EVIDENCE

- As a methodology/system of law that determines what goes in and what does not, how it is presented, and what use can be made of it by the TOF
    - Therefore, concerned with onus and burdens of proof
- Fundamental rule of evidence → **Everything that is relevant to a fact in issue is admissible unless there is a legal reason for excluding it**
    - AKA nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is thus probative should come in, unless a clear ground of policy or law excludes it

Charter and Evidence

- Express constitutional protection for some evidentiary principles in criminal proceedings
    - Presumption of innocence until proven guilty, fair and public hearing by an independent and impartial tribunal, right not to be compelled as a witness against oneself, right against self-incrimination in subsequent proceedings
- s.7 fundamental justice
    - Liberty is always at stake for criminal proceedings, therefore s.7 always applies
        - May be suggested that some evidentiary principles are embedded within s.7
- Charter protects important rights in investigation of offences
    - s.8 secure against unreasonable search and seizure
    - s.9 not to be arbitrarily detained or imprisoned
    - s.10(b) right on arrest or detention…to retain and instruct counsel without relay and to be informed of that right
    - Any CL or statutory rules that are inconsistent must be justified under s.1 or have no force or effect
- Where evidence is obtained in a manner that infringes a Charter right, there are remedies in s.24(1) and (2)

STAGE 1: RELEVANCE

*When assessing relevance, always assume the evidence is true.

- **No minimum standard/probative value at this stage** (*Watson* citing *Morris*), very low bar, can be relevant even if inferences that can be drawn are contested (*Arp*)

Two considerations in determining of something is relevant:

- (A) RELEVANCE (logically probative/relevant)
    - **Does it tend to prove or disprove, as a matter of human experience and logic, the fact in issue/the proposition for which it is put? (*Corbett*, cited in *Watson*)**
    - Test: **whether the evidence makes a fact in issue more or less likely to be true**
    - Done through common sense/logic
    - Nothing should be received which is not logically probative
    - Think about alternative narratives (does it make one or the other more/less likely?)
- (B) MATERIALITY (legal relevance)
    - This is about law, not logic
    - **Evidence is material if it is directed towards a matter in issue in the case** (*B(L)*)
    - Ex. Evidence about subjective knowledge is relevant in a murder trial, but not relevant in a manslaughter (because subjective foresight does not have to be proven)
    - **Primary:** substantive law; **Secondary**: intended to help TOF assess quality of evidence
- Once relevant → generally admissible *but* subject to judicial discretion and rules excluding evidence

Watson (1996) Doherty JA

F: A charged with 2M, convicted of manslaughter. V was at business. A arrived with C & H. V was shot and killed, C was wounded.

- Crown's position: A and friends arrived and intended to kill V. A was on guard and 3 men escaped in A's car.
    - → A liable for murder as aider (did not commit AR). **Crown needs to prove he was part of a plan**.

- Defence position: A had nothing to do with shooting, did not know H was armed. C wasn't armed. Claim dispute occurred and both V & H fired. H hit V 5 times, V fired but hit C. A fled with H&C.
- Conflict in expert evidence:
    - Fletis: 7 (V shot with 2 different guns – 7th bullet came from a different gun)
    - Barbetta: 5 (V could have been shot and killed by 1 gun, V could have fired shot that hit C)
    - All agreed 7 bullets were discharged.
    - **Became prominent issue:** if two weapons → strong inference that H&C were armed (supports Crown theory); if shot 5 times with 1 gun, it was possible H fired all the shots (supports D's theory that H was acting alone – spontaneous gun fight)
- Evidence of Mair: V always had a gun on him. TJ found it inadmissible (no issue of SD)

I: Admissibility of Mair's evidence
D: Relevant: gives degree of plausibility to A's account
R: Evidence was not tendered for the purpose of proving self defence. **TJ's assessment of relevance was too limited**. Is the evidence that he was in a habit of carrying a gun relevant in some other way in regard to the two theories of the case? Does it assist the TOF navigate between two competing hypotheses?

- **Relevance must be assessed in the context of the entire case and the respective positions taken by the Crown and the defence** (*Sims*)

Relevance inquiry here:

- (1) **Does the fact that the deceased always carried a gun make it more likely that he was in possession of a gun when he was shot?** (this brings you to the material issue) [intermediate inference]
    - Evidence of habit can be used to draw an inference of conduct from conduct (can be useful when it has nothing to do with what is before the court.
        - Vs. Disposition: which involves an inference of the existence of a state of mind from a person's conduct and a *further* inference of conduct on that specific occasion based on the existence of a state of mind
    - → Mair's evidence is of **habit** → passes this stage
- (2) **Does the fact that the deceased was in possession of a gun when he was shot make it less likely that the appellant was party to a plan to kill or do harm to the deceased, formed some time prior to his arrival with H & C?**
    - → If the deceased's possession of a gun when he was shot triggers a chain of inferences, based on logic or experience, which ultimately makes the appellant's participation in a plan to kill or do harm to the deceased less likely, then the second stage of the relevance inquiry is satisfied
    - Considered with the rest of the evidence → A jury, having concluded that the deceased was armed, could have inferred that Cain was shot not by his friend Headley, but by the deceased who was the target of Headley's assault

→ **Relevant**

Exclusionary Rules

- No exclusionary rule in a criminal context to show deceased or a third party is a 'bad person' (*Arcangioli*)
    - If relevant, will be admissible unless prejudicial effect outweighs probative value
    - This case: other aspects of the evidence would suggest criminal lifestyle – potential prejudice was already present (vs. if claiming SD → can be more prejudicial)

Balancing:

- Significant probative value with no prejudicial effect

ONCE RELEVANT, EVIDENCE IS PRESUMPTIVELY ADMISSIBLE

(subject to exclusionary rules and discretion)

STAGE 2: EXCLUSIONARY RULES

May be more than 1 exclusionary rule → need to satisfy all of them (*Khelowan*)

POLICY REASONS:

1. Distort the Fact Finding Function

- Evidence, though relevant, may tend to cause TOF to reason irrationally or inappropriately (distract or mislead)
- ex. hearsay (insufficient reliability); evidence of bad personhood (distort, moral prejudice)
- **Concern about fairness of the trial**

2. Unnecessarily Prolong a Trial or Confuse the Issues
   - Ex. Collateral facts bar → prevents a party from proving independently (**bringing in evidence/witnesses**) that an opposing party's witness is lying about matters that are unrelated to the matter in issue
     - Collateral facts: evidence that witness tends to tell lies (always an issue of credibility) – cannot open an inquiry into general credibility of every witness → would create trials within trials

3. Undermine Some Important Value Other than Fact-Finding
   - Where admission would bring administration of justice into disrepute (ex. infringes Charter), unfairly surprises the other party, would infringe other values (ex. privilege)
   - Important for long term fairness in the administration of justice, which outweighs the interest of the administration of justice of getting at the truth in any individual case

4. Concerns about the Manner the Evidence was Acquired or How it was Presented
   - TOF are not supposed to perform its own investigations into facts of the case, undermines neutrality of TOF, deprives parties opportunity to test the evidence
     - *Shearing* → private parties held to a lesser standard
   - Inadmissible because inconsistent with the nature of the adversarial process

5. Where Probative Value is Outweighed by its Prejudicial Effect
   - May distort fact-finding process, resulting in unfairness to the accused
   - Prejudicial effect: distortion in reasoning, unfair prejudice to social and individual interests (right to equality, privacy, and dignity)
   - Ex. evidence may be admissible for one purpose, but inadmissible for another
   - Counterbalancing factors to exclude evidence:
     - 1. may unduly arouse jury's emotions of prejudice, hostility or sympathy
     - 2. probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues
     - 3. evidence may consume an undue amount of time
     - 4. unfair surprise to the opponent, to which they would be unprepared

Seaboyer (1991) SCC McLachlin J

F: Seaboyer was charged with sexual assault of a woman with who he'd be drinking in a bar. TJ allowed A to cross-examine complainant on her sexual history/other acts of sexual intercourse which may have caused condition which was in evidence.

- Gayme: C was 15; A relying on consent/honest belief in consent and that she was the aggressor. Sought to cross-examine evidence on prior and subsequent sexual acts.

I: Is evidence tendered by the accused subject to balancing of prejudicial effects and probative value?

D: s.7 violated → s.276 inconsistent with the Charter.

R: Purpose of legislation: (1) abolish CL rules with permitted evidence that misled jury and had little probative value (2) preserve integrity of trial by eliminating evidence that has little probative value and unduly prejudices the TOF against complainant; (3) encourage reporting of crime (4) protect witness's privacy

- Arguments against legislation: infringes right to present evidence relevant to defence and violates right to fair trial, morally innocent should not be convicted, full answer and defence.
- **The prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law**
- s.277 does not infringe on right to a fair trial because this type of evidence cannot be tendered for a valid purpose (no logical relationship between sexual reputation and credibility of a witness) – generic reputation
- s.276 is more specific → does not condition exclusion on the use of evidence for an illegitimate purpose
  - **Categorical prohibition**/blanket exclusion, subject to three exceptions:

        - (1) Rebuttal evidence: info that was previously adduced by Crown
          (2) Evidence going to identity
        - (3) Evidence relating to consent to sexual activity on the same occasion as the trial incident: temporally limited
    - Under this provision, evidence could be excluded that should be received → **fails to distinguish between different purposes for which evidence is tendered (illegitimate v. valid)**
        - Ex. defence of honest belief, motivation to fabricate, to explain other physical conditions
            - Even evidence as to pattern of conduct may on occasion be relevant
- **TJ must weigh probative value and prejudicial effects – if use right process, entitled to deference**
    - To exclude defence evidence: **must substantially outweigh**
- S.1: fails balancing.
- **DOES NOT REVIVE CL RULES**:
    - Focus on the use to which the evidence is put, value of evidence must outweigh potential prejudice.
    - Judge must:
        - (1) **Assess with a high degree of sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence**
            - Evidence tendered for a legitimate purpose and that it logically supports a defence
        - (2) **Take special care to ensure that, in the exceptional case where circumstances demand that such evidence be permitted, the jury is fully and properly instructed as to its appropriate use**
            - Cannot draw impermissible inferences from evidence of previous sexual activity
        - Only in exceptional circumstances – has not actually played out this way.

SUMMARY
- (1) On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct:
    - (a) more likely to have consented to the sexual conduct at issue in the trial;
    - (b) less worthy of belief as a witness
- (2) Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence (ex. identity, motive to fabricate/bias, defence of honest belief, evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct
- (3) Before evidence of consensual sexual conduct on the part of a victim is received, it must be established on a voir dire that it is legitimate
- (4) The judge should warn the jury against inferring from the evidence of the conduct itself, either that the complainant might have consented to the act alleged, or that the complainant is less worthy of credit

Dissent (L'Heureaux Dube)
- Stereotypes operate in a way that it is hard to root them out and confront them directly → we cannot see our own biases. Biases are also compounded as you work through process (police – prosecutors – judges)
- s.277 (general reputation) → consent is to a person and not a circumstance
- s.276 – no relevant evidence is excluded under this provision → any evidence would not satisfy the "air of reality" that must accompany a defence, only based on myths and stereotypes.

1. DISCLOSURE AND DISCOVERY

Facilitate truth seeking by ensuring parties have access to information they need to prepare for court

CIVIL:

BCSC RULE 7-1

- **Discovery is automatic**, list of documents must be served on other party within 35 days after end of pleading period ((1)(a))
    - If claiming privilege must include in list, claim for privilege must be made in list with grounds ((6)) and described in a way that will enable other parties to assess validity of claims ((7))
- If party servicing realizes their list is inaccurate/incomplete or documents come into possession control that could be used by any party on record to prove/disprove fact – must amend and serve list. (BCSC Rule 7-1(9)
- If receiver believes list **omits documents**: written demand to amend, serve list, make documents available for inspection & copying under (15) & (16) ((10))*
- If receiving party believes lists **should include documents** that (a) w/i listing party's possession, power, or control; (b) relate to any/all matters in question in the action; and (c) are additional to those required in (1)(a) or (9), party must write and identify such documents with specificity and indicate the reason why they should be disclosed, may require listing party to amend, serve & make available. ((11))*
- Must allow other party to inspect and copy documents ((15))
    - Must request/pay for copies ((16))
- If **document is not in possession or control of a party of record**, the court may (under Rule 8-1) make an order for (a) production, inspection, and copying; (b) preparation of a certified copy that may be used instead of original ((18))

  *Party receiving written notice must within 35 days comply with demand, comply partially and explain those that are not disclosed ((12))
- **If party fails to make discovery/produce for inspection/copying as required, party may not put the document into evidence or use it for purpose of examination/cross-examination** ((21))

CRIMINAL:

- Asymmetrical obligations

Stinchcombe (1991 SCC Sopinka J)

F: A was lawyer charged with appropriating financial instruments from a client (Abrams) who filed for bankruptcy after A allegedly stole shares (but didn't include those shares as part of bankruptcy filing). Each count of the indictment turned on whether A had formal status as trustee of the property (issue: nature of the relationship).

- Lineman was former secretary, was interviewed by RCMP. Crown informed A about existence but not content of statement. Request for disclosure was refused. Written statement was taken; disclosure was again refused. Crown decided not to call her as a witness (wasn't worthy of credit).

D: Appeal allowed.

R: **Fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done**.

- Difference between Crown and defence role: defence can take a purely adversarial role (no obligation to assist prosecution) → BUT defence must give notice of intention to call expert witness (s.657.3)
- The search for truth is advanced rather than retarded by disclosure of all relevant material, failure to disclose impedes full answer and defence
- *MacNeil* → whatever is in the possession of the police is in the possession of the Crown for the purpose of disclosure
- **Duty to disclose is not absolute → subject to Crown discretion re: withholding info and timing**
    - The *absolute* withholding of information which is relevant to the defence can only be justified on the basis of the existence of a **legal privilege**
    - **Protection** of witnesses (timing and manner of disclosure to protect them)
    - **Relevance** of information (but err on side of inclusion)
    - Discretion is reviewable by the TJ → **on review, Crown must justify its decision**
        - Guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence

        - TJ may require disclosure despite law of privilege
    - Defence must bring attention of TJ to non-disclosure ASAP to remedy prejudice
- Timing
    - **Initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead**
        - Obligation to disclose is triggered by request by A; if unrepresented, Crown should inform A of right to disclosure. Until this is done, no plea taken.
    - Obligation to disclose is continues throughout the proceedings
- Contents
    - **No distinction between inculpatory and exculpatory evidence**
- Note: NOT covered by Stinchcombe: everything not in the hands of prosecutors and police

s.35 CONTEXT:

Tsilhqot'in Nation v BC (2014) (SCC – McLachlin CJ)
F: Seek AT.
I: What intensiveness is required to establish s.35 claim?
D: AT is established. Province's actions were inconsistent with duties.
R: **Functional approach should be taken to pleadings in AB cases → minor defects should be overlooked, in the absence of clear prejudice** (evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified → not "all or nothing").
Approach based on the best evidence that emerges (purpose of reconciliation) not a technical approach.

- 3 concepts provide useful lenses but court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts
- They are not ends in themselves but inquiries that shed light on whether AT is established
- Sufficiency → approached from both CL and AB and give account to both legal traditions
    - Aboriginal perspective focuses on laws, practices, customs and traditions of the group
        - Must know what the AB laws are, what they require and how they apply
        - **Indigenous laws come in through evidence while CL comes in through legal argument**
            - McLachlin defers to Vickers on findings of fact (absent palpable or overriding error)
    - CL perspective: focusses on possession and control
    - **Take into account: the groups size, material resources, manner of life, and technological capabilities and the characteristics of the lands claimed, intensity and frequency of use**
        - Show historically acted in a way that would communicate to 3rd parties that it held the land for its own purpose
        - Evidence of a strong presence on or over the land claimed (incl: acts, dwellings, labour, consistent presence, maintaining land, warning trespassers, cutting trees/grass, fishing tracts of water)
        - **Must reflect AB way of life**
- Continuity
    - **Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises — continuity between present and pre-sovereignty occupation**
    - Does not require an unbroken chain
- Exclusivity
    - *Delgamuukw* → "intention and capacity to retain exclusive control"
    - The fact other groups used land does not preclude exclusivity (permission requested and granted/denied speaks to exclusivity)
    - Lack of challenges to occupancy can support inference of intention & capacity to control
    - Must take into account context and characteristics of AB society

2. PRIVILEGE

- **Privilege can be argued where a party is seeking to avoid disclosing something that its relevant and probative because of nature of the relationship in which it was disclosed.**
    - *Might* be material and relevant
- Operates to enable people to speak and write with complete candour and openness in certain relationships, secure in the knowledge that the recipient of the communication cannot be compelled to disclose it even in legal proceedings → Encourages full and free disclosure required to ensure effective representation
- **Truth is not an absolute value**
- Doctors, journalists-sources, religious advisors are not presumptively inadmissible under CL
- *McClure* → Class privilege involves a prima facie presumption of inadmissibility once it is established that the relationship fits w/i the class (ex. solicitor-client, spousal, informer). Communications are excluded because there are overriding policy reasons for exclusion

SOLICITOR-CLIENT PRIVILEGE **Not examinable

Solosky: communication must:
- (1) be between a solicitor (this category includes the agents of a solicitor—for example, articling clerks or secretaries—who are not lawyers themselves) and client;
- (2) entail the seeking or giving of legal advice; and
- (3) be intended to be confidential

*Burden is on party claiming privilege BUT if factors are met, privilege attaches whether or not it is claimed

- Privilege is not only for legal advice per se, but for all communications "engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to their conduct, decisions or representation in the courts"
- As long as communication falls within usual and ordinary scope of the professional relationship, this privilege applies
- No privilege attaches to communications aimed at furtherance of unlawful conduct
- Lawyers bills → presumptively privileged (*Maranda*); non-payment of fees is not privileged (*Cunningham*) unless related to merits of the case or where disclosure will cause client prejudice
- **Now has constitutional protection → principle of fundamental justice under s.7** (*Lavallee; Federation of Law Societies Canada*)
    - Will only yield in certain clearly defined circumstances, does not involve a balancing of interests on a case-by-case basis
    - Idea that it facilitates other values
- *Davies* → charging decisions made by Crown are not covered by privilege
- *Blood Tribe* → as a matter of statutory power, can limit S-C privilege

Waiver*Burden of establishing waiver is on the party asserting it
- Holder of privilege waives their right to non-disclosure of the communication
- May be express or implied by conduct that is inconsistent with keeping a matter privileged
    - Sharing advice with 3rd party generally constitutes waiver
        - Exception: when clients of two or more lawyers have a common interest in keeping shared advice confidential
    - Inadvertent disclosure is not necessarily waiver
- Can waive part of a privileged communication

Pritchard v Ontario (Human Rights Commission) (2004 SCC – Major J)
F: A filed human rights complaint against former employer. Commission decided not to deal with complaint. A sought JR and brought motion for all documents that were before Commission when it made its decision, incl legal opinion provided to Commission by in-house counsel.
I: Is opinion provided by in house counsel S-C privilege in the same way as if prepared by outside counsel?

R: Whether in-house counsel is covered by S-C privilege must be assessed on a case-by-case basis bc have both legal and non-legal responsibilities

- Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered (*Campbell*)
- → **Was a legal opinion, provided to Commission by in-house counsel to be considered at their discretion** [Commission is client, counsel is lawyer]
    - No exception removes it from privileged class.

Common interest?

- **Commission is a statutory decision maker, and does not share 'common interest' with the parties before it**.
- Common interest has been narrowly expanded to cover parties with fiduciary duties (trustee-beneficiary, fiduciary aspects of Crown-IND relations, certain contractual or agency relations)

Exceptions to Solicitor-Client Privilege

1. Criminal Purpose

- *McClure* → legal advice must be lawful to attract protection
- *Descôteaux v Mierzwinski* → where communication is the actus reus of the crime, privilege cannot attach

2. Public Safety

- Aims at preventing crime from happening by allowing lawyer to warn person about specific threat posed by a client
- Limited disclosure → scope is determined by the threat itself

Smith v Jones (1999 SCC Cory J)

F: Privilege is claimed for a doctor's deport. Jones was charged with agg sexual assault, and was referred to a psychiatrist (Smith) by attorney with hopes of being useful in defence.

- Counsel advised him that it was consultation was privileged the same as it was with him.
- In interview with Smith, Jones had described at length his plan to kidnap, rape, and kill sex workers on the DTES
- Jones pled guilty and Smith found out sentencing judge would not be advised of his concerns – commenced action for limited disclosure
- TJ ruled that public safety exception to law of S-C privilege released Smith from confidentiality

I: What circumstances and factors should be considered in determining whether solicitor-client privilege should be set aside in the interest of protecting the safety of the public?

R: Only in rare circumstances, for a **compelling public interest** will S-C privilege be set aside. To determine when public safety outweighs privilege, look to three factors:

- (1) **Is there a clear risk to an identifiable person or group of persons?** [Clarity]
    - Is there evidence of long range planning? Has a method for effecting the specific attack been suggested? Is there a prior history of violence or threats of violence? Are the prior assaults or threats of violence similar to that which was planned? If there is a history of violence, has the violence increased in severity? Is the violence directed to an identifiable person or group of persons?
    - Generally, a group or person must be ascertainable
        - How ascertainable depends on other factors
        - If the group is large, considerable significance can be given to the threat if the ID of the group is clear and forceful
- (2) **Is there a risk of serious bodily harm or death**? [Seriousness]
    - Nothing short of this will be adequate
    - *McCraw* → serious psychological harm may constitute serious bodily harm as long as it substantially infers with the health/well-being of the complainant
- (3) **Is the danger imminent?** [Imminence]
    - Must create a sense of urgency that is applicable to some time in the future (but no real time limit as long as a reasonable person would think it would be carried out)

- *Factors overlap and vary in importance → weight attacked to each varies with case

A: (1) Yes: clear identifiable group [Sex Workers on DTES], specificity of method, evidence of planning, prior attempts, gathered materials (2) Utmost gravity (sexual sadistic murder) (3) Imminence – <u>caused concern</u> because he had been free for almost 15 months, did not carry out his plan BUT decided that this was met considering he breached bail conditions and because he was awaiting sentence, more likely he was aware of the consequences of any actions he would take.

→ <u>Factors taken together</u> (despite concerns with imminence) indicate privilege must be set aside

Shows that imminence may not be as important of a factor when the other two are strong.

Dissent (Major J): Should be a limitation which does not include conscriptive evidence so it respects the importance of privilege. Concern about whether maj. decision creates climate where dangerous individuals are less likely to disclose disorders and seek treatment.

R: **If the privilege is to be set aside, the court must find that there is an imminent risk of serious bodily harm or death to an identifiable person or group and the <u>extent of disclosure be as limited as possible</u>.**

<u>3. Innocence at Stake</u> *more rarely satisfied than public interest

- *McClure* → all privileges must give way in a case where there is a danger that an innocent person may be wrongfully convicted
  - BUT the court will find <u>any other means</u> rather than setting S-C privilege aside
  - In this case, A asserted he needed access to C's file in the context of a civil case to determine the nature of the allegations made to solicitor and assess motive to fabricate.
    - Failed on the facts (no evidence info could raise a reasonable doubt), could raise issue of motive from another source (pointing to sequence of events)
    - Argument could be made in principle

  *Refined in *Brown*

R v Brown (2002 SCC Major J)

F: V found stabbed in chest in street. Robertson told police that her BF, Benson, told her he killed V, what had happened, and that he confessed to lawyers. PO investigated for months but ultimately charged Brown who was seen looking for V morning he was killed, and video showed he entered the apartment < 1hr after the stabbing. Brown became aware of Benson's statement. Judge refused grant A access to information.

D: Appeal allowed.

R: **Rare exception – used as a last resort.** Best to wait till end of Crowns' case to assess whether the Crown can succeed in proving A's guilt BARD, if Crown cannot meet this standard, no need for McClure application.

<u>Test</u>:

- <u>Threshold question</u>: A must bring application <u>with evidence</u> that satisfies the court that:
  - (a) information they seek from S-C communication is **<u>not available from any other source</u>** (*but then how does the accused become aware of the communication)
    - If there are questions of whether the 'other source' evidence would be admissible then the J should hold a voir dire on the admissibility of it.
    - NOT concerned about relative reliability.

  AND
  - (b) **<u>Otherwise unable to raise a reasonable doubt</u>**
    - Objective is to determine if there is a genuine danger of wrongful conviction, not to usurp the TOF's function
- <u>Innocence at stake test</u>:
  - 1. The accused seeking production of the solicitor-client communication has to demonstrate an evidentiary basis to conclude that a communication exists that **<u>could</u>** raise a reasonable doubt as to his guilt
    -
  - 2. If such an evidentiary basis exists, the trial judge should examine the communication to determine whether, in fact, it is **<u>likely</u>** to raise a reasonable doubt as to the guilt of the accused
    - Purpose is not to have a 'cumulative effect' (**not to bolster or corroborate other evidence**) → cumulative effect would be only be considered where the S-C

communications make sense of the evidence that could not otherwise raise a reasonable doubt

- **Scope of disclosure**: Crown cannot "piggy back" to obtain disclosure but normal disclosure rules apply to Crown if defence is going to use them.
- Privilege holder entitled to immunity under s.7 (would be self-incriminating) and protected against using it against credibility.

A: Threshold test: (a) had another source in that Robertson's evidence *may* be admissible as hearsay (TJ reached premature conclusion in that would not be admissible, or if admissible, believed); fails (b)

LITIGATION PRIVILEGE

- Communications from persons other than the client
- Only lasts as long as the litigation
- *Blank v Canada* (2006 SCC):
    - Litigation privilege is not limited to communications between solicitor and client: it extends to communications between solicitor and third parties, litigant and third parties, and (citing *Sharpe*) provides a protected area to facilitate investigation and preparation of a case for trial
    - Once litigation has ended, the privilege has lost its purpose and therefore is at an end unless closely related proceedings remain on foot

SETTLEMENT PRIVILEGE

Union Carbide v Bombardier (2014 SCC) → permits parties to litigation to participate in negotiations that aim to settle disputes and improve access to justice

- The common law settlement privilege contains an exception which permits parties to produce evidence of confidential communications in order to prove the existence or scope of a settlement. A mediation contract may override that exception, but it must do so in express terms.

CASE-BY-CASE PRIVILEGE *burden on person claiming privilege

- Dependent on facts of given case
- There is no *prima facie* presumption of privilege in respect of communications to which case-by-case privilege applies (*McClure*)
- Case-by-case determined by *Wigmore* test:
    - (1) The communications must originate in a **confidence that they will not be disclosed**
        - Belief that communications are in confidence
        - Emphasis is on the one making disclosure
        - Don't just rely on precedent → this is *case-by-case* therefore must address specific facts of this case
    - (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties
        - Integral to relationship (particular relationship, but also general deterrence)
    - (3) The relation must be one which in the opinion of the community ought to be sedulously fostered
        - Community values the relationship because it serves a public good
        - General relationship
        - Can rely on precedent more here (mental health – MA v Ryan)
    - (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
        - This one **does all the work** – differs depending on the relationship and issues at stake
        - Balancing → weighing the relationship (specific or general) and the truth seeking function
            - **Are charter rights engaged?** (s.7, s.8, s.15)?
            - Factors differ in each case
            - Must reflect *Charter* values (*MA*)
        - *MA* → **disclosure must occur where there will be an unjust verdict**

R v Gruenke (1991 SCC Lamer CJC)
F: A was 22 V was 82 y/o man who had befriended her. He advanced sexually. He ended up dead. **A spoke to pastor and lay-counsellor after incident**.

- She testified he came over, she got in his car and he drove away. She struck him with a piece of wood and her boyfriend came and she didn't remember much else. Washed car, went to hotel.
- Crown theory was that BF had killed him and A had little to do with it but had enlisted aid of BF in planning and committing murder to stop sexual harassment and to benefit from will.
- **Pastor & counsellor had evidence in support of Crown's theory (undermining defence theory)**

R: Not a CL, prima facie privilege for religious communications → policy reasons are different (not so closely connected to justice system)

- Need to assess with regard to FOR and multicultural heritage → so cannot say that spiritual advice has no value
- Wigmore: do not satisfy first requirement → was not seeking spiritual advice, did not have an expectation of confidence (difference between someone helping her in bereavement and seeking religious advice) **looking at type of communication** (would not do this for a solicitor).
    - A testified she decided to take blame and saw no harm in speaking to a solicitor
    - Not deterministic that it was an informal setting

Concurring (L'Heureaux Dube): agree did not originate in confidence, but would have recognized a general religious communications privilege on basis of social value of religious communications, FOR, individual's privacy interest.

M.A. v Ryan (1997 SCC McLachlin J)
F: A was 17 when she underwent psychiatric treatment from Dr. Ryan. She brought a civil suit for damages against him sustained as a result of sexual relations/gross indecency. Ryan admitted to the conduct but pleaded consent, denied causation because he didn't *cause* her difficulties.

- A sought treatment from a new Dr., expressed concerns that communications remain confidential – received assurance that everything possible would be done so that they remained confidential, Dr. even refrained from taking notes at one point.
- CA ordered disclosure limited by 4 conditions (only solicitors and expert witnesses could examine it; could not disclose to those not authorized to see them; only used for purposes of litigation; only 1 copy to be made)

I: Were Dr.'s notes protected by privilege from disclosure in a civil suit brought by A against Ryan?
D: SCC dismissed appeal – affirmed CA decision.
R: Privilege should develop in accordance with *Charter* values, social and legal realities of the time.

- *Wigmore* criteria:
    - (1) Originate in a confidence that they will not be disclosed *onus on the one claiming privilege
        - Met in this case
        - *Almost always* the possibility that the court may order disclosure (even within traditional categories)
    - (2) The element of confidentiality be essential to the full and satisfactory maintenance of the relation between the parties to the communication *onus on the one claiming privilege
        - Satisfied
        - Generally, confidentiality is essential for existence and effectiveness of therapeutic relations
        - Specifically, A also viewed it as essential
    - (3) The relation must be one which in the opinion of the community ought to be sedulously fostered *onus on the one claiming privilege
        - Satisfied
        - General: mental health of citizenry is a public good of great importance
    - (4) The interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation

        - Finding of no privilege would damage other persons suffering from trauma to obtain treatment (to specific claimant, and larger society) – impacts health and ability to contribute to society
        - Privacy interests
        - Inequalities perpetuated by absence of protection
        - **Constitutional dimension** → factors must reflect emerging Charter values
            - s.8: heightened interest in case of sexual assault
            - s.15: in context of sexual assault, perpetuates disadvantage felt by victims of sexual assault (often women) – prevents them from helping to deal with trauma – disadvantaged position compared to other wrongs (price must pay for redress when confidentiality is broken)
        - Here, more is required to establish privilege → must be shown that the benefit from privilege in fact outweighs the interest in the correct disposal of the litigation. Disclosure is not all or nothing (but, then again, the relationship is not *less* broken because the disclosure is limited). **Focus on the truth seeking function of the trial here**.
- Open for other judges to find psychiatrist-patient records privileged in other cases
- Balance may be struck differently in a criminal suit than in a civil one
- **But case-by-case privilege will always yield to the possibility of an unjust result**
- *Dagenais* → can't decide which right will yield before looking at the particular case – one right will have to yield to another
    - (1) Delimit the legitimate scope of the rights → TJ has a responsibility to assess the claim of right and the real limits of those rights (sexual assault complainant cannot legitimately say that they can withhold everything from an accused because of s.8 and s.15)
    - (2) To the extent that there was a legitimate sphere of conflict was identified, they cannot adopt an ex ante hierarchy of rights. It is not possible to say s.7 is more important than s.15 for all cases and all purposes. Have to look at the rights and their underlying values.
    - Must create a balance that respects the balance of both sets of rights (quoted in *O'Connor*)
- **Procedure**
    - **1) A judge could proceed by examining every document or by reviewing affidavit summation of the documents and their relevance**
        - Production to the TJ
    - **(2) While it is not essential that the judge examine every disputed document, the court may choose to do so if necessary to the inquiry**
        - Then it is the judge's responsibility to examine the records and decide how/what should be disclosed

National Post (2010 SCC)
F: Paper trying to protect a confidential source who informed them about Chretien government. Documents they received were forged to create an appearance of wrongdoing. Police raid office looking for envelope/bank documents to identify source. The crime of forgery is when you put it in circulation.
R: Freedom of expression is at stake here. First argue class privilege (journalist-source) but problem of who owns the privilege, not *every* source wants confidentiality in the same way that *every* solicitor does.

- Case by case → fails: **Documents that are claimed to be privileged are also the actus reus of the offence** → more probative value when you get to the 4th stage – source likely committed the fraud or participated in a crime. (akin to solicitor-client when communications involve crime)

Third party disclosure (particularly sexual assault complainants)
O'Connor
s.7:

- *Morgentaler* → "security of the person" is sufficiently broad to include protection for the psychological integrity of the individual (s.7)

- *Mills* → the right to security of the person encompasses the right to be protected against psychological trauma
- But can never be absolute → *Hunter*: must balance against necessity of interference from the state

s.15

- Common for those who are victimized to seek counselling – overwhelmingly affects women, children and vulnerable people
    - Therefore, disclosure disproportionately affects these people
- Must require evidence to exist that shows records are relevant to a live issue at trial – without allowing resort to stereotypes etc.

3. EXPERT EVIDENCE

The core principle here is the need to strike a balance between using EE to assist the court's truth-seeking function and finding ways to identify and exclude unreliable EE

Is a witness offering an opinion that is allegedly based on specialised knowledge?

OPINION EVIDENCE IS PRESUMPTIVELY INADMISSIBLE (*WBLI*) **proponent of evidence has to persuade judge on BOP**

- Two exceptions:
    - (1) Lay person (within common knowledge)
    - (2) Expert evidence (can either be giving factual evidence (not opinion) or opinion evidence → if not sure which one, qualify them as an expert)

Tsilhqot'in → Indigenous oral historians are not considered experts (Vickers)

Statutory Provisions:

Canada Evidence Act *federal

- s.7: In any trial or proceeding, civil or criminal, cannot call more than 5 witnesses in respect of a single issue without leave
- s.8 provides statutory means of allowing a 'handwriting expert'

BC Evidence Act

- s.10(1) Does not include CA, SC or Provincial Court
    - (3) Must be 30 days written notice of the expert's opinion
    - (4) Assertion of qualifications in a written statement is proof of the qualifications (prevents court/parities to challenge qualifications)
- s.11 must give 30 days written notice [civil only (s.12) – cannot involve punishment/fine/imprisonment]

Criminal Code

- s.657.3(1) Expert testimony may be given if (a) court recognizes the person as an expert; and (b) the party intending to produce the report in evidence has given the other party a copy of the affidavit or declaration, and report and reasonable notice of the intention to produce it in evidence
    - Applies to either party
    - (2) Court may require person for examination/cross-examination
    - (3)(a) Party intending to call expert witness should give notice **30 days before** intention to do so [**in practice, 60 days in BC**], accompanied by: (i) name of witness (ii) description of the area of expertise (iii) statement of the qualifications of the proposed witness as an expert
        - (b) Crown calling a witness shall also provide to other parties: (i) copy of the report it any prepared by witness for the case and (ii) if no report → summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based
    - (4) if notice not given → various remedies
    - (7) Information disclosed under this section may only be used for purpose of that proceeding

BC Supreme Court Rules *apply only to civil cases

- Rule 11-2
    - (1) Expert has a duty to assist the court and not to be an advocate for any party
        - *WBLI* → must be independent

        - *JLJ* → qualifications and ability to offer an expert perspective, is limited by their field and the expertise
    - (2) Must certify that he or she is (a) aware of the duty in (1) and (b) has made the report in conformity of that duty and (c) if called to give testimony (oral or written) that it is in conformity with the duty
        - *WBLI* → can be *not* qualified if do not sign/understand duty
- Rule 11-3: (1) Can be ordered to jointly appoint expert, and then is the only expert (7)
- Rule 11-4: When each party may retain own experts
- Rule 11-5: Court may appoint an expert if it considers the expert opinion evidence may help court in resolving an issue (inherent jurisdiction – rarely used)
- Rule 11-6: Expert's report that is tendered as evidence must include the certification required under 11-2(2) and set out:
    - (a) the expert's name, address and area of expertise;
    - (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
    - (c) the instructions provided to the expert in relation to the proceeding;
    - (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
    - (e) the expert's opinion respecting those issues;
    - (f) the expert's reasons for his or her opinion, including
        - (i) a **description of the factual assumptions** on which the opinion is based
        - (ii) a **description of any research conducted by the expert that led him or her to form the opinion**, and
        - (iii) **a list of every document, if any, relied on by the expert in forming the opinion**.
    - (3) Unless ordered otherwise, report must be served on every party at least 84 days before
    - (4) If a party intends to tender an expert's report at trial to respond to an expert witness whose report is served under subrule (3), the party must serve on every party of record, **at least 42 days before the scheduled trial date**

- **Preconditions:** (*Mohan* test, reformulated from *Abbey*)
  If the evidence fails *any* precondition stages, you will not go to balancing.
  They are binary (yes/no); fail any → excluded
    - **1. Logical relevance**
    - **2. Material issue**
      Assume evidence is true/inferences can be made at the precondition stage (*Morris*)
    - **3. Scope of expert evidence** (this is not a precondition, not a cost-benefit; it is an *analytical aid*)
        - *Abbey* – done from two perspectives: (1) what info will the expert give in their own terms (2) from the courts perspective, what the limits of that may be
        - TJ determines what role the expert will play in this case (define scope)
            - Can admit part, edit language used to frame opinion
    - **4. Necessity and propriety of hearing from an expert**
        - ***WBLI* → is the evidence necessary**?
        - *Mohan*: necessary to allow the TOF to appreciate the nature of the issues due to their technical nature, that ordinary people are unlikely to form a correct judgment about it
            - *Mohan* → if evidence is novel it must be ***essential*** → **unlikely to come to a satisfactory conclusion without evidence**
        - *DD:* **Question is whether the expert will provide information which is likely to be outside the ordinary experience and knowledge of the trier of fact**
        - (1) Cannot offer an opinion on pure question of domestic law
        - (2) Credibility cannot be the subject of expert testimony (*KA; Bjeland*)
        - May not give an opinion on issues of mixed fact and law (guilt, negligence, etc.) (*Mohan*)

DD **(2000 SCC)**

- F: Crown sought to call child psychologist to rebut defence's submission that lateness of disclosure support inference she was not telling the truth
- McLachlin CJ – Dissent:
  - Ample foundation that evidence went beyond ordinary knowledge/expertise of the jury
  - Before concluding instruction is sufficient, must be satisfied it will achieve the same purpose as expert evidence
- Majority:
  - Proper subject to simple jury instruction (principle reflects current state of Canadian law) – admission of expert testimony was not necessary
  - "Necessity" means that the evidence must be more than merely "helpful," but necessity need not be judged "by too strict a standard"

K(A) (1999 ONCA Charron JA)
F: KA & KA charged with sexually assaulting children in their family. Crown sought to introduce expert evidence from social worker to (1) show Cs exhibited behaviour patterns consistent with sexual abuse; (2) explain certain behaviours by Cs (delayed disclosure) were not unusual
D: New trial; would have led TOF to conclude incorrectly that they could not discredit Cs' testimony
R: **Necessity:**

- **(a) Will the proposed expert opinion evidence enable the trier of fact to appreciate the technicalities of a matter in issue?**
- **(b) Will it provide information which is likely to be outside the experience of the trier of fact?**
- **(c) Is the trier of fact unlikely to form a correct judgment about a matter in issue if unassisted by the expert opinion evidence?**
- In the case of sexual abuse, usually touches on credibility. But **credibility is not a proper subject of expert evidence** – but evidence about a feature of witness's behaviour or testimony may be admissible even though it may have some bearing on credibility.
  - Evidence tendered to show the complainant is more or less likely to be telling the truth because she delayed reporting the abuse is not the proper subject-matter of expert testimony and is inadmissible

5. Properly qualified expert

- *Mohan* → 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 [modest standard – just have more knowledge than average TOF]
- *WBLI* (2015 SCC Cromwell J) → expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted [in precondition stage this is thin independence]
  - Just statutory provisions
  - **Think about Bias → WBLI where you look at bias in the analysis**
  - *WBLI* **– can return to qualifications in a richer way when get to weighing stage**

6. Other exclusionary rules

Hearsay: not a bar to admission of expert testimony, but it is a reminder that the TOF has to assess the degree to which the expert's testimony is based on facts that have in fact been proven (*Lavallee*, *Abbey*)

Abbey (1982 SCC Dickson J)
F: Dr. testified that A told him about delusions, visions preceding his arrest and had described symptoms to his mother. TJ accepted and treated as factual the hearsay

evidence. Sole defence to importing cocaine and possession for the purpose of: insane at material time. TJ found him not guilty.
R: Expert witnesses may base their opinions on hearsay <u>if relevant</u> (second hand evidence) – especially true of opinions of psychiatrists.

- <u>BUT this second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based</u>
- Danger is that the TOF will accept the evidence as going to the truth of the facts stated in it. While admissible in context of opinion – <u>in no way admissible as evidence to prove factual basis of events/experiences</u>.
- **Problem is the weight given to evidence:** before any weight can be given to opinion, facts on what the opinion is based must be found to exist

Lavallee (1990 SCC Wilson J)
F: Dr. relied on interviews with A, interview with A's mother when forming opinion. Neither A nor mother testified.
R: Do not have to prove every fact before opinion is given weight, <u>as long as there is *some* admissible evidence to establish foundation of expert's opinion, TJ cannot instruct to ignore evidence</u>. TJ must warn jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion

- If wanted to prove that she *in fact* had be subjected to cycles of abuse, could not do so by expert evidence (ex. use testimony, medical records etc.)
- Sopinka concurring → effect of *Abbey* is that an expert opinion relevant in abstract to material issue but based on unproven hearsay is admissible, but given no weight (when expert forms his or her opinion based in statements by party to the litigation, or from any other source that is inherently suspect – requires independent proof, has effect on weight).

Credibility Exclusionary Rules

Beland (1987 SCC McIntyre J)
F: As charged with conspiracy to commit robbery. Crown led evidence that they had conspired with 2 people to rob an armoured truck. No robbery took place b/c G disclosed to police. G's testimony was the only evidence which directly implicated them in the conspiracy. Each respondent said would undergo polygraph – wanted the results included as evidence. Crown appealed.
I: Admissibility of polygraph evidence of A
D: Allow appeal, confirm conviction.
R: **May not be led for sole purpose of bolstering credibility (no expert is required for credibility – that is for TOF)**.
Dissent (Wilson J): Would have held it admissible – operator does not give opinion on credibility, but interprets data and gives an opinion on whether it conforms to person telling truth. Could testify to accuracy of device, TOF would consider all evidence and decide credibility.

- **Balancing** [gatekeeper function – exercise of judicial discretion]
  - **7. Benefit side** = Probative potential + significance of issue to which evidence is directed- *Abbey*
    - *Mohan* → **<u>the closer the evidence is to the ultimate issue, the more strictly the tests of necessity and reliability will be applied</u>**
    - **<u>A. Reliability concerns are always relevant to admissibility of expert</u> –** even when testimony is common (*Abbey*)
      - *Trochym*: reliability is properly assessed any time it is fairly challenged (even in relation to relatively well-established expert testimony)

- **<u>Careful reliability analysis should be conducted every time that reliability is fairly contested</u>** (*WBLI*)
- **Incl subject matter of evidence, methodology used by expert in arriving at opinion, expert's expertise and extent to which expert is impartial/objective** (*Abbey*)
- Does not require TJ to be convinced that the opinion is correct, that is for the TOF – just assess whether the particular conclusions/opinions are supported by a body of specialized knowledge family to expert and the manner that the expert proposes to present their testimony accurately reflects the science and any relevant controversies in uncertainties in it.
    - In determining threshold reliability, TJ should focus on factors such as:
        - 1. the reliability of the witness, including whether the witness is testifying outside his or her expertise;
        - 2. the reliability of the scientific theory or technique on which the opinion draws, including whether it is generally accepted and whether there are meaningful peer review, professional standards, and quality assurance processes;
        - 3. whether the expert can relate his or her particular opinion in the case to a theory or technique that has been or can be tested, including substitutes for testing that are tailored to the particular discipline;
        - 4. whether there is serious dispute or uncertainty about the science and, if so, whether the trier of fact will be reliably informed about the existence of that dispute or uncertainty;
        - 5. whether the expert has adequately considered alternative explanations or interpretation of the data and whether the underlying evidence is available for others to challenge the expert's interpretation;
        - 6. whether the language that the expert proposes to use to express his or her conclusions is appropriate, given the degree of controversy or certainty in the underlying science;
        - 7. whether the expert can express the opinion in a manner such that the trier of fact will be able to reach an independent opinion as to the reliability of the expert's opinion**.**
        (*Inquiry into Pediatric Forensic Pathology in Ontario Report*)
- *WBLI* → before you can assess reliability of expert testimony in a given field, need to identify what tools are appropriate
    - **Think about the nature of the task that expert is performing and kinds of reliability checks that are most related to that task**
- **(Relevance/Materiality)** → if already done, skip this.
- **(i) Can the technique do what the Court requires it to? How do you know?**
    - Seek independent evidence that the technique works (*JLJ, Trochym, Abbey*)
        - *Aitken*: no independent advice
        - See below (1) Scientific Evidence (2) Non-Scientific Evidence
    - In *every case*, publication of the technique and peer-reviewed literature regarding its effectiveness is important (*Abbey*)
    - Is the technique broadly accepted within the relevant field?
        - <u>If not →</u> clue that may not be reliable; if yes → not warrant of reliability
    - How does the relevant field assess reliability and manage uncertainty?
    - Is there controversy in the field?
    - **<u>(1) SCIENTIFIC EVIDENCE</u>**

- Think about fit --> whether the reasoning/methodology can be properly applied to the facts in issue
- Does it ***classify***?
    - Identify risk of misclassification (diagnostic value)
- Does it seek to ***quantify*** something?
    - Consider consistency, validity, calibration
- Does it seek to ***compare*** two things or ***identify*** someone from a physical trace?
    - Look for published/accepted procedures, validation studies, proficiency tests, error rates, procedures to reduce contextual bias/contamination (blinding procedures) NAS reports important here.
    - Assess relevant probabilities (likelihood of discrepancies of common source, likelihood of commonalities if different source)
    - Without these things, few grounds to permit experts to adopt expressions of frequency/confidence like in *Aitken*
- Is it ***medical*** evidence (ex. COD)?
    - Look for evidence of research, not just clinic experience or peak body policy statements. Attend to quality/strength of research base
- **Reliable foundation test** (*JLJ* held *Daubert* factors to assess reliability)
    - **(1) Can it been tested? Has it been tested?** (with respect to the *particular* claim being made)
        - What is the error rate?
        - How are standards maintained?
    - **(2) Whether the theory/technique has been subjected to peer review and publication?** – increases likelihood that flaws will be detected
    - **(3) Known or potential rate of error**
    - **(4) General acceptance**
- Novel Scientific Evidence
    - *Mohan*: Must be ***essential*** (v. necessary) in sense that TOF will be unable to come to a correct decision without it + a stiffened reliability assessment
        - Should be assessed on a case by case basis
    - *JLJ* → Daubert criteria could assist in assessment of novel scientific evidence
        - Techniques that are reliable for therapeutic uses are not necessary sufficiently reliable for use as evidence in court (cited in *Trochym*)
    - TJs should be particularly concerned with whether there is sufficient information to understand relative controversies and frailties that may surround the evidence (C&E) (court did not do this in Aitken)
    - *Aitken* → did not consider it new bc of clinic use for years, use in UK courts (this is incorrect – contra *Trochym* and *Mohan*)

Trochym (2007 SCC Deschamps J)
F: Witness underwent hypnosis to improve memory, stated A arrived at the apartment before GF was killed.

R: One of the characteristics of the technique that makes it successful for therapy (mind is malleable under hypnosis) is a concern for evidentiary purposes
R: Not sufficiently reliable. Courts need to be open to the possibility that techniques and forms of evidence may become less reliable
Assess reliability on own terms – don't worry so much if its novel or not.

Aitken (2012 BCCA Finch and Hinskon)
F: A charged with 1M. Shooting was recorded by a security camera, shooter's face was concealed. Other evidence linked Aiken and his business partner to shooting. At trial, Crown relied on evidence of Mr. Kelly, a podiatrist, who testified that both A and shooter captured in footage exhibited certain unusual gait patterns. A challenges admissibility of the evidence on basis that it lacked requisite level of reliability for novel science. TJ held it was not novel science.
I: Should it be considered novel? D: Appeal dismissed
R: Exemplifies confusion caused by adoption of a stiffened reliability analysis for novel scientific evidence.
TJ did not consider whether clinical training translates to forensic tasks of identifying similarities from CCTV images *for the purposes of identification*.

- This case also shows risks of allowing 'experts' to enumerate similarities ('very strong similarity' → is interpreted idiosyncratically) – excluding numerical estimates does not eliminate reliability concerns.

CA: upheld admissibility. Focused on scientific/non-scientific, not whether the technique worked and whether E had relevant experience to do the task. (focussed on *qualifications* rather than *reliability*/*validation*). **Here the Crown was required to demonstrate threshold reliability w/ tools appropriate to nature of opinion.**

- (2) **NON-SCIENTIFIC EXPERT EVIDENCE**
  - In *every* case the TJ should drill down and determine whether the actual evidence to be given by the witness satisfies a standard of threshold reliability" (*Abbey*)
  - Reliability assessed based on standards relevant to the field (*Abbey*)
  - *Abbey,* focus on factors such as:
    - Is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
    - Is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
    - What are the particular expert's qualifications within that discipline, profession or area of specialized training?
    - To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?
    - To what extent 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?

- To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?
- To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
- To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?
- 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?

- **(ii) Is the expert *qualified* to apply and *capable* of applying the technique?**
  - Is there a recognized discipline, profession, or area of specialized training?
  - Is work within the field subject to quality assurance measures and appropriate independent review by peers?
  - What are this expert's qualifications, with particular attention to the work performed for this case?
    - *WBLI* → Higher threshold than in precondition stage
  - Focus on *domain relevant* qualifications eg. training in forensic pathology, not general training in pathology
  - Look for evidence of *proficiency testing* and peer review of this expert
- **(iii) Has the expert applied the technique correctly *in this case*?**
  - Is expert independent (objective), and has instructing lawyer/police officer worked properly with expert? See *WBLI*
  - Is there evidence of the possibility of contextual bias or cognitive contamination?
    - Has witness been exposed to task-irrelevant information? Is there a risk of observer effects? Is there evidence of proper attention to base rates? Has witness updated opinion to reflect new information, etc - see NAS report?
    - **Contamination:** the forensic analyst is exposed to information about the case or the suspect that is not necessary for their analysis
    - Consider chain of custody and flow of information between informants and experts
    - *Aitken* → Kelly made no effort to shield himself from incriminating/suggestive information (only 1 set of images) to compare to crime scene. Investigators lost chance to confirm/disconfirm opinions.
  - Is expert using technique for its intended and tested purpose, with proper attention to limits? (Is the technique reliable for the task-at-hand?)
    - *Aitken*: clinical podiatrist is not necessarily capable of doing this task under these conditions despite having indicia of reliability/feedback in a clinical setting – in context of forensics has no basis to know about error rate/no validation studes.

- **B. Cogency** (*Abbey*)
  - What issue does it address? How far does it go to address that issue? Can the evidence rationally affect the likelihood of a material fact?
- **C. Centrality** (*Abbey*)
  - How central is the issue?
  - If it is a secondary issue, that is where it is important.

- **8. Cost side = Prejudicial risk**
  - **Must consider risks as they apply to that particular case**
  - **The risk that the trier of fact will misuse, misunderstand or be distracted by evidence**
  - Unduly protracting and complicating proceedings, consumption of time
  - Risk jury will be unable to make effective and critical assessment of the evidence
    - Complexity, jargon, impressive credentials (may abdicate fact-finding role on assumption expert knows more)
  - Are there concerns about independence/impartiality of expert?
  - *Mohan* rejected the idea that an expert witness may not offer testimony that touches on the ultimate issue but said that **the closer the evidence is to the ultimate issue, the more strictly the tests of necessity and reliability will be applied**

TOF:

- Is there additional evidence one would expect to see if the opinion is correct, but which is not present here?
- If there is other evidence that tends to contradict the expert's opinion, are there independent reasons to consider that this other evidence is wrong?
- If there is other evidence that tends to contradict the expert's opinion, *why* am I satisfied that this evidence is wrong?
- If TOF rejects the factual premises on which the opinion was based, the expert opinion must be rejected as well

4. SELF-INCRIMINATION *Only applies in criminal cases

Fairness to the accused and enforcing State obligation to prove case before A needs to respond (self incrimination), concerns about reliability (*Hodgson*), guarantees fundamental fairness (*Hodgson*)

Charter s.7: principle of fundamental justice that you cannot be coopted in own prosecution in various ways

- s.13*: protects witnesses from incrimination based on statements whether or not object

Canada Evidence Act

- s.5(1) No witness is excused from answering any question that the answer may incriminate them, or establish liability to a civil proceeding
- s.5(2)* Answer not admissible against witness if they object (unlike s.13)

BC Evidence Act

- s.4(1) cannot be excused from answering questions…
- s.4(2) If objects, cannot be used against them

* Does not immunize from derivative use

BUT: s.7 of the Charter gives compelled witnesses a "constitutional exemption" from testifying when either (1) the predominant purpose of compulsion is to obtain self-incriminating evidence or (2) the compulsion would cause undue prejudice to the witness (threaten fairness of subsequent trial) – but finding of prejudice will not always merit an exemption (can use less drastic remedies)

COMMON LAW CONFESSIONS RULE:

- **Is not principle of fundamental justice**
  - *Oickle* warned against constitutionalizing bc CL has broader scope than the Charter (applies whenever a person in authority questions a suspect), Charter has different burden/standard of proof (Charter: A must show on BOP a violation; CL: burden on Crown to show BARD voluntariness); remedies are different (Charter: excluded only if 24(2); CL: always excluded)
  - **But** other times SCC has found it is incorporated into s.7
    - *GB*: used s.7 to read down provision of CC to exclude voluntary statement from A's trial
    - *Singh*: held CL rule was related to Charter right to silence upon detention → say they are functionally equivalent (if A proves BOP violation, then crown cannot prove BARD voluntariness)

Test:

(1) THRESHOLD: Crown must lead evidence capable of persuading the TOF **THE STATEMENT WAS MADE** (*Oickle*)

(2) DID A SPEAK TO SOMEONE HE OR SHE REASONABLY BELIEVED TO BE A PERSON IN AUTHORITY? (*Hodgson*)

- **Subjective** and **reasonable** (*Hodgson*)

- **If no** → can look at the statement as exception to hearsay (against interest)

Hodgson (1998 SCC Cory J)
F: A occasionally babysat C and siblings. C testified that from ages 7-11, A sexually assaulted her. After telling family, they went to confront A at job. Each witness explained A's confession slightly differently. Court finds that after they confronted him and he apologized, mother went to call police, returned and hit him, father pulled out knife and held it to his back. Then confessed. Testified that he was not frightened/threatened but shocked/upset. At trial, did not object to confession. Argues that TJ erred in not directing voir dire on own.
I: Were parents acting as persons of authority in CL confession rule?
D: Were not involved in the investigation → no evidence sufficient to trigger TJ to hold voir dire.
R: **Person of authority: person formally engaged in the "arrest, detention, examination, or prosecution of the accused" (AB)**. Also encompasses persons who are deemed to be persons of authority *as a result of the circumstances around making of statement* (depends to what extent A believed person could influence/control proceedings against him/her).

- *Wells* → A charged with sexually assaulting 3 children. Parents consulted with RCMP and attempted to obtain admission from the accused by a trick. One of fathers confronted A, he denied it, got physically violent, made A apologize. Cory J held TJ should have held a voir dire to determine whether F was person in authority. New trial → statement was admitted.
- *SGT* → A charged with sexually assaulting adopted daughter. Was interviewed by PO, wrote apology to C. C's mother sent him email – in response A made incriminating statements. **Generally need to be interactions btwn parents and police.** Did not testify A thought mother could influence/control proceedings. Even if he did, has to be reasonable.

VOIR DIRE:
- If voluntariness not conceded, must hold voir dire
- A will often have to testify, but testimony **will not be used in the Crown's case, even if admits to crime**
- Evidence form voir dire cannot be brought into main trial w/o consent of both parties (*Gauthier*)
- Issue is *voluntariness* not truth (cannot be used to impeach credibility later)

(3) VOLUNTARINESS:

***OICKLE* TEST*:* Crown has onus to show BARD that a's will was not overborne by: (i) Inducements; (ii) Oppressive circumstances; (iii) Lack of an operating mind** (*Oickle*)

*Can be single present, or present in some combination

- What happens in practice, is defence engages with evidence to give reasons why there may be a reasonable doubt about voluntariness
- If court has reasonable doubt about voluntariness → excluded (but in practice, very low threshold, generally admitted)

Oickle (2000 SCC Iacobucci J)
F: Series of 8 fires. PO asked 7-8 people to do polygraphs to narrow possible suspects. 5/6 individuals did so, passed test. A, agreed to submit test. Was fully advised of right to silence/lawyer. Conducted lengthy "control" interview first; then during test did not ask about specific fire but asked if earlier statements had been truthful. He failed. Reminded him of his rights. Then he said "What if I admit to the car? … Then I can walk out of here and it's over." Told he could leave. Did not leave. Confessed to setting fire to fiance's car. Took a written statement. Arrested. Questioned at station – admitted rest of fires. Put in cell, does reenactment.
- TJ held voir dire – ruled voluntary/admissible. Convicted.
- CA. Held TJ decision.

D: Voluntary.
R: **Broadened circumstances where court will consider whether will is overborne.** Need to be sensitive to the particularities of the individual suspect (particularly vulnerable etc.). Dangers of using non-existent evidence. Videotaping is important (but not required). Contextual analysis.
- Ex. Minor inducement such as a tissue/warmer clothes may amount to an inducement if A is deprived of sleep, heat and clothes for several hours. Where suspect is treated properly, will take stronger inducement.

- Factual finding

Application: Questioning was persistent/accusatorial but never hostile/aggressive/intimidating. Offered food/drink. Told him he could leave before he was arrested. Minimizing the seriousness of the crime is not problematic (**real question is whether they suggested that they would minimize the *legal consequences*)**. Offered psychological help (**but did not say *only if* he confessed)**. Moral inducements are fine (**not implied threat or promise**). CA held that PO effectively told him they would not interrogate fiancé if he confessed – based on strong relationship, could be inducement, but **did not threaten her with *harm*** (at most, said she would not be polygraphed). **There was no emotional disintegration in this case as a result of the exaggeration of the polygraph – did not render it inadmissible**.

- **(I) THREATS OR INDUCEMENTS**
  - **(i) Is there an inducement?**
    - Quid-pro-quo for confession
    - Moral inducements don't count (bc not act of authority, cannot change moral status)
  - **(ii) Is it strong enough in the circumstances to indicate the A was not exercising a meaningful choice?**
    - *Did they confess because the inducement was a **kind** that would overwhelm ability to decide whether to speak or remain silent?*
    - Look at **to what extent the A was continuing to be selective about what they say** (answering some questions but not others?)
    - *Spencer* → A wanted to see gf, police said he wouldn't be able to unless he offered a partial confession
      - Here A was savvy, was not strong enough inducement
      - Dissent: PO did threaten to bring charges against GF (unlike Oickle) and A confessed *immediately* after being told that she would be charged unless he confessed
    - *Leblanc* → involuntary; "until we get some sort of answers where the stuff come from … we just can't get no bail"
    - *Letendre* → involuntary: PO said "Well, I'm getting mad". A got scared and confessed. (<u>implicit threat</u>)
    - *Parsons* → involuntary: A made statement after he was told that if matter wasn't cleared up he would be held in custody over weekend
    - *Hayes* → voluntary: police told A it would be better for him to answer questions and wouldn't be v good if lying
    - *S(SL)* → involuntary: PO said the only way you can get better is by telling me the truth," and the accused's denials of the allegations were met with statements like "you're not on the right track."
- **(II) OPPRESSIVE CIRCUMSTANCES**
  - Must be nexus between circumstances and decision to speak to police
  - *Prager* → "something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary"
  - Case-by-case
    - Can be based on length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement
  - *Hobbins* → An atmosphere of oppression may be created in the circumstances surrounding the taking of a statement, although there be no inducement held out of hope of advantage or fear of prejudice, and absent any threats of violence or actual violence.
    - **Question of whether the circumstances *caused* the accused to confess**
    - <u>Whether it is better to confess to obtain a temporary alleviation of the circumstances</u> (different than a threat)
  - *Hoilett* → homeless man was mentally ill, confiscated clothes, put him in cell w/o clothes or blanket for 2 hours. Involuntary.

- *Otis* → A said 57 times he did not want to speak to police, court held that the only message to take from this was that he could not go back until he confessed
- *Sing* → A said 18 times, court held that it not about the number but about what A understood
- *Hobbins* → An accused's own timidity or subjective fear of the police will not avail to avoid the admissibility of a statement or confession unless there are external circumstances brought about by the conduct of the police that can be said to cast doubt on the voluntariness
  - Not purely objective

- **(III) LACK OF AN OPERATING MIND**
  - ***Whittle*** → A suffered from schizophrenia was charged with M. Victim died in circumstances that PO saw as accidental but suspicious. A told them he had voices in his head telling him to confess. Defence counsel told him not to say anything. Made statements, led PO to find physical evidence. Interspersed with statements, digressions.
    - Legal test for operating mind: Requires that A possess a **limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused**
    - No inquiry is necessary as to whether the accused is capable of making a good or wise choice
    - Inner compulsion cannot be basis for exclusion.

(4) CAN THE CROWN PROVE BARD THAT POLICE DID NOT ENGAGE IN TRICKERY THAT WOULD SHOCK THE COMMUNITY

- Normally, TJ is not permitted to exclude relevant admissible evidence because it was obtained by improper or unfair means
- EXCEPT: Iacobucci J in Oickle said that an accused's statements may be excluded where police used tactics that were "so appalling as to shock the community – but its difficult to imagine things that would shock the community but result in an voluntary confession.

DERIVED CONFESSIONS RULE

Sufficiently connected to previous involuntary confession?

- Derived Confession Rule: Contextual, fact-based approach to determining whether it is sufficient connected to prior inadmissible confession to also be excluded.
  - Factors to consider: the time span between the 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 and other similarities between the two circumstances
  - **A subsequent confession would be involuntary if either:**
    - (1) The tainting features which disqualified the first confession continued to be present; OR
    - (2) The fact that the first statement was made was a substantial factor contributing to the making of the second statement
  - See *Wittwer* (below)
- Derivative use of evidence: see "Derivative Evidence" below

> ***Rex v St Lawrence*** (1949 ON Sup Ct)
> F: Witness gave evidence that he saw A run across his path where he saw a deceased man lying. A was taken into custody and made statement in circumstances that made it inadmissible. Found evidence confirming statement.
> R: **Where the discovery of evidence confirms the confession - then that part of the confession that is confirmed by the discovery of the fact is admissible**. Statements which the discovery of the facts does not confirm are not admissible

5. CHARTER EXCLUSION REMEDY

24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence ***shall*** be excluded if it is established that, having regard to all the circumstances, **the admission of it in the proceedings would bring the administration of justice into disrepute**

- Must be in a court of competent jurisdiction (trial court, Supreme court etc.)
- **(1) A must show a breach of his/her *own* Charter rights on a BOP (*Edwards*)**
    - s.7 (right to silence), s.8, s.9, s.10(a), s.10(b) normally

Edwards (1996 SCC Cory J)
F: PO placed A under surveillance after getting info he was a trafficker (were told had drugs on person, at residence or at GF's apartment (18 y/o student who lived alone). Observed A go from residence → GF's apartment, after he left was stopped by police. Saw A swallow something wrapped in cellophane. Suspected there may be crack in GF's apartment (did not have sufficient evidence for warrant). Made statements to GF (lies & half-truthes). She showed them where the drugs were. Were jointly charged.
D: Dismiss appeal. Conviction upheld.
R: Intrusion of rights of a third party may be relevant in 2nd stage of s.8 (whether it was conducted reasonably). BUT A did not establish expectation of privacy (so don't need to go there). No property interest, no privacy interest.
Concurring in result (La Forest): s.8 is intended to afford protection to all to be free from state intrusion – applies to everyone.

- **(2) A must demonstrate on a BOP that the evidence was <u>*obtained in a manner*</u> that breached his/her Charter rights (connection/nexus):**
    - Case-by-case analysis (*Strachan*)
    - **Purposive and generous approach** (do not need to establish strict connection) (*Wittwer*)
    - <u>(A) Causal</u> (*Strachan*)
        - Consider strength of causal connection (*Goldhart*)
    - <u>(B) Temporal</u> (*Strachan*)
        - If removed in time, or within agency of another person (not A or PO) → unlikely to be obtained in a manner (*Goldhart*)
    - <u>(C) Contextual</u> (*Wittwer*)
        - Consider: the time span between the 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 and other similarities between the two circumstances (*I(LR)* and *(TE)* cited in *Wittwer*)

Can be a combination of the three (*Plaha* in *Wittwer*)

- **<u>BUT connection that is merely remote or tenuous will not suffice</u>** (*Goldhart*, *Strachan*)

Strachan (1998 SCC Dickson CJ)
F: Confidential source told PO that A had marijuana in apartment (two other sources gave same tip w/i previous few days). Applied for warrant – legally granted. When executing the warrant, there were two people who they did not expect. Had background belief that group had firearms. A picked up phone and went to call lawyer, prevented him from doing so. Found evidence, still wasn't allowed to call lawyer.

- Crown argued that even if he was allowed to call his lawyer, it wouldn't have prevented to execution of the warrant – therefore the evidence was not *obtained in a manner*
    → No *relationship* between breach and discovery of evidence.

D: Was obtained in a manner – but admitted the evidence.
R: *Therens* → requires a temporal, not necessarily a causal connection

- Requiring a causal connection would make courts have to speculate whether evidence would have been discovered but not for the Charter violation (artificial)
- Also overly narrow view (generally would exclude from consideration violations of 10(b))
- **Must consider entire chain of events during which the Charter violation occurred and the evidence obtained**
- Can be analysed causally or temporally
    - Temporal connection is not determinative → may be too remote

Case-by-case analysis

Goldhart (1996 SCC Sopinka J)
F: PO received tip that narcotics were being cultivated in converted schoolhouse. Individual named "Willie" operating grow-op. Vehicle belonging to William Goldhart was sighted on property. PO didn't believe they had enough info for a warrant. C decided to approach the building and knock on door, as he approached detected odour of marijuana. Colleagues confirmed odour. Using results of 'olfactory surveillance" obtained a warrant. One of occuupants (Mayer) attended court, had been advised that the evidence could be excluded but pled guilty. Then cooperated with A's prosection bc was "born again"

- A argued that the PO would not have known about Mayer without the warrantless search
- TJ admitted evidence but found breach of s.8
- CA overturned convictions (evidence of Mayer had only been obtained through breach)

D: No temporal connection, causal connection is too remote
R: Sufficient connected to breach of s.8 to warrant 24(2). Remoteness relates to temporal and causal connection. Must consider strength of causal connection. TJ failed to examine the entire relationship between evidence and illegal search and seizure → failed to consider whether there was a temporal link, did not evaluate strength of causal connection. Emphasized that Mayer *chose* to provide evidence (discovery of the person cannot be equated with securing evidence from that person which is favourable to the Crown). Testimony cannot be treated the same as an inanimate object → **there is no property in a witness** (neither Crown nor A can claim ownership over what a person may choose to do with information)

- **Pertinent event for temporal link is decision of Mayer to cooperate (not his arrest). This is an intervening event (voluntary decision).**

Application of causal connection factor is the same (connection is tenuous)

Wittwer (2008 SCC Fish J)
F: A convicted of 3 counts sexual interference. First statement: questioned on unrelated charge, recounted incident involving 2/3 Cs (didn't inform him of right to counsel). Second statement: informed of right to counsel, but hindered effort (did not provide # of duty counsel). Third statement: lasted 5 hours, did not inform him that prior statements might be inadmissible. PO claimed he had no knowledge of them – A kept telling him to talk to other PO. PO the acknowledged that he knew about what he had described, proceeded immediately to give statement.

- TJ concluded there was a significant temporal separation between impugned statement and 3rd statement, causal connection relatively weak. Convicted.
- CA: upheld.
- A argues third statement was also obtained in a manner and should be excluded.

D: Contextually connected → excluded.
R: **Adds contextual connection.** Idea that breach continues to function.

- Here: connection is temporal (statement immediately followed acknowledgment); is also causal (elicited after more than 4 hours resistance, and a result of reference to other statement); and is also contextual: any prior gap between statements was bridged by Skrine's association of one statement with the other.
- *I(LR)* and *(TE)* – Sopinka J said that factors to consider include: **the time span between the 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 and other similarities between the two circumstances
  - If tainting factors that made first statement involuntary continue to be present or fact that first statement was made was a substantial factor contributing to making of second statement.

- **(3) A must demonstrate that admitting the evidence would bring the administration of justice into disrepute, *Grant* factors**:
  - (1) Seriousness of the Charter breach (focus on *state* conduct)
    - *Do courts condone deviations from the rule of law by failing to disassociate themselves from fruits of unlawful conduct?*
    - DO NOT consider impact on A, or A's behaviour; Focus on PO
    - More serious or law is more settled (is there knowledge?) → greater need to disassociate
    - Good faith → reduces seriousness (but ignorance cannot be rewarded, wilful blindness or negligence cannot be equated with good faith)
    - Pattern of abuse? → supports exclusion
  - (2) Impact on A's Charter protected interests (focus on A)
    - *What interests are engaged by the infringed right and what degree did the violation impact on those interests?*
    - If two rights violated, consider them separately
    - Interpreted expansively
    - Discoverability
    - Impact on case itself and A's life beyond the case (do not talk about community)
  - (3) Society's interest in adjudication on the merits (probative value, prejudicial risk plus societal interest in maintaining repute of justice system)
    - *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?*
    - Reliability, centrality of evidence → militates toward admission
    - Should also consider negative impact of failing to admit evidence
    - Seriousness of the offence is a neutral factor

Grant (2009 SCC McLachlin CJ & Charron J)
F: History of assaults, robberies, drug offences over lunch hour. PO were on patrol to monitor the area. A came to attention of plainclothes officers (stared at them in intense manner and fidgeted). Uniformed officer cuts off A then two other officers also go over. Asked him questions, testifies that he didn't feel like he could walk away. Court finds there was an investigative detention – has right to silence & lawyer (*Mann*). But did not have reasonable basis to detain him (violated s.9), and 10(b) was violated. Find firearm and marijuana.
- Was obtained in a manner (unclear whether causal, but temporally and contextually connected)

D: (1) was not abusive, not bad faith, law was unsettled; (2) detention: not severe, right to counsel: non-discoverable but for statement, mandatory minimum, but PO were police → still significant; (3) reliable evidence, essential to case. Evidence is admissible.
R: Asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute [objective]
- Reasonable person is basically a judge
- **Focus is:**
  - (1) Long-term **(maintaining the integrity of, and public confidence in, the justice system)**
  - (2) Prospective: evidence should not do *further* damage (not remedial): **would administration of justice be served best by distancing itself from actions of police?**
  - (3) Societal: aimed at systemic concerns
- Types of evidence:

- Statements by A
  - Generally, should be excluded bc law about obtaining statements is very clear (violates dignity and autonomy, right against self-incrimination). BUT if breach is more technical than substantial – may be seen as less serious.
- Bodily evidence
  - Seriousness can vary greatly
  - First and second inquiries fact specific but third generally militates toward admission (generally reliable)
    - But if deliberately inflicted and serious impact – generally excluded
    - Where conduct less serious and intrusion less severe – generally admitted
- Non-bodily physical evidence
  - A lot turns on seriousness of intrusion, how clear the law is
  - Privacy, human dignity engaged
  - Reliable evidence → generally favours admission in third inquiry
- Derivative evidence: evidence obtained as a result of other evidence by Charter breach (ex. statement)
  - 1st inquiry: fact-specific
  - 2nd inquiry: relevant consideration is to what extent the Charter breach impinged on interest in a free and informed choice
    - Discoverability of evidence (about probabilities)
    - May militate towards admission

3rd inquiry: real evidence (reliable) = militate toward admission

- **Derivative Evidence**
  - CEA s.5(2) and s.13 do not immunize derivative evidence from testimony required in court
  - BUT SCC has interpreted s.7 as providing witnesses with these protections in limited circumstances
  - Evidence is considered 'derived' from compelled testimony and immune from subsequent use when:
    - It could (inquiry of logical possibilities not *mere* possibilities) not have been obtained, or significance of it understood, but for the testimony of a witness → excluded under s.7
    - Evidence is self-incriminatory despite not being created by A bc could not otherwise become part of Crown's case → excluded under s.7
    - **A must demonstrate evidence is derivative deserving of limited immunity protection on BOP**
      - A must raise issue with TJ showing a plausible connection between evidence and prior testimony
    - **Practically speaking, burden is borne by the Crown since the Crown knows how the evidence was obtained**

6. HEARSAY *Presumptively inadmissible

Search for truth in adversarial process

STEP 1: Hearsay = out of court statement offered for the truth of its contents (*Baldree*)

- Depends on analysis of materiality and relevance – have to look at the purpose that the statement is being offered to 'prove' and therefore whether it is being offered for the truth of its contents
- NOT hearsay: operative legal fact, explaining why someone acted in a certain way, relevant for credibility, *is it relevant even if its false?* (*Subramaniam*)

> ***Subramaniam v Public Prosecutor*** (1956)
> F: A was convicted of being in possession of 20 counts of ammunition, sentenced to death. A described his capture including a conversation with terrorists where one said "I am a communist" and threatened him. TJ said it was hearsay.
> R: Not hearsay → The fact that the statement was made is relevant in considering the mental state and conduct of the witness (if actual statement is true or false). Here, it did not matter whether the declarants were going to act on their statement (the truth of the contents) but whether A's belief was reasonable.

Implied Assertions

Out of court statements will also be hearsay if used for truth of contents and that truth is *implied* (*Baldree*)

> ***Baldree*** (2013 SCC Fish J)
> F: R was convicted at trial of possession of marijuana/cocaine for purposes of trafficking. During arrest, Baldree's phone rang and PO answered it – at trial PO described the call.
> D: Phone call was inadmissible.
> R: No substantive distinction between express and implied hearsay → **should apply equally to both**.
> - Here, Crown did not offer evidence as circumstantial evidence that R was engaged in trafficking but asked the TOF to conclude, based on PO's testimony, that the unknown caller intended to purchase marijuana from R because he believed him to be a drug dealer. Hinges on truth of declarant's underlying belief.
> - Same risks are present (heightened risk of misperception, may have been wrong, may have been to mislead; less risk of misrepresentation).

→ HEARSAY IS PRESUMPTIVELY INADMISSIBLE, those who are seeking to have it admitted bear the burden of proof

STEP 2: EXCEPTIONS

A. STATUTORY

Canada Evidence Act

- s.12(1) witness may be questioned as to whether they have been convicted of any offence; (1.1) if witness either denies or refuses to answer → opposite party may prove the conviction by (2) a certificate containing substance and effect of conviction and proof of identity
- s.29(1) a copy of any entry in any book or record kept in any financial institution shall in all legal proceedings be admitted in evidence as proof, in the absence of evidence to the contrary, of the entry and of the matters, transactions and accounts therein recorded [banking records]
  - (2) shall not be admitted in evidence unless it is one of the ordinary books or records and the entry was made in the usual and ordinary course of business (affidavit)
  - (6) may be able to inspect and copy records (analogous to discovery obligations)
- s.30(1) where oral evidence would be admissible, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence
  - (2) allows the court to draw an inference when there is no information where one would reasonably be expected to be recorded in the record

Criminal Code

- s.715(1) Where at the trial of an A, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against A or on the preliminary inquiry, refuses to be sworn and to give evidence, or if facts are proved on oath that it can be inferred that person is

dead, has become and is insane, is so ill that unable to travel/testify, is absent from Canada and where that the evidence was taken in front of A, **may be admitted as evidence into the proceedings without further proof, unless A proves that the accused did not have opportunity to cross-examine the witness.**
    - See *Khelowan* (did NOT do this

BC Evidence Act

- s.15(1) witness may questioned as to past convictions and if denies the fact or refuses to answer, opposite party may prove the conviction

BCSC Civil Rules

- Rule 40: where a witness is dead, or unable to attend and testify because of age, infirmity, sickness or imprisonment or is out of the jurisdiction, court may permit a transcript of any evidence of that witness (when taken under oath) whether or not involving the same parties to be put in as evidence (this can also make testimony in criminal case admissible in the civil case)

B. COMMON LAW: CATEGORICAL

(1) Spontaneous Statements

Bedingfield (1879)
F: A and V were in sexual relationship which she tried to end, was afraid and asked police to protect her. Witnesses were source of hearsay. V came running out of house with throat cut, said something pointing back at house. A's account was that she had cut her own thoat, then his. Crown argued he had first cut hers, then his own. Evidence that razor was found under his hand.
D: Guilty
R: Evidence could not come in, despite being able to talk about what she was doing etc. No exception.

Ratten (1972)
F: A was convicted of murder of his wife, had been having an affair with another woman. 3 phone calls: (1) A's father called, normal conversation w wife in background (2) important call – female yelling at telephonist hysterically to get the police (3) 5 minutes later, police officer called A. wife had been shot.

- A argued that the discharge was accidental when he was cleaning his gun, could not explain how his gun was loaded
    - Denied phone call had been made by wife, also denied he phoned police.

R: Evidence was tendered and admitted as evidence of an assertion by the deceased that she was being attacked by the accused, and that it was, so far, hearsay evidence, being put forward as evidence of the truth of facts asserted by his statement. Res Gestae can be used in 3 ways:

- (1) When a situation of fact (e.g. a killing) is being considered it is arbitrary and artificial to confine the evidence to the "firing of the gun"
    - **As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded**
    - **Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it**
    - **Same in principle of statements before the event**
- (2) The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae
- (3) 3. A hearsay statement is made either by the victim of an attack or by a bystander— indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae

Clark (1983 ONCA)

F: A charged with killing ex-husband's new wife – convicted of 2M, appealed. Crown and defence disagreed about who the aggressor was (Clark described how she had either stabbed her accidentally, provocation or self-defence → testified that she had knocked on V's door, wanted 2 lawn chairs, V pushed her and then saw V holding knife, said she grabbed knife with her hand and pushed V with other). Crown wanted to bring a witness that heard V saying "I've been murdered! I've been stabbed". → relevance is that it goes against A's statement because A said it was an accident (it's about volition)
D: Appeal dismissed
R: Spoken while event was still transpiring, were contemporaneous with events. **Exact contemporaneity should not be followed**. This kind of statement may be less risky with regard to deliberately changing stories or distortion (but note: the possibility of misperception is still there). The court finds that the evidence is V's belief as to what had occurred and evidence as to the truth of the facts stated by her as a true exception to the hearsay rule

(2) Statements against Interest (Pecuniary or Penal)

- Idea that statements against own interests are extremely unlikely to be false (*O'Brien*)
- Penal or proprietary interest (*O'Brien*)
- In *O'Brien: Ward* holds that to be a statement against penal interest, it must be: (1) **to the persons' immediate prejudice**; and (2) **against his interest at the time when he stated it**.
    - If it is for their interest or may only be against interest in the future, it is inadmissible

O'Brien (1978 SCC Dickson J)
F: O'Brien and Jensen were jointly charged with possession of a narcotic for the purpose of trafficking. O'Briend was arrested & convicted, Jensen fled the country. A was convicted, J returned to Canada and told A's counsel that he alone had committed the act, agreed to testify. J died before the hearing.
D: Not a statement against interest.
R: Applying *Ward* test, J not make his declaration until 10 months after O'Brien had been convicted, and 6 months after own charges had been stayed.

- Further, **his confession was to be in circumstances in which his words could not be evidence against him in a criminal trial**
- This eliminates the basis for trustworthiness this exception is based on (reliability concerns).

EVEN IF USING STATUTORY/CATEGORICAL EXCEPTION: ALWAYS EXAMINE RELIABILITY (*Mapara*)

- Consider: are there things that would make it unreliable? Reasons to lie? Reasons it would have been misperceived by witness? Wrongly remembered by declarant?
    - *What would be the functional approach of cross-examining? Why is that necessary/unnecessary here?*

C. PRINCIPLED APPROACH

Hearsay can be received if two criteria satisfied (*Khan*, affirmed in *Smith*):

- (1) Necessity to prove a fact at issue in the case
    - (A) Witness unavailability (ex. *Khelowan*)
    - (B) Testimonial unavailability (ex. *KGB* → witness contradicts prior statements)
    - Difficult to obtain other evidence and other evidence was inadmissible
    - **"Reasonably necessary"** (*Khan*)
    - Can be because of unavailability of testimony, necessity due to harm created by the trial process (*Khan*)
    - Question of law for the TJ (*Smith*)
- (2) Reliability (remember this is *threshold* reliability)
    - Depend on factors of a given case
    - **Where circumstances are such not to give rise to apprehensions traditionally associated with hearsay evidence, should be admissible even if cross-examination is not possible** (*Khan*)

        - Reliable evidence ought not be excluded simply because it cannot be cross-examined
    - Generally met on two different grounds (*Khelowan*)
        - (1) Because of the circumstances in which it came about, the contents of the hearsay statement may be **so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process** (*Khelowan*) [inherent reliability]
            - Idea that trial fairness is the end that must be achieved and cross-examination is but the means to achieve that ends. In certain situations, cross-examination is not required.
            - *Smith*: admitted first two statements bc of inherent reliability
            - *Khan*: unlikely based on developmental stage that she would lie
        - (2) The evidence may not be so cogent but the **circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination**. [testability] (*Khelowan*)
            - In these circumstances, the admission of the evidence will rarely undermine trial fairness.
            - Look to external corroborating evidence (must be truly independent and reliable), if there is none and you would expect corroborating evidence, can be a negative factor (*Khelowan*)

    **TJ still has discretion to exclude!

ONCE FOUND NECESSARY AND RELIABLE PRESUMPTIVELY ADMISSIBLE AGAIN

- **Identify constitutional principles that are relevant (if Crown seeking to exclude hearsay: A's right to full answer and defence; truth-seeking, constitutional right of confrontation, (s.35)) → can use these principles after necessity/reliability to 'break' stalemates (not with s.35 though!)**
    - *Khelowan* → constitutional right to cross-examine should not be watered down

Khan (1990 SCC McLachlin J)
F: Child accompanied mother to Drs office. 15 minutes after leaving mother asked if she was talking to the Dr, and she told her mother about sexual act the Dr had performed on her.
- TJ held it was hearsay and did not fit with the categorical exceptions
- CA held that the requirements of spontaneous declarations should be relaxed (due to inherent reliability)

D: Not inadmissible.
R: Res gestae does not hold in this scenario (presumptive reliability that gives rise to that exception is not hold in this scenario). **Hearsay evidence should be received if two criteria are satisfied: (1) Necessity** (here, child could not testify)**; (2) Reliability** (timing, demeanor, personality, understanding/intelligence, external corroborating evidence)
Judge must have regard to need to safeguard rights of accused (the right to cross-examine)

Smith (1992 SCC Lamer CJ)
F: King's body was found near service station. A had picked her up and driven to Canada that weekend, A was drug smuggler. Crown's theory was that A had asked King to take cocaine back to US and she had refused; he later returned, drove her somewhere where he killed her. To support this theory, relied on evidence of phone conversations between V and her mother:
- (1) King said A had abandoned her at the hotel and she wanted a ride home.
- (2) King said he had not returned
- (3) Traced to pay phone in lobby of hotel, King told her A had come back for her and would not need a ride home.
- (4) Traced to pay phone at service station near where her body was found, King said she was "on her way" [not subject to appeal]
- Also important that King was travelling with a credit card that was forced (important in assessing reliability)

D: Phone call #1 and 2 admitted, #3 excluded.

R: Does not fit categorical exceptions. First two calls: clearly necessary; no reason to doubt veracity, no other reasonable motive (no evidence she had reason to lie), there is contextual evidence (taxi driver comes and leaves), other indicia of what is going on. Third call: issues with reliability: did she actually have time to observe A's return? Was she mistaken? Was she motivated to lie? There is evidence that she left the taxi and walked straight to the payphone. Not sufficient indicia of reliability to admit the evidence without possibility of cross-examination.
Principled approach set out in *Khan* as a general framework.

Khelawon (2006 SCC Charron J)
F: A charged with aggravated assault. None of C were available to testify. Crown sought to adduce 3 statements made by C: to employee, to doctor, to police. Only statement to police was admitted at trial.

- Defence theory was that employee had influenced Cs out of spite
- Employee's statement was that she noticed C did not come to breakfast, checked on him, told her he had to leave by 12 otherwise A would kill him, that A had come to his room and punched him.
- Few days later went to Dr with employee, told Dr he had been hit. Dr thought injuries were consistent with C's account but also with a fall.
- Statement to police with employee: observed bruising, described incident
- Broadly consistent with each other.
- Medical records:

D: Inadmissible.
R: Here, there are concerns: mental acuity, possibility that injuries caused by fall, police video did not involve oath, statements by other Cs had greater difficulties and could not help in assessing C's reliability, and motivation to fabricate. Inadequate substitutes for testing evidence. **Did not take opportunity to cross-examine outside context of trial**.

Inconsistent Statements:

- Where witness recants on the stand, can use previous statements against them (credibility)
- If the statement is by A, Crown can always admit the hearsay statement of A against A (subject to Oickle) (*Hart*)
- *KGB,* in assessing reliability consider: (1) whether declarant was under oath (signed affidavit? Statement in preliminary inquiry?) (2) was warned about consequences of false statement; (3) whether statement was recorded in its entirety (*Oickle* → does not need to be recorded, but in the context of hearsay, *KGB* says having a recorded statement is a helpful sign of reliability)

Indigenous Oral History Evidence:

- **s.35: Constitutional value of reconciliation needs to be attended to** (*Tsilhqot'in*)
- **Government cannot lay a claim for the right to cross-examine in this context (cannot counterbalance against s.35 with cross-examination here)**
- Requires us to invite the court to move away from Eurocentric assumptions about the reliability of evidence (*Mitchell*) unless it is written we cannot trust it – form of understanding that is predicated on a society that is arranged on a society with a technology of text).
    - We must be careful to put reliability of Indigenous oral history evidence on a footing that respects its true value and the cultural norms of the transmission and preservation of cultural knowledge in Indigenous societies
    - Cannot be inattentive to the special nature of Aboriginal oral history (Newman)
        - Further, allowing oral history evidence *supports* truth seeking objectives → the categorical approach was impeding the truth seeking function
    - Reconciliation must in part take account of the different cultural forms of knowledge that emerge from indigenous cultures (forms of knowledge, preservation and transmission)
- Should not use the history of colonialism against Indigenous people
- Need to be wary of making assumptions about reliability that are based on 'universal' cultural beliefs

    - Not undervaluing evidence available if it doesn't precisely conform with the evidentiary standards that would have been applied in Western law
- Encourage TJ to examine own assumptions
- Oral history evidence does not need corroboration (*Delgamuukw; Mitcheli*)
    - But corroboration can be helpful – but it is not necessary. Court should not conclude that corroborating evidence is required because evidence from IND witnesses does not stand on own two feet.
- **Adopt Vickers analysis for oral history evidence: adapted requirements of *Khan:***
    - (1) Counsel should outline traditions of peoples they are representing: (i) how their oral histories, stories, legends, and customs are preserved; (ii) who is entitled to relate such things and whether there is a hierarchy in that regard (iii) the community practice with respect to safeguarding the integrity of the oral history/stories/legends/traditions (iv) who will be called to relate such evidence and the reasons they are being called to testify
    - **(2) Necessity** – would prefer non-hearsay evidence
    - **(3) Reliability: *judged within context of s.35 and reconciliation** (*Delgamuuwk, Mitchell, Tsilhqot'in*)
        - 1. Personal information about the witness's circumstances and ability to recount what others have told him or her
        - 2. Who it was that told the witness about the event/story
        - 3. Relationship of the witness to the person who they heard event or story
        - 4. General reputation of the person from whom the witness learned of the event or story
        - 5. Whether that person witnessed the event or was simply told of it
        - 6. Another other matters that might bear on the question of whether the evidence tendered can be relied upon by the TOF to make critical findings of fact
        - Why they are an appropriate person to hear the information from
        - How knowledge is transferred, what steps are taken to ensure reliability (*Delgamuuwk* → can't be doo dogmatic about what this looks like)
        - TOF cannot hold IND peoples responsible for gaps as a result of the history of colonialism (may have had to adapt traditions etc.). Must be sensitive to the challenges IND communities have faced in maintaining their knowledge and that the court experience may be re-traumatizing.
    - McLachlin CJ: "the trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history *may be appropriate* both on the question of admissibility and the weight to be assigned to the evidence if admitted"
    - **But that it is also important to bear in mind that evidence that is brought through oral history should not be allowed to carry more weight than it can reasonably carry - not strain evidentiary principles beyond the limits of common sense** (*Mitchel; MNR*)

7. SIMILAR FACT EVIDENCE

Core principle: safeguarding state responsibility to prove A did the particular acts with which he or she is charged

Triggered any time the Crown offers evidence which is discreditable to A and which relates to uncharged acts, character traits or habits (*Handy*)

- General rule that prohibits bad character evidence is not because its irrelevant, but because generally its probative value outweighs its potential prejudice – but this is an exception saying that the probative value is so high that it overcomes the potential for prejudice

Burden is on Crown to persuade TOF that value of SFE outweighs moral and reasoning prejudice (*Handy*)

- Two appropriate ways to use SFE:
    - (1) A has a proven tendency to commit this offence in a particularly distinctive way, and that this crime fits with that distinctive way [tendency principle] → *Smith*, *Handy*
    - (2) The possibility of natural or accidental co-occurrence of a number of very similar acts is so remote that the only plausible explanation is that they are being committed by the same person [coincidence reasoning] – needs to be accompanied by an anchor to the accused (at least 1 event BARD committed by A) → *Makin*
        - *Arp* – if A is alleged to have done acts bc so similar, need to connect 1 with the A in a robust way

Makin (1894)
F: John & Sarah Makin were convicted of murders of Murray & unidentified male infant. POs found remains of 4 infants in backyard of J&S's house, one wearing clothes identified as Murray's. Evidence of Murray's parents linked Makins to their son. No identifiable cause of death. Problem if they only introduced evidence of Murray's death, would likely be acquitted, but didn't know who other babies were.
D: Appeal dismissed
R: MI: whether Murray died of natural causes (bc that's what defence would be). Here, SFE used to mediate between two competing explanations. Here, had to prove the pattern on BOP and the anchor BARD. To be admissible, the TJ must be satisfied that anchor *is* Murray bc there is evidence he has been given to Makins. [coincidence evidence]

Smith (1915)
F: Had been married to 3 women, each was found dead in bath. Smith stood to benefit financially from each death. Was charged with murder of Munday. Theory of defence was that she had drowned.
D: Properly admitted
R: Distinctive pattern, the number, and how similar their deaths were.

Handy (2002 Binnie J)
F: C was casual acquaintance who said sex turned non-consensual and violent. Crown sought to adduce evidence from ex-wife about 7 SF incidents that occurred during cohabitation. Ex-wife and C had met a few months before the alleged sexual assault – told C about A's criminal record and her allegations of his abuse, told C she had received money. TJ admitted evidence, jury convicted.
R: MI: Whether consent was withdrawn and whether he continued despite that fact→ inferences to be drawn: (1) A is person who derives pleasure from sex that is painful to partner, will not take no for an answer; and (2) that he proceeded wilfully in this case knowing C did not consent. Focus on the inference Crown is inviting TOF to make (how far does it go?). "Inferences sought to be drawn must accord with common sense, intuitive notions of probability and the unlikelihood of coincidence"

- **This case is different than Makin bc all the SFE there was very similar/there was a pattern** (does not reflect independent series of events the same way).

Presumptively inadmissible (always **high prejudicial risk**) – Crown must establish that the probative value outweighs prejudicial risk (clear articulation of materiality and relevance, must have strong probative value)

- Must go beyond propensity evidence
- A. Material issue

- Primary and secondary materiality, probative value will be less for secondary materiality (vs. if it was tends to prove AR, for example)
- **Must not be framed too broadly
- Here: non-consent of ex-wife does not relevant to whether C consented

- **B. Strength that similar acts actually occurred** (evidence of conviction is stronger than witness testifying about past acts)
  - But ultimate reliability is for the TOF
  - Must be ***reasonably capable of belie***
- **C. Probative Value**
  - (i) Material issue
    - Primary and secondary materiality, probative value will be less for secondary materiality (vs. if it was tends to prove AR, for example)
    - **Must not be framed too broadly
      - Here: non-consent of ex-wife does not relevant to whether C consented
  - (ii) Strength that similar acts actually occurred (evidence of conviction is stronger than witness testifying about past acts) Must be ***reasonably capable of belief***
    - But ultimate reliability is for the TOF
  - (iii) Connecting Factors: **Are they sufficient similar to the charged event that they have a degree of connectedness that supports the inference proposed by the Crown? How far does that information take you?**
    - 1. Proximity in time
      - More time, more likely would 'mature out'
      - Remoteness in time may affect relevance and reliability
    - 2. Extent to which other acts are similar *in detail* to the charged conduct
      - Substantial dissimilarities may dilute probative value and aggravate prejudice (compound confusion & distraction)
    - 3. Number of occurrences of similar acts
      - But more similar acts TOF hears about, more prejudice
    - 4. Circumstances surrounding or relating to the similar acts
      - This is important in this case → completely different circumstances
    - 5. Distinctive feature(s) unifying the incidents
      - Here, cogency was said to derive from repetition rather than distinctiveness
    - 6. Intervening events
    - 7. Any other factors which would tend to support or rebut the underlying unity of the similar acts
- B. Potential Collusion
  - Destroys foundation on which admissibility is sought → events described are too similar to be credible explained by coincidence
  - Here, went beyond mere opportunity, whiff of profit
  - **If there is an air of reality (defence points to) then TJ needs to assess it, if TJ finds BOP there was collusion → goes no further**
- C. Additional Prejudicial Effects
  - Inflammatory nature of similar acts
  - Whether Crown can prove point with less prejudicial evidence (must address this → can you only introduce *some* of the acts, some details about them, or different form of evidence?)
  - Potential distraction of TOF from proper focus on facts charged
  - Potential for undue time consumption
  - Moral and reasoning prejudice (moral: bad person; reasoning: requiring less proof to convict)
- **D. Weighing**
  - Think about **cogency** → increases as the fact situation moves further to specific end of -spectrum (tendency → highly specific behaviour)
  - **Crown must establish on BOP**

STAGE 3: GENERAL DISCRETION TO EXCLUDE

BALANCING PROBATIVE VALUE AND PREJUDICIAL RISK

If prejudicial risk outweighs the probative value then the evidence should be excluded (*Corbett*)
If it is defence evidence → prejudicial risk must *substantially* outweigh probative value (*Seaboyer*)

PROBATIVE VALUE

- Weight that should properly be accorded to the evidence
- Consider credibility of witness, reliability of evidence
- Centrality: what issue dies it address? How central is that issue?
- Cogency: how far does it take you to addressing the issue?

PREJUDICE

- Reasoning prejudice:
    - Introduce evidence of other events that confuse or distract the TOF?
        - SFE: Consumption of jury time dealing with whether other incidents occurred? (*Handy*)
- Moral prejudice:
    - Unfocussed trial (*Handy*)
    - Wrongful conviction (*Handy*)
    - General disposition or propensity (*Handy*)
    - Risk that verdict will be based on prejudice rather than proof (*Handy*)
- *Handy*: relative importance of the issue in a particular trial may have a bearing on weighing
- As probative value advances, prejudice does not necessarily recede (*Handy*)