to be excluded because the benefits of its admission cannot justify the adverse effects its admission will cause: See Paciocco & Stuesser, *supra* note 1 at 35-45.

¹⁵ Delisle et al, *supra* note 8 at 184-85.

¹⁶ In *R v Wray*, (1970), [1971] SCR 272 at 293-295 (per Martland J), 11 DLR (3d) 673, [Wray], the majority of the Supreme Court found an exclusionary discretion exercisable in the hands of trial judges but heavily circumscribed its use, holding that improperly obtained evidence did not fall within its remit. Instead the discretion could only be exercised against evidence that could be characterized as gravely prejudicial, of tenuous admissibility, and of trifling probative value, a high standard indeed. For further discussion of *Wray*, see Section II, below. According to Paciocco & Stuesser, *supra* note 1 at 35, for most of the past century judges “were considered to have little to no discretion to exclude technically admissible evidence.”

¹⁷ The trial judge's determinations whether the requirements of relevancy, materiality, and the requirements of admittance under any specific exclusionary rules are met on the facts of a particular case is not the discretion spoken of here.

¹⁸ See, for example, *R v SGT*, 2008 SKCA 119 at para 97, 314 Sask R 44; *R v Riley*, [2009] OJ No 2474 (QL) at paras 22-24, 2009 CanLII 30455 (SCJ) [Riley]; *R v*

this may be explained by the fact that some overlap exists between discretions¹⁹ – they are not always easily distinguished, nor their methods of operation easily understood.²⁰

More importantly, an analysis of the four types of exclusionary discretions identified by Delisle et al provides some significant new insights into how each operates, including what their scope is and what areas of their operation remain unclear.²¹ While this article follows the lead of those legal scholars and considers the four exclusionary discretions identified by them, it expands upon their brief commentary by thoroughly comparing each of the discretions, as opposed to simply considering each separately. By discussing each of the exclusionary discretions and making the necessary links with other stages of the admissibility of evidence analysis, a better understanding of how these four discretions operate is developed.

This article is divided into nine sections. Section II will examine the general discretion to exclude Crown evidence that can be implied into a statute. Section III will review the general discretion at common law to exclude Crown evidence where its prejudicial effect outweighs its probative value. Section IV examines the general discretion at common law to exclude defence evidence where its prejudicial effect substantially outweighs its probative value. Section V canvasses the discretion recognized in law that permits improperly obtained evidence to be

Hawkins, [1996] 3 SCR 1043 at para 85, 141 DLR 193 [*Hawkins*]; *R v Courchene* (1999), 135 Man R (2d) 267 at para 33 (available on WL Can) (QB).

¹⁹ Paciocco & Stuesser, *supra* note 1 at 36-37. For extensive discussion of this, see Section IV and Conclusion below.

²⁰ See *Harter*, *supra* note 13 at paras 41-42, per McLachlin and Major JJ (concurring) which exemplify these difficulties. While many of the exclusionary discretions discussed in this article are mentioned or seem to be alluded to by these two justices in their discussion of the trial judge's exclusionary discretion, they seem to conflate what this article recognizes as different, and separate, kinds of discretion. As an example, they appear to conflate the exclusionary discretion existing at common law exercisable against Crown evidence with that existing within a statutory rule of admissibility, namely section 12 of the *Canada Evidence Act*, RSC 1985, c C-5 [*Canada Evidence Act*], also applicable against Crown evidence: see Sections I and II below. What is more, their reasons leave questions concerning the scope of the different exclusionary discretions, and of their relationship to one another unanswered, including any possible overlap, questions which this article eagerly takes up.

²¹ Delisle et al, *supra* note 88.

excluded to ensure a fair trial, arising from the Supreme Court case of *Harrer* and the *Charter*. In Section VI, the general discretion employable against Crown evidence where its prejudicial effect exceeds its probative value is re-visited, and several reasons offered to explain why it is the discretion most often engaged by the trial judge. In Section VII, the question of where the common law discretions should be viewed as falling in the general admissibility of evidence analysis is raised and the argument made that the discretion is best conceived of as a free-standing exclusionary rule, to be considered after relevance and technical admissibility have been established. In Section VIII, the idea that the trial judge's exclusionary discretion is best understood as comprising of four separate discretions is tested against competing viewpoints and shown to be the preferable approach. Section IX highlights the most important findings about the trial judge's exclusionary discretion revealed by this article, and concludes that the trial judge's discretion remains important in ensuring a fair trial.

II. THE GENERAL DISCRETION TO EXCLUDE CROWN EVIDENCE AS IMPLIED INTO A STATUTE

The first type of exclusionary discretion rests upon judicial decisions that have interpreted statutory provisions dealing with the admittance of evidence in a criminal trial in a specific way. Generally, these decisions have interpreted different statutory provisions, contained in statutes such as the *Canada Evidence Act*²² and the *Criminal Code of Canada*,²³ as providing for a single exclusionary discretion. This discretion, exercisable in the hands of the trial judge, allows for the exclusion of Crown evidence where its prejudicial effect outweighs their probative value despite meeting the required statutory criteria for admissibility.²⁴ This balancing of

²² CEA, *supra* note 20.

²³ *Criminal Code of Canada*, RSC 1985, c C-46 [Criminal Code].

²⁴ Examples of such statutory provisions include:

Ss 9(1) and 11 of the *Canada Evidence Act* (providing for the admission of prior inconsistent statements): see *R v Woodcock*, 2010 ONSC 1972; Section 12 of the *Canada Evidence Act* (providing for the admission of evidence of prior convictions against an accused who denies the fact of any such convictions): see *Corbett*, *supra* note 2; *R v Charland* (1996), 187 AR 161, 110 CCC (3d) 300 [*Charland* cited to AR]; S 715

prejudicial effect against probative value is always undertaken with an eye towards ensuring a fair trial process.²⁵ In short, “the fact that the statute makes such evidence admissible in no way requires its reception in evidence.”²⁶

Supreme Court decisions over the years have explained the exact source of this discretion differently, which may be due in part to the different language used within the various statutes themselves.²⁷ In *Corbett*,

of the *Criminal Code* (providing for the admission of evidence previously taken): see *R v Potvin*, [1989] 1 SCR 525 at 547–555, 47 CCC (3d) 289, [Potvin]; *Hawkins*, *supra* note 18 at para 53. S 715.1 of the *Criminal Code* (providing for the admission of videotaped statements by victims or witnesses under 18 about sexual offences): see *R v L (DO)*, [1993] 4 SCR 419, 85 CCC (3d) 289 [L (DO) cited to SCR].

²⁵ *R v Saroya* (1994), 36 CR (4th) 253 at 256, 76 OAC 25 (CA) [Saroya]. This is equally true of the balancing exercise that occurs with respect to the exercise of the trial judge’s exclusionary discretion at common law: see Section II below.

²⁶ *Corbett*, *supra* note 2 at 733, per La Forest J (dissenting). See also *Potvin*, *supra* note 24 at 553–554.

²⁷ In *Corbett*, *ibid*, La Forest J, in recognizing a judicial discretion to exclude, put some emphasis on the fact that section 12(1) of the *Canada Evidence Act*, the statutory provision at issue, provides that a witness may be questioned on his previous convictions, and so is therefore permissive as opposed to obligatory. In other words, the word may is directed to the trial judge, and confers upon him a discretion not to allow previous conviction evidence to be received where its probative value is outweighed by its prejudicial value: *Canada Evidence Act*, *supra* note 20, s 12(1).

Similarly, in *Potvin*, *supra* note 24, at 547–548, the majority of the Supreme Court held that the fact that the then section 643(1) (now section 715) of the *Criminal Code* provided that prior testimony “may” be read as evidence, as opposed to “shall” be read as evidence—what the provision read prior to the 1955 revisions—conferred a discretion upon a trial judge not to allow previous testimony to be admitted “in circumstances where its admission would operate unfairly to the accused.” The Court, however, was careful to circumscribe the scope of this kind of discretion: “...the discretion to prevent unfairness is not a blanket authority to undermine the object of section 643(1) by excluding evidence of previous testimony as a matter of course”. Notably, it left open the question of whether such a discretion could be said to have existed prior to the 1955 amendments, in the context of a section 643(1) which used obligatory language as opposed to permissive language.

Based on the reasons of a majority of judges of the Supreme Court, even absent this, a judicial discretion to exclude would likely have been read in, in any event: at paras 29–41. This conclusion is buttressed by the Supreme Court’s decision in *L (DO)*: *supra* note 24 at 428–429. There, the Court incorporated a judicial discretion to exclude into then-section 715.1 of the *Criminal Code* despite the obligatory language of the section: see *L (DO)*, *supra* note 24 at 430.

the first case in which such a statutory discretion was recognized, the Supreme Court interpreted section 12 of the *Canada Evidence Act* as “leaving room” for the exclusionary discretion existing at common law to operate.²⁸ In contrast, in *Potvin*, the Supreme Court interpreted the provision at issue, section 715 of the *Criminal Code*, as “conferring” an exclusionary discretion on a trial judge.²⁹ In the later case of *Hawkins*³⁰ a plurality of the Supreme Court, citing *Potvin*, held that section 715 “preserves” a residual discretion to exclude.³¹ Finally, in *L (DO)*, the Supreme Court interpreted the provision at issue, then section 715.1 of the *Criminal Code*, as “incorporating” a judicial discretion to exclude.³² Section 715.1 was also the subject of some discussion in lower courts,³³

²⁸ *Corbett*, *supra* note 2 at 688, 691, per Dickson CJC, Lamer J, Beetz J, and La Forest J (dissenting).

²⁹ *Potvin*, *supra* note 24 at 552.

³⁰ *Supra* note 18.

³¹ *Supra* note 18 at para 53.

³² *Supra* note 24 at para 3. For the then-text of section 715.1 of the *Criminal Code*, see *L (DO)*, *supra* note 24 at 430, per L’Heureux Dube and Gonthier JJ

³³ In *R v Toten*, (1993), 14 OR (3d) 225 at 249-252, 83 CCC (3d) 5 [*Toten* cited to OR], the Ontario Court of Appeal offered an entirely different perspective on what was then section 715.1 of the *Criminal Code* than the Supreme Court does in *L (DO)*. Specifically, it seems to find two overlapping statutory discretions operating at the same time within this section of the *Criminal Code*.

First, the statutory provision leaves room for the common law discretion exercisable against Crown evidence to operate: where the prejudice to the trial process outweighs its probative value the evidence must be excluded. The Court underlined that this first discretion is constitutionally enshrined by section 7 of the *Charter*.

Second, according to the Court, there is also a discretion implied into section 715.1 that allows videotaped evidence to be excluded “which does not serve the purpose of the statute”: *Toten* at 252. The Court identified the purpose of this statutory rule of admissibility as being “to enhance the truth-finding function of the trial.”: *Toten* at 250. Even though the Court was quick to recognize two overlapping discretions, it was just as quick to circumscribe their use, stating that the inclusionary rule created by then section 715.1 (providing for the admission of videotaped statements by victims or witnesses under 18 about sexual offences) should only be displaced sparingly.

In my own view, the first discretion identified by the Court in *Toten* is sufficient to exclude evidence which does not serve the purpose of the statute. The catalogue of factors considered within the balancing or weighing exercises of most, if not all, statutory discretions have been clearly crafted in support of the statutory provision. Incorporating a second exclusionary discretion within statutory rules of admissibility

though that discussion (and the Supreme Court's) was largely superseded by the amendment of section 715.1 to provide an explicit statutory discretion.³⁴

Regardless of how the statutory discretion to exclude is described to exist in law, it is not expressly created by statute. There is no provision in the statute that specifically provides for the operation of an exclusionary discretion, no provision that states that a trial judge may refuse to admit the evidence (though there is no provision that forbids it either).³⁵ A statutory provision that expressly states that the trial judge may refuse to admit evidence is best regarded as a purely statutory discretion to exclude – and should not be confused with the kind of discretion discussed here.³⁶

would be redundant and needlessly complicated.

³⁴ Section 715.1 has been amended to provide the trial judge with a wholly statutory discretion to exclude video-recorded evidence where he or she is of the opinion that this is necessary to preserve the proper administration of justice, so the discussion herein is largely now of only academic interest. The exclusionary discretion incorporated into the section by the Supreme Court in *L (DO)* has been superseded and no longer exists within that section: *R v Ortiz*, 2006 ONCJ 72 at paras 25-26 (available at WL Can) [Ortiz]. See also *Criminal Code*, *supra* note 23, s 715.1, as amended.

Though the catalogue of factors laid down in *L (DO)* to be considered in deciding whether to apply the implied exclusionary discretion within the former section 715.1 may still be relevant in deciding to apply the express exclusionary discretion contained within the new section 715.1, the amended section undoubtedly reduces the ambit of the discretion by requiring that a higher standard be met; the trial judge must find that the admission of the video-recorded evidence would interfere with the proper administration of justice: *Ortiz* at para 32. See also *Criminal Code*, *supra* note 23, s 715.1, as amended.

³⁵ This point was made by La Forest J (dissenting) in *Corbett*, *supra* note 2 at 731-732 in respect of section 12 of the *Canada Evidence Act*. A reading of the reasons provided by the rest of the court indicates that the other five judges (Dickson CJC, Lamer J (as he then was), Beetz J, McIntyre J, and Le Dain J) who took part in the judgment agreed with La Forest J's point. See also *Delisle et al*, *supra* note 8 at 181.

³⁶ *Rothman v R*, [1981] 1 SCR 640 at 695-697, 121 DLR (3d) 578 (per Lamer J's discussion of then section 178.16 of the *Criminal Code*) [Rothman]. For example, the new wording of section 715.1 of the *Criminal Code* (*supra* note 23, as amended.) provides that the presiding judge or justice may refuse to admit the evidence if he or she "is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice."

A. The Appearance of the Implicit Statutory Discretion to Exclude and Its Unique Operation

The statutory form of exclusionary discretion was first recognized by a majority of members of the Supreme Court of Canada in *Corbett*.³⁷ In that case, the matter at issue was the constitutionality of section 12 of the *Canada Evidence Act*, which not only allows the Crown to cross-examine an accused as to any prior convictions he or she might have, but also to prove any such convictions where the accused refused to answer questions pertaining to earlier conviction(s) or denied the existence of any such convictions.³⁸

A majority of judges on the Supreme Court, while agreeing that section 12 of the *Canada Evidence Act* should be read as leaving room for the exclusionary discretion already existing at common law to operate,³⁹ disagreed on whether or not section 12, standing alone (that is without an exclusionary discretion), violated the *Charter's* fair trial protection housed in section 11(d), which guarantees that any person charged with an offence is to be presumed innocent and to receive a fair trial.⁴⁰ In the end, the lead

³⁷ *Corbett*, *supra* note 2 at 692, 698, 732. Dickson CJC, Lamer J (concurring), Beetz J (concurring separately), and La Forest J (dissenting) all recognized the existence of such a discretion, though only La Forest J believed it should be exercised in favour of *Corbett*. McIntyre and Le Dain JJ (concurring) refused to recognize such a discretion, holding that the legislative provision at issue, namely Section 12 of the *Canada Evidence Act*, was unambiguous in leaving no room for such a discretion to operate. Estey J, while present, took no part in the judgment.

³⁸ *Canada Evidence Act*, *supra* note 20, s 12(1). It is worth noting that for this section to be implicated, an accused must first choose to testify.

³⁹ *Corbett*, *supra* note 2 at 688, 691, per Dickson CJC, Lamer J, Beetz J, and at 701, per La Forest J (dissenting).

⁴⁰ *Charter*, *supra* note 4, s 11(d). Beetz J argued that not reading in such a discretion to exclude would violate sections 7 and 11(d): *Corbett*, *supra* note 2 at 699. Two of the other judges, Dickson CJC and Lamer J, disagreed. They believed, however, that a discretion had to be read in to prevent a possible untoward effect of section 12 of the *Canada Evidence Act* which could deprive the accused of a fair trial in a sense not caught by the *Charter*. Put simply, the introduction of evidence of previous convictions could divert the jury from the task of deciding the case on the basis of admissible evidence relevant to the proof of the charge faced by the accused: *Corbett*, *supra* note 2 at 688. La Forest J (dissenting) held that reading in such a discretion would ensure that section 12 of the *Canada Evidence Act* remained constitutionally valid: *Corbett*, *supra* note 2 at 745-746.

opinion,⁴¹ concluded that the exclusionary discretion should not be exercised on the facts of the case to prevent Crown counsel from posing questions to Corbett on his past criminal convictions. This would have left the jury with a distorted picture of the facts as related to the principal factor in the case, credibility.⁴²

In reaching its decision not to exclude the evidence of Corbett's previous convictions, the court considered the impact of the evidence on the fairness of the trial process and to the accused.⁴³ In assessing this, the court weighed the probative value of allowing the evidence of Corbett's previous convictions against the prejudicial effect that might arise through this allowance.⁴⁴

The answer to the question of whether this weighing exercise should be employed in every case involving statutory rules of admissibility that are interpreted as leaving room for an exclusionary discretion to operate in deciding whether evidence is so unfair as to force exclusion, is probably no, in light of the Supreme Court's holding in *Potvin*.⁴⁵ There, the majority of the Supreme Court, in the context of section 643(1) (now 715) of the *Criminal Code* (which allows prior testimony of a witness to be read into evidence) identified a different weighing exercise:

...the discretion should only be exercised after weighing what I have referred to as the "two competing and frequently conflicting concerns" of fair treatment of the

⁴¹ *Corbett*, *supra* note 2 at 670-699, per Dickson CJC, Lamer J, and Beetz J.

⁴² *Corbett*, *supra* note 2 at 698.

⁴³ With respect to the common law discretion exercisable against Crown evidence, the focus of courts has shifted over the years from looking at fairness as concerns the accused to one which also considers fairness as concerns the trial process more broadly: see Section III discussion below. With respect to the statutory kind of discretion, courts do not seem to have oscillated as much. For example, in both *Corbett*, *supra* note 2, and *Potvin* (*supra* note 24) the Supreme Court goes beyond fairness as concerns solely the accused.

⁴⁴ In so doing, the Supreme Court noted that a trial judge must consider a specific catalogue of factors particular to this context, agreeing in this regard with the list appearing in the reasons of La Forest J (dissenting): *Corbett*, *supra* note 2 at paras 740-744. For a thorough listing and brief analysis of cases illustrating the inherent difficulty in conducting the balancing of prejudice against probative value based on the catalogue of factors enumerated in *Corbett*, see *Charland*, *supra* note 24.

⁴⁵ *Supra* note 24.

accused and society's interest in the admission of probative evidence in order to get at the truth of the matter in issue.⁴⁶

It is also worth noting that in *R v Toten*,⁴⁷ the Court of Appeal for Ontario posited a different exercise in respect of one of the exclusionary discretions said to exist within then section 715.1 of the *Criminal Code*: where admitting the evidence would be contrary to the purpose of the statute, it must be excluded.

While the weighing exercise laid down in *Potvin* obviously involves considerations of probative value and prejudice, its words are decidedly different than those used to describe the statutory discretion recognized in *Corbett* in the context of section 12 of the *Canada Evidence Act*. The words chosen by the Supreme Court in *Potvin* appear to narrow the ambit of the statutory discretion recognized there. For example, the weighing exercise in *Corbett*, balancing the evidence's probative value against its prejudicial effect, seems to leave room for considering the fairness of its introduction to third parties or to the victim.⁴⁸ The standard in *Potvin*, however, only anticipates consideration to the accused and to society in terms of whether the admission of probative evidence is necessary in order to get at the truth of the matter.

Consistent with this idea of a narrower ambit to the discretion, the Supreme Court in *Potvin* identified two specific situations at which the statutized exclusionary discretion was aimed: first, evidence may be excluded where there has been unfairness in the manner in which it was obtained, and second where the admission of the evidence would have a significant effect on the fairness of the trial itself. Though the lack of a bright line between the two grounds upon which evidence under this

⁴⁶ *Potvin*, *supra* note 24 at 553. Curiously, the second concern – society's interest in the admission of probative evidence in order to get at the truth of the matter in issue – is also factored into the balancing exercise that occurs within the exclusionary rule housed by subsection 24(2) of the *Charter*, which allows the exclusion of unconstitutionally obtained evidence in certain circumstances: *Paciocco & Stuesser*, *supra* note 1 at 350; *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 [*Grant*].

⁴⁷ *Supra* note 33.

⁴⁸ The common law discretion which permits Crown evidence to be excluded where its prejudicial effect outweighs its probative value (see Section III below) includes a consideration of these things as well: see *Mohan*, *supra* note 2 at 20–21.

discretion can be excluded is plain,⁴⁹ they are not necessarily mutually exclusive.

In *L (DO)* the Supreme Court adopted the general weighing exercise espoused in *Corbett* within the context of then-section 715.1 of the *Criminal Code*.⁵⁰ Where the evidence's prejudicial effect outweighed its probative value, it was to be excluded.

The net effect of the Supreme Court's decisions seems to be that in the context of section 12 of the *Canada Evidence Act* and then section 715.1 of the *Criminal Code* the balancing of probative value against prejudice⁵¹ is the weighing exercise to be employed in deciding whether to exclude the impugned evidence, while in the context of section 715 of the *Criminal Code* the narrower weighing exercise identified by the Supreme Court in *Potvin* is the test to be employed.⁵²

Returning to *Corbett*, the question of how the Supreme Court could justify implying an exclusionary discretion into section 12 of the *Canadian Evidence Act* in the absence of express language in the statute is worthy of specific treatment. Beetz J's concurring reasons isolated the central issue facing the court: should section 12 of the *Canada Evidence Act* be construed so as to leave room for the trial judge's exclusionary discretion? This would prevent cross-examination of an accused as to prior convictions where the probative value of such evidence in terms of

⁴⁹ *Potvin*, *supra* note 24 at 551.

⁵⁰ *Supra* note 24. For text of former section 715.1 of the *Criminal Code*, see *L (DO)*, *supra* note 24 at 430, per L'Heureux Dube and Gonthier JJ

⁵¹ This is the weighing exercise by which the exclusionary discretion existing at common law exercisable against Crown evidence operates: see Section II discussion below. It is also the same basic standard by which the exclusionary discretion existing at common law employable against defence evidence operates, though unlike the common law discretion applicable to Crown evidence, which only requires the prejudice of the impugned evidence to outweigh its probative value for exclusion to result, in this case the prejudice of the impugned evidence must substantially outweigh the probative value for exclusion to result: see Section III discussion below.

⁵² Undoubtedly, the different weighing exercise propounded by the Supreme Court in all these cases reveal the Court's struggle with how to measure and weigh probative value against prejudicial effect, in the context of a judicial discretion to exclude. Not surprisingly, high courts in other jurisdictions, including the House of Lords, have been similarly challenged: see *R v Sang*, [1979] 2 All ER 1222, 1980 AC 402 (available on BailII).

credibility was low but the potential prejudice to an accused was high.⁵³ While a majority of judges, including Beetz J held it should, McIntyre and Le Dain JJ strongly asserted that without a *Charter* infringement (which they did not find on the facts) the doctrine of parliamentary supremacy required the strict application of section 12, leaving no room for the recognition of such an exclusionary discretion exercisable in the hands of the trial judge. They went so far as to say that construing the section so as to provide for such a discretion would usurp Parliament's function because the court would, in effect, be amending the *Canada Evidence Act* and preventing Parliament from exercising its power to alter the common law through clear legislative enactment.⁵⁴

This latter contention by McIntyre and Le Dain JJ requires comment, as it implicitly raises another form of discretion which was in place and recognized at common law at the time. This kind of discretion, to be discussed next, currently is the broadest of the four discretions, and unlike the discretion recognized in *Corbett*, derives its authority from the common law, specifically the decision in *Wray*,⁵⁵ though the balancing exercise by which it operates has been significantly relaxed by virtue of the Supreme Court's decision in *R v Seaboyer*.⁵⁶

McIntyre and Le Dain JJ identified this as the only discretion in law that exists to exclude otherwise admissible evidence in a particular case. But as they accurately point out, its common-law derived authority prevents it from having the legal stature to overcome the clear statutory pronouncement in section 12 of the *Canada Evidence Act*. Nor did they believe the court could "elevate a general common law discretionary power to the level of an amendment to a specific and clear provision" without compromising the principle of parliamentary supremacy.⁵⁷

The interpretation of the statute by a majority of members of the Supreme Court so as to allow for the continued operation of an exclusionary discretion on the part of the trial judge would overcome the

⁵³ *Corbett*, *supra* note 2 at 699.

⁵⁴ *Corbett*, *supra* note 2 at 699-701.

⁵⁵ *Supra* note 16.

⁵⁶ [1991] 2 SCR 577, 83 DLR (4th) 193 [*Seaboyer* cited to SCR]. This has led to a significant increase in the frequency with which it is exercised to exclude Crown evidence.

⁵⁷ *Corbett*, *supra* note 2 at 699-700.

first noted problem. This would elevate (as it were) a common law general discretionary power to the level of statutory law, in effect creating a new form of exclusionary discretion which could overcome the clear statutory dictates of section 12. The lead opinion⁵⁸ endorsed La Forest J's characterization of the exclusionary discretion as being derived from the common law by virtue of the decision in *Wray*, and as continuing to subsist since the language in section 12 did not expressly abolish it.⁵⁹ In the view of a majority of the Justices, this absence meant that the section would have to be read as leaving room for the common law discretion to operate, albeit in a new and superior form, in order that a "fair trial" could be ensured for the accused. This interpretation of section 12 would minimize the violence done to the doctrine of parliamentary supremacy feared by McIntyre and Le Dain JJ, because there was no question that section 12 failed to indicate that the exclusionary discretion possessed by the trial judge should be removed, though clearly the Supreme Court's interpretation was elevating the common law principle recognized in *Wray* to a new stature, that of statutory law.

What is more, the balancing exercise by which the discretion existing within section 12 of the *Canada Evidence Act* was said to operate, namely a balancing of prejudice against probative value, was a departure from the *Wray* standard, which only allowed for the exclusion of admissible evidence where its probative value was low, and its prejudice very high.⁶⁰ As La Forest and Dickson JJ (concurring) stated in *Potvin* (albeit in the context of the statutory discretion contained in section 715 of the *Criminal Code*) trial judges may exclude evidence under this discretion even if its probative value is more than modest.⁶¹ This new balancing exercise was also a harbinger of things to come in terms of the scope of the common law exclusionary discretion, which would come to embrace the same exercise. It is clear that the exclusionary discretion existing within section 12, unlike the *Wray* formulation, can exclude evidence even where the strict requirements for exclusion noted in *Wray* are absent.⁶² This seems to

⁵⁸ Corbett, *supra* note 2 at 697.

⁵⁹ Corbett, *supra* note 2 at 730, per La Forest J (dissenting).

⁶⁰ *R v Richard* (1980), 56 CCC (2d) 129 at 136, 25 BCLR 29 (BC CA) [*Richard*] (describing the standard by which the *Wray* discretion operates).

⁶¹ *Potvin*, *supra* note 24 at 532.

⁶² See Section III-A below for an explanation of the restrictive tripartite standard that

be equally true of the statutory discretions recognized by the Supreme Court within the contexts of sections 715 and 715.1 of the *Criminal Code* in *Potvin* and *L (DO)*.

B. Why It Was Necessary for the Supreme Court to Recognize This Kind of Discretion

Before turning to the next form of discretion, it is of some importance to spell out why reading in room for “the trial judge’s exclusionary discretion” to operate within a statutory rule of admissibility was necessary. First, ensuring an accused person a fair trial, as required and contemplated by the *Charter*,⁶³ means that statutorily admissible evidence sometimes has to be excluded. As two Supreme Court justices opined, “[The] judicial discretion [conferred by section 715.1 of the *Criminal Code*] has its foundation in the judge’s duty to ensure a fair trial for the accused.”⁶⁴ The recognition of a statutory exclusionary discretion would strain against *Charter* challenges on the basis that the mechanical application of the statutory rule by the court had led to an unfair trial and a breach of sections 11(d) and 7⁶⁵ of the *Charter*. The Supreme Court, per L’Heureux-Dube and Gonthier JJ (concurring), referring to *Baron v Canada*,⁶⁶ seemed attuned to this point in *R v L(DO)*: “...this court has held that residual judicial discretion may be constitutionally required in order to provide a mechanism for balancing the rights of the accused and the state.”⁶⁷ In the

had to be met for evidence to be excluded under the *Wray* discretion.

⁶³ As a result of *Harrer*, *supra* note 13 at paras 21-24 trial judges now also have a “constitutionalized common law duty,” which exists apart from the *Charter*, to ensure a fair trial in a sense that goes beyond that strictly contemplated by the *Charter*: see Section IV discussion below.

⁶⁴ *L (DO)*, *supra* note 24 at probably 461, per L’Heureux Dube and Gonthier JJ (concurring).

⁶⁵ Section 11(d) of the *Charter*, *supra* note 4 provides an accused with a right to a fair trial. It reads: “any person charged with an offence has the right to be presumed innocent according to law in a fair and public hearing by an independent and impartial tribunal” [emphasis added]. The Supreme Court of Canada has also held that an accused’s right to a fair trial is “a principle of fundamental justice” and thus entitled to protection under section 7 of the *Charter*: *R v Pearson*, [1992] 3 SCR 665 at 682-683, 77 CCC (3d) 124.

⁶⁶ [1993] 1 SCR 416, 99 DLR (4th) 350.

⁶⁷ *L (DO)*, *supra* note 24 at 461.

context of that case, the majority of the Supreme Court stressed that the incorporation of a judicial discretion to exclude within section 715.1 would ensure that “s. 715.1 is consistent with fundamental principles and the right to a fair trial protected by ss. 7 and 11(d) of the Charter.”⁶⁸

There is also merit to the broader point made by Dickson CJC and Lamer J in *Corbett* that a fair trial encompasses more than what is envisioned by section 11(d) or by other *Charter* sections. For example, certain prejudices to the trial process or to the accused that might arise from the application of a statutory rule of admissibility, while not necessarily cognizable under the *Charter*, should be remediable by the trial judge – the ultimate protector of trial fairness – through the exercise of his or her residual exclusionary discretion.⁶⁹

Second, the discretion is necessary to ensure the principles of fairness underlying the law of evidence are realized. As came to be understood with respect to common law rules of admissibility, rules of admissibility created by statute or otherwise cannot be applied mechanically in all circumstances. This would not ensure that the goals underlying the law of evidence, not least ensuring the accused’s right to a fair trial,⁷⁰ are met.⁷¹ “A discretion exists because existing rules do not cover every situation, and may not adequately protect an accused’s right to a fair trial.”⁷² The Supreme Court in *Potvin*, in recognizing the existence of a statutory discretion in the then section 643(1) (now section 715), so cautioned: “I believe that the preferable interpretation of s. 643(1) ...confers on [the trial judge] a statutory discretion to prevent any unfairness that could otherwise result from a purely mechanical application of the section.”⁷³ [emphasis added].

⁶⁸ *Ibid* at para 3.

⁶⁹ *Corbett*, *supra* note 2 at 685-697, per Dickson CJ and Lamer J.

⁷⁰ *Ibid* at 692, per Dickson CJ and Lamer J.

⁷¹ *Paciocco & Stuesser*, *supra* note 1 at 36.

⁷² *R v Buric* (1996), 28 OR (3d) 737 at 750, 106 CCC (3d) 97 (CA).

⁷³ *Supra* note 24 at 550. I submit that, in light of the *Potvin* court’s admonition that the statutory discretion not be used as a matter of course and their identification of two sets of circumstances in which the discretion is exercisable, the court’s use of the words “any unfairness” in the above quoted passage should be read with caution and not be interpreted as encapsulating a broad notion of fairness. The fact is, in most circumstances, evidence made admissible pursuant to section 715 of the *Criminal Code* will be received.

In sum, undoubtedly there is a need for the trial judge to possess a residual discretion to exclude any evidence where its probative value is exceeded by its prejudicial effect. To require that a trial judge be constrained by statutory rules of admissibility, besides being inconsistent and arbitrary relating to the equivalent common law rules, would undermine the trial judge's fundamental duty to ensure a fair trial process for all parties, especially the accused. This requires ensuring that the probative value of evidence received is not outweighed by its corresponding prejudice.

III. THE GENERAL DISCRETION AT COMMON LAW TO EXCLUDE CROWN EVIDENCE

The second discretion is the trial judge's general discretion at common law to exclude Crown evidence where its prejudicial effect outweighs its probative value.⁷⁴ It owes its existence to *Wray*,⁷⁵ though

It is fair to say, therefore, that not all statutory discretions are created equal: The scope of the exclusionary discretion incorporated into section 715, in light of the statements made by the Supreme Court in *Potvin*, is likely narrower than that incorporated into either (former) section 715.1 of the *Criminal Code* or section 12 of the *Canada Evidence Act*. Having said that, it paradoxically anticipates excluding some improperly obtained evidence which is unlike the Supreme Court's discussions of the exclusionary discretions incorporated into section 715.1 of the *Criminal Code* and section 12 of the *Canada Evidence Act*, in *L (DO)* and *Corbett*, where there is no mention of either being exercisable against improperly obtained evidence. In this way, the exclusionary discretion incorporated into section 715 of the *Criminal Code* may be viewed as being wider than those discretions to exclude incorporated into (former) 715.1 and section 12 of the *Canada Evidence Act*.

Despite the Supreme Court's concern in *Potvin* that the scope of the statutory discretion in question be kept within strict bounds, it rejected the *Wray* formulation as the weighing exercise to be used in deciding whether the statutory discretion should be exercised on any given set of facts. The Court criticized it as being too restrictive, stressing that a trial judge's emphasis should be on: "The protection of the accused from unfairness rather than the admission of probative evidence 'without too much regard for the fairness of the adjudicative process' should be the focus of the trial judge's concern": *Potvin*, *supra* note 24 at 553.

⁷⁴ *Paciocco & Stuesser*, *supra* note 1 at 38-39, recognize this form of discretion.

⁷⁵ Admittedly in *Wray*, the discretion's existence was only recognized in the *obiter* comments of Martland J. Despite this, there is no question as to its existence: see *Boulet v The Queen*, [1978] 1 SCR 332, 75 DLR (3d) 223; *Paciocco & Stuesser*, *supra*

since that case its ambit has grown substantially.⁷⁶ In *Wray*, the majority decision of the Supreme Court, per Martland J, held that a trial judge has the discretion to exclude legally admissible evidence that would operate unfairly, arising from their duty to ensure the accused receives a fair trial.⁷⁷ A trial judge exercising that discretion is limited to ensuring the trial itself is fair. In short, “a judge cannot look beyond the trial itself in exercising this discretion.”⁷⁸ In other words, a trial judge has no jurisdiction to exercise this discretion to exclude evidence for reason only that it was obtained in an improper manner, since this arose during pre-trial procedures.⁷⁹

A. The *Wray* Exclusionary Discretion

In *Wray*, prejudice was defined for the purpose of exclusion as evidence that could operate unfairly and unjustly toward the accused, as opposed to merely unfortunately.⁸⁰ The Supreme Court, obviously wanting to restrict the scope of this discretion, purportedly to “preserve the integrity of the rules of evidence,”⁸¹ held that in order for a judge to exercise his or her exclusionary discretion the evidence in question had to be gravely prejudicial, of tenuous admissibility, and of trifling probative

note 1 at 37; *Corbett*, *supra* note 2 at 742. See also McWilliams et al, *supra* note 11 at 5-2.

⁷⁶ McWilliams et al, *supra* note 11 at 5-1- 5-2. The authors correctly attribute the growth in the scope of the discretion to the seminal decision in *Seaboyer*, *supra* note 56. For further comment: see Sopinka et al, *supra* note 5 at 31; *Corbett*, *supra* note 2 at 739, per La Forest J (dissenting).

⁷⁷ *Wray*, *supra* note 16 at 293.

⁷⁸ AF Sheppard, “Restricting the Discretion to Exclude Admissible Evidence” (1971) 14 *Crim LQ* 334 at 336.

⁷⁹ *Ibid.* Under existing law, there is an appreciation that improperly obtained evidence can lead toward an unfair trial, requiring the trial judge to exercise his residual exclusionary discretion to prevent such an occurrence. Unlike past practice, pre-trial procedures and the trial itself are no longer treated as separate water-tight compartments in relation to decisions whether to exercise an exclusionary discretion based on the anticipation of an unfair trial.

⁸⁰ *Wray*, *supra* note 16 at 293-295. See also *Corbett*, *supra* note 2 at 722, per La Forest J (dissenting).

⁸¹ David M Paciocco, “The Proposed Canada Evidence Act and the “Wray Formula”: Perpetuating an Inadequate Discretion” (1983) 29 *McGill LJ* 141 at 143 [Paciocco, “Wray Formula”].

force.⁸² It was acknowledged that legally admissible evidence “could cause errors in reasoning and judgment”⁸³ on the part of the trier of fact. Situations arose where certain evidence (an inflammatory picture, for example) would likely cause errors in judgment if received, despite being technically admissible.

This high tripartite standard for characterizing evidence as sufficiently prejudicial to justify exclusion was not to survive – as Paciocco notes, significantly confining the scope of the discretion undermined the discretion’s very purpose of preventing the unfair operation of evidence that was legally admissible.⁸⁴ Much of the very evidence the exclusionary discretion was meant to be employed against could not be characterized as gravely prejudicial, of tenuous admissibility, and of trifling probative value. Indeed, in *Wray* the Court held that the improperly obtained evidence in that case – an involuntary confession that led to the discovery of the murder weapon – was not excludable since the fact that it might “operate unfortunately” to the accused was not enough. It had to “operate unfairly” to the accused, which was only possible where the impugned evidence possessed the three aforementioned attributes,⁸⁵ a rare occurrence indeed.

Unlike the exclusionary discretions recognized in law today, the discretion in *Wray* was unduly focused on the probative value of the evidence instead of on the circumstances surrounding how it was obtained. If the evidence was of more than “trifling” probative value then no matter how improperly it was obtained; or how prejudicial it might be to the accused’s case or the fairness of the trial; or how much its admittance might cause errors in reasoning and judgment, it would be received into evidence.⁸⁶ In short, “the concern for probative evidence” outweighed “the concern for adjudicative fairness as between the Crown and its agents and an accused person.”⁸⁷

As a result of this fundamental flaw, the standard for determining whether something was sufficiently prejudicial to justify exclusion was relaxed. A more general weighing of probative value and prejudice, outside

⁸² *Wray*, *supra* note 16 at 293.

⁸³ Paciocco, “*Wray* Formula”, *supra* note 81 at 143.

⁸⁴ *Ibid.*

⁸⁵ *Wray*, *supra* note 16 at 293.

⁸⁶ *R v Burlingham*, 1995 2 SCR 206 at para 146, 124 DLR (4th) 7.

⁸⁷ *R v Clarkson*, [1986] 1 SCR 383 at 391-392, 26 DLR (4th) 493.

the *Wray* formula, arose. Where prejudice outweighed probative value, the evidence could be excluded.⁸⁸ In *Seaboyer*, by expanding the common law power of a trial judge to exclude technically admissible Crown evidence, the Supreme Court was importing the balancing exercise recognized by it in *Corbett* with respect to the exclusionary discretion contained within section 12 of the *Canada Evidence Act* (though not explicitly). Prior to this, the exact relationship that had to exist between the potential prejudice and probative value of a piece of evidence in order to trigger the common law exclusionary discretion remained less than clear.⁸⁹ Thankfully, this is not the case today. The weight of authority indicates that prejudice need merely outweigh probative value for exclusion to result.

It is worth noting that the *Wray* test for exclusion, however circumscribed, has not been explicitly discarded by the Supreme Court of Canada, even though, since *Seaboyer*, it no longer provides an accurate legal description of the general power of a judge to exclude relevant evidence.⁹⁰ Consequently the general discretion employable against Crown evidence existing at common law may (technically speaking) be capable of operating under either formulation.⁹¹ Having said this, it is a non-issue since the wider balancing test enunciated by the Supreme Court in

⁸⁸ *Seaboyer*, *supra* note 56 at paras 610-611; *Mohan*, *supra* note 2 at 20-21, 37-38, per Sopinka J (balancing probative value against prejudice for the purposes of the exclusionary discretion involves a balancing of the benefits of the evidence against its costs).

See also Paciocco & Stuesser, *supra* note 1 at 3 (recognizing *Mohan* as the source in law of this new formula). Although *Mohan* is more recent authority, and often cited for the proposition that a trial judge possesses a residual discretion to exclude technically admissible Crown evidence where its probative value is exceeded by its prejudicial effect (see e.g. *R v Duncan* (2001), [2002] 11 WWR 134 at para 43 (available on WL Can) (Man Prov Ct); *Welsh*, *supra* note 6 at para 35), this proposition of law was first formally laid down by the Supreme Court in the earlier case of *Seaboyer*.

⁸⁹ *Morris*, *supra* note 2 at 202; *Corbett*, *supra* note 2 at 739. This lack of clarity is evident in the numerous ways in which the *Wray* standard was described by different courts in past cases. In fact, often the specific tripartite standard (see Section II discussion above) was never referred to at all, or at least not in its entirety: see e.g. *Richard*, *supra* note 60 at 136: "...if the evidence is of limited probative value and highly prejudicial, the judge has a discretion [to exclude]".

⁹⁰ *Corbett*, *supra* note 2 at para 739-740, per La Forest (dissenting); *Seaboyer*, *supra* note 56 at paras 40-43.

⁹¹ See Sopinka et al, *supra* note 5 at para 2.57.

Seaboyer and *Mohan* is usually applied by any court grappling with whether to exclude a piece of Crown evidence under this form of exclusionary discretion⁹² and any evidence that might have been caught by the restrictive *Wray* discretion will almost certainly be caught by the wider *Seaboyer* discretion.

The *Wray* formulation has also fallen into disuse because it has no ability to exclude evidence based on the circumstances in which it was obtained. Thankfully, some of the exclusionary discretions which have come to be recognized in law, as well as the exclusionary rule brought in by virtue of the introduction of subsection 24(2) of the *Charter*,⁹³ have come to fill the large void left by the Supreme Court in the *Wray* decision.

B. The *Seaboyer* Exclusionary Discretion

Considering the concepts of prejudice and probative value would help illustrate how the discretion articulated in *Seaboyer* operates. As a starting point, both the level of prejudice and probative value are determined by reference to the specific facts of a case, and therefore are not to be considered in the abstract.⁹⁴

The probative value of evidence is determined primarily by considering its credibility, its reliability, and the strength of the inference it gives rise to.⁹⁵ “The assessment of probative value requires that the Crown clearly identify the purpose for which the evidence ... is proffered.”⁹⁶ A judge contemplating the exercise of his or her exclusionary

⁹² See e.g. *Mohan*, *supra* note 2 at 20-21, 37-38; *DD*, *supra* note 3; *Powell*, *supra* note 2.

⁹³ Subsection 24(2) places a duty on courts in certain circumstances to exclude unconstitutionally obtained evidence: see generally *Paciocco & Stuesser*, *supra* note 1 at 350; *Grant*, *supra* note 46.

⁹⁴ *Corbett*, *supra* note 2 at 744, per La Forest J (dissenting). Although La Forest J made this point in the context of the statutory discretion that exists within section 12 of the *Canada Evidence Act*, it is equally applicable in this context as well. For an actual example of how this approach manifests itself: see *Morris*, *supra* note 2, per McIntyre J, where the low probative value of the presence of a newspaper article concerning the heroin trade in Pakistan rather than in Hong Kong found among the accused's possessions, it still provided for the inference that the accused had apprised himself on the sources of supply of heroin and was thus receivable.

⁹⁵ *Paciocco & Stuesser*, *supra* note 1 at 35, 41.

⁹⁶ *Powell*, *supra* note 2 at para 8.

discretion “must come to some appreciation of the probative value of the evidence.”⁹⁷

Prejudice refers to any adverse effects arising from the introduction of evidence.⁹⁸ For example, evidence can be excluded “where its admission would involve an inordinate amount of time that is not commensurate with its value.”⁹⁹ As stated in *R v Collins*,¹⁰⁰ for something to count as prejudice it need not be shown that it will be adverse to the other party’s position. Instead, it must simply have the potential to adversely affect the fairness and integrity of the proceedings. The trial judge cannot exclude relevant evidence solely for the reason that it tends to prove the guilt of the accused.¹⁰¹ For something to constitute prejudice, it must be more than mere speculation or conjecture.¹⁰² In *Duguay*,¹⁰³ the Court held that the evidence must either have the potential to render the trial unfair for the accused or be susceptible in some way to misuse by the trier of fact.

Again, here, with respect to the assessment of prejudicial value, there is ambiguity in that in the past some courts have focused on prejudice to the trial process as concerns only the accused,¹⁰⁴ while others have focused on prejudice as concerns the trial process more generally.¹⁰⁵ The latter view includes a consideration of the impact evidence can have on accused persons, victims, and third parties. The weight of recent authority supports the latter interpretation.¹⁰⁶ The factors considered under the prejudice side of the equation have included:

1. a tendency that the evidence is given more weight than it deserves;¹⁰⁷

⁹⁷ *R v Duguay*, 2005 NBQB 48 at para 88, 277 NBR (2d) 165 [*Duguay* QB].

⁹⁸ Paciocco & Stuesser, *supra* note 1 at 40-41.

⁹⁹ *Mohan*, *supra* note 2 at 20-21.

¹⁰⁰ (2001), 160 CCC (3d) 85 at para 19, 150 OAC 220 (Ont CA).

¹⁰¹ *R v Tran*, 2001 NSCA 2 at para 28, 19 NSR (2d) 18 (NS CA); *R v Aziga*, 2008 CarswellOnt 7630 at para 25 (WL Can), 2008 CanLII 66631 (Ont SCJ) [*Aziga*].

¹⁰² *R v Kinkead*, 1999 CarswellOnt 1264 at para 18 (WL Can), 1999 CanLII 14909 (Ont SCJ).

¹⁰³ *Supra* note 7 at para 73.

¹⁰⁴ See, for example, *Wray*, *supra* note 16.

¹⁰⁵ *Mohan*, *supra* note 2 at 20-21.

¹⁰⁶ See *DD*, *supra* note 3 at para 11 (affirming *Mohan*, *supra* note 2). See also Paciocco & Steusser, *supra* note 2 at 40; *R v Bartkowski*, 2004 BCSC 321 (available on WL Can) [*Bartkowski*]; *R v Boyd*, 2006 MBQB 128 at para 25, [2006] 11 WWR 721 [*Boyd*].

¹⁰⁷ McWilliams et al, *supra* note 11 at 5-14.4; *R v Paul*, 2004 CarswellOnt 1293 (WL Can) at para 32, 2004 CanLII 12063 (SCJ) [*Paul*].

2. might somehow be prejudicial to non-parties, witnesses or complainants (e.g. certain lines of questioning in sexual assault cases);¹⁰⁸
3. might threaten the fairness of the process;¹⁰⁹
4. might confuse or mislead or raise side issues;¹¹⁰
5. might cause unfair surprise (depriving a party of the opportunity to respond);¹¹¹
6. might involve an inordinate amount of time;¹¹²
7. might distort the truth-seeking function of the trial;¹¹³
8. might unduly inflame the jury's emotions;¹¹⁴
9. might usurp the function of the jury;¹¹⁵ and
10. might overwhelm the jury with an aura of infallibility (arises in the context of expert evidence)¹¹⁶

In considering the level of prejudice, some courts have also mentioned the need to consider the mode of trial: is the trial being heard before a judge alone or a judge and a jury? In a recent case, *Powell*, the Ontario Superior Court of Justice reasoned that in a judge-alone trial the risk of evidence being misused is far less than when it is being considered by a lay jury.¹¹⁷ This is because trial judges are more likely than jurors to “have the

¹⁰⁸ McWilliams et al, *supra* note 11 at 5-14.8; *Boyd*, *supra* note 106 at para 25.

¹⁰⁹ McWilliams et al, *supra* note 11 at 5-14.4; *DD*, *supra* note 3 at para 37; *Bartkowski*, *supra* note 106 at para 12; *Boyd*, *supra* note 106 at para 25.

¹¹⁰ Paciocco & Stuesser, *supra* note 1 at 40; *Corbett*, *supra* note 2 at 714; McWilliams et al, *supra* note 11 at 5-14.5; *Wray*, *supra* note 16 at 297; *Paul*, *supra* note 107 at para 32.

¹¹¹ Paciocco & Stuesser, *supra* note 1 at 40; McWilliams et al, *supra* note 11 at 5-15; *Wray*, *supra* note 16 at 297.

¹¹² Paciocco & Stuesser, *supra* note 1 at 40; *Corbett*, *supra* note 2 at 714; McWilliams et al, *supra* note 11 at 5-14.7; *Paul*, *supra* note 107 at para 32.

¹¹³ McWilliams et al, *supra* note 11 at 5-14.4–5-14.5; *Bartkowski*, *supra* note 106 at para 12; *Paul*, *supra* note 107 at para 32.

¹¹⁴ McWilliams et al, *supra* note 11 at 5-14.4.

¹¹⁵ *Ibid* at 5-14.6.

¹¹⁶ *DD*, *supra* note 3 at para 37; *Paul*, *supra* note 107 at para 32.

¹¹⁷ *Powell*, *supra* note 2 at para 10. Curiously, in *Duguay QB*, *supra* note 97 at para 113 the trial judge states the converse. He says that where there is a jury trial a trial judge should generally be very loath to exclude the evidence given the crucial role the jury plays in such trials. Although this was not explicitly stated by the trial judge, this seems to imply that where a trial is by judge alone, the trial judge should be more willing to exclude the impugned evidence. In spite of his statements, the trial judge did notably choose to exercise his residual discretion to exclude the impugned evidence, to prevent the jury from considering it. I submit that any approach which favours exclusion of the evidence in judge-alone trials over that of jury trials is not to be preferred for the reasons enumerated in the text above and below.

ability to disregard the prejudicial aspects, if any ..."¹¹⁸ of evidence by properly cautioning themselves. Where a trial is held before judge alone, it seems prudent that trial judges be given a little bit "greater latitude to consider evidence whose admission might be questioned"¹¹⁹ were it to be put before a lay jury.¹²⁰

Another related factor mentioned by some courts,¹²¹ with the potential to have great impact on the admissibility of evidence analysis, is whether jury instructions can reduce potential prejudice to a point where evidence which would not otherwise have had sufficient probative value to overcome prejudice can, as a result of such instruction, gain admittance. As noted by the Supreme Court in *Mohan*, "the possibility that evidence

¹¹⁸ *R v Andirchow*, 2008 ABPC 298, 459 AR 36 at para 20.

¹¹⁹ *R v Sutherland* (2001), 156 CCC (3d) 264 at para 19, 146 OAC 53 (Ont CA) [*Sutherland*]. It also seems prudent that trial judges be given more leeway in their discretionary determinations whether the requirements of admittance under any specific exclusionary rules are met on the facts of a particular case where the case is being heard by a judge alone and not a judge and jury: see *R v Poslowsky* (1997), 11 CR (5th) 141 at para 34-35 (available on WL Can) (BC SC).

¹²⁰ In my view this should not be done as a matter of course. The exclusionary discretion exists in part because some evidence is so potentially prejudicial that it should not be considered by the trier of fact, regardless of the mode of trial. It is likely for this reason that in *R v Sutherland*, Justice Laskin, while reasoning that judges should be given more room to accept evidence they might not otherwise in the presence of a jury, did not recommend "a wholesale abandonment" in these circumstances, "of the trial judge's gatekeeper function which requires that he or she exclude evidence where its prejudicial value outweighs its probative value." (*Powell*, *supra* note 2 at para 24, referring to the Court's reasons in *Sutherland*, *supra* note 119, per Laskin J). I submit that this duty on a trial judge in most cases must be discharged. (See, for example, *Powell*, *supra* note 1 at paras 17-24 where the trial judge decided to exclude the gun evidence in spite of the absence of a jury and in spite of his acknowledgement that trial judges have a greater ability than lay jurors to disregard any prejudicial aspects of evidence.) Only in the most exceptional circumstances should a judge decide to accept otherwise excludable evidence for reason only that the trial is before a judge alone as opposed to a judge and jury.

¹²¹ *Aziga*, *supra* note 101 at para 25; *Paul*, *supra* note 116 at para 23. Interestingly, in *R v Chretien*, 1999 BCCA 411 at para 20, 137 CCC (3d) 87, the Court rejects this factor as being one that should be considered in balancing probative value against prejudice, in deciding whether to apply an exclusionary discretion. In light of the Supreme Court's clear recognition of this factor in cases such as *Mohan* (*supra* note 2 at 24) and *Corbett* (*supra* note 2 at 693), there is no question as to its existence, notwithstanding the contrary statement made in this regard in *Chretien*.

will overwhelm the jury and distract them from their task can often be offset by proper instructions.”¹²² In *Corbett*, the Supreme Court, after balancing probative value against prejudice (albeit in the context of an implied statutory discretion), decided against exercising an exclusionary discretion even though the risk of prejudice arising from introduction of the accused’s prior convictions (namely that the jury could conclude that the accused is a bad person and has a propensity to commit criminal offences and therefore must have committed the crime with which he stands charged) was recognized as being high. This was because the risk of prejudice could be eliminated (or at the very least minimized) by a proper instruction to the jury about the impermissible use of the prior criminal record.¹²³ Nonetheless, the greater the prejudicial effect of the evidence, the less likely it seems that it can be sufficiently addressed by way of a proper instruction to the jury.¹²⁴

A further factor, which is subsumed within some of the aforementioned factors, is the degree to which the evidence might be decisive to the ultimate issue of guilt or innocence. Where the evidence is likely to influence the ultimate issue, it is fair to say that prejudice would clearly need to exceed probative value in order for exclusion to result, to lessen the room for close calls. It is also worth noting that in these situations the test for admittance within specific exclusionary rules (such as the expert evidence rule) is more strictly applied.¹²⁵

Another factor which has been considered by some courts¹²⁶ is the level of agreement, if any, between Crown and defence as to whether the evidence is likely to be prejudicial to the fact-finding process. While the exercise of the exclusionary discretion is the sole province of the trial judge, there is no doubt that its analysis will often (if not always) be heavily informed by the evidence presented by Crown and defence counsel. That said, even where there is agreement between counsel that the evidence presents no danger and should be admitted, the trial judge still retains the

¹²² *Mohan*, *supra* note 2 at 24.

¹²³ *Corbett*, *supra* note 2 at 121, per Dickson CJ and Lamer J. For similar holdings, see *Saroya*, *supra* note 25 at 257-258; *R v Terry*, [1996] 2 SCR 207 at para 30, 135 DLR (4th) 214.

¹²⁴ See generally *R v Grewall*, 2000 BCSC 1370 at para 51 (available on WL Can).

¹²⁵ *Mohan*, *supra* note 2 at 20-21.

¹²⁶ *R v Morrissey* (2003), 12 CR (6th) 337 at para 22 (available on WL Can) [*Morrissey*].

discretion to exclude the evidence. Consequently, where he or she has a reasonable basis for concluding that the evidence's prejudicial effect outweighs its probative value, the trial judge may exclude the evidence regardless of any submissions, joint or otherwise, from counsel that dictate the opposite outcome.

Needless to say, depending on the particular circumstances of any case, a variety of factors that serve to inform the level of prejudicial effect of the evidence will present themselves. "The relative weight to be assigned to factors requires an *ad hoc* judgment and is not a process that can be captured by a bright line capable of yielding a single correct result."¹²⁷

Once the assessments of prejudice and probative value are complete, a balancing of one against the other occurs. Where prejudice is found to outweigh probative value, the evidence may be excluded. This exercise must be completed by a trial judge before any application of the exclusionary discretion, though he or she may not need to refer explicitly to this balancing in their reasons for decision.¹²⁸ The exclusionary discretion, while integral to ensuring the fairness of the trial process, should not be viewed as "a blanket discretion for judges to repudiate conduct on the part of authorities regarded as distasteful or inappropriate."¹²⁹ In other words, where the probative value of Crown evidence is found to outweigh its prejudicial effect, even by the slightest of margins, the evidence, no matter how objectionable, must be received.¹³⁰

¹²⁷ *R v Pilon*, 2009 ONCA 248 at para 54, 243 CCC (3d) 109. The same can no doubt be said of the statutory discretions that exist within statutory rules of admissibility.

¹²⁸ *R v Devine*, 2008 SCC 36 at para 30, [2008] 2 SCR 283 [*Devine*].

¹²⁹ *Rothman*, *supra* note 36 at 696, per Lamer J. While this statement was made in the context of a different exclusionary rule, a "pure discretion" to exclude (see Section I and note 40 above) contained within then section 178.16 of the *Criminal Code* (*supra* note 23), it is equally applicable to the trial judge's exclusionary discretion regarding Crown evidence at common law established in *Seaboyer*.

¹³⁰ A properly crafted jury instruction cautioning the jury about the impermissible use of the evidence can sometimes provide a piece of evidence, which might not otherwise have enough probative value to exceed prejudicial effect, with sufficient probative value to make it receivable. This is because a proper jury direction can reduce or remove prejudicial effect, such that prejudicial effect no longer exceeds probative value: See generally Paciocco & Stuesser, *supra* note 1 at 44.

IV. THE GENERAL DISCRETION AT COMMON LAW TO EXCLUDE DEFENCE EVIDENCE WHERE ITS PREJUDICIAL EFFECT SUBSTANTIALLY OUTWEIGHS ITS PROBATIVE VALUE

The third type of exclusionary discretion concerns defence evidence and also owes its existence to the common law. In *Seaboyer*, the Supreme Court of Canada decided to change the common law, giving life to a new form of exclusionary discretion: the trial judge can now exclude what is otherwise technically admissible defence evidence.¹³¹ “[N]o matter how limited this discretion might or might not be in relation to defence evidence, the discretion does exist.”¹³²

Prior to this case, there existed no exclusionary discretion applicable to defence evidence.¹³³ If defence evidence was found to be legally admissible, it would be received regardless of the prejudice it occasioned. As a result, the general exclusionary discretion existing at common law first recognized in *Wray* had no applicability to defence evidence, and this continues to be the case under the post-*Wray* formulation recognized by the Supreme Court in *Seaboyer* and *Mohan*.

However, as a consequence of *Seaboyer*, a trial judge can now exclude defence evidence where its prejudice substantially outweighs its probative value.¹³⁴ This standard is more imposing than the formulation applicable to Crown evidence¹³⁵ which requires only that prejudice exceed probative value, though it is probably not more imposing than the tripartite standard for exclusion laid down by the Supreme Court in *Wray*. The discretion to exclude defence evidence “only becomes engaged where the prejudicial effect of the evidence substantially exceeds its probative value.”¹³⁶

Unlike the discretion regarding Crown evidence, the discretion applicable against defence evidence can only be understood with reference

¹³¹ *Seaboyer*, *supra* note 56 at 611.

¹³² *R v TJB*, 2004 CarswellNfld 122 at para 6 (WL Can), 2004 CanLII 16157 (PC) [TJB].

¹³³ See generally, Paciocco & Stuesser, *supra* note 1 at 38.

¹³⁴ *Seaboyer*, *supra* note 56 at 611; *aff'd R v Shearing*, 2002 SCC 58 at para 107, [2002] 3 SCR 33.

¹³⁵ See Paciocco & Stuesser, *supra* note 1 at 38-39 for a discussion of the rationale behind the more imposing standard applicable to defence evidence.

¹³⁶ *R v Palma* (2000), 149 CCC (3d) 169 at 175 (available on WL Can) (Ont SCJ).

to the fundamental tenet of our criminal justice system that an innocent person not be convicted.

McLachlin J, speaking for the majority of the Supreme Court in *Seaboyer*, explained it this way:

The right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial, a commitment expressly embodied in s.11(d) of the *Charter*. It has long been recognized that an essential facet of a fair hearing is the "opportunity adequately to state [one's] case". This applies with particular force to the accused, who may not have the resources of the state at his or her disposal. Thus our courts have traditionally been reluctant to exclude even tenuous defence evidence. For the same reason, our courts have held that even informer privilege and solicitor-client privilege may yield to the accused's right to defend himself on a criminal charge.

....

The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. As one writer has put it: If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.

In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent [references excluded].¹³⁷

It follows that where defence evidence is found to be technically admissible, the circumstances which will justify its exclusion will be very narrow indeed.¹³⁸ A natural consequence of this principle is that evidence introduced by the Crown that would almost certainly be excluded by a judicial discretion to exclude, may not suffer that fate if introduced by the defence.

*R v Morrissey*¹³⁹ is instructive. There, the defence sought to introduce critical evidence of the accused's relationship with two previous girlfriends in an attempt to undercut the Crown's theory that the shootings in the case were a murder/suicide attempt on the part of Mr. Morrissey, as opposed to a suicide attempt by Mr. Morrissey gone terribly wrong. The

¹³⁷ *Seaboyer*, supra note 56 at 607-608, per McLachlin J.

¹³⁸ *Seaboyer*, supra note 56 at 611.

¹³⁹ Supra note 126.

evidence of disposition, according to the defence, demonstrated that Mr. Morrissey, when he got angry or upset at the time of breakdown in a personal relationship, turned his feelings of distress on himself as opposed to his partners. The evidence was crucial to Mr. Morrissey's state of mind at the material time, since it vitiated the specific intent required for murder.¹⁴⁰

Fuerst J, while recognizing that the relevance of the defence evidence involved propensity reasoning, which is generally problematic since it is premised on the belief that a person's disposition is a reliable predictor of conduct in a given situation, refused to exclude the evidence, pursuant to her exclusionary discretion or otherwise.¹⁴¹ She underlined that the danger of propensity reasoning concerning the accused (that it will do no more than blacken an accused's character) makes Crown evidence of this kind impermissible,¹⁴² not defence evidence which seeks to assist an accused in making full answer and defence. Because prejudice did not substantially outweigh probative value, the evidence could not be excluded. Fuerst J also underlined that a trial judge possesses the discretion to relax rules of evidence in favour of an accused in order to prevent a miscarriage of justice, which she was choosing to exercise if the impugned evidence, strictly speaking, was not technically admissible for violation of the similar fact evidence rule.¹⁴³ Last, the risk that the evidence would be used as evidence of Mr. Morrissey's general disposition was not unduly high since the trial was by judge alone.

In *R v Young*,¹⁴⁴ expert evidence tendered by the defence addressing the effect of alcohol on the human body survived where comparable Crown evidence might not have. There, the trial judge refused to apply the

¹⁴⁰ *Morrissey*, *supra* note 126 at paras 7-14 & paras 23-24.

¹⁴¹ *Ibid* at para 25-27.

¹⁴² *Ibid* at para 21. This kind of evidence is referred to as "similar fact evidence" when tendered by the Crown. It is inadmissible unless it can meet the test for admission set down in *R v Handy*, 2002 SCC 56, [2002] 2 SCR 908 [*Handy*], a test heavily imbued by considerations of probative value and prejudice. Fuerst J refused to qualify the defence evidence as "similar fact evidence" since it was not evidence that had been tendered by the Crown for the purpose of blackening the character of the accused: at para 21.

¹⁴³ *Morrissey*, *supra* note 126 at para 26. Even though the evidence can be received in these circumstances, this does not entitle it to any weight. Fuerst J notes as much, in her reasons at para 24.

¹⁴⁴ 2003 BCSC 1831 (available on WL Can) [*Young*].

general standard for exclusion applicable to expert evidence tendered by the Crown – where prejudice outweighs probative value – to the exercise of his exclusionary discretion. The Crown took the position that significant indicia of prejudice, identified by the Supreme Court in *Mohan*,¹⁴⁵ namely, its ability to confuse the jury or cause it to put undue weight on the evidence, were present on the facts. In any event, argued the Crown, the evidence was not probative to any issue in the case. All told this meant that the evidence's prejudicial effect outweighed its probative value, meriting its exclusion. Barrow J refused to exclude the evidence, pointing out that the issue of intoxication was relevant to the question of the accused's mental state in relation to the offence with which she stood charged.¹⁴⁶ More important for our purposes, the trial judge held that prejudicial effect did not "clearly" outweigh probative value so the discretion was not exercisable.¹⁴⁷

In balancing prejudicial effect against probative value, there is no doubt that some of the factors considered by the trial judge in exercising this form of discretion are specific to or figure more predominantly in this context and are sensitive to the often delicate nature of the evidence in question. In *R v TJB*,¹⁴⁸ the accused stood charged with sexual assault and sought to introduce evidence from three witnesses to demonstrate the neighborhood's view on the complainant's poor reputation for truth and veracity. Gorman J had to ascertain whether to allow a foundation to be laid that would then allow the three witnesses to give evidence of the complainant's general reputation for truthfulness in the community. The proper foundation being the witnesses' actual knowledge of the community's view of the reputation of the complainant as to truth and veracity in the neighborhood in which she resides. Without this foundation, the evidence would be inadmissible.¹⁴⁹ The danger of prejudice was clear in that receipt of the evidence might very well lead to

¹⁴⁵ *Supra* note 2.

¹⁴⁶ *Young*, *supra* note 144 at para 4.

¹⁴⁷ *Ibid* at para 11.

¹⁴⁸ *Supra* note 132.

¹⁴⁹ *TJB*, *supra* note 132 at para 1. As a general rule, such evidence is inadmissible. In *R v Diu* (2000), 49 OR (3d) 40 at 52, 144 CCC (3d) 481 (CA), the Court of Appeal for Ontario stated: in "general, the character of a victim of a crime is irrelevant and neither the accused nor the Crown may lead such evidence."

the forbidden inference that, because of the complainant's bad character, she "got what she deserved".

While recognizing the highly limited nature of the discretion exercisable against defence evidence, Gorman J disagreed with defence counsel's view that defence evidence as to a complainant's reputation for truth and veracity was automatically admissible, with the question being one of weight rather than admissibility.¹⁵⁰ As the trial judge noted:

The inherent "dangers" involved in the presentation of such evidence should not be underestimated. We all may have views on the character of others, but expressing "our communities" view of such character is much more difficult and problematic. It will invariably be based upon hearsay and the worse forms of gossip, rumour or an innuendo. In addition, such evidence will always, to a certain extent, be colored by our personal views of that person. No one can proffer such an opinion on behalf of their community free from such frailties.¹⁵¹

Gorman J's view is the correct one; defence evidence of the kind at issue in *TJB*, or otherwise, is not automatically receivable just because it is introduced by the defence on behalf of an accused; it is always subject to being excluded by the trial judge where its prejudicial effect substantially outweighs its probative value. That said, the discretion must be exercised very cautiously, especially relative to the *Seaboyer* discretion applicable to Crown evidence, since the accused's right to make full answer and defence is "such a fundamental principle of justice that it cannot be lightly interfered with."¹⁵² It follows that, where a "proper foundation" as defined by relevant jurisprudence is present, defence evidence on the character of the complainant, no matter how objectionable and inflammatory, must be received.

It is important to note that a proper foundation is not a perfect foundation, but merely one that gives the trial judge a reasonable basis for concluding that the witness's testimony is not confined to his or her own opinions or views of the complainant's reputation for truthfulness, but one which is at least in part informed by the neighborhood's view (which clearly the witness must have some personal knowledge of). Thus, in *TJB*, Gorman J allowed testimony of one of three defence witnesses to be received, even though the witness had significant difficulty in

¹⁵⁰ *TJB*, *supra* note 132 at paras 5-6.

¹⁵¹ *Ibid* at para 16.

¹⁵² *Ibid* at para 19.

distinguishing between her personal view of the complainant's character and the community's view of the complainant's reputation for truthfulness.¹⁵³ In determining whether a proper foundation for the proposed defence evidence has been laid in this context, which in effect disabuses a trial judge of their power to exclude this kind of evidence in all circumstances, a trial judge's considerations should include:

- i. Whether the witness's testimony reveals that he or she might be mistaken as to identity of the complainant;
- ii. Whether the witness goes further than merely expressing his or her personal opinion as to the complainant's reputation for truthfulness and veracity;
- iii. Whether the witness has personal knowledge of the views of community on the complainant's reputation for veracity and truthfulness, or whether his or her opinion is completely devoid of personal knowledge and solely reliant on hearsay.

All the above said, in balancing probative value against prejudicial effect for defence evidence, the trial judge may need to consider some of the same factors as it does with respect to the discretion exercisable against Crown evidence. For instance, in assessing the probative value of defence evidence, a consideration of its credibility is undertaken.¹⁵⁴

Of the four kinds of exclusionary discretions herein examined, it is fair to say that the ambit of the discretion applicable to defence evidence is the most constrained, though it bears repeating that prior to *Seaboyer*, defence evidence was altogether immune from a judicial discretion to exclude. Despite its limitations, the discretion to exclude defence evidence has been exercised on a number of occasions and there is no longer any question as to its existence.

¹⁵³ *TJB*, *supra* note 132 at para 21. Of note, Gorman J exercised his discretion to exclude the evidence from the other two witnesses finding that a "proper foundation" was not present to support their respective testimonies. Hence, this defence evidence's prejudicial effect was found to substantially outweigh its probative value: at paras 20 & 22.

¹⁵⁴ *Ibid* at para 18.

V. THE GENERAL DISCRETION TO EXCLUDE CROWN EVIDENCE TO ENSURE A FAIR TRIAL ARISING OUT OF THE *CHARTER* AND *R v HARRER*

The final type of discretion owes its existence to section 11(d) of the *Charter* and to the Supreme Court's decision in *R v Harrier*,¹⁵⁵ though it is traceable to the dissenting opinions of some Supreme Court Justices in cases such as *Wray*.¹⁵⁶ It has aptly been characterized as a "constitutionalized common law discretion".¹⁵⁷ It permits a trial judge to exclude improperly obtained evidence, even in the absence of a *Charter* breach, in order to ensure a fair trial.¹⁵⁸ This discretion seems to fill a void left by that in *Wray*, which (to repeat) left little, if any, room for improperly obtained evidence – or any other evidence for the matter – to be excluded, because of the high standard that had to be met, and because of the refusal to consider pre-trial procedures as a factor bearing on the fairness of the trial process itself. It is also fair to say that because this form of discretion specifically contemplates the exclusion of improperly obtained evidence in order to ensure a fair trial for the accused, the wider *Seaboyer* formulation employable against Crown evidence may not always be exercisable against this kind of evidence.¹⁵⁹ When, for example, the evidence's probative value clearly outweighs its prejudicial effect.

¹⁵⁵ *Supra* note 13. Interestingly, Paciocco & Stuesser, *supra* note 1 attribute the source of this discretion to the *Charter* and to *Buhay* (*supra* note 14). *Buhay* does identify the discretion at para 40, but is simply affirming the earlier case of *Harrier* in this regard.

¹⁵⁶ See generally McWilliams et al, *supra* note 11 at 5-15.

¹⁵⁷ *Ibid* at 5-19; Sopinka et al, *supra* note 5 at 31. See *Harrier*, *supra* note 13 at paras 21-24, per La Forest J.

¹⁵⁸ *Harrier*, *supra* note 13 at paras 21-23, per La Forest J; Sopinka et al, *supra* note 5 at 31. The concept of a fair trial recognized in *Harrier* extends beyond simply that which is guaranteed under section 11(d): see *Harrier*, *supra* note 13 at paras 21-24. In this way, the decision in *Harrier* is traceable to Corbett and the reasons of Dickson CJC and Lamer J that speak to the need for a statutized exclusionary discretion to ensure a "fair trial" beyond that contemplated by the fair trial protection housed in section 11(d) of the *Charter*.

¹⁵⁹ Even if I am wrong and there is in fact complete overlap between these two forms of discretion, translating into the reality that either can operate to exclude improperly obtained Crown evidence in order to ensure a fair trial, a trial judge would be wise to opt for the *Harrier* discretion as it specifically anticipates exclusion of this kind of evidence.

In *Buhay*,¹⁶⁰ a case in which a *Charter* breach was found and hence a subsection 24(2) analysis undertaken, the Supreme Court recognized these two overlapping discretions in its *obiter* comments – though curiously it does not expressly recognize the “constitutional stature” of the exclusionary discretion laid down in *Harrer*.¹⁶¹

In *Riley*,¹⁶² the Court appeared to contemplate an overlap between the *Harrer* and *Seaboyer* exclusionary discretions (exercisable against Crown evidence), stating that “the framework” laid down in these two cases for the exclusion of evidence is the one to be employed to exclude hearsay evidence where its prejudicial effect exceeds its probative value. But it makes no express comment about these discretions’ abilities (or lack of abilities) to exclude improperly obtained evidence.

In *Hawkins*,¹⁶³ the Supreme Court says the discretion at common law exercisable against Crown evidence has simply been “constitutionalized” by its decision in *Harrer*. In other words there is only a single discretion generally employable against Crown evidence. Thus, according to the Supreme Court in this decision, there is complete overlap. If this interpretation is accepted to be the current state of the law, then the *Harrer* decision is best viewed as simply having further broadened the scope of the common law exclusionary discretion in *Seaboyer* – by expressly recognizing that, unlike the *Wray* discretion, it is readily employable against improperly obtained evidence – and elevated its legal stature by “constitutionalizing” it.

In *Harrer*,¹⁶⁴ La Forest J, writing for the majority of the Supreme Court, characterized the discretion as free-standing and necessary to ensure that a trial is fair from the outset. To ensure a fair trial, resort to sections 24(1) or 24(2) of the *Charter*¹⁶⁵ was not always appropriate, nor

¹⁶⁰ *Supra* note 14 at para 40.

¹⁶¹ *Supra* note 13.

¹⁶² *Supra* note 18 at paras 22-24 & 32-33.

¹⁶³ *Supra* note 18 at para 85.

¹⁶⁴ *Supra* note 13.

¹⁶⁵ *Charter*, *supra* note 4, ss 24(1) and 24(2). Section 24(1) provides for the exclusion of evidence, which while not obtained in breach of the *Charter* would if admitted undermine the right to a fair trial as defined by section 11(d). In its own words, it provides for “such remedy as the court considers appropriate and just in the circumstances.” As can be seen, this section applies to prospective breaches of section 11(d). Section 24(2), on the other hand, provides for the exclusion of evidence

sufficient in all circumstances of a case.¹⁶⁶ As a result, La Forest argued that the former common law duty placed on the trial judge to ensure that an accused receives a fair trial, when understood in light of section 11(d) (which houses the fair trial guarantee) gave rise to a new form of judicial discretion to exclude: “a constitutionalized common law discretion” which could be used to exclude improperly obtained evidence, even in the absence of a *Charter* breach. This included exclusion before a trial even started, if necessary. This not only expands the former common law duty placed on a judge to ensure a fair trial, but also elevates it to constitutional stature independent of the *Charter*’s exclusionary provisions.¹⁶⁷

The new exclusionary discretion was recognized in *Harrer* for a multitude of reasons. First, the discretion recognized in *Seaboyer* could not ensure a fair trial in all circumstances, because evidence which was illegally or improperly obtained might still possess enough probative value to outweigh any possible prejudice arising from its admission. Thus, it was still possible that some improperly obtained evidence whose receipt would render a trial unfair could be received into evidence.¹⁶⁸

Second, improperly obtained evidence might not always be cognizable by the *Charter* for the purpose of exclusion for any number of reasons. First, the evidence may not have been obtained in breach of the *Charter*. Second, the evidence may have been obtained in breach of the *Charter*, but would not, if admitted, breach the fair trial protection housed in section 11(d), making the exclusionary provision based on trial fairness contained in section 24(2) inapplicable.¹⁶⁹ Third, in a situation like *Harrer*, where the

obtained in breach of the *Charter*.

¹⁶⁶ Resort to these sections was not possible in *Harrer* because of an absence of Canadian state action. The impugned conduct involved American police officers: *Harrer*, *supra* note 13 at paras 1-8.

¹⁶⁷ *Harrer*, *supra* note 13 at paras 21-24.

¹⁶⁸ Based on what is said by the Supreme Court in *Potvin* (*supra* note 24) the same cannot be said about the statutory exclusionary discretion incorporated into section 715 of the *Criminal Code*. According to the majority of the Court in that case, the statutory discretion contained therein is exercisable against improperly obtained evidence that has met the requirements for admissibility contained within the section: see Section II discussion above.

¹⁶⁹ Though such evidence may still be excludable under section 24(2) where the *Charter* breach is particularly serious and where admission of the evidence would bring the administration of justice into disrepute: See, for example, *R v Stillman*, [1997] 1 SCR 607, 144 DLR (4th) 193.

impugned conduct involves a non-Canadian state agent, the *Charter* might not apply at all. In these circumstances trial fairness might not be preserved in the absence of the *Harrer* discretion.

Third, by elevating what was until *Harrer* a statutory or common law discretion to exclude to constitutional stature, the Supreme Court has created room for the *Harrer* discretion to operate even in cases not involving improperly obtained evidence. McWilliams et al. state that as a result of the Supreme Court's decision in *Harrer*, a trial judge now has a broad discretion to exclude evidence not only where its probative value exceeds its prejudice, but also "where its admission would render the trial unfair."¹⁷⁰ That said, Paciocco and Stuesser take a narrower view, stating that the exclusionary discretion premised on trial fairness is "most likely to be invoked where evidence has been unfairly or illegally obtained".¹⁷¹

In situations where it might not be possible or wise to rely on any of the other forms of judicial discretion to exclude, the "constitutionalized common law discretion", recognized in *Harrer* and clearly beyond the reach of Parliament to abolish by ordinary legislative enactment, can perhaps be used.

VI. THE PREDOMINANT EXCLUSIONARY DISCRETION

Now that we have reviewed each kind of discretion, it is worth reconsidering the most important: the trial judge's free-standing discretion at common law, recognized by the Supreme Court in both *Seaboyer* and *Mohan*, which permits Crown evidence to be excluded where its prejudicial effect outweighs its probative value. This discretion often plays a determinative role both with regard to the admissibility of evidence and with regard to the disposition of a case. As well, it is the discretion a trial judge can most frequently employ to preserve the integrity of the rules of evidence. When it comes to the decision of whether or not evidence found legally admissible is nevertheless to be excluded for reasons of fairness, it is the discretion most often triggered.

This is true for a number of reasons. First, since most rules of evidence are grounded in common law this form of discretion is left ample room to

¹⁷⁰ McWilliams et al, *supra* note 11 at 5-2.

¹⁷¹ Paciocco & Stuesser, *supra* note 1 at 36-37.

operate.¹⁷² Even in the hearsay context, where evidence can be admitted pursuant to a principled approach that assesses whether the impugned evidence has sufficient reliability and necessity, assessments which are heavily imbued with considerations of probative value and prejudice, there is room for this discretion to operate.¹⁷³

Second, its prevailing formulation – that Crown evidence may be excluded where its prejudice outweighs its probative value – is broader than that of the other discretions, save that which is contained within certain statutory rules of admissibility. For example, the formulation in *Seaboyer*, applying to defence evidence, requires that prejudice substantially outweigh probative value before the discretion to exclude becomes exercisable. The general exclusionary discretion read into most statutory rules of admissibility applies only to those sparse¹⁷⁴ statutory rules, with the result that its scope is more restricted in the sense that it will be exercisable in far fewer situations (even where the standard is the same). And, of course, some particular statutory discretions may have particular restrictions or freedoms unique to them.¹⁷⁵

¹⁷² Having said this, it has at least three limits. First, it has no applicability to defence evidence. Second, it has no applicability to statutory rules of evidence, though the prevailing balancing exercise on which most statutory discretions are (or have been) based is the same, namely a weighing of probative value against prejudice. Third, it may not always be exercisable against illegally or improperly obtained evidence since the “constitutionalized common law discretion” recognized in *Harrer* and the *Charter*’s exclusionary rule contained in section 24(2) specifically deal with this.

¹⁷³ *Welsh*, *supra* note 6 at para 34; *Devine*, *supra* note 128 at para 30; *R v Khelawon*, 2006 SCC 57, [2006] 2 SCR 787 at para 49.

¹⁷⁴ I have found only five statutory sections in which such a discretion has been expressly incorporated by the courts. That said, it seems likely that most, if not all, statutory rules of admissibility must be read as including a judicial discretion to exclude in order to remain constitutionally valid: see Section I and accompanying notes above.

¹⁷⁵ For example, in *Potvin*, the Supreme Court held that the statutory discretion incorporated into section 715 of the *Criminal Code* is only exercisable in rare circumstances, based on a narrow weighing exercise. Having said that, the aforementioned limitation only pertains to section 715 of the *Criminal Code*. Other statutory sections (concerning admissibility of evidence at a criminal trial) in which a judicial discretion to exclude has been incorporated are not similarly saddled. They operate on the same standard as the general discretion from *Seaboyer*: where the prejudice of a piece of evidence outweighs its probative value, it may be excluded.

What is more, one of the two circumstances in which the judicial discretion to exclude contained in section 715 of the *Criminal Code* becomes exercisable (where

Third, the general discretion to exclude arising out of *Harrer* and the *Charter* is more circumscribed: It is most likely to be implicated in cases where evidence against an accused is improperly obtained.¹⁷⁶

Finally, in a criminal trial where the liberty of an accused is often at stake, more often than not it will be Crown evidence at issue, meaning discretions applicable to Crown evidence will most often be triggered.

VII. SITUATING NON-STATUTORY DISCRETIONS: LOGICAL RELEVANCE VS. LEGAL RELEVANCE

One area worth exploring with respect to non-statutory exclusionary discretion is its place in the admissibility of evidence analysis. As suggested earlier, an exclusionary discretion, regardless of the form it takes, is best understood as operating as a free-standing exclusionary rule in the admissibility analysis, to be considered after relevance and technical admissibility have been established.¹⁷⁷ Nonetheless, some are of the view that inherent in the concept of relevance is the requirement to assess the evidence in terms of its benefits balanced against its costs.¹⁷⁸ Viewed thus,

evidence has been obtained through illegal or improper) means that the statutory discretion contained in section 715 specifically contemplates excluding “improperly obtained Crown evidence” in some circumstances (in order to ensure a fair trial). The same cannot be said for the exclusionary discretion recognized in *Seaboyer* exercisable against Crown evidence, which considers only that evidence whose probative value is exceeded by its prejudicial effect (though this may well capture most improperly obtained evidence). In this way, the statutory discretion contained in 715 of the *Criminal Code* may be viewed as being wider in scope than the *Seaboyer* exclusionary discretion employable against Crown evidence.

¹⁷⁶ Paciocco & Stuesser, *supra* note 1 at 36-37; for contrary views, see Delisle et al, *supra* note 8 at 194; Riley, *supra* note 18 at para 23. Recall also, that the Supreme Court of Canada, in *Potvin* (*supra* note 24) stated that the discretion incorporated into section 715 of the *Criminal Code* could be employed to exclude improperly obtained evidence in certain circumstances despite the fact it has met all statutory requirements for admissibility. Having said that, I could find no judicial decision in which this discretion was utilized in such a manner.

¹⁷⁷ In *Mohan*, *supra* note 2, the majority's reasons, per Sopinka J, endorse this view.

¹⁷⁸ For a brief discussion of legal relevance, see *Morris*, *supra* note 2 at 193-205, per Dickson, Lamer and Wilson JJ (dissenting). For an example of the view complained of see *Cowles v Balac* (2006), 83 OR 3d 660 at para 201, 273 DLR (4th) 596 (CA), Borins JA (dissenting on other grounds):

the free standing exclusionary discretion first recognized in *Wray* is no more than a component of the exclusionary rule of relevance and has no independent existence. From this perspective, logical relevance is not enough. What is required is legal relevance; in addition to establishing logical relevance, the determination is made that the benefits of the evidence outweigh its cost, making the evidence worth receiving.¹⁷⁹

This approach has not been the prevailing one and, thankfully, authoritative case law does not support it.¹⁸⁰ In *R v Morris*, the majority of the Supreme Court, per Lamer J, made clear that the standard of legal relevance has never been the law in Canada.¹⁸¹ The standard of logical relevance is preferable for clarity of legal reasoning and because it makes the most sense to discuss the exclusionary discretion separately from and after the basic rule of admissibility and specific exclusionary rules have been applied. It is necessary these steps be completed first, for they inform the analysis taken up by the trial judge at the exclusionary discretion stage. This is a reflection of the fact that specific exclusionary rules are but specific manifestations of the broader residual discretion possessed by the trial judge,¹⁸² itself an exclusionary rule.

For something to be relevant it has to possess at least some probative value – the evidence has to make the proposition for which it is proffered more probable than it would be in its absence. So at the preliminary stage of the admissibility analysis, one first needs to assess the probative value of the evidence in a pointed and narrow way, as required by the rules of relevance and materiality, which if not met require the evidence be excluded in all circumstances.¹⁸³ Relevancy should be defined narrowly. If

The established test for the admission of evidence at a trial rests on relevancy. Under this test, where evidence is tendered by impeachment purposes, ... the admission of the evidence requires a showing of relevance to the credibility of a witness on a material matter and a demonstration that the potential value of the evidence for this purpose outweighs its potential prejudicial effect.

¹⁷⁹ Paciocco & Stuesser, *supra* note 1 at 37.

¹⁸⁰ See *Mohan*, *supra* note 2; *DD*, *supra* note 3; Paciocco & Steusser, *supra* note 1 at 37.

¹⁸¹ *Morris*, *supra* note 2 at 199-201. See also *Corbett*, *supra* note 2 at 719, per La Forest (dissenting).

¹⁸² *Corbett*, *supra* note 2 at 715, per La Forest J (dissenting).

¹⁸³ It bears repeating that the analyses that occur under the rules of relevance and materiality and subsequently under specific exclusionary rules, such as the hearsay

it is defined too broadly, to include a balancing of costs against benefits, it may come to operate in an inclusionary way, leaving little, if any, room for the exclusionary discretion to operate.¹⁸⁴ As stated by the Court in *R v Watson*: “A finding that evidence is relevant does not determine admissibility”.¹⁸⁵

Another implication of my comments is that under the rule of relevance there is some discretion exercised on the part of the trial judge because for evidence to be found relevant it must have some probative value. While the standard for relevance is fairly well accepted, it remains a question of law which is still somewhat vague and largely a matter of common sense.¹⁸⁶ Thus, the question of what is sufficiently probative for the purposes of the rule of relevance is open to some debate despite the clear holding in *Morris*, that a minimum amount of probative value is not required for the purpose of establishing relevancy;¹⁸⁷ the evidence need only have some probative value.

*R v Arcangioli*¹⁸⁸ provides the classic example: was the accused's flight from the scene of the crime relevant evidence on the issue of his identity as the victim's stabber? The accused admitted to punching the victim, but denied stabbing him. In answering “no”, the Supreme Court concluded

rule, will invariably involve questions of probative value and prejudice, but are distinct from that which takes place under the trial judge's exclusionary discretion.

¹⁸⁴ MS Weinberg, “The Judicial Discretion to Exclude Relevant Evidence” (1975) 21 McGill LJ 1 at 9-10 [Weinberg, “Judicial Discretion”].

¹⁸⁵ (1996) 30 OR 3d 161 at 176, 108 C.C.C. (3d) 310 (CA) [Watson]. There is at least one notable exception to this. In the context of admitting defence evidence describing the bad character of the complainant or the deceased, a finding of “relevance” makes the evidence “technically admissible” because no exclusionary rule, like that excluding bad character evidence against an accused, exists in law. That is to say, unless a trial judge finds that the evidence's prejudice substantially outweighs its probative value, requiring the application of the exclusionary discretion applicable to defence evidence, the evidence will be received. In this context then, the admissibility of evidence analysis is truncated. This is because the test for admissibility relies exclusively on relevance and a weighing of probative value against prejudicial effect: *Watson*, *ibid*.

¹⁸⁶ Weinberg, “Judicial Discretion”, *supra* note 184 at 9-11. For an informative discussion of relevance, see *Corbett*, *supra* note 2 at 718-722, per La Forest J (dissenting).

¹⁸⁷ *Morris*, *supra* note 2 at 199-200. According to the Supreme Court in *Morris*, once this is established, the weight, if any, to be given to evidence is a question for the trier of fact; it has no role whatsoever in the relevancy inquiry.

¹⁸⁸ [1994] 1 SCR 129, 111 DLR (4th) 48 [Arcangioli].

that because the accused's flight was equally as indicative of an aggravated assault (the Crown's position), as a common assault (the defence's position), the evidence could not meet the relevancy threshold because it did not have any probative value. Had the Supreme Court applied the widely accepted standard of relevance, which deems evidence to be relevant if it "has any tendency as a matter of logic to advance the proposition sought to be proved" (my emphasis),¹⁸⁹ it might have concluded that the "flight" did have some tendency, however slight, to advance the theory sought to be proved by the Crown, namely that the jury could infer from the accused's flight that he had in fact committed an aggravated assault and not a common assault. That is because, even though the evidence of "flight" was equally explained by the commission of either crime, it still made the accused more, as opposed to less, likely to have engaged in either of the impugned acts, including in the act of aggravated assault. Thus, it possessed at least some probative value and was therefore relevant.¹⁹⁰

Curiously, the same question of relevance arose in a similar factual context in *R v White*.¹⁹¹ was the accused's instant flight following the discharge of his firearm equally supportive of the *mens rea* requirement for either the crimes of manslaughter or murder, and therefore excludable under the rule of relevance? While the dissenting judges, per Fish J, emphatically held that the case was simply a repeat of *Arcangioli* and answered the question in the affirmative,¹⁹² the majority of the Court disagreed.

The majority held that lack of hesitation prior to flight was more consistent with a murderous intent than with an accident: "As a matter of logic and human experience, one would expect an ordinary person to present some physical manifestation, such as hesitation, at a gun in their hand accidentally discharging into someone's chest."¹⁹³ It distinguished *Arcangioli* on the basis that the proposition sought to be proved in that

¹⁸⁹ Paciocco & Stuesser, *supra* note 2 at 32; Bartkowski, *supra* note 106 at para 8.

¹⁹⁰ In other words, it would have been preferable for the Supreme Court to admit the evidence as relevant, then give it little weight as it was equally indicative of the commission of two crimes.

¹⁹¹ 2011 SCC 13, [2011] 1 SCR 433 [*White*].

¹⁹² *Supra* note 191 at paras 132-191.

¹⁹³ *Supra* note 191, at para 67, as per Rothstein J.

case was decidedly different: whether the question of flight alone made the accused more likely to be guilty of one offense than another, which, it concluded, “as a matter of logic and human experience” it did not. In *White*, the issue was whether the accused’s manner of flight made him more likely to have possessed the *mens rea* of a person guilty of murder as opposed to manslaughter, which, it concluded, “as a matter of logic and human experience” it did.¹⁹⁴

I submit that the distinction that was drawn by the Supreme Court in *White* to distinguish *Arcangioli*, as set out above, was unnecessary and takes the relevancy inquiry beyond its proper scope. The fact of the matter is, in both *White* and *Arcangioli*, the evidence, however minimally, increased the probability that the accused persons were guilty of the higher offences as opposed to the lesser offences. The fact that it may have also equally increased the probability that the accused persons were guilty of the lesser offences, as opposed to the higher offences, is irrelevant since in neither case was the latter proposition the proposition sought to be proved by the Crown.

While *White* and *Arcangioli* are perhaps exceptional cases, it is evident that what is “relevant” or not is not amenable to a bright line test and remains largely a matter of common sense, over which reasonable persons can disagree.¹⁹⁵ Thus, the trial judge retains a measure of discretion to decide whether something meets the “relevancy” criterion.

Still, the discretion exercised by the trial judge under the rule of relevance is not properly regarded as an exclusionary discretion in the sense discussed here for at least three reasons. First, an exclusionary discretion “presupposes that [the rule of relevance] has already been exercised in favour of admissibility, i.e., that the trial judge has decided that the evidence is sufficiently probative to be relevant.”¹⁹⁶ Second, courts’ treatment of relevance suggests that most evidence proffered by the defence or Crown satisfies this preliminary condition of admissibility with

¹⁹⁴ *Supra* note 191, at paras 66-70.

¹⁹⁵ This point is exemplified by the divergent rulings from different members of the Supreme Court in *White*. Fish J, writing for the dissent in that case, vigorously disagreed with the majority’s ruling on the question of relevance, arguing that the case was a rerun of *Arcangioli* (*supra* note 188). Accordingly, because the evidence was equally indicative of murder as manslaughter on the issue of intent, the evidence had to be excluded as irrelevant.

¹⁹⁶ Weinberg, “Judicial Discretion”, *supra* note 184 at 11.

little difficulty as the threshold has become a low one.¹⁹⁷ In other words, most evidence will be found relevant, and thus, in most cases, little, if any, discretionary power on the part of the trial judge to find that the evidence before them is irrelevant exists.¹⁹⁸ In *Arp*, the Supreme Court of Canada made this readily apparent when it opined that no minimum amount of probative value is required for a piece of evidence to be relevant. In the court's words, "To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to increase or diminish the probability of the existence of a fact in issue."¹⁹⁹

Third, the prevalent view is to define relevance narrowly, with a narrow consideration of only the probative value of the evidence.

This analysis conducted under the rule of relevance is very unlike the broad ways that probative value and prejudice are considered by the trial judge when exercising an exclusionary discretion, based on the variety of factors that present themselves on any given set of facts, particularly the general discretion spoken of here that exists at common law and allows for the exclusion of Crown evidence where its prejudice exceeds its probative value.

VIII. FOUR SEPARATE DISCRETIONS?

The characterization of the trial judge's exclusionary discretion as four separate discretions, while in my view supported by authoritative case law and by at least one set of legal scholars,²⁰⁰ is not universally accepted. In fact, most scholars take a different view.

McWilliams et al²⁰¹ (as well as Sopinka et al)²⁰² identify two "broad discretions" to which a trial judge may turn to exclude technically admissible evidence, namely the discretions to exclude where prejudice exceeds probative value and where the admission of evidence would

¹⁹⁷ *R v J-LJ*, 2000 SCC 51, [2000] 2 SCR 600 at para 47, per Binnie J; Paciocco & Steusser, *supra* note 1 at 19; Corbett, *supra* note 2 at paras 715, 720, per La Forest J (dissenting).

¹⁹⁸ Arcangioli, *supra* note 188 is the exception to the rule: see Section VI above.

¹⁹⁹ *Arp*, *supra* note 2 at para 38.

²⁰⁰ Delisle et al, *supra* note 8 at 184-185.

²⁰¹ McWilliams et al, *supra* note 11 at 5-2.

²⁰² Sopinka et al, *supra* note 5 at para 2.54.

render the trial unfair. Paciocco and Stuesser identify the same two discretions, though they explain the second differently. Specifically, they say that the exclusionary discretion premised on trial fairness is “most likely to be invoked where evidence has been unfairly or illegally obtained.”²⁰³ In this way, it seems these authors understand the scope of this discretion to be limited to a discrete context; McWilliams et al characterize it as a broad discretion, holding it out as one of the two bases under which a judge can exclude evidence.²⁰⁴

Admittedly, the characterization of the trial judge’s discretion as composed of the two aforementioned types of discretion also has some support in the case law.²⁰⁵ However, it should be mentioned that, while both sets of aforementioned authors identify only two types of discretion, they do acknowledge “the discretion” retained by trial judge with respect to statutory rules of admissibility²⁰⁶ and “the discretion” applicable to defence evidence,²⁰⁷ but curiously do not characterize these as “kinds of exclusionary discretion.”²⁰⁸

With respect, this approach is flawed. First, each form of discretion identified in this article has a separate juridical source, that is to say a separate source in law that explains its existence. Second, some types of discretion operate based on radically different standards. By treating each kind separately, instead of lumping each together or opting to treat the discretionary power differently depending on context, the individual standards can be kept clear and the law applied correctly. For example, the general discretions to exclude applicable to Crown evidence and defence evidence, both expressly recognized by the Supreme Court in *Seaboyer*, speak to very different standards. By separating each the law is kept clear.

²⁰³ Paciocco & Stuesser, *supra* note 1 at 36-37. While the authors do not identify the source of this kind of discretion with the Supreme Court decision in *Harrer* (*supra* note 13), clearly the *Harrer* discretion is the one being referred to.

²⁰⁴ Delisle et al, *supra* note 8 at 204 support McWilliams’s view on the scope of the *Harrer* discretion.

²⁰⁵ See, for example, *Buhay*, *supra* note 14 at para 40.

²⁰⁶ Paciocco & Stuesser, *supra* note 1 at 37, 38; McWilliams et al, *supra* note 11, at 5-17.

²⁰⁷ Paciocco & Stuesser, *supra* note 1 at 38; McWilliams et al, *supra* note 11 at 5-4. Both sets of authors, while recognizing these discretions, characterize them as arising in certain contexts or as subsets of other, larger discretions.

²⁰⁸ The words chosen by Paciocco and Stuesser to describe what, in their view, are the two exclusionary discretions recognized in law: *supra* note 1 at 36.

In the relatively recent case of *R v Fattah*,²⁰⁹ it was demonstrated that the standards belonging to different exclusionary discretions can be easily confused. There, the Court stated that technically admissible Crown evidence was subject to exclusion “where its probative value is substantially outweighed by its prejudicial effect...”²¹⁰ This is the standard appropriate for defence evidence, not that of the Crown.²¹¹

Nonetheless, trial judges must be mindful of not unduly fettering their exclusionary discretion power by misinterpreting or misapplying the law. Where the standard for exclusion pursuant to a particular discretion is met in accordance with applicable law, the evidence should be excluded in all circumstances.

IX. CONCLUSION

The residual discretion possessed by a trial judge to exclude what is otherwise admissible evidence has experienced a revolution. In *Wray*, the Supreme Court of Canada recognized that the trial judge has the discretion at common law to exclude legally admissible evidence, albeit in very narrow circumstances. Since then, the discretion has morphed into no less than four forms.²¹² Firstly, the general discretion that can be read into statutory provisions allowing for exclusion of Crown evidence where its prejudice outweighs its probative value. Secondly, the general discretion that exists at common law which allows for the exclusion of Crown evidence where its prejudice outweighs its probative value. Thirdly, the

²⁰⁹ 2007 ABCA 400, 422 AR 357 [*Fattah*].

²¹⁰ *Fattah*, *supra* note 209 at para 17 [emphasis added].

²¹¹ While the law is clearly misstated by the Court, it is not clear if this standard is applied by it in deciding against excluding the evidence: *Fattah*, *supra* note 209 at paras 17-19.

²¹² In *McWilliams et al*, *supra* note 11 at 5-20.1 the authors’ reading of *Buhay*, *supra* note 14, in conjunction with other relevant case law allowed them to conclude that the Supreme Court may be recognizing a new common law discretion to exclude evidence where its admission would bring the administration of justice into disrepute, the general standard by which the exclusionary rule contained with subsection 24(2) of the *Charter* operates. If this is so, a fifth form of discretion may soon need to be added to the list. It is worth noting that the minority judgment in *Wray*, endorsing the majority view of the Court of Appeal below, argued for the incorporation of this very ground into the judicial discretion to exclude recognized by all members of the Supreme Court as existing at common law: *Wray*, *supra* 16 note at 285.

general discretion that exists at common law which allows for the exclusion of defence evidence where its prejudice substantially outweighs its probative value; and fourthly, the “constitutionalized common law discretion” arising out of the *Charter* and the *Harrer* decision which allows for the exclusion of evidence to preserve a fair trial.

This article has shed new light on how each of these discretions operates by analyzing each in relation to one another. It has been determined that the exclusionary discretions differ quite markedly in their scope. For example, the ambits of each of the discretions existing at common law, from largest to smallest, may be listed in the following order:

- i. The *Seaboyer/Mohan* discretion exercisable against Crown evidence
- ii. The *Harrer* discretion exercisable against Crown evidence
- iii. The *Seaboyer* discretion exercisable against defence evidence

The *Wray* discretion is notably absent from the list. This is because, even though it may still be good law in that it has not been specifically discarded by the Supreme Court²¹³ it has fallen into disuse. To repeat, this is because it has been subsumed by the *Seaboyer* discretion exercisable against Crown evidence – the *Seaboyer* discretion captures all evidence that would have been captured by the *Wray* discretion. Nonetheless, it is worth underscoring where its ambit would lie with respect to the exclusionary discretions identified in the above list since, as is evident in this article itself, it is still the discretion commonly cited and used as a reference point by the many judges and the small group of legal scholars attempting to explain the scope and operation of particular exclusionary discretions existing in law. Properly understood, the *Wray* discretion belongs at the bottom of the list, since there is no question that its ambit is the most restrictive.

Notwithstanding the findings of this article, it is readily apparent that the exclusionary discretions discussed herein are not easily distinguishable, nor easily comprehensible, and that there is probably overlap between them. In fact, much about the nature of some of these discretions remains a mystery. For example, is the balancing exercise that characterizes the operation of the discretion to exclude Crown evidence at common law

²¹³ *Corbett*, *supra* note 2 at para 739–740, per La Forest J (dissenting); *Seaboyer*, *supra* note 56 at paras 610–611. See also *Sopinka et al*, *supra* note 5 at para 2.57.

really independent of relevance? While I argue that the correct approach is to treat each separately, the balancing of probative value against prejudice according to the Supreme Court is still commonly considered as an aspect of legal relevance.²¹⁴

As a final point, something need be said about the reasons for the dearth of literature on the trial judge's exclusionary discretion. First, according to Weinberg, who studied the trial judge's exclusionary discretion pre-1975, when only the *Wray* formula was in existence, it is largely explainable by the fact that the discretion to exclude is rarely exercised, especially where evidence is of high probative value.²¹⁵ While this claim is less supportable today in light of developments to the discretion that have widened its ambit, it still holds a kernel of truth in that where the probative value of evidence is high the exclusionary discretion would appear to have little room to operate since there is less chance that the prejudicial value will be able to outweigh it.²¹⁶ This is even truer when one considers some courts' recognition that jury instructions can often reduce the level of prejudice – even serious prejudice – to the extent necessary to permit evidence which might not otherwise have sufficient probative value, to be received. That said, the trial judge's exclusionary discretion remains a prominent factor in admittance into evidence decisions in many contexts.²¹⁷ This is true notwithstanding the fact that this discretion is “residual” in nature, and therefore of necessity, to be applied “sparingly so as not to marginalize or trump the many specific evidentiary rules which constitute the law of evidence.”²¹⁸

Second, a principled approach, characterized by a balancing of prejudice against probative value, is pervading the law of evidence, making it difficult to isolate disparate forms of exclusionary discretion for

²¹⁴ *Mohan*, *supra* note 2 at 20-21. See also Paciocco & Stuesser, *supra* note 1 at 38. For a recent trial level decision: see *Morrisey*, *supra* note 126.

²¹⁵ See Weinberg, “Judicial Discretion”, *supra* note 186 at 38 and accompanying notes.

²¹⁶ See, for example, *R v Muchikekwanape*, 2002 MBCA 78, 166 CCC (3d) 144 (Man CA) at paras 41-47 [*Muchikekwanape*].

²¹⁷ *Welsh*, *supra* note 6 (out-of court identification evidence); *R v Pena*, 1997 CarswellBC 1202 (WL Can), 1997 CanLII 2087 (BC SC) (videotape evidence); *Jabiaranha*, *supra* note 7 at para 26-32 (scope of cross-examination); *Powell*, *supra* note 2 (post-offence conduct); *Hawkins*, *supra* note 18 (hearsay); *Muchikekwanape*, *supra* note 216 (photographic evidence).

²¹⁸ *Welsh*, *supra* note 6 at para 37.

discussion and withering away room for the free-standing discretion that exists at common law to operate. Telling examples of this are the emergence of the principled approach to hearsay in *R v Khan*,²¹⁹ and the reformulation of the similar fact evidence rule in *R v Handy*.²²⁰ The latter change to the law of evidence adopts a balancing of probative value against prejudicial effect exercise into an exclusionary rule itself,²²¹ which raises the question of whether in the context of similar fact evidence, an exclusionary discretion, as understood in this article, can be said to exist at all, a question which is beyond this article's purview.

Third, "the modern trend has been to admit all relevant and probative evidence and allow the trier of fact to determine the weight which should be given to that evidence, in order to arrive at a just result."²²² As noted by L'Heureux-Dube and Gonthier JJ (dissenting) in *L (DO)*, "A just result is best achieved when the decision-makers have all relevant and probative information before them."²²³ The Supreme Court of Canada's recent emphasis on the danger that juries may come to an incorrect decision in the absence of evidence, militating towards courts receiving more and more evidence, does not bode well for the exercise of the judicial discretion to exclude.²²⁴

Given that it is here to stay, efforts must nevertheless be made to better understand the nature of the trial judge's exclusionary discretion. While its ambit has changed over the years, there is no question of the ongoing need for an exclusionary discretion exercisable in the hands of a trial judge to preserve a fair trial and to prevent the untoward effects a mechanical application of rules of admissibility (whether common law or statutory in origin) can have. Where an exclusionary discretion is not exercised when it should be, it is possible that evidence which is highly prejudicial will be received with all the attendant dangers that this entails,

²¹⁹ [1990] 2 SCR 531, 59 CCC (3d) 92.

²²⁰ *Handy*, *supra* note 142.

²²¹ *Ibid* at paras 56-69.

²²² *R v Nikolovski*, [1996] 3 SCR 1197 at para 19, 141 DLR (4th) 647, per Cory J, citing L'Heureux-Dube and Gonthier JJ (concurring) in *L (DO)*, *supra* note 24. For further support of this proposition, see *Corbett*, *supra* note 2 at 720, per La Forest J (dissenting) and para 51, per Dickson CJ and Lamer J.

²²³ *L (DO)*, *supra* note 24 at 454-455.

²²⁴ Though this trend should not be viewed as a return to the *Wray* standard for the exclusion of technically admissible evidence.

not least the prospect of false conviction. Properly used, the trial judge's residual exclusionary discretion can be used to minimize the risk of miscarriages of justice, and more specifically, of wrongful convictions.²²⁵

Understanding how the trial judge's residual exclusionary discretion operates in its various forms is crucial because of the serious consequences exclusion of a piece of evidence can have on criminal trials. Often when an exclusionary discretion becomes an issue at trial, the evidence in dispute will impact the ultimate issue of guilt or innocence.²²⁶ The judicial discretion to exclude is a very important rule of evidence because it can exclude otherwise admissible evidence, the presence or absence of which can have serious implications for the trier of fact in their role of coming to the truth and for the trial judge as trier of law in their role of preserving a fair trial for all parties, especially the accused.

²²⁵ *R v Khela*, 2009 SCC 4, [2009] 1 SCR 104 at para 90.

²²⁶ A prime example of this is *R v Corbett*, *supra* note 2. The impugned evidence, the accused's earlier conviction for non-capital murder, sought to be excluded by the defence at trial, stood to impact the ultimate issue of guilt or innocence with respect to the present charge of murder. Since credibility had become the primary issue with which the jury had to grapple, evidence of this kind could turn its mind one way or the other. The Supreme Court was forced to decide whether or not the trial judge in the case should have excluded the evidence of the accused's prior conviction (holding that he had a discretion to do so which was not ousted by section 12 of the *Canada Evidence Act*), deciding on the facts of the case that he had not run afoul of the *Charter* or acted improperly by allowing the evidence to be introduced.