Foundational approach

**STARTING PRESUMPTIONS**

* Onus to demonstrate materiality and relevance is on the party seeking to tender the evidence
* In determining admissibility, all evidence is presumed to be true (**Watson**).

**MATERIALITY & RELEVANCE**

* To be admissible, evidence must be relevant to a material issue.
* **Relevance:** Evidence is relevant if it has any tendency, as a matter of logic and human experience, to prove a fact in issue (**Corbett** cited in **Watson**).
  + There is no minimum probative value required for evidence to be deemed relevant (**Morris** cited in **Watson**; **Arp**).
* **Materiality:** Evidence is material if it is directed towards a matter in issue in the case (**B(L)**).
  + **Primary**: substantive law—what needs to be proven in order to convict (actus reus, mens rea, identification)—motive is also primary because it is always relevant
  + **Secondary**: questions that relate to reliability or credibility of other evidence—e.g. relates to credibility of crown’s key witness or reliability of expert testimony—not directly aimed at issue in case, but is intended to help the trier of fact assess the quality of evidence
* **Prima facie admissibility:** Once relevance and materiality are established, the evidence is *prima facie* admissible (**Watson**).
  + The onus then shifts to the person seeking to exclude the evidence to demonstrate that an exclusionary rule is triggered.

**EXCLUSIONARY RULES**

* **Privilege**: page 4
* **Opinion Evidence**: page 6
* **Self-Incrimination**: page 13
* **Improperly Obtained Evidence**: page 16
* **Hearsay**: page 19
* **Similar Fact Evidence**: page 24

**COST-BENEFIT ANALYSIS**

* The court retains a residual discretion to exclude evidence where:
* **Crown/civil evidence**: its prejudicial effect outweigh its probative value (**Watson**)
* **Defence evidence**: its prejudicial risk substantially outweigh its probative value (**Seaboyer**)
* **Probative value** considers the believability (reliability + credibility of witness) and cogency of the evidence. In other words, how likely is it to be true, and how valuable is the evidence in the resolution of the case? (**Mohan; Handy**)
* **Prejudicial effect** refers to the possibility that the evidence may distort the fact-finding process, resulting in unfairness to the accused (**Mohan**).
  + Moral prejudice: The danger that the facts offered may unduly arouse the jury’s emotions of prejudice, hostility, or sympathy (**Handy**)
  + Reasoning prejudice: the evidence may create a side issue that will unduly distract the jury from the main issues or will consume an undue amount of time (**Handy**)

Discovery and Disclosure

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| **Trigger** | Is a party seeking to rely in court on something it should have disclosed, but didn’t? |
| **Policy** | * Justice is better served when the parties know the case to be met * Encourages settlement |

**Civil Discovery: BC Civil Rule 7-1**

**(1)** List of documents

* All parties must prepare and serve a list of documents within 35 days after the end of the pleading period.
* The list musts include all documents that are/have been in the party’s possession or control that could be used to prove or disprove a material fact, OR that the party intends to refer to at trial.

**(15)** Must allow inspection and copying

**(18)** Documents not in possession of party

* The court can order production of a document held by a person who is not a party to the litigation.

\* You are entitled to disclosure as of right, don’t need to ask for it (**7**)

**Criminal Disclosure:**

* The Crown has an obligation to make disclosure of all relevant information to the accused in its possession and control.
* **When obligation is triggered:** 
  + If the accused is represented, the obligation is triggered when the accused requests disclosure, which may be made at any time after the charge (**Stinchcombe**).
  + If the accused is unrepresented, the Crown must advise the accused of the right to disclosure (**Stinchcombe**).
  + Information in possession and control of the police is deemed to be in the possession and control of the Crown for the purposes of Crowndisclosure (**McNeil**).
* Policy basis for Crown disclosure: the job of the prosecutor is not to win, but to see that justice is done (**Stinchcombe**).
  + Reciprocal disclosure may be considered at another time in the future (**Stinchcombe**).

Privilege

Privilege **is** **inimical to the truth-seeking process** because it excludes potentially relevant and reliable evidence. Thus, compelling reasons must be present for privilege to apply.

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| **Trigger** | Is a party seeking to avoid disclosing something that is, or might be, material and relevant? |
| **Burden** | The party seeking to exclude the evidence must establish that it falls within a privileged class or should be excluded on the basis of the Wigmore criteria. The party seeking to admit the evidence must then convince the court that the evidence should be disclosed in spite of the privilege. |
| **Standard** | Balance of probabilities |

**Class Privilege**

* **Solicitor-Client**: Applies to communications between a solicitor and client in respect of legal advice.
  + **Test**:
    - Between a solicitor and client;
    - Entail the giving and seeking of advice;
    - Be intended to be confidential
  + Where test is made out, privileged forever (**Blank**)
  + **Policy rationale:** Solicitor-client communications are essential for the proper functioning of the legal system itself (**McClure**)
    - * **Exceptions**: SC privilege does not apply where:
        + Innocence at Stake: **Brown**
* Test:
* Information which is available from solicitor-client communication is not available from any other source and will
* Accused must show that (s)he is otherwise unable to raise a reasonable doubt.
* The privileged information is likely to raise a reasonable doubt.
* Rationale: public interest in preventing wrongful convictions outweighs interest in privilege.
* Public Safety: **Smith**
* Test:
  + Is there a clear risk to an identifiable person/group of persons?
  + Is there a risk of serious bodily harm or death?
  + Is the danger imminent?
* Rationale: public interest outweighs the interests recognized by solicitor-client privilege.
* Facilitating a Criminal Purpose: **McClure**
  + If a client seeks legal advice to commit a crime or fraud, that advice can be used against the client.
* **Litigation**:
  + Policy: promotes adversarial system by ensuring that parties are able to prepare their case without adversarial interference or fear of premature disclosure (**Blank**).
  + Applies to all documents created for the dominant purpose of litigation (**Blank**)
  + Applies only for the duration of the litigation (**Blank**)
* **Settlement**:
  + Applies to all communications engaged in for the purpose of settlement, except to demonstrate that a settlement was reached and its terms (**Union Carbide**).

**Case-by-Case Privilege**

**Policy rationale:** some relationships so important to the community that the court is willing to countenance the possibility of an unjust result to protect them. This is a very hard burden to discharge.

* Categories of relationships that have not been recognized as attracting a class privilege may attract a case-by-case privilege where the party seeking to exclude the evidence can establish that the evidence meets each of the Wigmore criteria (**Slavutych**; **Ryan**):
  1. **Confidentiality:** The communications must originate in a confidence that they will not be disclosed.
  2. **Confidentiality is essential:** This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
  3. **Importance of relationship:** The relation must be one which in the opinion of the community ought to be sedulously fostered.
* About both the specific relationship before the court and the category of relationship in general.
  1. **Balancing:** The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.
* I.e., must weigh the injury to the relationship against the benefit to the truth-seeking litigation)

Expert evidence

# EXPERT EVIDENCE: STATUTORY RULES

**Which regime applies?**

* Is this a civil proceeding within provincial jurisdiction?
  + Use the *BC Evidence Act.*
  + If conducted in the BC Supreme Court, use the BCSC Rules as well
  + Note: BC Evidence Act doesn’t apply to BCCA, BCSC, or BCPC (s. 10(1)).
* Is this a proceeding under federal law (including criminal)?
  + Use the *Canada Evidence Act.*
  + If in BCSC and civil, use the BCSC Rules as well.
  + If criminal, use the *Criminal Code* as well.

**BC Evidence Act:**

* Applies only to quasi-judicial or administrative hearings, not BCCA, BCSC, or BCPC (**10(1)**)
* S. 11 does not apply in proceedings where fine, penalty, or imprisonment may be imposed (**12**)
* **Doesn’t apply to bodies that make their own rules re: expert evidence** (**10(2)**)
* An unsigned statement is admissible if a written copy is provided to OP at least 30 days in advance of tendering the statement in evidence (**10(3)**)
* An expert’s assertion of qualifications in writing is proof of those qualifications (**10(4)**)
* If a written statement of an expert is given, any party may call the expert as a witness (**10(5)**)
* **An expert cannot testify unless a written statement of their opinion and the facts on which it is formed has been served on OP at least 30 days before the expert testifies (11(1))**
* Despite 11(1), a judge/presiding official can, by application or on own initiative, (**11(2)**)
  + order that the expert who hasn’t furnished statement may testify
  + order that the expert who furnished statement less than 30 days in advance may testify
  + order that statement be furnished less than 30 days in advance
  + require statement more than 30 days in advance.
* Can prove that written statement was furnished to OP by affidavit to that effect (**11(3)**)

**BC Supreme Court Civil Rules:**

* An expert has a duty to assist the court and is not an advocate: **11-2(1)**
* An expert must certify that she: **11-2(2)**

1. is aware of her duty to the court;
2. her report is in conformity with duty;
3. her oral testimony will be in conformity with that duty.

* If an expert is jointly appointed, the following must be settled: **11-3 (1)**

1. the identity of the expert;
2. the issue that the expert evidence may help resolve;
3. agreed upon facts or assumptions;
4. facts that are not agreed upon that a party wants the expert to consider;
5. the questions to be considered;
6. when the report must be delivered;
7. responsibility for expert’s fees.

* If a joint expert is appointed, they are the only expert who may testify to the issues agreed to: **11-3(7)**
* Parties can appoint their own experts: **11-4(1)**
* The court may appoint its own expert: **11-5(1)**
* An expert report must include: **11-6(1)**

1. the expert’s name, address and area of expertise;
2. the expert’s qualifications;
3. the instructions provided to the expert;
4. the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
5. the expert's opinion respecting those issues;
6. the expert’s reasons for his or her opinion, including
7. the factual assumptions on which the opinion is based,
8. any research conducted that led her to form the opinion, and
9. a list of every document, relied on in forming the opinion.

* An expert’s report must be served on every party at least 84 days before trial: **11-6(3)**
* A responding report must be served 42 days before trial: **11-6(4)**

**Canada Evidence Act:**

* Only 5 experts may be called by either side without leave of the court **(7)**
* Witnesses can testify to the authenticity of handwriting **(8)**

**Criminal Code**

**Expert evidence can be given by report: 657.3 (1)**

* Must be accompanied by the affidavit or solemn declaration of the person, setting out, in particular, the qualifications of the person as an expert:
* Applicable if:
  + the court recognizes that person as an expert; and
  + the party intending to produce the report in evidence has, before the proceeding, given to the other party a copy of the affidavit or solemn declaration and the report and reasonable notice of the intention to produce it in evidence.

**Attendance for examination: 657.3 (2)**

* The court may require the expert to appear for examination or cross in respect of the issue of proof of any of the statements contained in the affidavit/solemn declaration/report.

**Notice for expert testimony: 657.3 (3)**

* Must give 30 days notice in advance of trial of intent to call expert. Notice must include:
  + the name of the witness,
  + a description of their area of expertise sufficient to permit the other parties to inform themselves about that area of expertise, and
  + a statement of the qualifications of the proposed witness as an expert.
* A **prosecutor** must also, within a reasonable period before trial, provide to the other party or parties
  + a copy of the report, if any, prepared by the proposed witness for the case, and
  + if no report is prepared, a summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based; and
* An **accused** must provide the above to other parties before the prosecution closes their case.

**If notices not given: 657.3 (4)**

* If (3) not complied with, court may
  + grant an adjournment for preparation for cross-examination of the expert;
  + order the party who called the expert witness to comply with (3); and
  + order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness’s testimony.

**Additional court orders: 657.3 (5)**

* If a party has received the notice and material in (3), but has not been able to prepare for the evidence of the proposed witness, the court:
  + adjourn the proceedings;
  + order that further particulars be given of the evidence of the proposed witness; and
  + order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness’s testimony.

**Use of material by prosecution: 657.3 (6)**

* The **prosecutor** may not produce material provided to by accused under (3) if the expert doesn’t testify.

**No further disclosure: 657.3 (7)**

* Unless otherwise ordered by a court, information disclosed under this section in relation to a proceeding may only be used for the purpose of that proceeding.

# EXPERT EVIDENCE: THE COMMON LAW TEST

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| **Trigger** | Party seeks to introduce opinion evidence. |
| **Presumption** | Presumptively inadmissible. |
| **Burden** | The burden of proof is on the party seeking to admit the evidence. |
| **Standard** | Balance of probabilities |
| **Policy** | Principled approach to expert evidence addresses the tension two countervailing policy considerations: on the one hand, that fact TOFs sometimes need expert evidence to understand facts and draw correct inferences; and on the other, the risk that TOF will assign more weight to expert evidence than is warranted. |

Opinion evidence is presumptively inadmissible. Witnesses may testify only to facts which they perceived, not to the inferences that they drew from those facts (**WBLI**). An exception from this rule is that experts may testify to their opinion where their evidence meets the requirements set out in (**WBLI**).

To be admissible, the party tendering the evidence must satisfy the court that the evidence is relevant, necessary, tendered by a qualified expert, is not subject to another exclusionary rule (at the “preconditions” phase), and is more probative than prejudicial (at the “gatekeeping” phase) (**WBLI**).

**1. PRECONDITIONS**

* **Nature and Scope**:
  + Before deciding admissibility, the trial judge must determine the nature and scope of the proposed expert evidence (**Abbey**)
* **Relevant & Material**:
  + Evidence is relevant if, as a matter of human experience and logic, the existence of the evidence makes the existence of another fact more probable than it would be without the existence of the evidence (**Watson**).
  + Evidence is material if the fact that the evidence makes more probable is itself a material fact in issue or is relevant to a material fact in issue (**Watson**)
    - **NB: expert evidence not admissible solely for the purpose of bolstering credibility: K(A).**
  + There is no minimum probative value required for evidence to be deemed relevant (**Morris** cited in **Watson**; **Arp**).
* **Necessity**:
  + Necessity arises where the subject matter of the inquiry is “such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge” (**Kellhier**, cited in **Mohan**), and the evidence cannot come in through another source (**DD**).
  + **If evidence relates to human behaviour**:
    - The fact that the evidence relates to human behaviour and not some technical discipline ought not obscure the need for expert evidence (**Lavallee**).
  + **If technique is novel**:
    - Must be “essential” to meet the necessity threshold (**Mohan**).
* **Qualifications**
  + To be qualified, an expert witness must be “shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify” (**Mohan**).
    - This is a “modest standard,” requiring only that the trier of fact demonstrate more expertise than the average trier of fact (**Mohan**, **WBLI**).
  + The expert must also be impartial and independent, but this is a thin independence that will rarely serve to disqualify expert (**WBLI**)
* **Absence of an exclusionary rule:**
  + Hearsay: Experts may base their opinions on hearsay. However, before “weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist” (**Abbey**).
    - The only facts that must be found are those that an expert obtains from a party to litigation (or another inherently suspect source) touching a matter directly in issue. Facts “of a general nature which is widely used and acknowledged as reliable by experts” do not need to be proven (**Lavallee**).

**2. GATEKEEPING: Costs and benefits**

At the gatekeeping stage, the question is whether the evidence is more probative than prejudicial (**Abbey** cited in **WBLI**).

**A. Probative Value**

**i. Reliability**

Reliability is a central concern in determining the probative value of the evidence (**Abbey**). The goal of the reliability inquiry is to find independent evidence that the technique used by the expert actually works. While **Daubert** and **Abbey** provide suggestions of factors that may be relevant to this inquiry in respect of particular types of evidence, both are open-ended and allow consideration of any factor relevant to reliability.

* **“Novel Science”**
  + **If novel science**: The **Daubert** factors are particularly important in evaluating novel science (**JLJ**).
  + **If new application of recognized technique**: In **JLJ**, Binnie J. explained “novel science” to embrace both new techniques and novel applications of recognized techniques.
  + **If recognized science that is challenged**: However, the court in **Trochym** noted that they may also be applied to recognized techniques “whose underlying assumptions are challenged.”
* **Is the technique reliable**?
  + Scientific evidence: **Daubert** factors:
    - Has the technique been/can it be tested for ability to generate consistent results?
    - Has the technique been subjected to publication and peer review?
    - What is its known or potential rate of error?
    - Is the technique generally accepted within the scientific community? Or is it controversial?
  + Qualitative evidence: Reliability must be determined using tools appropriate to the technique (**Abbey**)
    - **Recognized discipline:** To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
    - **Quality assurance:** To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
    - **Accepted methodologies:** To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
    - **Reliability of methodology:** To what extent do the methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
    - **Reasoning:** To what extend are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?
    - **Data Management:** To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?
    - **Limits of the discipline:** To what extent did the witness, in advancing the opinion, honour the boundaries and limits of the discipline from which his or her expertise arises?
    - **Independence from litigation:** To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process? 🡪 **speaks to confirmation bias**
* **Is the expert qualified to apply and capable of applying the technique?**
  + **Qualifications:** What are this expert’s qualifications, with particular attention to the work performed for this case?
    - As **Cunliffe and Edmond** remind us in their analysis of Aitken, it is essential that the court assess the expert’s qualifications as they pertain to the technique (s)he has used in preparing his/her opinion for the court.
  + **Proficiency testing:** Have the expert’s results undergone proficiency testing (= testing of reliability of expert’s results)?
  + **Peer review:** Have the expert’s results undergone peer review?
* **Has the expert applied the technique correctly in this case?**
  + **Appropriate technique:** Is the expert using the technique for its intended and tested purpose, with proper attention to limits? (Is the technique suitable for the task-at-hand?)
  + **Independence:** Is expert independent (objective), and has instructing lawyer/police officer worked properly with expert?
  + **Cognitive bias:** Is there confirmation/contextual bias/cognitive contamination?
    - Refers to a tendency to interpret new evidence as confirmation of one's existing beliefs or theories.
    - **Cunliffe and Edmond** suggest that confirmation bias is a particular concern in respect of comparison techniques. Confirmation bias arises through exposure to extraneous information (e.g., about the case or the subject of the analysis) that may subtly bias the expert toward a particular outcome. To prevent such contamination, **blind analysis** (i.e., not just comparing a suspect to a sample) should be used and the expert should only be given such information as is necessary to the preparation or his/her report.

**ii. Centrality/cogency of the evidence**

How far does the evidence take the TOF to the resolution of a material issue?

**B. Prejudicial Risk**

* The main danger of expert evidence is that it will be accepted by the TOF as “virtually infallible and as having more weight than it deserves” (**Mohan**).
  + **Jargon:** Where evidence is given using unfamiliar jargon or scientific language, risk exists that the cross-examiner won’t be able to expose the opinion’s shortcomings and prevent effective evaluation of the evidence by the jury (**Abbey**, **Mohan**).
  + **Impressive credentials:** A jury faced with a well-presented firm opinion by a person of “impressive antecedents” may abdicate its fact-finding role on the assumption that the expert knows more about the issue than they do.
* The degree of risk will vary based on the circumstances of the case (**Abbey**)
* Also look for moral and reasoning prejudice

Self-incrimination

**1. Confessions Rule**

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| **Trigger** | Crown seeks to introduce out of court statement made by accused to PIA |
| **Burden** | (1) On accused to demonstrate air of reality in respect of PIA  (2) On crown to demonstrate the statement was voluntary on BARD |
| **Policy basis** | * Concerns with (potentially) false confessions * Principle that accused should not be conscripted into his own prosecution * Deter bad conduct on the part of the police |

The confessions rule is engaged where the Crown seeks to introduce out of court statements made by an accused to a person s(he) reasonably believed was a person in authority. For such a statement to be permitted, the Crown must demonstrate beyond a reasonable doubt that it was given voluntarily (**Hodgson**).

**Person in Authority**

The persons in authority component of the rule is satisfied where (1) the accused subjectively believed that the person to whom (s)he was speaking could influence or control the proceedings against him/her and (2) that belief was objectively reasonable in the circumstances (**Hodgson**).

**If person in authority is uniformed/identified police/prison guard**:automatically considered persons in authority by virtue of their status (**Hodgson**).

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| Examples of the PIA rule  Successful:  **Wells**, 1998 SCC: Children allege they were sexually assaulted by accused. Parents plot w/RCMP to trick confession. Trick wasn’t successful, so one of the fathers assaulted the accused by holding a knife to his throat and punching him. The accused confessed during the assault.  Unsuccessful:  **Hodgson**, 1998 SCC: Complainant + family went to the accused’s place of employment and confronted him re: alleged sexual assault of complainant. He confessed to the assault. Complainant’s mother called the police and struck the appellant. Complainant’s father pulled a knife out and held it to the appellant’s back. Not PIA, because violence done/police contacted after confession.  **SGT**, 2010 SCC: Accused made inculpatory statements to the mother of the girl he was accused on molesting. Mother was not a PIA, because she was unconnected with the prosecution of the case (her only interaction with the police had been 1 year earlier, when she had called the police but was told to call back later b/c the relevant department was closed.) |

**Voluntariness**

There are three heuristics that can help a judge determine the voluntariness of a statement: the existence of an inducement; the confession was made in an atmosphere of oppression; and whether the accused lacked an operating mind at the time of the confession.

**Contextual analysis:** The three factors are contextual: if there is some oppression and some threats or promises, for instance, they might together result in a lack of voluntariness even if each factor alone would not meet that threshold (**Oickle**).

Inducements

A confession may be rendered involuntary if the person in authority makes a threat or promise contingent on the suspect’s confession. There must be some suggestion of a quid pro quo to constitute an impermissible inducement (**Oickle**). However, the existence of a quid pro quo in itself will not render a confession involuntary if the inducement is a weak one (**Spencer**).

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| Examples of threats or promises:  **Involuntary**:  **Leblanc**, 1972 BCCA: Police told the accused that he wouldn’t get bail until he confessed.  **Letendre**, 1979 BCCA: An officer told the accused “well I’m getting mad” and another officer said that he did not like to see his partner get mad.  **Parsons**, 1979 NFLD CA: Accused told that if the matter was not cleared up soon, he would be held over the weekend.  **S(SL)**, 1999 ABCA: Police told the accused that “the only way you can get better is by telling me the truth,” and, in response to denials, said “you’re not on the right track.”  **Voluntary**:  **Spencer**, 2007 SCC: Officers told the accused that he could only see his girlfriend if he confessed. Inducement too weak to rise to the level of involuntariness.  **Hayes**, 1982ABCA: Police told the accused that “it wouldn’t be very good if you’re telling us a story now and it turns out you’re lying.” |

Operating Mind

The operating mind test requires that the accused have sufficient cognitive ability to understand what she is saying, and that the evidence may be used against her. It does not ask whether the accused is capable of making a good or wise choice, or is compelled by psychosis to confess (**Whittle**).

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| Examples of a sufficiently operating mind:  **Whittle**, 1994 SCC: accused was schizophrenic who confessed because voices in his head told him to do so. Did not meet the involuntariness threshold. |

Oppression

Oppression is interrogation conducted under “inhumane conditions,” (**Oickle**), such that the circumstances tend “to sap, and has sapped, that free will which must exist before a confession is voluntary” (**Prager**).

Relevant considerations might include the length of questioning, the length between questionings, and whether the accused has been given proper refreshments. What rises to the level of oppression will also depend on the personal characteristics of the accused (**Prager**).

**2. Evidence Derived from Involuntary Confessions**

**Derived Confessions**

* The derived confessions rule excludes statements which, despite not appearing to be involuntary when considered alone, are sufficiently connected to an earlier involuntary confession as to be rendered involuntary (**SGT**). Considerations include:
  + The time span between statements
  + Advertence to the previous statement during questioning
  + The discovery of additional incriminating evidence subsequent to the first statement
  + The presence of the same police officers at both interrogations
  + Other similarities between the two circumstances
* A “subsequent confession would be involuntary if either the tainting features which disqualified the first confession continued to be present or if the fact that the first statement as made was a substantial factor contributing to the making of the second statement” (**R v I(LR)**).
* The court in **SGT** did not decide whether the subsequent statement must be made to a person in authority.

**Confessions confirmed by subsequent fact (physical evidence)**

* Where a confession must be true by reason of the discovery of a fact, the part of the confession that is confirmed by the fact is admissible (**St. Lawrence, Wray**).

**3. Police Trickery**

An accused’s statements may be excluded where police used tactics that were “so appalling as to shock the community” (**Oickle**).

* Note that Emma is not aware of this rule ever being used successfully

Improperly obtained evidence

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| **Trigger** | Crown seeks to admit evidence obtained in breach of Charter |
| **Burden** | On accused |
| **Standard** | Balance of Probabilities |
| **Policy** | Truth-seeking (militates toward admission) vs. Charter compliance (militates against admission): **Grant** |

Section 24(2) of the Charter provides that evidence may be excluded if it was “obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter,” if, “having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

There are three components to a claim for a s. 24(2) remedy. The onus of establishing each component on balance of probabilities lies with the accused.

**1. Infringement of Personal Charter Rights**

First, the accused must establish that his or her ownCharter rights have been infringed (**Edwards**).

**2. Obtained in a Manner**

* Second, the accused must establish that the evidence was “obtained in a manner” that infringes a Charter right.
* The question at this stage is whether there is a “sufficient connection” between the breach of the Charter right and the obtention of the evidence by the police.
* In determining the sufficiency of the connection, three factors must be considered:
  + first, the temporal connection between the obtention of the evidence and the breach;
  + second, whether there is a causal relationship between the breach and the obtention; and
  + third whether there is a contextual connection between the breach and the obtention (**Strachan; Wittwer**).

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| **Examples**  Not obtained in a manner  **Goldhart**, 1996 SCC: Police conducted a warrantless search & found evidence of a grow op. One found during the search, who the police did not previously know about, subsequently experienced a religious conversion, confessed, and cooperated in the prosecution of the other men. His evidence was not obtained in a manner b/c no strong temporal connection and no strong causal connection.  Obtained in a manner  **Strachan**, 1988 SCC: Accused was denied right to counsel during search. Police found drugs, drug paraphernalia, and cash. Evidence found to have been obtained in a manner given the strong temporal connection, even though there was no causal connection.  **Wittwer**, 2008 SCC: Accused admits to criminal behaviour during an interview. He has not been given police warnings, so police try to remedy problems & conduct a second interview, during which he again admits culpability, but his charter right to counsel is breached. Police conduct a third interview (with new interviewing officers). He does not make admission in this interview until the officers disclose that they know that he confessed in first two interviews. Here, there is a temporal, causal, and contextual connection. |

**2. Administration of Justice into Disrepute**

* The third stage of the inquiry asks whether the admission of the evidence would bring the administration of justice into disrepute.
* The concern, at this stage, is to balance the competing goals of getting at the truth, which militates in favour of admitting all probative evidence, and maintaining the integrity of and public confidence in the justice system, which militates in favour of the exclusion of evidence obtained in breach of the Charter (**Grant**).
* In **Grant**, the court described three heuristics that may be used to assess whether the admission of the evidence would bring the administration of justice into disrepute.

***\*See taxonomy of evidence chart below for hints on application\****

**a. The Seriousness of the Breach**

The first is the seriousness of the breach, which considers only the state’s conduct. The more serious the breach, the greater the need for the courts to dissociate themselves from that conduct in order to preserve public confidence in and ensure state adherence to the rule of law.

* + More serious if:
    - It’s deliberate
    - The conduct is clearly forbidden by law (no ambiguity)
    - The conduct is part of a policy that is in systematic breach of a Charter right

**b. The Impact of the Breach on the Accused’s Charter Interests**

The second is the impact of the breach on the Charter-protected interests of the accused. This analysis considers both the manner of breach and harm that results from the breach.

* More serious if the technique violates the bodily integrity of the accused

**c. What is society’s interest in the adjudication of the case on its merits? (RELIABILITY)**

The final question is where society’s interest lies vis-à-vis the adjudication of the case on its merits. Here, the court must ask “whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial.” In particular, it should attend to the reliability of the evidence.

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| **Taxonomy of evidence:**  **Statements Made by the Accused**   * “The three lines of inquiry described above support the presumptive, although not automatic, exclusion of statements obtained in breach of the Charter.”   **Bodily evidence**   * Impact on the accused:   + Consider the technique’s impact on the accused’s privacy, bodily integrity and dignity. The more intrusive, the less likely it will be admitted. * E.g. breath sample evidence: “method of collection is relatively non-intrusive”   **Non-bodily physical evidence (real evidence)**   * Impact on the accused: * **Discoverability**: the judge should focus on whether the police would likely have found the derivative evidence even in the absence of the statement. * The basic notion is that the intrusion will be greater where the evidence would not have been discoverable but for the statement. * Interest in adjudication on the merits:   + In most cases, real evidence is going to be reliable. (Note however that real evidence involving scientific analysis may not be reliable – must consider the reliability of the forensic technique.) |

Hearsay

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| **Trigger** | Party seeks to introduce out of court statements for the truth of their contents |
| **Burden** | Hearsay statements are presumptively inadmissible. The party seeking to admit the evidence bears the burden of proof that the evidence should be admitted through a categorical exception. |
| **Standard** | Balance of probabilities |
| **Policy** | The admission of hearsay balances society’s interest in getting at the truth against the integrity of the trial process in absence of contemporaneous cross (risk that declarant misperceived fact or lied; witness wrongly remembered): **Khelawon** |

**Definition of Hearsay**

* Hearsay refers to out of court statements adduced for the truth of their contents (**Baldree**). In this context, “out of court” means that the statement was made outside of the court proceedings in which it is adduced.
* Hearsay statements are presumptively inadmissible (**Khelawon**)
* The person seeking to adduce the evidence must therefore rebut the presumption by demonstrating that the hearsay evidence fits within a categorical exception to the hearsay rule or by establishing that it ought to be admitted in view of is necessity and reliability.
* **If hearsay is implied**: where an out of court statement or action inferentially implies a fact (e.g., a person calling a phone owned by accused to buy drugs implies that the accused is a drug dealer: **Baldree**), that statement is subject to the hearsay exclusion (**Baldree**).

**Categorical Exceptions**

* Where a hearsay statement fits within a categorical exception, the courts must still consider the necessity and reliability of the evidence (**Mapara**).

Statutory

* **Dead/insane/unavailable witness:**
* **Criminal**: The evidence of a witness given at a previous trial on the same charge, was taken in the investigation of the charge, or on the preliminary inquiry into the charge can be admitted if (1) the witness refuses to be sworn or to give evidence, is dead, has become insane, is too ill to travel or testify, or is absent from Canada, and (2) the evidence was taken in the presence of the accused, unless (3) the accused proves that (s)he did not have full opportunity to cross-examine the witness (**Criminal Code, s. 715**)
* **Civil**: Where a witness is dead, unable to attend and testify because of age, infirmity, sickness or imprisonment, is out of the jurisdiction, or his or her attendance cannot be secured by subpoena, a transcript of his/her evidence taken in any proceeding, hearing or inquiry under oath may be admitted (**BC Supreme Court Rules, R. 12-5**).
* **Prior Convictions:** If a witness denies that (s)he has, or refuses to answer questions about his/her prior convictions, the OP may use hearsay evidence to prove that (s)he does have a criminal record (**Canada Evidence Act, s.** **12; BC Evidence Act, s. 15**)
* **Account statements** may be admitted to prove that a transaction took place without hearing testimony from the person who entered the particular transaction **if** it is a record ordinarily kept by the financial institution, was generated in the normal course of business, and is a true copy (**Canada Evidence Act, s.** **29**)
* **Business Records:** Records kept in the ordinary course of business are admissible. If a record doesn’t reflect a particular fact (e.g. a withdrawal) where one would be expected to exist, the court may draw an inference that the fact did not take place (e.g. withdrawal didn’t happen) (**Canada Evidence Act, s.** **30**)

Common law

* **Res Gestae/Spontaneous Declaration:** The res gestae rule applies to spontaneous statements made by the victim of an attack or a bystander in circumstances such that concoction is implausible (**Ratten; Clark**). Such circumstances include being grievously injured (**Clark**) or apprehending imminent harm (**Ratten**).
* **Statements against penal interest:** In **O’Brien**, the court held that statements against penal interest may give rise to an exception to the hearsay rule where the statement can be used against the declarant in court proceedings, and the declarant is aware of that fact.

**The Principled Approach**

The principled approach, first developed in **Khan**, holds that hearsay evidence may be admitted where it is both necessary and reliable.

**Relevance & Materiality**

* Evidence is relevant if, as a matter of human experience and logic, the existence of the evidence makes the existence of another fact more probable than it would be without the existence of the evidence (**Watson**).
* Evidence is material if the fact that the evidence makes more probable is itself a material fact in issue or is relevant to a material fact in issue (**Watson**)
* There is no minimum probative value required for evidence to be deemed relevant (**Morris** cited in **Watson**; **Arp**).

**Necessity**

* Necessity is founded on society’s interest in getting at the truth.
* The party seeking to adduce must demonstrate that it is “reasonably necessary” for the evidence to be admitted in its hearsay form (**Khan**).
* Necessity will arise, for instance, where the declarant is dead (**Smith**, **Khelawon**), too young to give viva voce evidence, or likely to be traumatized by testifying in court (**Khan**).
* However, the categories of necessity are not closed and should be assessed on a case-by-case basis (**Smith**).

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| **Examples of Necessity**  Necessary:  **Khan**: Declarant unable to testify owing to her young age. E.g. in obiter: necessity may be found where testifying would traumatize child.  **Smith**: Declarant unable to testify because she is dead.  **Khelawon**: Declarant unable to testify because he is dead.  **KGB**: Testimony unavailable because the declarant comes to trial, but recants or changes their expected testimony |

**Reliability**

* Threshold reliability is considers the extent to which the traditional concerns associated with hearsay arise in a given case.
  + These concerns include the risk that the declarant was inaccurate or untruthful, or that the witness misunderstood the declarant’s statement.
  + **If hearsay evidence is brought against a criminal defendant**:The importance of this step is heightened when hearsay is brought against a Section 7 Charter right to a fair trial. Typically, this right will include the ability to cross-examine a witness in order to test the integrity of their evidence.
* The reliability inquiry asks whether that hearsay evidence is sufficiently reliable so that “contemporaneous cross-examination of the declarant would add little if anything to the process” (**Khelawon**).
* Indicia of reliability may include:
* **Corroboration:** The presence or absence of corroborating evidence (**Khan**; **Smith**; **Khelawon**)
* **Timing:** The timing of the statements relative to the events in question (**Khan**)
* Speaks to possibility of concoction
* **Oath:** Whether the declarant made the statement under oath or was warned about the consequences of a false statement (**KGB**)
* **Recorded:** Whether the statement was recorded (**KGB**)
* Indicia of unreliability may include:
  + **Mental instability:** The mental instability of the declarant (**Khelawon**)
  + **Capacity to lie:** Whether the declarant had reason to lie (**Smith**)
  + **Motive to lie:** Whether the declarant is capable of deceit (**Smith**)
  + **Ability to lie:** Whether the declarant would have been able to fabricate the statement (**Khan**)

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| **Examples of reliability:**  Reliable:  **Khan**: 3 y/o would not be able to describe sex acts if they had not happened to her; corroborating evidence (semen on clothing matching Khan’s blood type); statements made temporally close to event.  **Smith** (first two calls – Smith has left, needs ride home): corroborating evidence (taxi pick-up); no reason to lie.  **KGB factors**:   * Declarant was under oath * Declarant was warned about consequences of false statement * Statement was recorded in entirety (helpful warrant of reliability: shows that statement was actually made)   Unreliable:  **Khelawon**: declarant had history of dementia, paranoia, confusion; gave original statement to care home worker with grudge against Khelawon.  **Smith** (third call – Smith has come back): King had reason to lie (mother planned to send someone to pick her up who she is afraid of; didn’t want mother to worry); not reliable (would have been unable to see Smith return, based on testimony that she walked straight from taxi to phone booth); capable of deceit (had used false credit cards, seemingly willingly). |

Similar fact evidence

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| **Trigger** | When Crown offers evidence which is discreditable to accused and which relates to uncharged acts, character traits or habits (Handy) |
| **Burden** | On Crown |
| **Standard** | Balance of probabilities |
|  | Prejudice will always outweigh probative value ceases to be true |

Similar fact evidence is presumptively inadmissible because it will always introduce moral and reasoning prejudice (**Handy**). To be admitted, the Crown must persuade the trial judge on a balance of probabilities that the probative value of the evidence outweighs its prejudicial risk (**Handy**).

1. **Purpose** for which it’s offered (materiality/relevance)

* Cannot be general disposition
* **Tendency Principle:** Can be to demonstrate a tendency to commit an offence in a particularly distinctive way, amounting almost to a signature, and that the charged act fits with that signature.
  + This will generally bolster complainant’s credibility
* **Coincidence Principle:** Can be used to demonstrate that a series of acts have occurred that are so similar that coincidence is inconceivable, and they must therefore have been committed by the same person. One of the acts must be clearly anchored to the accused.
  + This will generally go to identity

1. **Probative value**:

* **Actually occurred:** Strength of evidence that similar acts occurred
* **Similarity:** Degree of similarity or connectedness between charged and similar acts:
  + Proximity in time of the similar acts
  + Extent to which the other acts are similar in detail to the charged conduct
  + Number of occurrences of the similar acts
  + Circumstances surrounding or relating to the similar acts
  + Distinctive feature(s) unifying the incidents
  + Intervening events
  + Any other factor which would tend to support or rebut the underlying unity of the similar acts.
* **Collusion** (= risk of fabrication)

1. **Prejudicial risk**

* **Moral prejudice**: The danger that the facts offered may unduly arouse the jury’s emotions of prejudice, hostility, or sympathy
* **Reasoning prejudice**: the evidence may create a side issue that will unduly distract the jury from the main issues or will consume an undue amount of time

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| **Examples**  **Handy**: SFE of painful sex w/wife not admissible: potential of fabrication, insufficiently similar  **Makin**: SFE of 12 dead babies buried in gardens of premises occupied by Ds admitted, because coincidence implausible  **Smith**: SFE that 3 wives of D made financial arrangements to his adv. & then drowned in the bath |

Section 35 Evidence

**Discover in s. 35 cases**: **Tsilqhot’in**

* Technical defects in discovery or pleadings will not bar the admission of evidence, where relevant.
* Rationale: “What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society.” A technical approach would serve to undermine this goal.

**Test for Aboriginal title**: **Tsilqhot’in**

* **Burden:** on the claimant.
* **Elements of the test**:
  1. “Sufficient occupation” of the land claimed to establish title at the time of assertion of European sovereignty;
  2. Continuity of occupation where present occupation is relied on; and
  3. Exclusive historic occupation.
* **Definition of occupation: aboriginal law + common law**The concept of occupation is derived from both common law and aboriginal law. The implication is that the court must be educated by lawyers and indigenous communities about what the indigenous laws are and what evidentiary requirements it contains.

**Hearsay in Section 35 Cases**

Section 35 Principles & Hearsay

* As the Supreme Court of Canada has repeatedly recognized, aboriginal claims give rise to unique and inherent evidentiary difficulties owing to the historical nature of the subject matter and the absence of written records relating thereto (**Van** **der Peet**, **Mitchell**, **Tsilqhot’in**).
* In **Mitchell**, McLachlin CJ held that these evidentiary difficulties must not render the rights protected under section 35 “illusory.” Rather, the rules of evidence must be applied in a manner “commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1)” (**Mitchell**, quoted in **William**).
* While aboriginal groups must bring cogent evidence relating to the material issues in the case, the court must take care to evaluate the cogency and reliability of the evidence with regard to the specific context of the aboriginal culture from which it emanates, and must avoid reliance on Eurocentric assumptions about how knowledge ought to be preserved.
* However, the court must not lose sight of the fact that aboriginal evidence, like any other form of evidence, can range from “the highly compelling to the highly dubious,” and should not be allowed to carry more weight than it can reasonably support (**Mitchell**, quoted in William).

Vickers Approach

* These theoretical considerations were given concrete application in **William**, where Vickers J. outlined an approach to the admissibility of aboriginal hearsay evidence. He suggested a two-step process to evaluating such evidence.
* **First** **stage: overview**
  + Counsel for the aboriginal group should provide an overview of the aboriginal group in respect of:
    - How their oral history, stories, legends, customs, and traditions are preserved;
    - Who is entitled to relate such things ad whether there is a hierarchy in that regard;
    - The community practice with respect to the safeguarding the integrity of its oral history, stories, legends and traditions;
    - Who will be called at trial to relate such evidence, and the reasons they are being called to testify.
  + This information is intended to provide the trial judge with the contextual factors she must bear in mind when evaluating the reliability of the evidence.
* **Second stage: principled approach**
  + At the second stage, the trial judge must apply the principled approach to hearsay by determining the necessity and reliability of the evidence.
  + The reliability inquiry may consider factors unique to the aboriginal context. Vickers J suggests that the following factors may be relevant:
    - Personal information concerning the witness’s ability to recount what others have told him or her;
    - Who it was that told the witness about the event or story, the general reputation of that person, and whether that person witnessed the event or was simply told of it; and,
    - Any other information that might bear on the issue of reliability.

**Benoit: suggestion that some unreliable forms of oral history evidence require corroboration – read narrowly – don’t generalize to all oral history evidence.**