**Exam Reminders**

* **Remember who you’re representing and for what purposes.**
  + **Is she asking for weight or admissibility?**
    - **She may ask us to be trier of fact. When we assess weight we should be deciding if it goes to the guilt or not of A or the finding that should be made. If there were vulnerabilities of it, what are they**
    - **Also if we are counsel what we would think about things throughout the case. Ie what do I need to prove and what do I need to prove this?**
* **Each fact provided means something.**
* **Use the foundational approach for every single piece of evidence.**
* **Do peice by peice analysis of evidence**
* Need more info? Let Emma know.

**Principles that Enhance the Rules of Evidence (Objectives of the Justice System)**

1. Search for truth
2. Ensuring accused (everyone) receives a fair trial
3. Efficiency of the trial process
4. Goals of the trial process
5. Preserving the Integrity of the Administration of Justice

# THE FOUNDATIONAL APPROACH

The foundational approach to *every* prospective piece of evidence is *the same*:

1. Is the info **material** to a **live issue** in the case?
2. If yes, is it **relevant**? (i.e. Does it make any material fact more or less likely?)
3. If yes, is it excluded by one of the **exclusionary rules?**
4. If not, does the **prejudicial effect** **outweigh its probative value?** (if the information is being adduced by the defence, the test is **substantially outweigh**).
5. If not, the evidence is **admitted**.

**(1) Materiality**

* Materiality is **a legal question**: what needs to be proved?
  + It must be a live issue (not conceded) (***R. v. BL***)
  + EGs:
    - **Identity** (in Stuart)
    - What constitutes the terms of the K (between Myers and Sugartree)
    - Actus Reus/ Mens Rea
    - Existence of a duty to consult
      * How strong is the duty
    - Is there aboriginal title?
* **Two types of materiality:**
  + **Primary Materiality:** information that is directly material to an issue in dispute.
    - (a) Information that arise from the cause of action that was pleaded (civil) ***Larson v Boyd***
    - (b) Requirements imposed by the substantive law (elements of cause of action or crime);
    - (c) Procedural law requirements.
  + **Secondary Materiality:** information that relates to the value (credibility/reliability) of other evidence, including testimony.
    - Reliability of the evidence - since it is secondary evidence, it is less reliable, and therefore more likely to be excluded. ***McClure*; *Brown***
    - EG:
      * Things that relate to the credibility or character of the witness (generally excluded)

**(2) Relevance**

* Note: break down the evidence to its potential uses and assess relevance of the different uses
* Relevance is a question of logic.
* Relevance is established “if, as a matter of logic and experience, the evidence tends to **prove** the proposition for which it is advanced” ***R v Collins*; *R v J-LJ***
* No minimum probative value for evidence to be relevant ***R v Arp*, *R v Morris*:** the D has a newspaper article related to sources of supply of heroin in Pakistan)
* --> If you are unsure of relevance, the evidence should be heard, at this stage of the analysis ***Corbett***
  + **Exception:** inferences based on **pervasive myths about human behavior** should be excluded ***R v Seaboyer*; *R v Osolin***
* Relevance must be assessed in the **context of other evidence** and **the case as a whole** ***R v. Monteleone***
* The fact that a person was **in the habit of doing a certain thing** in a given situation suggests that the person acted in the same way when a similar situation arose ***R v Watson***
* **There are two types of evidence** [no distinction, per ***R v Cooper***
  + **Direct evidence:** no inference is required (e.g. a person testifies having read the document).
  + **Circumstantial evidence**: tends to prove a factual matter by proving other events of circumstances from which the occurrence of the matter in issue can reasonably be inferred.
    - Circumstantial evidence does not need to resolve the issue but only help, in whatever degree, in resolving the issue ***John v R*, Justice Ritchie**

**(3) Exclusionary rules**

* Do they apply & operate to exclude the evidence?
* Applied more leniently to allow admission of Criminal defence evidence ***R v Williams***
* Charter may also admit technically inadmissible evidence ***R v Felderhof***
  + EG: right to make full defense - argue this for admission
* Keep in mind the flexible rules of evidence applied in the Aboriginal context.
* Jump to appropriate exclusionary rule: eg privilege, expert evidence, self incrimination, improperly obtained evidence, hearsay

**(4) Judicial discretion to exclude**

**INTRO**

* Trial judges have the discretion to exclude technically admissible evidence, where its **probative value is outweighed (civil) by its prejudicial effect. *Mohan***
* Consider if admission would be
  + Unjust or unfair or gravely prejudicial to the accused OR
  + Whether it would bring the administration of justice into disrepute
* **Defence evidence can be excluded only where its probative value is substantially outweighed by its prejudicial effect *Seaboyer*, confirmed in *R v Shearing***
* **Note:** Appeal courts give considerable deference to trial courts that have chosen to exercise or not to exercise the exclusionary discretion ***Terry***.

**TEST**

* **Consider the PREJUDICE likely to be caused by the evidence**.
  + Note: prejudicial effect is about the weight the evidence deserves. It is not about a negative effect on the accused’s case.
  + **Moral Prejudice (punish for past behavior)**
    - The information tends to prove that the accused is a less than reputable individual rather than proving the material issue.
    - The prejudice: possibility that the trier of fact will use evidence of past immorality to punish the accused in the present case is the prejudicial effect.
      * EG: a person’s past criminal record.
  + **Reasoning Prejudice (expert evidence or 3P evidence)**
    - The risk that evidence detrimental to the a party will be given more weight than it deserves ***R v Valley***; ***R v Osolin***;.
  + **Additional Prejudice**
    - **Inordinate amount of time:** if it involves “an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact is out of proportion to its reliability” (***R v Mohan*,1994 SCC**)
    - **Surprise:** Unfair surprise depriving a party of the opportunity to respond;
    - **Side Issues:** Creation of distracting side issues;
    - **Confusion:** Potential to confuse the trier of fact
    - **Mislead Jury:** Consider whether the trial would be rendered unfair or would mislead the jury ***R v Harrer***
  + **Removed by Jury Direction?:** Could prejudicial effect be removed by judicial direction to the jury, for example?
* **Consider the PROBATIVE VALUE of the evidence**
  + **Probative value is essentially about weight**. This makes it different from relevance because we are beginning to calibrate the scale at this point.
  + **We need to consider context and other corroborating evidence.**
  + **(i)** **How strong are the inferences that may be drawn from the evidence?**
    - A fingerprint allows a stronger inference than a carpet fiber, for example.
  + **(ii)** **How reliable is the evidence *Mohan***?
    - Did the person do what they were supposed to do? Did they do it correctly?
  + **(iii) What is the credibility of the proposed evidence** ***Darrach***?
    - Does the witness have motive to mislead or a history of dishonesty?
  + **(iv) Fairness to parties and witness**
  + **(v) The importance of the evidence**
    - Consider whether case will fall apart without this...BUT don’t admit if it will mislead.
* **Does Prejudicial Effect outweigh probative value?**
  + If so, evidence is excluded
* **If Defence Evidence: Does prejudicial effect SUBSTANTIALLY outweigh probative value.**
  + If yes, evidence is excluded.
* **Mention the possibility of limiting jury instructions.**
  + Make an argument about whether or not they would be effective.
  + We should trust the intelligence of jurors ***Griffin***

# INFORMATION GATHERING

* **Core principle:** is facilitating the truth-seeking function by ensuring the parties have access to the information that they need.
  + **It is asymmetrical in the criminal context:** because of the presumption of innocence. Crown must disclose everything; in civil, both parties must disclose.

**Discovery in Civil Cases:**

**BC Rules of Civil Procedure - *Rule 7-1*- List of documents**

* **Disclosure happens after the pleadings are closed;** therefore look to pleadings to determine what would be material.
* **This is a continuing obligation.**  As new facts become relevant, there may be additional disclosure.

**Stage one Document disclosure**

* 7-(1) (a) **Within 35 days** of the end of the pleading period, each party of record must **prepare a list of docs** that lists

o (i) all documents that **are or have been in the party’s possession or control** and that **could, if available, be used** by any party of record at trial **to prove or disprove a material fact**;

o (ii) and **all other documents** to which the party **intends to refer at trial**;

* 7-(1) (b) and **serve** the list on all parties of record.
* 7-(2) List must include a description of each listed document
* 7-(6) & 7-(7) **Privilege:** if privilege from production is claimed, the claim must be made in the list of documents with a statement of the grounds of the privilege and the nature of the information that is privileged for other parties to assess the validity of the claim.

**Production & Inspection of Documents**

* 7-(15) A party who has served a list of documents **must allow the other side to inspect and copy the listed documents** in normal business hours and at the location specified in the list, except those docs that the listing party objects to producing (i.e. privilege)
* 7-(16) The listing party must, on request of the party entitled to inspection and on receiving payment in advance, **serve the parties with copies of the documents**.

**Third Party Disclosure**

* 7-(18) If a document is in the **possession or control of a person who is not a party of record, the court may apply under rule 8-1 brought on notice to the person and the parties of record**, make an order for production, inspection and copying of documents
  + **Test** (*Dufault*): Probative value must be balanced with privilege, embarrassment of or adverse effect on the third party.

**Inspection of Document by Court**

* 7-(20) If production is objected on **grounds of privilege**, the court may inspect the document for the purpose of deciding the validity of the objection.

**Party May Not Use Document**

* 7-(21) If a party **fails to make discovery of or produce for inspection or copying documents**, the party **may not put the document in evidence in the proceeding** or **use it for examination** or cross-examination.

**Discovery in Criminal Cases: *R v Stinchcombe*, SCC 1991**

* **Rule:** The Crown is under a general duty to disclose all relevant information that is within the Crown’s possession or control.
* This rule applies even when the Crown is not going to introduce it into evidence.
* Generally, disclosure goes only from the Crown to the defence
* It includes material that the police have, whether or not the police have given it to the Crown. THEREFORE Crown has an obligation to make inquiries to the police.
* **Limits** - don’t have to disclose irrelevant information or information that will compromise the investigation.
* **Timing:**  Disclosure should be made **before the accused elects mode of trial or has to enter a plea *Stinchcombe***
  + **Ask** - Accused has to ask for the evidence (but usually Crown automatically gives)
  + If the accused is self-represented, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done.
  + The obligation to disclose is a continuing one and disclosure must be completed when additional information is received.
* **Exception to Rule that Only Crown must Disclose:**
  + - **Expert Evidence *- 657.3 CC***: Accused AND Crown have duty to disclose expert evidence
    - **Alibi evidence** 
      * Negative inference drawn if not disclosed by accused
      * **if alibi not disclosed until trial:** judge can’t exclude it, but they can instruct the jury to regard it with extreme scepticism

|  |  |
| --- | --- |
| Crim | Crown must disclose all relevant info. Accused has not been obliged yet to say whether he is or is not guilty. For that reason, we are not basing it on materiality – we are basing it on relevance. It is logical relevance. The Crown is NOT being asked to second guess what the accused might do. Have to give everything with what is conceivably relevant. |
| Civil | All info that could prove or disprove a material fact. The scope of the pleadings has already been set out since disclosure is after the pleadings have closed; so you know what the party is pleading, and therefore what is material. |

# PRIVILEGE

**Introduction:** Privilege is recognized when a public interest (such as national security, the expeditious administration of the government or hindering police authorities in obtaining information from source) outweighs the importance of the search of truth.

**Principle:** It is anathema to truth seeking – when a privilege is recognised, it’s because the court or legislature prioritises a relationship over the need to have full information at trial

* Privilege can pre-exist the foundational approach as it can be invoked before litigation and exist outside of litigation.
* Privilege can also be invoked as an exclusionary rule.

**\*\* “I am going to try to assert class privilege first as the categories are already established. If the relationship is not covered by Class privilege, I will move on to case by case privilege”\*\***

* **(if very obviously NOT litigation or sol-client privilege, mention quickly and move on to case by case)**

**Class Privilege**

* **Principle:** Class privileges recognize some relationships as having a need for confidentiality that is so significant that the public interest in preserving it outweighs the truth-seeking interest.
* Class privilege entails a *prima facie*  presumption that the communications are privileged and inadmissible ***Gruenke***
* A **person seeking to use** a class privilege must demonstrate on a **balance of probabilities** that the communication fits within a class privilege.
* Once a privilege has been established, other side must prove waiver or loss on a **balance of probabilities** to set it aside.
* Spousal privilege is recognized ***Couture***

### When privilege may be asserted

* Can be asserted at trial obviously but even as early as when a solicitor is approached with a search warrant (***Solosky***)

**Solicitor and Client**

**Introduction**

**Rationale:** the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it ***Blank***. Thus, the purpose of solicitor-client privilege is to protect the client, and ensure a fair, just and efficient law enforcement process ***Lavallee***.

**The issue:** here is how to balance the search for truth vs the protection of confidentiality.

**FIRST Materiality & Relevance**

* **Is the evidence material? Materiality is a legal question: what needs to be proved? It must be a live**

**issue (not conceded) *R. v. BL***

* **Is the evidence relevant?**
  + **Relevance is established “**if, as a matter of logic and experience, the evidence tends to prove the proposition for which it is advanced**” *R v Collins*, 2001 OntCA; *R v J-LJ*, 2000 SCC**
  + **No minimum probative value for evidence to be relevant *R v Arp*, SCC 1998, *R v Morris*, 1983 SCC:** the D has a newspaper article related to sources of supply of heroin in Pakistan**)**

**NEXT: Apply the TEST**

* **Rule:** The pa**rty invoking privilege must prove** the following on the **balance of probabilities** that
  + **(a) there was a communication**
  + **(b) made in confidence**
  + **(c) for the purpose of obtaining legal advice**
* **Go through following steps**
* **(1) There was a communication;**
  + **Physical objects:** no such privilege applies to physical objects, unless the physical object was prepared by the client or the lawyer to assist in explaining a point, or it was a videotape for communicative purpose ***Murray***
  + **The identity of the client** ***Fink, Lavallee*** or **fees *Maranda and Richer*** may be protected depending on intent and nature of particular relationship
* **(2) The communication must be made in confidence;**
  + Communication must be made in confidence; not necessarily expressly. Parties have to be clear that they intended information to be confidential.
  + Confidentiality begins as soon as the potential client takes the first steps, and consequently even before the formal retainer is established ***Solosky v Canada***
  + If the solicitor is authorized or instructed to transmit the communication to others then it cannot be said that the client desired that it be confidential ***Fraser v Sutherland***
  + **3rd party presence rule** – unless a translator or someone necessary to conduct the lawyer’s business third parties present means the conversation is not longer privileged ***Pritchard***. Therefore, if you want conversation to be confidential, state that, or ask 3P to leave.
  + **Joint and common interest**: ex: 2 people embarking on a joint venture
    - When 2 people have a common interest, while they have the common interest, the privilege extends to both(**Pritchard**)
* **(3) The communication must be for the purpose of obtaining legal advice;**
  + Sol client privilege can extend from before a retainer is signed (***Descoteaux***)
  + Communication must be made in the course of seeking legal advice, not just telling your lawyer something without asking advice. (***Bencardino--****client told lawyer about being threatened/intimidated. Court said this is not privileged because he was not seeking legal advice. Crown could call lawyer)*
  + If communication made in personal or business capacity, no privilege will attach (***Rudd v Frank--****friends;* ***Campbell*** *business*)
  + Giving legal advice includes telling someone what should be done given relevant legal context (***Gower--****EE retained out of prov lawyer who prepared report and gave legal advice. Because gave advice, privileged even though out of province)*
  + **Exception to obtaining legal advice**: where the purpose is to circumvent legal responsibility, the privilege is potentially LOST
    - There is no privilege where client seeks advice to help perpetrate crime or fraud: (***Solosky***)
    - No privilege where client communicates with lawyer with intention to commit an unlawful tortious act (***Dublin v Montessori***)
* **(4) If the above criteria are met, then the information is privileged.**
  + **If so, the client’s privilege is permanently protected at his/her instance; DON’T GO ON TO GENERAL DISCRETION TO EXCLUDE**
    - only the client can waive the privilege.
  + The **burden of proof** shifts if the other side on **balance of probabilities** wants to show that privilege was waived.

**Litigation Privilege**

**Rationale:** to ensure the efficacy of the adversarial process; it provides a “zone of privacy” within which a solicitor can prepare for trial without intrusion into his or her thoughts or work product

***Blank*, *General Accident Assurance v Chrusz***

**Burden of Proof**: is on the party asserting the privilege on the balance of probabilities.

**FIRST: Materiality and Relevance**

* **Is the evidence material? Materiality is a legal question: what needs to be proved? It must be a live issue (not conceded) *R. v. BL***
* **Is the evidence relevant?**
  + **Relevance is established “if, as a matter of logic and experience, the evidence tends to prove the proposition for which it is advanced” *R v Collins*, 2001 OntCA; *R v J-LJ*, 2000 SCC**
* **No minimum probative value for evidence to be relevant *R v Arp*, SCC 1998, *R v Morris*, 1983 SCC: the D has a newspaper article related to sources of supply of heroin in Pakistan)**
* **Proving some relevance is probably enough to have the court look at the privileged material and make a ruling.**
  + Be sure to expressly state what competing interests are being balanced and in what context.

**NEXT: Apply the Rule**

* **Rule:** Litigation Privilege applies to the following:(***College of Physicians, Blank***)
  + **(1)** To a **communication between a lawyer or agent of the client and a third perso**n, even non-confidential communication, or material of a non-communicative nature;
    - It should apply if a lawyer’s skill and knowledge is implicated (Australian approach).
  + **(2)** If, at the time of making the communication, **litigation had commenced or was anticipated**;
  + **(3)** The **dominant purpose** of the communication was use in or advice on litigation. ***College of Physicians of BC***
    - It does not need to be the sole purpose, must be more than substantial purpose ***Waugh***
* **END:** it ends when litigation ends ***Blank***
  + It will extend to subsequent cases involving the same or related parties and the same or related cause of action **Blank**

**Uncertainty: copied documents**

* ***Ottawa Carleton*** says making of a copy does not give original document privilege
* ***General Accident*** says the concept of creation has been applied by some courts to include copying of public documents and protection of the copies in the lawyers brie
* ***Blank***court did not make a determination of whether litigation privilege would be given to documents gathered by a solicitor in contemplation of litigation (ie copied docs). Said it seems consistent with the rationale and purpose of litigation privilege but also that it shouldn’t exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one’s own litigation file. Said they would wait for another day. Cunliffe thinks they should favour US approach and protect it

**Criminal Cases and Litigation Privilege:**

* It applies to work product of the Crown and work by the police for the preparation of the trial; not similar work produced by the police during the investigation stages leading up to the prosecution of the accused, which would be subject to disclosure obligations ***R v Tang*, Alta QB 2002.**

### Loss or Waiver of Litigation or Solicitor Client Privilege

* **FIRST:** what are the different documents (there will probably be more than one!) AND what privilege are they subject to (deal with each document separately).
* **SECOND**: What suggests there was a waiver of privilege?
  + It was sent to the opposing solicitor so the expectation of confidentiality is lost. You would have to argue that the solicitor intentionally waived privilege
    - Could argue that you cannot use litigation privilege as a shield to mislead the court, this would undermine the purpose of advancing adversarial system
  + Cannot be invoked to protect disclosure evidence of the claimant party’s abuse of process or similar blameworthy conduct
* **THIRD:** What suggests there was NO waiver of privilege?
  + Not lost if shared with 3rd party, so long as there is common interest in existing or anticipated litigation (***General Accident***)
  + Most courts have said **mistaken passing along of information by solicitors does not equal a waiver of privilege.** (***Metcalfe***)But there are instances where a mistake like this can be used against the solicitor.
* **FOURTH: How do we deal with this? The ethical method of dealing with accidental passing of information suggests that we consider the following.**
  + Lawyers have duties to client, court, fellow lawyers
  + Strategies to overcome this? (***Metcalfe***)
    - Start with a call to the person who made the mistake and identify mistake been made. This is the ideal situation. MOST LAWYERS WILL DO THIS
    - S’s lawyer would have to make additional discovery upon knowing they made the mistake - does the document suggest that there should be more disclosure about other facts.
    - If the lawyer says he is standing on sol client privilege, then you go to the court and present the error and ask the court to order that the opposing party make them do further discovery
    - (***O Connor***)the trial judge would probably talk to the other side tell them to show the records and argue why not relevant, then judge would make the decision

**Privilege of Expert Communication is Waived when:**

* You rely on report or expert testifies ***VCC v Phillips***  **BCSC**
* As long as expert remains in role of confidential advisor, there are reasons for maintaining privilege over docs in his possession. Once he becomes a witness, however, his role is changed…this includes implied waiver over papers in his possession which are relevant to the formulation of the opinions offered (privilege can be waived in respect of facts or premises in expert’s file on which the opinion is based and came to knowledge from docs supplied to him(***Piche v Levours***)
  + (***Trans north Turbo***)***:*** if documents in possession do not relate to facts and assumptions, it need not be produced
  + Where accused makes reference to expert report, he waives privilege in ENTIRE report ***Stone***
* **Principles for Expert Report** (***Brown v Lavery (summarizing Stone* - BROWN WAS QUALIFIED BY HORODYNSKY - Q to EMMA**)
  + A report prepared by expert at request of counsel for litigation purpose is covered by lit priv
  + By announcing it to opening jury address the opinion of the expert contained in report, counsel waives privilege in content of entire report
  + Waiver extends to info in the report which would otherwise be subject to solicitor client privilege
  + Once an expert is called as a witness, the opposing party is entitled to production of ‘foundation’ of expert’s opinion

**Case-by-Case Privilege**

**Introduction**

* Because this relationship does not fall under solicitor client privilege (because it is not between a solicitor client), and it does not fall under litigation privilege (because the document was not created for the dominant purpose of litigation), we will therefore consider whether it falls under case-by-case privilege.
  + We will follow the c-by-c approach because the **court is unlikely to recognize** any future class privileges ***National Post ; Slayutch***
* **Privilege can exist on Case by Case basis *Gruenke ; Am v Ryan***
* **The Wigmore** Test provides the four fundamental conditions that must be met before privilege is extended to any communication. Although the criteria are not carved in stone, they were endorsed in ***National Post*** as providing an appropriate framework for balancing the competing interests at stake. As such, I will proceed with an analysis based on the Wigmore criteria.
* **Burden of proof:** is on the party asserting the privilege on a balance of probabilities(***National Post***)
* We should note that there can be partial privilege over certain documents or communications. (***AM v Ryan***)
* It would be better if there were an alternative source from which to get the information (rather than ruin the relationship).

**FIRST: Materilaity and Relevance:**

* **Is the evidence material? Materiality is a legal question: what needs to be proved? It must be a live**

**issue (not conceded) *R. v. BL***

* **Is the evidence relevant?**
  + **Relevance is established “if, as a matter of logic and experience, the evidence tends to prove the proposition for which it is advanced” *R v Collins*, 2001 OntCA; *R v J-LJ*, 2000 SCC**
  + **No minimum probative value for evidence to be relevant *R v Arp*, SCC 1998, *R v Morris*, 1983 SCC: the D has a newspaper article related to sources of supply of heroin in Pakistan)**
    - * **Proving some relevance is probably enough to have the court look at the privileged material and make a ruling.**
        + Be sure to expressly state what competing interests are being balanced and in what context.

**NEXT: APPLY THE RULE**

* (**1) the communication must originate in a confidence that that they will not be disclosed (i.e. that the identity of the informant will not be disclosed);** 
  + - There generally needs to be an explicit agreement about confidentiality, but sometimes it can be implicit (such as in the example of psychologist and client ***MA v RYAN*** *(court said no need for client and psych to discuss the confidentiality)*
* **(2) the element of confidentiality must be essential to the relationship in which the communication arises; it may be established by**
  + - **Consider: (1)** This particular relationship; **(2)** This type of relationship generally ***MA v Ryan***.
    - **Ask:** Without confidentiality, would there have even been a relationship? ***National Post***
* **(3) the relationship must be one which the community believes should be “sedulously fostered” (diligently, deliberately and consciously) in the public good; and**
  + - The community is generally equated with the Canadian public ***MA v Ryan***...in this case, the community would be in favour or protecting the relationship.
* **(4) Assess injury to relationship v. benefit of correct disposal of litigation (benefit can be greater good)/ harms of disclosure v. damage of observing the confidentiality**
  + - **Harms of disclosure (Injury to the relationship)**
      * Short term interests of the parties
      * Prospect of long term injury to the general professional relationship;
      * The nature of what would be disclosed
      * When weighing the harms against the benefit of disclosure in civil cases, though these cases are not governed by charter, court said should have regard to charter values: ***MA v Ryan***
        + right to privacy and equality ***MA***;
        + 2b - freedom of expression **Moysa**
        + Dignity of persons
      * Public interest in respecting the **confidentiality** promise
      * Diaries of victims of sexual assault been considered privileged even though no social relationship ***V KL v R DG***
      * In civil cases right to privacy might be more compelling. (***AM v Ryan--****SCC applied partial or conditional discovery*)
    - **Public Interest in Disclosure:**  court in ***National Post*** said it’s broader than just harm to litigation, but to consider public interest in disclosure.
      * Seriousness of the offence and interest in having someone prosecuted;
        + concern with the wrongs perpetrated and suppression of crime ***National Post***
      * Probative value of the alleged evidence;  **physical evidence (ie DNA) has high probative value and weighs in favour of inclusion *National Post***
      * Public interest in free expression will ALWAYS weigh heavily in the balance.
      * Contemporary social and legal realities;
      * **Consider society duty to protect children/vulnerable people:** court said no privilege in scenario where family therapy and man admitted sexually assaulting children. Weighed society’s duty to protect children above his right to privilege ***R v S (RJ)***
    - **Consider when Accused Seeking Records of Complainant:** Court must strike balance between A’s charter right to full answer and defence and V’s right to privacy
    - **Partial Privilege**: Consider whether full or partial disclosure is necessary.
* **(5) Form conclusion on whether public interest in disclosure outweigh the harms of disclosure.**
  + - **Give a suggestion of other ways the Court could obtain information short of destroying the relationship, if you conclude it should not be admitted.**
* **(6) Move on to General Discretion to Exclude** because harm to the relationship could be different than the harm the potential evidence could cause.
  + **Remember if defence wants to get evidence the Prejudicial effect must SUBSTANTIALLY outweigh the probative value for the court to exclude it.**
  + **IF TIME MOVE BACK TO PAGES ON PE V PV TO GO THROUGH IT THOROUGHLY**
  + **Think about prejudice, misuse, misunderstanding**

***R. v. National Post (2010) SCC***

* NP tried to protect source by not disclosing documents requested under a search warrant. Document implicated Chretien, but it turned out it was forged; police wanted DNA evidence to find out who committed the forgery.
* There is no class privilege for journalist-source. Court is unlikely to recognize new class privileges and therefore an analysis should proceed on a case-by-case basis.
* The court was striking a balance between two competing interests- the public interest in the suppression of crime and the public interest in the free flow of accurate and pertinent information.
* The court recognized that sometimes the competing right will outweigh the public interest in suppression of crime.

# EXPERT EVIDENCE

**The key principle:** is the need to strike a balance between using expert evidence when it will assist the court’s truth-seeking function, and finding ways to identify and exclude unreliable evidence

The testimony of experts is an exception to the general rule barring opinion evidence. There are concerns that expert evidence may mislead the triers of fact, as it tends to be more conclusive than it might actually be.

**Remember: If this concerns experts testifying with regards to aboriginal evidence, go down to section on aboriginal evidence.**.

**Expert Evidence Test**

* **Statutory Procedural Requirements (GO THROUGH QUICKLY IF NEED TO SHOW WHAT TO DO)**
  + **Civil**
    - ***BSSC Rules***
      * **S. 11-2(1)(2)** – duty of independence. Expert must sign certificate in that regard.
      * **11-6(3)** - Expert repo**rts need to be served 84 days before trial** for civil trials. A responding report can be served 42 days before trial **(11-6(4))**
    - ***BCEA*** - these sections only apply to quasi-judicial or administrative hearings, but do NOT appy to proceedings in the CA, SC, or Prov Crt.
      * **S. 11(1)** – Written statement of expert opinion and facts on which it is formed mu**st be given to every party in adverse interest at least 30 days before** the expert testifies.
      * Exceptions in **s. 11(2)**.
    - ***CEA***
      * Limits experts to 5 per issue.
  + **Criminal**
    - The ***Criminal Code*** at section **657.3 (3) (a)** says that a party (Crown or defence) **intending to call an expert must at least 30 days before the trial give notice to the other** side of its intention to do so along with the name of the witness, description of area of expertise of the witness and a statement of his qualifications.
    - **657.3(b)** further specifies that a **prosecutor** who intends to call an expert witness must provide, within a reasonable period, a **copy of the report prepared by the expert and if no report is prepared a summary of the opinion anticipated to be given by the expert**.
      * The Goudge report recommends that parties provide detailed reports to each other rather than summaries.
      * The defence doesn’t have to give the summary of expert opinion until the end of the Crown’s case.

**FIRST: START WITH MATERIALITY AND RELEVANCE**

* **Is the Evidence Material?**
  + **Materiality is a legal question:** what needs to be proved? It must be a live issue (not conceded) ***R. v. BL***
* **Is it Relevant?**
  + Relevance is established “if, as a matter of logic and experience, the evidence tends to prove the proposition for which it is advanced” ***R v Collins*; *R v J-LJ***
  + No minimum probative value for evidence to be relevant ***R v Arp*, *R v Morris*:** the D has a newspaper article related to sources of supply of heroin in Pakistan)

**NEXT APPLY THE EXPERT EVIDENCE TEST:**

**Introduction:** say all this

* **Presumptively inadmissible:** Expert evidence is opinion evidence and therefore presumptively inadmissible.
* **Burden of proof:** is on the **party seeking to have the evidence admitted on a balance of probabilities.**
* **Evidence Admitted in Past:** Expert evidence that has routinely been accepted in the past can be subject to an admissibility inquiry if requested by the opposition (***Mohan***). It will be, in practice, presumptively admissible though.
* **Why I will use *Abbey:*** In order to ensure that the expert evidence is admitted at trial, we will need to be prepared to establish that it meets the qualifications set out in ***Mohan***, which were later elaborated upon and explained by the Ontario Court of Appeal in ***Abbey****.* Though ***Mohan*** is a Supreme Court of Canada decision, I will follow the approach set out in ***Abbey*** because it essentially considers the same criteria as ***Mohan***, but goes further to arrange it in a more conceptual framework and gives direction on how to assess the ***Mohan*** criteria. Furthermore, the ***Abbey*** approach has been followed in other courts of appeal, including in British Columbia.
  + **Put most of the emphasis on reliability**

**APPLY THE ABBEY TEST**

* **(1)** **Delineate scope of Expert opinion -** know what expert proposes to say
* **(2)** **Threshold Stage:**  ***Abbey***.
  + **(a) Does evidence have logical relevance to material issue** 
    - **Materiality & Relevance:** refer to above briefly
    - Remember if it makes it any more likely at all, it is relevant
  + **(b) Opinion relates to a matter that is properly subject to expert opinion**
    - It’s necessary if it offers information the trier of fact is otherwise unlikely to have ***Mohan***, but if the judge/jury can form its own conclusions without the assistance of an expert, the expert’s opinion is unnecessary (**Abbey SCC**)
    - Is it necessary to have expert or is there a way to get this information before the jury in some other form? ***DD*** *(case about whether expert could tell jury about patterns of disclosure child sexual assault).*
    - Can the jury understand the importance of the information without the expert?
    - **Essential**?
      * Sopinka in ***Mohan*** says novel science has to be essential
      * ***Trochym*** says it is more important to focus on reliability; essential is not the focus. AS WELL, reliability extends beyond the concept of “novel science”.
  + **(c) The witness must be qualified to give that opinion. (Look to CV)**
    - **FIRST**: This is a modest test (***Mohan***). It does not require academic qualifications; the expert has to have experience that goes beyond the average trier of fact.
      * **AMBIGUITY** –This has been disputed by commentators and in the Goudge report. The better view is that qualifications should be required. A major concern with expert evidence is that unreliable evidence might masquerade as infallible evidence. Put less extremely, it may be given more weight than it deserves. Experts whose qualifications are based on experience may be more likely to present unreliable and thus prejudicial evidence. This should be accounted for by requiring qualifications or scrutinizing this evidence more rigorously. In any case, ***Mohan*** continues to be good law and therefore the ***Mohan*** standard of not requiring qualifications should be applied.
      * **Consider**:
        + The Discipline itself

To what extent is the field a recognized discipline?

* + - * + Expert’s qualifications

What are expert’s qualifications

Is he specialized in the area he is testifying in?

* + - * + Expert’s work in general
        + Expert’s testimony
        + Methodology

Was experts research subject to peer review?

What is the outcome of the peer review?

What is the opposing academic literature? Is there significant disagreement with this opinion?

* + - **Second**, the opinion must be in the witness’ field of expertise
    - **Third**, expert’s evidence should be confined to his area of expertise
  + **(d)** **Does opinion contravene any exclusionary rule? *Abbey , KA***
    - **Hearsay that forms the basis of an expert opinion,** is always admissible to understand the basis under which experts come to their view:because expert’s usually have to inform themselves by talking to people, and including this in their evidence or research (***Lavallee***).
    - **Character evidence**: Claiming a person behaved in a certain way because of their character.
      * It is OK to say she has done it before. It is NOT ok to say she is mean, therefore she did it.
      * **Exception:**
        + Expert evidence of disposition of accused may apply due to the **distinctive group exception**. This exception allows the admission of expert evidence to accused’s disposition if the personality profile of the perpetrator group had identifiable and distinctive psychological elements in order to differentiate them from the general population. In ***J (JL)*** and ***Mohan*** the court did NOT find there was a distinctive group; however the possibility may still exist. ***J(JL)*** ***(*** *court barred expert evidence from court since class of perpetrators not sufficiently distinctive)*
    - **The rule against oath helping:** prohibits the admission of evidence adduced solely for the purpose of proving that a witness Is truthful - ***Llorenz***
    - **Confessions:** can’t use expert evidence to bring in a confession that would otherwise be inadmissible under ***Oickle*** (ie the confession was not voluntary)
* **(3)** **The trial judge must decide whether the benefits of the evidence outweigh its potential harms in the** **specific case** and if its probative value is overborne by prejudicial effects, judge must exclude. ***Mohan***
  + **Consider if it’s Central to Core issue?** if it is central AND reliable, then it has higher benefit. If it is central and NOT reliable, then it creates a greater cost.
  + **(a)** **Probative Value of Evidence and the significance of the issue to which the evidence is directed.**
    - **Do to that, we consider whether it is legally reliable.**
      * **Legal Reliability**
        + Reliability is an essential component of admissibility ***Trochym***
        + Since ***Trochym*** the courts say you have to think about reliability when other side argues it and it being “essential” is not as important, but this hasn’t been overruled.
        + Since Goudge report in 2008, court has **not** been confining reliability to new fields. (even accepted fields can be thrown out for being unreliable). ***Trochym*** gives authority to do this
        + **The definition of reliability asks:**
        + **(1) To what extent does the expert method or technique do what it purports to do.**

**Consider**

what you need the evidence to prove (relevance and materiality)

Is this an acceptable theory?

Is there an error rate?

Is it published in other journals?

We should know what he has published, and what the limitations are about that?

How can we test this opinion? What might its vulnerabilities be? How much reliance do we want to place on it?

The capacity of the expert witness to apply that technique

The extent to which T has applied that

* + - * + **(2) The capacity of the expert witness to apply what he purports to do.**
        + **(3) Whether expert has properly applied it.**
        + \*\*\*If any of these fail, it can lead to a misleading opinion.
        + **\*\*\*The point - will it be helpful to the trier of fact in coming to a correct disposition of the case?**
        + Note the difference between scientific and legal reliability:

**Scientific reliability** - refers to proposition that a given method or technique consistently gives the same result given certain conditions. If scientist says it is reliable, that means it is consistent. ;

**Legal reliability** - concerned with both reliability and validity.

* + - * **AMBIGUITY:**  ***Starr*** said to focus only on threshold reliability of evidence without considering corroborating evidence. BUT: ***Starr***is seems to be REVERSED BY ***Khelawon***which says you should consider corroborating evidence at the threshold stage.
      * Though the Court in ***Starr*** and ***Khelewon*** was considering hearsay, there is no reason to treat reliability differently when considering expert evidence.
        + When assessing the reliability of expert evidence we should consider corroborating evidence, so long as we can ensure it is independent**.**.
      * **Additional Reliability principles for Experts on Aboriginal Cases (Apply above with these in mind)**
      * The assessment of reliability has to be sensitive to context of the discipline.
        + If you are assessing reliability of anthropologist evidence, think of what anthropology requires of expert
        + Ex: As in ***Delg*** if expert spent a lot of time with the culture, this does not necessarily tainted his evidence. SCC said that, anthropological principles require the experts to have a close knowledge of culture etc.
  + **(b)** **Assess Prejudicial Effects**
    - **Costs:** 
      * Think about particular risks of particular evidence ***Abbey***
      * What is the consequence if the evidence is wrong, as opposed to being left out entirely?
      * The opinion may be used by trier of fact for wrong purpose.
      * The expert evidence may mislead trier of fact, or cause the TOF to substitute the expert’s judgement for their own.
      * Expert evidence may distort the fact finding process
      * Evidence will consume inordinate amount of court time not commensurate with probative value
      * Is there a danger the jury will be unable to effectively make a critical assessment of the evidence - is there a danger the jury will substitute expert’s judgment for theirs?
    - **May be able to limit with jury instructions** (***JJL***).
  + **(c) Make a conclusion regarding whether the evidence is necessary. Balance the reliability and the costs/benefits.** Consider the ***Mohan*** criteria regarding necessity.
    - Necessity is not judged on an onerously high standard; Necessity can be met were trier of fact will get the wrong answer without the expert ***Lavallee***
    - It provides technical information;
    - It relates to matters about which the trier of fact is unlikely to come to a correct conclusion; and/or
    - It relates to an area that is not well understood by an ordinary person.
    - It must be necessary that the information be introduced by an expert rather than by other means, such as jury instructions (***DD***).
      * **Additional Necessity Principles for Experts in Aboriginal Matters (still consider above)**
        + ***Delgamuukw*** says because of dislocation and disruption experienced by aboriginal communities and passage of time. Can be difficult to get access to rights guaranteed in s 35. So evidentiary standards must be administered with attention to difficulties created by colonialism, as well as the long passage time, or the fact that physical artifacts may not be preserved.
        + Necessity analysis might have to have regard to those things, might be that best evidence u can get about aboriginal community is less good than a settlor in the area
        + It is necessary for aboriginal people to rely on oral history, because that’s all they have
* **Reconcile A B and C and come to a conclusion about whether or not it should be admitted**
  + **Partially admit?** Note that Abbey states that it is possible that only part of the expert testimony can be admitted, while other parts are not. The judge has the discretion to make that decision.
  + **DEFENCE EXPERT: you need to make a decision about whether prejudicial effects should outweigh the probative value or SUBSTANTIALLY OUTWEIGH the probative value**
    - **This hasn’t been decided.**
    - **think about the policy underlying the question, which is the accused’s right to make full answer and defence**
    - **Say “ because of this general tendency to consider if it substantially outweighs, it seems perfectly fine to apply to experts as well, especially because we do not go on to consider general discretion to exclude”)**

**DO NOT GO ON TO CONSIDER GENERAL DISCRETION TO EXCLUDE!!!!**

### Experts for Aboriginal Rights and Trials (Anthropologist etc)

* Ex Archeologist in aboriginal rights case

**Introduction**

* Because this is an expert testifying on behalf of Aboriginal claimants, we need to marry the ***Abbey*** criteria with ***Delgamuukw*** and ***Mitchell***
  + ***Delgamuukw*** tells us that in order to give effect to s 35, court needs to apply rules of evidence with sensitivity to aboriginal culture and history
  + ***Mitchell*** confirmed this and added that it can’t be the case that aboriginal evidence is given more weight than it can bear
  + (ie single knife traded could be evidence of north south trading)
* **As said above, a will-say of this expert’s evidence should be provided to the court when the trial counsel provides its summary of evidence at the first stage of the Vickers test for aboriginal hearsay evidence.**
* **I will Apply the *Abbey* test for Expert Evidence, keeping principles of *Delgamuukw* and *Mitchell* .**

**GO NOW BACK TO BEGINNING OF EXPERT EVIDENCE TEST. BUT MAKE SURE TO APPLY THE RELIABILITY AND NECESSITY CRITERIA where they are apparent**

***Abbey***

* Gang member charged with a murder; Got teardrop tattoo sometime after the murder
* Crown wanted to introduce sociologist who researched gangs to talk about what meaning of tattoo might be
* Risks of introducing this evidence:
  + Expert didn’t interview members of gang abbey came from and didn’t interview abbey
  + The jury gives the expert’s opinion too much weight and defers their judgment to expert’s judgment
  + Doherty seemed to forget about the risk of misuse
* The court focused on the risk that the evidence might be wrong/ie risk of evidence being unreliable
  + Doherty focused on whether gang members interviewed had any reason to lie about what tattoos meant
  + Doherty said that gang members would have no reason to lie and Abbey was a real gangster, so this was pretty reliable expert evidence

***R. v. Mohan (1994) SCC***

* The accused, a doctor, is charged with sexual assault and wants to introduce an expert who will say a certain type of person would have committed these three sexual assaults and that the accused is not of the type.
* Application of the test:
  + a person who committed sexual assaults on young women could not be said to belong to a group possessing behavioral characteristics that are sufficiently distinctive to be of assistance. Also, there is no evidence that doctors who commit sexual assaults fall into a distinctive class.

# SELF INCRIMINATION

**Introduction**

* **Key principles:** are fairness to A, the right to a fair trial, and the Crown must prove its case before A has an obligation to respond. These two considerations are balanced against society’s interest in investigating and prosecuting crime.
* **Triggered** when someone confesses or makes and admission (oral OR written)( short of a confession) in a criminal case saying something that could inculpate them and the crown wants to use it
* **Immediately think about who the A was talking to and in what circumstances**
  + If undercover police officer in cell, NOT PRETENDING to be person in authority, consider section 7
    - TEST ***Otis:*** *whether dialogue between A and police officer is akin to an investigation*
    - Crown looks to subtler cues such as who moved conversation onto topic of the crime etc.
  + Where undercover officer posing as priest or lawyer, you are in TRICKERY. Go to ***Oickle***,
  + If A is in DETENTION and KNOWS who he’s talking to police officer, use ***Oickle*.**
  + IF A is talking to someone who is NOT a person in authority (a friend), then admit as an exception to hearsay.
  + If A is talking to mom, or a person who is of questionable authority, go through Oikle test.

**Consequences of Silence**

* ToF may not be told of A’s silence (***Chambers* 1990 SCC; *Cones* 1999 OCA**)
* unless silence has “a real relevance and proper foundation for admissibility”, such as when it is needed to explain other evidence (***Turcotte* 2005 SCC*, Stevenson* 1990 OCA**).
* A’s tactics may make his or her silence relevant and admissible **(*W.M.C.* 2002 BCCA).**
  + The classic example is an **alibi defence**, which may be weakened if A does not inform Crown after speaking with counsel and Crown has made full disclosure (***Cleghorn* 1995 SCC)**. Inferences that may be drawn from A’s silence are limited even where it is relevant and admissible.

**Statutory rules that Protect Against being Cross Examined on Prior Testimony**

* A witness can object to answer a question based on possibility it might incriminate himself. TJ can force witness to answer but the answer cannot be used against them in subsequent prosecution. ***Canada Evidence Act s 5 BC Evidence Act s 4***
  + This rule requires that person knows of his or her right and asserts it
* ***BC Evidence Act* s 4** provides that a person cannot object to answer something that might make them civilly liable. But that answer cannot be used against them in a subsequent civil proceeding or proceeding in BC statute. The application of the rule does not require the witness to raise objections.
* **These rules not relevant any more cause of section** *13 Charter***. Under**  *s 13 Charter***,** if the accused has made a voluntary testimony in another proceeding (ie they voluntarily took the stand), you can cross examine them later if they contradict that testimony AND you can not be compelled to testify. BUT when the testimony the accused made was compelled (ie they were subpoenaed), the accused cannot be cross examined on that earlier statement. *Henry*
  + Under this section, the accused doesn’t have to assert privilege. He is automatically protected.
  + If testimony is freely given, do not apply Oickle, Singh, or s.24(2), because they do not apply.
* In Civil law, if you are compelled to make an incriminating statement, that statement can’t be used against you in a subsequent proceeding BC Evidence Act s.4. BUT, since there is no right to silence in civil law, you can be compelled to testify in the subsequent proceeding. At that time, you might be asked to make that same statement again.

##### R v Henry

Trial 1 – A (freely) testifies, T1

Trial 2 – A testifies, but changes testimony T2.

Court says that here, you can cross-examine, because the accused was never compelled.

She also thinks that the court is coming up with a RULE in Henry, and not a principle.

**The Common Law Confessions Rule** (***Oickle***)

**INTRODUCTION**

* ***Singh*** says that where you have confessions rule and s.7 concerns, these two things are functionally equivalent when the accused is knowingly talking to a person in authority (only exception if officer dressed like priest or lawyer); therefore, use  ***Oickle*** because it puts the burden on the Crown. **Otherwise, see s. 7 *Charter*** 
  + **Briefly state why we are using Oikle** - in this case, the person knows they are in a detention situation, and likely knows she is talking to a person in authority.
* The underlying **rationale** of ***Oickle*** is to exclude false confessions by determining whether the accused made a **meaningful choice to speak** to the authorities.

**APPLY THE TEST *Oickle:***

**Rule:** Crown must prove in **all of the specific circumstances**, **beyond a reasonable doubt** that the confession was voluntary: **Go through the following steps:**

* **(1) Has Crown led evidence capable of persuading the TOF that a statement was made:**
  + Leading evidence from a police officer will usually be enough to pass this stage of the test.
* **(2) Do the circumstances of the statement or other evidence establish that the accused believed the statement was made to a “person in authority”?**
  + **Where person of authority is issue**, A bears evidential burden, which is met by demonstrating that A was aware that he or she WAS speaking to police or prosecuting authorities. Once met, the crown bears legal burden to establish **BRD** that person is not a person in authority or statement made voluntarily.
* **(3) Can the Crown establish BRD that the accused did not reasonably believe that the statement was made to a person in authority?** 
  + Test is both subjective and objective (**Rothman**)
    - **Subjective** - does the accused have knowledge and belief that this is a person of authority.
    - **Objective** – The objective piece is the person could reasonably influence the state pursuit of the conviction (ie accused’s belief was reasonably held).
  + **If Crown cannot prove was reasonably person in authority (**EG: an undercover police officer would not satisfy the “person in authority” criteria (***Rothman***).
    - **First: go to Trickery**
    - **Then go to s. 7**
* **(4)** **Can the Crown prove BRD that the accused’s will was not overborne i.e. that the statement was voluntary?**
  + **Voluntariness is narrowly defined by the Court in *Oickle*.**
  + It is an **objective standard taking into account the individual circumstances of the accused.**
  + Failing to tell the accused that they have a right to silence will make it more difficult to argue the confession was voluntary.
  + **A. Inducements**.
    - Promises or Threats
      * Not all efforts to persuade the accused to speak are improper. What are problematic are “quid pro quo” **promises** or **threats** that by their nature raise a reasonable doubt as to whether they caused the accused to speak against his/her will.***Oickle***
        + ***Ibrahim*** – confession is not admissible obtained because of fear of prejudice or hope of advantage (threats or promises).
      * **Threats** – beatings
        + “It would go better for you to talk” – this language may or may not lead to exclusion. Look at the context. Try not to use it, but if used, it doesn’t automatically lead to exclusion. Look at it in context
        + Does the Police officer take away the choice to make a statement?
      * **Conscience things/Appeals to morality** – you would feel better if you told us…this can be ok. ***Oickle***
      * Where inducement is figment of As imagination, comes from within accused, his declaration is admissible ***Sinkarski (****schizophrenia example)*
    - **The inducement must be strong enough, considering the circumstances and individual, to raise a reasonable doubt about whether the will of the subject has been overborne** (***Spencer***).
    - Spiritual or psychological inducements with generally not be strong enough. ***Oickle (appeal to conscious Lloyd)***
  + **B. Oppressive circumstances.**
    - The court may exclude statements where the conduct of the police officers raise doubts as to whether the accused was able to make an effective choice to speak to the authorities or remain silent.
    - To be oppressive, it must be EXTREME: Includes things such as depriving the accused of food, clothing, water, sleep, or medical attention, denying the accused access to counsel, or engaging in intimidating or prolonged questioning. ***Hiolett*** – drunk and high, charged with sexual assault; stuck naked in a cell with no Kleenex; he confessed (he says) to get warm and a Kleenex. This is EXTREME.
    - Must be external circumstances and not mere timidity on the part of the accused.
    - **Policy reasons for the rule:**
      * The concern is that mistreatment like this can sap the will of the accused to resist requests for information (ie the person may confess to escape the inhumane conditions).
      * Diminished mental ability short of a lack of an operating mind (ie a small mental handicap) can be relevant in determining whether inducements or oppressive circumstances caused accused to speak involuntarily.
  + **C. Lack of an operating mind *Whittle -*** *schizophrenia but still operating mind)***.**
    - A statement may be involuntary when it is not the product of an operating mind. This test focuses on the accused’s state of mind at the time he made the statement*.*
    - **The accused has the evidential burden** of showing that there was a lack of an operating mind; once the accused has adduced sufficient evidence to make it a live issue, the Crown has to prove BRD that the statement was voluntary.
    - **Operating mind test** (adopted in ) ***Oickle from Whittle confirmed in Singh:*** the accused must have knowledge of what he is saying AND that he is saying it to police officers who can use it to his detriment. The operating mind test should not be a discreet inquiry completely divorced from rest of confessions rule.
    - **Difficult to Establish:** Since Whittle DID have an operating mind, it will be very hard to show lack of an operating mind.
      * **might be acceptable in following circumstances:**
        + **Psych shock *Ward***
        + **Intoxication:** the accused’s intellectual ability must be very significantly diminished ***R v Bennett*,**
* **(5) Can the Crown prove BRD that police did not engage in trickery that would shock the community?**
  + **Rationale:** If the police tactics are so egregious, then regardless of whether the confession is voluntary or not, it should be excluded under public policy grounds, because including it would bring the justice system into disrepute.
  + **AMBIGUITY** – this seems more appropriately to be analyzed under s.7 because the accused will not believe they are speaking to a person in authority.
  + But, ***Oickle*** says TRICKERY could still apply if A doesn’t know its a person in authority.
  + **TEST *Oickle: w*hen looking into police trickery, 2 facets of inquiry:** 
    - (1) - court may exclude confession where police trickery is so appalling as to shock community regardless how it affects voluntariness.
    - (2) - even if not shocking, the use of deception is a relevant factor in overall inquiry into a statement’s voluntariness.
  + **Consider:** all of circumstances of proceedings, the manner in which statement was obtained, degree to which breach of social values, seriousness of charge, effect exclusion would have on result of proceedings.
* **(6) - Are there points that don’t fit into the above factors??**
  + **The above three categories are not tightly constrained.**
    - The test doesn’t go far enough in providing categories to consider; however, categories are less important than the idea that she was not advised of her right to counsel/silence etc.
  + These factors might be stretched to fit into “oppressive circumstances”...
  + **Failing to tell the accused that they have a right to silence** will make it more difficult to argue the confession was voluntary.
* **(7) Come to conclusion: Was statement voluntary or will it be excluded?** The confessions rule is primarily about **reliability** - about the risk of false confessions. The court will be alert to whether the accused was tempted to confess falsely. Given that...
* **(8) If Voluntary, statement will be included** (IT doesn’t breach section 7 because functionally equivalent).  **BUT Go on to consider the General Discretion to Exclude (To exclude, prejudicial effect must outweigh probative value because Crown wants to use the evidence)** 
  + **GO BACK TO PAGE ON PE V PV IF TIME**

**Confession + Derivative Evidence:** One place where you might want to think about section 7, is where confession yields real evidence, that crown wouldn’t have otherwise found. Ie gun or body. That’s derivative evidence

* Analyse confession under ***Oickle*** rule
  + If voluntary, then confession and derivative evidence (gun) are BOTH admitted (***Singh***).
* If you find confession **involuntary** according to Oickle
  + If NO derivative evidence, statement is excluded (***Oickle***)
  + **If derivative evidence - exclude statement (*Grant***) and
    - **ASSUME there is a breach of s. 7. Say you are assuming so (*Singh***).
    - **State that the BOP is on the accused to prove on a balance of probabilities that there was a breach of section 7.**
    - **Then go on to 24(2) to consider whether derivative evidence should be admitted.**

**Section 7** (undercover police officer not pretending to be a priest/lawyer) (***Singh***)

**INTRODUCTION**

* **FIRST:** ***Singh*** says that where you have confessions rule and s.7 concerns, these two things are functionally equivalent; therefore use ***Oickle*** because it puts the burden on the Crown, but where A doesn’t know he’s confessed to a person in authority, we use section 7.
* The Accused has a right to hear his right to counsel and be informed of legal aid but police do not need to inform accused of his right to remain silent ***Hebert***
* **Burden of Proof:** S. 7 breach must be **proven by the accused** on a **balance of probabilities**.
  + Has the accused been denied the choice to speak or remain silent?
* **TRIGGER FOR SECTION 7: detention of accused (S. 7 has role outside of CL rule when):**
  + Arrest or Detention - Encounter between police and person that leads to an objective and subjective believe that the person is not able to walk away.
  + **s.7 will apply when the accused is speaking with an undercover agent or otherwise doesn’t know the person is a person in authority** (***Hebert***).
    - **There must be a causal link between the conduct of the state agent and the accused’s statement. IE** Is the conversation akin to an interrogation or did the conversation develop naturally?***Hebert, Otis***.
      * If the police engage the accused in conversation and take the subject toward the subject they want to get evidence about, then it breaches s 7 BUT if they are just in the same room and the accused confesses, then the confession is voluntary.
  + **Video?** s.7 could encompass more than testimonial evidence (accused was videotaped while walking to a line-up; tape didn’t violate rights). ***Parsons***
  + **Body Samples?** Court held that taking body samples from the accused infringed right to security of the person and contravened principles of fundamental justice, thus infringed s 7 ***Stillman***
    - **Dissent:** McLachlin said it infringed unreasonable search and seizure NOT s 7. S 7 should be testimonial evidence only
  + **Operating Mind** - “operating mind” standard requires that the accused have sufficient cognitive capacity to understand what saying and what is told to him, including understanding that what he says can be used in court. This ALSO applies to the right to silence under s.7 ***Whittle***
  + **Statutorily Compelled Statements?**– such statements would violate s.7 right to protection against self-incrimination. ***White*** (accused made statements under provincial legislative compulsion to PO about hit and run accident)
* **Balance:** The right to silence must be balanced against the state and public interest in investigating and prosecuting crime (***BSA***).
  + To what extent is compulsion being exercised?
  + To what degree are the state and the accused in an adversarial position?
* **Must then proceed to s. 24(2) analysis under** ***Grant*** **to see if statement should be excluded**
* **If derivative evidence comes from confession also go to *Grant* to decide whether to admit the evidence in addition to deciding whether to admit the statement**

**Right to Silence and the Co-Accused**

* In order to make full answer and defence it is permissible for an accused to attack the credibility of a co-accused, which includes the right to cross-examine on the pre-trial silence of the co-accused ***Crawford (****one A made statement to police other didn’t. At trial other A testified original one didn’t. Cross examined eachother about not giving statement to police)*

***R. v. Oickle (2000) SCC***

* A confessed to lighting several fires after a long interrogation in which he was offered food and drink and allowed him to use the bathroom. Police also administered a polygraph and exaggerated its reliability.
* The court ruled that the mild tactics and inducements were not enough to raise a reasonable doubt as to voluntariness.

***R. v. Singh (2007) SCC***

* Accused kills guy with stray bullet then makes admissions are repeatedly asserting his right to remain silent.
* Where A is detained and knows that he/she is speaking to a person in authority, s. 7 and ***Oickle*** are functionally equivalent, but accused is better off relying on CL rule in ***Oickle***.
* The dissent disagrees, saying that s. 7 requires that a state agent respect an accused’s wish to remain silent - once the accused asserts the right to silence, then the questioning must stop.
  + An accused may volunteer a statement that is not free and meaningful if their right to silence has been frustrated by relentless questioning.

***R. v. Sinclair (2010) SCC***

**Majority:** in most cases, an initial warning coupled with a reasonable opportunity to consult counsel satisfies s. 10(b). you do not need to continually provide access to counsel. There is also no right to have a lawyer present during questioning

Police must give additional opportunity to speak to counsel where unanticipated development make it necessary for the accused to seek advice.

**Binnie (dissent):** Accused should have right to re-contact counsel when a need for legal assistance arises on an objective basis.

**Lebel and Fish: (dissent):** Accused should have an ongoing right to talk with counsel while in detention or under arrest. Police must stop interview to allow accused to consult with counsel upon request.

# IMPROPERLY OBTAINED EVIDENCE: 24(2)

**Infringement which would lead you to Consider section 24 (2)**

- **Breach of S 7:** if the court finds a breach of section 7 (ie statement was made to undercover police officer and IS therefore excluded), court will assess whether statement should be included nevertheless under 24(2)

-**Derivative Evidence from Involuntary Confession:** if statement found to be involuntary under Oickle but produces **derivative evidence**, court will consider whether to exclude derivative evidence under 24 (2)

**-Investigative Detention (s.9 - everyone has the right to be free of arbitrary detention or arrest):**

* It arises not just when there is some physical restraint of suspect but also a psychological detention: a circumstance where individual has either a legal obligation to comply or a reasonable person would conclude by reason of state conduct that they have no choice but to comply. ***Grant*** *(in the facts of this case: PO standing in frong of him, no detention; keep hands in front of you, no detention...but maybe?; other two PO’s standing behind plain clothed officer = detention)*
  + **Consider** 
    - **Demeanour of police, or nature of the police conduct:** how they were behaving? What the police say and where they are standing.
    - **The presence of others or the circumstances giving rise to the encounter?**
    - **Characteristics of the individual:** age, minority status, etc.
* **For a Detention not to be arbitrary the officers must have reasonable suspicion or legal ground to obtain accused person. *Grant***

-**Breach of 10(a): saying what they’re charged with**

**-Breach of 10(b): Right to Counsel**

**-Breach of 8: Unreasonable Search and Seizure**

**Introduction**

* **Core principle surrounding improperly obtained evidence found in s.24(2):** is to maintain public confidence in the administration of justice by excluding evidence where admission would bring the administration of justice into disrepute.
* **Strikes a balance between:** civil liberties and society’s interest in prosecuting a case on its merits. Therefore, some illegally obtained evidence will be admissible and some will be excluded, depending on whether the administration of justice is brought into disrepute.

**APPLY THE s. 24(2) TEST**

**0 - The first step is to identify the Charter breaches.**

**1 - The sole basis for exclusion of evidence is 24(2)** ***Strachan; Therens*.**

**2 - Burden of proof on accused (party seeking exclusion) to prove breach of the *Charter* on a balance of probabilities *Collins ; Stillman***

**3 - Accused must establish that one or more of his personal right were breached *Collin; Stillman; Edwards***

* **Example where not A’s personal right*:*** 
  + ***Edwards (****A crashing on gf’s couch and stashes drugs in her couch police conduct warrantless search. Q if A has interest in privacy of apartment. Court finds that only gf has the privacy right in her apartment A didn’t so he couldn’t argue to have the drugs excluded becuase only his gf’s rights were infringed****)***
  + Driver of a car has right to privacy, but passengers don’t.

**4 - Must be court of competent jurisdiction *Collins & Stillman***

* s.24(1) tells us that any application for a s.24 remedy must be made before a court of competent jurisdiction ***Mills***
  + Judge conducting a preliminary inquiry lacks the jurisdiction to entertain a s 24 application ***Mills***
* Trial courts are courts of competent jurisdiction and so are superior courts ***Mills***
* National parole board not court of competent jurisdiction ***Mooring***

**5 - Evidence must be “obtained in a manner” that breaches charter right *Strachan Flintoff***

* There needs to be some connection between the breach and finding the evidence
* **A CAUSAL connection is clearly enough - if the breach CAUSES the discovery or creation of evidence.**
  + Evidence will be excluded if Crown cannot show it would have been found regardless of the charter breach ***Burlingham*** (court excluded info relating to the obtention of a gun because crown couldn’t prove on balance of prob that the evidence would have been found without unconstitutionally obtained info)
* **TEMPORAL or CONTEXTUAL will also be enough** ***Flintoff ; Strachan*** 
  + The Whole course of dealings between A and police is a single transaction and the whole of this relationship needs to be examined ***Black***
  + **AMBIGUITY**  **if breach after the evidence**- ***Strachan*** says the breach must precede the discovery but you can make a principled argument that it could be during or after. After all, the principle is that the court will distance itself from the breach so as not to bring the administration of justice into disrepute. Because this is not a causal connection, a breach before or after should not matter.
  + **However, if the Crown can prove on balance that the evidence would have been obtained regardless of the unconstitutionally obtained information, then evidence will be admitted *Strachan*.**
  + ***Strachan*** (*police had warrant to search premise, but when they burst in S said he wanted to call lawyer and police said no. police discover evidence they would have* ***inevitably*** *found. there was no causal connection but the court said the context in which evidence was obtained included a breach of the accused rights.)*
  + ***Flintoff*** *( A strip search first, then breathalyzed. Court said closely connected enough that they would go on with assessment)*
* **Too Remote?** - Impugned evidence has to be really remote to fall outside of purview of s 24(2) ***Strachan***
  + If A makes voluntary statement to cellmate days after 10 b infringement, too remote ***McArthur***
  + Police did a search of A’s apartment without warrant and found a guy who ended up pleading guilty and being a witness. Court said doing this made the causation too remote. ***Goldhart:***

**6 - Balance Factors to see if admission of evidence would bring admin of justice into disrepute *Grant***

* **Principled approach:** Court in ***Grant*** rejects ***Collins*** analysis in fa**vour of contextual analysis that balances three factors and is more consistent with the principled approach.**

**The *Grant* Test requires the court to consider:**

**A - seriousness of breach committed by police officers or authority**

* A **key question** is whether the authorities’ behavior has been so serious that the court should dissociate itself from that behavior by excluding the evidence (***Collins***).
  + This is best assessed on a continuum. You can be at either end or in the middle.
  + **Consider the following about the Police Officer**
    - Police behaviour is carefully controlled - the court has been clear that they should perform the actions that they regularly do correctly. Furthermore, if the court has already made a ruling on the issue, the court will not be lenient the next time ***Grant***
    - Was there a state of **urgency**? Extenuating circumstances, such as an emergency, can lessen the seriousness of the breach.
      * can’t demonstrate urgency retrospectively ***Genest***
      * the risk of destruction of evidence must arise on particular information ***Feeney***
    - Was it **systematic?** (doing it to other people)\*\*\*(SEE AMBIGUITY BELOW)
    - **Good faith** will reduce the need to exclude ***Silveira***
      * Includes operating under a law that is subsequently ruled unconstitutional
      * **Honest** mistaken, in good faith, will lessen the seriousness.
    - **Bad Faith**
      * EG: includes taking advantage of A’s unconsciousness to do something that would otherwise require consent (***Pohoretsky***) or
      * conducting a clearly impermissible search (***Greffe***) or
      * where police should have known they were trespassing (***Kokesch***).
    - **Ignorance of Charter** of standards must not be rewarded; negligence or willful blindness cannot be equated with good faith ***Genest***
    - Violation is more serious if **alternative approaches** exist; but it will also be judged serious if the police breach the *Charter* to get around a lack of legal alternatives (***Dyment, Kokesch***).
    - Where the court has already ruled, it is very serious to breach the accused’s rights in the same way ***Silviera***.
    - Violation is more serious if there is a **pattern of breaches** of A’s rights (***Belnavis, Stillman***) because the administration of justice is more easily brought into disrepute.
    - This is not a remedy for misconduct (***Collins***).
  + **AMBIGUITY if systemic** - May include institutional or systemic factors. Although the ***Grant*** court was unclear as to whether institutional or systemic factors should be accounted for, the better view is that they should. While the inquiry is focused on officer’s conduct, we must remain vigilant of the primary goal of s. 24(2), which is to uphold public confidence in the justice system through the court distancing itself from conduct that would bring the administration of justice into disrepute. Policy decisions of this type affect the Charter rights. Even if officers are acting according to policy, we should critically analyse their actions.
* **If Evidence is Statement by the Accused** (to undercover police officer or in breach of s 10 a or b)**: *Grant***
  + There is a presumptive general exclusion of statements obtained in contravention of the *Charter* for the preservation of public confidence because including the statements would bring the administration of justice into disrepute since the principle against self-incrimination is in play: the accused should not be co-opted into giving a confession.
  + Police behavior in obtaining statements is strongly constrained. Serious police misconduct is strongest for exclusion, inadvertent slips may suggest admission (but the courts haven’t told us what minor slips are).
    - unless, in a rare event, the breach is so technical so as to have no real importance.
* **If Evidence is Bodily Evidence (**breathalyzer, hair, dna)
  + Not the same as statements – concern here is dignity and privacy. Conscriptive evidence test failed to capture flexible language of s 24(2).
  + Deliberate and egregious breaches which suggest a disregard for A’s rights should not be condoned. A breach in good faith does not negatively impact repute of administration of justice.
  + Focus here is on the PO - was it deliberate or inadvertent.
* **If Evidence is Non-bodily Physical Evidence (**gun, drugs, knife)
  + depends upon the manner of discovery and the degree to which this manner of discovery undermines the Charter-protected privacy interests of the accused. Privacy interests related to the nature of non-physical evidence are also considered.
  + Be careful not to confuse with derivative evidence (evidence comes from statement).
  + Deliberate and egregious breaches which suggest a disregard for A’s rights should not be condoned. A breach in good faith does not negatively impact repute of administration of justice.
* **If Evidence is Derivative Evidence:** (when you make a statement resulting from breach which leads police to find evidence ie gun)
  + – depends on the deliberateness of the Charter breach used to obtain the statement, which is usually from unconstitutionally obtained statements. The more serious the conduct, the more the admission will undermine public confidence in the legal system.

**B - Then consider the impact of the breach on the charter protected right**

* Look at the interests engaged by the infringed right and examine the degree of violation;
  + From fleeting and technical to profoundly intrusive;
* \*\*\*Look at the underlying rationale of the right
  + Consider the expectations of individuals; for example, privacy and dignity.
  + presumption of innocence;
  + s. 7 - the right to remain silent in the face of state interrogations into criminal activity AND the right of an accused not to be compelled to testify
  + s.10(a) - Right to know what you are charged with - until you know allegations against you in difficult to decide how to defend yourself
  + s.10(b) - Right on arrest or detention to retain and instruct counsel without delay - until you have legal counsel, you might not know how to proceed in the interrogation, or what your rights are.
  + s.8 - Unreasonable search and seizure - protects the persons dignity and privacy.
* **This is an objective test.**
* **If Evidence is Statement:**  Impact on *Charter* protected rights – failure to observe right to counsel undermines A’s right to make a meaningful and informed choice to speak or stay silent. Spontaneous statements are less problematic than induced statements
* **If Evidence is Bodily Evidence -** Impact on *Charter* protected rights – the degree to which a breach intrudes on A’s bodily integrity, privacy and dignity will vary. The greater the intrusion, the more likely the court is to exclude the evidence (Recall hierarchy of rights: ie plucking hair v. strip search should be considered at this point, taking blood etc)
* **If Evidence is Non-bodily Physical Evidence -** Impact on *Charter* protected rights – most often privacy s 8. Intrusion may vary – consider hierarchy of rights: a house is a place with a higher protection of privacy than a business or car. Intrusion into a person’s bodily integrity is demeaning and will be considered serious. Person is more closely protected than pockets but pockets more than home and home more than car
  + Note this is NOT Grant - this is walking around house, smelling pot and going inside. Thus privacy is infringed. Again, there is a spectrum of privacy.
* **If Evidence is Derivative Evidence:** Impact on *Charter* protected rights – consider extent to which breach impinged on A’s right to make a free and unconstrained choice whether to speak to police. Discoverability may be an important factor – if it was **independently discoverable**, That is, if the police would inevitably have discovered the evidence, it militates in favour of inclusion. BUT if evidence is NON-discoverable, this will militate in favour of exclusion.

**C - Finally, consider society’s interest in adjudicating the case on its merits**

* In some cases, excluding evidence can bring administration of justice into disrepute ***Therens***
* **What is the centrality of this evidence to the Crown’s case?**
  + This stems from reliability. The more central it is, the more it will weigh in favour of inclusion.
* **Seriousness of the offence will always be a neutral factor *Grant***
* **Ask: Is the evidence reliable**?
* **If Evidence is Statement -** Interest in having case tried on merits – compelled statements raise concerns about reliability. Where present, this concern suggests exclusion.
* **If Evidence is Bodily Evidence -** Interest in having case tried on merits - reliability of bodily evidence normally favours admission.
* **If Evidence is Non-bodily Physical Evidence -** Interest in having case tried on merits – reliability normally favours admission
  + Here, police conduct has to be in bad faith, or somewhat more than trivially encroaching on accused before the evidence will be excluded.
  + Police have to do a lot to get the evidence excluded.
* **If Evidence is Derivative Evidence:** Interest in having case tried on merits – for physical evidence reliability normally favours admission. Since evidence in this category is real or physical, there is usually less concern as to the reliability of the evidence; thus public interst in adjudicating case on its merits will favour in admission of this evidence.

**D - Final balancing stage**

* Given the above, would admitting the evidence bring the administration of justice into disrepute? court has a **duty** to exclude such evidence
  + Go back to the seriousness of the breach principle, and weigh against getting to the truth of the matter.
* Disrepute is a legal standard that must be assessed from the perspective of a **reasonable person, fully informed of all the circumstances, and who understands the Charter** and its underlying values, but with judicial detachment from pressures that can render a community’s mood unreasonable ***Grant***

**E - Consider General Discretion to Exclude: If prejudicial effect outweighs probative value, court can exercise discretion and exclude it anyway. GO BACK TO PAGE ON GENERAL DISCRETION IF YOU HAVE TIME**

**Examples where court applied 24(2)**

* ***Grant*** (*police stop suspicious looking black man who, when they asked if he had anything he shouldnt gave them a gun)* gun admitted because of unsettled area of law and great reliability.
  + **Keep in mind that the gun basically constituted the entire crime, the law was unsettled and defence was given to the decisions below in this case.**
* ***Harrison (****police pulls over a guy who was keeping to speed limit, had no front plate. Then eh realized he was from alberta and didn’t have to have it. Police pulls him over anyway and searches the car finds LOTS of Cocaine)* – evidence excluded although it was reliable because the breach was egregious and deliberate

# HEARSAY

**INTRODUCTION**

* **Hearsay is an out of court statement admitted for the truth of its contents.**
* **The key principle:** here is the search for the truth through the adversarial process. Though the court prefers to search for truth through the direct process of direct and cross-examination, it is sometimes necessary to admit hearsay evidence.
* The hearsay **rule is triggered:** when a party seeks to introduce a statement made at another time for truth purposes.
* **If the statement hearsay**it is presumptively inadmissible.
  + **If Abrogated by Statute:** Hearsay will be presumptively admissible if a statute explicitly or implicitly abrogates the rule. If this is the case, presume it is admissible but evaluate the dangers as to weight. This is more likely to arise in the civil context.

**APPLY THE TEST**

**DO THE FOLLOWING FOR EACH SEPARATE PART OF THE STATEMENT YOU MIGHT WANT TO USE**

* **A. Is it a statement made at another time (express or implied)?** 
  + **Note:** conduct intended to convey meaning is hearsay ***Perciballi***.
  + Can be statements made by someone else, or can be statements made by the very witness who is testifying.
* **B. What is it’s truth content?**
  + **Do you want to use it for truth purposes?**
    - ***Non-truth purposes may include:***
      * to establish the declarant’s belief at the time of making the statement;
      * to establish the recipient’s belief at the time of hearing the statement;
      * to establish that the hearer or the declarant had a particular state of awareness or knowledge
      * **to impeach or bolster the credibility of the declarant (who is also the witness).**
* **C. Is it being introduced to prove the truth of its contents? *Khelawon***
  + **What is it’s:**
    - **Relevance?**
    - **Materiality**

If yes to 1.A and 1.C, the statement is hearsay and you should proceed to consider the exceptions. If no, the statement is not hearsay.

**2. Does the hearsay statement fit within an established exception to the hearsay rule?** If so, it is presumptively admissible. ***Starr; Mapara*** The onus is on the party seeking admission on a **balance of probabilities to show that it meets the exception**.

**A. Admissions by a party**

* Any admission made by a party to a civil action or the accused, that the other party or the Crown wants to bring is admissible and not hearsay ***Evans ; Foreman***
  + If the accused wants to bring his own statement, it is hearsay. ***Foreman***
  + If the evidence is an admission by a party, including a statement by the accused in a criminal case, it is admissible. There is no need to consider the necessity and reliability of that evidence before concluding admissibility. ***Starr*; *Foreman*; *Terrico*.**
  + **Though you may not go on to consider necessity and reliability, BUT you MUST still consider Residual discretion to Exclude**. (ie ***Pickton*** *“I killed 49 women” was admissible but very prejudicial because not related to whehter he killed those 6 and could still influence jury)*

**B. Prior testimony -**

* At **common law**, evidence from a prior proceeding is admissible if:
  + (1) the witness is unavailable;
  + (2) the parties are substantially the same;
  + (3) the material issues are substantially the same; and
  + (4) the person against whom the evidence is used had an opportunity to cross-examine the witness at the earlier proceeding. *Walkerton v. Erdman* 1894 SCC.
  + **Remember:** Only worry about this if you want to use prior testimony for truth purposes, not if you want to impeach witnesses
  + Ok if witness was not cross examined - as long as the opportunity to cross-examine exists (old lady in My Cousin Vinny).
* For **civil cases**, **r.40(4) *Supreme Court Rules (B.C.)***provides a broad right to admit hearsay evidence from prior proceedings.
  + BUT this has been held valid at the junior level, and has not been confirmed by higher courts (?)
* For **criminal cases**, **s. 715 (1) *Criminal Code*** allows a party to introduce hearsay evidence if:
  + (1) the witness is unavailable on certain grounds or refuses to testify; and
    - Witness refuses to be sworn; is dead; insane; unable due to illness to attend, or absent from Canada.
  + (2) the evidence was elicited in a prior proceeding on the same charge.
  + A bears the onus of proving that s/he did not have a full opportunity to cross-examine the witness. Does not breach *Charter* s. 7 or 11(d): ***Potvin***.
  + **when accused earlier compelled to testify section 13 of charter protects him from having statement used against him *Henry***
* **If the prior testimony falls outside these exceptions, use the principled approach.**

**C. Declarations in the course of duty**

* **TEST**: At Cl, statements made by a person under a duty to another person to do an act and record it in the ordinary practice of the declarant’s business are admissible, as long as they were made contemporaneously with the facts stated and without motive or interest to misrepresent the facts ***Ares v Venner (****malpractice suit against physician, court held nurses’ notes admissible without necessity of calling original note makers as witnesses)*
  + **1-Written note needs to be made contemporaneously with the observation being made *Palma***
  + **2-Observation was made in course of duty**
  + **3-By someone who has personal knowledge of the situation (*Setak*)**
    - someone who is supposed to make recording does it, doesn’t apply to meeting minutes…someone could be looking and telling other to write it down both have obligation to be accurate) ***Setak Palma***
  + **4-person making the observation is under a duty to make a record of the observation *Laverty Wilcox***
    - ***Wilcox*** *(allegation of overfishing. Guy in charge of paying fishermen was instructed by employer to enter #s in computer but pay them for crabs brought in. on his own, he kept a log book where he wrote down what was coming in. Court said couldn’t come under declarations udner course of duty because he had no obligation to keep the book.)*
      * This is troubling because exception only available to corporations and govt not **individuals** (it WOULD apply to the notes the credit card company makes of my phone call; it would NOT apply to the notes that I make of the phone call)
  + **5-person making record must have no motive to fabricate** (**Ares v Venner**) - there needs to be particular evidence of a motive to fabricate before this is an issu
  + **Summary Notes:**  A summary is admissible if the person who first recorded the information was under a duty to record it ***Monkhouse***
* **There are STATUTORY EXCEPTIONS TO THE HEARSAY RULE BASED ON DUTY**
  + **Although there are statutory exceptions to the CL exception,** there is a trend towards using principled approach here if admissibility under existing rules is questionable **(e.g. *Larsen* 2003 BCCA; *Wilcox* 2001 NSCA)**
    - if doing exam. Say you know theres a common law duty, but you think principled approach is better in this context because common law factors not as clear etc.
  + **s. 30 *Canada Evidence Act*** (for proceedings under federal law) and **s. 42 *Evidence Act (B.C.)*** (BC jurisdiction) provide that business records can be admitted, but are limited to declarations of fact made in ordinary course of business (i.e. does not extend to opinions).
    - It is also unclear if the evidence looks unreliable whether it will be let in.
    - **Medical Opinion**: you CAN NOT admit a medical opinion under these factors - it has to come in under the CL 5 factors above
  + **s. 30 *Canada Evidence Act*** is broader than common law because it does not limit admissibility to records made pursuant to duty.
  + Note difficulties associated with admitting evidence generated in anticipation of litigation **(s.30(10) *Canada Evidence Act*;** ***Setak v. Burroughs***

**D. *Res gestae***

* **Bodily Conditions (ow, my back is hurting)**
  + statements of physical sensation contemporaneous with experiencing the sensation are admissible as evidence of the existence of that state; however, statements about what caused that sensation are not ***Youlden v London GAC, Czibulka*.**
  + The statement itself must show that it is contemporaneous (or shortly after) ***Samuel v Chrysler*** *(p wanted to admit statements made to her doctor for purpose of proving she actually suffered from complaints described by her but court said impossible to determine if contemporaneous so did not admit. Also concerned with reliability because litigation was under way. Did admit them as proof of complaint to explain treatment)*
    - If narrative about past symptoms, not admissible
    - It doesn’t need to be an involuntary exclamation. Just made relatively soon after experiencing sensation
    - NOT proof that the alleged event CAUSED the sensations.
  + It might still be susceptible to reliability analysis if there’s reason to suspect the person is fabricating their pain. It may be necessary to show that the past statement is the best evidence available ***Samuel***
  + Declarant need not be unavailable to testify as precondition to admissibility of statement. But a need must exist for declarant to rely on prior statements cause of impaired memory ***Samuel.***
* **State of Mind**
  + If mental state of the declarant is in issue, then statements of his mental state are generally admissible in proof of the fact.
  + **Contemporaneous:** State of mind exception likewise depends on being contemporaneous with experience of that state.
    - Has to be about something you are ABOUT to do (I am GOING to skip office hours because...)
    - NOT admissible if it is about something in the past (I didn’t go to my office hours because...)
  + **Natural Manner:** The statement must be made in a natural manner and not in circumstances of suspicion (do they have an intention to fabricate) ***Starr-****witness saw her bf, who was witness of a hit in the car with another woman and the witness says where are you going with other woman and he says going to write off a car with Starr. he gets shot. Court asks can they use that evidence but decides not to because he might have had reason to lie to his gf)*
  + **INFERENCES**
    - They **can** be used as a basis from which to infer that the declarant acted in accordance with the relevant intention if the person acted in a natural manner and not in circumstances of suspicion **(*Starr*).**
    - They **can’t** be used to infer that accused acted in accordance with the declarant’ perception of the accused’s intention (can NOT be used to infer G’s state of mind) ***Smith, Starr, Griffith & Harris***
    - **Accused’s Motive:** In ***Griffin*** - **majority** of the court admitted the statement to show that P feared G and only G; AND that it raised an inference that G had a motive to harm P. This is **relevant** because the fact that P feared G made it more likely that G ultimately harmed him.
      * SO, note that there can be different purposes for using the statement (ie victims state of mind; the accused’s motive). Accepting the statement for one purpose may have the consequence of the jury using the statement for another purpose.
      * Dissent - it does not matter what purpose the court says the jury has to use the statement for, it will always be used to infer that G killed P.
* **Spontaneous Statements**
  + A statement may be accepted if it was made spontaneously (contemporaneously) by a participant in the event
  + Justification is (1) little time for calculation (2) no problem of faulty memory (3) perception may be heightened.
  + **AMBIGUITY about the reliability of a spontaneous statement** - Some research suggests good reason to doubt perception during a startling event since danger and stress can affect estimates of time and distance. Although that fact has not yet been considered in this exception, it might be necessary for the court to consider refining this approach under the principled exception, since exact contemporaneity may be less important than the question of whether there are concerns about concoction or distortion ***Clark***. Nevertheless, some contemporaneity remains important ***Khan*.**
    - ***Clark* (**deceased was stabbed and after yelled out help ive been stabbed)

#### **Khan (**childs statement about sex assault made 15 mins after it took place. Court said couldn’t admit it on spontaneous declaration but that admissible on another basis of newly principled approach to hearsay.)

* + if longer than 15 minutes, consider **Khan** and apply principled approach
* **Declarations accompanying relevant acts**
  + Statements made at the time of a relevant act which tend to explain that act will be admissible ***Clowser v Samuel*** *money order sent with letter of instructions letter lost and evidence of contents was admitted explainging act of sending money order*
  + The act which is accompanied by the declaration must be either a fact in issue or relevant to it **Hyde**
  + The statement must accompany the act or transaction and be uttered at the same time or shortly before or after the commission of the act

If the evidence fits within *any* established exception, it is presumptively admissible (*per* Iacobucci J. in ***Starr*** and McLachlin C.J. in***Mapara*).** But the party resisting can still challenge either the category or the particular evidence under the principled approach. SEE BELOW

**Challenging Traditional Exceptions with the Principled Approach**

* **Particular Category of Exception:** Can the party resisting admission, prove on a **balance of probabilities** that **elements of the exception** do **not meet the standards of necessity or reliability? *Starr Mapara***
  + **Apply principled approach Tabbed below**
  + If not necessary or reliable, the evidence is inadmissible. It would not be able to meet the principled approach, obviously.
  + The following exceptions have been confirmed as meeting the twin requirements of necessity and reliability:
    - Declarations in the course of duty (***R v. Larsen* 2003 B.C.C.A. 18); and**
    - Spontaneous statements (*res gestae*) **(*Starr*).**
    - Prior Identifications
    - Co-conspirator’s statements (***Mapara***)
    - Statements of present intention

**NOTE: if falls into one of above categories, say so and focus on the particular type of evidence**

* **Particular Evidence:** Can the party resisting admission prove that **this evidence** is not necessary or reliable on a **balance of probabilities**? ***Starr Mapara***
  + Apply Principled Approach Tabbed Below
  + If so, the evidence is inadmissible. It would not be able to meet the principled approach, obviously.
* **Residual Discretion to Exclude:** The judge should nevertheless exercise his or her residual discretion to exclude the evidence on the basis that its prejudicial effect outweighs its probative value (defence evidence will only be excluded where prejudicial effect substantially outweighs probative value – ***R. v. Seaboyer***
  + The success of this inquiry will be rare ***Khelawon***

**PRINCIPLED APPROACH *Khan ; Smith***

**If the hearsay statement does not fit within an established exception, should it be admitted under the**

**principled approach? *Khan***

* **Hearsay evidence is presumptively inadmissible, but will be admissible when it is necessary and reliable (*Khan*)**
* **Burden of Proof:**  The party seeking admission has the burden of establishing in a *voir dire,* on a **balance of probabilities,** that the evidence is necessary and reliable ***Khan* and *Khelawon***
* **The more reliable the evidence, the less necessary it need be, and vice versa.**
* **(A) Is the evidence necessary?** 
  + Judged from the truth-seeking function of the trial.
    - It does not mean necessary to the party’s case, it means necessary to finding the truth (***Smith***).
    - Necessity cannot undermine the other party’s ability to test the evidence in the criminal context, (***Khelawon***).
    - There are three ways the evidence will be necessary:
      * **(i) Witness unavailability** (***Khan***)
        + Includes expediency or convenience (***Smith***).

Getting 300 people to testify about drug call, for example.

* + - * + Includes reasonable risk of harm to potential witness (***Nicholas***).
      * **(ii) Testimonial unavailability** (***KGB***; ***FJU***)
        + Witness is available but recants, forgets, or is otherwise unavailable to provide the same information.
        + Where the problem is testimonial incapacity, substitutes may be less important (***KGB***).
      * (**iii) Efficiency *Ares v Venner***
* **(B) Is the evidence sufficiently reliable to overcome the traditional hearsay dangers?**
  + **It is a balancing of all the factors**.
  + The below are not mutually exclusive but their relative importance should be driven by context (***Khelawon***).
  + **AMBIGUITY**  **in assessing reliability**
    - In ***Starr***Iacobucci held that you can only think about things intrinsic to the evidence when thinking about reliability. And you cannot think about any other piece of evidence that tends to corroborate or enhance reliability. He said this is left to the trier of fact
    - However, ***Khelawon*** said that was inconsistent with ***Khan*** and its not really a workable distinction.
    - Though there remains a distinction between threshold and ultimate reliability, when determining if evidence meets the threshold, it is okay to look at other evidence.
  + **(i)** **Is the statement Inherently reliable?** In other words, do the **circumstances** in which the statement came about provide indicate it was truthful and accurate? (***Khan***; ***Smith***). Below are some factors:
    - **Is there corroborating evidence** (***Khan***)? **Most important**.
    - Do the usual dangers from hearsay arise?
      * Perception, memory, miscommunication, etc.
    - Did the declarant have any motive to lie ***Khan (****preschooler wouldn't lie about getting sexually assaulted. more reliable)* ***Smith (****teenager might lie to mom not as reliable)*?
    - Did the declarant know the implications of the statement (***Khan***)?
    - Are the declarants actions consistent with his statement?
    - Reliability will not be achieved if hearsay statement is equally consistent with other hypotheses ***R v RD (****childs statements about sex abuse by father were inadmissible because consistent with her lying to cover up sex activity with her brother)*
  + **(ii)** **Were there adequate Substitutes for Cross Examination?** Below are some factors:
    - If the following factors are present, it may suggest there is an adequate substitute for cross-examination ***(KGB)***
      * The prior statement given under oath (***Hawkins***)?
      * Is there opportunity for cross-examination so that ToF can assess demeanor (***Hawkins***)?
        + This factor goes a LONG way to showing reliability.
      * Was the statement videotaped (***Khelawon***)?
      * Understands consequence of lying ***KGB*** *gave statements they saw A do stabbing but then recanted*
    - If there are very important factors that MUST be cross-examined on, the evidence is likely to be excluded (***Khelawon***).
      * **Unless you can point to reasons why cross-examination is not needed, its need will be presumed**
    - In ***FJU*** and ***KGB*** – court thought about inherent reliability AND substitutes for x-exam. There can be a MIXTURE of the two types of reliability.
* **(C) BALANCE Necessity and Reliability: Should Evidence be Admitted?**
  + In the Criminal context, right of A to make full answer and defence and the right to a fair trial is engaged when crown wants to use hearsay against accused. (ie test the Crown’s evidence through cross-x), ***Khelawon.***
* **(D) If it should be Admitted: Should it be subject to general Discretion to Exclude? :** Does PE outweigh PV?
  + Remember if it is Defence Evidence PE must Substantially outweigh PV.

GO TO SECTION IN OUR CAN ON PE V PV

**Double Hearsay**

* Analyze each part separately beginning with the part farther away from the court.
* However, do the exclusionary discretion for both at the end of the total analysis.

***R. v. Khan (1990) SCC***

* Young girl’s hearsay statement convicts doctor of sexual assault. she told her mom 20 mins later, falling out of spontaneous statement exception.
* Court applied principled approach
  + No motive to falsify story
  + Statement was made almost immediately after the event
  + She couldn’t have knowledge of sexual acts.
  + Corroborating evidence of seamen on sweater and her inability to appreciate what she was saying and its implications were deemed adequate substitutes for reliability.

***Smith***

* Girl calls mom and says she’s getting ride with someone; she is murdered.
* Necessary – witness unavailability
* Reliability
  + Inherent reliability – circumstances showed the statement to be true
  + First two calls
    - Mom had no reason to lie; dangers associated with hearsay were not present
  + Third statement,
    - Conditions did not indicate trustworthiness: there are all sorts of reasons a teenage girl would lie to her parent.

***R. v. Khelawon***

* Old people abused in care homes; old guy dies before case is tried.
* Presence of adequate substitutes to show reliability of statement:
  + Under oath
  + AND videotaped
  + NO cross
    - The inability of cross-examination imposed significant limitations on the accused’s ability to test the evidence.
  + AND , there were there were other reliability concerns: witnesses old and losing mind and dead.

***R v KGB***

* B stabbed and killed someone; issue was friends first said B was responsible; later they recanted; Crown wanted statements for the truth of their contents
* Presence of adequate substitutes show reliability of statement:
  + Under oath
  + Statement was videotaped in entirety
  + AVAILABLE for cross: opposing party could cross-examination declarant on prior inconsistent statement

***R v U(FJ)***

* FJ told officer her father (accused) was having sex with her; at trial JU recanted the allegations of sexual abuse
* Presence of adequate substitutes to show reliability of statement:
  + Not made under oath;
  + Not videotaped,
  + BUT she was AVAILABLE for cross-ex. This significantly alleviated the dangers arising from hearsay.

***R. v. Griffin and Harris (SCC) 2009***

* G and H charged with V’s murder.
* Circumstantial evidence place G and H near the scene.
* V had been hiding prior to murder, while G searched for him.
* G’s defence was that someone else murdered V.
* Prior to death V said to girlfriend, “if anything happens to me, it’s your cousin’s family.
* **Majority** – hearsay was admissible as a state of mind exception. V’s state of mind and provided circumstantial evidence of G’s motive. It was not used for its truth. A limiting jury instruction was required so that the statement was not used to impute G with intention.
* **Dissent** – The purpose to which the hearsay might be omitted was not workable. The statement could not support the inference that no one else wish to harm V.
* Although**,** V’s state of mind did tend to support other evidence that G wished to harm V, the risk of misuse was too great. The jury would almost certainly make the prohibited inference.
* There are also reliability concerns regarding with V really feared G and this could not be alleviated by cross-examination.

# ABORIGINAL EVIDENCE SECTION

**Information Gathering and Aboriginal Rights and Title Litigation**

**35. (1) *Constitution Act*** states that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. Rights protected by s. 35 are those which were not extinguished before 1982, but also that aboriginal practices may change over time.(***Sparrow***)

Aboriginal people bear the burden of establishing (balance of probabilities) that an aboriginal right exists.(***Van der Peet***)

**TEST for Aboriginal Rights:**(***Van der Peet***)

* (1) existence of the ancestral practice, custom or tradition advanced as supporting the claimed right;
  + Existence of a system of land tenure law internal to the Gitskan (***Delamuukw***)
  + Historical use and occupation of the land
  + Aboriginal rights may include title to land, in which case the aboriginal community must demonstrate a continuing connection to land. (***Delgamuukw 1997***)
  + The exercise of certain rights may also have a geographical dimension.(***Mitchell* (2001)**)
* (2) that this practice, custom or tradition was “integral” to his or her pre-contact society in the sense it marked it as distinctive; and
  + Can it be said that the culture would have been “fundamentally altered” **without** this practice, custom or tradition? Was it a defining feature? Was it vital to the collective identity? Did it truly made the society what it was? (***Mitchell***)
* (3) reasonable continuity between the pre-contact practice and the contemporary claim.

**If there is a claim that the Crown had a Duty to consult, evidence should show (from memo):**

* (1) The claim of aboriginal right or title to the area and its surrounds (Go to Van der Peet test)
* (2) The claim was communicated to government decision makers
* (3) Potential adverse effect of project on (1)
* (4) No or inadequate consultation

The **scope of the Crown duty to consult** with aboriginal communities depended on the strength of the community’s claim to rights and title. A strong *prima facie* claim attracts the greatest protection, and correlates with a higher obligation on the Crown’s part. A less substantiated claim will attract less protection**.** (***Haida v. B.C.* (2004)**).

A provincial administrative adjudicator is empowered to make an incidental finding about the existence of aboriginal rights or title where that question is relevant to a matter that arises before him or her. This finding wouldn’t become binding precedent, but would guide the adjudicator’s decision making in the particular case**.** (***Paul v. B.C.* (2003)**)

### Evidentiary Principles and Aboriginal Evidence

Lamer C.J. confirmed the principle first mentioned in(***Van der Peet***)that the constitutional framework and burden of proof meant that courts had to “come to terms with the oral histories of Aboriginal societies” (***Delgamuukw*** )

Lamer C.J. held that “the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.”(***Delgamuukw***)

(***Mitchell***)clarified the evidentiary principles laid down in the earlier cases. McLachlin C.J. held that the flexible application of evidentiary rules applied to both admissibility and weight of evidence.

* However, three basic evidentiary principles persist when a court is presented with evidence in support of an Aboriginal claim (as they do in other cases). These are:(***Mitchell***)

* + **evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case.**
  + **the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it.**
  + **even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.**

In other words, what we call the fundamental approach still applies. Admissibility is still determined on a case by case basis.

**Aboriginal Hearsay/Elder Test** (***T’silqhot’in Nation****)*

**INTRODUCTION**

* The SCC in ***Mitchell*** and ***Delgamuukw*** guide our approach to admission of hearsay in cases dealing with aboriginal evidence.
  + In considering whether oral histories should be admitted as evidence, the court must be alive to the fact that it is necessary to adapt the rules of evidence to accommodate the admissibility of hearsay evidence (***Delgamuukw***). ***Mitchell*** confirms this, and emphasizes that we should not fall back on Eurocentric ideas, but rather, give weight to the aboriginal perspective. However, the evidence in aboriginal cases should not be given more weight than it can bear.
  + Requiring independent validation of oral history is not consistent with applying the principles of evidence flexibly with attention to the constitutional nature of Aboriginal rights (***Van der Peet***).
  + Furthermore, SCC says in thinking about oral history evidence, we should not fall back into Eurocentric perception of truth. We need to be sensitive to cultural differences about keeping and conveying information ***Mitchell.***
* In ***Tsi Nation,*** a case considering Ab rights and title, the Vickers J. came to a decision about a process regarding admission of aboriginal oral histories. While his decision was only intended to be an approach for his case, this approach embodies the approach of ***Delg*** and ***Mitchell*** and is consistent with the principles of ***section 35 of the Constitution*** as Newman considers it a good attempt at reconciliation; as such, it should serve as an approach to admission of aboriginal hearsay evidence.
* The below will not be a voir dire, but will be at the beginning of the testimony so that the TJ can make an early finding on the hearsay evidence.

**APPLY Framework set out by Vickers J. in *Tsilquotin Nation***

**FIRST: At the beginning of trial counsel should provide a Summary of the following:**

* **(i)** How their oral history, 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 of safeguarding the integrity of its oral history, stories, legends, and traditions;
* **(iv)** Who will be called at trial to relate such evidence, and the reasons why the are being called to testify.
* **(v)** Essentially, the summary should provide a will say of evidence to be given by experts in order to help the TJ evaluate reliability when the evidence is heard.

**SECOND: In relation to each piece of evidence TJ needs to think about necessity & reliability (in terms of what constitutes reliability for the aboriginal tradition and with regards to corroboration).**

* **(1)** Identify the hearsay according to the ***Khelawon*** factors. (oral history = hearsay)
  + Was the statement made at another time?
  + Is the statement being introduced for its truth content?
* **(2)** Apply the ***Khan*** test of necessity and reliability.
  + **(A) Necessity**
    - Where someone has witnessed an event, they should be called
    - If everyone is dead, then necessity is satisfied.
    - ***Delgamuukw*** says because of dislocation and disruption experienced by aboriginal communities and passage of time. Can be difficult to get access to rights guaranteed in **s 35.** So evidentiary standards must be administered with attention to difficulties created by colonialists
    - Necessity analysis might have to have regard to those things, might be that best evidence you can get about aboriginal community is less good than a settlor in the area
    - It is necessary for aboriginal people to rely on oral history, because that’s all they have
  + **(B) Reliability**
    - How do the below meet the ***Khelawon*** criteria of inherent trustworthiness and substitutes from cross-examination, keeping in mind the Constitutional nature?
    - Begin with what aboriginal community says to measure the reliability, following ***Tsilquot’in*** and ***Delgamuukw***
    - Next, think about inherent reliability etc to determine whether there is a particular reason to be concerned with it.
    - **Factors to consider**
      * **(i)** Personal information concerning the witnesses circumstances and ability to recount what other have told him/her;
      * **(ii)** Who told the witness about the event or story;
      * **(iii)** The relationship of the witness to the person from whom he or she learned of the event or story;
      * **(iv)** The general reputation of the person from whom the witness learned of the event or story;
      * **(v)** Whether that person witnessed the event or was simply told of it;
      * **(vi)** Any other matters that might bear on the question on whether the evidence tendered can be relied upon by the trier of fact to make critical findings of fact.
      * **(vii)** It makes sense to bring in reliability factors specific to this community.
      * **(viii)** Can look at corroborating evidence (***Khelawon***).
        + **Problem** in the Aboriginal context because its often too difficult to find corroborating evidence. The evidence provided shouldn’t be discredited just because nothing else can corroborate it.
      * **(ix) Newman** – suggests inquiry into witnesses’ roles in preparing for litigation.
        + **This is contentious because all witnesses generally prepare for litigation and plaintiffs are very involved. If Aboriginal witnesses are to fit within the system, why should this be a criterion**?
* **(5)** Experts must qualify via ***Abbey***. BUT Aboriginal witnesses giving oral history n**eed not be qualified as experts** but their evidence must satisfy the above. ***Tsilquotin***
* **(6) General Discretion to Exclude**
  + Given this case will likely not have a jury, the question of the residual discretion to exclude is probably dealt with through weight, since there is little risk the TJ sitting alone will improperly use the evidence. Thus, at this stage, it is more likely that the evidence will be admitted, and weight will be the important factor.
  + Furthermore, the witness is available to be cross-examined so there is little room for prejudicial effect.