NOTES

The Proposed Canada Evidence Act and the "*Wray* Formnla": Perpetuating an Inadequate Discretion

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A fundamental policy underlies our rules of evidence: they should serve to ensure a fair trial. But the mere operation of these rules does not always achieve this goal, and a discretion to exclude otherwise admissible evidence is necessary. This discretionary power was recognized by the Supreme Court in *R.* v. *Wray,* but was defined there extremely narrowly. The Court articulated a rigid tripartite test, requiring the evidence to be gravely prejudicial, only tenuously admissible, and of trifling probative force. The proposed *Canada Evidence Act, 1982* contains in section 22(2) a virtually unchanged version of the "*Wray* formula". Convinced that the present drafting is dangerously inadequate, the author argues for a more workable statutory formula. To underscore the general importance of this power to exclude, he illustrates the numerous cases in which a judge could require the discretion in order to prevent an unfair trial. In light of this importance, the shortcomings of section 22(2) become manifest. The present formula suggests the trial judge must find *actual* prejudice, while the only reasonable rule would be to require a *real risk* of prejudice. The terms of section 22(2) are generally unduly restrictive. They prevent the free operation of a sliding scale by which to weigh relevance against prejudice. They add confusion to the rule of relevance itself, suggesting that the minimum standard of probative value may now be lowered to some point beneath "trifling". More particulary, the criterion of "tenuous admissibility" is triply flawed. It is inappropriate, as it defeats the very purpose of the discretion by chiselling it down to an effectively unexercisable power. It is often redundant, overlapping in most cases with the rule of relevance. It is unworkable, requiring a fine line to be drawn where none is possible. The author concludes that a better formula is clearly desirable, and he proposes an elementary balancing test. A discretion to exclude should always exist where the real risk of a prejudicial effect outweighs probative value.

Un principe fondamental sous-tend nos règles de preuve: elles doivent assurer un procès équitable. Leur application mécanique n'atteint toutefois pas toujours cette fin et la discrétion d'écarter une preuve, même recevable, est parfois nécessaire. Ce pouvoir discrétionnaire a été reconnu par la Cour suprême dans l'arrêt *La Reine* c. *Wray,* quoique dans un sens très restreint. La Cour suprême y a alors posé trois critères: il doit s'agir d'une preuve fortement préjudiciable à l'accusé, dont la recevabilité tient à une subtilité et dont la force probante est insignifiante. Le texte proposé de l'article 22(2) de la *Loi fédérale de 1982 sur la preuve* reprend en des termes à peu près inchangés la formule *Wray.* Convaincu de la dangereuse insuffisance de ce projet de loi, l'auteur propose une disposition statutaire d'application plus facile. Pour souligner l'importance de cc pouvoir discrétionnaire, il énumère plusieurs cas où le juge pourrait choisir d'écarter une preuve dans le but d'éviter un procès inéquitable. Les lacunes de l'article 22(2) deviennent alors évidentes. Cet article semble indiquer que le juge du procès pourra écarter une preuve, autrement recevable, seulement s'il est convaincu que son admission causerait un *préjudice réel.* La seule règle raisonnable, selon l'auteur, devrait plutôt permettre au juge d'exercer sa discrétion lorsqu'il existe un *risque réel de préjudice.* De façon générale, le libellé de l'article 22(2) s'avère inutilement restrictif. Il empêche de comparer la pertinence d'une preuve avec le préjudice que son admission pourrait causer. Il rend obscure la règle de pertinence même, laissant entendre qu'il faudra désormais exiger une force probante encore moins que "insignifiante" avant d'exclure une preuve. Plus particulièrement, le critère de "recevabilité tenant à une subtilité" est triplement vicié: il est impropre, souvent redondant et irréalisable. L'auteur conclut qu'il faudmit recourir à une formule selon laquelle le risque de préjudice s'évaluerait en regard de la force probante. La discrétion d'écarter une preuve devrait toujours exister lorsque le juge estime que le risque réel de préjudice dépasse la force probante de cette preuve.

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Synopsis

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Introduction

A primary expectation that we have of our rules of evidence is that they will help to ensure a fair trial. While based upon the principles and policies which reflect our generally accepted standards of fairness, these rules too often do not fulfill their purposes exhaustively or exclusively. The consequence of this technical shortcoming can be that a rule operates unfairly.

It follows that the mere application of rules will not necessarily ensure a fair trial. The Supreme Court of Canada recognized this fact in the case of *R.* v. *Wray*,[1] where, for the majority, Martland J. indicated that a trial judge possesses a discretion to exclude technically admissible evidence which would operate unfairly, based upon his duty to ensure that the accused receives a fair trial.[2] Justice Martland defined that discretion narrowly:

> It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly.[3]

Borrowing largely from this formulation, which can be referred to as the "*Wray* formula", the framers of the proposed *Canada Evidence Act,*

[1][1971] S.C.R. 272, [1970] 4 C.C.C. 1, (1970) 11 C.R.N.S. 235, (1970) 11 D.L.R. (3d) 673 [hereinafter cited to S.C.R.].
[2]*Ibid.*, 287.
[3]*Ibid.*, 293.

1982[4] have included a provision which, if enacted, will statutize this discretionary power. According to s. 22(2):

> The court may exclude evidence the admissibility of which is tenuous, the probative force of which is trifling in relation to the main issue and the admission of which would be gravely prejudicial to a party.[5]

Martland J. adopted the strict formula now found in section 22(2) from a passage stated *obiter* in *Noor Mohammed* v. *The King*.[6] While the passage does employ the same terminology contained in the *Wray* formula, there is no compelling indication that Du Parcq L.J. intended these words to serve as legal terms of art, delimiting a general formula for the exclusionary discretion.[7] Yet if, as appears to be the case, Martland J. was searching for strict controls upon the use of an exclusionary discretion, then it is little wonder that the passage commended itself to him and that he was quick to adopt it as the exclusionary formula. That decision seems to have been more a matter of choice than of authority. Ironically, this apparent desire to preserve the integrity of rules by so narrowly confining the discretion appears to prevent the discretion from vindicating its very rationale. The tripartite criteria and the restrictive language employed seriously impair the discretion's ability to ensure a fair operation of rules. The *Wray* formula thus falls prey to the very malady which gave rise to its existence; it, and hence section 22(2), are both technically flawed.

I. The Necessary Scope of the Exclusionary Discretion

Since the focus of the discretion is the unfair operation of evidence at trial, it must encompass every identifiable case where technically admissible information could cause errors in reasoning and judgment. An examination

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[4]Bill S-33, given first reading 18 November 1982, since withdrawn and returned to committee. It is the product of the *Report of the Federal/Provincial Task Force on Uniform Evidence*, initially prepared for the Uniform Law Conference of Canada, and since published by Carswell (1982).

[5]A major change made by section 22(2) is the extension of the exclusionary discretion to evidence tendered by the accused. This appears to undermine the discretion's original purpose of ensuring that the accused has a fair trial because the section allows exclusion of evidence which has the possibility of raising a reasonable doubt on behalf of the accused. However, the primary goal of guaranteeing the fair operation of evidentiary rules justifies the change. Where evidence tendered by the accused could mislead the trier of fact, it should also be subject to exclusion. See the discussion of the potential scope of the discretion *infra*, Part I.

[6][1949] A.C. 182, 192, [1949] 1 All E.R. 365 (P.C.).

[7]For criticisms of the legal analysis of Martland J., see Weinberg, *The Judicial Discretion to Exclude Relevant Evidence* (1975) 21 McGill L.J. 1, 4-5. Other criticisms are offered by Sheppard, *Restricting the Discretion to Exclude Admissible Evidence* [:] *An Examination of Regina v. Wray* (1972) 14 Crim. L.Q. 335, 342-7.

of these cases demonstrates the critical importance of the exclusionary discretion and of a properly drafted statutory formula. It also provides a useful benchmark against which to measure section 22(2). For convenience, potentially dangerous evidence can be divided into three categories: inflammatory evidence, inadequate evidence, and non-assessable evidence.

A. Inflammatory Evidence

Evidence within this category can have an emotive effect, causing a trier of fact to exaggerate the importance of the information provided. The largest class of inflammatory information relates to the bad character of an accused. Evidence which invites the conclusion that the accused is a bad person can cause the trier of fact to accept guilt where such a finding is not warranted. The evidence suggests that the accused is a contemptible individual. The sober judgment of the trier can be clouded by an emotional reaction. In the words of Lord Hailsham, the evidence may add more "heat than light".[8]

Evidence which is technically admissible can often have the incidental effect of showing that the accused is of bad character. Such is almost always the case with similar fact evidence. Information adduced to prove particular acts of misconduct on occasions other than the one giving rise to the charge in question will be technically admissible, according to the conventional articulation, where it gives rise to a relevant inference other than the mere general conclusion that the accused is the type of person who could do such a thing.[9] Although its specific probative value is, as a general rule, sufficient to justify its admissibility, such evidence will still give rise to the prohibited inference of bad character. If the trier of fact were to place emphasis upon that inference the evidence would operate unfairly. Hence, in *Noor Mohammed* v. *The King* Du Parcq L.J. speaks in terms of an auxiliary discretion to exclude.[10]

The same undesirable incidental effect can occur where evidence of an accused's bad reputation is called. Where an accused calls one or more witnesses to testify as to his good reputation with respect to a *particular*

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[8]*D.P.P.* v. *Boardman* [1975] A.C. 421, 454, [1974] 3 All E.R. 887 (H.L.).

[9]D. Piragoff, *Similar Fact Evidence* [:] *Probative Value and Prejudice* (1981), refers to this as "Propensity Reasoning". This traditional formulation is derived from *Makin* v. *The Attorney-General for New South Wales* [1894] A.C. 57, [1891-1894] All E.R. Rep. 24 (P.C.). The author, like many before him, points out deficiencies in the workability of this formulation. See, for example, Sklar, *Catchwords and Cartwheels* (1977) 23 McGill L.J. 60.

[10]*Supra*, note 6, 192. The exercise of an exclusionary discretion was accepted by the Supreme Court of Canada in *Boulet* v. *The Queen* [1978] S.C.R. 332, (1977) 75 D.L.R. (3d) 223.

and *relevant* character trait,[11] the Crown may call witnesses to testify as to the accused's bad reputation. The problem is that while such evidence is called ostensibly to rebut the inference of good character, the Crown may in fact lead evidence of bad reputation with respect to *any* character trait of the accused.[12] Given the potential lack of relevance and the diverse aspects of one's character, such rebuttal evidence can be extremely inflammatory.

Similarly, where an accused puts his good character into issue by calling evidence of good reputation, or by implying generally that he is not the type of person to commit the crime in question, the Crown may adduce evidence of the accused's criminal record.[13] Even where an accused does not put his good character into issue, his criminal record may be presented if he becomes a witness at the trial.[14] Clearly proof of a prior criminal record has inflammatory potential.

In *R.* v. *Stratton*[15] the Ontario Court of Appeal held that a trial judge does not have a discretion to refuse statutorily sanctioned questions concerning, or proof of, an accused's criminal record.[16] The Court seemed rather concerned by the inflammatory potential of such information but refused the discretion as an invasion of a statutory right conferred upon the Crown.[17] If the exclusionary discretion is statutized, however, it should follow as a matter of course that it can be applied to exclude evidence otherwise admissible under statutory rules.[18]

Occasionally evidence entirely unrelated to the character of an accused can lead to an emotional rather than rational examination of probative value. Real evidence can inflame the trier of fact, as has been recognized

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[11]Character evidence may be initiated by the accused alone. See *R.* v. *Rowton* (1865) Le. & Ca. 520, (1865) 169 E.R. 1497, [1861-73] All E.R. Rep. 549.

[12]*R.* v. *Winfield* (1939) 27 Cr. App. R. 139, 141, *per* Humphreys J.: "There is no such thing...as putting half a prisoner's character in issue and leaving out the other half." This has been heavily criticized by Sir Rupert Cross, *Evidence*, 5th ed. (1979) 428-9, although the rule was apparently approved by the House of Lords in *Stirland* v. *D.P.P.* [1944] A.C. 315, [1944] 2 All E.R. 13.

[13]*Criminal Code*, R.S.C. 1970, c. C-34 as am., s. 593.

[14]*Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 12.

[15](1978) 21 O.R. (2d) 258, (1978) 90 D.L.R. (3d) 420 (Ont. C.A.) [hereinafter cited to O.R.].

[16]The Court in *Stratton* relied upon *R.* v. *Leforte* [1962] S.C.R. viii, (1962) 31 D.L.R. (2d) 1. Although the case deals with s. 12 of the *Canada Evidence Act*, its reasoning applies equally to s. 593 of the *Criminal Code*.

[17]*R.* v. *Stratton*, *supra*, note 15, 278. Curiously, in *R.* v. *Tretter* [1974] 3 O.R. (2d) 708, 716, (1974) 26 C.R.N.S. 153 (Ont. C.A.), it was conceded that the common law discretion could exclude evidence rendered statutorily admissible by s. 643 of the *Criminal Code*.

[18]Improvements in this area by the proposed *Canada Evidence Act, 1982* would reduce the need for a discretion under s. 12 of the present *Act* but not with respect to s. 593 of the *Criminal Code*. See s. 123 and s. 25(2) of the proposed *Act* and *cf.* the recommendations of the Task Force in this regard in the *Report*, *supra*, note 4, 93.

in cases involving exposure of injuries and tendering of explicit photographs.[19] Such evidence can create a sense of horror and disgust. Where information causes these reactions, the likelihood of a sober decision can be diminished and the evidence can have a tendency to induce a judgment based upon unfair considerations.

On other occasions technically admissible evidence tendered pursuant to rules which typically have nothing to do with inflammatory evidence can produce exaggerated inferences. For example, the Crown may tender statements "by an accused charged with [sexual assault] which contain [...an] admission with respect to the charge in question, but also contain clear admissions of two previous [sexual assaults]."[20]

The doctrine of *res gestae* is particularly susceptible of permitting the coincidental inclusion of dangerous evidence. The offence in question could be committed under circumstances which, if revealed, would demonstrate another act of misconduct. For example, an act leading to a charge of dangerous driving could occur where an accused was being pursued by police in connection with some other discreditable offence. If the nature of that other discreditable offence was revealed to the trier of fact, the very real prospect of an unfair inference arises.

B. Inadequate Evidence

To be admissible, evidence must be relevant. To be relevant it need not be conclusive as to the existence or non-existence of a fact in issue. It must merely have a tendency to render the existence or non-existence of that fact more probable.[21] Evidence can be adduced, then, which no reasonable person could consider determinative of the fact in issue. Clearly it would be unfair to an accused if such inconclusive evidence was inculpatory and the court relied upon it alone in drawing a damaging inference.

The case of *R.* v. *Bengert (No. 7)* provides an example.[22] The Crown attempted to prove that the accused was involved in a conspiracy to traffic narcotics. It hoped to show that the accused had recently travelled to Montreal to visit a known trafficker of drugs. Though not a material issue in itself, it might have given rise to the material inference that the purpose of the

[19]For a review of the authority in this regard see MacFarlane, *Photographic Evidence: Its Probative Value at Trial and Judicial Discretion to Exclude it from Evidence* (1974) 16 Crim. L.Q. 149.

[20]Ratushny, *R v. Deleo and Commisso* [,] *Annotation* [:] *Discretion, confessions and counsel* (1972) 18 C.R.N.S. 268, 271.

[21]*Report of the Federal/Provincial Task Force, supra,* note 4, 61.

[22](1979) 15 C.R. (3d) 33 (B.C.S.C.).

meeting involved the distribution of narcotics. The only evidence offered to prove the "known drug trafficker's" status was a conviction relating to a major American drug deal thirteen years earlier. Berger J. conceded that if the Crown had successfully proved that the Montreal contact was a major drug dealer, evidence as to the rendez-vous would have been admissible. Since it had not, Berger J. excluded this evidence as prejudicial, the prejudice being the danger of an improper inference. Had the Court held otherwise, evidence would have been left before the trier of fact which was insufficient to support a legitimate inference.[23]

A closely related situation can occur where the trial judge is required to rule on a preliminary issue of admissibility. For example, where an accused is confronted with an allegation of his guilt before he has been arrested it is possible that he will be taken to have "adopted" the allegation as true. Before attributing the adoption to the accused, a trier of fact must be satisfied that the accused heard and understood the statement and failed to deny it effectively where he could reasonably have been expected to do so. According to one line of authority no "foundation" is required before the scenario is left to the trier of fact.[24] Clearly it would be unfair if the trier concluded that an allegation had been accepted by the accused if the preliminary evidence could not support such a conclusion. This was recognized by MacKeighan C.J.N.S. in *R.* v. *Thompson,*[25] in which he indicated that a trial judge could use an exclusionary discretion to keep such evidence from the jury.

C. Non-assessable Evidence

Evidence can only be relied upon "fairly" where the trier of fact is in a position to assess its credibility and weight. If for any reason the trier of fact is unable to gain a rational appreciation of the true value of the evidence, it is unfair to an accused if the evidence is relied upon to his detriment. Reliance upon such evidence could only be considered arbitrary.

This concern led to an application of the *Wray* formula in two cases. In *R.* v. *Dingham*[26] the Crown attempted to tender statements made by an alleged murder victim shortly before her death. The victim had stated that

[23]Ratushny has suggested that "gravely prejudicial" cannot refer to the probative force of evidence: "Otherwise it would be in contradiction with the third criterion [trifling probative value]". See *supra,* note 20, 271. Ratushny's observation highlights the problems created by the use of terms such as "gravely" and "tenuous".

[24]*R.* v. *Christie* [1914] A.C 545, (1914) 83 L.J.K.B. 1097 (H.L.).

[25](1974) 8 N.S.R. (2d) 417, 425-6, (1974) 26 C.R.N.S. 144 (N.S.S.C., App. Div.).

[26](1978) 4 C.R. (3d) 193, 195 (B.C.S.C.).

the accused "tried to kill" her and "did it on purpose". Murray J. of the British Columbia Supreme Court ultimately relied upon the *Wray* formula to exclude the evidence. While he did not specifically articulate as much, the earlier portion of the judgement reveals his concern about the court's inability to assess the accuracy of the deceased's observations.

The decision in *R.* v. *Moore*[27] resulted in exclusion of evidence for similar reasons. Purporting to apply the *Wray* principles, Van Camp J. refused to admit the preliminary hearing transcript of a deceased rape victim's testimony at the rape trial of the accused. The decision to refuse was based upon the inability of the accused to cross-examine fully the deceased victim. In the absence of such an investigation the evidence could not be duly assessed. Thus the accused was seen to be seriously prejudiced by the prospect of its admission.

Based upon similar reasoning there can be cases where the hearsay exceptions do not provide a sufficient guarantee of trustworthiness to outweigh the risk of unreliability.[28] Proper reasoning is not ensured merely because a rule of evidence renders information admissible. Indeed, such a realization is the very basis for the discretion.

II. The Technical Failure of Section 22(2)

A. "Actual" Prejudice versus a "Real Risk" of Prejudice

To identify cases of prejudice, section 22(2) uses the phrase "the admission of which would be gravely prejudicial to a party". The operative word "prejudice" is a good choice given that it describes "a judgement found before due examination and consideration".[29] It is, therefore, particularly well suited to identifying errors in reasoning. However, apart altogether from the use of the restrictive adjective "gravely", the phrase is itself inadequate. It requires that the admission of the evidence *would be* prejudicial. Clearly it is impossible for anyone to know in advance whether a trier of fact will fall victim to the misleading potential of such evidence. Indeed, this conclusion can rarely be made even at the end of a trial. Consequently, the

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[27](1973) 17 C.C.C. (2d) 348 (Ont. H.C.). Van Camp J. erroneously held that s. 643(1) of the *Criminal Code* conferred a discretion on the trial judge to exclude. In *R.* v. *Tretter*, *supra*, note 17, it was held that this was not so. However, the Court of Appeal conceded that the common law discretion applied, and since Van Camp J. applied the *Wray* principle, *R.* v. *Moore* is still instructive.

[28]This sphere of judicial discretion was recognized by Rand J. in *Finestone* v. *The Queen* [1953] 2 S.C.R. 107, 109-10, (1953) 107 C.C.C. 93, (1953) 17 C.R. 211. See Sheppard, *Restricting the Discretion to Exclude Admissable Evidence* (1972) 14 Crim. L.Q. 334, 339.

[29]*The Oxford English Dictionary*, vol. VIII (1970).

discretion must assume a role often played by our rules of evidence, namely the prevention of possible mistakes in reasoning. To do so, the discretion must focus on the *real risk* of prejudice rather than on *actual* prejudice.

This preventative function seems to have been recognized as a matter of necessity at common law, notwithstanding the wording that has been used. In *Noor Mohammed,* [30] for example, if the Court had used the discretion rather than the similar fact evidence rule to exclude the evidence there could have been no hint beforehand that the improper inference would be drawn. And in *R.* v. *Bengert (No. 7)* [31] there was no indication that the trier of fact would treat the Montreal rendez-vous as part of the conspiracy. Thus, the phrase is clearly understood to encompass evidence which has the very real potential to cause errors in reasoning, not just evidence that is certain to cause such errors. If the discretion is to be statutized, now is the time to correct the shortcomings in its wording.

B. The Unduly Restrictive Terms of Section 22(2)

The discretion to exclude is based upon the relationship between the likely prejudicial effect of the tendered information and its importance to the court in the proper assessment of the factual issues. In essence, section 22(2) poses this question: given the importance of the information, is it justifiable to require the party against whom it has been tendered to bear the risk that it will be improperly considered? Such a determination must be made upon a sliding scale. The more important the evidence, the greater the risk of prejudice we can fairly expect that party to bear. But section 22(2) prevents the free operation of a sliding scale. According to its formula, the extent of prejudice can be contrasted with the importance of the information only when that prejudice can be characterized as "grave",[32] and the sliding scale can only be used where the probative value of the evidence can be characterized as "trifling".[33] Thus, if evidence is moderately useful, even the gravest prejudice cannot be grounds for exclusion. If the prejudice is moderate but not "grave", even trifling information must be received. It is therefore suggested that the formula is too restrictive, as it excludes too many cases which should be subject to this critical balancing.

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[30]*Supra,* note 6.

[31]*Supra,* note 22.

[32]"Grave" — "weighty, important, requiring serious thought, serious"; *The Oxford English Dictionary,* vol. XI (1970).

[33]"Trifling" — "of little moment or value, paltry, trumpery, insignificant, petty"; *The Oxford English Dictionary,* vol. IV (1970).

The other side of the problem concerns those situations where section 22(2) does apply. The three-part formula *permits* a judge to exclude unduly prejudicial evidence; it does not *require* him to do so. This raises the question of the relationship between the exclusionary discretion and the rule of relevance itself. It is not only evidence that is "completely bereft of proof quality" which is excluded by the rule of relevance.[34] In order to be admitted, evidence must obtain that degree of significance which tends to change the probability of a desired inference. Yet, under section 22(2) a judge may accept information of "trifling" probative value. The standard of relevance would appear to be lowered to some point beneath "trifling". The exact point is not clear, nor is it clear that a change in standard was intended. What is clear is that the restrictive language of section 22(2) would bring unwelcome confusion to the very rule of relevance.

Section 22(2) also casts doubt upon a widely held view of the role of the trial judge in assessing relevance. According to this view, a mere logical connection between the tendered evidence and the probability of the fact sought to be proved may not be sufficient to justify admissibility. In exercising a discretion,[35] the trial judge will weigh the probative value of the evidence against competing factors. In particular he considers the risk that the evidence might raise distracting side issues, unduly prolong the trial, unduly surprise the opposing party, or inflame emotions and provoke feelings of prejudice, hostility or sympathy. When some or all of these factors are present, the judge must decide whether the probative value makes the evidence worth hearing. Like the *Wray* formula before it, section 22(2) clearly calls into question the propriety of this investigation.

The decision in *Wray* should not be considered to affect the common law power of the judge to exclude evidence where its receipt would unduly prolong or complicate the proceedings. An important distinction exists. This discretionary power permits the court to control its own process; the *Wray* formula provides protection for the accused against prejudice. The Supreme Court decision therefore should only be permitted to affect the judge's assessment of evidence in light of its prejudicial effect.[36] If the formula is statutized, however, it could be read as supplanting all of the above discretionary powers. A judge would have the discretion to consider only prejudice as a counter-balancing factor. Since the statutory formula provides

[34]*Report of the Federal/Provincial Task Force on Uniform Evidence, supra*, note 4, 64.

[35]See *R.* v. *Wray (No. 2)* [1971] 3 O.R. 843, 848, (1971) 4 C.C.C. (2d) 378, *aff'd* [1974] S.C.R. 565, (1973) 10 C.C.C. (2d) 215, (1973) 33 D.L.R. (3d) 750. In the Ontario Court of Appeal, Arnup J.A. considered confusion and complication as important factors in determining whether to exercise a discretion. Hoffman, *Similar Facts After Boardman* (1975) 91 L.R.Q. 193, 205, sees this analysis as part of the rule of relevance itself.

[36]See S. Schiff, *Evidence in the Litigation Process* vol. I (1978) 69-70, who speculates that the effect of the *Wray* decision on this discretion may be so confined.

for a discretion based specifically and exclusively upon prejudice, the maxim *expressio unius est exclusio alterius* could preclude the exercise of a common law discretion based upon other factors.

There are other exclusionary discretions that could be endangered by the statutization of the *Wray* formula. At present one could argue that a trial judge may exclude evidence in order to protect a third party.[37] He may also exclude information which, though material to the issue of credibility, is of little probative value and a source of great embarrassment to a witness.[38] As before, the *Wray* case should not be interpreted as having any effect upon these discretions. Unfortunately, section 22(2) could convey that impression.[39]

C. *An Inappropriate Criterion: "Tenuous Admissibility"*

The final problem with section 22(2) is its requirement that evidence, to be excluded, must be only "tenuously admissible" in the first place. Given the purpose of the discretion this prerequisite is inappropriate. In the majority of cases it is also redundant, and, where it is not redundant, it is unworkable.

1. Its Inappropriateness

The purpose of the discretion is to prevent an unfair operation of rules which are often technically deficient. To defer, then, to these unsatisfactory rules, by restricting exclusion to cases where evidence is barely admissible anyway, is inappropriate. Technical deficiencies do not exist only at the edges of the rules. All evidence which tends to render the existence of a material fact more probable can be admitted. But its admission will still be dangerous if the information admitted cannot satisfactorily establish the material inference and no other evidence is adduced to support it. Even the traditional rule of similar fact evidence could be complied with, yet the

[37]*R.* v. *St-Jean* [1976] C.A. 513, (1976) 32 C.C.C. (2d) 438, (1976) 34 C.R.N.S. 378, *per* Kaufman J.A. But see also *R.* v. *Hawke* (1975) 7 O.R. (2d) 145, 181-3, (1975) 22 C.C.C. (2d) 19, (1975) 29 C.R.N.S. 1 (Ont. C.A.) and *Reference Re Legislative Privilege* (1978) 39 C.C.C. (2d) 226, (1978) 83 D.L.R. (3d) 161 (Ont. C.A.). It is submitted that due to the nature of the enquiry in *R.* v. *Wray* the Ontario Court of Appeal position is not the inevitable or even correct corollary of that case.

[38]*R.* v. *Sweet-Escott* (1971) 55 Cr. App. R. 316, *per* Lawton J.

[39]The crucial question is whether we wish to confirm the tendency of lower courts to treat the *Wray* formula as outstripping its original context and devouring these separate discretions. Such a prospect requires careful consideration.

evidence admitted might still be dangerous. It could give rise to a material inference apart from bad character. If so, then although the standard of tenuous admissibility is met, the permitted inference may be trite and the potential prejudice significant. The criterion of "tenuous admissibility" therefore does not seek to identify dangerous information: its sole function is to confine the scope of the discretion. While some control is admittedly necessary, this objective should not be achieved in an arbitrary way. If applied, the criterion could render the discretion largely impotent.

2. Its Redundance

The statutory formula is often redundant since it requires evidence to have an extremely low probative value *and* to be tenuously admissible. In many cases the very issue of admissibility requires an examination of probative value. For example, it is generally agreed that even the admissibility of similar fact evidence must be resolved by assessing the degree of probative value.[40] This is clearly true for the category described above as "Inadequate Evidence".[41] Thus, in most situations where the section could apply, the question of tenuous admissibility is already answered by an investigation of the "probative force" of the evidence "in relation to the main issue".

3. Its Unworkability

In cases where the admissibility of the evidence involves something more than a mere assessment of probative value the criterion of tenuous admissibility could be given independent meaning. Unfortunately issues of admissibility cannot always be analyzed against a precisely graduated scale. Considering the example of a confession which coincidentally contains an inflammatory admission, Ratushny speculates that there could be "a marginal point at which proof beyond a reasonable doubt has been established but, if the evidence of voluntariness were a trifle weaker the statement would be excluded."[42] While no doubt the correct interpretation of the criterion in the context of this example, such a determination is impressionistic at best and hardly capable of precise dissection. Evidence can only rarely be weighed with the precision of troy ounces of gold. The criterion of "tenuous admissibility" calls for a clarity of analysis which simply does not exist.

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[40]See the discussion of "Degree of Probative Force" in Piragoff, *supra*, note 9, 114, where a collection of those commentators is presented.

[41]See *supra*, Part I(B).

[42]Ratushny, *supra*, note 20, 270-1.

Conclusion

Problems with the formula can be traced to a distrust of discretion and a desire to temper its incursion into the integrity of rules. The preference for rules and the sceptical attitude toward discretion seem to be natural corollaries of our system of criminal justice. A judge is supposed to be a technician who implements justice by cutting along the dotted lines of ready-made rules. There are concerns that a discretion that purports to liberate a judge from the mandatory direction of rules could undermine this system and invite the implementation of a personal brand of justice. But these concerns are misplaced. From the numerous examples above of potentially dangerous evidence, it is apparent that the evidentiary rules are flawed and therefore undeserving of zealous respect. In any event, the discretion itself refrains from deferring to a trial judge's personal sense of justice. Instead, the process required is a technical one which involves a weighing of variables: the probative value of the evidence against the risk and extent of prejudice. These are variables which do not invite a political response; there is no danger of personal brands of justice.

These unfounded concerns have resulted in an extreme irony. Section 22(2) attempts to ensure a proper operation of rules by liberating fairness from the technical straitjacket the rules sometimes impose. Despite this purpose, the formula is itself placed in a technical straitjacket which in turn impairs its ability to fulfill its function. The problem is caused by an exceedingly deferential respect for our imperfect rules of admissibility — the very rules which require the discretion in the first place. A formula which is unbridled by restrictive language is easier to accept once it is recognized that, although the discretion is a power to side-step rules, it is one that will in fact reinforce those rules. A less restrictive formula will further the purposes which the rules alone cannot.

After a detailed investigation of the proper scope of the judicial discretion to exclude, the House of Lords concluded in *R.* v. *Sang* that "a trial judge in a criminal case has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value."[43] With slight modification the *Sang* formula would constitute a significant improvement over section 22(2). The *Sang* formula avoids unduly restrictive terms, thereby maintaining the sliding scale necessary to ensure the fair

[43]*R.* v. *Sang* [1980] A.C. 402, 437, [1979] 2 All E.R. 1222. The *Sang* formula also contained a second branch: "Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means." This aspect does not touch upon the question at hand.

operation of evidentiary rules. It also avoids the irrelevant criterion of tenuous admissibility. Its only downfall is a failure to replace the requirement of *actual* prejudice with the requirement of a *real risk* of prejudice. A trial judge therefore should always have a discretion to exclude where the real risk of prejudice outweighs probative worth. This is the formula that should be statutized in place of the *Wray* test, lest section 22(2) become just one more rule incapable of fulfilling its purpose.