**Winter**

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Evidence Summary

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# Overview, Sources, Goals and The Basic Rule

What is Evidence?

* “Evidence consists of all of the means by which any alleged matter of fact… is established or disproved” (*Black’s Law Dictionary*)
  + The quote above is what we normally mean when we say what the “law of evidence” is
* “Evidence is the data that triers of fact use in performing the fact-finding function.” (Paciocci & Stuesser, *The Law of Evidence*)
  + Essence of the law of evidence: how do you take information out there in the world and bring it into the tribunal setting so that the person who has to make the decision at the end of the day can decide what the result will be
* Evidence was originally created to be used in judge and jury trials

What is Encompassed by the Law of Evidence?

* The kinds and forms of information that the trier of fact can receive
  + There are different types of evidence: hearsay evidence, opinion evidence, testimonial evidence etc.
  + The law of evidence governs the type of evidence that is admissible and when they are admissible
* The means by which information can be presented and tested in a proceeding
  + Most evidence is oral evidence (testimony) and so the question is how can you test this (witness examination and cross-examination)
* Permissible use of the information by the trier of fact adjudicating the proceeding
  + May be able to use it for a certain purpose but not another (eg. could use to prove motive but not to prove anything else)

Sources of the Law

* There is no codified law of evidence. We must look at a number of sources and they all interact in different ways including: common law, statutes (federal and provincial), the *Constitution,* Aboriginal law and scholarly works.

#### Common Law

* Majority of Canadian evidence law is still common law – judge-made rules (hearsay, character evidence, opinion rules, collateral facts)
* Judges also have some (exceptional) discretion to change the rules for a particular case, usually to avoid a miscarriage of justice
  + Discretion operates solely in favor of the accused and it is to ensure there is no miscarriage of justice.

### R v Salituro (1991 SCC)

**Facts:**  Salituro signed his wife’s name on a cheque and cashed it. He said he had permission. She denied this. TJ accepted wife’s evidence and convicted accused. At the time of the offence, accused and his wife were separated with no reasonable possibility of reconciliation.

**Prior Proceedings:**  CA upheld conviction. No reason to apply spousal incompetence rule to separated spouses without reasonable hope of reconciliation. The justification for the spousal incompetence rule is that it supports marital harmony.

**Held:** Appeal dismissed.

**Reasons:** Making irreconcilably separated spouses incompetent witnesses is inconsistent with *Charter* because there is no marriage to protect

* + There are constraints on the power of the judiciary to change the law. If changes may have complex ramifications, those should be left to the legislature. Judges should confine themselves only to incremental changes necessary to keep common law in line with society.

**Ratio:** Spousal incompetency doctrine does not apply where there is no marital harmony to preserve (irreconcilably separated spouses). Complex changes should be left to legislature, but judges should make incremental changes to bring rules in line with changing society. Judges must ensure common law develops in accordance to the *Charter*. Spouses who are irreconcilably separated can be competent witnesses.

#### Statutes (Federal and Provincial)

* No comprehensive code of evidence therefore you must look at a number of sources and they all work together in different ways
* Each jurisdiction has an *Evidence Act* that applies in that jurisdiction
  + ***Canada Evidence Act*** applies where federal government has jurisdiction – Canada Labour Code, Criminal law, Fisheries
  + ***Ontario Evidence Act*** applies when the tribunal is under the provincial jurisdiction
  + It is possible to incorporate by reference some other provincial rules (even when applying the ***Canada Evidence Act***)
* Individual statues may also contain evidentiary rules applying to the matters governed by the statute
  + I.e ***Family Law Act, Banking Act, Immigration and Refugee Act*** – all have some evidentiary rules
* Statutory provisions may “include” (have read in) a discretion to exclude evidence if prejudicial impact outweighs probative value

#### Constitution

* *Constitution Act, 1867* determines which level of government legislates rules for which kinds of matters
  + Divides power between 2 levels of government – so if it is in the federal sphere then we must look at federal statues
* *Constitution Act, 1982* (the *Charter*) imposes limits on the rules that any jurisdiction may impose

#### Aboriginal Law

* Aboriginal claims raise difficult issues relating to proof
* Overall burden does not change, but evidential rules are to be applied flexibly
* Oral histories admissible if “useful and reasonably reliable”
  + Aboriginal claims often rely on historical claims that are not written; so the Courts have recognized that though the burden of balance of probabilities does not change; the rules must be applied with some flexibility

### Mitchell v MNR (Minister of National Revenue) (2001 SCC)

**Facts:** Respondent stated that aboriginal and treaty rights exempted him from paying duty on items brought from US. Federal Court held that respondent had an aboriginal right but NOT a treaty right to cross border without paying duties on goods destined for personal and community use and noncommercial trade with other First Nations.

**Held:** Appeal allowed. The claimed aboriginal right has not been established, he did not present enough evidence showing that the importation was an integral part of the band’s distinctive culture. The respondent must pay duty on the goods imported into Canada.

**Reasons:** *Constitution Act* accorded constitutional status to existing aboriginal and treaty rights, including those at common law. However, government retains jurisdiction to limit aboriginal rights for justifiable reasons in pursuit of substantial and compelling public objectives.

* Laws of evidence must ensure aboriginal perspective is given weight. But, claims must still be established on persuasive evidence. Claimants must demonstrate features of pre-contact society and so oral histories may offer otherwise unavailable evidence.
* Evidence did not show an ancestral practice of trading or establish this northerly trade as a defining feature of Mohawk culture. Mohawk culture would not have been “fundamentally altered” without this trade.
* “A court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in” (*Van der Peet*)
* Aboriginal oral histories meet the test of usefulness on two grounds: (1) They may offer evidence of ancestral practices and their significance that would not otherwise be available; (2) The evidence must be reasonable reliable
  + Even useful and reasonably reliable evidence may be excluded by TJ if its probative value is overshadowed by its potential for prejudice

**Ratio:** Rules of evidence must be applied flexibly, in a manner commensurate with inherent difficulties posed by aboriginal claims. Oral histories are admissible as evidence where they are both useful and reasonable reliable, subject to the exclusionary discretion of the TJ.

#### Scholarly Works

* Texts, articles, commentaries by prominent legal scholars
* Professional and Judicial Codes of Conduct governing advocates and decision-makers which forms part of the law of evidence
* Courts have recognized certain people as having a specific expertise in the law of evidence
* There are rules on how advocates must behave in tribunals

Purpose of the Law of Evidence

* The fair and orderly reconstruction of legally important events for the purpose of resolving a dispute about those events
  + **Fair and orderly:** part of the law of evidence is that it will operate appropriately. You want it to be fair to people and so even if they do not win, they should feel as though they had a fair chance.
  + **Reconstruction:** Court cases happen long after the original event so you must take events that happened in the past and put it into a package that you can reconstruct
  + **Events must be legally important:** Don’t want just anything before the court, want it to be relevant to resolving the dispute
    - “What can I complain about as a tenant?” – defines what is legally relevant in the case for example.

Goals of the Law of Evidence

* Search for the truth (but more a search for proof and not necessarily the truth – what can I prove?)
  + The general reconstruction of events
* Fairness
  + Want to be fair to the opposing parties
* Trial efficiency
  + Courts are expensive and so the question becomes “do I really need this evidence?”
* Finality
  + Want decisions to be as final as possible. Appeals and judicial reviews are available, but limited.
  + At a certain point, courts will say that they have had enough chances
* Other social interests (equality, human dignity, privacy etc.)
  + Law of evidence sometimes reflect stereotypes of certain people and how they behave and operate
  + Will see particularly in criminal law

Fundamental Rule of the Law of Evidence

* “All relevant evidence is admissible unless there is a clear rule of law or policy to exclude it.”
  + Always start by deciding whether the evidence is relevant. If it is relevant, it is admitted. If it is irrelevant, it is not admissible

# Key Concepts

* Relevancy (and materiality)
* **Probative value:** how much weight we will assign to it (how important it is)
* **Prejudicial effect:** Takes into account potential misuses of this information

Relevancy

* Logical relevance (*Thayer*)
  + Evidence must be logically probative of a matter in issue to be admissible
  + Relevance is all about common sense and logic; if it is logically relevant to an issue then it is admissible
  + You are asking if there is a logical connection between that piece of evidence and the issue to be decided.
* Legal relevance (*Wigmore*)
  + Evidence must be more than merely logically probative of a matter in issue to be admissible
  + Relevance + idea; yes, must be relevant under *Thayer*, but must have some degree of something else also added; would combo relevant and probative value and say only if you have both would be relevant
* *Thayer* is the Canadian definition
  + The definition is LOGICAL RELEVANCE (we keep probative value separate)
  + Is there a logical connection (as a matter of common sense) between that piece of information and what must be decided? If yes, the piece is evidence and is admissible
    - Sounds easy, but what we think is logical and what the tribunal thinks is logical are often not the same thing
  + Less concern about admitting potentially irrelevant evidence outside of criminal law

Basic Terminology

* Testimonial (oral evidence)
  + Ex. Put person on the stand and you ask them questions and they say their answers
  + Affidavit of a person (even if not oral) -> witness attesting to certain things
* Real evidence
  + Things, documents, photos
  + Overlaps with the 3 below (they are specific forms of real evidence)
* Documentary evidence
  + Documents; things reduced to writing (business documents, wills); some say photos – but they are more so real evidence
* Demonstrative evidence
  + Complex reconstruction in court like models or trying on clothing
* Electronic evidence
  + Regulated by statute
  + Computer generated or computer stored; can save data from these systems, print out
  + Not really a document/real evidence because whether it is reliable depends on the computer system that created it
  + Examples include wreckage from cell phones, Facebook accounts etc.
* Direct evidence
  + Relates directly to a fact or issue – “I witnessed an assault,” and then I say “that person committed the assault”; then that is direct evidence (have to decide if they are credible)
* Circumstantial evidence
  + Inferences must be drawn in order to prove these
  + Ex. having DNA sample increases the probability it was them or at least that they were at the scene; but we must draw an inference that the fact that their DNA matches that sample, and that the science is reliable
  + When looking at generalizations about how people behave gets messier (with science it is easier)
    - King Solomon trying to cut up the baby -> made generalization that women want to keep their kids alive, made inference that the woman who wanted him not to cut up the baby was the mother (could be wrong because it is an inference, but does not mean it is an invaluable way of reasoning)
  + Evidence can be direct or circumstantial-> effects how you must go about arguing that it is relevant
* Substantive admissibility
  + If it is of primary relevance to the case
* Impeachment
  + Can impeach a witness by showing that they made a prior inconsistent statement
  + Impeachment is of secondary relevance because it helps in deciding whether the people making the testimony can be believed or whether the witness is credible (when we try to impeach those witnesses, we are telling trier of fact that there is concern for us to be believing this interest; can impeach them by showing they made a prior inconsistency)
* Permissible/ impermissible uses & limiting instructions
  + Prior inconsistent statement could be substantively admissible BUT not automatically substantively admissible (might not be able to use to decide the case only to impeach witness)
    - Trier of fact will say you can use this evidence to decide what happened or use it to believe witness
  + How am I going to use it? And if it is valuable in multiple ways; the judge instructs “only use it for this purpose” -> limiting instructions; then you are not allowed to use the evidence for certain purposes
* Admissibility/weight
  + **Admissibility:** whether a piece of evidence can be considered by the trier of fact
  + **Weight:** the significance that is accorded to an admissible piece of evidence by the trier of fact.
    - It can be that you assign no weight to the evidence even though it is relevant and therefore admitted

Procedure

* Usually determined by TJ on a *voir dire* which is a small mini trial had when there is a dispute as to what evidence can be admitted
  + Evidence that is admissible on a *voir dire* is not necessarily admissible at trial
* Ruling may be made after hearing proposed evidence, counsel’s agreement to proposed evidence, or summary of proposed evidence.

Importance of Context

* Distinction between the full application of the law of evidence in a context and a later application of it in other contexts
* Important to know the context in which you are applying the law

Varying Levels of Application

* Primary focus- criminal and civil (jury/bench) trials
  + Primary focus has always been the criminal trial and criminal judge and jury trials
    - Dealing with people who are not legally trained; could use/interpret evidence more prejudicially
  + Applies almost with the same degree of force as criminal bench trials (but more lax because know they are a legally trained person); more room to let in evidence in a bench trial than in a judge and jury trial)
  + Civil trials can be judge alone or jury trials; most are judge alone trials (close to criminal bench trial – more relaxed)
* Other areas – rules may be relaxed or inapplicable (e.g. Admin tribunals where you see greatest relaxation of rules of evidence)
* Even when the rules are relaxed or inapplicable (I.e. In admin tribunals), law of evidence overall remains a relevant concern because we must understand how they apply in criminal setting to know how to adjust for this setting

Factors to Consider

* General nature of the tribunal
  + Criminal jury vs bench;
  + Bail hearing (are they a danger; should they be released back into the environment?; can use hearsay, character evidence, prior convictions of accused – may not be able to use at criminal trial where you are trying to find someone guilty or not because they might be too prejudicial). Law of evidence not the same as what applies to the criminal trial
  + Eg. The range of issues being dealt with -> might be stricter laws of evidence if it significantly impacts the person on trial
* Specific function being exercised
* Specific issue being addressed
* Constituting and other statutes

### Morris v R (1983 SCC)

**Facts:** Morris was convicted of conspiracy to import and traffic heroin from Hong Kong. TJ admitted into evidence a newspaper clipping entitled “The Heroin Trade Moves to Pakistan” found in the appellant’s home and dealings with the heroin trade in Pakistan.

**Prior Proceedings:** BCCA dismissed appeal, finding that TJ considered the article but did not give it much weight.

**Held:** Appeal dismissed. The TJ made no error in law in admitting evidence of the newspaper clipping.

**Reasons:** An inference could be drawn from the unexplained presence of the clipping among the appellant’s possessions that he had an interest in and had informed himself on the sources of supply of heroin. This evidence was relevant to a material issue in the case.

* While probative value of the evidence may be low, TJ did not consider its prejudicial effect to be so great as to be excluded.
* Admissibility of evidence must not be confused with weight. If the newspaper article had been about the heroin trade in Hong Kong that may have had more weight. It will be for the jury to decide how much weight they will give.
* The presence of the clipping tends to prove that the accused either clipped it or received it and kept it. Because people who are traffickers are more likely to keep such information than not, people who keep such information are more likely to be traffickers than people who do not, and a person who traffics is more likely to have committed the alleged offence, than one who does not.
* The weight to be given to evidence is a question for the trier of fact, subject to the discretion of the TJ to exclude evidence where the probative value is minimal and the prejudicial effect great (*R v Wray* 1960 SCC).
* No minimum probative value is required for evidence to be deemed relevant.
* A clipping about the source of a drug trade in another country shows some degree of interest in how you go about importing drugs from that country. If you are not interested in the drug trade, you are not likely to clip that out of the newspaper and keep it.

**Ratio:** Test for whether evidence should be admitted: (1) Is evidence is relevant? Is there a logical connection between the evidence and the substantive law? (2) If so, does evidence have probative value? This examines how strong the logical connection is and whether it is grounded on some basis or is purely speculative. A further inquiry is whether it will have a prejudicial effect and how strong the prejudicial effect will be?

### R v Watson (1996 ONCA)

**Facts:** Deceased was shot and killed at his business premises. Accused was charged with 2nd degree murder. Accused wanted to adduce evidence that the deceased sold drugs which supported the defence position that the killing was the result of a confrontation about drugs. TJ ruled that this evidence could not be adduced because evidence of acts of previous misconduct by the deceased unknown to the accused and suggesting a disposition for violence on the part of the deceased were inadmissible unless self-defence was advanced because it was irrelevant. Accused was convicted of manslaughter and sentenced to 10 years imprisonment.

**Held:** Appeal allowed; new trial ordered. TJ erred in holding evidence was inadmissible. Evidence supporting inferences that the deceased was armed and used a weapon during the confrontation made the defence position as to the accused’s non-involvement in any plan to kill the deceased more viable than if those inferences were not available. The proposed evidence, was therefore, relevant to a material fact in issue.

**Reasons:** Must distinguish between evidence of habit and evidence of disposition

* **Evidence of habit:** Permits one to draw an inference that, if a person habitually behaved in a particular manner under a given set of circumstances, the person did, in fact, behave in that manner when the circumstances arose again.
* **Evidence of disposition:** relies on premise that a person’s conduct may be predicted from their disposition. Jury may have drawn inference from the fact that the deceased habitually carried a gun that he was carrying a gun this night.
* When evidence is relevant, it will be received unless TJ concludes that its prejudice substantially outweighs its probative value.
* Since victim’s possession of a gun at the time he was shot makes a chain of inferences, which leads to accused’s participation being less likely, evidence is relevant.
* A finding of relevance does not determine admissibility – it can still be excluded if it is against an exclusionary rule or too prejudicial
* **Issue 1:** Does the fact that deceased always carried a gun make it more likely that he had one that night?
  + Court says yes: Evidence of habit is circumstantial evidence and may support an inference that in the situation in question the person acted in the same way as they habitually did in that type of situation
  + Doesn’t tell you directly whether Mair had a gun this day, but makes it more likely because in 99 similar instances he had a gun
* **Issue 2:** Does the fact that the deceased was in possession of a gun when shot make it less likely Watson was party to a plan to kill or do harm to him, formed before his arrival at the rental unit?
  + Involves a “chain of inferences” to make a determination
  + Crown’s Theory: W, C & H went to D’s business with the pre-formed plan of shooting D. All three were carrying guns. C & H went to the back and shot D, H shot C accidentally. W was out front as a guard/get-away driver.
  + Defence’s Theory: W was there but he did not know H or D were armed. C & W were not armed, and only H. W did not know about or participate in the killing. H shot D, D shot back at H but accidentally hit C
  + The Linked Inferences
    - If D had the gun in his possession during shooting, it is possible he used it and that only H & D fired shots
    - If the shooting was a result of a spontaneous confrontation between H & D, it is less likely there was a plan to kill D
    - Since it is at least a reasonable inference then the evidence must be admitted

**Ratio:** If a fact makes a different, material fact, more likely, it is relevant. No rule limiting evidence of prior misconduct by the deceased to cases where self-defence is raised. Sufficiency of the evidence is not a requirement.

# Types of Evidence

Testimonial (Oral) Evidence

* Proof of facts is normally accomplished through the oral testimony of witnesses
  + Usually because you need a good witness to back up that evidence

#### Order of Questioning Witnesses

* **Proponent’s case:** (whether it is the plaintiff, claimant or the Crown)
  + **Examination in chief:** Plaintiff/Claimant/Crown calls a witness and asks the relevant questions
  + **Cross-Examination:** Witness is then offered to cross-examination to the other side (defence)
  + **Re-examination:** Limited right on the part of whoever first called the witness. However, it is not a right to ask again all the questions that you asked during the examination in chief, it is intended for a very narrow purpose
  + You then close your case
* **Responding Party’s Case:** Exact same as above.
* **Reply Evidence:** It is a limited right meant to dealt with unanticipated things (ie. Things you could not have thought of before)

Purposes of Examination-in-Chief

* 1) To build or support own case
  + Also must think about the disclosure or discovery. Normally both sides have a good idea about what the other’s case will be
* 2) Weaken your opponent’s case
  + Must think about whether there is evidence that you can get out of your witness that will undermine the other side’s case
    - E.g. in criminal case if you know other side will argue self defence, you may try to get your witness to discredit this
* 3) Strengthen/weaken the credibility of witnesses
  + Can ask witnesses questions that are geared towards undermining facts that go to either support or weaken their credibility
    - E.g. In car accident you may ask about their eye sight because this would detract from their ability to accurately see what they said they saw
* 4) Your job, as counsel, is to control your witness, and the way to do this is through your questioning
* 5) You must be able to think on your feet and adapt your questioning based on what your witness is telling you

#### “No” Leading Questions

* Primary rule in examination in chief: you cannot ask a leading question to your witness.
  + i.e. you cannot say “so the light was red?”
* Presumed bias for the party who is calling the witness
  + Presumption that witness will testify in your favor and so there is a bias assumption that they are in favour of that party
* Calling party’s knowledge
  + You should know exactly what the witness is going to say based on your preparation with the witness
* Suggestibility of witnesses
  + If you suggest an answer to someone in the form of a question the tendency of most people is to say yes

#### Types of Leading Questions

* Questions that suggest the answer and only require a yes or no from the person answering the question
  + I.e. “the car was red?”, “it was raining outside?”, “he hit him first, right?”
* Questions that presuppose a fact not testified to by the witness
  + You have asked a question and it is based on facts that no one has testified to yet therefore, it is important to be listening to what the witness says and determine what has already been testified to
  + E.g. “when did you stop beating your spouse” when there is no evidence that anyone has been beaten

#### Exceptions to the General Rule of prohibition on leading questions

* 1) Introductory matters
  + You called witness to the stand and the witness provides their name etc., and then you can say “So, what do you do for a living?”. If no one cares what they do for a living and you’re just trying to get information then you can say “I understand you teach law for Western and you have a wife and 2 children?” This is allowed to a certain degree.
* 2) Identifying persons, places or things
* 3) Contradictory statements
  + If they testify to something different than what they have previously said, you can remind them of what they said earlier and then once you have established that the prior statement exists, then you can go into the content of it
* 4) Complicated or technical matters
* 5) Hostile or adverse witnesses: only with leave of the court
  + **Hostile witness:** Witness you call expecting to be your friend, but it is clear from their answers they don’t want to help you.
  + There are procedures that you must follow to have a witness declared a hostile witness and if the court rules that they are a hostile witness then it basically turns into a cross-examination of your own witness
* 6) Necessary in the interests of justice
  + With people with specific types of vulnerabilities, ie. children and people with mental disabilities, it is not possible to get an answer without asking leading questions
* 7) Uncontroversial facts
  + If there is one issue in the case but you need a bunch of background information that is not contested, then you can

Purposes of Cross-Examination

* 1) Undermine opponent’s case
  + It is usually the proponent of the case that bears the burden of proof and so undermining their case can be enough to win
* 2) Support own party’s case
* 3) Impeach the witness’ credibility or reliability
* 4) Here you get to ask leading questions, in fact you should ALWAYS be asking leading questions
  + **General rule:** Unless it absolutely cannot hurt you, never ask question that you do not know the answer to
* 5) The fact that you have a right to cross-examination does not mean you HAVE TO cross examine
  + Is the answer to the question going to help me? If not, should I even ask it?

Purposes of Re-examination

* 1) Clarify relevant testimony
  + If you asked a witness something but in cross-examination that answer has gotten confused because they say something slightly different, you can say “In examination in chief you said X, in cross you said XY, can you clarify whether it is X or XY?”
* 2) Rehabilitate the witness’ credibility

Testimonial Factors

* **Narration:** Witness’s ability to communicate what they perceived to the court
  + You may have seen something but if you cannot tell the trier of fact what you saw then the witness is useless
    - Do they speak English? Is there a vulnerability/disability that will make it difficult for them to give evidence in court?
* **Sincerity:** Witness’s willingness to tell the truth
  + When you put the witness on the stand, do you think they actually believe what they are saying is true or do you have concerns they are just going to tell you want you want/need to hear rather than what actually happened
* **Memory:** Witness’s ability to recall what they perceived
  + Cases don’r get to court quickly, there is a lengthy delay before something gets before a court and people’s memories fade with the passage of time. The longer something went on, the more likely you have a witness who does not remember
  + If something was a traumatic event, that might impact what they remember
* **Perception:** Witness’s ability to perceive accurately (see, hear etc.) the events in questions

Assessing Witnesses

* Key issues
  + 1) Honesty of the witness
  + 2) Accuracy of his/her observations
  + 3) Reliability of his or her memory
* A key part of this is how they can communicate all of this to the court

Contradictory Witnesses

* Sometimes there are witnesses that make contradictory statements
* It is not a “credibility contest” between the various witnesses
  + It is not like if I believe X, then I cannot believe Y.
* Must assess the relative credibility of each witness, in the context of the overall evidence in the case
  + Some evidence might make you believe what A said is true, other evidence might make you believe what B said is true

#### Factors to Consider

* 1) Whether the witness’ testimony is consistent with the witness’ conduct before, during and after the event
  + If witness says they were terrified, but then their actions after the event do not support that then you may not believe them
* 2) Inherent plausibility of the events stated by the witness
  + Sometimes someone will tell you something and it just does not make any sense at all
* 3) Presence of plausibly collateral details supporting the witness
  + If the witness says they are travelling through the intersection and a car smashed into them and took off and that their car was totalled but there was no evidence at the scene of there being that much damage you may question it
* 4) Absence or presence of corroboration
  + **Corroboration:** are there other facts that even if they do not directly support the witness testimony, lend some degree of comfort in accepting that what the witness said was true
* 5) Consistency with other evidence: if all witnesses are telling you the same thing, then generally you are more inclined to believe it
* 6) Witness’ demeanour
  + Relevant but do not over-emphasize its importance, particularly their demeanour in court
  + Law does allow courts to use a witness’s demeanour
  + Can be talking about someone’s demeanour at the time incident occurred (a little more relevant) but if you ask them in court to testify about past events that is different because people can be uncomfortable being a witness or speaking in public

# Documents

* Generally, documents must be introduced by witnesses but what you really care about are the contents of the document because you want the trier of fact to use these contents as evidence in the case

Proof of Documents

* 1) Produce and identify the document
* 2) Authenticate the document
  + Author of document
    - If it is a contract the person who signed the contract can authenticate it
  + Witness to its creation
    - If the actual author is dead, a witness who was there at the time can attest to the signature
    - Lawyer can testify as to what they did so long as it is not breaching any solicitor-client privileges
  + Witness who attests to handwriting
  + Comparison with genuine document: comparison of an unknown signature with a known signature
  + Expert testimony
    - Can call a handwriting expert who will testify that handwriting is more likely than not or definitely X’s handwriting
    - *Evidence Act* allows the trier of fact to draw their own comparisons between handwriting samples
  + Admission by opposing side

#### Best Evidence Rule

* Proof of content of documents requires the original document, if available

#### Proving the Contents

* E.g. Business records
  + Common law
  + **S. 30** *Canada Evidence Act*
    - **30(1)** Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record
    - **30(2)** Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist
    - **30(3)** Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy’s authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is
      * **(a)** affidavit of those persons sworn before commissioner or person authorized to take affidavits; or
      * **(b)** a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.
    - **30(4)** Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person’s qualifications to make the explanation, attests to the accuracy of the explanation, and is
      * **(a)** affidavit of those persons sworn before commissioner or person authorized to take affidavits; or
      * **(b)** a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.
    - **30(5)** Where only a part of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.
    - **30(6)** For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record
    - **30(7)** Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party
    - **30 (8)** Where evidence is offered by affidavit under this section, not necessary to prove signature or official character of person making the affidavit if the official character of that person is set out in the body of the affidavit.
    - **30 (9)** Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.
    - **30(10)** Nothing in this section renders admissible in evidence in any legal proceeding
      * **(a)** such part of any record as is proved to be
        + **(i)** a record made in the course of an investigation or inquiry,
        + **(ii)** a record made in the course of obtaining or giving legal advice or in contemplation of legal proceeding,
        + **(iii)** a record in respect of the production of which any privilege exists and is claimed, or
        + **(iv)** a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;
      * **(b)** any record the production of which would be contrary to public policy; or
      * **(c)** any transcript or recording of evidence taken in the course of another legal proceeding.
    - **30 (11)** The provisions of this section shall be deemed to be in addition to and not in derogation of
      * **(a)** any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or
      * **(b)** any existing rule of law under which any record is admissible in evidence or any matter may be proved.
  + **S. 31.1-31.8** *Canada Evidence Act*
    - **31.1** Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.
    - **31.2** **(1)** The best evidence rule in respect of an electronic document is satisfied
      * **(a)** on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or
      * **(b)** if an evidentiary presumption established under section 31.4 applies
    - **31.2(2)** Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.
    - **31.3** For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven
      * **(a)** by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;
      * **(b)** if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or
      * **(c)** if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.
    - **31.4** The Governor in Council may make regulations establishing evidentiary presumptions in relation to electronic documents signed with secure electronic signatures, including regulations respecting
      * **(a)** the association of secure electronic signatures with persons; and
      * **(b)**  integrity of information contained in electronic documents signed with secure electronic signatures.
    - **31.5** For the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.
    - **31.6** **(1)** Matters referred to in 31.2(2), 31.3 & 31.5 and regulations made under 31.4 may be established by affidavit.
    - **31.6 (2)** A party may cross-examine a deponent of an affidavit referred to in (1) that has been introduced in evidence
      * **(a)** as of right, if the deponent is an adverse party or is under the control of an adverse party; and
      * **(b)** with leave of the court, in the case of any other deponent.
    - **31.7** Sections 31.1 to 31.4 do not affect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence.
    - **31.8** The definitions in this section apply in sections 31.1 to 31.6.
      * **computer system** means a device that, or a group of interconnected or related devices 1 or more of which,
        + **(a)** contains computer programs or other data; and
        + **(b)** pursuant to computer programs, performs logic & control, & may perform any other function.
      * **data** means representations of information or of concepts, in any form.
      * **electronic document** means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data.
      * **electronic documents system** includes a computer system or other similar device by or in which data is recorded or stored and any procedures related to the recording or storage of electronic documents
      * **secure electronic signature** means a secure electronic signature as defined in 31(1) of the [*Personal Information Protection and Electronic Documents Act*](https://laws-lois.justice.gc.ca/eng/acts/P-8.6).
  + **S. 34.1** *Evidence Act*
    - **34.1** (1) In this section,
      * “***data***” means representations, in any form, of information or concepts
      * “***electronic record***” means data that is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device, and includes a display, printout or other output of that data, other than printout referred to in (6);
      * “***electronic records system***” includes the computer system or other similar device by or in which data is recorded or stored, and any procedures related to the recording and storage of electronic records.
  + **S. 35** *Evidence Act*
    - **35 (1)** In this section,
      * “***business***” includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;
      * “***record”*** includes any information that is recorded or stored by means of any device.
    - **35 (2)** Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
    - **35 (3)** (2) does not apply unless party tendering the writing or record has given at least 7 days notice of their intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession production for inspection of the writing or record within 5 days after giving notice to produce the same.
    - **35 (4)** The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.
    - **35 (5)** Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

Possible Reasons to Prefer Documents to Witnesses

* 1) Contemporaneity of the documents
  + If document reflects what occurred at the time, more reliable because there is no lapse in time and it was created before anyone was charge or sued
* 2) Created before litigation was contemplated
* 3) Intended use of the documents
* 4) Steps taken to ensure accuracy

Possible Reasons to Prefer Witnesses to Documents

* 1) Trial safeguards- oath, in court, legal consequences
  + A lot of emphasis is placed on these trial safeguards in terms of their role in ensuring that what we hear in court is truthful
* 2) Tested by cross-examination
  + When the document is signed there is no one going through it cross-examining the people about the contents of the document but in court, there is a formal process of cross-examination
* 3) Lack of recognition of importance of document at time it was created
* 4) Consistency with overall events

# Real Evidence

* Real evidence are things where the piece of evidence speaks for itself
* The witness is there just to say that the photo is accurately the thing in question, but the thing is the actual evidence

Advantages/Disadvantages

* 1) May be more effective since no intermediary
* 2) Practical/safety concerns
* 3) Difficult fully reflecting in court record
* 4) Maintaining items integrity
* 5) Dependant on trier of fact’s assessment skills

#### Photographs and Videotapes

* Authentication
  + Accurate representation of facts
  + Fairness and no intention to mislead
  + Verification on oath, if reasonable
* Key concern = undue prejudice

### R v Nikolovski (1996 SCC)

**Facts:** Accused convicted of robbery. He appealed, arguing that TJ erred in identifying him solely based on videotaped recording of the robbery.

**Prior Proceedings:** ONCA allowed the appeal and set aside conviction. TJ should not have relied solely on her comparison of the appearance of the robber on the videotape and the appearance of the accused in court absent corroborating evidence identifying him. Crown appealed.

**Held:** Appeal allowed, conviction restored.

**Ratio:** Good quality videotape that gives a clear picture of the events and perpetrator could, by itself, prove identity of the perpetrator beyond a reasonable doubt but you still need to authenticate it. Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant. Jury should be instructed to consider carefully whether the video is of sufficient clarity and quality and shows the accused for a sufficient time to enable them to conclude identification beyond reasonable doubt.

**Reasons:** Why was the security video admissible?

* + No alterations or changes. In order to get a video in as real evidence you must be able to authenticate it. The store clerk could do that by saying he was there and what happened on the video is actually what occurred
  + It was of sufficient clarity and quality to be admitted.

### R v Andalib- Goortani (2014 ONSC)

**Facts:** AG is a Toronto police officer charged with assault with a weapon for events that took place during the G20 Summit. Image of this incident was posted anonymously to a website. There was no doubt that the woman in the photo was the victim, but a significant dispute arose as to whether the officer was AG, or whether the image had been digitally altered. Defence objected to image’s admissibility and called expert to challenge authenticity. Experts agreed that some properties of the image had been altered through the process of being uploaded.

**Held:** Photo was not admissible.

**Reasons:** Crown had failed to establish the photo’s authenticity. Crown had not established that the image was not tampered with or altered before it came into the Crown’s possession.

* Why was uploaded photograph inadmissible?
  + Photographs not as good as videos because they only capture moments not whole thing. Generally, still admissible though!
  + It could not be authenticated-No one knew who took the photo. As a result of the uploading process, most of the metadata disappeared and the composition of the photograph could no longer accurately be determined to be as it had been taken. Court said that given that, they could not say it was an accurate and fair representation of what happened.
  + Inability to confirm an “accurate and fair representation”
    - If the photo was admitted, it would likely decide the case and so you must be SURE that if you admit the evidence that it is exactly what happened. If you could not make a firm conclusion that it has not been altered, then you should not admit the evidence.

**Ratio:** Photo’s are only “conditionally” admissible, and certain pre-conditions must be “established” based on at least “some evidence” before the photo is available to a witness or trier of fact. The party seeking to tender the image bears the burden of authentication. 3 requirements for the admissibility of photos: (1) evidence demonstrating their accuracy in truly representing the facts; (2) evidence of their fairness and absence of any intention to mislead; and (3) evidence of their verification on oath by a person capable of doing so (*R v Creemer and Cormier*)

#### Things

* Talking about things like guns, pen, drugs, things that you can pick up and put down
* Basic rules apply
  + Relevance, exclusionary discretion
* Authenticated
  + Verification on oath
    - You must call the person who got the thing to testify that that it is the thing
    - Often will be the officer who picked up that thing and they will confirm it has not been altered or changed since
  + Chain of custody
    - Establishing the continuity of the item and that the item being presented in court is the same item
    - You do not have to prove continuity beyond a reasonable doubt, but the court must be satisfied that it is likely the thing was safely locked up, that no one else had access to it and they know it is the same thing

#### Non-Things

* Taking a view of a thing or property
  + You can say “I think it would be a good idea to go take a look at the scene”
  + Does not happen often because the scene of the event has likely changed by the time the court case is occurring
* Judicial discretion
  + Judges don’t like to do it because it is difficult to create a proper record of it
* Proper record
* Observation of a witness’ demeanour of appearance
* “Informal” evidence
* No admissibility test

# Demonstrative Aids

Terminology/Purpose

* **“Demonstrative evidence”:** things that are used to explain other evidence
  + - If the evidence is complicated or technical then you may use demonstrative aid to make it easier to present
* **“Illustrative evidence”:** evidence that illustrates testimony but does not, by itself, prove anything
  + E.g. A computer animation used to illustrate a witness’s testimony is offered to support the related substantive evidence (the testimony) rather than as proof of something else
* **“Evidential or testimonial aid”:** Provisions that make it easier for victims and witnesses to provide their testimony in court
  + E.g. Allowing the victims and witnesses to testify outside the courtroom by closed-circuit television or inside the courtroom but behind a screen which would allow them not to see the accused or allowing a support person to be present while victims and witnesses testify in order to make them more comfortable.
* Purpose of the “evidence”
  + Illustrate/demonstrate, summarize, and/or explain the primary facts so they can be more easily understood/remembered

#### Examples

* Anatomical models/medical diagrams/ treatment charts
  + Especially in medical malpractice case, treatment charts can summarize the long history of the persons hospitalization
* Overview photographs and maps (i.e., not directly showing the “events” before the court/tribunal)
* Scale diagrams (of intersections, locations etc., to explain the locale of the “event” before the court)
* PowerPoint presentations summarizing various types of voluminous information such as cellphone tower pings, accounting or banking records, cellphone or “social media” communications.
* Animations or videos showing current status or expected outcomes (eg. “day in the life” videos)
* Video re-enactments or computer reconstructions of “past events”
* In-court demonstrations

Advantages of Demonstrative Aids

* 1) Powerful, and increasingly prevalent, form of “evidence” or “evidential aid”
* 2) Visual (rather than oral), simplified (rather than complex), vivid and engaging (rather than dry and boring), transportative (rather than static), unusual (rather than routine).
  + See them a lot in civil cases but usually only in high profile criminal cases

Disadvantages of Demonstrative Aids

* 1) Risk of being misleading and/or overvalued by trier of fact- too simplified, vivid, engaging, transportative, unusual…
* 2) Unequal access to resources- favours big pocket and government litigants who can afford to use these demonstrative aids
  + It is a lot harder for the small plaintiff trying to use or the defence to respond especially with accident reconstruction
* 3) Too time-consuming? – not “evidence” per se, but only “aids” to understanding the “real” evidence
  + It takes time because you must create it, explain how it was created etc.
* 4) Too difficult to “test” through cross-examination (particularly if contested facts and unequal resources)

“Test” for Admissibility of Demonstrative Aids

* 1) Material and relevant
* 2) Accurate representation
  + How close does this demonstration reflect what is accepted as to the undisputed facts and if it does represent disputed facts will it be able to explain to the trier of fact that these are the undisputed facts and that these are why we included them?
* 3) Reasonably necessary to illustrate or explain the witness’ evidence
* 4) No risk of causing unfair prejudice to the opposing side

#### Laying the Foundation

* Relevance
* Mode of preparation
* Authenticity (accurate depiction)
* Proposed use and utility of aid

#### Consider/Contrast

* Photograph of the car accident, at the intersection, taken immediately after the accident occurred
* Aerial photograph of the intersection where the accident occurred, taken shortly after (or even before) the accident occurred

### R v MacDonald (2000 ONCA)

**Facts:** Accused was a fugitive, “takedown” did not go smoothly. M was charged with 2 counts of aggravated assault and 1 count of dangerous driving. 20 months later, police made a video in which they attempted to reconstruct the takedown. Defence counsel objected to it’s admission arguing it was more prejudicial than probative. TJ rules it admissible. Jury found M guilty. He appealed.

**Held:** Appeal allowed. The admission of the videotaped re-enactment was a reversible error.

**Reasons:** TJ erred in admitting it because (1) he failed to appreciate that its many factual inaccuracies undermined its probative value and (2) he was not sensitive to the prejudice caused by re-enacting one side’s version of events.

* The video was highly inaccurate and overall had little or no probative value and was highly prejudicial

**Ratio:** The same overriding principle applies which is to decide whether the prejudicial effect of the video re-enactment outweighs its probative value. If so, it should not be admitted. In balancing this, TJ’s should consider the video’s relevance, its accuracy, its fairness and whether what it portrays can be verified under oath. Serious concern with videotaped re-enactments is that that they could unfairly influence the jury’s as they may give it more weight than it deserves and discount less compelling or less vivid evidence which is more probative.

# Courtroom Experiments

* Discretion of judge
* Confusion and delay
* Inability to “record” for appellate review
* Inability to sufficiently replicate the original occurrence

# Electronic Evidence

CEA, s. 31.8- Definitions

* Electronic document means data that is recorded or stored on any medium in or by a computer system or other similar device [cellphones] and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data. (basically anything that is electronic can be a form of electronic document)

Admissibility (ss. 31.1-31.4)

* **Two requirements:** 
  + Authenticity of document (s. 31.1)
    - Low standard
    - “Evidence capable of showing” the document is what it is purported to be (31.1)
    - Disputes about genuineness of the document are for the ultimate trier of fact
  + Best evidence rule (ss. 31.2-31.4)
    - 1. Proof of integrity of the document system that recorded or store the document by evidence (s. 31.2(1)(a))
    - 2. Proof of the integrity of the document system that recorded or stored the document using one of the three presumptions provided for in subsection 31.3 (subsection 31.2(a)), namely the “functioning system” presumption, the “opposing party” presumption, and the “third party business record” presumption.
    - 31.4 For documents bearing secure electronic signatures, proof by the presumption provided for by regulation pursuant to subsection 31.4 (subsection 31.2(b))
    - 4. Absent evidence to the contrary, proof that the document has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in a printout (subsection 31.2(2)).

#### Proof of Contents (s. 31.7)

* “31.1 to 31.4 do not affect any rule of law relating to admissibility of evidence, except rules relating to authentication & best evidence”

### R v CB (2019 ONCA)

**Facts:** B and C convicted of sexual assault. Two complainants, P and D alleged they were sexually assaulted after being given alcohol and marijuana in B’s basement. At trial, defence cross-examined P on texts she supposedly sent to B at the time of the alleged assault, and cross-examined D on photographs showing the complainants sitting with accused immediately after alleged assault. The texts and photos were extracted from a cellphone given by B’s mother. P acknowledged that the number the texts were sent was her number and later said she did not think she sent them. D identified the people in the photos, said they were taken in B’s basement and group appeared to be happy. TJ said that text messages had not be authenticated because there was no direct evidence regarding how they were extracted and concluded they had no probative value. TJ also found photo had no probative value because people in the photo had not been identified and photo was not shown to either complainant. Accused appeals.

**Held:** Appeal allowed. TJ’s conclusion that the complainants were credible witnesses who gave reliable evidence was central to the finding of guilt. Therefore, misapprehension of evidence played an essential role in reasoning process that led to convictions.

**Reasons:** TJ erred in concluding texts had no probative value because they were not authenticated by direct evidence from sender or expert.

* Evidence supported finding that text messages were exchange of communications between P and B
* The photo was in fact put to D, and she identified persons depicted in the photo
* Why were the text messages admissible*?*
  + Authenticated by P – testified it was her number, she was operating phone, explained the meaning of one of the texts and the contents of the texts were consistent with events
  + Fact that it may have been tampered with or that she may not have sent them, was not an admissibility issue but a weight issue
  + Admitted because there was some evidence they are what they are purported to be: text messages sent/received by this person
  + Integrity established under the functioning system presumption

**Ratio:** Texts may be linked to phones by examining recorded number of sender and receiving evidence linking number to individual. Inference that sender authored message sent from their number should be drawn in absence of evidence that gives air of reality to tampering claim.

# Relevance & Fact-Finding

Relevancy

* Based on human experience, common sense and logic
* Question – does the existence of “Fact A” make the existence (or non-existence) of “Fact B” more probable than it would be without the existence of “Fact A”? – If so, “Fact A” is relevant to “Fact B”
* Does not require a direct connection between the evidence and material facts or issues
* Can be “direct” or “circumstantial” evidence

# Direct Evidence

* Direct evidence of a fact is always relevant
  + E.g. an eye-witness states “That’s’ him”

# Circumstantial Evidence

* Requires a nexus or link between the evidence and the fact to be proven
  + E.g. from a fingerprint infer “That’s him”

### R v Villaroman (2016 SCC)

**Facts:** Villaroman brought laptop to a repair shop. Repair technician discovered child pornography. Police who seized the computer. A forensic analysis established that only 1 user account had been set up and that the computer was used almost everyday. Villaroman claimed police breached his *Charter* rights by seizing computer without a warrant and argued that this should result in the evidence found being excluded.

**Prior Proceedings:** Guilty at trial. He appealed, citing *Charter* grounds and argued evidence was too circumstantial to prove guilt. CA set aside conviction and stated TJ had not applied proper tests to circumstantial evidence to prove guilt beyond a reasonable doubt. Acquitted.

**Held:** Appeal allowed; acquittal set aside. Returned to the BCCA to address *Charter* issues. CA incorrectly assumed TJ made a mistake by not considering reasonable inferences consistent with innocence. The inferences CA said TJ should have considered were unreasonable.

**Ratio:** To prove guilt beyond a reasonable doubt, Crown does not have to disprove every single explanation that could be drawn from circumstantial evidence and could support a finding of innocent. In assessing circumstantial evidence, inferences that are consistent with innocence do not have to arise from proven facts. However, TJ does not make an error simply because they do not consider reasonable inferences that are inconsistent with guilt that could arise from a lack of evidence. Inferences may be drawn from circumstantial evidence but must be considered in light of all evidence and the absence of evidence, assessed logically, and in light of human experience & common sense.

**Reasons:** To prove child pornography, Crown must prove beyond a reasonable doubt; (1) the defendant knew the nature of the material; (2) the defendant had the intention to possess it; (3) the defendant was able to exercise control over it.

* Evidence was circumstantial because it did not prove that he knowingly came to possess it or that it was there without his knowledge
* While all the evidence was circumstantial, all three of the above elements were proved beyond a reasonable doubt.
* Reasonable doubt is a state of mind: how sure the jury must be of guilt in order to convict
* A good way for the trier of fact to consider making an inference of guilt from circumstantial evidence is if the inference of guilt drawn from circumstantial evidence is “the only reasonable inference”
* DIt would have been unreasonable to look at these inferences. He had control of the computer, computer had only 1 profile, the username was similar to his and the files were organized and accessed. Therefore, all reasonable inferences other than guilt were excluded.

#### Admissibility Standard

* Low standard of relevancy- need only tend to increase or diminish the probability of the existence of a fact in issue
* Does not have to conclusively prove a fact or make it more probable than not
* May be based on (require) a “chain of inferences”

#### Conflicting Inferences

* Proposition does not always have to be true to provide the inferential link
* Relevant circumstantial evidence may be subject to competing interpretations
* Facts are not irrelevant just because they can be interpreted in more than one inference can be drawn from them
  + Inferences are for trier of fact to decide after the evidence has been admitted but you MUST be able to make a connection

#### Assessed in Context

* Relevancy of evidence must be assessed in the context of the other evidence in the case and the positions of the parties
* Relevancy of evidence may need to be re-assessed in light of other evidence
* Evidence can be “conditionally admitted” by a trial judge

Assessing Weight

* Probative value vs weight
  + **Probative value=** estimate of how significant the evidence is, if it is properly used
    - If there are uses that could be made by the trier of fact, then it has probative value
  + **Weight=** significance of the evidence, as ultimately assessed by the trier fact
    - It could have a high probative value but overall, the trier of fact could put less importance on that evidence
* Assessing probative value or weight when relevance is disputed
  + Strength of the inferential link
  + Almost always, usually, sometimes, rarely
* Evidence must always be weighed
* Weight of direct evidence depends on inferences about credibility/reliability
* Weight of circumstantial evidence depends on inferences about credibility/reliability and on inferences connecting the circumstance with a material fact
  + Have to add in the extra fact of what is the weight of the inference itself

Basic Considerations

* Source of evidence – first hand?, second hand?, factual?, opinion?
* Probability – sensible?, believable?
* Internal consistency- very few contradictions in the evidence itself
* External consistency – fits generally with the other evidence in the case
* Examine the evidence in terms of it’s consistency with the probabilities that surround the currently existing conditions
* How harmonious is it with the probabilities a practical & informed person would readily recognize as reasonable in the circumstances

# Principles of fact-finding

1. Quality, not quantity
   1. You can win a case with one witness of good quality and lose with 20 witnesses whose quality sucks
2. No evidentiary hierarchy
3. Some evidence must exist to support a factual finding
   1. You cannot make a finding of fact in the absence of evidence. This is an error of law and grounds for appeal
4. Consider all relevant evidence material to a significant point
5. Findings can be based on an acceptance of all, some, none of a witness’ testimony
   1. It is not an all or nothing situation.
6. Findings of fact must be made on all essential matters
7. Rejected evidence has no evidentiary rule
8. Finding that a party has fabricated evidence can be used as evidence against that party
9. Findings of fact can be based on an assessment of credibility alone
10. Witness’ evidence may be entirely rejected if witness deliberately lied on a material matter

# Combining the Evidence

* Corroborative evidence
* Contradictory evidence
* Convergent evidence
* Conjunctive or linked evidence
* Conflicting evidence

### R v White (2011 SCC)

**Facts:** Matasi was shot and died. Eyewitnesses reported White was the shooter and immediately fled the scene. Initially at trial, the identify of the shooter was an issue. However, later, the defence conceded that White shot Matasi and was guilty of manslaughter, not 2nd degree murder.

**Prior Proceedings:** When admitting this post-offence conduct (White fleeing the scene), judge cautioned jury as to the possibility of misusing this information by alerting them of the risks associated with giving it too much emphasis. Jury convicted him of 2nd degree murder.

**Held:** Appeal dismissed, conviction upheld. Juries can consider actions that occur after the offence as circumstantial evidence of guilt.

**Reasons:** TJ did not need to instruct the jury that the evidence of his post offence conduct had “no probative value”, and TJ was correct in merely cautioning the use of this evidence.

* Post-offence conduct had probative value in determining guilt of more serious offence. If he hesitated before fleeing, defence would have used this to indicate it was an accident. Therefore, lack of hesitation, while not determinative, supports position that it was intentional.
* Why was the manner of White’s flight relevant in *White*?
  + Accused’s conduct after offence is a form of circumstantial evidence and may support inference of guilt
  + Other types of after the fact conduct: flight from jurisdiction, resisting arrest, failure to appear at trial, acts of concealment, attempt to commit suicide etc.
  + Post offence conduct can infer consciousness of guilt concerning the offence which can infer actual guilt
  + Analytical Steps:
    - 1) Identify the issue to which the evidence is said to relate
    - 2) Determine if evidence legally supports inference of guilt with respect to specific offence rather than another offence

**Ratio:** Post-offence conduct can be considered by juries in determining accused’s level of culpability. While juries may misuse this type of evidence, it ought to be considered if its evidentiary value exceeds its prejudicial effect. This kind of evidence should be accompanied by a cautionary instruction from the judge to the jury to prevent overreliance.

### R v Munoz (2006 ONSC)

**Facts:** O, F and M allegedly conspired with I to murder F’s wife. I testified at prelim hearing that accused was also a member of the conspiracy. The only direct evidence was that the accused told I to make a deposit to his lawyer’s account. Judge inferred that the money was to come from F for the accused’s participation in conspiracy. The accused applied to quash his committal for trial on the charge of conspiracy.

**Held:** Application granted.

**Reasons:** Judge exceeded jurisdiction by committing based on inference not reasonably drawn from evidence. Evidence at most supported inferences that money came from F and was in exchange for accused doing something illicit. Further inference that the accused conspired to murder was a gap that was not bridged by evidence. No evidence that the accused knew of the conspiracy or did anything to further it.

**Ratio:** An inference is a deduction of fact based on "inductive reasoning" using logic, reasonability and human experience

### R v Schwartz (1988 ONSC)

**Facts:** Accused was charged with possessing restricted weapons for which he did not have registration certificates. At trial, police officer gave evidence as to the absence of registration. The accused was convicted and appealed. On appeal, Judge held that the trial judge erred in admitting hearsay evidence concerning the lack of registration and excluded this evidence. Appeal judge allowed the appeal and quashed the conviction. Manitoba CA allowed the Crown’s appeal and restored the conviction.

**Issue:** Should the hearsay evidence be admitted?

**Held:** Appeal dismissed.

Examples

* Plaintiff entered an intersection without stopping and got into an accident. Plaintiff did not notice the stop sign. He sued the township for negligence in placing the stop sign in a position that was difficult to see. He sought to tender the evidence of a nearby resident who would testify that many accidents had occurred at that intersection, but that shortly after the plaintiff’s accident the township moved the stop sign and then no more accidents occurred. Defence said this evidence is not relevant. Was the evidence admissible?
  + “the relevant data”:
    - Local resident knowledge of the frequency of accidents before the stop sign was re-located and his knowledge that no accidents had occurred after it had been moved
  + Reasoning Process:
    - A number of accidents occurred at the intersection when the stop sign was in it’s original spot
    - No accidents occurred at the intersection after the stop sign was moved to its new location
    - Can be reasonably inferred that stop sign was less visible in its pre-accident location, compared to current location
* A is being prosecuted for passing counterfeit money. No issue bill is counterfeit, only issue is whether A knew so. A admits he bought drinks and paid for them with a counterfeit bill but claims ignorance bill was counterfeit. Crown seeks to call W, the bartender, to testify that when he served A and his friends, he saw A light a cigar with a $20 bill. The Defence said the bartender’s testimony is not relevant.
  + It is still relevant that there is a competing inference. It does not affect the admissibility of the evidence
  + Issue: Did A known the $20 bill was counterfeit? Is W’s evidence admissible? Why or why not?
  + “the relevant data”
    - A lit cigar with the bill at the same time as he is charged with passion counterfeit money
  + Reasoning Process
    - $20 is a reasonable amount of money and, as a matter of logic, people do not throw away $20 by burning it
    - It can be reasonably inferred that A burnt the $20 bill because he knew it was fake
* P sues D for repayment of a promissory note. D denies this and alleges the note is a forgery. P calls several witnesses who testify that handwriting on the note is D’s. P also wants to call W to testify that D asked W loan him money before and after the date of the note.
  + Should W’s evidence be admitted?
    - Inference about people who ask for money is that they ask multiple people. Can infer if someone is asking for money they are asking because they need it and can infer that person is not shy about asking for money. Person who needs money is more likely to ask someone for money and a person who asks is more familiar with process of asking for money.
* B hit a pedestrian and is being sued. Issue is whether B stopped at stop sign. At trial, P proposed to have W1 testify that he once saw B drive the wrong way down a one-way street, that he once saw B blow his horn in a hospital quiet zone, and that he once saw B steer with his feet in traffic. P also proposed to have W2 testify reputation for driving is that of a reckless daredevil. Finally, P proposes to have W3 testify that he worked at a gas station where the incident occurred, that he has serviced B’s car and knows it is a standard-shift automobile, and that in all the times he saw B drive through the intersection, he never saw B come to a full stop at the stop sign. Rather, B always would spurt through the intersection without downshifting to first gear.
  + **W1:** Evidence goes to B’s past conduct when driving but he is only able to point to a few specific incidents of prior bad driving
    - May not be enough instances here to consider it a habit. You need more information to make these assessment
    - Wide variety of behaviour implying bad/reckless driving, but we do not know timing. Lacks specificity.
  + **W2:** He is just talking about a general broad reputation; he is not relying on anything in particular
    - General reputation not backed by any specific incidents of bad driving behaviour
    - Generally, hearsay can be used in some criminal cases, but is generally not admitted in civil cases
  + **W3:** Probably most relevant because it directly goes to B’s consistent behaviour with stop signs
    - W3 is testifying evidence of habit: habitual conduct of behavior that is specific to the person in question
    - Evidence would clearly be admissible because it speaks to bad driving conduct specific to the particular fact situation
    - Testimony concerns sufficiently “habitual” behaviour to be admitted as evidence of habit
    - Shows B has gone through without stopping, from which one could reasonably infer on this occasion B did not stop

# Probative Value and Prejudicial Effect

* + Probative value vs. weight
  + **Probative value:** Estimate of how significant the evidence is, if properly used
    - This is the term we use when we are determining whether evidence is admissible and trying to assess as the trier of law, if the evidence is admitted what could a jury or trier of fact do with it
    - Not asking what the jury is going to do with it but rather the full range of what the jury COULD do with it
  + **Weight:** Significance of the evidence, as ultimately assessed by the trier of fact

Assessing Probative Value

* Assessing probative value necessarily involves a limited weighing of the evidence
* Threshold assessment only – is the evidence worthy of being heard by the trier of fact?

#### Exclusionary Rules Rationales

* **1)** Distortion of the fact-finding process
  + Largely the reasoning process that the trier of fact goes through
  + Also, the risk of moral persuasion in the wrong way. Talking about the jury being inflamed by evidence admitted
* **2)** Trial efficiency
  + If you admit a lot of types of evidence, it can take up a lot of time in the trial
  + E.g. expert evidence: you must qualify the expert, expert must explain the underlying documents etc. It takes a lot of time and so we have rules that regulate when expert evidence can or cannot come in
* **3)** Other societal values
* **4)** Incompatibility with the trial process
  + Hearsay rule: Says that hearsay rule is inadmissible in a court of law, but it has a lot of exceptions

#### Exclusionary Discretion

* TJs have discretion to exclude otherwise admissible evidence based on assessment of probative value compared to prejudicial effect
* This is where the assessment of the probative value comes in
* We are looking at prejudicial effect of the use of the evidence and trial efficiency

Prejudicial Effect

* Prejudicial effect refers to the risk that admitting the evidence may prejudice the trial process
* Prejudicial effect does not refer to the damage to a party’s case that the evidence may cause – if this were true no evidence admissible
  + Rather, we mean it must have some more specific form of distorting trial process

#### 5 Main Forms of Prejudice

* Arouse prejudice, hostility, sympathy
* Create a side issue that will unduly distract the jury from the main issue in the case
* Consume an undue amount of time
* Unfairly surprise the opponent
* Usurp the function of the jury

#### More Generally Stated

* Risk that evidence may: (1) Undermine an accurate result, (2) Complicate or frustrate the trial process, (3) Assault the dignity of witness or parties

#### Other Forms of Prejudice

* Paciocco & Stuesser – “any potential that evidence has to undermine an accurate result, to complicate or frustrate the process, or to assault the dignity of witnesses or parties” then you can exclude it
  + This is a general way of summing up the 5 forms above

#### Factors to Consider in Assessing Prejudicial Effect

* There are things the trier of law can do to explain how to use evidence
* Prejudicial evidence may be necessary, and the probative value is so high that prejudicial effect won’t keep it out
* The extent to which the potential prejudice is already present in the trial because of other evidence
* The mode of trial in a case
* The likelihood that the potential prejudice will occur
* The use of limiting instructions

#### Overcoming Prejudice by Limiting Instructions

* Limiting instructions from the trial judge not to use evidence in a certain way may remove some or all the potential prejudice
* The likelihood that the jury will understand the instruction
  + Look at the nature of the instructions and see whether the jury will be able to follow the instruction
* The likelihood that they will follow it (in light of how tempting the improper form of reasoning is)
* A limiting instruction to the jury will generally be mandatory if the potentially prejudicial evidence is ultimately admitted

#### Partial Exclusion

* Finding that probative value is outweighed by prejudicial effect does not necessarily result in complete exclusion of evidence
  + This may happen with an accused criminal record. You might exclude some of it to limit its prejudicial effect
  + Or expert can only testify on some points because if they testify on all the points then it would be too prejudicial
  + Must consider whether there is a way to limit the evidence to limit the prejudice
* A judge can edit the evidence to exclude (some) prejudicial aspects and thereby tip the scales in favour of admission

Applicable Tests (Seaboyer)

* **Crown’s evidence:**
  + Probative value of the evidence is outweighed by its prejudicial effect
  + Once prejudicial value exceeds probative value then the evidence goes out
* **Defense’s evidence:**
  + **Higher standard:** accused should be given the highest chance of establishing that the Crown did not prove case
  + Probative value of the evidence is substantially outweighed by its prejudicial effect.
    - Not enough to say there is prejudicial effect, it must be substantial in the case

Applicable Tests (Anderson)

* **Civil cases:** Use the Crown standard which is probative value of the evidence is outweighed by its prejudicial effect
  + Precise scope of the discretion is not well defined in civil cases
  + There are less instances of the court applying the exclusionary discretion in civil cases

### Anderson v Maple Ridge (District) (1992 BCCA)

**Facts:** P sued defendant, among others, for damages suffered in car accident with misplaced sign. Judge and jury dismissed action. P appealed.

**Held:** Appeal allowed, new trial ordered.

**Ratio:** A judge trying a civil case in Canada has a discretion to exclude relevant evidence if its prejudicial effect outweighs its probative value. Evidence is relevant if it is logically probative of either a fact in issue or a fact which itself is probative of a fact in issue.

**Reasons:** Evidence of the municipality’s subsequent relocation of the sign and its consequences was admissible. The evidence was not to be excluded on the ground that it inferred negligence, as long as the jury was instructed that the evidence could not be taken as an admission of liability. The evidence of the relocation of the sign was not to be excluded on the grounds of it’s prejudicial effect.

* Evidence was relevant because it was logically probative of the fact sought to be proved, i.e. that the sign, at the time of the accident, was either difficult to see or easily overlooked

Constitutional Rules

* In criminal matters, the exclusionary discretion is a principle of fundamental justice protected under s.7 of the *Charter*
* Thus, any legislation or common law rule that seeks to abridge or curtail the discretion is, subject to *Charter* s.1, unconstitutional

# Summary of Steps

1. Is the evidence relevant?
2. Is the evidence subject to an exclusionary rule?
   1. I.e. if the way to get the evidence in is through expert evidence is there an exclusionary rule: yes expert evidence, do I satisfy?
3. Should the trier of law exercise her discretion to reject the evidence?
   1. This is where we apply the probative value and prejudicial effect and depends on whether it is a Crown or Civil case?
4. What weight should the trier of fact assign to the evidence?
   1. Trier of fact makes determination of what weight evidence will be given and what use they will make of it

**\*\*must go through all of these steps for EVERY piece of evidence\*\***

Criminal Code Section 276 (as it then was)

* **276(1)** In proceedings in respect of an offence under section 271, 272 or 272, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless
  + **(a)** it is evidence that rebuts evidence of complainant’s sexual activity or absence thereof previously adduced by prosecution;
  + **(b)** it is evidence of specific instances of the complainant’s sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
  + **(c)** it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant

Criminal Code Section 277 (as it then was)

* **277** In proceedings in respect of an offence under section 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant
* Section now extends to a number of other sexual offences: s.151 - 153.1 or 155, 160(2) or (3) or section 170, 171, 172 and 173

# Problems

Seaboyer; Gayme/ Goldfinch

* What evidence was sought to be admitted in these cases? What are differences (in terms of relevance) between types of evidence?
  + Cross examination to be admitted:
    - *Seaboyer*: other acts of complainant’s sexual intercourse that may have caused injuries Crown put into evidence
    - *Gayme*: prior and subsequent sexual conduct of complainant to show there was no assault and she was aggressor
    - *Goldfinch*: evidence that accused and complainant were “friends with benefits” to provide “context” to relationship
* Why was s. 277 constitutionally valid, but not s. 276? What was the key difference between the provisions?
  + *Section 277-* constitutional because it excludes only irrelevant evidence, namely evidence of sexual reputation for the purpose of challenging or supporting the credibility of the complainant
    - “There is no logical or practical link between a woman’s sexual reputation and whether she is a truthful witness.”
  + *Section 276*- unconstitutional because it was a blanket prohibition subject to minimal exceptions, and thus could exclude relevant evidence whose probative value was not substantially outweighed by its prejudicial effect
  + Two fatal flaws:
    - Did not focus on the purpose for which the evidence was being tendered
    - Relied on a “pigeon-hole” approach – the evidence was in or out depending on whether it fit within an exception
* In terms of relevance, what conclusions does court draw about the use of other sexual activity of a complaint in a criminal case? Why?
  + The “actual evil” – the misuse of other sexual activity evidence to support 2 inferences (“twin myths”) that are not reasonable
    - i.e. the complainant is therefore:
      * more likely to have consented
      * an unreliable/untruthful witness
  + Other consensual sexual activity evidence is not admissible solely to support the “two/twin myths”, i.e. that the complainant is by reason of such conduct
    - More likely to have consented to the sexual conduct at issue at trial
    - Less worthy of belief as witness
  + Other consensual sexual activity evidence is potentially admissible for other purposes if:
    - It has probative value on an issue in the trial and
    - Its probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence
  + “Illustrative” Examples
    - Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the assault
    - Evidence of prior sexual conduct, known to accused, tending to prove that accused believed complainant consented
    - Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant
    - Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence
    - Evidence tending to rebut proof introduced by the prosecution regarding the complainant’s sexual conduct

#### Importance of the Cases

* Remind us to think critically about the generalizations- the common-sense assumptions about human behaviour that underlie the inferential reasoning process (and that are sometimes embedded in common law of evidence) before relying on them
* Dangers that can arise if we do not critically examine existing assumptions about human behaviour:
  + Irrelevant, invented or ungrounded facts get snuck in
  + Facts get suggested by innuendo
  + Attention is focused on the actor rather than on the act
  + Appeals are made to hidden prejudices and stereotypes

### R v Seaboyer; R v Gayme (1991 SCC)

**Held:** S. 277 (prohibiting the use of evidence of sexual reputation to challenge credibility of complainant) is constitutional but s. 276 is unconstitutional and not justified under s. 1.

**Reasons:** 276 overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defenses and therefore to a fair trial. It creates too great a risk that an innocent person may be convicted

* No logical or practical link between a woman’s sexual reputation and whether they are a truthful witness. Additionally, evidence that complainant had relations with accused and others does make it more likely complainant consented to the alleged assault, nor work to undermine her credibility. Therefore, evidence excluded by s. 277 can serve no legitimate purpose in the trial
* However, s. 276 does not condition exclusion on use of the evidence for an illegitimate purpose. Rather, it constitutes a blanket exclusion, subject to three exceptions
* Legislation serves 3 purposes: the preservation of the integrity of the trial by eliminating evidence with little or no probative value, but which unduly prejudices trier of fact against complainant. It encourages the reporting of crime. It protects witness’s privacy. However, sometimes, especially mistaken belief in consent, evidence of past consensual encounters may be admissible.
* S. 276 precluded that admission, and therefore violated the right to a fair trial. S. 276 also would preclude a defence attacking the credibility of the complainant on the grounds that the complainant was biased or had motive to fabricate the evidence.
* Where complainant is young, prior sexual encounters may explain why complainant recounts in graphic detail certain sexual acts. Evidence of instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape are also a valid use of such evidence. Rebuttal evidence against prosecution evidence of complainant’s previous sexual history is also allowed. Must be determined at a *voir dire*, and jury must be instructed as to potential errors of invoking myths.

**Ratio:** Evidence of complainant’s sexual history can distort trier of fact’s reasoning process by arousing hostility or bias toward the complainant, resulting in a misuse or misevaluation of evidence. Past sexual experiences are not relevant to one’s credibility or readiness to consent.

### R v Goldfinch (2019 SCC)

**Facts:** Accused dated and lived with a woman. She ended the relationship, but later considered their relationship to be “friends with benefits”. Accused was charged with sexual assault and wanted to tell the jury they were “friends with benefits”. Crown agreed to tell the jury that they had lived together/dated and that sometimes she would spend the night. TJ said the accused could tell the jury that they were “friends with benefits”. Jury found him not guilty. Crown appealed. CA said this evidence should not have been allowed

**Held:** Jury should not have heard they were “friends with benefits”. New trial ordered.

**Reasons:** While accused said the evidence was for “context”, it did not add anything useful to help jury decide guilt. Telling jury served only to suggest that she agreed to have sex in the past and so was more likely to agree that night. This is wrong because agreeing to sexual acts does not carry over from one time to the next. Consent must be given and communicated at the time of each act. TJ made a legal error by allowing jury to hear this evidence, he should have made accused show the evidence was useful for some other reason.

Corbett and Prior Convictions

* ***CEA* 12(1):** A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction
* ***CEA* 12(2):** The conviction may be proved by producing
  + **a)** A certificate [of conviction]… purporting to be signed by the clerk of the court or other officer having the custody of the records of the [appropriate]; and
  + **b)** proof of identity
    - Must prove the certificate relates to the person either by person’s admission or calling officer who can match prints
* Charge: 1st degree murder of a drug trade associate
* Defense: Not involved; Crown’s identification witnesses are lying
* Key Issue: credibility of Corbett and the Crown witnesses
* Record: Armed robbery, escaping custody, theft, break and enter, non capital murder (1971). Defense doesn’t want this admitted
* Prior convictions not admitted to prove truth of something but to attack person’s credibility on the basis they have a criminal record
* Why are prior convictions relevant to credibility? Are all prior convictions relevant to credibility?
  + Crown says you can use evidence to prove that if a person committed a prior offence, they have disregard for the rules, and are unwilling to obey the legal and moral rules of society, then we can infer they are untrustworthy, more likely to lie in court
  + Accused who testifies “takes his character with them” on the stand
  + In theory, all prior convictions are admissible to assess credibility, but some are more probative than others
  + E.g. crimes of direct dishonesty (theft, obstruction of justice, perjury etc.) vs crimes of violence (assaults, serious drug offences etc.) vs motor vehicle offences (over 80, impaired)
  + But, cannot truly pigeonhole because it depends on exact offence in the category and specific circumstances of the case
* What is the potential prejudice associated with prior convictions?
  + Risk of Misuse- improper reasoning:
    - Accused committed crime once before, therefore did it again – this is not reasonable
    - Accused is a criminal, therefore a bad person, thus committed the crime (or should be punished even if they didn’t)
    - But, if excluded, create risk of distorted assessments of credibility
* Does s. 12 *CEA* allow a trial judge to exclude some or all an accused’s prior convictions? If so, why, and on what basis?
  + Court has discretion to exclude some of the criminal offences on the record so that only a partial record will be presented
  + Test: usual probative value versus prejudicial effect analysis
* Factors to consider:
  + Nature of prior conviction
  + Similarity of the prior conviction to the present charge
  + Remoteness or nearness of the prior conviction to the present charge
  + Fairness to the prosecution (I.e. case is a credibility contest)
  + Nature of the record- length of the record, number of convictions
* Prior Convictions and Procedure
  + Witness may be cross-examined on whether they have any prior convictions as to: offence, date and sentence
  + Prior convictions may be proved if the witness denies them
  + Discharge is not a conviction (it is simply a finding of guilt)
  + Application is usually brought at the close of the crown’s case
  + *Voir dire* may be held
  + Accused is entitled to know the outcome of the application
  + Judge may modify the ruling

### R v Corbett (1988 SCC)

**Facts:** Accused was charged with 1st degree murder and sentenced to life. At trial, he is called as a witness and under s.12 of the *CEA*, evidence is brought of his past murder conviction. Accused appealed, claiming that this violates his *Charter* right under s.11(d) for a fair hearing.

**Held:** For Crown, *Charter* not violated and s. 12 applies.

**Ratio:** Witness may be questioned as to if they have been convicted of criminal offence. Prior convictions can be introduced if relevant to a material issue and the relevance goes towards witness’s credibility and cannot be used as bad character evidence. TJ’s have discretion to exclude all or part of prior criminal record. Test is whether permitting it would result in unfair trial. S. 12 applies when an accused is also a witness, but only to the extent of establishing credibility of their testimony, not to findings of guilt. Judges should begin from the premise that juries should receive all relevant evidence accompanied, where necessary, by a limiting instruction.

* “All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy”.

Potvin and Prior Testimony

* **643(1):** Where, at the trial of an accused, a person whose evidence was given at a previous trial upon the same charge, or whose evidence was taken in the investigation of the charge against the accused or upon the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved upon oath from which it can be inferred reasonably that the person
  + **a)** is 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

And where it is proved that his evidence was taken in the presence of the accused, it may be read as evidence in the proceedings without further proof, if the evidence purports to be signed by the judge or justice before whom it purports to have been taken, unless the accused proves that it was not in fact signed by that judge or justice or that he did not have full opportunity to cross-examine the witness.

* Why was the prior testimony of Deschenes admissible at Potvin’s trial?
  + Because Deschenes refused to be sworn at trial and Potvin had opportunity to cross-examine Deschenes at prelim hearing
* What does the phrase, “a full opportunity to cross-examine the witness”, in s. 643 [now s. 715] require?
  + Requires the chance to cross-examine at the time the statement was made, not whether it was fully exercised
  + Likely not a “full opportunity” to cross-examine a witness if (1) the accused was deprived of the right to counsel or (2) the court improperly restricted defence counsel’s cross examination.
* Does the court have discretion to exclude the prior testimony even if pre-conditions for admissibility are present? Why or why not?
  + Court has discretion because:
    - The section is permissive- such evidence “may” (not must) be admitted
    - Discretion is statutory and broader than the traditional probative value/prejudicial effect analysis
    - Discretion includes situations where:
      * The testimony was obtained in a manner which was unfair to the accused or,
      * Admission of the (fairly obtained) testimony at the trial would not be fair to the accused
    - Nb. Trial judge should (usually) instruct jury they have not had the benefit of observing the witness give testimony

### R v Potvin (1989 SCC)

**Facts:** Accused and two others were charged with murder. Crown proceeded against the accused first and called co-accused (D) as witness. D testified at preliminary inquiry but refused to testify at trial. Transcript of D’s testimony at preliminary hearing was received into evidence at trial pursuant to s.715 of *Criminal Code*. Accused was convicted. Appeal was dismissed, and the accused appealed further.

**Held:** Appeal allowed; new trial ordered. TJ did not properly exercise his discretion in deciding to admit D’s testimony at the preliminary hearing. Additionally, TJ failed to warn the jury that they had not had the benefit of observing the witness give his testimony.

**Reasons:** S.715 does not violate s.7 or 11(d) of the *Charter*. The justice system has traditionally held evidence given under oath at a previous proceeding to be admissible at a criminal trial if the witness was unavailable at the trial, provided that the accused had an opportunity to cross-examine the witness when the evidence was originally given.

**Ratio:** TJ has discretion to exclude previous testimony which is not based on the probative worth of the evidence or how the evidence was obtained. S. 4(5), now 4(6), must be interpreted in a purposive manner and that it prohibits only statements that are prejudicial to the accused.

A Surgically Repaired Fact

* The plaintiff suffered fractures of his face and cheekbone and various lacerations as a result of a motor vehicle damage. Claiming for negligence. To treat the fractures of the jaw, the surgeon inserted Kirschner wires. These wires protruded a few inches from the plaintiff’s left cheek and were capped with corks. They were removed about 4 weeks after the surgery. At trial, the plaintiff seeks to admit 2 photographs of the plaintiff’s face that were taken immediately after his dismissal from hospital showing his injuries and the wires.
* Relevance of the Photos:
  + **(1)** Demonstrate the extent of the injuries suffered by the plaintiff, and the after-effect of the injuries
  + **(2)** Assist the “expert” in explaining the repairs undertaken
* **The Potential Prejudice:** Are they too gruesome? Could they inflame the jury or incite sympathy for the plaintiff?
* **The Ruling:** They are admissible
  + They are relevant to the quantum of damages: explaining nature, extent and aftermath of injuries
  + They accurately reflect the plaintiff’s face post-surgery
  + They are not unfair or misleading
  + They are not overly gruesome; we see worse on TV everyday of the week

A Wrongful Death

* The plaintiff is suing the city for wrongful death in relation to the death of his son, who was struck on the head with a baseball while watching the game. He died later that day in hospital. Claim is for negligence. The plaintiff wants to admit a color photograph showing his deceased son lying in his casket, after being prepared by the mortician, and before internment. The photograph shows the white satin interior of the casket and the portion of body visible for viewing The deceased’s face bears a deep tan, and he is clothed in a white sport coat and a blue shirt open at the deck. No physical markings, wounds, defects or other bodily abnormalities are visible on the photo
* **The Relevance of the Photo:**
  + Liability?: Demonstrates the person is dead, but this is almost certainly admitted at trial
  + Causation/Damages?: Does not assist in assessing causation or damages; at most shows that the deceased was a young boy
* **The Potential Prejudice:**
  + Not gruesome?
  + Incite the jury to sympathy?
* **The Ruling:** Inadmissible
  + Photograph is not relevant to a live issue in the case, which is determinative
  + Photograph is also prejudicial, in that may tend to elicit sympathy for the plaintiff

The Blue Bus Problem

* King City has 110 buses. The Blue Bus Company owns 100, all painted blue. The Green Bus Company owns the other ten, all painted green. One night, at 11:30, P was standing on the corner of King Avenue and Main Street. It was a dark night and the street was not well lit. Suddenly a bus came around the corner at a high rate of speed and struck P. P fell over and was badly injured. The bus did not stop. It was too dark to see the colour of the bus. P comes to you and wants to sue the Blue Bus Company.
* What further information would you want to obtain from your client? From other sources?
  + Information from your client:
    - Detailed description of the bus (including any markings), the direction bus was travelling, the estimated speed of bus, the state of the plaintiff (sober etc), any potential witnesses/other persons present, the specific nature of injuries and medication documentation, the after-effects of injuries and medication documentation
  + Information from other sources:
    - Detailed description of the types of buses operated by the 2 companies, the actual routes covered by the 2 companies in general and being operated that night (i.e. timetables for the routes), the potential the bus was being operated by another company or person (eg. Interprovincial bus line, private or chartered bus), any maintenance/incident reports, statements from other persons who observed the incident, video surveillance in the area, medical reports
* What significance would you attach to the fact that there are 100 blue buses compared to only 10 green buses in (a) preliminary investigations, and (b) negotiating a settlement?
  + Preliminary Investigations:
    - Initial tentative hypothesis: The bus that struck P was most likely operated by the Blue Bus Company
    - Caveat: The Green Bus Company, or some other bus company/person, cannot be ruled out
  + Negotiating a Settlement:
    - Statistical information on its own is not of much significance in negotiating a settlement
    - Additional facts that are “case-specific” to P’s claim required
  + “Regardless of what rule governs the required quantum or preponderance of proof, naked statistics…. do not count at all as proof of what actually happened on a particular occasion. To determine what actually happened – including how it happened and who did it – we must match particularistic evidence from the particular occasion against possibly applicable causal generalizations….”.
  + “The problem is not, that it ordinarily is improper to rely solely on naked statistics. Rather, the problem is that naked statistics are not probative at all on the issues of what actually happened, how and by whom.
    - Wagner J in Benhaim c. St-Germain (2016, SCC) citing R.W. Wright, “Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof (1988).
* Would you go to trial based on your client’s evidence and this single (statistical) fact?
  + No, not if you wanted to win.

#### Statistical Evidence

1. Courts may consider statistical evidence and use it to draw inferences relevant to the issues
2. Such evidence is approached with caution and is not determinative
3. Trial judge decides what weight, if any, to give to such evidence in light of the evidence as a whole
4. On appeal, deference is accorded to the trial judge’s assessment of weight

# *Canada Evidence Act* ss. 3-4, 13-16.1

* **S. 3 – Interest or crime:** A person is not incompetent to give evidence by reason of interest or crime.
* **S. 4(1)- Accused and spouse:** Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defense, whether the person so charged is charged solely or jointly with any other person
* **S. 4(2)- Spouse of accused:** No person is incompetent, or uncompellable, to testify for prosecution by reason only that they are married to accused.
* **S. 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.
* **S. 4(6)- Failure to testify:** The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.
* **S. 13- Who may administer oaths:** Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before court, judge or person.
* **S. 14(1)- Solemn affirmation by witness instead of oath:** A person may, instead of taking an oath, make the following solemn affirmation: “I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth”
* **S. 14(2) – Effect:** Where a person makes a solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath
* **S. 15(1)- Solemn affirmation by deponent:** Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, does not wish to take an oath, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit the person to make a solemn affirmation in the words following, namely, “I, \_\_\_\_\_\_\_\_\_, do solemnly affirm, etc”, and that solemn affirmation has the same force and effect as if that person had taken an oath.
* **S. 15(2)- Effect:** Any witness whose evidence is admitted or who makes a solemn affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn.
* **S. 16(1) – Witness whose capacity is in question:** If a proposed witness is a person of 14 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

# *Evidence Act* ss. 6-8, 10, 11, 16-18.2

* **S. 6- Witnesses, not incapacitated by crime, etc:** No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest
* **S.7- Admissibility notwithstanding interest or crime:** Every person offered as a witness shall be admitted to give evidence although he or she has an interest in the matter in question or in the event of the action and although he or she has been previously convicted of a crime or offence
  + 1. A person with an interest in the case is a competent and compellable witness for the Crown and defense
  + 2. A person with a criminal record is a competent and compellable witness for the Crown and defense.
* **S. 8(1)- Evidence of parties:** The parties to an action and the persons on whose behalf it is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or any of the parties, and the spouses of such parties and persons are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties
* **S. 8(2)- Evidence of spouse:** Without limiting the generality of (1), a spouse may in an action given evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage
* **S. 10- Evidence in proceedings in consequences of adultery:** The parties to a proceeding instituted in consequence of adultery and the spouses of such parties are competent to give evidence in such proceedings, but no witness in any such proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery

Parties and their Spouse

1. **General rule:** All parties to civil litigation and their spouses are competent and compellable witnesses for all parties
2. **Exception:** This is subject to any other provision in the *Evidence Act*, e.g., competency challenge under s. 18.

# Competency and Compellability – Accused and Spouses

Spouse of Accused: A Brief History of the Law’s Evolution

* 1. Common law-incompetent subject to matters affecting his or her “person, liberty or health”
  + **Original Rule:** spouse of an accused was incompetent witness at accused’s trial except in matters affect the spouse’s person, liberty or health (ie. Cases involving alleged crimes of violence by the accused against the spouse)
* 2. Statute- competent for the defence but not for prosecution except in certain cases
* 3. Courts- narrowed the meaning of spouse and decline to extend it to common law spouses
  + Courts also got involved to change what spouse meant
* Justifications for the Rule
  + Preservation of marital harmony
  + “Natural repugnance” against compelling a spouse to the means of the other’s spouses condemnation
* Narrowing of Rule
  + *Evidence Acts* made spouse competent for the defence but not normally for the prosecution
  + *Evidence Acts* added “new exceptions” to the incompetency of the spouse in relation to sexual offence crimes, child victims of violence and codified the common law exception
  + Courts defined spouse to exclude divorced spouses, irreconcilably separated spouses, and “sham” marriages
    - Spouse meant legally married at the time of the trial. If you were divorced for example you were not a spouse
    - **Irreconcilable spouses:** if no possibility for reconciliation then not considered a spouse for these provisions
    - **Sham marriage:** if they only got married so that they cannot testify
  + Courts declined to extend the exception to common law spouses
    - Court said it clearly is a *Charter* violation under s.15 but it is justified under s.1

#### Accused and Spouses (*Canada Evidence Act*, s.4)

* **4(1)** Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person
* **(2)** No person is incompetent, or uncompellable to testify for the prosecution by reason only that they are married to the accused.

#### Accused and Spouses (*Evidence act*, s.8; *Provincial Offences Act*, s. 46(5))

* **8(1)** The parties to an action…. are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or of any of the parties, and the spouses of such parties and persons are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties
* **46(5)** Despite section 8 of the *Evidence Act*, the defendant is not a compellable witness for the prosecution
  + *Provincial Offences Act* governs the prosecution of provincial offences in Ontario
  + Defendant is a competent witness if they choose to testify but they cannot be compelled to testify

Spouses: CEA vs EA

* Are there any difference in the status of spouses in federal matters governed by *CEA*, versus provincial matters governed by *EA/POA*?
  + No, general rules exists, spouses in Canada and ON are competent & compellable witnesses for prosecution and defence
* Subject only to case-by-case competency challenge

### R v Salituro (1991 SCC)

**Facts:** Accused signed his wife’s name on a cheque. His defence was that he had her authority. She denied this at trial, and he was convicted. TJ concluded this in part because they were separated at the time. Without her testimony, he would not have been convicted. Question was whether her evidence falls under an exception to the common law rule of spousal incompetency.

**Ratio:** S.4(6) of *Canada Evidence Act* 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”. The reason to protect the doctrine is marital harmony, it is also naturally repugnant to compel a wife or husband to be the instrument of the other’s condemnation. Therefore, does not apply where there is no marital harmony to preserve, such as irreconcilably separated spouses. The rule is also incompatible with the *Charter*.

Accused: Basic Principles

* A person charged with an offence is a competent witness only for the defence
  + The prosecution cannot force the accused to testify
  + Accused person can exercise the right to testify on their behalf and this is for them alone to decide
  + The prosecution can cross-examine an accused who chooses to testify on his or her own behalf
* The non-compellability of the accused (accused’s right not to testify) is constitutionally protected under *Charter* s. 11(c)
* Justifications for the Rule
  + Torture/inhumane treatment
  + Protect the innocent
  + Adversarial theory
  + Privacy
  + Cruelty

#### Comment on the Failure of an Accused to Testify (*CEA*, s4(6))

* **4(6)** “The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution”
  + Reference to spouse here references idea that spouse was incompetent witness for prosecution but competent for defence
  + This section applies only to jury trials. No application in a judge alone trial. The restrictions however still apply, a Crown counsel can’t do the things in a judge alone trial than they cannot do in a jury trial.

#### Purpose of the Rule

* Protect accused’s right not to testify by prohibiting comments that suggest, directly or indirectly, adverse inference should be drawn against the accused from a failure to testify
* **Impact of Rule:** accused’s failure to testify cannot be used as positive evidence of their guilty

#### Exception to the Rule

* An adverse inference may be drawn from failure to provide notice of alibi in sufficient time to allow the prosecution to investigate it and/or to testify in support of the alibi

#### Scope- Judge and Crown

1. No “negative” comments except about alibi defenses.
2. “Neutral” comments are permissible (but not truly encouraged)
3. “Positive” comments by the trial judge are permissible and sometimes required.

#### Scope – Defence Counsel

1. “Positive” comments on right not to testify permissible but cannot go beyond the evidence
   1. Cannot suggest there is a reason accused chose not to testify if it is not in evidence. Every comment backed by evidence
2. “Positive” comments on client’s testimony vs. co-accused’s failure to testify are permissible
   1. They can say “My client testified to the following, uncontradicted” meaning the other side did not testify
3. “Negative” comments on co-accused’s failure to testify are not permissible

Parties: Basic Principle

* Parties to the litigation are competent and compellable witnesses for any other party to the litigation

#### Failure of Party to Testify or Call Material Evidence

* Trier of fact may draw adverse inference against a party who fails to call a witness (i.e testifying personally) in some circumstances
  + i.e., trier may infer that the witness’ evidence would have been contrary to the party’s case, or at least unhelpful

#### Factors to Consider

* whether there is a legitimate explanation for the failure to call the witness/testify
* whether the witness is within the exclusive control of the party or “equally available” to both parties
* whether the witness has material evidence to provide; and
* whether the witness is the only person or the best person who can provide the evidence

#### Failure of Party to Testify

* ***RCP*, Rule 53.07** allows a party to call and cross-examine an adverse party
* What impact does this have on the ability to draw an adverse inference against a party who does not testify?

#### Permissible Comment

* Neutral comments such as telling the jury the Crown’s evidence is uncontradicted
* Positive comments such as telling jury that, as a matter of law, no adverse inference may be drawn from accused’s failure to testify
* Defence counsel may tell the jury that the accused has a right not to testify
* Defence counsel may comment on a co-accused’s failure to testify provided they do not invite the jury to use the co-accused’s silence as evidence, especially evidence of guilt

# Oaths and Substitutes

Evolution of Law

* Oath to the Christian God
* Oath to any Supreme Being
* Oath meaningful to the person
* Oath or solemn affirmation

General Rule

* A witness must swear an oath or solemnly affirm to tell the truth before any evidence is taken from him/her in court

#### *CEA*, s. 13-14

* **13** Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person
* **14(1)** A person may, instead of taking an oath, make the following solemn affirmation: I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth
* **14(2)** Where person makes a solemn affirmation (1), his evidence shall be taken and have the same effect as if taken under oath

#### *Evidence Act*, s. 16, s. 17

* **16** Where an oath may be lawfully taken, it may be administered to a person while such person holds in his or her hand a copy of the Old or New Testament without requiring him or her to kiss the same, or, when the person objects to being sworn in this manner or declares that the oath so administered is not binding upon the person’s conscience, then in such manner and form and with such ceremonies as he or she declares to be binding.
* **17(1)** A person may, instead of taking an oath, make an affirmation or declaration that is of the same force and effect as if the person had taken an oath in the usual form

#### “Usual” Wording: Oath

* “Do you swear that the evidence to be given by you to the Court [touching the matter in question between the parties] shall be the truth, the whole truth and nothing but the truth, so help you god? (Material in brackets may be added in civil cases)

#### Aboriginal Witnesses

* “This eagle feather symbolized the direct connection to the creator for our people and is being held in the spirit of truth”

Ability to Swear or Affirm

* A person can give sworn testimony only if they understand the nature and consequences of the oath or solemn affirmation

#### “Nature and consequence”

* Appreciate the solemnity of the occasion
* Appreciate the added responsibility to tell the truth when they take an oath, beyond ordinary duty to tell the truth
* Understand what it means to tell the truth in court
* Understand in both a practical and moral sense when a lie is told in court
* Generally assume person understands nature and consequences of what they are doing unless they aren’t a competent witness

# Factual Incompetency (Case by case challenges)

Testimony other than on Oath or Affirmation

* Persons subject to an inquiry
  + Persons over age of 14 whose “mental capacity” is challenged (*CEA* **s. 16**) or whose “competence” is challenged (*EA*, **s. 18**)
    - *OEA* does not specifically speak to people with mental illnesses it simply speaks to people in general where there is a competency issue
  + Persons who are under the age of 14 (*CEA* **s. 16.1**, *EA* **18.1**)
    - The legislation in regards to children’s testimony changes dramatically across Canada
* Challenge to proposed witness’ competency should be made when the witness is called to testify
  + When parties originally introduce their witnesses, you must challenge it now. Not an absolute rule because you may expect the witness to be competent but over the course of their testimony something arises that calls their competency into question and at this time you can then bring it up. Court’s don’t like this, but it happens
* Possible outcomes:
  + Person is permitted to testify on making a promise to tell the truth
  + Person is permitted to testify without promising to tell the truth, in 2 situations
    - If you don’t fall within these situations, the person will not be allowed to testify
  + Person is not permitted to testify

Mental Capacity

#### *Canada Evidence Act,* s. 16

* **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 can communicate the evidence.
* **(2)** A person referred to in (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 (1) who does not understand nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of an Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.
  + When this was added, Parliament made it clear that they meant that the person would simply promise to tell the truth and there would not no large inquiry as to what it meant to tell the truth but that is not what happened so they added s. 3.1
* **(3.1)** A person referred to in (3) shall not 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.
  + This was done to shorten the *voir dire* process but also that there was a knowledge that asking mentally ill people to explain something in the abstract for example would lead them to be deemed incompetent as a result of their linguistic difficulties
* **(4)** Person who neither understands the nature of an oath or solemn affirmation and can’t 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.

#### Basic Process and Principles

1. Where a witness’ capacity is challenged, and the trial judge is satisfied there is an issue as to capacity, the judge must hold an inquiry.
   1. Conduct of the Inquiry
      1. Potential witness is normally called during the inquiry so the judge can make decision based on direct observations of the potential witness as well as any other evidence
      2. witness may not testify if, e.g., is in a fragile emotional state: (*Parrott* SCC 2001)
         1. usually must have some evidence to demonstrate that. The expectation is that the person will be called because they are the best person to show whether they will be competent to testify
      3. other witnesses may be called (family members, experts) esp. if s/he has personal & regular contact with witness
2. Trial judge first determines if the proposed witness understands the nature of an oath or solemn affirmation (as earlier discussed)
3. If the answer is yes, the witness will testify, if at all, on oath or solemn affirmation
4. If the answer is no, the witness may be allowed to testify on giving a promise to tell the truth
5. In either case, trial judge must determine if the witness is able to communicate the evidence, which requires:
   1. the capacity to observe
   2. the capacity to recollect, and
   3. the capacity to communicate
6. If the witness is not able to communicate the evidence, s/he may not testify.
7. The burden rests on the party challenging the witness’ competency.

#### More on Capacity

* Focus is on the capacity to perceive, recollect and communicate
* Focus is not on whether they can actually perceive, recall or communicate about the events in question
* Not a high threshold –requires only a basic ability to perceive, remember, and communicate
  + You only want to exclude people where there is a significant deficiency where you can make a conclusion that their evidence will be of no use to the court because you cannot put any weight on it. If you cannot reach this level, then they are competent
* Deficiencies in actual perception, recollection, communication of events goes to weight to be given to the testimony
* **Capacity to perceive:** ability to perceive and differentiate from the imaginary, input from others and/or subsequent formed beliefs
* **Capacity to remember:** ability to maintain one’s recollection and to differentiate it from input form others
* **Capacity to communicate:** ability to understand questions and to respond to them in an intelligible way

Evidence Act, s. 18

* Does not speak of people with mental disabilities in particular
* **18(1)** A person of any age is presumed to be competent to give evidence.
* **18 (2)** When a person’s competence is challenged, the judge, justice or other presiding officer shall examine the person.
* **18 (3)** However, if the judge, justice or other presiding officer is of the opinion that the person’s ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead.
  + If the judge asks the question it may hamper the inquiry, then the person who is most familiar with the witness can ask the questions but the judge always has the right to ask further supplementary questions

#### Basic Principles of *EA* s. 18

1. Competency presumed unless challenged.
2. Where challenge occurs, judge examines the proposed witness.
3. Judge may allow counsel to question the witness if believes witness’ ability to answer will be hampered by judicial questioning.
4. Inquiry similar to that under *CEA* **s. 16**
5. Burden rests on the party challenging the witness’ competency.

### R v Walsh (1978 ONCA)

**Facts:** At trial, Crown witness, a professed Satanist, was ruled incompetent because he did not recognize a social duty to tell the truth, although he knew he could be prosecuted & punished. Court heard medical evidence that the he had a sociopathic personality, but no mental illness

**Ratio:** Witnesses can be incompetent to testify under oath, but competent under affirmation. The witness was incompetent to take an oath, but not to solemnly affirm to tell the truth. His potential penal liability for bearing false witness was sufficient.

**Held:** Yes he had the capacity to testify.

**Reasons:** Witness suffered from sociopathic personality, but did not suffer from psychosis or insanity. Witness had average or better intelligence and was capable of distinguishing truth from falsehood. The witness would not have had the normal emotional response to wrongdoing in committing a falsehood. Witness never refused to affirm under s. 14 of the *Canada Evidence Act* and, was not given the opportunity to affirm. Witness was competent mentally to testify and the requirements of s. 14 were satisfied so he should have been affirmed.

### R v DAI (2012 SCC)

**Facts:** Crown alleges that the complainant, a 26-year old with the mental age of a 3 - 6 year old, was repeatedly sexually assaulted by her mother’s partner. Crown wanted to call the complainant to testify about the alleged assaults. TJ found that she had failed to show that she understood the duty to speak the truth. The TJ also excluded out-of-court statements made by the complainant to the police and her teacher on the grounds that the statements were unreliable and would compromise the accused’s right to a fair trial. The case ultimately collapsed.

**Prior Proceedings:** The accused was acquitted. The Ontario Court of Appeal affirmed this result.

**Held:** Appeal should be allowed, acquittal set aside and a new trial ordered.

**Ratio:** S.16(3) of *CEA* does not necessitate an inquiry into the witness’s ability to understand abstract terms, such as the truth. Court brought the test for competence for adults much closer to that for children under the age of 14. Challenging party may only ask questions about the child’s ability to understand & respond to questions (or communicate evidence)

# Persons Under 14 years

Canada Evidence Act, s. 16.1

* **16.1(1)** A person under fourteen years of age is presumed to have the capacity to testify.
* **16.1 (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.
  + If you are a child witness you will not be taking an oath or affirmation, rather you are talking about a promise to tell the truth
* **16.1 (3)** The evidence of a proposed witness under 14 shall be received if they are able to understand and respond to questions.
  + This is the basic capacity test for a child: can they understand and respond to questions.
* **16.1 (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.
* **16.1 (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.
* **16.1** **(6)** The court shall, before permitting a proposed witness under 14 to give evidence, require them to promise to tell the truth.
* **16.1 (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.
* **16.1 (8)** For greater certainty, if the evidence of a witness under 14 is received by the court, it shall have the same effect as if it were taken under oath.
* This section removes the earlier presumption against testimonial competence of children, placing the onus on the challenging party to satisfy the court there is an issue as to the child’s capacity
* Deems a child’s evidence on a promise to tell the truth to have the same effect as if it were taken under oath
* Where required, inquiry under s. **16.1** is broadly similar to that required under *CEA* s.16(3): *DAI*
  + Focus is on child’s ability to understand and respond to questions
  + *DAI*: In deciding how s. 16 should be interpreted, court refers to inquiry under 16.1 and talks about the similarities between them and the reason they are worded differently is because children have always been treated differently than adults
* Challenging party may only ask questions about child’s ability to understand & respond to questions (or communicate evidence (*DAI)*
* Questions as to the child’s understanding of the nature of a promise to tell the truth are prohibited at the competency stage
  + At some point child should be asked “do you promise to tell the truth” but can be in different words
  + Child must promise to tell the truth. If they don’t, they have not satisfied the statute and is grounds for appeal

Evidence Act, s. 18.1

* Provincial section that deals with when child witnesses can testify in provincial courts
* **18.1(1)** When the competence of a proposed witness who is a person under the age of 14 is challenged, the court may admit the person’s evidence if the person is able to communicate the evidence, understands the nature of an oath or solemn affirmation and testifies under oath or solemn affirmation.
* **18.1 (2)** Court may admit the person’s evidence, if the person is able to communicate it, even though the person does not understand the nature of an oath or solemn affirmation, if the person understands what it means to tell the truth and promises to tell the truth.
* **18.1 (3)** If court is of the opinion that person’s evidence is sufficiently reliable, court has discretion to admit it, if they can communicate the evidence, even if person understands neither the nature of an oath or solemn affirmation nor what it means to tell the truth.

#### Basic Principles

* Deals with the competency of children under the age of 14
* Inquiry is broadly similar to an inquiry under *CEA* s.16.1/s. 16
* However: trial judge has discretion to allow a child to testify if court is of the opinion that the child’s evidence is “sufficiently reliable”
* When you consider these provisions, the impact they have had on the courts is that we see way fewer competency challenges

### R v Bannerman (1996 MBCA)

**Facts:** Accused was convicted of 2 sexual offences of persons under 14. 13 year old complainant states that he “does not know what it is to swear and tell the truth on the Bible,” and did not know what would happen if he did not tell the truth. He was still sworn.

**Grounds of Appeal:** TJ erred in permitting one of the complainants to be sworn without sufficient inquiry into his capacity to know the nature and consequences of an oath. The objection fell on a failure to know the consequences of not telling the truth.

**Held:** Inquiry was sufficient to show that he understood nature and consequences of an oath. Appeal dismissed. Appeal to SCC also dismissed.

**Reasons:** Complainant understood that taking an oath placed him under a moral obligation to tell the truth, a breach of which would be “bad” or “wrong”. He knew that “on all occasions he should tell the truth and particularly when he swears, he shall tell the truth”. There is enough basis for the judge to exercise his judicial discretion and to conclude that it was proper for the boy to be sworn. We should avoid laying down what and how many questions must be asked as each case will depend on it’s own facts, and the impression that the child makes upon the judge will be important. The belief as to the spiritual consequences of an oath will differ according to the witness’ theological beliefs.

**Ratio:** An appreciation of the moral consequences does not require that witness believe in divine retribution for lying. TJ is able to personally examine and hear from potential witness, and their discretion to swear them in should not be amended unless it is manifestly abused. All that is required when one speaks of an understanding of the consequences of an oath is that the child appreciates it is assuming a moral obligation.

### R v Marquard (1993 SCC)

**Facts:** Appellant was charged with aggravated assault of her 3.5 year old granddaughter. Crown alleged she put the child’s fact against a hot stove door. The child’s unsworn testimony was that her “Nanna” had put her in (or on) the stove. The appellant and her husband both testified that the child burned herself trying to light a cigarette. Crown and defence called expert witnesses relating to the functioning of butane lighters, the nature of the burns, whether the child was telling the truth and the psychological effects of abuse. TJ admitted, and did not instruct the jury to disregard, evidence of expert witnesses who went beyond the area of their expertise. TJ also invited the jury to place weight on these opinions. Defence counsel objected to the judge’s charging the jury that they could rely on the opinions outside the stated areas of expertise.

**Prior Proceedings:** Guilty and sentenced to 5 years imprisonment. ONCA upheld the conviction but reduced the sentence.

**Held:** Appeal allowed

**Ratio:** Ability to communicate evidence involves (1) capacity to observe, (2) capacity to recollect and (3) capacity to communicate. In the case of a child testifying under s.16 of *CEA*, testimonial competence is not presumed and judge must inquire into competence of the witness to testify which is an inquiry into capacity to perceive, recollect and communicate. Not to determine credibility, but capacity to give evidence.

**Reasons:** It is necessary to explore whether the witness can perceive events, remembering events and communicating events. Not necessary to determine in advance that the child perceived and recollects the very events at issue as a condition of ruling their evidence be received. What is required is basic ability to perceive, remember and communicate. Judge’s questions were sufficient to determine this, and the testimony’s admission was not an error by the judge.

# Examination of Witnesses

Examination-in-Chief

* “Rule” against leading questions however there are exceptions
  + **Test:** question suggests the answer or presupposes a fact not given in evidence by the witness
    - Essentially you are becoming a witness in your own case by presupposing your own answers
  + **Impact:** may reduce the weight to be given to the evidence
* Repetitive questions
  + **Test:** purpose is to obtain a different answer or to underscore damaging evidence
  + Permissible to a degree if witness’ answers are entirely or partially non-responsive
    - You can ask repetitive questions when the answer you get is not quite what you were expecting them to say so then you can rephrase the question or if the witness is being unresponsive
  + **Caveat:** no badgering or harassing witness
    - At a certain point once you have gotten an answer even if it is one you don’t like the court will tell you to move on because simply repeating the questions and getting the same answer back will amount to badgering the witness
* Rule against splitting the case
  + Applicant calls all its evidence before closing case
    - You can start responding to what you think will be the defence case
  + **Purpose:**
    - Responding party is entitled to know the case to meet before calling evidence
      * You must be fair to the opposing side so they know what case they will have to make before they make it
      * Also saves court time, prevents unfair surprises, confusion and prejudice because other side can say “they didn’t bring this up so I should not have to respond to it”

Cross-examination

* Relevant to the material issues
  + Includes questions relevant to the credibility of a witness
  + Not limited to what was asked in examination in chief you can ask anything that is relevant
  + Don’t need to know the answer to question you ask or prove the question you ask but you have to have a good faith basis
* Good faith basis for question
  + Honestly advanced on the strength of reasonable inference, experience or intuition
  + No putting facts to witness known to be false
* Improper questioning:
  + Question is unfair or the answer will not be meaningful to the trier of fact
  + If it is a relevant question, you can ask it, if it is irrelevant you can’t ask it, if it is argumentative court may ask you to rephrase
* **Examples:**
  + Irrelevant, argumentative, rude, overly repetitive or harassing questions then TJ can bud in and reign in your conduct
  + Try to avoid vague, confusing or wordy questions
* **Factors:** age, knowledge, sophistication

### R v Lyttle (2004 SCC)

**Facts:** Accused was charged with robbery, assault causing bodily harm, kidnapping and possession of a dangerous weapon. Victim identified accused in a lineup. Accused argued victim was hurt because of drug debt and picked the accused out of the line up to protect his association in drug ring. Police officers also held this theory, but Crown refused to call them as witnesses. In *voir dire* and at trial, TJ stated that counsel for the defence can only proceed with cross-examination in respects to this theory if she could provide substantial evidence on the matter.

**Prior Proceedings:** Accused was convicted at trial. The Court of Appeal upheld the convictions stating the verdict could be saved by section 686(1)(b)(iii) of the *CC* but stated that the TJ had in fact erred in not allowing defence counsel to advance her drug debt theory.

**Held:** Appeal allowed and new trial ordered.

**Reasons:** TJ unduly restricted accused’s ability to cross-examine Crown witness.

**Ratio:** No need for an evidentiary basis for asserting disputed facts in cross. Counsel merely must have a good faith basis for putting the question to the witness. Cross examiner may pursue any hypothesis that it honestly advances on the strength of reasonable inference, experience or intuition. Only limited by good faith and professional integrity. TJ can call a *voir dire* to determine if there is good faith basis.

Problem

* **Q:** Your name is Samantha James and you live at 1129 Parkway Drive?
* **A:** Yes
  + Leading, but introductory so it is okay
* **Q:** Do you remember November 5, 2018 when you were hit by a pickup truck driven by Christopher Black?
* **A:** Yes, I could never forget that day
  + Leading & objectionable because suggests answers and assumed fact not in evidence in relation to material & disputed issues
* **Q:** What happened on November 5, 2018?
* **A:** The pedestrian signal was green when I started across the street. I was halfway across the road when a blue Datsun pickup truck ran the red light and hit me. It just kept going. I ended up with a broken leg.
  + Good, general, broad open question and directs the witness to the area of interest
  + You will then want to unpack this, tell them to slow down and ask step by step questions

#### Excerpt from Cross-examination of Ms. James

* **Q:** You testified that the pickup truck which you hit was a blue Datsun?
* **A:** Yes, that’s right.
  + This question is fine in a cross examination because you are supposed to present the witness with leading questions
* **Q:** Your testimony on discovery was that it was a blue Nissan pickup truck!
* **A:** But that’s the same truck!
  + This is a statement, not a question
  + This is the process of using a prior inconsistent statement to impeach someone’s credibility but there is a process you need to go through rather than just blurting out “this is not what you said it discovery”
  + Leading questions are permissible (& expected) in cross, but counsel failed to follow the proper steps for impeachment
* **Q:** No it isn’t! A Datsun is not a Nissan.
* **A:** Well, they look exactly the same.
  + At this point you are just arguing with the witness, it does not advance your case anyway
  + Argumentative? Witness’ answer shows there may not be an inconsistency at all, just a misunderstanding. No need to prove statement as witness admits it.
* **Q:** I understand that you are near-sighted?
* **A:** Yes
  + Permissible. Counsel can cross-examine on factors affecting testimonial capacity such as eyesight.
* **Q:** Were you wearing your glasses at the time of the accident?
* **A:** No, but I was clearly able to see the license plate.
  + Permissible. Counsel can cross-examine on factors affecting testimonial capacity such as eyesight.
* **Q:** Have you ever been convicted of a criminal offence?
* **A:** No
  + Who cares? Why ask about this?
* **Q:** Yes you were! You were convicted of possession of marijuana 15 years ago and given an absolute discharge.
* **A:** I had forgotten about that.
  + This is not the way you prove a conviction and also an absolute discharge is not a conviction so why ask about this?
  + You can ask about prior convictions, s. 22 of *EA* or 12 of *CEA* but these refer to convictions and not discharges
    - S.22: “A witness may be asked whether he or she has been convicted of any crime, and upon being so asked, if the witness either denies the fact or refuses to answer, the conviction may be proved…”
    - But is a discharge a “conviction”
      * No, it is a “finding of guilt”
    - Does this preclude asking the question?
      * Consider: Probative value/prejudicial effect.

Re-Examination

* Limited to matters that first came out on cross-examination and that could not have been reasonably anticipated
* Clarify relevant testimony
* Rehabilitate credibility

Reply (Rebuttal) Evidence

* **Purpose:** respond to new matters
  + Impermissible to “split the case”
    - You are looking at things that could not reasonably be anticipated
    - You can then call additional evidence to respond to this evidence
  + No contradiction on collateral matters
* **Test:** matter could not reasonably have been anticipated
  + Evidence that merely confirms or reinforces earlier evidence is not proper reply evidence

Re-Opening the Case

* The further along the Crown is in the case the more difficult it is to open. If the defence has already started to answer the prosecution’s case then generally the rule is you cannot reopen
* In civil cases there is less harm if plaintiffs reopen their case and so it is more likely. Still discouraged because you are also reopening the right of opposing counsel to respond to it
* **Purpose of re-opening:** Allow applicant to adduce evidence even though its importance should have been recognized
* **Application of the test:** discretion to re-open narrows as the case proceeds through its various stages
  + Credibility has two aspects: (1) Is the witness a truthful person? And (2) Is the witness telling the truth?

# Rule in *Brown v Dunn* (1893 HL)

* “My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making an explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.”
* **Plainly stated:** Counsel should confront (cross-examine) a witness on any “matter of substance” on which counsel intends to contradict the witness, whether by calling evidence or in closing submissions.

#### Rationales for the Rule

1. Fairness to the party
2. Fairness to the witness
3. Fairness to the trier of fact
   1. We are asking someone to resolve a dispute, you are tying their hands if you do not give them the full information
4. Efficiency

#### Scope of the Rule

* Rule requires cross-examination only on matters of substance, not on inconsequential details
* **Note however:** in some cases, generally confronting the witness may be sufficient to satisfy the rule

### R v Quansah (2015 ONCA)

**Facts:** Quansah and Tu are inmates at Central North Correctional Centre. Tu challenged Quansah to a fight. Quansah hesitated and no fight occurred. Quansah was concerned about the consequences of backing down. That evening, Quansah agreed to fight Tu. The next morning, when the doors were “cracked” at 9am, Quansah stabbed Tu to death in Tu’s cell. They were alone.

**Prior Proceedings:** At trial, Quansah said it was self-defense. Jury decided it was not self-defense and found Quansah guilty of 1st degree murder. On appeal, Quansah argued that trial counsel breached the rule in *Browne v Dunn* and that the trial judge erred in instructing the jury.

**Held:** Appeal dismissed.

**Ratio:** The rule in *Browne v Dunn* provides that if a party intends to later impeach a witness with contradictory evidence, that party must put that evidence to the witness while in the witness box to give them an opportunity to provide an explanation. Failure to cross-examine a witness on a point supports an inference that the opposing party accepts the witness’s evidence on that point. The rule is not fixed, and TJ’s have significant discretion in its application. The rule “does not require that every scrap of evidence on which a party desires to contradict the witness for the opposite party be put to that witness in cross-examination.” Focus should be on matters of substance on which a party relies on to impeach a witness’s credibility.

**Reasons:** The failure to cross-examine can be of little significance if the contradicted evidence is of little significance in the conduct of the case and to the resolution of critical issues of fact.

Remedial Options

* Trial judge has discretion to decide on the appropriate remedy.
* Options include one or more of:
  + No remedy required if it is not a serious enough breach
  + Allow the witness to be recalled
  + Instruct jury that the failure to cross-examine may be considered when assessing how much to believe (1) the evidence of the witness who was not confronted with the contradictory evidence and (2) witness who gave the contradictory evidence

Factors to Consider

* Seriousness of the breach: How crucial is it to the case? – The more serious it is, the more likely you are to get a remedy
* Context in which the breach occurred
  + Was it an inadvertent breach or something overtly done by counsel?
* Timing of the objection and the impact of any delay
  + Did opposing party immediately stand up and object so that there is still opportunity to respond or was it in closing submissions when everyone has gone home because that makes it difficult to get everyone back?
* Positions of the objecting party and the offending party
  + The party who did not get the chance to provide the information what do they want to happen (do they want the witness back?). Does the other party want the other party to recall the witness?
  + No requirement that you must first recall the witness and then make an adverse inference you can combine these remedies
* Impact on and availability of the witness to be recalled, and the practicalities of doing so
  + Can you get the witness back? What is the impact on them? Are they available to come back? Is it practical to do so?
* Impact on the orderly and timely completion of the trial
  + If you are in closing submissions it’s not as practical
* Type of trial (judge alone or jury)
  + Easier in judge alone trial
* Adequacy of an instruction to correct the failure and preserve trial fairness
  + The remedy rarely used is that if you think the consequences are so severe you can declare a mistrial, but we don’t tend to use this as a remedy of choice because of the costs associated

#### Simple Example

* The plaintiff is suing the defendant as a result of injuries suffered in a motor vehicle accident. Plaintiff testified that he had the green light, and the accident occurred because the defendant drove through a red. Defendant will testify that the light was amber when he entered the intersection, and the accident occurred because the plaintiff had “jumped” the light.
* As the defendant’s counsel, would you cross-examine the plaintiff on the color of the light?
  + Yes, you are not going to let it just sit and then bring it into your case because plaintiff’s counsel will object

# Present Memory Refreshed Past Recollection Recorded

Present Memory Refreshed

* Witness may refresh his or her memory before or while testifying
  + It is professional incompetence if you have not refreshed their memory before they get on the stand, they should be given the opportunity to reread their prior statement
  + You can also do it on the stand, if they forget some of the things, they originally told you
* Witness may use any means that will rekindle his or her recollection
  + You refresh their memory with documents, can be a photograph sometimes, but usually is a prior statement
  + What is used is not the evidence, you must ask “whether their present memory has been refreshed” and they must say yes
* Recollection is the evidence, not the stimulus used to refresh that memory (*Fliss*)
* Practically speaking, documents (notes, transcripts, statement etc.) are what are normally used to refresh memory
* No requirement that the document was created by the witness, prepared contemporaneously with events, or even accurate
* **Safeguards:**
  + Counsel must first try to get the witness to recall through questioning without external aids (i.e. leading questions)
    - You have to ask them if it will help to refresh their memory if they say no they you are stuck you cant do it
  + If document is used, witness is NOT allowed to simply read from the document: it must “refresh” memory
  + Opposing party has the right to examine the refreshing document, and cross-examine based on it

Past Recollection Recorded

* Witness who cannot remember the relevant events may testify from a record of his or her past recollection
  + You are trying to get the court to accept the document because the refreshing did not work
* Record is the evidence, not the testimony

#### Criteria (*Fliss*)

* Recorded in some reliable way
* Sufficiently fresh and vivid to be probably accurate at that time it was recorded
* Confirmation of the accuracy of the record
* Original record, if available
  + If not available, you have explanation why and you have accurate information that it is a copy then can use the copy

### R v Fliss (2002) SCC

**Facts:** Accused charged with 1st degree murder. Undercover officer surreptitiously recorded accused’s alleged confession. The next day the officer corrected the transcript based on the recording and recollection. TJ excluded the recording and resulting transcript, holding the judicial authorization ought to have been refused for insufficiency of evidence. However, TJ allowed officer to testify about the confession and to refresh his memory with transcript. A jury convicted the accused. The BCCA allowed the appeal and substituted a verdict of 2nd degree murder.

**Held:** Appeal dismissed.

**Ratio:** Where a witness has testified that they cannot recall core details of statements made, the Court may admit the notes or documents if it is satisfied that they meet the Wigmore criteria: (1) **Reliable recording:** thepast recollection must have been recorded in some reliable way; (2) **Timeliness:** at the time the record was created, the recollection must have been sufficiently fresh and vivid to be probably accurate; (3) **Voucher for Accuracy:** witness must be able now to assert that the record accurately represented his knowledge and recollection at the time; and (4) **Absence of Memory:** the witness must have no memory of the recorded events.

**Reasons:** While the jury was entitled to hear from the officer and the officer was entitled to refresh his memory by any means, the trial judge and CA erred in concluding that because the officer had a substantial recollection of parts of the conversation he was at liberty to provide the jury with a recitation of the whole transcript. The officer’s evidence went well beyond what he could recall at the time of trial and his testimony did not qualify for admission as “past recollection recorded”. He did not testify that the transcript accurately represented his knowledge and recollection at the time he reviewed it, but rather he testified to having corrected it based on a recall of “parts of it”. It was these portions that he did not remember that violate s.8 of the *Charter* because the sole basis of the testimony was the unauthorized tape.

* Even though officer gave evidence that contravened s.8 of the *Charter,* section 24(2) ought not to be applied to exclude the evidence because the admission of the evidence did not affect the fairness of the trial. The evidence put into the record was not conscripted, the confession was freely volunteered. The Charter breach did not cause or contribute to the accused’s statements.
* Police had prior judicial authorization for the surreptitious recording and the exclusion of officer’s testimony of his conversation would bring the administration of justice into disrepute because murder is the most serious of crimes and accused freely confessed his guilt.

#### Problem

* Evan Early is the plaintiff in a motor vehicle accident case. He calls Fanny Fanshaw to testify that she observed the collision and the license number of the truck that left the scene of the accident, which other evidence will prove belongs to the defendant. Unfortunately, Fanny is unable to remember the license number. She is however able to testify that a few minutes after the accident, she told her husband the license number and he wrote the number down in his daytimer.
  + Can you get the daytimer in to establish what the license number is?
    - **Was it recorded in some reliable way :** Husband recorded, have you satisfied it he recorded it in some reliable way? He probably would have no reason to write it down inaccurately deliberately.
      * Would have been easier if police/other official under a duty to be accurate had done it though
    - **Sufficiently fresh and vivid:** The accident occurred and shortly after she told him the number, so it seems contemporaneous and it is unlikely she forgot the number in those 2 or 3 minutes. So probably satisfied. She told husband the number a few minutes after accident, which was likely an unusual occurrence in her life.
    - **Confirmation of the accuracy of the record:** may be the sticking point. We might not be able to determine this, but you will want to know whether her husband showed her the daytimer and asked if it was right and if she said yes then that would be confirmation. You can confirm through her testimony that while she cannot remember the number now, at the time that she gave her husband the number she afterwards confirmed with him it was correct. No real evidence to show witness can confirm record accurately represents her knowledge at the time
    - **Original record:** daytimer appears to be available for use at trial
  + Probably can use the daytimer as evidence for the license plate number

# Enhancing Credibility

General Rule

* Party may not ask questions or adduce evidence for sole purpose of bolstering the credibility of one of his or her own witnesses.
* Exceptions to the Rule:
  + Expert evidence
  + Reputation for veracity
  + Prior consistent statements

# Collateral Fact Rule

The Rule Stated

* A witness’ answer to questions put on cross concerning collateral facts is final and cannot be contradicted by extrinsic evidence
* Places no limits on your ability to ask witnesses questions, it limits your ability to call evidence to contradict the witness
  + Witness say light was green but you have evidence it was red can you use it? Depends if court finds it to be collateral fact

#### Rationales for the Rule

1. Economy of time: If you allow contradiction on every fact, then it will go on forever
2. Prevention of confusion
3. Fairness to the witness

What’s Not a Collateral Fact?

* “If the answer of a witness is a matter which you would be allowed on your part to prove in evidence – if it has such a connection with the issue, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him.” (*A.-G. v Hitchcock* (1847))
  + If you can prove it as part of your own case, then it is not a collateral. You may not want to prove it because it is not relevant at initial stages, but it may become more relevant as an impeachment technique later on

What is a Collateral Fact?

* “Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?” (*Wigmore on Evidence*, 4th ed (1970)).
  + If the only reason you are calling the evidence is to contradict the witness it is a collateral fact
* [I]t is obvious that there are two different groups of facts on which evidence would have been admissible independently of the contradiction: (1) facts relevant to some issue in the case, and (2) facts relevant to the discrediting of a witness.” (*Wigmore on Evidence*, 4th ed (1970)).
  + If it is something you can prove it is not a collateral fact, if it goes to witness’ credibility then it could be a collateral fact but if you can prove why it is relevant then it wont be. If you cannot prove it’s relevance, then it will be deemed a collateral fact

#### Phipson Rule

* A fact that is relevant to the case is not collateral
* BUT when talking about credibility, there are recognized exceptions and you can get it in if you can fit it into one of these categories
  + Different than Wigmore because Wigmore said it can be allowed in even if it does fit into one of these categories

#### Recognized Exceptions (*Boyd*)

1. Bias, interest and corruption
   1. One of the main ways to impeach someone’s credibility where you can call evidence and not have it be collateral
2. Prior convictions: usually in criminal cases
3. Prior inconsistent statements
   1. One of the main ways to impeach someone’s credibility where you can call evidence and not have it be collateral
4. Medical evidence relating to physical or mental incapacities
5. General reputation for veracity

Bias, Interest or Corruption

* **Bias=** hostility or prejudice against the opponent personally or in favour of the proponent personally
  + Preference for one side or the other
* **Interest=** personal connection to a party or matter in the trial so that they have an interest in the outcome of the litigation so that it should favour one side over the other
* **Corruption=** willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony

#### Examples

* The accused is charged with dangerous driving. The witness, Sam, was in an office in a building that overlooks the relevant intersection. Sam testified during the defence case that the traffic signal was green when accused’s car went through the intersection. The Crown asked Sam in cross whether the light was amber. Sam insisted the signal was green.
  + Can the Crown call evidence in reply to prove that the traffic signal was amber?
    - Yes, this is a material fact, they should have called this as a fact to their case so could be a splitting of the case issue.
    - The colour of the light is a material issue in the case even though it is also an issue relevant to Sam’s credibility.
    - Clearly relevant to the argument of whether person was driving dangerously and therefore, not a collateral fact
    - Also going to be relevant to Sam’s credibility but that is less of a concern right now
* Witness, Jane, is asked during cross if she is the common law spouse of the plaintiff. Jane denies any such relationship.
  + Can the defendant call evidence to prove Jane is the plaintiff’s common law wife?
    - Yes, the defendant can call extrinsic evidence to prove W is P’s common law wife
    - As P’s spouse, W has a reason to be biased in P’s favour and has an interest in the outcome of the case.
* Witness, Spooner is asked during cross if he had been offered a bribe. Spooner responded that he had not.
  + Can the Crown call evidence to prove Spooner had been offered a bribe?
    - It is not a material fact in the case.
    - This says nothing about his character or credibility because he was just offered a bribe.
    - The situation would be different if S had solicited or accepted a bribe as this would show bias
* Witness, Albert, is asked a series of questions in cross designed to challenge his capacity to observe, recollect and communicate his observations of the relevant events.
  + Can the defendant call evidence to contradict Albert’s answer to prove the following:
    - 1) Albert has a hearing problem?
      * Yes, because it goes to his capacity to have actually heard what he said he heard
      * Yes, can call evidence to contradict A and establish that A lacked the requisite capacity to observe, remember or recount
    - 2) His glasses were being repaired?
      * Yes, because it goes to his capacity to have actually seen what he said he saw
      * Yes, can call evidence to contradict A and establish that A lacked the requisite capacity to observe, remember or recount
    - 3) He could not have been returning from the library because it was closed?
      * Only reason you would want to contradict him is that he was lying or mistaken about coming back from the library, but we don’t really care where he was coming from, we just care that he was at the scene
      * If there was a dispute about whether he was actually at the scene: Then his explanation as to how he came to be there may be less collateral because his presence was a potential material issue in the case
      * It depends, you need to know why it might be relevant where he was coming from
      * Maybe, it depends on all the facts. If there is no doubt A was there, it may be collateral because why he was there is not relevant. If there is doubt whether A was there, it is not collateral because it goes to whether A had the requisite capacity to make observations at all.

“Linchpin” Facts

* Any fact in the witness’s account of the background and circumstances of the relevant event that the witness could not have been mistaken about if his story was in fact true
  + Are they so internally tied to your version of events that it makes no sense to say you would be wrong on this point and right on another point? If so, then these are Linchpin’s facts because being right on them undermines the entire credibility

**Example- Hogan’s Death**

* Brown is charged with the murder of Hogan. Crown called M to testify that on December 1 she saw Brown and Sherrick toss Hogan off the bridge into the Don River. She knew both Brown and Sherrick. Defence called Sherrick who testified that he was not at the bridge that day. Defence also wants to call Dolan who will testify that Sherrick was at his place on December 1, miles away from the scene of the crime. TJ said Dolan’s evidence was collateral and would not let him testify. Issue was whether Brown killed Hogan; whether Sherrick was there with him was not relevant to this.
  + - Was the TJ right?
      * CA said the evidence was crucial to the defence case and should of been admitted because it went to the credibility of the Crown’s main witness and therefore was not collateral
    - If M was wrong about Sherrick being at the bridge, does this case considerable doubt about Brown’s involvement?

A Modern Rule?

* “[W]hen will [a matter] be collateral, and [when] will it not be collateral? The answer is simple: when it is important, it is not collateral. When it is unimportant, it is collateral. Ten thousand cases add up to that.” (Younger, *The Art of Cross-Examination* (1976)

#### Paciocco & Stuesser

* “is the evidence offered of sufficient value and of sufficient importance to the issues before the court that we ought to hear it, having regard to the necessary court time required, potential confusion of issues, and any unfairness and prejudice to the witness?”

Collateral Facts Defined: Summary

* Facts that are not collateral:
  + Facts provable independently as part of the party’s case (*Hitchcock*)
  + Facts admissible for a purpose independent of contradiction (*Wigmore*)
  + Linchpin facts (*McCormick*)
  + Important facts (*Younger/ Paccioco & Stuesser*)

### R v Boyd (2006 MBQB)

**Facts:** Accused was charged with an assault of an officer. Accused sought to admit “collateral fact” evidence with respect to an incident that occurred the day after the alleged assault when the accused was alleged to have harassed the same officer. Accused claimed the alleged 2nd incident never occurred and was fabricated by the officer. Accused submitted that the evidence regarding the second incident showed malice and bias on the part of the officer and that it was therefore relevant to the assessment of the officer’s credibility in relation to the 1st incident.

**Held:** Evidence was admissible and would therefore be entered as exhibits in the trial proceedings.

**Ratio:** Collateral matters are matters that are not determinative of an issue arising in pleadings or indictment, or not relevant to matters which must be proved for the determination of the case. General rule respecting collateral facts evidence is that one cannot impugn a witness’s credibility by contradicting the witness on matters which are collateral, even where the core issue is credibility. However, an exception to this is that the evidence is not collateral where it relates to facts relevant to some issue in the case, or to facts relevant to the discrediting of a witness on grounds of moral character, bias, corruption, skill, intoxication and illness. To establish bias, the accused must prove that the witness possessed a real interest in the outcome of the proceedings and evidence of conduct which suggests that the witness possesses partisan feelings towards one of the parties. Answers to questions directed solely at the impeachment of credibility must be taken as final except: **(i)** to prove a charge of bias/partiality in favour of the opposing party; **(ii)** to prove a witness has previously been convicted of a criminal offence, **(iii)** to prove that a previously inconsistent statement was made by a witness where the foundation has been laid **(iv)** medical evidence to prove that, by reason of a physical or mental condition, the witness is incapable of telling or unlikely to tell the truth and **(v)** to prove by independent evidence that an adverse witness has a general reputation for untruthfulness and that the witness testifying to such reputation would not believe the impugned witness under oath.

**Reasons:** The defence evidence of the accused’s ex-wife who claimed to be with him at the time alleged by the officer as to the second event is relevant to the assessment of the officer’s credibility in relation to the incident before the court. The evidence relating to the second incident was a collateral fact that was only relevant to the assessment of the officer’s credibility.

# Rehabilitating Witness

* You don’t get to do anything to rehabilitate until your witness has been impeached.

Methods of Rehabilitation

* Re-examination
* Reputation for veracity
* Expert evidence

# Prior Consistent Statements

* **General rule:** Prior consistent statement of a witness are generally not admissible to enhance the witness’ credibility
  + - Because consistency does not mean truth, it does not help you determine whether person is telling you the truth today

#### Rationales for the rule

* Consistency vs truthfulness
* Efficiency
* Hearsay if admitted for its truth

#### Exceptions to the Rule

* Recent fabrication
  + - A prior consistent statement is admissible to rebut a prior statement
    - Scope of the Exception:
      * Statement must have been made prior to the time when it is alleged the fabrication began
      * Allegation of recent fabrication can be made expressly or implicitly from the whole circumstances of the case, the evidence of the witness who has been called, and the conduct of the trial
      * Counsel may anticipate the allegation of recent fabrication and examine the witness in chief with respect to prior consistent statements where the circumstances of the case are such as to raise the suggestion that the witness’ evidence is a recent fabrication
      * **Example:** On February 12, 2017, P was driving on Highway 7 towards London, returning to her home after spending the day in Stratford. She reached Highway 119 intersection when a car driven by D1 crossed the centre line and collided head on with their vehicle. D2 is the owner of the car. P was severely injured and has sued D1 and D2. It is admitted D1 was impaired by alcohol and speeding at the time of the collision. One of the main issues at trial for D2 was whether D2 had given D1 permission to use her car.
        + There are four potential witnesses:

D1, who will testify D2 gave him the car keys.

S, who will testify that D2 gave D1 the car keys and never suggested that S should drive.

D2, who will testify that she told D1 he could not have the keys, nor could S, because both had been drinking, and that shortly afterwards she told B what had occurred.

B, who will testify that before she and D2 learned of the accident, D2 spoke to her on the patio and told her D1 had asked her for the keys to her car and she said no.

* + - * + Additional evidence:

PC Smith: Shortly after the accident, she took a brief statement from D2 at the scene of the car accident, where she stated that D1 wanted to get food with S, that she told D1 he was not going to get food, and then a comment that S was supposed to drive.

D2’s type-written statement to the police: The day after the car accident, D2’s father, a police officer, went to her house and learned what occurred. At his suggestion, D2 prepared a type-written statement setting out her recollections of what happened, which she then provided to the police

* + - * + At trial D2’s counsel seeks to call B to ask what D2 said to her, and to admit D2’s type-written statement to police, under the “recent fabrication” exception.

Is B’s testimony about what D2 said to her admissible under the exception?

Is D2’s written statement admissible under the exception?

* Prior identification
* Recent complaint
* Narrative
* Statements by accused on arrest (in specific situations)
* Section 715.1 CC
* As circumstantial evidence

### R v DC (2019 ONCA)

**Facts:** Complainant alleged abuse. Appellant was tried before a judge and jury and convicted of 3 counts of assault with a weapon, 1 count of aggravated assault and 1 count of assault. He received a sentence of 4.5 years less 10 months credit for presentence custody. Appellant submits that the trial was unfair because he was forced to proceed without counsel despite having repeatedly expressed his desire to have counsel. He also submits that TJ failed to give proper limiting instructions on the use of the complainant’s prior consistent statements and on the treatment of evidence when faced with a multi-count indictment in the absence of a similar fact ruling.

**Held:** TJ erred with respect to the absence of a limiting instruction on the use of the complainant’s prior consistent statements.

**Reasons:** The Crown led evidence of various prior consistent statements of the complainant in support of the prosecution of the appellant. These statements consisted of statements made by the complainant to her family doctor and her mother.

# Impeaching Credibility

* You can impeach another person credibility by reputation for veracity, expert evidence etc. but the primary way is by showing that the witness made a prior inconsistent statement
* Used to be that if someone made a prior inconsistent statement, they were not credible but now they are just challenged on credibility
* Methods of Impeachment
  + Reputation for veracity
  + Expert evidence
  + Prior inconsistent statements
  + Prior convictions

Prior Inconsistent Statement

Meaning of “Inconsistent”

* Conflicting authorities
  + “slightly different form”
  + “substantially inconsistent”
  + The “forgetful” (untruthful) witness

#### Rules of Thumb

1. Whether the trier of fact could reasonably conclude that a witness who believed the truth of the facts they are testifying to would have been unlikely to make the prior statement they are alleged to have made- if so, it is inconsistent
2. Whether proof of statement will assist trier of fact in assessing credibility without causing undue prejudice to witness or calling party

Relevant Provisions from Canada Evidence Act

* Ss. 10-11 *CEA*- other side’s witnesses
  + - **10(1)** – On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness’ attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit
      * Statements in writing, reduced to writing, or recorded – looking at something where there is a very good version of what the witness said, there is not much doubt about what was said
      * “relative to the subject-matter of the case” – it is something that you can admit either because it goes to a matter at issue or because it goes to the credibility
      * Witness’s attention must be directed to parts of the statement that will be used to contradict
      * Judge may require (and often will require) the production of the statement and may use as he sees fit
      * Process of Contradiction

1. Anchor the contradiction by confirming the witness’s testimony in chief
   1. Witness testifies something you can ask them if they are sure that is what they saw
2. Confront the witness with the prior inconsistent statement
3. Highlight the contradiction
4. Confirm whether the witness made the statement and or s/he will adopt it
   * + **10(2)-** A deposition of a witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer shall be presumed, in the absence of evidence to the contrary, to have been signed by the witness.
     + **11**- Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement
       - Inconsistent oral statements, doesn’t talk about written statements
       - If not admitted, witness’s attention must be directed to circumstances of the statement prior to proving the statement
       - If witness admits making the oral statement, then you do not have to prove it
   * S. 9 *CEA* – your own witness
     + **9(1)-** A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, ~~proves adverse~~ (this part has been read out), the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement
       - No impeachment through bad character
       - Contradiction through other evidence
       - Contradiction of an adverse witness with a prior inconsistent statement, with leave of the court
       - Notice of the circumstances under which the statement was made
         * You must give the witness notice that you will be using a prior inconsistent statement
       - Meaning of Adverse
         * “The word ‘adverse’ is a more comprehensive expression than ‘hostile’. It includes the concept of hostility of mind, but also includes what may be merely opposed in interest or unfavorable in the sense of opposite in position.” (*Wawanesa Mutual Insurance Co v Hanes*, [1961] OR 495 (CA))
         * Because of the word adverse, at common law we don’t have to rely on the hostility argument
       - Procedure:
5. Counsel advises the court they are bringing a s. 9(1) application
6. Judge directs the jury to retire and enters a *voir dire*
7. Party seeking leave to cross-examine their witness calls evidence to establish the witness is adverse to him/her
8. Judge usually hears submissions and then decides if the witness is adverse
9. If statement is to be proved, counsel must comply with the notice requirement by drawing it to their attention

* Hostile/ Adverse Witnesses
  + Declaration is required
  + Leave of the court is required
  + Cross-examination is at large which means you can cross-examine your witness on anything!
    - **9(2)-** Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness’ present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse
      * This is the section you go to if you are talking about an adverse witness
      * Don’t need a declaration of adversity because the fact they made a prior inconsistent statement is evidence of adversity
      * Leave of court is required
      * Cross-examination is restricted to the prior inconsistent statement
      * Statement may be proven if denied
      * Procedure (*Milgard*)
        1. Advise court bringing a s.9(2) application
        2. Jury retires and enter a *voir dire*
        3. Inform judge of the particulars of the application and produce the alleged written/recorded statement, pointing out the inconsistencies to the judge
        4. Judge determines if there is an inconsistency between the prior statement and the witness’s in court testimony
        5. If there is an inconsistency, counsel proves the statement
        6. Opposing party can cross-examine and call evidence as to the circumstances under which statement was made to determine if there is a basis for judge exercising discretion not to allow cross-examination on the statement
        7. Judge decides whether to permit cross-examination –judge usually hears submissions from counsel before making his decision
        8. Jury is then recalled

Relevant Provisions from Evidence Act

* Ss. 20-21 *EA* – other side’s witnesses
  + **20** – A witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, relative to the matter in question, without the writing being shown to the witness, but, if it is intended to contradict the witness by the writing, his or her attention shall, before such contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of so contradicting the witness, and the judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his or her inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he or she thinks fit.
  + **21**- If a witness upon cross-examination as to a former statement made by him or her relative to the matter in question and inconsistent with his or her present testimony does not distinctly admit that he or she did make such statement, proof may be given that the witness did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and the witness shall be asked whether or not he or she did make such statement
* S.23 *EA*- your own witnesses
  + **23-** A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character, but the party may contradict the witness by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his or her present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and the witness shall be asked whether or not he or she did make such statement.

Impeachment of Own Witness at Common Law

* You can do this at common law but you need a declaration of hostility
* Party may cross-examine his own witness if the court declares the witness to be a hostile witness
* Hostile means that the witness has a motive to harm the calling party to assist the opposing party
  + Usually means they were not responsive or not helpful to your questions
  + If you can show this, you will get declaration of hostility which would then allow you to cross-examine your own witness

# Introduction to Hearsay

Definition of Hearsay

* Hearsay is:
  + 1) Out-of-court statement
  + 2) Offered to prove the truth of the matter asserted in it
* For hearsay, always needs to ask, “what am I going to use this piece of information for?”

#### Example

* Plaintiff needs to prove that the car was red. Counsel calls a witness, Tom, who testifies: “Mary, my wife, said the car was red.”
  + Yes it is hearsay, the statement was made out of court.

#### Rationale for the Rule

* 1) Weaknesses of oral testimony - concerned about these things because in hearsay evidence, witness is not usually in court
  + **Sincerity:** Whether the witness is willing to tell the truth in court
  + **Perception:** Witness’ ability to perceive accurately the events in question
  + **Memory/recollection:** Witness ability to recall what they perceived
  + **Narration/communication:** Witness’ ability to communicate what they perceived to the court
* 2) Absence of the traditional safeguards (either in whole or in part) leaves us concerned with admitting hearsay in court
  + Oath or its equivalent
  + Presence in court so you can see how they respond to questions both in what they say and how they act
  + Cross-examination
* Other Rationales
  + “Best evidence” rule: Best evidence would be calling the actual witness not the person that witness told the information to
  + Risk of misrepresentation/falsity because you cannot question the person who actually made the statement
  + Unfair surprise: though less so today because of discovery and disclosure obligations
  + Minimize judicial discretion
  + Risk of misuse of state power because it is usually the state that has greater access to hearsay evidence than anyone else
  + Procedural fairness

#### Examples

* A witness, Elaine, who is on the stand testifies: “On October 15, I was in Atlanta. I spoke with my brother, Simon, who was in London over the telephone. My brother said to me: “Its raining in London.”
  + Hearsay?
    - Depends what it is being used for. Cannot say whether it is hearsay until we know why the party wants it admitted:
      * If the purpose is to prove the telephones were working? – Not hearsay. Fact that she spoke with her brother, regardless of what was said, helps to prove the phones were working
      * If the purpose is to prove Elaine believes it was raining? – Not hearsay. Mere fact that the statement was made, even if untrue, is relevant to establish why Elaine believed it was raining
      * If the purpose just to prove it was raining? – Hearsay. Statement is being offered for truth of its contents. What the statement said – it’s contents- are exactly what is to be proved and (hopefully) accepted to show that it was raining in London
* Wife is charged with bigamy. Will and his 1st wife Diane were never divorced. Crown alleges Will went through a formal marriage with Tanya knowing that Diane was still alive. Will’s defence is he believed Diane was dead. She is actually still alive and living in Toronto.
  + 1) To prove the marriage, Martin’s evidence that Bill said “I do” when Martin asked him if he took Diane to be his wife?
    - No – saying I do is an inoperative legal term – one element in creating a legally valid marriage
  + 2) To negate the defence, Riker’s evidence that Will said “Diane has just moved to Ottawa”
    - No, evidence is not being used to prove Diane has moved to Ottawa, but merely to show Will’s state of mind at the time he entered into the marriage to Tanya, that is, it shows Will believed Diane to be alive at the time
    - Could be hearsay if you want to prove she actually moved to Ottawa
    - But you could also be using this to try to prove the knowledge of the person saying this. If he said this after he married Tanya, that suggests he thinks Diane was alive which negates his defence that he thought she was dead
* Picasso purchased a painting by Dali from Sam’s Gallery. Klee claims ownership of the painting, alleging that he lent the painting to Sam. Sam claims the painting was a gift. Picasso says he has no knowledge of any dealings between Sam and Klee. When painting was purchased, it has a card attached to it, “Property of Sam’s Gallery. Price $1,000.” Is the card hearsay if offered to support the inference:
  + 1) Sam was the true owner?
    - Yes, because you are using the truth of the words that Sam owns the painting to prove that Sam is the owner
    - Yes, if offered to prove Sam was the owner since the assertion on the card is then relevant only if it is true
  + 2) Picasso was a good faith purchaser for value without notice?
    - No, if offered to prove Klee was a bona fide purchaser for value with out notice, because it is then relevant to show Klee’s knowledge at the time of the purchase, whether or not the card itself is factually correct
    - Not hearsay because it goes to his state of mind at the time he bought the painting which was Sam owned it
* Joe orally agreed to sell Bill a car. There is a dispute over the purchase price. Joe claims the agreed price was $7,000; Bill says it was $6,000. Which, if any, of the following statements are hearsay if offered to prove the terms of the oral agreement?
  + (a) Bill testifies Joe said, “I offer to sell my car for $6,000”
    - No because it is just part of the offer. These were operative legal facts or “words” that form an element of a valid contract – legally binding even if not true i.e. proof of operative facts or words means proof of words whose utterance has legal consequences by virtue of rules of law
  + (b) Joe testifies Bill said, “I agree to pay $7,000 for the car”
    - No it is just the acceptance of the offer (legal word- same description as (a) above)
  + (c) Fred, who was present when the transaction occurred, testifies that Joe said, “I offer to sell my car for $7,000”
    - If Fred is present when the transaction occurred, then it is simply evidence of the legal words spoken so not hearsay
  + (d) Pete, Joe’s friend, testifies that a few hours later Joe told him, “I just found a sucker to take my old car for $7,000”
    - Hearsay, not an operative legal fact. It merely recounts the creation of a past contract.
      * Pete was not present at the time the offer was made
      * If offered to prove the terms of the contract, its relevance depends on the statement being true
    - Hearsay because it is an out of court statement and if you were using it to establish that the car price was $7,000 then it is hearsay. It merely recounts the creation of a past contract
* The steamship *Douglas* sank in the River Thames. On Oct 27, the steamship *Mary Nixon* collided with the wreck of the *Douglas* and was damaged. Owner of the *Mary Nixon* sues the owner of the *Douglas* claiming that the defendants were negligent in that they did not place any warning lights near the wreck. At trial, defendants call the captain of the tugboat *Endeavour* to testify that the mate on the *Douglas* asked him to request the harbourmaster to take care of the wreck, and that he came back and told the mate that the harbourmaster had undertaken to light the wreck. The harbourmaster had the power, but not the obligation, to undertake this duty.
  + Is the proposed testimony hearsay?
    - No, defendants are being sued in negligence, so the issue is whether they took reasonable care in relation to wreck.
    - The captain’s evidence is not being offered to prove that the mate actually did make the request to the harbourmaster and get the undertaking, but only to show that the statement was made and therefore the defendants thought that the harbourmaster had undertaken to light the wreck. This is some evidence that they took reasonable care in dealing with the wreck.
    - Hearsay if you wanted to use it to prove there was a light on the wreck but it is not hearsay if you want to use it to prove your state of mind as to whether you believed he would put a light on the wreck
* The accused is charged with trafficking cocaine. Police officer testifies he received a tip from a reliable informant, providing a description of the accused and stating the accused would be engaged in selling drugs to various buyers at a certain locale and time. Officer testifies that he observed the accused at the stated time and place transferring small white packets to people in exchange for rolled-up bills. The officer arrested and searched the accused and located cash and drugs. Is the officer’s testimony about the informant’s tip hearsay if offered to support the inference that:
  + (a) The accused was a cocaine trafficker?
    - Yes, hearsay. Informant’s tip is only relevant as proof accused is a cocaine trafficker if it is accepted as being true.
    - Clearly hearsay because that is what you are trying to prove
  + (b) The officer had reasonable grounds to make the arrest?
    - No, not hearsay. The information is only being used to establish the officer’s state of mind and knowledge when he made the arrest, and thus whether he subjectively had reasonable grounds to arrest
* P needs to prove John was alive at a specific time. P calls a witness, Tim, who testifies he heard John say “I am alive” around that time.
  + No, not hearsay. The mere fact that John spoke is relevant to whether he was alive – it does not matter what he said, the mere fact that he spoke proved he was alive. Statement would be equally admissible if Tim heard John say “I am in London”

# Hearsay: The Basic Approach

Basic Analytical Approach

* 4 Steps you have to go through, but you may not have to go through all of them, you may go to the one step that is relevant

1. Is the evidence (the “out of court statement”) hearsay?
   1. If so, it is *prima facie* inadmissible.
   2. If not, admissibility is determined by other rules of evidence.
2. If it is hearsay, does the evidence fit within a traditional common law exception?
   1. If so, it is *prima facie* admissible pursuant to that exception.
3. If it does not fall into a common law exception, does the evidence fit with a statutory exception?
   1. If so, it is *prima facie* admissible
4. If it does not fall within a common law or statutory exception, does the evidence fit within the principled approach (exception)?
   1. If so, it is *prima facie* admissible.

#### Recall: Definition

* Hearsay is:
  + 1. An out-of-court statement – person who made the statement is not in court today
    - Anything can be an out of court statement (can be words, a document, conduct, a computer printout)
  + 2. Offered to prove the truth of the matter asserted in it
    - Important part- If it is not being used for its truth then it is not hearsay.

#### Recall: Non-Hearsay

* Proof the statement was made
  + Proof of the listener’s state of mind (*Subramaniam*)
    - Why the listener was afraid for example
  + Proof of the source of the listener’s knowledge (*Wildman*)
    - The police officer who relies on what someone else tells him to form grounds for arrest. It explains why I did something … because someone told me something
  + Proof of an agreement
    - The words themselves create a legal obligation where what you say is evidence of itself of something legally having occurred whether you meant it or not

Tough Calls? Recall the Main Rationale for the Rule

1. Weaknesses of oral testimony
   1. Sincerity – the risk of fabrication, perception, memory/recall – how long ago did this occur and how much attention were you paying, narration/communication
      1. Without the witness who made the statement you cannot test these things
2. Absence of traditional safeguards: Oath or its equivalent, presence in court, cross-examination

#### Ask Yourself:

* Who is the real (i.e. the most important) witness?
  + The person who made the statement? – If they are not in court then it is likely hearsay
  + The person who heard the statement? - Then it is likely not hearsay

More Hearsay/ Non-Hearsay Situations

1. “Automated” statements
2. Prior statements of witnesses who are actually in court now
3. Assertive conduct
4. Implied assertions
   1. Used to be treated as non hearsay but has undergone some development

#### “Automated” Statements

* “Statements” that are the process of pure automation are not hearsay statements
  + No human involvement in the out of court statement then it is not hearsay
* Compare:
  + Computer-stored records
    - Record has metadata attached to it, no one does that, computer does. Information inputted is hearsay because I am an out of court person inputting data and so contents of the data are hearsay if I am relying on it for its truth.
    - The stuff the computer attaches to the data is not hearsay because the computer did it and therefore there is no one to cross examine. The issue when becomes is the computer reliable?
  + Metadata that automatically attaches to that record

#### Prior Statements of a Witness who is actually in court now

* A witness, W, is on the stand in court. Is the prior statement of W hearsay if it is being offered for its truth?
  + Yes, because the statement was made out of court
  + Unless… it is adopted by the witness
* But see later: admitting prior inconsistent statements for their truth

#### Assertive Conduct

* Explicitly assertive conduct – ie., conduct that is meant to convey meaning – is hearsay
  + Really easy to treat this as hearsay if it is being offered for its truth because it is essentially equivalent to language
  + Consider
    - Pointing in a direction
    - Hand-signals (stop, go…)
    - Nodding or shaking one’s head

#### Implied Assertions (*Baldree*)

* A statement or conduct that implies some fact that the trier of fact is being asked to believe is true
  + Verbal implied assertions are hearsay
  + Non-assertive conduct is normally not hearsay (but sometimes it might be)
* Old rule used to be that implied assertions were not subject to the hearsay rule but in *Baldree*, the SCC said that they are not going to do this anymore, implied assertions, particularly verbal ones but sometimes also non-verbal ones, will be treated as hearsay
  + Court did this because you can always get an implied assertion in if you can show that it meets the principled approach

#### Example: *Wright v Tatham* (HL 1893)

* Marsden, wealthy man, left everything to his servant Wright. Tatham was Marden’s cousin and heir at law, i.e., if the will was invalid, he would inherit everything. Tatham challenged the will on the basis Marsden was not mentally competent when he executed it. Wright wanted to put in evidence three letters addressed to Marsden from three different individuals, all of whom were now deceased, written to Marsden at different time.
  + 1. A note from a cousin telling Marsden about a recent trip abroad.
  + 2. A letter from vicar advising Marsden to see his lawyer regarding a legal dispute
  + 3. A letter from a curate thanking Marsden for all he had done for the curate.
* Letters dealt with subjects and were written in language appropriate to the understanding of a reasonably intelligent person.
* Hearsay? Why or why not?
  + You are trying to prove the mental competency of Marsden and you are trying to admit the letters for the truth of them because they prove he was competent because they prove that he could read and understand the letters and they were written by a cousin, a vicar and a curate who are reasonably intelligent people that had a relationship with him and would not have written such letters unless they knew that he would be able to understand them
  + **Purpose for admitting the letters:**
    - To prove Marsden was competent when he wrote them
    - That is, the letters were being tendered for the author’s belief in Marsden’s sanity and the truth of this belief
  + **Reasoning Process:**
    - Trier of fact is being asked to infer from the manner in which the letters were written and the subjects dealt with that the authors believed Marsden to be a rational person
    - The authors of the letters were intelligent men and it was improbable they would have sent such letters if they thought Marsden was not competent/not rational
    - But: if the authors had said directly, “Marsden is competent”, this would be hearsay
    - Statements/conduct that implies this should equally be considered to be hearsay

#### Example: *Baldree* (2013 SCC)

* Police arrested B for trafficking cocaine and marijuana. At the station, B’s cellphone rang. Officer answered it. The call went as follows: Caller was male. He said that he was at 327 Guy Street and that he was a friend of Megan and asked for Chris. I said, “Chris who?”. The male advised, “Baldree”, and asked for 1 ounce of weed. I asked him how much Chris charged him. The male said he pays $150. I told him I would deliver some, to 327 Guy Street.
  + - Hearsay? Why or why not?
      * Yes, hearsay because you want to use the call to prove that Baldree is a drug trafficker
      * **Purpose for Admitting the call:**
        + To show Baldree was a drug trafficker
        + That is, the call was being tendered to show the callers believed that Baldree sold the drugs
      * **Reasoning Process:**
        + Trier of fact is being asked to infer that caller wanted to buy drugs from Baldree because he believed Baldree to be a drug trafficker
        + The call is therefore only relevant if you assume it is true
        + If the caller had said he wanted to buy drugs from Baldree because Baldree sells drugs, the statement would be hearsay
        + Statements/conduct that implies this should (and in Canada is) equally considered to be hearsay
      * SCC said – don’t worry about the form of the words but rather the substance of what is being said and what they are being asked to sue it for

#### Example: The Shipwreck

* Plaintiff sues defendant in negligence. Issue is whether the ship that went down with plaintiff’s cargo was seaworthy when it left dock. Defendant wishes to call a witness who will testify that captain inspected the ship and then set sail with his wife & young daughters.
  + Hearsay? Why or why not?
    - Hearsay because you cannot cross examine the captain, so it depends on whether his statement was meant to convey meaning because if it was not then it was not hearsay.
    - Treated as hearsay under *Baldree* because you are asking the court to believe the captains belief as to whether it is seaworthy and to accept that it was. The relevance of the statement seems to depend on the captain’s belief and his belief only becomes relevant if you accept it to be true
    - **Purpose for Calling the Witness:**
      * To prove the ship was seaworthy
      * Witness is being called to show the captain’s belief that the ship was seaworthy and the truth of this belief
    - **Reasoning Process:**
      * Trier of fact is being asked to infer from the fact the captain inspected the ship and then set sail with his family that the captain believed the ship to be seaworthy
      * A ships captain knows what makes a ship seaworthy and, having inspected the ship, a captain would not sail, especially with family, if he believed the ship was not ready for sea
      * If the captain had said directly, “The ship is seaworthy”, this would be hearsay.
      * Statements/conduct that implies this should equally be considered to be hearsay

The Principled Approach -Overall Exception to the Hearsay Rule

#### Basic Rule

* Hearsay that does not fall within traditional (common law / statutory) exception may be admitted if it is necessary & reliable evidence.
  + **Test:** Is it necessary? Is it reliable? If so, then it is admissible.

#### Key Issues

1. How we got here
2. Interaction between principled approach and exceptions
3. Meaning of necessity
4. Meaning of reliability
5. Use of corroborating evidence
6. Safeguards for the accused
7. Residual discretion to exclude

#### A Brief History

* The basic rule excludes a large amount of potentially relevant evidence
  + Hearsay evidence is inadmissible
* So: exceptions developed to the rule
  + “Useful” hearsay (i.e., hearsay that fits within an exception) is admissible
  + As each “new” type of “useful” hearsay was identified, a “new” exception was created
  + Aka the “pigeon-hole” approach
* Exceptions got added to exceptions, from the common to the obscure until…
  + *Myers v DPP* (1965)- no more new (or reformulated) CL hearsay exceptions; rationalization of law is a matter for Parliament
  + *Areas v Venner* (1970) – declined to follow *Meyers*; Canadian courts can still create (reformulate) common law exceptions
    - Didn’t want to follow *Meyers* because they thought they should respond to new developments
* Eventually, 1990s, a move towards a unified “principled” approach
  + Wigmore- two unifying principles underlie (most) of the main exceptions
    - **Necessity** – we admit hearsay when we absolutely need it
    - **Reliability** – we admit hearsay when we are sufficiently satisfied that the statement is truthful and accurate despite the lack of cross-examination

Khan (1990 SCC)/ Smith (1992 SCC)/ Starr (2000 SCC)

* Emergency and consolidation of the “principled” approach to hearsay
  + The hearsay rule is subject to a “principled” analysis based on the principles of necessity and reliability
  + The traditional exceptions continue to exist (but may need to be reformulated and may not always govern)
  + There is no evidence for any “new” exceptions because hearsay evidence is admissible if it satisfied the twin principles of necessity and reliability

### Khan (SCC 1990)

**Facts:** Mother took her child, 3.5 years old, to the doctor’s. Child was left alone with the doctor for several minutes. About 15 minutes after they left the office, in response to a question from her mother, the child said the doctor told her to close her eyes and he would give her a candy, but he instead but his birdie in her mouth. The mother said the child used “birdie” to mean penis. The alleged offence would therefore have occurred about a half hour before the statement was made. The child was just short of 5 years old at the time of trial and the judge found she was incompetent to testify and so the only way to get this evidence in is through mom’s testimony. Evidence is clearly hearsay.

* Why was the child’s statement inadmissible under the traditional common law hearsay rule?
  + It is a hearsay statement; it was an out of court statement.
  + It was being offered to prove Dr. Khan touched the child for a sexual purpose
  + It did not fit within any of the recognized common law exceptions particularly the spontaneous utterance exceptions
* Why did the inadmissibility of the statement raise concerns (beyond the case) for the court?
  + The risk of not admitting these statements is that you render it almost impossible to prosecute cases involving children
  + The other problem is that there is not much reason to doubt the child’s evidence
  + There is often a problem obtaining admissible evidence from young children in sexual assault cases
  + Often time hearsay statements by the child are the best evidence that can be obtained
  + Excluding hearsay puts a vulnerable population at risk and has the potential to provide offenders immunity from prosecution
* Why did the court not “reformulate” the existing exception that was the closest fit (spontaneous utterance) to admit the statement?
  + Problem with broadening the exception is that if people can then fit within the exception, then it is admissible
  + Reformed rule would be absolute so no ability to ensure statement was actually necessary or reliable given the specific facts
  + Reform would distort the rule: the meaning of “spontaneity” would be stretched to the point of non-existence
* How did the court change the law to admit the statement? A new exception or a new approach?
  + SCC held a child’s hearsay statement could be admitted at trial if it was established to be both necessary and reliable
  + It was not immediately clear if this was a new child hearsay exception: for crimes against children or a new approach to hearsay applicable in all cases
* The child’s testimony was necessary and reliable
  + **Necessity:** child was incompetent
  + **Reliability:** established by several factors
    - No motive to lie
    - Statement emerged naturally, with minimal questioning
    - Contents of statement/child’s understanding (or lack thereof) of sexual acts
    - Corroborative evidence (semen/saliva)
* A Note on *Khan*
  + Necessity means “reasonably necessary” (to a fact in issue)
  + Necessity can include situations where the witness would be traumatized or suffer emotional harm if required to testify
    - How do you establish this possibility?
      * “sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child”
    - So: expert evidence can suffice (by report, by calling the expert)
    - *F(WJ)-* child just under seven started to testify behind a screen but then stopped answering questions entirely
      * Is necessity established?
        + SCC said that it was established as necessity has to be approached in the context of the situation and where it becomes apparent from observing the child in court that the testimony is causing emotional harm to the child then it has been established
  + Necessity does not always require expert evidence; it can be established by the judge’s observations of the witness in court
  + It may also be established in rare cases where it is “self-evident” that trauma or harm will result

### Smith (1992 SCC)

**Facts:** Smith was charged with murder. Crown’s theory was that Smith initially abandoned the deceased at a hotel when she refused to carry drugs back across the border for him, but later he returned and picked her up, drove her to another place, and murdered her. Crown wanted to rely on three phone calls King had made to her mother:

* + 1. King told her mother she had been abandoned by Smith and needed a ride home
  + 2. King told her mother Smith still had not returned.
  + 3. King told her mother Smith had returned and would drive her home.
    - Not admissible unless you could get it in through some new route because it did not fit into any existing exception
* What exception did the court rely upon to admit the first two statements?
  + The “state of mind” exceptions for the limited purpose of proving King wanted to return home (her state of mind at the time)
  + Statements were not admissible to prove that Smith had, in fact, abandoned King (ie. To prove Smith’s actions on that day)
* How did the court admit the statement?
  + SCC held that *Khan* had not created a new exception, but a new approach
  + The third statement could therefore be admitted if it was established to be both necessary and reliable
  + **Necessity was easy:** King was dead
  + Reliability for the first two statements was also easy: no reason to doubt the veracity of King
    - No known reason to lie
    - Concerns about perception, memory and credibility were not present to any real degree
  + Third statement was not sufficiently reliable:
    - King may have been mistaken or wanted to deceive her mother to avoid her sending someone to pick her up
    - Timing of call indicates that she simply observed a car, and it may not have been accused
    - Timing also suggests she had not even spoken to accused yet (if it was him) to confirm he would drive her home
    - King was capable of deceit (travelling under an assumed name and was using forged/stolen credit cards)\*\*
      * Her general reputation was such that she could be dishonest
* What did the court’s decision mean for the law of hearsay in general?
  + Principled approach is a new approach that applies to ALL types of hearsay evidence not just child hearsay statement. If you cannot find a traditional exception you can rely on necessity and reliability to get it in
  + Neither this case nor *Khan* talked about how the principled approach relates to existing exceptions. Did they override them?
  + *Smith* confirms that the principled approach of necessity and reliability applies to all hearsay statements, but it did not address the issue of the relationship between the principled approach and the existing exceptions

### Starr (2000 SCC)

**Facts:** Starr was charged with 1st degree murder. He was drinking with C and W. After they left the hotel, C and W drove away. They stopped at a gas station where they were approached by G, C’s girlfriend. She was angry C was out with W rather than her. G asked C to come home with her. He told her he could not because he had to “go and do an Autopac scam with Robert.” G understood Robert to be Starr, who she saw sitting in another parked car at the station. Crown’s theory was Starr killed C in a gang-related execution and Starr suggested the Autopac scam to C to get him out into the country where he could be killed. Crown wants to call G who is angry because C was in the car with W.

* What exception did the court consider as the basis for admitting the Autopac statement?
  + The “state of mind/present intentions” exception… as reformulated
* Why did the court find the statement to be inadmissible under the principled approach?
  + **Necessity was easy:** C was deceased
  + But it was not sufficiently reliable, and in any case its probative value outweighed its prejudicial effect
  + Specifically, the circumstances did not substantially negate the risk that C lied to G:
    - C and G had been in a relationship for over 2 yeas
    - G testified C might “take off” on her so she tried to approach him without being seen
    - C and G were arguing, G was angry at C
    - C did not normally discuss business with G
  + And the risk of prejudice was too great:
    - Risk that jury would use the statement as evidence of Starr’s intention and subsequent actions (rather than C’s)
    - Risk that jury would use the statement to conclude Starr was a criminal generally and a bad person, and thus guilty
* What did the court’s decision mean in general for the law of hearsay and the principled approach?
  + SCC reconfirmed the principle approach to hearsay and that it ultimately governs the law
  + All evidence (even existing exceptions) must be tested against the principled approach

#### Reasons for the Co-Existence of Principled and Exceptions

1. Under and over-inclusive
   1. Need the principled approach because sometimes the exceptions either don’t allow in enough evidence or because sometimes they allow in too much evidence so that is why they must co-exist
2. Predictability and certainty
   1. We cannot get rid of the exceptions because they add a degree of predictability and certainty to the law of evidence
3. Explanatory and educative
4. Guidance on historical and contemporary rationales

#### But: Principled Ultiamtely Wins

1. Trial fairness and integrity of the justice system
2. Intellectual coherence
   1. You cannot have a principled approach unless it works both ways (must be able to get evidence in and keep evidence out)

#### Meaning of Necessity

* “reasonably necessary” (*Khan*)
  + It does not have to be ultimately necessary (in the sense that if you do not have it then you don’t have a case)
  + It doesn’t mean you cant have the witness and hearsay, you can have both it just has to be reasonably necessary
* To prove a fact in issue (*Smith*)
  + You can have hearsay, witnesses and multiple hearsay on the same point because it only must be relevant to a point in issue
* Unavailability of declarant
  + Where the person who made the statement is not available to be a witness in court for one reason or another
* Expediency or convenience
  + Hearsay statement may be the quickest route to get evidence in court, but this doesn’t really have much to do with necessity

#### Summary: Necessity

* **True unavailability:** dead, seriously ill, incompetent, refuses to testify despite the best efforts of the court
* **Absent witness:** cannot be located, unknown, out of jurisdiction, failed to respond to subpoena
* **Functionally absent:** partial or complete lack of memory, not giving the same evidence
* **Relative necessity:** hearsay is the better evidence, undue consumption of time or money
* *Khelawon and Baldree*: To satisfy the necessary steps, party claiming necessity must take reasonable steps to procure witness in court

#### Meaning of Reliability – *Khelawon* (2006 SCC)

* Case by case assessment
* Two key components:
  + **Circumstantial guarantees of trustworthiness:** circumstances which statement was made provide assurance it is trustworthy
    - Once you replicate the trial safeguards that is all you must do, all other concerns are for the trial judge to figure out
    - These tend to be more difficult
  + **Adequate substitutes:** alternate procedural protections minimize some of the concerns related to hearsay
    - The availability of some cross-examination is a procedural guarantee
    - An oath, presence in court and cross-examination of some type
    - You are looking at replication of the court’s safeguards
* Things to consider when making arguments about reliability:
  + Understand why we exclude hearsay
  + The focus is on the statement-maker, not the witness testifying about the statement
  + Consider what you would ask in cross-examination if the statement-maker was present on the stand because this will help you identify whether there are things that detract from the reliability of the statement
    - If cross-examination would lead to questions that cannot be answered because the declarant is not available, then you have reliability concerns and it becomes how serious those concerns are

#### Summary: Sincerity

* Motive to be truthful (oath or substitute, possible penalty)
  + You can point to a procedural guarantee such as being on oath at the time the statement was made or if they were aware, they would be exposed to some consequences if they lie. Could be employment consequences if they lie to their employer or disciplinary if they lie to the regulator
  + Could also be that the person was under a duty to ensure accuracy
* Motive to fabricate
  + Can be a very important consideration
  + *Blackman*- whether there is a motive to lie in specific circumstances and how much weight it should be given
* Availability for cross-examination
  + To what extent can you cross-examine the witness or recipient of the statement and will that answer the hearsay concerns?
* Evidence of demeanour
  + Is there an independent third party that can describe how the witness was behaving?
* Location and its influence on truth-telling
  + Some degree of formality about when the statement was made (was it in a police statement (would add to it’s reliability), in a bar (would detract from reliability))
* Role or influence of recipient
  + Did the person have undue influence over the declarant such that it is their statement and not the declarant’s statement?
* No memory but an assertion of past accuracy
  + They can confirm the accuracy of the prior testimony which goes to the prior testimony’s sincerity regardless of whether they can remember it or not
* Spontaneity and contemporaneity
* Immediate correction of inaccuracies
* Made prior to litigation

#### Summary: Perception

* Significance of the event for the declarant
  + Someone who cares more about it would probably give a more accurate account of what happened
* Influence of alcohol or drugs
* Duress, emotional turmoil, mental illness
* Declarant had peculiar means of knowledge
  + Were they present? Was it first or second-hand observations? Did they just hear about it through the grape vine? Why do they know what they say they observed?

#### Summary: Memory

* Passage of time since the statement was made
* Memorable event or a duty to record the statement
  + Law school graduation may be more important to you than high school graduation so you may remember that one better
* Impact of the declarant’s characteristics (age, mental ability, another characteristic)

#### Summary: Narration

* Type of statement – oral, document, audio/video recording
  + Videotaped or oral statement- you are not concerned with narration because you have it on video or audio provided that they are good quality and you can hear the whole statement on it
* Leading, suggestive, coercive questions
* Influence of alcohol or drugs
* Duty to record or report events
* Duress, emotional turmoil, mental illness
* Internal coherence, ambiguity, translation, presentation in court

#### Use of Corroborating Evidence

* **Definition:** Evidence that independently tends to support/undermine the reliability of the statement
  + - Piece of evidence that has nothing to do with the statement but lends support to belief that statement is accurate
* Original View: *Khan* vs *Smith*
  + *Khan* – apparently okay (use of semen and saliva that was found on the child had nothing to do with the child’s statement per say but it was a piece of evidence that support the Crown’s case but also if the child is not telling the truth then how did the semen and saliva get on the child? There is no other reason for it to be there)
  + *Smith* – apparently not okay (only circumstances under which statement was made)
    - If it is the circumstances under which the statement is made then extrinsic evidence has nothing to do with that
    - Lower courts, depending on their views, chose whatever case they wanted to admit or reject their extrinsic evidence
  + *U(FJ)* – apparently okay (“striking similarity” between two statements)
    - Can you use the mere fact of consistency to admit consistent parts of hearsay statement that has been recanted?
      * Yes, but the striking similarity had nothing to do with the circumstances under which statement is made
* Clarification: *Starr* (2000)
  + Corroborating (confirmatory) evidence may not be considered at the threshold reliability stage
  + If we allow pieces that go towards the strength of the case to support reliability then we would be “boot strapping” which is a circular argument, there is no independent support for your conclusion
  + From *Starr* until *Khelawon*, extrinsic evidence was not admitted but this was heavily criticized by academics and lower courts had a hard time sorting out what was extrinsic and non-extrinsic evidence
* Today: *Khelawon* (2006)/ *Bradshaw*
  + Corroborating (confirmatory) evidence may be considered at the threshold reliability stage
  + When you are assessing threshold reliability you need to consider everything that goes to the threshold reliability of the evidence which includes extrinsic evidence that confirms or detracts from the truthfulness of the statement
* High Threshold (*Bradshaw*)
  + **Very Narrow Test:** the narrow test negates the reliability of this evidence
    - Evidence must go to reliability of the statement (not the case) AND
    - Material aspects of the statement
    - Hearsay dangers that exist
    - Alternative (even speculative) explanations ruled out
      * Start asking the types of questions you would ask in cross and unless I am satisfied that the answer to all of those is that the statement is true then you cannot use the extrinsic evidence
    - “Only likely remaining explanation”: Extrinsic evidence must exclude alternative explanations, MUST be only remaining explanation
      * Declarant is truthful about material aspects of statement (and/or)
      * Material aspects are accurate

Safeguards

1. Right to make submissions
   1. Weight accorded to the evidence
   2. Quality of corroborating evidence
2. Cross-examination
   1. The more ability there is some opportunity for effective meaningful explanation, the less hearsay dangers there are

Residual Discretion to exclude

1. Probative value is slight and undue prejudice might result (*Smith*)
   1. Some debate about whether hearsay evidence was subject to a special weighing for probative value and prejudicial effect
2. Prejudicial effect of the admission of [the] statement … outweighed its probative value (*Starr*)
   1. This is the straightforward probative value prejudicial effect assessment
   2. Higher standard always to exclude defence evidence than to exclude Crown evidence

#### Example

* Sailor was stabbed and taken to the ship’s doctor. The doctor asked him who stabbed him. Sailor said he was wounded by the second electrical mechanic’s knife. He then lapsed into unconsciousness. He revived 20 minutes later and again implicated the second electrical mechanic, as his attacker. The sailor later died from his injury. The second electrical mechanic is charged with murder.
  + Is the statement admissible at trial?
    - This statement is relevant to the identity of the killer as it identifies the person the deceased says killed him
    - Hearsay?- Yes, out of court statement tendered to prove the identity of the attacker
    - Necessity? - Yes, sailor is deceased
    - Reliability?
      * Motive to be truthful? Speaking to doctor but not about an issue necessary for treatment
      * Motive to be truthful? Speaking to a superior officer?
      * No apparent motive to fabricate since there no animosity between them
      * Special means of knowledge? – Present, and stabbed, which suggests close enough to his attacker
      * Little time to falsify or forget – taken to doctor immediately after being stabbed
      * Fully conscious and appeared to know what he was saying
      * Statement not made in response to a (very) leading question – asked who stabbed him, not whether stabbed by X (and it was apparent he had been stabbed)
      * Corroboration? – Blood stains….
* Further Facts to Consider
  + Sailor arrived at the doctor’s office shortly after he was stabbed
  + He was initially fully conscious
  + Doctor asked the sailor who had wounded him
  + Blood stains on the second mechanic’s pants were consistent with the sailor’s blood type
  + No prior animosity existed

#### Prior Inconsistent Statement of Non-Party Witnesses: *B(KG)* (1993)/ *U(FJ)* (1995 SCC)

* Orthodox rule
  + Admissible solely for the purpose of impeaching the witness’s credibility
  + Exception: adopted on the stand by the witness
* Modern rule
  + Admissible for substantive purposes if necessary, and the standard of substitute indicia of reliability are present

#### Threshold Inquiry/Necessity

* Threshold inquiry
  + Statement would have been admissible as the witness’ sole testimony
* Necessity
  + Recantation of feigned loss of memory satisfied the necessity criterion
  + Forgetful witness will also be okay if the trial judge is convinced that their forgetfulness is fake. This will satisfy necessity, but it may not get you past reliability threshold
  + SCC in *K(GB)* said that necessity is satisfied because they lost the best evidence available (the prior inconsistent statement)

#### “Standard” Indicia of Reliability

1. Sworn or affirmed statement made after a proper warning
2. Videotaped in its entirety
   1. Satisfies narration concerns because we know what was said and it also gives us access to demeanour evidence as you can watch the witness as they are giving their evidence
3. Full opportunity to cross-examine the witness at trial on the statement
   1. Even though you could not cross-examine when statement was made, you can cross a recanting witness on the stand
   2. A witness who negates the ability to cross-examine may be an issue

#### Example *C(JR)* (1996 SKCA)

1. Audiotaped statement
2. No oath or warning
3. No information on what witness was told about the importance of telling the truth
4. Witness’ mother was present but drunk
5. Police officer believed the complainant
6. Complainant recanted shortly after making the statement
7. Witness could be cross-examined

**Would you admit the statement for its truth?**

* Is there any substitute for the oath requirement? – No
* Is there any substitute for the videotape requirement? – Yes, an audio tape so it may not give us full access to demeanour evidence, but we do have some evidence towards demeanour evidence
* Cross-examination? – Yes, the witness is on the stand saying they lied so they can be fully cross-examined on it
* Lower Courts – some said yes, some said no.

#### Example: *Eisenhauer* (1998 NSCA)

1. No oath or warning
2. Crown’s witness was originally a suspect and was given the standard police caution and *Charter* warnings
3. No videotape but officer made detailed, albeit not verbatim, notes
4. Witness could be cross-examined

**Would you admit this statement?**

* Some substitute for the oath- was a proper Charter warning (i.e. can remain silent, warning about importance of telling the truth)
* Some degree of confidence in the accuracy of the recording but it is not completely accurate as the officer admits they are not verbatim, and you have no access to demeanour of the witness
* Lower courts came to conflicting decisions

#### Substitutes: Oath and Warning

* Indicia of reliability
  + “near” oath
  + Given caution/ *Charter* warnings
  + Location (e.g. police station)
* Indicia of unreliability
  + Refused to be sworn
  + Told would not have to testify

#### Substitutes: Videotape

* Judicial transcripts
  + 100% accurate account
* Audiotapes
* (signed) Written statements
  + Then at least you have no concerns about the accuracy of the statement because they attested it is accurate
* Oral statement/police notes that are not verbatim
  + Issues here because you may not even have the entire statement correct
* Independent third parties
  + Justices of the peace who swore the statement
  + Commissioner of oaths who swore the statement
  + Court clerk
  + Translator
  + Witness’ own lawyer where witness is taking a statement for the purposes of another proceeding their client will appear in
  + Counsel, parents or adult relatives
    - Someone who would not be motivated to lie to you as their purpose is to provide their independent demeanour evidence that you do not have available to you

#### Determining Admissibility

1. Standard or substitute indicia of reliability are present
2. Statement was made voluntarily if made to a person in authority
3. No other factors that would tend to bring administration of justice into disrepute if statement was admitted as substantive evidence
   1. Is there any impropriety in how the statement was obtained?
      1. Was there coercion? Undue influence?
   2. High standard and generally applies where there was police impropriety in taking the statement

#### Example: *F(JU)* (1995 SCC)

1. “will-say” statement alleging father committed acts of oral and anal sex against child and physically assaulted her
2. No oath or warning
3. Accused gave a statement to the police admitting to instances of oral and anal sex and physical violence
4. Complainant and accused subsequently recanted the allegations/ admissions of sexual assault

**“Striking Similarity” Test**

1. Striking similarity between the statement and another independently admissible statement
2. Full opportunity to cross-examine
3. Other bases for similarity are negated
   1. Collusion
      1. Concern where you have two independent complainants who come with the same story you would want to know if they got together before hand to make up the story
   2. Prior knowledge
      1. Was one of the witnesses told beforehand what they other witness was going to say?
   3. Third party influence
      1. Is the mother or father priming the children to make an accusation against the other parent?

If you can rule out these three things, then they are admissible as long as there is an opportunity to cross examine

### R v Khelawon (2006 SCC)

**Facts:** K, a retirement home manager, was charged with assaulting S, an elderly resident. The investigation started after an employee of the home found S in his room with various injuries and his belongings in garbage bags. S said K assaulted him, put his belongings in the bags, and threatened to kill him if he did not leave the home. The police obtained a videotaped statement from S. By the time of trial, S had died.

* **Necessity:** Yes, S was dead
* But, new component based on fair trial considerations:
  + Did the party seeking to admit the evidence make “all reasonable efforts” to obtain the evidence in a manner that also preserves the rights of the other party?
* Reliability is NOT satisfied
* **Factors favouring admission:**
  + Videotaped statement so no doubt about narration of statement and we can assess S’s demeanour
  + S indicated he understood the importance of telling the truth and that he could be charged if he did not tell the truth
* **Factors against admission:**
  + Statement not under oath and there was concern if he understood consequence of not telling the truth and of S’s overall mental capacity
  + Risk influenced by employee who found him/initially cared for him
    - Cooke had a motive to want Khelawon to be charged so did she influence S?
  + Risk of fabrication given S’s dissatisfaction with the management of the home & K
  + Extrinsic evidence inconclusive-(1) the injuries he had suffered but these were consistent both with being assaulted and with falling and so they could not help you decide which one it was and (2) the garbage bags and clothing and the court said they don’t know how the clothing got in the bags and he could of put it there himself so they did not admit it
* New “reliability” components:
  + “Striking similarity” test is available in the context of unavailable declarants
    - Extrinsic evidence can be considered as a factor in assessing reliability
  + No mandated order of analysis
    - Practically speaking, start with the simplest route (procedural)
    - If established, no need to consider other reliability concerns

**Ratio:** Altered the threshold of the reliability branch of the principled approach, overruling *Starr*. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place. A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance. In “rare cases”, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*. Thus, the starting point is the hearsay rule and its categorical exceptions. TJ’s may now consider evidence going beyond the circumstances under which the statement was made at the threshold reliability stage, which includes corroborative and/or conflicting evidence.

### R v Devine (2008 SCC)

**Facts:** D was charged with robbing and assaulting S on two occasions, several months apart. P witnessed 1st incident. S and P refused to give statements to the police after 1st incident, but after 2nd incident they both identified D. At trial, S and P recanted their identifications. P said she identified D because someone told her it was him

**Reasons:**

* P’s identification was not hearsay (i.e. judge did not believe P’s assertion that she D because someone else told her it was D)
* P’s prior statement was necessary because she recanted her identification of D as the assailant
* P’s statement was reliable because:
  + P was warned about the seriousness of giving a statement; and the consequences of giving a false statement
  + P was sworn
  + P’s statement was video recorded
  + There was a “meaningful opportunity” to cross-examine P
* Note, as per *Khelawon*
  + Procedural safeguards met, so other reliability concerns need not to be considered at the threshold stage- they are for the trier of fact to consider

### R v Blackman (2008 SCC)

**Facts:** B was charged with the murder of E. Crown’s theory was that B shot E in retaliation for a July 2000 altercation in which E stabbed B, and that B had unsuccessfully attempted to kill E in February 2001. To support its theory, Crown introduced statements E made to his mother in the weeks before his death in which he stated that he had stabbed a man in July 2000, and that he had been shot outside a strip club in February 2001 by the man he had stabbed.

* **Necessity was satisfied:** E is deceased
* **Reliability was satisfied:**
  + Circumstantial evidence that E had no motive to lie to his mother
    - Nature of relationship
    - Context in which statement was made by E to his mother
  + Inconsistencies in the mother’s evidence could be left to trier of fact since the mother could be cross-examined on them
  + “Sufficiently contemporaneous” given the “unusual and attention-focusing” event
  + Inconsistencies in mother’s evidence and potential tainting could be left to trier of fact since she could be cross-examined
  + E’s past untruthfulness with his mother and any motive to lie were not conclusive of admissibility because could also be tested by cross-examination
  + E’s general truthfulness, lifestyle problems and criminal record were ultimate reliability concerns.
* Relevance must be considered as part of the admissibility *voir dire*
  + Not an exacting standard because relevance can ultimately only be determined based on the totality of evidence at the trial
* Reliability factors:
  + Presence or absence of a motive to lie is a relevant consideration
    - But: it is just one factor, and its significance will vary depending on the circumstances
  + Cross-examination of recipient of statement can address concerns about motives to lie, inconsistent statements, and potential tainting of statement

### R v Bradshaw (2017 SCC)

**Facts:** Two people were shot to death. T became the target of a Mr. Big investigation, during which he told an undercover officer he killed both victims. When T met Mr. Big, he said he shot one victim and B shot the other. T was arrested and charged with murder. In police interviews, T gave several contradictory statements before confessing. T also took part in a re-enactment, in which he said that B shot the second victim and helped in the first murder. At B’s trial for murder, T refused to be sworn.

* Is the recording of T’s re-enactment admissible for the truth of its contents?
* Formulations of the “circumstantial guarantees” reliability standard:
  + Statement was made “under such circumstances that even a sceptical caution
  + Statement is so reliable that it is “unlikely to change under cross-examination” (*Khelawon*)
  + “No real concern about whether statement is true or not because of the circumstances in which it came about” (*Khelawon*)
  + When the only likely explanation is that the statement is true *(U(FJ))*
  + Note: it “does not require that reliability be established with absolute certainty” (*Smith)*
* **Necessity is established:** T refused to testify at B’s trial
* **Reliability was not established:**
  + **Factors favouring admission:**
    - Re-enactment was videotaped
    - T received legal advice
    - The re-enactment was voluntary and free-flowing
    - The re-enactment was against T’s interests (legally and his own safety)
  + **Factors against admission:**
    - Statement was not on oath
    - No warning about the consequences of lying
    - No cross-examination at the time re-enactment made or at trial because he refused to testify
    - T had a motive to lie about B’s involvement to minimize his own role in the murders
    - T provided inconsistent statements about B’s involvement
    - T was a “Vetrovec” (suspect or unsavoury) witness
    - Extrinsic evidence did not rule out alternative explanation that T lied about B’s involvement in the murders
      * Weather and forensic evidence were accurate, but did not relate to B’s involvement in the murders
      * Recordings of B admitting participation in murders raised trustworthiness issues
    - Trial procedural safeguards other than cross-examination (eg. Jury cautions, limited admissibility, enhanced leeway for defence during closing submissions) are not part of the threshold reliability test
* **Dissent re:** circumstantial guarantees of trustworthiness
  + Re-enactment was voluntary and free flowing
  + Re-enactment was contrary to T’s interest as he implicated himself in two counts of first degree murder
  + T’s alleged motive to fabricate was rebutted by his prior consistent statement of Mr. Big
  + No investigative misconduct (no inducements or assurances by the police before re-enactment)
  + Re-enactment not a requirement to plead to second degree murder
* **Dissent re:** procedural reliability
  + May include procedural safeguards available at trial to assist jury in evaluating hearsay evidence
  + It is for judge to adapt and implement trial procedural safeguards as required to address the hearsay dangers raised
  + Formulations of the “circumstantial guarantees” reliability standard:
    - Statement is “so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process” (*Khelawon*)
    - Statement “is made under circumstance which substantially negate the possibility that the declarant was untruthful or mistaken” (*Smith*)
* **Dissent re:** corroborative evidence
  + Threshold test in a threshold test:
    - Is unduly complicated
    - Eliminates useful corroborative evidence, and
    - Is contrary to the functional (no bright lines) approach from *Khelawon*
    - Corroborative evidence included:
      * Surreptitiously recorded call in which B admitted involvement in the murders
      * Telephone records as circumstantial evidence implicating B in the murders
      * Forensic evidence confirming T’s account of the details of the murders

#### Example 1:

* Arthur bought a “first edition” *Wigmore on Evidence* from James on Amazon. The sales invoice that came with the book states, “Sold. *Wigmore on Evidence* (1st ed). CDN $1,355.00”. There is also a hand-written note that states: “If you are not satisfied with this item, it may be returned within 30 days for a full refund. James.” Five days after receiving the book, Arthur emailed James, stating: “I am furious!!!!!! I took the book to a local dealer last week and he said it was not a first edition at all. I am returning the book and I want the full refund you promised!!!!!!”. Arthur then mailed the book back. James never refunded Arthur’s money. Arthur wants to retain you to sue James for breach of contract. He gives you the sales invoice and the email. You agree to take Arthur’s case. Will the sales invoice with the hand-written note and the email be admissible at the trial? If so, why and for what purpose(s)?
* Is this directly admissible evidence?
  + This is documentary evidence and so we would have to see what the requirements for documents are. But is it hearsay?
    - It is an out of court statement that we want to use for it’s truth
    - But it constitutes an offer and acceptance and so it is not caught by the hearsay rule!
    - If we can get sales invoice in as an out of court statement then the contents will be admissible because it is not caught by hearsay.
    - His email saying, he wants his money back is a revocation of the contract therefore not caught by hearsay
    - The statement about it not being a first edition is for sure hearsay

#### Example 2:

* H and R had a child, M. together in January, 2017. In April 2017, H and R separated. H was given custody of M, while R was granted access on various days. Various problems arose between H and R, and on various occasions H denied R access to M. Eventually, they worked out an access schedule with supervised exchanges. However, access problems continued. At one point, H took M to his pediatrician regarding the child’s behaviour (periods of withdrawal, acting out, refusing to eat, aggression and crying bouts). The pediatrician thought that access was creating the problems. He advised H to keep a “communication book” recording the negative behaviours of M both before and after the access visits. H kept the book from mid-December 2018 until June 2019. In June 2019, a further custody/access hearing occurred. H is called as a witness. She testified that she really had no independent memory of any specific events that occurred because there were so many of them and because so many were similar from one day to the next. She admits the notes were originally intended only for use between H and the pediatrician, that the daily notes were made at the time of the events that occurred, and that they were entirely accurate when made.
* H’s counsel applies to have the “communication book” admitted for its truth at trial? Would you allow her application?
  + First thing that would strike us was that the communication book was never intended to decide whether access was supposed to continue and so it was not completed for litigation – therefore not necessarily accurate
  + She said it was accurate at the time she wrote it
  + This fits in the past recollection criteria exception but you can also get it in based on the principled approach but that should cause some concerns for trial judge as she was told only to record the negative behaviours and you cannot assess negative behaviours without positive behaviours so it is a distorted record
  + TJ excluded the evidence and even though it meets the past recollection recorded exception it was not sufficiently reliable

#### Example 3:

* Samantha wants to retain you to sue Dr. Golden for malpractice. She tells you that she went to see Dr. Golden a year ago because she had a small bump and red area that keeps expanding on her leg. Dr. Golden told her it was just a mild reaction to a sand flea bite, and would eventually go away. He gave her a salve to ease the itching. Samantha later discovered it was a tick bite, and it caused Lyme’s Disease. She now must go through a lengthy and expensive treatment, and full recovery is not certain because of the delay in starting the treatment. Samantha says Dr. Golden’s nurse, Vee, took notes during the appointment. She has a copy of her medical records and in them you find a photocopy of note dates the day of Samantha’s appointment, which states: “Patient- Samantha X; c. small bump & expanding red area. Dr. G – d. flea bite; p. ointment (prn/2 wks)”, and it initialed, “VV”. Nurse Vee still works for Dr. Golden. You agree to take the case. Would you try to have Nurse Vee’s notes admitted at the trial? Why or why not? If you want it admitted, what additional information would you want to obtain from/about Nurse Vee before the trial?

### R v B(KG) (1993 SCC)

**Facts:** Two guys are attacked by 5 men including BKG. At some time during dispute, one of the men stabs one of the guys in the heart and kills him. All men, in separate videotaped interviews without preparation said “I was there, the guy got stabbed, I didn’t see it, but my buddy KGB said that he may have killed the guy with his knife”. KGB gets arrested and goes to trial. 3 of the men were called as witnesses but refused to adopt their earlier statements and changed their testimony. Now they claimed that they made up the story about BKG’s admission to exculpate themselves from any involvement. First man said he only said that so that he wouldn’t be suspicious. Second and third men also said they lied.

**Prior Proceedings:** TJ has reasonable doubt and so an acquittal was entered.

**Held:** New trial ordered.

**Reasons:**

* Are the videotapes hearsay?
  + Yes, double hearsay as they are being admitted to show that KGB stabbed the guy. They cannot be cross-examined on the statements because they said that they lied. Prior inconsistency in statement can only be admitted to impeach the witness. The Crown could admit the prior inconsistent statement to show they were liars, but not to prove the truth of the contents but that is not what the Crown wanted, Crown wanted to prove that they were lying now and telling the truth on the video.
    - **Note:** There was no oath at the time the prior inconsistent statement was made, the trier of fact could not assess their demeanor when made, there was no opportunity to cross-examine
* Should prior inconsistent statements be considered hearsay?
  + Court departed on past law on prior inconsistent statements and rules that such statements could not be admitted into court as proof of the truth of their contents, provided that they met *Khan* test of necessity and reliability
  + **Principle exception to the hearsay rule:** Wherever you have hearsay evidence of any form, while it is still prima facie inadmissible, the party seeking to admit that evidence notwithstanding its hearsay character can admit it and have it admitted it where they can show that it meets the test of necessity and reliability.
    - **Necessity:** not a huge hurdle, doesn’t need to be necessary. Evidence would be helpful and is an effective means of getting it. Was necessary to further the prosecution however
    - **Reliability:** to find this you need to look at the testimonial factors (oath, threat of perjury, ability to assess demeanor, ability of contemporaneous cross-examination – all of these things tend to show reliability)
  + Prior inconsistent statements could be used solely for the limited purpose of impeaching a witness’ credibility, and not for establishing the truth of a statement, if the witness refused to acknowledge its truth when confronted with it at trial.

**Ratio:** This case was the final nail in the coffin of the pigeonhole approach. For any hearsay evidence, the evidence will be admissible (even without a pigeonhole) where it meets the “Necessity and Reliability” test. Prior-inconsistent statements could be introduced into court if these conditions were met: (1) the evidence contained in the prior statement is such that it would be admissible if given in court; (2) the statement has been made voluntarily 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) that the statement is reliable in that it has been fully and accurately transcribed or recorded; and (5) the statement was made in circumstances that the witness would be liable to criminal prosecution for giving a deliberately false statement.

The Approach to Hearsay

1. Is it hearsay?
   1. Is the statement adduced to prove the truth of its contents?
   2. Is there no opportunity for a contemporaneous cross-examination of the declarant?
2. If the proposed evidence is identified as hearsay, it is presumptively inadmissible
3. Does the hearsay fall within a tradition exception? If so, it is presumptively admissible
4. If not, must prove to the principled approach. Must interpret necessary and reliability flexibly taking into account all circumstances
   1. The (Threshold) Reliability Test: Is the hearsay reliable enough?
      1. Is the hearsay inherently trustworthy enough that cross-examination would be of little marginal utility in establishing the value of the evidence?
      2. OR: Can the truth or accuracy of the hearsay nonetheless be sufficiently tested by other means (i.e. substitute for trier of fact to rationally evaluate the evidence?
   2. The Necessity Test: Is the hearsay necessary?
      1. Necessity is given a flexible definition
      2. Necessity is not equated with the unavailability of the witness: it is based on the unavailability of the testimony
      3. The context giving rise to the need for the hearsay evidence may impact on the degree of reliability required to justify its admission.

# Hearsay: The Exceptions

Overview

* **(1)** Admissions by a party:
  + **(a)** statements by a party offered by the opponent to the litigation
  + **(b)** statements by an employee or agent
  + **(c)** confession to a person in authority by an accused charged with an offence
* **(2)** Exceptions based on the unavailability of the out-of-court declarant:
  + **(a)** declarations against pecuniary and proprietary interest
  + **(b)** former testimony
  + **(c)** Dying declarations, statements against penal interest, and former testimony under CC s.715
* Exceptions that do not require the declarant to be unavailable:
  + **(a)** business records
    - **(i)** common law exceptions
    - **(ii)** statutory exceptions
  + **(b)** past recollection recorded- remember this is a hearsay
  + **(c)** spontaneous utterances
  + **(d)** statements about physical sensations
  + **(e)** state of mind/ present intentions
  + **(f)** prior convictions

Admissions by a Party offered by an Opponent

#### Basic Rule

* Any oral or written statement (or conduct) made by a party to litigation is admissible against that party at request of an adverse party
* The more relied upon rule; and one of the simplest
* **Admission=** anything ever done or said by a party to the case, is admissible against the party in the case
* Admissible by the ADVERSE party cannot use your own admission as evidence to yourself
  + It is something the other side wants to use against you; other side wants to use to hurt your case
  + There is something in admission contrary to what you are saying in court (which is why opponent wants to use it as evidence)

#### Additional Points

1. Admissions can only be used in evidence against the party that made the statement.
2. Admissions are only evidence against the party that made the statement
   1. Not admissible against other parties etc; only the party that made it
3. Admissions do not have to be based on personal knowledge of the facts asserted
4. It must be possible to ascertain the meaning of the statement
   1. Statements can have a degree of ambiguity about them especially if they are missing portions. Must be able to actually ascertain the meaning of the statement to admit it (*Ferris)*
5. Age of the party goes to the weight to be given to the statement, not its admissibility
   1. Age of child/mental state of person can go to the weight
   2. In weight see if probative value outweighs prejudicial effect (young child may not have appreciated what was being said)
   3. Maybe must show the child knew the statement at the time they made it could be used against them \*case law suggests that there may be some requirement for this for children
6. Admissions by an accused to a person in authority are governed by the confessions rule
   1. Only situation where an admission is governed by additional rules

\* \* Generally an admission is going to be admissible against the party that made it (any statement any conduct; only against that person)

Ferris (1994 ABCA)

**Facts:** Ferris was charged with murder and phoned his father from the police station. A police officer overheard Ferris say “I’ve been arrested” and, after some unintelligible words, “I killed David”, followed by further unintelligible words.

* Is Ferris’ statement, “I killed David”, admissible as an admission?
  + The words you can’t hear could be “they think I KILLED DAVID but I didn’t”
  + You don’t know from the parts the police officer heard if this is an assertion or a denial; it was thus considered too ambiguous to go through the trier of fact

### The King v Schmidt (1948 SCC)

**Facts:** Accused was found guilty on a charge of having committed incest with his sister, Elsie Schmidt. At the trial the proof of consanguinity was based mostly on 2 letters which the complainant said she received from the accused, in one of which he addressed her as “Sis” and the other in which he had signed “Brot. Chris. Smith.”

**Prior Proceedings:** Convicted at trial. CA quashed the conviction on the ground that there was no evidence of the relationship between them.

**Issue:** Whether there was an admission by the accused of the alleged relationship between him and Elsie Schmidt? Even if that be so, whether that admission was evidence upon which the jury might convict?

**Held:** Appeal allowed, new trial ordered.

**Ratio:** A person accused of incest may admit the relationship and the jury was entitled to treat both letters as admissions against him and to say that a blood relationship was meant by the expressions used.

**Reasons:** There is no reason why a statement by the accused of his relationship with the complainant is not evidence any more than if he had stated it in the witness box.

### R v Streu (1989 SCC)

**Facts:** The accused appealed a conviction for possession of stolen goods on the ground that there was no evidence that the goods were stolen. The accused sold an undercover police officer a set of new car rims and tires for 1.10 of their value and told the officer “I know they’re hot”.

**Prior Proceedings:** Alberta CA dismissed the appeal. The court held that although there was no direct evidence that the goods were stolen, the circumstantial evidence was sufficient to justify the trial judge’s conclusion that the goods were stolen. The accused appealed.

**Held:** Appeal dismissed. Affirmed accused’s conviction

**Reasons:** Admission of knowledge that the goods were stolen was hearsay, but was admissible where the accused accepted its truth.

**Ratio:** The rationale for excluding hearsay evidence was that the party against whom the statement was made had no opportunity to cross-examine the declarant. The rationale does not apply where a party relies on a hearsay statement in making an admission, because the party is apparently satisfied that the statement is true or at least had an opportunity to test its reliability. An admission on hearsay is admissible and the weight to be attached to it is left to the trier of fact.

#### “Adoptive” Admissions

* A statement by a non-party that is adopted by a party is admissible as a party admission
* A party adopts a statement by indicating she/he believes or accepts it
  + Some subjective belief in it, or accept it as being true
* Adoption can occur by words, actions, conduct, demeanour and/or silence
* Adoption by silence requires that:
  + The statement was made in the presence of the party
  + The circumstances in which it was made are such that the party could reasonably be expected to reply to it
  + In such circumstances, silence permits an “inference of assent”.
    - Assent= expression of approval of agreement
  + E.g: “You stole those things didn’t you” and there is silence rather than “of course not”; that could be an admission by silence

### R v Robinson (2014 ONCA)

**Facts:** Johnson, Robinson and White were partying at the home of Mekeela Lyle. The three men and one other companion noticed Akila Badhanage walking down the street and decided to rob him. A witness saw Johnson grab Akila from behind and hold him in a bear hug. White ran up from behind and made 2 jabbing motions towards Akila’s chest. Akila was taken to the hospital and pronounced dead. Back at Lye’s apartment, Johnson and Robinson berated White for stabbing the victim and told him that it was stupid. White told Lyle that he stabbed the victim because he was “willing out” and yelling “I don’t have it”. White told Lye he did not intend to kill the victim; he only meant to “poke” him. Johnson, Robinson and White were tried together fir first degree murder. Robinson was found guilty of second-degree murder.

**Prior Proceedings:** Trial judge granted Robinson’s application for a directed verdict of not guilty on the charge of first-degree murder, holding that no evidence existed that Robinson played an essential, substantial or integral role in the killing. In his charge to the jury, TJ instructed the jury on the doctrine of adoption of silence and told the jury that they could use Lye’s evidence of White’s statements for the truth of their contents against Johnson and Robinson if the accused persons in whose presence the statement was made were silent in the sense that they not take issue with the statement and; if the jury was satisfied it was likely that, had Johnson and Robinson disagreed with White’s statements, Johnson and Robinson would have expressed their disagreement in some fashion. Jury found Johnson and White guilty of 1st degree murder and Robinson guilty of second degree and Robinson was sentenced to life imprisonment with no possibility of parole for 13 years.

**Issue:** Did TJ err in instructing jury they could find that Robinson had, through his silence, adopted certain statements made by heir co-accused?

**Held:** Johnson and Robinson’s convictions set aside. New trial for Johnson and substituted conviction for manslaughter against Robinson.

**Ratio:** An adoptive admission is a statement made by a third party in the presence of and adopted by the defendant. There is only adoption to the extent that D assents to the truth of the statement expressly or impliedly. Assent may be inferred from words, action, conduct and demeanor. Silence may constitute an adoptive admission where the circumstances give rise to a reasonable expectation of reply. Where silence is the man of an alleged adoption, several conditions must be met: (1) D must have heard the statement; (2) the statement must be about a subject matter of which D was aware; (3) D must not have been suffering from any disability or confusion and (4) the declarant must not be someone to whom D would be expected to reply, as for example, a child.

Streu (1989 SCC)

**Facts:** Streu was charged with possession of stolen property having a value in excess of $200. Streu sold the goods to an undercover police officer who was posing as a purchaser for $125. Crown wishes to call the officer to testify that during the conversation leading to the sale, Streu admitted that the tires and rims belonged to a friend who had “ripped them off”.

* Is Streu’s statement to the officer admissible? If so, why and for what purpose?
* Is this sufficient of Streu’s knowledge that the property was stolen to admit him and convict him?
  + Not his statement, not to indicate he had personal involvement; just that he had knowledge/awareness they were stolen
* Conveying it on to the undercover officer showed a level of believing it and accepting it-> thus became an adoptive admission that could be used in court against him

#### Rationale for the Exception

* **Adversarial theory:** a party cannot complain about the inability to cross-examine because:
  + The party made or adopted the statement
  + The party can choose to testify to explain the statement so a lack of cross-examination is not as big of a concern
* Not based in any way on necessity or reliability (makes this exception unique) – not really part of the principled approach (what you can do is look at probative value and prejudicial effect because that applies to everything)
  + Based purely on adversarial theory

Statements by an Employee or Agent

#### Basic Rule

* A statement by an employee or agent acting with the scope of his or her authority during the existence of the relationship is admissible (as an admission) by the employer or principal

#### Criteria

* Employer/employee or principal/agent relationship exists
  + Must call evidence or there has to be an admission that this relationship exists
* Statement made by employee or agent
* Employee or agent was acting within the scope of his/her authority
  + Can show expressly or by implication
* Statement is offered in evidence against the employer or principal

Some dispute in *Strand Electrical* about if they had figured out the scope of the authority (is where this came from)

* Can’t put a company on the stand so you put a person acting for company on the stand and have to clarify their scope of authority
* Saying the employee or agent is the alter ego of the principal of the employer (so their admission as an employee or agent acts as an admission AGAINST the employer or principal)

#### Rationale for the Exception

* **Adversarial theory:** a party cannot complain about the inability to cross-examine because:
  + The party made (expressly or impliedly) authorized the statement
  + The party can choose to testify to explain the statement

Confessions Rule

#### Basic Rule

* Any statement by an accused to a person in authority is not admissible unless the Crown proves beyond a reasonable doubt that the statement was made voluntarily
  + Rare cases of using the criminal burden rather than the civil balance of probabilities; high bar because if someone makes a confession it is likely going to be reliable evidence (unlikely for someone to give false confessions)

#### Rationale for the Rule

* Reliability of confessions
* Impact of confessions
* Fundamental fairness: there is a right against self-incrimination

#### Relevant Issues

1. Who is a person in authority?
2. What happens in the *voir dire* concerning voluntariness?
3. On what grounds may a statement be found to be involuntary?
   1. Must be shown it is voluntary beyond a reasonable doubt.

#### Persons in Authority

1. Person formally engaged in the arrest, detention, examination or prosecution of the accused
2. Person who is deemed to be a person in authority based on the circumstances surrounding the making of a statement

R v Hodgson (1998 SCC)

**Facts:** H is charged with sexual assault. The complainant and her parents confronted H at work, and he admitted the sexual assaults. The mother called the police and, on her return, struck H. At some point after the statement the complainant’s father held H at knifepoint, allegedly to prevent him from leaving before the police arrived. H denied making a confession. H testified he did not feel frightened nor threatened at the time. H’s counsel at trial did not object to the admission of the statement.

**Issue on Appeal:** Whether H’s statement should have been subject to a *voir dire* to determine its voluntariness?

**Held:** *Voir dire* was not required

**Reasons:**

* No evidence to suggest judge should have inquired about a *voir dire*
* No evidence to suggest H subjectively believed the complainant’s family had any influence over potential conflict
* No evidence that the complainant or her family had spoken to the police or anyone else in authority or were even considering making a criminal complaint at the time they confront H about the assault
* Physical violence after the statement could not impact on its voluntariness
* **Part 1:** Accused subjectively believed the receiver of the statement had the ability to influence the course of the proceeding
* **Part 2:** Accused’s belief was objectively reasonable in the circumstances \*some objective reality that this person is acting as a police or prosecution and seems to have some ability to influence the prosecution
* Statement Induced by Private Persons
  + Private person may obtain a statement from an accused by improper means
  + Statement is admissible
  + The issue is weight:
    - If the jury concludes the statement was obtained improperly, they should give it little weight
    - Trial judge must caution jury – “clear direction” – about the danger of relying on a statement to a private person that was obtained improperly
      * Ie. Inform the jury the statement may not signify a true desire to confess but only the result of the actual or feared treatment, and may thus be unreliable

**Conventional Persons of Authority**

* Based on their very position it is clear they have the ability to influence the course of the prosecution against the accused person
* Rarely an inquiry of authority in these cases, usually it is like of course the uniformed police officer is a person of authority
* Harder if you are talking to a police officer who is not obviously a person of authority (i.e. not dressed as a police officer etc)

If not fitting into this category move onto the second part of the test…

**Was it objectively reasonable** for the accused to think the person was a person of authority?

\**Confessions rules only applies to criminal law- only an accused person charged with an offence – everything else it just an admission*

#### Case-by-Case Examples:

* Parole officer
* Insurance adjuster
* Social worker
* Parents (Accused, complainant)
* Employer
* Teacher
* Physician

#### Allocation of Burdens

1. The accused bears the evidential burden of pointing to some evidence to support the claim that the statement was made to a person in authority. They must show that they made the statement to a person of authority and thus should not be admitted.
2. The Crown bears the persuasive burden of proving beyond a reasonable doubt that the:
   1. Statement was not made to a person in authority, or
   2. It was made voluntarily

\* Undercover police officer is not a person of authority in a legal/conventional sense; AND could likely not be deemed a person in authority -> would fail subjective belief of the accused component; no reason to believe they could influence the court of the prosecution for the accused

* In very few cases have undercover police officers been deemed to be persons of authority (as normally they are playing a role as part of the criminal event; no reason to believe they are persons of authority)

**NOTE:** \*It is much harder to admit a confession than an admission (because Crown has to prove it was made voluntarily beyond a reasonable doubt) which is a high bar; SO as an accused (who wants to keep the statement or conduct out of the case) you would want to say “this is a confession not an admission” because less likely it can actually meet the bar to be used as evidence

#### Voluntariness *Voir Dire*

1. Issue is voluntariness of the statement, not its truth.
2. *Voir dire* is mandatory absent a concession of voluntariness.
   1. Unless it is waved by the accused
   2. If they fail to do, could be sent back to re-trial
3. Crown must prove the statement is voluntary before using it for any purpose, including impeachment
4. The accused may testify on the *voir dire*
   1. Accused to explain their own state of mind; could be helpful
5. The accused may be asked if the statement is true
   1. Even though the focus of the voir dire is to determine voluntariness not truthfulness; could help you in assessing whether the statement is reliable
6. The Crown may not use the accused’s testimony in its case in the main trial
   1. Trial within a trial -> because unless accepted by both parties to be admitted into the main trial it cannot be
7. Evidence adduced during the *voir dire* may be used in the main trial with the consent of both parties

\*Kind of the same as any *voir dire* with any evidential ruling, just this higher “beyond a reasonable doubt” voluntariness bar

#### Meaning of Voluntariness – Factors to look at to see if a Statement was voluntary beyond a reasonable doubt

* Inducements (*Ibrahim*)
  + Threats or promises
* Operating mind (*Ward*)
  + Know what you are saying
  + Know it can be used against you
  + Very low standard, you just have to know what you are saying and know it can be used against you (don’t have to know it could be damaging to you) to have an “operating mind”, normally you’re talking about people with severe mental illnesses
* Oppression (*Serack)*
  + Conduct and circumstances of the detention and interrogation
  + Looks at the circumstances in which the confession was made -> looking at the cell conditions the accused was kept in (how cold was the cell, were they fed/given water, allowed to use the bathroom, subjected to bright lights or kept in the dark etc.)
* Police trickery (*Rothman)*
  + Shock the conscience test
    - Whether or not the conduct of the police would shock the conscience of the community
      * ex. Police impersonating a priest to get a confession – would result in the exclusion of the confession
    - How statement was obtained, societal values implicated, seriousness of charge, effect of exclusion on proceedings
    - Lying about having details to go against the accused person wouldn’t really fall into this

#### Current Law: *Oickle* (2000 SCC) – This case re-configures the confessions rule (still talking about inducements and operating mind and police trickery, but changes how they work together)

* Touchstone is voluntariness
* First three components are not independent factors; contextual analysis of all facts is required
  + Consider inducements, operating minds, oppression, and consider them all together (said look at them all together and see if the concerns are sufficient, not just assessing them)
* Police trickery is a discrete issue
* Casual connection is essential
  + Must prove that whatever was done IS the reason for the confession (did police do something that caused person to confess)
* Inducement Doctrine:
  + Key concept: “quid pro quo” \*meaning “a favor or advantage granted or expected in return for something”
    - Person in authority said “If you don’t give us the statement X is going to happen” OR “if you do give us the statement Y is going to happen” (these would count as quid pro quo, and behaviour that would exclude a confession)
  + Classic threats & promises
    - Overt threats will always get a statement excluded
    - Becomes more problematic when you are talking about more minor threats or more minor promises
  + Spiritual and moral inducements vs. practical inducements
    - “you’ll feel better if you confess, god will like you more if you confess” – you have not held anything out to them as a qui pro quo, this is not an inducement that would exclude a statement (you are not in control of giving them any of these things)
    - “if you make the statement you get bail” – this is a threat
    - “it would be better if” “I am going to be angry if” – these are trickier
  + Problematic phrases
* Oppression Doctrine:
  + Denial of food, water, clothing, sleep, bathroom facilities
  + Denial of access to counsel, medical attention, family
  + Overly aggressive and prolonged questioning
  + Exaggerated or non-existent or fabricated evidence
* Impugned Conduct (from the case itself):
  + Minimizing the seriousness of the crime
    - Made it seem like the arson charge was not that big of a deal, the question arose in whether it resulted in the involuntariness of the confession
    - If you minimize the seriousness of the charge that could be problematic because if you minimize the moral culpability of the accused for having committed it, you may make it more likely the accused will make a statement
    - Crown says that it is actually problematic if you undermine the legal consequences attached to the crime
  + Offers of psychiatric help
    - Problematic because it could be a quid pro quo but it depends how you word it. If you word it “it would better it you get psychiatric help” is different than the investigators saying “If you confess, we will get you psychiatric help”
  + Use of “it would be better”
    - Would be better to avoid but does not in itself require the confession be excluded as it isn’t promising anything
    - It is an implied threat in some circumstances
    - Not necessarily fatal because we will look at the entire context, attached to what you said was the use of the phrase “it would be better” an implied threat?
  + Abuse of trust
    - The police were nice to him, developed a rapport with him and made him feel comfortable and willing to talk to him and the defence said this was unfair
    - SCC said this was a dumb argument, there is no abuse of trust between police and accused person
  + Atmosphere of oppression
    - This is a factor that can lead to the exclusion of a confession (ie. If you put them in a dark damp cell)
    - None of those things in this case, police were courteous, Oickle was given food, water and allowed to sleep
    - SCC said not only was the absence of oppression apparent here, but the lack of oppressive circumstances is a factor when you go back to considering whether inducement resulted in a confession
  + Alleged threats against the fiancée
    - In some circumstances, the relationship between the accused and the person the police are talking about can lead a person to confess to prevent the other person from getting into trouble
    - However, SCC said the threats to fiancée did not rise to this level, they just said they were going to question her which was perfectly normal in this situation
  + Use of the polygraph test and results in terms of exaggerating the reliability of polygraph tests
    - Whole polygraphs are not admissible there is no restriction on investigators using it as an investigative technique
    - It did not rise to grounds for exclusion here

\*Really is dependent on the facts of the case and the circumstances of the case itself, and the exact words used, and who the accused person is (someone easily influenced?) to determine what would make it so a confession has to be excluded

#### “Tainting”

* A subsequent statement is inadmissible if the improper conduct leading to the first involuntary statement is still operating on the accused at the time of the subsequenty statement

#### Factors to Consider

* Time lapse between the statements
* Statements made to the same officer
* Accused’s attention was directed to the first statement prior to the making of the subsequent statement
* Accused re-cautioned before making the subsequent statement

#### Role of Confessions Evidence

* Persuasive form of evidence
* Impacts on all facets of the case

#### False Confessions

* An innocent suspect may confess to a crime that he or she did not commit
* Belief that psychological interrogation methods cannot cause a “normal” suspect to falsely confess is a myth
* There are no accurate statistics on the scope of the problem in Canada

#### Types of False Confessions

* **Voluntary False Confessions**
* Confession occurs without any police interrogation or after the suspect is subject to minimal police pressure
* Multitude of reasons why individuals make voluntary false confessions
* Motivating Factors
  + Attention, acceptance, recognition, fame, notoriety
  + Impress others
  + Protect friend or relative
  + Expiate guilty
  + Inability to separate fact and fantasy
* **Stress-compliant False Confessions**
  + Suspect is overwhelmed by the stresses and pressures of custodial interrogation
  + Suspect comes to believe the only way to end the punishing experience of interrogation is by confessing
* **Coerced-compliant False Confessions**
  + Suspect is subjected to coercive interrogation techniques during the interrogation
  + Suspect consciously decides to end interrogation to escape aversive questioning or, alternatively, to gain promised reward
* **Coerced-persuaded False Confessions**
  + Suspect is subjected to coercive influence techniques during the interrogation
  + Suspect comes to temporarily doubt the reliability of his or her memory and to believe that he or she committed the crime
  + Suspect confesses even though he or she does not remember committing the crime
* **Non-coerced persuaded False Confessions** 
  + Suspect is subjected to psychological influence techniques
  + Suspect comes to temporarily doubt the reliability of his or her memory and to believe that he or she committed the crime
  + Suspect confesses even though he or she does not remember committing the crime

#### Vulernable Suspects

* Persons with a mental disability
* Young persons
* Compliant personalities
* Suggestible personalities

#### Problematic Tactics

* “Third degree” tactics
* Lengthy interrogations
* Police deception about the strength of the evidence against the suspect
* Threat of punishment or promise of leniency
* Consequences for a third party

#### Problematic Cases

* High-profile serious cases
* Public pressure to solve the crime
* Lack of other viable suspects or independent evidence of guilt

#### Evaluating a Confession

* Was the statement voluntary or were coercive factors present?
* Did the statement contain a detailed post-admission narrative?
* Did the narrative contain accurate and consistent details?
* Were those details knowable only to the perpetrator, or were they derivable from second-hand sources?

#### Proposals for Reform

* Mandatory warning requirement
* Right to have counsel present in the interrogation room
* Mandatory videotaping or audiotaping
* Limits on police interrogation tactics
* Expert testimony on false confessions

#### Limits on Police Interrogation Tactics

* Use of Reid technique in cases involving mentally-disabled suspects
* Permissible length of interrogation
* Deception relating to forensic evidence
* Promises of significant leniency relating to disposition or sentence

#### Competing View

* Insufficient empirical evidence on the effects of specific tactics to justify limiting police interrogation methods
* Holistic, fact-specific inquiry is the best approach for protecting the innocent
* “community shock” test is appropriate

#### Expert Evidence

* Expert evidence to prove incapacity or a lack of an operating mind
* Expert evidence on the phenomenon of police-induced false confessions

#### Example – The confession

* The accused, Brandon S, is charged with 18 counts of robbery. His girlfriend, Tanya H, was also arrested for one of the robberies. S is 40 years old. He had a good deal of familiarity with the criminal justice system, having been convicted of 15 prior offences. S was interviewed by a police officer and made a statement. The passages below are excerpts from the interview between the police officer and S.
  + **PO:** So what I’m saying here is there is some middle ground here. You’re gonna achieve your goal of keeping her out of the shit and I’m going to achieve my goal and do my job and find out the details of….
  + **S:** I’ll give you the ones that she’s involved in; if you keep her out of it.
  + **PO:** I can’t make promises to you in exchange for information, because the courts, unfortunately can interpret that as being an inducement to obtain a statement.
  + **S:** There’s no inducement.
  + **PO:** Okay. Now you have to understand, Brandon uh… and hear me out here, okay, because this is important, and uh it’s how things work, and unfortunately I cannot change that. The way the law is, I can’t promise you anything or make any deals in here, uh … in exchange for you giving me your involvement in crime. Uh … because as I said earlier, that can be interpreted when this goes to court, it can be interpreted by the courts as being an inducement to obtain a statement from you. Do you understand?
  + **S:** Uh huh
  + **PO:** I can’t do that, I can’t promise you anything or try and induce a statement. It has to be your free will, right.
  + **S:** I know.
  + **PO:** … obviously I can’t right here, right now start making deals with you. That’s… that’s not my positions and that… that just cannot happen.
  + **S:** Well when can you?
  + **PO:** What I’m wanting you to listen here to is… when that charge gets forwarded to Crown Counsel, they are the ones that are in position to do any deal makings…
  + **S:** Yeh that’s great
  + **PO:** … between you…
  + **S:** And they’re in a position to say “Fuck you too”
  + **PO:** You’re the guy that’s involved and she is simply the driver, it doesn’t take a Rhodes Scholar to figure out the likelihood of where the charges are gonna fall at the end of the day. Unfortunately I… I’m not in a position to… to make that deal with you, but I know that the Crown is. All I can do is give the information to Crown with my recommendation. And then Crown…
  + **S:** So I get no guarantees.
  + **PO:** You want guarantees from me, but I… I cant give you any guarantees at this point…
  + **S:** Then take my back to my cell.
  + **PO:** When we’re done…
  + **S:** Take my back to my cell then.
  + **PO:** Listen, here me out, Brandon.
  + **S:** No, just take me back to my cell.
  + **PO:** Well, then what’s gonna happen is this. Tanya’s gonna be coming down and she will be charged with robberies because those investigations will proceed further and she will be identified, trust me, out of photo line-ups from the witnesses in Victoria, in Abbotsford and possibly in South Surrey- although I haven’t looked deeply into that file yet, that’s why I need to hear from you. I can talk to other Police investigators, Brandon, and I can talk to the Crown.
  + **S:** Well, do it then.
  + **PO:** But I need to hear your story first.
  + **PO:** No, it isn’t, Brandon, because listen. If you went down and talked to her right now and I know that you simply wanna talk to her, probably to tell her that you love her and that you’re doing the right thing, and you’re keeping her out of the shit. Correct? Exactly. You know that, I know that. And you know that it’s not a promise that I’m making to you, or a guarantee in order… like an exchange to get information here that you’re gonna talk about. But unfortunately, it’s a tough issue because the courts could possibly see that as an inducement to get your statement, an incriminating statement. Now you know as well as I do that that’s horse shit, but unfortunately that’s what we’re dealing with. Now what I’m telling you, and I’ll stress again, is you will have an opportunity to talk to her. If at the end of this process, the end of our discussion I’m satisfied that you’ve been upfront, you’ve cleaned your slate, I will give you that opportunity, I’m promising you that as my word. And I’ve been honest with you from the get go here. But I can’t do it now until some of this stuff is on the table….
  + **S:** So what do you want in order for me to talk to her?
  + **PO:** I wanna know exactly what your involvement was in the Tillicum Mall robbery, and…
  + **S:** And you’ll let me talk to her?
  + **PO:** And I wanna know exactly what your involvement was in the uh… Safeway Robbery at Ocean Park. I wanna know everything.
  + **PO:** I can’t take your information and statement on these other robberies you’re involved in, if later down the road it’s only gonna be useless in court because it’s interpreted that I gave you an inducement by promising you a conversation with Tanya. It just can’t work that way legally, it’s a problem, I’m telling you that. I’ve been down this road before, where people wanna speak to their significant other in cells.
  + **S:** How about I give you one?
  + **PO:** Well it’s a start?
  + **S:** Then do I get to see her?
  + **PO:** But I need to clear the slate, that’s what I’m saying. You told me earlier that the plan was gonna be that you clear all these robberies…
  + **PO:…** but I just need to know one thing Brandon, it’s kind of important to me to know you with a … we… we’ve talked a lot I feel like I’ve gotten to know you like… like a brother really, over the last however many hours I’ve been speaking to you. I just wanna know… like we’ve talked a lot you’ve… you’ve unloaded a lot of shit on me in the last however many hours from last night when we talked. And I just wanna know why, why ah… why did you decide to talk to me about all these things and clear your slate here with me? What’s your motivation?
  + **S:** My girl
  + **PO:** What’s that?
  + **S:** For my girl.
  + **PO:** For your girl. For Tanya.
  + **S:** Yeah
  + **PO:** Okay. All for her, not for yourself as well? No
  + **S:** Somewhat, mostly for her
  + **PO:** Mostly for her, okay, fair enough Brandon. You know what I admire that cause that’s… Tanya is important to you, you told before she’s… she’s everything to you. You love her to death, she’s the centre of your universe. And I know what that feels like I mean so. You know again… big step on your part. So what I’m gonna do Brandon is I’m gonna take you back downstairs.
  + **PO:** You know, do you feel better?
  + **S:** Uh uhm
  + **PO:** Good to get it off your chest, at least somewhat?
  + **S:** Yeah
  + **PO:** Okay. And what I hope to Brandon tomorrow is… to talk to you further, and even down the road I’d like to keep up and see how you make out. You know you’re… you’re quite right tomorrow courts a new thing… courts a different thing you’re gonna… in all likelihood end up over at Pre-Trial. But that’s just next door to us.
  + **S:** Yep.
* Is S’s statement voluntary?
  + **Problematic**- the fact that the officer is leading the defendant on as to the quid pro quo of the defendant giving his information in exchange to visit his girlfriend. This is problematic because they could be co-conspirators and by giving him the chance to see her, he could direct her testimony.
  + Crown will try to argue that he did make this statement on his own, and this was a 40 year old guy who had been through the system many times and he knows what he is doing as he brings up the topic of making a deal
    - The officer told him clearly that he could not make him any deals or promises
  + SCC admitted the statement
    - Issue came down to whether you must consider a qui pro quo within all the circumstances
    - Personal characteristics of the accused (his history of crime) can be used towards whether the statement would be admissible. If the accused were a less seasoned criminal, the statement may have been deemed inadmissible

Statement Against Penal Interests

#### Basic Rule

* A statement against a person’s penal interests (ie. statement that implicates person in a criminal offence) is admissible for its truth

#### Criteria

* Unavailable declarant
* Declarant apprehended she/he was vulnerable to penal consequences
* Vulnerability is not too remote
* Declaration was against interest
* Purpose is to exculpate accused

#### Rationale for the Exception

* **Necessity:** declarant is dead or otherwise unavailable
* **Reliability:** person is unlikely to knowingly speak against their interest unless what they say is true

#### Example: Penal Interest

* Accused, Samuel, charged with murder. Crown’s theory is that Samuel killed the deceased, Ethan, by shooting him twice in the head. The defence wishes to adduce at trial the evidence of a witness, Troy, with respect to statements made to him by James concerning the murder. Troy is a friend of both Samuel and James. Troy will testify that a week after Ethan’s death, he met with James. James was behaving strangely so Peter asked him what was the matter. James started crying, mentioned Ethan and said words to the effect that they “got the wrong guy on that charge” and tapped himself on the chest with his hand. Troy indicated James also mumbled something about the *CEA*. James died two weeks alter from chronic hepatitis. Is Troy’s evidence about James statement admissible?

### Lucier v R (1982 SCC)

**Facts:** Appellant’s home was destroyed by fire while he was away, and shortly after he’d added more fire insurance coverage. A friend of his was seriously burned in the fire, and told police that he had set the fire at the request of the appellant. Both statements were made to police after he had been duly cautioned. He died a few days later.

**Held:** Appeal allowed.

**Ratio:** Other cases deal with exculpatory statements, this is inculpatory. Such statements are not allowed because accused cannot cross them.

In a proper case, statements tendered on behalf of the accused and made by an unavailable person may be admitted at trial if they can be shown to have been made against the penal interest of the person making them; but such a rule could not apply to statements which have an inculpatory effect on the accused. Such statements implicating the accused robs him of cross-examination.

Statements against Pecuniary or Proprietary Interests

#### Basic Rule

* A statement against a person’s pecuniary or proprietary interest is admissible for it’s truth - against their OWN interests
  + Pecuniary interest in a matter -> is one where there is reasonable likelihood or expectation of appreciable financial loss or gain to the other person (or to other persons)
  + Proprietary interest -> advantage, profit, right or share held by owner of a tangible or intangible asset or property with all associated rights

#### Criteria

* Unavailable declarant
  + Person who cannot be called to the stand (includes if they are dead, out of jurisdiction or so ill they cannot testify etc.)
* Personal knowledge of the facts asserted in the statement
  + Ties into the rationale for the exception
* Statement was against the person’s interest when made
  + This is unlike an admission and it ties into the rationale for the exception
* Knowledge when made that the statement is against one’s interests

#### Rationale for the Exception

* **Necessity:** Declarant is dead or otherwise unavailable
* **Reliability:** Person is unlikely to knowingly speak against their interest unless what they say is true
  + Generally, if we are going to make an admission against our interests, it is reliable because we are not going to do something that hurts ourselves generally unless it is true

#### Example

* M is suing K for repayment of a promissory note. K’s defence is that he never borrowed the money, and even if he did, he repaid it. M wants to admit a letter from K to J in which K states: “I just borrowed $5,000 from M but I don’t intend to pay him back because he owes me $10, 000.” Is the letter admissible under the statements against pecuniary interest exception?
  + This is also technically an admission
  + \*Against K’s interest because admits borrowed money; but also, against M because shows that M owes him more money
  + There is a lot of debate in case law about whether to admit this kind of statement in its entirety

### R v O’Brien (1978 SCC)

**Facts:** O’ Brien and Jensen charged with possession of a narcotic for purposes of trafficking. Jensen fled the country. Following O’Brien’s conviction Jensen returned and told O’Brien’s lawyer that he alone committed the act. He agreed to testify. Before the hearing, Jensen died. At the hearing, counsel repeated the statement as a witness, and on that basis the appeal was granted and an acquittal directed.

**Held:** Appeal should be allowed. The evidence was inadmissible.

**Reasons:** Evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the objective of the evidence is to establish the truth of what is contained in the statement.

* + Jensen’s statement is an example of hearsay and is inadmissible unless it falls within an exception to the hearsay rule.
  + A declaration against penal interest should meet certain requirements before being admissible: (1) the fact stated should have been “to the deceased’s immediate prejudice” at the time when he stated it; (2) when the deceased made the statement he should have known the fact to be against his interest; (3) the declaration would have to be made to such a person and in such circumstances that the declarant should have apprehended a vulnerability to penal consequences as a result; (4) the vulnerability to penal consequences would have to be note remote
  + Jensen did not make the statement until 10 months after respondent was convicted and not until almost 6 months after the charges he faced had been stayed. He made his statement in the privacy of a lawyer’s office and refused to swear an affidavit.
  + His desire was not to create damaging evidence detrimental to his penal interest. Statement was not against his interest. He had no intention of giving evidence against himself. Therefore, the statement did not meet the test and was inadmissible.
  + Failure to fall within the exception is fatal to the admission of Mr. Simon’s hearsay.

**Ratio:** Statement against penal or pecuniary interests are admissible. Statement must be to deceased’s immediate prejudice (against interest at the time). If it can be construed in favor of his interest, or against his interest only in the future it is inadmissible. Deceased must this.

Prior Testimony

#### Basic Rule at Common Law – at common law, prior tesTimony is admissible if it meets this criteria

* Declarant is unavailable
* Former proceeding between the same parties
* Substantially the same facts in issue
* Full opportunity to cross-examine at the prior hearing

#### Rationale for the Exception

* **Necessity:** unavailability
* **Reliability:** procedural safeguards \*because testimony generally same safeguards we tend to have in a trial
  + Solemn occasion/open court
  + Statement on oath
  + Subject to cross-examination
  + Accurate transcript/recording

Statutory Exception (CC s. 715)

* Unavailable witness
* Given during a prior trial, etc. concerning the same charge
* Taken in the accused’s presence
* Full opportunity to cross-examine at the prior hearing
* Discretion to exclude exists

**715(1):** Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person

1. Is dead
2. Has since become and is insane
3. Is so ill he is unable to testify or travel, or
4. Is absent from Canada,

And where it is proved that the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceeding without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.

**(2)** Evidence that has been taken on the preliminary inquiry or other investigation of a change against an accused may be admitted as evidence in the prosecution of the accused for any other offence on the same proof and in the same manner in all respects, as it might, according to law, be admitted as evidence in the prosecution of the offense with which the accused was charged when the evidence was taken.

**(2.1)** Despite (1) and (2), evidence that has been taken at a preliminary inquiry in the absence of the accused may be admitted as evidence for the purposes referred to in those subsections if accused was absent further to the permission of a justice granted under paragraph 537(1)(j.1).

**(3)** For the purposes of this section, where evidence was taken at a previous trial or preliminary hearing or other proceeding in respect of an accused in the absence of the accused, who was absent by reason of having absconded, the accused is deemed to have been present during the taking of the evidence and to have had full opportunity to cross-examine the witness.

**(4)** Subsections (1) to (3) do not apply in respect of evidence received under subsection 540(7).

#### Rationale for the Exception

* **Necessity:** Unavailability
* **Reliability:** procedural safeguards
  + Solemn occasion/open court
  + Statement on oath
  + Subject to cross-examination
  + Accurate transcript/recording

#### Rule 31.11 of *Rules of Civil Procedure*

* **31.11(11)** At the trial of an action, a party may read into evidence as part of the party’s own case against an adverse party any party of the evidence given on the examination for discovery of,
  + **(a)** the adverse party; or
  + **(b)** a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise,

if the evidence is otherwise admissible, whether the party or other person has already given evidence or not

* Admits examinations for discoveries under the admission exception to the hearsay rule
* **31.11(2)** The evidence given on any examination of discovery may be used for the purpose of impeaching the testimony of the deponents as a witness in the same manner as any previous inconsistent statement by that witness
* Scope of Rule:
  + Deals with parties and their representatives
  + Admissions by the party
  + Impeachment of the party
* **31.11(6)** Where a person examined for discovery,
  + **(a)** has died;
  + **(b)** is unable to testify because of infirmity or illness
  + **(c)** for any other sufficient reason cannot be compelled to attend at the trial; or
  + **(d)** refuses to take an oath or make an affirmation or to answer any proper question

Any party may, with leave of the trial judge, read into evidence all or part of the evidence given on the examination for discovery as the evidence of the person examined, to the extent that it would be admissible if the person were to testify in court

* **31.11(7)** In deciding whether to grant leave under subrule (6), the trial judge shall consider,
  + **(a)** the extent to which the person was cross-examined on the examination for discovery
  + **(b)** the importance of the evidence in the proceeding;
  + **(c)** the general principle that evidence should be presented orally in court; and
  + **(d)** any other relevant factor
* Scope of the Rule
  + Deals with any witness (not just parties)
  + Allows for the admission of their evidence for its truth if the witness is unavailable (dead, ill, refused to be sworn in etc.)
  + Requires leave of court
  + Main considerations:
    - Extent of cross examination, importance of evidence, preference for oral testimony, other relevant considerations

Business Records

\*One of the most used exceptions

#### Rule at Common Law: *Ares v Venner* (1970 SCC)

* Record was made in the ordinary course of business
* Record was made contemporaneously (at time of event)
* Person had “personal knowledge” of the matters being recorded
* Person was under a duty to make the entry or record
* No motive or interest to misrepresent matters stated in record

#### Example: *Ares v Venner*

* “Circ’n checked. Toes cool to touch. Sole of foot blue. Unable to wiggle toes. Swelling still apparent but toes blanching well. Toes cold, greyish-white. Foot Cool. Dr. V notified and visited. Foot lowered. Circ’n improved. Colour returning to toes, blanching slowly. Toes remain cold. Colour bluish pink. Blanching. Circ’s improving.”
* Issue was the admissibility of the nurse’s notes
  + Court said these are reliable because they were made by a nurse who was under a duty to make the notes; there was contemporaneity (made the notes at or shortly after she observed it); it’s the nurses job to take notes
  + Admissibility based on expediency/convenience; reliance as they do it as their job and there was no motive to do it inaccurately, rather there was a duty to do it accurately

### Ares v Venner (1970 SCC)

**Ratio:** Expanded common law business records exception to allow for admission even when the “recorder” was alive and available to testify.

**Reasons:** Hospital records, including nurses’ notes, made contemporaneously by someone having a personal knowledge of the matters being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. This should not preclude a party wishing to challenge the accuracy of the records or entries from doing so. Had the respondent here wanted to challenge the accuracy of the nurses’ notes, the nurses were present in court and available to be called as witnesses if the respondent wished.

### R v Wilcox (2001 NSCA)

**Facts:** The respondents were charged with hundreds of counts under the *Fisheries Act*.

**Prior Proceedings:** At trial, the judge ruled a document tendered by Crown as inadmissible, the Crown closed it’s case, invited a direct verdict of acquittal and then appealed arguing the judge erred in excluding document. Appeal allowed and the matter was remitted to trial court.

**Held:** The trial judge did not err in finding no breach which would have supported the exclusion of evidence. The document should have been admitted under the principled exception to the hearsay rules as there were strong circumstantial guarantees of trustworthiness. Regulatory offences in a highly regulated industry require ss. 7 and 8 of the *Charter* to be applied more flexibly

#### Rationale for the Exception

* Necessity: Expediency
* Reliability:
  + Personal knowledge
  + Contemporaneity
  + Motive to make an accurate record \*made a lot of records, under a duty to do so, I do these things accurately every day

#### *Canada Evidence Act* s. 30

* Ordinary course of business
  + Records had to have been made in the ordinary course of business
* Personal knowledge not required
  + i.e. double hearsay permitted \*type of information is routinely recorded, which is where the reliability comes from
* Statements of fact and opinion
  + Not something that requires expert qualifications (like toes are blue – will let in as a business record)
* Contemporaneity not required
  + Possible to have records made reasonably close to the time that the courts are satisfied they were accurately recorded
* Broad definition of business and record
  + Nb. Investigative records excluded
* Seven day notice requirement
  + Can rely on the common law exception if you miss this

1. Business defined:
   * Businesses (ex. Hells Angels is a criminal organization that would fall under this)
   * Professions
   * Trades
   * Callings
   * Manufacturers or undertakings
   * For profit or non-profit
   * Including by governments and their various entities
2. Records defined:
   * Books
   * Documents
   * Papers
   * Cards
   * Tapes
   * “other things”
   * In whole or in part

#### *Evidence Act*, s. 35

* Usual and ordinary course of business
  + Made in the usual and ordinary course of any business
  + Must show business regularly makes these writings, expected part of how business operates (normally not hard to satisfy)
* Personal knowledge not required
  + Ie. Double hearsay permitted
* Statements of fact
  + Unlike the *Canada Evidence Act* which allows statements of opinion
  + If court decided it is an opinion it is not admissible here (but could fall back on the common law exception)
* Contemporaneity requirement
* Broad definition of business and of record
* Seven day notice requirement

1. Business defined:
   * “every kind of”
   * Business
   * Profession
   * Occupation
   * Calling
   * Operation or activity
   * For profit or non-profit
2. Records defined:
   * “any information”
   * “recorded or stored”
   * “by any device”

#### Rationale for the Exceptions

* Necessity: expediency
* Reliability:
  + Routine nature of process
  + Business reliance (would not put reliance on records that are known to be false

#### Example: Civil Case

* Accident case. Defence seeks to introduce a report made by investigating officer (now in Africa) after his attendance at the scene
* Report contains
  + Officer’s measurements and observations
  + Statements of witnesses to the accident
* Under the *OEA* is this admissible?
  + Report made in the course of an investigation -> not an issue because investigative reports allowed in *OEA* unlike *CEA*
  + Double hearsay is permitted so that is fine
  + Some questions of whether it is fact or opinion
  + Part of his job -> he is a police officer (so would fit in business records)
  + So probably admissible
* *CEA* not admissible
  + Because it is an investigative report which is excluded under the *CEA*

#### Example

* Samantha wants to retain you to sue Dr. Golden for malpractice. She tells you that she went to see Dr. Golden a year ago because she had a small bump and red area that keeps expanding on her leg. Dr. Golden told her it was just a mild reaction to a sand flea bite, and would eventually go away. He gave her a salve to ease the itching. Samantha later discovered it was a tick bite, and it caused Lyme’s Disease. She now has to go through a lengthy and expensive treatment, and full recovery is not certain because of the delay in starting the treatment. Samantha says Dr. Golden’s nurse, Vee, took notes during the appointment. She has a copy of her medical records and in them you can find a photocopy of a note dated the day of Samantha’s appointment, which states: “Patient – Samantha X; c. small bump & expanding red area. Dr. G – d. flea bite; p. ointment (prn/2 wks)”, and it initialed, “VV”. Nurse Vee sttil works for Dr. Golden. You agree to take the case. Would you try to have Nurse Vee’s note admitted at the trial? Why or why not? If you want it admitted, what additional information would you want to obtain from/about Nurse Vee before the trial?
  + Either she can personally recall this – get her as a witness and call her directly
  + If not, need information that will get the information in
    - Ordinary course of business? Nurse. Do you usually make these kinds of notes?
    - Would be an *Ontario Evidence Act* matter because it is a civil case

Spontanenous Utterances

#### Basic Rule

* A statement made before or after a dramatic or startling event is admissible for its truth if made in circumstances of “spontaneity” such that possibility of fabrication or concoction can be disregarded

#### Criteria

* Statement relates to a startling event or condition
  + That sparks the spontaneity (been triggered by something, didn’t have time to think about it)
* Excitement caused by the event or condition is still operating at the time of the statement such that the possibility of concoction or fabrication can be excluded
  + If you’re still acting under that condition you do not have time to come up with a statement
* Statement is “reasonably contemporaneous” with the event

#### Guidelines \**Andrews* Case sets this out (adopted by sCC)

1. So startingly an event that there was no real opportunity for reasoned reflection
2. Declarant’s mind was still dominated by the event when the statement was made
3. No special features raising the possibility of concoction or distortion
   * Can I be satisfied here that the person’s reaction to the thing is a spontaneous accurate reaction to the thing itself
4. No special features giving rise to the possibility of error in the narrated facts

#### Rationale for the Exception

* **Necessity:** Expediency/ best evidence
  + **But:** exception is not to be used to avoid calling an available declarant
* Reliability:
  + Spontaneity and reasonable contemporaneity
  + No real risk of concoction
  + No real concerns about memory
  + Heightened perceptions

### R v Khan (1990 SCC)

* **Facts:** Daughter who told mom that her doctor put his “birdie in her mouth” (same facts as above)
* Would this fit under the spontaneous utterances exception?
  + Is this a startling and traumatic event? For an adult, yes but did the child really appreciate this to be a traumatic event
  + Is it reasonable contemporaneous? More like 15 min after event occurred, might be fine if court was satisfied no risk of concoction or fabrication
  + How did it come about? Question from the mother – this leads to some concern about the spontaneity of the statement, as it was triggered by a question

### R v Clark (1983 ONCA)

**Facts:** The accused went to her ex-husbands house and killed his new wife. The woman had gone to collect some lawn chairs, and while in the garage with the deceased, the woman claimed the deceased attacked her with a knife and in the struggle, she was stabbed. The neighbor testified that she heard the victim say “Help! I’ve been murdered, I’ve been stabbed”. At trial, these statements were properly admitted and were evidence of the truth of the facts stated.

**Ratio:** Statements made spontaneously in circumstances where concoction or distortion can safely be excluded are admissible as an exception to hearsay rule and for the truth of their facts whether or not statements were made exactly contemporaneously with events they relate to.

**Held:** Statement admissible

**Reasons:** The statement was offered for its truth, therefore was hearsay unless subject to an exception.

### R v Nurse (2019 ONCA)

**Facts:** Nurse is charged with murdering Kumar who had been violently stabbed at the side of the road – he had serious abdominal injuries and his vocal cords have been severed. While Kumar was being treated by EMS, Nurse approached. Officers at the scene saw Kumar point to his abdominal injury and then gesture towards Nurse. Guilty at trial, then appealed.

**Held:** Appeal dismissed.

**Ratio:** Could get this in under the spontaneous utterances or the principled approach -> Should go to trier of fact to decide weight

Statements about Physical Sensations

#### Basic Rule

* A statement of a person’s present bodily condition is admissible to prove how person was feeling at the time the statement was made
  + Relates to what people feel physically in their bodies

#### Criteria

* The statement relates to present bodily condition
* The statement is (reasonably) contemporaneous with the bodily condition
* The exception applies to only the declaration of the physical sensation
  + This gets in the physical sensation, but it does not get in anything else with it
  + If you say “My back hurts, I shouldn’t have lifted that rock”, the “I shouldn’t have lifted that rock” does not make it in

#### Example

1. Jane is planting a garden. She turns over the soil and then puts in new plants. Jane then says, “Boy, is my back killing me!”
2. Jane goes to her doctor, who conducts an exam. Whenever doctor touchers her back or asks her to bend, Jane grimaces and groans
   * All of her reactions to feeling the sensation of the pain are admissible
3. During the examination, the doctor says to Jane, “How long has you back been like this?” Jane responds, “For a few days.” The doctor also asks, “How did you hurt your back?” Jane says, “Gardening.”
   * The exception does not get these comments in as they are not about the physical sensation but rather they are about the cause or duration of the physical sensation
   * You cannot admit through the hearsay exception a statement about the cause – it is a narrow exception

#### Rationale for the Exception

* **Necessity:** Expediency or convenience/ best evidence available
  + - The declarant is usually available, but the idea is that it is the best evidence available about what the person was feeling at the time as it is how they experienced the pain
  + **But:** exception is not to be used to avoid calling an available declarant
* Reliability:
  + Contemporaneity or spontaneity with the events in question
    - The longer from when you felt the sensation the less accurate you will be in recounting that sensation
  + It must not convey the circumstances of suspicion
    - i.e. if you are already contemplating litigation, then the court will not admit it under this exception

State of Mind/ Present Intentions Exception

#### Basic Rule

* A statement of a person’s present mental state (including emotional state) is admissible to prove what the person’s mental state was at the time the statement was made
* State of mind exception can also be an emotional exception
* It is more appropriate to treat state of mind exceptions as hearsay rather than circumstantial evidence (*Starr*)

#### Criteria

1. Statement of the declarant’s present state of mind or present intentions
2. Statement was not made under circumstances of suspicion (*Starr*)

#### Example

* The issue is cause of death- murder or suicide. The deceased made the following statements a few weeks prior to her death:
  + No one likes me; no one would miss me
    - Not expressed state of mind, but implies she is depressed, and you would have to draw a conclusion from the words
  + I intend to kill myself
    - This would be admissible under hearsay exception

#### Admissible for Certain Purposes

1. Evidence of the declarant’s state of mind/intention at the time the statement was made
2. Evidence that the declarant acted in accordance with that state of mind/ intention

#### Not Admissible for Other Purposes

1. State of mind of persons other than the declarant, unless a hearsay exception exists for both levels of hearsay
   * If you say “Jon and I are feeling depressed”, it can be used to determine I am feeling depressed but not that Jon is depressed
2. Persons other than the declarant acted in accordance with the declarant’s stated intentions
   * Subtle twist to it (*Starr*)
   * If you want to use a statement that encompasses more than 1 person’s state of mind, you must establish that the actions of the other person also satisfy the hearsay rule. This means that when you are looking at a hearsay statement you must look at how Cooke (from *Starr*) knew that.
   * **Co-conspirators exception to the hearsay rule:** The parties are acting in concert and so the statement of one person in that conspiracy can be taken to be the state of all co-conspirators (but does not happen very often)
3. Past acts or events referred to in the statement occurred
   * “I am feeling blue because my dog died”, can use it to support declaration of “I am feeling blue” but not that my dog died

#### Example

* The deceased wrote the following statements in a letter to a friend in the week before her death:
  + James intends to kill me
    - Not admissible for James’ state because it is not James’ state, it is the statement of the deceased
    - But it is admissible to show that the deceased was afraid of James’ as it does go to her state of mind
  + I tried to kill myself last night, but I did not take enough pills and just got sick.
    - Admissible under the state of mind exception? It is a state of mind about what she was feeling last night but it doesn’t establish her state of mind today. The fact that she took pills is not admissible at all
    - Inadmissible because it deals with a prior act, was not said at the time the person was trying to kill themselves

### Smith (1992 SCC)

**Facts:** Woman who called her mom 3 times but then died (facts above) The three phone calls:

* + “Larry has gone away.”
    - Not an expressed state of mind
  + “Larry has not come back and I need a ride home.”
    - Not an expressed state of mind, but you can draw an inference from her state of mind which would be that she wanted to go home. You can infer that at that time her state of mind was that she wanted to go home
  + “Larry has come back and I no longer need a ride.”
    - Not admitted under the express state of mind because it does not really relate to a state of mind at all. There is nothing on the facts to indicate that he actually came back or that he would agree to drive her home

### Starr (2000 SCC)

* C told G that he could not go home with her right then because he had to “go and do an Autopac scam with Robert”
* Is C’s statement about doing an “Autopac scam” admissible under state of mind exception? If so, to what extent?
  + It is Cooke’s state of mind and you could infer that he acted in accordance with this and went off and did the scam
  + To get it in in relation to Robert, you could have to rely on the co-conspirators exception because there is no evidence as to the basis that Cooke was making this statement

#### Rationale for the Exception

* **Necessity:** Expediency or convenience/ best evidence available
  + But: exception is not to be used to avoid calling an available declarant who is able to explain their own actions
* Reliability:
  + Contemporaneity or spontaneity with the events in question

Prior Convictions

#### Basic Rule at Common Law

* *Prima facie* proof that the person convicted committed the acts in question
  + In order to convict someone, you must be able to prove that they did it
  + Only *prima facie* because there are circumstances that could call into question the reliability of the conviction at a later date
* Rebuttal is governed by the abuse of process doctrine (these exceptions are rare)
  + Tainted first proceeding
  + Fresh evidence
  + Fairness

#### *Evidence Act*, s. 22.1

* Proof a person has been convicted or discharged in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person

Dying Declarations

#### Basic Rule

* A “dying declaration” is admissible in a homicide case against the person alleged to have caused the death

#### Criteria

* Declarant is deceased
* Declarant had a “settled expectation of death” when making the statement
* Death occurred within a reasonable period after making the statement
* Statement concerns the cause or circumstances of the death
* Prosecution is for homicide
* Statement is admissible only against the person alleged to have caused the death
* Statement would be admissible if the declarant was alive

#### Rationale for the Exception

* **Necessity:** declarant is dead
* **Reliability:**
  + “Making peace”/ no motive to lie
  + Limited nature of the statement
  + Fairness to the deceased

#### Example

* Jane is charged with murder. She and two other people were in a room with the deceased, Harry, who died of a gunshot wound. After Harry was shot, staggered out of the room and collapsed. He gasped out with his last breathe, “Jane has done this to me.” Harry had a very strong dislike, almost a hatred, for Jane because of an incident dating back to their youth.
* Is Harry’s statement admissible to help prove that Jane shot Harry?

Problems

#### Problem 1 – The Car Accident

* A and B are in a car accident. A is driving; B is the passenger. B tells the police officer who attends the scene that they had been at a hockey game and each of them had consumed 4 beers. B is now dead. Is B’s statement admissible at A’s trial to prove A was drinking?
  + **Statement against pecuniary interest:** No because B is not driving and therefore he has no liability, he was just the passenger
  + Unless you can get this admitted through the principled approach you cannot get it in
    - **Necessity:** Easy he is dead
    - Reliability:
      * Made to a police officer
      * No incentive for B to lie
      * Statement made at the scene of the accident: contemporaneity and so no issues that he forgot what happened (BUT: he did have 4 beers so was be inebriated?)

#### Problem 2- The Ladder

* P falls off a ladder. He sues the manufacturer for his injuries. The manufacturer calls a bystander, W, who will testify that X told him he kicked the ladder and that is why it fell. X cannot be found. Is X’s statement admissible at trial?
  + **Against Pecuniary Interest:** X has opened himself to a lawsuit by making this statement to W.
  + Any statement that opens you up to potential pecuniary liability or affects your proprietary interest is caught by exception

#### Problem 3- The Estate Claim

* H tells R that she is going to borrow $10,000 from W the next day. H died. W sued H’s estate claiming he is owed $10,000. Is H’s statement admissible at the trial?
  + Cannot be a statement of intention because it is not contemporaneous because she says “the next day”
  + **Statement about pecuniary interest:** no because it does not show she actually borrowed money, it only shows she thought about borrowing it and so it shows no liability against her
  + It does not get admitted under an exception so you would have to try to get it in under the principled approach

#### Problem 4- The Fall

* Paul claims that Fred pushed him down the steps of the law school, causing Paul to break his arm. Before the trial, Paul examines Max who was walking towards his car in the parking lot. When asked to describe what occurred, Max states that he heard Paul and Fred arguing with each other as they came out of the law school and then he heard Fred say, “… you’ll pay!”. He turned around and saw Paul falling down the stairs. At trial, Paul calls Max to the stand. Max testifies that he never heard Fred’s voice at all before the accident, and in fact had no idea that Fred was present when Paul fell. On cross-examination, Paul ask Max whether he said in his examination for discovery that he had heard Fred’s voice. Max agrees he said that, but says he was mistaken.
* Is Max’s prior statement admissible? If so, for what purpose?
  + Yes, he has a prior inconsistent statement and so you bring it back to that including that it was him, that he was sworn in etc.
  + Common law exception for prior inconsistent statements: Yes, necessity is satisfied by the mere fact of recantation
    - **Is it reliable:** The prior statement was from an examination for discovery where he was under oath, had counsel present, was cross-examined and there is a transcript present
    - Therefore, you would likely be able to get this statement in under common law rules of prior inconsistent statement

#### Problem 5- The Oil Well

* Oil well exploded, killing a worker. The family of the worker is suing the oil company, claiming that it was negligent in maintaining the well. As part of its defence, oil company wishes to rely on 2 documents. The first is a monthly maintenance report filled out by the company’s regional safety inspector, indicating that the oil well was inspected and found to be in good working condition every month from the day it was built until the day it exploded. The second is an e-mail, written by the same inspector to the company’s CEO a few hours after the incident, and providing a physical description of the damage to the pump and the surrounding area.
* Are the documents admissible? If so, for what purpose?
  + **First report:** Business records exception would probably get it in
  + Second report:
    - Is this a business record: *OEA* says yes
    - Is this a document: Yes anything written or recorded, stored on any type of device
    - What does *OEA* require before you can admit a document:
      * Must be made in the ordinary course of business?
        + First record: Monthly maintenance report: sounds like that is part of the usual course of business
        + Second record: No, it fails this test. There is nothing that indicates that it is usual in the ordinary course of business that it is usual for inspectors to send these reports after an incident. This doesn’t mean you cannot get it in another way but just means it is not a business record.
      * Must be in the usual and ordinary course of business?
        + First record: Yes the monthly maintenance reports were made monthly
        + Second record:
      * Contents of report: To see whether it is statements of facts, data, or is it a statement of opinion
        + In Ontario, the *Act* requires statements of fact
      * Who made the report?
        + Sometimes personal knowledge can be a requirement but under *Ontario Act*, personal knowledge is not a requirement
      * There is also a notice requirement which shows that you did tell the other side

#### Problem 6- Which Hotel?

* Sheraton Hotel sued Sheraton House Hotel for infringement of its trade name. To establish a likelihood of name confusion, Sheraton Hotel’s counsel wants to introduce a series of memoranda that the company asked its employees to prepare each day listing the number of times during the day in which people had confused the two names. The company asked its employees to prepare these memoranda after it filed the lawsuit against Sheraton House Hotel. Are these memoranda admissible at trial? If so, for what purpose?
  + They were made in the contemplation of litigation
  + It was also outside the ordinary course of business
  + Only kept track of those who were confused not those who were not- could be a reliability issue
  + Is this an issue of double hearsay?

#### Problem 7- The Exploding Furnace

* Jason’s gas furnace exploded, causing significant damage and injuring Jason. Jason is suing the furnace manufacturer, Lennox, alleging unsafe design. Lennox claims the furnace is perfectly safe; it was just installed by the contractor in a room that did not have proper ventilation. Lennox further states that Jason knew the room was too small, and that he was the one who insisted the furnace be located there. The contractor is now dead, and his company is no longer in business. Lennox wishes to admit a letter written by the contractor to Jason before the furnace was installed. Letter states: “As we discussed, you should not install the furnace in the room you have selected because the furnace will not have adequate ventilation and could explode. Installing it there will also violate the municipal by-laws. You insist though, and it’s your money and your house, so will install the furnace on Monday where you requested.”
* Is the contractor’s letter admissible? If so, for what purpose?

#### Problem 8- The Damaged Suit

* Sam dropped off his favourite linen suit at London Dry Cleaners. He says when he got the suit back from the dry cleaners, there was a hole burned through the collar. London Dry Cleaners says the hole was there when the suit was left to be cleaned.
* Are the following pieces of evidence admissible? If so, for what purpose?
  + (1) The laundry ticket for the jacket that was filled out by the employee who accepted the jacket for cleaning. The ticket has various boxes to be checked relating to the condition of the clothing, one of which relates to damage to the clothing. The employee had checked the box and written next to it, “Small hole in the collar.”
    - Yes, it can be admitted under business records exception because part of this business is to provide tickets and this is part of the usual and ordinary course of this business to fill these out accurately (want employee to testify to this)
    - You don’t really need personal knowledge though in this case the employee who received the suit would have it
    - Assume the 7-day notice requirement was complied with
    - Likely can get this ticket it to establish that when the suit was dropped off, there was already a hole
  + (2) A memorandum from the owner of London Dry Cleaning to all employees written 1 week after Sam dropped off his jacket stating that all linen jackets are to be hand-pressed because using the automatic process creates a risk of creating holes. During his testimony, the owner stated that their processes posed no risk to clothing and they therefore had not had to change their methods because of the incident.
    - Statement against pecuniary interest: acknowledging potential liability for damaged clothes
    - This is also a prior inconsistent statement
    - Might also meet the business records rule
    - This is also an admission because he owns the company, even if the company is what is being sued but he is clearly given the authority to act on the company’s behalf so it is either a direct admission or one on behalf of the company
      * The fact that you changed a process is not evidence of negligence, but it is relevant as you may be able to draw inferences as to the state of facts before. It is therefore not a basis to exclude it but it does not go to establish negligence per say
  + (3) An excerpt from the examination for discovery of Joe Quinn, a friend of Sam’s, in which he states that he and Sam went to a play in Toronto a month before Sam dropped off the jacket and during the intermission Joe noticed that there was a small hole in the collar of the jacket. Joe has moved to a small island in Greece
    - **31.11(6)** exception applies – a witness can be found to be unavailable if there is sufficient reason as to why they are not compellable (he is in another country, it is expensive to fly, there are health reasons to not fly and so court can find there was sufficient reasons not to have him testify)
    - You can ask court for leave to have this admitted despite him not being able to testify in court. Likely will get in
  + Sam’s girlfriend, who will testify that the night after Sam picked up the jacket, he told her over dinner that “London Dry Cleaner burned a hole in my favourite linen jacket.”
    - Not admissible
    - Sam could have had a motive to lie to her about where the hole came from
    - Not an admission because Sam wants to admit the statement, they are only admissions if they are adduced by the adverse party
    - Also wont be admissible under principled approach because Sam clearly has a reason to lie

#### Problem 9 – The Inferior Rings

* Princley agrees to sell Fell’s Fine Things 25 rings for $50,000. When Fell’s receives the rings, it found them to be of poor quality and asked for money back. Princely refused to return the money, so Fell’s Fine Things sues him. A few weeks before trial, Princely calls owner of Fell’s and says, “This has gone too far; this lawsuit is damaging my reputation. I’m not admitting to anything, but it’s possible I accidently used an inferior alloy in making the rings. Give me two weeks and I’ll re-make the rings and give you $10,000 back. If I do that will you drop the lawsuit?” Owner of Fell’s replied, “Would you go to $20,000?”, which resulted in Princely hanging up.
* At trial, Fell’s Fine Things wants to have admitted Princely’s statement, “I’m not admitting to anything, but it’s possible I accidently used an inferior alloy in making the rings.” Is the statement admissible? If so, for what purpose?
  + Just speaking on their own on the phone
  + Can we get the evidence in
  + “It’s possible I accidently used an inferior alloy in making the rings”
    - Could be an admission

### R v Starr (2000 SCC) -overruled by Khelawon

**Facts:** Auto- pac scam case (facts above).

**Ratio:** It was hearsay because it was used to prove the truth of the statement- that they were going to pull a scam. It was not subject to the state of mind exception because it was not being used to prove that the victim was going to go, but rather that the accused had created this plan to lure him to a remote location. It also was made under suspicious circumstances, which is required by the exception. The principled exception is not available either, since the statement was made in a manner which was under suspicion (he was having a fight with his girlfriend, he may have said it just to avoid the fight).

### R v Potvin (1989 SCC)

**Facts:** Three people plotted to rob a woman of her jewelry by breaking into her house. While two went to get beer, the accused remained. The woman was severely beaten and died. One of the two co-conspirators had a deal with the Crown and provided evidence. When trial arrived, he refused to testify. Crown moved to admit the previous testimony under s. 715 of the *Criminal Code*. It was argued on appeal that this violated the accused’s s. 7 and s. 11 *Charter* rights.

**Ratio:** Protection against hearsay evidence is a protection against testimony without cross-examination. However, accused had the opportunity to cross-examine at prelim. Such evidence does not breach the *Charter* if accused had such an opportunity. It is the opportunity, rather than the fact of cross-examination that matters (doesn’t matter if you don’t actually cross-examine) If, however, the right to cross-examine was impacted by lack of counsel, improper restrictions on the cross-examination etc, then accused has not had “full opportunity” to cross examine.

# Opinion Evidence

#### Basic Rule

* Witnesses are permitted to testify to the facts that they perceived, not the inferences (ie. opinions) that they draw from those facts
  + Tell us what they saw, heard, what they did etc.
  + We don’t usually ask witnesses what they thought, believed or inferred

#### Rationale for the Rule

* Opinion evidence is superfluous
  + Ie. Not needed as trier of fact can draw own opinion from the facts and the opinions of witnesses do not add anything
* Risk up usurping trier of fact’s role
  + Inability to evaluate accuracy of opinion without access to the facts underlying it
  + Risk that the trier of fact will just accept the witness’s evidence and will not take the time to come to their own conclusion
  + We do allow opinion evidence in, but we only allow it when it meets the exceptions to the opinion evidence rule

#### Exceptions to the Rule

1. Lay opinion evidence (non-expert opinion evidence)
   * No qualifying *voir dire*, the person can give their opinion if they meet the criteria
2. Expert opinion evidence
   * There must be a *voir dire* to see if they meet the qualifications of an expert

Lay Opinion Evidence

#### Basic Rule: *Graat* (1982, SCC)

* A lay witness may provide opinion evidence if the opinion constitutes a “compendious statement” of the witness’ observations in relation to matters of common experience and the opinion is so close to the facts that it is impossible to separate the two
* When the opinion adds something to the believability of the facts you may also want the opinion
* More simply stated: Lay witness may provide their opinion if this allows the witness to more accurately express the perceived facts

#### Criteria

* Opinion is relevant: all evidence must be relevant
* Not excluded by any exclusionary rule or policy
  + This is a basic principle of evidence, you have to be able to get it in and it cannot be excluded by something else
* Opportunity for personal observation
  + We want that lay person to perceive the fact (who saw what was done etc.) because since they firsthand made the observations they are in the best position to draw that conclusion
* Better position than the trier of fact to “justify” the inference because they actually perceived it
* Sufficient relevant experience to draw the inference
  + The types of opinions that we generally except a person who has had that experience to be able to give (ie. Most adults will be able to say whether the car was going fast or slow because they have the experience to make this determination as to what constitutes fast and slow in a general sense)
  + What is relevant experience can vary from person to person and issue to issue
* “Compendious mode of speaking”
  + Ie. Concise summary of subtle or complicated facts otherwise difficult to articulate
  + It is a way to succinctly summarize what the persons view is
* Guidance of an expert is not needed (especially when talking about non-controversial and basic opinions)

#### Common Examples: (*Graat*)

* Identification of handwriting, persons, and things
* Apparent age
* Person’s bodily plight or condition (illness/death)
* Person’s emotional state (distressed, angry, depressed)
* Condition of things (worn, new, used)
  + These are things we can make an assessment on because they are things we do in everyday life
* Certain questions of value
* Estimates of speed and distance

#### Ultimate Issue Rule

* **Original statement of rule:** Lay witness may not give an opinion that touches on the “ultimate issue” in the case
* Rationale for the Rule
  + Usurp the role of the trier of fact
* **Modern position: rule has been abolished (*Graat*)**

#### Statutory “Lay Opinion”

* Comparison of disputed writing with genuine writing
* See *Canada Evidence Act* section 8 and *Evidence Act* section 57
  + ***Canada Evidence Act* section 8:** Comparison of a disputed writing with any writing proved to the satisfaction of the court to scpebe genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting those writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.
  + ***Evidence Act* section 57- Comparison of disputed writing with genuine:** Comparison of a disputed writing with a writing proved to the satisfaction of the court to be genuine shall be permitted to be made by a witness, and such writings and the evidence of witnesses respecting them may be submitted to the court or jury as evidence of the genuineness or otherwise of the writing in dispute.

### R v Graat (1982 SCC)

**Facts:** Officers observed the defendant driving at a high rate of speed, weaving, and hitting the shoulder. They smelled alcohol and he couldn’t walk straight. Accused complained of chest pains, and police took him to the hospital. Once released, it was too late to do breath sample. His friends testified he was tired. Both officers testified that they formed an opinion that his ability to operate a motor vehicle was impaired.

**Ratio:** As a general rule, opinion evidence is not admissible; witnesses testify as to the facts which they perceived, not as to the inferences – that is, the opinions – that they drew from their perceptions. Non-experts can give an opinion on (i) handwriting identification, (ii) people and things, (iii) apparent age, (iv) the bodily plight or condition of a person (dead or kill), (v) an observed emotional state (distressed, angry aggressive, affectionate, depressed), (vi) the condition of things (worn, shabby, used, new), (vii) certain questions of value and (viii) estimates of speed and distance. First determine relevance, then consider if it should be excluded opinion evidence on law or policy grounds. There are two exclusions to the general exclusionary rule: (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 separately and distinctly” and (2) an expert may be permitted to give opinion evidence when such evidence is necessary for trier of fact to appreciate, understand, or come to the correct conclusions about, non-opinion evidence.

**Reasons:** Someone should be able to testify in opinion form if they are able to more clearly and accurately relay the facts they perceived. Also, this evidence should not be excluded on the grounds that they are not experts, intoxication is not such an exceptional condition that requires a medical expert to diagnose it. A non-expert could not give an opinion on a legal issue, such as whether a person was negligent because this statement is not solely factual, but also an application of legal standards. But impairment to drive is fact, not law. Police officers are not experts because intoxication is something everyone can observe.

Expert Opinion Evidence

* Expert evidence is necessary, and something that is essential to come to the correct conclusion

#### Basic Rule

* Expert opinion evidence is admissible if the following criteria are satisfied:

1. Properly qualified expert



* + Key component

1. Necessary to assist the trier of fact
   * Key component
2. Relevant (reliable)
   * This does not add anything to the basic law of evidence because in all cases evidence must be relevant
3. No exclusionary rule
   * This does not add anything to the basic law of evidence because in all cases evidence must not be subject to some other exclusionary rule

#### Who is an Expert?

* A witness who has been shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which the witness will testify
* Not everyone is an expert in everything. This person must have a degree of knowledge that is beyond that of the ordinary person
* Concerned that this person knows more in the area of expertise that is relevant in the particular case
* This is not a high standard- you just need to have more knowledge than the ordinary case for your opinion to assist the trier of fact and any deficiencies in your expertise go to the weight that will be given to your evidence

#### Types of Experts

* Factual witness
  + Because the expertise they are conveying is based on their own personal observations
  + Ie. A treating physician in the case may be giving expert evidence on the degree of injuries based on what they actually perceived. When they are saying what they saw that is fact, when they are saying what the injuries mean that is evidence
* Pure expertise
  + Ie. In a case where all you are doing is calling a psychologist to tell the trier of fact the things to keep in mind to determine whether a child, in general, is able to tell the truth, how they communicate evidence, and the limitations of when a 7 year old is telling you something versus a 3 year old
* Expertise applied to facts
  + I.e. may give expert a hypothetical situation and ask their opinion as to whether the cause of the injuries was the car crash
  + You are asking them to provide their expertise in relation to the facts
* Opinion derived from an investigation of (admissible and inadmissible) facts
  + Often arises where you are calling a psychiatrist to give an opinion of someone’s state of mind at the relevant time based partly on stuff that will generally be part of the case but also based on what other people told them that will not end up being part of the case
  + Fact that some of it is based on inadmissible evidence will affect the weight given to this expert evidence once it is admitted

#### Purpose of Expert Evidence

* The purpose of expert opinion evidence is to provide information that is beyond the scope of experience and knowledge of the trier of fact, for the purpose of assisting the trier in the fact-finding process
  + If we do not think it is necessary, then we wouldn’t call the expert evidence

#### Dangers of Expert Evidence

* Distortion of the fact-finding process
  + Something seems to have additional weight when it comes in through an expert so we are concerned with jury’s latching on to the fact that it came from an expert and not applying any assessment as to the actual evidence or not understanding what the expert even said and so they just accept it
  + For this reason, it is important that you break down the expert evidence so that everyone can understand it
* “Contests” of experts
  + Both sides can call experts and essentially cancel each other out and the jury has no idea how to evaluate either one of them (don’t want the jury playing eeine meeine miny mo with the experts)
* Risk of inordinate expenditure of time and money
  + Experts are not cheap- therefore a degree of unfairness between the parties

#### Role of Expert

* Expert is not an advocate
* Expert’s primary duty is to the court, not the retaining party
  + There was a lot of debate as to whether this was a legal requirement – If expert is not acting with a duty to the court could you exclude the expert? Issues of independence, impartiality and bias are part of the basic admissibility of an expert (*White)*.
* Lack of independence and impartiality **MAY** lead to the rejection of expert evidence (*White*)

#### *Voir Dire* Required…. Or Not?

* Main difference between lay opinion and experts is that experts require *voir dire* and the basic presumption is that you do need *voir dires* but sometimes it is not always required
* If there is no need for a *voir dire* then you do not need one
  + Rationale: not wasting courts time and money when it is obvious what the answer will be
* No requirement to hold *voir dire* if it is apparent that:
  + Common law admissibility requirements are met
  + Probative value of the evidence outweighs its prejudicial effect
* If *voir dire* required:
  + Identify nature and scope of proposed expert testimony
    - Person calling the *voir dire* is responsible for identifying this
    - “I am calling the following expert. They will say the following 4 things….”
  + Threshold admissibility inquiry
  + Gatekeeper exclusionary role

#### Why a Gatekeeper Role?

* Sufficiency of legal controls over experts and expert evidence
  + We want to be sure expert evidence only come in when it is absolutely necessary and absolutely reliable
* Concern over “junk science” and the “battle of experts”
  + **Junk science:** seemed like science at the time but we now know has no validity (ie. Used to do hair comparisons to compare 2 types of hair under a microscope but you cannot draw any conclusions about whether that person is likely to be the killer )
* Lack of reproducibility of “established” sciences
  + If you can’t replicate something it has no validity, therefore concerns about whether we can draw conclusions based on that
* Need to preserve trier of fact’s role

#### First Stage: Threshold Stage- Admissibility Test (*Abbey*)

1. Properly qualified expert
   * Most important
2. Necessary to assist the trier of fact
   * Most important
3. Relevant (reliable)
4. No other exclusionary rule

#### Properly Qualified Expert

* Special or peculiar knowledge beyond that of the trier of fact
* Requisite knowledge acquired through study or experience (training)
  + Experience: I can bake a cake because I have practiced for 16,000 hours
* Expertise is the relevant area
* Low threshold; once satisfied, deficiencies go only to weight
* Factors to consider (depends on the type of expert):
  + Academic qualifications
    - Ie. If you want to call a doctor, you want to ensure that the doctor has an MD
  + Additional training
    - You can be a doctor, but then you can be trained in orthopedic surgery and have had additional training with bones
  + Practical experience
    - Some doctor has been working for 10 years whereas another has only been there for 1 year. Depends what you are looking for either can be more relevant for your case
  + Publications
    - If they have published, what have they published in?
  + Peer-reviewed books and articles
    - Peer-reviewed has gone through other experts that have said that it met the standard of knowledge required
  + Professional papers and presentations
  + Merit-based memberships
  + Honours and awards
  + Prior acceptance as an expert by a court before
    - If there has been a contested *voir dire* on your qualifications and it was determined that you were an expert, it enhances the idea that this court should be satisfied that you are on expert (has to be in the same area of expertise)
* Novel Science: *J-LJ* (2000 SCC)
  + “basic threshold of reliability” of the underlying science
    - Want some further confidence that this evidence is sufficiently accepted
  + Adoption of *Daubert* factors
    - Comes from an American case where court was talking about the contested nature of scientific evidence
  + Hands-on approach
    - Person calling the expert must be able to explain that the science behind it is sufficiently reliable to be trusted
    - Extra onus: to provide a sufficient background on the underlying science before person can be qualified as an expert
  + Contested theories or novel applications
  + Testing of the theory or technique
  + Peer review and publication of theory/technique
    - That testing has been proven to be reliable
  + Known or potential rate of error
  + Acceptance of the theory or technique within the relevant field of knowledge
    - To what extent has it been generally accepted
  + Nb.: limitations of these “protections”
* Expert has a duty to the court to be fair, objective and non-partisan (*White*)
  + **Impartial:** opinion reflects the expert’s objective assessment of the case
    - Exert must understand their duty is to explain to court the relevant degree of expertise, not to either side
    - Expert’s opinion should not change based on who hires you
  + **Independent:** opinion is the product of the expert’s independent judgement uninfluenced by outcome or who retained them
    - Expert cannot change the report based on what that side wants (this wouldn’t be independent)
  + **Unbiased:** opinion does not unfairly favour one party over another
* Issues of bias: all experts are retained by one side or another (does this mean the expert is biased?)
  + Appearance of bias alone is not enough to make expert’s evidence inadmissible
    - If it was the appearance of bias then all expert’s would be excluded as they are retained by one side or the other
  + Applicable test:
    - Whether the expert’s lack of independence renders the expert incapable of giving an impartial opinion in the specific circumstances of the case
    - Looking not at whether they are connected to one side, but whether that connection has hampered their independence or impartiality such that they cannot give an independent opinion
  + Applying the test:
    - Expert’s evidence recognizing and accepting duty to the court is generally sufficient to satisfy threshold
      * Easiest way to do this
      * Court will presume the expert is telling the truth, onus will then flip to the other side
      * If you expert confirms it, it will be presumed in the absence of reasons to doubt it
    - Burden shifts to other party to show realistic concern the expert is unable and/or unwilling to comply with the duty
    - If established that there is a reason to be concerned, the burden shifts back to the party proposing to call the evidence on the balance of probabilities
    - Not an onerous burden at the threshold stage
    - Considerations include nature and extent of the expert’s connection to the litigation (not mere fact of a connection)
    - Mere employment by a party is not sufficient to discredit a proposed expert
      * When you think about criminal cases where police officers are testifying, the fact that they are employed by the crown does not mean they are incapable of providing an independent opinion
    - Relevant considerations to includes:
      * Direct financial interest in the outcome?
        + Their opinion may not be objective if they are set to get something if they win
      * Very close familial relationship with a party?
        + Is the expert related to someone who is related to the case?
      * Exposure to professional liability if one’s opinion is reject by the court?
        + Odd because in most cases expert opinions, when rejected, do not create professional liability but in some cases there is a potential for it if the court really critiques the person’s expertise
      * Acting as advocate, not as an expert?
        + When you are conveying your expert opinion, does it sound like you are not trying to be an expert but that you are trying to get the court to accept what that party wants?
        + Sometimes see it in psychiatric or medical reports
    - Expert evidence is rarely excluded for bias; usually goes to weight (*White*)
    - Anything less than a clear unwillingness or inability to provide the court with fair, objective, and non-partisan evidence should not result in exclusion
      * It is a factor but it doesn’t normally lead to exclusion

#### Necessity

* Expert evidence is required to permit trier of fact to appreciate the matter in issue by providing information outside the experience and knowledge of the trier of fact
* More than merely helpful
* Risk of wrong conclusion
* Loss of access to important information
* Outside the experience and knowledge of triers of fact
  + Evolution of general knowledge and experience
    - In some cases, we call an expert evidence to say that a lack of recent complaint does not necessarily mean the person is not telling the truth. In *DD*, the court said that the fact that someone has not made a recent complaint about being abused does not mean we cannot believe them. No longer need an expert for this
  + Technical evidence, computer by-product evidence, “mundane” technologies
    - Do you need someone tell you how a cell phone or Facebook works? No. But we used to need one. What an expert is needed for today may not be what we need one for tomorrow.

#### Summary of Necessity

1. Evidence is necessary
   * Appreciate the technicalities of the matter
     1. Ie. May need someone who can tell us how bridges are built
   * Information outside the trier of fact’s experience
   * Form a correct judgement about the matter
2. Need for evidence is sufficient to overcome its potential prejudicial effect
   * Availability of other evidence
     1. If there another way to get the evidence in through a simpler route?
     2. Court require parties to have meetings of experts to present facts that are not in dispute and call your experts only to argue what is in dispute
   * Complexity of the evidence

#### Relevance

* The evidence is logically relevant to a fact in issue
  + What are the matters in issue?
  + How will the proposed evidence tend to prove one or more of the matters in issue?

#### Abscence of Exclusionary Rule

* Decided on a case by case basis
* Key concerns: (where expert evidence tends to be caught by another exclusion)
  + Hearsay rule
  + Character evidence rule
  + Rule against oath-helping

#### Second Stage: Judicial Gatekeeper Role- Exclusionary Discretion (*Abbey*)

* Costs/ benefits analysis required? Available?
  + - There are certain types of law where judges are not permitted to weigh the evidence (ie. Summary judgement motion). In these situations, there may be no need to do the gatekeeping function.
* Assignment of weight
  + - How much weight can jury assign to evidence? What is the evidence’s probative value? How much of it is jury likely to accept?
* *Mohan* factors- sliding scale
  + - Materiality, weight, reliability, availability of other evidence, risk of uncritical acceptance, undue consumption of time, risk of confusion, undue complexity, and so on…
* Consideration of bias
  + - Extent of alleged bias, nature of proposed evidence
    - If we have evidence where we are concerned about it going to the trier of fact and concerns about the bias of the expert, then this combined may be enough to exclude the expert
* Test- whether the proposed evidence is sufficiently beneficial to outweigh the potential harms of admitting it?
  + - We are talking about the probative value/prejudicial effect test.

#### Ultimate Issue Rule

* Expert opinion rules used to be subject to the ultimate issue rule
* **Original rule:** Expert witness may not give an opinion that touches on the “ultimate issue” in the case
* Rationale for the rule:
  + Usurps the role of the trier of fact
* Modern rule: Rule was abolished (*Mohan*)
  + But it remains a factor to consider in assessing necessity and reliability

#### Use of “Hearsay” Evidence

1. Expert opinion is admissible even if it is based on second-hand evidence (*Lavallee and Abbey*)
2. Second- hand evidence is admitted to show the facts on which the opinion is based, not to prove the facts themselves
3. Use of second-hand evidence affects the weight to be attributed to the opinion
4. (Some) facts on which the opinion is based must be found to exist before any weight can be given to the opinion

#### Hypothetical Questions

* Hypothetical questions may be used to elicit the expert’s opinion
  + Opinion is based on disputed facts
  + Evidence will be led at trial to establish the facts
    - In order to use a hypothetical question, you must have a good faith basis that the facts will establish that
  + Questions cannot be put that rely on inadmissible evidence
    - Cant say “Assuming accused says X” when you know accused will never be called to testify or they will never say X

#### Authoritative Works

* Examination in chief
  + Expert must adopt the opinion expressed in the book, article etc. to rely upon it in his/her testimony
* Cross-examination
  + Expert must acknowledge the book, article etc. as authoritative before s/he can be cross-examined using it

#### Exceeding Qualifications

* Expert testimony beyond the area of qualification should be disregarded
  + Experts are expected to testify within the area of expertise to which they have been qualified but they tend to give information outside their area of expertise so you need to consider: (1) could they have been qualified in that area? If so the court can retroactively qualify them. If not, any opinions they have given outside their area of expertise must be dismissed by the court, they are inadmissible, and no weight can be given to them.
* **Caveat:** testimony is admissible if the witness’ expertise is otherwise apparent from the record

#### Weighing the Evidence

* Assessed in the context of the whole case
* May accept or reject in whole or in part
* Weight may be diminished by reliance on facts not proven by admissible evidence
* Hypothetical facts must be substantially true to accept an opinion based on them
* Uncontradicted expert opinion should be given a great deal of consideration
* Extent of (deficiencies in) expertise is a matter of weight

Relevant Statutes and Rules

#### *Criminal Code,* s. 657.3

* Expert opinion is admissible through an “expert report”
  + One way to try and narrow down the waste of court time, if the opinion will not be disputed
* If you are going to rely on an expert report then you must provide affidavit/declaration setting out the expert’s qualifications
* Court recognizes the proposed witness as an expert
* Reasonable notice is provided
  + Intention to rely on the report, provision of the report and the expert’s qualifications
* Court may require expert to appear for examination or cross-examination on qualifications or substantive issues if the court thinks that the filing of the report will not be sufficient and they want the expert to testify
* Specifies the requirements for “reasonable notice” and remedies for non-compliance
* Reasonable notice:
  + At least 30 days before trial, OR as otherwise set by court (but this can always be extended by the trial judge)
  + Name, area of expertise, statement of qualifications
* For prosecution, also requires:
  + Within a “reasonable time” before trial (ie. Same time frame)
  + Copy of report or, if no report, summary of opinion and the grounds for the opinion
* For defence:
  + No requirement to provide expert report or summary of opinion until close of prosecution’s case

**657.3(1)- Expert testimony:** In any proceedings, the evidence of a person as an expert may be given by means of a report accompanied by the affidavit or solemn declaration of the person, setting out, in particular, the qualifications of the person as an expert if

**(a)** the court recognizes that person as an expert; and

**(b)** the party intending to produce the report in evidence has, before the proceeding, given to the other party a copy of the affidavit or solemn declaration and the report and reasonable notice of the intention to produce it in evidence

**657.3(2)- Attendance for examination:** Notwithstanding subsection (1), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of any of the statements contained in the affidavit or solemn declaration or report

**657.3(3)- Notice for Expert Testimony:** For the purpose of promoting the fair, orderly and efficient presentation of the testimony of witnesses,

**(a)** a party who intends to call a person as an expert witness shall, at least 30 days before commencement of the trial or within any other period fixed by the justice or judge, give notice to the other party or parties of his or her intention to do so, accompanied by

**(i)** the name of the proposed witness,

**(ii)** a description of the area of expertise of the proposed witness that is sufficient to permit the other parties to inform themselves about that area of expertise, and

**(iii)** a statement of the qualifications of the proposed witness as an expert;

**(b)** in addition to complying with paragraph (a), a prosecutor who intends to call a person as an expert witness shall, within a reasonable period before trial, provide to the other party or parties

**(i)** a copy of the report, if any, prepared by the proposed witness for the case, and

**(ii)** if no report is prepared, a summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based; and

**(c)** in addition to complying with (a), an accused, or his or her counsel, who intends to call a person as an expert witness shall, not later than the close of the case for the prosecution, provide to the other party or parties the material referred to in paragraph (b).

**657.3(4)- If Notices not given:** If a party calls a person as an expert witness without complying with (3), the court shall, at the request of any other party,

* **(a)** grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness;
* **(b)** order the party who called the expert witness to provide that other party and any other party with the material referred to in paragraph (3)(b); and
* **(c)** order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness’s testimony, unless the court considers it inappropriate to do so

**657.3(5)- Additional Court Orders:** If, in the opinion of the court, a party who has received the notice and material referred to in subsection (3) has not been able to prepare for the evidence of the proposed witness, the court may do one or more of the following:

* **(a)** adjourn the proceedings;
* **(b)** order that further particulars be given of the evidence of the proposed witness; and
* **(c)** order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness’s testimony.

**657.3(6)- Use of material by prosecution:** If the proposed witness does not testify, the prosecutor may not produce material provided to him or her under paragraph (3)(c) in evidence without the consent of the accused.

**657.3(7)- No further disclosure:** Unless otherwise ordered by a court, information disclosed under this section in relation to a proceeding may only be used for the purpose of that proceeding.

#### Number of Experts

* *Canada Evidence Act,* section 7: no more than 5 experts per party without leave of the court
  + ***CEA* section 7:** Where, in any trial or proceeding, criminal or civil, it is intended by prosecution or defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than 5 of such witnesses may be called on either side without leave of the court, judge or person presiding.
* *Evidence Act,* section 12: no more than 3 experts per party without leave of the court
  + ***EA* section 12:** Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding.

#### *Civil Procedure Rules*, Rule 4.1

* Now specifically include the expert’s duty to be impartial, nonpartisan and fair
* Expert’s Duty is threefold (See R.4.1.01(1) below):
* Expert’s duty to the court prevails over the expert’s obligation to the party retaining the expert
  + Also requires an expert to acknowledge that

**Rule 4.1.01(1):** It is duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

**(a)** to provide opinion evidence that is fair, objective and non-partisan.

**(b)** to provide opinion evidence that is related only to matters that are within the expert’s area of expertise; and

**(c)** to provide such additional assistance as the court may reasonably require to determine a matter in issue.

**Rule 4.1.01(2):** The duty in (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

#### *Civil Procedure Rules*, Rule 53.03

* Similar to *Criminal Code* Section 657.3
  + Specifies the timelines for service of expert reports by the parties and the required content of the report (see below)

**Rule 53.03 (1):** A party who intends to call an expert witness at trial shall, not less than 90 days before pre-trial conference scheduled under 50.02(1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

**Rule 53.03 (2):** A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before pre-trial conference, serve on every other party a report, signed by the expert, containing the information listed in subrule (2.1).

**Rule 53.03 (2.1):** A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert’s name, address and area of expertise.

2. The expert’s qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert’s opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert’s own opinion within that range.

6. The expert’s reasons for his or her opinion, including,

**i.** a description of the factual assumptions on which the opinion is based,

**ii.** a description of any research conducted by the expert that led him or her to form the opinion, and

**iii.** a list of every document, if any, relied on by the expert in forming the opinion.

1. An acknowledgement of expert’s duty (Form 53) signed by the expert.

**Rule 53.03 (2.2):** Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts’ reports in order to meet the requirements of subrules (1), (2) and (3), unless the court orders otherwise.

**Rule 53.03 (3):** An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

**(a)** a report served under this rule;

**(b)** a supplementary report served on every other party to the action not less than 45 days before the commencement of the trial; or

**(c)** a responding supplementary report served on every other party to action not less than 15 days before the commencement of the trial

**Rule 53.03 (4):** The time provided for service of a report or supplementary report under this rule may be extended or abridged,

**(a)** by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or

**(b)** by the court, on motion

#### *Family Law Rules*

* Quite unique in that they provide for 2 different types of experts:
  + **Litigation experts:** retained to provide an opinion for the purposes of litigation (person engaged for the purposes of litigation to provide expert opinion evidence)
    - You retain them specifically for the court case
    - Rules 20.1 (duty of expert) and 20.2 (content of expert reports)
      * Similar to *Civil Procedure Rules*
      * Some unique aspects
        + Eg. Under content, an expert is expected to provide “a description of any substantial influence a person’s gender, socio-economic status, culture or race had or may have had on the test results or on the expert’s assessment of the test results”
        + This reflects the fact that we know from psychological research that these attributes of a person can have an impact on certain types of testing
  + **Participant experts:** not retained for litigation purposes, but providing an expert opinion based on observing or participating in the events at issue
    - A person who does not provide an expert opinion for litigation purposes but who ends up having a relevant information because of the exercise of their skills, knowledge, training or experience while actually observing or participating in the events in issue
      * E.g. A treating physician
    - Minimal requirements
      * Notice period: At least 6 days before settlement conference, party must serve notice intention to call a participant expert.
      * Provision of written opinion, if any
        + As well, if the party plans to submit a written opinion prepared by that expert as evidence at the trial, they must provide a copy of it
      * If requested, copy of any supporting documents
        + The opposing party can request copies of any documents supporting the opinion evidence that the participant intends to rely upon
    - These minimal requirements reflect the fact that, for the most part, a participant expert’s opinions will be found in clinical notes and records or in reports prepared for the purposes of consultation and treatment and otherwise subject to disclosure.
    - **Important note:** A participant expert is strictly confined to the requirements of a participant expert. That is, their opinion must be based on their observations or participation in the actual events. If they stray beyond that, then they are subject to the requirements of a litigation expert and must comply with the litigation expert rules.
* Important differences in requirements depending on the type of expert in question

**Rule 20.1- Duty of Experts**

**20.1(1)** - This rule applies to,

**(a)** a person who is a litigation expert within the meaning of rule 20.2; and

**(b)** an expert who is appointed by the court under rule 20.3.

**20.1(2)** - It is the duty of every expert to whom this rule applies to,

**(a)** provide opinion evidence that is fair, objective and non-partisan;

**(b)** provide opinion evidence that is related only to matters that are within the expert’s area of expertise; and

**(c)** provide such additional assistance as the court may reasonably require to determine a matter in issue.

**20.1(3)** - In the case of a litigation expert, the duty in subrule (2) prevails over any obligation owed by the expert to a party

**Rule 20.2- Expert Opinion Evidence**

**20.2(1)** – In this rule,

“joint litigation expert” means a litigation expert engaged to provide expert opinion evidence for 2+ parties

“litigation expert” means a person engaged for the purposes of litigation to provide expert opinion evidence

“participant expert” means a person not engaged to provide expert opinion evidence for purposes of litigation, but who provides expert opinion evidence based on the exercise of their skills, knowledge, training or experience while observing or participating in events at issue.

**20.2(2)-** A party who wishes to call a litigation expert as a witness at trial shall, at least six days before the settlement conference, serve on all other parties and file a report signed by the expert and containing, at a minimum, the following:

**1.** The expert’s name, address and area of expertise.

**2.** The expert’s qualifications, including his or her employment and educational experiences in his or her area of expertise.

**3.** The nature of the opinion being sought and each issue in the case to which the opinion relates.

**4.** The instructions provided to the expert in relation to the case.

**5.** The expert’s opinion on each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert’s own opinion within that range.

**6.** The expert’s reasons for his or her opinion, including,

**i.** a description of the factual assumptions on which the opinion is based,

**ii.** a description of any research or test conducted by or for the expert, or of any independent observations made by the expert, that led him or her to form the opinion, and, for each test,

**A.** an explanation of the scientific principles underlying the test and of the meaning of the test results, and

**B.** a description of any substantial influence a person’s gender, socio-economic status, culture or race had or may have had on the test results or on the expert’s assessment of the test results, and

**iii.** a description and explanation of every document or other source of information directly relied on by expert in forming the opinion.

**7.** An acknowledgement of expert’s duty (Form 20.2) signed by the expert.

**20.2(3)-** If two or more parties wish to call a joint litigation expert as a witness at trial, subrule (2) applies with necessary modifications

**20.2(4)-** Any supplementary report by a litigation expert must be signed by the expert, and shall be served on all other parties and filed,

**(a)** at least 30 days before the start of the trial; or

**(b)** in a child protection case, at least 14 days before the start of the trial.

**20.2(5)-** The following documents shall accompany a report when it is served on a party under subrule (2), (3) or (4), unless the documents have already been served on the party:

**1.** A copy of any written statement of facts on which the litigation expert’s opinion is based.

**2.** A copy of any document relied on by the litigation expert in forming his or her opinion.

**20.2(6)-** Unless a judge orders otherwise, a litigation expert may not testify about an issue at trial unless the substance of the testimony is set out in a report that meets the requirements of this rule.

**20.2(7)-** A joint litigation expert may be cross-examined at trial by any party.

**20.2(8)-** Litigation expert opinion evidence concerning the following matters may only be presented by a joint litigation expert:

**1.** A claim for custody of or access to a child under *Divorce Act* (Canada) or *Children’s Law Reform Act*, unless the court orders otherwise.

**2.** Any other matter specified by the court.

**20.2(9)-** If parties who wish or are required to engage a joint litigation expert do not agree on a matter relating to the engagement, any one of them may make a motion for directions.

**20.2(10)-** The court may, on motion under subrule (9) or otherwise, make an order engaging a joint litigation expert for two or more parties.

**20.2(11)-** In making an order under (10), the court shall ensure that the matters listed in subrule 20.3 (2) are either set out in the order or are otherwise addressed by the order.

**20.2(12)-** Parties who engage a joint litigation expert, or for whom a joint litigation expert is engaged, shall cooperate fully with the expert and make full and timely disclosure of all relevant information and documents to the expert, and the court may draw any inference it considers reasonable from a party’s failure to do so.

**20.2(13)-** If a joint litigation expert provides opinion evidence on an issue for a party, no other litigation expert may present opinion evidence on that issue for that party, unless the court orders otherwise.

**20.2(14)-** A party who wishes to call a participant expert as a witness at trial shall,

**(a)** at least six days before the settlement conference,

**(i)** serve notice of the fact on all other parties, and

**(ii)** if the party wishes to submit any written opinion prepared by the expert as evidence in the trial, serve the written opinion on all other parties and file it; and

**(b)** serve on any other party, at that party’s request, a copy of any documents supporting the opinion evidence the participant expert plans to provide.

**20.2(15)-** Unless the court orders otherwise, this rule applies, with the following modifications, to the use of expert opinion evidence on a motion for a temporary order under rule 14 or a motion for summary judgment under rule 16:

**1.** Expert witness reports and any supplementary reports shall be served and filed as evidence on the motion in accordance with the requirements of subrules 14 (11), (11.3), (13) and (20), as applicable.

**2.** Any other necessary modifications.

#### *Small Claims Court Rules*, Rule 18

* Expert reports admissible if served 30 days before trial, unless the court orders otherwise that the expert appear
* Party must provide the opposing side with a summary of the expert’s qualifications
* Report is admissible to the same extent as would occur if expert was present to testify at trial
* Opposing party may issue summons for expert to attend for cross-examination
* This rule is designed to try to minimize the cost for small claims litigants

**18.02(1)- Written Statements, Documents and Records:** A document or written statement or an audio or visual record that has been served, at least 30 days before trial date, on all parties who were served with notice of trial, shall be received in evidence, unless TJ orders otherwise.

**18.02(2):** Subrule (1) applies to the following written statements and documents:

**1.** The signed written statement of any witness, including the written report of an expert, to the extent that the statement relates to facts and opinions to which the witness would be permitted to testify in person.

**2.** Any other document, including but not limited to a hospital record or medical report made in the course of care and treatment, a financial record, a receipt, a bill, documentary evidence of loss of income or property damage, and a repair estimate.

**18.02(3):** A party who serves on another party a written statement or document described in (2) shall append to or include in it,

**(a)** the name, telephone number and address for service of the witness or author; and

**(b)** if the witness or author is to give expert evidence, a summary of his or her qualifications.

**18.02(4)-** A party who has been served with a written statement or document described in (2) and wishes to cross-examine the witness or author may summon him or her as a witness under subrule 18.03 (1).

**18.02(5):** A party who serves a summons to witness on a witness or author referred to in (3) shall, at the time the summons is served, serve a copy of the summons on every other party.

**18.02(6):** Service of a summons and the payment or tender of attendance money under this rule may be proved by affidavit (Form 8A)

**18.02(7):** A party who is not served with a copy of the summons in accordance with (5) may request an adjournment of the trial, with costs.

#### Common Law Displaced- *Criminal Code*, s. 320.31(5)

* Parliament or legislatures can override the requirement for expert evidence if they use clear statutory language
  + **S. 320.31(5):** Evaluating officer’s opinion relating to the impairment (by drug or by alcohol and drug) of a person’s ability to operate a conveyance is admissible pursuant to statute without qualifying the evaluating officer as an expert in advance. He or she can simply testify.

Practical Considerations

#### Issues to Consider:

1. Discussions between counsel and experts
   * The ONCA addressed this in a 2015 decision *Moore v Getahun*. ONCA recognized that consultation and collaboration between counsel and expert witnesses is essential if an expert witness is to understand their duties and provide a report that complies with the relevant rules. Court recognized that there are safeguards in place to ensure that the report still reflects the expert’s opinions and not that of counsel which includes the expert’s own duty to the court, the ethical obligations imposed by Law Societies and by courts on lawyers as well as the ethical obligations of the experts themselves imposed by their profession.
   * Finally, there is also the fact that experts will be cross-examined on their report and that through cross-examination, any flaws, errors or omissions can be brought to the court’s attention.
2. Disclosure of working papers and draft report
   * This issue was also addressed in *Moore v Getahun* decision. The basic rule is that expert reports in a draft form, working papers and drafts and consultations between counsel and an expert are not subject to automatic disclosure. Instead, they are protected by a privilege known as litigation privilege.
   * However, litigation privilege is not absolute. First, and most importantly, a counsel who is calling an expert witness must comply with the relevant disclosure and discovery obligations. Second, litigation privilege does not protect against improper conduct. This means that if the opposing party is able to provide reasonable grounds to suspect that counsel communicated with an expert witness in a manner that was likely to interfere with the expert’s duties of independent and objectivity, then that party can ask the court and the court will order production of draft reports or notes or discussions between counsel.
   * Absent a factual foundation for improper influence, there is no right to production and courts will not order it
3. Use of expert reports at trial (exhibits vs *aide memorie*)
   * It is important to ensure that you are clear as to whether the expert report is being used as evidence at trial or is simply being used as an aide for the judge.
   * If the expert report itself is the evidence, it must be made an exhibit. It can then be referred to by the trier of fact and if necessary, it forms part of the court record on the appeal.
   * In contrast, if you are simply providing the expert report to trier of fact to help them follow along with the expert, it is not the evidence. What is the evidence is the testimony of the expert and the expert report should not be noted as an exhibit.

Problems

#### Problem 1

Group of forestry workers in Northern Ontario are suing Great Northern Forestry Corporation for exposure to NY6-DH, a chemical defoliant used before logging to clear the undergrowth and make access to the site easier. The workers claim exposure to NY6-DH caused them to develop various cancers including skin, lung and prostate cancer. The Corporation admits using NY6-DH, but says the chemical is safe and does not cause or contribute to cancer. The workers wish to call Dr. Wood, a physician in the area of cancer research, to testify about the chemical attributes of NY6-DG and whether exposure to it can cause cancer. They rely on the following:

* In late 2017, Dr. Wood developed a new laboratory test for studying chemicals to determine whether they cause or contribute to cancer. Since then, a handful of other researchers have accepted and relied on the test, but it is not universally recognized or acknowledged as valid in the oncology field. Dr. Wood’s research to date had been subject to peer-review, as the few articles written by Dr. Wood on this research have been accepted and published in leading oncology journals. According to Dr. Wood’s research and that of other researchers who have relied on the test, the error rate for the test is low.
* Dr. Wood has not personally conducted tests on NY6-DH, but has reviewed results of tests conducted by technicians in his lab and other labs who have tested that chemical using Wood’s technique. This is common; physicians and other specialists who study the causes of disease often rely on the work of trained lab technicians in conducting studies and drawing conclusions. Based on the results of the tests that were reviewed, Dr. Wood will testify that the tests prove the NY6-DH can cause skin, lung and prostate cancer.
* Dr. Wood has 2 degrees (an MD and a PHD in Biochemistry and Molecular Biology), as well as additional courses and training in the oncology and chemistry. Dr. Wood had written a number of peer-reviewed publications, and is a member of several professional organizations related to cancer research. Dr. Wood has never testified in court. Dr. Wood’s father worked for Corporation for 24 years. His father’s job was eliminated as a result of company re-structuring. Dr. Wood’s father was quite vocal in his criticism of the company when lost his jobs, even though he and the other workers received a generous severance package and full pension.
* You are the Trial Judge. Would you admit Dr. Wood’s proposed testimony? Why or why not? Address all relevant issues.
  + First thing to consider in deciding whether to admit expert testimony: it is necessary. Issue is whether the chemical being used cause cancer which is not something an ordinary person would know without someone explain to them whether chemical X could of contributed to or caused cancer. It would require an expert.
  + Can this person be qualified in this area?
    - Look at proposed expert, look at their education or practical experience in a general sense, do they have any bias?
      * There are some concerns about whether the expert can provide objective expert evidence because their father was let go from the company years ago.
      * It is very rare we exclude someone at the qualification stage on the issue of bias, you must come to the conclusion that they are incapable of providing an impartial, fair decision to the court (*White*).
      * But usually issues with bias tend to get dealt with at the discretionary gatekeeper stage. But on an exam, you would also want to make an issue of this at the qualification stage
      * Aside from bias, Dr. Wood seems qualified to give expert evidence on this matter.
      * We know from the test that all you need to be an expert is some degree of knowledge more than the ordinary person (aside from bias he meets this.
      * Therefore, he could probably be qualified
  + Is the science he is purporting to testify about reliable science?
    - In Canada we don’t adopt an all or nothing approach, when we have novel science, we are concerned about whether it could be reliable, whether it should be treated by the law as reliable
    - This is a new laboratory test, so we immediately have some concerns. It is not universally recognized yet
    - Important factor for novel science: What is the error rate?
      * In this case it appears to be low, so it may be that a TJ says it is sufficiently reliable and can be tested further during cross so they may let it in at this stage
    - One issue is Dr. Wood hasn’t personally conducted the test; he has relied on others. However, we know that scientists regularly rely on tests from other people, but experts are entitled to rely upon hearsay. Issue is whether this hearsay becomes central to the case such that you would want further evidence. Would want to flag this.
  + Final issue: his opinion is the ultimate opinion in the case: does this cause cancer and his answer will be yes
    - We need to make sure jury is advised that it is ultimately up to them to decide whether to accept or reject testimony

#### Problem 2

* Assume the trial judge has ruled that Dr. Wood can testify. On cross-examination, the defendant’s counsel asks Dr. Wood if Dr. Wood is familiar with “Cancer: Its Causes and Treatments”, a medical reference book authored by Dr. H. Pierce and published in 2017. Dr. Wood acknowledge familiarity with the book and the fact that it is well-respected in the medical field.
* Defendant’s counsel then directs Dr. Wood’s attention to a footnote in Dr. Pierce’s test, which states, “It is accepted that defoliants, such as RV7-QR and NY6-DH, create no increased risk of cancer due to their molecular structure.” Plaintiff’s counsel objects to the use of the reference book and questions based on it.
* You are the trial judge. How would you rule?

#### Problem 3

M is charged with possession of cocaine for the purpose of trafficking. The charges relate to the execution of a search warrant at M’s apartment and the seizure of over 400 grams of cocaine. Cst. B, an officer involved in the investigation (he located the drugs and acted as exhibit officer at the scene), has known M for approximately 4 years, and believes M is a drug trafficker. At M’s bail hearing, Cst. B testified that he believed M was involved in organized crime. M was released on bail in part because of concerns with the strength of the Crown’s case against M. Following the hearing, Cst. B asked Cst. F., a police officer trained on the Cellebrite UFED system, to forensically analyze the seized cellphone. Cst. F examined the cellphone, extracted its contents, and produced a “Digital Examination Report” of the test messages on the cellphone, which he then provided to Cst. B. Cst. B then produced a report for the Crown analyzing the text messages on the cell phone.

* Cst. B has been a police officer for 20 years. For the past 8 years, he has been assigned to the Drug Unit. He has been involved in over 200 drug trafficking cases including as a surveillance officer, affiant for CDSA warrants, undercover officer, search officer, informant handler and exhibits officer. Cst. B has spoken with numerous accused persons, witnesses and confidential sources involved in and with knowledge of the language and terminology used in drug trafficking. He has prepared 20 expert reports for the Crown on whether drugs were possessed for the purpose of trafficking including issues relating to language and terminology. Cst. B has been formally qualified in 5 cases to provide such opinions in court.
* Cst. F has been a police officer for 10 years. For the past 7 years, he has been assigned to the Forensic Identification Division, specifically the Forensics Analysis Unit. Cst. F was trained on the use of the Cellebrite UFED system in 2014 and is a certified logical operator and a certified physical analyst for data. He has passed yearly recertification exams. Cst. F has extracted data from over 180 cellphones, and has testified multiple time in court with respect to his extractions. Cst. F had no involvement in the investigation other than the extraction of the data from the cellphone.
* Cst. F will testify that Cellebrite UFED is a read-only device. It can only read data from a cellphone and does not have the ability to write data on the cellphone. Essentially, it reads the data from the cellphone and transfers it to a program on the computer, also developed by Cellebrite, for analysis of the data. Accuracy of the transfer is confirmed by visually comparing the data on the cellphone with the data on the computer. It is then possible to generate reports- digital extraction Reports- either of the entire contents of the phone or, by using the search function, only certain data on the cellphone. The program will also auto-populate the report with whatever name is linked to a phone number in the cellphone’s contacts list. Cellebrite UFED is sole only to approved law enforcement and law-related organizations. It is not sold directly to the public.
* At trial, the Crown seeks to qualify both Cst. F and Cst. B as expert witnesses, as follows:
  + **(1)** Cst. F as an expert in the use of the Cellebrite UFED system and the extraction of data from cellphones; and
  + **(2)** Cst. B as an expert in the language and terminology (drug slang, coded and guarded language) used in cocaine trafficking to establish that certain words and phrases used in the text messages are indicative of cocaine trafficking
* Cst. F and Cst. B have both stated in their reports that they understand their duty to the court and are willing and able to provide impartial, independent and unbiased evidence. You are the trial judge. How would you rule?
  + Raises issue of bias because Cst. B was involved in the investigation and he has personal knowledge about M and a personal belief about who M is, that he is a drug trafficker and involved in organized crime.
  + This was based on a real case. ONCA excluded him from testifying because he was too involved in the case and therefore was not capable to providing independent evidence.
  + Cst. F was not otherwise involved in the investigation but was effectively a specialist for the police and these people tend to be accepted as police witnesses because there is nothing that would preclude defence counsel from going to Cst. F and asking for their opinion.
  + Other thing to look at is what the Crown is trying to qualify the Cst.’s as. Have we set the grounds of qualification broad enough to capture what the experts will actually be testifying about.
    - Cst. B- you want to talk about the actual contents of the cell phone, you want him to talk about language and terminology and not just broadly about how drug trafficking happens

#### Problem 4

JM and RR have a 9 year old daughter. Pursuant to a child protection order, daughter resides with her mother, JM. RR exercises supervised access and is subject to various conditions including drug testing. RR wishes to have unsupervised access. Child protection authorities are not willing to allow unsupervised access because they are concerned RR is using cocaine based on positive test results from 6 urine samples taken over the prior 6 months. RR disputes the test results. The Crown wishes to qualify Dr. N, a physician and medical biochemist, to give expert toxicological evidence respecting the presence of cocaine metabolite in urine as indicative of drug use. Dr. N is the Director of Toxicology Services and oversees the lab that conducted the tests of RR’s urine samples. The lab is a “clinical” lab; it is not an accredited “forensics” lab like Health Canada’s Drug Analysis Service. It uses liquid chromatography and tandem mass spectrometry to analyze samples.

* A summary of Dr. N’s curriculum vitae indicates the following:
  + PhD in physiology
  + Fellow of the Royal College of Physicians and Surgeons of Canada since 1989 with a specialty in medical biochemistry
  + Fellow of the Canadian Academy of Clinical Biochemistry since 2002
  + Director of Toxicology Services since 2006
  + Ongoing training in forensic toxicology (Attended tri-annual meeting of International Association of Forensic Services in 2017)
  + Lectured to students/resident on pathology including forensic toxicology several publications (most recent “The Use of Tandem Mass Spectrometry in Screening and Confirmation of Drugs”, IAFS, 2017)
  + Qualified to give expert evidence on toxicology testing in courts in the past
* Dr. N’s report explains that testing for cocaine use involves analyzing a urine sample for cocaine metabolite which is produced when a living organism metabolizes cocaine. These samples cannot be “contaminated” by introducing cocaine into a urine sample because it has not be metabolized. Dr. N also attests in his report that he understands his duty to the court and is willing and able to provide a fair, objective and unpartisan opinion.
* Would you find Dr. N to be a properly qualified expert?
* Would your decision be difference if Dr. N had been in a relationship with JM’s mother for approx. 5 years, which ended amicably about 3 years ago? Would your decision change if it was RR, and not Dr. N, who advised the court of this info?
* Assuming Dr. N is qualified as an expert, what additional information would you want to know as part of your gatekeeper’s duty to assess the reliability of the evidence?
  + Aside from the relationship with JM’s mother, there would be no issue qualifying this expert. Can they be impartial?
  + Look at reliability of the science in question and the reliability of the lab conducting the science

#### Problem 5

* P is charged with the 2nd degree murder of his parents. The Crown alleges that P went into his parents’ bedroom in the middle of the night and shot his parents with his father’s target pistol as they lay sleeping. P testified that he fell asleep watching TV in the basement of the family home. He awoke to the sound of gunshots and went upstairs where he encountered a masked intruder armed with a gun. He grabbed for the gun. As he did so, he was shot in the abdomen. He still managed to pry the gun away from the intruder, who ran from the house. The Crown’s theory is that P fabricated the story about the intruder and shot himself to cover up the murders. The defence proposes to call an expert, Dr. Floftus, to establish that (1) a significant minority of the population mistakenly believe people are better able to remember details of traumatic events and (2) to establish that a witness to a traumatic event may have false memories of that event. The defence intends to rely on the evidence to counter the Crown’s theory that P’s false statements and inconsistent accounts of what occurred demonstrate that he fabricated his intruder story. Dr. Floftus is a renowned American psychologist. She has studied and written about human memory for years. She is a recognized expert. In relation to people’s misconceptions about the memories of those who have had traumatic experiences, Dr. Floftus will testify that studies have shown that a significant minority – sometimes as great as 50% - of the general population have misconceptions about various aspects of human memory. Studies have shown that it is common for lay people to believe that traumatic experiences will leave participants with an imprinted memory of that event. However, scientific evidence contradicts this belief. Not only are memory of violent events in fact weaker than that of non-violent events, witnesses to traumatic events often have false or illusory memories of these events.
* You are the trial judge. How would you rule?
  + Raises the issue about whether the evidence is necessary because when you look at what the expert is supposed to testify to, it may not be necessary, most people are aware that in traumatic events people may not be able to remember events.

#### Problem 6

* The plaintiff is suing the defendant for damages. The plaintiff claims that when she was 15, the defendant forced her to have vaginal intercourse with him. The plaintiff wishes to qualify and then call to testify a sexual assault nurse examiner who examined the plaintiff after the assault to testify about the observations he made during this examination and whether the injuries observed are more consistent with non-consensual than consensual sexual activity. The nurse had a BA in English Literature, a BSc in Nursing, a MSc in Perinatal Nursing Science and she is currently a candidate for a PhD in nursing. The course work in the MSc and PhD involves courses in anatomy, physiology and the female reproductive system, but no specific courses relating to sexual assault. The nurse also has a certificate as a sexual assault examiner. This course consisted of 2 weeks of full-time study followed by an apprenticeship period of about 1 month where he had to demonstrate that he could conduct a pelvic exam. The course included an examination of slides and videos of carious consensual sex injuries and non-consensual sex injuries. The nurse had worked as a sexual assault nurse examiner since 1999 at various hospitals. His duties as a sexual assault nurse examiner include: (1) taking a history of the patient; (2) examining the patient and documenting the results of that; (3) collecting forensic evidence for a sexual assault evidence kit, if possible; (4) collaborating with other medical personnel; (5) contacting the police at the patient’s request; and (6) providing the patient with other referrals. During his employment as a nurse examiner he has done a number of pelvic examinations both on women generally and on women who had reported that they have been the victims of a sexual assault. The nurse has not engaged in any research or academic writing in the area of distinguishing injuries from non-consensual sex from those caused by consensual sex. He is not a member of any relevant association or organizations. He has taught in the sexual assault nurse examiner certification course, with a focus on how to perform pelvic examinations. He has a passing familiarity with the limited research on the congruency or correlation between various types of injuries and assault or consensual sexual activity but does not have any in depth knowledge of the literature.
* You are the trial judge. How would you rule?
  + Went back to the idea of what is required to have a properly qualified expert?
  + She certainly could be qualified in certain areas but the question is whether that expertise relates to the evidence that she is being called to give as to whether or not what she has observed is consistent or not consistent with sexual assault but there is no evidence here that suggests that she is able to give that opinion.

### R v Abbey (1982 SCC)

**Facts:** Accused was charged with importing cocaine and possession of cocaine for purpose of trafficking. Crown and defendant’s psychiatrist agreed that the accused suffered from a disease of the mind known as hypomania, but they differed regarding whether he was capable of appreciating the nature and quality of his acts. They agreed that he knew that what he was doing was wrong. Evidence showed that the accused had a delusion that he was in receipt of power from an external source and that he thought this source would protect him from punishment.

**Held:** TJ erred holding that a person who by reason of disease of the mind does not “appreciate” penal consequences is insane within 16(2).

**Ratio:** There is an exception to the general exclusionary rule on opinion evidence, for a witness duly qualified to express an expert’s opinion. **Reasons:** A delusion which renders accused incapable of appreciating that penal sanctions attaching to commission of the crime are applicable to him does not go to the *mens rea* of the offence, does not render him incapable of appreciating the nature and quality of the act, and does not bring into operation the “first arm” of the insanity defence (not guilty because of a failure to appreciate the nature and quality of an act).

### R v Lavallee (1990 SCC)

**Facts:** Lavallee and her common law partner had an abusive relationship. On night of the killing, there was a party at their house. Rust hit her and told her that she was going to “get it” when the guests left. He threatened to harm her, saying “either you kill me, or I’ll get you”. Rust slapped her, pushed her and hit her on the head. He handed Lavallee a gun, which she first fired through a screen. Lavallee contemplated shooting herself, however when Rust turned around she shot him. She was charged with murder. A psychiatrist gave expert evidence at trial describing her state of mind, and that she felt as though she was “trapped” and that she would have been killed if she did not kill him.

**Prior Proceedings:** Acquitted at trial, but overturned at CA who ordered a new trial. Lavallee appealed this order to the Supreme Court.

**Held:** Appeal allowed, acquittal restored. TJ did not err in allowing Dr. Shane’s testimony to be used as evidence.

**Reasons:** Jury’s acquittal heavily relied upon Dr. Shane’s assessment of the appellant. He stated that she felt as though she was trapped. However, the appeal court stated that this evidence was not admissible because it swayed the jury and did not elaborate on the facts but merely provided an opinion. Justice Wilson vehemently disagrees. After going into the history of spousal abuse and the effects that it has on the women who are abused she held that expert evidence is very much admissible and helpful in establishing the necessary elements were present for s. 34(2) to provide a defence. This section requires the accused to have reasonably believed that she was in danger, and that she had no other option to stop it other than causing death or grievous harm. Expert evidence helps jury realize that even though she shot him while he was walking away, she still thought her life was in serious danger. Expert testimony helps prove that the defence was not too far removed or too violent to have been reasonable in the circumstances.

**Ratio:** Self-defence applies even when you are not directly or immediately in harm. Expert testimony can be helpful in claims of self-defense as it helps the jury/judge understand the condition that the accused was in when they acted and allows for an objective determination if their actions were reasonable in the circumstances.

### R v Marquard (1993 SCC)

**Facts:** Grandma charged with aggravated assault for putting 3.5 year old granddaughter’s face against stove.

**Prior Proceedings:** Crown and defence called a number of expert witnesses to corroborate their version of the events. Expert evidence relating to the function of butane lighters, the nature of the burn, whether the child was telling the truth at trial and the psychological effects of abuse were adduced. Crown witnesses were permitted to testify in areas outside the ambit of their expertise. Instead of instructing the jury to disregard the evidence where it went beyond the expertise of the expert, the trial judge told the jury to simply weigh those options, stating that the opinions outside the area of expertise were to be weighed along with the other evidence. Defence counsel did not object to the witnesses giving evidence outside their area of expertise, but objected to the judge’s charge that they could rely on the opinion outside their stated areas of expertise. Found guilty and sentenced her to 5 years imprisonment. The ONCA upheld the conviction, but reduced the sentence.

**Reasons:** The “expertise” rule was not offended by allowing a plastic surgeon who was not an expert in child abuse cases to testify that the passivity of children to treatment is a characteristic common to abused children.

* + Here, the witnesses were qualified more narrowly than their areas of expertise, or in one case, not formally qualified at all.

**Ratio:** The ultimate conclusion as to credibility or truthfulness of a particular witness is for the trier of fact and is not the proper subject of expert opinion. The only requirement for the admission of expert opinion is that the expert witness possess special knowledge and experience going beyond that of the trier of fact. Deficiencies in the expertise go to weight, not admissibility. The proper practice is for counsel presenting an expert witness to qualify the expert in all the areas in which the expert is to give opinion evidence. If this is done, no question as to the admissibility of their opinions arises. There may be features of a witness’ evidence which go beyond the ability of a lay person to understand, and therefore, may justify expert evidence bearing on credibility.

### R v Mohan (1994 SCC)

**Facts:** The respondent, a practicing pediatrician, was charged with 4 counts of sexual assault on 4 female patients during medical examinations conducted in his office. He intended to call a psychiatrist who would testify to the effect that the perpetrator of the alleged offences did not have the characteristics attributable to any of the three groups in which most sex offenders fall.

**Ratio:** The admission of evidence depends on the application of 4 criteria: (1) Relevance, (2) Necessity in assisting trier of fact, (3) Absence of any exclusionary rule and (4) a properly qualified expert. This case illustrates the traditional common law position on the admissibility of expert evidence: it must be **necessary**.

**Reasons:**

* (1) Relevance
  + Matter to be decided by the judge as a question of law
  + *Prima facie* admissible if logically relevant
  + BUT other considerations come into play including a cost-benefit analysis, cost being the impact on trial process
  + Logically relevant evidence may be excluded if its probative value is overborne by its prejudicial effects, if it involves an inordinate amount of time, or if it is likely to misguide the jury
* (2) Necessity in assisting the trier of fact
  + “Helpfulness” sets too low a standard
  + However, necessity is not be judged on too strict a standard
  + The opinion must provide information which is likely to be outside the experience and knowledge of judge or jury
  + Expert opinion admissible where non-specialists wouldn’t be able to draw (reasonable accurate) inferences using general knowledge/ common sense
* (3) The absence of any exclusionary rule
* (4) a properly qualified expert.
  + Evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which they undertake to testify.
  + Expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny

### R v J-LJ (2000 SCC)

**Facts:** Accused was charged with a series of sexual assaults on 2 male children. He tendered the evidence of a psychiatrist to establish that in all probability a serious sexual deviant had inflicted the abuse, including anal intercourse, and no such deviant personality traits were disclosed by the accused in various tests including penile plethysmography.

**Prior Proceedings:** After *voire dire*, TJ excluded the expert evidence because it purported to show only a lack of general disposition and was not saved by the “distinctive group” exception recognized in *Mohan*. Accused was convicted. CA allowed the appeal and ordered a new trial.

**Held:** Appeal should be allowed and conviction should be restored.

**Reasons:** The TJ’s discharge of his gatekeeper function in the evaluation of the demands of a full and fair trial record, while avoiding distortions of the fact-finding exercise through the introduction and inappropriate expert testimony, deserves a high degree of respect. TJ was not persuaded that the *Mohan* requirements had been met.

* Psychiatrist was pioneer in trying to use penile plethysmograph, previously recognized as therapeutic tool, as a forensic tool.
* If expert evidence were accepted that the offence was probably committed by a member of a “distinctive group” from which the accused is excluded, it would be a short step to the conclusion on the ultimate issue of guilt or innocence.
* The “distinctive group” exception sought to be applied here requires that it be shown that the crime could only, or would only, be committed by a person having distinctive personality traits that the accused does not possess. The personality profile of the perpetrator group must identify truly distinctive psychological elements that were in all probability present and operating in the perpetrator at the time of the offence
* The issue whether the “profile” is sufficient depends on the expert’s ability to identify and describe with workable precision what exactly distinguishes the distinctive or deviant perpetrator from other people and on what basis the accused can be excluded. The expert evidence tendered in this case was unsatisfactory on both points.
* Witness did not satisfy TJ that the underlying principles and methodology of the tests were reliable, and applicable.
* The possibility that such evidence would distort the fact-finding process was real. Consideration of the cost-benefit analysis supports TJ’s conclusion that the testimony offered as many problems as it did solutions, and it was therefore within his discretion to exclude. Majority of the CA erred in interfering with the exercise of that discretion.

### R v DD (2000 SCC)

**Facts:** Complainant alleged that the accused had sexually assaulted her when she was 5-6 years old. Complainant told no one about these events for 2.5 years.  At trial, defence cross‑examined the complainant, now 10, on the lengthy delay in reporting and suggested that she fabricated the story.  Crown called a child psychologist to testify that a child’s delay in alleging sexual abuse does not support an inference of falsehood.  During *voir dire*, psychologist gave a general explanation applicable to all children that delayed disclosure could occur for a variety of reasons and does not indicate the truth of an allegation.  TJ admitted the expert evidence and the jury found the accused guilty. CA held that the expert evidence should not have been admitted because it was neither relevant nor necessary, set aside the verdict and ordered a new trial.  Crown appealed from the finding that the expert evidence was inadmissible but agrees that the order for a new trial was warranted.

**Held:** Appeal should be dismissed. The psychologists’ evidence was not necessary and should not have been admitted.

**Ratio:** Mere helpfulness or a finding that the evidence might reasonably assist the jury is not enough to admit an expert’s opinion.  Expert opinion is admissible if exceptional issues require special knowledge outside the experience of the trier of fact.

**Reasons:** The content of this evidence had no technical quality sufficient to require expert’s testimony.  It was neither unique nor scientifically puzzling but was rather the proper subject for a simple jury instruction.

### R v Parrot (2001 SCC)

**Facts:** A mature woman with a mental disability was seen being put into the accused’s car.  When police located her, her shorts and underwear were in disarray, she had bruises and scratches on her body. The woman made out-of-court statements to the police constable and to the doctor who examined her that the man in the car had done it.  The accused was charged with kidnapping and sexual assault. TJ was told that the complainant would be unable to give detailed evidence in court since her mental development was equivalent to that of a 3-4 year old and her memory of the events was poor.  Crown counsel applied to admit earlier out-of-court statements, some of which had been videotaped.  Defence counsel opposed, arguing that the out-of-court statements were unreliable and unnecessary given complainant’s availability to testify.  TJ found it unnecessary to have the complainant herself called at the *voir dire*.  The out-of-court statements were admitted.  The accused was convicted. CA held that the trial judge erred in admitting the hearsay evidence when the complainant was available to testify and there was no expert suggestion that she would suffer any trauma or adverse effect by appearing in court. CA maintained the conviction with respect to kidnapping but the conviction with respect to assault causing bodily harm was quashed and a new trial was ordered.  The Crown appealed against the setting aside of the assault verdict.

**Held:** Appeal should be dismissed. TJ’s ruling set aside and CA ordering of a new trial on the assault charge affirmed.

**Ratio:** If the witness is physically available and there is no suggestion they would suffer trauma by giving evidence, that evidence should not be pre-empted by hearsay unless the TJ has first had an opportunity to hear the potential witness and form their opinion as to competence.

**Reasons:** There was no necessity shown at the *voir dire* for the expert medical evidence.  The complainant was available to testify and there was no suggestion that she might be harmed thereby.  At the time the expert testimony was called, there was no basis laid for its reception.  The complainant herself did not testify.  The expert evidence was thus improperly admitted at the *voir dire*. As a consequence, the trial judge had no admissible evidence on which to exercise a discretion to admit the complainant’s out-of-court statements. Even if the expert medical evidence had been properly admitted and accepting the trial judge's view that the out-of-court hearsay evidence was “reliable”, the trial judge erred in finding its admission to be “necessary”. There were no exceptional circumstances in this case to displace the general rule of necessity.

### R v Sekhon (2014 SCC)

**Facts:** Sekhon attempted to drive a pickup truck across the border and was flagged for secondary inspection by Canadian customs officials, which led to the discovery of 50 one-kilogram bricks of cocaine (valued at over $1.5 million). Sekhon produced a key fob from his pocket. The police later found out that when the key fob’s buttons were pressed in a particular sequence, it opened a hidden compartment where the cocaine was hidden. Sekhon claimed he did not know the cocaine was in the vehicle but that he had simple agreed to drive his friend’s truck. He argued that he lacked the requisite knowledge to be found guilty of importing cocaine and possessing cocaine for the purpose of trafficking. Crown called RCMP Sergeant Arsenault to give expert evidence regarding the drug trade in BC. He had been a police officer for 33 years, and was involved in approx. 1,000 cocaine importation cases. Amongst other evidence, TJ relied on Sgt. Arsenault’s testimony that in the he has never encountered a “blind” courier who had no knowledge of what he was moving.

**Held:** Conviction upheld. Sgt. Arsenault’s testimony concerning the “blindness” of other individuals he had investigated was anecdotal. TJ erred in admitting it into evidence. However, despite the inadmissible testimony, there was enough circumstantial evidence to convict the accused.

**Reasons:** The guilt or innocence of the accused person’s Sgt. Arsenault encountered in the past was legally irrelevant. The anecdotal evidence does not speak to the particular facts before the Court, but has superficial attractiveness of showing that the probabilities are in Crown’s favor.

* + In addition to its low probative value, the prejudicial effect of such testimony was high; it essentially amounted to a statement by an expert police officer that individuals in Sekhon’s position always know about the drugs.

### White Burgess Langille Inman v Abbott and Hailburton Co (2015 SCC)

**Facts:** Plaintiffs sued former auditors of their company for professional negligence. Defendant’s brought a motion for summary dismissal. To resist the motion, the plaintiffs commissioned an expert from an accounting firm in forensic accounting to opine on the standard of care. The appellants brought a preliminary motion to have her evidence struck on the basis of a reasonable apprehension of bias. They argued that the plaintiffs started the action after they retained auditors from a different branch of an accounting firm to perform various accounting tasks which revealed problems with the defendant’s previous work. The defendants argued that there was a reasonable apprehension that the expert would be biased because of the risk that her firm would itself be sued if her evidence was rejected.

**Prior Proceedings:** Motion was granted at first instance, but CA allowed the appeal, concluding that motions judge erred in excluding affidavit.

**Ratio:** An expert’s awareness of the duty to be impartial and his or her willingness to carry out that duty are necessary for the evidence to be admissible. Beyond this threshold requirement, other concerns about the expert’s objectivity are to be resolved in the exercise of the court’s “gatekeeper” function in controlling expert evidence.

**Reasons:** Adopted the two step analysis for admissibility set out in *R v Abbey*

* + 1) The party leading the evidence must establish the threshold requirements of admissibility (relevance, necessity, absence of an exclusionary rule and a properly qualified expert).
  + 2) Requires the court to exercise a gatekeeping function, balancing the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks.
* Court rejected appellant’s suggestion that the expert was necessarily unable to provide independent evidence and the suggestion that the expert lacked independence because she “incorporated” some of the work done by the other branch of the accounting firm.

### R v Bingley (2017 SCC)

**Facts:** Bingley was driving erratically and hit a car. Police noted signs of impairment and conducted a roadside screening test which Bingley passed but he failed a field sobriety test. At the police station, the DRE conducted a drug recognition evaluation and Bingley admitted he had smoked marijuana and taken 2 Xanax in the previous 12 hours. DRE concluded Bingley was impaired by a drug.

**Prior Proceedings:** TJ said no *voir dire* due to s. 254(3.1) of the *Criminal Code*. DRE testified as an expert regarding results of the evaluation. Accused was acquitted. Crown appealed and appeal was allowed, new trial ordered. At 2nd trial, TJ said that s. 254(3.1) does not allow for automatic admissibility of DRE’s evidence and held that DRE could not be a qualified expert because they were not trained in the science underlying the procedure. DRE evidence not allowed. Accused was acquitted. Crown appealed again, appeal was allowed and new trial ordered.

**Held:** Appeal dismissed, order for a new trial confirmed.

**Reasons:** The common law rules of evidence apply to s.254(3.1). Test for expertise is merely knowledge outside the experience and knowledge of the trier of fact and the DRE had this. Scope of DRE’s expertise is in the application of the 12-step evaluation, not in its scientific foundation.

# Privilege – Solicitor-client privilege, other class privileges and case-by-case privilege

Overview

* Privilege and the doctrines related to them are exclusionary rules meaning they are designed to keep out evidence even though that evidence is relevant and probative to the case at hand.
* Preclude disclosure of certain communications and information (usually only in legal proceedings but sometimes in other contexts)
* Exist to protect certain types of relationships (ie. Solicitor-client relationship) or other important societal interests (ie. The right of individuals not to incriminate themselves, the public interest or the interest of third parties in terms of privacy)

Types of Privilege

* There are two types of privileges:
  + **Class** (also known as blanket or categorical privileges): For class privileges, once the criteria for the class is satisfied, unless an exception applies, the evidence is inadmissible in court.
    - 1) Solicitor-client
    - 2) Litigation
    - 3) Settlement
    - 4) Spousal
    - 5) Informer
* **Case-by-case**
  + All other privileges that are not class privileges are case-by-case privileges. There is no closed category of case-by-case privilege. Any communication that was conveyed in confidence could potentially be subject to case-by-case privilege but that will not be determined until the court makes a ruling on it.
  + Some of the more common relationships that often give rise to claims of privilege are:
    - 1) Doctor-patient
    - 2) Therapist-patient
    - 3) Journalist-informant
    - 4) Religious/ spiritual communications (often referred to as the priest penitent relationship)
* Key distinction between case-by-case privilege and class privileges is case-by-case privileges ALWAYS involve a balancing of interests.
* Most of the privileges are common law privileges and a few are statutory privileges such as spousal privilege and journalist-informant privilege. Some also have constitutional implications such as solicitor-client privilege and journalist-informant privilege

Related Doctrines

* These related doctrines operate somewhat like privilege in that they are designed to exclude otherwise relevant and probative evidence, but they are not designed to protect certain types of relationships, but rather to protect certain types of societal interests
  + 1) Privilege against self-incrimination
    - This is the only one we will be looking at in this course
    - Has both a statutory and constitutional component
  + 2) Public interest immunity
  + 3) Access to third party records

Standard/Burden of Proof

* Depends on the type of privilege
  + Class privileges
    - There is a *prima facie* presumption of inadmissibility which means that the person claiming the privilege can satisfy it without revealing the contents of the communication. They just need to show that the conditions for the privilege appear to be satisfied.
    - Onus then shifts to party seeking to set aside privilege to show through specific questioning that communication is not privileged and should be admitted. Only if they can do this will judge inquire into contents of the communication
  + Case-by-case privileges
    - Onus rests on person asserting privilege to establish that communication is privileged and therefore inadmissible.
* In both cases, the burden is the civil standard on the balance of probabilities
* Privilege always belongs to the person for whose benefit it exists. Therefore, holder of the privilege is the person who can claim or waive the privilege. (Yes, privilege can be waived)

Solicitor-Client Privilege

* One of the oldest (can be traced back some 400 years in English law), most established and most protected privileges known to law
* It is near absolute in it’s application and has now been recognized in Canada to be a substantive right
* It is a principle of fundamental justice under s.7 of the *Charter of Rights and Freedoms*
  + It therefore protects client confidentiality outside of the actual trial context

#### The Rule

* Protects confidential communications between a solicitor and a client made for the purpose of obtaining legal advice
* It is a class, and therefore a blanket, privilege
* It arises automatically

#### Rationales

* Intended to promote full and frank disclosure in the seeking and giving of legal advice
* Personal autonomy by giving individuals control over the dissemination and confidentiality of personal information
* Access to justice because this depends in part on the ability of an individual to obtain effective legal advice and that itself requires absolute candour between the solicitor and the client
* Efficacy of the trial process
  + Promotes a just and effective adversarial legal system by ensuring the client has the undivided loyalty of their solicitor

#### Applicable Test

* 1) There must be a communication
  + Privilege only applies to communications but this can be oral or written statements
  + Does not apply to observations (lawyer’s observations of blood on client’s shirt is not privileged, nor is the shirt)
  + Privilege also does not apply to pre-existing documents. It only extends to documents created for the giving of legal advice
  + Privilege may cover facts that arise out of or are connected to the relationship (ie. The amount of fees and disbursements are presumed to be privileged, name and address of the client may or may not be privileged depending on the circumstances)
* 2) That communication must be between a professional legal adviser (solicitor) and a client
  + Privilege only extends when professional legal advisor (the solicitor) is acting in capacity of a solicitor. That means the person must be professionally qualified and entitled to practice law (doesn’t have to be in jurisdiction where advice is being given)
  + The individual must be acting as a lawyer at the time, not a business partner, a friend or acquaintance
  + The privilege extends to those who assist the lawyer professionally (ie. legal assistant, articling student, law clerk or paralegal)
  + Third party communication may also be protected if third party is simply acting as a channel of communication or a conduit between the solicitor and the client
* 3) The purpose of the communication must be to obtain legal advice
  + This means the client must be seeking legal advice (including information the client provides to the lawyer at the time the legal advice is being sought so that the lawyer can decide to accept the retainer)
  + The privilege can arise before a formal retainer exists and can also apply even if a formal retainer is never established.
  + The type of solicitor does not matter. It can be someone who is in private practice or in-house counsel.
  + Issues often arise when dealing with government lawyers in house counsel or corporate counsel as to whether the purpose was in fact for giving legal advice because these individuals often perform non legal duties. In these situations we want to look at the nature of the relationship, the content of the advice and the surrounding circumstances and based on this decide whether or not it is legal advice being sought.
  + There is no requirement that litigation be ongoing or contemplated when legal advice is sought and it protects communications that flow in both directions : from the client to the lawyer and from the lawyer to the client.
* 4) The client must have intended the communication to have been made in confidence
  + Can be communications that the client expressly makes confidential by telling lawyer it is confidential, or communications that client could reasonably assume would be understood by lawyer that they would be intended to be confidential.
  + The fact that a communication is being made with an unnecessary third party being present can be seen to undermine the intent for the communication to be confidential. Therefore, it is important, as a lawyer, to ensure that the only people in the room are people within the sphere of the relationship covered by solicitor-client privilege
  + Assume there is a client that asks their lawyer to hire an expert to prepare a safety report on the client’s factory. The lawyer does so, receives the report and passes it along to the client. Is this report caught by solicitor-client privilege?
    - To answer this, courts have adopted a functional approach that focuses on the role that the 3rd party plays in the giving of legal advice. If the function is essential to the existence or operation of the solicitor-client relationship then it is protected by solicitor client privilege. There are 2 main ways this can occur:
      * **1)** Third party is simply a communication channel between the solicitor and the client; or
      * **2)** Third party is an expert who assembles, analyzes and translates client’s information so that it can be used by the lawyer.
    - For example, where client authorizes a third party to direct a solicitor to act on behalf of the client, this will be seen to be an essential function. On the other hand, if third party is authorized only to gather information from outside sources and pass it on to the solicitor so solicitor can advise the client, that will not be seen to be essential function.
    - As a practical matter, if litigation is ongoing or anticipated, third party cases are more commonly argued under litigation privilege than under solicitor-client privilege
* When these requirements are met, solicitor-client privilege applies, and the evidence is presumptively inadmissible

#### Key Attributes

* Privilege holder is the client: the privilege belongs to the client, not to the solicitor
* Privilege is permanent: It continues to apply even after the termination of a solicitor-client relationship, after the death of a client, or, if you are dealing with a business, after the business goes bankrupt
* Solicitor cannot disclose absent waiver (either express or implied by client) or an exception (not allowed to & can’t be compelled to)

#### Exceptions to the Rule

* Solicitor-client privilege is near absolute, but there are circumstances where solicitor-client information may be disclosed
* 1) Waiver vs. inadvertent disclosure may be
  + Waiver
    - May be express or implied
    - Express-voluntary and informed disclosure by the client to disclose privileged information
      * When a client makes the decision, anything material to the information disclosed is no longer privileged
    - Implied- client takes a position that is inconsistent with maintaining the privilege
      * Much more difficult
      * Usually arise in circumstances usually in the context of litigation where the client has taken a position that is fundamentally inconsistent with maintaining the privilege
      * Implied waivers exist because they are required in order to ensure fairness to the opposing party
      * When deciding whether a client has impliedly waived privilege, there are 3 factors to consider:
        + **1)** the intention of the client
        + **2)** fairness to the opposing party
        + **3)** consistency
      * **Example:** If a prosecutor defended a case on the basis that police officers acted in good faith on a legal opinion from the Department of Justice that a reverse sting was a legal operation, the content of the opinion from the DOJ would therefore be crucial and in fairness to the other side, may have to be disclosed.
      * More generally, if a party asserts reliance on legal advice received or an understanding of the law based on legal advice, then it can be said that there is an implied waiver of solicitor-client privilege
  + Inadvertent disclosure
    - This is where privilege is inadvertently, unintentionally disclosed. It is not a waiver situation because there was no intention to disclose it, nor is it an implied waiver because there is no position being taken that is inconsistent with holding the privilege
    - Traditionally, privilege was lost if the information was inadvertently disclosed and this was the case even when documents were stolen by opposing party in stealth. Onus was on privileged holder to protect privilege or lose it.
    - The modern approach is much less harsh, it looks at whether the holder of the privilege was at fault. If they are not at fault, courts are reluctant to say that they should be penalized by the loss of the privilege.
    - Factors that courts will look at:
      * Excusable error
      * Immediate attempt to retrieve the disclosed information
      * Preservation of the privilege would cause unfairness to the opponent
      * Public policy that a person should not benefit from his own impropriety (usually when opposing party retrieves documents in stealth – we shouldn’t reward them for bad behaviour by letting the privilege go)
    - No settled position in Canada. TJ has discretion to find whether or not privilege has been lost in these circumstances.
* The next three are the recognised exceptions. It can be said that they apply as exceptions to other forms of privilege as well
* 2) Future crimes
  + Excluded communications:
    - Criminal in themselves
    - Made by the client with a view to obtaining legal advice to facilitate the commission of a crime
  + Some say that this is not a true exception, but rather that the privilege does not extend to these communications because they fall outside of the scope of the professional relationship.
  + Applies only to future and ongoing crimes, it does not extend to communications with regards to past crimes
  + Merely asking about legality of a transaction is not sufficient to result in loss of the privilege even if transaction is illegal.
  + It is necessary to show that the advice was being sought for the purpose of facilitating the commission of the crime. Therefore, when asking for the advice, the client must know that the act in question is unlawful.
  + Does not matter if solicitor is aware of client’s purpose, focus is on what the client knew at the time he was asking for advice
  + It is not enough to merely allege a criminal purpose or criminal fraud, there must be some evidence which the judge can infer that the client acted with an illegal purpose
  + If the future crimes exception is found to apply, the only part of the communication that is excluded is the part that is criminal or made to facilitate the commission of a crime. The communication can be edited to ensure that non privileged material is the only thing that is disclosed
* 3) Public safety (*Smith v Jones*)
  + This exception allows for the disclosure of privileged information if it is necessary to protect public safety
  + A very stringent test
  + Imminent risk of serious bodily harm or death to an identifiable person or group
    - Would a reasonable observer, given all the facts, consider the potential danger to be clear, serious and imminent?
  + Factors to consider:
    - **Clarity of the risk:** Is there a clear risk to an identifiable person or group of people?
    - **Seriousness of the risk:** Is there a risk of serious bodily harm or death, including serious psychological harm?
    - **Imminent of the risk:** Is the danger imminent? Is it going to occur in the next minute? The next hour? The next day?
  + The application of the test is very case specific. The weight given to each factor will vary and all surrounding circumstances will have to be considered
  + In *Smith v Jones,* the SCC listed a number of more specific considerations but the court was not setting out an exhaustive list, it was for guidance only and there may be other facts that go to each of the points
    - **Clarity**
      * Identify a particular individual or group that is at risk
      * The potential group of intended victims can be large if they are clearly ascertainable
      * However, general threats against everybody may be too indistinct except where the threat and harm is compelling, serious and imminent
      * The specificity of the identification that is required will vary depending on more specific factors including:
        + Whether there is evidence of long-range planning?
        + Has a method been suggested for effecting the attack?
        + Does the client have a prior history of violence or threats of violence?
        + Has the client engaged in prior assaults or threats that are similar to those planned?
        + Does the client have a history of violence and has there been any increase in it’s severity?
        + Is the violence directed towards an identifiable person or group?
    - **Serious**
      * This requirement is strictly applied
      * The threat must be such that the intended victim is in danger of being killed or of suffering serious bodily harm including serious psychological harm if it substantially interferes with the persons well being or health or it is justified in setting aside solicitor-client privilege ONLY if it is rises to this level
    - **Imminence**
      * **General Rule:** the nature of the threat must be such that it creates a sense of urgency.
      * A sense of urgency can apply at some point in the future and therefore there is no set time limit within which the threat must be carried out. This depends on the seriousness and clarity of the threat (ie. a clear and detailed threat to kill someone 2 weeks from now when released from prison can satisfy this)
      * Issue is whether a reasonably person would believe that the threat can be carried out and if so the threat can be classified as imminent even if we are not dealing with a short timeline
  + As a practical matter, if a solicitor wishes to disclose under the public safety exception, where possible, they should obtain a declaration from the court authorizing the disclosure. In some cases, this will not be possible in which the solicitor can notify the potential victim and/or the authorities
  + Disclosure should be limited to those aspects that are necessary to indicate that there is an imminent risk of bodily harm to death to an identifiable person or group
* 4) Innocence at stake
  + This allows the privilege to be overridden if there are core issues going to the accused’s guilt and a genuine risk of wrongful conviction (*McClure*)
    - The information sought must be essential, in that it is the only way that the accused can establish their innocence
  + Exception is a compromise between accused’s right to make full defence and other person’s right to solicitor-client privilege
  + A high standard applies.
  + The judge must first be satisfied that the material is in fact privileged, it has not been waived and that no other exceptions apply to permit disclosure. Where those conditions apply, the burden is on the accused, on the civil balance of probabilities, to satisfy the threshold and substantive innocence at stake test
  + Two-step approach
    - **1) Threshold (or evidentiary) test**
      * Requires court to consider whether the information is available from any other source admissible in court and whether there is some other way that the accused could raise a reasonable doubt as to their guilt.
      * If either of these are answered in the affirmative, the threshold inquiry fails and that is the end of the matter and the solicitor-client privilege stands. In other words, both questions must be answered in the negative before you move on to consider whether the innocence at stake substantive test is satisfied
    - **2) Substantive test**
      * Two party inquiry
        + First requires the accused to demonstrate that a privileged communication exists. Mere speculation about what might be in a file is not enough to satisfy the test. The accused must provide some evidence of a possible communication which requires him or her to have some knowledge of the possible communication from some course. The accused must also demonstrate that the possible communication could raise some doubt as to their guilt. That means the evidence must relate to a substantive issue. Information that will only be used to challenge credibility or to raise a collateral matter will rarely satisfy the threshold test.
        + If stage 1 is satisfied, the judge will then examine the material to determine if it in fact contains information that is likely to cause a reasonable doubt of the accused’s guilt. The accused must normally show the information goes directly to the proof of an essential element of the defence and the trial judge can disclose any information satisfying this standard even if access to this information was not originally sought by the accused. This recognizes that the accused will not have in fact seen the file.
  + Where the innocence at stake exception is satisfied, the disclosure is made to the defence, not to the Crown. The trial judge will order disclosure of only that information that is necessary to raise a reasonable doubt and for the most part, questions about innocence at stake will be deferred until the close of the Crown’s case because at that point in time, the judge is in the best position to assess whether their innocence is truly at stake.
  + An accused can renew the application later in the trial if the trial judge initially rules against the accused on the initial motion.
  + The person whose privilege is being challenged is entitled to be heard on the initial application.

### Descoteaux v Mierzwinski (1982 SCC)

**Facts:** Police were investigating the legal aid bureau in Montreal in relation to a charge on Marcellein Ledoux for falsely stating his financial status in order to qualify for services. The police had a search warrant to seize the records from the legal aid interview with Ledoux and the legal aid application he filled out. The clinic appealed the seizure on the basis that the documents were protected by solicitor-client privilege.

**Prior Proceedings:** Quebec Superior Court ruling upheld by Quebec Court of Appeal.

**Held:** Appeal dismissed.

**Ratio:** Court reaffirmed the opinion in *R v Solosky* that privilege was a substantive right that even existed outside of a proceeding.

**Reasons:** While the documents normally would have been protected by privilege, they were ultimately un-protected because they were, themselves, criminal. Where a law interferes with the right to privilege then the privilege must prevail except for where it is absolutely necessary in order to achieve the purpose of the enabling legislation.

* The court described privilege as “all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship”.

### Airst v Airst (1998 ONSC)

**Facts:** In matrimonial litigation, it was ordered that a joint evaluation report be prepared in respect of certain matrimonial assets. The husband was required to send the valuator several documents. He inadvertently included 2 letters which were the subject of a claim for solicitor-client privilege. The letters were not related to the valuation, and the valuator did not use either letter in making his report. The court was asked for a ruling on whether privilege was lost as a result of the disclosure of the letters to a third party.

**Issue:** Application for a ruling as to whether solicitor-client privilege was lost in respect of inadvertently disclosed documents.

**Held:** Privilege was not lost, and the documents should not be disclosed to counsel for the wife.

**Reasons:** Recent authorities suggest that inadvertent disclosure does not necessarily result in an effective waiver of solicitor-client privilege.

* Where there are competing interests in a case involving inadvertent disclosure, the court must exercise a discretion and determine the issue based on the particular circumstances
* **Some factors to consider include:** the way the documents came to be released, whether there was a prompt attempt to retrieve the documents after the disclosure was discovered, the timing of the discovery of the disclosure, the number and nature of the 3rd parties who have become aware of the documents, whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party, and the impact on the fairness, both actual and perceived, of the processes of the court
* In this case, the equities favoured holding that the privilege was not lost. The release of the documents was entirely inadvertent.
  + Disclosure was limited in scope and restricted to 1 person retained in a capacity that might be broadly construed as confidential. There was no public disclosure of the documents.
  + The content of the documents did not bear on the third party’s assessment of the material he was retained to review.
  + Courts ability to assess the facts would not be impaired by a lack of disclosure. To the contrary, release of the solicitor-client instructions may be seen as giving the wife an unfair advantage by revealing tactical approaches
  + The disclosure was discovered after both parties testified and therefore disclosure at this time was problematic

### R v Ward (2016 ONCA)

**Facts:** The moving party, former trial counsel for the appellant, moves for the return of a document inadvertently sent by his own counsel to the appellant’s appeal counsel in the context of an allegation that the moving party provided in effective assistance at trial. Moving party submits that document is privileged, and that inadvertent disclosure did not constitute a waiver of privilege. Appellant argues the moving party has not established that the document is protected by solicitor-client privilege. In the alternative, he submits that a balancing of the interests favours abrogation of solicitor-client privilege because the contents of the document could be relevant to moving party’s credibility. Crown agrees with the moving party that the document is privileged and should be returned.

**Held:** Letter is protected by solicitor-client privilege. Inadvertent disclosure did not amount to trial counsel’s waiver of privilege, and privilege should not be set aside in this case. Letter and its contents were not to be used in any way in the appellant’s appeal.

**Reasons:** Communications between a lawyer and their client are privileged where they involve the giving or seeking of legal advice and where the parties intend them to be confidential (*Solosky v The Queen*). The client holds the privilege and only he or she can waive it (*McClure*).

* Where solicitor-client privilege has not been waived, court may also consider whether privilege should yield in order to allow an accused to make full answer defence (*R v Brown*).
* In this case, the content of the letter and the context make it clear that trial counsel sent the letter to his own counsel in the course of seeking advice about how to respond to appeal counsel’s requests. Inference drawn that trial counsel intended the communication to be confidential.
* Inadvertent disclosure does not necessarily mean privilege had been waived. While the waiver can be express or implied, whether privilege has been waived by inadvertent disclosure is a fact-specific inquiry, which may include consideration of:
  + - The way the documents came to be released
    - Whether there was a prompt attempt to retrieve the documents after the disclosure was discovered
    - The timing of the discovery of the disclosure
    - The number and nature of the 3rd parties who have become aware of the documents
    - Whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party
    - The impact on the fairness, both actual and perceived, of the processes of the court

### Smith v Jones (1999 SCC)

**Facts:** Accused was charged with aggravated sexual assault on a prostitute. Accused’s lawyer had him evaluated by a psychiatrist for the purpose of building a defence. Accused confessed to the psychiatrist that he had committed the aggravated sexual assault and that he planned to kidnap, rape and murder more prostitutes in the near future. The psychiatrist objected to the accused’s lawyer omission of the accused’s confessions as he argued that public safety was at risk if the lawyer did not reveal the accused’s confession to the court. The psychiatrist filed an affidavit (a written statement for use as evidence in court) describing the accused’s confession. The psychiatrist brought this action to be able to disclose his affidavit concerning the accused’s confession to him.

**Issue:** Is the psychiatrist released from his duty of solicitor-client confidentiality on account of the public safety exception?

**Held:** Yes, psychiatrist is released from his duty of confidentiality on account of the public safety exception

**Reasons:** Solicitor-client privilege is a principle of fundamental importance to the administration of justice but it is subject to some exceptions.

* **1) Innocence of the accused:** i.e. when exercising solicitor-client privilege could actually be more detrimental to the accused than to reveal whatever has been kept confidential
* **2) Criminal Communications:** communications that are criminal in themselves, or are intended to obtain legal advice to facilitate criminal activities are not protected by solicitor-client privilege
* **3) The Public Safety Exception:** (important in this case)
  + 3 factors should be taken into consideration in determining whether public safety outweighs:
    - **1)** Is there a clear risk to an identifiable person or group of persons?
      * A group of person must always be ascertainable
      * A general threat of death or violence directed to everyone in a city or community, or anyone with some the person may come into contact, may be too vague to warrant setting aside privilege
      * In his interview, the accused clearly identified the potential group of victims (prostitutes in a specific area) and described, in detail, his place and method of effecting the attack
    - **2)** Is there a risk of serious bodily harm or death?
    - **3)** Is the danger imminent?
* When solicitor client privilege is put aside, the disclosure should be limited so that it includes only information necessary to protect public safety. The judge setting aside the privilege should strive to strictly limit the disclosure to those aspects of the report or document which indicate there is an imminent risk of serious bodily harm or death to an identifiable person or group.

### R v McClure (2001 SCC)

**Facts:** McClure was a former school librarian who was accused of sexually touching his students. McClure wanted to know what victim had told his lawyer so that he could prepare a better defence.

**Issue:** Should the solicitor-client privilege of another be invaded in favour of the accused’s right to make a full answer and defense? What is the appropriate test to use for determining when an accused’s right to full answer and defence overrides another’s solicitor-client privilege?

**Held:** No, privilege should not be waived.

**Ratio:** The client, not the lawyer, holds the privilege and only he or she can waive it. Solicitor client privilege is almost absolute, and may be set aside only in very rare circumstances.

**Reasons:** Solicitor-client privilege may only be set aside very rarely, “where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction”

* Under innocence at stake test, accused must first establish information sought from solicitor-client communication is not available from any other source and that they are unable to raise a reasonable doubt as to guilt any other way. If this threshold is satisfied, court will consider whether there is an evidentiary basis upon which to conclude that a communication exists that could raise a reasonable doubt as to the accused’s guilt, and if so, whether communication is likely to raise a reasonable doubt

Litigation Privilege

* Originally viewed as a branch of solicitor-client privilege
* The modern view is that it is a distinct privilege related to, but different from, solicitor-client privilege
  + It has a different policy basis, different test and different consequences
* Can also sometimes be referred to as solicitor-third person privilege, work-product privilege or solicitor’s- brief privilege

#### The Rule

* Protects communications between third parties (private investigators, insurance adjusters, medical advisors) and counsel (or an unrepresented litigant) obtained for the purpose of litigation
* The privilege applies when the litigation is a reality or when litigation has commenced
* The privilege does not apply if there is only a possibility of litigation or even in cases where there is a reasonable prospect, but not yet a reality, of litigation

#### Rationale

* Purpose is to facilitate the adversary process itself, rather than to protect a relationship
* The adversary system could not function properly if lawyers knew that their investigations in preparation for a trial would have to be turned over to the opposing side.
* This exception is based upon a need to protect an area to facilitate the investigation and preparation of a case for trial by an adversarial advocate without fear that they will be forced to assist the other side
  + Essentially creates a “zone of privacy”
* Reflects the need to ensure that relevant information is available to other side to ensure fairness and reliability of adjudicative process
* Therefore, litigation privilege has limits

#### Key Attributes

* Privilege belongs to the client
* Confidentiality is not required as a precondition to the existence of the privilege
* Applies to both actual and anticipated litigation
* **Modern View:** Dominant purpose test (*Blank*)
  + **VIEW NOW:** Allows for communication to have been prepared for more than one purpose but litigation privilege only arises if the dominant purpose for making the communication was for use in or advice about litigation.
  + **Old View:** Original test was the substantial purpose test which allowed or required the substantial reason for the communication to be in preparation for litigation, but this need not have been the main, primary or dominant view.
  + E.g. An inspector employed by a railway that completes an accident report. Issue arises as to whether this report is subject to litigation privilege. Report would be highly relevant, and it could have been prepared for any number of reasons: safety, operations, discipline or possible litigation. Under old view, it was probably protected under substantial purpose test but to satisfy dominant purpose test we would have to inquire more directly as to which of it’s purposes was dominant purpose. Only if dominant purpose for preparing the report was possible litigation will it be protected by litigation privilege.
* Limited duration – expires once the litigation that gave rise to the privilege, and any related litigation, has ended
* Meaning of related litigation
  + Non-exhaustive definition
  + Includes separate proceedings that include the same/related parties & cause of action or judicial source
  + Also includes proceedings with common issues & purpose of the original action
* **Exception:** improper misconduct
  + The party seeking access must demonstrate a *prima face* case of actionable misconduct by the other party in relation to the proceedings with respect to which the litigation privilege is claimed
  + Derived from the future crimes exception

#### Ingathered Documents

* **Ingathered documents:** copies of documents taken from private and public sources gathered by a lawyer or his or her staff in the course of preparing for impending litigation.
* Conflicting case law on whether ingathered documents are protected by litigation privilege.
  + **Broad view:** the privilege applies in circumstances where the documents were gathered in the sense of being selected and assembled by a lawyer and his or her staff using legal knowledge, skill and judgement for the course of preparing for the pending or anticipated litigation. This is considered to be preparation for the lawyers and as privilege is therefore warranted because such documents may include information including the lawyer’s theory of the case
    - Cannot make non-privileged documents privileged by gathering them and giving them to a lawyer or his or her staff
  + **Narrow view:** No privilege is attached.
* Privileged if the collection involved the exercise of legal knowledge, skill, judgement and industry
* Privilege never attaches to copies of non-privileged documents

### Blank v Canada (Minister of Justice) (2006 SCC)

**Facts:** In 1995, Crown laid charges for regulatory offences against the respondent. These were quashed. In 2002, further charges were laid, but the indictments were stayed before trial. R sued the Crown alleging, among other things, fraud. He attempted to obtained prosecution documents from the prior proceedings, but this was refused by the Crown claiming privilege.

**Issue:** Are the prosecution documents from past proceedings subject to litigation privilege? Narrowly: Do documents once subject to litigation privilege remain privileged when the litigation ends?

**Held:** No, appeal dismissed.

**Ratio:** Documents subject to litigation privilege are no longer privileged once the litigation (broadly defined) ends.

**Reasons:** SCC acknowledges the existence of litigation privilege as a separate category of privilege. They affirm that the proper test is the dominant purpose test. Further, they affirm that litigation privilege is temporary. Once the litigation is over, the privilege has passed.

* The Ministers litigation privilege over the files has expired because R seeks files related to proceedings that have terminated
* The purpose of litigation privilege is to create a “zone of privacy” in relation to pending or apprehended litigation. Litigation privilege may remain if related litigation remains pending or is reasonably contemplated. Further, litigation privilege would not protect evidence of abuse of process or similar blameworthy conduct dispute the materials otherwise being subject to privilege.
* Court cited three differences between solicitor-client and litigation privilege
  + **1)** Solicitor client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege applies to communications of a non-confidential nature between the solicitor and 3rd parties and even includes material of a non-communicative nature
  + **2)** Solicitor client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege applies only in the context of litigation itself

### Lizotte v Aviva Insurance (2016 SCC)

**Facts:** In the course of an inquiry into a claims adjuster, the assistant syndic of the Chambre de l’assurance de dommages (the “syndic”) asked insurer A to send her a complete copy of its claim file with respect to one of its insured. In response, the insurer produced a number of documents, but explained that it had withheld some on the basis that they were covered either by solicitor-client privilege or by litigation privilege. The syndic responded to this refusal by filing a motion for a declaratory judgment. At the hearing of the motion, the syndic conceded that solicitor-client privilege could be asserted against her and that the issue before the court was therefore limited to litigation privilege. She argued that s. 337 *ADFPS* was sufficient to lift the privilege, because it created an obligation to produce “any . . . document” concerning the activities of a representative whose professional conduct is being investigated by the Chambre de l’assurance de dommages. The Superior Court concluded that litigation privilege cannot be abrogated absent an express provision. The Court of Appeal upheld this, holding that even though litigation privilege is distinguishable from solicitor-client privilege, it is, to the same extent, a fundamentally important principle that cannot be overridden without express language.

**Held:** Appeal should be dismissed.

**Ratio:** Litigation privilege is a common law rule that gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. Solicitor‑client privilege and litigation privilege are distinct: the purpose of solicitor‑client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process; solicitor‑client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends; and, finally, litigation privilege applies to unrepresented parties and to non-confidential documents, and is not directed at communications between solicitors and clients as such. Litigation privilege is subject to clearly defined exceptions, not to a case‑by‑case balancing test. The exceptions that apply to solicitor‑client privilege are applicable to litigation privilege. They also include the exception recognized in *Blank*for evidence of the claimant party’s abuse of process or similar blameworthy conduct. Finally, litigation privilege can be asserted against third parties, including third party investigators who have a duty of confidentiality.

**Reasons:** The litigation privilege invoked by the insurer can be asserted against the syndic, and none of the exceptions to its application justify lifting the privilege. Moreover, this privilege cannot be lifted by applying s. 337 *ADFPS.*A party should not be denied the right to claim litigation privilege without clear and explicit legislative language to that effect. The parties’ ability to confidently develop strategies knowing that they cannot be compelled to disclose them is essential to the effectiveness of the adversarial process. However, s. 337 *ADFPS*, on which the syndic is relying, merely authorizes a request for the production of “any . . . document”. This is a general production provision that does not specifically indicate that the production must include records for which privilege is claimed. A provision that merely refers to the production of “any . . . document” does not contain sufficiently clear, explicit and unequivocal language to abrogate litigation privilege. Insurer was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fall within the scope of that privilege.

(Dispute) Settlement Privilege

* **Dispute Settlement Privilege:** relates to attempts to settle dispute without trial
* Settlement privilege protects offers to settle and these offers cannot be raised in pleadings or in court. Settlement privilege exists in order to encourage settlement discussions between parties. If parties were not assured that they could speak frankly, offer concessions and not risk having those words or concessions used against them in litigation, settlement discussions would not occur.
* Settlement privilege arises in situations where litigation has either commenced or is contemplated
* Must be express or implied intention between parties that the communications will not be disclosed if the settlement discussions fail
* Purpose of the settlement discussions must be to reach a settlement
* One of the classic indicators that settlement privilege is being relied upon is when letters are phrased, or discussions are commenced beginning with “without prejudice”. However, this phrasing is not required for the privilege to attach. It is sufficient if the overall circumstances show that the implied intention was that the discussions not be disclosed.
* There is debate in case law about whether the privilege attaches only in cases where there is a formal offer to settle. The better view is that it applies to all communications that are part of the process that the parties are engaging in in an attempt to settle the dispute.

### Sable Offshore Energy Inc v Ameron International Corp (2013 SCC)

**Facts:** Sable Offshore sued a number of defendants who supplied it with paint intended to prevent corrosion of their structures and onshore facilities. Sable also sued several contractors and applicators who prepared surfaces and applied the paint. Paint allegedly failed to prevent corrosion. Sable entered into Pierringer Agreements with some of the defendants, allowing those defendants to withdraw from the litigation while permitting Sable’s claims against the non-settling defendants to continue. Pierringer Agreements allow one or more defendants in a multi-party proceeding to settle with the plaintiff, leaving the remaining defendants responsible only for the loss they actually caused. All of the terms of those agreements were disclosed to the remaining defendants with the exception of the amounts the parties settled for. The remaining defendants sought disclosure of the settlement amounts. TJ dismissed the application seeking disclosure of the settlement amounts, concluding they were covered by settlement privilege. CA overturned that decision and ordered the amounts disclosed.

**Held:** Appeal allowed. There is no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

**Reasons:** The purpose of settlement privilege is to promote settlement. Negotiated amount is a key component of successful negotiations and therefore it is protected by the privilege. The non-settling defendant have received all the non-financial terms of the Agreements, they have access to all the relevant documents and other evidence that was in the settling defendants’ possessions and they have the assurance that they will not be held liable for more than their share. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking.

**Ratio:** Settlement privilege allows parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. Settlement privilege protects the efforts parties make to settle their disputes by ensuring the communications made in those negotiations are inadmissible. The protection is for settlement negotiations, whether or not a settlement is reached. However, there are exceptions. To come within those exceptions, a defendant must show that, on balance, a competing public interest outweighs the public interest in encouraging settlement.

Spousal Privilege (Marital Communications Privilege)

* No spouse can be compelled to disclose any communication made to them by the other spouse during the marriage
  + - See: ***Canada Evidence Act***, s. 4(3) and ***Evidence Act,*** s. 11
      * Therefore it is a statutory privilege
* The privilege applies to all spouses, it is not restricted to situations where one of the spouses is an accused in a criminal case

#### Rationales

* Preservation of marital harmony
* Encourage the sharing of confidences between spouses
* Natural repugnance over invading marital confidences
* However, none of these is a very compelling rationale for keeping from the court evidence that would otherwise be relevant and probative. This is especially true today given the reforms that have been made to the spousal incompetency and compellability rules
  + - E.g. It is doubtful that spouses would stop communicating with each other because of the possibility that in the future the conversation might be disclosed in a legal proceeding, particularly since most spouses are unaware of the privilege.
    - This has led to suggestions that we should reform the rule either by abolishing it outright or by giving the trial judge the power to order disclosure of the communication if it is appropriate, thereby making it a case by case privilege

#### Scope of the Privielge

* Holder of the privilege is the receiving party, not the speaking party
  + The holder of the privilege is the party who received the communication, not the party who said it
  + Therefore, it is the testifying spouse who gets to decide whether to claim the privilege or waive it
  + If that spouse decides to waive the privilege, the other spouse who provided the communication cannot rely on the privilege to privilege to prevent it being disclosed during testimony
* Applies only in relation to communications “during the marriage”
  + The marriage must have existed at the time the communication was made, AND at the time disclosure is sought
  + The privilege does not cover pre or post marriage discussions
  + Marriage includes only legal marriages, it does not include common law marriages or a marriage that has been terminated by divorce, death or irreconcilable separation
    - Makes sense because if there is no longer a marriage to protect or foster, there is little reason to continue the privilege
    - The province of Alberta extends the definition of spousal privilege to include adult interdependent partners, therefore in Alberta, the privilege applies beyond those engaged in legal marriages
* Protects all such communications made during the marriage, whether or not intended to be confidential at the time it was said
  + However, it protects only communications, it does not protect observations of facts or events not intended to be expressed
    - For example, if a spouse came home wearing a bloody shirt and said “Oh my god, I stabbed him”, the communication “Oh my god, I stabbed him” could be protected by marital communication privilege if the receiving spouse wanted to protect it but the receiving spouse’s observation of the bloody shirt is not protected
* Does not preclude disclosure of a communication by a 3rd party who deliberately or accidentally overheard the conversation
  + Exception: applies in the situation of authorized wire taps where the privilege can be asserted by the receiving spouse.

### R v Couture (2007 SCC)

**Facts:** David Couture was charged with the 2nd degree murder of an ex-girlfriend and her friend. While in prison on other charges, David was visited by a woman named Darlene, who was a “Christian Volunteer Counsellor”. She was married to someone else, Schwab, at the time. During the visits, David confided to her that he killed them. He told Darlene that he killed his girlfriend out of jealousy, and then killed her friend because she saw him kill the girlfriend. After having kill them, he had anal sex with both. He was released on parole. One of the conditions was that he go and live with Darlene and her husband. While there, Couture physically assaulted Darlene. Schwab demanded that he leave the home, and he did. Darlene stayed in contact with Couture. Darlene divorced her husband and married Couture in February 1996. In June 1996 officers visited Couture’s home in connection with the murder investigation. He wasn’t home so they spoke to Darlene. David had, apparently continued to be abusive, and Darlene was thinking of leaving him. She told the cops David confessed the murders to her while she was his counsellor, and said she’d never come forward because she felt that her position called for confidentiality. She subsequently left David and made a series of official police statements, detailing everything David and told her. After making these statements, she reconciled with David, and went back to the cops to downplay what she said. She did not exactly recant, but suggested her memory was not good. David was charged.

**Prior Proceedings:** As a result of her marriage to David, Darlene’s statements were not admissible under the spousal competency rule. However, the trial judge applied *Hawkins* and admitted the evidence of her out of court statements as an exception to the hearsay rule. Couture was convicted and sentenced to life in prison with no possibility of parole for 16 years.

**Held:** Wife’s statements were inadmissible. Dismissed Crown’s appeal and ordered a new trial.

**Reasons:**  Martial harmony was in jeopardy in this case. The statements Mrs. Couture made were made during the marriage. The court said that if they were admitted, police would routinely call spouses into the station and take statements, knowing that they’d be admitted under the hearsay rule. This would tend to undermine marital harmony and perform a general “end run” around the spousal incompetence rule.

* Owing to the spousal incompetency rule, Mrs. Couture could neither be called as a courtroom witness, nor could she be cross-examined regarding her statements to police. Her statement were thus hearsay and the legal issue become one of admissibility
* Court distinguished from *Hawkins*
* It is important to keep an inquiry regarding spousal incompetency separate from that regarding hearsay

### R v Nero (2016 ONCA)

**Facts:** Co-appellants Nero and Caputo were charged with several drug trafficking offences after investigators had obtained a “bumper crop” of evidence through various warrants and search orders. Some of the evidence was gathered by intercepting private communications made between Nero and his girlfriend. Nero challenged the admissibility of these intercepted communications, claiming that he and his girlfriend were in a common law relationship and that the communications were covered by spousal privilege.

**Prior Proceedings:** TJ found that the two were not common law spouses, and that while the exclusion of common law spouses from the spousal communication privilege infringed s. 15 of the *Charter,* this infringement was justified under s.1.

**Held:** Application for leave to appeal is dismissed. Spousal incompetency exception does not extend to common law spouses.

**Ratio:** Spousal communication privilege does not extend to common law spouses.

**Reasons:** Relied on *R v Nguyen*

Informer Privilege

* The privilege that is closest to solicitor-client privilege in terms of the amount of protection offered by it
* Like solicitor-client privilege, informer privilege applies to all proceedings (civil, criminal, administrative or inquiries)
* It is a privilege of long standing and has been repeatedly upheld by the Supreme Court of Canada
* There are a few limits on it

#### Definition of “Informer”

* Any person who gives information to the police relating to a criminal investigation in exchange for a promise of confidentiality
* This includes individuals who are, at least from the police perspective, anonymous. That is, individuals who call a Crime Stoppers tip hotline whose information is then relayed anonymously to the police by the Crime Stoppers organizations are treated as confidential informers under the law
* Informer status is usually contrasted to agent status.
  + Unlike Confidential Informer’s (CI’s) who merely keep their eyes and ears open and report what they see or hear, police agents act at the instruction of the police. They play and active role and go into the field. They are expected to testify, and no privilege applies in relation to any actions taken by an agent.

#### The Rule

* No person can be compelled to disclose any information that might tend to identify a confidential informer, or narrow the pool of potential persons who could be that informer

#### Rationales

* Rule of public order
* Recognizes the importance of informers in suppressing crime
* The rule also recognizes the duty to protect persons who report crime (regardless of their motive)
* The rule has two purposes: **1)** To protect individuals who assist law enforcement; **2)** To encourage others to assist law enforcement by giving them a guarantee of confidentiality to ensure they are not subject to retribution (*Leipert*)

#### Criteria

* Informer privilege arises when a police officer guarantees protection and confidentiality to a person in exchange for information or assistance about criminal activity
* Guarantee of confidentiality can be express or implied
  + In most cases, the guarantee of confidentiality is expressed – the officer tells the informer “You will be protected”, “Your information will be treated as confidential”
  + However, the courts have recognized that the promise could also be implicit or implied. In these circumstances, the question becomes whether the police conduct would have led a person, in the shoes of the potential informer, to believe, on reasonable grounds, that his or her identity would be protected.
* In deciding whether informer privilege has been established a court will look at a number of factors:
  + What was the person told?
  + How was the information treated?
  + How did the person behave?
  + Are there any signed agreements?
  + Were there any video cautions?
* Determining whether an implicit promise of confidentiality has been made can get complicated in several situations including:
  + Where the person has been referred from another police service
  + Where the person is offering information not just on one investigation but on multiple investigations or multiple offences
  + Where the person may have some degree of involvement on the offences in question

#### “Tend to Identify”

* Very broad range of information
  + E.g., Confidential Informer characteristics
  + E.g., Confidential Informer associates and activities
* In *R v Omar* 2007 ONCA
  + The Ontario Court of Appeal indicated that informer that might “tend to identify an informer” could include things like age, gender, occupation, socio economic status, health related issues, lifestyle choices, associates, connection with the arrest of other persons, dates, times, locations and the fact of contact with the police as an accused, victim or witness, criminal convictions, discharges, acquittals or withdrawals, any indication that the informer is or has been bound by a recognizance, an undertaking, a probation order, a prohibition order or has been on parole, geographical areas frequented, the length of time in the community, the length of time as an informer, and the motivation for providing information.
  + Important to recognize that although these types of information might TEND to identify informers in general, the specific question still has to be asked whether in this particular case, this particular type of information tend to identify this informer

#### Loss of Privilege

* Like all privileges, the privilege can be waived by the holder of the privilege
* Waived by Crown AND CI
* Informer privilege does not apply where the potential informer is communicating with the police in order to further criminal activity or to interfere with the administration of justice (similar to the future crimes exception under solicitor-client privilege).
* When looking at waiver, a number of questions must be asked:
  + **1)** Who is the holder of the privilege?
    - Normally it is the Crown but the Crown cannot waive privilege without the express consent of the informer, In this sense, the privilege can be seen to be shared jointly between the Crown and the informer. Neither can waive it without the consent of the other
* Absent waiver, the privilege is almost absolute. The only recognized exception is the innocence at stake exception.

#### Informer…. Or Not?

* In most cases, there is no dispute that the person is in fact an informer
* In cases where concerns are raised, the issue is determined by a trial judge in an *in camera* hearing
* The participants in the hearing are the person claiming the informer status and Crown counsel, neither the accused nor his counsel are entitled to participate, however, in some cases, the court will appoint an *amicus curiae* to represent their interests
  + Most likely to occur if the interests of the person who is claiming informer status and the Crown appear to be the same.
* The issue is determined by the trial judge on the civil standard of the balance of probabilities
* If the trial judge decides that the person is an informer, the court must give effect to the privilege

#### Innocence at Stake Exception

* Operates in the informer privilege context just like it does in the solicitor-client context.
* The accused must be able to prove that the evidence shows a basis to conclude disclosure of the CI’s identity is necessary to establish the accused’s innocence, and,
* It is the only way to establish the accused’s innocence
* The information that the accused believes the informer could provide must therefore not be available from any other source and the accused must be unable to raise a reasonable doubt as to guilt by any other means. That means the information must, as necessity, relate to one of the elements of the offence charged
* One situation where this may occur is if the accused is able to show that the informer is also a material witness, someone for example who actually saw the offence being committed
* The exception cannot apply if the accused is relying upon a defence of entrapment because the issue of entrapment is determined only after the accused has already been found guilty of the offence charged

### R v Leipert (1997 SCC)

**Facts:** Police received a tip from a Crime Stoppers Association that the accused was growing marijuana in his basement. On the basis of this tip and officer’s observations, the officer obtained a search warrant. At trial, accused asserted that pursuant to his *Charter* right to make a full answer and defence, he was entitled to the Crime Stoppers document reporting the tip. Crown refused on the ground of informer privilege. TJ edited the document to edit out all reference to the identity of the informer and then ordered disclosure. Crown ceased to tender evidence, the defence elected to call no evidence and the TJ entered an acquittal. CA reversed TJ decision and ordered a new trial.

**Held:** Appeal should be dismissed. TJ erred in editing the tip sheet and in ordering it to be disclosed to the accused.

**Ratio:** Informer privilege is almost absolute and cannot be balanced against any other interests of justice other than innocence at stake. Once the privilege has been established, neither the police nor the court possesses discretion to abridge it. The privilege is jointly shared between the source and the Crown. Consent is required from both parties before waiver can be effected. Privilege prevents not only disclosure of the informer’s name, but also any information which might implicitly reveal his identity. Informer privilege applies to anonymous “Crime Stopper” tips. The one exception to informer privilege is the innocence at stake exception. The court will only order the disclosure of the identity if it is needed to show the innocence of an accused person. In order to raise this exception, there must be a basis on the evidence for concluding that disclosure of the informer’s identity is necessary to demonstrate the innocence of the accused.

**Reasons:** Where an accused seeks to establish that a search warrant was not supported by reasonable grounds, he may be entitled to information which may reveal the identity of the informer where the information is absolutely essential. Essential circumstances exist where the accused established the “innocence at stake” exception to informer privilege.

* Anonymous tips sheets should not be edited so that they can be shown to the defence unless the accused can bring himself within the innocence at stake exception.
* Was not established that informer’s identity was necessary to establish innocence of the accused therefore the privilege remained.

### R v Durham Regional Crime Stoppers Inc (2017 SCC)

**Facts:** Following a fatal shooting, Crime Stoppers received an anonymous tip. The caller reported that he observed four men in the backyard of a house neighbouring the crime scene and that he saw them drive to a lake where they threw things into the water. Soon after the call, X.Y. was charged with 2nd degree murder. Crown brought a pre-trial application to introduce evidence of the anonymous tip. The Crown maintained that the call was made by XY to divert attention away from himself during the police investigation. XY denied making the call. In addition, he and Crime Stoppers submitted that the call was covered by informer privilege.

**Prior Proceedings:** The application judge found that informer privilege did not apply. His ruling was appealed to the SCC.

**Held:** Appeal dismissed.

**Ratio:** Informer privilege is absolute and acts as a complete bar on the disclosure of informer’s identity. However, informer privilege cannot apply where it would compromise the very objectives that justify its existence: furthering interests of justice and maintenance of public order. Therefore, informer privilege does not exist where a person has contacted Crime Stoppers with the intention of furthering criminal activity or interfering with administration of justice. Where Crown alleges that informer privilege does not apply because the caller acted with the intention of furthering criminal activity or interfering with administration of justice, the onus rests with the Crown to show, on a BOP, that the person made the tip with the requisite intention such that they are excluded from the scope of the privilege. This is a high bar and most of the time, informer privilege will apply to an anonymous tip to Crime Stoppers. In determining whether informer privilege applies to an anonymous tip made to Crime Stoppers, a judge must proceed on the assumption that the privilege exists.

Case-by-case Privileges

* These includes things like doctor-patient privilege, journalist-informant privilege and priest penitent privilege
* Class privileges exist because of the general belief that maintaining confidentiality of the types of communications caught by these privileges is important enough to override the general principle that all relevant evidence should be admissible in court
* However, it is recognized that other types of professions may want to claim a privilege based on the need to protect the confidentiality of their communications. This includes journalists, clerics, doctors, social workers, counsellors, mediators, accountants and other financial experts.
* Despite the fact that it is clear why privilege is necessary in some of these professions, Canadian courts have been extremely reluctant to create new class privileges because the more privileges you recognize as a class, the more you exclude relevant evidence from the adjudicative process
* The case by case approach allows for any communication to potentially be protected by privilege but the drawback is that you will not know until the court rules whether it will be protected by privilege
* The starting point for case by case privileges is that the communication will not be protected. The onus is on the party that does not want the communication to be disclosed to establish that the privilege should apply.
* It is a fact specific analysis based on the totality of circumstances in each case on whether the policy reasons for excluding the evidence outweighs the need for the evidence to resolve the dispute
* The relevant standard is the civil standard of balance of probabilities

#### General Criteria for Case-by-Case Privileges

* Canadian courts apply a 4-part test (initially articulated by *Wigmore*) to decide whether to recognize a case by case privilege in a particular case. All 4 criteria must be satisfied. (*Ryan*)
  + 1) Confidential communication
    - The communication must have originated in confidence that it would not be disclosed.
    - An expectation of absolute certainty that it would NEVER be disclosed is not required, the mere possibility of disclosure is not sufficient to negate the confidential aspect of the communication
    - This is usually met. Most people do not assert a claim for privilege unless they believe the communication was made in confidence and there is some, often over indication or guarantee, of confidentiality
      * i.e. a form had an expressed statement on it that it would be kept confidential
      * i.e. the existence of a formal practice of confession within a religion can be strong evidence for the desire of confidentiality
        + However, there is no requirement that the communications be made to an ordained priest or minister or that it be part of a form practice of confession for confidentiality to attach
    - Some specific factors to consider:
      * The persons involvement and their expectations as to confidentiality
      * The place where the communication took place
      * The context in which the communication took place
  + 2) Confidentiality is essential to maintain the relationship between the parties
    - In professional relationships this is not difficult to establish because as a general matter, clients are often disclosing very personal things to the professional and might be reluctant to make the disclosure absent confidentiality
  + 3) The relationship is one that the community believes should be fostered
    - It must be a relationship that, in the opinion of the community, ought to be urged and promoted
    - Again, in professional relationships this is often not difficult to do given the functions the functions that the various professions serve in the community
      * Ie. Everyone or at least most segments of society would accept the important of the doctor-patient relationship, the priest-penitent relationship and the journalist-informant relationship
  + 4) Injury caused to the relationship by disclosure of the communication must outweigh the benefit gained for the disposal of the litigation
    - This is the most important criteria and it is usually the one that results in a denial of the privilege
    - It requires that the injury outweigh the benefit
    - In looking at whether the injury that would be caused to the relationship by the disclosure in fact is greater than the benefit that would be gained from the disclosure for the correct disposal of the litigation
    - Courts have identified a number of factors to consider including:
      * The short-term interests of the specific parties in the immediate case (ie. The benefits and harms to the parties themselves)
      * The long-term interests of the professional relationship in general
        + What does society gain in the long run by protecting this kind of relationship or how society would be injured in the long run if we did not protect this relationship

Ie. A guarantee of non-disclosure of doctor-patient relationships may make more people willing to be fully open with their physicians and thus benefit society by ensuring people receive appropriate treatment and become fully functioning members of society

* + - Issue is whether disclosure is necessary to get at truth in order to reach a correct verdict or avoid a wrong verdict
    - Outcome on this issue will be affected by the type of case. Ie., the ascertainment of truth is more important in criminal cases because a person’s liberty is at stake whereas in civil case you are usually only talking about money
      * Therefore, more difficult to get court to recognize a case by case privilege in criminal case than a civil case
  + If the court determines that disclosure is required, they can still screen what must be disclosed. That is, the public and private interest in resolving the litigation can often be solved by partial disclosure of the communications rather than full disclosure
    - This can include limiting the number of communications that have to be disclosed, editing the communications to weed out non-essential material and imposing conditions on access (who can see it, how and when)
    - Therefore, it is not an all or nothing rule like solicitor-client privilege is
* Procedurally, the resolution of a claim to case by case privilege occurs during a *voir dire* because disclosure of the communication is necessary in order to assess the harms/ benefit analysis.

#### Journalist-Informant Claims

* Under case-by-case privilege
* There is a common law case by case claim and there is also now a statutory claim under s.39.1 of the *Canada Evidence Act*
  + See, e.g., *National Post* (SCC, 2010): case dealt with a case by case claim of journalist privilege
  + Court applied the *Wigmore* critieria
  + First three criteria were satisfied:
    - Source given a blanket unconditional promise of confidentiality
    - Source would not have provided the communication (bank loan authorization) without that promise of confidentiality
    - Investigative journalism into government conflict of interests (and thus journalist-informant relationship) should be fostered and thus the journalist-informant relationship in this context should be fostered
  + But, no privilege granted due to failure to satisfy the fourth criteria
    - The balancing of interests in this case favoured the disclosure of the information because these were serious criminal allegations
    - Reasonably Probable Grounds to believe the “communication” (the bank loan authorization) was forged
    - Authorization was thus physical evidence of the crime, and indeed the *actus reus* of it
    - Forensic analysis of it might then assist the police to identify the perpetrator of the crime
* Statutory privilege: ***CEA***, s. 39.1 – for matters within federal jurisdiction
  + Definition of journalist and journalistic source
    - **Journalist:** a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration (for pay) to the collection, writing or production of information for dissemination by the media OR anyone who assists such a person
    - **Journalistic source:** a source that confidentially transmits information to a journalist on the journalist’s undertaking not to disclose the source’s identity in a situation where the anonymity of the source is essential to the relationship between the journalist and the source. This mimics the first and second for case by case claims of privilege under the common law
  + **S. 39.1(2):** Allows for the journalist to object to the disclosure of information or a document on the grounds that the information or document identifies or is likely to identify a journalistic source
  + A court can also raise this issue on it’s own motion
  + Assigns burden of proof
* ***CEA*, s. 39.1(7):** criteria for disclosure that court must take into consideration when deciding whether to authorize disclosure
  + No other reasonable means to obtain the information or document preserving the confidentiality of the journalistic source
  + The public interest in the administration of justice outweighs the public interest in
    - Balancing of interests considering the importance of the information/document to a central issue in the case; general idea of freedom of the press; the impact of disclosure on the journalist and the source
    - The balancing of interests under the statutory section is therefore very similar to the balancing of interests under the case by case common law approach
* ***CEA*, s.39.1(8):** Allows the court to impose conditions that it considers to be appropriate in order to protect the identity of the journalistic source as much as possible
* An important difference between the case by case common law approach and the statutory criteria is that under the statute, the burden of proof is on the person who requests the disclosure, they are the ones who must show that the conditions set out in (7) are fulfilled. This is unlike the case by case common law approach. Therefore, there is in fact a presumption of non-disclosure under the statutory regime.

### R v Gruenke (1991 SCC)

**Facts:** The accused told her counsellor/pastor about her involvement in a murder before turning herself in.

**Issue:** Is her communication with the pastor protected under privilege?

**Held:** There was no expectation of confidentiality here and the confession was not for a spiritual purpose. Therefore, no privilege was attached.

**Ratio:** *Prime facie* privilege for religious communications constitutes an exception to general principle that all relevant evidence is admissible.

**Reasons:** Policy reasons giving solicitor-client privilege are different religious communications that are not essential to justice. Freedom of religion in s.2(a) will be significant in some cases but it doesn’t need to be recognized as a class privilege. In applying the *Wigmore* criteria, both s.2(a) and 27 must be kept in mind. The communications were made for emotional stress relief, not for religious or spiritual purposes. It doesn’t necessarily matter if the communication was not to an ordained priest or minister or wasn’t a formal confession. A formal confession may indicate expectation of confidentiality, but it isn’t necessary or determinative. Courts must be careful in applying *Wigmore* so as to recognize importance of spirituality and not cause a chilling effect.

### M(A) v Ryan (1997 SCC)

**Facts:** 17-year old psychiatric patient was sexually involved with her psychiatrist, Dr. Ryan, and sued for damages. Dr. Ryan requested access to the notes of his former patient’s new psychiatrist during discovery. His former patient claimed that they were privileged communications.

**Held:** Upheld lower court’s ruling that access to the documents be made on a selective basis, in other words, partial privilege.

**Ratio:** Confidentiality will be upheld if the following 4 criteria are met: (1) The communication originates in a confidence that it will not be disclosed; (2) The confidence must be essential to the relationship in which the communication arises; (3) The relationship must be one which should be “sedulously fostered” in the public good; and (4) The interests served by protecting the communications from disclosure outweigh the interest in getting at the truth. The onus is on the party seeking to prevent disclosure to demonstrate on a BOP that each criterion has been met. Privilege is less likely to be protected in a criminal case since the correct disposal of the charges outweighs the benefit of protecting the confidential information. However, this doesn’t mean that everything must be disclosed but there are circumstances where partial disclosure will achieve this ends of justice.

### R v National Post (2010 SCC)

**Facts:** McIntosh was a journalist employed by the National Post investigating whether Prime Minister Jean Chretien was engaged in a conflict of interest in relation to the lending activities of a federally funded back. During investigation, McIntosh received a document from a secret source. The document appeared to substantiate the alleged conflict of interest. McIntosh sent the document to the bank, to the Prime Minister’s office and to a lawyer for the Prime Minister. These parties maintained that the document was a forgery. The bank filed a complaint with the RCMP, which commenced an investigation. When the journalist and the National Post refused to produce the document and the envelope in which it was delivered, the RCMP obtained a search warrant to compel their production.

**Prior Proceedings:** The National Post succeeded in having the warrant and assistance order quashed, but the Court of Appeal overturned that decision. National Post appealed, arguing that the source was protected under a journalist privilege.

**Held:** Appeal dismissed. No privilege arose. National Post failed to demonstrate that fourth criterion (below) was satisfied. The public interest in protecting the secret source in these circumstances did not outweigh the public interest in a criminal investigation.

**Ratio:** No constitutional right to protect confidential sources. No blanket or “class” privilege between journalists and their sources.

**Reasons:** A privilege for journalists and their sources could be found on a case by case basis if following criteria are met:

* 1) where the communication was made explicitly in exchange for a promise of confidentiality;
* 2) where the confidentiality was a pre-condition to the disclosure;
* 3) where the relationship between the journalist and the secret source must be sedulously fostered in the public good; and
* 4) where public interest served by protecting the identity of the informant outweighs the public interest in getting at the truth
* No privilege arose. The secret source attempted to dupe the National Post into publishing a document which, on its face, implicated a Prime Minister in a serious financial conflict of interest. The Post could not confirm the document’s authenticity and the police has reasonable grounds to believe that the document was a forgery.

Privilege Against Self-Incrimiantion

* It is not a privilege in the same sense as the other privileges we have examined
* Not intended to protect a type of relationship or types of communications. Rather, its focus is to protect other societal interests

#### Rationale

* The purpose of the privilege against self-incrimination is to protect each individual’s right to be presumed innocent of the charges against them and not to be forced to participate in assisting the prosecution in building its case.
* The privilege assists in the ascertainment of the truth in the sense that compelled testimony is rarely useful testimony
* The privilege adds to individual autonomy by giving the individual the right to choose whether or not to participate in criminal prosecutions against him or her
* The privilege also assists in ensuring a fair state-individual balance by recognizing that the state already has superior resources and should therefore be able to build its case without the assistance of the accused

#### ***CEA***, s. 5/ ***EA***, s.9

* The common law privilege against self-incrimination allowed witnesses to refuse to answer questions on the grounds that it might expose them to criminal liability
* The common law privilege has been statutorily established both federally and provincially
* These sections require witnesses to answer questions even if it may expose the witness to criminal or civil liability. However, the sections do provide the witnesses with protection against subsequent incriminatory uses of their answers against them
  + ***CEA*** s.5: The witnesses answer cannot be used against them in any subsequent criminal trial or other criminal proceedings other than a prosecution for perjury in the giving of the evidence or for the giving of contradictory evidence
  + ***EA*** s. 9:The witnesses answer cannot be used against them in any subsequent civil proceeding or in any proceeding under the Acts of the province (including any subsequent proceedings for provincial offences)
* Criminal/civil liability
* Protections offered must be specifically invoked by the witness, they do not apply automatically

#### Scope of Protection

* The statutory protections apply to all witnesses including accused persons. They also apply to all testimony whether it is voluntary (the accused testifying in his or her own defence) or compelled testimony pursuant to a subpoena
* The “use” is assessed at the first proceeding
  + It is then that the witness must show the evidence has a tendency to incriminate him or her
* The privileges provide absolute protection against any later use
  + Ie. The Crown may not use it for it’s case in chief, nor may it use it for cross-examination of an accused person

#### *Charter*, s.13

* A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate the witness in any other proceeding other than a prosecution for perjury or for the giving of contradictory evidence
* This section requires the witness to answer but receives protection against subsequent incriminatory uses of the answers
* Unlike statutory privileges, s.13 does not require the witness to invoke the protection. It applies automatically, even if the witness is not aware that the protection exists
* Criminal prosecution only

#### Scope of Protection

* Section 13 of the *Charter* is available to all witnesses including accused persons
* It applies to voluntary and compelled testimony
* The “use” is assessed at the second proceeding
  + Determination of whether the use is incriminatory
  + Therefore, protection only applies if the use of the testimony in the subsequent proceeding would incriminate the accused
  + Evidence is incriminatory if it can be used in the subsequent proceeding to prove guilt, meaning to prove or assist in proving 1 or more of the essential elements of the offence for which they are being tried
* Re-trial is “any other proceeding”
* Voluntary witness at first trial
* Compelled witness at first
* Unlike s.5, s.13 does not provide absolute protection against potential uses of the testimony. Two situations must be considered:
  + **1)** The situation where in the first proceeding the accused was a voluntary witness. Where this occurred, Crown cannot use his or her own testimony as part of it’s case in chief. However, it may use the earlier testimony to cross-examine the accused.
    - Most common occurrence of this is when the accused testifies voluntarily at the first trial and then again chooses to testify on a re-trial of the matter
  + **2)** The second situation is where an accused was compelled to testify in the first proceeding. In this case, s. 13 prevents the Crown from using any incriminating testimony from the earlier proceeding for ANY purpose. It cannot be part in the case in chief, nor can it be used to cross-examine the accused if the accused chooses to be a witness at the second proceeding.
    - However, if the testimony from the earlier proceeding is not incriminatory, it can used at the second proceeding by the Crown to impeach the accused’s credibility if he or she chooses to testify

### R v Noel (2002 SCC)

**Facts:** Accused was charged with first degree murder. Case against the accused consisted of numerous incriminating statements that he made to the police.  The accused’s defence was that his brother had killed the victim while he merely assisted in disposing the body.  The accused testified at trial and denied any participation in the killing.  He repudiated all his previous incriminating statements.  The accused’s brother had also been charged with that murder.  He was tried separately and acquitted.  The accused testified for the Crown at the preliminary inquiry and at his brother’s trial.  The accused admitted that his statements to police were true, and admitted having been brother’s accomplice.  When the accused eventually testified in his own trial, the Crown was permitted to cross‑examine him at length on the incriminating statements he made during his brother’s trial.  The accused was found guilty by the jury.  The Court of Appeal, in a majority decision, upheld the conviction.

**Held:** Appeal allowed and new trial ordered.

**Reasons:** During his trial the accused was cross-examined at length on the testimony he gave previously.  Typically, Crown counsel would read excerpts from the transcript of the accused’s prior testimony and, consistently, the accused would repudiate his prior in‑court statements, stating that he was in fact lying during his brother’s trial, claiming that his brother had threatened him and forced him to lie.  However, the Crown went further and, at various points in the cross‑examination, attempted to get the accused to adopt the incriminating portions of his prior testimony.  Cross‑examination was illegally aimed at incriminating the accused and not only at testing his credibility.  The risk of misuse of the incriminating evidence given by the accused at his brother’s trial was overwhelming and could not have been alleviated by any instructions. Since the accused invoked [s. 5(2)](https://qweri.lexum.com/calegis/rsc-1985-c-c-5-en#!fragment/sec5subsec2) of the [*Canada Evidence Act*](https://qweri.lexum.com/calegis/rsc-1985-c-c-5-en) at his brother’s trial, the Crown should have been prevented from introducing that prior testimony at the accused’s own trial.  When the accused is cross-examined by reference to incriminating evidence that he gave in a judicial proceeding — whether the protection of [s. 5](https://qweri.lexum.com/calegis/rsc-1985-c-c-5-en#!fragment/sec5) of the [*Canada Evidence Act*](https://qweri.lexum.com/calegis/rsc-1985-c-c-5-en) was claimed or not — the accused is protected by [s. 13](https://qweri.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en#!fragment/sec13) of the [*Charter*](https://qweri.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en).  When the evidence given in a judicial proceeding by a witness who subsequently becomes an accused was incriminating at the time it was given, such that the witness could have been granted the statutory protection of [s. 5](https://qweri.lexum.com/calegis/rsc-1985-c-c-5-en#!fragment/sec5) of the [*Canada Evidence Act*](https://qweri.lexum.com/calegis/rsc-1985-c-c-5-en), but did not know to ask, the focus should shift to the use that the Crown proposes to make of that evidence at the subsequent trial of the accused.  Clearly, the Crown is precluded from introducing it as part of its case in chief.  Whether the Crown can confront the accused with his prior incriminating testimony in cross‑examination, purportedly to test his credibility, will depend on whether there is a real danger, despite any warning given to the jury, that the protected evidence may be used to incriminate the accused.

**Ratio:** Under s. 13 of the [*Charter*](https://qweri.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en), when an accused testifies at trial, he cannot be cross‑examined on the basis of a prior testimony, even if it is tendered for the apparent limited purpose of testing credibility, unless the trial judge is satisfied that there is no realistic danger that his prior testimony could be used to incriminate him.

### R v Henry (2005 SCC)

**Facts:**  Henry and Riley had previously been convicted on the 1st degree murder. Their convictions were overturned by BCCA and the matter was sent back for retrial. Henry and Riley had testified in their own defence at the first trial and did so again at the second, but told a different story. They were convicted again after the Crown cross-examined them on the inconsistent statements. Majority of CA upheld their conviction, rejecting their argument that s.13 ought to have prevented their previously given testimony from being revealed to the jury despite that they had voluntarily testified in their own defence on both occasions. In dissent, Justice Hall stated that finding that the testimony on which the Crown had cross-examined the appellants was directly incriminating, and that previous Supreme Court’s decisions limited the use of such testimony to impeaching the accused’s credibility. Henry and Riley appealed to the SCC as of right as a result of the decision being split.

**Issue:** Is section 13 available to an accused who chose to testify at his or her retrial?

**Held:** Henry and Riley’s previous testimony had not been improperly introduced at second trial. Appeals dismissed; convictions restored.

**Ratio:** Section 13 applies to ANY USE of evidence given under compulsion, including for purpose of challenging accused’s credibility. Section 13 does not protect an accused who chooses to testify at a retrial from having his or her previously volunteered testimony used against them.

**Reasons:** Purpose of s.13 was to “protect individuals from being indirectly compelled to incriminate themselves”. Witnesses can be compelled to testify on potentially incriminating matters in return for the State’s promise that such compelled evidence cannot be used against them. By preventing the subsequent use of this testimony, such a system encourages the witness to provide full and frank testimony.

* Court overruled *R v Mannion*, holding that s. 13 was only available to an accused who had testified compulsorily in the earlier proceeding, whether a retrial of the same matter or a different trial. The court drew a distinction between retrial situations where the accused has previously testified voluntarily (and should not be entitled to full immunity) and instances where the accused had been compelled to testify as a non-accused witness in a different trial (and should thus receive full immunity)

### R v Nedelcu (2012 SCC)

**Facts:** Nedelcu lost control of a motorcycle while riding with his co-worker. The co-worker was not wearing a helmet and suffered permanent brain damage. Nedelcu was charged with impaired driving and dangerous driving causing bodily harm. Victim’s family also sued for damages in tort. On examination for discovery for the civil claim, Nedelcu claimed that he had no memory of events.

**Prior Proceedings:** At criminal trial, Nedelcu provided a detailed account of the accident. Crown sought leave to cross-examine him on evidence given during the examination for discovery. During *voir dire,* TJ found that while attendance at the discovery was statutorily compelled, the discovery lacked the “state-compelled incriminatory features” that were necessary to engage s. 13. As a result, the Crown was permitted to use the evidence in cross to challenge Nedelcu’s credibility. TJ subsequently convicted him on the second charge. CA disagreed with TJ’s analysis of compellability, allowed the appeal and ordered a new trial.

**Held:** For the purposes of s.13, he had been “statutorily compelled to testify at his examination” but s. 13 was never engaged.

**Ratio:** Partially restored the distinction between the use of such evidence (as above in *Henry)* to incriminate the accused directly or to impeach his or her credibility. Section 13 was not engaged when an accused’s testimony obtained under compulsion in a related civil proceeding was used to convict him in the criminal trial by attacking his credibility.

* Defined incriminating evidence “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”
* The facts did not entitle Nedelcu to the protection of s.13 because his statement that he could not remember anything from the night of the accident could not be used to prove his guilt at trial.

Problem 1

Plaintiff’s counsel inadvertently sent an expert’s report to defendant’s counsel, who read it, assuming the plaintiff intended to call the expert. Plaintiff decides not to call the expert, but the defendant, now aware that the plaintiff was not going to call the expert, thinks that they might call him. They include a copy of the expert’s report in their pre-trial brief. As a result, the plaintiff’s counsel becomes aware of the mistake. She moves for a declaration that the report is privileged and to restrain the defendant from using it and requiring the defendant to return the report and all copies. Will her motion be successful?

* The privilege that applies here would be litigation privilege or solicitor-client privilege
  + If you look at the facts, the plaintiff retained the expert to provide an opinion on litigation and when a lawyer retains an expert to provide an opinion and the report is covered by solicitor client privilege in the litigation
  + Solicitor client privilege is a stronger privilege than a litigation privilege which is time limited
  + Solicitor client privilege covers direct communications between solicitor and the client.
  + Often times, in order to figure out what I am going to do with a case, I need to talk to other people about how certain facts will work or not work into the case so I hire an expert. That expert falls within the protection of solicitor client privilege because they are acting on my behalf to give me an opinion specifically for the purpose of litigation. If I use this report in litigation, it will be disclosed because it is information relevant to the case but until I make that decision it retains the protection of solicitor client privilege.
* If it has been inadvertently disclosed, is there a way to get it back?
  + The original approach is that when something is disclosed it is lost, but now courts take a more factor based approach and look at whether the privilege should be retained or lost. They look at whether the error was truly inadvertent, were there steps taken to try and assert privilege once the mistake was realized and then would it be fair to say to the opposing party that they cannot use that material versus would it be unfair to the party who disclosed it that it is lost?
  + Most cases now, if it is truly inadvertent and they take steps to rectify it, courts generally allow them to reassert the privilege and don’t deem the privilege as lost

Problem 2

Adrian Albright is charged with sexually assaulting and murdering Violet, the 5 year-old daughter of his neighbor. The Crown calls his wife, Wendy Albright, to the stand. The Crown intends to ask Wendy what Adrian said to her about his whereabouts on the day of the murder and to describe what Adrian was wearing that day. Does Wendy have to answer the Crown’s questions? Explain why or why not?

* Here, we are talking about spousal privilege, it is a class privilege that covers certain things. Is this a spousal privilege actually recognized by law? What we mean is that it applied only to spouses, if you are in an equivalent to a spousal relationship you cannot be covered, you must be legally married spouses.
* How broad is the privilege what does it cover? They want to ask whether her husband was home this day, she would have to answer questions just about observations but anything Adrian said to her about where he was would be protected and she would not have to answer. She only would have to answer to what she saw.
* The spouse on the stand has the choice to assert the privilege. The privilege does not protect the person who made the communication but the person who received the communication.
* She will be compelled to answer the question about what he was wearing.

Problem 3

A special inquiry is called to investigate allegations that the police abused their power in the charging, arrest and prosecution of a prominent lawyer, “H.P.”. H.P. was charged with sexual assault allegedly committed against a client. H.P. also happened to have acted for the family of a First Nations leader, who was shot by a local police officer. Lawyer was a “thorn in the side of the police”. Upon receiving the complaint the police summarily arrested H.P. at his office. A journalist had been tipped-off of the arrest and, with the photographer in tow, he went to the lawyer’s office building to see and have the arrest photographed. Subsequently the case against the lawyer was shown to be very suspect and was stayed by the Crown mid-way through the trial. The inquiry was formed to investigate both the police and Crown’s handling of the case. A serious allegation is raised that the police, under the direction of high-ranking officers, were acting in a malicious and abusive fashion towards the lawyer. The journalist, who witnesses the arrest, is subpoenaed to give evidence at the inquiry. He is sworn as a witness. He is asked to identify his informant. In reply, he advises the inquiry that he promised this individual that he would not disclose the person’s identity [he does know the person’s name] and he refuses to answer that question on the ground of journalist-informant privilege. How would you rule? Why?

* Here we are talking about journalist-informant privilege because there is no other privilege a journalist can assert.
* Are we talking about a federal area or a provincial area? If it is federal, the *CEA* has a statutory journalist informant section but if you are dealing with it in Ontario or any other province it becomes a case by case privilege and you need to look at the factors of cases by case privilege to determine if this privilege applies.

# Confessions and Self-Incrimination, Credibility and corroboration

### R v Hodgson (1998 SCC)

**Facts:** H is charged with sexual assault. The complainant and her parents confronted H at work, and he admitted the sexual assaults. The mother called the police and, on her return, struck H. At some point after the statement the complainant’s father held H at knifepoint, allegedly to prevent him from leaving before the police arrived. H denied making a confession. H testified he did not feel frightened nor threatened at the time. H’s counsel at trial did not object to the admission of the statement.

**Issue:** Whether the statement made by the accused to the complainant and her family was made voluntarily.

**Held:** Appeal should be dismissed.

**Ratio:** The confessions rule provides that any out-of-court statement made by an accused person to a person in authority is inadmissible against the accused unless the prosecution proves beyond a reasonable doubt that the statement was voluntary. Ultimately, a trial judge must determine whether a confession is voluntary, not whether it is true.

### R v Oickle (2000 SCC)

**Facts:** Oickle was under investigation by police for a series of fires. He voluntarily underwent a polygraph test. The police told him he failed and began to question him. He eventually confessed. Oickle was told he was under arrest and brought to the police station for further questioning. He was put in a cell near 3am, around 9 hours after his confession. The police talked to him again at 6am asking him to provide a re-enactment, which he did.

**Prior Proceedings:** At trial, Oickle was convicted. Court of Appeal found that the confession was inadmissible and overturned the conviction.

**Held:** Confession was admissible.

**Ratio:** leading case decided by the SCC on the common law rule for confessions. Though the *Charter* remains in force for confessions made while in custody, the common law rule still applies in all circumstances. The majority outlined factors to determine whether a confession was voluntary. The factors that should be used to determine whether a confession is voluntary are:

* 1) The Court must consider whether the police made any threats or promises. Whether there is a quid pro quo for the confession will usually determine whether it was voluntary
* 2) The Court must look for oppression. That is, where there is distasteful or inhumane conduct that would amount to an involuntary confession
* 3) The Court must consider whether the suspect has an operating mind. The suspect is sufficiently aware of what he or she is saying and who they are saying it to
* 4) The Court can consider the degree of police trickery. While trickery in general is allowed, it cannot go so far as to “shock the community”

### R v W(R) (1992 SCC)

**Facts:** Accused was charged with indecent assault, gross indecency and sexual assault against 3 young girls. The youngest, his niece, was between 2-4 when the incidents occurred, 7 when they were reported to authorities and 9 at trial. The other two girls were his step-daughters. The younger one was between 9 and 10 at the time of the events, 11 when they were reported and 12 at trial while the oldest was 10 at the time of the events, 14 at the time of reporting and 16 at trial. At trial, the girls described the incidents and the accused denied the allegations. The evidence of the oldest child was uncontradicted but the evidence of the younger 2 had several inconsistencies. Accused was convicted. CA set aside convictions and entered acquittals finding that there was “really no confirmatory evidence”, that the evidence of the 2 younger children was “fraught with inaccuracy” and that neither of the older children was “aware or concerned that anything untoward occurred”.

**Held:** Appeal allowed.

**Reasons:** In determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, a court of appeal must re‑examine and to some extent reweigh and consider the effect of the evidence.  The test is whether a jury or judge properly instructed and acting reasonably could have convicted.  In applying this test the appeal court should show great deference to findings of credibility made at trial.  While the Court of Appeal thus did not err in this case in re‑examining and reweighing the evidence, it did err in setting aside the convictions.  The law concerning the evidence of children has undergone two major changes.  First, the notion that the evidence of children was inherently unreliable and therefore to be treated with special caution has been eliminated.  Thus various provisions requiring child's evidence be corroborated have been repealed.  Second, there is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children.  While the evidence of children is still subject to the same standard of proof as the evidence of adult witnesses in criminal cases, it should be approached not from the perspective of rigid stereotypes, but on a common sense basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.  The Court of Appeal went too far in this case in finding lacunae in the evidence which did not exist and in applying a stringent, critical approach to the evidence.

### R v NS (2012 SCC)

**Facts:** NS was a witness in a criminal case in which her cousin and under were charged with sexually abusing her when she was a child. On the first day of the preliminary inquiry, the defendant objected to NS wearing her niqab while testifying. He asserted a right to “demeanour evidence”, including NS’s full facial expressions.

**Ratio**:The right of a witness to wear a niqab while testifying must be decided on a case-by-case basis, having regard to a 4 part test; (1) Would ordering the witness to remove the niqab while testifying interfere with her religious freedom; (2) Would permitting the witness to wear it while testifying create a serious risk to trial fairness for the accused; (3) Is there a way to accommodate both rights and avoid the conflict between them and (4) If no accommodation is possible, would the positive effects of requiring the witness to remove the niqab outweigh the negative effects of doing so?

**Reasons:** Court sought to balance the witness’ right to religious freedom and defendant’s right to a fair trial.

* Held that a TJ must assess whether there is a way to accommodate both sets of rights and avoid a conflict between them
* However, the court held that even where a witness has a sincere religious belief, she will be required to remove her niqab if it poses a significant risk to the right of a defendant to a fair trial. Factors affecting trial fairness will including whether the witness’ proposed evidence is central to the trial and whether the evidence is contested.

### R v Corbett (1988 SCC)

**Facts:** Accused was charged with 1st degree murder and sentenced to life. At trial, he is called as a witness and under s.12 of the *CEA*, evidence is brought of his past murder conviction. Accused appealed, claiming that this violates his *Charter* right under s.11(d) for a fair hearing.

**Held:** For Crown, *Charter* not violated and s. 12 applies.

**Ratio:** Witness may be questioned as to if they have been convicted of criminal offence. Prior convictions can be introduced if relevant to a material issue and the relevance goes towards witness’s credibility and cannot be used as bad character evidence. TJ’s have discretion to exclude all or part of prior criminal record. Test is whether permitting it would result in unfair trial. S. 12 applies when an accused is also a witness, but only to the extent of establishing credibility of their testimony, not to findings of guilt. Judges should begin from the premise that juries should receive all relevant evidence accompanied, where necessary, by a limiting instruction.

* “All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy”.

# Proof of facts without evidence – admissions, judicial notice, Burdens of Proof and Presumptions

Formal Admissions

#### Formal Admissions: Criminal

* There are 4 types of formal admissions in criminal cases:
  + **Guilty plea**
    - A formal admission by the accused of those facts that are necessary to prove the elements of the offence including any facts particularized in the indictment or in the information
      * E.g. If the information specifies that the accused is charged with possession for the purposes of trafficking in heroin, a guilty plea is an admission by the accused that the drugs were possessed for the purpose of trafficking and that the drug was indeed heroin
    - Not necessarily an admission to all facts led by the Crown, only those facts necessary to prove the offence charged.
    - An accused may also plead guilty to a lesser offence or another offence under the provisions of the *CC*
      * The Crown has a choice to either accept the facts as being alleged by the accused OR accept the plea but prove additional facts OR reject the plea to the lesser or other offence and try to prove the offence that has in fact been charged
        + E.g. If the Crown charges the accused with murder, the accused might choose to plead to manslaughter, admitting the killing but disputing that it was intentional. The Crown does not have to accept the manslaughter plea, it can continue to try to convict the accused of murder. However, the accused’s admission of manslaughter is a formal admission that he killed the person and it can be relied upon by the Crown
    - to be valid, a guilty plea must be voluntary, unequivocal and informed
      * This requires that the accused be informed of the nature of the allegations made, the effect of the plea and the consequences of the plea.
      * It is standard for trial judges to conduct a “plea inquiry” to ensure that the accused’s plea of guilt is in fact voluntary, unequivocal and informed
    - Once entered, a guilty plea can only be withdrawn with the consent of the judge. This will only occur if the accused is able to convince the judge that the plea was not voluntary, unequivocal or informed. If consent to withdraw the plea is given by the trial judge, then the plea has no effect and it does not constitute an admission by the accused. It cannot be relied upon by the prosecution.
  + **S. 655 *CC*** 
    - An accused may also make admissions that fall short of a full plea of guilty.
    - In indictable cases, this section allows the accused to make admissions when on trial for an indictable offence
      * E.g. Where the accused admits committing the completed offence but asserts an affirmative defence such as self defence and duress
      * Accused may also admit the defence but deny the mental element such as a sexual assault case involving a defence of consent
      * Accused may also admit only some facts in the case (identify, the fact of jurisdiction and the date and time)
      * Admissions by the accused are made in response to a Crown’s request to admit
      * Once admitted, the fact in question is said to proven and therefore the Crown is not entitled to call evidence on that issue
      * The Crown is not required to accept an accused’s admission if it does not comply with the facts that the Crown is seeking to have admitted but the Crown cannot reject an admission solely because it wants to keep an issue artificially alive in order to introduce potentially prejudicial evidence
    - No similar provision that allows Crown to admit facts but there is case law which indicates that Crown may do so.
      * Eg. Where possession is an issue, one of the facts often relied on by the Crown to indicate possession is whether the accused owned or lived at the property in question. If the Crown is satisfied beyond a reasonable doubt that it will not be able to prove that the accused owned or lived at the residence, it may simply admit this fact while at the same time arguing that other factors indicate possession
  + **Agreed statement of fact** 
    - The accused and the Crown may also work together in cases where the facts are agreed upon to come up with an agreement statement of fact
    - This is expected to be clear, unambiguous, precise and unequivocal
      * It is expected in these cases that evidence will not need to be called
      * If this standard is not established, it may well be that the Crown ends up having to call evidence to prove a fact that has come in dispute. If accused’s evidence conflicts with the statement of fact, judge should require the Crown to call evidence on the point
    - No statutory authority for agreed statement of fact in criminal cases, instead, their use has been explained as a waiver by both parties as to the usual rule that witnesses must be called to establish facts.
    - Formal admissions under S. 655 cannot be taken back without the permission of the trial judge. This is in contrast to admissions in agreed statement of facts where if there is a dispute, the trial judge should normally call the Crown to call evidence on that point
      * In both cases, in a subsequent proceeding, the admission constitutes an informal admission in that proceeding. It is therefore evidence against the accused, although, because it is an informal admission, the accused may contradict it by any other proof like any other informal admission
  + **Admissions at common law**
    - Even before the statutory provisions, judges always permitted admissions of facts by an accused in criminal cases
    - Common scenario: Where an accused admitted formally that an admission was voluntary and that there was therefore no need for a *voir dire* for the Crown to prove voluntariness.

#### Formal Admissions: Civil

* Formal admissions can also be made in civil matters in relation to facts that are not in dispute between the parties
* An admission can be made by either the client or by counsel
* Once made, the admission is conclusive regarding the matters that are being admitted. Therefore, it is no longer necessary to call evidence on the question and in fact, evidence will not be admitted
* In civil cases, there are a variety of ways in which formal admissions may be made:
  + Statement in the pleadings
  + Failure to deliver pleadings
  + Agreed statement of facts filed at the trial
  + Oral statement made by counsel at trial
  + Silence of counsel
  + Letter written by party’s solicitor before trial
  + Reply to a request to admit facts
  + Failure to reply to a request to admit facts
* The specifics about how pleadings or failure to respond to pleadings amount to formal admissions is covered in Civil Procedure
* As with criminal admissions, formal admissions bind the party that made them, and may not be withdrawn without leave of court
  + Leave generally will not be granted unless admission was made without authority, by mistake or under duress, there is a triable issue concerning whether the admitted fact exists, and no prejudice will be caused to the party whose favour the admission was made
* Counsel has the implied authority to make admissions on behalf of a client provided counsel thinks it is proper in the honest exercise of his or her judgement and the admission is incidental to the lawsuit

Judicial Notice

* The judicial notice doctrine is both well-defined but also inexact
* Limits are inexact
  + No bright-line rules
* Intersects with other doctrines
  + Common sense inferences
  + The idea that in some cases expert opinion evidence is required
* Key issues
  + When to apply the rule
  + Notice or no notice to the parties that the rule is being applied

#### Informal Notice

* Triers of fact are all expected to rely on their own understanding, knowledge and experience about how the world operates. We expect and accept this will occur and we do not insist on proof of things that are matters of common sense and human experience
* Day to day application of “common sense”/ “knowledge and experience” of the trier of fact about how the world generally works
* Danger with relying upon common sense: invalid generalizations and stereotypes may sneak in
  + Important to break down exactly what the underlying assumptions are in explaining why a piece of information is relevant

#### Expertise Required

* On the other end of the spectrum, the opposite of judicial notice is the expert opinion rule. Judicial notice cannot be taken of anything of which expert opinion is required because by definition, when an expert is required, we are talking about information that is “beyond the scope of experience and knowledge of the trier of fact”
* It is important to note that what requires expert evidence today may not require expert evidence
* In deciding where boundaries lie between common sense inferences, judicial notice and expert evidence we must keep in mind that those boundaries will change as technology changes and as peoples knowledge and understanding of the world changes

#### Judicial Notice

* When thinking about the doctrine of judicial notice, it is useful to distinguish between three types of facts
* The doctrine of judicial notice in its strictest sense applies only to adjudicative facts
  + **Adjudicative facts**
    - Who, what, where, when, how and why
    - They are the facts that deal with the particular parties and particular issue in dispute in this case
  + **Legislative facts**
    - These are the facts that set or establish the social, economic, cultural and historical context of legislation relevant to the dispute in question
    - In other words, these facts are the background data to the legislation
    - Important when it is necessary to interpret a statute and when it is necessary to decide if a statute is constitutional
    - Courts are more inclined to take judicial notice of facts when they are legislative facts rather than adjudicative facts
  + **Social framework facts**
    - Set the general social context for applying the evidence
    - More recently developed
    - Establish a general framework for analysis but not invariably based on social science research about societal conditions and human behaviour
    - Relevant only if it is possible to link the framework facts to the specific evidence in the immediate case. Even when that is possible, it is important to approach such facts with a degree of skepticism and to look at the underlying research because while the basic facts may not be in dispute, the conclusion to be drawn from those facts can be a matter of substantial debate

#### Adjudicative Facts

* The doctrine of judicial notice is designed to deal with adjudicative facts
* It is a rule that applies only in narrow circumstances
* The general approach is that adjudicative facts must be proven by admissible evidence
* Judicial notice of adjudicative facts can occur in two situations: (*Potts)*
  + 1) Judicial notice of adjudicative facts can be taken if any idiot knows the fact
  + 2) Judicial notice of adjudicative facts can be taken if any idiot can find the book

#### Notorious Facts Test (Any Idiot Knows the Fact) (*Potts*)

* The test allows judicial notice to be taken of any fact that is so generally known that a reasonable person could not dispute it
* It is not enough that the trier of fact knows the fact to be true, the fact must be notorious in the community in which the case arises and at the time of which the case arises and therefore be beyond dispute
* Trial judge cannot act on their personal knowledge alone
* No reasonable informer person would dispute the fact
* There are three points to stress:
  + What constitutes common knowledge will vary according to time and place
  + Community does not have to mean the entire community, can be a particular subset of community
  + If a fact can be reasonably questioned, then it cannot be the subject of judicial notice
* Examples of the type of fact that have been judicially noticed under the notorious facts test:
  + Geographical facts like international boundaries, location of cities, landmarks such as lakes and rivers
  + Human needs and behaviours such as the fact that being pregnant normally takes 9 months
  + Business and trade practices such as standard means of calculating pension benefits

#### Indisputable Source Test (Any Idiot Can Find the Book) (*Potts*)

* This test allows judicial notice to be taken of a fact that is capable of being immediately and accurately demonstrated by resorting to a readily accessible source of indisputable accuracy
* Have generally included:
  + Dictionary, encyclopedia, historical documents, almanac, atlas, calendar, chart, maps, internet sources recognized to be reliable such as Google Maps, Google Earth and Good Street View

#### Rationales

* Two main rationales have been suggested for the judicial notice doctrine:
  + Thayer/Wigmore
    - Expediency
      * Judicial notice saves time by shortening and simplifying the trial, particularly because some obvious facts might be difficult and time consuming to prove
    - *Prima facie* recognition of the truth of the noted fact, not conclusive truth of it
      * TJ would therefore have a discretion of whether to take judicial notice of a fact that is amenable of being judicially noted and it would also be open to the opposing party to challenge the truth of that fact by calling evidence to contest it
      * If the only reason that a judge is taking judicial notice of a fact is for reasons of convenience, it does not make sense to deprive the opposing party of the right to challenge the accurate of that fact
    - Open to dispute
  + Morgan
    - Maintain the credibility of the court’s system
      * In his view, the credibility of the court’s system would be undermined if cases were lost because the court refused to accept the truth of indisputable or notorious facts
      * Judicial notice promotes credibility by **(1)** Creating uniformity in decision making where it otherwise might not exist and **(2)** Allowing TJ to exercise control over the jury by telling them they must accept certain facts
    - Conclusive recognition
      * If you accept the credibility argument above, then that should mean that is the final say. The judge should take judicial notice of facts that are amenable to judicial notice and the opposing party would not be allowed to contest the noted fact. This is because the judge is taking judicial notice to maintain credibility precisely because the fact is indisputable or notorious. It would therefore bring the administration of justice into disrepute to allow the opposing party to question a fact that the court says is unquestionable
    - Not open to dispute
* Canadian courts rely on both views
  + In terms of the effect of judicial notice we accept Morgan’s view that once a fact is judicially noted, it is conclusively proven and cannot be disputed by the opposing party
  + We also accept an element of the Thayer/Wigmore view that the trial judge has a discretion whether to take judicial notice of a fact that is suitable for judicial notice in any particular case. That is merely because the judicial notice can take judicial notice does not mean that the judge has to take judicial notice. This generally occurs only when the facts that are to be judicially noted are central adjudicative facts in the case itself

### R v Potts (1982 ONCA)

**Facts:**  Accused was charged with speeding 123km in a 60km zone. After all evidence was in, counsel for the accused first raised the point that no evidence had been adduced by the Crown as to the status of the Colonel By Drive. Counsel did not dispute the status of the driveway as Commission property, nor did he dispute the fact that the accused was breaking some speed limit in Ontario. His argument was that proof of the status of the driveway as property which attracts the application of these regulations was an essential element of the Crown’s case that was not proved and it could not be proved by taking judicial notice of it. The accused was convicted. Appeal allowed. Crown now appeals.

**Held:**  Appeal should be allowed and original conviction restored.

**Ratio:** A judge can accept something as fact thereby exempting the requirement to present evidence to establish the fact (judicial notice) where: (1) The fact is so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) The fact is capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. What constitutes common knowledge is to be judged by reference to that which is common knowledge in the community where and when the issue is being tried.

**Reasons:** Justice of the peace was entitled to take notice of the fact that the place where the offence occurred was a driveway under the control and management of the National Capital Commission without that fact having been proved at trial. This fact was sufficiently notorious in the City of Ottawa, by the constant presence of N.C.C. vehicles, employees and traffic signs. The status of the driveway was not disputed at trial because it was clear what the status of the road was.

#### Legislative/Social Background

* In contrast to adjudicative facts, when it comes to legislative or social background facts, the courts adopt a more lenient standard
* They are prepared to accept facts when they are accepted by reasonable people who have properly informed themselves on the topic as not being subject to reasonable dispute for the purpose for which it is to be used which is to determine the statutory interpretation of a legislation, the constitutional validity of legislation or the social framework in which any issue is to be decided (*Spence*)
* The more central the fact is to the disposition of the issue in dispute, the greater the need there is to ensure it is reliable and trustworthy and thus there might be a heightened risk that the court will exclude it

#### Judicial Notice of Law

* General rule:
  + Courts take judicial notice of domestic (federal/provincial) law, but not foreign law
    - This includes domestic common law and domestic statutory law whether at the federal or provincial level and regulations pursuant to the various statutes
  + See ***CEA***, ss. 17, 18; ***Legislation Act***, 2006, ss. 13, 29, 74 (in Ontario, we turn our attention to *Legislation Act* not *Evidence Act*)
  + Nb. Does not usually include municipal by-laws
    - As a result, in these areas, the relevant law must generally be proved through other means, whether that is through some other statutory section or through expert evidence
* The rationale for this rule is expediency

### R v St Lawrence Cement Inc (2002 ONCA)

**Facts:** Defendant was charged with operating a heavy diesel-fuelled motor vehicle that contravened emission standards. The relevant admission standards are contained in a document entitled Drive Clean Guide and the Guide is adopted and incorporated by reference in the Regulations and the regulation was published in the Ontario Gazette. At the defendant’s trial before a justice of the peace, the evidence established that its motor vehicle exceeded the emission standards in the Guide, but the justice of the peace acquitted the defendant on the basis that the Crown had not proved the Guide. The acquittal was upheld by the ONCJ and the Crown appealed.

**Held:** Appeal allowed.

**Reasons:** Section 5(4) of the Regulations Act provides that judicial notice is to be taken of regulations that have been published in the Ontario Gazette. The guide was part of the regulation as it was incorporated by reference in the regulation. The effect of incorporation by reference is that the material incorporated is considered to be part of the text of the legislation. Because the text of the Guide was effectively written into s. 12(2) of the regulation by the doctrine of incorporation by reference, and because the regulation had been published in the Ontario Gazette, the Crown was not required to prove the Guide, and the justice of the peace was required to take judicial notice of it.

#### Social Framework Facts

### R v Spence (2005 SCC)

**Facts:** Black man robbed East Indian man. Trial judge refused to allow the defence to challenge jurors for cause on the basis of the victim’s race. (i.e. challenge East Indian juror on the basis that they would be naturally biased towards the plaintiff). Accused appealed

**Issue:** Did TJ’s refusal to let the defence challenge jurors on basis of the victim’s race compromise the right of the accused to a fair trial?

**Held:** No.

**Ratio:** The standard for when “social” facts can be noticed is articulated. The stringency of the test for judicial notice of social facts varies according to the importance of the fact to the disposition of the case at bar (stricter when central to the matter at hand)

**Reasons:** Racial prejudice against visible minorities is a social fact of which judicial notice has been taken without evidence.

* Defense contends that race-based sympathy for the victim by a juror compounds the prejudice against the accused (which already exists because he is black) – is not a case of race hostility, but race sympathy
* Jurors are presumed to be impartial between the Crown and the accused
  + A juror can be challenged for cause if the application demonstrates the realistic potential for the existence of the partiality of that juror
  + Establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards
  + Courts have accepted likelihood that anti-black racism is aggravated when alleged victim is white. No similar consensus that “everybody knows” a juror of a particular race is likely to favor a complaint/ witness of the same race, despite trial safeguards
* Judicial notice of facts is not-rebuttable – once something like this is noticed, it cannot be disputed by the parties
* “Social fact” evidence = social science research used to construct a background context for deciding factual issues crucial to resolution of a case. “Social facts” are general, not specific to the circumstances of a particular case. If properly linked to the adjudicative facts, they help to explain aspects of the evidence
* The permissible scope of judicial notice should vary according to the nature of the issue under consideration. More stringent proof may be called for of facts (social, legislative, adjudicative) that are close to the center of the controversy
* **\*Test for Judicial Notice of Social Facts:** “I believe a court ought to ask itself whether such “fact” would be accepted by a reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the “fact” to the disposition of the controversy”
* In this case, the facts of which it is suggested that judicial notice should be taken (that racial sympathy by jurors towards victims exists) would be dispositive of the appeal
  + Need stringent test for judicial notice. This fact is not indisputable – cannot be judicially noticed for this purpose

#### Problem 1

A trial judge who has lived in London all her life could take judicial notice of the fact that the University of Western Ontario is located in London. Explain where this statement is true or false and the basis for your conclusion.

* She can take judicial notice of this fact because it is a geographical location and well known in the town. The fact that she has lived in London is not what gives her the ability to take judicial notice. The fact that Western is Located in London, is known throughout Ontario and the fact that she lives in London she has a general idea of what the London community knows but a judge in Toronto or St. Thomas would also be able to take judicial notice of this.

#### Problem 2

Would you take judicial notice of the following:

1. At 6pm on January 1 in Winnipeg, Manitoba it is night [the sun has set].
   * There is a readily accessible reference text that will tell you what time the sun sets and you can take geographical notice of where Winnipeg is that time of year when the time would set.
   * They are easy to establish if someone asks you how you know this.
2. The cost of raising a child increases as the child grows older.
   * Seems like common sense, may not be something you need to even take judicial notice. This is the background common sense inferences that we expect trial judges to rely on.
   * This fact could be stated without having to take judicial notice.
   * Distinguish this from the other area where judicial notice is not required which is common sense background information
   * You could answer this by saying “Not required, so, not necessary”
3. Defence expert testifies: “There is a well-recognized phenomenon in young children – the ability to make up stories- and this phenomenon is called confabulation.” As trial judge, you have presided over many sexual assault trials and you are familiar with the Badgely Report on Sexual Offences Against Children, which disagrees with the expert’s statement. You rely on the Badgely Report in rejecting the expert’s evidence. Is this permissible?
   * This raises issues of fairness, is this something that is so well established in the community or is it just one view and another expert has another view?
   * They should not take judicial notice of this.
4. Abuse of children is a serious concern in our society.
   * Common sense, background information and is just general knowledge. The question then becomes what use are you trying to make with this information?
5. There is evidence that the accused was repeatedly assaulted by her common law husband. She is charged with welfare fraud, money of which went to support the husband. Can you take judicial notice of “Battered Women Syndrome” and the accused’s learned helplessness in finding that she acted out of necessity?
   * You might be able to take a general recognition that there is something known as Battered Women’s syndrome but you could not take judicial notice as to whether it applied in this case. You would need an expert to give an opinion that the individual in this case was suffering from Battered Women’s’ Syndrome.

### R v Falconer (2016 NSCA)

**Facts:** Accused was convicted by a jury of first degree murder. The Crown and accused had entered into a 32 paragraph Agreed Statement of Facts documented under s.655 of the *Criminal Code*. Section 655 permitted an accused to admit any fact alleged against him without proof of that fact. Many of the paragraphs documented agreements that statement of the accused and expert reports were admissible without the necessity of a *voir dire*. Affidavits were said to be admitted for the truth of their contents. The accused appealed, arguing that the agreements about the admissibility of evidence should not have been included in an Agreement Statement of Facts under s. 655 of the *Code.* This caused the jury to be inappropriately informed about the voluntariness of the appellant’s statements; and that the trial judge’s failure to intervene led to the jury being confused about the admissions.

**Held:** Appeal dismissed.

**Ratio:** When a factual admission is made pursuant to s.655 it is for the Crown to state facts. It is not open to the accused to frame the Crown’s allegations so as to conform to his own purpose and then require the Crown to admit it.

**Reasons:** There was no *voir dire* contesting admissibility of appellant’s statements. In these circumstances, there was no error in admitting the Agreed Statement of Facts that documented the parties agreement that the statements were voluntary and admissible without the necessity of a *voir dire*. It also did not amount to a legal error to permit the jury to be exposed to the agreement that the experts’ reports were being admitted. The jury could not have been confused that the contents of the appellants’ statements and the experts’ reports must be accepted by them as being conclusive. While it is generally good practice to avoid the unnecessary use of legal language surrounding the admissibility of evidence, there was no prejudice to the stipulation that the content of the affidavits were being admitted for the truth of their contents.

Burden of Proof

* Two different types of burdens:
  + **Persuasive burden:** rests on the party who is required by the law to prove the relevant facts to succeed in the case
    - If that party does not establish the facts, they will lose the case
    - The allocation of the persuasive burden is a matter of law. Always possible to determine who has the persuasive burden of proof before a case begins and once this determination is made, the persuasive burden does not shift
    - Who bears the persuasive burden can be different depending on what aspect or issue is being examined.
  + **Evidentiary burden:** rests on the party whose duty it is to raise the issue
    - The party must adduce, or point to, some evidence on the issue capable of supporting a decision on the issue in his or her favour before the issue needs to be considered by the trier of fact
    - It is up to that party to show that the issue is in fact a live issue in the case
* A party can bear both the evidentiary and persuasive burden on an issue but this is not always or necessarily the case

#### Standard (or Quantum) of Proof

* The standard of proof tells you how much evidence a party needs in order to discharge the burden assigned to him or her
* There are several different standards that can possibly be used or referred to in cases (ie. civil, criminal or administrative)
* Below are some of the more common terms that are referred to

H-> RS -> RPG -> PFC -> BOP -> BRD -> AC

* H = mere hunch
  + This is intuition
  + You think it is likely the case, but you are not really able to articulate any reasons why
* RS = reasonable suspicion
  + Situation where you can articulate, to at least some degree, the underlying facts that lead you to the conclusion to suspect that X or Y is true
  + Fairly common standard in criminal cases where police officers are required to have reasonable grounds to suspect certain things before they are allowed to undertake certain actions
* R(P)G = reasonable (& probable) grounds
  + Higher standard that reasonable suspicion
  + It requires a greater degree of proof, what is known as a credibility based probability that the thing is how you say it is
  + A common standard in criminal cases
    - Ie. Police officers need reasonable and probable grounds to make an arrest, they need reasonable grounds to attain most types of search warrants
* PRF = prima facie case
  + This standard is essentially that in the absence of any evidence to the contrary, you would likely conclude that the person had established or at least had sufficient evidence to establish their case
  + There is some evidence in other words on everything you need to prove in order to successfully win your case
* BOP = balance of probabilities
  + This is the 50 + 1 standard
  + A trier of fact looking at the case would be satisfied that it is more probable than not that facts alleged fall in your favour
* BRD = beyond a reasonable doubt
  + Standard that prosecution bears in criminal cases and that it must satisfy before jury or a judge is entitled to convict
  + In other words, overall guilty must be proven beyond a reasonable doubt
* AC = absolute certainty
  + There is no requirement in law ever to prove something to absolute certainty, but you will often hear this phrase in criminal cases in contrast to beyond a reasonable doubt
    - Sometimes say “beyond a reasonable doubt is a very high standard, but it does not require absolute certainty”

#### Balance of Probabilities

* One standard, differing degrees of certainty
* The balance of probabilities standard may sometimes include additional qualifying terms
  + “preponderance of evidence”
  + “detailed and convincing evidence”
  + “cogent and sensible evidence”
* These additional qualifying terms do not refer to different standards, the standard remains the balance of probabilities, but rather to different degrees of certainty that may be required by the court in order to meet that standard
* In other words, the amount of evidence you require to meet that probability standard will depend on the seriousness of the case and the nature of the allegations

#### Civil Cases

* Plaintiff usually bears the evidentiary and persuasive burden
  + **The basic rule:** She, he, it who alleges must prove
  + The plaintiff must normally prove the allegations as set out in the statement of claim
  + On the other hand, the defendant must prove any special or affirmative defence raised
    - Ie. If a plaintiff sues for breach of contract, the defendant argues there was no breach and indeed no contract. The plaintiff has the persuasive burden of proving that there was a contract and if they cannot discharge this burden, the plaintiff will lose. If the defendant alleges that the defendant lacked the capacity to contract, the defendant will have the persuasive burden on this point
* Standard of proof is usually proof on the balance of probabilities which is less than beyond a reasonable doubt but more than a prime facie case
  + The plaintiff must present evidence to support the facts alleged and then convince the trier of fact, on the balance of probabilities, that the alleged facts are true (that is, more probable than not)
* A defendant in a civil case may make a motion for a non-suit at the close of the plaintiff’s case
  + A motion for a non-suit is an allegation by the defendant that the plaintiff has failed to adduce evidence that is capable of establishing one or more element of the cause of action
  + The trial judge, at the close of the plaintiff’s case, will determine the motion
  + Judge must decide whether the evidence, assuming it to be true and drawing all reasonable inferences from it that the jury would be entitled to draw, is sufficient to establish the issues in contention
  + If a plaintiff defeats a motion for non-suit, this does not mean the plaintiff wins. This just means that the case goes to the trier of fact to be determined

### FH v McDougall (2008 SCC)

**Facts:** Trial judge had to decide whether the plaintiff had been sexually assaulted by the defendant 40 years earlier and there was no direct third-party testimony. The appellant plaintiff was a former resident student of a residential school in BC. McDougall was a supervisor of junior and intermediate boys at the school. BC Supreme Court found that he sexually assaulted the appellant when the appellant was about 10 years old. BCCA allowed McDougall’s appeal in part and reversed the decision. Neither court made any reference to inherent probability.

**Held:** Appeal allowed and restored judgement of trial judge.

**Ratio:** There is only one standard of proof in a civil case: proof on a balance of probabilities.

#### Criminal Cases

* Prosecution bears the persuasive and evidentiary burden with respect to the elements of the offence charged
* The prosecution also bears the evidentiary burden in respect of proving the defence
* Standard – beyond a reasonable doubt which is higher than the civil standard of proof on a balance of probabilities, but it does not require absolute certainty
  + The requirement of proof beyond a reasonable doubt on the ultimate issue in the case is a constitutional requirement under section 11(d) of the *Charter* and flows from the presumption of innocence (*Oakes*)
  + A judge must instruct the jury on the meaning of reasonable doubt on the guidelines set out by the court in cases such as *Lifchus* and *Starr*. The reason for this is that beyond a reasonable doubt is a technical legal standard, it may not correspond to the ordinary meaning of those words in common discourse. Therefore, it is importance that juries understand the difference between the two concepts because the accused liberty is at stake in a criminal case
  + The components of a reasonable doubt instruction should include (*Lifchus*):
    - Stressing the vital importance of the standard, given its link to the presumption of innocence
    - That the burden of proving guilt rests on the prosecution
    - That a reasonable doubt is a doubt based on the evidence and can arise from evidence or absence of evidence
    - Judges should not tell juries that reasonable doubt standard is an ordinary concept or to use the same standard as decisions they are required to make everyday or that it is equivalent to prove to a moral certainty (*Lifchus, Starr)*
    - Guidelines that SCC provided in *Lifchus* is not a magic incantation, ultimate question is where the charge to jury is consistent with the principles in that case. Merely because the charge deviates from the model, does not therefore mean it is necessarily inadequate. The issue is whether the charge as a whole gives rise to a reasonable likelihood that the jury misapprehended the burden and standard of proof that it was to apply to decide the case (*JHS*)
    - In cases where the accused testifies, a *WD* instruction is generally required. This requires that the jury must be told that they must acquit if they believe the evidence of the accused and it establishes that he or she is not guilty
      * Must also acquit if they are left in reasonable doubt of the evidence, even if they do not believe it
      * Even if they do not believe the accused’s evidence and are not left in doubt by the accused’s evidence, they must still consider whether on the balance of the evidence that they do accept they are satisfied beyond a reasonable doubt that the accused is guilty of the offense charged (*Morin*)
* Defence bears the evidentiary burden on most defences, but the persuasive burden only on a few defences (ie. Mental disorder, non-insane automatism and intoxication)
  + The accused typically has only the evidentiary or tactical burden in terms of defences to show that there is an air of reality to the issue. Once the accused has discharged this evidentiary burden, the onus is on the prosecution to raise a reasonable doubt to at least one of the elements of the defence in order to convict the accused
  + In the rare cases where the accused does bear a persuasive burden on the defence, the accused burden is not beyond a reasonable doubt but only on the balance of probabilities
  + The air of reality test, the normal evidentiary burden borne by the accused, has 2 elements to it:
    - 1) A judge is required to put to the jury all defences arising on the facts that have an air of reality where they are specifically raised by the accused
    - 2) Judge also has a positive duty to keep from the jury defences that do not have an air of reality or evidentiary foundation to them. This is to ensure verdicts are supported by the evidence to maintain the fairness of the trial and to reduce the risk of confusing the jury by having them consider defences for which there is no real evidence
  + In terms of applying the air of reality test, a judge will consider all of the evidence, assuming the evidence relied upon by the accused to be true whether that evidence comes from Crown witnesses or from defence witnesses, and decide whether on that evidence, there is a real issue for the jury to decide
    - This requires that there be evidence that goes to each element of the defence such that a properly instructed jury, acting reasonably, could find that the defence was available to the accused and thus acquit the accused
    - The judge does not determine credibility or reliability in making this assessment, rather the judge assumes that the witnesses are truthful and accurate in their testimony, subject only to limited weighing in circumstantial cases to assess the reasonableness of the inferences that are sought to be drawn by the evidence presented in the court
* Courts have been clear that the jury is not to assess each individual piece of evidence standing along against the reasonable doubt standard as this could have the effect of eliminating much evidence from consideration. The jury is to consider the totality of the evidence and its cumulative effect in deciding if each element or issue to be proved is proved beyond a reasonable doubt
* An accused may bring a motion for a directed verdict at the close of the Crown’s case
  + This is essentially the equivalent of a motion for a non-suit in civil cases
  + Defendant is asking the judge to find that the Crown has not adduced evidence capable of establishing one or more elements of the offence (in other words that the Crown has not established a prima facie case)
  + In deciding whether to grant motion for directed verdict, judge will consider whether there is admissible evidence that if believed, could rationally lead a properly instructed jury to believe that accused is guilty beyond reasonable doubt (*Arcuri*)

### R v Lifchus (1997 SCC)

**Facts:** Lifchus was a stockbroker who was accused of fraud and theft. He was convicted of one and acquitted of the other. He appealed on the basis that the judge did not properly explain the burden of proof to the jury. He said that “beyond a reasonable doubt” is simply an everyday idea and that everyone understands it – a “plain language” approach. CA allowed the appeal ordering a new trial, which the Crown appealed.

**Issue:** How should a judge charge a jury on the meaning of “beyond a reasonable doubt”?

**Held:** Appeal dismissed.

**Ratio:** When defining important criminal terms such as “beyond a reasonable doubt” the judge must not simply use a plain language definition; they must include descriptions of the important underlying concepts of criminal law that must be considered, and the specific degree that must be proven to be acceptable. If a different charge is used, a verdict should only be overturned to order a new trial if there is a reasonable likelihood that the charge led the jury to misapprehend the standard of proof.

**Reasons:** Justice Cory agreed that this was not the correct way to describe “beyond a reasonable doubt” to a jury, because it is not simply the plain understanding of it. He gives a list of things to include in a charge:

* The standard of proof beyond a reasonable doubt is inextricably intertwined with the principle fundamental to all criminal trials, the presumption of innocence;
* The burden of proof rests on the prosecution throughout the trial and never shifts to the accused
* A reasonable doubt is not a doubt based upon sympathy or prejudice, rather, it is based upon reason and common sense
* It is logically connected to the evidence or absence of evidence
* It does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt
* More is required than proof that the accused is probably guilty – jury which concludes that accused is probably guilty must acquit

As well as a list of things not to include

* Describing the term as an ordinary expression which has no special meaning in the criminal context
* Inviting jurors to apply the same standard of proof that they apply to important decisions in their own lives
* Equating proof beyond a reasonable doubt to proof to a moral certainty
* Qualifying the word doubt with adjectives other than reasonable, such as serious, substantial or haunting which may mislead jury
* Instructing jurors that they may convict if they are sure that the accused is guilty, before providing them with a proper definition as to the meaning of the words beyond a reasonable doubt

### R v JHS (2008 SCC)

**Facts:** At trial, accused and complainant had differing accounts of the events in question, with the accused maintaining that no sexual assault had occurred and the complainant disagreeing. Judge charged the jury by stating, “It will be up to you to decide how much or how little you will believe or rely upon the testimony of any witness. You may believe some, none or all.. [the real issue in this case is whether the alleged events ever took place. It is for the Crown counsel to prove beyond a reasonable doubt that the events alleged in fact occurred. It is not for the accused to prove that these events never happened. If you have a reasonable doubt whether the events alleged every took place, you must find him not guilty… you do not decide whether something happened simply by comparison one version of events with another, or choosing one of them. You have to consider all the evidence and decide whether you have been satisfied beyond a reasonable doubt that the events that form the basis of the crime charged, in fact, took place.” Jury found accused guilty. CA overturned verdict finding that the TJ failed to properly explain the principle of reasonable doubt. CA relied upon *R v W(D)* which stated that that TJ are required to instruct jury that they must acquit in 2 situations; (1) if they believe the accused and (2) if they do not believe accused’s evidence but still have a reasonable doubt as to his guilt after considering the accused’s evidence in the context of all evidence. CA said TJ did not illustrate the second principle.

**Held:** Appeal allowed, original conviction restored.

**Reasons:** Although the TJ did not explicitly repeat the instructions laid out in *WD*, he got across the point of the questions and prevented any chance of the jury misunderstanding what was required. He still got the point across which was to ensure that the principle of “beyond a reasonable doubt” retains its position of primacy in the criminal trial process.

### R v Morin (1988 SCC)

**Facts:** The appellant was acquitted of first degree murder. CA found (1) that TJ erred in his charge when he invited the jury to apply criminal standard of proof beyond a reasonable doubt to individual pieces of evidence; and (2) that he ought to have directed the jury that certain evidence elicited by Crown's examination of the defence psychiatrist was relevant on the issue of identity. CA ordered a new trial. Appellant submits that CA failed to recognize a two‑stage process in the deliberation of the jury. The appellant submitted that in the "fact finding" stage, the evidence must be examined in relation to the other evidence but, having been so examined, it must individually meet the test of proof beyond a reasonable doubt. At the verdict stage, the jury looks at all the evidence which it has accepted and determines whether this evidence as a whole establishes the guilt of the accused beyond a reasonable doubt. He also submitted that the evidence of the psychiatrist on examination did not establish the necessary nexus between the perpetrator and the appellant to be admissible, if such evidence is ever admissible for the prosecution; and finally, that the Court of Appeal erred in dismissing his application to admit fresh evidence.

**Held:** Appeal should be dismissed.

**Ratio:** Reasonable doubt plays two distinct roles in the criminal trial process. First, at the primary level, the facts upon which the jury rely in order to arrive at a determination of guilt must be established beyond a reasonable doubt. This means that the jury must be satisfied, within the context of all the facts of the case, that each of the facts they rely on for a finding of guilt has been proved beyond a reasonable doubt. After looking at the context of all the facts, if the jury still has a reasonable doubt about a particular fact, this doubt must be resolved in favour of the accused and that piece of evidence rejected. At the second level, reasonable doubt operates in the determination of guilt or innocence. The jury must look at totality of evidence and determine whether on the proved facts, i.e., on those facts which have survived scrutiny at the 1st level, the accused is guilty. If there remains a reasonable doubt as to accused's guilt, the doubt must be resolved in favour of the accused and a verdict of not guilty.

### R v Arcuri (2001 SCC)

**Facts:** Accused was charged with 1st degree murder. At the preliminary inquiry, the Crown’s case was entirely circumstantial and the accused called 2 witnesses whose testimony was arguable exculpatory. The preliminary inquiry judge rejected the accused’s contention that he must weigh the evidence and determined that the accused should be committed to trial for 2nd degree murder.

**Held:** Appeal should be dismissed.

**Ratio:** The test for a directed verdict is “whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty”. The test requires that the judge not 1) weigh evidence, 2) test the quality or reliability of admissible evidence or 3) draw inferences of fact. However, courts are allowed to do “limited weighing” of the evidence to assess “whether it is capable of supporting the inferences the Crown asks the jury to draw”.

**Reasons:** The question that arises in this case is whether the preliminary inquiry judge’s task differs where the defence tends exculpatory evidence. The task is essentially the same, in situations where the defence calls exculpatory evidence, whether it be direct or circumstantial. Where the Crown adduces direct evidence on all the elements of the offence, the case must proceed to trial, regardless of the existence of defence evidence, as the only conclusion that needs to be reached is whether the evidence is true. However, where the Crown’s evidence consists of, or includes, circumstantial evidence, the judge must engage in a limited weighing of the whole of the evidence to determine whether a reasonable jury properly instructed could return a verdict of guilty.

* In this case, before committing the accused to trial, the preliminary inquiry judge considered the evidence as a whole, surveying the circumstantial evidence presented by the Crown, as well as the allegedly exculpatory evidence tendered by the defence. There is no reason to believe that he arrived at the wrong result in committing the accused to trial.

### R v Oakes (1988 SCC)

**Ratio:** The presumption of innocence states an accused is to be treated as innocent, cannot be convicted until the Crown proves guilt beyond a reasonable doubt and the presumption of innocence must be proved beyond a reasonable doubt. A reverse onus provision in a criminal proceeding violates the accused’s *Charter* rights and cannot be justified under s. 1.

#### Presumptions

* A legal device that requires a trier of fact to reach a conclusion on a factual issue without having direct evidence on that issue
* Presumptions without basic facts versus presumptions with basic facts
  + **Presumption without basic facts:** a conclusion that must be drawn until the contrary is proved
    - Ie. The presumption of innocence- an accused is to be treated as innocent, cannot be convicted until the Crown proves guilt beyond a reasonable doubt
    - Ie. Presumption of sanity in s.16 of *Criminal Code*- all accused are presumed to be sane until the contrary is proven
  + **Presumption with a basic fact**: either mandates or allows drawing conclusion as to another fact based upon proof of the basic fact
    - Ie. The presumption that a person intends the natural consequences of his or her actions - the presumed fact (the person’s intent) can be found upon proof of the basic fact (the person’s actions)
      * Ie. If I throw a baseball directly at a window, it can be presumed or inferred that I intended to break it.
* Basic Fact presumptions can be further broken down into permissive versus mandatory presumption
  + **Permissive:** a presumption is permissive if it is option as to whether the inference of the presumed fact is to be drawn on proof of the basic fact
    - These are not really presumptions at all. Rather, they are merely a logical directive or device since the trier of fact should only rely on the presumption when it is reasonable to do so and in accordance with the evidence
    - The danger of using the language of presumption in these cases is that the trier of fact may be misled into believing the conclusion must be drawn in all cases
  + **Mandatory:** A presumption is mandatory if it is not optional. That is, the inference of the presumed fact MUST be drawn on proof of the basic fact
    - Only mandatory presumptions are true presumptions
* Rebuttable versus irrebuttable presumption
  + **Rebuttable:** A presumption is rebuttable if the law allows the party to dispute it by pointing to sufficient evidence to negate the trier’s ability to draw the stipulated inference
    - For presumptions without basic facts, you usually have to be able to point to enough evidence to reach the requisite standard set by law (ie. The presumption of innocence requires proof beyond a reasonable doubt)
    - For presumptions with a basic fact, one usually only has to point to enough evidence to put the basic fact into question. That is, some evidence to the contrary.
      * It is an evidentiary burden. Once there is evidence to the contrary, the presumption is spent and the opposing side must establish the presumed fact without the benefit of the presumption
      * However, there are reverse onus provisions which effectively reverse the onus of proof
  + **Irrebuttable**: Not really a presumption at all since it is not open to the party on whom it operates to negate its effect.
    - It is a rule of law, often a deeming provision that says that something is X and has to be taken to be X even if that contradicts human experience or the actual evidence in the case
      * Ie. The presumption that everyone knows the law – we know that is not true, the law is too complicated for everyone to know it or all of it’s details yet the presumption is that everyone knows the law and we operate on that basis.
      * The code has many deeming provisions that are effective irrebuttable presumptions
        + Ie. There is a Code provisions that states that a place that is equipped with a slot machine shall be conclusively presumed to be a gaming house. You cannot call evidence to the contrary
* Presumptions of law versus of fact
  + **Presumption of law:** exists as a matter of law. It arises pursuant to statute or in some cases, the Constitution.
    - Its purpose is usually to assign the burden of proof to one party or the other
    - Presumption does not have to be true as a matter of human experience
    - Presumption of law includes things like the presumption of innocence, the presumption that judges know the law and the presumption that jurors abide by their oath
  + **Presumption of fact:** based on recurring cases of circumstantial evidence. That is, they are shortcuts to proof because as a matter of human experience, we usually find that the existence of Fact A means that Fact B also exists
    - Ie. The presumption of guilty knowledge from the possession of recently stolen goods, the presumption of legitimacy and the presumption of regularity regarding appointments to an office
    - Some presumptions of fact exist also or exclusively for policy reasons
      * Ie. In the impaired driving over 80 case, there are presumptions that read back a person’s blood alcohol level at the time they were driving to be what the blood alcohol level was at the time at which it was administered. Usually not accurate but it exists to negate the need to always call a toxicologist
    - A presumption of fact is generally a presumption with a basic fact. On proof of fact A, the existence of Fact B is rebuttable presumed
    - A presumption of fact is mandatory, but it does not automatically arise at law in the sense that it is open to the party against whom the assumption operates to point to evidence that negates the force of the presumption.
      * Where this occurs, the party who sought to rely on the presumption is forced to prove the presumed fact using ordinary methods of proof

#### Reverse Onus Provisions

* Legal rule that places the legal burden of proof on the party who does not normally bear it
  + Ie. In a civil case, the defendant and in a criminal case, the accused
* If the presumption does not place the persuasive or legal burden on the party, it is usually referred to as a mandatory presumption rather than a reverse onus provision
* Reverse onus provisions use the language such as “If he establishes, if he proves, the proof of which lies upon him, he satisfies”
* On the other hand, mandatory presumptions use language such as “In the absence of evidence to the contrary”
* Criminal cases
  + Reverse onus provisions that place the persuasive burden on the accused (even if only on the balance of probabilities) violates s. 11(d), and must be justified under s.1 (*Oakes*)
    - This applies where the presumed fact relates to an element of the offence, or an element of a defence
* There are a number of reverse onus provisions, the constitutionality of which has been considered by various courts. Some have been upheld, many have been not.

#### Problem 1

A, is being prosecuted for passing counterfeit money. A admit that he bought drinks at a bar for himself and two friends and paid for the drinks with a counterfeit $20 bill but claims ignorance that the bill was counterfeit. The only evidence against A on the issue of knowledge is W’s testimony that while in the company of his two friends, A lit a cigar with a $20 bill. W is the bartender. A moves for a directed verdict. How should the judge rule? Would your answer be different if W testified that A often came to the bar and that A was sober? What if, in addition, W testified that A was stingy and rarely added a tip to his bill? Explain your answers.

* + Criminal case so the burden would be beyond a reasonable doubt. Question is do we have enough evidence such that a jury could conclude beyond a reasonable doubt that they are guilty
  + You may grant the directed verdict because it was not sufficient evidence to rule out other reasonable explanations

#### Problem 2

A and B were returning from a hunting trip during a severe wind and rainstorm. The road itself was traditionally well-maintained. A was driving his truck; B was in the passenger seat. At some point the truck went off the road, because the next day the badly damaged truck and the bodies of A and B, still strapped in their seats, were found in the raging creek running along the highway. A forensic examination of the truck’s showed no other vehicle had been involved in the accident. B’s spouse sued A’s estate for negligence in the death of B, claiming that an inference of negligence arose from the fact of a single vehicle accident on a well-maintained road. A’s estate brought a motion for a non-suit. How would you rule? If you would not grant the motion for non-suit, how would you rule on the issue of negligence? Explain your answers.

* + Raises same issue but in a civil case. You have some information but not a lot. Is the limited information sufficient to put the case to the trier of fact?
  + Plaintiff is saying that a single car accident doesn’t happen for no reason the driver must be negligent. Court would probably not accept this especially because there was a storm therefore, we cant say for sure the person was negligent.
  + You would probably grant the motion for a non-suit and even if you are not certain you wouldn’t find the person guilty.

#### Problem 3

How would you classify (or describe) the following “presumptions”:

* 1. A person is presumed to be dead if she or he has not been heard of for seven years (ie. The presumption of death)
     + What type of presumption is this? This is a rule of law. It is not a presumption in any sense, the use of the word presumption does not add anything to it.
     + This is a legal rule that says absence of evidence that someone is alive for 7 years means the person is dead
     + It is a non rebuttable presumption of law once you establish the facts
  2. Evidence that an accused broke and entered a place is, in the absence of evidence to the contrary, proof that he broke and entered with intent to commit an indictable offence therein.
     + You have presumptions of fact that is to be presumed if you have another fact
     + If you can prove the accused broke and entered into the house, you can presume they broke and entered with an intent to commit an indictable offence
     + The language of “in the absence of evidence to the contrary” means it is a rebuttable presumption. The presumed fact is that it was done with intent but the other side can call evidence that negates this presumption, that in other words breaks the chain.
     + This is a rebuttable fact presumption
  3. At common law, a child under the age of seven years is conclusively presumed to be incapable of committing a crime
     + Presumption of law. This is just a rule of law that says that a child under 7 does not have criminal capacity
  4. Any person who sells or purchases any rock, mineral or other substance that contains precious metals is guilty of an offence unless he established that he is the owner or agent of the owner or is acting under lawful authority.
     + This creates a revere onus provision, it flips the burden of proof. This creates a criminal offence and normally in these situations the Crown has to prove the accused did these things which requires proof that the person did not have the authority to sell. However, this says that the crown does not have to prove this, the defence does
     + In criminal cases you cannot put the burden of proof on the accused and so they would have to try and justify it under section 1 but it is unlikely to be justified.