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Hamish Stewart

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Section 7 of the Charter and the Common Law Rules of Evidence

Hamish Stewart*

I. INTRODUCTION

The advent of the *Canadian Charter of Rights and Freedoms*¹ coincided, roughly, with the Supreme Court of Canada's revolution in the common law of evidence. The Charter came into force in April 1982; the common law evidence revolution arguably began the next month, when the Supreme Court brusquely swept away the corroboration requirement for the testimony of accomplices.² It would, no doubt, be possible to find links between these two developments, both doctrinally and in terms of the legal culture of the past 25 years; in particular, the boldness and creativity that the Court showed in the early Charter cases³ may well have influenced its approach to other areas of the law, including the common law of evidence. But my interest here is in the more direct relationship that has emerged between section 7 of the Charter and the common law rules of evidence. The Court has on several occasions dealt

* Faculty of Law, University of Toronto. A draft of this paper was prepared for the National Conference on the Charter and Criminal Law, Osgoode Hall Law School, Toronto, September 29, 2007. I am very grateful to Michael Code and Thomas Cromwell for their comments on the draft, and to Jamie Cameron and James Stribopoulos for the invitation to participate in the conference.

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

² *R. v. Vetrovec*, [1982] S.C.J. No. 40, [1982] 1 S.C.R. 811 (S.C.C.). Another case from the same year evincing a similar impatience with categorical rules is *R. v. Graat*, [1982] S.C.J. No. 102, [1982] 2 S.C.R. 819 (S.C.C.). Some might say that the evidence revolution began earlier, with *Ares v. Venner*, [1970] S.C.J. No. 26, [1970] S.C.R. 608 (S.C.C.) (admitting hearsay evidence in the absence of an existing common law or statutory exception) or later, with *R. v. Khan*, [1990] S.C.J. No. 81, [1990] 2 S.C.R. 531 (S.C.C.) (same). On the revolution in the common law of evidence generally, see John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. Supplement (Markham, ON: LexisNexis Canada, 2004), Chapter 1.

³ See, for instance, the early cases adopting a generous and purposive approach to the definition and limitation of Charter rights: *Canada (Combinex Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97, [1984] 2 S.C.R. 145 (S.C.C.); *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.); *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.) [hereinafter "*Motor Vehicle Reference*"]; *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

with the claim that a statutory change to the common law rules of evidence is unconstitutional because the change is inconsistent with the principles of fundamental justice. The Court's response has usually been to reject the claim and uphold the statute, but in doing so, to vindicate the values underlying the common law rule in question, usually by an exercise in statutory interpretation that preserves the trial judge's discretionary power to exclude evidence on the ground of excessive prejudice. Where this interpretation is not possible, the statute is vulnerable to invalidation. In cases where no formal constitutional issue arises, the Court has also tended to reinforce its revolutionary changes to the common law rules of evidence by intimating that they are consistent with, or perhaps even required by, section 7 of the Charter.

This combination of constitutionally informed statutory interpretation and common law development could, in principle, lead to the recognition of a general right to the exclusion of patently unreliable evidence as a principle of fundamental justice under section 7 of the Charter.⁴ But, for a variety of doctrinal and pragmatic reasons, such a dramatic change to the law of evidence is unlikely; it is more likely, and perhaps more desirable, that the Supreme Court will continue to develop the existing rules of evidence with a view to reducing the amount of unreliable evidence that is put before triers of fact.⁵ Towards the end of this paper, I argue that, along these lines, recent undesirable developments in the common law confessions rule might be reversed if more attention was paid to the norm that underlies the relationship between section 7 and the common law rules of evidence: excessively prejudicial evidence is inadmissible.

II. THE COMMON LAW OF EVIDENCE AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

1. Section 7: A Brief Overview

Section 7 of the Charter reads as follows:

⁴ Compare David M. Paciocco, *Charter Principles and Proof in Criminal Cases* (Toronto: Carswell, 1987), at 335-91.

⁵ Compare Kent Roach, "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions" (2007) 52 *Crim. L.Q.* 210.

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The approach to a section 7 claim is now well established. The claimant must first show that there is state conduct that affects one of the three protected interests — life, liberty or security of the person. The claimant must then identify a principle of fundamental justice and show that the way the state conduct affects his or her protected interest is not in accordance with that principle. If the claimant succeeds in demonstrating all of these elements, then he or she has established a violation of section 7 of the Charter. If the violation is not authorized by any statute, then it cannot be justified under section 1, and the claimant would be entitled to a remedy under section 24(1) of the Charter. If a statute provides a discretion, itself constitutionally valid, that engages the section 7 interests, then section 7 requires the decision-maker to exercise the discretion properly.⁶ If a statute violates section 7, then in principle the violation might be justified under section 1 of the Charter as a reasonable limit on the section 7 right. But the Supreme Court of Canada has never upheld a section 7 violation under section 1.⁷ For the purposes of this paper, I will assume that an evidentiary statute violating section 7 would not be upheld under section 1. If not justified under section 1, the statute would be declared of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*,⁸ and the claimant might also be entitled to a personal remedy under section 24(1) of the Charter.

In criminal proceedings, section 7 is always applicable because the liberty interest is always engaged: if found guilty, the accused may be imprisoned.⁹ Thus, criminal proceedings always have to comply with the principles of fundamental justice. But what are these principles? In

⁶ As in extradition and deportation proceedings; see, for instance, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 208 D.L.R. (4th) 1 (S.C.C.).

⁷ On the high standard for upholding a s. 7 violation under s. 1, see *Reference re s. 94(2) of the Motor Vehicle Act*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 518 (S.C.C.). This high standard has sometimes been interpreted as obviating the *Oakes* test except in extreme emergencies: see, for instance, *Cheskes v. Ontario (Attorney General)*, [2007] O.J. No. 3515, 87 O.R. (3d) 581, at para. 138 (Ont. S.C.J.). There are some dissenting judgments that would have upheld a s. 7 violation under s. 1; notably, in *R. v. Hess*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906 (S.C.C.), McLachlin J., dissenting, would have upheld a clear violation of the “no liability without fault” principle.

⁸ Schedule B to the *Canada Act* (U.K.), 1982, c. 11.

⁹ *R. v. Marmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 89 (S.C.C.); *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 18 (S.C.C.).

the *Motor Vehicle Reference*,¹⁰ the Court rejected the argument that the principles of fundamental justice should be equated with procedural fairness or natural justice; while the principles of fundamental justice certainly require procedural fairness,¹¹ they also include substantive requirements.¹² The early section 7 cases indicated, grandly if somewhat vaguely, that the principles of fundamental justice were to be found in “the basic tenets of our legal system”¹³ and, like sections 8 through 14 of the Charter, were “essential elements of a system for the administration of justice which is founded upon a belief in ‘the dignity and worth of the human person’ ... and on ‘the rule of law’”.¹⁴ More recently, the Court has articulated a rather stringent three-part test for determining whether a proposed legal principle or rule is a principle of fundamental justice for section 7 purposes:

[F]or a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.¹⁵

So any assertion that a particular common law rule of evidence is a principle of fundamental justice must now be tested against this standard. A common law rule of evidence rule will typically satisfy the first and third criteria; given that these rules are routinely applied by trial judges, they are certainly legal principles that can be identified with sufficient

¹⁰ *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

¹¹ See, for example, *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.).

¹² See, for example, *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 (S.C.C.) (a law must not be vague); *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.) (the fault element of a criminal offence must be proportionate to the seriousness of the offence); *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.) (a law must not be overbroad in relation to its own purposes); *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) (a law must not be arbitrary).

¹³ *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 503 (S.C.C.).

¹⁴ *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 503 (S.C.C.), quoting from the preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III, and from the preamble to the Charter.

¹⁵ *R. v. Marmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 113 (S.C.C.); see also *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at 590-91 (S.C.C.); *R. v. White*, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417 (S.C.C.).

precision. The question will be whether the rule is “fundamental to the way in which the legal system ought fairly to operate”, and this in turn will depend on how well the rule promotes the goals of the common law trial process: the search for truth, fairness to the parties, efficiency, the integrity of the administration of justice and other social values.¹⁶

2. Common Law Values in the Rules of Evidence

Section 7 is always engaged in criminal proceedings because the accused always faces a possible deprivation of liberty. So the rules of evidence, like any other aspect of the proceedings, must comply with the principles of fundamental justice. The rules of evidence in Canada remain largely a matter for development under the common law, subject to certain statutory changes. But are any of the common law rules of evidence principles of fundamental justice for the purposes of section 7 of the Charter? This issue has been addressed in a series of cases involving statutory changes to the common law that have facilitated the prosecution of offences, particularly sexual offences. In these cases, the Supreme Court of Canada has generally rejected the argument that any particular common law rule of evidence is a principle of fundamental justice, but in so doing, the Court has in effect constitutionalized certain of the values underlying the common law rules. The usual response to these section 7 challenges has been to interpret the statute as preserving some important aspect of the common law and, with that interpretation in place, to reject the challenge.

At common law, a trial judge has the power to exclude evidence where, in the trial judge’s view, the prejudicial effect of the evidence outweighs its probative value.¹⁷ This power is sometimes called a “discretion”, and it is discretionary in the limited sense that the trial judge’s assessment of prejudicial effect and probative value is entitled to considerable deference on appeal. But there is an important sense in which the exercise of the power is not discretionary: if the trial judge concludes that the prejudicial effect of the evidence outweighs the probative value,

¹⁶ This list of objectives is based on John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. Supplement (Markham, ON: LexisNexis Canada, 2004), at 8-10.

¹⁷ For a review of the different formulations of this power, see *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 610-11 (S.C.C.), *per* McLachlin J.

he or she must exclude it.¹⁸ I will refer to this power as the “discretionary exclusionary power”.

Rather than constitutionalizing any particular common law rule of evidence, the Supreme Court of Canada has effectively constitutionalized the discretionary exclusionary power by rejecting Charter challenges to statutes while interpreting them as preserving the power. As Rosenberg put it some years ago, “the courts have been remarkably resistant to using the *Charter* to strike down evidentiary rules ... [and] have found that it is much more useful to uphold the existing rule, while giving to the trial judge a greater discretion in applying the evidentiary rules.”¹⁹ This process may be illustrated with reference to four cases decided between 1988 and 1993.

Under section 12 of the *Canada Evidence Act*,²⁰ any witness “may be questioned as to whether the witness has been convicted of any offence”. It is well established that section 12 applies to the accused as a witness, if the accused chooses to testify at his or her own trial. In *R. v. Corbett*,²¹ the accused argued that the application of section 12 to an accused person infringed the right to a fair trial guaranteed by section 11(d) of the Charter.²² The Court rejected this argument, but only after interpreting section 12 as preserving the discretionary exclusionary power.²³ Indeed, Beetz J., speaking for himself, was clearly of the view that section 12 would offend section 7 if it could not be read as incorporating the discretion.²⁴

In *R. v. Potvin*,²⁵ the accused challenged what is now section 715 of the *Criminal Code*.²⁶ This section creates an exception to the rule against hearsay for a transcript of a witness’s testimony from a previous proceeding on the same charge where the witness “refuses to be sworn or to give

¹⁸ Compare *R. v. Handy*, [2002] S.C.J. No. 57, [2002] 2 S.C.R. 908, 164 C.C.C. (3d) 481 at para. 153 (S.C.C.).

¹⁹ Marc Rosenberg, “The Impact of the *Charter* on the Law of Evidence in Criminal Cases”, in Jamie Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 181, at 191.

²⁰ R.S.C. 1985, c. C-5.

²¹ [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670 (S.C.C.).

²² Thus *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670 (S.C.C.) is not, strictly speaking, a s. 7 case, but it is well established that the right to a fair trial is also a principle of fundamental justice under s. 7.

²³ *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670, at 729-40 (S.C.C.), *per* La Forest J., dissenting on other grounds.

²⁴ *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670, at 699 (S.C.C.), *per* Beetz J.

²⁵ [1989] S.C.J. No. 24, [1989] 1 S.C.R. 525 (S.C.C.).

²⁶ R.S.C. 1985, c. C-46.

evidence” or can be shown to be dead, insane, too ill to testify or absent from Canada, and where “the evidence was taken in the presence of the accused”, unless “the accused did not have full opportunity to cross-examine the witness.” The accused Potvin, along with Deschênes and another, were charged with murder. However, the Crown proceeded against the accused separately, and called Deschênes as a witness at the accused’s preliminary inquiry. The accused was committed for trial. At trial, Deschênes refused to testify, and the Crown relied on section 715 to put his preliminary inquiry testimony before the jury. The accused argued that it was a principle of fundamental justice that he should have the opportunity to cross-examine all the witnesses against him *at trial*; accordingly, section 715 offended section 7. The Court rejected this argument, holding instead that section 7 required that “the accused have... a full opportunity to cross-examine the witness when the previous testimony was taken if a transcript of such testimony is to be introduced as evidence in a criminal trial for the purpose of convicting the accused”.²⁷ But the court also interpreted section 715 as preserving the discretionary exclusionary power;²⁸ indeed, Wilson J. for the majority interpreted it as providing an even broader exclusionary discretion.

In *R. v. L. (D.O.)*,²⁹ the Court considered a constitutional challenge to section 715.1 of the *Criminal Code*,³⁰ which provides for the admission of a video recording of a statement of a young witness “made within a reasonable time after the alleged offence” and describing the offence, if the witness “adopts the contents” of the video recording while testifying.³¹ Such a video recording would probably not be admissible, absent the statute. If offered for the truth of its contents, it would be hearsay, and if it merely repeated the witness’s testimony, it would be a prior consistent statement; it would therefore be admissible only under a common law exception to one of these rules. The accused argued that the rule against hearsay and the rule against the admission of prior consistent statements were principles of fundamental justice and that section 715.1 was

²⁷ *R. v. Potvin*, [1989] S.C.J. No. 24, [1989] 1 S.C.R. 525, at 543 (S.C.C.).

²⁸ *R. v. Potvin*, [1989] S.C.J. No. 24, [1989] 1 S.C.R. 525, at 551-52, *per* Wilson J. and at 532, *per* La Forest J. (S.C.C.).

²⁹ [1993] S.C.J. No. 72, [1993] 4 S.C.R. 419 (S.C.C.).

³⁰ R.S.C. 1985, c. C-46.

³¹ When *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, [1993] 4 S.C.R. 419 (S.C.C.) was decided, s. 715.1 was applicable only to complainants in sexual cases, and spoke of a “videotape”; it has since been broadened to all witnesses who are under 18 at the time of the alleged offence and to all forms of “video recording”. The words I have quoted in the text appear in both the former and the current versions of the section.

unconstitutional because it created exceptions to those rules. The Court rejected these arguments.³² On the assumption that the section did create the exceptions to the common law rules suggested by the accused,³³ the Court rejected the claim that these rules were principles of fundamental justice; rather, the governing principle of fundamental justice was the right to a fair trial. Section 715.1 did not infringe the right to a fair trial, in particular because it was read as preserving the discretionary exclusionary power.³⁴

Finally, and perhaps most notoriously, in *R. v. Seaboyer*³⁵ the Court constitutionalized a version of the discretionary exclusionary power as it applies to evidence led by the defence. A proper appreciation of the significance of *Seaboyer* requires a brief explanation of the common law background. At common law, the complainant in a sexual case could be questioned about her sexual history, based on the assumption that an unchaste woman was more likely to consent to sexual activity and less likely to be truthful. While independent proof of the complainant's sexual history was limited by other rules of evidence,³⁶ neither the complainant's testimony, nor the independent proof (to the extent that it was admissible) concerning her sexual history would be excluded on the ground that its prejudicial effect exceeded its probative value. Indeed, at common law, there was good authority for the proposition that the discretionary

³² The lengthiest and most thoroughly reasoned judgment was delivered by L'Heureux-Dubé J., Gonthier J. concurring. The majority judgment, delivered by Lamer C.J.C., La Forest, Sopinka, Cory, McLachlin, and Iacobucci JJ. concurring, basically agrees with L'Heureux-Dubé J.'s analysis of the constitutional issues; it appears that the need for a separate concurring judgment was due to the majority's reluctance to accept everything that L'Heureux-Dubé J. had to say about the policy objectives of s. 715.1. Justice Major, speaking for himself, was content to state that he agreed with L'Heureux-Dubé J.'s disposition of the constitutional questions. I will refer mainly to L'Heureux-Dubé J.'s reasons.

³³ The Court expresses some doubt as to whether s. 715.1 creates an exception to the rule against hearsay, but L'Heureux-Dubé J.'s explanation of why the video recording is not a prior consistent statement clearly shows that the video recording is indeed hearsay: "The videotaped evidence is the only evidence before the court with regard to the details of the child's sexual abuse. It is, in fact, *the* evidence itself, as if the child were giving it in open court or in lieu of open court evidence." (*R. v. L. (D.O.)*, [1993] S.C.J. No. 72, [1993] 4 S.C.R. 419, at 458 (S.C.C.), original emphasis). The video recording cannot be "*the* evidence" against the accused unless it is accepted for the truth of the events that the witness describes in the recording; consequently, a video recording admitted under s. 715.1 is hearsay.

³⁴ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, [1993] 4 S.C.R. 419, at 461 (S.C.C.); compare at 429, *per* Lamer C.J.C.

³⁵ [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.).

³⁶ See Hamish Stewart, *Sexual Offences in Canadian Law* (looseleaf) (Aurora, ON: Canada Law Book, 2004), at §7:400.10.

exclusionary power simply did not apply to evidence tendered by the defence.³⁷

In 1983, as part of a major reform of the sexual offences, Parliament enacted a predecessor to what is now section 276 of the *Criminal Code*.³⁸ This statute provided that evidence of the complainant's sexual history was admissible only in three narrow and well-defined situations. Two accused persons, in separate proceedings, challenged section 276 of the *Criminal Code*, arguing that its abrogation of the common law rules of evidence infringed their section 7 right to make full answer and defence.

The Supreme Court of Canada, rejecting the assumptions underlying the common law rules, was unanimously of the view that a trier of fact could not legitimately base inferences about either consent or credibility on evidence of the complainant's prior sexual activity; accordingly, to the extent that section 276 excluded evidence that supported only those inferences, it did not offend the Charter. But a majority of the Court, *per* McLachlin J., agreed that section 276 was nonetheless unconstitutional. First, McLachlin J. identified the following principle of fundamental justice: "the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law."³⁹ This constitutional principle, though narrower than the common law rule that the discretionary exclusionary power did not apply to defence evidence, significantly limits the legislature's power to modify the rules of evidence in penal proceedings. Second, McLachlin J. outlined a number of hypothetical situations in which section 276 would exclude evidence of the complainant's sexual activity even though that evidence could support legitimate inferences and even though the prejudicial effect of the evidence would not substantially outweigh its probative value with respect to those inferences. Accordingly, section 276 was struck down.⁴⁰ But, in striking section 276 down, the Court did not simply revive the

³⁷ In the words of Martin J.A., "no discretion exists to exclude relevant evidence offered by an accused on the ground that it is prejudicial to the Crown": *R. v. Valley*, [1986] O.J. No. 77, 26 C.C.C. (3d) 207, at 239 (Ont. C.A.), leave to appeal refused, [1986] 1 S.C.R. xiii (S.C.C.); see also *R. v. Hawke*, [1975] O.J. No. 2200, 22 C.C.C. (2d) 19, at 54-55 (Ont. C.A.).

³⁸ R.S.C. 1985, c. C-46. For a discussion of an earlier version of the statutory prohibition on questioning the complainant about her sexual history, see Hamish Stewart, *Sexual Offences in Canadian Law* (looseleaf) (Aurora, ON: Canada Law Book, 2004), at §7:400.20.

³⁹ *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 611 (S.C.C.).

⁴⁰ Justice L'Heureux-Dubé, in one of her most famous dissents, held that s. 276 did not exclude any evidence that could, in a decision-making atmosphere free of false stereotypes about women's behaviour, support legitimate inferences; consequently, she would have rejected the s. 7 challenge altogether.

common law as it stood before the reforms of the 1970s; instead, it put in place a new and very detailed common law rule governing the admission of evidence of a complainant's sexual conduct.⁴¹

In my view, these four cases — *R. v. Corbett*,⁴² *R. v. Potvin*,⁴³ *R. v. L. (D.O.)*⁴⁴ and *R. v. Seaboyer*⁴⁵ — give constitutional status to the trial judge's discretionary exclusionary power. It is a principle of fundamental justice that a trial judge must have the power to exclude evidence tendered by the Crown where the prejudicial effect of that evidence outweighs its probative value. While it is true that the Court has never expressly stated that this rule is a principle of fundamental justice, in light of these cases, there is little doubt that a statute that could not be interpreted so as to respect it would violate section 7.⁴⁶ Moreover, it is a recognized principle of fundamental justice that a trial judge must have the power to admit evidence tendered by the defence unless its prejudicial effect substantially outweighs its probative value. An evidentiary statute that limits or removes this power in criminal proceedings (or any other proceedings where life, liberty or security of the person is at stake) therefore infringes section 7. Wherever possible, the Court will read statutes that modify the common law rules of evidence as preserving the discretionary exclusionary power.

But there is a strong argument to be made that these principles of fundamental justice were not, historically speaking, very deeply rooted in the common law of Canada. In 1970, the Supreme Court of Canada said that the discretionary exclusionary power extended only to "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".⁴⁷ As late as 1989, only two years before *R. v. Seaboyer*,⁴⁸

⁴¹ *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 634-36 (S.C.C.). When Parliament enacted the current version of s. 276 — its third attempt to create a satisfactory limit on the questioning of the complainant — it followed this new common law rule very closely. Unsurprisingly, the new s. 276 survived constitutional challenge: see *R. v. Darrach*, [2000] S.C.J. No. 46, [2000] 2 S.C.R. 443 (S.C.C.).

⁴² *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670 (S.C.C.).

⁴³ *R. v. Potvin*, [1989] S.C.J. No. 24, [1989] 1 S.C.R. 525 (S.C.C.).

⁴⁴ *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, [1993] 4 S.C.R. 419 (S.C.C.).

⁴⁵ *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.).

⁴⁶ Compare Rollie Thompson, "Rounding Up the Usual Criminal Suspects, and a Few More Civil Ones: Section 7 after *Chaoulli*" (2007) 20 N.J.C.L. 129, at 160. The constitutionalization of the discretionary exclusionary power was anticipated by David M. Paciocco, *Charter Principles and Proof in Criminal Cases* (Toronto: Carswell, 1987), at 430-32.

⁴⁷ *R. v. Wray*, [1971] S.C.J. No. 80, [1971] S.C.R. 272, at 293 (S.C.C.); see also Marc Rosenberg, "The Impact of the *Charter* on the Law of Evidence in Criminal Cases", in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 181, at 181-83;

a majority of the court seemed to think that the *Wray* formulation still governed.⁴⁹ And, on the other side of the coin, the discretion did not extend to evidence tendered by the defence;⁵⁰ evidence led by the accused was, of course, subject to the ordinary rules of evidence, but those rules could be relaxed in the accused's favour.⁵¹ Moreover, although the Court's approach to the constitutional question in *Seaboyer* was deeply rooted in the nature of the common law trial process, the remedy was not simply to revive a discredited common law approach but to promulgate a statute-like common law rule motivated by common law values.

Thus, while the Court is very reluctant to constitutionalize any particular common law rule of evidence, even one as fundamental as the rule against hearsay, it is quite willing to constitutionalize the values underlying the rule. This willingness is most clearly seen in its constitutionalization of the discretionary exclusionary power. The purposes of this power are to protect the integrity of the common law trial process from evidence that is so unreliable, inflammatory or otherwise unfair that a party should not be required to respond to it, and to keep the trial process focused on the real issues between the parties. By reading statutory incursions on the common law rules of evidence as subject to the discretionary exclusionary power, the Court protects these purposes while giving Parliament considerable scope to amend the rules of evidence to respond to deficiencies in the common law.

3. Intimations of Constitutionality

In cases where a statute is not in issue, the Court has not had to directly face the question of whether the common law rules of evidence are principles of fundamental justice; but the Court has often intimated that some aspects of the common law support constitutionally guaranteed rights, or vice versa. Most famously, the Court drew extensively on some aspects

David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005), at 33-34.

⁴⁸ [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.).

⁴⁹ *R. v. Potvin*, [1989] S.C.J. No. 24, [1989] 1 S.C.R. 525, at 552 (S.C.C.), per Wilson J. (Lamer and Sopinka JJ. concurring). Justice La Forest, speaking for himself and Dickson C.J.C., rejected the *Wray* formulation but nonetheless described the discretionary exclusionary power in stringent terms. He held (at 531) that s. 715 left "room for the operation of the ordinary principles of the law of evidence, including the rule that the trial judge may exclude admissible evidence if its prejudicial effect substantially outweighs its probative value".

⁵⁰ See note 37.

⁵¹ Compare *R. v. Williams*, [1985] O.J. No. 2489, 18 C.C.C. (3d) 356 (Ont. C.A.).

of the common law to recognize a constitutionally protected right to silence under section 7 of the Charter.⁵² Moreover, the Court has on several occasions expressly stated that some aspect of the common law rules of evidence is consonant with section 7 values; as David Paciocco puts it in his contribution to this conference, the Court has left “Charter tracks” on the common law of evidence.⁵³ In developing the principled approach to hearsay in *R. v. Khelawon*, the Court has indicated that “difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused’s ability to make full answer and defence, a right protected by s. 7”.⁵⁴ In delineating the broad scope of the accused’s right to cross-examine in *R. v. Lyttle*, the Court has stated that “the right of an accused to cross-examine prosecution witnesses ... is an essential component of the right to make a full answer and defence” which is “protected by ss. 7 and 11(d)”.⁵⁵ In reformulating the test for the admissibility of similar fact evidence in *R. v. Handy*, the Court stated that a “verdict ... based on prejudice rather than proof ... undermin[es] the presumption of innocence enshrined in ss. 7 and 11(d)”.⁵⁶ These last three cases — *R. v. Khelawon*, *R. v. Lyttle*, and *R. v. Handy* — were all unanimous decisions intended to clarify, in a principled way, various difficult points of the common law of evidence. It is true that none of them involved a constitutional challenge to a statute, so that the Court was not required to decide the precise implications of the principles of fundamental justice for the rule against hearsay, the right to cross-examine or the admissibility of similar facts, but it is nonetheless striking that the Court was prepared to intimate that its reformulation of the common law rule in question might be required by the principles of fundamental justice.

⁵² *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.).

⁵³ David Paciocco, “Charter Tracks: Twenty-Five Years of Constitutional Influence on the Criminal Trial Process and Rules of Evidence”, in this volume.

⁵⁴ *R. v. Khelawon*, [2006] S.C.J. No. 57, [2006] 2 S.C.R. 787, at para. 47 (S.C.C.).

⁵⁵ [2004] S.C.J. No. 8, [2004] 1 S.C.R. 193, 180 C.C.C. (3d) 476, at paras. 41 and 43 (S.C.C.).

⁵⁶ *R. v. Handy*, [2002] S.C.J. No. 57, [2002] 2 S.C.R. 908, 164 C.C.C. (3d) 481, at para. 139 (S.C.C.). Compare *R. v. Terezakis*, [2007] B.C.J. No. 1592, 223 C.C.C. (3d) 344, at paras. 45-46 (B.C.C.A.).

III. UNRELIABLE EVIDENCE AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

1. A Right against Unreliable Evidence?

An important theme runs through both types of cases discussed in the previous section: the link between the accused's right to a fair trial and the trial judge's role in excluding unreliable evidence. So it is tempting to argue that Canadian courts should recognize a general section 7 Charter right against the admission of patently unreliable evidence. It might be argued that this right is implicit in the constitutionalization of the discretionary exclusionary power, insofar as one type of prejudicial effect is the concern that the trier of fact will give excessive weight to unreliable evidence. Moreover, this right would be entirely consistent with the intimations of constitutionality that have helped to inform the development of the common law of evidence in the Charter era, notably in *R. v. Khelawon*,⁵⁷ where it was suggested that the exclusion of unreliable evidence under the principled approach to hearsay might be required by the section 7 right to a fair trial.

However, it has to be said that Canadian courts have not, so far, been receptive to recognizing a right to the exclusion of unreliable evidence as such. In *R. v. Buric*,⁵⁸ the trial judge found that the proposed testimony of a Crown witness had been tainted by the manner in which the police had interviewed the witness, and excluded the evidence on the ground that its admission would make the trial unfair. The accused were acquitted. The Ontario Court of Appeal ordered a new trial, holding that the apparent unreliability of the evidence was not a ground for excluding it; the issues of credibility raised by the police interview could be explored in cross-examination. Justice Labrosse commented that "The admission of evidence which *may* be unreliable does not *per se* render a trial unfair."⁵⁹ The Supreme Court upheld the Court of Appeal's decision. In *R. v. Osmar*,⁶⁰ the accused sought exclusion of his statement to an undercover police officer in a "Mr. Big" scenario. The Ontario Court of Appeal held that there was no Charter ground for exclusion⁶¹ and that, at common law,

⁵⁷ [2006] S.C.J. No. 57, [2006] 2 S.C.R. 787 (S.C.C.).

⁵⁸ [1996] O.J. No. 1657, 28 O.R. (3d) 737 (Ont. C.A.).

⁵⁹ *R. v. Buric*, [1996] O.J. No. 1657, 28 O.R. (3d) 737, at 750 (Ont. C.A.) (original emphasis), aff'd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.).

⁶⁰ [2007] O.J. No. 244, 84 O.R. (3d) 321 (Ont. C.A.).

⁶¹ *R. v. Osmar*, [2007] O.J. No. 244, 84 O.R. (3d) 321, at paras. 25-47 (Ont. C.A.).

such a statement could be excluded only in accordance with the fourth branch of the confessions rule as articulated in *R. v. Rothman*,⁶² that is, only if the conduct of the police in obtaining the statement would shock the conscience.⁶³ In *R. v. Duguay*,⁶⁴ the New Brunswick Court of Appeal rejected the suggestion that a trial judge, in applying the discretionary exclusionary power, should always consider the reliability or unreliability of proposed Crown evidence. Although the Court noted that an assessment of threshold reliability is now required for certain decisions about admissibility, it held that this assessment should not apply generally to all evidence, because of the dangers of usurping “the role of the jury in our criminal justice system” and making “the *voir dire* process ... more onerous than the trial on the merits”.⁶⁵ Strikingly, the facts of the case involved the proposed testimony of a jailhouse informant; notwithstanding the well-documented frailties of such evidence,⁶⁶ the Court followed *R. v. Brooks*⁶⁷ and held that, in the circumstances, a *Vetrovec* warning relating to the jailhouse informant would have been sufficient.⁶⁸

There is much to be said for the view that requiring a showing of threshold reliability as a precondition for the admission of every piece of evidence would fundamentally change the nature of the trial process, and not necessarily for the better: the gain in the quality of the information put before the trier of fact might well be offset by the increased length

⁶² [1981] S.C.J. No. 55, [1981] 1 S.C.R. 640 (S.C.C.).

⁶³ *R. v. Osmar*, [2007] O.J. No. 244, 84 O.R. (3d) 321, at paras. 48-54 (Ont. C.A.).

⁶⁴ [2007] N.B.J. No. 337 (N.B.C.A.).

⁶⁵ *R. v. Duguay*, [2007] N.B.J. No. 337, at para. 56 (N.B.C.A.). Compare David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005), at 41, which the Court quotes extensively.

⁶⁶ See Kent Roach, “Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions” (2007) 52 *Crim. L.Q.* 210, at 225-28.

⁶⁷ *R. v. Brooks*, [2000] S.C.J. No. 12, [2000] 1 S.C.R. 237 (S.C.C.).

⁶⁸ *R. v. Duguay*, [2007] N.B.J. No. 337, at paras. 58-61 (N.B.C.A.). The accused was charged with first degree murder and counselling the commission of another first degree murder. The theory of the Crown was that the accused had killed one victim and had ordered the murder of the other. The theory of the defence was that one Bernier was responsible for the killings. The case against Duguay rested essentially on the testimony of his alleged accomplices, who had admitted their involvement, and of Bernier, who denied any involvement in the deaths. The proposed jailhouse informant would have testified that the accused tried to hire him to deliver a document which would result in Bernier’s being silenced. The trial judge held that this evidence was so unreliable that it was inadmissible. The accused was acquitted. On appeal by the Crown, the Court of Appeal held that the trial judge had erred in excluding the evidence on this ground, but nonetheless dismissed the Crown’s appeal because the error could not have affected the verdict.

and complexity of the process itself.⁶⁹ But there is also much to be said for the view that, where courts have repeatedly recognized that there are systematic reasons why a certain kind of evidence is unreliable, the common law should recognize those systematic reasons by requiring an assessment of threshold reliability for that kind of evidence.⁷⁰ Like the principled approach to hearsay, this development would at least be consistent with, if not required by, the constitutional fair trial right of accused persons. In the next part of this paper, I suggest how the common law confessions rule might be revisited along these lines.

2. The Confessions Rule Revisited

At common law, a statement by an accused person to a person not in authority is admissible pursuant to the hearsay exception for party admissions. But a statement to a person that the accused knows to be a person in authority must be proved, beyond a reasonable doubt, to have been voluntarily made before the Crown can use it against the accused for any purpose. Until recently, the voluntariness requirement could be stated as follows. To demonstrate voluntariness, the Crown had to negate, beyond a reasonable doubt, three tainting factors. First, an inducement — a threat or a promise — would make the statement involuntary and inadmissible.⁷¹ Second, a statement that was not a product of the accused's "operating mind" would be considered involuntary and inadmissible.⁷² Third, notwithstanding the absence of an inducement and the presence of an operating mind, a statement obtained under oppressive circumstances would be involuntary and inadmissible.⁷³ In addition to these three grounds of involuntariness, the Supreme Court has recognized that a statement to a person in authority, whether or not the accused knew that the person

⁶⁹ Some might say we have already gone a long way down this road: see, for instance, Michael Moldaver, "A Trial Judge's Perspective on the *Charter*", in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 143.

⁷⁰ Compare Kent Roach, "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions" (2007) 52 *Crim. L.Q.* 210.

⁷¹ This classic branch of the voluntariness rule originates in *Ibrahim v. The King*, [1914] A.C. 599 (P.C.).

⁷² *R. v. Ward*, [1979] S.C.J. No. 29, [1979] 2 S.C.R. 30 (S.C.C.); see also the rather restrictive formulation of the operating mind requirement in *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 941-42 (S.C.C.).

⁷³ *R. v. Hobbins*, [1982] S.C.J. No. 25, [1982] 1 S.C.R. 553 (S.C.C.).

was in authority, may be excluded at common law if it is obtained by means of a trick that would shock the conscience of Canadians.⁷⁴

The confessions rule is as deeply rooted and as important to the criminal trial process as any other common law rule of evidence, so it might seem natural to hold that the confessions rule is a principle of fundamental justice for section 7 purposes. But it has not been necessary for the Supreme Court to take this step because there has rarely been any legislative incursion on the common law rule.⁷⁵ Moreover, as Iacobucci J. pointed out in *R. v. Oickle*, there are at least three important structural differences between the common law confessions rule and an argument for exclusion under the Charter:

First, the confessions rule has a broader scope than the *Charter*. For example, the protections of s. 10 only apply on “arrest or detention”. By contrast, the confessions rule applies whenever a person in authority questions a suspect. Second, the *Charter* applies a different burden and standard of proof from that under the confessions rule. Under the former, the burden is on the accused to show, on a balance of probabilities, a violation of constitutional rights. Under the latter, the burden is on the prosecution to show beyond a reasonable doubt that the confession was voluntary. Finally, the remedies are different. The *Charter* excludes evidence obtained in violation of its provisions under s. 24(2) only if admitting the evidence would bring the administration of justice into disrepute. ... By contrast, a violation of the confessions rule always warrants exclusion.⁷⁶

⁷⁴ This branch of the common law confessions rule originates in Lamer J.’s concurrence in *R. v. Rothman*, [1981] S.C.J. No. 55, [1981] 1 S.C.R. 640, at 656-57 (S.C.C.), and was said to be part of the rule in *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 65-67 (S.C.C.), and in *R. v. Singh*, [2007] S.C.J. No. 48, 285 D.L.R. (4th) 583, at para. 35 (S.C.C.).

⁷⁵ But see *R. v. G. (B.)*, [1999] S.C.J. No. 29, [1999] 2 S.C.R. 475 (S.C.C.), where the Court considered a section of the *Criminal Code*, R.S.C. 1985, c. C-46, that, in a particular context, made an otherwise inadmissible statement admissible to impeach the accused’s credibility if he chose to testify. To preserve the constitutionality of the section, the Court read the section as not applying where the statement in question was involuntary.

⁷⁶ *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 30 (S.C.C.). Additional questions about the relationship between the common law rule and the Charter would include the following (see also *R. v. Singh*, [2007] S.C.J. No. 48, 285 D.L.R. (4th) 583, at para. 39 (S.C.C.)). Would evidence derived from an involuntary statement be admissible, as at common law, or would such evidence be treated as “derivative conscriptive evidence” (*R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.)) under s. 24(2) of the Charter? Would the Charter version of the confessions rule include the rule in *R. v. St. Lawrence* (1949), 93 C.C.C. 376 (Ont. H.C.J.), to the effect that an involuntary confession is admissible to the extent that it is confirmed by physical evidence? Compare *R. v. Sweeney*, [2000] O.J. No. 3534, 148 C.C.C. (3d) 247 (Ont. C.A.).

These differences point to the difficulty of conceptualizing the confessions rule under the Charter. Should the confessions rule, including its rule of automatic exclusion, simply be imported wholesale into section 7,⁷⁷ so that there would be no resort to section 24(2)? Should police conduct that results in an involuntary statement be conceptualized as a violation of the accused's rights, leading to an argument for exclusion under section 24(2)?⁷⁸ Should the extension of the confessions rule to include police conduct that shocks the community be incorporated into section 7?

The Supreme Court has recently addressed some of these structural questions in *R. v. Singh*.⁷⁹ The majority held that in the particular context where the accused is detained and knows he or she is speaking to a person in authority, the common law confessions rule and the section 7 right to silence are "functionally equivalent", meaning that the same result, in terms of the admissibility of the accused's statement, will follow no matter which inquiry the trial judge embarks upon.⁸⁰ More specifically, the majority held that where the accused was detained and the Crown can establish voluntariness, the accused will be unable to establish a breach of the right to silence, and that where the accused is able to establish a breach of the right to silence, the Crown will be unable to establish voluntariness.⁸¹ But the Court did not hold (at least not expressly) that an involuntarily obtained statement is always a breach of the right to silence.

While the Court's recognition of the confessions rule as, in some sense, a principle of fundamental justice is welcome, recent developments in this area of the law are not consistent with its constitutionalized status. The content of the rule has been diluted to the point that it may permit the admission of unreliable and unfairly obtained evidence. In particular, the Court has refused to extend the protection of the confessions rule to statements to persons not in authority even when the circumstances in

⁷⁷ In my view, this is the effect of *R. v. G. (B.)*, [1999] S.C.J. No. 29, [1999] 2 S.C.R. 475 (S.C.C.); see also *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 931 (S.C.C.) ("While the confession rule and the right to silence originate in the common law, as principles of fundamental justice they have acquired constitutional status under s. 7 of the *Charter*"). But Iacobucci J.'s comments in *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 30 (S.C.C.), indicate that he did not regard these authorities as settling the issue.

⁷⁸ This approach would not account for the "operating mind" branch of the confessions rule, which requires no conduct at all by the police to render a confession involuntary.

⁷⁹ [2007] S.C.J. No. 48, 285 D.L.R. (4th) 583 (S.C.C.).

⁸⁰ But see note 76, raising issues that did not arise on the particular facts of *R. v. Singh*, [2007] S.C.J. No. 48, 285 D.L.R. (4th) 583 (S.C.C.).

⁸¹ *R. v. Singh*, [2007] S.C.J. No. 48, 285 D.L.R. (4th) 583, at para. 8 (S.C.C.).

which the statement was made cast serious doubt on the reliability of the statement, and where the statement is given to a person in authority, the Court appears to have weakened the traditional common law concept of voluntariness.

As noted above, the trend in the cases that confront section 7 with statutory changes to the common law of evidence is not to constitutionalize any particular rule of evidence but to preserve the trial judge's discretionary exclusionary power. The reason for preserving that power is to protect the accused's right to a fair trial by preventing the Crown from leading evidence that would operate unfairly against him. And the confessions rule is at least in part motivated by the same concern: an involuntary confession is likely to be unreliable. Since we know both that there are many reasons why someone might confess falsely and that jurors find it difficult to believe that anyone would confess falsely, the confessions rule requires proof of voluntariness beyond a reasonable doubt before a jury can hear an accused's statement to a person in authority. In addition, the confession rule is supported by the principle against self-incrimination, the "the overarching principle" of our criminal process,⁸² and by the concern that the accused be fairly treated when in police custody.

If the relevant principle of fundamental justice is not any particular common law rule of evidence but the idea that a person should not have to defend himself or herself against evidence that is unreliable or unfairly obtained, then section 7 would support revisiting two aspects of the confessions rule. First, the Court should reconsider its reluctance to exclude statements to persons not in authority.⁸³ The rule that a statement by the accused to a person not in authority is admissible is a simple application of the party admissions exception to the rule against hearsay. The party admission exception is motivated not so much by the inherent reliability of party admissions — there are all sorts of reasons why these statements might be unreliable — but by the role of party admissions in the adversarial system.⁸⁴ The party against whom the statement is led cannot complain that he or she lacks an opportunity to cross-examine the declarant; he or she is the declarant, and so can take the stand to explain, or to deny having made, the out-of-court statement. So reliability seems

⁸² *R. v. P. (M.B.)*, [1994] S.C.J. No. 27, [1994] 1 S.C.R. 555, at 577 (S.C.C.); compare *R. v. Singh*, [2007] S.C.J. No. 48, 285 D.L.R. (4th) 583, at para. 21 (S.C.C.).

⁸³ Compare Kent Roach, "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions" (2007) 52 *Crim. L.Q.* 210, at 232-34.

⁸⁴ *R. v. Evans*, [1993] S.C.J. No. 115, [1993] 3 S.C.R. 653, 85 C.C.C. (3d) 97 (S.C.C.).

not to be the issue when a trial judge is considering a party admission. But even this rationale should yield where the statement is given in circumstances that cast serious doubt on its reliability. The rigid application of this rule has led to statements being admitted where the accused was assaulted and threatened with death,⁸⁵ unlawfully confined,⁸⁶ or subject to intense pressure from a purported gang⁸⁷ — conduct that, if committed by a person in authority, would clearly make the statement inadmissible. The accused can, of course, seek to demonstrate before the trier of fact that the circumstances in which the statement was made should lead them to disbelieve it, but we know that jurors find it difficult to believe that a person would falsely confess, even under pressure, and it is partly for this reason that statements to persons in authority are inadmissible unless voluntary. The Court should recognize that sometimes a statement to a person not in authority can be made in circumstances that render it so unreliable as to be inadmissible.

This recognition, though, need not be as radical as requiring the Crown to prove all statements by the accused to be voluntary beyond a reasonable doubt. Rather, statements to persons not in authority should be made subject to the discretionary exclusionary power, a principle of evidence law that we already know to be a principle of fundamental justice. So a confession to a person not in authority should be excluded if its prejudicial effect outweighs its probative value. A classic form of prejudicial effect is the concern that the jury may give undue weight to a particular kind of evidence; since we know that jurors tend to overvalue confessions, they should not be admitted unless their probative value outweighs that prejudicial effect.⁸⁸ For example, a confession obtained under threat of death has in most cases virtually no probative value because anyone would comply with the threat rather than risk death by maintaining his or her innocence, so almost any degree of prejudicial effect, that is almost any likelihood that the jury would accept the statement despite its unreliability, would outweigh its probative value.

⁸⁵ *R. v. Wells*, [1998] S.C.J. No. 67, [1998] 2 S.C.R. 517 (S.C.C.).

⁸⁶ *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449 (S.C.C.).

⁸⁷ *R. v. Grandinetti*, [2005] S.C.J. No. 3, [2005] 1 S.C.R. 27 (S.C.C.).

⁸⁸ Compare *R. v. Wells*, [2003] B.C.J. No. 927, 174 C.C.C. (3d) 301, at para. 65 (B.C.C.A.) and *R. v. O'Connor*, [2002] O.J. No. 4410, 170 C.C.C. (3d) 365, at paras. 47-51 (Ont. C.A.) (excluding a statement, though not a confession to the offence charged, by an accused person to a person not in authority on the ground that its prejudicial effect outweighed its probative value); but contrast *R. v. Osmar*, [2007] O.J. No. 244, 84 O.R. (3d) 321, at paras. 52-53 (Ont. C.A.).

Other circumstances might be less likely to produce an unreliable statement and so would generate a smaller prejudicial effect.

Second, recognizing the connection between the section 7 fair trial right and the common law confessions rule should lead the Court to reconsider recent developments which threaten to seriously erode the confessions rule. As noted above, the common law confessions rule traditionally had three reasonably well-defined branches: a statement could be rendered involuntary by an inducement, lack of an operating mind or oppression. But *R. v. Oickle*, *R. v. Spencer* and *R. v. Singh*⁸⁹ seem to have significantly altered this approach, in both structure and content. In *Oickle*, Iacobucci J. held that challenges to voluntariness should not be categorized; instead, a trial judge should “strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession’s voluntariness, taking into account all the aspects of the rule”.⁹⁰ The Court’s rejection of a pigeonholing approach to voluntariness is consistent with the trend of the law of evidence towards a principled approach. But other aspects of *Oickle* are troubling. The Court introduced novel elements into the assessment of voluntariness: the question of whether there was a *quid pro quo* for the accused’s statement and the suggestion that what really mattered was whether the accused’s will was “overborne”.⁹¹ These elements become even more significant in *Spencer* and *Singh*. *Spencer* holds that, in contrast to the traditional English position,⁹² the mere presence of an inducement is not enough: “it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis”.⁹³ *Singh* and *Spencer* appear to confirm, in contrast to all precedent before *Oickle*, that the test for involuntariness is not whether the statement is tainted by inducement, lack of operating mind or oppression, but whether the accused’s will has been overborne.⁹⁴

⁸⁹ *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.); *R. v. Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500 (S.C.C.); *R. v. Singh*, [2007] S.C.J. No. 48, 285 D.L.R. (4th) 583 (S.C.C.).

⁹⁰ *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 71 (S.C.C.). For other criticisms of *Oickle*, see Don Stuart, “*Oickle*: The Supreme Court’s Recipe for Coercive Interrogation” (2001) 36 C.R. (5th) 188; Hamish Stewart, “Justice Frank Iacobucci and the Revolution in the Common Law of Evidence” (2007) 57 U.T.L.J. 479, at 492-96.

⁹¹ *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 56-57 (S.C.C.).

⁹² Compare *Commissioners of Customs and Excise v. Harz*, [1967] 1 A.C. 760, at 820-21 (H.L.), per Lord Reid; *R. v. Smith*, [1959] 2 Q.B. 35, at 39 (Ct. Martial App. Ct.), per Lord Parker C.J.

⁹³ *R. v. Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500, at para. 15 (S.C.C.).

⁹⁴ Compare *R. v. Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500, at para. 8 (S.C.C.); *R. v. Singh*, [2007] S.C.J. No. 48, 285 D.L.R. (4th) 583, at para. 50 (S.C.C.).

In the case of a threat, for example, it is arguably not enough that the threat induced the detainee to speak; rather, it seems that the effect of the threat must be so powerful that the detainee's will must have been overborne.⁹⁵ *Oickle*, *Spencer* and *Singh* were intended to put the confessions rule on a principled rather than a categorical basis;⁹⁶ however, the result of these cases appears to be that the protections accorded by the traditional concepts of voluntariness are weakened to the point where unreliable confessions may well be admissible.

In light of these cases, it is quite possible that the police could make an explicit promise or threat, and the accused could make a statement in response, yet the statement could be found to be voluntary because the accused's will was not "overborne": the accused chose to speak. The very fact that would traditionally have made the statement inadmissible would now indicate voluntariness. This approach would amount to a radical departure from the insight underlying the common law confessions rule, which was that a statement could be rendered unreliable by a wide variety of motives to speak, and that the only motive likely to produce a reliable statement was a genuine willingness, protected as far as possible from extraneous motives, to speak. There are many circumstances other than an "overborne will" that can prompt a suspect to speak to authorities: to get bail, to avoid an apparent threat from the police, to mitigate what appears to be a powerful prosecution case, to find favour with police and prosecutors, to protect friends or family members. None of these circumstances requires the will to be "overborne"; any of them could prompt an unreliable statement. And unreliable evidence is prejudicial evidence; it invites conclusions about guilt that rest on inadequate foundations.

If it really is the case that *Oickle*,⁹⁷ *Spencer*⁹⁸ and *Singh*⁹⁹ have replaced the classic questions of whether the accused's statement was tainted by

⁹⁵ It is possible that asking whether the detainee's will is overborne is merely a shorthand way of asking whether the threat (or other relevant factor) induced the detainee to speak, and I certainly hope that this interpretation will prevail. But it is striking that in neither *Spencer* nor *Singh* does the majority put the point this way, despite Fish J.'s insistence in dissent that the majority is changing the established test for voluntariness: compare *R. v. Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500, at paras. 31-32 (S.C.C.), *per* Fish J. dissenting; *R. v. Singh*, [2007] S.C.J. No. 48, 285 D.L.R. (4th) 583, at para. 79 (S.C.C.), *per* Fish J. dissenting.

⁹⁶ As has occurred in other areas of the common law of evidence, notably hearsay (*R. v. Starr*, [2000] S.C.J. No. 40, [2000] 2 S.C.R. 144 (S.C.C.); *R. v. Khelawon*, [2006] S.C.J. No. 57, [2006] 2 S.C.R. 787 (S.C.C.)) and similar facts (*R. v. Handy*, [2002] S.C.J. No. 57, [2002] 2 S.C.R. 908, 164 C.C.C. (3d) 481 (S.C.C.)).

⁹⁷ *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

⁹⁸ *R. v. Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500 (S.C.C.).

inducement, lack of operating mind or oppression with the question of whether the accused's will was overborne, then there is a serious danger that statements traditionally regarded as unreliable will now be admissible under the confessions rule; that is, there is a serious danger that these statements will be admitted even though their prejudicial effect outweighs their probative value. And there is nothing in these cases to suggest that the Court has rejected the common law's long-standing reasons for thinking that involuntarily obtained statements were unreliable;¹⁰⁰ if anything, the Court's reference in *Oickle* to selected social scientific evidence concerning false confessions reinforces rather than undermines those reasons.¹⁰¹ If the discretionary exclusionary power is a principle of fundamental justice, to comply with section 7 of the Charter, the recent erosion of the confessions rule in *Oickle* and *Spencer* should be reversed.

IV. CONCLUSION

The relationship between section 7 of the Charter and the common law rules of evidence has been direct but subtle. The Supreme Court has in general avoided constitutionalizing any particular common law rule of evidence, but has worked hard to preserve, even to extend, the trial judge's discretionary exclusionary power — that is, the power to exclude otherwise admissible evidence where its probative value is outweighed (or, in the case of defence evidence, substantially outweighed) by its prejudicial effect. It is clear that the Court regards the discretionary exclusionary power as a principle of fundamental justice. Moreover, the Court has on several occasions intimated that various aspects of its revolution in the common law of evidence — the development of a principled approach to a variety of formerly categorical decisions about admissibility — accord with, or are even required by, the principles of fundamental justice. In this paper, I have suggested that while it is unlikely that the Court will subordinate the entire common law of evidence to the discretionary exclusionary power, keeping the constitutional status of the discretionary exclusionary power in mind might help to reverse the recent erosion of the common law confessions rule.

⁹⁹ *R. v. Singh*, [2007] S.C.J. No. 48, 285 D.L.R. (4th) 583 (S.C.C.).

¹⁰⁰ Contrast *R. v. Trochym*, [2007] S.C.J. No. 6, [2007] 1 S.C.R. 239 (S.C.C.), where the majority relied heavily on social science evidence to revisit an evidentiary rule.

¹⁰¹ *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at paras. 34-46 (S.C.C.).

