Fall
2018

Evidence Summary

FALL 2018

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TYPES OF EVIDENCE AND CONDITIONS FOR RECEIPT OF EVIDENCE

Types of Evidence that can be Received by the Court

SWORN STATEMENTS

The most common form of evidence before the court is sworn testimony of a witness who is present in court or who was present at some pre-trial procedure in which the sworn testimony was taken

Civil Cases: Examination De Bene Esse

- The examination which takes place before an officer of the court is known as an examination de bene esse
    - May be examined, cross examined, and re-examined in the same manner as a witness at trial
- The **commissioner** is a person named by the court to hear the evidence

Discovery

- In civil cases, the parties are given the opportunity to engage in a process of "discovery" where they are entitled to examine each other before a court report in order to test the merits of noe anothers case
- **Admissions Against Interest:** where a party to a discovery makes a statement against that party's interest that is an admission and that record can be read in at trial – strange because it is technically hearsay
    - Exception to the hearsay rule

Affidavits

- In exceptional circumstances, the judge may permit facts to be proved by affidavit evidence

UNSWORN STATEMENTS

Pre-trial unsworn statements are generally inadmissible as a result of the hearsay rule. But, they are in practice received quite a lot as a result of various exceptions of the rule.

REAL EVIDENCE

Any evidence where the court acts as a witness, using its own senses to make observations and draw conclusions rather than relying on the testimony of a witness

- Includes any evidence that conveys a relevant first hand impression to the ToF
    - Allows the ToF to use their own senses to make observations and to draw conclusions… rather than being told by the witness
- Real evidence cannot be produced before a court without prior testimonial evidence, or an admission, in order to establish the identity of the thing
    - Needs to be **authenticated or identified** by direct or circumstantial evidence
        - Level needed is relatively low

(a) Things

Photographs

R v Creemer lays out the 3 essential criteria for admissibility of photographs

(1) Accuracy in representing the facts
(2) Fairness and absence of any intention to mislead
(3) Verification on oath by a person capable of doing so

- They must contribute to a true representation of what they purport to depict and not be calculated to mislead
- They must be verified on oath by the person who took them, or someone in a position to attest to their accuracy

Video Recordings

- The same 3 criteria as above – need to support authenticity and accuracy of recording

- In *R v Nikolovski,* the SCC held that a videotape alone, without any corroborating evidence **CAN** provide the necessary evidence to enable the ToF to identify the accused as the perpetrator of the crime

Audiotapes

An audiotape is an item that has some characteristics of a vica voce testimony. It discloses what was said, by whom, and how the words were spoken

- Issues concerning the **authenticity** of the tape recordings, as for example the accuracy of the recording process, and the **identity** of the speakers
    - This is usually left for the ToF
- In *R v Pleich* the OCA held that taped conversations between an accused and other persons should be treated much like testimony from a witness who had overheard a conversation and made accurate notes
- In *R v Rowbotham* the same court held that audiotapes are original evidence that can provide cogent and convincing evidence of culpability or innocence

(b) Taking a View

A view is an observation made of a person, place or thing during the course of the trial after the jury has been sworn, but before it has rendered its verdict

- Authorized by s. 652 of the c.c.
- Take place in the presence of all participants, including the defendant, counsel, and court reporter
- A determination whether to order a view may include the following factors
    a) The importance of an issue to be decided of the information that may be gained by the view
    b) The extent to which the information has been or could be obtained from other sources, including maps, diagrams, models, photographs or videotapes
    c) The extent to which the place, person, or thing to be viewed has changed in appearance since the material time, and the consequent danger that the view may mislead

(c) Appearance or Demeanour of a Person

- In criminal cases, the court has a wide discretion to order or deny physical displays
- The SCC has considered whether forcing an accused to participate in a police line up is a violation of the right against self incrimination
    - The court held it was not
- More recently, the SCC held in *R v S (N)* that a witness who wishes for religious reasons to wear a niquab while testifying in a criminal proceeding will be asked to remove it if it is necessary to prevent a serious risk to the fairness of the trial
- It has been found to be inappropriate for the Crown to ask the jury to watch the defendant and observe his behaviour as various witnesses testify

Experiments and Re-enactments

Combination between sworn statement and the production of things

- If the experiment is conducted **outside the courtroom** – sworn statement
- **Inside the courtroom** → involves the production of things and their manipulation by a witness who is usually an expert
    - Only permitted in rare circumstances
        - Discretion of the judge
- Caution has been urged with respect to the use of videotaped re-enactments played in court due to the concern that such evidence, given its visual impact, may have the potential to be given more weight by a jury

Documents

A document includes any written thing that is capable of being made evidence, irrespective of the material upon which it is written

- Its **authenticity** must be shown by direct or circumstantial evidence or by admission
    - Where some evidence of authenticity has been adduced, the party tendering the document asks that it be marked as an exhibit
        - It becomes evidence in the case, its weight a matter for the trier of fact
- Where document is being used for its proof of contents - usually requires original

Conditions for Receipt of Evidence

Generally, for a piece of evidence to be considered by the ToF, it must be RELEVANT and ADMISSIBLE

(1) Relevant?

How to Determine Relevancy

- There must be a **connection or nexus** between the two which makes it possible to infer the existence of one fact from another – *Cloutier*
- It is for the TJ to decide
- In order to satisfy the standard of relevance, it must have **some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely** than the proposition would be in the absence of evidence" – *White*

(a) Relevant to What?

- Evidence must be relevant to a "fact in issue"
    - In criminal cases, the most basic "facts in issue" are the elements of the offence, actus reus and mens rea, and any defences raised by the defence (*R v Arp*)
- Direct or circumstantial evidence of the facts in issue are irrelevant
- A fact will be relevant not only where it related directly to the fact in issue, **but also where it proves or renders probable the past, present or future existence (or non-existence) of any fact in issue**
- A fact that proves the existence or tends to prove the existence of a precondition to the admissibility of a piece of evidence, such as the voluntariness of a confession, the authenticity of a signature on a document, or the statutory conditions for a legal wiretap is equally relevant

(b) Relevance vs. Exclusionary Rules

- The question of relevance comes BEFORE the application of exclusionary rules or the judge's residual discretion to exclude admissible evidence
    - Bad character evidence, self-incriminatory testimony, involuntary confessions are all excluded for OTHER policy reasons, not because they are not relevant

(c) Relevance vs. Weight

- At the time the evidence is offered by a party, its relevance might not yet be established
- The practice is for the court to receive evidence on an undertaking that relevance will be established later

(d) Relevance vs. Materiality

- Evidence is material in the sense if ti is offered to prove or disprove a fact in issue
    - Ex; evidence offered by a plaintiff in conversion action to prove a loss of profit is not material since loss of profits cannot be recovered in such an action, and evidence that an accused charged with forcible entry is the owner of the land is immaterial since the offence can be committed by an owner

(2) Exclusionary Rule?

Is the evidence subject to an exclusionary rule?

- If yes → stop, evidence is out
- If no → prima facie admissible

(3) Judicial Discretion

Does the judge have another reason to exclude the evidence? Usually determined by (1) weighing the probative value, against the prejudicial effect. (2) if the evidence was improperly obtained ,

(a) Probative Value and Prejudicial Effect Weighing

Probative Value

In assessing probative value a TJ is necessarily determining the degree or extent to which the evidence will prove the fact in issue for which is it tendered

- May also depend on the reliability of the evidence in question

- The TJ must take care not to determine the ultimate reliability, which is for the jury – but rather <u>ensure that the proposed evidence meets a threshold of sufficient reliability</u>

Evidence has probative value if it is…

- **Believable**
  - Credibility → is the witness honest? Is there motive to mislead?
  - Threshold reliability → is the witness accurate and capable of making accurate observations?
- **Informative**
  - Is the evidence conclusive? Is it direct or circumstantial? How many inferences have been drawn?
  - What does the evidence actually tell us about the case
  - Does it make you lean in a particular direction strongly?
  - Does it go to an important issue?
  - Strength of inferences

Prejudicial Effect

Evidence is given more weight than it deserves – acts as a surrogate for proof so the conclusion isn't derived from logic or reasoning

- Example: relevant but inflammatory
  - A photo of an injury that raises the emotion of the jury

<u>Forms of Prejudicial Effect</u>

1. The danger that the evidence will arouse the ToF's emotions of prejudice, hostility or sympathy
   - Most common form of prejudice at issue
   - Often refers to bad character evidence – being painted as a "bad guy"
   - Essentially, it is reasoning prejudice. The danger that the ToF will act **on the basis of emotions** rather than reason, and engage in stereotypical and unjustified forms of reasoning

2. The danger that the proposed evidence in response will create a side issue that will unduly distract the ToF from the main issue in the case
   - **Collateral fact rule** → excludes from evidence the stuff that goes to collateral matters… only tangentially related to issues at trial

3. The likelihood that the evidence will consume and undue amount of time
   - E.g. expert evidence of marginal assistance on a very minor issue – takes up a ot of time

4. The danger of unfair surprise to the opponent who had no reasonable groudns to anticipate the issue and was unprepared to meet it
   - A party must advance its case at first opportunity
   - E.g. important evidence mentioned and introduced in reply

5. The danger that evidence will be presented in such a form as to usurp the function of the ToF
   - E.g. evidence that speaks directly to the credibility of a witness – trying through evidence to give the ToF the conclusion it **should** draw

<u>Other Forms of Prejudicial Effect</u>

- In *Seaboyer* the court considered the danger of admitting prior sexual history evidence might discourage reporting
- In *Candir* the court considered the cost to litigants in future cases for the presentation of repetitious evidence

<u>Assessing Prejudicial Effect</u>

1. The possible countervailing influence of jury instructions
   - Must consider the likelihood that the jury will understand and follow the instructions
   - Limiting instruction will typically be mandatory if the potentially prejudicial evidence is ultimately admitted
2. The extent to which the potential prejudice is already present in the trial because of other evidence
   - Was bad character evidence already present that the prejudicial effect was only repetive
3. The mode of trial in the case
   - Risk is lower in judge alone
4. Likelihood that the potential prejudice will occur

(b) Improperly Obtained Evidence

- *R v Harrer* – discretion to exclude evidence which was improperly obtained
- The judge is required to balance societal interests in the effective prosecution of serious criminal cases and individual interests before deciding whether the evidence should be excluded or admitted

(c) In Favour of the Crown/ Third Parties → NOT A THING.

- In *R v Valley* – the Ont CA held that there was **no judicial discretion to exclude evidence on the basis than its admission would operate unfairly to the Crown**
- Courts are reluctant to exclude evidence offered by an accused in his or her defence and will only do so if its prejudicial effect substantially outweighs its probative value
- Evidence that an individual, other than the accused is a person of bad character will be received unless the TJ concludes that its potential to prejudice the jury substantially outweighs its probative value

- The common law recognizes that a TJ has a discretion to exclude evidence, otherwise admissible in certain circumstances
- **What is required, in an assessment of the EFFECT of the reception of evidence on the FAIRNESS of the trial**
  1. Its probative value is overborne by its prejudicial effect
  2. It involves an inordinate amount of time that is not commensurate with its value
  3. It is misleading in that its effect on the trier of fact is out of proportion to its reliability
  4. It involves the needless presentation of cumulative evidence

Civil Cases

A judicial discretion to exclude admissible evidence is recognized in civil cases – usually applies when an attempt is made to introduce real or demonstrate evidence into the court room

- *Draper v Jacklyn* – SCC held that graphic photographs of the plaintiff's face during the course of his surgical treatment should have been put before the jury unless their likely prejudicial effect on the jury was so great as to exceed their probative value
  - The TJ is in the best position to determine what would "shock the jury" and the appellate court should not be quick to interfere with the exercise of this discretion

Criminal Cases

In favour of the accused

- Before 1971, courts followed *R v Wray* which the COA rejected the notion there was any discretion to exclude relevant evidence that could bring the administration of justice into disrepute.
- After this case, the SCC rejected this restrictive approach.
- Justice LaForest in *R v Harrer* stated that the **TJ has a duty,** now constitutionalized by the enshrinement to a fair trial right in the Charter, **to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial**
- As such, the TJ has a discretion to exclude evidence where its probative value is outweighed by its prejudicial effect or where the effect of admitting the evidence would be to mislead the jury or to otherwise render the trial unfair
- The exercise of the discretion is generally called upon in 2 broad situations
  a) Where the reliability of the evidence is questionable and its prejudicial impact significant
  b) Where, quite apart from any Charter breach, there has been unfairness in the manner in which the evidence was obtained

Direct and Circumstantial Evidence

The distinction between them has very little practical significance anymore

Circumstantial Evidence → is any circumstance which may or may not tend to implicate the accused in the commission of the offence for which the accused is charged

Direct or Positive Evidence → when a witness can be called to testify ot the precise fact which is the subject of the issue on trial

- *R v Villaroman* – example of difference between circumstantial and direct evidence
  - Direct → witness might say she saw it raining outside

- Circumstantial → you see someone in a lobby wearing a raincoat and holding an umbrella so you might infer from that it is raining outside
  - Indirect evidence

Treatment of Circumstantial Evidence

- Not really a big deal anymore… is used to be in criminal cases there was something called "Hodges Case" where a court was only entitled to convict on the basis of circumstantial evidence only when special warning was given.
- this was overruled by *R v Cooper* **where the SCC rejected the notion that exclusive reliance on circumstantial evidence required any special warning to the jury**

Admissibility Generally

(a) Conditional Admissibility

- It is a matter of the courts discretion to allow such evidence before the preliminary facts are approved
- Clearly, in a criminal trial, the judge must be careful in allowing in any evidence which could prejudice the accused if the preliminary facts were not later proved
- An instruction to the jury to disregard the evidence may not be sufficient to remove the prejudice and a mistrial might have to be ordered

(b) Limited Admissibility

Evidence that can be used for one purpose but can't be used for something else

- Example, a criminal record may be relevant for credibility, but not identity
- The jury may require a caution against the improper use of the evidence and, in certain cases, such caution is mandatory

(c) Curative Admissibility

- Where evidence that is technically inadmissible has been received by the court without objection from the opponent, the opponent may present evidence in response, which may also be inadmissible, in order to prevent a distorted picture from being presented to the trier of fact

EVIDENTIAL BURDEN AND BURDENS OF PROOF

Definitions

Burden: some obligation to convince the court of something

Legal Burden: the ultimate obligation of a party to prove his or her case (or a specific issue) to the standard imposed by the applicable branch of law.
Synonyms include "***persuasive burden***", "ultimate burden", "fixed burden", "burden on the pleadings".

Evidential Burden: the burden that a party has to adduce enough evidence to raise a particular issue. The party must point to SOME evidence that indicates to the judge that a particular issue is something that really ought to be addressed in the proceedings.
Synonyms: "minor burden", "secondary burden", "burden of adducing evidence".
Note, that you really don't have to "adduce evidence", you can point toward evidence already adduced by the other party in order to discharge this "burden".

Standards: how we discharge that duty, i.e. how much must be proven

Civil Standard: the degree of uncertainty the jury is allowed to have; balance of probabilities, more likely than not, etc.

Difference between Burdens

- The term **evidential burden** – means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue
  - Threshold for burden is low

- The term **persuasive (legal burden)** – means that a party has an obligation to prove or disprove a fact or issue to the criminal or civil standard

(a) Persuasive (Legal) Burden

Civil → balance of probabilities
Criminal → beyond a reasonable doubt

- Where there are several disputed facts or issues in a case, the persuasive (legal) burden in relation to different issues may be distributed between the parties
    - Example; the Crown has the persuasive legal burden in relation to the external circumstances and the mental element for the crime of murder
    - However, at common law, the accused bears the persuasive (legal burden) for the defence of not criminally responsible due to a mental disorder

(b) Evidential Burden

Relates to a particular fact or issue

- Question of **LAW**
    - It is for a judge to decide whether there is evidence fit to be left to a jury which could be the basis for some suggested verdict
- The evidential burden and the persuasive burden however do not always co-exist
    - In criminal cases, the Crown normally has the persuasive (legal) burden with respect to all elements of the offence, subject to a constitutionally valid common law rule or statutory provision allocating the onus of proof to the accused
    - If the accused wishes to raise a defence which does not simply constitute a denial of an element of the offence, an evidential burden is imposed on the accused

Effect of Discharging the Evidential Burden

- There are two possible evidentiary effects when a party satisfies an evidentiary burden
    - The discharge of some evidential burdens permits the trier of fact to decide that issue
      (1) The jury **MAY** not must convict in these circumstances
    - Where a party satisfies other evidential burdens
      (2) the trier of fact **MUST** make a determination favourable to that party unless there is evidence to the contrary
- The consequences of failing to satisfy an evidential burden will vary depending on which party failed
    - If it is the Crown and a main element of the offence → the judge must withdraw the case and not leave it to jury
    - If defence can't point to evidence in **air of reality** for a defence → it will not be left to jury

Allocating the Burdens

Criminal Cases

- *R v Stone* – the SCC allocated the burden of proof to the accused to prove that her or his conduct was involuntary
    - Justified the allocation of the burden of proof on a balance of probabilities to the accused because the defence was easily feigned and mental disorder automatism should be aligned with the defences of NCR
    - Similar required an accused to establish extreme intoxication akin to insanity or automatism to a balance of probabilities for general intent offences
- *R v B(D)* – issue before the SCC was the constitutionality of s 72(1) of the YCJA which provided a person over 14 who committed an index offence shall be sentenced as an adult unless the young person persuaded the court that a youth sentence was of sufficient length to hold the young person accountable for his or her offending behaviour
    - The majority of the SCC created a common law presumption of diminished moral capacity because young persons have heightened vulnerability, less maturity and a reduced capacity for moral judgment
    - Held it was inconsistent with s 7 of the Charter

Civil Cases

- In civil cases, the persuasive burden is more susceptible to being influenced by different policy consideraiotns
- The SCC recognized the law of torts may from time to time reflect policy considerations which can impact in part on the burden of proof in a negligence action
    - Recognised as a difficulty of proving causation in a medical malpractice suit
- *Snell v Farrell*

  - The SCC reaffirmed that the plaintiff had the persuasive burden for establishing on a balance of probabilities that the defendant caused or contributed to the injury
  - The court concluded that the difficulties in proving causation could be met without allocating the burden of proof of causation to the defendant
  - Rather, could be based on the weighing of evidence based on common sense and that a trier of fact may infer causation in some circumstances in the absence of scientific proof
- *Athey v Leonati*
  - The SCC considered the burden of proof for causation where there were tortious and non-tortious contributing causes for the plaintiff's injuries
  - The court confirmed that the general test for causation was the "but for" test but recognized that the traditional but for test was unworkable in some situations and should be replaced by "material contribution" test
    - This test is whether the defendants negligence "materially contributed" to the occurrence of the plaintiff's injury outside the de minimus range
-

Regulatory or public welfare offences

- *R v Sault Ste. Marie* – the SCC created a new category of responsibility for regulatory offences where there is no express requirement for a mental state
  - The court held that the Crown has the evidential and the persuasive (legal) burden for the AR but that the accused had the legal burden to prove that he or she acted without negligence
  - The creation of a strict liability offences was seen by the court as a compromise or "half way house" between true crimes requiring a subjective mental state and offences of absolute liability where merely doing the act was culpable in law
- *R v Wholesale Travel Group* – SCC examined a statutory reverse onus which allocated the legal burden of proof to an accused to prove due diligence for a regulatory offence
  - The court found the provision to breach the Charter under presumption of innocence, but it was upheld as a reasonable limit under section 1
  - A significant policy issue was the effectiveness of the legislative alternatives to induce compliance by prosecutions
- At the end of the day, if a conviction can result, notwithstanding the existence of a reasonable doubt, the presumption of innocence is engaged
- Infringement may be justified under s 1 however, particularly in respect of regulatory offences
  - Also the imposition of a persuasive (legal) burden of proof may be read down in some circumstances to an evidential burden in order to be saved under s 1

Standards of Proof

Satisfying the Evidential Burden

The Plaintiff's Evidential Burden and a Motion for a Non-suit in CIVIL Proceedigns

- At the end of the plaintiff's case if the defence elects to call no evidence, the judge uses discretion to determine whether there is evidence that the plaintiff put forth to satisfy a reasonable person of the plaintiffs case
- Where the defendant elects to call no evidence, the TJ must then exercise a judicial function to determine if there is any evidence to satisfy a reasonable person of the plaintiff's case
- It is rare that a defendant's counsel will call no evidence **because if the TJ dismisses the motion for a non-suit, the defendant is precluded from leading evidence for the purpose of raising a defence to the plaintiff's case**
  - The case is right there and then decided by the juror or judge
  - Important to remember, if this happens, if the case is lost by the defendant and appealed to the CoA, the defendant is bound by the fact they didn't call any evidence
- A better option for the defendant would be to ask for a non-suit, BUT still call evidence, that way the CoA can use that evidence

Note: in either case whether the defendant calls evidence or not, the TJ should receive the jury's verdict before ruling on a non-suit

The Crowns Evidential Burden and Motion for a Directed Verdict in Criminal Proceedings

- The preliminary hearing judge may discharge an accused at the conclusion of a preliminary hearing and a TJ may direct a verdict of acquittal
- The test to determine whether or not the Crown has discharged its evidential burden, commonly referred to as the *Shephard test* is a question of law

  - Applies to whether an accused should be committed for trial, whether a person should be extradited from Canada, and whether the TJ should order a directed verdict of acquittal at the end of the Crowns case
- Shepherd test was reformulated in *A v. Acuri*
  - The court confirmed that the accused must be committed for trial **where the Crown adduces direct evidence on each of the essential elements of the offence**

The Defendant's Evidential Burden

Criminal

- The accused has an evidential burden to adduce evidence or point to evidence on the record for a defence
  - But this is ONLY IF THE CROWN IS ABLE TO PROVE EVERY OTHER ELEMENT
- The TJ must make a determination whether an accused has discharged this burden

Air of Reality Test

- In *R v Pappajohn* the SCC coined the term "air of reality" to describe the threshold test for the defence of mistaken belief in consent for the crime of sexual assault
  - **Air of reality →** means the TJ must determine if the evidence put forward is such that, i**f believed, a reasonable jury properly charged could have acquitted**
- In *R v Fontaine* – a unanimous SCC confirmed that an accused discharges his or her evidential burden if there is some evidence upon which a properly instructed jury could reasonably decide the issue in the accused favour
  - Justice Fish in this case recognized that the accused bears only an evidential burden for **some** defences, like self defence, but he or she has bot the evidential AND persuasive burden with respect to other defences, such as mental disorder automatism

Application of the Accused Evidential Burden (Air of Reality)

- The TJ screens the evidence – **BUT** does not determine how likely or unlikely it is… instead, **must consider whether the evidence is reasonable capable of establishing or supporting the necessary inferences to make out the proposed defence**
- The accused has to show there is an air of reality, and then the Crown must disprove it BYD

Meaning and Application of Reasonable Doubt

In *R v Lifchus* the SCC recognized that the onus of proof resting on the Crown was inextricably linked to the PRESUMPTION OF INNOCENCE and there could not be a fair trial if the jury didn't understand this

- It is therefore essential the TJ explains the concept to the jury properly
  - Need to reassure that the CROWN must prove and it never shifts to the accused
- SCC provided a model jury charge on reasonable doubt
  - Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit
  - On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so
- In *R v Lifchus* the SCC explained the type of jury instructions on reasonable doubt should be avoided
  - Standard should not be described as an "ordinary" concept
  - Trial judges should avoid referring to "moral certainty"
  - Trial judges should not qualify the word "doubt"

Credibility and Reasonable Doubt

- The troublesome problem of assessing the credibility of witnesses often arises in sexual assault cases when the complainant and the accused testify to conflicting or irreconcilable versions of an event
- It is **NOT** a question of choosing between the competing versions of events but whether the evidence as a whole leaves them with a reasonable doubt in relation to any element of the offence
- In *R v W (D.)* - the issue of credibility when the accused testifies and how it relates to the principle of reasonable doubt
  1. First, if you believe the evidence of the accused, you must acquit
  2. Second, if you do not believe the testimony of the accused, but you are left in a reasonable doubt by it, you must acquit
  3. Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused

- Doesn't matter if the accused themselves doesn't testify…
    - The trial judge should provide the W(D) instruction whenever there is conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case relating to an essential element of an offence

PRESUMPTIONS

- There are different classifications of presumptions
- In this course we deal with 2

(1) **Presumption without basic facts** → A legal conclusion **MUST** be drawn in the absence of rebutting evidence
(2) **Presumption with basic facts** → upon proof of a basic fact (Fact A), a presumed fact (Fact B), in the absence of any rebutting evidence, either *may* be drawn or *must* be drawn depending on the particular assumption

PRESUMPTIONS WITHOUT BASIC FACTS

The presumption requires a conclusion to be drawn in the absence of rebutting evidence

- These presumptions assign either an evidential burden or a persuasive (legal) burden to the adversary as a matter of substantive law
    - E.g. presumption of innocence

PRESUMPTION WITH FACTS

Can be subdivided into 3 categories

(1) Presumption of Fact
    - Applies where upon proof of the basic fact (Fact A), a presumed fact (Fact B) **MAY BE INFERRED**
(2) Conclusive Presumption of Law
    - Where upon proof of the basic fact (Fact A),, a presumed fact (Fact B) **IS CONCLUSIVELY PROVEN**
(3) Rebuttable Presumption of Law
    - Applies where proof of the basic fact (Fact A), a presumed fact (Fact B) **IS PRESUMED UNLESS THE OPPOSITE PARTY EITHER**
        i. Raises a reasonable doubt about the existence of the proven fact
        ii. Satisfies an evidential burden
        iii. Satisfies the persuasive or legal burden of proof depending on the particular presumption

(1) Presumption of Fact

A deduction that may logically and reasonably be drawn from a fact or group of facts found or otherwise established

- Nothing more than a common sense logical inference that may be drawn from the proven facts
- In *R v Kowlyk,* the SCC held that, upon proof of the unexplained possession of recently stolen property, the trier of fact may, but not must, draw an inference that the possessor is guilty of theft or a related property offence
- Applying logic and common sense, trial judges may rule that where a party establishes a combination of facts or certain circumstantial evidence the party has satisfied its evidential burden sufficient to overcome a motion for a non-suit or directed verdict of acquittal

Examples of Inferences:

Doctrine of Recent Possession

- A common sense inference that a person in unexplained "recent" possession of stolen items, is the person who stole the items. This is an inference where the trier of fact may but not must draw an adverse inference
- The strength of the inference depends on the "recency" of the theft and the surrounding circumstances -n *R v Kowlyk*

Consciousness of Guilt (Post Offence Conduct)

- Most often referred to as "post offence conduct" so that this type of evidence is improperly used by the jury
- This type of evidence requires a careful jury instruction on the relevance of the conduct and the chain of inferences which must be drawn before the fact finder may use the evidence on the issue of guilt of the accused for the alleged offence
- This evidence must be decided in the context of the totality of the evidence. No different than other circumstantial evidence

(2) Conclusive Presumptions of Law

On proof of Fact A (basic fact), Fact B (presumed fact) IS CONCLUSIVELY DEEMED TO BE TRUE

- Rare (mostly statutory)
- Created by federal and provincial legislation

(3) Rebuttable Presumptions of Law

A. Differences Between Them

Upon proof of the basic fact (Fact A), another fact (Fact B) is presumed to be true in the absence of evidence to the contrary

- Most common and significant
- Differs from a presumption of fact
    - A presumption of fact **does not compel the trier of fact to draw the required inference**
    - The party against whom a presumption of fact operates is under no obligation, as a matter of law, to adduce rebutting evidence to rebut the inferred fact, albeit he or she runs a risk of an adverse determination in direct proportion to the strength of the inference

B. Operation of a Rebuttable Presumption of Law

A rebuttable presumption of law assists a party to satisfy an evidential burden on the persuasive (legal) burden

- It compels the adversary to rebut the presumption by satisfying an evidential burden or the persuasive burden, depending on the legal effect of a particular presumption

EXAMPLE IS R. V ST. PIERRE AND BREATHALYZER TESTS!!

Presumption in s.258(1)(c)

Basically states that when police take a breath sample at the side of the road, the results, in the absence of evidence to the contrary, prove the BAC was the same at the time of the offence, as it was at the side of the road.

This presumption allows the Crown to prove the concentration of the accused's BAC level at the time of driving without the need to call expert evidence to bridge the temporal gap between the accused's BAC at the time of driving and the breathalyzer test

In this case, there was evidence that the accused consumed alcohol in the police station washroom just prior to taking her test and the question arose as to what constitutes evidence to the contrary

- Majority of the SCC held that s 258(1)(c) was a temporal presumption designed to simplify the evidential necessity of bridging the time gap between the time of the breathalyzer test and the time of the offence
- The Court held that the accused rebutted the presumption by adducing evidence that the BAC at the time of the test was *different* than at the time of the offence

RESULT OF THIS CASE

- Parliament amended the CC by adding subs 258)(1)(d.1) which effectively overruled R v St Pierre
    - It provides that where the accused's BAC exceeded 80mg at the time of the breathalyzer test, it will be presumed, in the absence of evidence to the contrary, to have exceeded 80mg at the time when the offence was alleged to have been committed
- **It is no longer sufficient to show that the BAC at the time of the test was different from that at the time of the offence**
- The *Ontario Limitations Act 2002* clarified the discoverability rule with respect to claims based on assault and sexual assault
    - The Act provided that the limitation period in respect of a claim based on assault or sexual assault does not run during any time in which the claimant is incapable of commencing the proceeding because of his or her physical, mental or psychological condition
    - The legislation created 2 rebuttable presumptions
        (1) A person whose claim is based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced until the contrary is proven
        (2) A person whose claim is based on assault shall be presumed to be incapable of commencing proceedings earlier if one of the parties to the intimate relationship was someone on whom the person was dependent

- The effect of these presumptions was to allocate the persuasive (legal) burden of proof to the person defending the claim to prove to a balance of probability that the claimant was capable of commencing the action earlier.

C. Evidential Effect of a Rebuttable Presumption

- The SCC held that once the Crown proved an accused was found in possession of tools that were capable of being used for housebreaking, he or she had the persuasive (legal) burden to provide a lawful excuse for such possession on a balance of probabilities
- In *Proudlock* the SCC held that rebuttable presumptions of law required the accused either to raise a reasonable doubt or to prove a fact or an excuse to a balance of probabilities
- In *Oakes* Dickson CJC, without reference to Proudlock, described the different degrees of proof that may satisfy a presumption resting on an accused in a criminal trial
    - If a presumption is rebuttable, there are 3 potential ways the presume fact can be rebutted
        (1) The accused may be required merely to raise a reasonable doubt as to its existence
        (2) The accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact
        (3) The accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact

IMPACT OF THE CHARTER

Question arises whether a particular presumption that allocates one or the bother burden to an accused is contrary to s. 11(d) of the Charter

- If yes, next question is whether the presumption can be saved under s 1 of the Charter
- In *R v Downey* the SCC considered a rebuttable presumption that, upon proof that the accused associated with prostitutes, he or she was presumed to be living off prostitution
    - Cory J stated that the presumption of innocence is infringed where
        1. An accused is liable to be convicted despite the existence of a reasonable doubt
        2. An accused is required to prove or disprove on a balance of probabilities either an element of an offence or an excuse
        3. Even if there is a rational connection between the basic fact and the presumed fact, this connection is constitutionally insufficient to require an accused to prove an element of the offence
        4. A provision which was legislatively intended to play a minor role in providing a relief from conviction will violate the presumption if it requires the accused to establish that fact
- Accordingly, it does not matter whether the challenged provision is characterized as an element of the offence, a defence, an excuse or justification, or an exemption, since it will violate the presumption of innocence because it permits a conviction in spite of a reasonable doubt as to the guilt of the accused

HEARSAY

DEFINITIONS

Hearsay is an out-of-court statement offered for the truth of its contents through the testimony of someone other than the declarant

→ the essential defining features are

a) The purpose of adducing the statement to prove the truth of its contents

b) The absence of the opportunity to cross examine the defendant who made the statement

To diminish potential error and to increase rights to a fair trial, a witness is generally required to testify under 3 conditions

(1) Personal presence in court
(2) Under oath or its equivalent
(3) Subject to **cross examination**

** the reason hearsay is an issue is because it doesn't meet one of those 3 criteria

Essential defining features

(1) Out of court statement is introduced to prove **truth of its contents**
(2) Absence of opportunity to cross examine

Potential Sources of Error

1. Perception
2. Memory

3. Communication
4. Sincerity

Classic Hearsay Paradigm: (4 components)

(1) Declarant
- The person (not usually a witness), who makes a statement that a party seeks to adduce in evidence

(2) Recipient
- The person who has received the statement or heard something from the declarant and is summoned as a witness to give the evidence of the statement before the TOF

(3) Statement
- What was said to the recipient by the declarant

(4) Purpose
- The exclusionary rule does not bar reception of every statement made by a declarant that a party seeks to introduce in evidence through the testimony of the recipient
- The statement is only excluded by the rule when offered for the purpose of proving the truth of its contents
- The hearsay rule **DOES NOT** exclude a statement offered as original evidence for a relevant purpose other than to prove the truth of its contents
-

RATIONALE

Hearsay evidence is presumptively inadmissible because of the difficulty in assessing its credibility and reliability

- "Hearsay evidence is not excluded because it is irrelevant – there is no need for a special rule to exclude irrelevant evidence. Rather, it is the difficulty of testing hearsay evidence that underlies the exclusionary rule -*Khelawon*
- The worry is that untested evidence will be treated as having probative force that it does not deserve – *Blastland*
- Hearsay might be misperceived, wrongly remembered, delivered in an unintentionally misleading manner, or delivered in an intentionally misleading way – *Blastland*
- When testimomny is tendered through another witness, evidence relating to those considerations will often not be available (*R v Abbey)*
    - You won't hear the language she used
    - Can't cross examine about words actually used
    - No way to make a demeanour assessment
    - Memory problems
    - ToF loses the information relevant to the weight of evidence, and the risk is that the ToF fives evidence more weight than it deserves

DANGERS WHEN DECLARANT IS/ISN'T BEFORE COURT

Isn't Before Court

- Special attention has been given to hearsay as being particularly fraught with untrustworthiness and unreliability because its evidential value rests on the credibility of an out of court asserter who is not subject to the oath cross examination or a charge of perjury
- There is no guarantee of the veracity of the declarant and the trustworthiness of the declarants statement
- The declarant is not under oath and not subject to cross examination therefore their perception, memory and credibility cannot be tested

Is Before the Court

- Hearsay issues also arise when earlier out of court statement made by a witness who is giving testimony in court
    - I think this would be a 911 call***
- The earlier statement is considered hearsay even though the declarant is now a witness, under oath or affirmation and subject to cross examination
- When a witness **specifically recants** an earlier out of court statement, counsel may seek to tender the prior statement for the truth of its contents
- Another notable situation where a prior statement of a witness may be tendered for its truth is when the witness testifies that he or she has **no present memory** of the event in issue, but had prepared an earlier statement about the event
- If a prior statement is tendered not for its truth, but **merely to show inconsistency or consistency to impeach** or bolster the credibility of the witness respectively, **no hearsay dangers arise**
- Moreover, if the witness merely repeats or adopts the earlier statement as part of his or her testimony, then no hearsay issue arises

HEARSAY VS. NON-HEARSAY – PURPOSE FOR WHICH EVIDENCE IS TENDERED

Critical to the definition of hearsay, is the fact that the out-of-the court statement is being offered for the truth of its contents (to prove the truth of the assertion contained within the statement)

- Evidence offered for some other purpose is NOT hearsay and is not subject to the exclusionary rule – *Subramaniam*
  - Why not?
    - If all you care about is the fact the statement was made, then the reliability of that statement is in issue and the relevance is in the person who heard it – if that person is testifying, then you can test the evidence in court
- "the purpose for which the out-of court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises" 0 *Khelawon*
- **Often, the most useful question to ask in trying to distinguish hearsay from non-hearsay is whether the statement has equivalent value even if the contents are not true**

Khelawon

"Consider the following example. At an accused's trial on a charge for impaired driving, a police officer testifies that he stopped the accused's car because he received information from an unidentified caller that the car was driven by a person who had just left a local tavern in a 'very drunk' condition. **If the statement about the inebriated condition of the driver is introduced for the sole purpose of establishing the police officer's grounds for stopping the vehicle, it does not matter whether the unidentified caller's statement was accurate, exaggerated, or even false.** Even if the statement is totally unfounded, that fact does not take away from the officer's explanation of his actions. **If, on the other hand, the statement is tendered as proof that the accused was in fact impaired, the trier of fact's inability to test the reliability of the statement raises real concerns**. Hence, **only in the latter circumstance is the evidence about the caller's statement defined as hearsay** and subject to the general exclusionary rule"

Subramaniam

"The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes … This … could … have afforded cogent evidence of duress"

- There was a law against carrying ammunition
- The defence's theory was that he had ammunition because the terrorists forced him to carry ammunition – duress, "do this or I will kill you". This could be a defence
- To advance the defence, he must be able to talk about what the terrorists said to him; the words that they uttered to him
- This is an out of court statement, being uttered by someone else, but it is not being used for the truth of the contents; rather to prove that he had fear because they said something (whether true or not)
- It matters that it was said, not whether it was true that the terrorists were actually plotting to kill him

- Hearsay evidence is presumptively inadmissible unless an exception to the hearsay rule applies. The primary reason for this general rule of exclusion is general inability to test the reliability of hearsay evidence
- **The essential defining features of hearsay are twofold**
  1. The out of court statement is adduced to prove the truth of its contents; and
  2. The absence of a contemporaneous opportunity to cross examine the declarant
- Hearsay includes an out of court statement made by a witness who testifies in court, if the statement is offered to prove the truth of its contents

HOW TO MAKE THE DISTINCTION

R v Baltzer

- Essentially, it is not the form of the statement that give it its hearsay or non-hearsay characteristics, **BUT THE USE TO WHICH IT IS PUT**
- Whenever a witness testifies that someone said something, immediately one should ask then "what is the relevance of the fact that someone said something"
  - If the relevance stands in the fact it was made = making of the statement which is evidence (not hearsay)
  - If it contains an assertion that is a relevant fact = hearsay

IMPLIED ASSERTIVE STATEMENTS OR CONDUCT

Evidence can also be hearsay if it implicitly asserts fact – can come from an oral or written statement or from communicative conduct

- Implied assertions involve a double inference
  (1) From the declarants words or conduct to the declarants knowledge of a person, thing or event

(2) From the declarants knowledge is that the person, thing or event was as the declarant believed it to be
→ this is the problematic one because the hearsay rule is implicated because the inference is dependent upon the trustworthiness of the declarants belief, and the declarant is not a witness in the proceedings

Example from Wright

- The defendant sought to use the letters to the deceased to show implicitly that the authors believed and perhaps had observed that Marsden was competent at the time the will was executed
    - The Court held that this evidence was hearsay
    - Nowhere in the letters did anyone write "I have observed you being competent" or anything like that, but the content of the letters infer that they believed the person to be competent, and had maybe observed him to be behaving in a competent way
    - **It was as if the defendant had introduced letters that said "I have observed you acting in a sane manner"**
    - **Written communication is almost always hearsay unless the author is able to testify**

R v Wysochan (1930 Sask CA) → Bad decision
Accused and husband of victim were with deceased when she was shot (one of them killed her); Crown tender evidence that wife was asking for her husband before she died and talking to him and the court found this to be hearsay that could be used to implicate the accused shot her, and not the husband since she was reaching for him

R v McKinnon (1989 CA)
Accused on trial for murder; Crown had police officers give evidence that the accused's wife accompanied them to the burial site of the victim. Evidence was not hearsay by conduct, rather was tendered as evidence that police did not obtain information about location of burial from another potential suspect (used to rule out another suspect, not to impliedly say accused killed victim); court construes implied hearsay narrowly as to include gestures

- "It has always been my understanding that **such hearsay usually amounted to a description of actions or behaviour which are themselves means of expression, such as shrugs, headshakes, or other gestures that are a substitute for or supplement to oral communication"**

R v Baldree
Guy calls Baldree and says "do you have any weed" and police want to admit it as evidence

Exceptions to Hearsay

** **remember, during analsyis of traditional exceptions, that all traditional exceptions are subject to reassessment under the principled approach (Starr), thus the court can also consider whether hearsay evidence is necessary and reliable. However, principled challenged to traditional exceptions have not been successful in the past (*Paciocco*)**

Traditional Exceptions

The hearsay rule is subject to a number of exceptions. Much attention these days is focused on the principled exception but traditional exceptions continue to be important

Res Gestae

Really only justifies reception of hearsay statements made spontaneously before there was time for concoction

- Reason for such is because in emotionally overpowering circumstances such as physical or emotional shock, nervous excitement causes reflexive statements out of the control of the person giving the statement, thus the possibility of concoction or coercion can be disregarded – *Clark*
- **Excited utterances (**true example)
- **Statements of bodily and mental condition** (often)
- **Statements of intention (**supposedly)

(1) Excited Utterances

Spontaneous hearsay exclamations are admitted in evidence because in emotionally overpowering circumstances, the possibility of concoction or distortion can be safely disregarded

Reasoning: Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance

may be taken as particularly trustworthy and thus as expressing the real tenor of the speakers belief as to the facts just observed by him – *Clark citing Wigmore*

- Basically, you don't have time to pause and think of saying something that is necessarily false to assist someone in a case
- For the TJ to decide that in the circumstances the possibility of concoction or distortion can be truly safeguarded
    - If the TJ considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it - *Ratten*

Relevant factors to consider

- Whether the event preceding the utterance was startling, dramatic or overwhelming so as to lead to an instinctive rather than a reflective utterance
- Whether the utterance was the product of the startling event
- Whether the utterance was proximate in time to the event producing it
    - It used to be that precise contemporaneity was required between the event and utterance (*Bedingfield*)
        - This is no longer the case (*Clark*)
    - However, **temporal proximity is still relevant as bearing upon the possibility of reflective concoction as well as faulty memory**

E.g. in *R v Khan*

- In 1990, the SCC held that a statement made 30 minutes after the alleged crime was not admissible under the rest gestae exception
- the statement was not contemporaneous, being made… probably one half hour after the offence was committed. **Nor was it made under pressure or emotional intensity which would give the guarantee of reliability upon which the spontaneous declaration rule has traditionally rested**
- courts often take into account the declarants physical and mental state between event and utterance
    - if declarant was injured, the passage of a lengthy period might not be as significant

Overall Test

1. Must be satisfied that the possibility of concoction or coercion can be disregarded. (*Ratten*) Will consider:
    a. Whether event preceding utterance was startling and dramatic or overwhelming, leading to instinctive rather than reflective utterance
    b. Whether utterance was product of the startling event
    c. Whether utterance was proximate to the event producing it
        - Temporal proximity is not required (*Clark*), but is still relevant to possibility of reflective concoction
        - *Khan*: statement made 30 minutes after the event was not admissible under *res gestae* exception
        - Court will consider the physical and mental state between event and utterance (may allow for more time if severely injured, fighting for life, etc)
2. There is NO REQUIREMENT that declarant be unavailable to testify; the theory is that the spontaneity of the utterance makes is superior evidence

(2) Statements of Bodily and Mental Condition

Out of court statements concerning how a person is feeling are admissible to show how the person was feeling at the time

- Extends to both bodily feelings (e.g. pain), and mental feelings (e.g. fear)
- NOT admissible as direct proof of *cause* of the feeling (*Czibulka*)… however in some cases, evidence of the sensation coupled with evidence of the context can circumstantially establish cause
- NOT admissible to prove the feelings of another (*Griffin*)

Rationale: The theory is that there is a certain reliability to such statements and in the case of unavailable declarants, there is no other way to prove the feeling

- The theory is that contemporaneous statements may be **more accurate** than testimony given at trial months or years later, when the declarants memory is likely to have faded and his opportunity and inclination for deliberate misrepresentation may have increased

Overall Test

1. **Statement must be made contemporaneously with physical or mental sensation**
    - Can admit a statement about a past feeling that happened a few minutes ago, but no more
    - How much time is allowed to pass will be determined on case-by-case basis, keeping in mind that contemporaneous nature of statement assures its reliability
2. **Statement must have been made in a natural manner, and not under circumstances of** suspicion (*Griffin*)

- The hallmark of such statements is their spontaneity (*Samuel*)
- Must be casually made, but it doesn't have to be an involuntary, knee-jerk reaction statement (*Youlden*)
- Must have been made before litigation was contemplated

3. **There is NO REQUIREMENT that declarant be unavailable to testify; the theory is that contemporaneous statements are more accurate than testimony given at trial months or years after the sensation**
   - Still, there must be some reason to rely on statement, even if just bc of impaired memory (*Samuel*)

- Evidence in the form of text messages also raised hearsay concerns where one or both of the persons who sent them are not available or refuse to give evidence before the court
- Where texts are tendered for the purpose of showing that they were sent and the senders are not available to testify, the issue may be one of authentication
- These statements may be the only means by which the court can determine the declarants state of mind
- The state of mind of intention is troublesome

(3) Statements Of Intention

Refer to statements concerning a persons intention to act in a certain way. Such a statement may be used to infer

(a) That the person actually had the intention to act in a way (he intended to go to the movies
→ relies upon the truth of the stated intention, thus uses the truth for a hearsay purpose

(b) That the person subsequently did act in that way (he did go to the movies)
→ relies upon the truth of the stated intention, simply adding a second link in the chain of reasoning – also used for hearsay purpose

Rationale: such statements are often the only evidence available of intention, and when made in casual circumstances are unlikely to be contrived

- *"Assuming relevance, evidence of utterances made by a deceased (although the rule is not limited to deceased persons) which evidence her state of mind are admissible. If the statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule … Evidence of the deceased's state of mind may, in turn, be relevant as circumstantial evidence that the deceased subsequently acted in accordance with that avowed state of mind. Where a deceased says, 'I will go to Ottawa tomorrow', **the statement affords direct evidence of the state of mind – an intention to go to Ottawa tomorrow – and circumstantial evidence that the deceased in fact went to Ottawa on that day.** If either the state of mind, or the fact to be inferred from the existence of the state of mind is relevant, the evidence is receivable subject to objections based on undue prejudice"*

A statement of intention is not always strong evidence of a subsequent behaviour, because a person can change her mind

- The reasonableness of the inference will depend on a number of variables including
  - Nature of the plan
  - Proximity in time between statement of plan and proposed implementation
- The SCC in *Starr* added the condition that the **statement cannot have been made in circumstances of suspicion** (e.g. circumstances suggesting that the declarant had a motive to fabricate)
- Statements of intention are "not admissible to establish that past acts or events referred to in the utterances occurred" *P(R.J)*
  - (ie. I intend to buy a donut because my wife has been depriving me of donuts for the last three months – admissible to show that you intend to buy a donut. Inadmissible to show that you have been factually deprived in the past)
- **Statements of intention must be often edited to exclude reference to past events**
  - Sometimes the whole statement will be inadmissible because the reference to the past event cant be extracted
- Statements of intention **can also be problematic because they can lead to inferences regarding the conduct of other persons mentioned in the statement**
  - E.g. the statement "I am going to go out for a beer with Johnny" could be used to infer that Johnny went out for a beer with the declarant
  - The statement is NOT admissible to prove that Johnny went out for a beer
  - It is only admissible to show that the declarant intended to go out for a beer

General Test

1. Declarant must be unavailable to testify

2. An utterance indicating an intention is admissible where it is reasonable to infer the person acted on that intention. (*PR*) In determining reasonableness, court will consider:
    a. Nature of the plan described
    b. Proximity in time between the statement and the proposed implementation of the plan
3. The statement cannot be made in circumstances of suspicion (*Starr*)

Statements Against Pecuniary or Proprietary Interest

Common law has recognized this exception to hearsay for a long time: if a person makes a written or oral declaration which is against his pecuniary or proprietary interest (*St Hilaire v Kraveck*)

Rationale: belief that when a person asserts a statement against his or her pecuniary or proprietary interest, it is not likelyto be false, as a monetary disadvantage can ensue from such a declaration

- Example; "I owe Johnny 200$"

Preconditions:

1. Declarant must be unavailable to testify
2. Declarant must have made a statement of some fact, the truth of which he has personal knowledge
3. Such fact must have been to the deceased immediate prejudice, against his interest at the time he said it
    - If it can be construed for OR against → this step is not met
    - If it MAY be against a declarants interest in a certain future event → step is not met
4. Declarant must have known the fact to be against his interest when he uttered it

Statements Against Penal Interest

Historically, common law held that statements against penal interest to be inadmissible; but SCC has changed this in *O'Brien* when the court stated "there is little or no reason why declarations against penal interest and those against pecuniary or proprietary interest should not stand on the same footing. A person is as likely to speak the truth in a manner affecting his liberty as in a matter affecting his pocketbook"

- Basically saying an individual would never willingly incriminate themselves so the statement must be true

Criticism: these statements are easily manufactured by accused seeking to exculpate themselves or accused may lie about committing an offence to seem cool… but the SCC has safeguards in *R v Demeter*

Test from *Demeter – adopted by SCC*

Note: these preconditions are stricter than for pecuniary interest exception due to criticisms above

1. Declaration must have been made to a person and in such circumstances that the declarant "should have" apprehended a vulnerability to penal consequences of the *statement* (and not just the act itself)
2. Vulnerability to penal consequences must not have been remote, must have been a realistic one
3. Declarant must have personal knowledge of the fact he asserts
4. Declaration must be considered in its totality, such that if upon the whole the weight is in favour of the declarant, it is not against his interest
5. If doubtful, Court can consider whether or not there is any connection between the declarant and the crime or the declarant and the accused
6. Declarant must be unavailable by reason of death or grave illness which prevents testimony from even a bed
    - It is sufficient if the declarant cannot be located (*Pelletier*)
    - It is not sufficient if the declarant simply refuses to testify
7. Statement cannot be used if inculpatory of accused, ONLY if EXCULPATORY (*Lucier*)

Prior Judicial Proceedings

Testimony given at a prior judicial proceeding by a witness who is now unavailable is often admissible for its truth at a subsequent trial

- Theory is that the hearsay dangers are not present because
    - Issues are substantially the same
    - The testimony was given under oath
    - Is an official solemn proceeding
    - The opposing party had an opportunity to cross examine
    - An accurate record of the testimony was made
- In all cases, **certain preconditions must be met, most importantly, that there have been adequate opportunity to cross examine**

Testimony from Prior Civil Trials

- Governed by common law
- In order for the evidence to be admissible:
    - Witness must be unavailable
    - The parties, or those claiming under them, must be substantially the same as in the earlier proceeding
        - This precludes the admissibility of evidence given at an earlier criminal trial in a subsequent civil trial arising out of the same event (no plaintiff – crown)
    - Material issues must be substantially the same
        - Correspondence of issues such that the cross-examiner in the earlier proceedings was motivated to challenge the evidence in the same way
    - The person against whom the evidence is to be used against had an adequate opportunity to cross examine the witness at an earlier proceeding
        - Need not actually have done it, just the opportunity

Testimony on Discovery

R 31.11(6) ROCP: testimony given on discovery may be admitted at subsequent trial

TEST (arising from Rule)

1. Deponent must be unavailable
2. Leave of the trial judge is required. TJ required to consider:
    a. The extent to which the person was cross-examined on examination for discovery
        - Mere *opportunity* to cross-examine is NOT enough
    b. Importance of the evidence in the proceeding
    c. General principle that evidence should be presented orally in court
        - Must be some reason for going around the general rule
    d. Any other relevant factor

Verdicts from Prior Criminal Proceedings

In cases where a civil suit follows a criminal trial, the plaintiff often wants to prove the case in reference to the earlier criminal conviction

- OEA s. 22.1 states that proof of a prior conviction, in the absence of evidence to the contrary, is proof that the crime was committed
- BUT, the defendant can avoid the application **if he shows that there is still a live issue to be tried → ex; new evidence**

Testimony from Prior Criminal Proceedings

- S. 715 of *Criminal Code*: testimony given at a previous trial on same charge or at preliminary inquiry into a charge may be admissible at a criminal trial if certain requirements are met
- S. 715 is constitutionally valid bc of accused's opportunity to cross examine (*Potvin*)
- If evidence admitted under S. 715, TJ should remind jury they have not had benefit of observing witness giving testimony
    - In appropriate circumstances, TJ may want to advise jury that defence counsel may have had tactical reasons not to cross examine witness at preliminary hearing, and thus the cross examination that was conducted may not have been as extensive as it would have been if the witness testified at trial (*Li*)

TEST

1. Witness refuses to give evidence or is unavailable within the meaning of s. 715: (a) dead; (b) has since become and is insane; (c) is so ill that he is unable to travel or testify; or (d) is absent from Canada
    - Taking into account technological means of taking evidence (ie teleconference) (*Li*)
    - Spousal incompetency does not bring witness within ambit of this section (*Hawkins*) BUT see *Couture*
2. Witness's earlier evidence was given in the presence of the accused
3. Accused had full *opportunity* to cross-examine the witness in earlier proceeding
    - Note: mere opportunity to cross-examine IS enough
    - Accused does not have full opportunity when: witness refuses to answer questions in cross-examination, witness dies or disappears in midst of cross-examination, judge curtails cross-examination by imposing improper limitations or restrictions (*Lewis*)
        - Improper limitation or restriction must have significantly impaired opportunity to cross-examine (*Lewis*)

4. JUDGE HAS RESIDUAL DISCRETION to refuse to admit testimony even if all requirements in s. 715 are met if the evidence was obtained unfairly or where admission of evidence would render the trial unfair. Judge should balance two competing factors: fair treatment of accused verses society's interests in the admission of probative evidence (*Potvin*)
    - Ie where Crown aware that witness would not be available to testify but failed to inform accused (*Potvin*)
    - Ie where Crown failed to disclose highly relevant information to the accused

Statements by Parties

An out of court statement made by a party is admissible for the truth of its contents when introduced by opposing party

Rationale: not totally clear – 2 views
(1) Such statements are reliable because no person would make a false statement contrary to his interest – *Rojas*
(2) Party cannot reasonably complain about unreliability of own statement because has opportunity to explain it at trial – *Morgan*

Criminal Cases
- Additional rules apply to the admission of statements by the accused to **"persons in authority"** (police, crown attorneys, prison guards"
    - Thus, the crown must **prove beyond a reasonable doubt,** in a voir dire that the accused's statement was voluntary – *Oickle*
- Statements to the accused to other people are not subject to the voluntariness rule and are presumptively admissible without a voir dire

Implied Admissions
- An admission is a statement made or an act done by a party to a lawsuit which is or which amounts to a prior acknowledgement that some fact is not as he now claims it to be
- A party can be deemed to have made a statement without actually having said anything
- Evidence should only be admitted after a voir dire so judge can assess circumstances in which implied admission occurred
    - In criminal cases, judge must find on a BoP that the accused adopted the statement (*JF*)
- Exception: accused in criminal case can never be held to have impliedly adopted a statement made by a person in authority due to right to remain silent (*Turcotte*)
-

Test – An admission can be implied if:
1. A statement (usually accusation) is made in presence of party in circumstances that the party would be expected to respond
2. The party's failure to respond can reasonably lead to the inference that he adopted the statement, AND
    - Evidence is sufficient to support a reasonable inference of adoption (*Tanasichuk* NBCA)
3. The probative value of the evidence outweighs its prejudicial effect

Business Records

Past business records may be introduced for the truth of their contents – admissibility is largely governed by statute

Litigants are often interested in introducing records of past business activity for the truth of their contents
- E.g. in a medical malpractice suit, the defendant doctor may want to introduce notes made by nurses documenting statements made by the patient or conditions observed by the nurses
- E.g. in a chop shop case, the prosecution may want to introduce manufacturing records in order to connect various car parts to stolen cars

Most basic precondition is that the record MUST HAVE BEEN MADE IN THE USUAL AND ORDINARY COUR
- Matter of routine
    - This is to add to the rationale that there is no motive to fabricate mundane business records – motive to be accurate
- There is also a reduced concern over honest error because business records tend to be made contemporaneously with the events recorded

** See long summary on pg 56 for more on this

Dying Declarations

Early common law exception – for the statement to be admissible, the deceased had to have a settled or hopeless expectation of death, and must have been a competent witness if they were available to testify

Requirements

(a) Settled or Hopeless Expectation of Death

- The declarant must have possessed the believe that he or she was mortally injured and was going to die when he or she made the statement
- It is immaterial whether another person in a similar situation would have harboured the same feeling or that a physician
- The feeling to be possessed is not merely fear that the declarant may succumb to death, but that in fact the declarant has a solemn conviction that he or she will soon die and that there is no hope whatsoever of recovery

(b) Trial must be one in which the accused is charged with murder or manslaughter

- The nature of the cases in which such evidence is admitted is limited to homicide
- In addition to murder and manslaughter, criminal negligence causing death has been held to be an appropriate charge since that crime may also fall under the rubric of manslaughter

(c) Injuries Those of Declarant and the Subject of the Change

- Dying declarations are also limited to situations where the death or injuries in question are those of the declarant himself or herself whose death is the subject of the charge

Hearsay – Principled Exceptions

Traditionally, hearsay was only admissible when it fell within one of the various specific exceptions; but this resulted in seemingly reliable evidence being excluded because it did not fit the cookie cutter shape of a traditional exception

- The SCC in *R v Khan* created a broad exception to the hearsay rule, which was confirmed in *Smith.* Thus, Khan signaled an end to the categorical approach and the beginning of a flexible principled exception
- As the SCC said in *Khelawon*, some hearsay presents minimal danger (such as mistakes, exaggerations, or deliberate falsehoods), and the exclusion of such evidence can impede the fact finding function of the court. Thus, the SCC said a hearsay statement can be admitted if it is **NECESSARY** and its contents are **RELIABLE/ TRUSTWORTHY**
- If the evidence would be excluded under a separate rule of evidence had the declarant been available to testify, the principled exception does not apply (*Couture*)

THE STARR FRAMEWORK

- The SCC in *R v Starr (2000)* made yet another dramatic change in the law of hearsay
    - **It held that all existing traditional exceptions can be challenged under the principled approach requirements of necessity and reliability**
- Why did they do this? Justice Iacobucci:
    1. Trial fairness and the integrity of the justice system
        - Issue of wrongful convictions if the crown was allowed to introduce unreliable hearsay
    2. The intellectual coherence of the law of hearsay

NECESSITY

It must be necessary to receive hearsay evidence because equivalent non-hearsay evidence is not available

- Founded on society's interest on getting at the truth and ensuring the integrity of the trial process
- With respect to unavailability, there is a high degree of necessity and failure to introduce the statement may mean the total loss of the evidence
- Necessary does not mean necessary to a partys case, in the sense that the party will lose case without the evidence
- Necessary means "reasonably necessary"
    - Thus, it is not strictly required that relevant direct evidence is not available
        - In some cases, it will be sufficient if there is no other way of getting evidence of the same value from other sources
            - E.g. children have better memories right after the event
- There may be instances that although the declarant is available to testify at trial, the better evidence may be the declarants out of court statement made at a time much closer to the event in question

- *R v Parrott* – complainant with a severe mental disability was not found to be necessary to introduce as hearsay
  - Justice Binnie held that if the witness is physically available and there is no suggestion that he or she would suffer trauma by attempting to give evidence then that evidence should generally not be pre-empted by hearsay unless the TJ has first had an opportunity to hear the potential witness and form his or her opinion as to the testimonial competence
- *R v R(R)* – handicapped girl with mental age of 5 was found unavailable to testify because she was traumatized by the incident and failed to attend trial

- **Mere unwillingness IS NOT SUFFICIENT**
- In *R v O'Connor* the OCA held that it is not sufficient for the Crown to simply show that a witness is not compellable because he or she is out of the jurisdiction
  - Efforts should be made to pursue other options to obtain the testimony such as teleconferencing
- The lack of an independent memory has been sufficient to meet the necessity requirement
  - For example in *R v F (E.J.)* the necessity test was met because the witness had no memory of having made a statement or of the events addressed by the statement
- In *R v Wilcox,* the fact that the maker of the record had no independent recollection of the information he recorded, thereby making it impossible for him to give meaningful evidence of the contents, was sufficient to satisfy the criterion of threshold necessity
- Necessity therefore does not mean absolute necessity.
  - It may be that a court will demand a higher standard of reliability in situations where the nature of the necessity is not so extreme

RELIABILITY

One must look to the circumstances under which the statement was made. If the statement was made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable"

- Accordingly, it is not essential that the statement be absolutely reliable… **substantial reliability** will be sufficient

Threshold vs. Ultimate Reliability

- There is a **difference between threshold reliability and ultimate reliability**
- **Hearsay evidence need only satisfy the former to be admissible. The latter is an issue for the trier of fact**
  - "[T]he trial **judge only decides whether hearsay evidence is admissible. Whether the hearsay statement will or will not be ultimately relied upon in deciding the issues in the case is a matter for the trier of fact** to determine at the conclusion of the trial based on a consideration of the statement in the context of the entirety of the evidence" (*Khelawon*)
  - "The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact" (*Khelawon*)
  - "… it **is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility** *voir dire*" (*Khelawon*)

- Accordingly, it is not essential that the statement be absolutely reliable… **substantial reliability** will be sufficient
- If the prime concern regarding the reliability of the statement is whether it was ever made, that is a matter of ultimate reliability
  - The making of a statement is a matter for the jury to decide and goes to the credibility of the witness who heard the statement
- Chief among areas of inquiry would be testimonial attributes of the declarant, including his or her capacity to observe, recollect and communicate and the declarants perception, memory and credibility.
- In *B. (K.G.)* Lamer CJC elaborated on factors of reliability
  - The requirement of reliability will be satisfied when the circumstances in which the prior statement was made provide sufficient guarantees of its trustworthiness with respect to the 2 hearsay dangers a reformed rule can realistically address if:
    (1) The statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation
    (2) The statement is videotaped in its entirety

(3) The opposing party has a full opportunity to cross examine the witness respecting the statement, there will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement

- Threshold reliability can be satisfied by there being
  1. Procedural reliability because of the procedural safeguards in place that allow the trial judge to assess the reliability of the statement
  2. Substantive reliability arising from the circumstances surrounding the making of the statement and any corroborating evidence
  3. A combination of aspects of procedural and substantive reality
- In *R v Diu* the OCA held that a prior videotaped statement was too unreliable to be admitted for the truth of its contents mainly because of the absence of an oath and the lack of a meaningful opportunity to cross-examine the witness on the truth of his out of court statement
- Other factors that may be important to substantially negate the possibility of inaccuracy or fabrication
  - The declarants motive to lie
  - The spontaneity of the statements
  - Contemporaneity with the events set out
  - The demeanour of the declarant
  - The declarants conduct
  - The relationship between declarant and the narrator of the statement
  - The possibility that the declarant was mistaken
  - The state of mind of the declarant when the statement was made
  - Contents of the statement
- Where it can be demonstrated through other evidence that the declarant had every reason to be truthful, that would go to show that the statement is inherently reliable
- On the other hand, where evidence shows that the declarant had a motive to lie, it is obvious that the statement cannot be trusted
  - In those grey areas, where there is no evidence one way or another, a court cannot draw the inference that there was no evidence of a motive to fabricate
- The basis for admitting prior inconsistent statements for the truth of their contents is founded not upon the inherent trustworthiness of the statement, but rather upon the fact that there are adequate substitutes for testing the evidence, including the factor that the declarant is in the witness box and available to be cross examined, which is the best means for determining the reliability of the earlier statement
- However, the mere fact that the witness is available for cross examination, may not constitute sufficient reliability
  - There must be an adequate basis for the trier of fact to assess the reliability of the prior statement in relation to the testimony at trial
- In *R v Adam* the court suggested the following 5 conditions for admitting prior inconsistent statements for their truth
  1. That the evidence contained in the prior statements is such that it would be admissible if given in court
  2. The statement made was voluntary by the witness and is not the result of any undue pressure, threats or inducements
  3. The statement was made in circumstances, which viewed objectively would bring home to the witness the importance of telling the truth
  4. The statement is reliable in that it has been fully and accurately transcribed or recorded
  5. That the statement was made in circumstances that the witness would be liable to criminal prosecution for giving a deliberately false statement
- In *R v Bradshow* the SCC emphasized that some form of cross examination of the declarant, such as with preliminary inquiry testimony or the cross examination of a recanting witness at trial, is usually required.
- **In the end,**
  - The threshold reliability of a non-accused witness' prior inconsistent statement may be established by
    (1) The presence of adequate substitutes for testing truth and accuracy (procedural reliability); and
    (2) Sufficient circumstantial guarantees of reliability of inherent trustworthiness (substantive reliability)

SELF-SERVING EVIDENCE

A witness, whether a party or not, may not repeat his or her own previous statement concerning the matter before the court, made to other persons out of court, and may not call other persons to testify to those statements

General Exceptions

- A number of exceptions to the rule have developed in common law permitting the introduction of a witness' prior consistent statement when credibility has been impeached
- The prior consistent statement must be highly relevant to rebut the particular mode of impeachment
- The law has in fact limited prior consistent statement evidence of a witness to situations where its admissibility is sought specifically:
  (1) To rebut allegations of recent fabrication
  (2) To establish eyewitness prior identification of the accused
  (3) To prove recent complaint by a sexual assault victim
  (4) To establish that a statement was made that forms part of the *res gestae* or to prove the physical, mental or emotional state of the accused
  (5) To adduce facts as part of the narrative
  (6) To prove that a statement was made on arrest
  (7) To prove that a statement was made on the recovery of incriminating articles or

To prove videotaped complaints under s 715.1 of the *Criminal Code*

Evidence to Rebut Allegations of Recent Fabrication by the Witness

- "If, in cross examination, a witness's account of some incident or set of facts is challenged, thus presenting a clear issue of whether, at some previous time, he said or thought what he has been saying at the trial, he may support himself by evidence of earlier statements by him to the same effect"

How is the evidence to be used?

- The purpose of evidence of a prior consistent statement is to remove a potential motive to lie and a trial judge may consider removal of this motive when assessing the witness' credibility
- There is a distinction between the evidence being used to bolster credibility, which is permissible, and the evidence being used for its truth, which is not permissible
- It is impermissible to assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth

How must the allegation be raised?

- Often made in cross examination, in which the previous statement may be adduced on re-examination or through the evidence of another witness
- A mere contradiction in the evidence is not sufficient to give rise to the recent fabrication exception

Form of Allegation

- The allegation that the witness' testimony is recent fabrication may take a number of different forms
- In the face of such allegations, counsel may tender a statement of the witness made at a time when it could not be said that such influences existed
- A fabrication can arise because outside sources have influenced the witness
- Another kind of allegation to impeach the witness' credibility is that the witness did not speak of the matter before, at a time where it would have been natural to speak
  - The imputation is that a witness who is truthful would have raised the issue at an early opportunity
    - This can't happen for the accused if they are the witness as they have the right to remain silent
- Prior consistent statements have been allowed to be tendered when a witness' credibility has been attacked by a prior inconsistent statement
  - However, it has been said that if the making of the prior consistent statement is not in disrepute, then the fact that the witness made a consistent statement earlier in time than the inconsistent statement has little bearing on his credibility, since it has already been demonstrated that the witness is capable of self contradiction

Timing of Prior Consistent Statements

- It is only consistent statements made prior to the time when it is alleged that the fabrication began that are admissible
- In all cases, the timing of the prior consistent statement is crucial to its admissibility

Prior Eyewitness Identification

- Questions may be legitimately asked as to whether the witness is truly relying on present recollection in making such identification or whether he or she has been strongly influenced by the circumstances
- Because such eyewitness identification evidence in the courtroom is subject to frailty, it is permissible for the witness to testify about prior descriptions given and previous acts identification to support his or her testimony; and this evidence can b given without any impeaching allegation having first been made

- The point for consistency and eye witness reports is both for credibility reasons and policy reasons
    - It is obviously not in the accused's interests to be identified for the first time in the courtroom
    - Identification is much more reliable if it takes place closer to the event in question and is conducted under circumstances which ensure accuracy and are fair to the accused

Recent Complaint

- The common law permitted the credibility of complaints in sexual offences who testified at trial to be supported by evidence that she or he made a complaint about the incident within a short time after it occurred
- In the last century, the admissibility of recent complaint evidence was expanded to include a victim of any sexual offence, whether male or female
- A trial judge had to be satisfied as a matter of law that the following conditions had been met before the Crown could adduce evidence of the recent complaint

(1) The words of an extra-judicial statement had to be capable of constituting a complaint
(2) The complaint had to be recent
(3) The complaint must not have been elicited from the complainant by questions of a leading and inducing or intimidating character

Res Gestae or to Show Physical, Mental or Emotional State of Accused

- An earlier statement made by the witness while the event in question is taking place may be part of the *res gestae* and to be admissible evidence as an exception to the hearsay rule
- Such statements are admissible in their own right as proof of the contents therein and there need not be consistent testimony given in court on the same point

Evidence Admitted as Part of the Narrative

- These two categories of the narrative exception are referred to respectively as pure narrative evidence and narrative as circumstantial evidence

Pure Narrative Evidence

- If they form a necessary part of the narrative
- This pure narrative exception allows the decision maker to understand the "chronological cohesion" of the case; it is not used to prove the truth of its contents but is merely an aid un understanding the case as a whole
- They can better appreciate the unfolding of events
    - If the prior statements are not an essential part of the narrative, they should not be admitted
- Narrative is justified as providing background to the story – to provide chronological cohesion and eliminate gaps which would divert the mind of the listener from the central issue
- In all cases, where evidence is admitted under the rubric of prior consistent statements, the trial judge is obliged to instruct the jury as to the limited value of the evidence
    - The fact that the statements were made is inadmissible to assist the jury as to the sequence of events from the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness
        - However, the jury must be instructed that they are not to look to the content of the statements as proof that a crime has been committed
- The evidence of the prior statement should be described in general terms only and should not contain details of what was actually said so as to invite the jury to draw an inference of truthfulness of the complainants evidence at trial by reason of its apparent consistency with the prior statement

Narrative as Circumstantial Evidence

- A prior consistent statement can be used to provide the surrounding circumstances and context to aid in the evaluation of the credibility and realibility of the witness' in court testimony
- In *R v Khan,* the Ontario Court of Appeal noted that previous judgments had used prior consistent statements by children who were victims of sexual assault to assist in the assessment of the childs credibility

FACTS	- The adult complainant was subject to three body searches by the arresting officer - The male officer was charged with sexual assault and claimed the complainant fabricated the story - The crown sought admission of the statement of the female officer who reported it

	- The TJ admitted the statement as a prior consistent statement to assist the court with the ultimate credibility of the complainant
ISSUE	- Did the TJ err in allowing the statement?
HELD	- No
REASONS	- The complainants statement was admissible under the narrative as circumstantial evidence exception to the prior consistent statement rule, and that the TJ properly used it as evidence of the sequence and timing of events and the emotional state of the complainant at the time of the utterance, thereby assisting the TJ in evaluating the credibility of the complainants in court testimony

Statements Made on Arrest

- The statements made by an accused upon his or her arrest, which are exculpatory in nature, have been said to be admissible as an exception to the general rule prohibiting self serving evidence
- The SCC was more explicit in *Lucas v R* wherein it indicated that it was permissible for an accused to testify in his examination in chief about an exculpatory statement made to the police upon arrest similar to the testimony that the accused was giving in the courtroom
- In *R v Edgar* the court found that exculpatory evidence made at the time of arrest will very often have significant probative value and "vital relevance" to the issue of guilt
- As a result, under *Edgar* to put into evidence a previous exculpatory assessment, an accused must meet 3 requirements
  (1) The accused must testify
  (2) The statement must be made when the accused was arrested to when the first accused of committing a crime
  (3) The statement must be spontaneous

Explanatory Statements Made by an Accused in Possession of Stolen Goods or Illegal Drugs

- An accused who is charged with possession of stolen goods may tender evidence of his or her innocent explanation made at a time when he had been found in possession
  - This evidence is allowed because of the inference that could arise that an accused would have given an explanation at the time if the possession was in fact innocent

Admissions of Video Recorded Complaints

- Section 715.1 of the Criminal Code permits the admissibility of video recorded evidence in certain proceedings, made by a complainant under 18 years of age
- Certain conditions must be satisfied to make the video recording admissible
  - Made within a reasonable time
  - Describes the acts complained of
  - The complainant adopts the contents of the video
- Onus is on the Crown to prove the conditions

A More Principled Approach to Admissibility

- The list of exceptions to the exclusionary rule is not exhaustive
- In Edgar, Justice Sharpe said
  (a) The hearsay concerns are removed if the maker of the prior statements takes the stand and is exposed to cross examination
  (b) Too much is made about the issue of fabrication. This risk can be addressed through effective cross examination and by the appropriate caution in the trial judge's instruction to the jury as to weight, particularly where spontaneity is lacking
  (c) Trial efficiency would rarely justify the exclusion of relevant, probative evidence that could lead the court to acquit an accused

- *In R v Khan*, Doherty J.A. advocated for a principled approach to the admissibility of prior consistent statements
  - The principled approach based on broad principles would require the following steps
    1. First determine the purpose for which the evidence is tendered – if it is for the truth of the prior statement, then that would be determined by the principles controlling the admissibility of hearsay

2. If the prior statement is not for the truth of its contents, then one should ask for what purpose is it offered.

CONFESSIONS

A written or oral communication made by the accused stating or inferring that he or she committed the crime; a confession may be either a complete admission of all the elements of the crime or an admission of one or more material facts tending to prove the guilt of the accused – *Singh*

- A confession is an exception to the hearsay rule and can be admitted as evidence for the truth of its contents – *Moore*
    - In *Bigaouette* the court stated with respect to probative value of a confession "the general rule is that a free and voluntary confession made by a person accused of an offence is receivable in evidence against him… as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a statement against himself, if the facts of a confession were not true"

INCULPATORY AND EXCULPATORY STATEMENTS

- The Supreme Court of Canada in R v Piche rejected the distinction between exculpatory and inculpatory statements for the purposes of the confessions rule
- In *Piche* the accused was charged with murdering her common law husband
    - Immediately after the shooting, Piche told the police that she spent the evening with the victim, that there had been an argument, but when she left the apartment the deceased was sleeping
    - At trial she testified that she shot the victim accidentally
    - Because the trial judge held that the statement to the police was inculpatory, he did not consider whether the statement should also apply to the exculpatory statement
- The SCC however, held that both the exculpatory and inculpatory statements should be subject to the confession rule
    - "the admission in evidence of all statements made by an accused to persons in authority, whether inculpatory of exculpatory, is governed by the same rule and thus put to an end the continuing controversy and necessary evaluation by trial judges of every statement

DANGERS OF FALSE CONFESSIONS

The SCC in *R v Oickle* emphasized the danger of false confessions and the importance of recognizing this danger in creating a modern common law confession rule

- The general confession rule guards against the danger of unreliable confessions by requiring the Crown to prove to a judge beyond a reasonable doubt that an accused's statement was voluntarily made.
- Applying a cost benefit analysis, a judge may also exclude evidence if its prejudicial effect exceeds its probative value
- A judge may also exclude evidence if its admission would result in an unfair trial to an accused because of concerns about the process by which the evidence was obtained in the absence of a breach of the Charter
- In a rare case where there is clear, cogent and compelling evidence that an otherwise confession is false, a judge may be satisfied that it is necessary to sue their common law direction to exclude the confession
- Once a confession is determined to be admissible, the principal safeguard against a wrongful conviction based on a false confession is the trier of fact

Type	Definition
Stress Compliant	Occur when the aversive interpersonal pressures of interrogation become so intolerable that suspects comply in order to terminate the questioning. False confessions are given knowingly to escape the punishing experience of interrogation
Coerced Compliant	Product of the classically coercive influence techniques (threats and promises)
Non-Coerced Persuaded	Police tactics cause the innocent person to become confused and doubt his memory, be temporarily persuaded pf his guilt and confess to a crime he did not commit
Coerced persuaded	Like the non-coerced persuaded but there is some classic coercive aspects like the coerced compliant

SCOPE OF THE RULE

Applicability

- The rule applies to all oral or written statements made out of court by an accused to a person in authority proffered by the Crown

- The rule also is applied when a third party offers an inducement in the presence of a person in authority and the former is the agent ir is clothed with authority

Persons in Authority

This section is about someone in authority INDUCING the confession – aka safeguarding against false confessions

- The assessment of who may be a person in authority is highly fact specific and is conducted on a case by case basis
- In *R v B(A)* Justice Cory summarized the following common law principles

(1) A person in authority is someone engaged in the arrest, detention, examination or prosecution of the accused
(2) In some circumstances, the complainant in a criminal prosecution may be considered to be a person in authority
(3) The parent of an infant who is the injured party or complainant in a criminal prosecution may be a person in authority
(4) An inducement made by one who is not in authority but made in the presence of persons in authority who do not dissent from it, may be deemed to have been made by a person in authority

- Justice Cory writing for the majority in *R v Hogson* confirmed that a person in authority typically refers to persons formally engaged in the arrest, detention, or examination and apart from police officers or prison officials, no individual is automatically considered a person in authority solely by reason that he or she may exercise authority over the accused
- The person in authority test has both subjective and objective components
    - The determination whether the receiver of a statement is a person in authority

Persons not in Authority

Mr. Big Situations

Reliability is a concern when statements are given as a result of violence, threats inducements, or oppression, regardless of whether the person receiving the statement is in authority

- In *R v Hart* the SCC noted that Mr. Big confessions present unique dangers, and that such dangers must be addressed by placing a filter on their admissibility
    - In this case, the accused's young daughters had drowned in suspicious circumstances
    - The court in this case specified the risks posed by Mr. Big confessions
        - Their lack of reliability
        - Prejudice to the accused due to evidence that he or she was willing to participate in a crime scenario and join a criminal organization
        - Potential for police misconduct that may extend to abuse of process
- In determining the appropriate legal framework for admissibility of Mr. Big, the Court wished to achieve a **just balance** – one which guards against the risk of wrongful convictions that stem from false confessions but which ensures the police are not deprived of the opportunity to use their skill and ingenuity in solving serious crimes
- **the crown will bear the burden of establishing that, on balance, the probative value of the confession outweighs its prejudicial effect and it will be for the defence to establish an abuse of process**
    - In *R v Mack* the SCC found that the probative value of a Mr. Big confession was high in a case where the inducements by the police were low, and there was an abundance of confirmatory evidence

THE HART FRAMEWORK

any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility is overcome where the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect.

Part 1

(1) Examine the circumstances in which the police elicited the Mr. Big confession, having regard to the following non-exhaustive factors
    a. Length of the operation
    b. Number of interactions
    c. Nature of relationship
    d. The nature and extent of the inducements offered
    e. Presence of any threats
    f. The conduct of the interrogation itself
    g. The personality of the accused, including age, sophistication and mental health
(2) Look to the confession for markers of reliability, which may include
    a. The level of detail contained
    b. Whether it leads to the discovery of additional evidence

c. Whether it identifies any elements to the crime not made public
d. Confirmatory evidence

(3) Consider the prejudicial effect of a Mr. Big Operation which may give rise to moral and reasoning prejudice
(4) Weigh the probative value of the confession against its prejudicial effect

Part 2

(1) Consider whether the accused has established an abuse of process by the police – the onus is on the accused to establish such abuse having regard to
   a. The use of physical violence or threats of violence
   b. Operations that prey on the vulnerabilities of an accused (such as mental health problems, addictions, youthfulness)

Development of the Modern Voluntariness Rule

- In 1914, Lord Sumner enunciated a rule, commonly referred to as the *Ibraham* rule that set the tone for much of the 20th century – voluntariness element
- In 1921, the SCC adopted the *Ibraham* rule in *R v Prosko*
  - Since then, the test of voluntariness has become entrenched in the common law and courts have laboured to adapt this rule of policy to the different factual circumstances present

Voluntariness in a sense is determined negatively – a statement obtained by hope of advantage (a promise) or fear of prejudice (a threat), exercised, held out or inspired by a person in authority, is involuntary in the eyes of the law, since it may be unreliable

- In *R v Rothman* the accused was charged with a narcotic trafficking offence. Accused was cautioned and refused to make a statement. The police then planted an undercover agent in his cell and was led to believe he was a truck driver
  - Rothman eventually made incriminating statements
- The case was concerned with whether the officer was **a person in authority**

Following test for Confessions to Authority Figures

(1) A statement made by the accused to a person in authority is inadmissible if tendered by the prosecution in a criminal proceeding unless the judge is satisfied beyond a reasonable doubt that nothing said or done by any person in authority could have induced the accused to make a statement which was or might be untrue
(2) A statement made by the accused to a person in authority and tendered by the prosecution in a criminal proceeding against him, though elicited under circumstances which would not render it inadmissible shall nevertheless be excluded if its use in the proceedings would, as a result of what was said or done by any person in authority in eliciting the statement bring the administration of justice into disrepute

Usually if in authority, the Charter has implicates because they are state actors: Charter

- Unfairness to the accused or police misconduct may trigger Charter scrutiny whereupon the reliability of the evidence is of minimal, if any relevance
- In *R v Hebert* the court considered the common law confession rule and the privilege against self-incrimination as they inform the right to silence under s 7 of the *Charter*
- In *R v Whittle* the SCC held that the right to counsel, the right to silence, and the common law confession rule are interrelated and operate together to provide a standard of reliability with respect to evidence obtained from detained persons and to ensure fairness in the investigatory process
- A common element of all three rules is the right of the suspect to make a choice in relation to action by the state and whether the action by the authorities deprived the suspect of making an effective choice.
- The issue in *Oickle* was whether the accused's confession was voluntary
  - The persistent and often accusatorial questioning by the authorities, their exaggeration of the reliability of the polygraph, and the mid inducements offered to the accused did not render the confession involuntary
- *R v Singh* – the rule much like the right to silence, is a manifestation of the broader principle against self incrimination
- In *Hart* the majority of the SCC decided the admissibility or Mr. Big confessions should not be determined having regard to the right to silence under s 7 because such confessions are not obtained while the accused is detained

In *R v Wray* the court held that Wray's confession was involuntary and therefore inadmissible

- However, the police led the police to discover the murder weapon
- The majority held that the derivative evidence (murder weapon), and those parts of the confession that were collaterally proven to be true (the accused knowledge of the location of the murder weapon) were admissible

VOLUNTARINESS TEST

Rests on the ability of the accused to make a meaningful choice whether or not to confess

Quick Summary

(1) Threats or inducements
- The statement must not be obtained by hope of advantage or fear of prejudice held out by a person in authority

(2) Oppression
- Depriving the suspect, and creating a situation where the accused free will is effectively overborne will render a confession involuntary
- Ex; depriving of sleep or food

(3) Operating Mind
- The causes for a lack of operating mind include physical shock, lack of intellectual capacity, hypnosis, intoxication etc.

(4) Police Trickery
- There must be a clear connection between the obtaining of the statement and the conduct; furthermore that conduct must be so shocking as to justify the judicial branch of the criminal justice system in feeling that, short of disassociating itself from such conduct through rejection of the statement, its reputation and, as a result, that of the whole criminal justice system, would be brought into disrepute
-

(a) Threats or Inducements

The statement must not be obtained by hope of advantage or fear of prejudice held out by a person in authority
- Thus, police interrogation techniques that attempt to convince an accused to confess will not necessarily render a confession involuntary
    - Inducements only become improper when, standing alone or in combination with other factors, they are strong enough to raise a reasonable doubt whether the will of the suspect has been overborne
- **The threshold test for voluntariness is HIGH**
- In the courts opinion, the most important consideration is whether a quid pro quo offer is made

Oickle court tried to define precisely the types of threats or promises that would raise a reasonable doubt as to voluntariness
- Explicit offer for lenient treatment = raise reasonable doubt on voluntariness
- Subtle/ veiled threats such as "it would be better for you to confess" – less clear and should only be excluded where the circumstances reveal an implicit threat or promise
- A threat or promise made to or concerning another person may constitute an improper inducement
    - The relationship between the suspect and the third party and the nature of the threat or inducement are important factors to consider in assessing the effect of the threat or promise on voluntariness
- Justice Iacobucci confirmed that the **moral or spiritual inducements will generally be insufficient to render a confession involuntary**

There is also a subjective aspect to the test now
- Requiring a determination of whether the accused has sufficient cognitive ability to understand the causation that the evidence may be used against him and the mental ability to make the choice to speak to the authorities or to remain silent
    - Once this requirement of the confession rule has been satisfied, the focus of the inquiry shifts to whether the conduct of the authorities deprived the suspect of making a meaningful choice
- If the inducement which the person in authority adopts, that statement may be inadmissible
- The threat or promise does not have to relate to the crime confessed
    - For example, in *R v Kalanshnikoff* the accused, after being stopped for a traffic violation, was told that if he provided police with information on a certain robbery, his traffic ticket would not be processed. Several days later he went in and confessed

(b) Oppression

Oppression occurs where the conduct of authorities is so oppressive that the accused's free will is effectively overborne, thereby sapping the will and strength of the interviewee to make an independent choice to speak or remain silent

- The SCC in *Oickle* recognizes oppression as a free standing ground capable of negative voluntariness under the confession rule
- The court in *Oickle* illustrated factors that may create an atmosphere of oppression:
    - Depriving the suspect of food, clothing, sleep or medical attention, denying an accused access to counsel and questioning an accused for a prolonged period in an excessively aggressive and intimidating manner
- In *Oickle* the SCC analyzed the relationship between oppression and false confessions and acknowledged that a person may confess out of a desire to escape inhumane conditions created by authorities
- Justice Iacobucci suggested that false confessions could arise where the police use non-existent or fabricated evidence together with oppression to convince a suspect that her protestation of innocence is futile

(c) Operating Mind

The operating mind test of voluntariness focuses on the accused's state of mind at the time he or she makes the statement

- The causes for a lack of an operating mind include physical shock, lack of intellectual capacity, hypnosis, and self induced drunkenness
- In *R v Whittle* the accused was a schizophrenic who suffered from auditory hallucinations
    - The accused, in disregard of the consequences of speaking to the police, confessed in order to stop the internal voices which were telling him to unburden himself
    - Sopinka J noted that an accused need only possess a limited cognitive capacity to be fit to stand trial and the accused's fitness in this regard was undoubted
    - Concluded that there was no reason for a higher standard of competency in exercising the right to counsel before trial than during trial
        - Requires an accused to possess a limited degree of cognitive ability to understand what is said and whether or she is saying, to comprehend the caution and to understand that the evidence may be used in proceedings against him
- It is unnecessary for the accused to possess analytical ability to determine if the decision to speak with authorities is a wise one or is in her or his best interests
- The evidentiary burden to adduce sufficient evidence to raise the issue should be allocated to the accused

(d) Police Strategies, Tricks, and Misinformation

Appears to be two facets to the inquiry of police trickery – *R v Oickle*

(1) A court may exclude a confession where police trickery is so **appalling as to shock the community**
    - Ex; a police officer elicits a statement pretending to be a legal aid officer
    - Or injects truth serem into a diabetic

(2) Even if not rising to a shocking level, **the use of deception is a relevant factor in the overall inquiry into a statement of voluntariness**

- In *Rothman* Lamer J described the test's application
    - **There must be a clear connection between the obtaining of the statement and the conduct**
        - furthermore that conduct must be so shocking as to justify the judicial branch of the criminal justice system in feeling that, short of disassociating itself from such conduct through rejection of the statement, its reputation and, as a result, that of the whole criminal justice system, would be brought into disrepute
    - Judge should consider **all the circumstances of the proceedings**
        - the manner in which the statement was obtained
        - the degree to which there was a breach of social values
        - the seriousness of the charge, and
        - the effect that the exclusion would have on the result of the proceedings.
- The reformulated rule asks a trial judge to determine whether the accused made an informed choice to speak to the authorities and allows a trial judge to consider the principles of fairness to the accused and the repute of the administration of justice.
- Canadian courts are left to identify on a case-by- case basis those tricks which unacceptably contravene Charter values or violate the underlying principles of the administration of justice
- As noted in *Oickle* the use of fabricated evidence by the police is generally insufficient to render a confession involuntary

  - However, in *R v Wiegand,* the culmulative effect of "fabricated evidence" and oppressive circumstances raised a reasonable doubt as to the voluntariness of a confession
- Despite suggestion to the contrary in both *Rothman* and *Oickle* tricks related to certain religious practices have been upheld by the lower courts
  - The spiritualist, acting as a police agent, arranged a meeting with the prime suspect in a robbery and a shooting. The suspect agreed to a meeting, and engaged in certain ritualistic prctices and then confessed to the agent
  - The OCA agreed with the trial judge in admitting the statement, because there was no evidence the accused approached the agent in a religious sense
- The court in *Welsh* was similar but they commented that the decision did not stand for the proposition that the police are entitled to pose as spiritual advisors to obtain statements from suspects
  - The court warned that the police must proceed with caution and with respect for freedom of religion.

(e) Young Persons

***Section 146(2)* of the Youth Criminal Justice Act is an evidentiary provision which governs the admissibility of statements of young persons to persons in authority**

- In *R v H (LT)* the SCC was called upon to assess the extent to which a young person must actually understand the informational warning, as well as the standard of proof on the Crown to demonstrate compliance with s. 146
  - Majority said the purpose of s 146 is to protect adolescents who are "presumed on account of their age and relative unsophistication to be more vulnerable than adults to suggestion, pressure, and influence in the hands of police interrogators"
- What constitutes "reasonable efforts" will vary in each case and is to be assessed objectively
  - Relevant factors may include – level of sophistication, and other personal characteristics
- The crown must prove compliance with s 146 beyond a reasonable doubt
- Young persons need to be aware of the consequences of waiving their rights and of making a statement under s 146
  - They also must be aware of the possibility of being tried in adult court and the resulting implications with respect to stigma and penalty

(f) Taking Statements and Police Questioning

Due to the perceived lack of control over the interrogative processes, courts have cautiously reviewed any exchange of comments between an accused and a person in authority after the accused had been detained

- If police engage in extensive or intrusive cross examination – may render admission involuntary
  - For example; in *R v Durocher* the accused was cross examined a number of times after being told on each occasion his answers were not satisfactory
- Police may use more subtle forms of interrogation – such as a polygraph test, as a legitimate investigative tool
  - Failure to inform a suspect that the results are not admissible is less problematic than the fabricated information
  - Even if police exaggerate the accuracy, reliability or importance of the polygraph, it will not automatically render a confession to be involuntary
- No restriction on the police concerning a cooling off period between the polygraph test and the post test interview
- The SCC in *Oickle* commented on the growing practice of recording police interrogations
  - A recorded interview allows courts to monitor interrogation practices, the practice deters techniques that are likely to produce untrustworthy confessions, and an accurate and complete record enables courts to better assess voluntariness, which will have a salutary effect on the appropriate procedures
- The Ontario Court of Appeal indicated that it was inappropriate to rely upon the officers testimony with respect to an unrecorded statement elicited from the accused
- Where police fail to make a video or audio recording of a statement, the trial judge must determine whether the alternative means of recording the interview are sufficient to prove voluntariness beyond a reasonable doubt
  - If the police office is transcribing questions and answers, a complete record should be kept in order to reduce the suggestion that only the incriminating portions of an accused's responses were selected.

(g) Subsequent Tainted Statements

The admissibility of an accused's statement which has been preceded by an involuntary confession involves a factual determination based on factors designed to ascertain the degree of connection between the two statements

- The SCC has referred to this as the "**derived confessions rule**"
- Relevant factors include the time span between the two statements, the advertence to the previous statements during the questioning, the discovery of incriminatory evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the making of the two statements

- "if the threat or the promise under which the first statement was made still persists when the second statement is made, then it is inadmissible"
- There is no general rule that an involuntary statement renders all subsequent statements inadmissible on the ground the second statement was tainted by the first
    - A subsequent statement, however, would be inadmissible if either the tainting features which disqualified the first confession continued to the present or if the fact of the first statement was a substantial factor contributing to the making of the second semester
- **The Crown has the persuasive legal burden of proof to establish that any threat or inducement that had rendered the earlier statement inadmissible did not continue**

(h) Appellate review

The majority in *Oickle* held that since the determination of voluntariness is essentially a factual one, if the trial judge considers all relevant circumstances, an appellate court should only overturn the decision for some palpable and overriding error that affected the trial judges assessment of the facts

The Voir Dire

Requirement

Must be held whenever the Crown seeks to introduce a statement made by an accused to a person in authority

- A preliminary issue may arise whether or not the receiver of the statement is a person in authority
- Where the evidence discloses a close connection between the receiver of the statement and the authorities and there is some evidence that the receiver was acting as a person in authority, the trial judge should inquire whether the defence wishes to adduce some evidence
    - In these circumstances, the TJ may, on his own motion, direct a voir dire to determine the preliminary issue whether the receiver of the statement was, in the circumstances, a person in authority
- The accused or his counsel may expressly waive the necessity for holding a voir dire
- With respect to Mr. Big confessions, a voir dire is required to determine whether the Crown is able to satisfy the burden to show that the probative value of the confession outweighs its prejudicial effect

Procedure

In a voir dire, in the absence of the jury, the Crown calls witnesses who testify to the surrounding circumstances of the arrest and subsequent events culminating in the taking of the statement

- Focus is on the VOLUNTARINESS
- Generally, all witnesses involved in the taking of the statement must be called to testify concerning the surrounding circumstances
- The issue is whether the Crown has discharged the burden of proof in the context of the facts of a particular case that the statement was voluntary
- A practical evidentiary problem is whether the Crown should produce and file the statement as an exhibit or adduce the content of an oral statement during the *voir dire* proceedings
- The defence is entitled to cross examine the Crown's witness and to call witnesses, including the accused, on the *voir dire*
    - The question then arises whether the TJ or the Crown may ask the accused if the statement is true
- In *R v Declercq* the majority of the SCC held that though the issue on the voir dire was voluntariness and not the truth of the statement, the admitted truth or falsity of the statement was relevant to that inquiry
- After witnesses have been examined and cross-examined, counsel make final arguments and the judge rules on the admissibility of the statement
    - However, even when all the requirements for voluntariness are met, the judge still has a limited discretion to exclude the statement

Role of the TJ and ToF

- Admissibility of a confession is within the exclusive jurisdiction of the judge and ToF decides everything else (whether or not it is to be believed and the weight)
- The jury must be given an opportunity to review the circumstances of the confession so that it can assess the probative value of such evidence
    - However, it is inappropriate to instruct the jury that they need not worry about the voluntariness of a confession because it was establish at law in the voir dire
    - Such an instruction may be confusing, and is of no concern to the jury as voluntariness is in the exclusive domain of the trial judge

- Where there is an air of reality to a claim that a confession by the accused was false, it may be necessary for the trial judge to caution the jury about the phenomenon of false confessions, in order to dispel the assumption that nobody would confess to something that he or she did not do.
- Usually, the confession is introduced during the prosecution's case and Crown counsel will call witnesses who will attest to the making of the statement and its content
    - In practice, those witnesses will include many of the same people who testified during the voir dire and often they simply repeat what they said earlier
- A different issue arises when the accused contests the identity of the maker of the statement
    - 2 step process
        (1) The fact finder must determine the preliminary issue whether the Crown has established on a balance of probabilities that the statement is that of the accused
        (2) If the threshold is met, the trier of fact should then consider the contents of the statement along with other evidence on the issue of guilt or innocence
- The TJ must caution a jury where an individual, who is not a person in authority, obtains a statement from the accused by means of coercive tactics such as violence or credible threats of violence
- The TJ should instruct the jury that if they conclude the statement was obtained by coercion, they should be cautious about accepting it, and that little, if any weight should be attached to it

Onus and Standard of Proof

Crown has onus of proving voluntariness and it is beyond a reasonable doubt.

- Where an accused makes an out of court admission and then seeks to place an innocent interpretation on that statement at trial, thus creating a contest between two conflicting interpretations going directly to the ultimate issue, the accused is entitled to the benefit of the doubt if the jury believes the accused's evidence at trial or is left with a reasonable doubt as to its truth
- Where the person in authority requirement is in issue, the accused bears an evidential burden that will usually be met by demonstrating that the accused was **un**aware that he or she was speaking to the police or prosecuting authorities
    - Once met, the Crown bears the persuasive (legal) burden to establish beyond a reasonable doubt either that the receiver is not a person in authority, or that the statement was made voluntarily
- With the exception of Mr. Big confessions, and, arguably police investigations that are a variation of Mr. Big scenarios, under the common law confession rule, the Crown has the evidential burden and the persuasive (legal) burden to prove beyond a reasonable doubt that the accused's statement was voluntary.
    - In contrast, the accused has the evidential burden and persuasive burden to prove, on a balance of probabilities, a Charter infringement
        - The accused must also establish on a balance of probabilities that the admission of the evidence would bring the administration of justice into disrepute
- Confronted by the reality that the Crown will ultimately bear the burden of justifying reception of a Mr. Big confession, the state will be strongly encouraged to tread carefully in how it conducts these operations

Evidence Disclosed as a Result of an Inadmissible Confession

- Issue arose as to whether incriminating evidence discovered in consequences of an involuntary confession should be received
- In *R v Warickshall* - the accused was charged with accessory after the fact to theft
    - As a result of an improper inducement, she admitted where the stolen property could be found
    - The police found the property and sought to adduce it as evidence
- Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have derived
- An application alleging a breach of a right under the *Charter* and seeking a remedy under s.24(2) may be an alternative to the common law

In *R v Grant* the SCC held that the admissibility of physical evidence found as a result of a statement obtained in breach of a *Charter* right is determined by balancing the 24(2) factors

(1) The seriousness of the police conduct in obtaining the statement that led to the real evidence
(2) The impact of the breach on the *Charter* protected interests of the accused
(3) Society's interest in having the case adjudicated on its merits

- Where the discovery of the fact confirms the confession – that is, where the confession must be taken to be true by reason of the discovery of the fact – then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible
- The underlying principle is that the finding of the article simply confirms that fat of the accused's knowledge of where the article was located. The confession is therefore admissible for that purpose only

- It is not admissible to show that the accused said he or she put the articles where they were found, as the finding of them does not confirm the statement
- *R v Sweeney* – the COA held that the rule should be interpreted to give TJ's the discretion to exclude involuntary confessions notwithstanding later confirmation by the finding of the real evidence
- for example; anything found by the police before the confession cannot *ex post facto* confirm the confession
    - nor does the finding of "subsequent facts" confirm more than that part of confession which is directly connected with the discovery"

CHARTER IMPLICATIONS

- The right to silence, the confession rule, and the right to counsel provide an accused with the right to make a meaningful choice whether or not to confess
- The *Oickle* court also pointed out basic distinctions between the burden of proof under the *Charter* and the common law
    - For example, the confession rule allocates the evidential burden and persuasive (legal) burden beyond a reasonable doubt to the Crown for voluntariness, whereas if an accused alleges that the police violated her or his Charter rights, he or she has the evidential burden and legal burden (balance of probabilities) to prove a breach of the Charter and to prove that the infringement would bring the administration of justice into disrepute
- Finally, the court noted that the remedies under the 2 regimes are different.
    - Under s 24(2) of the *Charter,* evidence is excluded only if its admission would bring the administration of justice into disrepute.
    - In contrast, a violation of the confession rule always warrants exclusion

Charter. S 13

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence

(a) Automatic Protection

- Unlike section 5(2) of the Canada Evidence Act and many provincial provisions, the protection from the subsequent incriminating use provided by s.13 is automatic
- The majority indicated that the protection of s.13 applies whether the witness testified voluntarily or under compulsion in the **first proceedings**
- Problems arose when in later decisions, the holding in *Dubois* was taken out of context and extrapolated so that s. 13 protection was extended to cases where the witness testified voluntarily at **both** proceedings.
    - This goes beyond the intent of the provision

(b) In any Proceedings

- Section 13 applies where the incriminating statement was made in the context of a prior "proceeding".
    - The term prior proceeding should be given a large and liberal interpretation
- It would not, however, include an informal police investigation

(c) Incriminating Use

- In *R v Nedelcu* the SCC amended this definition to "evidence given by the witness at the prior proceeding that the Crown could use at the subsequent proceeding, if it were permitted to do so, to prove guilt"

i. Crown's Use in Cross-Examination

- In *R v Kuldip* Chief Justice Lamer drew a distinction between cross examination for the purpose of undermining the credibility of the accused and cross examination to prove the truth of the previous statements and so to incriminate the accused, holding that s 13 was not implicated in the former instance
- Using a prior inconsistent from a former proceeding during cross examination in order to impugn credibility of an accused does not, in my view, incriminate that accused person
- In *Calder* the Court said that when it made the distinction in *Kuldip* between the use of the testimony for the purpose of impeachment and use for the purpose of incrimination, it did not have to consider s 24(2) of the Charter and to address the effect such use would have on the administration of justice
- In *Calder* the court held that a statement obtained in contravention of the accused's s 10(b) Charter rights and excluded on that basis, could not be used for the limited purpose of impeaching the accused's credibility.

- If the accused did not tell the truth in the earlier court proceeding, that fact could be demonstrated by the Crown in the subsequent proceeding to show that the accused lacks credibility
- The result of the decisions in *Kuldip* and *Noel* was that where the Crown attempted to make use of the prior testimony apparently for the sole purpose of testing the credibility of an accused now testifying at his or her own trial, careful scrutiny had to be given to whether there was any realistic danger that the prior testimony could be used to incriminate the accused
- The SCC re-examined its s 13 jurisprudence in its unanimous 2005 decision in *Henry*

R v Henry
- Retrial of the accused who were convicted of first degree murder at their first trial
- Both accused testified at the first trial that they were involved in the events leading to the victims death, but relied on the defence of intoxication
- At the retrial, both accused again testified
- One accused continued to advance the defence of intoxication, but claimed he had no significant memory of events
- The other accused resiled from that defence and contended that the co-accused was responsible for the victims death
- Crown counsel cross-examined both accused on their testimony at the first trial, for the ostensible purpose of impeaching their credibility
- The SCC concluded that the cross examination did not constitute a breach of s 13

Accused persons who choose to testify at both their first and at their retrial are voluntary rather than compelled witnesses at both trials
- There is no compulsion and no quid pro quo involved in their testimony
- When they testify at their re-trial, even if they give evidence inconsistent with their testimony at their first trial, they are in no need of protection from being indirectly compelled to incriminate themselves
- In other words, what is important is whether the prior statement was compelled and not the use to which the prior testimony is later ostensibly put
- Underlying the Court's conclusion in *Henry* is a **clear policy concern**
    - The court acknowledged that to permit accused persons to tailor their testimony at successive trials by preventing exposure of contradictions in their accounts would call into question the credibility of the trial process, a result far beyond the intended prospective purpose of s 13.
- *R v Nedelcu*
    - ON his examination for discovery, he testified that he had no memory of the events
    - At his criminal trial, he gave a detailed account of the events
    - A majority of the SCC held that the accused was compelled for the purpose of s. 13 to testify at his examination for discovery
        - However, s 13 is directed not at any evidence he may have been compelled to give at the discovery, but to incriminating evidence, meaning evidence that the Crown could use at the subsequent criminal trial to prove his guilt

(d) <u>Any Other Proceedings</u>
- The protection afforded by s 13 applies to administrative proceedings only if they expose the individual to true penal consequences, such as imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large
- An issue that may be of diminished significance in light of the decision in *Henry* and its policy rationale concerns the different proceedings involved in a single criminal investigation
- In *R v Dubois* it was held that a re-trial on the same charge or an included offence constituted another proceeding for the purpose of s 13
    - This was affirmed in *R v Henry* although s 13 offered the accused no protection in that case
- Preliminary hearing and the trial constitute the same proceeding

(e) Who can Claim the Protection?
- The protection given by the evidence statutes and s 13 can be claimed onlmy by the witness for his or her own benefir, and not for the protection of a third person

Charter s. 7 – Right to Remain Silent

(a) Introduction

- Section 7 of the Charter encompasses a further constitutional right to remain silent that cannot be abrogated by statute
- The common theme uniting these elements is the idea that a person faced with the power of the state in the course of the criminal process has the right to choose whether to speak to the police or remain silent
- The right to remain silent has deep roots in the common law

(b) The Section 7 Right to Silence

- Supreme Court has held that a detained person has a pre-trial right to freely choose whether to speak to the authorities or remain silent
- The state is not entitled to override the exercise of choice to remain silent by a detainee
- The police may not use subterfuge to interrogate a detainee after he or she has asserted the desire to remain silent
- Placing an undercover police officer in the cell with a suspect who has expressly stated that he or she does not wish to speak to the police in order to solicit admissions, infringes that right
- An accused cannot rely on the right to silence principle where he or she voluntarily reveals information, knowing that it is being recorded for police purposes
- Like the right to counsel, **the right to silence can be waived**
    - In *R v Singh* – an accused who was under arrest for murder asserted his right to silence numerous times during the police interview
    - The officer continued questioning the accused stating that he had a duty to place all evidence before the accused
    - The accused eventually confessed
        - In a 5-4 decision, the Court held that the TJ properly ruled the statement was admissible
    - Justice Charron stated that the context of an interrogation of a detainee by an obvious person in authority, the confession rule subsumes the s.7 charter right to silence
- *Herbert* granted the police leeway to use "legitimate means of persuasion" in questioning a detainee who asserts his or her right to remain silent, meaning persuasion that does not denby the detainee
- Underlying the majority opinion in *Singh* is a clear policy concern that an individual's right to choose whether to speak to authorities must be balanced with society's interest in discovering the truth from the person who may be the most fruitful source of information
    - Justice Charron cautioned that where the police persist in questioning a detainee notwithstanding his or her assertion of the wish to remain silent, any resulting statement may be involuntary because it is not the product of a free will to speak

i. <u>When does the right to silence arise?</u>

- The right to silence outlined in *Hebert* only arose on arrest or detention because an adversarial relationship between the state and the individual commences at that point
- The common law right to silence exists at all times against the state, whether or not the person asserting it is within its power or control. Like the confessions rule, an accused's right to silence applies anby time he or she interacts with a person in authority, whether detained or not

ii. <u>Scope of the Right to Silence</u>

- Does compelling real evidence (blood, photographs, line-ups, fingerprints) amount to a breach of the s 7 right to silence
- The court, however, implied that s.7 could be applied to real evidence
- The majority of the SCC held that the taking of samples without authorization violated the accused's right to security of his person and contravened principles of fundamental justice
- Justice McLachlin in dissent, concluded that the right to silence protected by s.7 did not extend beyond testimonial evidence

iii. <u>The Mr. Big Strategy</u>

- With regard to section 7 of the Charter, the SCC in *Hart* came to the opposite conclusions
- In solo concurring reasons, the judge found that rather than requiring creation of a new common law rule of evidence, the appropriate way to address admissibility of Mr.Big confessions is to apply the principle against self incrimination under s 7 of the Charter
- *White* criteria – principle against self incrimination has been violated where a confession from a Mr. Big scenario meets the following
    (1) Whether there was an adversarial relationship between the accused and the state at the time the statements were obtained
    (2) Whether there was coercion by the state in obtaining the statement
    (3) Whether there was a risk of unreliable confessions as a result of any compulsion

(4) Whether permitting the use of the statements would lead to an increased risk of abusive state conduct

- For the majority in Hart, stated that s 7 of the *Charter* is not an appropriate basis for determination of admissibility of Mr. Big confessions because such confessions are not obtained while the accused is detained by the police
- In *Branch* the SCC held that the person called as a witness at an inquiry can successfully refuse to testify if the predominant purpose of the inquiry is to obtain evidence to incriminate that person

iv. Mental State of the Accused

- The common law confession rules require that a statement be the product of the "operating mind" of the suspect
- In *Whittle* – the accused told police of his involvement in various crimes including murder
    - According to the testimony of the defence psychiatrist, the accused was aware of what he was saying and what was said to him and the court process, but had been hearing internal voices in his mind telling him to unburden himself which left him indifferent to the consequences of his statements
- The SCC "operating mind" standard requires that the accused must have sufficient cognitive capacity to understand what he is saying, and what is being told to him, including understanding the caution that anything he says could be used against him
    - The court also held that this standard equally applies to the right to silence under s.7
    - The accused must have the mental capacity to make an active choice whether or not to speak to the authorities
    - The *Whittle* court held that the statements were admissible under s.7 of the Charter because the accused had sufficient understanding of what he was saying and the consequences
    - Thus, the mental capacity standard for the right to silence under s 7 stems directly from one of the underlying purposes of the right: the accused must have the opportunity to make an informed choice whether to speak to the authorities or not

Protecting an Accused's Privilege Against Self Incrimination and Right to Silence

(a) Any Duty Upon Police to Advise Accused of the Right to Silence

- In *Hebert* McLachlin implied that there was no duty on the police to expressly inform the accused of his or her right to silence, beyond the duty to inform that person of the right to counsel
- They need not, under s 7 of the Charter, tell the accused that he or she has a right to remain silent

(b) Commenting on the Accused's Failure to Testify

- Section 4(6) of the *Canada Evidence Act* prohibits a judge or counsel for the prosecution from commenting to the jury on the failure of the accused (or the accused's spouse) to testify
- The section does not prevent a judge or the prosecutor from commenting that the Crown's evidence is uncontradicted or is the only evidence on the matter or is undenied
- However, counsel for a co-accused may comment on the failure or the accused to testify or elicit evidence that the testifying co-accused did not give a statement o the police
    - Counsel for a co-accused may not, however, invite the jury to use the accused's silence at trial as evidence, especially as evidence of the accused's guilt
- s. 4(6) does not prevent a trial judge from instructing the jury that the accused has the right to remain silent at trial
- Such an instruction is appropriate where there is a realistic concern that the jury may place evidential value on an accused's decision not to testify
- The jury is entitled to draw such an inference of its own accord
- It cannot be said that, in the absence of a TJ's instruction on the issue, the accused is being penalized for exercising his constitutional right

(c) Inferences from Failure of Accused to Testify

- An interesting question arises where the trier of fact is a trial judge, not a jury
    - Is an adverse inference permissible from the accused's failure to testify in a judge alone trial
- It was argued before the SCC that the trial judge had improperly drawn an adverse inference from the failure of the accused to testify
    - Justice Sopinka for the majority in a 3-2 decision, held that the trial judge had not drawn an adverse inference from the accused's silence, but rather drew the inference from the fingerprint evidence itself
    - However, he stated that while she did not do so, the trial judge could properly have drawn an inference from the silence in a limited sense: if there is sufficient inculpatory evidence, the failure of the accused to provide exculpatory evidence through testimony may justify a finding of guilt
- There are however, limited permissible uses of silence by the trier of fact
    - Silence may be seen as the absence of an explanation which could raise a reasonable doubt

(d) The Right to Silence and the Co-Accused

- In *R v Crawford,* the SCC considered the right to silence in a situation where 2 co-accused were tried together
    - The appellant made no statement to police, but testified at trial 12 months later that the co-accused was responsible
    - The co-accused, on the other hand, did not testify, but had given a statement to police on his arrest that the appellant was responsible
    - At the joint trial, counsel for the co-accused cross examined the appellant on his pre-trial failure to make a statement to the police
- This case raised a conflict between two rights found within s 7 of the Charter
- He concluded that in order to make a full answer and defence, it is permissible for an accused to attack the credibility of a co-accused, which includes the right to cross examine on the pre-trial of the co-accused
    - "*an accused who testifies against his co-accused must accept that his credibility can be fully attacked by the latter. The accused who has incriminated a co-accused by his testimony cannot therefore rely on the right to silence to deprive the accused who is implicated by his testimony of the right to challenge that testimony by a full attack on the credibility of the former including reference to his pre-trial silence*"
- Justice Sophinka outlined 5 points that the jury should be told

(1) The co-accused who has testified against the accused had the right to pre=trial silence and not to have the exercise of that right used as evidence as to innocence or guilt
(2) That the accused implicated by the evidence of the co-accused has the right to make full answer and defence including the right to attack the credibility of the co-accused
(3) That the accused implicated by the evidence of the co-accused had the right, therefore, to attack the credibility of the co-accused by reference to the latter's failure to disclose the evidence to the investigating authorities
(4) That this evidence is not to be used as positive evidence on the issue of innocence or guilt to draw an inference of consciousness of guilt or otherwise
(5) That the evidence could be used as one factor in determining whether the evidence of the co-accused is to be believed. The failure to make a statement prior to trial may reflect on the credibility of the accused or it may be due to other factors such as the effect of a caution or the advice of counsel

(e) Disclosure of an Alibi

- As part of the right to silence, the accused is under no obligation to disclose to the Crown that it will be relying on an alibi defence
- However, if timely disclosure is not made, the accused runs the risk that the Crown may use this fact to attack the credibility of the alibi

(f) Evidentiary Effect of the Accused's Silence in the Face of an Accusation from a Person in Authority

- Allowing direct evidence of the accused's failure to assist the police in their investigation or failure to five a timely explanation to the police can compromise the accused's right to remain silent
- Therefore, as a general rule, such evidence is not permitted
- In *Chambers,* a defence wasn't raised until the defence has his second trial, which was held over 5 years after the charge was laid
    - The TJ, allowed the Crown counsel to cross examine the accused as to why he had not raised the defence prior to that time and in particular at the time of his arrest
    - Objections were taken to this line of questioning and both counsel subjectively agreed that the trial judge would direct the jury to ignore the questions and answers
- As a matter of logic, failure to raise a defence until the 11th hour, is relevant in assessing its merit
- The SCC specifically held in *Turcotte* that an individuals silence in the face of police questioning will rarely probative of guilt
    - The rare exceptions include, in addition to the failure to make timely disclosure of an alibi, where the defence raises an issue that renders the accused's silence relevant, or where the accused's silence is inextricably bound up with the narrative

(g) Refusal to Submit to Psychiatric Examination

- Where the accused puts in issue his or her mental state at the time of commission of the offence, the Crown may adduce evidence that the accused refused to speak to a psychiatrist retained by the prosecution

Admissions in Criminal Proceedings

- Not necessarily a full confession – but an agreement on the facts so as to avoid litigating and proving agreed upon facts
- Criminal Code s.655 Specifically authorizes an accused to admit facts alleged against him

- *Section 655*: Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

- The Crown cannot refuse to accept the admission on the basis for wanting to keep an issue alive to introduce new evidence (Procter)
- It can refuse to accept an admission where the defence is trying to recast the facts that the prosecution seeks to prove and trying to admit its version
- It probably cannot refuse to accept an admission where the facts are the same as articulated by the Crown (S-R(J))
- Admissions are also different than pre-trial statements→ pre-trial statements are a hearsay exception that can be admitted but not for the truth of their contents – admissions are admitted for the truth of their contents

GUILTY PLEAS

- The most common means by which an accused admits facts (and arguably law) is by way of a guilty plea
- A GP constitutes an admission of all of the essential elements of the offence (but nothing more)… e.g. does not necessarily constitute an admission of the manner in which the offence was committed or the injuries caused
- Under s. 606 of the criminal code, a GP must be
  (1) Voluntary
  (2) Unequivocal (not confusing or uncertain)
  (3) Informed

CHARACTER EVIDENCE

1. **Has A put her good character in issue by expressly or implicitly asserting that she would not have done the things alleged against her b/c she is a person of good character?**
   a. **A can put character in issue by offering general reputation evidence from other witnesses (***Rowton***)**
      i. It must be general reputation evidence in the community → but "community" is not limited to residential community. Any relevant community that knows A well can be the source of general reputation evidence (*Levasseur*)
      ii. This is limited to general reputation – the witness cannot be questioned about specific acts
      iii. On CE, the defense can say "are you aware that A was (insert bad thing here)? i.e. do they know enough about A to actually give the evidence.
      iv. For certain types of offenses, general reputation evidence will not be very persuasive. (*Profit*)
      v. Cannot ask the witness if they would believe A on oath.
   b. A can put her character in issue by testifying on the stand to her good character
      i. A is not limited to general reputation evidence – can speak to prior good acts
      ii. If A is speaking about specific good acts, the Crown can CE about specific bad acts (*McNamara*)
      iii. The Crown in CE cannot induce A into putting his character in issue (*Bricker*)
      iv. If A puts character in issue, s.666 of the CC applies and it's broader than s.12 of the *CEA*.
   c. A can put character in issue by adducing expert evidence to show that she does has/does not have the particular trait that the perpetrator would/would not have
      i. Initial Threshold for expert evidence (*Mohan*): to even be considered potentially admissible, psychiatric evidence must be a) relevant to an issue, b) of appreciable assistance to the trier of fact (PV), and c) otherwise unavailable to layperson
      ii. It must also pass the expert evidence rules (i.e. qualified expert)
      iii. **Test**: Expert evidence of character can be admitted if TJ is convinced that either the perpetrator or A has distinctive behavioral or psychological characteristics such that the comparison of one with the other would be of material assistance in determining guilt or innocence (*Mohan*)
      iv. "Evidence that the offense had distinctive features which identified the perpetrator as a person possessing unusual personality traits constituting him a member of an unusual and limited class of persons would render admissible evidence that A did not possess the personality characteristics of the class of persons to which the perpetrator of the crime belonged." (*Robertson*)
      v. A "mere disposition for violence" is not uncommon enough to constitute a feature characteristic of an abnormal group. (*Robertson*)
      vi. *Mohan*: people of all backgrounds commit assaults on young women – not distinctive enough
      vii. Note: if the Crown wants to put in this kind of evidence, it has to meet the SFE test!
   d. A can also implicitly put her character into issue; can be deemed to have put her character at issue
      i. A can deny allegations and explain defenses without putting character in issue. However, if A implicitly suggests that she is not the type of person to commit the offence, character has been put into issue (*McNamara*)
      ii. Example: A saying he had been earning an honest living = character evidence (*Baker*)
      iii. Example: A giving examples of times he returned lost property = character evidence (*Samuel*)
      iv. Example: A says he has never been convicted or arrested = character evidence (*Morris*)
   e. **A also puts character in issue if they attack the character of a 3rd party** (*Scopelliti*)
      i. In offering bad character evidence of a 3rd party, A is tacitly suggesting she is a better person
2. **If A has introduced evidence of her good character, she is entitled to a charge to the jury that the jury may infer from**

that evidence that A is not the type of person that would commit the offence (*Loggocco*)

3. **If A has introduced evidence of her good character, the Crown can then rebut with bad character evidence**
   a. **The Crown can CE the witness giving the general reputation evidence or A**
      i. The Crown can cross-examine on specific bad acts (*McNamara*)
      ii. The Crown cannot attack every aspect of A's character – only the part that A brought up
   b. **The Crown can adduce evidence of general bad reputation in the community through witnesses**
      i. This does not include evidence of specific acts and cannot be personal opinion (*Rowton*) A cannot call witnesses to testify about specific good acts but they can testify about them themselves.
         1. But the Crown can then CE A on specific bad acts.
      ii. But on CE you can bring out a bad thing and ask if the witness knows about a particular bad instance. It brings out the bad fact anyway; the trier of fact hears it.
   c. **Crown can prove prior convictions of A**
      i. If A puts her character in issue, the scope of CE on the criminal record permitted by s.666 goes beyond that allowed under s.12 of the *CEA*. Since the CE under s.666 is predicated on A having put their character in issue, A may also be questioned about the specifics underlying the convictions. The crown can enter the entire criminal record into evidence, subject to the residual discretion.
   d. **The Crown can bring expert evidence saying A shares characteristics the perpetrator must have had** (*Tierney*)
      i. Note: *Morin* – Crown tried to do this but A had not yet put character in issue
4. **All of the Crown's rebuttals are subject to the residual discretion!**

- Character evidence is subject to a number of exclusionary rules
  - The basis for excluding it is not on the basis that it is irrelevant – it is because the risk of prejudice is too great
  - But there is a danger that the prejudicial impact will make someone want to convict or find against someone even if the case is not well founded, we do not trust juries to distinguish between someone that they think deserves punishment versus someone who is guilty of a specific thing
- As such, the only reason to admit character evidence is to prove some other issue to which character is relevant → character is **always a circumstantial evidence** of some other fact in issue
- As a general rule, evidence of the accused's **good character** is admissible on the issue of innocence or guilt, provided that the trait relates to a relevant issue (*R v Tarrant; R v Kootenay*) – but you have to be careful…
- Generally speaking the Crown cannot adduce evidence of the accused's **bad character**, unless the accused has put his/her own character at issue – then the Crown can adduce evidence of bad character (Sopinka p. 614)

Evidence of Good Character – how Can it Be Admitted? (3 ways)

(1) By adducing evidence as to his or her good reputation, either by cross examining a witness called by the Crown, or by eliciting such evidence during the examination in chief of a witness called by the defence
(2) By personally testifying as to specific acts of good conduct
(3) By calling expert opinion evidence as to disposition

(1) Reputation

- The evidence **cannot** be an expression of **the witness' own opinion** of the accused character
- The witness must therefore have **knowledge of the accused's reputation in the community** with respect to the character trait in question *R v Demyen*
  - Cannot testify to his personal opinion of the accused's reputation or to observations he made of certain conduct of the accused tending to show good character – *Profit*
- The accused can adduce evidence of reputation of his or her good character by cross examining witnesses called by the prosecution
- The witness may not be asked whether in light of the accused's reputation, he or she would believe the accused under oath
- Reputation evidence can only be rebutted by Crown evidence of bad reputation, **not** specific acts of bad conduct
- In sexual assault cases, the TJ may consider that sexual misconduct occurs in private and will likely not be reflected in community reputation. This goes to diminished (*Profit*)

(2) Specific Acts

- Obviously accused cannot testify as to their own reputation**, so they can testify in regards to acts they have done that may speak to their character**
- Aside from introducing permissible evidence of good character by relating specific acts which portray him or her in a good light, an accused puts his character in issue by any evidence that projects the image of a law abiding citizen

  - May be in the form of the accused's own comment on his disposition with respect to a relevant trait
- **Determining whether the accused has put his or her good character in issue is important, ,because it can open the door to rebuttal evidence by the Crown of evidence of bad character**
- The accused puts his or her character in issue by evidence of his or her own specific past conduct or acts, such as
  - Never having been arrested
  - Earning an honest living for four years
  - Receiving professional awards
  - Returning lost property to owners on two previous occasions
  - Claiming to think that his activities were legal
- The accused does not give evidence of good character or put character in issue merely by denying guilt and repudiating the Crown's allegations
- It is sometimes difficult to determine when an accused is giving evidence of good character as opposed to simply meeting the substance of the prosecutions case or giving background information
- Clear cases of putting character in issue are those where the accused states or suggests that he or she has never been arrested for or convicted of an offence
- In other cases, character is not so obviously placed in issue
  - For example *R v McFadden,* an accused charged with a murder occurring during the course of a sexual assault denied the offence, stating that he had "the most beautiful wife in the world"
  - The court accepted that the effect of this statement was that the accused had a good character for sexual fidelity and that he had, therefore put his character in issue

(3) Expert Opinion Evidence

- The accused may also **adduce psychiatric evidence to prove a distinctive disposition making the carrying out of the crime by him or her less probable**
  - However, this opinion evidence with respect to disposition is **limited to certain traits**
- Ex; calling psychiatric evidence to prove that did not have requisite intent showing he had a particular defence mechanism that made him react violently to homosexual behaviour – *Lupien*
- *R v Mohan* – a unanimous Court rejected the language used in previous cases which had held that evidence regarding "abnormal" character traits could be admitted
  - The court stated that the term "abnormal" imported a value judgment on the lifestyle of individuals who shared a particular kind of distinctive characteristic
  - The court in *Mohan* proceeded to set the following threshold for the admission of this kind of character evidence:
    - "has distinctive behavioural characteristics such that a comparison of one with the other will be of the material assistance in determining innocence or guilt"
    - "has the scientific community developed a standard profile for the offender who commits this type of crime"
- The limitations on calling expert psychiatric evidence are **sensible because they prevent criminal trials from becoming a battle of the experts relating to the accused's propensities**
- It seems that unclear, it seems that expert psychiatric evidence cannot be adduced by the defence solely for the purpose of bolstering the credit of the accused
-

Overall

- Evidence of an accused's good character is relevant to support an inference that the accused is unlikely to have committed the offence charged, to support the accused's credibility as a witness and to negate a mental state required for the crime
- The character evidence must, however, be relevant to the particular charge
- The weight attributed to evidence of good character may depend on the particular crime with which the accused is charged

Inadmissible on Behalf of the Crown

Character evidence tendered by the Crown whose only purpose is to show that the accused is the type of person likely to have committed or is capable of committing the offence is inadmissible

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Rationale: such evidence may be relevant, but it overly prejudicial; jury may convict accused simply because he is a bad man, deserved punishment for past behaviour, or must have committed the offence even if the Crown can't prove it; Additionally, there are concerns over consumption of time, distraction from the main issue, and unfair surprise.

Bad Character of the Accused

Usually relevant, but dangerous because the character of the accused is not a fact in issue. A crown cannot introduce evidence on the accused's bad character and argue that based on their character, they are likely to have committed the offence

- The Crown is not permitted to adduce evidence of the accused's bad character either by evidence of reputation or specific acts
- To expose the accused to such cross examination would be unfair because of the concern that a jury may give such evidence undue weight on the issue of guilt or innocence
    - On the other hand, it would be unfair to the Crown to confer complete immunity to the accused from such questioning, particularly where an accused is relying on an unblemished character which he or she does not possess
- In *R v T (J.A)* the Ontario CA identified **why bad character evidence was prejudicial to the accused**
    1) - The jury may assume that the accused is a bad person, thus likely to be guilty of the offences charged
    2) The jury may tend to punish the accused for the extrinsic misconduct by finding them guilt
    3) The jury may become confused by the evidence and their attention may be deflected from the main purpose of the trial

When is it admissible?

(1) The Crown may adduce evidence of bad character of the accused, where the accused has put his or her character in issue
(2) The evidence may also be admissible as part of the Crowns case if it is **relevant to an issue at trial and the probative value outweighs its prejudicial effect**
    - Evidence of discreditable conduct occurring after the commission of the charged offence is admissible, and is subject to the same test of whether the probative value of the evidence exceeds its prejudicial effect
    - Temporal connection will be considered by the TJ
(3) Bad character evidence is routinely and necessarily admitted where accused are charged as a result of Mr Big scenarios
    - A Mr. Big investigation will yield evidence of bad character because the scenario created is designed to elicit a confession by the accused to a specific crime by inviting the accsued's participation in other crimes
    - The SCC addressed the issue of admissibility in *Hart* and created a new common law evidence rule – **probative value of the accuseds confession must outweigh the prejudicial effect**
(4) Similar fact evidence
(5) Credibility of accused

Accused Put Character in Issue

- No rule of policy prevents the accused from raising evidence of his or her own bad character
    - For instance, the defence may wish to raise the accused's criminal record in examination in chief in order to soften the impact of such evidence if it was introduced by the Crown
- The accused's protective shield cannot be removed
- Where the accused puts his character in issue, the Crown is entitled to refute the good character evidence with evidence of bad character
- The crown may refute the evidence of good character by
    (1) Cross examining the accused
    - Crown can cross-examine people who have been brought in to testify to the accused's reputation or history about that reputation or history and ask questions that challenge it (e.g. past criminal record, specific bad acts) (*R v B; R v A [1979] CA; R v Bracewell [1978] CA*)
    - Goes to witness's actual knowledge of the reputation and to credibility

    (2) Cross examining any witness called by the defence
    - If the accused offers a self-opinion there is not much the Crown can do – not much to ask about it
    - If the accused gives specific acts of good conduct, then the Crown gets a much broader capacity – they can bring in all sorts of evidence about specific bad acts (*R v McNamara (No. 1)* [1981] ONCA)

    (3) Tendering rebuttal evidence

- Only admissible on the issue of credibility of prior evidence
- At most you can neutralize the impact of evidence that has been provided, this cannot be the basis for inferences of guilt or innocence (*McNamara (No. 1)*)

Extrinsic Reply Evidence by the Crown Where Character is in Issue

- The reply evidence of bad character rebuts good character evidence
  - Thus, bad character evidence is admissible to neutralize the good character evidence and is also relevant to the accused's credibility, but subject to certain exceptions, such evidence is not admissible on the issue of guilt or innocence
- The policy behind this is that the court should not be misled by being left with the impression that the accused enjoys a certain character, when, in fact, he or she does not possess such a character at all
- Trial judges are permitted to vary or revoke orders due to a material change in circumstances

Relevant to an Issue at Trial

- Keep in mind the overarching rule of probative value vs. prejudicial effect
- Categorizing evidence is important: labels matter
- It all comes down to relevance – is there another purpose to it?
- If its not being introduced to merely show that the accused is the type of person to commit the offence (prohibited chain of reasoning – bad person = guilty person), but has another purpose…. It is admissible
  - It has to show more than the accused is of questionable morality/has a general propesntiy for violence
- So when is it relevant to an issue at trial?
- Evidence of **motive**
  - Affairs
  - Drug debts
  - Drug deals
  - Gambling debts
  - Deportation order
  - See *R v Carroll 2014*
- Necessary for **narrative**
  - Gang member
  - Drug deals
- Necessary to explain **the relationship between parties**
  - Human trafficking
  - Gang members
  - Drug dealer/customer
  - Questionable moral character of place of meeting

Mr. Big Situations

- Bad character evidence is routinely and necessarily admitted where accused are charged as a result of Mr Big scenarios
  - A Mr. Big investigation will yield evidence of bad character because the scenario created is designed to elicit a confession by the accused to a specific crime by inviting the accsued's participation in other crimes
  - The SCC addressed the issue of admissibility in *Hart* and created a new common law evidence rule – **probative value of the accuseds confession must outweigh the prejudicial effect**

Credibility of Accused

- Evidence of the accused's disreputable lifestyle may be relevant to credibility in some cases
- Section 12 of the Canada Evidence Act
  - Fact of the record
  - Date
  - Identity of the crime
  - Penalty
  - NOT details of the offence
- Corbett Application – TJ has discretion to exclude certain entries
- For the purpose of credibility only – must be a jury instruction

Section 666 Criminal Code: Proving Prior Convictions

666. Where, at a trial, the accused adduces evidence of his good character, the prosecutor may, **in answer thereto**, before a verdict is returned, adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed.

- An accused may put his or her character in issue during examination in chief or cross examination by answers which expressly or by implication indicate that he is not the sort of person who would have committed the offence alleged
- If an accused puts his character in issue during examination in chief – the scope of cross examination goes beyond that allowed under s 12 of the Canada Evidence Act
    - Since the cross examination under s. 666 is predicated on the accused having put his character in issue, the accused may also be questioned about the specifics underlying the criminal conviction
- However, some convictions may lack sufficient probative value
- Section 666 is broader than s. 12 of the CEA because **it applies whether or not the accused testifies and permits the Crown to adduce the facts underlying a particular conviction**

Section 12 – Canada Evidence Act

12 (1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment.

Proof of previous convictions

12 (1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

How conviction proved

12 (2) A conviction may be proved by producing

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and

(b) proof of identity.

NOTE: Only allows you to bring in offence, jurisdiction and penalty, **not** circumstance, explanation, etc. (very limited)

- Evidence of previous convictions admitted under s. 12 goes only to the accused's credibility as a witness
- The jury must be properly instructed
- A non exhaustive list of factors to be considered by the TJ in the exercise of this discretion
- The factors are:

(1) The temporal proximity of the previous conviction to the present charge
(2) The nature of the previous conviction
(3) The fairness to the prosecution of exclusion following an attack by the accused on the credibility of Crown witnesses
(4) The seriousness of the prior conviction
(5) Length of the criminal record

Cross Examination of an Accused Where Character is Not in Issue but Evidence of Discreditable Conduct is Relevant to an Issue in the Trial

- Evidence of discreditable conduct is admitted on this basis because it is relevant to **motive**
    - Examples include
        - Accused was having an affair at the time of his wife's death, admitted to show motive to kill her
- Similarly, evidence of the accused's bad conduct on other occasions may be admitted because it is relevant to explain why the victims of the alleged offence continued to associate with him or her
- Sometimes evidence of other bad acts by the accused is admitted because it provides necessary backgrounds or narrative to the alleged offence
- THIS HAS A POTENTIAL FOR MISUSE AND SHOULD BE APPLIED WITH CAUTION

CHARACTER OF PERSONS OTHER THAN THE ACCUSED

Bad Character of Co-Accused

- The rule which prevents the Crown from leading evidence of bad character **does not apply to an accused leading evidence of bad character to a co-accused**
    - As long as such evidence is logically relevant to the defence of the accused
- For example; where 2 accused are charged with an offence of violence, one accused may seek to adduce evidence of the co-accused's violent disposition, to raise a reasonable doubt about his own guilt on the basis that the evidence suggests a propensity on the part of the co-accused to commit the offence charged
- The trial judge should weigh the probative value of the evidence to support the accused's defence against the prejudicial effect of the evidence to the co-accused
    - It must be remembered that the balancing of probative value and prejudicial effect is different where the evidence is tendered by the defence rather than the Crown
- *R v Pollock* – it is not enough for counsel who wants to lead evidence of the co-accused's bad character to simply assert that it is necessary for his or her client to make full answer and defence
    - They must lay an evidentiary foundation for that assertion, either through evidence of the Crown's witnesses or during the defence case

Character of Deceased

- An accused may be permitted to introduce evidence of the deceased's propensity for violence
    - Accuseds persons often introduce such evidence in a homicide prosecution by putting forward a defence of self defence or provocation
- The accused can prove such disposition by
    (1) Evidence of reputation
    (2) Proof of specific acts
    (3) Evidence of the deceased criminal record
    (4) Expert opinion evidence of disposition
- Such evidence is admissible to show the accused's reasonable apprehension of violence from the deceased when that state of mind is a relevant issue
- Then the evidence is relevant to show the probability of the deceased having been the aggressor or having provoked the accused and to support the accused's evidence that the deceased was the aggressor

Character of a Third Party Suspect

- So long as the evidence is relevant, there is a sufficient nexus between the third party and the offence, and the evience is not otherwise excluded by a rule of evidence, evidence of the bad character of a third party can be adduced by the defence
- For example; *R v McMillan* – the accused, charged with the murder of his child, was entitled to adduce psychiatric evidence of his wife's personality in order to prove that she was more likely than he to have committed the offence
- A unanimous SCC held the evidence that the witness had a propensity for violence was admissible for the purpose of proving that the witness, rather than the accused, committed the crime
    - This is because there is no danger of a wrongful conviction because the witness is not on trial
- The Crown may be entitled to adduce rebuttal make up, so long as the character evidence is relevant and it is proper rebuttal evidence

Character of Complainant in Sexual Offences

- Former common law was viewed as being traumatic to the point that complainants would appear to be on trial, and it inhibited complainants from wanting to report crimes
- In response to changing social attitudes, Parliament enacted legislation (s. 276 and 277)
    - S 277: evidence of sexual reputation is not admissible for the purpose of attacking or supporting the credibility of the complainant
- Section 276 was struck down by *R v Seaboyer* and *R v Gayme* on the basis it was inconsistent with ss 7 and 11(d) of the Charter
- The court laid down guidelines as to what evidence of past sexual activity by the complainant was admissible

(A) Specific instances of sexual conduct tending to prove a person other than the accused caused the physical consequence of the rape alleged by the prosecution
(B) Evidence of sexual conduct tending to prove bias or motive to fabricate

(C) Evidence of a pattern of sexual conduct so distinctive and so closely resembling the accused's version of alleged encounter to prove the victim consented
(D) Evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove the accused acted reasonably that the victim was consenting
(E) Evidence tending to rebut proof introduced by the prosecution regarding the victim's sexual conduct
(F) Evidence that the victim had made false allegations of rape

- Parliament enacted a new exclusionary rule under s.276(1) which creates a general exclusionary rule that evidence that the complainant has engaged in sexual activity, whether with the accused or a third party, **is not admissible to support an inference that the complainant is more likely to have consented**
- 276(2) enacts a rule of limited admissibility and a three fold admissibility test of evidence of sexual activity

(1) The evidence is of specific instances of sexual activity
(2) The evidence is relevant to an issue at trial
(3) The evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice

Character of Witnesses in General

- No policy rule excludes relevant evidence of the bad character of an ordinary witness led by the accused
- The credibility of an ordinary witness can be impugned in a number of ways, including those tending to prove the witness' bad character by evidence of disposition or past acts of misconduct

Previous Convictions

- A witness for the Crown, but not the defence, many also be cross examined on an outstanding charge because it may show a motivation for the witness to favour the Crown
    - Ex; jailhouse informants

Oath helping

- Evidence of good character of a witness for the purpose of bolstering the credibility of the witness is not admissible

Oath helping evidence is inadmissible in modern times because questions of credibility are the province of the triers of fact who are in as good a position to determine the credibility of witnesses appearing before the court as the "oath helpers

When Bad Character is Typically Used

- In most cases, the good or bad character of the accused is not a fact in issue with respect to the innocent or guilt of the accused
- Three exceptions to character as a fact in issue deserve mention
    1. Dangerous offender designation
    2. Crown is allowed to adduce evidence in relation to the defence of not criminally responsible in certain circumstances
    3. Defence of entrapment

SIMILAR FACT EVIDENCE

Introduction

Evidence of true similar fact are proven facts that the accused acted in such a manner on other occasions from which an inference may be draw that he or she acted in a similar way on the occasion in dispute. PRESUMPTIVELY INADMISSBLE

Relevance – may indicate the repetition of acts which are unlikely to have resulted from coincidence.

- The onus is on the prosecution to show the **probative value** outweighs the **prejudicial effect**
- There are may ways to adduce evidence of bad character, such as general reputation evidence, specific incidents of misconduct, evidence that shows a "unique trademark" or "signature" of the way the accused has committed the same or similar crimes on another occasion, if the probative value outweighs the prejudicial effect
    - Needs to have a **high degree of similarity** between the evidence of the commission of the crime and the similar act

        - If it is likely it was committed by the same person = ordinarily admissible
            - Depends on degree of distinctiveness or uniqueness
- The evidence must be tendered to prove the existence or non-existence **of a material fact or matter in issue** otherwise it is inadmissible
    - Not admitted for credibility purposes
- The so-called SFR applies where **the Crown of a party proffers evidence of discreditable conduct of the accused or opposite party on other occasions as evidence of the probability that he or she did or did not perform the act which is alleged or have the requisite state of mind**
- In *R v Sweitzer* the SCC adopted the principal approach that admissibility was governed by weighing the probative value of the evidence against its prejudicial effect
- In *R v Handy* the SCC reconciled the conflicting interpretations and theories on similar factrule and set out a coherent framework on how to apply it
    - In short, *Handy* provides a principled and functional framework to determine the admissibility of similar fact evidence
- Similar fact evidence is **presumptively inadmissible** because of its potential to prejudice a fair trial
    - "similar fact evidence is presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs the potential prejudice and thereby justifies its reception
- Where similar fact evidence becomes more focuses and specific to circumstances similar to the charge, the probative value of the evidence becomes more cogent
- There are different ways a party may adduce evidence of bad character
    - The crown or a party may adduce expert opinion
    - General reputation evidence
    - Specific incidents of misconduct on other occasions
    - Evidence of the possession of documents or tings or past associations
- If the proffered character evidence does no more than show that the accused is the type of person likely to have committed the offence or its only relevant is that he or she has a mere propensity to commit offences of this nature, the evidence is inadmissible since it lacks probative value and its potential unfair prejudicial effect is too great

SCOPE:

Applies to discreditable conduct and does NOT apply to evidence which does not show discreditable conduct

- The question arises as to what constitutes discreditable conduct
    - In some cases, the answer will be obvious
    - I others, it will depend on the nature of the prior conduct, the offence charged, other surrounding circumstances, and the proposed evidential use of the evidence
        - Ex; in *Morris* the possession of the newspaper clipping was neither illegal nor immoral, but its evidential significance in the context of other circumstances was to show the accused's participation in an illegal drug conspiracy
- Because SFE is **circumstantial evidence**, its relevance is dependent upon the inference to be drawn, and the issues sought to be proven in the context of the specific facts of a case
- Evidence of true similar acts are proven facts that the accused acted in such a manner on other occasions from which an inference may be drawn that he acted in a similar way on the occasion in dispute
- Similar fact evidence may indicate the repetition of acts which are unlikely to have resulted from coincidence
- SFE may consist of evidence of non-similar acts or facts which show the accused <u>may have a disposition likely to be possessed by the perpetrator</u>
- SFE may include evidence which is not similar to the facts or events of the alleged crime and may include evidence of an accused disposition
    - It is only when the evidence is of such a nature that the similar fact rule need to be considered
    - SFE evidence is admissible if it is relevant to a material issue in the case and the probative value of the evidence outweighs its prejudicial effect

RELEVANCY AND MATERIALITY OF SFE

- Evidence of the accused's good character is relevant to his or her credibility and to the probability that the accused did not commit the prohibited act
- Relevance has two components

(1) Materiality
(2) Probative Value

- **Relevance** is not a legal concept
    - It is a rational method of fact finding based on logic, common sense, and experience

  - The term relevance is concerned **with the relationship between the proffered evidence and the issues in the case that the proponent of the evidence is advancing**
  - Probative value → relevant evidence must have a tendency to make the existence or non-existence of any fact that is material to the determination of the case more probable or less probable than it would be without the evidence
- **Materiality** is a legal concept
  - It is determined by reference to the substantive law, the adjectival laws of procedure and evidence
- The Crown or party in a civil proceeding must identify the material issues in dispute, and the purpose for which the similar fact evidence is tendered in order to determine if it is relevant to a material issue
- A simply test to determine is the proffered evidence is relevant is to ask "**what inference is sought to be made from the proposed evidence and whether it has some tendency to advance the inquiry before the court**"
- There must be some evidence of a nexus between the accused and discreditable conduct on other occasions
- The SCC in *Handy* held that identifying credibility without more as the issue in question is too broad a gateway for the admission of propensity evidence

Inferences and the Reasoning Process

Evidence of character means the disposition or tendency or a person to act or think in a particular way or a persons trait or group of traits or her or his actual moral or physical disposition

- Assuming relevancy, when evidence of discreditable conduct (Fact A) is proffered as an evidentiary fact to prove another fact (Fact B), Fact A is not direct evidence of the existence or non-existence of Fact B
  - Rather, Fact A is circumstantial evidence which required one or more inferences to be drawn in the context of other facts to prove Fact B
- **Propensity reasoning** requires two or more inferences to be drawn from the evidence of discreditable conduct
  - Upon proof of acts or omissions on other occasions than that which forms the basis of the charge (Fact A), it is inferred that the accused has a propensity to act or think in a particular way (Fact B), from which it is further inferred that the accused acted in conformity with his or her propensity on the specific occasion in question (Fact C)
- in many cases, the probative value of the SFE rests on the capability to draw the intermediate inference from the evidence
- The probative value of SFE is sometimes based on one or more of the following premises
  (1) A persons conduct on other occasions is a reliable of future behaviour
  (2) The relevant character trait or propensity is identifiable and it has been correctly identified in the subject case
  (3) The person acted in accordance with her or his character trait or propensity on the day in question

Propensity and Non-propensity Reasoning

Previous Convictions

- An accused may be cross examined on previous unlawful acts resulting in a conviction
- There is a risk, however, that the trier of fact will use the evidence of the criminal record for the wrong purpose
  - May misuse the evidence by reasoning that because of the accused or a partys criminal record, he is the type of person who is more likely to commit a crime or is deserving of punishment

Incidental Crimes

- Example of a stolen vehicle and then a robbery with the stolen vehicle and the police find fingerprints of an individual in the car, can they assume he did the robbery too?
- There remains a risk that the jury may be prejudiced against the accused because proof of the car theft shows he or she is a dishonest person and should be punished

Evidence of Reputation

- It is unlikely the Crown could lead evidence of the accused's bad reputation in the community because the evidence is too general and it would not have sufficient probative value to outweigh its prejudicial effect

Expert Evidence

- Admissibility of expert evidence is governed by the following – *Mohan*

(1) The evidence is relevant to a material issue in the case
(2) The evidence is not excluded by a policy rule
(3) The evidence falls within the proper sphere of expert evidence
(4) The witness is a properly qualified expert

- Before an experts opinion is admitted, the TJ must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has **distinctive behaviour characteristics** such that a comparison of one with the other will be of material assistance in determining innocence or guilt

Possession of Documents or Things

- The possession of documents or things, such as possession of child pornography or possession of controlled substances is relevant direct evidence of an element of an offence
    - The possession of documents or things may also be proffered as circumstantial evidence of an element of an offence
        - In the latter scenario, upon proof of possession of a document or thing, an inference may be drawn as to the accused's propensity or disposition from which an inference may be drawn to prove an element of an offence

REQUIREMENTS FOR POTENTIAL ADMISSIBILITY (ACTUAL TEST BELOW)

1. Evidence Linking the Accused to Similar Acts

There must be some connection between the alleged similar acts and the accused or the party

- The ink is a precondition to the admissibility of the evidence of similar acts
- The mere opportunity to commit the discreditable conduct or evidence which shows no more than a mere possibility the act is of the accused will not be sufficiently probative to render the SFE admissible

R v Jesse (2005)
Accused charged with inserting wine cork into JM's vagina while unconscious and the Crown proffered SFE that the accused had been convicted in 1995 of sexually assaulting another unconscious woman by shoving garbage bags into her vagina. TJ held it was admissible because it was "some" evidence of identity linking the accused to the assault.

2. Probative Value of the Similar Fact Evidence

- As previously mentioned, SFE is circumstantial – and an individual piece of circumstantial evidence on its own may be insufficient, but when it is combined with other evidence, it may justify the inference
- The more similarities between the acts, the more distinctive the similarities and the greater the number of acts = the stronger inference
- Evidence of misconduct that tends to prove a *mere* propensity to engage in the particular type of conduct charged would lack sufficient probative value in most scenarios
- Similarity does not necessarily require a strong peculiarity or unusual distinctiveness underlying the events being compared to be admissible in every case
    - In some cases, for example, where there are repeated acts during the same temporal period toward the same complainants, the conducts is cogent even though the acts are not distinctive or unique
- The SCC listed helpful factors to determine **whether a nexus existed between similar acts** and the alleged crime in relation to the disputed issue. These factors are

(1) The proximity in time and place of the similar acts
(2) The extent to which the other acts are similar in detail to the charged conduct
(3) The number of occurrences
(4) The circumstances surrounding or relating to the similar acts
(5) Any distinctive features unifying the incidents
(6) Any intervening events
(7) Any additional factors tending to support or rebut the underlying unity of similar acts

3. Probative Value of Evidence of Identity

Identity of Individual

- SCC stated the admission of propensity evidence to prove identity should be done with caution to rule out the coincidence and mistaken identity – *R v Perrier*
- the SCC held that the admissibility of similar act evidence on the issue of identity required a high degree of similarity between the acts – *Arp*
    - In most cases where similar fact evidence is adduced to prove identity the trial judge may compare the manner that the acts were committed to determine if the similar acts involve a unique trademark or reveal a number of significant similarities

- The manner in which the acts were committed were not strikingly similar enough in this case in the sense of a signature or trademark and did not consist of a series of significant similarities
  - the accused's involvement with both victims in *Arp* shortly before their death in the context of the surrounding circumstances was objectively improbable, and this evidence increased the probative value of the evidence that the accused was the person who killed both victims
- reasoned that the probative force of similar fact evidence derives from the similarity of conduct that, barring coincidence, a common factor was involved

Identity of an Individual in a Group or Gang

- The SCC in *Perrier* held that evidence of similar acts may be used to support the inference that the same group or gang committed the similar acts and the crime charged by applying the factors set out in *Handy* and by using the test for the identity in *Arp*
- a high degree of similarity between the acts of the group is required to render the likelihood of coincidence objectively improbable
- The SCC formulated rigid criteria for the admissibility of evidence of similar acts of groups or gangs because members who participated in some crimes might be improperly convicted of other crimes by virtue of their association with a gang
- The first alternative way to link the individual to crimes of the group or gang is the "constant" or "static" group formula
- The criteria for this are

(1) The group membership never changed
(2) The gang always remained in tact
(3) The gang never committed the criminal acts unless all were present
(4) The accused was a member of the gang
(5) The accused was present at the time of the commission of the act

Expert Evidence of Identification

- *Morin* - The court reasoned that the expert evidence did not establish that the accused was a member of a distinctive group with the same propensities as the perpetrator and thus it lacked a significant probative value
- Justice Sopinka stated that there must be some further distinguishing feature for expert evidence of the accused's character to be admissible

Reasons for Exclusionary Rule

Main reason → trial fairness.

- The SCC has "sharply circumscribed" the circumstances in which SFE is received due to the potentially poisonous nature of the propensity evidence and its potential to result in a wrongful conviction
- Dangers identified at 2 levels

(1) Effect on the trial process and the potential infringement of the rights of the accused to a fair trial
(2) Its detrimental effect on the system of law enforcement

(1) Effect on Trial Process and Rights of Accused

1. The ToF may assume that the accused is a "bad person" who is likely to be guilt of the offence charged
2. Jury might tend to punish the accused for past misconduct by finding the accused guilty of the offence charged
   a. Reasoning prejudice: occurs where a jury gives the discreditable conduct on other occasions a disproportionate weight relative to its true probative value
   b. Moral prejudice: where a jury convicts because the jurors think the accused is an immoral person or the sort of person who ought to be punished because of discreditable conduct on other occasions
3. The jury might become confused as it concentrates on resolving whether the accused actually committed past or subsequent discreditable acts and the attention is deflected from the main purpose of their deliberations
4. Inherent difficulty for an accused to defend a case with multiple allegations, especially if the past misconduct occurred many years ago
5. Not an effective use of court resources

Effect on System of Law Enforcement

- 3 significant aspects

(1) The increased reliance on bad character evidence by the prosecution, instead of gathering other evidence
(2) The focus of the criminal justice system on an accused's past conduct makes it difficult for her or him to overcome a criminal past

(3) The frequent or routine admission of bad character evidence could very well bring the administration of justice into disrepute by the continual dependence on past misdeeds contrary to the rational and dispassionate analysis upon which the criminal process should rest

ADMISSIBILITY OF SFE

NEED TO WEIGH PROBATIVE VALUE AGAINST PREJUDICIAL EFFECT

Probative Value

- The probative force of similar act evidence generally depends on the following

(1) The purpose of the proffered evidence of similar acts
    a.
(2) The *link between the accused and the discreditable acts*
    → this is where the test above would come in.
(3) The importance of the material fact in issue
(4) The cogency of the evidence showing the discreditable or criminal acts
(5) The strength of the evidence that the accused committed the discreditable or criminal act
(6) The strength of the inference sought to be drawn from the discreditable conduct
(7) The connectedness between discreditable conduct on other occasions and the offence charged
(8) The substantial similarities or dissimilarities
(9) The possibility (air of reality) of collaboration or collusion

Ontario CA in *Handy*

1. The evidence must relate to a specific issue
2. The court must determine whether the SFE is tainted by collusion, which undermines the improbability of coincidence
3. The court should consider the similarities and difference between the evidence that forms the basis of the charge and the evidence of similar acts sought to be admitted
4. Strength of the evidence that the similar acts occurred

Unfair Prejudice

- The TJ must identify the general and particular prejudices that may result from the admission of the similar fact evidence
- The more reprehensible the prior or subsequent conduct, such as sexual abuse to a young child, the greater the potential for prejudice
- SFE consisting of a multiplicity of incidents poses additional concerns
    - The trier of fact may find the task of sifting through ta large volume of evidence to be onerous and be unable to sort out the disputed similar fact evidence

Weighing Probative Value against Prejudicial Effect

- The test for the admission of similar fact evidence requires the trial judge to weigh the probative value of the evidence against the prejudicial effect caused to the accused by its admission
- The two variables are not correlative: probative value of the evidence goes to proof of the factual issue in dispute but the prejudicial effect of the evidence relates to the fairness of the trial
- The TJ must resist the inclination to give short shrift to the matter of prejudice but must thoughtfully consider the potential of the similar fact evidence to undermine the accused's right to a fair trial
- *R v Bush* – judge concluded that the nature of the SFE required exclusion
    - Despite the fact that the SFE was highly probative and reliable, the Court concluded the admission would result in overwhelming prejudice to the accused that could not be cured by a jury instruction
    - This was one of the rarest of cases where the similar fact evidence would overwhelm the ability of a jury to dispassionately consider the facts relating to the subject charges, and effectively shift the burden of proof to the accused
- An important consideration in the balancing exercise is whether the similar act evidence consists of multiple acts or only a singular similar act
- While a single similar act may be admissible, it may have less cogency than a series of acts

SFE AND JURY'S

- It is up for the jury to determine the inferences to be drawn from the similar fact evidence

  - The TJ should explain the double inference required when the probative value of the evidence relies upon propensity reasoning
  - The TJ should instruct the jury of the limited purpose and minimize the potential prejudicial effect
- The TJ should point out the significant similarities and the important dissimilarities and the important dissimilarities of the similar fact evidence
- Where there is a possibility of collusion or collaboration, the TJ should provide some direction to the jury on collusion
- Even though the similar fact evidence on one count may fall short of proof beyond a reasonable doubt, it can be used by the jury to prove the allegations in another count beyond a reasonable doubt
- One the trier of fact determines on a balance of probabilities that the two similar acts or counts were committed by the same person, the jury can use all the evidence relating to the similar acts in determining whether the accused is guilty beyond a reasonable doubt of the act charged

OPINION EVIDENCE

- Witnesses generally give evidence as to observed facts, they do not usually give evidence as to opinions – ex; as to inferecnes or conclusions that should be drawn from facts

General rule: Witnesses are only entitled to testify to facts within their own knowledge, observation and experience, and are not entitled to give opinion evidence (*D(D)*)

- Grounded on the idea that "it is ths task of the fact finder, whether a jury or judge alone, to decide what secondary inferences are to be drawn from the faxcts proved (*D(D)*)

TWO EXCEPTIONS

1. A **lay witness** may be permitted to give opinion evidence when she is "merely giving a compendious statement of facts that are too subtle and too complicated to be narrated sepatately and distinctly" – Graat
2. An **expert witness** may be permitted to give evidence when such evidence is necessary for the trier of fact to appreciate, understand, or come to the correct conclusions about non-opinion evidence

LAY OPINION

- The line between fact and opinion evidence is often blurry
  - E.g. identification/recognition evidence is really opinion evidence
  - E.g. estimates of speed
- Prior to the *Graat* decision, the TJ would simply stop the witness if he or she began to answer in the form of an opinion and the judge would then determine whether the proffered testimony would be necessary for the trier of fact

Graat Test – Admissibility for Lay Opinions

(1) The witness has personal knowledge of observed facts
(2) The witness is in a better position than the trier of fact to draw the inference
(3) The witness has the necessary experiential capacity to draw the inference, that is, form the opinion
(4) The opinion is a compendious mode of speaking and the witness could not as accurately, adequately, and with reasonable facility describe the facts she or he is testifying about

Examples of Lay Opinions

Identity of Persons and Places

- A witness may state his or her belief as to the identity of persons or objects in court or not
  - May also identify people in photographs/videos
- Where the prosecutions case depends entirely or largely on eyewitness identification evidence, the Ontario specimen jury charge informs the jurors that there have been miscarriages of justice and persons have been wrongly convicted because of mistaken eyewitness identification
  - *Hibbert* → the honest, sincere and convincing witness could distort the true value that the jury might place upon the evidence
- A trial judge cannot withdraw a case from the jury on the ground of weak identification evidence
- Opinion evidence of lay witnesses is permitted for the purposes of identification of places as well as persons
- Where the witness previously knew the accused, the level of familiarity between the accused and the witness may serve to enhance the reliability of the evidence

Identification of Handwriting

- The lay witness must be familiar with the handwriting before he or she is able to provide an opinion on the author
    - If the witness has had sufficient opportunity to acquire knowledge of the handwriting in question, the frequency and number of observations goes to weight
- The handwriting on a disputed document may be proven by a direct comparison with a document that is known to have been written by the person in question

Mental Capacity and State of Mind

- In civil cases a lay witness may express an opinion on the issue of a persons testamentary capacity
- If that layperson has had an opportunity to observe the testator over long periods of time and association, such evidence may be given greater weight of expert testimony
- In criminal cases, a layperson may testify to facts which circumstantially prove an accused lacked the requisite mental state by reason of mental disorder
    - However, a lay witness is not permitted to testify that an accused was capable of forming the requisite intent, as the jury is able to determine that matter without the assistance of such testimony
- Expert testimony in relation to how a normal child or adult will function has been admitted where the subject matter is beyond the knowledge of the average juror or to dispel myths or inaccurate stereotypical beliefs

Expert Opinions

Expert opinions are subject to stricter and more defined rules because there are particular dangers that come with admitting expert opinions

Primary danger → the jury might be usurped by that witness. This is because jurors are more likely to abdicate their role as fact finders and simply attorn to the opinion of the expert in their desire to reach a just result. The danger of attornment is further increased by the fact the expert evidence is highly resistant to effective cross examination by counsel who are not experts in that field. Additional dangers are created by the fact that expert opinions are usually derived from academic literature and out of court interviews, which is material that is unsworn and not available for cross examination. Finally it is time consuming and expensive – *(D.D)*

- A threshold requirement for the reception of evidence from lay witnesses is that they must possess a first-hand **knowledge of the fact perceived through one of their senses**
- **Expert witnesses on the other hand, have specialized knowledge, skill or experience and are not required to have first hand knowledge of the facts which form the basis of their opinions**
    - It is the experts function to provide the trier of fact with a ready-made inference from proven facts since the technical or scientific nature of the subject matter is likely to be beyond the fact finders knowledge or experience
    - Expert opinion evidence is admissible for the factfinder is unable to draw an inference or to form a proper conclusion without the assistance of experts
- In *Lavallee,* the SCC held that expert evidence on the psychological effect of being a battered woman was both relevant and necessary
    - Because the battering relationship as subject to a large number of myths, it was considered beyond the knowledge of the average juror and thus required explanation through expert testimomy

Criteria of Admissibility

In the context of novel scientific evidence, the SCC in *Mohan* stated the law governing the admissibility of exper opinion evidence

(1) The evidence is **relevant** to some issue in the case
(2) The evidence is **necessary** to assist the trier of fact
(3) The evidence **does not contravene an exclusionary rule**
(4) The witness is a **properly qualified expert**

- The party tendering the expert evidence has the evidential and legal burden to satisfy the *Mohan* criteria to a BoP
    - Each criterion must be satisfied
- Simply because an expert opinion has been received by the courts in the past, does not mean it will be immune from future challenge
- The case of *R v Abbey (2009)* the ONCA suggested that the Mohan factors be sub-divided and reorganized
    - The court specifically said it does not alter the substance of the analysis
- In the 2017 version or *R v Abbey* the following test was made

Expert evidence is admitted when

(1) It meets the **threshold requirement** of admissibility, which are:
   a. The evidence must be logically relevant
   b. The evidence must be necessary to assist the trier of fact
   c. The evidence must not be subject to any other exclusionary rule
   d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfill the expert's duty to the court to provide evidence that is
      i. Impartial
      ii. Independent
      iii. Unbiased
   e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose

(2) **The trial judge, in a gatekeeper role**, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:
   a. Legal relevance
   b. Necessity
   c. Reliability
   d. Absence of bias

→ STAGE 1 – Threshold Requirements

(a) Relevant

The term "relevance" is concerned with the relationship between the proffered evidence and the issues in the case that the proponent of the evidence is advancing

- 2 components
  (1) Materiality → legal concept that is determined by reference to the substantive law, the procedural law, the indictment, the pleadings in a civil case, and any defence advance or reasonably raised
    - nothing is to be received unless it is logically probative to a matter
  (2) Probative value → to make the existence or non-existence of a material fact more probable or less probable than it would be without evidence
- There must be **a nexus between the content of the opinion and the material issue in dispute.**

(b) Necessary

Expert evidence is only admissible if it is necessary to assist the trier of fact

- Following criteria (*Mohan*)
  - If the ToF is unlikely to form a correct judgment about an issue, if unassisted by persons with special knowledge
  - Can provide information which is likely to be outside the experience and knowledge of a judge/jury
  - Because it will enable the ToF to appreciate the matters in issue due to their technical nature
- Opinion evidence that is merely helpful or might reasonably assist the jury did not satisfy the necessity threshold
- In *D.(D)* the SCC stated that expert evidence is necessary only when lay persons are apt to come to a wrong conclusion without expert assistance
- The TJ must therefore assess what the average juror knows and does not know and what is common sense
- **A TJ should consider whether a jury instruction can enable the jury to know relevant facts and draw proper inferences (instead of bringing an expert to testify to it)**

(c) Absence of an Exclusionary Rule

Expert evidence must not only pass the standards for admissibility applicable to expert evidence, but must also comply with other rules of evidence

- Most arise in the context of proffered evidence of the accused's disposition or absence of disposition to commit a particular crime
- *R v Robertson* – accused was charged with violent murder of a 9 year old girl
  - Defence sought to introduce psychiatric evidence that a propensity for violence was not part of the accused's mental makeup
  - Judge held it to be inadmissible
- The SCC in *Mohan* raised the threshold for the admission of expert evidence of disposition

- The trial judge must be satisfied as a matter of law that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining guilt or innocence

- In *Mohan* Sopinka J held that the criteria for admissibility of expert evidence of an accused's disposition are satisfied where the scientific community has developed a standard profile on the offender who commits this particular crime
- Difficulty arises where an experts opinion contravenes an exclusionary rule such as the rule against oath helping
  - For example battered woman syndrome
- Where the main effect of the opinion evidence is to convey to the jury the experts belief in the truthfulness of the witness, the trial judge has a residual discretion to exclude the proffered opinion because it may distort the fact-finding process
- Note: some things do not need expert evidence and can be better conveyed in the instruction to the jury
- There is a danger that the trier of fact will use the evidence for the wrong purpose, that is, to determine the complainants truthfulness in the circumstances
  - In those cases where the expert evidence is relevant for one purpose but not another, ther TJ must evaluate the proffered opinion and apply the prejudice/probative test

(d) Qualified Expert

Can only be given through a witness who is shown to have acquired special or particular knowledge through study or experience in respect of the matters on which he or she undertakes to testify – *Mohan*

i. Specialized Skill, Knowledge or Experience

- The proffered expert witness must possess special skill, knowledge or experience which is likely to be outside the knowledge or experience of the fact finder
- *Rice v Sockett* → expert implies he is one who has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation
- Experts evidence should be confined to his or her area of expertise, to minimize its potential for misuse or confusion
- There are differing judicial views relating to the minimum qualifications for a forensic expert
- If no objection is raised before the expert testifies in relation to a substantive issue, then any cross examination as to the experts qualifications goes only to the weight, not to the admissibility of the witness' testimony
- Opposing counsel has an obligation to object if the witness testifies beyond her or his purported area of expertise

ii. Independence, Impartiality of Witness and Absence of Bias

- The expert witness should provide independent assistance to the other court and should not assume the role of an advocate
- Finally it has been stated that evidence by a party retained expert that is adduced to counter evidence by a court appointed assessment in *family law* is rarely admissible or helpful
  - This happens all the time in criminal law though
- *White Burgess Langille Inman v Abbot and Haliburton Co* → **test for requirement of witness impartiality**
  - The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance
    - The expert must testify under oath they recognize and accept the duty
- Once the expert testifies on oath, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the experts evidence should not be received because the expert is unwilling to comply with that duty
  - If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence

(e) Reliability of Opinions Based on Novel or Contested Science

(will get more into this below)

→ Stage 2: Cost Benefit Analsyis

- The TJ must first determine whether the proffered expert evidence is sufficiently probative to warrant its admission
- The TJ must consider the potential predjucial effect of the potential prejudicial effect of the proffered expert evidence
- The underlying concern is the potential detrimental effect that the proffered evidence may have on the fairness of the trial or the integrity of the proceedings
- The residual power may be exercised for one or more of the following reasons

(1) The proffered opinion may be used by the trier of fact for the wrong purpose
(2) The expert evidence may mislead the trier of fact

(3) The expert evidence may distort the fact finding process

- A primary danger of the admission of opinion evidence is that jurors may abdicate their role as fact-finders and attorn to the opinion of experts due to their impressive credentials and mastery of scientific jargon
- In *R v Abbey*, the OCA stated that the cost benefit analysis is undertaken at the second stage of the two stwep analysis process required to determine admissibility of expert opinion evidence
    - The **benefit side** of the cost benefit evaluation requires a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed
        - Reliability
        - Methodology
    - The **cost side** includes the various risks inherent in the admissibility of expert opinion evidence
- In *Abbey* the expert testified that the appellant's teardrop tattoo supported a finding that he wsa a gang member who had killed the victim, whom he thought was a member of a rival gang
    - The testimony was based on 6 studies that the Court ultimately found could not support the conclusions reached by the expert, and therefore would not have been admitted if the unreliability of the studies has been known to the trial judge

Types of Sciences and How They Are Received by the Court

Uncontested Science

- In cases where **no party is contesrtingn the reliability of the science underlying the expert testimomy,** the courts focus on factors such as
    - How strongly the opinion evidence, at face value, supports the inference sought to be drawn from it
    - How important the issue to which the opinion evidence is directed to the outcome of trial
        - If it's a side issue, err on excluding it based on lack of direct importance
    - Whether the underlying data was recorded and is reviewable
    - The experts expertise
    - The extent to which the expert is shown to be impartial and objective

Contested Science

- Subject to further additional scrutiny
- The science may be contested either
    - Because it is novel
        - If so see *J(J.L)*
    - Because a party claims that a "familiar science" is unreliable
        - "even if it has received judicial recognition in the past, a technique or science whose underlying assumptions are challenged should not be admitted in evidence without first confirming the validity of those assumptions – *Trochym*
- The TJ is required ensure that the contested science satisfies a minimum threshold of reliability from a scientific perspective

→ 5 FACTORS CONSIDERED IN CONTESTED SCIENCE.

Comes from American case Daubert that was adopted in J (J.L)

1) Whether the science, and the relevant application of it, can be and has been tested

- And whether the errors were false positives or false negatives
- False positives are of greater concern than false negatives
- Arguably the most important factor, even if it cannot be required

2) Whether the science, and the relevant application of it, has been subjected to peer review and publication

- And whether the peer review has been substantial, positive and evidence-based

3) The known or potential rate of error

- Or whether the error rate is unknown or unknowable
- This was a problem in ***J.(J.-L.)*** because the rate of false negatives was greater than 50% and because there does not exist (or there was not proven to exist) a standard distinctive profile of an individual who would sexually assault young boys

4) The existence and maintenance of standards of operation

- The standard way of conducting such a test, with particular controls and factors, sample size, etc
- And whether they were followed in the case at bar

5) Whether the science used has been generally accepted

- By courts and/or scientists

- This used to be the general standard, but no longer. Reasons:
    - Would exclude new science, even if it was perfectly valid
    - Since specialty may be very small (especially in criminal) the chance for disinterested review is small and therefore the science may be poorly vetted
    - Everyone who works in (fingerprint science) has a vested interest in enhancing their own reliability and future job prospects; are not going to rat out their own science as unreliable
- **DON'T FORGET: When they are offering an opinion on the ultimate issue, you have to apply this test MORE STRICTLY.**

Soft Sciences or Unrecognzied

- In ***Abbey*** 2009, the Ont CA recognized that, **in respect of what might be called the 'soft sciences'** (like psychiatry, pathology and economics), many of the aforementioned factors will not be relevant
    - "**Most expert evidence routinely heard and acted upon in the courts cannot be scientifically validated** … [T]hese experts do not support their opinions by reference to error rates, random samplings or the replication of test results. Rather, they refer to specialized knowledge gained through experience and specialized training in the relevant field. To test the reliability of the opinion of these experts … using reliability factors referable to scientific validity is to attempt to place the proverbial square peg into the round hole"
- **In assessing those sorts of sciences, *Abbey* suggests that trial judges consider the following factors (among others)**
    - 1) To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
    - 2) To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
    - 3) To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?
    - 4) To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
    - 5) To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?
        - Has the expert remained within their area(s) of expertise or have they had to access areas outside of their expertise?
    - 6) To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?

Opinion on the Ultimate Issue

- There remains a concern that experts should not be able to usurp the functions of the ToF
- The SCC reaffirmed the principle that the ultaimte conclusion as to the credibility or truthfulness of a partiucvlar witness is for the trier of fact and is not the proper scope of expert opinion evidence
- Lay persons are capable of determining truthfulness based on logic, experience and exercising their intuition and common sense
- If experts were permitted to testify as to the credibility of a witness, juries might be overwhelmed by the experts opinion and there is a danger that they might accept the experts opinion on this issue in derogation of their duty
- Courts will permit expert opinion evidence where a witness is suffering from a physical defect or psychological condition that could affect his or her testimony
    - More recently, courts have extended this reasoning to permit expert evidence to "dispel myths" notwithstanding the evidence is also relevant to the credibility of the witness
        - *Lavalee* → battered woman syndrome was beyond the knowledge of the average juror

Hearsay Issues and Opinion Evidence

- Expert opinion is almost never based entirely on facts proven in a trial
- Experts necessarily rely upon information obtained from study and experience
    - That is what makes them an expert
- **Much of this information is (or can be) hearsay since it was not observed first hand by the expert**
- To the extent that this information comes from disinterested sources in the expert's area of expertise, the courts do not really concern themselves with the hearsay problem
    - The information is assumed to be either sufficiently reliable or sufficiently subject to testing at trial (or both)
    - And they usually assume peer review, etc or else the opposing lawyer is going to attack it

    - The scientific process seeks to ensure reliability, so the courts are OK relying on this
- There is a perceived hearsay problem**, however, when an expert relies upon facts specifically relevant to the case at bar. Unless those facts are otherwise proven at trial, they have not been offered under an obligation to tell the truth and have not been tested under cross-examination**
    - Ie. In a criminal NCR case, the expert is going to interview the person and use answers to form an opinion. To the extent that the expert relies on the information provided, this is hearsay, and it involves an **interested party** who could have a motive to fabricate
        - And especially in criminal, if that person does not testify personally, there is no way to test the accuracy of those circumstances
- Experts are entitled to base their opinions on out-of-court information
- To the extent that the information is used to establish the **basis** of the expert opinion (**process for arriving at the opinion**), it is not being admitted for the truth of its contents and thus is not hearsay. Its admissibility, therefore, is not problematic
    - **The trial judge must, however, caution the jury that the information used by the expert can only be used to evaluate the opinion.** That the expert used the information is not proof of the truth of the information
    - It can be resolved on this basis alone – the expert could testify "I was told A, B and C, and based on this, I conclude D." And the trier of fact can say that D does not logically follow, so we reject this opinion
    - The jury can choose to reject the hearsay problem entirely by rejecting the evidence
- But "this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based. **Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist**" (***Abbey***)
- That does not mean that every fact relied on by the expert must be proven
    - "… as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. **The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion**" (***Lavallee***)
    - Proving only A and B but not C does not render the expert opinion inadmissible – it only goes to the weight of the expert evidence
        - The expert says that A and B and C must be true. If C cannot be proven true, you would think intuitively that you cannot rely on conclusion D, because its missing a key component
        - This is **not how the law has developed**. The evidence is admissible, and it goes to weight only. And the jury can indeed place great weight on that evidence
- "Where the factual basis of an expert's opinion is a mélange of admissible and inadmissible evidence the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies" (***Lavallee***)
- **At some point, when very few of the underlying facts are proven, the trial judge is probably entitled to direct a jury that the opinion is entitled to no weight**

COMPETENCE

At common law, some classes of people were not permitted to testify in court – addressed the question of whether a proposed witness has the capacity to provide evidence in a court of law

- A finding of competency is not a guarantee that the witness's evidence will be admissible or accepted by the ToF
    - Purpose is to exclude worthless testimony on the ground the witness lakcs the basic capacity to community evidence to the court
- Witnesses are **generally presumed to be competent** – if you wish to challenge the competency of a witness, you should make that objection at the time the witness is called

General Rules

- Every person is competent to give evidence in any civil or criminal case.
- Every competent witness is compellable (via court process) to come before the court to give evidence.
- Every compelled witness must answer any questions put by the court or counsel and provide real evidence, provided that the evidence is relevant, admissible, and not subject to any rule of privilege.

HISTORICALLY

- Ancient common law provided that almost no one in a position to lead evidence was actually competent to do so

- This was based on rules regarding the relationship of witnesses to the subject matter of a case
    - Anyone connected to the cause of action (in a civil OR criminal matter) was incompetent.
    - Anyone with a criminal record was incompetent.
    - The spouse of a party (as well as the party himself or herself) was incompetent.

Spousal Incompetency

- Prior to 2015, the common law and statutory law made a spouse a competent witness for the accused, but generally a non-compellable witness for the Crown unless the accused was charged with one of the specific offences listed in s. 4 of the *CEA*
- In 2015, Parliament amended the CEA to make spouses competent and compellable to testify for the prosecution
- Section 4(2) now reads:
    - "no person is incompetent, or uncompellable to testify for the prosecution by reason only that they are married to the accused"
    - **NOTE: this provision is worded in the negative AND parliament left s. 4(3) untouched**
- **Section 4(3) Communications during marriage**
    - No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage
- Also note that spouse can waive privilege

Mental, Intellectual and Communicative Deficiencies

- *Canada Evidence Act*, s.16:
    - (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
        - **(a) whether the person understands the nature of an oath or a solemn affirmation; and**
        - **(b) whether the person is able to communicate the evidence.**
    - (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
    - (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.
    - (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.
    - (5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.
- **If a witness' capacity is challenged under CEA s.16, and the trial judge is satisfied that there is an issue as to capacity (THERE MUST BE SOME EVIDENCE OF AN ISSUE), the judge must hold an inquiry**
    - Capacity as to what?
        - Capacity of the proposed witness to testify under oath or solemn affirmation
        - Must convince the judge that there is some inability to testify, based on not understanding the meaning of an oath or a solemn affirmation
        - You probably want to convince the judge that there is no understanding of being able to testify at all
- During that inquiry, "the potential witness should normally be called to testify, thus enabling the trial judge to base his or her decision on direct observations of the potential witness as well as other evidence" (***R. v. Morrissey*** Ont CA 2007)
    - This is not an absolute rule. The witness may not have to testify if, for example, the witness suffered from a fragile emotional state: ***R. v. Parrott*** SCC 2001
- Other witnesses can also be called, such as family members or even expert witnesses like psychiatrists

- The trial judge must first determine whether the witness understands the nature of an oath or solemn affirmation
- **To understand the nature of an oath, the witness must appreciate (**see *Leonard***)**
    - **The solemnity of the occasion**
    - **The added responsibility to tell the truth in court over and above the duty to tell the truth in ordinary social conduct**
    - **What it means to tell the truth in court**
    - **What happens in both a practical and moral sense when a lie is told in court**
        - An appreciation of the moral consequences does not require that the witness believe in divine retribution for lying: ***Bannerman***
        - The courts appreciate that for many people the oath has lost any religious meaning but assume that it still makes them feel a moral obligation to be truthful

  - Basically ensure they understand that it is important, has important consequences, and a judge can do important things
- Although there is little case law discussing what it means to understand the nature of a solemn affirmation, it probably means much the same

- **If the trial judge determines that the witness does understand the nature of an oath or solemn affirmation the witness will be permitted to testify under oath or solemn affirmation**
- **If the trial judge determines that the witness does not understand the nature of an oath or solemn affirmation the witness will still be permitted to testify on a promise to tell the truth**
  - This requires an ability to tell the truth in concrete factual circumstances
    - "It may be useful to ask if she can differentiate between true and false everyday factual statements" (*D.A.I.*)
      - It **IS** appropriate to determine that the person can tell the truth relating to things that they actually understand and appreciate, in concrete factual statements
      - This *may* mean nothing more than that the person has the ability to communicate the evidence….but we do not know
    - "However, s. 16(3) does not require that an adult with mental disabilities demonstrate an understanding of the nature of the truth *in abstracto*, or an appreciation of the moral and religious concepts associated with truth telling" (*D.A.I.*)
      - A witness **DOES NOT** have to understand what "truth" means – the witness does not have to understand the concepts of truth and falsity in abstract terms
    - "It is unnecessary and indeed undesirable to conduct an abstract inquiry into whether the witness generally understands the difference between truth and falsity and the obligation to give true evidence in court … The witness is not required to explain the difference between the truth and a lie, or what makes a promise binding" (*D.A.I.*)
  - SCC has interpreted this (recently in *DAI*) in a way that is much more favourable to a finding of competence

- In either event, the judge must also be satisfied that the witness is able to communicate the evidence
- **An ability to communicate the evidence comprehends:**
  - **(1) The capacity to observe**
  - **(2) The capacity to recollect, and**
  - **(3) The capacity to communicate (from *Marquard)***
- "The inquiry is into ***capacity*** to perceive, recollect and communicate, not whether the witness ***actually*** perceived, recollects and can communicate about the events in question ... It is necessary to explore in a general way whether the witness is capable of perceiving events, remembering events and communicating events to the court … It is not necessary to determine in advance that the [witness] perceived and recollects the very events at issue in the trial as a condition of ruling that her evidence be received … The threshold is not a high one. What is required is the basic ability to perceive, remember and communicate. This established, deficiencies of perception, recollection of the events at issue may be dealt with as matters going to the weight of the evidence" (***Marquard,*** altered to reflect legislative change)
- **MOST** of this goes to weight – very little goes to the actual capacity of the witness
-
- **In *R. v. Farley* Ont CA 1995, the Court expanded on the meaning of capacity [see also *D.A.I. at para 36*]:**
  - "… the **capacity to perceive entails** not only an ability to perceive events as they occur**, but also an ability to differentiate between that which is actually perceived and that which the person may have imagined, been told by others, or otherwise have come to believe**. Similarly, the capacity to remember refers to the person's capacity to maintain a recollection of his or her actual perceptions of a prior event, and the ability to distinguish those retained perceptions from information provided to the person from other sources, such as statements made to the person by others. The capacity to communicate refers to the ability to understand questions and to respond to them in an intelligible fashion"
- If the witness does not have this capacity she will not be competent to testify

WITNESSES UNDER 14

- CEA s.16 ***used*** to apply to witness under 14 years of age, **but <u>it no longer does</u>** (the Stewart text is out of date)
  - Note that the ***OEA*** also **now has a specific section dealing with children (s.18.1)**, but an inquiry under that section appears to be similar to an inquiry under CEA s.16
    - Except that OEA s.18.1(3) **endows the trial court with discretion to allow a child to testify, even if the person understands neither the nature of an oath or solemn affirmation nor what it**

means to tell the truth, if the court is of the opinion that the child's evidence is "sufficiently reliable"

- Sherrin has NEVER seen an interpretation of this provision

- **Testimony of children is now governed by CEA s.16.1**

CEA s. 16.1 (Children)

(1) A person under fourteen years of age is presumed to have the capacity to testify.
(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.
(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

- CEA s.16.1 is relatively a new provision, the exact meaning of which is not yet fully determined
- Its most significant impact is to remove the earlier presumption **against** testimonial competence of children, placing the onus on the challenging party to satisfy the court that there is an issue as to the child's capacity
    - See also OEA s.18
- The section also makes it clear that a child's evidence given under a promise to tell the truth is to have the same effect as if it were taken under oath
    - No distinction can be made as to the weight of the evidence given under testimony vs oath
- To the extent that it calls for an inquiry, s.16.1 probably calls for an inquiry broadly similar in procedure to that required under s.16(3):*D.A.I.*
- However,
    - **The challenging party may only question the child's ability to understand and respond to questions**
        - (which the SCC in *D.A.I.* seemed to analogize to the ability to communicate the evidence)
    - **The child cannot be questioned as to her understanding of the nature of a promise to tell the truth (or, presumably, her understanding of the nature of an oath or solemn affirmation)**
        - "The child's ability to understand the obligation to tell the truth is now irrelevant to his or her competence to testify": *I.(D.)* Ont CA 2010
        - Previously children being questioned about understanding oaths got them all upset and had an adverse impact on the second part of the understanding to tell the truth
        - Parliament has said this is unfair, people under 14 can't be expected to understand that concept, the importance of telling the truth in court and what happens in a lie. This is too sophisticated
        - If you ask these questions, it could damage them as witnesses and create a negative presumption about their ability to answer questions at all
        - All we care about is their ability to communicate evidence
        - **Best guess**: under s.16 you can also question them on the ability to distinguish between truth and falsity in an everyday context in concrete scenarios
            - ("do you take a math class?" – "is the name of your mother Joan or Betty" – "are you on a baseball team or a football team?")
- **These sorts of questions can be posed at the trial stage, but they only go to weight, not admissibility**
        - See *S.(J.)* BCCA 2008, aff'd SCC 2010
        - So they can be posed at trial, after competence is declared, and during the direct or cross examination

OATH

- At common law, if the witness refused to take the oath or believed that the oath had no effect on conscience or if there was no belief in spiritual retribution, then the witness was not competent

- The original common law requirement of belief in a Supreme Being or spiritual retribution is no longer of importance
- Today, an individual may make an affirmation or declaration that is of the same force as if the individual had taken an oath in the usual form
- Where there is an objection to a witness' competence to take an oath on the basis of her or his religious belief, the witness may affirm
- A child over 14 is not considered a "witness of tender years" and is presumed to be competent to give sworn testimony
- Where the witness is under 14, the CEA no longer requires the court to conduct an inquiry to determine whether the person understands the nature of an oath or solemn affirmation
- The court must inquire into the childs understanding of the nature of an oath before that child can be sworn unless counsel admit that the witness has the requisite competency
- The CEA has been amended to provide that a proposed witness under 14 shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or affirmation
    - The court however, must require the person to promise to tell the truth
- A party who challenges the capacity of the proposed witness has the burden of satisfying the court that there is an issue as to the witness' capacity to understand and respond to questions
- The test for giving of unsworn testimony is whether the child's intellectual attainments are such that he or she is capable of understanding the simpler form of questions that it can be anticipated will be asked, is able to communicate the answer in an understandable manner, and understands the obligation to tell the truth

COMPELLABILITY

A compellable witness is one who may be forced by means of a subpoena to give evidence in court under the threat of contempt should he or she refuse to comply

COMPELLABILITY VS. COMPETENCY

Competency → refers to whether a person is **legally permitted to testify**
Compellability → whether a person can be **forced to testify**

- General rule is that a competent witness is a compellable witness
    - Does not hold truth for an accused

FAILURE OF ACCUSED TO TESTIFY

- The accused is a competent witness, but not compellable witness at the behest of the crown
- Constitutional issue under s 11(c) → any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence
- The accused has the right not to testify
- **But what, if any, inferences can be drawn from the accused's failure to testify?**
    - We will be considering criminal cases
    - **In civil cases it is permissible for the trier of fact to infer that a party did not testify because her evidence would have harmed her case**: *Vieczorek v. Piersma* Ont CA 1987
        - The permissibility means the facts will decide
        - If the defendant has no information to provide (maybe it's something that the employees did, not what the person did), then you cannot draw that adverse inference
        - If the defendant has some information to provide, then the adverse inference can be drawn, with the weight to be assigned by the trier of fact
- **The failure of the accused to testify cannot be used as positive evidence of guilt**
    - Use of trial silence to bolster the Crown's case would violate the constitutionally protected right to silence and presumption of innocence
        - "Just as a person's words should not be conscripted and used against him or her by the state, **it is equally inimical to the dignity of the accused to use his or her silence to assist in grounding a belief in guilt beyond a reasonable doubt.** To use silence in this manner is to treat it as communicative evidence of guilt" (***Noble***)
        - "If silence may be used against the accused in establishing guilt**, part of the burden of proof has shifted to the accused**. In a situation where the accused exercises his or her right to silence at trial, the Crown need only prove the case to some point short of beyond a reasonable doubt, and the failure to testify takes it over the threshold" (***Noble***)

- **The failure of the accused to testify cannot be used as positive evidence of guilt even when "a case to meet has been put forth and the accused is enveloped in a 'cogent network of inculpatory facts'**." (***Noble***)
    - This "invite[s] the use of silence when the level of the Crown's proof passes the case to meet test but falls slightly short of proof beyond a reasonable doubt" (***Noble***)
    - In saying this, **the SCC effectively over-ruled earlier authority that allowed the trier of fact to use trial silence as a basis for drawing inculpatory rather than exculpatory inferences** in a situation **where the Crown's case invites but does not compel inculpatory inferences**
- **The failure of the accused to testify cannot be used as positive evidence of guilt whether the trier of fact is a judge or a jury**
    - However**, as a practical matter it is impossible to prevent a jury from using the failure to testify in that way**
    - "They cannot be cautioned against such an inference *ex ante* because of s. 4(6), and they cannot be reversed *ex post* for drawing such an inference because speculation as to the jury's reasoning is forbidden" (***Noble***)
- **Technically, this does not mean that the trier of fact may not make any reference to the failure of the accused to testify**
    - "… where in a trial by judge alone the trial judge is convinced of the guilt of the accused beyond a reasonable doubt, the silence of the accused may be referred to as evidence of the absence of an explanation which could raise a reasonable doubt" (***Noble*)**
    - "… such a reference is permitted by a judge trying a case alone to indicate that he need not speculate about possible defences that might have been offered by the accused had he or she testified" (***Noble***)
        - But "if there exists in evidence a rational explanation or inference that is capable of raising a reasonable doubt about guilt, silence cannot be used to reject this explanation" (***Noble***)
- This 'exception' is rather meaningless because a trier of fact is not entitled to base a reasonable doubt on speculation about explanations or defences that do not arise from the evidence

Alibi Defence Exception

It is open to a jury to draw an inference from the failure of the accused to testify … in a case in which it is sought to establish an alibi *Vezeau SCC 1977*

- The ToF is entitled to draw an adverse inference about the credibility of the alibi defence from the failure of the accused to testify
    - **NOT** against the accused in the whole case – only an adverse inference against the alibi itself
- The same inference can be drawn from a failure to notify the authorities of the particulars of an alibi early enough to permit them to investigate the alibi prior to trial
- The exception is based on the facts that
    - An alibi is easily fabricated
    - An alibi defence is a defence divorced from the main factual issue at trial
    - The inference relates only to the credibility of the defence and not the proof of the offence

Jointly Tried Co-Accused

- These same common law, statutory, and Charter rules apply to a co-accused who is being tried jointly at the time that the evidence is required
- Such an accused is a competent witness for the co-accused, but he or she is not compellable at the instance of the Crown to testify against the co-accused

Commenting by Judges and Prosecution on Failure to Testify

- CEA s.4(6) states that "the failure of the person charged, or of the wife or husband of that person, to **testify shall not be the subject of comment by the judge or by counsel for the prosecution**" (but can be by accused's counsel)
- This section is **supposed to protect accused persons "against the danger of having their right not to testify presented to the jury in such fashion as to suggest that their silence is being used as a cloak for their guilt**" (***McConnell and Beer*** *SCC 1968*)
- It therefore prohibits comments that suggest, directly or indirectly, that an adverse inference should be drawn against the accused from a failure to testify
    - **Subject to the alibi exception**: ***Vezeau*** SCC 1977
- It does not prohibit any comment on the failure to testify
- **Neutral comments have been permitted** (although not necessarily encouraged)
    - E.g. telling the jury that evidence on an issue is uncontradicted (see *Noble*)
    - E.g. the prosecution telling the jury that the prosecution could not call the accused's wife as a witness (*Wildman* Ont CA 1981) (to avoid the jury maybe drawing an adverse interest against the prosecution's case)

        - The temptation to talk about what everyone is thinking is frequently irresistible, which leads to these types of comments
- Trial judges may also instruct the jury that, as a matter of law, no adverse inference may be drawn from the failure of the accused to testify: ***Prokofiew***
    - "… the trial judge should, in explaining the right, make it clear to the jury that an accused's silence is not evidence and that it cannot be used as a makeweight for the Crown in deciding whether the Crown has proved its case" (***Prokofiew***)
- Trial judges need not always give such an instruction but generally should where there is a realistic concern that the jury may place evidential value on an accused's decision not to testify
    - E.g. when two accused advance cut-throat defences, where one accused testifies and points the finger at the other while the other exercises his right not to testify: see ***Prokofiew***
- S.**4(6) does not prohibit defence counsel from commenting on the right of her client not to testify** (although counsel should be careful about explaining why her client did not testify, absent evidence in the trial supporting the explanation): see, e.g., ***Smith*** Ont CA 1997
- **Defence counsel seeking to assign blame to a co-accused is also permitted**, despite s.4(6) and *Charter* s.11(c), **to comment on the failure of the co-accused to testify**, as long as counsel does not invite the jury "to speculate or draw unwarranted inferences": ***Naglik*** Ont CA 1991

- Defence counsel seeking to assign blame to a co-accused may also be permitted, despite s.4(6) and *Charter* s.11(c), to comment on the failure of the co-accused to testify, as long as counsel does not invite the jury to use the co-accused's silence as evidence, especially evidence of guilt
    - Counsel can comment that her client (who testified) had nothing to hide, that his evidence stood uncontradicted, and that the jury can consider this in assessing whether they believe his evidence or whether it leaves them in a state of reasonable doubt
    - Although both the Ont CA and (less explicitly) the SCC have indicated that counsel's proposed submission should be vetted with the trial judge before it is made: *Prokofiew*

- **S.4(6) also apparently has no application to judge alone trials, where the Crown can invite the judge to consider the accused's failure to testify**: ***Binder*** Ont CA 1948
    - Note, however, that in light of *Noble* the Crown presumably cannot invite the judge to use the failure to testify as positive evidence of guilt
- **Curiously, s.4(6) does prohibit positive comments (i.e. comments that seek to protect the accused against adverse inference from a failure to testify)**
    - **E.g. a comment that the jury "cannot draw any conclusion unfavourable to the accused from" the fact that he did not testify**: ***Vezeau*** SCC 1977
        - Although maybe the jury can be told that they are not to be "influenced" in their decision by a failure to testify: ***McConnell and Beer***
    - E.g. a comment directing the jury to the limited inferences that they can permissibly draw from a failure to testify: ***Noble***

EXAMINATION OF WITNESSES

Most evidence is tendered through the testimony of live witnesses (even if they only identify a pieve of physical or documentary evidence)

- Some statutory exceptions
    - CDSA (s.51)
    - Formal party admissions
    - Evidence subject to judicial notice

→ Examination

EXAMINATION IN CHIEF

- A party who calls a witness examines that witness in chief.
- The main reason that the crown would call a witness is because that witnesses evidence assists in proving one or more of the essential elements that are required to be proven by the Crown beyond a reasonable doubt

- Some other reasons include
(1) Builds or support the calling party's case
(2) Weaken the opponents case
(3) Strengthen credibility of the witness
(4) Strengthen or weaken the credibility of other witnesses

Types of Questions and Rationale

- The party calling the witness **can only ask non-leading questions** unless there are admissions, in which case they can lead with respect to the admissions or unless with the consent of the defence.
- Reasons for the rule
    - Bias of the witness in favour of the examiner
    - Advantage the examiner has over his or her adversary in knowing what the witness' evidence is
        - Created a danger that leading questions will only bring out what is helpful to the party calling the witness, rather than a balanced version of the witness' knowledge
    - The propensity of a witness to assent readily to suggestions put to him or her by the party calling the witness

REFRESHING MEMORY

- 2 concepts: past collection recorded and present recollect revived

(1) **Past recollection recorded** → witness has no memory of the events but relies on a record which has been made contemporaneously with the circumstances being described. E.g. nurses notes on hospital record
    - The record becomes evidence
(2) **Present recollection revived** → witness requires a prompting to remember by reference to some writing. E.g. police officers notes
    - The record does not become evidence

Past Recollection Recorded

- Witness does not have any independent recollection of the events recorded
- Conditions for admissibility *R v Wilks 3005*
    (1) The statement must have been recorded in some reliable way
    (2) When made, the events must have been sufficiently fresh and vivid to be probably accurate
    (3) The witness must affirm that the statement was true and accurate when he or she made it
    (4) The original statement itself must be used, if it is available

HOSTILE WITNESS

- At common law, you can request the trial judge to declare the witness hostile and then conduct a cross examination
- **Test:** witness shows from the manner in which he gives evidence in chief that he is not giving evidence fairly and is not telling the truth because of hostility towards quesioners case
- A "hostile" witness is a witness who demonstrates an antagonistic attitude or hostile mind towards the party who call the witness.
- *R. v. Prefas and Pryce* (1988), 86 Cr. App. R. 111 (C.A.) – A witness is *hostile* to the party calling him/her if the witness is *not* desirous of telling the truth to the court at the instance of the party calling him/her. A *hostile* witness may be cross-examined by the party calling him/her to the extent that the judge considers necessary to do necessary to do justice, including as to
    - facts in issue or relevant to the issue;
    - matters affecting the witness' accuracy, veracity or credibility in the circumstances of the case; and
    - any former statement, oral or written, relative to the subject-matter of the case and inconsistent with his/her testimony.

→ Cross Examination

Cross examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth

- Generally 3 purposes attributed to cross examination
    (1) To weaken, qualify or destroy the opponents case
    (2) To support the partys own case through the testimony of the opponents witnesses
    (3) To discredit the witness
- In *R v Lyttle (2004)* the SCC reaffirmed the principle that counsel can question a witness in cross examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question forward

- Cross examination does have some limits
    - Must be relevant
    - Must not be harassing or repetitious or constitute misrepresentation
- TJ should direct ToF to completely disabuse their minds of unsubstantiated suggesting alluded to in cross examination – *R v Dixon*

Cross Examination of an Accused by Crown – *R v Bouhass*

- In *R v Bouhsass* the OCA indicated that cross examination of n accused by crown counsel is improper if by its tone and nature it is sarcastic, personally abusive and derisive.
- In particular, the court said that the cross examination stepped over the bounds of propriety in the following ways

(1) It required the accused to comment on the veracity of other witnesses
(2) It improperly required the accused to explain why certain witnesses were not being called to testify and was obliged to explain why his evidence was not corroborated by anyone
(3) It used the accused's constitutional right to disclose as a trap and suggested that the accused used it to script his evidence to avoid the minefields in the case against him
(4) Crown counsel repeatedly referred to the accused as a barefaced liar and the crown regularly injected his personal views and editorial comments into the questions that he put to the accused
(5) A number of suggestions were put to the accused in cross examination that were baseless, but highly prejudicial to the accused
(6) The crown mocked and unfairly challenged the accused's adherence to his religious beliefs

Impeachment of a Witness Credibility

- Testing testimonial capabilities
- Previous inconsistent statements
- Prior convictions

But… rule in *Brown v Dunn* → if a cross examiner intends to impeach the credibility of a witness by means of extrinsic evidence, he or she must give that witness notice of his or her intention to do so

Collateral Fact Rule

- General rule that answers given by a witness to questions put to him or her on cross examination concerning collateral facts are treated as final and cannot be contradicted by other evidence
- Not an absolute

- Most evidence is tendered through the testimony of live witnesses (even if they only identify a piece of physical or documentary evidence)
- There are some statutory exceptions
    - The Controlled Drugs and Substances Act s.51 (certificate of analysis)
    - Formal party admissions
    - Evidence subject to judicial notice

<u>CREDIBILITY OF WITNESSES</u>

- An important issue in most trials is the credibility: should this or that witness be believed?
  →in criminal cases, the question, as it related to evidence favoring the defence is more accurately: is the testimony of this or that witness sufficiently believable that it raises reasonable doubt? → evidence law is now an official cause of death – I will be its first victim

Assessing Credibility

- There is no magic formula for assessing credibility
- There are a number of factors that can speak to a witnesses credibility, including:

1) The witness's demeanor on the witness stand

- Does the witness appear to be sincerely trying to testify truthfully?
- Is the witness evasive in responding to questions?
- Is the witness reluctant to answer questions?
- Judges should use demeanor in the full context of the evidence and the trial (Bryce) → be careful – demeanor should never be relied upon by itself because it can be misleading

2) The extent to which the witness' evidence is or is not consistent with other evidence

- How well does the witness' evidence fit with the other evidence in the case?
- How does the witness' account stand in harmony with the other evidence pertaining to it? (S(DD))
  3) The inherent plausibility or implausibility of the witness's evidence
     - does the evidence seem to make sense given how people normally behave?
  4) The presence or absence of a motive to fabricate
- Evidence of a motive to lie can be a compelling basis for concluding that a witness cannot be trusted to tell the truth
- The fact that a witness has an interest in the outcome of a case can be evidence of a motive to lie
- The applies to accused persons in criminal cases, although care must be taken not to turn the accused's obvious interests in being acquitted into a presumption that he or she is lying
- We also cannot determine that some one is absolutely telling the truth simply because they have no apparent motivation to lie (B(RW))

Assessing Credibility of Child Witnesses and Mental Development

- Not all witnesses can be judged by the same criteria
- Children's evidence should be approached via a "common sense" basis

Impeaching Credibility

- There are many ways to undermine or impeach the credibility of a witness
- Broadly speaking, the most common way is to cross-examine the witness in order to portray the witness in a bad light
- Another way is to adduce evidence that the witness is not credible
- A party has a limited right to adduce evidence pertaining to a witness' lack of credibility/reliability - this has to be evidence that the witness is generally not credible or reliable – cannot be evidence that the witness is simply lying in this case (broad opinion)

Examination of Witnesses

- When a witness is called to the stand, she will be examined in-chief by the party calling her and then cross-examined by the party opposite
- No leading questions in examination-in-chief except in non-contentious and introductory matters; leading questions are expected in the cross-examination portion
- Before a witness gets to testify, the witness must give some indication that she will tell the truth, or her testimony is of no effect

Cross Examining a Witnesses Prior Criminal Convictions

- Another common way to impeach credibility is to cross-examine an opposing witness on previous convictions (CEA s.12; OEA a.22)
- Evidence of previous convictions is only admissible on the issue of credibility – such evidence is not admissible in a criminal case on the issue of propensity (jury must be instructed of this)
- Some offences are more probative than others to the issue if credibility (fraud, deceit, cheating – (Gordon))
- The risk of prejudice is greater with the offences similar to the offence at bar – these may be inadmissible due to serious prejudicial risk (Gordon)
- When deciding whether or not to admit prior conviction cross examination the judge can edit out the convictions that are deemed to be most prejudicial to the accused
- Precise factors to be considered have not been clearly articulated (Hutton)
- An accused cannot be cross-examined on an offence for which she has been discharged or a pardon (Patterson)
- Ordinary witnesses may be cross-examined about the details of prior convictions

Cross Examination of Witnesses

- At common law, counsel have wide latitude to determine what witnesses to call, in what order, and what evidence to adduce from them
- In the criminal case, the burden of proof rests upon the crown as the accused is cloaked in the presumption of innocence. The Crown has the burden of proving all of the essential elements of the offence beyond a reasonable doubt
- There are no witnesses a party must call (R v. Cook)
- Parties who are adverse in interest have the right to cross-examine witnesses
- If explanation or clarification is required, re-examination may be permitted
- In a criminal case, the accused is entitled to be present for all parts of her trial pursuant to section 650(1) of the Criminal Code
- Trials must be open to the public
- Any exercise of discretion with respect to the publication bans or in camera hearings must be employed with the open court principle and freedom of the press in mind
- The scope of cross examination is not limited to matters raised in examination-in-chief, but can extend to any question that is relevant to the substantive issues of the witnesses credibility
- The cross examiner can ask:
  - Leading questions, even on material points

- Questions which suggest facts that the cross-examiner cannot prove by other evidence (only if there is a good-faith basis – (Lyttle))
- The TJ has the right to curtail cross-examination that is irrelevant, prolix, or insulting (Anderson)

The Rule in Brown v. Dunn

- Where counsel intends to impeach a witness by presenting contradictory evidence, the evidence must be put to the witness to allow the witness to comment and/or explain
- One option is to have the witness recalled if the rule is not complied with (aka adduced later)
- Jury charge to take the issue into account

Exceptions to the Open Court Principle

- **Section 486.2(1)** of the Criminal Code allow a witness who is under the age of 18 years or may have difficulty communicating evidence by reason of a mental or physical disability, to testify behind a screen or viva closed circuit television
- This section does not iterefer with trial fairness, as the witnesses are still subject to cross-examination
- **S.650(1)** of the Criminal Code states that an accused shall be present in court during the whole of his trial
- **Section 475** of the Code provides that where an accused absconds during the course of his or her trial, he or she has deemed to waive his or her right to be present at such a trial, and the court may continue the trial and proceed to convict the accused

The Collateral Facts Rule

- A party is under some limitation as to the extent to which she can disprove, with independent evidence, statements made by an opposing witness
  - This is true even if the cross-examiner has complied with the rule in Brown v. Dunn, and even if the statement was made in examination-in-chief
- The Collateral Fact Rule prevents a party from adducing evidence to contradict a witness on a matter that is purely collateral (it doesn't constrict cross-examination, only bringing NEW evidence after to show the witness was lying)
  - On such a matter, the witness' answer is final and immune from contradiction by independent proof; it need not, however, be accepted as true
- The rule is subject to several statutory and common law exceptions
  - Prove bias towards a Third party
  - Prove witness has previous criminal conviction
  - Where a proper foundation has been laid, a previous inconsistent statement may be proved to contradict a witness
  - Medical evidence to prove the witness incapable of telling the truth or unlikely to do so
  - To prove a witness has a general reputation for untruthfulness
  - Note that a party does not have the right to prove a prior inconsistent statement solely on a collateral issue (Bernier)
- Kraus (1986) → "…collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case"
- (P(G)) → "the effect of the collateral fact rule is that, subject to certain exceptions, a party is not entitled to introduce extrinsic evidence to contradict the testimony of an adversary's witness unless that extrinsic evidence is relevant to some issue in the case other than merely to contradict the witness"

In Camera Testimony – R v. Hart

- In R v. Hart the appellant was convicted of first degree murder in the drowning deaths of his daughters
- Mr. Big operation got him to confess
- Appellant had a tendency to have seizures when testifying in front of crowds so he requested he testify without the public
- TJ said naaah but u can have a break and we will keep a doc around
- On appeal, the court found that TJ was wrong; the test to be followed for In Camera testimony is:

i) The judge must consider the available options and consider whether there are any other reasonable and effective alternatives available

ii) The judge must consider whether the order is limited as much as possible

iii) The judge must weigh the importance of the objectives of the particular order and its probable effects against the openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate

Testimony and the Charter

- In R v. S(N) the witness wanted to wear her Niquab; the court considered the following for a charter issue with a witness

i) Would requiring the witness to remove the niquab while testifying interfere with her religious freedom?

ii) Would permitting the witness to wear the niquab while testifying create a serious risk to trial fairness

iii) Is there any way to accommodate both rights and avoid the conflict between them

iv) If no accommodation is possible, do the salutary effects of requiring the witness to remove the Niquab outweigh the deleterious effects of doing so?

Examination of Witnesses by the Trial Judge

- It is up to the parties to present evidence to the court, however, it is the duty of the trial judge to question a witness, if, in the judges view, examination is necessary in order to properly evaluate the witness' evidence
- The trial judge is not limited to questions that clear up doubtful points, but also includes points not addressed in examination and can include leadings questions
- To ensure trial fairness, questions by the trial judge should not disrupt examination by counselor or show bias; the test for reasonable apprehension of unfairness:
  i) Whether the accused was prejudiced by the interventions but whether he might reasonably consider that he had not had a fair trial or
  ii) whether a reasonably minded person who has been present throughout the trial would consider the accused had not had a fair trial (R v. Valley)
- The trial judge should give counsel for both parties an opportunity to follow up on questions asked by the judge
- A trial judge may also call witnesses that the Crown has decided not to call in such circumstances:
  - The evidence is relevant to the narrative of the case
  - The evidence is potentially exculpatory
  - The Crown has provided no reason for failing to call the witness and
  - The accused's right to address the jury last is preserved

Examination in Chief

- A party who calls a witness examines that witness I chief; the main reason that the Crown would call a witness is because that witness's evidence assists in proving one or more of the essential elements that are required to be proven by the Crown beyond a reasonable doubt
- Some other reasons why a party may call a witness is because
  (1) Builds or supports the calling party's case
  (2) Weakens the opponents case
  (3) Strengthen the credibility of the witness
  (4) Strengthen or weaken the credibility of the other witnesses

Types of Questions and the Rationale Behind Them: Examination in Chief

- The party calling the witness can only ask non-leading questions unless there are admissions, in which case they can lead with respect to the admissions or unless with the consent of defence;
- Reason for the rule:
  - The bias of the witness in favour of the examiner
  - The advantage the examiner has over his or her adversary in knowing what the witness' evidence is. This creates a danger that leading questions will only bring out what is helpful to the party calling the witness, rather than a balanced version of the witness' knowledge
  - The propensity of a witness to assent readily to suggestions put to her by the party calling the witness

Bolstering, Contradicting, and Discrediting One's Own Witness

- Examples – bring out the skeletons in chief
- Hostility and adversity (R v. Milgaard)
- Prior consistent statements
- Refreshing a witness's memory

Past Recollection Recorded:

- Witness does not have any independent recollection of the events recorded
- Conditions for admissibility (R v. Meddoui)
  (1) The statement must have been recorded in some reliable way
  (2) When made, the events must have been sufficiently fresh and vivid to be probably accurate
  (3) The witness must affirm that the statement was true and accurate when he or she made it
  (4) The original statement itself must be used, if it is available

R v. R →

- The Ontario Court of Appeal Reviewed the four conditions for admissibility as follows:
  (i) Reliable record (requiring that the witness had prepared the record personally, or reviewed it for accuracy if someone else prepared ITO

(ii) Timeliness (Record made or reviewed while sufficiently fresh in the witness' mind – the time may vary with circumstances of the case)
(iii) Absence of memory (no present recollection of recorded events); and
(iv) Present voucher as to the accuracy (the witness verifies that he or she was being truthful at the time the statement was recorded); for there to be voucher, the memory loss must be found to be genuine as opposed to the witness being untruthful about his or her memory

Cross-Examination

- Generally three purposes attributed to cross examination:
  (1) To weaken, qualify, or destroy the opponent's case
  (2) To support the party's own case through the testimony of the opponent witnesses
  (3) To discredit the witness
- In R v. Little the SCC reaffirmed the principle that counsel can question a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question
- Cross-examination has some limits
- It must be relevant; not be harassing or repetitious or constitute misrepresentation
- Trial judges should direct juries to completely disabuse their minds of unsubstantiated suggestions alluded to in cross-examinations (R v. Dixon)

Cross-Examination of an Accused

- In R v Bouhsass the ONCA indicated that cross-examination of an accused by Crown counsel is improper if by its tone and nature it is sarcastic, personally abusive and derisive. In particular, the court said that the cross-examination stepped over the bounds of propriety in the following was:
  (i) It required the accused to comment on the veracity of other witnesses
  (ii) It improperly required the accused to explain why certain witnesses were not being called to testify and he was obliged to explain why his evidence was not corroborated by anyone
  (iii) It used the accused's constitutional right to disclosure as a trap and suggested that the accused used it to script his evidence to avoid the minefields in the case against him
  (iv) Crown counsel repeatedly referred to the accused as a barefaced liar and the Crown regularly injected his personal views and editorial comments into the questions that he put to the accused
  (v) A number of suggestions were put to the accused in cross-examination that were baseless, but highly prejudicial to the accused
  (vi) The crown mocked and unfairly challenged the accused's adherence to his religious beliefs

Lo, Cain, Perkins Trilogy

- What they stand for:
- That a prior inconsistent statement can provide context for admissible statements. Used in Cross-Examination inconsistencies are taken out of context. The Crown can then point to the consistency between the prior related statement and the testimony of the witness
- The consistencies are relevant solely to enable the decision maker to judge whether the relevant statement is really materially inconsistent when looked at as a whole, and to gauge the impact that any differences in detail should have on the overall credibility and reliability of the witness
- They are used to reduce the weight of inconsistencies that may remain

Oaths

- Usually, a witness indicates that she will tell the truth by taking an oath on a bible or other religious book
  5) Other forms of ceremony are also permitted (Ontario Evidence Act, s.16)
- In some circumstances, a witness will not be able to affirm or take an oath
- As a result, the witness will either not be permitted to testify or testify by making a promise to tell the truth
- **This issue arises in two cases:**
  1) Witnesses whose "mental capacity" is challenged under CEA s.16 or "competence" is challenged under OEA s.18
  2) Witnesses who are under 14 years of age
- In both situations, the matter is governed by the relevant evidence act
- Objection to the witness must be made when the witness is first called

CORROBORATION

- Historically, the law contained many corroboration requirements
    - Where the trier of fact may not make a certain finding on the basis of a single witness' testimony, unless it was confirmed in some material particular by independent evidence
- Most statutory and common law corroboration requirements have been eliminated in the last forty years – see *Vetrovic*
- "The general rule in most common law countries is that the evidence of one witness is capable of meeting the burden of proof in civil or criminal proceeings" – *Briscoe Estate* ONCA 2012
- But there are still a small number of statutory corroboration requirements
    - S.133 Criminal Code (perjury)
    - OEA s.13 (estate litigation)
    - In criminal cases, the common law also permits and occasionally requires a trial judge to caution juries about the dangers of relying on unconfirmed testimony
- THIS ONLY APPLIES TO CROWN WITNESSES!
- In criminal cases, the law historically required trial judges to warn the jury about the danger of convicting a person upon the uncorroborated (i.e. unconfirmed) testimony of certain categories of witnesses
    - E.g. accomplices, children, rape complainants
    - In some cases, this requirement was codified as a statutory obligation
- Evidence was corroborative only if it was 1) independent and if it confirmed, in some material particular, that 2) a crime had been committed and 3) that the accused had committed it
- The law in this area became highly technical and sometimes divorced from its purpose, which was to safeguard against wrongful conviction based on untrustworthy evidence
- The SCC in *Vetrovec* accordingly did away with many of the old common law corroboration rules and replaced them with rules that give trial judges discretion in providing special warnings to jurors
    - Arguably, a similar change has been made to the interpretation of the few remaining statutory corroboration requirements: *B.(G.)*
- A trial judge now is to "direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly … What may be appropriate, … in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness" (*Vetrovec*)
    - This only applies to jury trials
    - "There is no requirement that a judge sitting alone recite a *Vetrovic* caution in his or her reasons for judgment" – *Chevers*, ONCA 2011
        - But judges must be alive to these concerns
- Warnings need not be given for every witness falling within some predefined category, nor must a witness fall within such a category for a warning to be given
    - "All of this applies equally in the case of an accomplice, or a disreputable witness of demonstrated moral lack, as, for example, a witness with a record of perjury" (*Vetrovec*)
- The matter is within the discretion of the trial judge, although appellate courts will interfere where no warning is given in respect of particularly 'dangerous' witnesses in the circumstances of the case
    - This generally requires that the witness' evidence be important (although not necessarily critical) in the case, and that there be fairly strong reason to be concerned about the witness' trustworthiness
- If a warning is given, no particular words must be used, but the warning should:
    - Identify the need for special scrutiny
    - Explain why special scrutiny is needed (i.e. what it is about the witness, in the circumstances, that calls for scrutiny)
    - Caution the jury that, while it can act on the unconfirmed evidence of the witness, it is dangerous to do so
    - Caution the jury to look for confirmatory evidence
    - If possible, provide the jury with some guidance as to what, in the case, might constitute confirmatory evidence

- To be corroborative, evidence need not necessarily implicate the accused or confirm the Crown witness's evidence in every respect (*Khela* SCC 2009; *Chenier* Ont CA 2006)

- It need only "strengthen our belief that the suspect witness is telling the truth" (*Krugel* Ont CA 2000; *Chau* ABCA 2010)
- "However, when looked at in the context of the case as a whole, the items of confirmatory evidence should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence" (*Khela*)
- "As a matter of logic, where the only issue in dispute is whether the accused committed the offence, the trier of fact must be comforted that the impugned witness is telling the truth *in that regard* before convicting on the strength of that witness's testimony (*Khela*)
- "At least in the absence of evidence or collusion or collaboration, the evidence of one unsavoury witness can confirm the testimony of another" – *Pelletier* ONCA 2012

PRIVILEGE

The law of privilege operates as a bar to the admission of evidence, despite the fact that the evidence might be relevant and probative

- Legally privileged information is generally inadmissible unless the holder of the privilege waves it
- The law of privilege vividly demonstrates that the law of evidence is not solely concerned with truth-seeking
- The law of privilege is different from and often narrower than ethical duties of confidentiality
    - Does not cover as much information as confidentiality (though often it is the same information)
    - But in some circumstances, you will be bound only by confidentiality and not privilege

TWO TYPES OF PRIVILEGE

(1) Class privilege
(2) Case by case privilege

- **Class privileges** are those for which there is a ***prima face* presumption of inadmissibility.** They include:
    - Solicitor-client privilege
    - Litigation privilege
    - Informer privilege
    - Dispute settlement privilege (There is some debate over whether this is class or case-by-case.)
    - Marital communications privilege
    - Public interest immunity (sometimes called Crown privilege)
    - (Plus others granted by statute)
- **Case-by-case privilege** covers communications that are **not presumed to be inadmissible but which may be found to be inadmissible in a particular case**. It can (but will not necessarily) protect such things as
    - Doctor-patient communications
    - Journalist-informant communications
    - Religious communications

Class Privilege

- Recognized at common law
- There is a ***prima facie presumption of inadmissibility*** once it has been shown that the relationship fits within the class
- The onus lies on the party seeking disclosure of the information to show that an overriding interest commands disclosure – *A. (L.L.) v B (A.)*
- This is a complete bar to the information contained in records, whether relevant or not, and the onus to override this privilege is onerous – (heavy burden) *A.(L.L.) v B.A.*

Wigmore Test for Determining Privilege (Case by Case)

- 4 fundamental conditions must be met before privilege is extended to any communication and indicated that these four conditions serve as the foundation of policy for determining all relational privileges
    (1) Communications in the relationship must originate in confidence
    (2) The confidentiality within the relationship must be **necessary**
    (3) The relationship itself must be so important that it is the kind that the public will want to be seriously fostered
    (4) Injury to that relationship created by disclosure must be greater than the benefit that the disclosure would yield with respect to the proper resolution of the litigation

- In *R v Greunke (1989)* the SCC indicated that the 4 Wigmore criteria provide a general framework within which policy considerations and the requirement of fact finding can be weighed and balanced
    - Theses 4 factors do not preclude the identification of a new class on a principled basis

Case by Case Privilege

- Unlike class privilege, there is a presumption that the communications are not privileged and are admissible
- Two step process after the accused had notified all the parties with an interest in the confidentiality of the documents for which production is sought
- The accused must establish likely relevance of the documents

→ Class Privileges (types)

Solicitor and Client

One of the most zealously guarded privileges in law

- "It is the highest privilege recognized by the courts" (*Smith v. Jones*)
- Generally speaking, it p**rotects against compelled disclosure of confidential communications made for the purpose of obtaining legal advice**
- Protection is afforded because confidentiality in such communications is considered "indispensable to the continued existence and effective operation of Canada's legal system" (*Foster Wheeler*)
    - "The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients" (*Smith v. Jones*)
- Solicitor-client privilege belongs to the client, not to the lawyer
- Only the client can waive privilege
- **A lawyer is under a duty to claim privilege on behalf of a client**
- Privilege exists independently of any assertion of it, but there will sometimes be some obligation on the claimant to establish a plausible claim to the privilege
    - See *Foster Wheeler*
    - Note that people who have a law licence don't always do lawyering – many of your interactions may not be legal in nature. Your client may have some occasion to establish that you were acting as a lawyer, as opposed to a business advisor, or a tax advisor
- **Solicitor-client privilege will only attach if1**
    1. **. The communication was made between a solicitor and a client**
    2. **The communication was intended to be made in confidence**
    3. **The communication was made for the purpose of seeking legal advice**

(1) Solicitor- Client Communication

- The communication must have been made to a solicitor
- The communication must have been made to a solicitor
    - Communications with non-lawyers are not covered, even if the non-lawyer is providing legal advice
        - Unless the non-lawyer falsely holds herself out to be a lawyer and the client honestly and reasonably believes her to be a lawyer
    - A solicitor includes her agents, such as her articling students, law clerks, legal secretaries, and (possibly) outside experts
        - It is not entirely clear whether communications with outside experts are covered by solicitor-client privilege or litigation privilege (although it is probably the latter)
- The communication must have been made to a solicitor **acting in her professional capacity**
    - I.e. simply telling something to your friend, who happens to be a lawyer, does not make the communication privileged
- Clients **can** communicate through **third parties** without destroying the privilege, as long as the third party is merely a channel for communication from the client (and an expectation of confidentiality exists)
    - E.g. a client may be able to communicate through her accountant without destroying privilege
    - "If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that

function and which meet the criteria for client-solicitor privilege … The definition ties the existence of the privilege to the third party's authority to obtain legal services or to act on legal advice on behalf of the client. In either case the third party is empowered by the client to perform a function on the client's behalf which is integral to the client-solicitor function" (*Chrusz*)

(2) Confidential communication

- The communication must be intended to be confidential (**operating assumption is that you intended conversation to be confidential** when talking to your lawyer)
- **The desire for confidentiality need not be expressly stated as long as the circumstances indicate that the parties intended (reasonably**) to keep the communication secret
    - "Where the legislature has mandated that the record must be provided in whole to the parties in respect of a proceeding within its legislative competence and it specifies that the 'whole of the record' includes opinions provided to the administrative board, then privilege will not arise as there is no expectation of confidentiality" (*Pritchard*)
- The presence of a third party at the time of the communication **may vitiate the privilege <u>unless</u>** the presence of the third party is **essential or of assistance to the consultation**
    - Thus, the presence of a **translator will generally not destroy the confidence**
    - The presence of a client's friend or relative may, however, unless the presence of the friend or relative was required to advance the client's interests and there was an understanding that what transpired at the meeting would be kept in confidence
        - Exactly where you draw the line can be tricky – but **simply providing comfort is not enough, unless the client would be severely traumatized without the presence** of the relative (i.e. a young child accompanied by a parent – the 3rd party must leave, regardless of age, unless there is some requirement for them to be there)
- The presence of **more than one client** will not vitiate the privilege against others, but it does mean that no privilege exists between the clients
    - I.e. each client is entitled to share in and be privy to all communications passing between the lawyer and any of the clients
    - If a dispute between the clients later erupts, each client may demand disclosure of all such communications, although the communications still remain privileged against the outside world
- Similarly, **a client cannot claim privilege against third parties having a joint interest** in the subject-matter of the communications
    - E.g. if the executor of an estate seeks legal advice, no privilege may exist between the executor and the beneficiary of the estate
    - E.g. if a businessman consults counsel, no privilege may exist between him and his business partner (if the consultation related to the operation of the joint business and was not in contemplation of litigation against the partner)
    - Above two situations known as "common interest privilege" ("parties sharing a united front against a common foe": *Supercom of California* Ont Gen Div 1998)

(3) For Legal Advice

- Privilege only attaches to communications made in the course of seeking legal advice
    - Or made when the lawyer was "otherwise acting as a lawyer": *Blood Tribe* SCC 2008
- Thus, not all communications passing between lawyer and client are privileged
- A communication made for purposes of seeking business advice, for example, would not be privileged
    - "In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer" (*Campbell*)
- Similarly, "where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege" (*Pritchard*)
    - "Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered" (*Pritchard*)

Scope

- Privilege attaches to "**all information which a person must provide** in order to obtain legal advice **and which is given in confidence** for that purpose" (*Descôteaux*)

    - Thus, it **attaches to communications "whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem**" (*Descôteaux*)
- Privilege can attach **prior** to the time that a **formal retainer** is established
    - Preliminary communications with a lawyer with a view to eventual retainer are covered, even if no retainer ever materializes
        - "… confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established" (*Descôteaux*)
- Solicitor-client privilege survives:
    - the solicitor-client relationship
    - the litigation for which the legal advice was obtained
        - **Except perhaps in criminal cases where breaching privilege may assist another accused in defending himself:** *Dunbar* Ont CA 1982
- Privilege **only** attaches to communications and **not** to pre-existing items or documents
    - E.g. the videotapes of his crimes made and kept by Paul Bernardo were not privileged simply because he gave them to his lawyer
        - However, Bernardo's discussions with his lawyer about the videotapes were privileged
        - Similarly, a sketch of the scene prepared by a client to assist in explaining the events would be privileged
        - A document can be protected by privilege – as long as that document is prepared for the purpose of the litigation only
            - Grey area if you have prepared it in contemplation of litigation – assertion that you're creating it not for your own historical record, but for the sole purpose of giving it to a lawyer, even if you have not retained one yet or know which lawyer you are about to go to

Exceptions to Solicitor Client Privilege

- There are three exceptions to solicitor client privilege
  (1) Communications in order to facilitate a criminal purpose
  (2) Public safety
  (3) Innocence at stake
    - Not entirely clear, but exceptions probably apply to most other privileges as well

(1) Criminal Purpose

- "… if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant" (*Canada v. Solosky*)
    - Privilege is designed to facilitate the administration of justice it, not frustrate it
- The exception only applies if the client is seeking legal advice in order to commit a **future** crime
    - Seeking advice regarding past crimes or how to avoid committing a future crime is privileged
- Arguably, the exception also applies to **communications for the purpose of facilitating any unlawful purpose** even if it does not qualify as a crime (e.g. a tort, breach of contract, regulatory offence, etc.)
    - The law is **not entirely settled, but some cases support this** extension of the exception
- Privilege also does not attach if the communications are criminal in themselves (ie. Hate speech)
- A party seeking to set aside privilege on this ground bears the burden to establish an evidentiary basis for an assertion of criminal purpose
    - A mere assertion of criminal purpose is insufficient
    - The mere fact that legal advice was sought prior to the commission of a crime is insufficient
    - "… destruction of the solicitor-client privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a 'dupe or conspirator'." (*Campbell*)
- If an evidentiary foundation is laid, the trial judge should vet the potentially privileged material and only order production if "satisfied, either on the basis of the documents themselves or on the basis of the documents supplemented by other evidence, that the documented advice could be fairly said in some way to have facilitated the crime" (*Campbell*)

(2) Public Safety

- "Danger to public safety can, in appropriate circumstances, provide the requisite justification" for setting aside solicitor-client privilege

  - In the same circumstances, it would also justify setting aside any other privilege, though practically will not arise in many other cases
- **You can breach privilege under the criminal purpose exception if it falls under the public safety exception.**
- "There are **three factors to be considered**: **First, is there a clear risk to an identifiable person or group of persons? Second, is there a risk of serious bodily harm or death? Third, is the danger imminent?**" (***Smith v. Jones***)
  - "These factors will often overlap and vary in their importance and significance. The weight to be attached to each will vary with the circumstances presented by each case, but they all must be considered" (***Smith v. Jones***) **It is NOT a checklist.**
- **In determining whether there is a clear risk to an identifiable person or group of persons, a court should consider, among other things:**
  - Is there evidence of **long range planning**?
  - Has a **method for effecting the specific attack** been suggested?
  - Is there **a prior history of violence or threats of violence**?
  - Are the **prior assaults or threats of violence similar to** that which was **planned**?
  - If there is a history of violence, **has the violence increased in severity**?
  - Is the violence **directed to an identifiable person or group of persons**?
    - The requisite specificity of the identification will vary depending on the other factors**, but a detailed threat to kill young children might be sufficient, whereas "a general threat of death or violence directed to everyone in a city or community … may be too vague** to warrant setting aside the privilege" (***Smith v. Jones***)
    - The theory is that a threat to an identifiable group is more likely to be a real threat
    - In ***Smith v. Jones***, **a threat to kill prostitutes from a certain part of Vancouver adequately identified a group** of persons
- **A risk of serious bodily harm or death requires that the intended victim(s) be in danger of being killed or suffering serious bodily harm (which can include serious psychological harm)**
  - In ***Smith v. Jones***, the risk of murder obviously qualified
- "The risk of serious bodily harm or death **must be imminent**"
  - This refers to temporally in general sense: will it happen in the near future. But this is not what the SCC meant by saying this.
  - The SCC under this criteria goes back to talking about the clarity of the threat
  - The risk itself must be serious: a serious risk of serious bodily harm
    - "A statement made in a fleeting fit of anger will usually be insufficient" (***Smith v. Jones***)
      - In ***Smith v. Jones***, this was a problem because **the accused had had the opportunity to carry out his planned attack but had not done so.** Still, there was reason to believe that he was preparing to do so and that he may only have been reluctant to do so because he was awaiting sentence
    - This seems somewhat repetitive of the clarity requirement
  - The nature of the threat must be such that it creates a sense of urgency
    - This does not necessarily require a risk of harm in the near future
      - "… imminence as a factor may be satisfied if a person makes a clear threat to kill someone that he vows to carry out three years hence when he is released from prison. If that threat is made with such chilling intensity and graphic detail that a reasonable bystander would be convinced that the killing would be carried out the threat could be considered to be imminent" (*Smith v. Jones*)
- "**The disclosure of the privileged communication should generally be limited as much as possible.** The judge setting aside the solicitor-client privilege should strive to strictly limit disclosure to those aspects of the report or document which indicate that there is an imminent risk of serious bodily harm or death to an identifiable person or group"
- The information-holder constrained by privilege will normally seek a court order setting aside the privilege, but in urgent circumstances might be justified in notifying the potential victim, the police or a Crown prosecutor

(3) Innocence at Stake

- Solicitor-client privilege may be breached, in a criminal case, where innocence is at stake
  - i.e. "… where core issues going to the guilt of the accused are involved and there is a genuine risk of wrongful conviction" if privilege is not breached (*McClure*)
  - If there is strong belief that someone has confessed this crime to another lawyer, when someone else has been charged with it
- This is an exception that is to be rarely used and only as a last resort

- If disclosure of privileged communications is ordered, only the portions of the communications that are necessary to raise a reasonable doubt as to the guilt of the accused should be disclosed
- In order to come within this exception, the **accused must establish** that:
    - 1) **The information he seeks is not available from any other source**
        - A necessity requirement
        - If the information is technically available from another source but not in admissible form, then the information is not available from another source
        - The trial judge must first determine, however, that the alternative form of the information truly is not admissible
    - 2) **He is otherwise unable to raise a reasonable doubt**
        - "… privilege should only be violated where the accused cannot raise a reasonable doubt in any other way" (*Brown*)
            - I.e. "when the accused has shown that he has no other defence *and* that the requested communications would make a positive difference in the strength of the defence case"
        - This necessarily requires the trial judge to assess the strength of the Crown's case
            - "If the Crown has failed to prove its case beyond a reasonable doubt, then there will be no need to allow the *McClure* application and invade a third party's solicitor-client privilege … If the trial judge believes that the Crown has made a strong case in chief, but that the defence may be able to raise a reasonable doubt through its evidence, she may again decide to deny or postpone the *McClure* application. However, there is nothing to prevent the defence from renewing its *McClure* application during its side of the case in the belief that it will not otherwise be able to raise a reasonable doubt" (*Brown*)
- If the accused overcomes that initial threshold, he **must then provide some evidentiary basis for his belief that a solicitor-client communication exists** that could raise a reasonable doubt as to his guilt
- If the accused provides the necessary evidentiary foundation, the trial judge should examine the solicitor-client file to determine whether, in fact, there is a communication that is likely to raise a reasonable doubt as to the guilt of the accused
    - The trial judge may also seek amplification of the material by asking "the lawyer to supply an affidavit stating either that the information contained in the files is a complete record of the communications in question or containing all other information necessary to complete the record" (*Brown*)
- "The *McClure* application cannot be used to invade solicitor-client privilege simply because a solicitor's file will provide evidence that is more likely to be believed than the evidence already available to the accused. The quality of the evidence is not a factor" (*Brown*)
    - Disclosure "cannot be ordered to bolster or corroborate evidence that is already available to the accused" (*Brown*)
- "Further, the trial judge should be satisfied that the communication sought to be entered is not otherwise inadmissible, such as being the expression of an opinion rather than a statement of fact" (*Brown*)

Litigation Privilege

- Litigation privilege is related but not identical to solicitor-client privilege
- Solicitor-client privilege aims to protect a relationship **whereas litigation privilege aims to protect a process (the adversarial process)**
- The adversarial process requires that parties to litigation
    - "… **be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure**" (***Blank*)**
    - Have "… a protected area to facilitate investigation and preparation of a case for trial" (Robert Sharpe, quoted with approval in ***Blank***)
    - **Be assured that the opposing party cannot argue her case "on wits borrowed from the adversary**" (***Hickman*** USSC 1947)
- **Litigation privilege protects a lawyer's 'work product'**
    - A party would be loathe to properly prepare her case (as she must if the adversarial system is to succeed) if she had to turn over to her opponent the fruits of her work, including her opinions, strategies, conclusions
        - She might delay until the last minute or wait until her opponent did the work
    - Eg. Questions for cross-examination
    - Eg. Expert opinion evidence from accountant Tom. If the minute you received this, you had to turn it over, you may be reluctant to have this opinion ever provided, in case the opinion is unfavourable
- **Litigation privilege belongs to the litigant**, not to any lawyer involved
- Litigation privilege arises and operates even in the absence of a solicitor-client relationship
- However, it **only exists in the litigation context**

  - **I.e. when litigation is pending or actually contemplated**
- Litigation privilege covers "information and materials … created in the litigation context" (***Blank***)
  - I.e. for purposes of pending or contemplated litigation
- Litigation privilege is **not restricted to communications between solicitor and client and thus is broader than solicitor-client privilege**
- It can cover, as well
  - Communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties (e.g. witness statements)
  - **Communications that are not confidential**
    - "In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless" (***Blank***)
  - Material of a non-communicative nature (e.g. a test sample)
- It is not yet clear whether or to what extent it can cover documents gathered or copied – but not created – for the purpose of litigation
  - Eg. A lawyer may go around to registry offices, or be provided with documents from 20 years ago. The lawyer may copy them in case they are relevant
    - The lawyer is only copying them for the purpose of litigation. Does that matter?
    - Assume a criminal harassment charge, where the client/accused is gathering/copying the love letters that were sent.
      - Unclear if this is covered
  - You don't want to protect from disclosure/discovery any documents which just find their way into a lawyer's office in general, that would be too broad
- **In order for litigation privilege to attach, a document must have been created (or perhaps gathered or copied) for the dominant purpose of litigation, actual or contemplated**
  - Thus, privilege may attach if a document was prepared with more than one purpose in mind, but only if the primary purpose was litigation
    - Think a report after a train derailment – it could be for litigation and/or the purpose of enhancing safety in the future
    - Litigation Privilege will only cover that report if the dominant purpose was litigation and not safety
- **Litigation privilege "expires with the litigation of which it was born"** (***Blank***)
  - Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification
- But even where the specific litigation that gave rise to the privilege has ended, the litigation cannot be said to have ended in any meaningful sense where the litigants or related parties remain locked in what is essentially the same legal combat
  - I.e. when related litigation remains pending or may reasonably be apprehended
- **That includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action** (or "juridical source"), as well as proceedings that raise issues common to the initial action and share its essential purpose
  - E.g. the urea formaldehyde insulation litigation against the federal government, in which many different parties were involved but the underlying liability issues were the same
  - Eg. When one person sues in a context where multiple parties have the ability to sue, and other potential plaintiffs still exist
  - Eg. A sues B. A dies before the trial. Statutorily, the heirs can also sue. That technically involves different parties. But it is the same litigation. Litigation privilege remains.
  - Eg. Criminal charges followed by civil lawsuit.
  - **This was not the case in *Blank*, where the documents at issue were prepared for the dominant purpose of a now completed criminal prosecution whereas the current litigation related to civil redress for the manner in which the government conducted the prosecution**
- Litigation privilege **may also be pierced where a party makes a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed**
  - This was at issue in *Blank* because Blank was alleging prosecutorial misconduct
- "Whether privilege is claimed in the originating or in related litigation, **the court may review the materials to determine whether their disclosure should be ordered on this ground**" (***Blank***)

Informer Privilege

- Informer privilege protects those who provide information, confidentially, to law enforcement

    - Does **not** cover people who "play an active role in criminal investigations and proceedings that go beyond 'tipping' the police – (*Barros* SCC 2011)
    - A confidential informant "does not act at the direction of the state to go to certain places or to do certain things" (*N.Y.* Ont CA 2012)
        - Undercover stings, or working as police agents
        - These people are not covered by informant privilege
        - How far you have to go….is not terribly clear
- The police often need information from informers in order to combat crimes and criminal organizations (e.g. sophisticated drug cartels) because they often cannot otherwise access the necessary information
    - Thus, the privilege is considered "of fundamental importance to the workings of a criminal justice system" (*Leipert*)
- The privilege is in place to protect the safety of informers and to encourage others to come forward
    - If their identity was not protected, informers would often not come forward because the risk to their safety would be too great
- The privilege applies in both civil and criminal proceedings
- The privilege belongs jointly to the Crown and the informer
    - Thus a true waiver requires waiver by both the Crown and the informer
- The privilege only attaches when the police offer assurances of confidentiality to a prospective informer, but the law is not clear
- But the promise may be explicit or implicit: *Barros* SCC 2011
    - An implicit promise may arise even if the police did not intend to confer the status of informer, so long as the police conduct could have created reasonable expectations of confidentiality
    - "The legal question is whether, objectively, an implicit promise of confidentiality can be inferred from the circumstances. In other words, would the police conduct have led a person in the shoes of the potential informer to believe, on reasonable grounds, that his or her identity would be protected? Related to this, is there evidence from which it can reasonably be inferred that the potential informer believed that informer status was being or had been bestowed on him or her?" (*Named Person B* SCC 2013)
- Subject to one exception, the court possesses no discretion to abridge the privilege
    - "… courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations" (*Leipert*)
- The accused's constitutional right to disclosure does not trump the privilege
    - This is almost certainly the law (see, e.g., *Named Person*; *Barros* SCC 2011), but one sees occasional comments that suggest that in appropriate circumstances a trial judge can require disclosure despite a law of privilege: e.g. *Blank* para.56
- Both the court and the Crown must ensure that the informer's identity is not disclosed
    - The issue arises because the accused has a broad right to disclosure of information (whether through the law of disclosure, cross-examination, or otherwise), including a *prima facie* right to the information provided by an informer
- The law is very conservative in its approach to disclosure of information that might reveal the informer's identity
    - "Informer privilege prevents not only disclosure of the name of the informant, but of any information which might implicitly reveal his or her identity. Courts have acknowledged that the smallest details may be sufficient to reveal identity" (*Leipert*)
    - "Information which might tend to identify a confidential informant cannot be revealed" (*Named Person* SCC 2007)
        - Eg. Information about the time or location the observation was made
        - Eg. Information about the relationship between the informant and the accused
- In many cases, the Crown will be able to contact the informer to determine the extent of information that can be released without jeopardizing the informer's anonymity, but in cases where the informer's identity is unknown the Crown is often justified in refusing to disclose any information provided by him (since the Crown cannot know what might reveal his identity)
- Informer privilege is subject only to one exception: the innocence at stake exception
    - Thus there is no exception in civil proceedings
- "The accused must show some basis to conclude that without the disclosure sought his or her innocence is at stake" (*Leipert*)
    - I.e. "… that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused" (*Leipert*)
        - This can be a difficult threshold to pass
        - Mere speculation that disclosure might assist the defence will not suffice.
        - There must be an evidentiary basis for the conclusion that disclosure is the ***only*** way that the accused can establish innocence:

- A basis for the exception will exist where, for example, the informer is a material witness to the crime
    - I.e. has personal knowledge of the commission of the offence and possesses essential information needed to demonstrate the innocence of the accused
    - There should also be a basis for believing that there was an observation was not only a witness to an incriminating event, but **also** a witness to an exculpatory event
- There is also some suggestion that information disclosing the informer's identity can be revealed for purposes of a *Charter* application: see *Scott*
    - *Leipert* adopted a very narrow view of this exception, seemingly applicable only when factual (as opposed to legal) innocence is at stake
    - But more recently the SCC said "situations in which s.8 of the *Charter* is invoked to argue that a search was not undertaken on reasonable grounds may fall within the innocence at stake exception": *Named Person* 2007
    - The law is a little confused (and confusing) in this area
    - Most of the discussion is *obiter*, arising in the situation where innocence is not at stake and the issue is how much editing must occur in order to not reveal the informer's identity
- If the accused establishes a basis to conclude that her innocence is at stake, the trial judge should review the information sought to determine whether, in fact, disclosure is necessary to prove the accused's innocence
- If the court concludes that disclosure is necessary, the court should only reveal as much information as is essential to allow proof of innocence
- Before disclosing the information to the accused, the Crown should be given the option of staying the proceedings

Dispute Settlement Privilege

- Communications, written or oral, made with a view to settling a litigious matter are privileged in the event that settlement is not reached
- Settlement negotiations are very important to, and actively encouraged by, the legal system and it is recognized that no one would enter into negotiations if any concessions made could later be used against them
- The privilege applies in both civil and criminal matters
- The privilege belongs to both parties to the negotiations
    - And thus cannot be unilaterally waived by either
- A litigious **dispute must be in existence or contemplated**
- There must be an express or implied intention of confidentiality in the event that negotiations fail
    - This will often be assumed if lawyers are involved
    - Still, it is often safest to state 'without prejudice' on written communications
    - The presence of a mediator does not generally destroy the expectation of confidentiality
        - See, e.g., Civil Procedure Rule 24.1.14
- The communication must have been made for the purpose of attempting to effect a settlement
    - Although it extends beyond actual settlement offers to include related communications
        - Ie. When an insurance company acknowledges that an event has happened, and writes a letter to the claimant asking "will you be making a claim?" This is obviously prejudicial against the company who wrote the letter
- There are some exceptions
    - E.g. for 'unlawful' communications
        - E.g. extortionary utterances (ie. Accept settlement or I give salacious details to press)
        - E.g. threats to engage in unlawful conduct if the litigation proceeds (if you don't settle this, I'll punch you)
    - E.g. when the existence or interpretation of the settlement is at issue (where they think they've come to a settlement, but there is disagreement over actual terms of settlement).
    - E.g. when communications in furtherance of civil settlement are relevant to a criminal proceeding
        - See, e.g., *Pabani* Ont CA 1994, where the Crown was permitted to introduce in a murder prosecution admissions of past misconduct made by the accused in the context of matrimonial settlement negotiations

Marital Communcications Privilege

- CEA s.4(3) states that no husband or wife is compellable to disclose any communication made to him/her by the other during their marriage
    - See also OEA s.11: "A person is not compellable to disclose any communication made to the person by his or her spouse during the marriage"
    - Note: what about same-sex couples? – Sherrin – will be an issue in the near future

- These sections mean exactly what they say: "that where a wife or husband is otherwise compellable or competent to give evidence, there is no compulsion to divulge communications with a spouse" (*Zylstra*)
- The privilege exists in order to preserve marital harmony and encourage the sharing of confidences between spouses
    - "So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence, that the alarm and unhappiness occasioned to society by invading its sanctity, and compelling the public disclosure of confidential communications between husband and wife, would be a far greater evil than the disadvantage which may occasionally arise from the loss of the light which such revelations might throw on questions in dispute" (*Shenton v. Tyler* Eng CA 1939)
- The privilege only applies to communications and **not** to observations of facts or events
- The privilege applies to all communications, whether or not they were intended to be confidential (subject to waiver)
- The privilege only applies to communications made during the marriage
    - Thus, pre-marriage and post-marriage communications are not protected
    - Communications between parties to a common law relationship are not protected
- The privilege probably does not survive the marriage
    - The case law is not perfectly consistent on the point
- The privilege belongs to the recipient spouse and not to the giver of the information
    - Thus the recipient spouse can waive it irrespective of the wishes of the other spouse
- The privilege must be claimed in the presence of the trier of fact
    - So they DO have to take the witness stand
- A jury in a criminal case in which the communicating spouse is an accused must be instructed that the privilege is
    - A statutory privilege which all legally married witnesses are entitled to assert in a trial; and
    - One that belongs to the witness, not the accused person, and, as such, the decision whether to assert or waive the privilege lies with the witness, not the accused

Public Interest Immunity

- Information may be protected from disclosure on the ground that disclosure is contrary to the public interest
    - Many public interests may be affected by disclosure, e.g. national security, national defence, international or intergovernmental relations, police investigative techniques and activities, etc.
    - This is not a closed list, but does not refer to "clean sidewalks" or stuff like that
- A court, or in some cases the government, may prohibit disclosure in both civil and criminal actions
- Common Law:
    - A court has the common law jurisdiction to prohibit disclosure in cases where it holds that the interest in preserving confidentiality outweighs the interest in seeing that litigants have access to all relevant evidence
        - See *Carey v. Ontario* SCC 1986
- Statutorily:
    - The *Canada Evidence Act* also authorizes courts (or at least some of them) to control the disclosure of information in the public interest
    - With respect to most information, the court is directed to balance the competing interests and can order disclosure even if it would be injurious to a public interest
    - With respect to information affecting national security and international relations, however, the federal government can override a court order for disclosure, subject to an extremely limited right to judicial review: CEA s.38.13
    - With respect to cabinet confidences, the federal government can also effectively prohibit the disclosure of information, subject to some minimal judicial review: see *Babcock*
    - In cases where disclosure is prohibited, courts have some powers to compensate the affected litigant
        - E.g. by dismissing criminal charges (see, e.g., CEA s.38.14)
        - E.g. drawing an adverse inference against a government litigant (see *Babcock*)

Waiver

- Privilege of almost any sort can be waived by its holder
- Precisely what constitutes waiver varies slightly as between some of the privileges
- Generally speaking, however, waiver may be express or implied
- **Express waiver** is found "where the holder of the privilege:
    - (1) knows of the existence of the privilege; and
    - (2) voluntarily evinces an intention to waive it"
    - (*Youvarajah* Ont CA 2011)
        - E.g. by producing it in the context of discovery or in another litigation
- Implied waiver may be found in a variety of situations

  - E.g. where a privilege holder discloses privileged information to outsiders (i.e. persons unconnected to the litigation who do not share a common interest)
  - E.g. where a privilege holder discloses a portion of a privileged communication (implicitly waiving privilege respecting the remainder of the communication on the same matter)
  - E.g. where a privilege holder places in issue legal advice that he received: e.g. *Campbell*
    - But not because the officer answered in cross-exam, as required, that he obtained an opinion from a DOJ lawyer to verify his own understanding of the legality of a reverse-sting operation
    - **Facts**: accused arguing relief based on abuse of process. Drug case. Police engaged in a reverse-sting – the police engaged in criminal conduct to gather evidence against the accused, the accused joins in, and the accused is charged.
    - An issue was whether the police had a good faith reason to believe that the operation was legal, so the officer was asked about any legal advice he obtained
    - Here, the officer went further and said "not only did I get advice, but I relied on that advice", and then that advice became a live issue in the trial, and this is what constituted the implied waiver of privilege

- Commonality: voluntary deliberate conduct that supports an objective intention to waive privilege, at least to some extent. The courts then ask whether fairness and consistency require a finding of (possibly greater) waiver
- No waiver where communication to third person is itself subject to privilege
  - If you can find a chain of privileges
  - E.g. where a document protected by solicitor-client privilege is given to a third party in circumstances covered by litigation privilege
- Waiver may even be found when disclosure is entirely inadvertent
  - E.g. when a third party overhears a privileged conversation
  - E.g. when a lawyer accidentally includes a privileged document amongst documents being voluntarily disclosed to the other side
  - E.g. when someone, by stealth or even illegality, obtains a copy of a privileged document
- The traditional (British) rule is that privilege is lost no matter how the inadvertent disclosure occurred: *Calcraft v. Guest* Eng CA 1898
  - subject to the exception from *Ashburton (Lord) v. Pape* 1913 Eng CA, which authorizes a court prior to trial to grant equitable injunctive relief, requiring the return of the document and prohibiting it from being copied or published (thus rendering it unavailable for use at trial)
  - If a party waits to object at trial to the admissibility of the document, the *Calcraft* rule would apply
  - This is still valid law, subject to the better exceptions below
- More recently, Canadian courts have held that, at the very least, a judge has a discretion to determine that privilege has not been waived, taking into account such things as "(a) the manner in which the document came to be disclosed; (b) the timing of the inadvertent disclosure; (c) the timing of the reassertion of privilege (how quickly did you ask for it back); (d) the extent of the dissemination, including the involvement of third parties; (e) the prejudice to the party whose privilege has been violated; (f) the prejudice to the party who would benefit by the disclosure; and (g) the impact of the retention or conversely the return of the document on the procedural fairness and the truth seeking functions of the administration of justice" (*Dublin v. Montessori Jewish Day School* Ont SCJ 2007)
  - The over-arching concern is to protect a fair trial: *Li* Ont CA 2013
- Courts have also been less willing to find waiver in cases where information came into the hands of a third party by non-innocent means
- Some courts have taken into account the nature of the privilege at stake (e.g. litigation vs. solicitor-client – SC privilege the most sacred)
- In criminal cases, courts are especially concerned to interpret waiver in a manner that best protects the interests of the accused

→ Case by Case Privilege

- Even if the confidentiality of information is not protected by a class privilege, it may be protected in a particular case by the application of case-by-case privilege
- "The term 'case-by-case' privilege is used to refer to communications for which there is a *prima facie* assumption that they are *not* privileged (i.e., are admissible). The case-by-case analysis has generally involved an application of the 'Wigmore test' …, which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case" (*Gruenke*)
- The **four Wigmore criteria** are as follows:
  - 1) The communications must originate in a confidence that they will not be disclosed

        - This is a **factual issue** that will be decided based on the actual and reasonable expectations of the parties to the communication
        - For journalist-source communications, there must be an explicit promise of confidentiality: *National Post* SCC 2010
    - 2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties
        - This is both a **factual issue**, to be determined based on evidence applicable to the case at bar, and a **policy issue**, to be decided based on how important confidentiality is to the kind of relationship in question
    - 3) The relation must be one which in the opinion of the community ought to be sedulously fostered for the public good
        - This is an issue of **public policy**, informed by *Charter* values: see *Gruenke*
        - Analysis can focus on the specific type of relation in question, and not just the general type of relation: *National Post*, SCC 2010
            - Eg. Source and bloggers, as compared to source with professional journalist attached to a stable, sophisticated news organization
    - 4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation
        - This is the often crucial balancing exercise in which the costs of disclosure are weighed against the costs of non-disclosure
        - The **costs** of disclosure include **not only the costs to the particular individuals** affected by disclosure but also **to other individuals in similar relationships** and to the **public** at large: see *Ryan*
        - Consideration of the costs of disclosure must take into account **contemporary social and legal realities**
            - "One such reality is the law's **increasing concern** with the wrongs perpetrated by **sexual abuse** and the serious effect such abuse has on the health and productivity of the many members of our society it victimizes. Another modern reality is the extension of **medical assistance** from treatment of its physical effects to treatment of its **mental and emotional aftermath** through techniques such as psychiatric counselling. Yet another development of recent vintage which may be considered in connection with new claims for privilege is the ... *Charter*" (*Ryan*; see also para.30)
- The **balancing exercise "is essentially one of common sense and good judgment**" (*Ryan*)
- Ultimately, "… if the court considering a claim for privilege determines that a particular document or class of documents must be produced to get at the truth and prevent an unjust verdict, it must permit production to the extent required to avoid that result" (*Ryan*)
- Relatively few communications are ultimately found to be protected by case-by-case privilege
- Courts are concerned about the loss of important evidence
- However, there have been instances where privilege has been recognized
    - E.g. *Slavutych*
    - E.g. *Clearbrook* Fed Ct 2004, where a spousal communication (not covered by marital privilege) was protected in a patent litigation
- Courts take into account the **relevance** and **probative value** of the communications in issue
    - "A document relevant to a defence or claim may be required to be disclosed, notwithstanding the high interest of the plaintiff in keeping it confidential. On the other hand, documents of questionable relevance or which contain information available from other sources may be declared privileged" (*Ryan*)
- In criminal cases, they also take into account the seriousness of the offence at issue: *National Post* SCC 2010
    - The more serious the offence, the more likely disclosure will be needed to secure the truth
- Privilege is more likely to be recognized in civil cases than in criminal cases
    - "… the interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime. The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty" (*Ryan*)
- Privilege in criminal cases is more likely to be recognized in favour of the accused than in favour of the Crown
- A court that orders disclosure may seek to **protect confidentiality** in part through recognition of **partial privilege**
    - By recognizing privilege in respect of some, but only some, communications made in a particular relationship, and/or
    - By imposing conditions on who may see and copy the documents
        - These "are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth" (*Ryan*)

        - Possibly only to be seen by counsel, never copied, accessed only in a certain area, and returned at the end of the trial, with a bar on discussing this with anyone else
- The issue of privilege is determined on a *voir dire*
- The person seeking to **exclude** the evidence bears the burden of establishing that privilege should be recognized
- The trial judge is entitled to examine the allegedly privileged documents in order to determine the claim
- The SCC has suggested that neither party to a (case-by-case) relationship owns the privilege and thus either may waive it: *National Post* 2010
    - This comment was **only** made explicitly in reference to journalists and their sources

Note: common law settlement privileges exist throughout the trial and costs. A Rule 49 offer to settle remains confidential until the time period in the trial when costs are awarded, then becomes non-confidential based on the statute chosen.

SELF INCRIMINATION

- USED to be able to refuse to answer Qs that would incriminate themselves under common law; then came CEA s 5 and OEA s 9 which forced a witness to answer these questions regardless
- TODAY, these statutory provisions have been overtaken by s 13 of the *Charter*: witness who testifies in a proceeding has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceeding, **except** in prosecution of perjury or for giving of contradictory evidence
- Constitutional right does not need to be claimed to apply
- Rationale: main purpose of s 13 is to ensure an accused is not compelled to assist in his own prosecution, and thus not do exactly what s 11(c) prohibits (*Dubois*); another purpose is to encourage truthfulness of testimony by freeing witnesses of worry that their testimony will later be used against them
- Applies to "all proceedings", whether adjudicative or administrative; but must be a "proceeding" (ie not a statement made to police during an investigation)
    - BUT s 13 only applies when the second proceeding is brought to impose penal consequences, or else the prior testimony would never be able to be used to "incriminate" the witness
    - THUS, does not apply/prohibit use of prior testimony at civil proceedings ever (OEA s 9(2) *may* provide protection in civil cases, but the law is not entirely clear after *Anway*; see pg 106 of LS)
- DOES NOT apply in prosecution of perjury or for giving false or contradictory evidence (as stated in s 13 itself)

General Rules

- When accused's prior testimony was compelled, the Crown is not entitled to cross-examine the accused on his prior testimony for purposes of either credibility (impeachment) or guilt (incriminating him) (*Henry*)
    - EXCEPT, if prior compelled testimony was not incriminating (*Nedelcu*)
- When accused's prior testimony was voluntary, Crown is entitled to cross-examine him on that prior testimony (*Henry*)

Compelled vs Voluntary

- For purposes of s 13, testimony is compelled if it was "statutorily compellable" (*Nedelcu*)
    - Thus, evidence can be "compelled" even if witness's attendance was not forced by subpoena (*Henry*)
- S 13 NOT available to accused testimony given: in his defence at own trial; at bail hearing, in support of a pre-trial motion; at a pre-inquiry into a private prosecution (*Scully*); maybe when he testifies on discovery as P in a civil action given that the P initiates the proceedings (*Ramsaran*: affidavit filed by P in Small Claims found not to be compelled)

Incriminating vs Non-Incriminating

- Incriminating evidence = evidence given by witness at prior proceeding that Crown could use at subsequent proceeding to prove GUILT (*Nedelcu*)
- Time for determining whether evidence is incriminating is the time when the Crown seeks to use it at the subsequent hearing (*Nedelcu*); doesn't matter how it was used at the earlier proceeding

Permissible Use

- Cross-examination on prior VOLUNTARY testimony, permitted by s 13, can be used by the trier of fact on issues of CREDIBILITY and GUILT (*Henry*)
    - **Rationale: to try and tell jury to only use the cross-examination for issue of credibility, but not to draw the common sense inference of guilt, is not a workable approach (*Henry*)**
    - Could arguably be used as direct evidence of the facts asserted on the prior testimony to the extent that the accused adopts that prior statement (*Krause*)
- Cross-examination on prior INVOLUNTARY and INCRIMINATING testimony will never be permitted by s 13

- Cross-examination on prior INVOLUNTARY and NON-INCRIMINATING testimony, permitted by s 13, can be used by the trier of fact only on issue of CREDIBILITY, not guilt (but in theory would never go to guilt bc not incriminating) (*Nedelcu*)
    - *Nedelcu* seems to carve out exception to *Henry*; although *Nedelcu* doesn't expressly address past voluntary testimony

<u>Cross-examining on knowledge of s 13 in original proceeding…</u>

- When witness testifies for the defence and claims responsibility for the offence the accused is charged with, Crown often tries to cross-examine that witness on knowledge of s 13 protection
- SCC held that usually Crown cannot engage in this line of questioning (*Noel*; *Jabarianha*)
    - Might be allowed when there is independent evidence of collusion between accused and witness
- <u>Rationale:</u> Probative value low since s 13 does not provide transactional immunity and allows cross examination of witness on credibility at later proceedings; prejudicial effect high since questioning treats enjoyment of constitutional right as an indication of dishonestly and might lead to objections based on solicitor-client privilege

R v Henry (2005 SCC)
Henry and co-accused convicted of first degree murder of guy in relation to drug debt; sent back for re-trial; Henry had testified to one story at first trial and completely different story at second trial; admissible bc s 13 doesn't apply to voluntary testimony

R v Nedelcu (2012 SCC)
N took victim for ride on motorcycle, crashed and caused victim brain damage; prosecuted criminally for dangerous driving and sued civilly by victim; during discovery for civil matter said he had no memory of incident; during testimony at criminal trial said he remember 90-95% of what happened; Crown allowed to use evidence from civil discovery to impeach credibility bc although it was not voluntary, it was also not incriminating

Lecture

- Until the end of the 19th century, the accused was not able to give testimony on oath for 2 reasons

(1) He was regarded as an incompetent witness because of his obvious interest in the outcome of the proceedings
(2) It was registered as a violation of his privilege of self-incrimination to place him in this dilemma

- By the end of the 19th Century, there were statutory reform that made the accused a competent witness for the defence
    - This privilege involves testifying only and not the provision of a DNA sample, photographs or fingerprints
- *Canada Evidence Act, Section 5*

(1) No witness shall be excused from answering any question on the ground that the answer to the wuestion may tend to criminate him, or may tend to estasblish his liability to a civil proceeding at the instance of the Crown or of any person
(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence

Section 11(c) and 13 of the Charter

Section 11(c)

- Any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence

Section 13

- A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence

R v Dubois [1985] SCR

- A second trial is included in the words "in any other proceeding"

R v Noel [2002]

- The Supreme Court of Canada decided that under section 13 of the Charter, when an accused testifies at trial he or she cannot be cross-examined on prior testimony from an earlier trial unless the trial judge is satisfied that there is no realistic danger that the prior testimony could be used to incriminate the accused

R v Henry [2005]

- The Supreme Court of Canada attempted to simplify the courts interpretation of section 13 of the Charter.
- The Supreme Court of Canada allowed the two co-accused in R. v. Henry to be cross-examined at their second trial on evidence that was different than they had testified to at their first trial
- The Supreme Court of Canada could not see why section 13 should protect an accused from cross-examination where he chose to testify one way at his first trial then differently on the re-trial.
- The Court did not overrule Dubois and as a result the Crown cannot introduce in its case in chief the prior testimony of the accused, even if the accused voluntarily testified at the previous trial
- Where an accused has been compelled to testify as a witness in another proceeding and now chooses to testify, the prior testimony may not be used as the Crown to incriminate or attack -**changed in *Nedelcu, [2012] 3 SCR 311*

R v. Nedelcu [2012] 3 SCR

- A party seeking to invoke section 13 must first establish that he or she gave "incriminating evidence" under compulsion at the prior proceeding. If the party does not meet these requirements, section 13 is not engaged.-para. 8
- The time for determining whether the evidence given at the prior proceeding may properly be characterized as "incriminating evidence" is the time when the Crown seeks to use it at the subsequent hearing. –para. 16
- It is not "any evidence" that the witness may have been compelled to give at the prior proceeding, its "incriminating evidence"-para 16
- There will be instances where evidence given at the prior proceeding, though seemingly innocuous or exculpatory at the time, may become "incriminating evidence" at the subsequent proceeding, thereby triggering the application of section 13
- ..Henry could not have meant something different. In concluding that a witness's testimony from a prior proceeding could not be used to impeach that witness in a subsequent proceeding, the Court must have been referring to "incriminating evidence" being used for that purpose; it could not have been referring to "nonincriminating" evidence since s.13 does not concern itself with that type of evidence-para. 26
- Para. 28..On that example, surely the Crown would not be precluded, on the basis of Henry, from [page 324] cross-examining on the apparent inconsistencies relating to her morning activities, with a view to testing the witness's powers of recollection and hence, the overall credibility and reliability of her testimony particularly as to her ability to remember what she was wearing at the time of the robbery
- Full and frank testimony presupposes a witness who wants to tell [page 327] the truth but is afraid to do so lest the evidence be used to incriminate him at a subsequent proceeding. It does not presuppose a witness who is bent on giving false testimony.-para.40