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| Evidence Summary |

Table of Contents

Introduction 9

What encompasses the law of evidence? 9

Sources of the Law 9

Purpose of the Law of Evidence 10

Goals of the Law of Evidence 10

Fundamental Rule of Law of Evidence 🡪 relevance 10

Relevance 11

Methods of Evidence 11

How Evidence is Entered 11

Analysis and Use of Evidence 11

Admissibility vs. Weight 12

Procedure & *Voir Dire* 12

Varying Levels of Application 12

Factors to Consider for Application 12

*Minister of National Revenue v Grand Chief Michael Mitchell (Kanentakeron) (2001, SCC) 🡪 rules of evidence are flexible; oral histories are admissible if “useful and reasonably reliable”* 12

*R v Morris (SCC, 1983) 🡪 do not confuse admissibility with weight of evidence; relevance is the test and probative value is separate from relevance (and analyzed in regards to prejudicial affect)* 13

Types of Evidence 14

Testimonial/Oral Evidence 14

Order of Questioning Witnesses 14

Purposes of Examination in Chief 14

No Leading Questions 14

Types of Leading Questions 14

Exceptions to the General Rule 15

Purposes of Cross-Examination 15

Purposes of Re-Examination 15

Testimonial Factors 🡪 *narration, sincerity, memory, perception* 15

Assessing Witnesses 16

Contradictory Witnesses 16

Documents 16

Proof of Documents 16

“Best Evidence Rule” 16

Contents of Documents 16

Possible reasons to prefer documents to witnesses 17

Possible reasons to prefer witnesses to documents 17

Real Evidence 17

Photographs and Videotapes 17

Items/Things 18

Non-things 18

Demonstrative Aids 18

Electronic Evidence 20

CEA s. 31.8 🡪 Rule for electronic documents 20

CEA ss. 31.1-31.4 🡪 Admissibility 20

CEA s. 31.1 🡪 Authenticity 20

CEA ss. 31.2-31.4 🡪 Best Evidence 20

Relevance and Fact-Finding 21

Relevance 21

“Direct” or “Circumstantial” Evidence 21

Admissibility Standard 21

Conflicting Inferences 21

Assessed in Context 21

Assessing Weight 21

Basic Considerations 22

Principles of Fact-Finding 22

Combining the Evidence 22

*R v Morris (SCC, 1983 ) 🡪 relevant evidence application* 22

*R v Watson (ONCA, 1996) 🡪 relevant evidence application* 23

*R v White (2011, SCC) 🡪 relevant evidence can support a logical inference of guilt with respect to a specific offence* 24

Example #1 🡪 *Stop Sign* 24

Example #2 🡪 *The Counterfeit Problem* 25

Example #3🡪 *The Promissory Note* 25

Example #4🡪 *Hit Pedestrian* 26

Probative Value and Prejudicial Effect 26

Assessing Probative Value 26

Exclusionary Rules Rationales 27

Exclusionary Discretion 27

Prejudicial Effect 27

Five Main Forms of Prejudice 27

Other forms of Prejudice 27

Factors to Consider in Assessing Prejudicial Effect 27

Overcoming Prejudice by Limiting Instructions 27

Partial Exclusion 28

Applicable Tests ***(Seaboyer)*** 28

Applicable Tests ***(Anderson)*** 28

Constitutional Rules ***(Seaboyer)*** 28

Summary of Steps: 28

***R v Seaboyer; R v Gayme (1991, SCC) and R v Golfinch (2019, SCC)*** *🡪 Evidence of sexual conduct and reputation cannot be deemed logically probative of either the complainant’s credibility or consent –prejudice too great* 28

*Corbett* and Prior Convictions 30

***R v Corbett (1988, SCC)*** *🡪 some prior convictions are admissible to assess credibility –depends on probative value and context (i.e. crimes of dishonesty more probative than others)* 30

Importance of Corbett 31

Factors to look at in deciding whether to exclude prior conviction(s) 32

Potvin and Prior Testimony 32

Full Opportunity to Testify 32

***R v Potvin*** *🡪 to allow prior testimony the person must refuse or be unable to testify but must have had full opportunity to cross examine (i.e. preliminary hearing)* 32

Statistical Evidence 34

Competency and Compellability 34

Sources of the Law 34

General Rule 34

Three Basic Issues 35

Competency 35

Two Types of Competency 🡪 1) categorical 2) factual 35

Compellability 35

Possible Outcomes 35

Common Law Incompetency (old laws) 35

Statute 35

CEA 🡪 section 3 35

CEA 🡪 sections 6 and 7 35

CEA 🡪 section 8 36

Parties and their Spouses 36

Spouse of Accused 🡪 History 36

CEA 🡪 Accused and Spouse s. 4 36

EA 🡪 s. 8 36

Provincial Offences Act 🡪 s. 46(5) 37

Spouses: CEA vs. EA 37

Accused 37

Comment on the Failure of an Accused to Testify 🡪 CEA s. 4(6) 37

Scope –Judge and Crown 37

Scope –Defence Counsel 37

Parties 37

Failure of Party to Testify or Call Material Evidence 37

Factors to Consider 37

Failure of Party to Testify 38

Oaths and Substitutes 38

Evolution of Law 38

General Rule 38

Statute 38

CEA 🡪 section 13 38

CEA 🡪 section 14 38

EA 🡪 section 16 38

EA 🡪 section 17 39

Ability to Swear or Affirm 39

“Nature and Consequence” 39

Factual Incompetency (Case by case challenges) 39

Testimony other than Oath or Affirmation 39

Mental Incapacity 39

Persons Under 14 Years 41

Examination of Witnesses 43

Examination in Chief 43

Cross Examination 43

Example 🡪 asking about previous record 44

Re-Examination 44

Reply (Rebuttal) Evidence 44

Re-Opening the Case 44

Remember 🡪 Credibility two aspects 44

Prior Inconsistent Statements 44

Rule in *Browne v Dunn (1893, HL)* 45

Rationales for the rule 45

Scope of the rule 45

Remedial Options 45

Collateral Fact Rule 46

Rationales for the Rule 46

What’s not a collateral fact? 46

What is a collateral fact? 46

Recognized Exceptions 46

Example 🡪 dangerous driving 47

Example 🡪 common law spouse 47

Example 🡪 bribe 47

Example 🡪 capacity 47

“Linchpin” Facts 48

A Modern Rule? 48

Collateral Facts Defined: Summary 48

Rehabilitating Witness 48

Present Memory Refreshed 48

Past Recollection Recorded Technique 48

Criteria 🡪 Fliss Decision for Past Recollection 49

Enhancing Credibility 49

Exceptions to Rule 49

Prior Consistent Statements 49

Recent Fabrication 50

Impeaching Credibility 50

Methods of Impeachment 50

Prior Inconsistent Statements 50

Meaning of “Inconsistent” 50

Rules of Thumb 51

Relevant Provisions 51

CEA 🡪 Section 10 51

EA 🡪 section 20 51

CEA 🡪 section 11 51

EA 🡪 section 21 52

CEA 🡪 section 9(1) 52

CEA 🡪 section 9(2) 52

EA 🡪 section 23 52

CEA 🡪 section 10(1) 52

Process of Contradiction 52

CEA 🡪 section 11 53

Impeachment of Own Witness at Common Law 53

CEA 🡪 s. 9(1) 53

Meaning of Adverse 53

Procedure 53

Hostile/Adverse Witnesses 53

CEA 🡪 section 9(2) 53

Procedure 54

Hearsay 54

Rationale for the Rule 54

Other Rationales 55

Non-Hearsay 55

Example #1 🡪 red car 55

Example #2 🡪 Elaine in London 56

Example #3 🡪 Will bigamy 56

Example #4 🡪 Picasso 56

Example #5 🡪 Joe selling car 57

Example #6 🡪 Steamship Douglas 57

Example #7 🡪 cocaine trafficking 58

Example #8 🡪 Joe was alive 58

Basic Analytical Approach for Hearsay 58

Tough Calls? Recall the Main Rationale for the Rule 58

Hearsay/Non-Hearsay Situations 🡪 *1) automated statements 2) prior witness statements 3) assertive conduct 4) implied assertions* 59

***Wright v Tatham*** *🡪 handwritten letters can be admitted to infer the man was competent when he wrote them; trier of fact being asked to make inference* 59

***Baldtree (2013, SCC)*** *🡪 evidence may be only relevant if the trier of fact assumes it to be true –fine line with hearsay* 60

Example 🡪 the shipwreck 61

The Principled Approach 61

Basic Rule 61

Key Issues 61

A Brief History 61

***Khan (1990, SCC); Smith (1992, SCC); Starr (2000, SCC)*** *🡪 MAJOR PRINCIPLES* 62

***Khan (SCC, 1990)*** *🡪 statements inadmissible under traditional hearsay when out of court statement but can be admitted under principled approach when it is necessary (i.e. child incompetent to testify) and reliable (i.e. no motive to lie, natural statement, corroborating evidence)* 62

***Smith (1992, SCC)*** *🡪 Principled approach is an exception that applies to all hearsay and not just child statements; expands Khan’s application* 63

***Starr (2000, SCC)*** *🡪 Rare case where exception has been amended to incorporate the principled approach* 64

Reasons for the Co-Existence of Principle and Exceptions 65

But: Principle ultimately wins 65

Meaning of Necessity 65

Summary: Necessity 65

Meaning of Reliability –***Khelawon (2006, SCC)*** 65

Summary: Sincerity 66

Summary: Perception 66

Summary: Memory 66

Summary: Narration 66

Use of Corroborating Evidence 66

Views on Use of Corroborating Evidence 66

Use of Corroborating Evidence 67

Safeguards 67

Residual Discretion to Exclude 67

Prior Inconsistent Statement 68

***B(KG) (1993 SCC) / U(FJ) (1995 SCC)*** 68

Threshold Inquiry/Necessity 68

Standard Indicia of Reliability 69

Example 🡪 ***C(JR) (1996 SKCA)*** 69

Example 🡪 ***Eisenhauer (1998, NSCA)*** 69

Substitutes: Oath and Warning 69

Substitutes: Videotape 69

Determining Admissibility 70

Example 🡪 ***FJU (1995, SCC)*** 70

“Striking Similarity” Test 70

Full Analytical Approach 70

***R v Khelawon (2006, SCC)*** *🡪 the principled approach requires that for evidence to be admissible, hearsay must be necessary and reliable; in this case, not sufficiently reliable* 70

***R v Devine (2008, SCC)*** *🡪 case where reliability and necessity are met; Procedural safeguards met, so other reliability concerns need not be considered at threshold stage – for trier of fact to assess.* 71

***R v Blackman (2008, SCC)*** *🡪 must evaluate reliability in context; the reliability criterion is usually met by showing that sufficient trust can be put in the truth and accuracy of the statements because of the way in which they came about, or by showing that in the circumstances the ultimate trier of fact will be in a position to sufficiently assess their worth.* 72

***R v Bradshaw (2017, SCC)*** *🡪 formulation of the “circumstantial guarantees” reliability standard; does not require reliability be established with absolute certainty but circumstances point to trustworthy, reliable statement inference* 72

Hearsay: The Common Exceptions 74

Admissions by a Party Offered by an Opponent 74

***Ferris (1994, ABCA)*** *🡪 statements are not admissible if they are too uncertain/unclear (unreliable)* 74

“Adoptive” Admissions 75

***Streu (1989, SCC)*** 🡪 *admissions by an accused are adoptive statements where the accused indicates some belief or acceptance of the truth of the admission* 75

Rationale for the Exception 75

Statements by an Employee or Agent 75

Criteria: 75

Rationale for the Exception 76

Confessions Rule 76

Rationale for the Rule 🡪 High Threshold 76

Relevant Issues 🡪 sub issues to consider in confessions cases 76

Persons in Authority 76

Test for Persons of Authority 🡪 *Hodgson (1998, SCC)* 76

***Hodgson (1998, SCC)*** *🡪 must be a reasonable basis for the accused’s belief that the person hearing the statement was a person in authority (i.e. complainant/parents not person of authority)* 77

Statements Induced by Private Persons 77

Case-by-Case Examples: 77

Allocation of Burdens 78

Voluntariness Voir Dire 78

Meaning of Voluntariness 🡪 describes how confessions can be excluded 78

***Oickle (2000, SCC)*** 🡪 *current law on voluntariness; elaborated on doctrines above (more principled and functional approach) because all circumstances can be looked at together rather than pigeonholed into one category of involuntariness* 79

Tainting 79

*Confessions 🡪 Robbery and girlfriend* 80

*Example 🡪 the Car Accident* 80

Statements Against Pecuniary or Propriety Interests 80

Criteria: 80

Rationale for the Exception 80

Prior Testimony 81

Rationale for the Exception 81

Rule 31.11 🡪Prior Testimony Under Rules of Civil Procedure 81

Scope of the Rule 31.11 (2) 82

Scope of Rule 31.11(7) 82

Business Records 82

Rule at common law 🡪 ***Ares v Venner (1970, SCC)*** 82

Statutory Exceptions 83

Ontario EA s. 35 84

Ontario EA s. 35 🡪 Definitions 84

When to use CEA vs. Ontario EA 84

Rationale for the Exceptions 85

Spontaneous Statements 86

Criteria 87

Guidelines for understanding spontaneous statements 87

Rationale for the Exception 87

***Khan (1990, SCC)*** *🡪case of spontaneous statements from child; must be spontaneous, contemporaneity, no risk of concoction, no concerns about memory, heightened perceptions* 87

***Nurse (2019, ONCA)*** *🡪 spontaneous gesture counts as admissible if it meets criteria and can be considered under the principled approach too* 87

Statements about Physical Sensations 88

Criteria 88

Rationale for the Exception 88

State of Mind/Present Intentions Exception 88

Criteria 88

Admissible for Certain Purposes 89

Not Admissible for Other Purposes 89

***Smith (1992, SCC)*** 🡪 *case of state of mind; cannot make assumptions but if fails under this excpetion can try principled approach* 90

***Starr (2000, SCC)*** 🡪 *present intentions case exception* 90

Rationale for the Exception 90

Prior Convictions 90

Evidence Act, s. 22.1 91

Example 🡪 Spencer 91

Opinion Evidence 91

Rationale 91

Exceptions to the Rule 🡪 1*) lay opinion 2) expert opinion* 91

Lay Opinion Evidence 92

Basic Rule 🡪 ***Graat (1982, SCC)*** 92

Criteria 92

Common Examples 92

Ultimate Issue Rule 🡪 ABOLISHED 92

Statutory “Lay Opinion” 92

Expert Opinion Evidence 93

Basic Rule 93

Who is an Expert? 93

Types of Experts 93

Purpose of Expert Evidence 93

Dangers of Expert Evidence 93

Role of the Expert 93

Voir Dire Required or Not? 93

Why a Gatekeeper role? 94

Threshold Stage 94

Admissibility Test 94

Necessity 95

Relevance 96

Absence of Exclusionary Rule 96

Judicial Gatekeeper Role 96

Exclusionary Discretion 96

Consideration of Bias 96

Ultimate Issue Rule 96

Use of “Hearsay” Evidence 97

Hypothetical Questions 97

Authoritative Works 97

Exceeding Qualifications 97

Weighing the Evidence 97

Relevant Statutes and Rules 97

Criminal Code 🡪 s. 657.3 97

Number of Experts 98

Civil Procedure Rules, Rule 4.1 98

Civil Procedure Rules, Rule 53.03 98

Family Law Rules 98

Small Claims Court Rules, Rule 18 99

Common Law Displacement 99

Practical Considerations 99

Example Problems 100

Example #1 🡪 Forestry Workers 100

Example #2 🡪 Cross-examine familiarity with medical book 101

Example #3 🡪 minority population expert 101

Example #4 🡪 sexual assault examiner 101

Privilege and Related Doctrines 101

Types of Privilege 🡪 1) class 2) case-by-case 102

1) Class 102

2) Case-By-Case 102

Related Doctrines 102

Standard and Burden of Proof 102

Class Privilege 103

Solicitor-Client Privilege 103

Rationales 103

Exceptions to Solicitor-Client Privilege 103

Inadvertent disclosure 104

Applicable Test 104

Litigation Privilege 105

Meaning of Related Litigation 105

Rationale 105

Dominant Purpose Test 105

Ingathered Documents 106

Dispute (Settlement) Privilege 106

Criteria 106

Spousal Privilege 106

Rationale 106

Criticism 106

Scope of Spousal Privilege 106

Informer Privilege 107

Rationale 107

Criteria 108

“Tend to Identify” 108

Loss of Privilege 108

Informer or Not? 108

Innocence at Stake Test 109

Case-By-Case Privileges 109

Criteria (Wigmore) 109

Screening Disclosure 110

Journalist-Informant Claims 110

***National Post (SCC, 2010)*** 🡪 *fourth criterion is hardest to establish; privilege will not be granted where the injury would not outweigh the benefit (i.e. serious allegations, etc.)* 110

Statutory Privilege for Federal Matters (CEA s. 39.1) 110

Privilege Against Self-Incrimination 111

Rationales 111

CEA s. 5 and EA s. 9 112

Scope of Protection 112

Charter s. 13 112

Proof Without Evidence 112

Formal Admissions 113

Criminal 113

Civil 113

Judicial Notice 114

Three Types of Facts 🡪 *1) adjudicative 2) legislative 3) social framework* 114

Rationales for Judicial Notice Doctrine 115

Judicial Notice of Law 116

Burden of Proof and Related Issues 116

Burden of Proof 116

Standard of Proof 117

Balance of Probabilities 117

Civil Cases 117

Criminal Cases 118

Presumptions 118

Reverse Onus Provisions 119

Burden, SOP, Presumption Examples 120

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| Introduction |

# Introduction

* 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 data that triers of fact use in performing the fact-finding function” – Paciocco & Stuesser

## What encompasses the law of evidence?

* The kinds and forms of information that the trier of fact can receive
* The means by which information can be proven in a proceeding 🡪 i.e. oral, documentary, etc.
* How the information can be presented and tested in a proceeding
* Permissible use of the information by the trier of fact adjudicating the proceeding – may be able to used to prove one thing (motive, narrative), but not another (character, truth)
	+ Judge and jury – think about the fact that jurors are not legally trained (however the reality is that most trials are judges, not jury’s)

## Sources of the Law

* Common law 🡪 there is no “code”
	+ Majority of law is still common law- judge made rules
	+ Rules usually apply to the law as a whole, but judges also have some (exceptional) discretion to change the rules for a particular case, usually to avoid a miscarriage of justice (ex. prejudicial effect outweighs probative value, applied case-by-case and on exceptional cases)
* Statutes (federal/provincial)
	+ No comprehensive code of evidence
	+ Each jurisdiction has an Evidence Act applying in the area of jurisdiction – all areas where Federal gov’t has jurisdiction (ex. criminal, banking, labour, fisheries)
		- If provincial, its Ontario Evidence Act
		- S. 40 of the CEA incorporates by reference some other provincial rules
	+ Individual statutes may also contain evidentiary rules apply to the matters governed by the statute
		- *FLA, Immigration and Refugee Act, Banking Act* etc
		- Court systems have rules of procedure
	+ Statutory provisions may “include” (have read in) a discretion to exclude evidence if prejudicial impact outweighs probative value
		- Particularly in criminal law, lesser degree in civil law
		- This prejudicial vs. probative is a common law rule read in by the statute
* Constitution
	+ *Constitution Act* determines which level of government legislates rules for which kinds of matters
	+ *Constitution Act* 1982 (ex. the Charter) imposes limits on the rules that any jurisdiction may impose
		- Unlike 1867 where you’re talking about the ability to make rules between levels of gov’t – the Charter restricts gov’t from making any rules that are inconsistent with the Charter and Constitution
* Aboriginal law
	+ Aboriginal claims raise difficult issues resulting to proof
	+ Overall burden does not change, but evidential rules are to be applied flexibly
	+ Oral histories admissible if “useful and reasonably reliable” (*MNR v Kanentakeron*)
* Scholarly works
	+ Not formal sources, but courts have recognized their expertise
	+ Texts, articles, commentaries by prominent legal scholars
	+ Professional and judicial Codes of Conduct governing advocates and decision makers
	+ Using scholarly works is most useful when the law is not in your favour, you use this to say the law should be changed – especially where the law is informed by historical assumptions that are not relevant in a modern society

## 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” 🡪 so people feel the process was fair to them, unbiased
	+ “Reconstruction” 🡪 court cases happen long after the original event, can’t be exact, give best evidence to get the best reconstruction
	+ “Legally important” 🡪 basic rule of the law of evidence, we don’t want just anything before the court, we want it to be important that is *relevant* to resolving the dispute in question
	+ “Dispute” 🡪 define what your dispute is to figure out what is legally *relevant* (pleadings define what is dispute)

## Goals of the Law of Evidence

* Search for truth – really it’s the search for proof (what can you prove to be truth)
* Fairness – two sides to the story, be unbiased
* Trial efficiency
* Finality – appeal/judicial review rights within every area of law, but there are restrictions (not absolute)
* Other societal interests (equality, human dignity, privacy, etc)
	+ How we define relevancy has been argued to incorporate stereotypes, so societal interests such as the human dignity of a complainant have shaped relevance arguments in sexual assault cases (prior sexual history not relevant)

## Fundamental Rule of Law of Evidence 🡪 relevance

* “All relevant evidence is admissible unless there is a clear rule of law or policy to exclude it”
* If it’s irrelevant it is *not admissible*
* In order to decide what is relevant you must define your dispute – how does this piece of information help me prove or disprove this dispute?
* Once you decide its relevant, then check out the law to see what could exclude the evidence – exclusionary law
* **Key concepts**
	+ Relevancy (and materiality)
	+ Probative value 🡪 how much weight we are going to assign to it
	+ Prejudicial effect 🡪 takes into account potential misuses of that evidence, or ways that it may distort the fact finding mission (NOT that it will hurt your case)

## Relevance

* Logical relevance (Thayer)
	+ Evidence must be logically probative of a matter in issue to be admissible
	+ Is there a logical connection between that piece of data and what is being decided
	+ *Morris* and *Watson* – Thayer definition applied
	+ What we think is logically connected varies depending on the person, depending on your case
* Legal relevance (Wigmore)
	+ Evidence must be more than merely logically probative of a matter in issue to be admissible
	+ Found Thayer definition was too broad – logically plus rule

## Methods of Evidence

* Testimonial (oral) evidence
* Real evidence 🡪 things, documents, photographs, overlaps with the following 3
* Documentary evidence 🡪 records, things reduced to writing, some say photographs (but usually that’s accepted as real), originals of signed contracts
* Demonstrative evidence 🡪 reconstructions in court, models (physically or on a computer), trying certain types of clothing on (OJ and the glove)
* Electronic evidence 🡪 regulated by statute, computer generated or computer stored, print outs from those systems, whether or not its reliable will depend on the computer system that created, cellphone records, social media accounts

## How Evidence is Entered

* Direct evidence 🡪 from witnesses, no inferences drawn, credibility and reliability is big
* Circumstantial evidence 🡪 lots of problems in law of evidence arise here, not direct evidence, in order to make a conclusion that it proves a fact in issue you have to make *at least one inference*,
	+ E.g. 🡪 DNA, the probability that this crime was committed by another is 1/1,000,00,000, proves that the accused was present at the crime scene, I have to infer that the science is reliable and the person was there and therefore did the crime (same thing with finger print)
	+ How people behave 🡪 Solomon and two women come to him saying a baby is theirs – he said okay, ill kill the child – one woman said no give it to the other woman, King Solomon said its your baby because he made the generalization that the mother would want the baby to live no matter what, he made a generalization on how people behave
	+ Direct evidence on how a person behaves can be weaker, than circumstantial evidence such as DNA and fingerprint – the nature of the evidence does not tell you much about the strength/probative value of the evidence

## Analysis and Use of Evidence

* Substantive admissibility 🡪 proves substantive points of the case
* Impeachment 🡪 not directly relevant (does not help me decide a particular fact in the case), helps me decide if a witness is believable
* Permissible/impermissible uses & limiting instructions 🡪 what you should admit, how you should use it (substantive vs impeachment), and how much it should be weighed
* Admissibility/ weight 🡪 relevance is about is it admissible, subject to exclusionary rules, once it is admissible what can we do it, what probative value does it have, weight and probative value determines what *you do with it* once its admitted

## Admissibility vs. Weight

* Admissibility – whether a piece of evidence *can* be considered by the trier of fact
* Weight – the significance that is accorded to and admissible piece of evidence by the trier of fact
* “Some, none or all of the witness’ evidence”

## Procedure & *Voir Dire*

* Usually determined by the trial judge on a *voir dire* (trial within a trial)
	+ Small trial that focused on whether one particular piece of evidence will be admitted – decided by the trial of law, not the trier of fact
	+ Evidence admitted on *voir dire*, is not necessarily admitted in the larger trial
* Ruling may be made after hearing the proposed evidence, agreement of counsel as to the proposed evidence, or counsel’s summary of the proposed evidence

## Varying Levels of Application

* Primary focus – criminal and civil (jury/bench) trials
* Other areas – rules may be relaxed and inapplicable (to varying extents)
* Even when the rules are relaxed or inapplicable, law of evidence overall remains a relevant concern
* Cheshire cat 🡪 importance of context
	+ The full cat, or just the grin – is the cat fully there, or is it just the cat’s grin…
	+ Full application of the law of evidence in a context and a muted application of it in various other contexts

## Factors to Consider for Application

* General nature of the tribunal
* Specific function being exercised
	+ Bail hearing and the application of evidence law is different than a criminal trial
		- Asking different questions: is this person a danger to society and should not released? Risk of flight? Harm to the community? Can use hearsay, prior conviction of the accused, character evidence at bail hearing
		- Not used a criminal trial because the focus is on “did this person commit this crime”
* Rules of evidence that apply at sentencing hearing – not focused on guilty or not guilty – rules of heresay relaxed at sentencing hearing, often at sentencing evidence focuses on counsel’s submissions
* Specific issue being addressed
* Constituting and other statutes

## *Minister of National Revenue v Grand Chief Michael Mitchell (Kanentakeron) (2001, SCC) 🡪 rules of evidence are flexible; oral histories are admissible if “useful and reasonably reliable”*

* Facts 🡪 Aboriginal rights claim. Trading of goods between Mohawk and First Nations.
* Issue 🡪 What evidence is permitted to show pre-contact?
* Held 🡪 No aboriginal right. TJ erred in finding the evidence sufficient to establish an aboriginal claim (not enough pre-contact trans-boundary trading, therefore no valid aboriginal rights claim)
* Reasoning
	+ Rules of evidence must be applied flexibly, to align with the inherent difficulties posed by aboriginal claims. Such claimants must demonstrate features of pre-contact society in the absence of written records; oral histories may be used as evidence.
	+ **Oral histories are admissible as evidence where they are both useful and reasonable reliable**, subject always to the exclusionary discretion of the TJ. Laws of evidence must ensure that the aboriginal perspective is given due weight but consciousness of the special nature of aboriginal claims does not negate general principles governing evidence.
	+ Still maintain BOP standard. Evidence, such as oral histories, treaties or artefacts, must show a connection that is persuasive on the BOP to establish pre-contact customs for an aboriginal claim.

## *R v Morris (SCC, 1983) 🡪 do not confuse admissibility with weight of evidence; relevance is the test and probative value is separate from relevance (and analyzed in regards to prejudicial affect)*

* Facts 🡪 Man accused of conspiracy to import and traffic heroin from Hong Kong. TJ admitted newspaper clipping about heroin trade in Pakistan as evidence. Appellant appealed.
* Issue 🡪 is the newspaper clipping admissible?
* Held 🡪 admissible –appeal denied
* Reasoning:
	+ “Still relevant, could show intent. Similar to a list of banks found in the house of a man who is charged with bank robbery. **Do not confuse admissibility of evidence with the weight of the evidence.**
	+ Obviously a newspaper article on heroin trade in Hong Kong would have greater weight than the one found about Pakistan. But these are differences in degree, not in kind. And we all admit that if it was a Hong Kong article it would be admitted. **Weight to be given to evidence is for the trier of fact** **– subject to TJ to exclude evidence where value is minimal and may have prejudicial effect** (*Wray*). In this case, TJ did not think evidence should be excluded, and we defer to the TJ’s discretion.
* Reasoning: Dissent
	+ Evidence is not admissible if its only purpose is to prove that the accused is the type of man who is more likely to commit a crime of the kind he is charged. Thayer’s statement on evidence:
		- (1) must be logically probative of a required element, and
		- (2) unless a clear ground of policy or law excludes it (judge’s discretion: if its too remote of a connection, prejudicial to the accused, impolitic, etc).
	+ Compare probative value and prejudicial effect – this is because jurors will likely find it more relevant than it is. If the article was about Hong Kong or Canada’s custom laws, it would have been relevant to proving accused’s participation in conspiracy. BUT its about Pakistan, therefore its sole relevancy is to the accused’s disposition (persons who are traffickers are more likely to keep such info than those who are not, and a person who traffics is more likely to have committee the alleged offence than a person who does not).

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| Types of Evidence |

# Types of Evidence

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| Testimonial/Oral Evidence |

## Testimonial/Oral Evidence

* Proof of facts is normally accomplished through the oral testimony of witnesses
* Often when dealing with documents or real evidence you require a witness to authenticate that evidence – give necessary background facts to accept that piece of evidence

### Order of Questioning Witnesses

* Proponent’s Case
	+ Examination in chief
	+ Cross examination
	+ Re-examination – limited right, not a right to ask again all of the questions you asked previously, intended for a narrow purpose
	+ Then close your case
* Responding Party’s Case
	+ As above
* Reply
	+ Things you could not have thought about when you started and finished your case
	+ Rule against splitting your case
	+ Presumption in all proceedings is as the proponent of a case you will put your best evidence forth – you cannot ambush at the end

### Purposes of Examination in Chief

* Build or support own case 🡪 carefully constructed argument with relevant facts that come through
* Weaken opponent’s case 🡪 think about what the defence is going to argue. If you know they are going to argue self defence, prepare for it
* Strengthen/weaken credibility of witnesses
	+ E.g. ask if they had anything to drink when they gave statement
	+ E.g. ask how their eye sight is if it’s an eye witness
* NOTE 🡪 if your question does not help with any of these above points, then why ask the question?

### No Leading Questions

* Primary rule in examination in chief… why?
	+ Presumed bias for the party who is calling the witness
	+ Calling party’s knowledge
	+ Suggestibility of witnesses

### Types of Leading Questions

* Questions that suggest the answer
	+ Leading question 🡪 was the light red?
	+ Should ask 🡪 what colour was the light?
* Questions that presuppose a fact not testified to by the witness
	+ I.e. when did you stop beating your spouse? When there is no evidence of a beating in the evidence
* NOTE 🡪 often a “yes” or “no” answer is an indicator of leading question

### Exceptions to the General Rule

* Introductory matters
* Identifying persons, places or things
* Contradictory statements
* Complicated or technical matters
* Hostile or adverse witnesses, with leave of the court
	+ I.e. where your own witness will not cooperate you can request that the court allow you to treat them as hostile and it allows you to basically cross examine
* Necessary in the interests of justice
* Uncontroversial facts

### Purposes of Cross-Examination

* Undermine opponent’s case
* Support own party’s case
* Impeach the witness’ credibility

### Purposes of Re-Examination

* Clarify relevant testimony
* Rehabilitate the witness’ credibility

### Testimonial Factors 🡪 *narration, sincerity, memory, perception*

* Narration
	+ Witness’ ability to communicate what they perceived to the court
	+ Is there something (i.e. language, disability) that would hinder ability to testify in court and share narrative
* Sincerity
	+ Witness’ willingness to tell the truth
	+ Consideration –do I think the witness believes what they are saying is true or are they just telling me what I want to hear?
* Memory
	+ Witness’ ability to recall what they have perceived
	+ If it was a traumatic event it may affect their memory, lots of time passed
* Perception
	+ The witness’ ability to perceive accurately (see, hear, etc.) the events in question
	+ I.e. if witness was far away, bad eye sight, no lights in area, etc.
	+ Mostly background context you want to highlight so that you can prove witness could see what they saw

### Assessing Witnesses

* Key issues:
	+ Honesty of the witness
	+ Accuracy of his/her observations
	+ Reliability of his or her memory

### Contradictory Witnesses

* Not a credibility contest between the various witnesses
* Must assess the relative credibility of each witness, in the context of the overall evidence in the case
* Factors to consider:
	+ Testimony is consistent with the witness’ conduct before, during, and after the event 🡪 i.e. if witness says they were terrified and now they cannot walk down the street, yelled, etc.
	+ Inherent plausibility of the events stated by the witness
	+ Presence of plausible collateral details supporting the witness
	+ Absence or presence of corroboration
	+ Consistency with the other evidence
	+ Witness’ demeanor 🡪 relevant but do not over-emphasize its importance

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| Documents |

## Documents

### Proof of Documents

* Produce and identify the document
* Authenticate the document
	+ Author of document 🡪 get the author to identify the document in court
	+ Witness to its creation 🡪 i.e. Witness to will where the person has died
	+ Witness who attests to handwriting
	+ Comparison with genuine document
	+ Expert testimony
	+ Admission by opposing side
* Some documents are self-authenticating documents 🡪 if they have a confirmation sheet or are held by certain custodians (i.e. MOL docs)

### “Best Evidence Rule”

* Proof of contents of documents requires the original document, if available
* No longer a hard or fast rule in law –can rely on items other than original if you can convince the court that the original is not available

### Contents of Documents

* For example, business records
	+ Common law
	+ S. 30 CEA
	+ S. 35 EA

### Possible reasons to prefer documents to witnesses

* Contemporaneity of the documents
* Created before litigation was contemplated
* Intended use of the documents
* Steps taken to ensure accuracy

### Possible reasons to prefer witnesses to documents

* Trial safeguards – oath, in court, legal consequences
* Tested by cross-examination
* Lack of recognition of importance of document at time it was created
* Consistency with overall events

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| Real Evidence |

## Real Evidence

* Advantages/Disadvantages
	+ May be more effective since no intermediary
	+ Practical / safety concerns
	+ Difficulty fully reflecting in court record
	+ Maintaining items integrity
	+ Dependent 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
* It must accurately reflect the scene –has to be authentic but also should show what the eye sees (no weird lenses, no filters, no Photoshop, etc.)

#### R v Nikolovski (1996, SCC) 🡪 videotapes are admissible if they can be authenticated, no alterations, and of sufficient clarity/quality

* Facts 🡪 accused charged with robbing a convenience story –clerk described the robber. Crown introduced as evidence the videotape of the robbery recorded by the store security camera.
* Issue 🡪 is the security video admissible?
* Reasoning
	+ Trier of fact can look at the video and draw conclusions themselves – so videos are real evidence (just like witness testimony) and it can be relied on well because it is not as frail as a witness.
	+ Tape was authenticated by the store clerk – he testified it showed “all of the robbery”
	+ No alterations or changes
	+ It was of sufficient clarity and quality to be admitted

#### R v Andalib-Goortani (2014, ONSC) 🡪 photos that cannot be authenticated or confirmed as a fair and accurate representation are inadmissible

* Facts 🡪 police officer was charged with assault with a weapon for events at G20 Summit –alleged he struck a woman with a baton. An image was posted to a website that showed the woman as victim
* Issue 🡪 is the uploaded photograph admissible?
* Reasoning
	+ It could not be authenticated 🡪 anonymously uploaded, little metadata, evidence it had been “manipulated” to at least some degree
	+ Inability to confirm an “accurate and fair representation”

#### R v CB (2019, ONCA) 🡪 text messages that can be authenticated are admissible

* Issue 🡪 are the text messages admissible?
* Reasoning:
	+ Authenticated by DP – testified it was her number, she was operating the phone, explained the meaning of one of the texts, and the contents of the texts were consistent with events
	+ Integrity established under the functioning system presumption

### Items/Things

* Basic rules apply 🡪 relevance, exclusionary discretion
* Authenticated
	+ Verification on oath
	+ Chain of custody –prove its been in your possession and has not been altered, etc. The continuity of the item and the same as the item on day of occurrence. Just need to satisfy the judge –not beyond a reasonable doubt

### Non-things

* Taking a view of a thing or property 🡪 issue is the scene of the event probably changed since the occurrence of the crime
	+ Judicial discretion
	+ Requires proper record 🡪 what was actually seen? How much will be gathered? What is the value?
* Observation of a witness’ demeanor or appearance
* “Informal” evidence
* No admissibility test

### Demonstrative Aids

* Terminology includes:
	+ “Demonstrative evidence”
	+ “Illustrative evidence”
	+ “Evidential or testimonial aid”
* Purpose of the evidence
	+ Illustrate/demonstrate, summarize, and/or explain the primary facts so those facts can be more easily understood / remembered
* Examples:
	+ Anatomical models / medical diagrams / treatment charts
	+ 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 (e.g. “day in the life” videos)
	+ Video re-enactments or computer reconstructions of “past events”
	+ In-court demonstrations

#### Advantages of demonstrative evidence

* Powerful, and increasingly prevalent, form of “evidence” or “evidential aid”
* Visual (rather than oral), simplified (rather than complex), vivid and engaging (rather than dry and boring), transportative (rather than static), unusual (rather than routine)…

#### Disadvantages of demonstrative evidence

* Risk of being misleading and/or overvalued by trier of fact – too simplified, vivid, engaging, transportative, unusual
* Unequal access to resources – favours big pocket and government litigants
* Too time-consuming? – Not “evidence” per se, but only “aids” to understanding the “real” evidence
* Too difficult to “test” through cross-examination (particularly if contested facts and unequal resources)

#### Test for admissibility

* Material and relevant
* *Accurate* representation
* *Reasonably necessary* to illustrate or explain the witness’ evidence
* *No risk of causing unfair* prejudicial to the opposing side

#### Laying the Foundation

* Relevance
* Mode of preparation
* Authenticity (accurate depiction)
* Proposed us 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

#### Courtroom Experiments

* Discretion of judge
* Confusion and delay
* Inability to “record” for appellate review
* Inability to sufficiently replicate the original occurrence
* Example 🡪 OJ Simpson Glove (“if the glove doesn’t fit you must acquit”)

#### R v MacDonald (2000, ONCA) 🡪 re-enactments can be misleading due to factual inaccuracies and reflect only one side’s theory of the case

* Issue 🡪 is the video re-enactment admissible?
* Reasoning:
	+ Relevant as is sought to portray the incident underlying the charges against MacDonald
	+ But 🡪 misleading because of factual inaccuracies
	+ And 🡪 one-sided as reflected only the Crown’s theory

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| Electronic Evidence |

## Electronic Evidence

### CEA s. 31.8 🡪 Rule for electronic documents

* 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 (emphasis added).

### CEA ss. 31.1-31.4 🡪 Admissibility

* Two requirements:
	+ 1) Authenticity of document
	+ 2) Best evidence rule

### CEA s. 31.1 🡪 Authenticity

* Low standard to meet and easy to satisfy
* “Evidence capable of showing” the document is what it is purported to be
* Disputes about genuineness of the document are for the ultimate trier of fact

### CEA ss. 31.2-31.4 🡪 Best Evidence

1. Proof of the integrity of the document system that recorded or stored 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.
3. 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)).

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| Relevance and Fact Finding |

# Relevance and Fact-Finding

## Relevance

* Based on human experience, common sense and logic
* Question – does the existence of “Fact A” make the existence (or nonexistence) 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

###  “Direct” or “Circumstantial” Evidence

* Direct Evidence
	+ Direct evidence of a fact is always relevant
	+ E.g. 🡪 an eyewitness 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.”

### 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 way, or because more than one inference can be drawn from them
	+ Can be a weak inference –does not need to always be true but you can draw an inference and it is up to trier of fact to decide weight of it
	+ Can be conflicting interpretations

### Assessed in Context

* “Relevancy of evidence must be assessed in the context of the other evidence in the case and the position 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
	+ PV = estimate of how significant the evidence is, if properly used
	+ Weight = significance of the evidence, as ultimately assessed by the trier of fact
* 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

### Basic Considerations

* Source of evidence – first 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 its consistency with the probabilities that surround the currently existing conditions
* How harmonious is it with the probabilities a practical and informed person would readily recognize as reasonable in the circumstances

## Principles of Fact-Finding

1. Quality, not quantity
2. No evidentiary hierarchy
3. Some evidence must exist to support a factual finding
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
6. Findings of fact must be made on all essential matters
7. Rejected evidence has no evidentiary value
8. Finding that a party has fabricated evidence can be used as evidence against that party 🡪 but must be able to prove it
9. Findings of fact can be based on an assessment of credibility alone 🡪 he said, she said circumstances
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 Morris (SCC, 1983 ) 🡪 relevant evidence application*

* Facts 🡪 charged with conspiracy to import heroin from Hong Kong. Young arrested in 1979 at airport after arriving from Hong Kong with a body-pack of heroin. Young & Morris had telephone calls and a meeting with each other beforehand. Morris had a news clipping in his apartment relating to the heroin trade in Pakistan written sometime in 1977
* Issue 🡪 Why was the evidence of the news clipping relevant?
* Held 🡪 Majority – it’s not direct evidence, but its circumstantial
* Reasoning Process
	+ Persons who import heroin are more likely to keep information about the sources and movement patterns of heroin than those who do not
	+ Persons who keep such information are therefore more likely to be importers than people who do not
	+ Fact that Morris kept the clipping therefore made it more likely than it would otherwise be that he had been involved in importing the heroin
	+ Note 🡪 that the probative value/weight might be quite low because the clipping dealt with Pakistan heroin

## *R v Watson (ONCA, 1996) 🡪 relevant evidence application*

* Facts 🡪 Watson was charged with second-degree murder. Mair was a good friend of the deceased and saw him regularly including the day before his death. Mair told the police:
	+ “ . . . I've never seen any guns but [the deceased] had one with him all the time. The gun … was a 9 millimetre or something and he always carried it on him. It was always on his left side. It was his dog -- you know like a credit card. He never left home without it. He never took it out -- never let anyone touch it, it wasn't in a holster just inside his pants.
* Issues
	+ Does the fact the deceased always carried a gun make it more likely that he was in possession of a gun when shot?
	+ Does the fact 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?
* Crown’s Position
	+ W, C & H went together 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 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
* Reasoning
	+ Issue One 🡪 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 s/he habitually did in that type of situation.
	+ Issue two 🡪 Involves a “chain of inferences” to make a determination.
		- Does X + X make it less likely that Watson participated in a plan to kill or harm the deceased?
	+ **Battle of the experts**
		- Crown expert said 7 shots fired & bullets in D came from different gun than bullet in C
		- Defence expert said 5 shots
	+ **Linked Inferences**
		- If D had the gun in his possession at the time of the shooting, it is then possible that he used the gun and that the only individuals who fired shots were H & D
		- If the shooting was a result of a spontaneous confrontation between H & D, it is less likely that there was a plan afoot involving W to kill the deceased

## *R v White (2011, SCC) 🡪 relevant evidence can support a logical inference of guilt with respect to a specific offence*

* Facts 🡪 Second degree murder charge involving a gun – Difference between manslaughter and second degree murder – intent was what mattered
* Why was the manner of White’s flight relevant in this case?
	+ An accused conduct after an offence has occurred is a form of circumstantial evidence and *may* in appropriate cases support an inference of guilty
	+ Other types of after the fact conduct: flight from jurisdiction, resisting arrest, failure to appear at atrial, acts of concealment, attempt to commit suicide, etc
	+ After the fact evidence – what accused’s do after the offence and what conclusions you can draw from that evidence – form of circumstantial evidence
* The reasoning process
	+ Post offence conduct 🡪 consciousness of guilt 🡪 consciousness of guilt concerning the specific offence in issue 🡪 actual guilt on the offence in issue
* Analytical steps
	+ 1) Identify the issue to which the evidence is said to relate
	+ 2) Determine if the evidence logically supports an inference of guilty with respect to the specific offence rather than another offence

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| Example #1 🡪 *Stop Sign** Facts 🡪 The plaintiff was driving along a road in township A. He entered into an intersection without stopping and got into an accident. The plaintiff had failed to notice the stop sign. He sued the township for negligence in placing the stop sign for the intersection 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 had moved the stop sign and then no more accidents had occurred. Was the evidence admissible?
* Issue 🡪 Whether the placement of the stop sign made it difficult to see or easy to overlook by the traffic meant to serve?
* 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 was re-located
* The reasoning process:
	+ A number of accidents occurred at the intersection when the stop sign was in its original spot.
	+ No accidents occurred at the intersection after the stop sign was moved to its new location.
	+ It can be reasonably inferred from this that the stop sign was less visible in its pre-accident location, compared to its current location.
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| Example #2 🡪 *The Counterfeit Problem** Facts 🡪 A is being prosecuted for passing counterfeit money. A admits 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 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. A lit a cigar with a $20 bill at the same time he is charged with passing counterfeit money
* Issue
	+ Is W’s evidence admissible?
	+ Did A know the $20 bill was counterfeit?
* The Reasoning Process
	+ $20 is a reasonable amount of money and, as a matter of logic and common sense, 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 a fake bill.
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| Example #3🡪 *The Promissory Note** Facts 🡪 P sues D for repayment of a promissory note. D denies that he owes P any money, alleging that the note is a forgery. P calls several witnesses who testify that the handwriting on the note is D's. P also wants to call W to testify that D asked W to loan him money both before and after the date of the note. W will testify that D asked him for a loan both before and after the date on the promissory note
* Issue:
	+ Should W’s evidence be admissible?
	+ Did D sign the promissory note?
* Reasoning Process
	+ People who need to borrow money are more likely than those who do not need to borrow money to in fact borrow it.
	+ W will testify D asked to borrow money from him, which is evidence D needed to borrow money and was familiar with the process of borrowing money from others.
	+ It can reasonably be inferred that D is more likely than others about whom we know nothing to have borrowed money.
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| Example #4🡪 *Hit Pedestrian** Facts 🡪 B hit a pedestrian with his car and is being sued for the injuries caused. The issue is whether B stopped at the stop sign. At trial, P proposes 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 heavy traffic. P also proposes to have W2 testify that he is familiar with B's reputation for driving and that his reputation is that of a reckless daredevil. Finally, P offers proposes to have W3 testify that he worked at a gas station on the corner 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
* Issue
	+ Is the evidence of W1, W2 and/or W3 admissible? Why or why not?
	+ Did B stop at the stop sign?
* Relevant data:
	+ W1 🡪 B drove the wrong way down a one-way street, B blow his horn in a hospital quiet zone, B once steered with his feet in heavy traffic
	+ W2 🡪 B's reputation as a driver is a reckless daredevil
	+ W3 🡪 Works at gas station on the corner where the incident occurred, knows B's car is a standard because serviced it, B never stopped at intersection –always went through it without downshifting
* Reasoning Process
	+ W1 🡪 wide variety of behaviour seen by one person implying bad or reckless driving in different situations
	+ W2 🡪 general reputation not backed by any specific incidents of bad driving behaviour
	+ W3 🡪 bad driving conduct specific to this particular fact situation
		- W3's testimony concerns "habitual'' behaviour to be admitted as evidence of habit
		- Testimony shows B invariably went through the intersection without stopping, from which one could reasonably infer that on this occasion B also did not stop
* NOTE 🡪 all three may be admitted but it is likely W1 and W2’s (especially W2) will be given little weight because it may not be a strong enough inference. Prejudicial impact may be a factor
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| Probative Value and Prejudicial Effect |

# Probative Value and Prejudicial Effect

* General rule is that relevant evidence is admissible but it is excluded if it falls within an exclusionary principle
* Probative value vs. weight
	+ PV = estimate of how significant the evidence is, if properly used
	+ 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?
	+ Mostly a preliminary judgment –could the jury make use of it? Is this credible?

### Exclusionary Rules Rationales

* Distortion of the fact-finding process
* Trial efficiency
* Other societal values
* Incompatibility with the trial process

### Exclusionary Discretion

* Trial judges have a discretion to exclude otherwise admissible evidence based on an assessment of the probative value of the evidence compared to its prejudicial effect
	+ Assessment of probative value here –this is first part of equation
	+ Must decide PV then the prejudicial effect is analyzed

## 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

### Five Main Forms of Prejudice

1. Arouse prejudice, hostility, sympathy
2. Create a side issue that will unduly distract the jury from the main issue in the case
3. Consume an undue amount of time
4. Unfairly surprise the opponent
5. Assume the function of the jury

### 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.”

### Factors to Consider in Assessing Prejudicial Effect

* The extent to which the potential prejudice is already present in the trial because of other evidence
* The mode of trial in a case
	+ Jury trials are of greater concern because they are not experts in working through the evidence
	+ In judge alone trials this is not as much fo a concern because they are experts
* The likelihood that the potential prejudice will occur
* The use of limiting instructions

### Overcoming Prejudice by Limiting Instructions

* Factors to consider:
	+ Limiting instructions from the trial judge not to use evidence in a certain way may remove some or all of the potential prejudice
	+ The likelihood the jury will understand the instruction (in light of how complicated it has to be and how nuanced the distinction being drawn is)
	+ 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

* A finding that probative value is outweighed by prejudicial effect does not necessarily result in the complete exclusion of the evidence
* A judge can edit the evidence so as to exclude (some) prejudicial aspects and thereby tip the scales in favour of admission
	+ E.g. criminal record –can exclude some of the criminal record
	+ E.g. say expert can testify on points 1, 2 and 3 but not 4 because it is too prejudicial
	+ E.g. can show part of the video evidence but not all

### Applicable Tests *(Seaboyer)*

* Crown’s Evidence 🡪 probative value of the evidence is outweighed by its prejudicial effect
* Defence’s evidence 🡪 probative value of the evidence is substantially outweighed by its prejudicial effect
	+ Higher standard to exclude defence’s evidence because they should be given the highest possible chance to prove innocence
	+ Must be substantial in the case to exclude defence evidence

### Applicable Tests *(Anderson)*

* Civil cases:
	+ Crown standard used -Probative value of the evidence is outweighed by its prejudicial effect
	+ Nb. Precise scope of the discretion is not well defined in civil cases

### Constitutional Rules *(Seaboyer)*

* 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

NOTE 🡪 crown, defence and civil have different standards for pv

### Summary of Steps:

1. Is the evidence relevant?
2. Is the evidence subject to an exclusionary rule?
3. Should the trier of law exercise her discretion to reject the evidence?
4. What weight should the trier of fact assign to the evidence?

### *R v Seaboyer; R v Gayme (1991, SCC) and R v Golfinch (2019, SCC) 🡪 Evidence of sexual conduct and reputation cannot be deemed logically probative of either the complainant’s credibility or consent –prejudice too great*

* Fact 🡪 sexual assault cases. Section 276 and 277, rape shield, provisions used to exclude evidence of prior and subsequent sexual history.
	+ Seaboyer 🡪 S wanted to show history of injuries to show that he had caused the injuries through sex. S wanted to introduce other sexual history with injuries to show that it was not him. S wanted to show other acts of sexual intercourse of the complainant that may have caused the bruises and other injuries put in evidence by the Crown.
	+ Gayme 🡪 wanted to show other sexual history to show there was consent. Gayme wanted to show that prior and subsequent sexual conduct of the complainant to show there was no assault and she was the aggressor. It was consensual sex started by her.
	+ Goldfinch 🡪 Friends with benefits. You cannot understand what occurred that night if you don’t know what our relationship was. We were friends with benefits
* Held 🡪 s. 276 offends PFJs and is not saved under s. 1. S. 277 does not. Both appeals denied. Constitutional exemption not applied. Respect TJ decision.
* Reasoning 🡪 S. 277 excludes evidence of the complainant’s sexual reputation for the purpose of challenging or supporting the credibility of the complainant. Section 276 has the potential to exclude evidence which is relevant to the defence and whose probative value is not substantially outweighed by prejudice. It’s a blanket exclusion subject to 3 exceptions: rebuttal evidence, evidence going to identity, and evidence relating to consent to sexual activity on the same occasion as the trial incident. Two flaws in S. 276. Four principles:
1. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct (a) more likely to have consented to the sexual conduct at issue in the trial; or (b) less worthy of belief as a witness
2. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of an unfair prejudice flowing from the evidence
3. Before evidence of consensual sexual conduct on the part of a victim is received it must be established on a voir dire (which may be held in camera) by affidavit or the testimony of the accused or third parties that the proposed use of the evidence of other sexual conduct is legitimate
4. Where evidence that the complainant has engaged I sexual conduct on other occasions is admitted on a jury trial, the judge should warn the jury against inferring from the evidence of the conduct itself, either that the complainant might have consented to the act alleged, or that the complainant is less worthy of credit.

Note 🡪 The striking down of s. 276 does not revive old common law rule, which condoned invalid inferences from sexual conduct. Evidence of sexual conduct and reputation cannot be deemed logically probative of either the complainant’s credibility or consent.

Class Notes 🡪 Law governing sexual assault has changed since then. Court upheld s. 277 constitutionally valid but not s. 276. Difference between s. 277 and s. 276

* s. 277 says this evidence is not admissible for this purpose ( sexual history reputation evidence is not allowed for the purpose of supporting or challenging the credibility of an accused – does to tell you whether they are more likely to be a liar – prejudicial and irrelevant). It excludes something the law of evidence already excludes. S. 277 was necessary because the common law did not assume it. “There is no logical or practical link between a woman’s sexual reputation and whether she is a truthful witness”. If you have another purpose to articulate for why the evidence is needed, it does not exclude it (could be excluded by other rules of exclusion).
* Section 276 did not speak to purpose. It was a blanket prohibition on sexual history. Two fatal flaws:
	+ 1) Did not focus on the purpose for which the evidence was being tendered,
	+ 2) Relied on a “pigeon hole” approach – the evidence was in or out depending on whether it fit within an exception.
	+ You could exclude evidence that would be probative and that was not overly prejudicial
	+ Court reformulated s. 276
		- The actual evil is the misuse of other sexual activity evidence to support two inferences (the “twin myths” that are not reasonable
			* If a woman has had other sexual activity with either the accused or other persons:
				+ They are more likely to have consented
				+ Or an unreliable or untruthful witness
			* THIS IS NOT ALLOWED
* Other consensual sexual activity if the only purpose for trying to admit it is for one of those twin myths BUT if there is another valid reason, in the case, to admit the evidence you can admit it (subject to PV and PE)
	+ Might consider privacy and integrity exclusions
* Other consensual activity is potentially admissible for other purposes if:
	+ PV on an issue
	+ If PV is substantially outweighed by unfair prejudice
* Illustrative examples – may not be relevant today as we understand consent and sexual history myths

**Importance of the Cases**

* 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

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| Corbett and Prior Convictions |

## *Corbett* and Prior Convictions

* Section 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.
	+ (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.
* Section 12 tells us about prior convictions being admissible and may be proved if not answered to or denied
	+ Proof =showing certificate relates to person –can do so by omission or calling the officer who processed the accused, etc.

### *R v Corbett (1988, SCC) 🡪 some prior convictions are admissible to assess credibility –depends on probative value and context (i.e. crimes of dishonesty more probative than others)*

* Charge 🡪 first degree murder of a drug trade associate
* Defence’s position 🡪 not involved; crown’s identification witnesses are lying
* Key issue
	+ Credibility of Corbett and the Crown witnesses
	+ Why are prior convictions relevant to credibility?
* Record of Corbett 🡪 armed robbery, escaping custody, theft, B&E, non-capital murder
* Reasoning:
	+ Accused who testifies “take his character with him” on the stand
	+ Demonstrates prior disregard for the law and, a person who has disregarded the law before is more likely than a person who has not broken the law before to do so again, including by lying in court
	+ 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 as depends on exact offence in the category and specific circumstances of the case

### Importance of Corbett

* Why are prior convictions relevant to credibility? Are all prior convictions relevant to credibility?
	+ CED relates only to convictions for the use of credibility not similar fact evidence
	+ These are used to undermine the basis of an individual because a person who committed a prior offence shows disregard for the law and rules and if they have shown this, then they are untrustworthy person more likely to lie in court
	+ Accused who testifies takes his “character with him” on the stand
		- Demonstrates prior disregard for the law and a person who has disregarded the law before is more likely than a person who has not broken the law before to do so again, included by lying in court
	+ In theory all prior convictions are admissible to assess credibility, but some are more probative than others
		- E.g. crimes of direct dishonesty (theft, fraud, perjury, obstruction of justice) vs. crimes of violence vs. motor vehicle offences
		- But cannot truly pigeonhole as depends on exact offence category and circumstances of offence
		- Weight of the inference depends on the type of record
* What is the potential prejudice associated with prior convictions?
	+ Risk of misuse –improper reasoning
		- Accused committed crime once before, therefor did it again..
		- Accused is a criminal, thus a bad person in general, thus committed the crime (or should be punished even if he did not)
	+ But if excluded, creates risk of distorted assessments of credibility
* Does s. 12 CEA allow a trial judge to exclude some or all of an accused’s prior convictions? If so, why, and on what basis?
	+ Not all needs to be admitted –some can be excluded
	+ Presumption is when someone has a criminal record that the entire record is admissible
	+ Court has discretion, and sometimes this is agreed upon by the parties, to exclude parts of it
	+ Why discretion allowed?
		- Legislation allows for it (saying “may” instead of “shall) and is constitutionally required
		- Test 🡪 usual probative value vs. prejudicial effect analysis

### Factors to look at in deciding whether to exclude prior conviction(s)

* Nature of conviction
* Similarity of the prior conviction to present charge 🡪 risk = greater if similar to current charge (no similar fact evidence allowed)
* Remoteness or nearness of the prior conviction to present charge 🡪 remote in time
* Fairness to the prosecution (i.e. case is a credibility contest)
* Nature of the record –length of record, number of convictions, etc.

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| Potvin and Prior Testimony |

## 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

### Full Opportunity to Testify

* What does this mean? 🡪 Must be signed before the justice that it was purported to be taken – only allows for admittance of official transcripts

### *R v Potvin 🡪 to allow prior testimony the person must refuse or be unable to testify but must have had full opportunity to cross examine (i.e. preliminary hearing)*

* Why was the prior testimony of Deschenes admissible at P’s trial?
	+ D refused to testify, but he was physically there
	+ Necessity requirement satisfied 🡪 must be necessary that the witness who had the relevant info is no longer available to testify
* Did he have the full opportunity to be cross-examined?
	+ P had a full opportunity to cross-examine at the preliminary hearing
	+ This argument depends on technical knowledge of what preliminary hearings are in law – its largely about procedure, not evidence – they are usually used as avenues of charter applications or poke holes in prosecutor’s case (don’t want to tip your hat to the defense)
	+ The issue is not whether you asked all the questions you wanted to, but whether you had the opportunity to cross-examine – whether you take it or not is not relevant
	+ If you decide for tactical reasons not to does not matter
	+ The right of confrontation/cross-examine is a PFJ but it does not need to be satisfied at trial
* If you cannot use this section you have to rely on the hearsay exception
* Likely not a fully opportunity to cross examine a witness if:
	+ Accused was deprived of the right to counsel
	+ Court improperly restricted defence counsel’s cross-examination
	+ Judge did not allow you to ask certain questions, and was wrong
* Discretion includes situations where:
	+ The testimony was obtained in a manner which is unfair to the accused
	+ The prosecution knew that witness would not be available and failed to tell the accused that
	+ Admission of the (fairly obtained) testimony at the trial would not be fair to the accused
	+ Classic PV and PE analysis
* Nb. TJ should (usually) instruct jury they have not had the benefit of observing the witness given the testimony
	+ We do consider demeanor evidence to be relevant – reading a transcript does not have the same effect of oral testimony (non-verbal cues)
	+ Could be a ground of appeal if you don’t do it – but court could say the failure was not prejudicial

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| Example 🡪 Surgically Repaired Face* Facts 🡪 The plaintiff suffered factures of his face and cheekbone and various lacerations as a result of a motor vehicle damage. To treat the fractures of the jaw, the surgeon inserted Kirschner wires. These wires protruded a few inches from the plaintiff’s left check and were capped with corks. They were removed about four weeks after the surgery.
	+ At trial, the plaintiff seeks to admit two photographs of the plaintiff’s face that were taken immediately after his dismissal from hospital showing his injuries and the wires
* Relevant data 🡪 Relevant data – photographs of plaintiff after surgery showing his repaired face
* Issue 🡪 are the photographs admissible at trial?
	+ Need to prove *damages* and *causation*
	+ Is it likely that there will be a dispute that he was *actually* injured – no, that will be accepted
	+ So need to show the extent of damages that was suffered – show injuries and after effect
	+ Could show as real evidence and demonstrative aid for expert witnesses
* Relevance of photos
	+ Demonstrate extent of injuries suffered by Plf and after effect
	+ Assist the “expert” in explaining the repairs undertaken
	+ Any prejudicial effect
	+ Are these photos too gruesome – upset the jury, inflame the jury against the defendant
	+ Would it work? Not likely, it is at the heart of the issue – and are they really that gruesome (what is on TV and in the news)
	+ Assess gruesome in a social media world
	+ Not too gruesome and they accurately reflect what occurred – no tendency to distort and not inflaming
* Admissible
	+ Relevant to quantum of damages, explaining extent and aftermath
	+ Accurately reflects plf face post surgery
	+ Not unfair or misleading
	+ Could be authenticated
	+ Not overly gruesome – worse on TV every day of the week
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| Example 🡪 A Wrongful Death* Facts 🡪 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 from the injury.
	+ The plaintiff wants to admit a colour 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 neck. No physical markings, wounds, defects or other bodily abnormalities are visible on the photo.
* Held 🡪 not admissible
* Reasoning
	+ Just shows that the boy is dead
	+ The fact that the boy is dead is not disputed –so its not relevant
	+ But also, incredibly inflammatory
	+ Not gruesome but likely incite sympathy
* Could be useful for showing damages or causation?
	+ No –does not show anything about injuries or damages, just shows his face
* Note
	+ Basically would make you feel sorry for him and it will incite the jury to sympathize
	+ If anything, would want pictures of the boy alive –about age and the potential that he had
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### Statistical Evidence

1. Courts may take into account 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

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| Competency and Compellability |

# Competency and Compellability

## Sources of the Law

* Common law
* Statutory law (CEA, EA )
* Charter (ss. 7, 11(c))

## General Rule

* Proof of facts is normally accomplished through the testimony of witnesses
	+ Facts directly observed by the witness
	+ Authenticity of documents, real evidence etc.

## Three Basic Issues

1. Whether the type of witness is legally able to testify at all?
2. Whether the type of witness can be forced to take the stand to testify?
3. Whether the specific witness is legally able to testify in the specific case before the court?

## Competency

* A person is competent to be a witness if he or she is qualified or capable of giving evidence.

### Two Types of Competency 🡪 1) categorical 2) factual

1. Status, class or categorical incompetency (most now abolished by statute)
2. Factual or “case-by-case” incompetency 🡪 e.g. CEA ss. 16, 16.1, EA ss. 18, 18.1

## Compellability

* A person is compellable to be a witness if he or she can be forced to testify through the court process.

### Possible Outcomes

1. General rule 🡪 Competent and compellable witness
2. Not a competent witness, so no issue of compellability
3. Rarely 🡪 Competent but not compellable witness

## Common Law Incompetency (old laws)

* Infancy
* Infamy (convicted felons)
* Insanity
* Accused and their spouses
* Interested persons (e.g. parties and their spouses)
* Disbelief in Supreme Being

## Statute

### CEA 🡪 section 3

* **S. 3** 🡪 a person is not incompetent to give evidence by reason of interest or crime.
	+ Interest 🡪 A person with an interest in the case is a competent and compellable witness for the Crown and defence.
	+ Crime 🡪 A person with a criminal record is a competent and compellable witness for the Crown and defence.

### CEA 🡪 sections 6 and 7

* **S. 6** 🡪 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** 🡪 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.

### CEA 🡪 section 8

* **S. 8(1)** 🡪 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 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.

## Parties and their Spouses

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

### Spouse of Accused 🡪 History

1. Common law 🡪 incompetent subject to matters affecting his or her “person, liberty or health” – competent to testify only when the crime went against themselves
2. Statute 🡪 competent for defence but not for in prosecution except in certain cases (ex. sexual violence to themselves or other persons, ex children)
3. Courts 🡪 narrowed the meaning of spouse and declined to extend it to common law spouses – irreconcilably separated spouses are no applicable to this exception

Note 🡪 there is no difference b/w federal and provincial position on spouse – they are all competent and compellable

### CEA 🡪 Accused and Spouse s. 4

* **S. 4 (1)** 🡪 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 defence, whether the person so charged is charged solely or jointly with any other person.
* **(2)** 🡪 No person is incompetent, or un-compellable, to testify for the prosecution by reason only that they are married to the accused.
	+ Really this means you are not incompetent or in-compellable for the prosecution simply because you are a spouse, there may be another reason why you are incompetent or in-compellable but its not because you are a spouse

### EA 🡪 s. 8

* **S. 8 (1)** 🡪 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 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.  R.S.O. 1990, c. E.23, s. 8 (1); 2005, c. 5, s. 25 (2).
* **(2)** 🡪 Without limiting the generality of subsection (1), a spouse may in an action give 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.  R.S.O. 1990, c. E.23, s. 8 (2); 2005, c. 5, s. 25 (3).

### Provincial Offences Act 🡪 s. 46(5)

* **s. 46(5)** 🡪 Despite section 8 of the Evidence Act, the defendant is not a compellable witness for the prosecution.

### Spouses: CEA vs. EA

* Note 🡪 general rule now applies
* Spouse is a competent and compellable witness for the prosecution and the defence
* Subject only to case-by-case competency challenge

## Accused

* A person charged with an offence is a competent witness only for the defence
* The non-compellability of the accused is constitutionally protected under Charter s. 11(c).

### Comment on the Failure of an Accused to Testify 🡪 CEA s. 4(6)

* **S. 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.”

### Scope –Judge and Crown

1. No “negative” comments except about alibi defences.
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.
2. “Positive” comments on client’s testimony vs. co-accused’s failure to testify is permissible.
3. “Negative” comments on co-accused’s failure to testify are not permissible.

## Parties

* 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 an adverse inference against a party who fails to call a witness (including testifying personally) in certain 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?

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| Oaths and Substitutes  |

# 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

## Statute

### CEA 🡪 section 13

* **S. 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.

### CEA 🡪 section 14

* **S. 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.
* **(2)** Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.

### EA 🡪 section 16

* **s. 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.

### EA 🡪 section 17

* **s. 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

## Ability to Swear or Affirm

* A person can give sworn testimony only if s/he understands 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 involved in taking an oath or affirmation, beyond the ordinary duty to tell the truth in normal social conduct
* 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

## Factual Incompetency (Case by case challenges)

### Testimony other than Oath or Affirmation

* Persons subject to an inquiry
	+ Persons over the age of 13 whose “mental capacity” is challenged (CEA s. 16) or whose “competence” is challenged (EA, s. 18)
	+ Persons who are under the age of 14 (CEA s. 16.1, EA 18.1)
* Challenge to proposed witness’ competency should be made when the witness is called to testify
* 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 one situation
	+ Person is not permitted to testify

### Mental Incapacity

#### CEA 🡪 section 16

* **S. 16(1)** 🡪 If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
	+ **(a)** Whether the person understands the nature of an oath or a solemn affirmation; and
	+ **(b)** Whether the person is able to communicate the evidence.
* **(2)** 🡪 A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
* **(3)** 🡪 A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.
* **(3.1) 🡪** A person referred to in subsection (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.
* **(4)** 🡪 A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.
* **(5)** 🡪 A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

#### Basic Process and Principles

1. Where a witness’ capacity is challenged, and the trial judge is satisfied that there is an issue as to capacity, the judge must hold an inquiry.
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:
	* The capacity to observe
	* The capacity to recollect, and
	* 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.

#### Conduct of the Inquiry

* 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
* Witness may not testify if, e.g., is in a fragile emotional state: Parrott SCC 2001
* Other witnesses may be called (family members, expert witnesses (e.g. psychiatrist) especially if s/he has personal and regular contact with witness

#### Capacity

* Focus is on the capacity to perceive, recollect and communicate about the offence in question
	+ Competency is about the general ability to do these things
* Types of questions:
	+ Capacity to perceive: what colour is your shirt? – tie it to a factual circumstance, use simple language
	+ Ability to recall: where were you born? Where do you go to school?
	+ Ability to communicate: being able to answer questions
* Not a high threshold – requires only a basic ability to perceive, remember, and communicate
	+ There is a presumption of capacity
	+ We want as much evidence as possible
	+ Any issue of capacity may go to the weight of their evidence rather than rejecting them based on incapacity
	+ Where there is a significant deficiency then they will be unable to testify based on incapacity
* Deficiencies in actual perception, recollection, communication of events goes to weight to be given testimony
* *Farley* – requires ability to different between what is imaginary and what is real
* Capacity to perceive means ability to perceive and to differentiate between it from the imaginary, input from others and/or subsequent formed beliefs
* Capacity to remember means ability to maintain one’s recollection and to differentiate it from input form others
* Capacity to communicate means the ability to understand questions and to respond to them in an intelligible way
	+ Too many “Idk” may mean incapacity
	+ Children and people with mental disabilities ability to comprehend time may be different than us – important to consider – really we want to make sure they can put things in some degree of chronology
* Focus is not on whether actually perceived, recalls or can communicate about the events in question

### Persons Under 14 Years

* Not allowing children created problems where children were victims of crimes and in family and civil cases where children were witnesses.
* Ontario does not completely reflect CEA, but close to it.

#### Basic Principles

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.

#### CEA 🡪 section 16.1

* **S. 16.1 (1)** 🡪 A person under fourteen years of age is presumed to have the capacity to testify.
* **(2)** 🡪 A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
* Notes: child witnesses do not swear, they just make a promise to tell the truth
* **(3) 🡪** The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
* **(4)** 🡪 A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
* **(5)** 🡪 If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
* Notes: you can’t ask abstract questions about truth, can only ask about the ability to understand and communicate
* **(6)** 🡪 The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.
* **(7)** 🡪 No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
* **(8)** 🡪 For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

**Notes on s. 16.1**

* Governs the testimony of witnesses under 14 years of age
* 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*
* Challenging party may only ask questions about the child’s ability to understand and respond to questions (or, per *DAI*, the ability to communicate the evidence)
* Questions as to the child’s understanding of the nature of a promise to tell the truth (or, presumably, an oath or solemn affirmation) are prohibited at the competency stage
* Child must promise to tell the truth, in one way or another
	+ Don’t have to use “do you promise to tell the truth” but rather a series of questions can convey that they do
	+ “are you telling the truth” ≠ a promise
* If the child does not promise, then it is grounds for appeal

#### EA 🡪 section 18.1

* **S. 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.
	+ Notes: goes back to appreciating the solemnity of the occasion and the need to tell the truth beyond the ordinary social conduct.
* **(2)** The court may admit the person’s evidence, if the person is able to communicate the evidence, 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
	+ Notes: main difference between subsection 2 and *CEA* forces them to understand truth in the abstract. Must know the difference between telling the truth and telling a lie. Because of that it does not preclude abstract questions. The usefulness of it may be questionable though.
* **(3)** If the court is of the opinion that the person’s evidence is sufficient reliable, the court has discretion to admit it, if the person is able to communicate the evidence, even if the person understands neither the nature of an oath or solemn affirmation nor what it means to tell the truth.
	+ Notes: there is not a lot of case regarding *sufficiently reliable*. Can they perceive, recall or communicate (consider what they require in the *CEA*). Can they distinguish fact from reality in a general sense, can they distinguish their memory from other people’s memories in a general sense. Ontario makes it a bit harder by requiring the actual understanding of *truth*, but then imports this easier standard regarding reliability that we see in the *CEA*.

#### 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
* Note, however: trial judge has discretion to allow a child to testify if the court is of the opinion that the child’s evidence is “sufficiently reliable”
	+ As counsel battle over weight, rather than competency – don’t waste court time and annoy the judge, only do a competency challenge if you really think there is an issue
	+ We tend to favour admitting the evidence and then assessing weight within the context of all the evidence
	+ You can ask broader questions at trial than during the competency inquiry

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| Examination of Witnesses |

# Examination of Witnesses

## Examination in Chief

* “Rule” against leading questions
	+ Test: question suggests the answer or presupposes a fact not given in evidence by the witness
	+ 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
	+ Caveat: no badgering or harassing witness
* Rule against splitting the case
	+ Applicant calls all of its evidence before closing case
	+ Purpose
		- Responding party is entitled to know the case to meet before calling evidence
		- Prevent unfair surprise, confusion, prejudice

## Cross Examination

* Relevant to the material issues
* Includes questions relevant to the credibility of a witness
* 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
	+ Examples
		- Irrelevant, argumentative, rude, overly repetitive or harassing questions
		- Vague, confusing or wordy questions
	+ Factors 🡪 age, knowledge, sophistication

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| Example 🡪 asking about previous record* Conversation:
	+ Q –Have you ever been convicted of a criminal offence?
	+ A –No
	+ Q –Yes you were, you were convicted of marijuana fifteen years ago and given an absolute discharge.
	+ A –I had forgotten about that
* Problem
	+ The criminal record must be relevant to the proceedings (i.e. fraud, crimes of dishonesty) and this is not how you prove a criminal record –also cannot deal with the sentence
 |

## 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”
	+ 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

* Purpose of re-opening
	+ Allow the applicant to adduce evidence that was not adduced 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

## Remember 🡪 Credibility two aspects

1. Is the witness a truthful person?
2. Is the witness telling the truth?

## Prior Inconsistent Statements

* General rule 🡪 Prior consistent statements of a witness are generally not admissible to enhance the witness’ credibility.
* Rationales for the rule
	+ Consistency vs. truthfulness
	+ Efficiency
	+ Hearsay if admitted for its truth
* Exceptions to the rule
	+ Recent fabrication
	+ Prior identification
	+ Recent complaint
	+ Narrative
	+ Statements by accused on arrest (in specific situations)
	+ Section 715.1 CC
	+ As circumstantial evidence

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| Rule in *Browne v Dunn* |

## Rule in *Browne v Dunn (1893, HL)*

* The Rule 🡪 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 trier of fact
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

### Remedial Options

* Trial judge has discretion to decide on the appropriate remedy.
* Options include one or more of:
	+ No remedy required.
	+ Allow the witness to be recalled.
	+ Instruct the 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) The witness who gave the contradictory evidence.
* Factors to consider:
	+ Seriousness of the breach
	+ Context in which the breach occurred
	+ Timing of the objection and the impact of any delay
	+ Positions of the objecting party and the offending party
	+ Impact on and availability of the witness to be recalled, and the practicalities of doing so
	+ Impact on the orderly and timely completion of the trial
	+ Type of trial (judge alone or jury)
	+ Adequacy of an instruction to correct the failure and preserve trial fairness

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| Collateral Fact Rule |

## Collateral Fact Rule

* The Rule 🡪 A witness’ answer to questions put on cross-examination concerning collateral facts is final and cannot be contradicted by extrinsic evidence.

### Rationales for the Rule

1. Economy of time
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 have 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), 1 Ex. 91

### 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)
* “It is obvious that there are two different groups of facts of 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)

### Recognized Exceptions

1. Bias, interest and corruption
	1. Bias =hostility or prejudice against the opponent personally or in favour of the proponent personally
	2. Interest =personal connection of some sort to a party or matter in the trial
	3. Corruption = willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony
2. Prior convictions
3. Prior inconsistent statements
4. Medical evidence relating to physical or mental incapacities
5. General reputation for veracity

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| Example 🡪 dangerous driving* Facts 🡪 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 the accused’s car went through the intersection. The Crown asked Sam in cross-examination whether the traffic signal was amber when the accused went through the intersection. Sam insisted the signal was green.
* Issue 🡪 Can the Crown call evidence in reply to prove that the traffic signal was amber?
* Reasoning
	+ Yes, Crown can call evidence to prove that traffic signal was amber.
	+ The colour of the traffic signal is a material issue in the case even though it is also an issue relevant to Sam’s credibility
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| Example 🡪 common law spouse* Facts 🡪 The witness, Jane, is asked during cross-examination if she is the common law spouse of the plaintiff. Jane denies any such relationship.
* Issue 🡪 Can the defendant call evidence to prove Jane is the plaintiff’s common law wife?
* Reasoning:
	+ Yes, the plaintiff 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.
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| Example 🡪 bribe* Facts 🡪 The witness, Spooner is asked during cross-examination if he had been offered a bribe. Spooner responded that he had not been offered a bribe.
* Issue 🡪 Can the Crown call evidence to prove Spooner had been offered a bribe?
* Reasoning:
	+ No, merely being offered a bribe says nothing about the credibility of the witness.
	+ The situation would be different if S had solicited or accepted a bribe as this would show bias
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| Example 🡪 capacity* Facts 🡪 The witness, Albert, is asked a series of questions in cross-examination 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 answers to prove the following:
	+ 1) Albert has a hearing problem?
	+ 2) His glasses were being repaired?
	+ 3) He could not have returning from the library because it was closed?
* Reasoning:
	+ Q1&2 – yes, can call evidence to contradict A and establish that A lacked the requisite capacity to observe, remember or recount.
	+ Q3 – 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.
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### “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.

### A Modern Rule?

* “When 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)

### 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)

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| Rehabilitating Witness |

## Rehabilitating Witness

* Methods
	+ Re-examination
	+ Reputation for veracity
	+ Expert testimony

### Present Memory Refreshed

* Witness may refresh his or her memory before or while testifying 🡪 given opportunity to review their statement before on the stand but can occur on the stand as well
* Witness may use any means that will rekindle his or her recollection
* Recollection is the evidence, not the stimulus used to refresh that memory (Fliss)
* Present Memory Refreshed Safeguards:
	+ Counsel must firs try to get the witness to recall through questioning without external aids (i.e. leading questions)
	+ 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

### Past Recollection Recorded Technique

* Different from present memory refreshed because they do not have any memory of it to be refreshed
* Witness who cannot remember the relevant events may testify from a record of his or her past recollection
* Record is the evidence, not the testimony

### Criteria 🡪 Fliss Decision for Past Recollection

* 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

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| Example 🡪 car accident license number* Facts 🡪 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.
* Reasoning:
	+ 1) Reliably recorded? – Written down by husband in day timer. Easier if police/other official under a duty to make accurate notes.
	+ 2) Sufficiently fresh and vivid? – Told husband the number a few minute after accident, which was likely an unusual occurrence in her life.
	+ 3) Confirmation of accuracy? – Did husband show witness the number and confirm it? Or read it back to her so she could verify it? No real evidence to show witness can confirm record accurately represents her knowledge at the time.
	+ 4) Original record? – Day timer appears to be available for use at the trial.
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| Enhancing Credibility |

## Enhancing Credibility

* General Rule 🡪 A party may not ask questions or adduce evidence for the sole purpose of bolstering the credibility of one of his or her own witnesses.

### Exceptions to Rule

* Expert evidence
* Reputation for veracity
* Prior consistent statements

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| Prior Consistent Statements |

### Prior Consistent Statements

* General Rule 🡪 Prior consistent statements of a witness are generally not admissible to enhance the witness’ credibility.

#### Rationales for the Rule

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

#### Exceptions to the Rule

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

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| Recent Fabrication |

### Recent Fabrication

* The exception stated 🡪 a prior consistent statement is admissible to rebut an allegation of recent fabrication.

#### 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 witnesses who have 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.

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| Impeaching Credibility |

## Impeaching Credibility

### Methods of Impeachment

* Reputation for Veracity
* Expert Evidence
* Prior Inconsistent Statements
* Prior Convictions

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| Prior Inconsistent Statements |

### Prior Inconsistent Statements

### 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 that are alleged to have made — if so, it is inconsistent.
2. Whether proof of the statement will assist trier of fact in assessing credibility without causing undue prejudice to the witness or the calling party.

### Relevant Provisions

* Canada Evidence Act
	+ Ss. 10-11 CEA – other side’s witnesses
	+ S. 9 CEA – your own witnesses
* Evidence Act
	+ Ss. 20-21 EA – other side’s witnesses
	+ S. 23 EA – your own witnesses

### CEA 🡪 Section 10

* **S. 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.

### EA 🡪 section 20

* **S. 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.

### CEA 🡪 section 11

* **S. 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.

### EA 🡪 section 21

* **S. 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.

### CEA 🡪 section 9(1)

* **S. 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, 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

### CEA 🡪 section 9(2)

* **S. 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.

### EA 🡪 section 23

* **S. 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.

### CEA 🡪 section 10(1)

* Statements in writing, reduced to writing, or recorded
* “Relative to the subject-matter of the case”
* Witness’s attention must be directed to the parts of the statement that will be used to contradict prior to proving the statement
* Judge may 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.
2. Confront the witness with the prior inconsistent statement.
3. Highlight the contradiction.
4. Confirm whether the witness made the statement and if s/he will adopt it.

### CEA 🡪 section 11

* Inconsistent oral statements
* “Relative to the subject-matter of the case”
* If not admitted, witness’s attention must be directed to the circumstances of the statement prior to proving the statement

## Impeachment of Own Witness at Common Law

* 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 or assist the opposing party

### CEA 🡪 s. 9(1)

* 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

### 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 unfavourable in the sense of opposite in position.” 🡪 Wawanesa Mutual Insurance Co. v. Hanes, [1961] O.R. 495 (C.A.)

### Procedure

1. Counsel advises the court s/he is bringing a s. 9(1) application.
2. Judge directs the jury to retire and enters into a voir dire.
3. The party seeking leave to cross-examine his/her witness calls evidence to establish the witness is adverse to him/her.
4. Judge usually hears submissions and then decides if the witness is adverse.
5. If statement is to be proved, counsel must comply with the notice requirement.

## Hostile/Adverse Witnesses

* Declaration is required
* Leave of the court is required
* Cross-examination is at large

### CEA 🡪 section 9(2)

* Statement in writing, reduced to writing, or recorded
* No need for declaration of adversity
* Leave of court is required
* Cross-examination is restricted to the prior inconsistent statement
* Statement may be proven if denied

### Procedure

* Advise court bringing a s. 9(2) application
* Jury retires and enter into voir dire
* Inform judge of the particulars of the application and produce the alleged written/recorded statement, pointing out the inconsistencies to the judge
* Judge determines if there is an inconsistency between the prior statement and the witness’s in-court testimony
* If there is an inconsistency, counsel proves the statement
* Opposing party can cross-examine and call evidence as to the circumstances under which the statement was made to determine if there is a basis for judge exercising discretion not to allow cross-examination on the statement
* Judge decides whether will permit cross-examination — judge usually hears submissions from counsel before making his decision
* Jury is then recalled

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| Example 🡪 the Fall* Facts 🡪 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.
* Issue 🡪 Is Max’s prior statement admissible? If so, for what purpose?
* Reasoning:
	+ This would be a prior inconsistent statement so you would draw their attention to the prior statement and impeach Max
	+ You would also want him to adopt his prior statement and indicate it is true
	+ Would use the common law exception for prior inconsistent statements because Max is available and testifying
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| Hearsay |

# Hearsay

* What is it?
	+ 1) Out of court statement
	+ 2) Offered to prove the truth of the matter asserted in it

## Rationale for the Rule

1. **Weaknesses of oral testimony**
	1. Sincerity 🡪 witness’ willingness to tell the truth
	2. Perception 🡪 witness’ ability to perceive accurately (see, hear, etc.) the events in question
	3. Memory/recollection 🡪 witness’ ability to recall what they perceived
	4. Narration/communication 🡪 witness’ ability to communicate what they perceived to the court
2. **Absence of the traditional safeguard**
	1. Oath or its equivalent
	2. Presence in court
	3. Cross-examination

## Other Rationales

* “Best evidence” rule
* Risk of misrepresentation/falsity
* Unfair surprise
* Minimize judicial discretion
* Risk of misuse of state power
* Procedural fairness

## Non-Hearsay

* Proof the statement was made
	+ Proof of the listener’s state of mind (Subramaniam)
	+ Proof of the source of the listener’s knowledge (Wildman)
	+ Proof of an agreement

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| Example #1 🡪 red car* Facts 🡪 The plaintiff needs to prove that the car that left the scene of the accident was red. Counsel calls a witness, Tom, who testifies: "Mary, my wife, said the car was red."
* Issue 🡪 is this statement hearsay?
* Reasoning:
	+ Yes –it is hearsay
	+ The statement was made out of court
	+ The prosecution offers it to prove the car that left the scene was red
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| Example #2 🡪 Elaine in London* Facts 🡪 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: ‘It’s raining in London.’”
* Issue 🡪 is this statement hearsay?
* Reasoning:
	+ **Unsure** 🡪 Cannot say whether it is hearsay until you know the purpose that the party wants it admitted for
		- 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 believed it was raining? – **Not hearsay.** Mere fact the statement was made, even if it was not true, is relevant to establish why Elaine believes it was raining.
		- If the purpose is to prove it was raining? **— Hearsay.** The statement is being offered for the truth of its contents. What the statement says –- its contents —are exactly what is to be proved and (hopefully) accepted to show that it was raining in London.
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| Example #3 🡪 Will bigamy* Facts 🡪 Will is charged with bigamy. Will and his first wife Diane were never divorced. The Crown alleges Will went through a form of 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?
	+ 2) To negate the defence, Riker’s evidence that Will said “Diane has just moved to Ottawa”
* Reasoning
	+ 1) No – saying “I do” is an operative legal fact – one element in creating a legally valid marriage
	+ 2) 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 that time.
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| Example #4 🡪 Picasso* Facts 🡪 Picasso purchased a painting by Dali from Sam’s Gallery. Klee claims ownership of the painting, alleging that he lent the painting to Sam as a favour. Sam claims Klee gave him the painting as a gift. Picasso says he has no knowledge of any dealings between Sam and Klee. When the painting was purchased, it has a card attached to it, which read, “Property of Sam’s Gallery. Price $1,000.” Is the card hearsay if offered to support the inference:
	+ 1) Sam was the true owner?
	+ 2) Picasso was a good faith purchaser for value without notice?
* Reasoning:
	+ 1) Yes, if offered to prove Sam was the owner since the assertion on the card is then relevant only if it is true
	+ 2) 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
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| Example #5 🡪 Joe selling car* Facts 🡪 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.”
	+ (b) Joe testifies Bill said, “I agree to pay $7,000 for the car.”
	+ (c) Fred, who was present when the transaction occurred, testifies that Joe said, “I offer to sell my car for $7,000.”
	+ (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.”
* Reasoning:
	+ (A), (b) and (c) 🡪 not hearsay, 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
	+ (d) –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
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| Example #6 🡪 Steamship Douglas* Facts 🡪 The steamship Douglas sank in the River Thames. On the night of Oct. 27, the steamship the Mary Nixon collided with the wreck of the Douglas and was damaged. The 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 the trial, the 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.
* Issue 🡪 is the proposed testimony hearsay?
* Reasoning:
	+ No, the defendants are being sued in negligence, so the issue is whether they took reasonable care in relation to the 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.
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| Example #7 🡪 cocaine trafficking* Facts 🡪 The accused is charged with trafficking in cocaine. A police officer testifies he received a tip from a very 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. The officers testifies further that he observed the accused at the stated time and place transferring small white packets to various 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?
	+ (b) The officer had reasonable grounds to make the arrest?
* Reasoning:
	+ (a) Yes, hearsay. The informant’s tip is only relevant as proof the accused is a cocaine trafficker if it is accepted as being true.
	+ (b) 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
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| Example #8 🡪 Joe was alive* Facts 🡪 The plaintiff needs to prove that John was alive at a particular point in time. The plaintiff calls a witness, Tim, who testifies that he heard John say “I am alive” around that time.
* Issue 🡪 is this hearsay?
* Reasoning:
	+ No, not hearsay. The mere fact that John spoke is relevant to whether he was alive — it does not matter what he said, the important point is that he did speak.
	+ E.g., the statement would be equally admissible if Tim heard John say “I am in London”
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## Basic Analytical Approach for Hearsay

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 the other rules of evidence
2. Does the evidence fit within a traditional common law exception?
	1. If so, it is prima facie admissible.
3. Does the evidence fit with a statutory exception?
	1. If so, it is prima facie admissible.
4. Does the evidence fit within the principled approach (exception)?
	1. If so, it is prima facie admissible.

## Tough Calls? Recall the Main Rationale for the Rule

1. Weaknesses of oral testimony (sincerity, perception, memory/recall, narration/communication); and
2. Absence of traditional safeguards (oath or its equivalent, presence in court, cross-examination)

**NOTE: Ask Yourself**

* Who is the real (i.e. the most important) witness?
	+ The person who made the statement?
	+ The person who heard the statement?

## Hearsay/Non-Hearsay Situations 🡪 *1) automated statements 2) prior witness statements 3) assertive conduct 4) implied assertions*

1. “Automated” statements
	1. “Statements” that are the process of pure automation are not hearsay statements
	2. Machine automation with no human involvement are not hearsay
	3. Compare:
		1. Computer-stored records –can be hearsay if it has a human inputting the data
		2. Metadata that automatically attaches to that record –real evidence because there is nobody to cross examine, question becomes whether the computer is reliable
2. Prior statements of witnesses
	1. A witness, W, is on the stand in court. Is the prior statement of W hearsay if it is being offered for its truth?
	2. Yes, because the statement was made out of court.
	3. Unless … it is adopted by the witness.
	4. But see later: admitting prior inconsistent statements for their truth.
3. Assertive conduct
	1. Explicitly assertive conduct – i.e., conduct that is meant to convey meaning – is hearsay.
	2. Consider:
		1. Pointing in a direction.
		2. Hand-signals (stop, go).
		3. Nodding or shaking one’s head
4. Implied assertions
	1. A statement or conduct that implies some fact that the trier of fact is being asked to believe is true.
		1. Verbal implied assertions are hearsay.
		2. Non-assertive conduct is normally not hearsay (but sometimes it might be).

### *Wright v Tatham 🡪 handwritten letters can be admitted to infer the man was competent when he wrote them; trier of fact being asked to make inference*

* Facts 🡪 Marsden, wealthy man, left virtually everything owned to his servant Wright. Tatham was Marsden’s cousin and heir at law, i.e., if the will were invalid, he would inherit everything. Tatham challenged the will on the basis Marsden was not mentally competent when he executed the will. 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 times.
	+ 1. A note from a cousin telling Marsden about a recent trip abroad.
	+ 2. A letter from a vicar advising Marsden to see his lawyer regarding a legal dispute.
	+ 3. A letter was from a curate thanking Marsden for all he had done for the curate.
* The letters dealt with subjects and were written in language, which were appropriate to the understanding of a reasonably intelligent person.
* Issue 🡪
	+ Hearsay? Why or why not?
	+ Whether Marsden was mentally competent at the time he made the will.
* Evidence in dispute 🡪 cousin’s note, vicar’s letter and the curate’s letter
* Purpose for admitting the letters:
	+ To prove Marsden was competent when he wrote them.
	+ That is, the letters were being tendered for the authors’ belief in Marsden’s sanity and the truth of this belief.
* Reasoning:
	+ 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 but this would be hearsay.
	+ Statements/conduct that implies this should equally be considered to be hearsay.

### *Baldtree (2013, SCC) 🡪 evidence may be only relevant if the trier of fact assumes it to be true –fine line with hearsay*

* Facts 🡪 The police arrested B for trafficking in cocaine and marijuana. At the police station, B’s cellphone rang. An officer answered it. The call went as follows:
	+ The 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 one ounce of weed. I asked him how much Chris charges him. The male said he pays $150. I told him I would deliver same, to 327 Guy Street.
* Issue 🡪 hearsay or not? Trying to prove whether Baldree was a drug trafficker
* Evidence in dispute 🡪 call asking to buy drugs from Baldreee
* Purpose for admitting the call:
	+ To show Baldree was a drug trafficker
	+ That is, the call was being tendered to show the caller’s belief that Baldree sold drugs, and the truth of this belief.
* Reasoning:
	+ Trier of fact is being asked to infer from the call 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 he sells drugs, the statement would be hearsay
	+ Statements/conduct that implies this should (and is in Canada) equally considered to be hearsay

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| Example 🡪 the shipwreck* Facts 🡪 The plaintiff sues the defendant in negligence. The issue is whether the ship that went down with the plaintiff’s cargo was seaworthy when it left the dock. The defendant wishes to call a witness who will testify that the captain inspected the ship and then set sail with his wife and young daughters.
* Issue 🡪 hearsay or not? Whether the ship was seaworthy when it sailed
* Purpose for calling witness
	+ To prove the ship was seaworthy.
	+ That is, the witness is being called to show the captain’s belief that the ship was seaworthy, and the truth of this belief.
* Reasoning:
	+ Trier of fact is being asked to infer from the fact that the captain inspected the ship an then set sail with his family that the captain believed the ship to be seaworthy
	+ A ship’s captain knows what makes a ship seaworthy and having inspected the ship, a captain would not sail, especially with his family, if he believed the ship was not ready for se
	+ 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.
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| The Principled Approach |

## The Principled Approach

* Now predominate in law of hearsay
* Dictates everything including exceptions

### Basic Rule

* Hearsay that does not fall within a traditional (common law or statutory) exception may nonetheless be admitted if it is necessary and reliable evidence.

### 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 this 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 the exceptions, from the common to the obscure until…
	+ *Myers v DPP (HL, 1965)* 🡪 no more new (or reformulated) common law hearsay exceptions; rationalization of the law is a matter for Parliament
	+ *Ares v Venner (SCC, 1970)* 🡪 declined to follow Myers; Canadian courts can still create new (reformulated) common law exceptions
* 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) 🡪 MAJOR PRINCIPLES*

* Emergence 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 need for any “new” exceptions because hearsay evidence is admissible if it satisfied the twin principles of necessity and reliability.

### *Khan (SCC, 1990) 🡪 statements inadmissible under traditional hearsay when out of court statement but can be admitted under principled approach when it is necessary (i.e. child incompetent to testify) and reliable (i.e. no motive to lie, natural statement, corroborating evidence)*

* Facts 🡪 The mother took her child, then 3 ½ years old, to the doctor’s office. The child was left alone with the doctor in his office for several minutes. The mother then came into the office and the examination took place. 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 put his birdie in her mouth. The mother said the child used “birdie” to mean penis. The alleged offence would therefore have occurred about ½ 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.
* Questions
	+ 1) Why was the child’s statement inadmissible under the traditional common law hearsay rule?
		- At common law, the statement is hearsay as it is out of court statement
		- It is being offered to prove that Khan had touched the child for a sexual purpose
		- It did not fit within any of the recognized common law exceptions including the “spontaneous utterance” exception
	+ 2) Why did the inadmissibility of the statement raise concerns (beyond the case) for the court?
		- There is often a problem obtaining admissible evidence from young children in sexual assault cases
		- Often times hearsay statements by the child are the best evidence that can be obtained
		- Excluding hearsay therefore puts a vulnerable population at risk and has the potential to provide offenders immunity from prosecution
	+ 3) Why did the court not “reformulate” the existing exception that was the closet fit (the spontaneous utterance exception) to admit the statement?
		- Reformed rule would be absolute (in/out) so no ability to ensure the statement was actually necessary or reliable given the specific facts of the case
		- Reform would distort the rule: the meaning of “spontaneity” would be stretched to the point of non-existence
	+ 4) 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 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
* Reasoning
	+ Necessity 🡪 child was incompetent so hearsay statement necessary
	+ Reliability 🡪 established by a number of factors
		- No motive to lie
		- Statement emerged naturally, with minimal questioning
		- Contents of statement/child’s understanding (or lack thereof) of sexual acts
		- Corroborate evidence (semen/saliva)
* Notes:
	+ 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 to 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)
	+ 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) 🡪 Principled approach is an exception that applies to all hearsay and not just child statements; expands Khan’s application*

* Facts 🡪 Smith was charged with murder. The Crown’s theory was that Smith had initially abandoned King (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 at that location. The 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.
* Questions:
	+ What exception did the court rely upon to admit the first two statements? (Just identify the exception; we will look at it in more detail later on in the course.)
		- The “state of mind” exception for the limited purpose of proving King wanted to return home (ie., her state of mind at that time)
		- The 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?
		- The 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 deceased.
		- 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 not present to any real degree
		- Third statement was not sufficiently reliable:
			* King may have been mistaken or wanted to deceive her mother (motive to lie) to avoid her sending someone to pick her up
			* Timing of call indicates simply observed car, and it may not have been accused
			* Timing also suggests 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 knowingly using forged/stolen credit cards)
	+ What did the court’s decision mean for the law of hearsay in general?
		- Smith confirms that the principled approach of necessity and reliability applies to all hearsay statements
		- What it did not answer was the relationship between the principled approach and the existing exceptions
* Takeaway:
	+ Principled approach is an exception that applies to all hearsay and not just child statements
	+ Expands Khan
	+ Did not address how this relates to existing exceptions

### *Starr (2000, SCC) 🡪 Rare case where exception has been amended to incorporate the principled approach*

* Facts 🡪 Starr was charged with first-degree murder. He was drinking with C and W at a hotel. After he left the hotel, C and W drove away together. 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 with 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 gas station. The Crown’s theory was Starr killed C in a gang-related execution and that Starr had suggested the Autopac scam to C to get him out into the country where he could be killed. W was in the wrong place at the wrong time.
* Questions:
	+ What exception did the court consider as a basis for admitting the Autopac statement? (Just identify the exception; we will look at it in more detail later on in the course.)
		- 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 two years
			* 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 principled approach to hearsay and that it ultimately governs the law
		- All existing exceptions have to be tested against the principled approach
		- All evidence (even if within an exception) has to be tested against the principled approach
* Takeaway
	+ Rare case where exception has been amended to incorporate the principled approach

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

1. Under and over-inclusive
2. Predictability and certainty –trial efficiency
3. Explanatory and educative
4. Guidance on historical and contemporary rationales

### But: Principle ultimately wins

1. Trial of fairness and integrity of the justice system
2. Intellectual coherence
	1. Clear we have a new approach to hearsay that draws on existing exceptions but what wins is the necessity and reliability principle
	2. Exceptions to principled approach are RARE
	3. Practically going through the 4 step test means

### Meaning of Necessity

* “Reasonably necessary”
* To prove a fact in issue *(Smith)* 🡪 can have multiple hearsay on the same point because it needs to be relevant to fact in issue not the overall case
* Unavailability of declarant
* Expediency or convenience

### Summary: Necessity

* True unavailability 🡪 dead, seriously ill, incompetent, refuses to testify
* 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 (i.e. evidence required to supplement a present witness’ testimony)
* Relative necessity 🡪 hearsay is the better evidence, undue consumption of time or money

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

* Case-by-case assessment
* Two key components:
	+ 1) Circumstantial guarantees of truth worthiness 🡪 circumstances under which the statement was made provide assurance it is truth-worthy
	+ 2) Adequate substitutes 🡪 alternate procedural protections minimize some of the concerns related to hearsay
* 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.

### Summary: Sincerity

* Motive to be truthful (oath or substitute, possible penalty)
* Motive to fabricate
* Availability for cross-examination
* Evidence of demeanour
* Location and its influence on truth-telling
* Role or influence of recipient
* No memory but an assertion of past accuracy
* Spontaneity and contemporaneity
* Immediate correction of inaccuracies
* Made prior to litigation

### Summary: Perception

* Significance of the event for the declarant
* Influence of alcohol or drugs
* Duress, emotional turmoil, mental illness
* Declarant had peculiar means of knowledge

### Summary: Memory

* Passage of time since the statement was made
* Memorable event or a duty to record the statement
* Impact of the declarant’s characteristics (age, mental ability, other characteristic)

### Summary: Narration

* Type of statement – oral, document, audio/video-recording
* 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

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| Use of Corroborating Evidence |

## Use of Corroborating Evidence

* Definition 🡪 evidence that independently tends to support / undermine the reliability of the statement

### Views on Use of Corroborating Evidence

* Original view 🡪 Khan vs. Smith
	+ Khan 🡪 apparently okay (use of semen and saliva)
	+ Smith 🡪 apparently not okay (only circumstances under which statement was made)
	+ U(FJ) 🡪 apparently okay (“striking similarity” between two statements)
* Clarification 🡪 Starr
	+ Corroborating (confirmatory) evidence may not be considered at the threshold reliability stage
* Today 🡪 Khelawon/Bradshaw
	+ Corroborating (confirmatory) evidence may be considered at the threshold reliability stage

### Use of Corroborating Evidence

* High threshold ***(Bradshaw)***
* **Test:**
	+ Evidence must go to reliability of the statement (not the case) AND
	+ Material aspect of the statement
	+ Hearsay dangers that exist
	+ Alternative (even speculative)
	+ Only likely 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

### Residual Discretion to Exclude

1. Probative value is slight and undue prejudice might result ***(Smith)***
2. Prejudicial effect of the admission of [the] statement … outweighed its probative value ***(Starr)***

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| Example 🡪 sailor stabbed* Facts 🡪 A sailor was stabbed on board ship and taken to the ship’s doctor. The doctor asked him who had stabbed him. The sailor said he was wounded by the second electrical mechanic’s knife. He then lapsed into unconsciousness. He revived some twenty minutes later and again implicated the accused, the second electrical mechanic, as his attacker. The sailor later died from his injury. The second electrical mechanic is charged with murder.
* Issue 🡪 Is the statement admissible at trial? Trying to identify the murderer
* 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
* Disputed evidence:
	+ Deceased sailor’s statement that he was wounded by the second electrical mechanic’s knife.
* Reasoning:
	+ Hearsay 🡪 yes, out of court statements 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 no animosity between the two.
		- Special means of knowledge? Present, and stabbed, which suggests close enough to see 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 apparent had been stabbed).
		- Corroboration? Blood stains …
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| Prior Inconsistent Statements |

## Prior Inconsistent Statement

### *B(KG) (1993 SCC) / U(FJ) (1995 SCC)*

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

### Threshold Inquiry/Necessity

* Threshold Inquiry
	+ Statement would have been admissible as the witness’ sole testimony
* Necessity
	+ Recantation or feigned loss of memory satisfies the necessity criterion

### Standard Indicia of Reliability

1. Sworn or affirmed statement made after a proper warning
2. Videotaped in its entirety
3. Full opportunity to cross-examine the witness at trial on the statement

### 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. 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

### 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

### 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
* Audiotapes
* (Signed) written statements
* Oral statements / police notes
* Independent third parties
	+ Justices of the peace
	+ Commissioner of oaths
	+ Court clerk
	+ Translator
	+ Witness’ own lawyer
	+ Counsel, parents, or adult relatives

### 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 the administration of justice into disrepute if the statement was admitted as substantive evidence

### Example 🡪 *FJU (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 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
	2. Prior knowledge
	3. Third party influence

### Full Analytical Approach

1. Is the statement hearsay?
2. Does a traditional (common law or statutory) exception apply?
	1. Does the exception conform to the principled approach?
	2. If not, can you reformulate the exception and does it apply?
	3. Is the exception sufficient on the facts of the case?
	4. Should the judge use the residual discretion to exclude the evidence?
3. Are the necessity and reliability criteria of the principled approach satisfied?
	1. Should the judge use the residual discretion to exclude the evidence?

### *R v Khelawon (2006, SCC) 🡪 the principled approach requires that for evidence to be admissible, hearsay must be necessary and reliable; in this case, not sufficiently reliable*

* Facts 🡪 K, a retirement home manager, was charged with assaulting S, an elderly resident of the home. 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.
* Issue 🡪 is the out of court statement admissible?
* Held 🡪 not admissible
* Reasoning:
	+ Necessity 🡪 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
		- S indicated he understood the importance of telling the truth and that could be charged if did not tell the truth
	+ Factors against admission
		- Statement not under oath and concern if actually understood consequence of not telling the truth
		- Concern over S’s mental capacity
		- Risk influenced by employee who found him/initially cared for him
	+ 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

### *R v Devine (2008, SCC) 🡪 case where reliability and necessity are met; Procedural safeguards met, so other reliability concerns need not be considered at threshold stage – for trier of fact to assess.*

* Facts 🡪 D was charged with robbing and assaulting S on two occasions, several months apart. P witnessed the first incident. Both S and P refused to give statements to the police after the first incident, but after the second incident they both identified D as the assailant. At trial, S and P recanted their identifications. P said she identified D because someone told her it was him.
* Issue 🡪 Whether P’s initial statement identifying D is admissible for its truth?
* Reasoning:
	+ P’s identification was not hearsay (i.e. judge did not believe P’s assertion that identified D as the assailant 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; 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 be considered at threshold stage – for trier of fact to assess.

### *R v Blackman (2008, SCC) 🡪 must evaluate reliability in context; the reliability criterion is usually met by showing that sufficient trust can be put in the truth and accuracy of the statements because of the way in which they came about, or by showing that in the circumstances the ultimate trier of fact will be in a position to sufficiently assess their worth.*

* Facts 🡪 B was charged with the murder of E, who was fatally shot outside a bar in April 2001. The 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 outside a strip bar in February 2001. To support its theory, the 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
* Issue 🡪 is the out of court statement admissible?
* Held 🡪 admissible
* Reasoning:
	+ Necessity 🡪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
		- 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 the mother’s evidence and potential tainting could be left to trier of fact since the mother could be cross-examined on them
		- E’s past untruthfulness with his mother and any motive to lie 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 has to 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 it 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) 🡪 formulation of the “circumstantial guarantees” reliability standard; does not require reliability be established with absolute certainty but circumstances point to trustworthy, reliable statement inference*

* Facts 🡪 Two people were shot to death. T became the target of a Mr. Big investigation, during which he told an undercover officer that 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 to the murder. T also took part in an 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.
* Issue 🡪 Is the recording of T’s re-enactment admissible for the truth of its contents?
* Held 🡪 not admissible, fails reliability
* Reasoning:
	+ Formulations of the “circumstantial guarantees” reliability standard:
		- Statement was made “under such circumstances that even a sceptical caution would look upon it as trustworthy” *(Khelawon)*
		- Statement is so reliable that it is “unlikely to change under cross-examination” (Khelawon )
		- When “there is no real concern about whether the 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
			* 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 accurate, but did not relate to B’s involvement in the murders
				+ Recordings of B admitting participated in murders raised trustworthiness issues
			* Trial procedural safeguards other than cross-examination (e.g. jury cautions, limited admissibility, enhanced leeway for defence during closing submissions) are not part of the threshold reliability test
* Reasoning: Dissent
	+ Regarding 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 to Mr. Big
		- No investigative misconduct (no inducements or assurances by the police before re-enactment)
		- Re-enactment not a requirement to plea to second degree murder
	+ Regarding procedural reliability
		- May include procedural safeguards available at trial to assist jury in evaluating the hearsay evidence
		- It is for judge to adapt and implement trial procedural safeguards as required to address the hearsay dangers raised
	+ Regarding 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*

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| Hearsay: The Common Exceptions |

# Hearsay: The Common Exceptions

1. Admissions by a party
	1. Statements by a party offered by the opponent to the litigation
	2. Statements by an employee or agent
	3. Confessions rule 🡪 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
	1. Declarations against pecuniary and proprietary interest
	2. Former testimony
3. Exceptions that do not require declarant to be unavailable:
	1. Business records
		1. Common law exception
		2. Statutory exception
	2. Past recollection recorded
	3. Spontaneous utterances
	4. Statements about physical sensations
	5. State of mind / present intentions
	6. Prior convictions

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| Admissions by a Party Offered by an Opponent  |

## Admissions by a Party Offered by an Opponent

* Any oral or written statement (or conduct) made by a party to the litigation is admissible against that party at the request of an adverse party
* 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
	+ 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
	+ 5) Age of the party goes to the weight to be given to the statement, not its admissibility.
	+ 6) Admissions by an accused to a person in authority are governed by the confessions rule.

### *Ferris (1994, ABCA) 🡪 statements are not admissible if they are too uncertain/unclear (unreliable)*

* 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.
* Issue 🡪 Is Ferris’ statement, “I killed David”, admissible as an admission?
* Reasoning:
	+ Not possible to ascertain if it was an admission that he killed David, that he denied it, that it was him giving context to his dad, etc.
	+ There was too much uncertainty for this to be an admission
* Dissent Reasoning:
	+ Leave it to the trier of fact to decide

### “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
* 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”.

### *Streu (1989, SCC)* 🡪 *admissions by an accused are adoptive statements where the accused indicates some belief or acceptance of the truth of the admission*

* 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. The 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".
* Issue 🡪 Is Streu’s statement to the officer admissible? If so, why and for what purpose?
* Held 🡪 covered broadly by admissions exception
* Reasoning:
	+ By conveying it onto the undercover officer it indicates a degree of acceptance and belief in the matter
	+ Therefore, it becomes an adoptive admission –evidence that he knew or has some knowledge that the goods were stolen

### 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 chose to testify to explain the statement

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| Statements by an Employee or Agent  |

## Statements by an Employee or Agent

* A statement by 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
* Statement made by employee or agent
* Employee or agent was acting within the scope of his/her authority
	+ Can show this directly by showing scope of authority includes this
	+ Or by evidence
* Statement is offered in evidence 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 chose to testify to explain the statement

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| Confessions Rule  |

## Confessions 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.
	+ One of the rare thresholds where the Crown must prove it beyond a reasonable doubt
* Only applies to criminal law

### Rationale for the Rule 🡪 High Threshold

* Reliability of confessions
* Impact of confessions
* Fundamental fairness
	+ Right against self-incrimination

### Relevant Issues 🡪 sub issues to consider in confessions cases

1. Who is a person in authority?
	1. If the person is one of authority =confession
	2. If the person is NOT a person of authority =admission not confession
2. What happens in the voir dire concerning voluntariness?
3. On what grounds may a statement be found to be involuntary?

### Persons in Authority

1. Conventional 🡪 Person formally engaged in the arrest, detention, examination or prosecution of the accused
	1. Easy to identify 🡪 i.e. uniformed police officer, Crown, security officer, etc.
	2. Not as hard to prove
2. Deemed or found on facts of the case person of authority 🡪 Person who is deemed to be a person in authority based on the circumstances surrounding the making of the statement
	1. Not as conventionally identified
	2. Case by case assessment 🡪 deemed based on the facts

### Test for Persons of Authority 🡪 *Hodgson (1998, SCC)*

1. Accused subjectively believed the receiver of the statement had the ability to influence the course of the proceeding
	1. Based on their position –obvious that person has a role in it
2. Accused’s belief was objectively reasonable in the circumstances
	1. Where a deemed person can be found on the facts
	2. Some sort of objective reality this person is acting as part of the team and has the ability to have some sort of influence

### *Hodgson (1998, SCC) 🡪 must be a reasonable basis for the accused’s belief that the person hearing the statement was a person in authority (i.e. complainant/parents not person of authority)*

* Facts 🡪 H is accused with sexual assault. He admitted his crime to the complainant and her parents when confronted by them. The father then held him at knife point after making the statement.
* Issue on appeal 🡪 whether H’s statement should have been subject to voir dire to determine its voluntariness?
* Reasoning:
	+ Parents/complainants are not usually persons of authority
	+ Nothing to suggest they should be treated as deemed persons of authority –nothing to suggest it was believed in any way or that they had any influence
	+ Voir dire was not required
	+ 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 criminal proceedings against him
	+ 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 confronted H about the assault
	+ Physical violence after the statement could not impact on its voluntariness

### Statements Induced by Private Persons

* Private person may obtain a statement from an accused by improper means
* Statement is admissible
* Issue is weight:
	+ If the jury concludes the statement was obtained improperly they should give little weight to the statement
* Trial judge must caution jury – “clear direction” – about the danger of relying on a statement to a private person that was obtained improperly
* I.e. 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

### 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
	1. Not a high standard –just some proof of this
	2. If the accused can point to some evidence, burden shifts at next step
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.

**NOTE:** Much harder to admit confession than it is an admission

* Therefore, accused would rather try and say it was a confession instead of an admission because then the Crown has to prove it is admissible as a confession and voluntary

#### Common Example 🡪 undercover officers

* Often has to be dealt with here because if they are undercover it is not objectively reasonable to accused that this person is a person of authority
* Courts often find this is not a person of authority so not a confession

### Voluntariness Voir Dire

1. Issue is voluntariness of the statement, not its truth.
2. Voir dire is mandatory absent a concession of voluntariness.
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.
5. The accused may be asked if the statement is true.
6. The Crown may not use the accused’s testimony in its case in the main trial.
7. Evidence adduced during the voir dire may be used in the main trial with the consent of both parties.

### Meaning of Voluntariness 🡪 describes how confessions can be excluded

1. Inducements ***(Ibrahim)***
	* Threats or promises
2. Operating mind ***(Ward)***
	* Know what you are saying
	* Know it can be used against you
	* No requirement that you know it is damaging to you –just simply that you know what you are saying and that they can use it
	* Very low standard –often people with severe cognitive difficulties that would not pass threshold
3. Oppression ***(Serack)***
	* Conduct and circumstances of the detention and interrogation
	* Conditions of the cell (i.e. temperature, cleanliness, etc), what was done to them in detention, etc.
4. Police Trickery ***(Rothman)***
	* Shock the conscience test
	* How the statement was obtained, societal values implicated, seriousness of the charge, effect of exclusion on the proceedings
	* Example 🡪 police officer dressed up as priest to elicit confession

### *Oickle (2000, SCC)* 🡪 *current law on voluntariness; elaborated on doctrines above (more principled and functional approach) because all circumstances can be looked at together rather than pigeonholed into one category of involuntariness*

* Touchstone is voluntariness
* First three components are not independent factors 🡪 contextual analysis of all facts is required
* Police trickery is a discrete issue
* Causal connection is essential
* Inducement Doctrine:
	+ Key concept 🡪 “quid pro quo”
	+ Classic threats and promises
	+ Spiritual or moral inducements
	+ 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 🡪 i.e. saying we have a witness who saw you when you do not actually
* Impugned Conduct
	+ Minimizing seriousness of the crime
		- In this case, the arson charge was minimized and made it seem like not as big of a deal and the consequences are not as severe meaning the accused was more likely to confess
	+ Offers of psychiatric help
	+ Use of “it would be better”
	+ Abuse of trust
	+ Atmosphere of oppression
	+ Alleged threats against the fiancée
	+ Use of the polygraph test and results
		- Can be used as an investigative tool but not as evidence because no confirmed evidence that these tests are reliable

### 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 subsequent statement.
* Factors to consider:
	+ Time lapse between the statements 🡪 longer the time, less likely considered tainted
	+ 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

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| *Confessions 🡪 Robbery and girlfriend** Facts 🡪 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 has 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 exchange included:
	+ PO saying he cant make promises but says his opinion carries weight
	+ But he said if he talks to him he can let S talk to his girlfriend
	+ S said his main goal is to protect his girl, Tanya
* Issue 🡪 Is S’s statement voluntary?
* Reasoning
	+ Making promises about a third party when the relationship between the two is strong, this can lead to a false confession
	+ Issue comes down to considering the context of all the circumstances and when looking at quid pro quo
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| *Example 🡪 the Car Accident** Facts 🡪 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 four beers. B is now dead.
* Issue 🡪 Is B’s statement admissible at A’s trial to prove A was drinking?
* Reasoning:
	+ Unless this statement can get in through the principled approach, this does not fit under any of the other exceptions
		- Not a confession because he was not driving
		- Not a statement against pecuniary interest because he was not driving and has no liability here
	+ It would pass the necessity test
	+ For reliability –it was made at the scene, no incentive to lie, made to the officer… but it might come down to how the officer wrote the notes and if he was summarizing
* Held 🡪 would not be admissible through traditional exceptions but maybe principled approach
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| Statements Against Pecuniary or Propriety Interests  |

## Statements Against Pecuniary or Propriety Interests

* A statement against a person’s pecuniary or proprietary interest is admissible for its truth.

### Criteria:

* Unavailable declarant
* Personal knowledge of the facts asserted in the statement
* Statement was against the person’s interests when made
* 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

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| Example 🡪 Ladder case* Facts 🡪 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.
* Issue 🡪 Is X’s statement admissible in the trial?
* Reasoning:
	+ Anything that opens you up to potential pecuniary liability
	+ Looking at the time in which this statement was made, did the person realize it was against their interest
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| Example 🡪 the Estate Claim* Facts 🡪H tells R that she is going to borrow $10,000 from W the next day. H dies. W sues H’s estate claiming he is owed $10,000.
* Issue 🡪 Is H’s statement admissible at the trial?
* Reasoning
	+ Does not show she actually borrowed it just thought about it so it is not a statement against pecuniary interest
	+ Would have to fall back on the principled approach
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| Prior Testimony  |

## Prior Testimony

* Basic rule at common law:
	+ 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
	+ Solemn occasion / open court
	+ Statement on oath
	+ Subject to cross-examination
	+ Accurate transcript / recording

### Rule 31.11 🡪Prior Testimony Under Rules of Civil Procedure

* **31.11 (1)** 🡪 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 part 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
* **31.11 (2)** 🡪 The evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness
* **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 testifying 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 31.11 (2)

* Deals with parties and their representatives
* Admissions by the party
* Impeachment of the party

### Scope of Rule 31.11(7)

* Deals with any witness (not just parties)
* Allows for the admission of their evidence for its truth if the witness is unavailable
	+ Dead, infirm or ill, not compellable, refuses to be sworn or to answer
* Requires leave of court
* Main considerations:
	+ Extent of cross-examination, importance of evidence, preference for oral testimony, any other relevant considerations

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| Business Records |

## Business Records

### Rule at common law 🡪 *Ares v Venner (1970, SCC)*

* Record was made in the ordinary course of business
* Record was made contemporaneously with the action
* 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

#### Ares v Venner (1970, SCC) 🡪nurses records reliable because they are made contemporaneously, as part of their job and no motive to misrepresent; no need to cross-examine because she would need to rely on them anyways

* Facts 🡪 The record they wanted admitted was the nurses’ notes on the accused’s physical state:
	+ Note #1 🡪 “Circ’n checked. Toes cool to touch. Sole of foot blue. Unable to wiggle toes. Swelling still apparent but toes blanching well.
	+ Note #2 🡪 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’n improving.”
		- This is a combination of fact and observation
* Reasoning:
	+ These are reliable notes –they are reliable because they were made by the nurse, she made them while she was recording (contemporaneous), it’s part of her job to make notes on the patient’s file, and she had no motive to misrepresent
	+ It is not necessary in the classical sense because the nurse can be cross-examined but for the purpose of expediency it is necessary –they are also probably the best evidence because she likely would not have immediate recollection and would need to rely on the notes anyways

#### Rationale for the Exception

* Necessity 🡪 expediency
* Reliability
	+ Personal knowledge
	+ Contemporaneity
	+ Motive to make an accurate record

### Statutory Exceptions

* Every province has an exception for business records 🡪 not the same and vary based on province
* The Canada Evidence Act outlines the rule as well

#### CEA s. 30

* Record has to have been made in ordinary course of business
* Personal knowledge not required
	+ I.e. double hearsay permitted
* Statement of fact **AND** opinion
* Contemporaneity not required
* Broad definition of business and of record
	+ NOTE 🡪 Investigative records excluded though
* Seven day notice requirement

#### CEA s. 30 🡪 Definitions:

* Business Defined:
	+ Businesses
	+ Professions
	+ Trades
	+ Callings
	+ Manufactures or undertakings
	+ For profit or non-profit
		- Including any of the above by governments and their various entities
		- NOTE: this includes illegal businesses (i.e. Hell’s Angels drug records)
* Record Defined:
	+ Books
	+ Documents
	+ Papers
	+ Cards
	+ Tapes
	+ “Other things”
	+ In whole or in part

### Ontario EA s. 35

* Dual ordinary course of business
	+ Made in the usual and ordinary course of any business
	+ In the usual and ordinary course of such business to make such writing
		- NOTE: different from CEA that requires only ordinary course
* Personal knowledge not required
	+ I.e. Double hearsay permitted
* Statements of fact **only** –not statement of opinion like CEA
* Contemporaneity requirement
* Broad definition of business and of record
* Seven day notice requirement

### Ontario EA s. 35 🡪 Definitions

* Business defined:
	+ “Every kind of” 🡪 means list is not exhaustive
	+ Business
	+ Profession
	+ Occupation
	+ Calling
	+ Operation or activity
	+ For profit or non-profit
* Record defined:
	+ “Any information”
	+ “Recorded or stored”
	+ “By any device”

### When to use CEA vs. Ontario EA

* Civil cases =provincial
* Criminal cases =federal
* On an exam 🡪 if it is not clear/falls outside either of these categories she will make it clear on exam

### Rationale for the Exceptions

* Necessity 🡪 expediency
* Reliability
	+ Routine nature of process
	+ Business reliance

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| Example 🡪 Civil Case* Facts 🡪 civil motor vehicle accident case. Defence seeks to introduce a report made by the investigating officer after his attendance at the scene. Officer is believed to be in Africa
	+ Report contains 🡪 officer’s measurements and observations and statements of witnesses to the accident
* Issue 🡪 under Ontario EA is this admissible?
* Reasoning:
	+ It is a report so it is a record/document
	+ The type of report is admissible because Ontario does not have the same restriction like CEA that investigative reports are excluded
	+ There might be an issue that this could be observation and be opinion rather than fact
	+ Fits in the general duties of his job so made in the ordinary course of business
* Held 🡪 Under Ontario EA it is likely admissible, but under the CEA it would be excluded due to investigative reports exclusion but could try under the common law approach
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| Example 🡪 Criminal case* Facts 🡪 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 find a photocopy of a note dated the day of Samantha’s appointment, which states: “Patient – Samatha X; c. small bump & expanding red area. Dr. G -d. flea bite; p. ointment (prn/2 wks)”, and is initialed,“VV”. Nurse Vee still works for Dr. Golden.
* Issue 🡪 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?
* Reasoning:
	+ Would need to look at if it is the ordinary course of business, etc. to see if it would be admissible
	+ Try to get from the nurse the validity of the records taken from her notes
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| Example 🡪 Oil Well Case* Facts 🡪 An oil well exploded in Alberta, killing a worker. The family of the worker is suing the oil company, claiming that it was negligent in maintaining the oil well. As part of its defence, the oil company wishes to rely on two documents. The first document 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 document is an e-mail, written by the same inspector to the CEO of the company a few hours after the incident, and providing a physical description of the damage to the pump and the surrounding area.
* Issue 🡪 Are the documents admissible? If so, for what purpose?
* Reasoning:
	+ First thing you would have to do is check Alberta provincial evidence act
	+ If this happened in Ontario we go to our EA
	+ Test for Ontario EA 🡪 first document
		- This is a business –definition is inclusive
		- This is a document –definition is inclusive this would fit
		- Requires that it be made in ordinary course of business and ordinary record –this is a monthly maintenance report and filled out every month so this is ordinary of the business and occurs in usual course of business for a company of this type
		- The contents of the report are important –whether it is a statement of fact (i.e. recording data) or opinion (i.e. observations/opinion). Ontario allows only statement of fact
		- Who made the report? Personal knowledge is not required so still permissible
		- Notice requirement –must have provided 7 days notice under Ontario EA
	+ Test for Ontario EA 🡪 second document email
		- Fails the ordinary course of business test because the email is not part of the ordinary course of business and would not meet the business record test
* Held 🡪 first record would be allowed under the business records exception but second record would not
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| Example 🡪 The Hotel* Facts 🡪 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 had asked its employees to prepare each day listing the number of times during the day in which telephone callers, cab drivers, customers, and others had confused the two names. The company asked its employees to prepare these memoranda after it filed the lawsuit against Sheraton House Hotel.
* Reasoning
	+ Not admissible because the records were made in contemplation of litigation and not ordinary course of business
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| Spontaneous Statements  |

## Spontaneous Statements

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

### Criteria

* Statement relates to a startling event or condition
* 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
* Statement is “reasonably contemporaneous” with the event

### Guidelines for understanding spontaneous statements

1. So startlingly 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
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

### *Khan (1990, SCC) 🡪case of spontaneous statements from child; must be spontaneous, contemporaneity, no risk of concoction, no concerns about memory, heightened perceptions*

* Facts 🡪 The mother took her child, then 3 ½ years old, to the doctor’s office. The child was left alone with the doctor in his office for several minutes. The mother then came into the office and the examination took place. 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 put his birdie in her mouth. The mother said the child used “birdie” to mean penis. The alleged offence would therefore have occurred about ½ 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.
* Issue 🡪 is the child’s statement admissible?
* Reasoning:
	+ May be an issue whether the child understood this to be a traumatic or startling event
	+ Contemporaneous 🡪 statement made half hour later, need to decide is this is contemporaneous
	+ The answer came about as a response to her mother’s statement –some concern then whether it was spontaneous because it was triggered by a question –this goes to certainty and ruling out risk of concoction

### *Nurse (2019, ONCA) 🡪 spontaneous gesture counts as admissible if it meets criteria and can be considered under the principled approach too*

* Facts 🡪 Nurse is charged with murdering Kumar. Kumar had been violently stabbed at the side of the road – he had serious abdominal injuries and his vocal cords had 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.
* Issue 🡪 Can the officers testify about the gestures made by Kumar? If so, why and for what purpose(s)?
* Reasoning
	+ Is the gesture a statement that is identifying nurse? –This comes down to the specifics of the facts and whether this can be considered a gesture that identifies him
	+ Kumar died so this could be viewed as a dying declaration or spontaneous utterance –the stabbing just occurred and trauma was still there
	+ Nothing to indicate he had difficulty understanding who stabbed him
	+ No motive to concoct who stabbed him
* Held 🡪 gesture is admissible –could also be considered under principled approach

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| Statements about Physical Sensations  |

## Statements about Physical Sensations

* A statement of a person’s present bodily condition is admissible to prove how the person was feeling at the time the statement was made.

### Criteria:

* The statement relates to present bodily condition
* The statement is contemporaneous with the bodily condition
* The exception applies to only to the declaration of the physical sensation

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| Example 🡪 hurt back* Facts 🡪 During the examination, the doctor says to Jane, “How long has your back been like this?” Jane responds, “For a few days.” The doctor also asks, “How did you hurt your back?” Jane says, “Gardening.”
* Reasoning 🡪 it must be about present/contemporaneous physical sensations and not how it happened
 |

### Rationale for the Exception

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

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| State of Mind/Present Intentions Exception  |

## State of Mind/Present Intentions Exception

* A statement of a person’s present mental state is admissible to prove what the person’s mental state was at the time the statement was made.

### Criteria

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

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| Example 🡪 murder or suicide * Facts 🡪 the issue is the cause of death –murder or suicide. The deceased made the following statements a few weeks before her death:
	+ No one likes me, no one would miss me
	+ I intend to kill myself
* Reasoning:
	+ The first statement is not an express statement of mind –implies something but you would have to draw a conclusion from these words and make an inference. Therefore, it is not an express state of mind and there is a potential for ambiguity
	+ Admissible for certain purposes:
		- Evidence of the declarant’s state of mind/intention at the time the statement was made.
		- Evidence that the declarant acted in accordance with that state of mind/intention.
	+ Not admissible for other purposes:
		- State of mind of persons other than the declarant, unless a hearsay exception exists for both levels of hearsay.
		- Persons other than the declarant acted in accordance with the declarant’s stated intentions.
		- Past acts or event referred to in the statement occurred
 |

### 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.
2. Persons other than the declarant acted in accordance with the declarant’s stated intentions.
3. Past acts or event referred to in the statement occurred.

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| Example 🡪 letters of suicide or murder* Facts 🡪 The deceased wrote the following statements in a letter to a friend in the week before her death:
	+ 1) James intends to kill me.
	+ 2) I tried to kill myself last night, but I did not take enough pills and just got sick.
* Issue 🡪 is the statement admissible under the state of mind
* Reasoning:
	+ First statement is not admissible because it is not James’ state of mind –it is the deceased’s state of mind
	+ Depends largely on context where you are trying to get the statement in
	+ The second statement does not establish state of mind today, maybe just yesterday, the took pills part is not admissible at all because deals with prior act and not really state of mind –not at the time they were involved in trying to kill themselves it is a recount of what occurred previously
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### *Smith (1992, SCC)* 🡪 *case of state of mind; cannot make assumptions but if fails under this exception can try principled approach*

* Facts 🡪 There were three phone calls:
	+ 1) “Larry has gone away.”
	+ 2)“Larry has not come back and I need a ride home.”
	+ 3)“Larry has come back and I no longer need a ride."
* Issue 🡪 Admissible under the state of mind exception? If so, to what extent and for what purpose(s)?
* Reasoning
	+ Neither of the first statements here say anything about her state of mind –we can draw inferences from the phone calls, that being that she wants to come home
	+ If so, we can say her state of mind was that she wanted to go home and get out of the situation she was in
	+ But, Larry coming and going statements are only a recount of facts and not a state of mind so this part would not be admissible under this exception and we would need to rely on the principled approach
	+ The third statement would not be admissible at all –she made an assumption but no actual confirmed evidence that says Larry had returned she had just made an assumption

### *Starr (2000, SCC)* 🡪 *present intentions case exception*

* Facts 🡪 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.”
* Issue 🡪 Is C’s statement about doing an “Autopac scam” admissible under the state of mind exception? If so, to what extent and for what purpose(s)?
* Reasoning
	+ State of mind in terms of Cook doing autopac scam. COULD draw inference that Cook acted in accordance with that. But to get it in in relation to Robert must rely on co-conspirator’s exception; no evidence Robert said to him “I’m going to do scam” and there is a chance that Cook made it all up.
	+ Must consider if there are circumstances that would LEAD you to believe that someone would lie (here there was)

### Rationale for the Exception

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

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| Prior Convictions  |

## Prior Convictions

* Prima facie proof that the person convicted committed the acts in question
* Rebuttal is governed by the abuse of process doctrine
	+ Tainted first proceeding 🡪 i.e. perjury at first proceeding
	+ Fresh evidence
	+ Fairness
		- This means in the specific circumstances of the case I should be able to call evidence that the conviction should not be relied on
		- Rare cases where this occurs

### 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
	+ Statutory exception that includes discharges (which is not included under common law)
	+ Again, prima facie proof but can be rebutted

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| Example 🡪 Spencer* Facts 🡪 Brandon charged with robbery and gf Tanya also arrested. S has been convicted of 15 prior offences. Transcript between him and PO. PO suggesting confession in exchange for seeing his girlfriend; opportunity to see her will allow him to direct her testimony to not incriminate herself (quid pro quo)
* Issue 🡪 Is making of the statement causally connected?
* Reasoning:
	+ He outright said he’s making confession for gf
	+ strong attachment to gf; making implied threats can undermine confession if relationship is strong
	+ Crown would argue that he’s a seasoned criminal and that the PO continued to say “I’m not making you a deal”
	+ When S asks to go back to cell, PO turns the conversation to induce testimony again
* Voluntary? No 🡪 But the issue came down to the circumstances surrounding the quid pro quo. If you have savvy person, much harder time inducing a statement.
	+ Court of Appeal used *Oickle*
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| Opinion Evidence |

# Opinion Evidence

* Witnesses are permitted to testify to the facts that they perceived, not the inferences (ie. the opinions) that they draw from those facts

## Rationale

* Opinion evidence is superfluous
	+ i.e. Not needed as trier of fact can draw own opinion from the facts
* Risk of usurping trier of fact’s role
	+ Inability to evaluate accuracy of opinion without access to the facts underlying it

## Exceptions to the Rule 🡪 1*) lay opinion 2) expert opinion*

1. Lay opinion evidence
2. Expert opinion evidence

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| Lay Opinion Evidence |

## 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
* More simply stated:
	+ A lay witness may provide his or her opinion if this allows the witness to more accurately express the perceived facts.

### Criteria

* Opinion is relevant
* Not excluded by any exclusionary rule or policy
* Opportunity for personal observation 🡪 this person is the one who saw, heard, smelled, etc.
* Better position than the trier of fact to “justify” the inference 🡪 first hand observations =better position
* Sufficient relevant experience to draw the inference
* “Compendious mode of speaking”
	+ I.e. concise summary of subtle or complicated facts otherwise difficult to articulate
* Guidance of an expert is not needed

### Common Examples

* 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)
* Certain questions of value
* Estimates of speed and distance

### Ultimate Issue Rule 🡪 ABOLISHED

* Original statement of rule that has since been abolished 🡪 Lay witness may not to 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:
	+ **CEA s. 8** 🡪 Comparison of a disputed writing with any writing proved to the satisfaction of the court to be 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.
	+ **EA s. 57** 🡪 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

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| Expert Opinion Evidence |

## Expert Opinion Evidence

### Basic Rule

* Expert opinion evidence is admissible if the following criteria are satisfied:
	+ 1) Properly qualified expert
	+ 2) Necessary to assist the trier of fact
	+ 3) Relevant (reliable)
	+ 4) No 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**

### Types of Experts

* Factual witness
* Pure expertise
* Expertise applied to facts
* Opinion derived from an investigation of (admissible and inadmissible) facts

### 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

### Dangers of Expert Evidence

* Distortion of the fact-finding process
* “Contests” of experts
* Risk of inordinate expenditure of time and money

### Role of the Expert

* Expert is not an advocate
* Expert’s primary duty is to the court, not the retaining party
* Lack of independence and impartiality may lead to the rejection of expert evidence

### Voir Dire Required or Not?

* 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
	+ Threshold admissibility inquiry
	+ Gatekeeper exclusionary role

### Why a Gatekeeper role?

* Sufficiency of legal controls over experts and expert evidence
* Concern over “junk science” and the “battle of experts”
* Lack of reproducibility of “established” sciences
* Need to preserve trier of fact’s role

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| Threshold Stage |

## Threshold Stage

### Admissibility Test

1. Properly qualified expert
2. Necessary to assist the trier of fact
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
* Expertise is the relevant area
* Low threshold 🡪 once satisfied, deficiencies go only to weight
* Factors to consider:
	+ Academic qualifications
	+ Additional training
	+ Practical experience
	+ Publications
	+ Peer-reviewed books and articles
	+ Professional papers and presentations
	+ Merit-based memberships
	+ Honours and awards
	+ Prior acceptance as an expert 🡪 if there is a contested voir dire on record, they will not necessarily be accepted but still determined on a case-by-case basis

#### J-LJ (2000, SCC) 🡪 Novel Science

* “Basic threshold of reliability“ of the underlying science
* Adoption of Daubert factors
* Hands-on approach
* Contested theories or novel applications
* Testing of the theory or technique
* Peer review and publication of theory/technique
* Known or potential rate of error
* Acceptance of the theory or technique within the relevant field of knowledge
* nb.: limitations of these “protections”

#### Properly Qualified Expert 🡪 Duties

* Expert has duty to the court to be fair, objective and non-partisan
	+ Impartial 🡪 opinion reflects the expert’s objective assessment of the case
	+ Independent 🡪 opinion is the product of the expert’s independent judgment uninfluenced by outcome or who retained expert
	+ Unbiased 🡪 opinion does not unfairly favour one party over another

#### Properly Qualified Expert 🡪 Issue of Bias

* Appearance of bias alone is not enough to make expert’s evidence inadmissible
* 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
* Applying the test:
	+ Expert’s evidence recognizing and accepting duty to the court is generally sufficient to satisfy threshold
	+ Burden shifts to other party to show realistic concern the expert is unable and/or unwilling to comply with the duty
	+ If established, the burden shifts back to the party proposing to call the evidence on the balance of probabilities
	+ Not an onerous burden
	+ Considerations include the 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
	+ Expert evidence is rarely excluded for bias; usually goes to weight
	+ Anything less than a clear unwillingness or inability to provide the court with fair, objective, and non-partisan evidence should not result in exclusion
* Relevant considerations to include:
	+ Direct financial interest in the outcome?
	+ Very close familial relationship with a party?
	+ Exposure to professional liability if one’s opinion is rejected by the court?
	+ Acting as advocate, not as an expert?

### Necessity

* Expert evidence is required to permit the trier of fact to appreciate the matters 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
	+ Technical evidence, computer by-product evidence, mundane” technologies

#### Summary of Necessity

1. Evidence is necessary
	1. Appreciate the technicalities of the matter
	2. Information outside the trier of fact’s experience
	3. Form a correct judgment about the matter
2. Need for the evidence is sufficient to overcome its potential prejudicial effect
	1. Availability of other evidence
	2. 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?

### Absence of Exclusionary Rule

* Decided on a case by case basis
* Key concerns:
	+ Hearsay rule
	+ Character evidence rule
	+ Rule against oath-helping

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| Judicial Gatekeeper Role |

## Judicial Gatekeeper Role

### Exclusionary Discretion

* Costs/benefits analysis required? Available?
* Assignment of weight
* 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
* Test:
	+ Whether the proposed evidence is sufficiently beneficial to outweigh the potential harms of admitting it?

### 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 abolished by ***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
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 lead at trial to establish the facts
	+ Questions cannot be put that rely on inadmissible evidence

### 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
* 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
* Un-contradicted expert opinion should be given a great deal of consideration
* Extent of (deficiencies in) expertise is a matter of weight

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| Relevant Statutes and Rules |

## Relevant Statutes and Rules

### Criminal Code 🡪 s. 657.3

* Expert opinion is admissible through an “expert report”
* 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
	+ Reasonable notice = at least 30 days before trial, or as otherwise set by court
	+ Name, area of expertise, statement of qualifications
* Court may require expert to appear for examination or cross-examination on qualifications or substantive issues
* Specifies the requirements for “reasonable notice” and remedies for non-compliance
* 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

### Number of Experts

* CEA s. 7 🡪 no more than five experts per party without leave of the court
* EA s. 12 🡪 no more than three experts per party without leave of the court

### Civil Procedure Rules, Rule 4.1

* Expert’s Duty is threefold
	+ Provide fair, objective and nonpartisan opinion evidence
	+ Provide only opinion evidence that is related to matters within the expert’s area of expertise
	+ Provide additional assistance as the court may reasonably require to determine a matter in issue
* Expert’s duty to the court prevails over the expert’s obligation to the party retaining the expert

### Civil Procedure Rules, Rule 53.03

* Specifies the timelines for service of expert reports by the parties
	+ 90 days before the pre-trial conference if calling the expert
	+ 60 days before the pre-trial conference if expert is responding to opposing party’s report
* Required content of the report:
	+ Name, address, area of expertise
	+ Qualifications and experience
	+ Instructions provided to the expert
	+ Nature of opinion sought and issues to which it relates
	+ Expert’s opinion on the issues
	+ Expert’s reason for the opinion
		- Factual assumptions
		- Research conducted
		- Documents relied upon
	+ Acknowledgement of the expert’s duty ot the court

### Family Law Rules

* Two types of experts:
	+ Litigation experts
		- Retained to provide an opinion for the purposes of litigation
		- Rules 20.1 (duty of expert) and 20.2 (content of expert report)
		- Similar to Civil Procedure Rules but some unique aspects
	+ Participant experts
		- Not retained for litigation purposes, but providing an expert opinion based on observing or participating in the events at issue
		- Minimal requirements
		- Notice period (6 days before, must advise of witnesses and provide written opinion)
		- If requested, copy of any supporting documents
		- Strictly confined to their observations/participations of the event, and if they stray beyond that they must comply with litigation expert rules
* Important differences in requirements

#### Litigation Experts

* Rules 20.1 (duty of expert) and 20.2 (content of expert report)
* Similar to Civil Procedure Rules
* Some unique aspects
	+ E.g. “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”

#### Participant Experts

* Minimal requirements
* Notice period
* Provision of written opinion, if any
* If requested, copy of any supporting documents

### Small Claims Court Rules, Rule 18

* Expert reports admissible if served 30 days before trial, unless the court order otherwise
* Party must provide 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 to expert to attend for cross-examination

### Common Law Displacement

* Common law can be displaced if there is clear statutory language (i.e. CC. 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 without qualifying the evaluating officer as an expert

### Practical Considerations

* Issues to consider:
	1. Discussion between counsel and experts: ONCA [*Moore*]: it’s essential for witness to understand duties and provide a report that complies with the rules. There are safeguards in place to ensure it reflects the expert’s opinion and not the effect of the Crown/defense. Experts will be cross-examined, so any flaws or omissions can be brought to the attention of the courts
	2. Disclosure of working papers and draft report: ONCA [*Moore*]: expert reports in draft form, etc, between counsel and expert are not subject to automatic disclosure. Protected by litigation privilege. Lit Priv is not absolute, though. Doesn’t protect against improper conduct (if you have reasonable reasons. To suspect, that party can ask court and court will order production of draft reports). No RIGHT to production without reasons.
	3. Use of expert reports at trial (exbihits vs *aide memorie*):
		1. Exhibit: if expert report itself is the evidence
		2. *Aide*: if simply providing to trier of fact to help them follow along with the evidence.

## Example Problems

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| Example #1 🡪 Forestry Workers* Facts 🡪 forestry workers exposed to chemicals that caused cancer to skin, lung, prostate. Corporation admits to using chemical but says it is safe and does not contribute to cancer. Workers wish to call Dr. Wood (physician in cancer research). He had developed a new lab study for chemicals. To date has been subject to peer review, not universally recognized, but few articles have accepted it. Error rate for test is low. Dr. Wood did not personally conduct the test but relied on others who did and will testify it causes cancer. He had two degrees and training. But his father worked for the company for 24 years and was later fired for restructuring.
* Issue 🡪 should trial judge admit Dr. Wood’s proposed testimony?
* Held 🡪 TJ would likely admit it but would need to determine weight
* Reasoning
	+ Ordinary person would not understand causation of medical field and whether chemical X could have caused cancer
	+ An expert would be necessary to testify to that –this is the type of evidence where some degree of expertise is needed
	+ This person is the type of expert we would call? –They would have to be qualified in this area (background, education, practice, no issue of bias, etc.) –need to be reliable
		- Rare to exclude at qualification stage
		- Gatekeeper discretionary phase more likely
		- Would want to make an issue of her dad working at the company because this could go to bias and tainting the evidence of the expert
		- Other than this possible bias/connection to parties/company, the expert would be reliable
	+ Issue with the science –not universally accepted yet, it is still novel. What is the error rate? It appears to be low so this could be considered sufficiently reliable
	+ Another issue –Dr. Wood hasn’t conducted the test himself. However, this is usually how it works, they rely on tests conducted by other people which creates a hearsay issue but experts are allowed to do so. Question becomes whether it is so central that further evidence would need to be ascertained to this hearsay
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| Example #2 🡪 Cross-examine familiarity with medical book* Facts 🡪 Assuming Dr. Wood’s testimony was accepted, he was cross- examined. Asked if he wa s familiar with Dr. Pierce’s leading book in the field and Dr. Wood said yes. Dr. Pierce’s book said no increased risk of cancer. Plaintiff’s counsel objects.
* Issue 🡪 as TJ would you allow the objection?
* Held 🡪 The objection is unwarranted –defence counsel can ask the question
* Reasoning:
	+ He is entitled to ask that question because the witness recognized the book as authoritative
	+ Case law suggests experts can be crossed on text but the only stipulation is that they must be familiar with it and acknowledge it
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| Example #3 🡪 minority population expert* Facts 🡪 P charged with murdering his parents. Defence wishes to call expert to establish significant minority of population mistakenly believe people are better able to remember traumatic events and to establish that a witness may have false memories of the vent. Psychologist is renowned and expert in field.
* Issue 🡪 would TJ allow the expert’s testimony?
* Held 🡪 likely not because it is unnecessary
* Reasoning:
	+ Is this something an expert needs to testify to? Or is it generally known?
	+ Likely do not need an expert because not necessary
	+ Gatekeepers discretion –not super necessary so balancing factor
	+ Would fail at the necessity stage
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| Example #4 🡪 sexual assault examiner* Facts 🡪 P suing D. Claims when the P was 15, the D forced vaginal intercourse with him. P wishes to qualify and call a sexual assault nurse examiner to testify about observations made during examination. Primarily, to establish if the injuries are consistent with consensual or non-consensual sex. Nurse has a degree and certificate as sexual assault examiner. No experience or research in area of distinguishing consensual from non-consensual sex injuries.
* Issue 🡪 would TJ allow expert testimony?
* Held 🡪 no because this is not the proper expert
* Reasoning:
	+ Degree of expertise as examiner but nothing else suggests she is qualified to give that type of opinion
	+ Specific qualifications not there
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| Privilege and Related Doctrines |

# Privilege and Related Doctrines

* Exclusionary rules designed to keep out evidence even though it’s relevant and probative to the case at hand
* Preclude disclosure of certain communications and information
* Exist to protect certain types of relationships or other important societal interests

## Types of Privilege 🡪 1) class 2) case-by-case

1. Class
2. Case-by-case analysis

### 1) Class

* Once criteria for privilege is satisfied, evidence is inadmissible at court
* Classes:
	+ Solicitor-client
	+ Litigation
	+ Settlement
	+ Spousal
	+ Informer

### 2) Case-By-Case

* No close category
* Any communication conveyed in confidence COULD be subject but this won’t happen until court makes a rule on it
* ALWAYS involve balancing of interests
* Doctor-patient
* Therapist-patient
* Journalist-informant
* Religious/spiritual

### Related Doctrines

* What do they do? 🡪 Protect societal interests instead of relationships
* Types:
	+ Privilege against self-incrimination
	+ Public interest immunity
	+ Access to third party records

### Standard and Burden of Proof

* For class 🡪 prima facie assumption of inadmissibility
	+ i.e. Person claiming privilege can satisfy it without revealing communication –just have to show they meet the conditions
	+ Onus shifts to party seeking to set aside privilege to show communication ought to be admitted
* Case-by-case 🡪 onus rests on person asserting privilege to establish communication is privileged and therefore inadmissible
* Burden 🡪 civil standard (i.e. Balance of probabilities)
	+ Belongs to person whose privilege is at issue
* **Privilege may be waived**

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| Class Privilege |

# Class Privilege

1. Solicitor-client
2. Litigation
3. Settlement
4. Spousal
5. Informer

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| Solicitor-Client Privilege  |

## Solicitor-Client Privilege

* Rule 🡪 protects confidential communications between solicitor/client made for the purpose of obtaining legal advice
* Key attributes
	+ Most protected privilege
	+ Recognized to be a substantive right
	+ Principle of fundamental justice 🡪 protects client confidentiality outside of court
	+ Privilege holder is the client
	+ Privilege is permanent (even after death, business becoming bankrupt etc)

### Rationales

* Full and frank disclosure in the seeking and giving of legal advice
* Personal autonomy by giving individuals control over dissemination of confidential info
* Access to justice because this depends in part of a person to obtain effective legal advice
* Efficacy of the trial process because it ensures the client has the undivided loyalty of the solicitor

### Exceptions to Solicitor-Client Privilege

* Waiver
	+ Express (voluntary and informed decision by client to disclose privileged information) or
	+ Implied (client takes position that is inconsistent with maintaining the privilege)
	+ Requires 🡪 1) intention, 2) fairness to opposing party, 3) consistency
* Future (and sometimes ongoing) crimes
	+ Excludes communications that are:
		- Criminal in themselves
		- Made with a view to obtaining legal advice to facilitate the commission of a crime
	+ Must show advice was being SOUGHT, and the client must know that the act is illegal at time of questioning
* Public safety
	+ Imminent risk of serious bodily harm or death to an identifiable person or group
	+ Must consider:
		- Clarity
		- Seriousness
		- Imminence
* Innocence at stake
	+ No protection if there are core issues going to the accused’s guilt and a genuine risk of wrongful conviction ***(McClure)***
	+ Must be only way the accused could defend themselves against wrongful conviction
	+ High standard
	+ Two step approach
		- 1) Threshold test
			* Was info available from any other source/other way to raise reasonable doubt?
			* If yes, ends here and solicitor client privilege upheld
		- 2) Substantive test
			* First accused must demonstrate privileged communication exists
			* Information could raise reasonable doubt to his/her case
			* Then trial judge would examine, disclose any information satisfying standard
				+ Disclosure given to defence, not the crown
				+ Can renew the application

### Inadvertent disclosure

* Trial judge has discretion to find whether privilege has been lost, must consider:
	+ 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

### Applicable Test

1. Communications
	1. Not observations or pre-existing documents
	2. Between professional legal advisor and client
2. Professional legal adviser
	1. While acting in that position
	2. Extends to those assisting the lawyer (admin) and third party if they are acting as a channel of information and client
3. Purpose is to obtain legal advice
	1. Incudes info client provides to the lawyer when they are deciding to accept retainer; can apply even if formal retainer is not established)
	2. For in-house counsel, because they also do non-law things: nature of relationship, content of advice, surrounding circumstances
4. Made in confidence
	1. Expressly makes confidential, or could reasonably assume under circumstances that they would have intended it to be confidential
	2. Important to make sure the only people in the room are in the sphere of the protection
	3. Third party 🡪 i.e. Who makes a report
		1. Functional approach 🡪if the function is essential to the existence or operation of the relationship, it is protected
			1. Ex. Communication channel, or expert who assembles analyses and translated information from the client to be used by the lawyer
			2. But if only authorized to gather information, not essential
		2. If litigation is ongoing or anticipated

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| Example 🡪 doc sent to wrong party* Facts 🡪 Plaintiff’s counsel inadvertently send an expert’s report to defendant’s counsel who reas it assuming P intended to call expert. P ends up not calling him, but D decides to. They include a copy of the expert’s report in pre-trial brief. As such, P becomes aware of mistake and moves for declaration that report is privileged.
* Issue 🡪 will the report be declared privileged?
* Reasoning
	+ Solicitor-client privilege covers direct communications with client but sometimes you also need to get opinions from others so you hire an expert and provide them with info from client who falls within sol/client
		- Absolute privilege!!! Versus litigation privilege which is time-limited
	+ Was the error inadvertent? Were steps taken when mistake was realized?
	+ Then balancing of equities 🡪 would it be fair to say to opposing party, you can’t use, versus to the other, “sorry privilege is lost”
	+ When inadvertent error and steps are taken, courts generally allow you to reassert privilege, particularly if there has been some bad behaviour on other side that resulted in loss of privilege in the first place
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| Litigation Privilege |

## Litigation Privilege

* Rule 🡪 protects communications between third parties and counsel (or an unrepresented litigant) obtained for the purpose of litigation
	+ Applies when litigation is a reality or has commenced, not when there is a reasonable prospect but not a reality
* Privilege belongs to the client
* Confidentiality is not required
* Limited duration 🡪 expires once the litigation and any related litigation has ended

### Meaning of Related Litigation

* Non-exhaustive definition
* Same/related parties and cause of action
* Common issues and purpose

Exception 🡪 improper misconduct (derived from future crimes exception)

### Rationale

* Could not function if they knew investigations could be turned over to the other side
* “Zone of privacy” around preparation for litigation
* Reflects need to ensure relevant info is given to other side to ensure fairness

### Dominant Purpose Test

* Allows for communication to have been prepare for more than one purpose, but if the dominant reason for communication was for litigation, subject to litigation privilege

### Ingathered Documents

* Copies of docs taken from sources gathered by lawyer in the course of preparing for litigation
* Conflicting case law about whether protected by privilege
	+ Privileged if the collection involves the exercise of legal knowledge, skill, judgment and industry
	+ Privilege never attaches to copies of non-privileged documents

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| Dispute (Settlement) privilege  |

## Dispute (Settlement) Privilege

* Relates to attempts to settle litigation without trials
* Protects offers to settle –cannot be raised in court
* Rationale 🡪 to encourage settlement and ensure these discussions will not arise in court/trials, will not be disclosed if settlement discussions fail

### Criteria

* Litigation has commenced or is contemplated
* Express or implied intention of non-disclosure
* Purpose is to reach a settlement
* Applies to all efforts that are an attempt to settle the dispute

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| Spousal Privilege |

## Spousal Privilege

* Rule 🡪 no spouse can be compelled to disclose any communication made to them by the other spouse during the marriage
* Applies to all spouses and is not restricted to situations where one is an accused
* Statutorily outlines privilege
	+ CEA 🡪 s. 4(3)
	+ EA 🡪 s. 11

### Rationale

* Preservation of martial harmony
* Encourage sharing of confidence between spouses
* Natural repugnance over invading marital confidences

### Criticism

* Doubtful they would stop communicating because in the future this information can be used because people aren’t aware of this rule
* Arguments to make it case-by-case privilege and abolish the rule

### Scope of Spousal Privilege

* Holder of the privilege is the receiving party (not the speaker)
	+ Testifying spouse can decide to claim or waive the privilege
	+ If they waive, the other spouse cannot rely on privilege to prevent it being disclosed
* Applies only in relation to communications made “during the marriage”
	+ I.e. Existed at the time communication made and disclosure sought
	+ Marriage includes ONLY legal marriage, not common law, divorce, death
	+ In Alberta: privilege extends to adult interdependent partners
* Protects all such communications, whether or not intended to be confidential however protects ONLY communications, not facts or events
	+ I.e. would not include wearing a bloody shirt
	+ But if he said “oh my god I stabbed him” the statement could be protected if the receiving spouse decided to uphold this privilege
* Does not preclude disclosure by a third party to overheard the conversation
	+ Exception 🡪 authorized wire taps where privilege can be asserted by the receiving spouse

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| Example 🡪 calling wife to testify* Facts 🡪 A is charged with sexually assaulting and murdering child neighbour. Crown calls his wife, Wendy, to the stand. The Crown intends to ask Wendy what A said to her about his whereabouts and what he was wearing that day.
* Issue 🡪 Does Wendy have to answer the Crown’s questions?
* Held 🡪 Wendy can invoke spousal privilege but applies only to communication
* Reasoning:
	+ Spousal privilege is a class of privilege
	+ They are trying to call his wife –is this a spousal privilege recognized by law? Yes they are legally married
	+ How broad is the privilege, what is covered? 🡪 She can answer questions of observations (i.e. whether he was home) but their actual communications are protected and she can choose whether to testify about that (it is the spouse on the stand who decides if she asserts the privilege)
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| Informer Privilege |

## Informer Privilege

* 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
	+ Similar protection to solicitor/client privilege
	+ Applies to all proceedings (civil, criminal, etc.)
* **Informer:**
	+ Any person who gives information to the police relating to a criminal investigation in exchange for a promise of confidentiality
	+ Includes anonymous informers through crime stoppers
	+ Contrast to “agent” status: who act at instruction of police and are expected to testify so no privilege of this kind applies

### Rationale

* The rule of public order
* Importance of informers in suppressing crime
* Duty to protect persons who report crime (regardless of their motive)

### Criteria

* 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
	+ Implied 🡪 would the conduct of the officer would have let a person in the shoes of the informer to believe on reasonable grounds that they have guaranteed confidentiality
	+ What were they told, agreements signed, how did the person behave, video cautions
	+ Implicit can be complicated where
		- Person is referred from other police
		- Person is offering info on multiple investigations
		- Person has some degree of involvement in offences in question

### “Tend to Identify”

* Recall 🡪 privilege protects anything that might “tend to identify” a confidential informer
* Very broad range of information
* Example
	+ CI charactersitics
	+ CI associates and activities

#### R v Omar (2007, SCC) 🡪 information that might tend to identify informers needs to be analyzed in the particular case considering would this particular info tend to identify the informer

* “Information that might “tend to identify” 🡪 could include age, gender, occupation, socio economic status, health issues, lifestyle choices, associates, connections with arrest of other persons, dates, times, locations, and the fact of contact with the police as an accused, victim or witness, criminal convictions, discharge, acquittals, withdrawals, bound by recognizance, undertaking, probation or prohibition order, geographical areas, length of time in community or as an informer, motivation for providing information... ETC
* Though there might tend to identify informers in general, must ask specific question:
	+ In this particular case, would this particular type of information tend to identify this informer

### Loss of Privilege

* Waiver by Crown and CI
	+ Crown cannot waive without consent so jointly held –CI cannot waive without Crown
	+ Absent waiver, privilege is absolute except for innocence at stake exception
* Exception 🡪 informer privilege does not apply where potential informer is communication with police to further criminal activity or interfere with admin of justice (like future crimes exception)

### Informer or Not?

* Most cases no dispute if someone is a CI
* If in dispute, trial judge decides:
	+ *In camera* hearing by trial judge determines whether informer
	+ Informer, Crown, *amicus curiae 🡪* accused and his counsel may not attend so *amicus curiae* may be appointed if person who is claiming status and crown appear to be the same
* Civil balance of probabilities 🡪 If TJ decides they are informer, court must give effect to the privilege

### Innocence at Stake Test

1. Accused evidence shows a basis to conclude disclosure of the CI’s identity is necessary to establish the accused’s innocence, and,
2. It is the only way to establish the accused’s innocence
* Information that the accused believes that the information must not be able to come from any other source aside the informer and accused must be unable to raise RD as to guilt by any other means
	+ 1. Info must of necessity relate to one element of the offence charged
* Could occur, for example, if accused can show informer is a material witness
* Exception cannot apply if accused is relying on entrapment, because issue of entrapment only arises after they have been found guilty of the offence charged.

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| Case-By-Case Privilege |

# Case-By-Case Privileges

* Includes areas like:
	+ Doctor/patient
	+ Journalist/Informant
	+ Priest/penitent
* Courts are reluctant to make these specific classes because the more classes, the more information you can exclude from the adjudicative process
* Case-by-case means every communication is POTENTIALLY protected, but you will not know until the court rules
* Starting point 🡪 it is NOT protected; onus on party not wanting it to be disclosed to established privilege should apply; fact specific analysis based on totality of circumstances to examine whether the policy reasons for excluding evidence outweighs need for evidence to resolve the dispute

### Criteria (Wigmore)

1. Confidential communication
* In confidence, in expectation it would not be disclosed
* In religion, no requirement that you make confession as part of a formal process for confidentiality to be established
* Factors 🡪 persons and their expectations, place where it took place, context
1. Confidentiality is essential to maintain relationship
* In professional relationships, easy to establish
1. Relationship is one that should be fostered
* Ex. Which ought to be encouraged and promoted
* In professional relationships, easy, because for example, everyone accepts importance of doctor/patient
1. Injury caused to relationship by disclosure would outweigh the benefit
* Most important!! Usually at issue
* Factors 🡪 short-term interests of parties (benefits and harms), long term interests of the profession/society (i.e. In Doctor/Patient, if you are guaranteed confidentiality, more likely to share)

### Screening Disclosure

* If disclosure is found to be required, court can screen what must be disclosed:
	1. Limiting number of communications
	2. Editing communications to weed out unessential
	3. Imposing conditions on access
* Resolution of claim occurs during *voir dire* because disclosure is necessary to assess harms/benefit analysis

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| Journalist-Informant Claims |

## Journalist-Informant Claims

* Common law case-by-case claim
* Now statutory claim too 🡪 **s. 39.1 CEA**

### *National Post (SCC, 2010)* 🡪 *fourth criterion is hardest to establish; privilege will not be granted where the injury would not outweigh the benefit (i.e. serious allegations, etc.)*

* Issue 🡪 case-by-case claim to journalist-informant claims
* Held 🡪 no privilege because fourth criteria not met
* Reasoning:
	+ Applied Wigmore criteria
	+ First three criteria were satisfied
		- 1) Confidential info 🡪 Source given a blanket unconditional promise of confidentiality
		- 2) Confidentiality is essential 🡪 Source would not have provided the communication (the bank loan authorization) without the promise of confidentiality
		- 3) Relationship should be fostered 🡪 Investigative journalism into government conflict of interests (and thus journalist-informant relationship) should be fostered
	+ But, no privilege granted due to failure to satisfy the fourth criteria
		- Serious allegations
		- Reasonable 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 identify the perpetrator of the crime

### Statutory Privilege for Federal Matters (CEA s. 39.1)

* **CEA s. 39.1** 🡪 definition of journalist and journalistic source
	+ Journalist 🡪 occupation is to contribute directly either regularly or occasionally for consideration (pay) to the collection of writing for dissemination by media, or anyone who assists
	+ Source 🡪 Confidentially transmits info to journalist, on journalist’s undertaking not to reveal source
		- These mimic the common law first and second criteria for case-by-case privilege under common law
* Objection to disclosure because it will or is likely to identify the source
* Assigns burden of proof
* **CEA s. 39.1(7)** 🡪 criteria for disclosure (like fourth criterion of common law test)
	+ To order disclosure, court must be satisfied that there is no other reasonable means to obtain the information or document
	+ Balancing of interests considering
		- Importance of the information/document to a central issue in the case;
		- Freedom of the press;
		- The impact of disclosure on the journalist and the source
* **s. 39.1(8)** 🡪 court can impose conditions to protect source
	+ Burden of proof on person requesting disclosure
	+ Must show conditions in (7) are fulfilled
	+ Presumption of non-disclosure in statutory (as opposed to common law)

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| Example 🡪 police investigative report* Facts 🡪 special inquiry called to investigate police abuse in charging and arresting HP, a prominent lawyer. Lawyer was considered a “thorn in police’s side”. Upon hearing of arrest, journalist went to lawyer’s building to see and have the arrest photographed. Investigation escalated and the journalist was called to give evidence at the inquiry. He is sworn and asked to identify his informant who tipped him off of the arrest. He advises he will not disclose the person’s identify based on journalist-informant privilege.
* Issue 🡪 can journalist be required to testify?
* Reasoning:
	+ Federal or provincial? 🡪 Determines if CEA applies of case by case provincial privilege case
	+ Federal is advantageous to the journalist because it’s up to the Crown to show public interest
	+ Federal vs. provincial dictates where the burden lies
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| Privilege Against Self-Incrimination |

## Privilege Against Self-Incrimination

* Not a privilege 🡪 not intended to protect relationship/communication –focus is to protect other societal interests
* Protects individuals right to be presumed innocent and not to be forced into assisting prosecution in building its case
* Common law privilege has been **ABOLISHED**

### Rationales

* Assists in the ascertainment of the truth because compelled testimony is useful
* Individual autonomy by giving individual right to choose whether to participate in criminal cases against them
* Fair state-individual balance by recognizing the state already has superior resources, and should be able to build its case without the assistance of the accused

### CEA s. 5 and EA s. 9

* Witness must answer but receives protection for what they’ve said against subsequent incriminatory uses other than perjury for giving evidence
* Criminal / civil liability
* Protection must be invoked by the witness

### Scope of Protection

* Apply to all witnesses including accused persons
* Apply to voluntary and compelled testimony
* “Use” of testimony is assessed at the first proceeding THEN witness must show the evidence is (tends to be) incriminatory
* Privileges provide absolute protection against later use; ex. Crown can’t use it for case-in-chief or to cross-examine an accused person

### Charter s. 13

* Witness must answer but receives protection against subsequent incriminatory uses
* Criminal prosecution only
* Protection is automatic even if the person is unaware the protection exists
* Scope of Protection
	+ Avail to all witnesses
	+ Applies to voluntary and compelled testimony
	+ “Use” is assessed at the second or subsequent proceeding
		- Protection only applies if the use of the testimony in subsequent would incriminate
		- Incriminating if can be used to prove guilt in subsequent
	+ Re-trial is “any other proceeding”
	+ Unlike section 5, does not provide absolute protection against potential uses of testimony. Two situations must be considered
		- Voluntary witness at first trial: where this occurs, can’t use testimony as case in chief but can use to cross-examine.
		- Compelled witness at first proceeding 🡪 R cannot use incriminating testimony from earlier for ANY purpose if accused is witness at second. BUT if not incriminating at first proceeding, can be used to impeach if he or she chooses to testify

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| Proof Without Evidence |

# Proof Without Evidence

1. Formal admissions
2. Judicial notice

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| Formal Admissions |

## Formal Admissions

1. Guilty plea
2. Admissions pursuant to s. 655 of the Criminal code
3. Agreed statements of fact
4. Admissions at common law

### Criminal

#### 1) Guilty Plea

* What is it? 🡪 Formal admission of the accused by facts that are necessary to the offence, including particularized facts in the information.
* Not necessarily ALL facts, just those needed to prove
* Could plead to lesser offence; Crown has the option to accept or reject this plea
	+ Murder > manslaughter
* Voluntary, unequivocal, informed 🡪 to all parts of the allegation:
	+ Nature of allegation
	+ Effect of plea
	+ Consequence of the plea

#### 2) Admissions Pursuant to s. 655 CC

* Those that fall short of a full plea of guilt to the full offence
* Indictable 🡪 can make submissions ex where they assert defence or where they deny mental element; also could admit only some facts of the case (jurisdiction, ID, date, time)
* Once admitted, it’s proven and Crown can’t call evidence on this admission; they cannot reject an admission solely to keep it alive to introduce prejudicial evidence
* Crown is not required to accept an admission if it doesn’t have facts required
* Case law that allows Crown to admit facts but no provision in Criminal code because the purpose of having admissions is to streamline the trial

#### 3) Agreed Statement of Facts

* Rule 🡪 clear, unambiguous, precise, unequivocal
* Evidence will not need to be called because they agree
* If accused evidence conflicts, TJ should call crown can call evidence
* No stat authority; use has been explained as a waiver by both parties as to the usual rule that witnesses must be called to state facts
* In subsequent proceedings, if the accused agreed it is an informal admission so is therefore evidence against the accused (though accused could contradict it through other proof)

#### 4) Admissions at Common Law

* Could be admitted so there is no need for a *voir dire*

### Civil

* Ways to make formal admissions:
	+ 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
* Formal admissions bind the party that made them and they cannot be withdrawn without leave
* Leave will not be granted unless the admission was made without authority, mistake, under duress, triable issue concerning admitted fact as to whether it exists, and no prejudice will be caused to the party in whose favour admissions made
* Counsel has implied authority to make submissions if they think it is proper, in honest exercise, and incidental to the lawsuit

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| Judicial Notice |

## Judicial Notice

* Limits are inexact because they change as the world, and general knowledge, changes
* Intersects with other doctrines
	+ Judges take common sense inferences
		- “Informal” Notice
		- Day to day application of “common sense”/“knowledge and experience” of the trier of fact about how the world generally works fall outside judicial notice rule
		- Danger: invalid generalizations and stereotypes may sneak in
			* To combat, it’s important to breakdown the underlying assumptions when explaining why a piece of evidence is or is not relevant
	+ Expert opinion evidence is required
		- When information required is “beyond the scope of experience and knowledge of the trier of fact”
		- What requires expert evidence today may not require expert evidence tomorrow
* Key issues:
	+ When to apply the rule
	+ Notice or no notice to the parties that the rule is being applied

### Three Types of Facts 🡪 *1) adjudicative 2) legislative 3) social framework*

1. Adjudicative facts
	* Who, what, where, when, how and why
	* Doctrine of notice in its most strict sense only applies to these!
	* Only applies in narrow circumstances
	* Judicial notice can be taken if 🡪 “Rule of Thumb” Test
		1. **Notorious Facts Test** 🡪 any idiot knows the fact
			+ Allows notice to be taken if there is common or general knowledge in the community at the time the case arises (not the trial judge’s knowledge)
				1. Common knowledge varies with time and place
				2. Community could mean a subset of that community
				3. If a fact can be reasonably questioned, it cannot be subject of judicial notice
			+ No reasonably informed person would dispute the fact
			+ Examples 🡪 geographical facts (boundaries, landmarks), humans needs (pregnancy is 9 months), standard practices (calculating pension benefits)
		2. **Indisputable Source Test 🡪** Any idiot can find the book
			+ Judicial notice of a fact that is capable of immediate and accurate ascertainment by a readily accessible source
			+ Dictionary, encyclopedia, historical documents, almanac, atlas, calendar, chart, maps, internet sources recognized to be reliable such as Google Maps, Google Earth and Google Street View
2. Legislative Facts
	* These set or establish social, economic, cultural and historical context of legislation that is relevant to the dispute
	* Used to interpret statute or decide whether statute is constitutional
	* Courts are more inclined to take judicial notice of facts when theya re legislative versus adjudicative
	* Fact is 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
		1. More central to issue in dispute, greater need to ensure reliable = heightened risk the court will exclude it
3. Social Framework Facts
	* Set general social context/framework for analysis
	* Relevant only if possible to link facts to specific evidence in immediate case; even when it’s possible, must be skeptical of them and look critically at underlying science because they are likely up for substantial debate
	* Fact is 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
		1. More central to issue in dispute, greater need to ensure reliable = heightened risk the court will exclude it

### Rationales for Judicial Notice Doctrine

* Thayer / Wigmore
	+ Expediency, i.e. It saves time by shortening and simplifying the trial
	+ Judicial notice is prima facie recognition of the truth of fact, not conclusive proof of it
	+ Open to dispute by judge and open to other side to contest fact
* Morgan
	+ Maintain credibility of system which would be undermined if courts refused to accept truth of indisputable fact
	+ Created uniformity of decision-making and allowed TJ power over jury to accept facts are true
	+ Judicial notice should therefore constitute Final and conclusive recognition of noted fact, so TJ should take facts, and opposing party could not contest because TJ is taking judicial notice to maintain credibility because the fact is indisputable. Would bring admin of justice into disrepute to allow people to contest a fact that is incontestable
	+ Not open to dispute
* CDN courts rely on both
	+ For effects of judicial notice, we accept Morgan (if indisputable, can’t contest)
	+ But per Wigmore, TJ has discretion to take notice of fact that is suitable; merely because they CAN take judicial notice does not mean they HAVE to (occurs when facts are central adjudicative facts)
	+ BUT how can it enhance credibility of justice system to give judges discretion to accept as true, facts that no reasonable person would accept as truth??

### Judicial Notice of Law

* General rule 🡪 courts take judicial notice of domestic (federal/provincial) law, but not foreign law or usually municipal by-laws
* Statutory authority 🡪 CEA, ss. 17, 18; (Ontario) Legislation Act, 2006, ss. 13, 29, 74
* Rationale 🡪 expediency

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| Example #1 🡪 UWO in London * Facts 🡪 TJ who has lived in London forever could take judicial notice that UWO is loated in London. Is this true or false?
* Reasoning:
	+ Can take judicial notice
	+ Does it matter that she knows it or does everyone know it?
		- It is known throughout Ontario
		- She lives in London so has a sense of what the London community knows but someone from Toronto could equally take notice of the fact
		- It’s not about what she knows, is about within that community, this is a notorious fact
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| Example #2 🡪 what would we take judicial notice of1. At 6pm on January 1st in Winnipeg it is night 🡪 geographical fact that could be found in directory
2. The cost of raising child increases as child grows 🡪 common sense; may not need judicial notice because it is a common sense inference that we expect judges to rely on
3. Abuse of children is serious concern in our society 🡪 general knowledge. Concern would be about how they wanted to use this information
4. Battered woman syndrome may explain accused’s learned helplessness in finding she acted out of necessity? 🡪 Battered woman syndrome could be taken generally as something that has been recognized. Couldn’t take judicial notice about whether it applied and would need an expert to say that this person did suffer from BWS.
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| Burden of Proof and Related Issues |

# Burden of Proof and Related Issues

## Burden of Proof

* **Persuasive burden** 🡪 rests on the party who is legally required by the law to prove the relevant facts to succeed
	+ If they don’t establish facts, they will lose the case
	+ Allocation of this burden is a matter of law: it is possible to determine who has this burden before the case begins, and once it’s made it does not shift
	+ Who has the burden may 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
	+ I.e. The party must adduce or point to some point of evidence capable of supporting the decision on the issue in his or her favour before the issue needs to be considered
	+ It is up to that party to show that the issue is a live issue
* You can bear both persuasive AND evidentiary burden but this is not always the case

## Standard of Proof

* Tells you *how much* evidence a party needs to discharge the burden assigned
* A number of different standards that can be referred to (see below the “slide of standards”)
* **H → RS → RPG → PFC → BOP→ BRD → AC**
	+ H = mere hunch 🡪 lowest level
	+ RS = reasonable suspicion 🡪 where you are able to articulate to some degree the underlying facts that lead you to believe the conclusion to suspect that x or y is true; fairly common in criminal cases where police need RS to suspect before taking actions
	+ R(P)G = reasonable (& probable) grounds 🡪 requires “credibility based probability”; common in criminal cases for example police need RG to make an arrest or obtain warrant
	+ PFC = prima facie case 🡪 in absence of anything to contrary, would likely conclude the person had sufficient evidence to be able to establish their case
	+ BOP = balance of probabilities 🡪 50 + 1; trier of fact would be satisfied that it is more probable than not
	+ BRD = beyond a reasonable doubt 🡪 Prosecution bears this in criminal cases and must satisfy before jury/judge that overall guilt exists; very high standard but does not require absolute certainty
	+ AC = absolute certainty 🡪 no requirement in law ever to prove something to absolute certainty

## Balance of Probabilities

* BOP has one standard, differing *degrees* of certainty that may be required by the court to meet that standard
* Amount of evidence needed to meet BOP will depend on seriousness of case and nature of allegations
	+ “Preponderance of evidence”
	+ “Detailed and convincing evidence”
	+ “Cogent and sensible evidence”

### Civil Cases

* **Plaintiff** usually bears the evidentiary and persuasive burden
	+ Must prove allegations as set out in statement of claim
	+ Defendant must prove any special or affirmative defense raised
		- Ex. If P sues D on breach of contract, P must prove there was a contract and if they can’t, they lose; if D alleges that they lacked capacity to contract, they have the persuasive burden on this point
* Standard of proof is usually proof on the balance of probabilities
	+ Must adduce evidence and convince trier of fact that the alleged facts or more probably than not
* Motion for a non-suit may be brought at the close of the plaintiff’s case 🡪 allegation by D that P has failed to adduce evidence that is capable of establishing one or more elements of cause of action. TJ will determine motion and decide whether evidence is sufficient to establish issues in contention. If P defeats motion, doesn’t meant they win, all it means is the case goes to trier to fact to be determined

### Criminal Cases

**Prosecution in Criminal Cases**

* **Prosecution** normally bears the persuasive burden on the elements of the offence and on most offences
	+ Bears evidentiary burden with respect to proving the elements of the offence charged
* Standard of proof is beyond a reasonable doubt (higher than civil standard)
	+ BRD is a constitutional requirement under s. 11(d) and flows from presumption of innocence
		- Judge must instruct jury on meaning of RD according to *Starr* and other cases so they understand difference between legal and general definitions
		- Stress vital importance of the standard, burden of proving guilt rests on prosecution, and reasonable doubt is doubt based on evidence that can arise on evidence or absence of evidence

**Defence/Accused in Criminal Cases**

* **Defence/Accused bears** the evidentiary burden on most defences,
	+ But the persuasive burden only on a few defences (mental disorder, non instance automatism extreme intoxication)
* **Accused** has only the evidentiary or tactical burden to show air of reality to the issue. Once accused discharged evidentiary burden, prosecution must raise reasonable doubt on at least one element of offence to convict; where accused bears personal burden, accused burden is on BOP
* **Air of reality test** has two elements:
	+ 1) Judge must put all defences arising on facts to jury whether specifically raised by the accused
	+ 2) Must keep from jury defences that do not have air of reality or evidential foundation (positive duty)
		- These ensure fairness of trial, verdicts are supported by the evidence, reduce risk of confusing jury, etc.
* To apply air of reality 🡪 judge will consider all the evidence, assuming evidence is true, and decide whether on that evidence there is a real issue for jury to decide (requires there be evidence for each element of the defence)
	+ Does not determine credibility or reliability, rather assumes witnesses are being truthful
* Motion for a directed verdict can be made at the close of the Crown’s case

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| Presumptions |

### Presumptions

* Legal device that allows a trier of fact to reach a conclusion on a factual issue without having direct evidence on that issue
* No universally agreed upon way of classifying presumptions!

#### Presumptions without basic facts vs. presumptions with basic facts

* Without 🡪 conclusion that has to be drawn until contrary is proved (presumption of innocence or sanity in s.16 of *CC*)
* With 🡪 either mandates or allows drawing of conclusion of other fact based upon proof of fact (intends natural consequences of their acts. Presumed fact: intent, can be found upon the proof of the basic act)
	+ Ex. If you throw ball at window

#### Permissive vs. mandatory presumption

* Permissive 🡪 if it is optional as to whether inference of the presumed fact is to be drawn on the basic fact (not really presumption!!!)
* Mandatory 🡪 if it is not optional ie. Inference of the presumed fact must be drawn on proof of the basic fact (presumption for real)

#### Rebuttable vs. irrebuttable presumption

* Rebuttable 🡪 if law allows the party to dispute it by pointing to sufficient evidence to negate triers ability to draw stipulated inference
	+ if no basic facts, must be able to point to enough evidence to reach requisite standard set by law; ex presumption of
	+ if basic fact, only need enough basic facts to point to “some evidence to the contrary”
* Irrebuttable 🡪is not open to the party against whom it operates to negate its effects so not really a presumption; is a rule of law or deeming provision that says something must be taken to be X even if that contradicts our experience;
	+ Ex. The presumption that everyone knows the law
	+ Code has many deeming provisions like: a place that is equipped with a slot machine is deemed to be a gaming house

#### Presumption of Law vs. Fact

* Law 🡪 exists as matter of law and arises pursuant to statute or the Constitution
	+ Purpose is to assign proof to one party or the other
	+ Presumption does not have to be true as a matter of human experience
	+ Includes presumption of innocence, that judges know the law, that juror abide by their oath
* Fact 🡪 based on recurring cases of circumstantial evidence (as a matter of human evidence)
	+ Ex. Guilty knowledge from possession of recently stolen goods, legitimacy
	+ Some exist for policy reasons: in impaired driving over 80, presumptions that read back blood alcohol level at the time he/she was driving to be what it was at time of test administration; this is not accurate but exists to negate need to always call toxicologist
	+ Presumption with a basic fact: on proof of fact A existence of fact B is rebuttable presumed
	+ Mandatory but does not automatically arise at law in the sense that is it open to the party against whom the presumption operates to point to evidence that negates force of the presumption
	+ Party who seeks to rely on the method is forced to prove presumed fact using ordinary methods of proof

#### Presumption Simplified

* Prof 🡪 To simplify things, presumption SHOULD be restricted to things that are only REALLY presumptions, that is, mandatory rebuttable presumptions

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| Reverse Onus Provisions |

### Reverse Onus Provisions

* Legal rule that places the legal burden of proof on the party who does not normally bear it
	+ Ex. In civil case, the D
	+ In criminal, the accused
* If presumption does not place legal/persuasive burden on the party, is usually referred to as a mandatory presumption as opposed to reverse onus provisions
	+ Reverse onus provisions use the terminology: if he established, the proof of which lies upon him, he satisfies...
	+ Mandatory presumption use terminology: in the absence to the contrary
* Criminal cases
	+ Reverse onus provisions that place the persuasive burden on the accused violate s. 11(d), and must be justified under s. 1
	+ This applies whether presumed fact relates to element of the offence or defence

### Burden, SOP, Presumption Examples

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| Example #1 🡪 counterfeit money lit for cigar* Facts 🡪 A lit a cigar with a $20 bill. W is bartender who can testify.
* Issue 🡪 Did A know the bills were counterfeit?
* Reasoning
	+ Only piece of evidence was the burning of the cigar and we need to be satisfied BRD
	+ The more information you have, the harder to get directive verdict
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| Example #2 🡪 single car accident* Facts 🡪 A and B returning from trip on county highway during storm. Road well maintained. Truck left road and both bodies found next day. Single car accident. B was passenger and his estate sues A’s for negligence. A’s estate brought motion for non-suit
* Issue 🡪 how would TJ rule? Allow or dismiss non-suit?
* Reasoning
	+ “There isn’t enough information to draw a conclusion from a single car accident
	+ There is not enough to find negligence –especially considering the storm
	+ Would grant non-suit and if not, wouldn’t say they were negligent
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| Example #3 🡪 presumption classifications1. Person presumed dead after 7 years? 🡪 Presumption of death, non-rebuttable presumption of law
2. Evidence of break and enter, proof of intent to commit offence? 🡪 Breaking and entering means intent to commit indictable offence; fact presumption
	1. In absence to the contrary: rebuttable!!!
	2. In absence of fact, trier is directed to that presumption
3. Child under age 7 presumed incapable of committing crime 🡪 Presumption of law: child does not have criminal capacity
4. Person who sells or buys minerals is guilty of offence unless he establishes he is the owner 🡪 Reverse onus provision = flips burden of proof
	1. Guilty of offence if you do x. R has to prove. Proof requires no authority to sell, but here, crown doesn’t have to establish that, D does
	2. Reverse onus violate s. 11d in most cases so you would have to find some section 1 justification
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