***Voir dire***: Extra examination held to decide admissibility of a piece of evidence

**Proof**: Factual dimensions of evidence law, not the same as “evidence”

Foundational Approach – Same approach to *every* prospective piece of evidence:

Consider at every stage:

\* Is this evidence presumptively admissible or presumptively inadmissible?

\* What burden, on who, and standard of proof?

\* At stages 3 and 4: More sophisticated tests are applied to rule out low quality evidence

N

Y

Y

N

Y

Y

N

\_N\_\_\_\_

1) Is the info **material**  to an issue?

2) Is the info **relevant**?

\*3) Will the info be caught by one of the **exclusionary rules**?

4) PE>PV?

**Evidence admitted**

**Evidence excluded**

**Stage 1: Materiality** – “The first step of FA is determining the materiality of the piece of info. Stage 1 is satisfied if the info is directed toward a **matter in issue** (ONCA: *R v. B(L)*), i.e. a matter that is crucial to the case. We must also consider what the info’s designed to help prove. To determine that, we need to know whether it’s primarily or secondarily material. Because of \_\_, this info is [1O or 2O]. [Subsequent analysis of elements]”

*Primary Materiality – Elements*

1. Does the information arise from the cause of action that was pleaded (civil)?
2. What are the elements of the cause of action (or crime)? [requirements from the *substantive law*]
3. What requirements does the *procedural law* impose? [what is needed to allow this evidence in court]

*Secondary Materiality – Elements*

1. Does the info relate to the ***credibility*** of a witness? (trustworthiness; whether witness is to be believed, or any reason he might have for providing inaccurate info)
2. Does the info relate to the ***reliability*** of other evidence, including other testimony? (truthfulness, whether witness is influenced by anything that can cause even honest man to provide inaccurate info)

If secondarily material: “Secondary materiality speaks to c/r of evidence that would otherwise be material. It tends to have lower PV than primary materiality and is more likely to be *excluded*in Stage 4” **–** SCC: *McClure*, *Brown*

**Stage 2: Relevance** – Whether info makes fact “for which it’s advanced *more likely* than … in [its] absence” (*J-L.J.*)

No *minimum threshold* (*Arp*, SCC)

* “Relevance is *contextual* in that it depends on the *facts in issue,* the position taken *by the parties* in respect of those facts, and the other evidence” (*Truscott*)
* Even marginal relevance enough to *admit* rather than *exclude* for now 🡪 Can be excluded in later stages (*Osolin*)

Exception to admittance: Inference based on *inappropriate stereotype* (SCC: *Seaboyer*, e.g. earlier consent to casual sex)

Consider for every *contested piece of evidence*: Is it **direct** or **circumstantial**?

* *Direct evidence*: Evidence which, if believed, resolves a material issue.
* *Circumstantial evidence*: What is strength of inference to go circum evid 🡪 conclusion that ToF wants to know?

**Stage 3: Exclusionary Rules**

* Applied more *leniently* to allow the admission of *defence evidence* (*R. v. Williams*, ONCA)
* The *Charter* might also require technically inadmissible evidence to be received (*R. v. Felderhof*, ONCA)
* Compound ERs can sometimes apply:

*Triggers for Potential ERs*

1. Is the party seeking to rely in court on something it failed to disclose? 🡪 Disclosure or discovery **[PG 2]**
2. Is the party seeking to avoid disclosing something material and relevant? 🡪 Privilege **[PG 2]** 🡪 Still do Stage 4
3. Is a witness offering an opinion that is allegedly based on specialized knowledge? 🡪 Expert evidence **[PG 4]**
4. Is Crown introducing a statement made by A to a person in authority? 🡪 Self-incrimination (*Oickle* or s. 7) **[PG 4]**
5. Is Crown relying on evidence in circum. where A’s *Charter* rights breached? 🡪 *Charter* exclusion remedy **[PG 6]**
6. Is a witness offering something said at another time and place, for the truth of its contents? 🡪 Hearsay **[PG 8]**
7. Is Crown relying on evidence of A’s uncharged acts, character, or habits? 🡪 SFE **[PG 9]**

**Stage 4: Judicial Discretion to Exclude** –Does prejudicial effect/risk of the info *outweigh* its probative value?

\*\* Only analyze PV and PE if it’s not integrated into an Exclusionary Rule analysis \*\*

1. Consider the **prejudicial risk** likely to be caused: “Risk that ToF will misuse, misunderstand, or be distracted by the evidence” (*Handy*)
   * Also includes *emotion* rather than logic to drive a conclusion. It includes both the *distorting* impact that evidence can have on ToF and broader considerations of *fairness* (*Potvin*).
   * Risks of distortion (*Potvin*): **Moral prejudice** (risk of punishing A for being a bad person) and **reasoning prejudice** (risk that ToF might overvalue certain items, be misled, distracted, or confused)
2. Consider the **probative value** (measure of evidence’s value in FA): **Weight** that should properly be accorded to the evidence, including:
   * the strength of the *inferences* that may be drawn from circumstantial evidence;
   * the *believability* of the evidence; [credibility of witness, *reliability* of the proposed evidence]
   * the *centrality* of the issue addressed by the evidence (*Mohan*) [i.e. crucial or subsidiary purpose? How far does it resolve that issue?]
3. Consider *costs* of admitting the evidence, including inordinate amt of trial time and fairness to parties (*Mohan*).
4. Consider whether the prejudice may be removed by judicial **exclusionary direction** (jury cases).
   * “If ToF does believe the evidence, is it enough to convict?”

* Defence evidence can be excluded solely where: PE *substantially* > than PV (*Seaboyer*, SCC)
* Appeal courts will show *deference* to trial courts in relation to the discretion to exclude (*R v Terry*, SCC)

Information Gathering **–** Facilitates truth-seeking so both parties get all the info they need to prepare for trial

1. Is this a civil proceeding within provincial jurisdiction?
   1. Use *BC Evidence Act*
   2. If conducted in the BCSC (even if under fed juris.) 🡪 Use *BCSC Civil Rules* as well
2. Is this a proceeding under federal law (including all criminal)?
   1. Use *Canada Evidence Act*
   2. If criminal 🡪 Use the *Criminal Code* as well

**Discovery in Civil Procedures –** Symmetrical, both sides must disclose info

* **Principle of proportionality**: Nature and extent of discovery obligation proportionate to value of the litigation

BCSC COURT RULE 7-1 provides that each party to an action must prepare a list of relevant documents for discovery and serve it all other parties in the action, or else it won’t be admissible in court. Automatically triggered by (1)(a)(i) and (ii)

**Disclosure in Criminal Procedures** – Asymmetrical, only Crown has duty to fully disclose its case

* Crown has duty to act in public interest, which remains even post-conviction, and lay evidence before the court (*Boucher*, SCC). Results of investigations belong to the public, not to the State
* *WLBI v Abbot & Haliburton*: *R v Abbey* sets out correctly the criteria for admissibility

*R v Stinchcombe*, SCC Rule: All possibly relevant information (whether inculpatory or exonerating) must be disclosed in a timely fashion by Crown to A (whether helpful or adverse), subject to the reviewable discretion.

* **Reviewable discretion** allows the Crown to retain some discretion over timing (so disclosure could be held back until an investigation is complete or where witness safety is at issue) or privilege (such as informer privilege).
  + Reviewable because the defence can bring a motion to the trial judge to review it.
* Defence requesting disclosure triggers the Crown's obligation to make disclosure. This disclosure needs to be made before the A makes important procedural decisions (mode of trial, pleadings).

**ER:** PRIVILEGE – Allows some info and docs to be withheld legally during disclosure (relationship > truth-seeking)

**1) Class Privilege** – Special relationships recognized by SCC as a class as allowing for privilege

*Prima facie* assumption that their communications are privileged and inadmissible (*Gruenke*)

*Solicitor-Client Privilege* – *Elements (Descoteaux*, *Shirose):*

1. Where any legal advice is sought from a professional legal adviser in her capacity as such (incl. secretaries, etc.),
2. Communications relating to that purpose (incl. fees; not incl. physical objects)
3. Made in confidence by the client (i.e. C’s expectation about any info gathered)
4. Are at the client’s instance permanently protected
5. From disclosure by client or lawyer (neither can be forced to disclose except when court sees need for it: *Brown*)
6. Unless that protection is waived (the privilege is only C’s for waiving: *Youvarajah*, ONCA)
   * *Youvarajah* requires: 1) C is aware of his right to waive, and 2) voluntarily evinces desire to waive it

*Litigation Privilege* – Establishes zone of ***privacy***, even applies for self-represented litigants; Elements (*Blank*):

1. Communications between agent of C (i.e. a L) and a third person
2. At the time of making the communication, litigation had commenced or was anticipated
3. Dominant purpose of said communication was use in or advice on litigation

|  |  |  |
| --- | --- | --- |
|  | SOLICITOR-CLIENT PRIVILEGE | LITIGATION PRIVILEGE |
| PURPOSE/RATIONALE | Protects the confidential L-C relationship | Facilitates adversary process; protects litigation preparation |
| SCOPE OF APPLICATION | 1. Applies only to a solicitor-client relationship  2. Applies only to confidential communications  3. Applies any time client seeks legal advice even though no litigation is involved | 1. Applies to all litigants and 3rd parties in the litigation (*Blank*)  2. Applies to communications (either confidential or non-c) and non-communicative (e.g. copies made via legal skill, judgment).  3. Applies only in the context of litigation |
| SCOPE OF PROTECTION | Close to absolute protection | Only docs for dominant purpose of litigation protected (*Blank*) |
| PERMANENCY | Once privileged, always privileged | End upon litigation termination if no closely related proceeding |
| RECENT TREND | Strengthened | Weakened |

***CC s. 189(6)***: Where police are lawfully intercepting communications, any privileged info remains privileged.

*Exceptions to Class Privileges*

1. When you ask for advice about committing a crime
2. **Public Safety Exception** (*Smith v Jones*), with 3 factors:
   1. Clear risk to identifiable person/group of persons? (e.g. specific plan, prior history of violence, targeted)
   2. A risk of serious bodily harm or death?
   3. Is the danger imminent? (statement in a fit of anger not enough, needs to be a clear threat)
3. **Innocence at Stake Exception** (*McClure*) when privileged info being sought isn’t available from any other source, and A believes he needs it to be likely to raise a RD, with 2 part-test: \*\* Rarely in play \*\*
   1. TJ must find some evidentiary basis that S-C communication is likely to raise a RD
   2. TJ then examines the communication and asks if it’s likely to raise a RD

*How to Lose Privilege*

1. Disclosure to 3rd party or use as part of your case is seen as implied waiver (*Shirose*)
2. When L forced to withdraw because she’d taken advantage of opponent’s mistaken reveal of privileged info
   1. Because: Inadvertent waiver of privilege due to mistake =/= actual loss of privilege (*Descoteaux*)

**2) Case-by-Case Privilege –** *Burden of proof* on party that wishes to exclude the evidence by demonstrating privilege

Begins with presumption of admissibility (first prove m/r) 🡪 Rely on *Wigmore* criteria (here reformulated via *Gruenke*):

1. Must originate in confidence
2. Confidence is somehow essential to the full and satisfactory relationship between the parties
   * *Ryan* 2-level analysis: Consequences of displacing that r’ship, AND confidence in the field as a whole
3. Society has an interest in fostering this relationship (and it is diligently fostered and encouraged)
   * “Opinion of the community” or public interest (*Ryan*)
4. Harm by disclosure (incl. damages) must be greater than benefit of litigation disclosure
   * Can the same evidence be obtained in a different way?

“And if disclosure is ordered, what limits should be placed on it?”

*Journalist-Source Privilege – Category highlighted in National Post, applied Wigmore elements*

1. Can only arise where confidentiality promise given to journalist by whistleblower
2. The promise is inherent to the nature of the relationship between the journalist and the confidential source
3. Public interest exists in whistleblower sharing important info w/ journalist about serious crime of forgery
   * Not quite the same with a blogger (Snowden)
4. Balancing public interest in getting at the truth vs privacy of whistleblower 🡪 Is what is plausibly in the records relevant to the question of accurately conducting a crim investigation? Factors include:
   * The nature and seriousness of the crime
   * The centrality and PV of the evidence in question
   * The purpose and good faith of the investigation (e.g. exposing a government cover up?)
   * Whether the evidence is available through alternative means
   * The type of information sought (real evidence?)
   * The degree of public importance of the story
   * Whether the story is already in the public domain

**ER:** EXPERT EVIDENCE – Need to strike balance btw EE assisting truth-seeking vs identify/exclude unreliable EE

Party who wants to admit EE has *burden of proof* on BoP (*Abbey* 2009 OCA/*Mohan*); ***presumptively inadmissible*** (*Graat*)

**Lay opinion evidence** (lay witness can only testify to what directly perceived or fact, not opinions: *Graat*) 🡪 Exceptions:

1. Conclusion is one that persons of ordinary experience are able to make (e.g. judging someone as too drunk; allowed to give opinion on handwriting you know: *CEA*)
2. Lay witness can give opinion where they are in better position than jury to reach that opinion
3. Also acceptable in court: conscious ratiocination, voice recognition

**Expert opinion evidence** (w/ specialized knowledge) 🡪 Also use *Abbey* analysis

*Abbey* approach to **EE** admissibility (reformulates *Mohan* test, approved by SCC w/ slight modif. in *WBLI*, by BC in *Aitken*)

1. Define *proper scope* of the expert’s testimony (i.e. how relates to X-examiner’s work in expert’s own language) [1-2 sentences] – Ex: In *Abbey*, scope = cultural relevance of teardrop tattoo on gang member A’s face
2. Consider the *preconditions to admissibility*: [1. Incl. relevance and materiality (can cover w/ “See above analysis”)]
   1. Is the evidence the proper subject of EE? (Use *WBLI* Cromwell modification: Is it *necessary* for this evidence to come from an expert instead of ordinary person? For novel science, see below) 🡪 If Y 🡪
   2. Is the expert *properly qualified*? (*Mohan* modest standard: expert = knows more than ToF) 🡪 If Y 🡪
   3. Do any other ERs apply? [If Y, analyze it here FIRST, then go back to *Abbey* analysis] If N 🡪 Preconditions met

* *Abbey* SCC, confirmed in *Lavalee*: Hearsay is admissible in EE in order to explain the basis on which expert has reached his opinion, or to explain work by others in same field
* Different from case-specific hearsay evidence, which asks: Is there another source for that evidence that is more admissible?

1. Do the benefits of the evidence outweigh its costs? “Next, the ToF exercises their gatekeeper function.”
   1. PV: Especially reliability, so we turn to EC flowchart

“In BC, some jurisprudential ambiguity about how to assess EE’s threshold reliability. In *Aitken* (podiatrist tried comparative analysis, diff. conditions from what he’s used to), BCCA decided that, as long as the expert is testifying from recognized field on a recognized technique, then it will accept that as meeting the threshold test for reliability and pass it on to jury to decide on ultimate reliability. It is a narrower scope of judicial gatekeeping than *Abbey*, where Doherty J endorses the court’s active role in gatekeeping and assessing reliability: Different tools are needed for different times. However, BCSC in its *Trochym* and *LJL* decisions says that it’s appropriate to follow *Daubert* factors in assessing reliability even if expert doesn’t, which gives judges more of a role.”

* 1. Assess **centrality** of expert opinion to questions at stake (central = more reasons to question reliability)
  2. Costs: PE, trial time, harm to the trial process, risk the jury will defer entirely to expert (V. CAREFUL)

Don’t forget to consider: “While applying the *Abbey* framework, it’s important to acknowledge L’s responsibilities to the other party and to his C. As well, in ethical scenarios, it is prudent to consider whether to disclose particular evidence. ”

**Novel Science** – Defined as “Not been in courts before” in *J(R.J)*; *Mohan*: EE must be ***essential*** in sense that ToF will be unable to come to a correct decision without EE + a stiffened reliability assessment

Recommended: Assess reliability every time it is fairly challenged, not just in novel science (*Trochym*, SCC)

* If evidence is being used for first time (or for a new application), consider third layer in Stage 4 after PV and PE analysis: Is this a situation where I think it will be *essential* for ToF to hear this evidence?

**Statutory Rules for EE**

***BC Evidence Act*** *s. 10(3)* Serve written statement of expert to all opponents at least 30 days before expert testifies

*S. 11(1)* A person cannot give evidence of his opinion in a proceeding unless s. 10(3) is met, unless waived by TJ

***Criminal Code*** *s. 657.3(3)* requires both parties seeking to call a witness to do so 30 days before start of trial, must provide expert’s name, area of expertise, qualifications; (c) imposes less strenuous rules on defence (provide copy of expert’s report for Crown before close of Crown’s case)

***BCSC Civil*** *Rule 11-6 (1)* More onerous requirements than BCEA (expert ID, opinion, reasons, assumptions)

*(3)* requires serving expert’s report to opponents 84 days in advance, (4) requires responding expert 42 days

**ER:** SELF-INCRIMINATION – Fairness to accused, State obliged to prove case before A needs to respond

**Trigger**: When A makes a confession or admission

Examples:

**Right to remain silent** (A cannot be called by Crown to testify); but since compelled to answer Qs on the stand (***CEA*** *s. 5(1)*) and answers might incriminate self, ***CEA*** *s. 5(2)* protects A from having that testimony used against him

* SCC in *R v Singh* respects s. 7 determination to remain silent; once that right determined, police has to respect and stop asking Qs and either return A to cell or let A go… State can’t use its power to coerce a response

**Right to retain and instruct counsel** (in ***Charter*** *s. 10*) one-time-only for convo at time of arrest (*Sinclair* SCC)

*TJ and jury’s duty not to* *draw adverse inference* from A’s silence or timing of any disclosure (except if alibi is elicited for first time during trial, in which case TJ may hold it against A for not disclosing sooner)

**Voluntariness** must be proven by Crown BARD for statement made to a PiA (Iacobucci narrows its scope in *Oickle*)

* A stipulates it by, in *Singh*, accepting that confession was voluntary (🡪 If N 🡪 *Oickle* analysis chart)

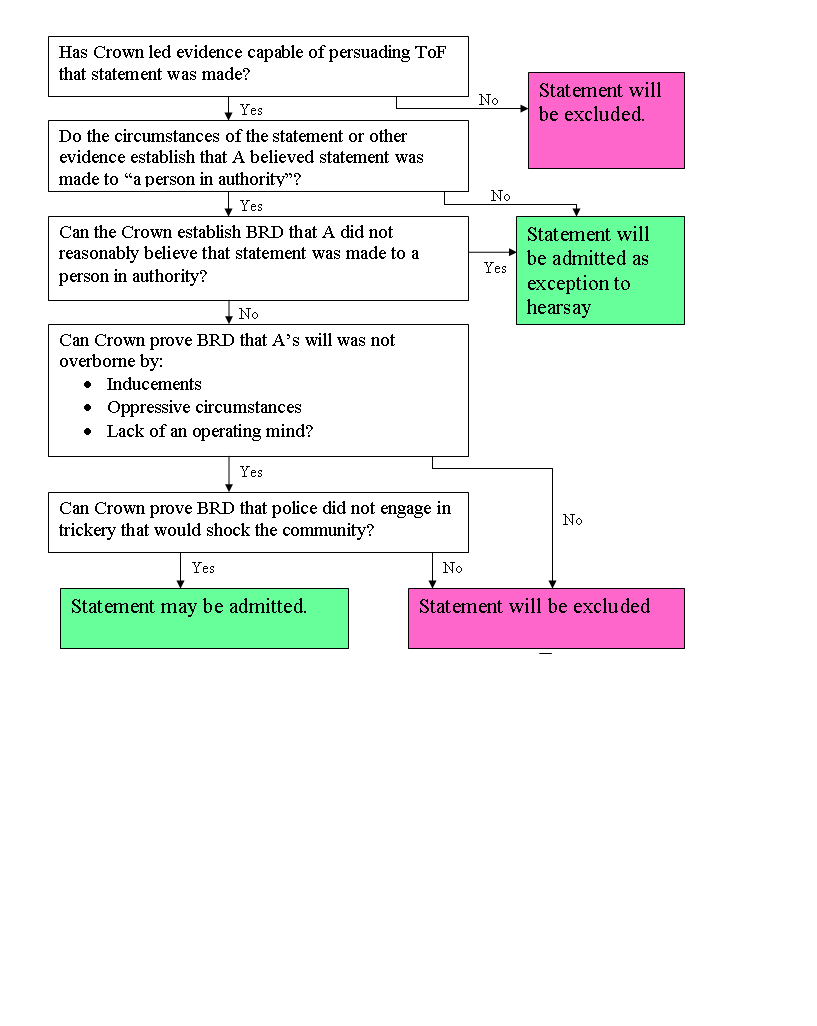
*Oickle* rule does NOT cover: **Mr. Big** scenarios (police sting to get A’s confession) 🡪 *R v Hart* criteria

Before moving on: 1-2 sentences that identify places where things are most likely to be different and how that affects the conclusion you made that fits with your reasoning. “I predict that the statements made by \_\_ will be admitted for these reasons \_\_. However, in the event that \_\_\_\_, the statement will be excluded.”

Allude to it, even if not crucial to crux of issue. 🡪

5

“The burden is on the Crown to prove BARD that the statement from A wasn’t the result of any of these…”



1

\*

2

\* Check for A’s consent here after Step 1: Does Crown have evidence capable of persuading ToF that the consent was made?

\*\* After Steps 2 & 3: If A speaking to PiA and detained in one of these situations 🡪 Triggers s. 7 rights:

1) Post-*Oickle* test, A’s statement found to be involuntary 🡪 Assume s. 7 violated 🡪 Go to s. 24(2) protection **[SEE BELOW]**

2) Statutorily compelled statement

3) Right to silence triggered 🡪 *Hebert* examination **[SEE BELOW]**

3

\*\*

4

**Step 3**. *Hebert*: A speaking to “cell plant” while detained who relentlessly drove shift toward talking about the crime and why was done 🡪 Was convo deemed too much like investigation (not just related to his pointed Qs or threatening manner)? 🡪 Did he actively elicit the incriminating statement? (w/ r-ship of trust: *Broyles*) 🡪 If Y, ***Charter*** *s. 7* breached

* 🡪 If N, Court thinks A would have made the statement anyways (i.e. no causal r’ship) 🡪 Find no breach of s. 7
* Found: Right to remain silent is a principle of fundamental justice guaranteed by Charter s. 7

**Step 4.** A’s will overborne by… **Inducements** (coercive compliance to make false confession; e.g. A so frightened by what he’s accused of that he agrees w/ what is accused)

* **Oppressive circumstances**: Rare to prove, rare to reach threshold set in *Hoillett* (left heroin withdrawal A in cold, denying requests until he confessed). In *Oickle* and *Singh*, Court judged that it should have some regard to the suspects, since some more vulnerable than others
* **Lack of an operating mind**: e.g. mentally ill A (*Whittle*), A’s in shock (needs medical testimony) and cannot choose to speak voluntarily

**Step 5.** **Trickery** = playing on A’s vulnerability to do something that officer otherwise wouldn’t do (e.g. injecting diabetic w/ truth serum not insulin, pretending to be chaplain – vitiates voluntariness, so no need to go through Oickle analysis)

* *Repeat offender* (i.e. had lots of contact w/ police investigation) found to be less likely to be fooled by police trickery: Test – Was THIS person (not reasonable person) overborne by the police fabrication?

If statement to PiA leads to *derivative evidence* 🡪 May need s. 7 and *Oickle*

***Charter*** *s. 7* applies to undercover/detained statements

If A knows s/he speaking to PiA 🡪 s. 7 and *Oickle* analyses are “functionally equivalent” (SCC in *Singh*) 🡪 Use *Oickle*! 🡪 Puts burden of proof on Crown, not on A to prove on BoP

If *Oickle* rule breached 🡪 Court MUST exclude the statement 🡪 Assume *s. 7* breached 🡪 Move into ***Charter*** *s. 24(2)* analysis 🡪 Court has discretion to decide if costs of excluding the statement are greater than costs of admitting it

**ER:** Improperly Obtained Evidence – “Evidence will be excluded when admission would bring the AoJ into disrepute.”

***Charter*** Exclusion Remedy *s. 24(2)*

1) Permits Court to grant such remedy it deems appropriate (recently: compensation to those w/ infringed rights)

2) Where court determines evidence was obtained in a way that doesn’t align with *Charter* rights, it must be excluded

* Example: Police/prosecutor violates rights as per s. 8

Pre-*Grant*, *Colins/Stillman* analytical framework: Evidence was either conscriptive or non-conscriptive

**Conscriptive** = evidence forced to give against yourself = automatically excluded

* + Induced self-incriminating statements
  + Real evidence obtained derivatively from conscriptive evidence
  + Bodily evidence (e.g. blood, body tissue, DNA, saliva, breath samples, strip searches)

*R v Grant* – Principle-based framework, consisting of pre-conditions and then factors.

Move *s. 24(2)* interpretation FROM *Burlington* punishing police who violate rights TO preserving public confidence in AoJ

Facts: Cited *R v Mann* (officers have limited custody to stop and search ppl if serious offence committed nearby). Law not fully settled, difficult for officers to identify when to caution Grant on *Charter* rights. Reasonable person in G’s position would have felt detained and not free to walk away.

**Step 1.** A must demonstrate (on BoP) a **breach of his own *Charter* rights**

1) *Court of competent jurisdiction*: On exam, EC will make case in BCSC or other obvious court

Preconditions to invoking s. 24(2). If met, move on to Grant factors **[SEE BELOW]**

2) *Personal Charter rights* violated (not someone else’s)

3) Violation done by *state agent*: PiA acting for State (could incl. doctors, TJs, Ls)

4) Sufficient connection between evidence and violation of *Charter* rights **[See Step 2]**

**Step 2.** A must demonstrate (on BoP) that evidence “**obtained in a manner**” that breached rights, with:

1) Causal connection, and

2) Temporal connection

between breach and evidence. (incl. part of same transaction… or contextual connection)

**Step 3.** A must show (on BoP) that **admitting the evidence would bring AoJ into disrepute**. *Grant* factors:

“Charron J in *Grant* explained how the purpose of s. 24(2), to secure integrity of AoJ from the objective perspective, shapes the 3 factors. That perspective means someone who is informed of the relevant circumstances, understands Charter values, and understands the long term importance of AoJ. And if there has already been harm, understanding that in the interest of justice some evidence is allowed anyway. If these 3 factors are low-impact, Court has an obligation under the Charter to exclude the evidence.”

On exam at this point: Go through facts and pick out most serious 🡪 Be aware of spectrum of conduct (active bad faith vs lack of good faith) 🡪 Look at nature of evidence obtained 🡪 Be aware of spectrum of privacy interests

**1)** Seriousness of *Charter* breach (focus on State conduct); 3 dimensions:

a) **Blameworthiness** of the state behaviour

i) *Conduct of officers*: Reasonableness will be regarded

- Spectrum of good faith to bad faith (*Grant* was confusion, so in-between)

- OK if officers diligently seek to comply w/ stat. regs. even if they breach *Charter* (*Siebel*, *Sonelli*)

ii) Possibility of *systemic or institutional misconduct*: Incentive-based (Court needs to know what to fix if Crown is repeatedly messing up disclosure), could affect lots but only few come to court

iii) *Pattern of violations*: > 1 = seen as more serious

b) **To what extent** did state behaviour depart from *Charter* standards?

- More brazenly it’s breached, more serious it is (*Clarkson*: officers take advantage of drunk A)

c) Any **extenuating** circumstances?

i) *Necessity*: Breach Charter to prevent destroying evidence (*Feeney*; but needs particular reason to believe something particular will happen, NOT reliance on general belief about wrongdoers)

ii) *Emergency threat* to police/public safety (*Golub*, ONCA: uzi threat = serious mitigation)

**2)** Impact on A’s *Charter*-protected interests (focus on A)

- **Conscriptive evidence** more likely to be excluded, depends on amt intrusion on bodily integrity/dignity

- If police speaks to A while executing warrant: more likely to be admitted (though tech. derivative)

**3)** Society’s interest in adjudication on merits (and in maintaining justice system’s repute)

- The higher the PV, the greater the breach’s seriousness must be in order to exclude the evidence

- [Identify relevance and materiality to help with] Reliability, centrality, and seriousness

**ER**: HEARSAY – Presumptively inadmissible on BoP, because of dangers (per Charron in *Khelawon*, Fish in *Baldree*) like:

1. Perception – D not there to testify directly, W could be in x-exam but possibility of broken telephone
2. Memory – D makes statement about something years ago, W’s memory can somewhat be got at by x-exam
3. Narration – D can be unintentionally misled, or something said gave wrong intention (but D not on stand)
4. Sincerity – D deliberately saying something untrue (x-exam can’t get at it)

Ask: Is the evidence *reliable enough* to pass on to ToF to make own decision on whether to ultimately rely on it? (Gist of Charron in *Khelawon*; don’t divvy factors up for jury vs judge to decide)

Elements from *Khelawon* and *Evans*:

1. **Out of court statement** – Trigger to start listening: “X said”, “I said to X”, “I heard” in another time/place (even prior trial process); A’s statement to W can be used against A (recognized by SCC as exception to hearsay)
2. **Offered to prove the truth of its contents** – Helps to do r/m analysis
   * Can speak to *mental state* (e.g. psychosis: saying things known to be untrue): Example – witness calls cops saying another car’s driver is drunk. Using this call to prove A’s drunk = hearsay & NOT OK. Using this call as evidence to A’s state and decision by cops to pull A over = OK
   * Used for the implied truth of its contents also OK (*Baldree*)
   * NOT truth purposes: **operative legal fact** (e.g. “I’m a partner”, “I will sell you my car for $\_”, “I’m giving you this as a gift for X), explaining why someone acted a certain way, witness wanting to disprove what’s being said, police knew/understood someone was drunk driving, warranting an officer’s legal search
3. “**Absence of contemporaneous ability** to cross-examine the declarant” (*Khelawon*, by Charron J)

**Exceptions**

Is the evidence hearsay? See *Khelawon*: introduced for truth, no contemporaneous cross-exam. (Onus on Party resisting admission to show that hearsay.)

**N**

N

Y

N

Y

N

N

Y

Y

N

Y

Y

Does the evidence fit within a categorical exception to the hearsay rule? (**Onus on Party seeking admission**.)

**Statements by Accused or by other party.**

Evidence is admissible under hearsay rule.

**Another established exception.**

Does the evidence meet the principled approach reqmts of necessity and reliability? (**Onus on P seeking to admit**.)

Can Party resisting admission show that elements of the *exception* do not meet standards of necessity or reliability?

Can Party resisting admission prove that *this evidence* is not necessary or not reliable?

**Evidence is inadmissible.**

**Evidence is admissible** under hearsay rule: go to general discretion to exclude (Stage 4)

Did Accused confess?

Check voluntariness & *Charter.*

Go to general discretion to exclude (Stage 4)

Hearsay rule not engaged – Check other Stage 3 exclusionary rules may apply.

**Evidence is inadmissible.**

Admissible under hearsay rule: go to general discretion to exclude. (Stage 4)

**Y**

**N**

**N**

**Y**

**Y**

**N**

**Y**

**N**

**Y**

**N**

**Y**

*1) Statutory Exceptions* – Arise in Categorical Exceptions too

***Canada Evidence Act*** *s. 29, 30(10)* – Records made in **regular course of business** (and some not) can be admissible.

***BCSC Civil Rules*** *r. 12-5 (52)* [Admissibility of prior proceeding/exam for discovery, due to necessity], *(53)* [If you bring in part of exam, should bring in whole], *(54)* [Broad door to admissibility; Looks like witness unavailability analysis in PA]

***Criminal Code*** *s. 715* (Evidence Previously Taken came from investigation or preliminary hearing, gives opportunity for A to test the evidence) – Only used where there’s reason to think D might die

*2) Categorical Exceptions* – *Mapara*, *Starr* Courts’ modern analysis: 1) Burden on proponent of hearsay to prove how it fits a CE 🡪 Party resisting admission gets burden to prove that the CE doesn’t adhere w/ N&R principles 🡪 CEs subject to challenge EXCEPT these major ones (not yet superseded by PA), which are ***presumptively admissible***:

1. Admissions by a party
2. Prior identifications
3. **Prior Testimony**: Requires witness unavailability (death/incapacitation), limited to proceedings btw substantially the same parties, same material issues, and A had opportunity to x-exam witness at earlier proceeding
   * *Larsen*: Even if this CL exception fits, must still comply with PA
4. Prior convictions
5. Declarations against interests by non-party
6. Dying declarations
7. **Declarations in the Course of Duty**: Admissible for the truth of the declaration (oral or written) w/o calling D to court where: Where D has personal knowledge of the matters, required to record everything done/said, as part of ordinary course of duty, contemporaneously with the actions, w/o motive to misrepresent
   * *Ares v Venner*, approved by *Larsen*: Statements made under course of duty *do* comply with PA
     + Possible: Records (even if contrary to duty) relied on to do job (*Wilcox* crab book, NSCA 2001)
   * Risks: If Ees don’t do what they’re supposed to, doesn’t say anything about D’s reliability, duty to record may not lead to fair record of what actually happened (e.g. if only recorded by 1, can’t be verified)
8. **Spontaneous Statements** (res gestae): Each of these better dealt with via PA (per *Starr*)
   * *Present physical condition* – D speaks of own current and present medical condition and W hears it, W’s testimony can be admitted (but cannot admit likely cause of D’s pain: *Czibulka*)
   * *Present mental state* – D speaks of *own* state of mind, not 3rd party’s (*Starr*); e.g. fear of particular A (*Grffin & Harris*, but doesn’t prove that A did the crime, had that intention, or was only one feared)
     + Charron, *G & H*: Need to trust jury to be able to navigate these differences
     + \*Can include *statements of present intention* (but not about 3rd party)
   * *Excited utterances* – D speaks while crime is proceeding or shortly after, no time to concoct 🡪 Reliability stems from likely shock, won’t be capable of lying 🡪 Court has moved away from strict temporal requirement 🡪 Court needs to show that D’s whole mental state consumed by what’s happening
     + Satisfaction of spontaneity requirement in *Andrews* (HL) looks like reliability analysis in PA
     + Witnesses have to be in same vicinity and overhear something in the crime as it occurs
9. Declarations as to reputation, pedigree and family history
10. Statements in ancient or public documents

Not CE-eligible, better to use PA instead: Computer-generated records (e.g. cell triangulation), animal results (e.g. is dog adequately trained, is sniff test constitutional? Can’t use as proof of the truth of what dog tries to identify, use to prove reasonable grounds for officer to conduct a search), *Nicholas* scenario (violent sexual assault), excited utterance made after actus reus complete (best vindicated by SCC’s PA approach), **statements of present tense impression** (argument of inherent authenticity since D chooses to calmly narrate something contemporaneously; often rejected in Canada)

*3) Principled Approach* – Presumptively inadmissible, burden to prove admissibility on party seeking to admit it

Tell why something doesn’t fit into a categorical exception (1 sentence) or why it comes close to fitting CE or PA and then, as *Larsen* and *Wilcox* decisions have demonstrated, we can still move on to Principled Approach. As introduced in *Khan*, a party can still introduce hearsay evidence (regardless if it fits pre-existing categories) if it fits the criteria of necessity and reliability.

***Necessity*** – Standard: What is necessary to help judge the case on its merits; 2 possible ways it often arises:

1. Witness unavailability – Such as death (*Khelawon*)
   * Some psychological evidence needed to prove that victim would have some mental trauma: e.g. doctor assaulting little girl (*Khan*), violent assault leading to PTSD (*Nicholas*), freezing on the stand (*F(WJ)*)
2. Testimonial unavailability
   * Examples: Witnesses told police one story but another in court, so it was necessary to introduce their OOC testimony (*KGB*), recanting witness (e.g. in domestic violence, sexual assault in *U(FJ)*)

Less common ways it arises: *loss of memory*

***Reliability*** – Starting presumption is that people are likely to speak the truth when in court and are reliable. Reliability requirement is met on the basis that ToF has a sufficient basis to assess statement’s truth and accuracy 🡪 No need to inquire further about it.

Questioned because of the hearsay dangers **[SEE ABOVE]**; 2 ways to think about it that work cumulatively:

1. Inherently **trustworthy** – Circumstances that make a statement more likely to be true: Strong corroborating evidence (in *Khan*, semen stain on shirt), no motive to fabricate (e.g. child in *Khan*, victim’s grandma yes motive in *U(FJ)*), D of sound mental state (medical history mattered in *Khelawon*), D is child likely w/o knowledge of the acts alleged, spontaneous/naturally made (not constructed, interrupted, led on by police suggestive Qs), w/o suggestion, temporally proximate to the act, against declarant’s interests; without shown “capacity to lie” (*R v Smith*: Girl was found to be untrustworthy after credit card fraud)
   * Also if there are safeguards for accuracy: under duty to record statements (e.g. writing in ledger that debt is paid), made to public officials, D knew statement would be publicized, or contemporaneous x-exam (e.g. preliminary inquiry)
2. **Testability** – Ability for D to be re-x-examined, or when evidence of same quality can’t be obtained in trial
   * Example: Recordings made which can substitute for x-exam (*KGB*; see its other factors below)
   * For *statements made to police*, factors that increase reliability: 1) D had sworn/made oath to tell the truth; 2) Statement recorded in its entirety; 3) Opportunity to x-examine, or D now available for x-exam and wasn’t contemporaneously

N+R = 1, where N, R > x (need to add up to sufficient n/r, where 0 < x < 1 and x = the min standard)

Stage 4? No need to consider PV (N+R does this), but think about *centrality and PEs still*

If Crown uses PA against A: Consider A’s right to full answer and defence

*Prior Inconsistent Statements* – If D gives different testimony to police than on stand and Crown wants to admit orig. statement 🡪 Don’t approach as categorical exception for *KGB*-like statements 🡪 Not a thing 🡪 Use PA, cite *Khelawon* reasoning. Ct sees sworn statement in prior court as inherent warrant of reliability, which helps preserve A’s right to make full defence (*Khelawon*).

***KGB factors*** to increase reliability the statement: 1) D was under oath; 2) D was warned about consequences of false statement; 3) Statement was recorded in entirety

**ER:** Similar Fact Evidence – Safeguarding state’s responsibility to prove A did the particular acts he’s charged with

***Presumptively inadmissible***, Crown has burden of proof (on BoP) to show PV > PR (moral/reasoning), but inherent prejudice is HUGE (for bringing in “evidence extrinsic to the charged act”)

Triggers (from *Handy*, *Pascoe*) that raise SFE analysis to avoid leading to raising bias against A:

1. Is the evidence discreditable to A? Does it show in some way that A is a bad person? If Y (*R v B.L*) 🡪 Step 2
2. Does the evidence relate to uncharged acts, character traits, or practices of A?
   * Examples: evidence of crim record (*Jesse*: if convicted, the impugned act presumptively occurred), something else A has that can determined AR/MR, something that doesn’t relate directly to A’s AR/MR

Defence: Need to show BARD that relying on SFE will lead to A being anchored to one of the charged crimes. Start with M of issue for which SFE is tendered and its R. Next: look at strength of the evidence for the acts that occurred to determine PV. Consider special circumstances that explain similarity and destroy PV (e.g. A having been convicted, A having been acquitted, concerns about collusion). Consider extent to which the evidence supports Crown’s proposed inference by thinking: Is A connected to the supposedly discreditable acts?

* ***Unconscious collusion*** (*Dorsey*): If A demonstrates that victims of the charged act and victims of similar acts had opportunity to speak with each other, Crown must disprove collusion on BoP
* ***Connectedness*** factors in *Handy*, per Binnie:
  + Can you connect A to the similar act? (*Arp*)
  + Is there similarity? If so, how much is there between the similar fact and the charged act? (Binnie)
    - Extent to which evidence supports the inference (*Sweitzer*) or how far the evidence takes you
* Tendency rule: A tends to do certain thing (e.g. enjoy rough sex, *Handy*) 🡪 Doesn’t mean he did it for alleged act
* Distinctive rule: MO is distinctive and unusual enough that crime is unlikely to be committed by different ppl

Aboriginal Litigation\*\* Rights and Title Claim is under Provincial Crown \*\*

*R v Delgamuukw*, SCC Rule: Oral histories should be on equal footing with other types of evidence (exception to hearsay) in order to manifest ***Constitution*** *s. 35* promise of reconciliation.

* Value of Indigenous legal systems can’t and should not be undermined by Courts
* Lamer J: Ordinary rules of evidence and methods of x-exam must be adapted in light of inherent *evidentiary difficulties* in adjudicating Abor claims (quoting *Van der Peet*). CAN’T determine admissibility Eurocentrically
  + Residential schools’ effects of wiping out whole generation’s opportunity to get traditional knowledge
* Oral traditions and records provide evidence for *Aboriginal title and rights claims* under s. 35, tangential to the ultimate purpose of evidence law in establishing historical truth.
* Held: Admissibility of hearsay oral evidence is to be determined on a case-by-case basis.

*Mitchell v MNR*, SCC Rule: Aboriginal oral histories will be admitted if they are useful and reasonably reliable, subject to TJ’s exclusionary discretion. NEED to show connection btw cultural practice and relevance and IN the affected area

* ***Eurocentric standards*** about history and record keeping should not prejudice the kinds of evidence that will be admitted and the weight they receive (e.g. ancient knives used to support history of north-south trade)
* [29] Need anthropological and historical evidence to bolster support for Aboriginal oral evidence

**Hearsay Use in Aboriginal Communities**

*AG Canada submission for procedure of processing oral evidence* = Similar to that for EE

* Risk of treating elders as experts: Average TJ poorly equipped to assess reliability of traditional knowledge
* Vickers: Inappropriate to put Abor oral evidence at same high bar of admissibility as expert testimony

*AG BC submission for procedure of processing oral evidence* = Depends on what type of testimony

* If testimony related to trad activities/practices and genealogies 🡪 Should be less stringent exam provision 🡪 Where W can demonstrate necessity and reliability in *voir dire*
* If evidence related to past historical event 🡪 Two stage process:
  1. Court hears from expert witness (w/ advanced knowledge of past historical events and methods applied by their group to preserve trad knowledge) 🡪 Informs Court about how that knowledge is obtained
  2. *Voir dire* of one particular W to examine necessity and reliability
* Vickers: Rejected this

*Tsilhqot’in Nation request for approach* = To assess admissibility of hearsay oral evidence in Aboriginal claims, Vickers in 2004 BCSC *Tsilhqot’in* decision offers a very context-specific application of PA. Its different way of looking at N+R is governed by desire to fulfil the promise of reconciliation first brought forth by SCC in *Delgamuukw*, *Mitchell*. Vickers rejected the submissions put forth by defendants Canada and BC because they don’t take into account manner in which history and traditions are learned in Abor communities. Necessity \_\_. Reliability is looked at with a careful assessment of all the relevant factors as well as degree of corroboration or contradiction from other forms of evidence. Vickers recommends \_\_. Next, to determine whether evidence can be relied on to a sufficient degree to be admitted as evidence, prelim exam of W \_\_. Once admitted, need to determine the weight to be given to W’s evidence.

Vickers: [24] Recommended that counsel first highlight in trial the traditions as they relate to the questions of:

* + How are their cultural practices preserved?
  + Who is entitled to preserve them? Is there a hierarchy involved?
  + Community practice for safeguarding the integrity of their oral history and practices?
  + Who can be called at trial to relate such evidence?
* Next, prelim exam of W concerning W’s personal attributes (credibility?) relating to ability to recount hearsay evidence: e.g. W’s credibility, source of story, r’ship to source, reputation in community, ability to tell stories
* Passage of time adds to evidentiary difficulties of Abor legends/oral traditions

There is controversy re: whether oral history must be corroborated by other evidence. Opponent might rely on Nadon’s view in *Benoit v Canada* (FCA), where he required corroboration for oral evidence or else it’s inadmissible. Newman highlighted the fact that Nadon’s view was too Eurocentric and inconsistent w/ *Delgamuukw*‘s inherent difficulties Abor groups face in bringing evidence.

Conclusion: Must fit with your reasoning, and identifies place where things are most likely to be different and how that could affect your conclusion. “I predict that the statements made by \_\_ will be admitted for these reasons \_\_. However, in the event that \_\_\_\_, the statement will be excluded.”