A JURISPRUDENTIAL "HOUSE OF CARDS": THE POWER TO EXCLUDE IMPROPERLY OBTAINED EVIDENCE IN CIVIL PROCEEDINGS

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Prior to the enactment of the Charter of Rights and Freedoms, courts were extremely reticent to exclude evidence that had been improperly obtained, preferring instead to advance the "search for truth" by admitting any proof relevant to the matter being tried. In criminal cases, this changed through section 24(2) of the Charter, which provided a specific route to exclusion. But in civil cases, there was no legislated change to the common law. Notwithstanding this fact, trial courts over the past 25 years have begun recognizing a power to exclude evidence that was illegally obtained by a party to the case. Despite the emerging consensus that such a power exists, the relevant jurisprudence reveals a reliance upon questionable lines of reasoning in which the cited authorities are nothing more than other trial level decisions that have done the same, a veritable legal "house of cards". This development prompts two significant questions that shall be explored in this article: (1) can judges exclude evidence in this manner; and (2) if they can, should they?

Avant la promulgation de la Charte des droits et libertés, les tribunaux se montraient extrêmement réticents face à l'exclusion des éléments de preuve obtenus de manière inappropriée, préférant promouvoir la « recherche de la vérité » en acceptant toute preuve pertinente à la question à trancher. Dans les affaires pénales, le paragraphe 24(2) de la Charte a changé cela en prévoyant une voie particulière pour l'exclusion. Toutefois, dans le contexte des recours civils, aucune modification législative n'est venue altérer la common law. En dépit de cet état de fait, les tribunaux de première instance ont commencé, au cours des 25 dernières années, à reconnaître l'existence d'une compétence pour exclure les éléments de preuve obtenus illégalement par une partie à l'instance. Malgré le consensus qui émerge selon lequel une telle compétence existe, la jurisprudence pertinente révèle que les juges se fondent sur des courants de raisonnement douteux dans lesquels la jurisprudence citée n'est autre que des décisions rendues par d'autres tribunaux de première instance, qui s'appuient eux-mêmes sur d'autres décisions du même type. Bref, un véritable « château de cartes » juridique. Cette évolution suscite deux questions importantes sur lesquelles portera le

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présent article : (1) Les juges peuvent-ils exclure des éléments de preuve de cette façon? (2) S'ils le peuvent, devraient-ils le faire?

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1. Introduction

In 2010, during the midst of a hotly contested custody application, Cindy Godin sought to advance her case for joint custody of her three children by submitting emails she felt could impeach her husband's credibility, reveal his true interest in custody and show how he really felt about certain pieces of joint property. Notwithstanding the assistance it might provide in shedding light on contested matters in the case, the trial judge refused to admit the evidence. In her view, allowing this to occur would cause great prejudice because of how Ms. Godin had obtained access to her ex-husband's email account. Evidence revealed that she secretly asked her oldest son to remove the computer from the matrimonial home where she was not permitted to go. In the process, "the mother breached the father's privacy to obtain access to both the computer and his email account."[1] The trial judge feared that admission would countenance the "odious practice"[2] of gathering evidence in that manner, thereby encouraging future parties to act similarly.

As an evidentiary ruling, the conclusion in *Godin v Godin* is both extremely unusual and surprisingly common. It is unusual because the evidence was not excluded owing to any breach of the *Charter of Rights and Freedoms*, conflict with any statutory provision or violation of any established common law evidentiary rule. Instead, it was excluded pursuant to the trial judge's inherent discretion to exclude evidence where its prejudicial effect outweighs its probative value. What makes this unusual is not the particular exercise of discretion that took place, but rather the fact that, with few exceptions, the manner in which

1 *Godin v Godin*, 2010 NSSC 365 at para 21 [*Godin*].

2 *Seddon v Seddon*, [1994] BCJ No 1729 (QL) at para 25, 1994 CanLII 3335 (SC (TD)) [*Seddon*].

evidence was secured has *no bearing on either its probative value or its prejudicial effect*.[3] The historical perspective at common law has *always* tended towards admitting improperly obtained evidence, with one judge famously noting that "it matters not how you get it; if you steal it even it would be admissible in evidence."[4]

At the same time, the decision can be regarded as extremely commonplace, at least if one looks at trial courts across Canada, where in recent years judges presiding in civil cases have increasingly exhibited a willingness to exclude relevant, probative evidence simply because of the manner in which it was obtained. In one of the only opportunities for an appellate court to consider the source of this alleged power, the Court of Appeal for Ontario in 2011 summarily dismissed an appellant's challenge of a trial judge's decision to exclude probative conversations that had been surreptitiously recorded.[5] In dismissing this part of the appeal in just three lines, the Court affirmed that the trial judge had "relied on solid principles" in excluding the evidence by concluding that the prejudicial effect of the evidence outweighed its probative value, accepting that the manner in which the evidence was obtained somehow increased its prejudicial impact on the trial itself.[6]

To be sure, judges have gotten very used to excluding evidence that was obtained illegally or improperly—even though exclusion on these grounds is a relatively recent development spurred entirely by constitutional reform. Older lawyers (and evidence scholars) will remember the approach adopted by the Supreme Court of Canada in its landmark 1970 ruling of *R v Wray*.[7] There, a majority of the Court concluded that a state official's pre-trial conduct has no bearing on the admissibility inquiry, and that the trial judge's power to exclude relevant evidence is limited to instances in which its probative value is outweighed by its prejudicial effect—with this latter term restricted to a focus of the hypothetical likelihood

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3 To be clear, in some circumstances, the manner through which a piece of evidence is secured *can* affect its probative value, at least when factors surrounding the creation of the evidence affect the reliability of the inference one seeks to draw from the proof. See e.g. *R v Hart*, 2014 SCC 52, in which the Supreme Court developed a new rule of evidence in response to concerns posed by "Mr. Big" investigative techniques upon the reliability of the normal inference one would draw from a confession. For further discussion, see David Tanovich, "*R v Hart*: A Welcome New Emphasis on Reliability and Admissibility" (2014) 12 CR (7th) 298. The problem addressed in *Hart* has no bearing on the matters being discussed here, as the evidence at issue is not created in a manner that raises concern about its probative value.

4 *R v Leathham* (1861), 4 LJQB, 8 Cox CC 498 at 501.

5 See *Sordi v Sordi*, 2011 ONCA 665.

6 *Ibid* at para 12.

7 *R v Wray*, [1971] SCR 272, 11 DLR (3d) 673 [*Wray* cited to SCR].

of the evidence diverting or misleading the trier of fact. Though the case dominated the jurisprudence of the 1970s, its primary finding was largely rendered irrelevant in criminal cases twelve years later by the enactment of the *Canadian Charter of Rights and Freedoms*,[8] which confers a power to exclude evidence illegally obtained through a contravention of one or more *Charter* rights.[9] But this development had little impact upon civil litigators, where the *Charter* and its specific power to exclude evidence is largely irrelevant unless the state unearths the evidence or is a party to the case.[10]

Nonetheless, the exclusion of probative evidence owing to concerns about the manner in which it was obtained has suddenly become quite common, a curious phenomenon given that there is every reason to believe that *Wray* and its progeny should govern the admissibility of evidence secured improperly by one of the parties to a civil proceeding.[11] The common law has consistently expressed a strong preference for admitting evidence regardless of how it was obtained—especially in civil proceedings—by relying upon the court's need to administer justice with as many relevant facts as possible. Given that the courts cannot rely upon the exclusionary power found in section 24(2) of the *Charter*, an alternative source of authority or principled basis for exclusion would seem to be required.

In this article, we hope to reveal the shaky jurisprudential foundation supporting the power currently being exercised by judges across Canada to exclude improperly obtained evidence in civil proceedings, and argue against the continued operation of this discretion. The first part of the article will examine the manner in which that power is presently being exercised, and the purported juridical sources for its use. Against this background, Part II will evaluate whether the "modern approach" to improperly obtained evidence coheres with historical developments in the law of evidence, with particular focus on the power to exclude

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8 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

9 *Ibid*, s 24(2).

10 *Ibid*, s 32. See also *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at 1170–71, 24 OR (3d) 865 [*Hill*] where the majority provided that:

> *Charter* rights do not exist in the absence of state action … [I]n the context of civil litigation involving only private parties, the *Charter* will 'apply' to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.

See also Peter Sankoff, *The Law of Witnesses and Evidence in Canada* (Toronto: Thomson Reuters, 2020) (loose-leaf), ch 20.3 [Sankoff, *The Law of Witnesses and Evidence 2020*].

11 See *Draper v Jacklin*, [1970] SCR 92, 9 DLR (3d) 264.

evidence and the accompanying theoretical support for this sort of exclusion. Finally, in Part III we will suggest some of the problems with this approach, highlighting the potential for mischief if the law continues to permit general matters of public policy to be considered when deciding whether to admit evidence.

2. Historical Approach to Exclusion

The law of evidence in Canada was heavily influenced by the English experience for much of the country's history, but particularly in the years prior to the enactment of the *Charter*. Historically, the English approach allowed for little operation of discretion when considering whether to admit evidence. Up until the early part of the 20th century, courts relied on a categorical approach to exclusion, rendering everything even remotely probative admissible unless it contravened an established rule of evidence. As Paciocco notes, "[t]his was because the 'rule of law' and common law theory are intrinsically wary of discretion."[12] Though judges retained the ability to introduce new rules of exclusion at any time, courts exhibited an apprehension to do so in light of the potential such rules had to keep important evidence from the finders of fact.

The categorical approach lost traction over time as courts recognized the value in retaining the discretion to exclude evidence that, though relevant, posed some type of prejudice. In the move toward broader judicial discretion, the courts have had to wrestle with competing views of the role played by the law of evidence in administering justice. The starting point in Canadian law was articulated by Chief Justice Dickson in *R v Corbett*, where he provided that:

> [B]asic principles of the law of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue, subject to the recognized rules of exclusion and exceptions thereto.[13]

This inclusionary foundation is very well grounded in historic debate about the main objectives served by the law of evidence. The notion that the rules should err on the side of inclusion finds its origin in the belief that the administration of justice, to the extent that it strives to arrive at "the truth," is best served by admitting all relevant information on which finders of fact can ground their decisions. This inclusive approach to the admission of evidence reflects the inherent constraints that operate to limit the ability to make findings of "fact" and finds support going back to

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12 David Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin, 2015) at 38.

13 *R v Corbett*, [1988] 1 SCR 670 at 697, 28 BCLR (2d) 145.

at least 1827, and Jeremy Bentham's monumental study of *The Rationale of Judicial Evidence*.[14]

Bentham ardently opposed most exclusionary rules and strongly criticized the system of proof employed in English courts at the time.[15] In his view, rules of admissibility and disqualification inhibit disclosure of the truth and obstruct the rational application of the substantive law.[16] Even the granting of the privilege against self-incrimination, spousal privilege, and solicitor client privilege were repudiated by Bentham to the extent that they advantaged a particular social value over the disclosure of truth.[17] And while these particular prescriptions have not gained any substantial traction, the essence of Bentham's philosophy persists, and "the influence of his criticism cannot be overstated."[18] As noted by Twining, Bentham's scholarship is grounded in "common-sense empiricism and a relatively optimistic faith in the judicial ability to discover truth in litigation."[19] To that extent, even many critics of Bentham disagree only to the extent that they dispute the practicality of his recommendations, meanwhile accepting that the laws of evidence, properly construed, further the search for truth.[20]

Of these critics, perhaps the most prominent is John Henry Wigmore, whose oft-cited works have been staples at the Supreme Court of Canada.[21] Though Wigmore disagreed with Bentham's prescriptions, preferring a gradual development of the rules of proof that reflect the judicial experience,[22] he was guided by the same core values, aiming at Bentham's "rectitude of decision."[23] In other words, both scholars shared a common

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14 Jeremy Bentham, *Rationale of Judicial Evidence, Specially applied to English Practice: from the manuscripts of Jeremy Bentham*, vol 5 (London: Hunt and Clarke, 1827) [Bentham, *Rationale of Judicial Evidence*].

15 Jeremy Bentham, *A Treatise on Judicial Evidence: Extracted from the Manuscripts of Jeremy Bentham*, ed by Etienne Dumont (London, UK: JW Paget, 1825) at 2 [Bentham, *A Treatise on Judicial Evidence*].

16 Alanah Josey, "Jeremy Bentham and Canadian Evidence Law: The Utilitarian Perspective on Mistrial Applications" (2019) 42:4 Man LJ 292 at 300.

17 Bentham, *Rationale of Judicial Evidence*, *supra* note 14 at 339–344.

18 Kenneth M Ehrenberg, "Less Evidence, Better Knowledge" (2015) 60:2 McGill LJ 173 at 175 [Ehrenberg].

19 Bentham, *A Treatise on Judicial Evidence*, *supra* note 15 at 258.

20 Ehrenberg, *supra* note 18 at 175.

21 See e.g. *R v National Post*, 2010 SCC 16 at para 53 [*National Post*]; *R v Gruenke*, [1991] 3 SCR 263 at 290, 75 Man R (2d) 112 [*Gruenke*]; *Piche v R* (1970), [1971] SCR 23, 11 DLR (3d) 700.

22 William L Twining, "Bentham's Theory of Evidence: Setting a Context" (2019) 18:1 J Bentham Studies 20 at 20–37.

23 William L Twining, *Theories of Evidence: Bentham and Wigmore* (London, UK: Weidenfeld and Nicolson, 1985).

destination, but disagreed about how best to arrive there.[24] One of the key insights underpinning Wigmore's theory of proof is the problem of hidden generalizations in judicial fact finding. As Bentham recognized, findings of "fact" depend on inductive, probabilistic reasoning, which relies on the experiences and expectations of judges and juries. The law of evidence must then respond to the reality that decision making does not occur in a vacuum, and that the availability of some types of evidence is more likely to distort the search for truth than further it. Wigmore's skepticism on this point has crystallized in many areas of Canadian evidence law, in particular in the context of sexual assault trials.[25]

This very brief exploration of the underlying principles of evidence law is not intended to adjudicate the correctness of the positions held by Bentham or his opponents. Rather, it simply points out the fact that creating an exclusionary rule focusing upon values extrinsic to the trial process is hardly demanded by first principles and it probably offends them. This was at the core of the majority opinion of the Supreme Court in *Wray*, and—leaving aside cases involving breaches of the *Charter*—it has been a staple of the jurisprudence at all levels of court since. The trend towards admitting probative evidence rather than excluding it is a powerful theme in Canadian evidence law.[26]

Given the case's historical importance, it is worth briefly considering the *Wray* decision in a bit more depth. The accused in *Wray* had been charged with murder stemming from his alleged involvement in the robbery of a gas station that went awry. Though there was circumstantial evidence linking the accused to the incident, the primary evidence linking the accused to the crime was a confession obtained through nine hours of

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[24] James L Kainen, "The Rationalist Tradition At Trial" (1992) 60:5 Fordham L Rev 1085 at 1086.

[25] See e.g. *R v ARJD*, 2017 ABCA 237, aff'd by 2018 SCC 6, where the Court rebuked reliance on myths about the "perfect victim" of sexual assault. The Court of Appeal of Alberta allowed the Crown's appeal from acquittal on the basis that the trial judge had improperly measured the complainant's conduct after the alleged assault against what they expected a victim of sexual assault would do. Another example of a rule of evidence that is more likely to "distort" the truth is the collateral fact rule. Though evidence of collateral facts is *relevant* to the trial process, because it impacts upon the credibility of witnesses giving evidence, it is nonetheless normally excluded. As the Court of Appeal of New Brunswick suggested in *R v Trecartin*, 2018 NBCA 49 at para 21, "if collateral evidence were allowed to be admitted it would open up every witness to endless [scrutiny] on every instance of inconsistency in relation to matters of no real relevance to the issues in dispute". In effect, most types of collateral evidence—while probative—are too prejudicial to warrant admission.

[26] David Paciocco et al, *The Law of Evidence*, 8th ed (Toronto: Irwin, 2020) at 14–15.

intensive interrogation and the murder weapon, whose location had been revealed by the lengthy police questioning.

At trial, the confession itself was ruled involuntary, and thus inadmissible, a conclusion upheld at every level of appeal. The question that divided the Supreme Court concerned whether the accused's involvement in locating the murder weapon and the murder weapon itself could nonetheless be put before the jury. The confessions rule provided a clear basis for excluding the accused statement, but the rule did not extend to cover clearly reliable evidence that had been discovered in light of the dubious confession. As a result, the Court was forced to determine whether "unfair" conduct by the state provided an equally valid reason for excluding evidence.

In a much-anticipated decision, Justice Martland, writing for the majority of the Court, ultimately held that no such discretion existed. After a fairly exhaustive review of the jurisprudence, he concluded that trial judges did possess a discretion to exclude evidence, but it was one that could only be exercised in extremely limited circumstances, in particular, when the "admission of evidence would operate unfairly." [27] Justice Martland went on to note that the balancing of interests favoured admission, suggesting that "[t]he allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly."[28] For its admission to operate unfairly, a piece of evidence would have to be "gravely prejudicial to the accused," and be of "trifling" probative force in relation to the main issue before the court.[29]

Justice Martland then evaluated whether concerns about how the evidence had been obtained could factor into the "prejudicial" calculus.

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27 *Wray*, *supra* note 7 at 288. See also *Wray*, *supra* note 7 at 299 Justice Judson's concurring opinion was equally as incisive:

> In this appeal, we are clearly faced with the question of whether we should make new law and give a trial judge a discretion to exclude relevant evidence if he thinks that it will operate unfairly against the accused or, according to his opinion, bring the administration of justice into disrepute … This type of evidence has been admissible for almost 200 years. There is no judicial discretion permitting the exclusion of relevant evidence on the ground of unfairness to the accused.

28 *Ibid* at 293.

29 *Ibid*. This aspect of the *Wray* decision has not been followed. The threshold for exclusion—in both civil and criminal proceedings alike—is whether the prejudicial effect of the evidence outweighs its probative value. See Sankoff, *The Law of Witnesses and Evidence 2020*, *supra* note 10 at 2-44–2-50; 2-53–2- 54.

Facing the issue head on, he swiftly rejected such an idea, criticizing lower court attempts to blend concerns about "'unfairness' in the method of obtaining evidence, and 'unfairness' in the actual trial of the accused by reason of its admission."[30] In the process, he rejected the notion that trial judges possessed any power to exclude "evidence, the probative value of which is unimpeachable," on the basis that it "was obtained by methods which the trial judge, in his own discretion, considers to be unfair."[31] Emphasizing this point, Justice Martland concluded by instructing that the "[e]xclusion of evidence on this ground has nothing whatever to do with the duty of a trial judge to secure a fair trial for the accused."[32]

This opinion was not unanimous, however. In dissent, Chief Justice Cartwright preferred an approach that would provide the trial judge with the power to exclude evidence where "to admit it would bring the administration of justice into disrepute in the minds of right-thinking men."[33] In this pre-*Charter* era, his overriding concern—not unreasonably given the status quo—was that there needed to be some way for judges to control highly objectionable police conduct, noting that a discretion to exclude admissible evidence was warranted where tendering illegally obtained proof would be unjust to the accused and also calculated to bring the administration of justice into disrepute.

Notwithstanding the reservations of Chief Justice Cartwright and the other dissenting justices, there was no mistaking the common law's approach to common law power to exclude improperly obtained evidence after *Wray*. Under the majority's approach, leaving aside established situations like the confessions rule, the manner in which evidence was obtained was simply not relevant to the question of whether or not to

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30 *Wray*, *supra* note 7 at 295. This separation of different types of prejudice has held through to the current day. See *R v Seaboyer*, [1991] 2 SCR 577 at 609–611, 4 OR (3d) 383; *R v Clarke*, 1998 CanLII 14604, [1998] OJ No 3521 (QL) (CA). One anomalous decision is *R v Hawkins*, [1996] 3 SCR 1043 at 1092–93, 30 OR (3d) 641 [*Hawkins*] where Chief Justice Lamer and Justice Iacobucci on behalf of a minority of the Supreme Court suggested—without much in the way of reasoning—that a trial judge *could* assess whether admitting evidence from the accused's spouse would unfairly impact his marriage, as part of the probative value/prejudicial effect inquiry. In a concurring opinion for herself and Justice La Forest, Justice L'Heureux-Dubé rejected this proposition, opining at *Hawkins*, *supra* note 30 at 1097, that "it is not open to an accused to argue that he or she will be unfairly convicted merely because a rule of evidence, in this case the spousal incompetence rule, did not apply in his or her favour" [emphasis in original]. This rare debate about prejudice, which outlines the pros and cons of allowing for a broader inquiry, has had little resonance on the subsequent jurisprudence.

31 *Wray*, *supra* note 7 at 295.

32 *Ibid* at 295.

33 *Ibid* at 285.

admit it. It is worth noting that *Wray* was not a "one-off" anomaly. On the contrary, the approach taken in that case remained dominant right up until the enactment of the *Charter* and section 24(2), unaffected even by attempts to skirt its application through resort to the *Canadian Bill of Rights*.[34]

This state of affairs was understandably unsettling for many lawyers, politicians, and even jurists who disapproved of the law's harsh rigidity in this area and shared the concerns of Chief Justice Cartwright about retaining the ability to respond to objectionable police conduct.[35] And these critics eventually prevailed, at least to some degree, when the *Charter* was amended from its original form to include a power, found in section 24(2), to exclude evidence obtained in a manner that violated an individual's *Charter* protected rights.[36] The drafters' decision to include section 24(2) represented a clear constitutional repudiation of the majority's core finding in *Wray* that the manner in which evidence was obtained was to have effectively no role in determining whether it was admissible. To that extent, the essence of section 24(2) represents a substantial departure from the law as it stood at the time. Not only does section 24(2) often *permit* the exclusion of evidence that was obtained improperly, in many cases it *demands* it. Without delving into the merits of the drafters' decision to create such a power, it is worth reiterating that the underlying principles of the law of evidence do not compel such a conclusion.

This is not to suggest that the law of evidence cannot or should not take into account matters extrinsic to the trial process. There are a number of evidentiary rules that operate to limit the admissibility of otherwise probative and relevant evidence.[37] But it cannot be forgotten that these

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34 See e.g. *Hogan v The Queen*, [1975] 2 SCR 574, 48 DLR (3d) 427 [*Hogan* cited to SCR], in which *Wray* was applied to the *Canadian Bill of Rights*, SC 1960 c 44. Hogan had been refused the right to speak with counsel, as guaranteed by section 2(c)(ii) of the *Canadian Bill of Rights* and argued that the evidence obtained as a consequence of the denial of his right should be excluded. *Hogan*, *supra* note 34 at 584, where Justice Ritchie writing for the majority, concluded that the *Canadian Bill of Rights* could not justify "the adoption of a rule of "absolute exclusion" on the American model which is in derogation of a common rule long accepted in this country".

35 For greater discussion of the response to *Wray*, see e.g. Bruce P Elman, "Returning to *Wray*: Some Recent Cases on Section 24 of the Charter" (1988) 26:3 Alta L Rev 604 at 606; Rosemary Pattenden, "The Exclusion of Unfairly Obtained Evidence in England, Australia, and Canada" (1980) 29:4 Intl L Comp L Q 664.

36 The *Wray* decision was a huge part of this. To review the historical backdrop, see Sankoff, *The Law of Witnesses and Evidence 2020*, *supra* note 10 at 20-9 to 20-12.

37 See e.g. the law of privilege restricts the admissibility of evidence in a number of contexts where the social value of maintaining relationships of confidence outweighs the

rules are the exception and are carefully balanced against the cost that exclusion may have on the overarching aims of pursuing truth. And in many cases, the overwhelming preference for inclusion has led courts to reject even well-founded attempts to recognize new rules that would lead to the exclusion of otherwise relevant, probative evidence.

Consider, for example, the Supreme Court's decision in *R v Gruenke* where it refused to recognize a legal common law privilege for religious communications.[38] The central issue in *Gruenke* was whether the Appellant's pastor should have been permitted to testify at her trial for first-degree murder. Before analyzing the policy reasons militating in favour of the privilege, the Court laid out the high standard to be met by the appellant in order to disturb the "fundamental 'first principle'" that all relevant evidence is admissible until proven otherwise.[39] To succeed, the Court said that the rationale for recognizing a privilege for religious communications must be "as compelling as the policy reasons which underlay the class privilege for solicitor-client privilege."[40] Just how high this standard is can be gleaned from the Court's description of the underlying rationale for solicitor-client privilege, particularly that it is "essential to the effective operation of the legal system."[41] Though not a precise standard, suffice to say it is difficult to imagine many other proposed categories of privilege that are equally "essential" to the administration of justice.

The applicable standard was tested again nearly 20 years in *R v National Post*, where the Court refused to grant class privilege on the basis of journalist-source confidentiality.[42] Just as *Gruenke* raised important questions of constitutional concern with respect to the practice of religion, implicating section 2(a) of the *Charter*, *National Post* implicated section 2(b) and its protection of freedom of the press. But despite forceful submissions indicating that a free press depended upon the ability of figures in media to offer anonymity, a majority of the Supreme Court concluded that a case-by-case model of privilege was sufficient to safeguard the press, allowing instances in which journalists could be compelled to provide law enforcement with information provided to them under the expectation of secrecy. Like *Gruenke*, *National Post* illustrates the force of the "first principle" of the law of evidence and its preference for more

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interest in coming to the truth. On this point, see *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52.

38 *Gruenke*, *supra* note 21.

39 *Ibid* at 288.

40 *Ibid*.

41 *Ibid* at 289.

42 *National Post*, *supra* note 21.

available information for finders of fact even in the face of compelling countervailing interests.

3. Current Approach to Exclusion

Although *Wray* and other important cases all suggested that the search for truth was the predominant concern for the common law of evidence, strange trends in the jurisprudence began to emerge in the late 1990s and early 2000s. Often without warning—and occasionally without explanation—trial judges began considering and then applying a discretion to exclude evidence of the very sort that had been rejected in *Wray*. While minor variations can be found in different provinces, the basic power to exclude improperly obtained evidence no longer seems to be contested,[43] and a fairly uniform approach to its application has emerged.[44] Much of this development has occurred in the family law context, specifically in the scenario where one parent attempts to tender into evidence stolen personal correspondence, text messages or emails taken from another's device, or surreptitiously recorded conversations. As a result, much of the jurisprudence responds to the specific concerns relevant to custody disputes and ensuring the best interests of the child.

It is useful then to proceed first by considering how the exclusionary power has developed in this context. In *AJU v GSU*,[45] the Court of Queen's Bench of Alberta provided one of the clearest articulations of the applicable principles surrounding illegally obtained evidence. After reviewing the jurisprudence regarding the common law discretion, Justice Pentelechuk concluded that excluding evidence illegally obtained by a party for the purpose of using it against the other was not only possible, it was desirable:

> If we accept that acrimony between parents and the adversarial process is damaging to children, admitting such evidence under the guise it is relevant to determining a child's best interest seems counterintuitive. Admitting such evidence encourages more. Not only does it risk rewarding the parent who possesses a greater acumen for documenting and recording, but it prolongs the litigation and increases expense with ever more voluminous affidavits and exhibits.[46]

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43 Though this position has been reached, reservations are occasionally articulated. See e.g. *Mazur v Corr*, 2004 ABQB 752.

44 See amongst others, *Palod v Macdonald*, 2018 ONCJ 507; *PEMA v SLA*, 2018 SKQB 145 [*PEMA*]; *MFH v MAH*, 2018 BCSC 2486 [*MFH*]; *Godin*, *supra* note 1; *D(A) v D(C)*, 2013 NLTD(G) 119 [*D(A)*].

45 *AJU v GSU*, 2015 ABQB 6 [*AJU*]. See similarly *St Croix v St Croix*, 2017 ABQB 490.

46 *AJU*, *supra* note 45 at para 167.

Mindful of these concerns, Justice Pentelechuk went on to find that illegally obtained evidence of this sort should only *rarely* be admitted, and that a *voir dire* was required in order to resolve its admissibility. At this stage, the evidence is presumptively inadmissible, with the onus placed on the party seeking to enter the evidence to establish "a compelling reason to do so."[47]

In British Columbia, the courts have framed the admissibility question somewhat differently, focusing more directly upon the probative value and prejudicial effect of any evidence obtained. In *MFH v MAH*,[48] which involved another custody dispute, the mother obtained without permission and then attempted to tender into evidence emails exchanged between the father and his new spouse. In deciding not to admit the emails, the Court noted that the prejudicial impact of admission outweighed whatever probative value they might have. The prejudice associated with entering the evidence derived from three related factors:

- the mother's actions extended beyond the scope of the permission granted by the father to be access his account;
- the mother's conduct constituted at least a *prima facie* invasion of the father's privacy;[49] and,
- the practice of extending beyond the scope of permissible access is one that should be discouraged, as it has the potential to promote suspicion and disruption in already tumultuous proceedings.[50]

A similar sort of framework has emerged in Ontario, where the predominant approach has been to admit improperly obtained evidence *only* when it is in the best interests of the child to do so.[51] In *Scarlett v Farrell*,[52] a father wished to admit videos he had recorded of interactions

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47 *Ibid* at para 168.

48 *MFH*, *supra* note 44.

49 See *Jones v Tsige*, 2012 ONCA 32, where the Court of Appeal for Ontario found that a bank employee repeatedly accessing the account information of her partner's ex-wife amounted to an invasion of privacy.

50 *MFH*, *supra* note 44 at paras 8–10.

51 See e.g. *Reddick v Reddick*, 1997 CarswellOnt 3477 (WL Can), [1997] OJ No 2497 (QL) (Ct J (Gen Div)) [*Reddick*]; *Hameed v Hameed*, 2006 ONCJ 274 [*Hameed*]; *Tillger v Tillger*, 2019 ONSC 1463 [*Tillger*].

52 *Scarlett v Farrell*, 2014 ONCJ 517. Though the Court affirmed the approach taken in earlier cases, the videos taken by the father were found to not have been recorded surreptitiously. As no other evidentiary rule prevented their admission, the videos were admitted.

between himself and the child to counter the claim that she was fearful of him. The Court reviewed the jurisprudence and affirmed that the correct approach was to balance the probative value of the evidence against the policy considerations weighing against entering evidence obtained improperly.[53] Whether such evidence is sufficiently probative to overcome the countervailing policy concerns will depend on the extent to which it assists the courts in making decisions about the best interests of the child.[54]

As the foregoing suggests, courts in different provinces have approached the question of exclusion in different ways, but the distinctions are not particularly significant. In requiring that the probative value outweigh the broad policy considerations associated with admitting improperly obtained evidence, the courts in Ontario and British Columbia have created a *de facto* presumption of inadmissibility. The presumption can be overcome only by establishing that admitting the evidence is sufficiently probative to the courts' determination of what is in the best interests of the child. This is functionally equivalent to the Court in *AJU* requiring a compelling reason to enter the evidence.[55]

4. Searching for a Source

The sudden willingness of courts across Canada to recognize a power to exclude illegally obtained evidence in civil cases is certainly surprising, if nothing else, given the strong historical resistance against recognizing such a power and the potential implications of doing so. While the *Charter*'s enactment settled the question of whether there exists a power to exclude evidence obtained in contravention of a person's constitutionally protected rights, it did nothing to change the law in cases where no such violation occurred. Is it nonetheless possible that such a power has developed, on a parallel track, within the common law?

It is worthwhile to explore this question by looking at criminal and civil decisions alike. After all, if an independent common law power to exclude evidence exists, it would be useful in every sort of judicial proceeding. In fact, attempts to develop this sort of power *have* occurred in criminal cases, usually in situations where resort to the *Charter* is unavailable for one reason or another. That said, the jurisprudence has

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53 *Ibid* at para 31.

54 *Ibid*.

55 Similar approaches have been taken by the courts in Nova Scotia, Saskatchewan, Yukon, and Newfoundland. See *Godin*, *supra* note 1; *PEMA*, *supra* note 44; *BDC v BJB*, 2012 YKSC 64 [*BDC*]; *D(A)*, *supra* note 44.

by and large foreclosed the idea of having a common law exclusionary rule with its own governing principles running along a "parallel track" to section 24(2).

The central role played by the *Charter* in the exclusion of illegally obtained evidence was discussed in *R v Hebert*,[56] where the Supreme Court of Canada considered whether a confession made to an undercover police officer placed in the cell with the accused was admissible. In finding that the police's conduct violated the accused's right to silence, the Court discussed how the enactment of section 24(2) of the *Charter* gave the courts licence to expand upon the narrow discretion to exclude improperly obtained confessions that had previously prevailed under the common law. Writing for a majority of the Court, Justice McLachlin, observed that "[t]he narrow view of the confessions rule adopted in Canada in recent years stems primarily from the *Wray* approach which emphasized reliability of evidence and virtually removed the discretion of the courts to reject statements on the ground that they had been obtained unfairly."[57] The Court then used the *Charter* to create a new rule of exclusion. Where the state was involved in compelling evidence from suspects in a manner that was contrary to the principle against self-incrimination, it could cause a violation section 7 of the *Charter*, triggering the power to exclude evidence in section 24(2).

In concurring reasons, Justice Sopinka was even more unequivocal about the *Charter*'s role in changing the new evidentiary dynamic. Though he noted that the *content* of the right to silence might not vary between the common law and the *Charter*, a judge's ability to *enforce* the right was only supported by section 24. In emphasizing this point, Justice Sopinka stated that:

> The enforcement mechanisms available to judges at common law do not compare to those granted by s. 24 of the *Charter*, particularly the power to exclude evidence pursuant to s. 24(2). Thus, it is no answer to a violation of the right to remain silent to say that the resulting confession, or the derivative evidence, would have been admitted at common law: we are not here applying the common law. Admissibility is now governed by s. 24(2) of the *Charter*. To define *Charter* rights only in accordance with the ultimate effectiveness of their common law and statutory antecedents would be to deny the supremacy of the Constitution.[58]

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56 *R v Hebert*, [1990] 2 SCR 151, 47 BCLR (2d) 1 [*Hebert* cited to SCR].

57 *Ibid* at 175.

58 *Ibid* at 199.

A similar emphasis on the importance of the *Charter* in this context can be found in *R v Harrer*.[59] The central issue before the Court in *Harrer* was whether the failure of the United States police to follow Canadian law rendered statements taken from a detainee to be inadmissible. The impugned evidence had been gathered in a manner that did not comply with the accused's *Charter* right to counsel, but it was obtained by US officials outside of Canada. As a result, the *Charter* did not apply. Because the *Charter* did not apply when the evidence was collected, the Court was left to consider whether the admission of evidence would render the trial unfair, contrary to sections 7 and 11(d) of the *Charter*. But having concluded that admitting the evidence would not render the trial unfair, there was no recourse available to the accused. In the end, the evidence was admissible despite the fact that it was obtained in a manner that would have violated the *Charter* had it occurred north of the border.

The Court's insistence in *Hebert* and *Harrer* on grounding the exclusion of evidence in the *Charter* raises significant questions about the manner in which the civil power to exclude has been developed. Section 24(2) has no application to the family law disputes discussed earlier, and the *Charter*'s "alternative" route to exclusion in section 24(1) is also of no assistance in this context. Section 11(d) applies only to persons charged with an offence, and as a consequence the *Charter* guarantee of the right to a fair trial cannot be used to protect against the admission of evidence in civil proceedings.[60] The most that a private litigant could do is argue that the decision to admit improperly obtained evidence is inconsistent with *Charter* values,[61] though this has not been the focus of the decisions discussed above.[62] There is also reason to remain skeptical about the potential success of such an approach. In one decision, *Matthews v Matthews,* the trial judge stated that he would have admitted the evidence even if he was convinced that that rules governing the admission of improperly obtained evidence were inconsistent with *Charter* values.[63]

Given the lack of a constitutional exclusionary clause, the absence of any common law authority to exclude and the Supreme Court's clear and unvarnished preference for admitting improperly obtained evidence unless it was obtained in contravention of the *Charter*, how exactly have judges in civil cases concluded that exclusion is possible? To put the matter as charitably as possible, it would appear that they have "invented"

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59 *R v Harrer*, [1995] 3 SCR 562, 128 DLR (4th) 98.

60 Section 7 of the *Charter* would be similarly restrained given the absence of an obvious liberty interest.

61 *Hill*, *supra* note 10; *M(A) v Ryan*, [1997] 1 SCR 157, 143 DLR (4th) 1; *Grant v Torstar Corp*, 2009 SCC 61.

62 See *Matthews v Matthews*, 2007 BCSC 1825 [*Matthews*].

63 *Ibid*.

this power by citing earlier authorities in a questionable manner, and then "scaffolding" the jurisprudence by citing each other's decisions, creating a virtual "house of cards," where each decision excluding evidence in this way provides authority for another case to do so, even if the framework for doing so remains obscured if not downright illusory.

A closer look at the jurisprudence reveals this, with several of the earliest decisions on point relying upon judgments of questionable pedigree. In many cases, judges have excluded illegally obtained evidence by utilizing the very power first recognized in *Wray*: the discretion to exclude proof where its probative value is outweighed by the prejudicial effect. In *Matthews*,[64] for example, the Supreme Court of British Columbia in discussing the prejudice associated with entering the mother's diary entries and personal correspondence that had been illegally obtained by the father during a custody dispute, noted, without citing any authority for the proposition, that prejudice includes "prejudice to the party opposing the admission of the evidence, prejudice to the trial process, and prejudice to the reputation of the administration of justice." [65] The trial judge then went on to balance the reputational costs of admitting the mother's diary and personal correspondence against those associated with refusing to admit evidence that might illuminate important concerns related to the children's best interest.[66] Not surprisingly, the decision ignores the lengthy excerpts from *Wray* suggesting exactly how the term "prejudice" should be construed—a construction that conflicts mightily with the use of the phrase in *Matthews*.

Matthews is hardly an isolated example of this phenomenon. Trial judges now regularly cite this discretion as providing the ability to exclude illegally obtained evidence by suggesting that the term "prejudicial effect" includes policy concerns that are somehow prejudicial to the interests of justice in an undetermined way. Many cite no authority at all, but others rely on a host of cases that provide no support for the proposition whatsoever. One commonly relied upon source is *Anderson v Erickson*,[67] a decision involving liability for a motor vehicle accident in which the Court of Appeal for British Columbia held that the trial judge had erred in

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64 *Ibid*.

65 *Ibid* at para 53.

66 *Ibid*. This balancing is consistent with the surrounding jurisprudence. See *Reddick*, *supra* note 51; *Sweeten v Sweeten*, 1996 CanLII 2972, [1996] BCJ No 3138 (QL) (SC (TD)).

67 *Anderson (Guardian ad litem of) v Erickson*, 71 BCLR (2d) 68, 1992 CarswellBC 250 (WL Can) (CA) [*Anderson*]. The Supreme Court of British Columbia cited *Anderson* in *MFH*, *supra* note 44 as one of the sources for its discretion to exclude improperly obtained evidence.

excluding evidence showing that a stop sign had been moved by the city after an accident occurred at that intersection.

Anderson is a peculiar authority for the notion that civil courts have the ability to consider broader policy concerns when deciding whether to exclude evidence under the common law discretion. In its judgment, the Court explicitly *refused* to rule on the precise scope of the discretion to exclude evidence possessed by trial judges hearing civil cases. More importantly, the Court's approach to the issues raised in the case was—consistent with the jurisprudence—in *favour* of admitting evidence rather than excluding it, notwithstanding policy concerns. In *Anderson*, the Court of Appeal considered a request by one of the parties to exclude the evidence of the relocated stop sign because it might discourage parties faced with potential civil proceedings from repairing what might be defective, in light of the possibility that it suggested an implied admission of fault.

On this point, the Court was wholly unpersuaded.[68] In its view, the only potential for prejudice was the traditional kind: the possibility that the trier of fact would overvalue the evidence and improperly infer from the decision to move the stop sign that the city was admitting fault. According to the Court, any such prejudice could be combatted by simply instructing the jury that the evidence, standing alone, could not be used for that purpose.[69]

Anderson is not the only source that has been "misappropriated" as authority for a broader power to exclude. The Supreme Court decision in *R v Morris*[70] has also been cited for this purpose.[71] *Morris* famously considered the admission of newspaper clippings discussing the heroin trade abroad in a heroin trafficking case. Writing for the majority, Justice McIntyre concluded that the clippings met the low threshold of relevance

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68 To be clear, the Court in *Anderson* did not articulate a clear limit on the general exclusionary power. Indeed, at the end of the discussion of probative value and prejudicial effect, Justice Wood indicated that the Court was leaving this question for another day. To that effect, *Anderson* neither supports the existence of a general exclusionary power nor does it preclude the possibility. But to the extent that it is has been cited as support for such a power, the case has been misapplied. See e.g. *MFH*, *supra* note 44 at para 3, where Justice Brundrett cited *Anderson* for the proposition that "certain policy considerations must be balanced in weighing the probative value of the evidence against its prejudicial effect".

69 In *Anderson*, *supra* note 67, the Court of Appeal also cited one of its earlier decisions, *Cominco Ltd v Westinghouse Canada Ltd*, 11 BCLR 142, 1979 CarswellBC 69 (WL Can) (CA), where, in the absence of a binding rule supporting the power to exclude evidence on the basis of policy, the Court refused to create such a discretion.

70 *R v Morris*, [1983] 2 SCR 190, 1 DLR (4th) 385 [*Morris* cited to SCR].

71 See *Tillger*, *supra* note 51.

required to admit them, citing the "nexus" between the evidence and the alleged conduct, which allowed an inference to be drawn that the accused was preparing to traffic drugs from his possession of the clippings. The Court unanimously affirmed Thayer's statement regarding the law of evidence, which provides: (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it.[72]

Taken out of context, the second point appears to provide a basis for the exclusion of improperly obtained evidence, at least when "policy concerns" demand it. But there is absolutely no reason to believe the Supreme Court was advocating for greater exclusion of evidence on policy grounds when such an approach conflicts mightily with the discussion about the law of evidence and the discretion to exclude that was taking place at this time. Moreover, in a discussion of the law governing similar fact evidence, which took place in the same judgment, the Court approvingly cited an earlier statement of the House of Lords that provided a textbook definition of prejudice:

> the reason for this general rule is not that the law regards such evidence as inherently irrelevant but that it is believed that if it were generally admitted jurors would in many cases think that it was more relevant than it was, so that, as it is put, its prejudicial effect would outweigh its probative value. Circumstances, however, may arise in which such evidence is so very relevant that to exclude it would be an affront to common sense.[73]

In *Gray v Insurance Corp of British Columbia*,[74] the Court of Appeal for British Columbia refused to apply the Thayer excerpt approved of in *Morris* in the broad sense discussed above. In *Gray*, the trial judge relied on *Morris* and *Anderson* to exclude evidence of inspection reports produced by a police officer, which corroborated the insurance company's position that the insured was driving under the influence of alcohol at the time of her accident. The Court of Appeal reversed, finding that the trial judge's decision to exclude the evidence extended beyond the limited discretion provided by *Anderson* and *Morris*.[75]

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[72] James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law*, vol 2 (Boston: Little, Brown, and Company, 1898) at 530, cited in *Morris*, *supra* note 70 at 201.

[73] *Morris*, *supra* note 70 at 202, citing *DPP v Kilbourne*, [1973] AC 729 at 757, [1974] 3 WLR 673 (HL (Eng)).

[74] *Gray v Insurance Corp of British Columbia*, 2010 BCCA 459.

[75] Like *Anderson*, *supra* note 67, *Gray* does not make clear holdings with respect to the scope of the general exclusionary power. The Court merely found that the trial

Gray was on solid ground, as the jurisprudential support for an existing discretion to exclude improperly obtained evidence at common law appears fairly "thin," to put it mildly.[76] Most of the decisions cite *Anderson* and *Morris*—if they cite any older authority at all—and then go on to cite each other, building an ever-growing list of authorities for a power that appears to have been wholly invented, contrary to the earlier conclusions by appellate courts that expressly refused to adopt the practice.[77] None of this is to suggest that evidentiary rules cannot evolve, or that policy concerns should never be assessed when determining whether to admit evidence. Nonetheless, if the courts wish to expand the power to exclude evidence for these reasons, it would be preferable if they first recognized that approaching matters in this way conflicts with a fairly substantial mass of precedent and attempted instead to articulate a clear and defensible rationale for *changing the law*.

The absence of an existing precedent is not a complete answer to the question of whether the courts have a discretionary power to exclude evidence in civil proceedings, of course, as the common law has the capacity to evolve. The power of judges to alter the common law was reviewed by the Supreme Court in *R v Salituro,* where the Court eschewed the notion that the role of judges was to simply "discover the common law, not change it," preferring instead a "more dynamic view" of the common law.[78] The contemporary understanding outlined by the Court permits courts to overturn its own previous decisions "where there are compelling

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judge had erred in principle by weighing the prejudice against both parties, where she was required to balance the probative value of the evidence against the potential prejudice.

76 See also *Propp v Propp*, 2014 SKCA 5, a dispute about the division of matrimonial assets, the Court of Appeal of Saskatchewan refused to find that the trial judge erred in admitting tax documents that the wife had taken from the location where they had been stored by the husband. The Court cited the traditional position at common law that the manner in which evidence was obtained has no bearing on its admissibility. However, the Court's finding in *Propp* is anomalous, even if one looks only in Saskatchewan. Since *Propp*, courts in Saskatchewan have diverged from this position, most notably in *PEMA*, *supra* note 44. In *PEMA*, the trial judge excluded a number of text messages sent between the daughter, her father, and step-mother in part due to the "undesirable" intrusion of the daughter's privacy interests.

77 Perhaps the best example of this phenomenon is *Seddon*, *supra* note 2, one of the initial cases that considered whether the power to exclude improperly obtained evidence existed at common law. The analysis in *Seddon* relied heavily on an erroneous view of the *Charter* that would have it apply to the conduct of individuals acting privately. Nevertheless, it was cited by later courts, such as *Rawlek v Rawlek*, 2003 BCSC 1466 [*Rawlek*], which was in turn cited by *Matthews*, *supra* note 62. When the Court of the Queen's Bench of Alberta canvassed the various decisions addressing this question in *AJU*, *supra* note 45, both *Seddon* and *Matthews*, among others, were cited to support the power to exclude.

78 *R v Salituro*, [1991] 3 SCR 654 at 665, 1991 CarswellOnt 124 (WL Can).

reasons for doing so."[79] But even when there is good reason to change, the Court cautioned courts not to delve into the legislative realm, noting that "complex changes to the law with uncertain ramifications should be left to the legislature."[80] Only modest, "incremental changes to the common law [designed] to bring legal rules into step with a changing society" fall within the proper scope of the judiciary.[81]

The rationale for supporting judicial reluctance to make dramatic changes to existing doctrine is quite straightforward. As Justice McLachlin (as she then was) noted in *Watkins v Olafson*, courts "may not be in the best position to assess deficiencies in existing law, much less problems which may be associated with the changes it might make."[82] Larger changes to the law, Justice McLachlin continued, "involve devising subsidiary rules and procedures relevant to their implementation."[83] These concerns are compounded by the nature of judicial decision making and the myopic scope of the case before a given court. The parties to a case are unlikely to possess the broad array of perspectives necessary to understand the implications of a decision, an issue which is only mitigated by the presence of interveners. But aside from practical concerns, Justice McLachlin noted that judicial reluctance to change the law emerges, "perhaps most importantly," from the "long-established principle that in a constitutional democracy that it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform."[84] In practical terms, this means where "the revision is major and its ramifications complex, the courts must proceed with great caution."[85]

This of course applies to the law of evidence. As the Supreme Court has noted, the traditional rules of evidence are not "cast in stone, nor are they enacted in a vacuum,"[86] and there are undoubtedly good reasons to argue against the admission of evidence that was improperly obtained. But substantial revisions to the law of evidence have the potential to generate ripple effects felt throughout the justice system. As noted at the outset, the truth-seeking function of Canada's system of justice depends on evidentiary rules conducive to that aim. If courts wish to make changes to the law of evidence, they should do so with trepidation, as recommended in *Watkins*. And when changes are made, they should be well-grounded

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79 *Ibid*.

80 *Ibid* at 666.

81 *Ibid*.

82 *Watkins v Olafson*, [1989] 2 SCR 750 at 760, 39 BCLR (2d) 294.

83 *Ibid*.

84 *Ibid* at 760–61.

85 *Ibid* at 761.

86 *R v Levogiannis*, [1993] 4 SCR 475 at 487, 16 OR (3d) 384.

in principle and policy to overcome the presumptive preference for precedent.

So what would qualify as a compelling reason to update the law of evidence? Presumably, new evidentiary rules should advance the aims of the law of evidence, or at least be consistent with the underlying principles. Discussing these principles in *Mitchell v MNR*, Chief Justice McLachlin noted that:

> Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.[87]

Adopting a rule that allows for the exclusion of improperly obtained evidence would not only be unsupported by these principles, it would largely be antithetical to them. In some instances, there will undoubtedly be reason to be concerned about the reliability of improperly obtained evidence, or issues with respect to the probative value of recordings that may lack the full context required to properly assess the relevance to particular issues. Courts have rightly relied on these factors when excluding improperly obtained evidence. But relying on the fact that evidence was improperly obtained as a justification for exclusion hinders the pursuit of truth by removing proof that might assist the court in reaching the proper factual conclusions, in order to achieve some broader policy goal. As a result, any rationale offered to justify excluding such evidence must overcome the fact that the conventional principles of evidence, supported by some fairly sound reasoning, demand otherwise.

The courts' motivation for excluding evidence in the family law cases discussed above tends to fall into three separate categories of concern, though there is overlap between them. The first concern is that admitting improperly obtained evidence will encourage future litigants to engage in the "odious practice"[88] of breaking the law to get evidence, which risks exacerbating the conflict and mistrust inherent in family law disputes. Thompson has opined that "there may be more room in family law than in other areas of litigation for the use of the legal process to harm others, to serve less rational, more emotional, more conflictual ends."[89] Mindful

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87 *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 30.

88 *Seddon*, *supra* note 2; *Matthews*, *supra* note 62.

89 Rollie Thompson, "Are There *Any* Rules of Evidence in Family Law?" (2003) 21 CFLQ 245 at 254.

of these concerns, he suggests that the rules of evidence in family law must respond to the unique context in which these disputes arise. In particular, this means that the objectives of advancing the best interests of the child, reducing conflict, and encouraging familial relationships weigh in favour of adopting an exclusionary rule designed to discourage the "odious" practice of illegally recording conversations or otherwise breaking the law to obtain proof.

The objective of focusing upon the best interests of the child has received the most attention from the courts, with the decision of whether to admit illegally obtained evidence often framed in terms of whether doing so would be in the best interests of the child.[90] For example, where the evidence being adduced suggests parental alienation, courts have been more willing to forgive the "odious" behaviour of the parent who surreptitiously recorded conversations or accessed the electronic records of the other parent.[91] In cases of this sort, the Court will all but invariably state that the prejudice to the administration of justice if the evidence was not admitted outweighs the prejudice associated with allowing the evidence in.

This is an unusual way of looking at the issue, as it seems to confuse prejudicial effect with probative value. The courts also seem to be confusing what is in the best interests of the particular child with what is in the best interests of children generally. It may well be in the best interests of children *at large* to develop rules that discourage behaviour likely to lead to conflict. However, once the illegality has occurred, turning a blind eye to evidence that sheds light on the parents' behaviour is rarely going to be in the best interests of the child. As stated by Justice Pentelchuk in *AJU* v *GSU*, "the purpose of a custody trial is to seek the truth and determine the best interests of the children."[92] One has to question how the best interests of the particular child in a proceeding is served by hindering the pursuit of truth.

It is also worth noting that the proposition of creating a rule to exclude evidence for the purpose of deterring illegal conduct has been suggested many times in Canadian history—always without success. Indeed, in criminal cases the idea of creating an exclusionary rule to deter police from breaking the law in order to obtain evidence that could be used to convict an accused person was rejected for decades. And even today, with a fairly robust section 24(2) of the *Charter* in place, courts eschew reliance

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90 See e.g. *Hameed*, *supra* note 51; *Fattali v Fattali*, 1996 CanLII 7272, [1996] OJ No 1207 (QL) (Ct J (Gen Div Fam Ct)).

91 *Reddick*, *supra* note 51.

92 *AJU*, *supra* note 45 at para 27.

on general deterrence as a rationale for exclusion.[93] Why then should such a rationale be applied to parents in custody disputes, or in any civil proceeding, for that matter? Aside from these inconsistencies, there are reasons to believe that employing the rule will do very little to produce the desired effect. In fact, the precise concerns used to justify the rule raise questions about how effective it would be. The emotionally charged parties in a custody dispute are rather unlikely to be guided by the sort of rationality on which deterrence rationales are predicated. Moreover, the deterrence rationale assumes that the relevant parties are informed about the exclusionary rule, which is unlikely to be the case in custody disputes.[94]

The second category of concern stems from the fact that surreptitiously recording conversations can, in some circumstances, amount to a criminal offence. Though the manner in which the evidence was obtained in these cases is not always criminal, section 184 of the *Criminal Code* makes it an offence to intercept private communications "by means of any electro-magnetic, acoustic, mechanical or other device," and is often cited as a factor that aggravates the prejudicial impact of admitting it.[95]

Excluding evidence because of concern about potential and actual violations of the criminal law is a particularly strange development, and suffers from many of the same shortcomings discussed above. The discretion to exclude evidence in criminal proceedings, fortified by a constitutional power to remedy matters set out section 24(2), takes into account much more than whether a law has been breached. It balances the seriousness of the infringing conduct, the impact of breaching the individual's *Charter* protected rights, and whether admitting the evidence would bring the administration of justice into disrepute. Aside from the fact that judges presiding in civil proceedings do not have section 24(2) as a remedial authority, relying on the fact that evidence was obtained illegally as a reason to exclude it without considering other factors has the effect of creating a *broader discretion to exclude evidence than in the context of a criminal proceeding where the police has violated an accused offender's constitutional rights*.

In any event, it is far from clear that the rationale of discouraging parties from engaging in criminal conduct should be achieved through the laws of evidence at all. In *Rawlek v Rawlek*, the Supreme Court of British Columbia correctly noted "that the taping in these circumstances

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93 *R v Grant*, 2009 SCC 32 at para 73.

94 Mike Madden, "A Model Rule for Excluding Improperly or Unconstitutionally Obtained Evidence" (2015) 33:2 BJIL 442.

95 See e.g. *Seddon*, *supra* note 2; *Matthews*, *supra* note 62; *BDC*, *supra* note 55.

is contrary to section 184 of the *Criminal Code of Canada* and thus if this were proven in a criminal trial the plaintiff would be guilty of a criminal offence."[96] Indeed, the criminal law itself should act as a primary deterrent in these situations. Moreover, the manner in which the evidence was obtained might have other negative ramifications. The trial judge in *Rawlek* noted that "the fact that the mother would resort to illegal, surreptitious means to tape her children's conversations with their father, private conversations, may very well be a factor in considering whether she is a fit parent."[97]

Finally, there is a branch of the jurisprudence in which judges are willing to exclude even if the party's conduct in obtaining evidence does *not* constitute a criminal offence, but are concerned about intrusions into another person's privacy. For example, in *PEMA v SLA*,[98] the Court elected to admit only two of the "many" text messages between the child and her father and his new partner that the mother had obtained from her daughter's phone. Strangely, the privacy interests motivating the trial judge to exclude the messages were those of the daughter, not the father against whom the text messages were being used. By framing the issue as an invasion into the daughter's privacy, the Court diminished the severity of the intrusion by distinguishing between texts sent to the daughter from those sent by her. Leaving aside the correctness of this analysis, it is untethered from any legal or constitutional requirements. If the courts consider themselves empowered to exclude evidence when anyone's privacy has been violated, the scope of this exclusionary power becomes almost unimaginably broad.

5. Conclusion

There is no doubt that the common law is capable of developing exclusionary rules that account for the manner in which evidence is obtained, even in the context of civil proceedings. Nonetheless, it is equally clear that there should be great reticence to do so given the legal history surrounding this question and the overall trend towards deferring to the legislature where competing social policy objectives are the purported reason for excluding evidence. Developments in the law of privilege are instructive. Notwithstanding multiple attempts for the courts to recognize and shield a variety of interests from court scrutiny, this area of the law has stultified, with the courts voluntarily declaring that "it is now practically impossible for a court, acting on its own, to recognize a new class privilege

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96 *Rawlek*, *supra* note 77 at para 5.

97 *Ibid* at para 5.

98 *PEMA*, *supra* note 44.

[and that] … 'in future such 'class' privileges will be created, if at all, only by legislative action.'"[99] This is no accident. Rather, it furthers the court's interest in seeking out all relevant facts, recognizing that "new class privileges demand 'that the external social policy in question [be] of such unequivocal importance that it cannot be sacrificed before the altar of the courts,'" because they "work against the truth-seeking purpose of a court or administrative proceeding."[100]

In light of such a clear policy direction questions remain about the source of the power to exclude improperly obtained evidence that trial judges have alleged themselves to possess, and whether it is desirable to maintain the practice. To the first question, a careful analysis of the decisions promoting an exclusionary rule reveals that most of them rely on little authority and have failed to consider the broader dimensions of taking this course. When this question ultimately receives the full attention of an appellate court, it will be interesting to see whether greater adherence to conventional principles of evidence law are promoted. If judges wish to recognize a power to exclude, the common law certainly is flexible enough to allow this path to be taken. Nonetheless, a power of this sort should be the subject of careful consideration that takes into account all of the potential ramifications. Judges would also do well to recognize what a significant departure from the norm an exclusionary discretion of this sort truly represents.

And to the second, it is unclear why the laws of evidence should be adapted to allow for the exclusion of improperly obtained evidence in civil proceedings, especially in custody disputes where it most commonly occurs. Even when mindful of the need to discourage illegality and the reluctance to reward those who engage in the conduct, the laws of evidence are not likely the appropriate avenue for these achieving these aims. With the exception of instances where the evidence is truly irrelevant, or where its probative value is exceeded by its potential to lead to an improper conclusion, admitting the evidence is more likely to promote the pursuit of truth, which is itself a precondition for arriving at the correct outcome. Establishing an evidentiary rule preventing the admissibility of evidence on the basis of matters extrinsic to the trial process rests upon the preference of those social values over the establishment of truth and the increased risk that courts will arrive at the wrong conclusion. Consequently, judges and legislators alike would profit from considering not just the importance of the social values themselves, but also the likelihood that excluding a certain type of evidence will in fact advance those aims and if there are any

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99 *Vancouver Airport Authority v Canada (Commissioner of Competition)*, 2018 FCA 24 at paras 57, 62.

100 *Ibid* at paras 49, 54.

available alternatives. In the case of improperly obtained evidence in the civil proceedings, there has been no evidence proffered to suggest that the rule will achieve its desired aims, and moreover each of the predominantly cited concerns can be addressed through alternative routes available to the courts.