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| LAW 280 | EVIDENCE |
|  | CondensedAnnotatedNotes |

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# INTRODUCTION TO THE FOUNDATIONAL APPROACH

## LEGISLATION

In other jurisdictions, reform of evidence law has proceeded by statute (eg. Federal rules of evidence in the US,Uniform Evidence Actin Australia, Police and Criminal Evidence Act in the UK). In Canada, there is an Evidence Act at the federal level (which governs anything that falls under federal jurisdiction, like criminal, immigration, taxation) and **individual evidence acts in each of the provinces.** These acts are incomplete relative to cognate jurisdictions, so when the legislature in Canada failed to pursue evidence reform and goaded by the Charter, the SCC pursued its own reform efforts. This has yielded **a more flexible evidence system** than a statutorily determined regime, **as judges have more leeway** to interpret the rules and reformulate them as necessary.

## KEY TRENDS

THE MOVE AWAY FROM RULES TOWARDS A PRINCIPLED APPROACH

Rules are relatively rigid, applied inflexible and without regard to the particular context of the case. Principles are more like guidelines - they need to be applied in every case, but their application varies contextually. KHAN’s reformulation of the hearsay analysis considers why courts may prefer to avoid hearsay, and when it may be in the interests of justice to admit hearsay. This illustrates the injustice inherent in having an "ossified" rule that applies in all cases.

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| RULES | PRINCIPLES |
| Predictability* Categories are firmer, and clear from the outset.
 | Flexibility* Trial judges have more flexibility to decide what evidence is admissible and is not.
 |
| Universality* Rules apply consistently, and judges' input is not as necessary
 | Contextual* Factors like which party is involved, what their resources are, criminal vs civil trials, *matter of the trial*, etc. are relevant
 |
|   | Lesser impact of precedent* Precedents still matter for the definitions, tests and principles, **BUT** the case-by-case structure means that the outcome in **the precedent** ***is not dispositive*.**
* CON- This makes trials more unpredictable and more expensive. This creates more asymmetry in access to justice.
 |

THE GOALS OF EVIDENCE LAW

1. **Search for truth** (emphasized by L'Heureux-Dube J in NOEL).
	* This is a primary goal, but it is not an overriding one. Sometimes courts emphasize this goal (reliability), sometimes they don't.
	* The search for truth is often not symmetrical in the criminal context - the Crown will produce the bulk of the evidentiary record.
	* In the civil context, the standard is on a balance of probabilities and both the defendant and the plaintiff will contribute significantly to the evidentiary record.
2. **Ensuring a fair trial process** (Charterplaces particular emphasis on **A**'s rights, especially s. 7’s right to make full answer and defence).
3. **Promoting an efficient trial process**. Courts have started adopting more stringent trial management procedures - by the time a case proceeds to trial, ancillary issues have often been settled and only the key issues are addressed, so pretrial preparation is crucial.
4. **Protecting external social goals such as important relationships** (class privileges apply to solicitor-client relationship, case-by-case privilege for others). Courts see themselves as a social institution, one whose goals may sometimes be subsidiary to the goals of other social institutions (eg. Section 38 of theCanada Evidence Act allows the government to withhold evidence for the purposes of national security).
5. **Safeguarding the integrity of justice** (s 24(2) of the Charterrequires that unfairly obtained evidence be excluded in some circumstances). Sometimes the courts will want to distance themselves from the bad behavior of other state actors, other times they will decide the court's aims override the interests of punishing this bad behavior.

OTHER CONCERNS

1. Wrongful acquittals
2. Re-victimizing the complainant
3. The **A**'s right to make full answer and defence
4. Wrongful convictions

COMPETING CONCERNS

1. Truth v confidentiality
2. Truth v fairness to **A**

THE IMPACT OF THE **CHARTER**

The Charteris only sometimes relevant (criminal cases and any involving government or state action, as well as some questions involving court procedure). The legislature, the executive, government agencies and the courts are all bound to some extent by the Charter- therefore the rules of evidence are also bound by the Charter.

The Charteris given teeth by s 24(2), which allows the court to remedy incorrect admissions of evidence through exclusion. In GRANT, there was a s 9 breach, and the court found that *but for* this breach, the police would not have found the **A**'s loaded, unregistered firearm (which he held near a school). Should that evidence be admitted or not?

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| ADVANTAGES | DISADVANTAGES |
| Court needs to know about threats to public safety | Police should not breach the Charter - admission incentivizes this behaviour |
| Allows the court to know the truth | Provides a meaningful remedy for thevictim of the Charter breach |
| The evidence pre-existed the Charter breach -it was not a confession extracted under duress. | If we only admit some evidence (eg. tangibleevidence), we risk creating a hierarchy of evidence |
| Society has an interest in administering justice | Admission might cause the public to lose faithin the police and the courts |
| No conviction without admitting the gun | Charter is central enough that adherence to its values has inherent value |
| Police officers shouldn't be excessively restricted |   |
| Justice system's reputation could suffer without admitting the gun |   |
| Two wrongs don't make a right, it would be better to admit the gun, and take disciplinary measures against the police officers |   |

When Charterprovisions are enlivened, they affect the manner in which the court approaches the balancing process, and may require the court to adapt statutory or common law rules (eg. the relationship between s 5 Canada Evidence Act and s 13 Charter; the O'CONNOR rules protecting privacy of criminal complainants). Section 24(2) is very consistent with the SCC's shift to a principle-based, discretionary approach, as it does not lay out an explicit set of rules for when evidence should be excluded.

## THE FOUNDATIONAL APPROACH

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

No

Yes

Yes

 No

Yes

Yes

No

No

Is the info. material to an issue?

Is the info. relevant?

Will the info. be excluded by one of the exclusionary rules?

Is PE>PV? (If defence evidence, is PE substantially greater than PV?)

**Evidence admitted**

**Evidence excluded**

STEP 1: MATERIALITY AND RELEVANCE

1. Is this evidence **material** to a question that's at issue in the trial? Evidence is material when it is directed towards a matter at issue in the case (R v BL).
	* + **Primary Materiality** or **Secondary Materiality?**
2. Is it **logically relevant**? Evidence is relevant when it tends to prove or disprove a material issue. This is a very low threshold standard, as in order to be relevant evidence has to make a material issue marginally less or more likely to true (CORBETT, SEABOYER).
	* + **Direct Relevance** and **Circumstantial Relevance**
3. Will the evidence be excluded by the operation of an **exclusionary rule**?
* Note that exclusionary rules are applied more leniently to allow the admission of important defence evidence (WILLIAMS). The Charter might also require technically inadmissible evidence to be received (FELDERHOF).
1. Is the evidence going be excluded by judicial discretion on the basis that the **prejudicial effect outweighs its probative value** (POTVIN)?
	* **Exception**: where the evidence is brought by the **A** in a criminal trial, the question is modified to whether the prejudicial effect **substantially** outweighs the probative value (SEABOYER).

All of these are questions of law, not fact, and will be addressed by the trier of law and reviewed on the standard of correctness by any appeal court.

Never take the first two questions for granted - it will help sharpen your analysis in the later steps. When policy considerations are material, logically relevant and generally also more prejudicial than probative, they will tend to exclude evidence.

* + 1. MATERIALITY

Key distinction: the legal facts (relevance) and the legal issues (materiality). The substance of the legal question can change the kind of evidence you need.

**Primary materiality**

Evidence that goes to an issue that must be addressed by the court (eg: a witness statement that goes to proving an element of the offence).

1. Does the information arise from the cause of action that was pleaded (civil)?
2. What requirements does the substantive law impose? (i.e. what are the elements of the cause of action or crime?)
3. What requirements does the procedural law impose?

**Secondary materiality**

Evidence that relates to the primary evidence (eg: evidence regarding the credibility of a witness). Secondarily material evidence is far more likely to be excluded (eg MCCLURE, BROWN). There are far more exclusionary rules about secondarily material evidence than there are about primarily material evidence.

1. Does the information relate to the credibility of a witness?
2. Does the information relate to the reliability of other evidence, including other testimony?

**Reliability**

Factors that can affect the accuracy of the evidence you're receiving (eg: does the eyewitness have poor eyesight?).

**Credibility**

Factors that affect the likelihood that a witness is telling the truth.

Evidence that goes to reliability or credibility is much more likely to be secondarily material and subject to exclusionary rules. Courts have neglected psychological research about the limits of identifying strangers and other forms of eyewitness testimony for this reason.

* + 1. LOGICAL RELEVANCE

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). There is no minimum probative value for relevance (R v ARP [1998] SCC)

1. Relevance must be assessed in the context of the other evidence and of the case as a whole (R v MONTELEONE [1987] SCC)
2. People may disagree about the relevance of a particular piece of evidence but at this stage of the enquiry the tendency should be to include evidence rather than to exclude (CORBETT). **Exception**: inferences based on pervasive myths about human behavior should be excluded (SEABOYER, OSOLIN).

**Directly relevant evidence** is evidence which, if believed, resolves a material issue.

**Circumstantially relevant evidence** requires an inference in order to address a material issue (eg: both the A and the actual offender have the same tattoo). An **inference** is about generalizations and assumptions that allow the trier of fact to reason from circumstantial evidence to a material fact. Obviously, concerns about stereotypes and the reliability of assumptions enter here.



Relevance is contextual, as it often depends on the particular factual matrix in the case. What counts as logically relevant evidence is very controversial, but generally courts are willing to accept any evidence which has a narrative of relevance, and will exclude it later if it is more prejudicial than probative.

1. PREJUDICIAL EFFECT & PROBATIVE VALUE

**Probative value** is distinct from relevance because relevance is simply binary (evidence is either relevant or its not) where probative value has to do with how much weight to accord the evidence.

Consider the probative value of the evidence. The considerations include:

* 1. the strength of the inferences that may be drawn from the evidence;
	2. the reliability of the evidence (MOHAN);
	3. the credibility of the proposed evidence (DARRACH).

**Prejudicial effect** is **NOT** about this is bad for one side’s case or the other, but measures the potential for distorting the trial process itself due to the ToF giving a piece of evidence inappropriate weight.

THREE TYPES OF PREJUDICE

1. POTVIN - **Moral prejudice**: evidence which would make the ToF want to punish the **A** for being a bad person. **Example**: **A** charged with minor sexual assault of 20 year old. Crown wants to adduce evidence of 14 convictions for child porn and assaults. This would be material and relevant, but court would exclude the evidence due to moral prejudice.
2. POTVIN - **Reasoning prejudice**: giving evidence more weight than it deserves, or using it for something it isn't meant for. **Example**: evidence that sexual assault victim (at party) had multiple partners or had history of hooking up at parties. This may be given too much weight and obscure whether consent was present in this present case. KHAN: psychiatrist’s evidence that accused was not part of class of persons that could commit offence – although this was junk science it could be overweighed by the jury.
3. **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” (MOHAN)

Defence counsel should take care to ensure that their strategy does not allow otherwise irrelevant and inadmissible evidence to be admitted (SMITH). Appeal courts will show significant deference to trial courts in relation to the discretion to exclude, per R v TERRY.

# INFORMATION GATHERING

## CIVIL DISCOVERY

Discovery is symmetrical in the civil context, in that both sides must disclose information.

BCSC COURT RULE 7-1

(1) Each party to an action must, within 35 days after the end of the pleading period, prepare a list of relevant documents (helpful or hurtful) for discovery. Contains a presumption that if a document was not listed for discovery, it will not be admissible in court.

(2) Subject to subrules (6) and (7), each party’s list of documents must include a brief description of each listed document.

(6) If it is claimed that a document is privileged from production, the claim must be made in the list of documents with a statement of the grounds of the privilege.

(7) The nature of any document for which privilege is claimed must be described in a manner that will enable other parties to assess the validity of the claim for privilege without revealing information that is privileged.

(9) If, after a list of documents has been served under this rule,

* 1. It comes to the attention of the party serving it that the list is inaccurate or incomplete, or
	2. There comes into the party’s possession or control a document that could be used by any party of record at trial to prove or disprove a material fact or any other document to which the party intends to refer at trial,

The party must promptly amend the list of documents and serve the amended list of documents on the other parties of record.

It is possible to demand an amended list of documents with additional documents under section (10) or (11), which requires reasonable specificity indicating the reason why such additional documents or classes of documents should be disclosed. The receiving party must comply with the demand or give reasons for not complying within 35 days of receipt of the demand under section (12). If the receiving party does not comply, the demanding party may apply for an order requiring the party to comply under section (13).

(20) If, on application for production of a document, production is objected to on the grounds of privilege, the court may inspect the document for the purpose of deciding the validity of the objection.

(21) Unless the court otherwise orders, if a party fails to make discovery of or produce for inspection a document as required by this rule, the party may not put the document in evidence in the proceeding or use it for the purpose of examination or cross-examination.

Under the rules passed in 2011, there is now a **principle of proportionality** in civil litigation,which holds that the nature and extent of the discovery obligation is proportionate to the value of the litigation. So far, judges have not been hugely willing to control the boundaries of discovery in this way - it is an open question how willing they will be limit discovery in different contexts.

## DISCLOSURE IN CRIMINAL CONTEXT

Discovery is asymmetrical in the criminal context – only the Crown has a duty to fully disclose its case.Disclosure is the cornerstone for how the **A** gets info re Crown investigation, but info can come to both parties via other mechanisms (subpoenas).The general rule is that the **A** does not have to make full disclosure of their case, but there are **exceptions**:

* Section 657.3 of the Criminal Code provides that the **A** does need to disclose to the Crown that they intend to call an expert witness and the basic point that they will be speaking to.

Common law rule that if the **A** wants to rely on the alibi, if they do not disclose this alibi to the Crown with sufficient time to for the Crown to investigate this alibi, the court will accord less weight to this alibi.

STINCHCOMBE made the convention that the Crown had to disclose its case to the **A** an actual rule.

### R v STINCHCOMBE [1991] SCC

|  |  |
| --- | --- |
| ***FACTS*** | Stinchcombe was a lawyer who was charged with breach of trust, theft and fraud. One of the Crown's witnesses was a former secretary of Stinchcombe's who had given evidence at the preliminary inquiry that supported the defence's position. Later a statement was taken from her by an RCMP officer, however, at trial the defence was denied access to the contents of the statement. When the Crown decided not to use the statement the defence made a request for it to the judge, who refused to provide it. The **A** was eventually convicted. |
| ***RULING*** | Sopinka J, writing for a unanimous Court, held that the judge was wrong in refusing the application by the defence, as the Crown was under a duty to disclose all evidence. "The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done." The duty, wrote Sopinka J, **is derived from the right of an A to make full answer and defence** which has been entrenched **under section 7** of the Charter. This duty, however, is still subject to rules of privilege. The case was sent to a retrial and the Crown was ordered to disclose all relevant documents at new trial.  |
| ***RATIO*** | 1. All possibly relevant information (whether inculpatory or exculpatory) must be disclosed in a timely fashion by the Crown to the A, whether it's helpful or adverse, subject to the reviewable discretion.
2. Reviewable discretion allows the Crown to retain some discretion over timing (so disclosure could be held back until an investigation is complete or where witness safety is at issue) or privilege (such as informer privilege). This discretion is reviewable because the defence can bring a motion to the trial judge to review it.
3. The defence requesting disclosure is what triggers the Crown's obligation to make disclosure. This disclosure needs to be made before the A makes important procedural decisions (mode of trial, pleadings).
 |
| ***NOTES*** | Machine generated alternative text: Abrams • Abrams goes bankrupt in 1984. He does not include on his . list of assets those assets that are the subject of this Legal work 1976-1980 (complainant) proceeding. Trust (A is trustee) 1980- • In 1986, Abrams makes a complainttothe Law Society A is bis.ness partner from 1980- about the A. The factthat he did not listthe assets at issue (disputed) callshis credibility into question. j» is interviewed by RCMP severaltimes • Testifies at preliminary hearing, apparently favorably •  typed upa releaseof trust document, and this formed the basis of the A’s defence •  is interviewed again bythe RCMP, who challenge her testimony, and signs a document written by the RCMP recanting her testimony . Crown advisesAjgJ.w will notbe called as a witness because of lack of credibility . ihçQmj wanted to cross-examine I4eIßJ, or the Crown’s interview notes • Crown declines to make that disclosure |

# PRIVILEGE (**P&S** 217-244, 253-259, Supp: **NATIONAL POST**, **BLANK**)

Privileged documents and communications don't have to be provided during disclosure. Privilege, unlike other rules of evidence, **is** **inimical to the truth-seeking process** because it excludes potentially relevant and reliable evidence. Thus, compelling reasons must be present for privilege to apply. The distinction between class and case-by case privileges was articulated by the SCC in GRUENKE**.**

HOLDER/ WAIVER OF PRIVILEGE

Privilege always only applies to the holder, and the privilege holder may waive privilege if s/he understands the consequences of this waiver, as per PERRON 1990 QCA. If TJ makes an error in upholding privilege of a witness there are no grounds of appeal because only the witness and not the parties have been harmed. A party cannot use privilege as both a sword and a shield – cannot selectively waive privilege. Implied waiver arises where a party puts their state of mind into issue. For example acting on a good faith basis due to legal advice received (RCMP officers in R v SHIROSE).

When privileged information is disclosed inadvertently it can be admissible (RUMPING v DPP [1962] UK, where a confession letter to wife was intercepted). This is based on:

1. the fact that privilege protects the holder, not the information per se,
2. the common law narrowly interprets privilege so as to reduce the negative impact on the truth finding process,
3. it is the duty of those involved in privileged communications to safeguard the information and if they do not the evidence should be admissible.

This changed with DESCÔTEAUX v MIERZWINSKI SCC: A "privilege" or a "right to confidentiality" is a substantive rule giving a person protection from disclosure of communications outside the trial setting. Thus, counsel is required to take steps to protect inadvertently disclosed materials. While this case concerned solicitor-client communications, there is little reason this substantive rule should not apply to *all* privileges.

**In criminal cases,** full answer and defense discourage the courts from using privacy concerns to suppress potentially exculpatory evidence. R v FINK – all efforts must be made to prevent accidental infringements of privilege in criminal cases. Subsection 189(6) of Criminal Code affords statutory protection for intercepted privilege information.

**In civil cases**, disclosure does not automatically result in a loss of privilege. METCALFE [2001] MB CA: Where privilege has been compromised (i.e. inadvertent communication to opponent counsel) in civil cases the privilege will yield where the information is important to the outcome of the case and there is no reasonable alternative form of evidence that can serve the same purpose. *There has not been a further Court of Appeal case that has followed this precedent.*

Privilege will be asserted at the time that discovery or disclosure is made. Just because information is privileged doesn't mean it can't affect court proceedings, however - the evidence could enter the court via a different means, or alter the behaviour of a lawyer. This particularly applies for defence counsel. Counsel must conduct their arguments based on the knowledge they actually have, so if defence counsel knows that the **A** committed the *actus reus*, they can hold the Crown to their high standard of proof beyond a reasonable doubt, but **cannot** suggest, contrary to their privileged knowledge, that the **A** did not commit the *actus reus*.

## CLASS PRIVILEGES

Class privilege is different than case-by-case privilege, as the party seeking to rely on privilege has to establish that it falls into an established class. 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.

In **GRUENKE**, the SCC rejected the creation of a class privilege for religious communications. Furthermore, the court (affirmed in **NATIONAL POST**) said that it would be unlikely to recognize any new class privilege, and would most likely have to be recognized by parliament.

So if you're outside of the solicitor-client, litigation or marriage class privileges, the privilege will have to be established on a case by case basis.

#### SPOUSAL PRIVILEGE (WILL NOT BE TESTED)

This is a statutory privilege. Canada Evidence Act s 4(3)provides privilege to husbands and wives in relation to being forced to testify against one another. In a few cases, the court has said this privilege is limited to those who are married, but since 2003 this has included same-sex married couples as well. This privilege is extinguished if the marriage ends.

#### SOLICITOR-CLIENT PRIVILEGE

Wigmore’s formulation was cited with approval by SCC in DESCÔTEAUX and SHIROSE:

1. **Legal advice of any kind is sought**
2. **from a professional legal adviser in that capacity (includes secretaries etc)**
3. **communications** (can include fees MARANDA v RICHER 2003 SCC: The test to consider is whether the fact (eg fees) arose out of the solicitor client privilege; thus, does not extend to physical objects that existed prior to solicitor-client relationship, like the gun in MURRAY). Privilege cannot be used as a shield (send documents to lawyer that would have otherwise been admissible). These documents are not considered communications.
4. **relating to that purpose** (note difficulties re in-house lawyers and business advice SHIROSE; PRITCHARD v ONT 2004 SCC; excludes communications in furtherance of crime, fraud or abuse of process DESCÔTEAUX; GOLDMAN SACHS v SESSIONS 1999 BCSC; BLANK 2006 SCC)
5. **made in confidence** (presence of third party who lacks a common interest or shares a common goal will negate confidence PRITCHARD*;* may include identity of client where protection of identity is a crucial reason client sought a lawyer FINK 2002 SCC)
6. **by the client**
7. **are** **at the client’s instance permanently protected** (exceptions arise regarding wills, trusts, and on case by case instance where client’s interests would be served by disclosure after death JACK [1992] MBCA. Innocence at stake (below) and public safety (P & S 234) are other limited exceptions.)
8. **from disclosure by client or lawyer**
9. **unless the protection is waived**.

**Q:** To whom does solicitor-client privilege belong?

**A: It belongs exclusively to the client**, and it is therefore the client's choice whether or not to waive that privilege. It is incumbent on a solicitor to ensure that a client is providing informed consent to any waiver of this privilege.

This is a common law privilege. BLANK: 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. The privilege survives the end of the relationship and the death of the client. Exceptions include a will dispute and questions surrounding the validity of a trust instrument where the settlor was deceased. This is based on the principle that the client’s interests are furthered by these disclosures. R v JACK MBCA: this principle was applied to allow communications between a family lawyer and the deceased.

FINK: no search warrant can be issued to obtain documents that would be protected under solicitor-client privilege.

#### LITIGATION PRIVILEGE

In BLANK v CANADA, Fish J says that litigation privilege is conceptually different from S-C privilege:

* The purpose of litigation privilege is to facilitate the adversarial process and establish a zone of privacy, not to protect the relationship
* Litigation privilege does not exist to protect a class or relationship, but rather a class of activity (preparing for litigation)
* It does not protect client confidences, litigation privilege does not require that communications be made in confidence
* The limits of litigation privilege are determined by the limits of that activity,
* Once the litigation process is over, the privilege ends
* It is not as likely to be protected as the highest privilege of solicitor-client, (see R v UPPAL, where the witness’s statements provided to co-accused as there was no prejudice. Would not have been provided if S-C privilege existed)
* This privilege applies even to self-represented litigants

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| --- | --- | --- |
|  | SOLICITOR-CLIENT PRIVILEGE | LITIGATION PRIVILEGE |
| PURPOSE OR RATIONALE | Protects the confidential relationship between lawyer and client  | Facilitates the adversary process |
| SCOPE OF APPLICATION | 1. Applies only to a solicitor-client relationship2. Applies only to confidential communications3. Applies any time client seeks legal advice even though no litigation is involved | 1. Applies to all litigants and 3rd parties in the litigation2. Applies to communications of either confidential or non-confidential nature and even material of a non-communicative nature.3. Applies only in the context of litigation |
| SCOPE OF PROTECTION | Close to absolute protection  | Only documents for the dominant purpose of litigation protected |
| PERMANENCY | Once privileged, always privileged | End upon the termination of the litigation absence closely related proceeding |
| RECENT TREND | Strengthened | Weakened |

It is often unclear whether solicitor-client privilege or litigation privilege applies with respect to third party communications. Solicitor-client privilege applies where the third party is an agent to the lawyer (eg translator or an expert that is employed by a lawyer). The function of the expert must be essential to the existence or operation of solicitor-client relationship(SMITH v JONES). Solicitor-client privilege will not function if expert is just gathering outside information.

### BLANK v CANADA [MINISTER OF JUSTICE] [2006] SCC

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| ***FACTS*** | Blank is the director of Gateway Industries. Gateway Industries were charged with 8 counts of some pollution offences. These charges were quashed, the Crown brought new charges and then stayed them. Blank is not happy with this, so he commences a civil action against the government and files for disclosure of documents relating to the criminal case. At issue before the SCC is the scope of s 23 of the ***Access Act*** – does litigation privilege apply even though the criminal case was over? |
| ***RULING*** | In this case, the civil action has a different juridical source than the criminal case, and so the litigation privilege from the latter has ended and can no longer be relied upon. This means that there are times in between litigations, particularly for the government, where litigation privilege is lost.  |
| ***RATIO*** | LITIGATION PRIVILEGE APPLIES:* 1. To a communication between a lawyer or agent of the client and a third person. It is uncertain whether this extends to copies taken for the purpose of litigation (HODGKINSON v SIMMS on P&S 241 – majority says yes, dissent says no). P&S suggest that privilege should apply to documents if they result from research or a lawyer’s skill and knowledge is implicated (BLANK offers approval of this approach).
	2. If, at the time of making the communication, litigation had commenced or was anticipated. This does not apply materials obtained in preparation for an inquest (HBC v CUMMINGS [2006] MB CA)
	3. The dominant purpose of the communication was use in or advice on litigation. This need not be the sole purpose, but must be more than substantial (WAUGH [1980] AUS HC: privilege not found as railroad operation and safety was also a significant purpose). This is a narrower protection than the substantial purpose test.

Litigation privilege only lasts as long as the litigation does, but can transcend the particular litigation where either: * + - * 1. separate proceedings that involve the same or a related cause of action (same juridical source, such as different parties suing for same event)
				2. proceedings that raise issues common to the initial action and share its essential purpose
 |
| ***NOTES*** | The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure and is consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor‑client privilege. |

#### EXCEPTIONS TO CLASS PRIVILEGES

In Canada it is applied more flexibly (“once privileged, not always privileged”) then US where per Swindler and Berlin there is no balancing of interests. Other jurisdictions have such as the UK and the US have framed the privilege as absolute However in SMITH v JONES Cory J terms S-C privilege the highest privilege recognized by the courts.

* + 1. COMMUNICATIONS IN FURTHERANCE OF CRIME OR FRAUD

This is not an exception per se, as in such cases privilege will be negated. S-C privilege will not protect communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime. . Client’s intention is key here (good faith?). Privilege does not apply to future crimes but does to past ones. The party claiming that the privilege should be set aside must have an evidentiary foundation. If there is a foundation the TJ will vet the material or evidence to see if it can fairly support an inference of criminal or fraudulent intent.

There is a question as to how serious a crime has to be in order for this exception to apply. BLANK (in context of litigation privilege) – abuse of process or similarly blameworthy conduct. AG (NT) v KEARNEY (AUSHC) – government communications about how to thwart aboriginal land claims were found to not be privileged.

* + 1. INNOCENCE AT STAKE EXCEPTION

Privilege will yield due to the right to make full answer and defence, where they stand in the way of an accused establishing their innocence. The interpretation of the MCCLURE innocence at stake test given in BROWN shows that the fact that evidence which could be obtained from privileged communications would be better than other evidence, or might buttress other evidence, is not enough.

INNOCENCE AT STAKE TEST

Note that first it is imperative that the court determine whether S-C privilege applies (eg waived?). The MCCLURE test, as set out in BROWN, is as follows (onus on the **A** to prove all on a BoP):

THRESHOLD TEST

1. the information sought from solicitor-client communication must be unavailable from any other source; and

2. the accused must be otherwise unable to raise a reasonable doubt (necessity).

INNOCENCE AT STAKE TEST

**STAGE 1:** the **A** seeking production must demonstrate an evidentiary basis to conclude that a communication exists which could raise a reasonable doubt as to his guilt (cannot be pure speculation).

**STAGE 2**: if such a basis exists, the trial judge must examine the communication to determine whether it is likely to raise a reasonable doubt.

Not recognized in other common law jurisdictions. P&S are critical of the demands this places on defence counsel. The MCCLURE/BROWN test requires defence counsel to take an illogical position and admit that there is no reasonable doubt for the **A**, and that the only way to raise a reasonable doubt is to waive some privilege. Also, forces the TJ to prejudge guilt. Only arises in extraordinarily rare cases, such as where a third party has confessed they committed the crime to their solicitor.

###  R v BROWN [2002] SCC

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| ***FACTS*** | Brown charged with murder, trying to get disclosure of third party documents of a man named Benson. Benson’s girlfriend claims that 3 weeks after the victim was found stabbed to death, Benson told her two things: (1) that he had committed the murder; and (2) that he had also confessed to his lawyer. Brown successfully brought a McClure motion for disclosure of Benson’s communications with his solicitor.**ISSUES:** 1. Should Benson’s privileged communication be disclosed under the innocence at stake test in this case?2. If so, what protection, if any does Benson get against what is essentially compelled self-incrimination? |
| ***RULING*** | The motions judge’s grant of access to the disclosed materials was premature in this case. Should have considered alternative avenues of admitting the evidence (hearsay of girlfriend). TJ should usually wait until the end of the Crown’s case to hear a McClure application (to see if it is necessary) but accused can bring motion at any point (TJ can delay motion if they think accused’s defence will show a possible reasonable doubt). The standard is whether a trier of fact could reasonably find the **A** not guilty.  |
| ***RATIO*** | In both the threshold and innocence at stake stages the A must have some knowledge of the information in question. A **MCCLURE** application should only be successful if the A does not have access to information that will be admissible at trial. In assessing whether the evidence is available in alternative forms (eg the drunken hearsay), the quality of the evidence does not matter (P & S – this makes no sense). Here thus it would not matter that the lawyer was a much more trustworthy source. |
| ***NOTES*** | The SCC stated that the rules of evidence (eg hearsay) may be applied with less than their full degree of rigor in order to prevent a wrongful conviction. The TJ should only order the parts of the communication that are necessary. The communications are not to be turned over to the Crown. **Privilege holders whose communications are disclosed under the innocence at stake exception have are protected by the residual principle against self-incrimination under s 7 of the Charter**. This means that privilege holders get Use Immunity and Derivative Use Immunity which protects from prosecution from crimes mentioned in the privilege information. They do not, however, get transactional immunity, which would be total immunity from prosecution for any crimes disclosed in the communications, regardless of whether there is otherwise discoverable evidence of those crimes. |

* + 1. PUBLIC SAFETY EXCEPTION

### SMITH v JONES [1999] SCC

|  |  |
| --- | --- |
| ***FACTS*** | **A** was charged with aggravated sexual assault on a prostitute. Counsel referred him to a psychiatrist hoping that it would be of assistance in the preparation of the defence or with submissions on sentencing in the event of a guilty plea. Counsel informed the **A** that the consultation was privileged in the same way as a consultation with him would be. During his interview with the psychiatrist, the **A** described in considerable detail his plan to kidnap, rape and kill prostitutes in a certain area. The psychiatrist informed defence counsel that in his opinion the accused was a dangerous individual who would, more likely than not, commit future offences unless he received sufficient treatment. Doctor contacts counsel and finds out they will not disclose the information in sentencing and files an affidavit with his opinion. |
| ***RULING*** | Held for the doctor. A reasonable observer, given all the facts for which solicitor‑client privilege is sought, would consider the potential danger posed by the accused to be clear, serious, and imminent. According to the psychiatrist’s affidavit, the **A** suffered from a paraphiliac disorder with multiple paraphilias, in particular sexual sadism and drug abuse difficulty. In his interview, the **A** clearly identified the potential group of victims (prostitutes in a specific area) and described, in considerable detail, his plan and the method for effecting the attack. **The combination of all these elements meets the factor of clarity, and the potential harm (a sexually sadistic murder) clearly meets the factor of seriousness.**Two important elements indicate that the threat of serious bodily harm was imminent: **first**, the accused breached his bail conditions by continuing to visit the specific area where he knew prostitutes could be found; and **second**, after his arrest and while awaiting sentencing, he would have been acutely aware of the consequences of his actions. |
| ***RATIO*** | **Recognizes public safety exception to solicitor-client privilege, based on the following** TEST**:*** 1. **Is there a clear risk to an identifiable person or group of persons?**The group at risk must be ascertainable (can be a general threat to public, but has to be severe if so).
	2. **Is there a risk of serious bodily harm or death?** The intended victim is in danger of being killed or of suffering serious bodily harm.
	3. **Is the danger imminent?** Must create a sense of urgency (can infer some urgency not only from time but also seriousness of threat).

**If after considering all appropriate factors it is determined that the threat to public safety outweighs the need to preserve solicitor‑client privilege, then the privilege must be set aside.** |
| ***NOTES*** | Justice Cory terms S-C privilege the highest privilege recognized by the courts.  |

#### IMPLIED UNDERTAKING RULE

At common law, the **implied undertaking rule** means that the party obtaining documents through **civil discovery** is subject to an "implied undertaking" that they may only use those documents in the present action (JUMAN v DOUCETTE [2008] SCC). This is founded on the fact that **(1)** civil discovery presents a state sanctioned invasion of privacy, and **(2)** the rule means that litigants are more likely to disclose information and thus the rule encourages a more complete and candid discovery. Failure to discharge an undertaking is contempt of court.

The principle may only be set aside where the party that seeks relief from the rule establishes on a balance that a greater countervailing public interest greater than the two listed above that warrants that setting the implied undertaking rule aside. In making this determination the SCC articulated the following guidelines in JUMAN:

* The implied undertaking rule should not be too readily set aside
* TJ should identify the competing values at stake. Public safety may trump the rule.
* Prejudice to parties should be considered - the least prejudice exists where the actions are related and the parties are the same
* The rule does not shield contradictory testimony

Once a document has been introduced in court, it is in the public record (principle of open court). This can create relatively strong incentives to settle.

**Q:** Does this rule apply in criminal proceedings?

**A:** In case decided on a different basis (PD v WAGG [2004] OCA), the court suggested there is good reason to respect the rule when considering materials that were used in a criminal case. The underlying process should offer some protection to documents disclosed in criminal proceedings, and this has been the trend, but there is no decision mandating such.

## CASE BY CASE PRIVILEGE (**P&S** 253)

The SCC recognized the distinction between class and case by case privileges in GRUENKE. Commonly asserted by psychiatrists in relation to their clients, journalists in relation to their sources, less commonly in religious, medical (non-counselling) contexts. All privilege issues will be assessed in a *voir dire* and the judge will have to examine at least some of documents.

**Q:** Why are other professions subject to this higher standard for establishing privilege?

**A:** It would excessively impede the truth seeking aim of the court. Also because the legal profession has an inflated sense of self-importance. Also because there is no necessary disciplinary processes in some other professions (like journalism or therapists), like the Law Society. Also because there is a "slippery slope" worry on the court that class-based privilege could be expanded too broadly if it were extended to other professions.

4 **WIGMORE** CRITERIA (**P&S** 254), accepted in **M(A) v RYAN**:

1. **The communications must originate in a confidence that they will not be disclosed.**
	* Different relationships have different contexts - the expectation of confidence between a psychiatrist and their patient (where the information will remain confidential) is different than the expectation of confidence in the journalistic context (where the goal is to protect the source, but to publish the information).
2. **Confidentiality must be essential to the relationship**
3. **The relationship must be one that the community "wishes to sedulously foster" (i.e. values it wishes to protect)**
	* How does the court figure that out? This is an unacknowledged fracture in evidence law. This will only apply to relationships where the community as a whole has a stake in them and wants to foster them - thus the court's hesitation regarding recognizing class-based privileges for religious figures. How to handle earnest religious communities that have values inimical to those of broader Canadian society (ie. Bountiful).
4. **The injury that would be caused by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. This is the section that does most of the work.**

The presumption is to disclose and the onus is on the party asserting privilege to establish these 4 criteria. This test is a utilitarian one because it aims only to allow privileges which serve the greater good. It was only in GRUENKEthat the court started to work with the four WIGMORE criteria, and in so doing reformulated them. RYAN underscores the issue that the case-by-case approach sacrifices certainty and individuals are unable to predict whether their communications will be privileged.

LETOURNEAU v CLEARBOOK IRON WORKS LTD [2004] FC is rare example where case-by-case privilege applied. This case involved an infringement of a patent, and communications with the inventor’s common-law spouse were found to be privileged. Important that evidence was exceedingly marginal when compared to the injury caused to the relationship.

### M(A) v RYAN [1997] SCC

|  |  |
| --- | --- |
| ***FACTS*** | Dr. Ryan is treating M(A) as a psychiatrist. Ryan has sex with her. He is charged criminally. M(A) brings a civil action against Ryan, and Ryan applies for a subpoena for Ryan's current psychiatrist to make her notes available to the court and testify as well. M(A) and her psychiatrist applied for both a class and case by case privilege. TJ found no class privilege and no case by case privilege because of the existence of a warning provided by the psychiatrist that their conversations might not be protected from future litigation. |
| ***RULING*** | No class privilege for doctor-patient relationship. McLachlin CJC, proceeds through the Wigmore analysis.**First stage:** the psychiatrist's warning was not sufficient to vitiate the expectation of confidence. Not just about what the particular parties believed, but the generic nature of the relationship (psychiatrist-patient). **Second stage:** discussion of the importance of confidentiality to the therapeutic process. **Third stage:** mental health is of paramount importance to the community. **Fourth stage:** the values protected by the Charter should be built into the analysis - privacy concerns extend beyond possible therapeutic damage, to the right to privacy protected by section 8 of the Charter. Furthermore, the court is concerned with "inequalities that might be perpetuated by the disclosure" - if disclosure is ordered, other complainants in sexual assault cases (s. 15 equality right) might be dissuaded from pursuing relationship of counselling. When weighing the injuries caused by disclosure, the court will look beyond the narrow consequences to the actual parties, and consider the broader effects on other possible parties. This is where the court is broadening the boundaries of the original Wigmore criteria. SCC states that disclosure civil context is more likely to occur than in the criminal context. Again the court suggests it will never recognize another class privilege. HELD: Limited disclosure of the psychiatrist's records and notes about the visit, but not her notes to herself was ordered, but with the condition that only to Ryan's solicitor and his expert witnesses could view them, and not to Ryan himself. |

JOURNALIST-SOURCE PRIVILEGE

### R v NATIONAL POST [2010] SCC

|  |  |
| --- | --- |
| ***FACTS*** | Major political scandal was exposed (Chretien made a phone call to a decision maker in relation to the making of a loan to a business in his riding). This information came from a source, X, who previously had given good information. Source given a guarantee of confidentiality in exchange for a bank statement which was perhaps forged.  |
| ***RULING*** | * The court draws a distinction between physical evidence (bank statement) and the identity of a source. Normally the journalist/source issues concern the protection of the latter.
* Class privilege is not appropriate for journalists/sources. This is because it is not clear who qualifies as a journalist, and they are not sure who exactly is being protected.
	+ 1. Easily met—the journalist clearly promised confidence explicitly (it has to be explicit per Binnie J).
		2. Easily met—the source insisted on confidentiality (the source must also insist per Binnie J).
		3. Sedulous fostering introduces some flexibility:
* “Professional” journalists get more weight because they have “greater institutional accountability” – bloggers, not so much.
* In general, relationship between professional journalists and secret sources ought to be “sedulously fostered” and no one has given a persuasive reason to discount the particular relationship in this case.
1. Balancing the public interest in protecting the identity versus the interest in getting at the truth. The judgment is actually horribly unclear on this point, but it seems that Binnie J believes that an alleged forgery is a serious offence, that the physical evidence might have high probative value, and that the investigation was bona fide.

The benefit considered in the fourth balancing stage is broader than just the correct disposal of the litigation. It doesn't only matter what is actually in the records, but what is plausibly in them is relevant to the question of accurately conducting a criminal investigation. Relevant factors include:* The nature and seriousness of the crime
* The centrality and probative value of the evidence in question
* The purpose of the investigation (eg government cover up?)
* Whether the evidence is available through alternative means
* The type of information sought (real evidence?)
* The degree of public importance of the story
* Whether the story is already in the public domain

 Here, the crime under investigation was **serious**, and there was a real possibility of obtaining DNA or other evidence from the envelope. Further, the documents and the envelope were not merely evidence tending to show a crime had been committed, but the **very *actus reus*** of the alleged crime. As a result, the Court concluded that the journalist had not established that the public interest in the protection of the secret source **outweighed** the public interest in the production of the physical evidence of the alleged crimes. Therefore privilege was not made out in and disclosure was ordered. |
| ***RATIO*** | * Recognition of journalist-source privilege on a case-by-case basis, and this can apply to the identity of a source. The court expanded on the factors to consider during (the most important) fourth stage.
* New classes of privilege will likely have to be created by legislative action, since the courts will not likely create them
 |

# EXPERT EVIDENCE (**P&S** 190-209, Supp: **Cunliffe**, **MOHAN**)

Expert opinion evidence is presumptively inadmissible, but may be admitted on a case-by-case basis. The burden of proving admissibility is placed on the party seeking to admit the testimony. The objection triggers an admissibility inquiry. If there is an objection, this inquiry will be held in a *voir dire*. According to MOHANand TROCHYM, where the opposing party wishes to object to the reliability of the expert testimony that has previously been admitted, they need to provide some reason why that should be revisited. This means that while expert testimony is on principle admitted on a case-by-case basis, it is highly precedential in that it is highly difficult to challenge the admissibility of expert evidence once it has been admitted on a routine basis based on precedent. Much forensic evidence is admissible without a reliability analysis under the cost-benefit stage of the ABBEY test. This does not mean that precedent is binding however under the MOHANtest. Mohan allows for a highly contextual analysis (see child abuse accommodation syndrome in R v BURNS, R v OLSCAMP, and R v KA: partly admissible depending on context).

The National Academy of Science found that the reliability of many forms of forensic science has not been established, either in reality or in court - this is a problem both in Canada and the United States, and especially in the criminal context.

 Expert evidence is an area where the court is increasingly looking to ensure that both sides have notice of what that expert evidence will involve. This is because both lawyers and judges are ill-equipped to judge expert testimony on the fly. The Innocence Project has found that as much as 60% of its wrongful convictions involve expert evidence, largely where experts exceed the scope of their expertise or where experts mislead the court regarding the state of research in their field. Problems with expert evidence arise in the civil context as well (see mass torts).

WAYS TO UNDERMINE EXPERT EVIDENCE

1. Investigate reliability at the pre-trial stage
2. Object to admissibility, raise MOHAN analysis in *voir dire*
3. Cross-examine the expert to undermine reliability
4. Call an opposing expert

## THE **ABBEY**/**MOHAN** **TEST**

ON EXAM: Use P&S’s reformulation of the ABBEY/MOHAN test but preface with:

ABBEY, while incorrectly viewing necessity as not a precondition to admissibility but a factor to be considered in the cost-benefit stage, properly separates the issues of legal and logical relevance. Logical relevance is a precondition whereas legal relevance is to be assessed at the cost benefit stage. ABBEYidentifies two threshold questions before the 4 MOHANcriteria can be addressed:

STAGE 1: THRESHOLD QUESTIONS

1. The burden of proving admissibility (on a balance of probabilities) lies on the party seeking to rely on the evidence
2. Before beginning on an admissibility inquiry, it is crucial to delineate the scope of expert evidence: what terminology will they use, where does their expertise fit within the case, what is the scope of their qualification.

STAGE 2: 4 PRECONDITIONS

ABBEY further reorganizes the MOHAN test by listing the 3 criteria as preconditions without a contextual analysis and a cost benefit analysis as a separate stage. Under the ABBEY approach necessity should be treated as a “cost-benefit” factor to be evaluated at the second, gate-keeping stage. However, the SCC has stated that necessity is a precondition to admissibility and so P&S leave it here while otherwise accepting the Abbey framework.

1. The expert evidence must be “necessary” in the sense that the expert deals with a subject-matter about which ordinary people are unlikely to form a correct opinion without assistance or where the technical nature of information requires explanation. The necessity inquiry includes examining whether substitutes for the expert testimony are available to address a trier of fact’s knowledge gap, including a jury direction or witness testimony. Is it superfluous and going to be revealed in other testimony (R v CG AND R v OSMAR). However, the fact that there are other experts testing on the same matter cannot undermine the necessity of an expert opinion on that matter (TAYLOR v SAWH AND R v KLYMCHUK).
2. The expert evidence must be logically relevant to a material issue. This is assessed under the foundational consideration of materiality and relevance. MOHAN made it clear that relevance requires legal and not merely logical relevance. Under ABBEY, however, the relevance precondition to admissibility requires only logical relevance, and **legal relevance is considered at the cost-benefit stage**. At this stage, therefore, relevance will be established where the expert evidence has a tendency as a matter of human experience and logic to make the existence of a fact in issue more or less likely than it would be without that evidence.
3. The witness must be qualified to offer the opinion in the sense that the expert possesses special knowledge and experience going beyond that of the trier of fact in the matters testified to (This is a modest standard and the matter testified to can be outside the expert’s main field of study R v RWD, R v FISHER). Where this threshold exists, deficiencies in expertise can affect the weight but not the admissibility of the expert evidence.
	1. The precise area of expertise of the witness should be defined at the *voir dire* so that the witness will not be permitted to offer opinion on evidence beyond their established expertise.
	2. According to P&S the fact that an expert witness has repeatedly testified for a certain side or party should not impact admissibility at the precondition phase (although it did in DEEMAR v COLLEGE OF VETERINARIANS OF ONTARIO ONCA), but partiality may impact on the weight given to the evidence.
4. The proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule. MOHAN: evidence was excluded due to the general exclusionary rule concerning expert testimony that purports the **A** could not have committed the offence. R v PASCOE: expert evidence was excluded because of the danger it would be used solely to show that the **A** was, as a result of his character, the kind of person to commit the crime.

STAGE 3: COST BENEFIT ANALYSIS

Even if these four preconditions are met, the trial judge must decide whether the benefits (only probative value) of the evidence outweigh its potential harms:

BENEFITS

The benefits (i.e. probative value) are determined by two factors (per R v KA):

* + - 1. the probative potential (cogency) of the evidence in proving the material issue at hand and
			2. the significance of the issue to which the evidence is directed.

Reliability/believability may be a third stage according to P&S. Probative value of expert testimony is centrally concerned with the reliability of the testimony (as per TROCHYM). Reliability includes considering - the subject matter of the evidence, the methodology used by the expert, the expert's own expertise and the impartiality and objectivity (credibility) of the expert. However, unless credibility problems are severe, this factor will not require exclusion but will be assessed in the weight the trier of fact gives the evidence. The further you travel from primary materiality into secondary materiality, the lower the probative value will tend to be.

This is where the precedential nature of expert evidence arises – if the matter is familiar and been accepted in the past the court will not engage in a reliability analysis. If however it is considered a novel theory (see below) or the expert is employing non-established techniques then reliability is an important consideration (TROCHYM**)**.

**RELIABILITY** (**CUNLIFFE** ARTICLE)

1. The extent to which expert methods and techniques can do what they purport to do (arson, dingo baby)
2. The capacity of an individual expert witness to apply those methods and techniques. The quality of the expert.
3. Whether an appropriately qualified expert witness has properly applied the appropriate methods and techniques in the particular case. This is a consideration of the quality of the expert’s performance in the particular case (DNA contamination)

If the evidence is purported to be based on the **scientific method** it will be assessed under the DAUBERT v MERRELL DOW PHARMACEUTICAL (US) (aff’d in ABBEY)criteria: testing underlying hypotheses relied on by the expert to see if they can be falsified, establishing known rates of error, peer review, publication, and general acceptance in the relevant academic community. The proper question to be answered where the expertise is **non-scientific** (eg police officers, accountants) **is whether experience and research permit the expert to develop a specialized knowledge that is sufficiently reliable to justify placing before a trier of fact** (see ABBEY p. 204 factors in considering sociological evidence of teardrop tattoo).

NOVEL AND CHALLENGED SCIENCE (**P&S** 206-209)

After TROCHYM, the better view is that it doesn't matter whether it is novel science or not, it is better to engage with this question at the level of reliability. You need to engage with reliability any time an argument on reliability is raised. In AIKEN, the Court says that the evidence is not novel or scientific, and therefore the Court doesn't have to engage with reliability - EMMA **THINKS THIS IS WRONG**. ***On the exam, ignore the novel science analysis entirely and focus on reliability.***

Expert evidence will be treated as “novel science” where(1) there is no established practice among courts of admitting evidence of that kind, (R v DIMITROV – does not matter if it is well established in scientific community) (2) where the expert is using an established scientific theory or technique for a new purpose, (TROCHYM) or (3) where there is a realistic (evidentiary foundation) challenge to the underlying theory of an established science(TROCHYM) (i.e., one whose evidence the courts regularly admit) – for instance, where the underlying theory or assumptions have not been scrutinized before as in R v OLSCAMP . There must be some evidentiary foundation to challenge established expert evidence under this third ground. MOHAN: in order to be admissible, a novel science must:

1. Be essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert;
2. Be subjected to special scrutiny with respect to its reliability; and
3. Satisfy an even stricter application of the necessity and reliability inquiries where the expert opinion approaches an ultimate issue in the case.

COSTS

R v DD (2000 SCC) held that costs include both **the difficulty** the courts have in assessing expert evidence (prejudice, confusion) and **the consumption of time and money** that the consideration of expert evidence requires. The risk of prejudicial effect includes the potential for moral [**A** is a bad person and should be punished] and reasoning [overweigh evidence] prejudice and confusion. In the context of expert evidence, **the most likely prejudicial effect is reasoning prejudice** that the trier of fact will overvalue the expert evidence. Confusion is closely associated with reasoning prejudice, but is also an independent concern. The court will also consider the ability of procedural safeguards (eg jury instructions, cross-examination, editing the expert opinion) to reduce the relevant risks.

* In R v T UK [2010] (terrorism case with most of it redacted), a forensic scientist purported to be able to identify that there was "moderate scientific support" that the **A**'s shoe had created the shoeprint found at the scene of the crime. But what the fuck does "moderate" mean? Very variable in its interpretation, and thus a source of **confusion**. Also KAUFMAN COMMISSION noted that experts should avoid stating there was a “match” in samples where there is any possibility of coincidental similarities.
* The cost-benefit analysis demands attention to necessity, and this is the appropriate time to have regard to this MOHANcriterion. In considering necessity, the trial judge should also consider whether other aspects of the trial process such as the jury instruction provide the jury with the tools necessary to come to a determination about the facts.

### R v MOHAN [1994] SCC

|  |  |
| --- | --- |
| ***FACTS*** | Dr. Chikmaglur Mohan was a pediatrician in North Bay, Ontario. He was charged with sexual assault of four teenaged patients. During his trial, the defence tried to put Dr. Hill, a psychiatrist, on the stand as an expert on sexual assault. Hill was intended to testify that the culprit of the offence must have possessed several abnormal characteristics of which Mohan did not have. In a *voir dire*, Hill testified that the culprit of the first three assaults was likely a pedophile, while the fourth would have been by a sexual psychopath. This evidence was held to be inadmissible by the judge. Mohan was eventually convicted at trial but was overturned on appeal.The issue before the Supreme Court was whether Hill's testimony could be admitted as an expert witness, and whether the testimony would violate the rule against character evidence. |
| ***RULING*** | Sopinka J held that the old common law test for the admissibility of expert evidence was too lax, and sought to establish a higher threshold based on the following 4 criteria:1. The evidence has to be necessary to assist the trier of fact
2. The evidence needs to be legally relevant, in the sense that its benefits outweigh its costs (stages 1,2 and 4 of the foundational approach)
3. The expert themselves must be properly qualified
4. The absence of an exclusionary rule that might otherwise apply. The one exception is the hearsay rule, as the expert is allowed to rely on hearsay in coming to their opinion.

In the current case, Sopinka found that there was insufficient evidence to suggest that there was any clear standard for determining the profile of a pedophile or psychopath. Thus, the expert evidence was not considered reliable. Furthermore, the expert's evidence was not sufficiently relevant to be of any help. |
| ***RATIO*** | **4** MOHAN **CRITERIA**1. Evidence has to be relevant (more than logical relevance - also encompasses the rest of the foundational approach)
2. Evidence has to be necessary to the trier of fact
3. Absence of any other exclusionary rule
4. Expert must be properly qualified
 |

The challenge of MOHANwas the conceptual confusion in those 4 criteria - this is why ABBEYis such an important decision. What ABBEYdoesn't do is change the substance of this test, but reorders the factors in such a way that their conceptual clarity is improved.

### R v ABBEY [2009] OCA

|  |  |
| --- | --- |
| ***FACTS*** | TJ used DAUBERTcriteria to exclude sociologist's expert evidence regarding tear drop tattoos. One possible explanation for the tattoo was that the tattooed individual had committed a murder for a gang. |
| ***RULING*** | DAUBERT criteria: American test which relies on error rates, publishing, peer review to determine whether expert evidence is reliability. These include testing underlying hypotheses relied on by the expert to see if they can be falsified, establishing known rates of error, peer review, publication, and general acceptance in the relevant academic community. The proper question to be answered where the expertise is **non-scientific** is whether experience and research permit the expert to develop a specialized knowledge that is sufficiently reliable to justify placing before a trier of fact. On appeal, Doherty JA held that expert evidence must be evaluated based on the type of evidence it is. **The TJ erred in applying scientific standards to fundamentally qualitative evidence.**Machine generated alternative text: Is the evidence scientific? What methods are appropriate to the fi e Id? DAUBERT criteria |
| ***RATIO*** | P&S say that ABBEY doesn't change the MOHAN criteria, it just reorganizes them. ABBEY identifies two threshold questions before the 4 MOHAN criteria can be addressed:1. The burden of proving admissibility (on a balance of probabilities) lies on the party seeking to rely on the evidence
2. Before beginning on an admissibility inquiry, it is crucial to delineate the scope of expert evidence: what terminology will they use, where does their expertise fit within the case, what is the scope of their qualification.

ABBEY further reorganizes the MOHAN test by listing the 3 criteria as preconditions and a cost benefit analysis as a separate stage which encompasses a consideration of the degree of necessity (incorrect according to P&S) and legal relevance (P&S says this is correct).  |

## RELEVANT STATUTORY PROVISIONS

Canada Evidence Act, s. 7: Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.

Criminal Code, s. 657.3(3) For the purpose of promoting the fair, orderly and efficient presentation of the testimony of the witness,

1. a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice of judge, give notice to the other party or parties of his or her intention to do so, accompanied by
	1. the name of the proposed witness
	2. a description of the area of expertise of the proposed witness that is sufficient to permit the other parties to inform themselves about that area of expertise, and
	3. a statement of the qualifications of the proposed witness as an expert.
2. in addition, a prosecutor who intends to call a person as an expert witness shall, within a reasonable period before trial, provide to the other party or parties
	1. a copy of the report, if any, prepared by the proposed witness for the case, and
	2. if no report is prepared, a summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based; and
3. in addition to complying with paragraph (a), an accused or his or her counsel who intends to call a person as an expert witness shall, not later than the close of the case for the prosecution, provide to the other party or parties the material referred to in paragraph (b).
4. If a party calls a person as an expert witness without complying with subsection (3), the court shall, at the request of the other party,
	1. Grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness;
	2. Order the party who called the expert witness to provide that other party and any other party with the material referred to in paragraph (3)(b); and
	3. Order the calling or recalling of any witness for the purpose of giving testimony on matter related to those raised in the expert witness’s testimony, unless the court considers it inappropriate to do so.

BC Supreme Court Rules Rule 11-2 (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.

Rule 11-4(1) Subject to Rule 11-1(2), parties to an action may each appoint their own experts to tender expert opinion evidence to the court on an issue.

Rule 11-6(1) An expert’s report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2(2) (certification of conformity with Rule 11-2[1]) and must set out the following:

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

(3) Unless the court otherwise orders, at least 84 days before the scheduled trial date, an expert’s report, other than the report of an expert appointed by the court under Rule 11-5, must be served on every party of record, along with written notice that the report is being served under this rule,

 (a) by the party who intends to tender the expert’s report at trial

(4) Unless the court otherwise orders, if a party intends to tender an expert’s report at trial to respond to an expert witness whose report is served under subrule (3), the party must serve on every party of record, at least 42 days before the scheduled trial date,

 (a) the responding report, and

(b) notice that the responding report is being served under this rule.

**Q:** How can we determine what methods are appropriate to the field?

**A:** Ask experts themselves (not terribly reliable), attach peer reviewed literature to any expert evidence, subject expert evidence to scientific scrutiny (looking for valid and repeatable evidence) with designed studies where base truth is known (which it is not in cases!). Also important to determine whether a field **can** even be subjected to scientific experiments. DNA is largely the only field of forensic science that has been subjected to this kind of experimental design to establish legal reliability (scientific validity).

FOR THE EXAM

Know the law: What is the definition of necessity in MOHAN, then how did ABBEYbifurcate it?

Understand the principles underlying the law: look to P&S and Cunliffe paper.

Expert evidence is **routinely** examined on her past exams.

# SELF-INCRIMINATION (**P&S** 283-287, 315-345, **OICKLE**, **SINGH**)

Two categories of rules with respect to self-incrimination: 1) those that apply during formal proceedings (generally known as the principle against self-incrimination) and 2) those that apply outside of formal proceedings (the right to silence). Does not apply to pre-existing physical objects (exception is the compelling of bodily samples?). The principle only provides protection against incrimination, not other uses of the compelled information (R v WEITNZ BCCA: eg booze breath as evidence giving PO reasonable grounds). In Canada, a witness cannot refuse to answer a question during testimony in court because the answer to that question may incriminate her. However, the police cannot act upon any incriminating statements given during testimony. There is a complicated set of jurisprudence surrounding how far the police can go in acting upon information obtained through testimony – essentially evidence that would not have been available but for the witness’ testimony is not admissible.

* Canada Evidence Actapplies to any proceeding brought under the federal law – including the Criminal Code, CDSA, immigration/refugee issues, etc.
* Charter s 5 allows a witness to make an objection to answering if they believe the answer will incriminate them. They will still have to answer the question, but will be protected from police action or prosecution on the answer given. This section predates section 13 of the Charter, which provides essentially the same protection.
* Charter s 7 covers the right to silence. Statements given by a suspect to the police or any person in authority are covered by the common law and section 7.

The **A**’s decision to invoke their right to silence and stay silent will usually be inadmissible at trial. The right to silence is robust enough that the **A** does not waive it by providing info selectively (R v TURCOTTE – no adverse inferences from not saying more, R v STEVENSON).

Exceptionally, the **A**’s silence can be admitted if there is a real relevance and proper basis for admission (R v CHAMBERS). It can also be admitted if it necessary to support the narrative of the surrounding evidence (R v TURCOTTE – sole use was for making sense of other statements). The tactics used by the **A** can open the door to proof of the **A**’s silence permit it to be used in a limited evidentiary fashion (eg where **A** claims to have said things to police or R v WMC – explanation on stand of silence opens the door).

The one pure exception to this rule is alibi evidence where the conduct of the defence can open the door to proof of silence. If the A does not provide reasonable notice (names, times) of an alibi to give police an opportunity to investigate the alibi can affect the weight of the alibi evidence. If the crown knows the defence does not have to disclose. Disclosure does not have to be made immediately on arrest (can consult counsel etc.). Any time proof of silence is admitted a careful jury instruction is needed. The rules are more lax with co-accused as they both have s. 7 right to full answer and defence (thus co-accused can bring evidence of silence, lack of disclosure about statement to police). The SCC has stated that pre-trial silence evidence can only be used to challenge credibility not as evidence of an accused’s guilt (CRAWFORD).

If an accused person makes a statement to ordinary persons, they are admissible at the behest of the Crown to prove the truth of their contents under the admissions by the accused exception to hearsay. Statements to persons in authority, however, are different.

## COMMON LAW CONFESSIONS RULE

OICKLE marked a shift to a more contextual case-by-case approach. There is a long-standing rule at common law that confessions of the accused to the police must be voluntary – if not, they are inadmissible. Voluntariness must be proven by the crown BARD.

* 1. It applies to statements made by the accused to **persons he knows or reasonably believes to be in authority** (eg with power to detain or prosecute, give favours).
	2. To satisfy the voluntariness rule and have such statements admitted against the accused, the Crown must prove beyond a reasonable doubt in all the circumstances that the will of the accused to remain silent was not overborne by **inducements (assessed, oppressive circumstances, the lack of an operating mind**, police trickery (only applies to state agents) or a combination of such things.

This is a strict rule, the TJ **has no discretion** to admit the involuntary confession. Derived confessions rule: the OICKLE rule also applies to any subsequent statements where the tainting factors of the initial involuntary statement remain in place (e.g. referring to a previous involuntary confession to get the **A** to confess again), but not in exceptional cases (e.g. offence of lying to police).

* 1. **Do the circumstances of the statement or other evidence establish that the A believed that the statement was made to a person in authority?**

The statement need not be given directly to a police officer to trigger the OICKLE analysis. If the **A** reasonably believes that the person to whom the statement is made has some influence with the police or other authoritative bodies, then that statement will trigger the common law test from OICKLE. Once it is established that the **A** gave a statement to a person in authority, the question is whether the will of the **A** was overborne. In inducement and oppression cases a purely objective standard is inappropriate – the question is did the **A** reasonably believe that refusing to make statement would result in prejudice or vice versa (R v ROTHMAN, R v GRANDETTI: undercover PO). This subjective approach just described is inappropriate for pure operating mid cases (not other ones though).

1. **Can the Crown prove BARD that the accused’s will was not overborne by inducements, oppressive circumstances, or lack of an operating mind?**

The Court signals that the reliability of confessions and other statements are a central concern in the confession rule and the OICKLE analysis. While the question of reliability does not appear in the Court’s discussion of the test, it clearly underlies the concerns over inducements, oppressive circumstances, and operating mind.

Previously, statements would only be excluded if they resulted from physical violence or intimidation from the authorities. IBRAHIM established that inducements or false promises of advantage might also overbear the will of the accused, rendering resulting confessions inadmissible. Note that ONCA has viewed the failure to record confessions as rendering them suspect (not true in BC).

**INDUCEMENTS**

In OICKLE, the court elaborated on the type of inducements that are unacceptable. Promises of moral or spiritual advantage are fine. Promises of eliminating the charges or a lighter sentence render the statement inadmissible, as are promises of psychological or other types of counselling in exchange for a confession. Threats or inducements relating to the **A**’s family may be problematic, depending on the circumstances. Impact on the particular accused is consider as per OICKLE (See also R v MC – criminal past means inducements did not overborne the will). See p 331 for list of inducements. In R v SPENCER, the SCC found that promising the **A** a visit with his girlfriend was not enough of an inducement as A was savvy criminal.

|  |  |
| --- | --- |
| **ACCEPTABLE** | **UNACCEPTABLE** |
| * Inducements not linked up with state power
* Moral inducements to talk
	+ “You’ll feel much better if you talk to us…”
	+ However, you must look at the conversation as a whole, since a moral inducement might appear to bleed into a legal inducement.
* Downplaying the moral seriousness of the offence
* Offering access to psychiatric help, on its own, is probably not improper if there is no quid pro quo.
 | * Telling the accused he has to talk.
* Threats—anything that links violence to a refusal to talk
	+ Direct threats
	+ Indirect threats (e.g. withholding of protection)
* Downplaying the legal seriousness of the offence
* Improper inducements
	+ Legal benefits (“If you talk, I can get you a deal”)
	+ In some circumstances, linking psychiatric help to confessing might be improper.
	+ Look for a quid pro quo: there must be a causal link between the improper inducement and the actual decision to talk.
 |

**OPPRESSIVE CIRCUMSTANCES**

R v HOILETT is an example where oppressive circumstances were clearly made out (the **A** was made to sit for hours in a freezing cold cell with unsuitable clothing). If anything, this case shows how extreme the circumstances must be (the **A** was drunk and high as well as cold and uncomfortable) in order for the Courts to consider them to be oppressive. A lengthy interrogation is not sufficient to make out oppressive circumstances. Exactly where the Courts will draw the line is unclear. Depriving the suspect of food, clothing, water, access to counsel, etc. are flagged by the Court as potentially overbearing the will of the **A**. In R v HAMMERSTOM, the TJ excluded a murder confession from the **A**, who in his fragile emotional condition brought on by aggressive questioning came to believe his protests of innocence would be futile as the cops told him there had video footage of him. This must be external pressure.

LACK OF AN OPERATING MIND

The operating mind stage deals with a slightly different question – only requires that the accused have a least a limited degree of cognitive understanding of what she is saying. In R v WHITTLE, a schizophrenic person confessed because the voices in his head were telling him to do so. The Courts admitted this confession. In another case in which the **A** confessed while in shock after accident, the confession was excluded (WARD). In WHITTLE, the court held that the accused recognized that he was talking to police officers and that consequences would result from the confession. Therefore he was ruled to have an operating mind and the confession was admitted into evidence.

The operating mind intersects with the oppressive circumstances and inducements criteria, as oppressive circumstances and inducements may have more of an effect one someone with psychological or mental problems. It is therefore analytically sensible to consider threats/inducements, oppressive circumstances, and operating mind together. For example in R v HOILETT the court found that while the **A** did not lack an operating mind, his intoxication contributed a bit under this factor and was used to supplement the oppressive circumstances finding.

The focus of these inquiries is on the **A**’s decision-making process. To raise a reasonable doubt as to the voluntariness of a confession is actually a fairly difficult task for defence counsel. Despite the fact that the burden is supposedly on the Crown to prove voluntariness beyond a reasonable doubt, in reality the defence bears the burden of raising evidence that casts doubt on voluntariness.

1. **Can the Crown prove that the police did not engage in trickery that would shock the community?**

The issue of police trickery is one of profound breach of trust. It does not necessarily address the same reliability concerns as the other parts of the OICKLEtest. Things that do **not** amount to police trickery include lying about evidence (either its existence or strength). Police trickery must be particularly egregious in order for it to render a statement inadmissible – it must shock the conscience of the community (ROTHMAN). ROWE: money given to Jamaican priesty guy by police who used a ritual to induce confession, this was not ruled police trickery (important that **A** did the ritual because he thought it would help him avoid apprehension). **Note** that the confession rule as discussed in OICKLEand the right to silence under s 7 of the Charter only cover statements made by the **A**. Other evidence, like physical evidence that is not obtained as a result of a statement to the authorities, does not trigger this analysis.

MR BIG SCENARIOS

There is case law that suggests that Mr Big confessions are not covered by OICKLE because they are not made to persons in authority from the perspective of the **A**. However, the SCC will soon hear the appeal from R v HART, a NFCA case in which a Mr Big confession was struck on reliability & voluntariness grounds. It will also hear R v FOREMAN, a Mr Big case from Ontario.

There is still a residual discretion to exclude. This is acknowledged by the SCC in HARRIER and TERRY. It has been applied by the BCCA in WELLS (confession obtained by violence or threat to a person not in authority). However, the standards are unclear when this discretion should apply.

### R v OICKLE [2000] SCC

|  |  |
| --- | --- |
| ***FACTS*** | Oickle – a volunteer firefighter – was suspected (along with many other people) of being involved in a number of fires that had been set over a period of several weeks. During the police investigation of 8 fires, the accused submitted to a polygraph test. The officer administering the test questioned him in a gentle and reassuring manner in order to gain his trust. At the conclusion of the test, the officer told the **A** that he had failed the test. The **A** was then questioned for about an hour and 40 minutes until he confessed to the first fire. He cried. He was arrested and warned of his rights. (Prior to his arrest he was consistently informed of his rights and informed that he could leave at any time).At the police station, the accused was placed in an interview room equipped with videotaping equipment. He was questioned for another 3-4 hours until he confessed to 7 of the 8 fires. He cried some more. Police then took a written statement from the accused, which took another 3 hours, and put him in a cell to sleep around 2:45am. At 6:00am, an officer noticed that the accused was still awake and asked if the accused would agree to a reenactment.On the videotape of the re-enactment, the accused was informed of his rights. The police then drove the accused around town as he pointed out the locations and explained how he started the fires.During the polygraph test and subsequent interrogation, officers:* exaggerated the accuracy of the polygraph test;
* minimized the moral significance of the offence, but they did not minimize the legal consequences;
* repeatedly mentioned that “I think you need help” or “[m]aybe you need professional help” (but at no time did they suggest that the accused could get help only if he confessed)
* repeatedly suggested that things would be better if the accused confessed, but always in the context of moral inducements (the accused would feel better, the community would respect him more, etc.);
* suggested that they would abstain from polygraph testing the accused’s fiancée if he confessed.

The **A** was never denied food, sleep, water, or even so much as access to the bathroom. Total questioning time was approximately 9-10 hours. |
| ***RULING*** | Oickle argued that he was a highly suggestible person, that the police used his relationship with his girlfriend to manipulate him, and that the police exaggerated the strength of the evidence they had against him (namely, the polygraph results). The Court ruled that none of this was sufficient to vitiate the voluntariness of the **A**’s confession. This decision makes it clear that section 7 of the Charter does not subsume the common law confession rule. Iacobucci J then set out the common law confession rule in great detail. The Charter and the confession rule are triggered by different things, and the burden and standard of proof for each are different. Charter violations must be made out by the person alleging them (the **A**) on a balance of probabilities, while the voluntariness of a confession or any statement to a person in authority by an A must be proven by the Crown beyond any reasonable doubt. Also, Charter violations have different remedies than involuntary confessions. Having said this, what are the factors that will vitiate the voluntariness of an **A**’s confession?1. Has the Crown led sufficient evidence capable of persuading the ToF that a statement was made? If not, the statement will be excluded. If so,
2. Do the circumstances of the statement or other evidence establish that the **A** believed that the statement was made to a person in authority? If not, the statement will be admitted as an exception to the hearsay rule. If so,
3. Can the Crown establish that the accused did not **reasonably believe** that the statement was made to a person in authority? If so, the statement will be excluded as an exception to the hearsay rule. If not,
4. Can the Crown prove that the accused’s will was not overborne by inducements, oppressive circumstances, or lack of an operating mind? If not, the statement will be excluded. If so,
5. Can the Crown prove that the police did not engage in trickery that would shock the community? If not, the statement will be excluded. If so, the statement may be admitted, subject to the trial judge’s discretion to exclude evidence whose prejudicial effect outweighs its probative value.
 |
| ***RATIO*** | * **The voluntariness of a confession or any statement to a person in authority by an** A **must be proven by the Crown beyond any reasonable doubt**.
* Sets out the analysis for determining the voluntariness of a statement made by the A to a person in authority.
 |
| ***NOTES*** | The expert evidence mentioned in the SCC decision was not adduced at trial – presumably it is the result of research by SCC clerks. This case has been criticized for this reason – the expert evidence cited in the decision was not subjected to the adversarial process or cross-examination. Recently the SCC has said that it will not use information gleaned from its own research that was not subject to the adversarial process in the proceedings below. |

## *CHARTER S 7* RIGHT TO SILENCE AND THE PRINCIPLED APPROACH

NOTE: Detention occurs when the **A** reasonably believes they are not at liberty to walk away or would be arrested if they walk away. This is different than the common law rule which is triggered by speaking to a person in authority. When in detention s. 7’s right to silence is equal to confessions rule and provides no more protection.

#### S 7 AND COMMON LAW CONFESSIONS RULE

Note you will never employ section 7 for detained persons as you can apply the confessions rule which the burden is on the crown to prove BARD (not on the accused to prove on a balance).

SINGH MAJORITY: Where **A** is detained and knows s/he is speaking to a person in authority, s 7 and the OICKLErule are “functionally equivalent”. If TJ concludes statement is voluntary, s 7 has no further scope in this context. An abuse of state power arises if a confession is elicited involuntarily, and the reliability concern is also heightened in this situation. The right to remain silent must be balanced against the state and public interest in investigating and prosecuting crime. Section 7 does have additional play where:

* **A** is speaking with an undercover agent (HEBERT [1990] SCC); or
* **A** is cross-examined on silence; or
* **A** is compelled by statute to make a statement (WHITE [1999] SCC*,* JONES [2006] OCA); or
* where derivative evidence has been discovered as a result of **A**’s involuntary statement (arguably: BURLINGHAM [1995] SCC).

SINGH MINORITY: Section 7 and OICKLE have different rationales, and s 7 goes further in protecting **A** against abuse of state power. Pursuant to s 7, a police officer or state agent must respect **A**’s clearly expressed wish to remain silent.

#### RIGHT TO SILENCE UNDER S 7

SINGH MAJORITY: A qualified right, contravened only if **A** is denied the choice to speak or remain silent. Whether **A** exercised choice is a contextual enquiry decided partly with regard to **A**’s cognitive abilities (*Otis* 2000 QCA). Police persuasion in the face of repeated assertion by **A** of a desire to end the interview or stay silent does not, in itself, deny the right.

SINGH MINORITY: The decision whether to speak or remain silent is effectively undermined if police persistence conveys to A that the right to silence has no practical effect and s/he will not be left alone until s/he answers the questions.

The key difference here is between the right to be free from making involuntary statements (per OICKLE) and the right, once one has expressed an intention to exercise silence, to be free from a persistent pressure to speak. Majority and minority disagree about the underlying rationale of the s. 7 protection and about the likely effects of a stronger protection of the right to remain silent.

#### DETAINED STATEMENTS (P&S 339)

Section 7 is triggered on detention (HEBERT)once **A** is subject to coercive power of state (NOBLE [1997] SCC). If an undercover agent actively elicits a confession from **A**, then **A** has been denied the right to choose whether to speak or remain silent to the authorities, as per HEBERT (right to silence asserted and then undercover placed in cell). LIEW [1999] SCC affirmed Hebert that the question is whether a free and meaningful decision to speak to authorities has been made (does not matter solely if A informed police he did not want to speak like Hebert). The court must ask whether the conversation is “akin to an interrogation” (HEBERT), but per LIEW [1999] SCC, a police office may shift conversation naturally (in the role he is playing) to incriminating subject. The question to ask is whether there is a causal link.

The second factor in deciding whether a detained statement breaches s 7 is whether the undercover agent exploited a relationship of trust – but posing as a co-arrested **A** is not enough to qualify (LIEW: admitted). This means the exploitation of a special relationship in which the the A thought meant the confession would not be used against him. This does not apply to statement made when not under coercive power of state (arrested or charged). Does not apply to statement made to fellow prisoner that are not state agents (see hearsay?).

**EXAMPLE:** **A** did not want to speak to police but spoke to an officer planted in his cell with the intention of eliciting a confession. In this case, the s 7 right needs to be respected. The undercover cop must walk a fine line - they are allowed to converse with the **A**, and they are allowed to shift the conversation to more incriminating topics**, BUT** they are not allowed to interrogate them ("Did you do it? How are you going to defend yourself?"). OICKLEwouldn't apply here because by definition the **A** does not know they are speaking to an authority figure. This was important in the PICKTON case, where the **A** admitted to the undercover cop that he had killed 49 women and was looking for number 50, and this was found to be admissible.

#### STATUTORILY COMPELLED STATEMENTS (P&S 341)

Where **A** is compelled by statute to make a statement (such as in ICBC claims), this in certain situations cannot be used against him or her if use would contravene the principle underlying s. 7 (WHYTE)*. Note that section 7 does mean that the A does not have to testify if statutorily compelled just means it cannot incriminate them.* Protection only applies ifthe purposes of section are engaged (unreliable confessions, right to autonomy etc..). IN determining whether the statement should be protected considered Ask (per WHYTE):

* whether there is an adversarial relationship between A and state agency when statement is made (see FITZPATRICK [1995] SCC); if voluntarily enter in a regulatory activity this is not the case and thus the statement can be used (not the case in Whyte as you have no choice as to whether or not to drive)
* whether the risk of an unreliable confession arises; and
* whether the legislation itself increases the risk of state abuse.
* whether the statement is a product of “real coercion”; (eg?? R v Jones – no reasonable expectation of privacy when crossing border)

#### DERIVATIVE EVIDENCE (342)

Under the Charter*,* derivative evidence *may* be excluded subject to the s 24(2) enquiry.

At common law, the R v ST. LAWRENCE rule provides that where an involuntary confession leads to the discovery of real evidence, the real evidence is admissible as the parts of the confession that are found to be true due to the evidence. Under s 7, where s 7 has been breached, this may lead to all derivative evidence being inadmissible per 24(2). This is a place where the functional equivalence" between s 7 and the common law may not work, as it is possible for evidence to be inadmissible at common law, but the **A** to fail to establish a breach of s 7 on a BoP, thereby rendering the evidence **admissible**. See R v SWEENEY: confession excluded but gun not asked to be.

### R v SINGH [2007] SCC

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| ***FACTS*** | The **A** was arrested for murder 2 for the death of an innocent bystander who was killed by a stray bullet while standing just inside the doorway of a pub. The **A** was advised of his right to counsel under s. 10(b) of the Charter and privately consulted with counsel. During the course of two subsequent interviews with police, the **A** stated on numerous (as many as 18) occasions that he did not want to talk about the incident. The interviewing officer persisted in trying to get him to make a statement. While the **A** never confessed to the crime, he made a number of admissions which, when taken together with other evidence, later became probative of the issue of identification at trial (video and photos of **A** in the bar with a baseball cap). On the *voir dire* to determine the admissibility of the statements made by the **A**, the TJ held that the admission was voluntary, and the probative value of the statements was held to outweigh their prejudicial effect. The **A** was subsequently convicted by a jury. The CA upheld the TJ’s ruling. Both in the CA and at the SCC the **A** did not contest the TJ’s findings of fact nor his conclusion that the statements were voluntary; his appeal solely concerns the s 7 Charter right to silence.The question before the court is, then, what should the police officer have done once the **A** advised him that he wished to remain silent. The defence argued for a *Miranda*-style rule, whereby once the **A** has expressed their wish to remain silent, the interrogation stops completely and the police cannot resume it until they have a written waiver and a further consultation with counsel (a bright line rule). The Crown argued that because the **A** admitted that the statement was voluntary under the *Oickle* rule, then s 7 operates identically and has no further application, and the statement should be admissible. |
| ***RULING*** | MAJORITYThere was a difference of perspective on the facts between the majority and minority decisions. But there is also a difference of perspective on principle. In Charon's majority decision, the **A** was perfectly capable of deciding which questions to answer or not to answer. According to Charon, s 7 protects the **A**'s freedom to choose whether or not to speak to police, and does not protect the **A** from having questions put to them. In determining the limits of s 7, Charon relies on the balancing of the **A**'s right to silence with society's interest in the effective investigation of crime. Quite aside from the fact that Singh admits that his statements were voluntary, there is other evidence that suggests the statements were voluntary (important factors): the fact that the **A** spoke to his lawyer; the number of times the **A** asserts their right to silence, though this is not definitive (OTIS); when they made the admission, did the **A** have an operating mind, was there threat or oppression; the **A** did not confess, but made selective admissions through decisions the **A** was making on their own (highly likely to have it ruled voluntary when selective admissions are made, while a full confession being blurted out would have a better chance at being ruled inadmissible through an OICKLEapplication).MINORITYIn Fish's minority decision, the **A** is worn down to the point where he had no choice but to answer. The operational question is whether police questioning frustrates the **A**'s ability to choose to remain silent. The purpose of the constitutional right is crucial, and we must assume that Parliament did not offer people these rights so that they could be ignored by police. The right to silence under s 7 has the right not only to freely choose to remain silent, but also to be free from further interrogation afterwards. That said, Fish rejects a bright line rule suggested by the defence, as it is not necessary to go that far in this case. Under Fish's approach, s 7 is a protective right whose limits are determined by that purpose, and there is no balancing undertaken until s 24(2). |
| ***RATIO*** | When police are interviewing a suspect who expresses a desire to remain silent, the police need to affirm that the suspect has the right to silence which that they can continue to exercise, but the police don't have to stop asking them questions. In other words, if a statement is voluntary under **OICKLE**, then s 7 has no further play as they are functionally equivalent in that sense (except for derivative evidence). |
| ***NOTES*** | Arguably the facts of the interrogation are more important than the facts of the actual offence. Perhaps a large part of the difference between Charron J’s decision and Fish J’s dissent is the fact that they both have markedly different views of the interrogation. Charron J held that Singh was fully capable of deciding whether to answer the questions the police were asking of him, whereas Fish J believed that Singh was so worn down by the interrogation that he effectively had no choice but to answer. |

###  R v SINCLAIR [2010] SCC

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| ***FACTS*** | The **A** was suspected in the death of a Kelowna man. He was arrested and asked questions about the death. He was allowed to speak to Legal Aid on the phone for three minutes, who told him that he had the right to refuse to answer any questions, the police would lie to him and attempt to make him ignore Legal Aid’s advice. Following this, Sinclair was interrogated for hours. He repeatedly stated his wish to remain silent. He was presented with evidence real and fabricated. Eventually Sinclair got confused and asked to speak to Legal Aid again. He was refused, the interrogation continued, and he confessed.  |
| ***RULING*** | There is no right to have a lawyer present during questioning, and that **the initial consultation is sufficient** to meet the section 10(b) guarantee. There are limited circumstances in which the **A** will have a right to consult counsel during questioning where she has already been able to consult counsel (change in procedure, jeopardy) where it is necessary to s 10(b)’s underlying purpose. |
| ***RATIO*** | The A has a meaningful right to choose whether to remain silent, but has no right not to have questions asked of them. Nor is there necessarily a right to re-consult counsel or have them present during questioning.  |
| ***NOTES*** | This approach is out of step with other jurisdictions. |

# IMPROPERLY OBTAINED EVIDENCE (**P&S** 352-396, **GRANT**)

## **SECTION 24**

Charter, Section 24

* 1. **(1)** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied (*personally*) may apply to a court of competent jurisdiction (*any criminal trial court*) to obtain such remedy as the court considers appropriate and just in the circumstances.

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

In order to rely on s 24(2) to exclude evidence, the burden remains on the **A** on a BoP throughout to prove the following **3 factors**:

* 1. The **A**'s Charter rights **must have been breached**. The **A** cannot rely on a breach of a third party’s rights, even if it was their co-accused.
	2. Evidence **must have been obtained in a manner** that violated the Charter rights of the **A**. This connection need not be causal, sufficient that the obtaining of the evidence forms a part of the sequence of events with the Charter breach.

WITTWER (P&S, 371): no s 10(b) warning, **A** confesses, police realize, give him s 10(b) warning and let him talk to a lawyer, **A** reconfirms his earlier statement after police **bring up earlier confession**. Court held that subsequent confession was so closely related to the original, that it was tainted by the Charter breach and therefore excluded.

FLINTOFF: Driver is pulled over, breath sample is obtained, and in the course of that the driver is strip-searched. Not at all clear that strip-search was warranted, but more importantly, was not causally related to the breath sample. Court doesn't care, the two are so closely related that both are excluded.

STRACHAN: Police have a valid warrant, exercise it properly and discover drugs at **A**'s house. **A** wants to call his lawyer during the police search, police don't let him which is a clear breach of s 10. Police argue there is no causal connection between the breach and the discovery of the evidence. Court found that the temporal connection was close enough that the evidence should be excluded.

* 1. Admission of this evidence must bring the administration of justice into disrepute (GRANTtest).

ON EXAM, Charter rights at issue will come from cases we've covered (s 9, GRANT; s 10, SINGH). MANN: Test for s 9 - would a reasonable person in the **A**'s positionfeel free to walk away?

PRIVACY RIGHTS HIERARCHY

The court has established a hierarchy of privacy rights under s 8 (in GOLDEN). A strip search is worse than a pat down, and therefore requires more protection; pockets are more protected than your home, and so on. Section 8 also protects information privacy, but most modern contracts waive this right. Section 8 offers less protection to more marginalized people, as it protects privacy more strongly for a house that you own than a hotel room you are renting, for instance.

## **THE GRANT TEST**

Under the old COLLINS/STILLMAN framework, evidence was either conscriptive or non-conscriptive. Non-conscriptive was generally included, conscriptive evidence automatically excluded. **Conscriptive evidence** is evidence you are forced to give against yourself (either an incriminating statement made by the **A**, or evidence taken from the body, or any real evidence obtained derivatively from conscriptive evidence). This bright line rule will lead to perverse outcomes in terms of what gets excluded or included.

The majority found that the analytical framework found in the prior leading cases of COLLINS/STILLMAN had created justifiable criticisms, and the majority turns to a principle-based approach (P&S, 355-356). The underlying principles are based on the goals of enforcing police standards, remedying breaches, protecting the court's reputation (distancing court from misbehavior on the part of the police), ensuring fair trials, but ***primarily* the need to preserve public confidence in the courts** (whose confidence? A reasonable informed person who knows and accepts Charter values - this is a legal conception, and it almost seems like they are describing a judge. Attempt to distance analysis from response to a particular case and shifting public attitudes towards the Charter, balance with focus on maintaining stability in definition of public confidence and long-term integrity of the justice system). This approach consists of THREE FACTORS:

* 1. Seriousness of the Charter-Infringing State Conduct
	2. Impact of the Breach (*not of admitting the evidence*) on the Charter-Protected Interests of the Accused
	3. Society's Interest in an Adjudication on the Merits

**The first factor** requires an assessment of whether the admission of the evidence would bring the administration of justice into disrepute (which includes an analysis of whether the breach was deliberate, and whether the officers were acting in good faith). The more severe the Charter infringement, the more the court must dissociate themselves from the breach. Seriousness is increased by patterns of breaches and deliberateness. Systemic issues are considered, but speak with a forked tongue - they can function in both directions. In some cases, systemic breaches are seen as more minor because they aren't deliberate, but in other cases they are seen as more serious because the breaches will be more common. Emma thinks deliberateness is a red herring here, and that systemic breaches are generally more serious (privileging goal of enforcing police conduct). Extenuating circumstances are also relevant here - police attempting to prevent physical harm or avoiding the destruction of evidence. The court does not want to allow extenuating circumstances to function as a loophole, however, and will force the police to point to something specific. Deliberate use of the suspect's vulnerability by the police also increase the seriousness.

**The second factor** focuses on how the accused person was affected by the state conduct (which includes an analysis of the intrusiveness into the person's privacy, the direct impact on the right not to be forced to self-incriminate, and the effect on the person's human dignity). Plays on the concept touched on in s 8, that there is a hierarchy of rights and that breaches that involve police going into the **A**'s house is more serious than those where the police go into the **A**'s car. Where you have a particularly vulnerable **A**, a breach might have had a greater impact on them, and the GRANTframework will take that into account. The seriousness of the charge is not considered here.

**The third factor** focuses on how reliable the evidence is in light of the nature of the Charter breach. Emma says this is actually about the probative value of the evidence because the majority says that the seriousness of the offence is a **neutral** factor here, and the focus is on the reliability of the evidence and its importance to the case (which combined = probative value). The higher the probative value of the evidence, the higher the impact and the seriousness of the breach must be in order to exclude the evidence.

All of these factors are equally relevant, *ex ante*, but if one of them is at the extreme end of the scale, it might overwhelm the other two and tip the balance towards exclusion. **Where these 3 factors are satisfied, the court has an obligation under the Charter to exclude the evidence.** Where there has been more than one breach, the Court will consider them together when considering exclusion under s 24.

###  R v GRANT [2009] SCC

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| ***FACTS*** | The **A** was walking down the street near some schools in Toronto. The police were on patrol due to recent problems with drugs and violence near schools. Two officers in an unmarked cruiser saw the **A** staring intently at them and fidgeting as they drove by. They told another officer in a marked car about him. This officer approached Grant on the sidewalk. The officers in the unmarked car eventually joined the other officer in obstructing Grant on the sidewalk. The police questioned Grant, who eventually revealed to them that he was carrying a bag of marijuana and a handgun. Defence counsel applied to exclude not only Grant’s statements, but also the physical evidence of the gun and drugs.The TJ found that Mr. Grant was not detained before his arrest, and that section 9 and section 10 of Charter were not infringed. The gun was admitted into evidence, and Mr. Grant was convicted of a number of firearm offences.On appeal, the OCA found that a detention occurred when the **A** began making incriminating statements, and since there were no reasonable grounds to detain Mr. Grant, section 9 of the Charter was infringed. Applying the COLLINS test, the related STILLMANtest, and other subsequent jurisprudence, the CA found that admission of the firearm would not unduly undermine the trial fairness. As a result, they would not have excluded the firearm, and the convictions were not overturned. The Court of Appeal also noted that moving a firearm from one place to another met the definition of 'transfer'. |
| ***RULING*** | SECTIONS 9 AND 10The majority found that **detention** refers to a suspension of an individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that they had no choice but to comply. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual’s circumstances would conclude the state had deprived them of the liberty of choice, the TEST consider these factors:* + The **circumstances giving rise to the encounter** as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.
	+ The **nature of the police conduct**, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
	+ The **particular characteristics or circumstances of the individual** where relevant, including age; physical stature; minority status; level of sophistication.

The majority went on to find that Mr. Grant was psychologically detained when he was told to keep his hands in front of him and when the other officers moved into position to prevent him from walking forward. Therefore, he was arbitrarily detained, and denied his right to counsel.The court also found that the detention was arbitrary because the police had no evidence of anything other than odd behaviour and no basis to detain Grant. There was a breach of s 9, and therefore also of s 10(b) (these will often happen together when police don't realize detention has begun). SECTION 24(2)There was both a temporal and causal connection between the evidence and Grant's Charter breach. Once a violation was found, the case turned on the application of section 24(2), which states that once a violation of an individual's Charter rights have been found, the evidence obtained through the violation must be excluded if its inclusion **would bring the administration of justice into disrepute**. What about in Grant's case?**SERIOUSNESS**: The breach was fairly serious because the police did not have reasonable or probable grounds. However, the law was unclear at what point the suspect was detained, which reduced the seriousness. The court was willing to accept that the point at which Grant was stopped on Danforth Avenue - it was not clear to the beat cop at what point the investigative detention began. The court found that there was no suggestion of racial profiling because defence counsel did not make that argument. Overall, not the most serious breach.**IMPACT:** The court considers s 9 first. Initially, when the cop steps out of the car, it's just a conversation. But when he tells Grant to keep his hands in front of him, it becomes a subtly coercive situation. The impact on s 9 was more than minimal. With regards to s 10(b), the issue is that Grant needed the advice that he did not have to answer the police's questions, and was not told of this. In conclusion, the court finds that the impact was significant.**ADJUDICATION:** The court finds that the gun is very reliable evidence and therefore the probative value is high. The seriousness of the offence is not relevant.When considering these three factors together, the seriousness was not high, the impact was significant but not the most serious, and high probative value, therefore the evidence is admitted. The court notes that this is a finely balanced case, and their admittance of the evidence is in part deference to the trial judge's decision. |
| ***RATIO*** | Outlines analysis for determining whether admission of evidence would bring the administration of justice into disrepute under s 24(2). |
| ***NOTES*** | Cite GRANT for investigative detention (court is willing to infer subjective impression from objective information, but language suggests that it is a modified objective test based on the characteristics of the **A**) and exclusion analysis under s 24(2). |

## CATEGORIES OF EVIDENCE

**Statements by the A**

These breach the **A**'s right to silence and not to self-incriminate. The court also finds this is true of s 10(b) infringements.

* **Seriousness of the Charter-Infringing Conduct:** Because this breaches the **A**'s right not to self-incriminate, and because police are expected to respect this right routinely, breaches in this context tend to be serious. There may be minor and inadvertent slips which may be less serious, where the police conduct is otherwise exemplary (ex: police fail to advise **A** of right to counsel but the **A** manages to speak to counsel all the same).
* **Impact of the Breach on the Charter-Protected Interests of the A:** Where it can be shown that the breach of the right didn't particularly impact what the **A** did or said (relevant that **A** volunteered information, not elicited through interrogation), this factor will tend to militate in favor of including the evidence. Where there is a strong link between the denial of the Charter right and the **A**'s refusal to speak, this factor will militate for exclusion.
* **Society's Interest in an Adjudication on the Merits**: Focus is on the reliability of incriminating statements here. If the evidence is likely to be unreliable, this is a strong reason to exclude it. The COLLINS/STILLMANrule made sense based on the application of the first and third factor, and conscriptive statements will (generally) continue to be excluded under the GRANTframework.

**Bodily evidence**

Under the old system, this is also conscriptive and automatically excluded (eg: breathalyzers, iris recognition, DNA).

* **Seriousness of the Charter-Infringing Conduct:** Not likely to be systemic, likely to be deliberate.
* **Impact of the Breach on the Charter-Protected Interests of the A:** This is where the hierarchy of rights is engaged (plucking a hair from the **A** is less serious than a strip search, which is about obtaining real evidence).
* **Society's Interest in an Adjudication on the Merits**: Reliability rubber hits the road - bodily evidence generally seen as having very high probative value. Interesting analytical questions arise now around the scientific reliability of fingerprinting - lower probative value than we previously thought.

**Non-bodily physical evidence**

Searching a home without a warrant and finding drugs, for instance. This is the category that was engaged in the HARRISONcase.

* **Seriousness of the Charter-Infringing Conduct:** The more deliberate the police conduct, the more settled the law, the more systemic the pattern of breaches, the more serious the breach.
* **Impact of the Breach on the Charter-Protected Interests of the A:** Hierarchy of rights is going to be relevant. More intimate rights and more deliberate breaches will lead to exclusion.
* **Society's Interest in an Adjudication on the Merits**: Reliability is likely to be high, but there may at times where probative value is constrained by the facts (more than one person living in the house - whose drugs are they?).

**Derivative evidence**

This is evidence derived from statements made by the **A** (Grant's gun, for example). In GOLDHART, court was willing to see discovering the existence of a person as potentially derivative evidence. This is one of the hardest areas to analyze under the COLLINS/STILLMANframework. Under that analysis, the conscriptive evidence is excluded and the derivative evidence is only admitted if it would have been discovered even without the breach. This was criticized because it requires speculation.

* **Seriousness of the Charter-Infringing Conduct:** The more deliberate the police conduct, the more settled the law, the more systemic the pattern of breaches, the more serious the breach.
* **Impact of the Breach on the Charter-Protected Interests of the A:** Discoverability plays a role here - did the police have grounds to get a warrant, and just not bother (this would correspondingly increase the seriousness)? Or were the police just acting on suspicion and had no grounds for a search? Often the derivative evidence is going to arise from the failure to warn of right to counsel under s 10(b) - focus is going to be on the impact that failure to warn.
* **Society's Interest in an Adjudication on the Merits**: Probative value will generally be high, so first two factors will have be more serious before the evidence will be excluded.

### R v HARRISON [2009] SCC

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| ***FACTS*** | Harrison and a friend were transporting drugs in a rental car from Vancouver to Toronto. Police observed that the vehicle had no front license plate, an offence if the car is registered in Ontario, and pulled the car over. He then realized the vehicle was registered in Alberta and was not required to have a front license plate. He was also informed by radio dispatch that the vehicle had been rented in Vancouver. At that time, there are no grounds to believe any offence was being committed.Nonetheless, Cst. Bertoncello was suspicious. The vehicle appeared to be "lived-in", which suggested it had been driven directly through from Vancouver. He knew that rental cars were often used by drug couriers. He knew that it was rare for drivers to drive that stretch of the road at exactly the speed limit, which Harrison had been doing. Finally, Harrison and his friend gave contradictory stories when questioned separately.Harrison was not able to provide his driver's license upon request, saying he left it in Vancouver. A computer check revealed Harrison's license was currently suspended, so police arrested him for that.Bertoncello asked Harrison and his friend if there were any drugs in the car. They both replied in the negative. Other police officers arrived, and Bertoncello began to search the car. He testified that he did so "incidental to the arrest" in order to find Harrison's driver's license**, even though the license's whereabouts was irrelevant to the charge.** Police found drugs in the car. |
| ***RULING*** | Seriousness of the police officer's conduct was seen as very high indeed, due to the pattern of breaches. Search for licenses is seen as a fabrication to justify that the officer's search of the trunk. That plus the fact that the court saw the officer as having lied on the stand render the **seriousness** factor very high. The **impact of the breach** was not as high, as while the trunk of the car and the glove box are more protected than the back seat, but this was a rental car and cars are less protected than your house or your body. **Society's interest in adjudicating on the merits** was high because the evidence (the cocaine) had very high probative value. Despite this, the evidence was excluded because of the seriousness of the police officer's conduct. |
| ***RATIO*** | Example of application of **GRANT** analysis under s 24(2). |
| ***NOTES*** | The fact that Bertoncello lied on the stand about his motives in searching the car was very important. |

# HEARSAY (P&S 103-153, 168-180, KHELAWON)

## WHAT IS HEARSAY?

In ***EVANS***, the court said that **hearsay** is evidence of an out-of-court statement that is used to prove the truth of its contents. **Cunliffe** prefers the terminology of “statements made at another time and another place” to “out-of-court statements” because statements made in another court or at another stage of the same proceedings can constitute hearsay.

**EXCEPTION: If a statement is part of a contract, then it is not hearsay.**

**DEFINING FEATURES OF HEARSAY (*KHELAWON*)**

1. Was the statement made out of court? (Including a statement made in another court, or at a different time, e.g. at the preliminary hearing.)
2. Is the statement introduced to prove the truth of its contents? Where the out of court statement is only being offered to prove the statement is made, it is not hearsay. If the statement has some (material and) relevant purpose other than the truth of its content it may be admitted on that basis.
3. Was there an opportunity for contemporaneous cross-examination? (This is not a defining feature of hearsay - a statement made in another court is still hearsay, despite satisfying this requirement. This is the fundamental concern with hearsay, as cross-examination plays essential role in evaluating the accuracy of testimony).

If a statement has two parts, one which is not hearsay and relevant to a secondary issue, and one which is hearsay and relevant to a central issue, then the court will be very hesitant to allow this statement in during a jury trial due to the prejudicial effect outweighing the probative value, but are more likely to allow it in if it is a trial by judge alone.

**IMPLIED STATEMENTS**

***PERCIBALLI [2001] OCA*, affirmed by the SCC (witness pointing out telephones)**

**Hearsay includes conduct that is intended to convey meaning**. Example: pointing to the person who shot the gun.

**It is contentious whether conduct or implied statements that are not consciously intended to convey meaning are also hearsay.** BCCA authority and House of Lords decision in ***KEARLEY (PO stay in house and pick up phone10 times in which others ask for drugs) and WRIGHT*** suggests that they are hearsay as they function as implicitly in a hearsay manner that they could not do if the were explicit, and need to be analyzed via the principled approach. OCA decision in ***EDWARDS*** with a nearly identical fact pattern toKEARLEYsuggests that these statements are not hearsay. In ***BALDREE***, the police seizing the cell phone during a drug bust, and received a phone call on that phone setting up a meeting for drugs. The police wanted to use the witness to that call to testify to its details for the purposes of establishing that the **A** was a drug dealer. The SCC held that this was a hearsay statement because the implied truth of the **D**'s statement on the phone is what was relevant at trial and that implied statements will always be hearsay when relied on for their truth. **Insert examples in P&S as well as Boyle & Cunliffe article.** On the exam, if you can identify any truth purpose, proceed with hearsay analysis.

**DISTINGUISHING BETWEEN HEARSAY AND NON-HEARSAY PURPOSES**

A statement is only hearsay if introduced to prove the truth of its contents. Per Charron J in ***KHELAWON***, it is important to assess the purpose for which the statement is offered. The purpose is tied closely with the substantive law in question.

***SUBRAMANIAM v PUBLIC PROSECUTOR [1956] UK PC***

**A** wanted to introduce evidence of out-of-court statements by alleged terrorists in order to establish that he had a reasonable apprehension of instant death. Court in Malaysia say this is hearsay, but the Privy Council ruled that this is not a hearsay purpose as to prove duress you only have to prove the threats were made (not that the terrorists would follow through on them).

***R v COLLINS [1987] SCC***

Police officer wanted to introduce evidence that another officer had advised him that **A** would be holding drugs. The purpose of this evidence was to establish that the police officer had a reasonable basis to suspect **A**, not the fact that the **A** possessed drugs – therefore, this was not hearsay.

**PRIOR STATEMENTS OF WITNESSES**

***KHELAWON*** makes clear that the law of hearsay extends to out-of-court statements made by witnesses who does testify in court when the out-of-court statement is tendered to prove the truth of its contents. When a witness adopts his/her earlier statement no hearsay issue arises and the prior statement can trigger the witness’ memory. However hearsay will apply where the witness recants or testifies they cannot recall the out-of-court statement.

**CONSEQUENCES OF IDENTIFYING HEARSAY**

**At common law, a hearsay statement is prima facie inadmissible.** This presumption of inadmissibility may be displaced if:

1. The party seeking to admit the evidence may prove that it is necessary and reliable. Burden on the party seeking admission, to balance of probabilities (***MAPARA***& ***KHAN***).
2. The party seeking admission may prove that the evidence fits within an established exception to the rule. The burden shifts to party resisting admission to demonstrate that *exception* does not adhere with necessity and reliability criterion or (rarely) to demonstrate that *this evidence* does not meet those criteria (***MAPARA***&***STARR***).

**Context is crucial.** Some statutes explicitly or implicitly abrogate the presumptive rule against hearsay. In these circumstances, start from a presumption that the hearsay is admissible, but that the hearsay dangers should be assessed before weight is accorded to the evidence.

**DANGERS OF HEARSAY**

The “lack of opportunity for contemporaneous cross-examination” piece is directed at the dangers of hearsay, which can be categorized as follows:

1. The risk of **miscommunication**, which cannot be corrected if declarant is unavailable (was **D**’s intention correctly understood by the **W**, and did the **W** hear correctly?)
2. The risk of **insincerity** or **dishonesty** (was **D** telling the truth, or did he have a motive to lie?)
3. The risks of **unreliability**, both in perception (what was the **D**’s opportunity to judge the events of which she speaks?) and memory (how well did the **D** recall the events at the time of making the declaration?)

**EXCEPTIONS TO HEARSAY**

Traditionally, the only way to get hearsay in was to meet one of the many categorical exceptions to the hearsay rule, which Lamer CJC deprecated as “technical categorical requirements” and “a rigid pigeon-holing analysis”. Wigmore was also critical of the categorical exception approach. There are 28 categorical exceptions in addition to the principled approach. **For instance, anything the A does or says is admissible, and is not hearsay** (policy exception)**.**

In a series of cases, the Supreme Court remade the law of hearsay along the **principled approach**. The old exceptions remain presumptively in place (***MAPARA***), but they must comply with the principled approach. The principled approach can also be used to admit certain hearsay evidence that does not meet any of the existing exceptions.

#### PRINCIPLED APPROACH (INTRODUCED IN **KHAN**)

Hearsay evidence is presumptively excluded, but will be admitted where it is necessary and reliable **(*KHAN*)**. The burden of proving admissibility based on the principled approach rests on the party seeking admissibility. Necessity and reliability may substitute for one another, to some extent – the more necessary evidence is, the less reliable it needs to be and *vice versa*. But in ***KHELAWON*** the SCC emphasized that admissibility is exceptional and therefore the tests should not be watered down. Increasingly, some of the more esoteric exceptions are being replaced with the principled approach. In ***MAPARA*** (and ***KHELAWON***), the court described the modern hearsay analysis (as first stated in ***STARR***) as follows:



 Note that the exception can be modified to bring in line with the principled approach. In rare cases evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

SUBSEQUENT CONSIDERATIONS:

* + 1. Even where the evidence is admissible under an exception to hearsay the TJ may refuse to admit the evidence if its prejudicial effect outweighs its probative value. NICHOLAS stands for the fact that there must be prejudice caused to the accused from the lack of availability of cross examination, furthermore SMITH states that a where hearsay has been admitted under the principled approach the lack of cross examination goes to the weight not the admissibility of the evidence.
		2. It must be remembered that even if the principled approach to hearsay is met, this does not trump the other rules of evidence. EG spousal violence scenario where both the hearsay and character rules may apply.

The Charter means that in the criminal context trial fairness is a key consideration- this does not just mean the risk of prejudice to the accused due to lack of cross-examination of hearsay but also societies interest in having the trial arrive at the truth (KHELAWON). Also when the accused relies on hearsay evidence the rules may be slightly relaxed.

How about in the civil context? In England they have abolished hearsay altogether in the civil context, only considering hearsay in notice and weight. P&S say that we should not relax the law of hearsay in the civil context, instead just consider each case contextually (119).

1. **THE PRINCIPLED APPROACH: NECESSITY (119)**

Necessity is a form of the best evidence rule – the court should consider the best evidence available so that justice may be done.

KHAN**: Evidence which doesn't meet a traditional exception may be still be admitted if it is both necessary and reliable. This is a general exception (**SMITH**,** WALKER**,** STARR**).**

**Necessity** does not mean that the evidence is necessary to one party's case (***SMITH***) or strict witness unavailability, but is **reasonably necessary** for the truth-seeking function of the trial. The court has held that necessity is never presumed. **Necessity must not undermine the other party’s right to test the evidence** (***KHELAWON***). There are two main paths to necessity:

**WITNESS UNAVAILABILITY**

**Witness unavailability** which includes expedience or convenience (***SMITH***) and circumstance in which there is a reasonable risk that the witness will suffer harm if forced to testify (***NICHOLAS***);

* ***NICHOLAS***: **W** had PTSD, testifying carried a risk of suicide
* ***KHELAWON***: **W** dies or becomes incompetent
* **W** has left the jurisdiction
* ***ROBINSON ONCA*** – do not have to provide certainty that psychological harm will ensue due to testimony, just need to show a real possibility of psychological harm

**TESTIMONIAL UNAVAILABILITY**

**Testimonial unavailability** (***KGB****,* ***FJU***) is where the witness is available but recants, forgets, or is otherwise unable to provide the same information. It is not enough that a witness is unwilling to testify due to fear or otherwise (***R v FWJ***). Where the problem is testimonial incapacity, reliability becomes correspondingly more important (***KGB***).

* ***KGB***; ***FJU***: **W** recants prior statement
* ***R v FWJ*** – 6 year old clammed up and was unable to testify to sexual assault, necessity was established
* ***KHAN***: the little girl could not provide a full and candid analysis of the event’s so the mother’s hearsay testimony of her daughter’s statement after leacing the doctor’s office was allowed.
* This does not generally allow for the admission of prior inconsistent statements (see below)

**Reasonable necessity** requires that reasonable efforts be undertaken to obtain the direct evidence of the witness. The necessity requirement is thus also there in part to ensure trial fairness as without this requirement out-of-court statements could replace in court testimony.

1. **THE PRINCIPLED APPROACH: RELIABILITY**

P&S and ***KHELAWON*** make the distinction between **threshold** and **ultimate reliability**. The distinction reflects the important difference between admission and reliance. **Threshold reliability** is concerned with the admission of the statement – so long as it can be assessed and accepted by a reasonable trier of fact the statement should be admitted. Once admitted the trier of fact determines the ultimate reliability of the evidence. What we are always considering for the admission of hearsay is threshold reliability.

 In ***KHELAWON***, the court abandoned the previous approach by ruling that a functional case-by-case approach should be adopted that considers all relevant factors going to reliability can be considered. In ***KHELAWON***, Charron J concluded that there are two ways to judge reliability: demonstrate that circumstances in which the statement was made warrant its truthfulness (***KHAN****;* ***SMITH***); or demonstrate that truthfulness may be tested, notwithstanding that evidence is introduced via hearsay (***KGB****;* ***HAWKINS***). The two are not mutually exclusive but their relative importance should be driven by the context (***KHELAWON***).

* 1. **Circumstantial/inherent trustworthiness**

Circumstances at the time the declaration was made that make it more likely that the declarant was being truthful. This is the reliability basis for most common law exceptions to the hearsay rule. See p 125 for factors that speak to inherent trustworthiness – spontaneously, naturally, no motive to fabricate, against the person’s interest, by a young person who may not have knowledge of the acts alleged, corroborating evidence etc. Motive is very important here (***CZIBULKA Ont CA*** – wife’s letter before murder spoke of abuse by A, was admitted by TJ overturned by Ont CA because lack of evidence of motive does not equal no motive). We are only considered here with the reliability of the declarant not the receiver (could come into play in TJ general discretion). The threshold is a high one – In ***KHELAWON*** the court talked about special care and in ***COUTURE*** the court stated “what must be shown is certain cogency about the statement that removes any real concern about their truth and accuracy”.

***KHAN***: spontaneous, no motive to lie, could not have known implications of statement, semen stain corroborated story;

***SMITH***: absence of motive to lie; in relation to first two phone calls, deceased had no reason to lie to her mother; dangers of perception, memory and credibility did not arise

***R v UFJ*** – prior inconsistent statement of complainant (she recanted) was admissible due to father (the accused) independent corroborating statement

* 1. **Testability/substitutes for cross-examination (127)**

Circumstances either making the hearsay evidence sufficiently testable by the ToF, or which provide adequate substitutes for testability. This removes the concern with hearsay as there are alternative means to assess the trustworthiness of the statement. ***KHELAWON*** **states that where the reliability requirement is met on the basis that the ToF has a sufficient basis to assess the statement’s truth and accuracy there is no need to inquire further about the likely truth of the statement** (see also ***HAWKINS SCC***).

***KGB***: under oath (***FJU***), videotaped

***HAWKINS***: under oath; opportunity for contemporaneous cross-examination during the past statement in court. Note that the testimony in question here was riddled with contradictions but the court found this to only apply in the weighing of the evidence

***KHELAWON***: (evidence **excluded**) although **D** was warned to tell the truth, he had a history of paranoia and delusion and there were concerns about his understanding of the situation and potential motives to lie. These were all topics for cross-examination – no possibility of this because **D** was dead.

***COUTURE*** – the availability of cross-examination is a crucial factor and the court suggests that this will most often mean that the substitute requirement is met.

* 1. **Combined circumstantial and substitution**

***FJU***: striking similarity between two **D**s out of court statements, coupled with complainants' availability for cross examination, function as corroborating evidence

***KGB***: accurate record of **D**'s statement; evidence that **D** knew s/he must tell the truth; fact that **D** testifies at eventual trial.

#### RELIABILITY FACTORS

|  |  |
| --- | --- |
| **CIRCUMSTANTIAL TRUSTWORTHINESS** | **TESTABILITY** |
| * + - Presence or absence of motive to lie
		- Probability of accurate memory & sound mental state
		- Danger of third party influence leading **D** to concoct the statement
		- Whether possession of special knowledge by the **D**, as evidenced by the declaration, makes it more likely to be true
		- Existence of real corroborating evidence
		- Spontaneity
		- Contemporaneity
		- Whether the statement is for or against the **D**’s interests
		- Youth or not understanding implications of statement
 | * + - * Presence of the **D** at trial for cross-examination
			* Video or other record of the statement simulating presence of the trier of fact at the time the statement is made (or adequate substitute)
 |
| **SUBSTITUTES FOR CROSS-EXAM** |
| * Oath, solemn declaration, or solemn affirmation plus warning of consequences (or sufficient substitute)
* Made to public authority
* Contemporaneous cross-examination, such as at a preliminary inquiry
 |

**RELIABILITY+NECESSITY=1**

To some extent, necessity and reliability can substitute for another. If the necessity is high, the court will allow the reliability to be lower for the threshold of admission; if the reliability is high, the court will allow for a lower necessity in determining the threshold. **EMMA**: there seems to be more flexibility around necessity than there is about reliability, and this is probably right - otherwise you are getting evidence you really want in despite serious concerns over reliability.

When it is a statement to police, party relying on statement must prove absence of misconduct or duress to balance of probabilities.

Note that it is relatively rare to find all three ***KGB*** factors, but judges admit hearsay in the absence of one or more of them.

**Double hearsay** is evidence where there are multiple levels of hearsay in a statement (ie: **W** relates statement from **D1** about what **D2** said). ***MAPARA*** held that each level of the hearsay must analyzed independently. In the case of Memo 18, the statement of **D2** is automatically admitted because it is a statement made by the **A** (***FOREMAN***).

#### PRIOR INCONSISTENT STATEMENTS (129)

Before ***KHELAWON***, courts tended to analyze prior inconsistent statements as a new categorical exception to the hearsay rule emerging from ***KGB*** and ***FJU***. ***KHELAWON*** clarifies that prior inconsistent statements should be analyzed under the principled approach. The leading cases provide guidance, **but no more than guidance**:

* In ***KGB*** Lamar J held that ideally the statement will be made under oath, videotaped and there will be an opportunity for cross-examination. These are not prerequisites to admissibility, and in practice these requirements are rarely met. In ***LETORNEAU*** the BCCA found reliability to be present even though none of these criteria were met. However, purely oral statements should be seen as suspect. Videotaping is desirable (especially in the criminal context) and should be encouraged. Courts will be very hesitant to allow police to admit prior statements if they were not videotaped unless there are special circumstances (***R v WILSON ONCA***).
* ***COUTURE*** emphasizes the importance to cross-examine a witness on their prior inconsistent statement. ***R v DEVINE [2008] SCC*** holds thateffective cross-examination is only possible where the witness admits making the prior statement and provides an explanation. P&S: If this is not available the need for other indicia of reliability is increased and vice-versa.
* All of the above speaks to testability but prior inconsistent statements can be admitted due to their inherent trustworthiness (see ***R v FJU*** above – striking similarity between statements of victim and A. Note that the court ruled that statements had to both be ruled admissible).
* KGB application results in section 9 (of ***Canada Evidence Act***) *voir dire* to consider whether party will be allowed to cross-examine a witness about a prior inconsistent statement (see page 133), the calling party must:
	+ - * 1. State its intention in tendering the statement (eg for truth)
	1. Prove on a balance that the PIS should be admitted for its truth
	2. Must establish threshold reliability
	3. Establish that the statement was made voluntarily, if made to a person in authority. And that there are no other factors that would bring the administration of justice into disrepute if the statement is admitted for its truth.

TJ will rule and provide reasons.

Cross-reference with **page 83** if admitting PIS for credibility purposes. See ***Canada Evidence Act*** s. 11 and ***B.C. Evidence Act*** ss. 13 – 15.

## CATEGORICAL EXCEPTIONS

In ***STARR*** the court reaffirmed the relevance of the existing hearsay exceptions while stating the primacy of the principled approach. Iaccobucci J recognized that the existing exceptions provide: 1) certainty and a more efficient court process, 2) a useful evaluative guide, and 3) they enforce that necessity is really a search for the best evidence available. Having identified a categorical exception, it is still open to party resisting admission to prove that the categorical exception does not conform to the principles outlined in the principled approach. Short of this, it can be argued that in this particular case the application of the categorical exception does not conform to the principled approach (MAPARA).

#### PRIOR IDENTIFICATIONS (134)

Prior IDs can be admitted where:

* + - * 1. The witness makes an in-court identification
	1. Where no in-court ID is made but the witness can testify that (s)he gave an accurate description or made an accurate identification (***SWANSON BCCA*** – where the witness is unable to make an in-court ID, the prior ID can be admitted if there are eye-witnesses that will testify about the witness making the ID).

Prior identifications of a witness are not admissible as they are hearsay where there is no in-court identification and the witness does not testify to the accuracy of the prior identification. The witness must testify that (1) she selected the perpetrator during examination and (2) the earlier examination must be reliable one.

Prior IDs are an exception to the rule that a witness is not permitted to testify to their past consistent statements (***STARR***). This is because without the prior ID the ToF is likely to not give the in court ID much weight (so long after the fact in ***KGB***). There is no consensus whether prior IDs are hearsay admissible according to a hearsay exception or not hearsay at all.

There is an issue where there is inconsistency between the witness statement and ID (eg facial hair in statement but accused had no facial hair), the witness has to adopt a stance that is consistent or else the ID cannot be admitted.

In ***DEVINE*** the SCC treated the recanting of a witness who ID’ed the **A** as a statement under a KGB analysis. Where there is no recantation but only a failure of recollection then the principled approach applies.

#### PRIOR TESTIMONY (P&S 138)

At common law, as per ***WALKERTON v ERDMAN [1894] SCC***, evidence from a prior proceeding is admissible if:

* 1. the witness is unavailable;
	2. the parties are substantially the same (eg Crown and civil adversary have same goal);
	3. the material issues are substantially the same; and
	4. the person against whom the evidence is used had **an opportunity** (does not actually need to) to cross-examine the witness at the earlier proceeding.

FOR CIVIL CASES, rule 40(4)of the ***BC Supreme Court Rules***provides a broad right to admit hearsay evidence from prior proceedings. **This is a broad right to admit testimony from prior civil or criminal proceeding, with none of the requirements above.**

FOR CRIMINAL CASES, there is a higher bar. According to ***s 715(1) of the*** ***Criminal Code***, a hearsay evidence MAY be admitted (permissive) if:

1. the *witness is unavailable* on certain grounds or *refuses to testify*; and
2. the evidence was *elicited in a prior proceeding on the same charge*.

Given that the accused had “full opportunity” to cross examine the witness.

For example, if a witness testifies at preliminary hearing and dies prior to trial, this might satisfy s 715. The **A** bears the onus of proving that s/he did not have a full opportunity to cross-examine the witness. This lack of cross examination in the current case does not breach s 7 of the ***Charter***, as per ***POTVIN [1989] SCC*** – the fact the accused may have proceeded differently in cross examination at the preliminary inquiry does not mean deny the accused the “full opportunity” to cross examine the witness at the preliminary inquiry.

Full opportunity is only denied where counsel wants to pose certain questions and is frustrated in doing so (eg witness refuses to answer during cross examination). The permissive nature of this section allows the TJ to still exclude evidence where: 1) there was unfairness in the manner in which the evidence was obtained, 2) the admission would affect trial fairness (by prejudicing the accused). As in Daviault the TJ has discretion to exclude evidence where the crebility of the unavailable witness is crucial.

**If the prior testimony falls outside these exceptions, use the principled approach.** Arguably ***KHELAWON*** means that prior testimony will be admitted under the principled approach (due to the presence of contemporary cross-examination which the lack of was a defining feature of heresay. Note they still treated ***HAWKINGS*** as needing the principled approach). On exam, use principled approach!

#### PRIOR CONVICTIONS (P&S 143)

A party to a civil proceeding may prove that the other party or a third party has been convicted of a criminal offence for the purpose of establishing *prima facie* that this person committed the offence charged.

At common law, evidence of a prior conviction may be used *offensively* to prove the basis of a claim/to make a case (***SIMPSON v GESWEIN [1995] MBQB***) or *defensively* to resist a claim (***DEMETER v BP LIFE INS [1983] OHC***). The conviction is taken to be *prima facie* proof that the conviction occurred, subject to rebuttal to give the opportunity for the party to explain why the conviction should be taken as proof of the underlying facts. The presumption will not readily be displaced as courts do not wish to relitigate the same matter (***FK v WHITE [2001] OCA***; ***TORONTO v CUPE [2003] SCC***). The underlying principle here is the desire to avoid re-litigating something that has already been litigated/decided, thereby bringing the administration of justice into disrepute.

Circumstances where proof may be displaced include (list from ***TORONTO v CUPE***):

* 1. where the *original conviction is tainted* by fraud or dishonesty;
	2. when fresh evidence impeaches the original result; or
	3. where *fairness* dictates that the original result should not now be binding in the new context (eg was criminal matter really minor so A did not raise a robust defence?).

An acquittal is not admissible to prove the party did not commit the offence.

FOR CIVIL CASES, s 71 of the ***Evidence Act (BC)***allows a party to introduce proof that a party was convicted of an offence for the purposes of establishing that this person committed the offence. Note s. 71 process.

#### ADMISSIONS OF A PARTY (P&S 146)

**Anything the other party said or did may be used against them.** **Note** thatthis is still constrained by materiality, relevance, and the general discretion to exclude. SCC treats this as an exception to hearsay (***COUTURE****;* ***EVANS***). ***EVANS*** statements do not have to be made against interest in the common sense, the only requirement is that the statements admissibility must be raised by opposing counsel. Wigmore suggests that admissions of a party are not hearsay at all, but the better view is that this is not subject to necessity/reliability analysis (***FOREMAN [2002] OCA***; ***TERRICO [2005] BCCA***). ***EVANS*** states that admissions are different from other hearsay evidence and may not even be hearsay at all. NO need to comply with KGB requirements for prior inconsistent statements.

* Formal admissions (document signed by party, stating they admit to X, deny Y) bind the party and are not readily withdrawn (for **A**, see the guilty plea per ***Criminal Code s 655***).
* **Informal admissions (conduct/silence/statement) are not conclusive proof and may be explained or contradicted** (***BAKSH [2005] BCCA***).
* **A party’s admission may be based on hearsay rather than personal knowledge**, but will still bind the party provided that s/he accepts/believes the truth of its contents when making the admission (***STREU [1989] SCC***). IF there is no evidence the party adopted the hearsay statement then it is not admissible.
* A party’s conduct may amount to an admission, provided that the inference from conduct to admission is valid (WALMSLEY v HUMENICK 1954 BCSC *–* parents paying medical bill was not an admission by conduct – they were friends etc).
* **Admission by silence can only arise in circumstances where that party may be expected to respond.** Does not apply in the criminal context where Crown is questioning the accused. Failure to respond may lead to inference that party is agreeing, if the following four preconditions are met (R V TANASICHUK NBCA):
	+ - * 1. A statement, usually an accusation, is made in the presence of the party,
				2. In circumstances such that the party would be expected to respond,
				3. Where the failure to respond could reasonably lead to the inference that the party adopted the statement by his silence,
				4. And the probative value of the evidence outweighs its prejudicial effect.
* Admissibility of **vicarious admissions** (those made by a **D** authorized by the party to make the statement, or by a servant or agent) is unsettled. OCA in R v St RAND ELECTRIC viewed that unauthorized statements are not admissible against the party. In the US and Laskin’s dissent in STRAND and ***MORRISON-KNUDSON v BC HYDRO [1973] BCSC***, there isno need for express authority given to the agent, but 1) agent must testify, 2) statement must be made to a third party within the scope of the agent’s authority. ***MORRISON-KNUDSON v BC HYDRO [1973] BCSC***:statement can be made by employee to their principal. In the UK, the speaker needs to be expressly authorized to bind the employer or principal. However, for this situation, safest to use the principled approach.

#### DECLARATIONS IN THE COURSE OF DUTY (P&S 166)

This is used a lot because many corporate and governmental entities impose recording requirements on their employees in course of customer service. According to ***ARES v VENNER 1970 SCC*** (nurses notes), these are admissible where:

* 1. made contemporaneously with observation;
	2. in ordinary course of duty;
	3. by someone with personal knowledge of the situation;
	4. who is under a duty to make the record; and
	5. who has no motive to fabricate.

A summary is admissible if the person who first recorded the information was under a duty to record the information (***MONKHOUSE [1987] ACA***).

Section 30 ***Canada Evidence Act*** and s 42 ***Evidence Act (BC)*** provide statutory exceptions but are limited to written declarations of fact made in ordinary course of business (so this does not extend to opinions but as Venner notes this is often blurry).

Note difficulties associated with admitting evidence generated in anticipation of litigation (where there is possible motive to fabricate), under 30(10) ***Canada Evidence Act*** records are not admissible if part of an inquiry or are legal, or in contemplation of litigation. Per ***SETAK v BURROUGHS 1977 OHC*** which considered a different provincial provision (that allowed admissibility in these circumstances), could attach no weight to the record but not rule it inadmissible if it had complied with the statute. **May be a trend towards using principled approach here if admissibility under existing rules is questionable** (***LARSEN [2003] BCCA***; ***WILCOX [2001] NSCA***).

Both BC and Canada have the requirement that the document be made during the ordinary course of business. PALEMER v HOFFMAN SCOTUS: railway accident report ruled to not be prepared with respect to the railroad business (instead it was for litigation). This was not followed in SETAK, which held that records whether made during principal or auxiliary phase of business should be admissible. Per s 42(2)(b) ***Evidence Act (BC),*** there is a further requirement that it was in the usual course of business to make the record (eg the person was under a duty to record). WILCOX (NSCA): secret crab book contrary to instructions violated the duty requirement. Section 30 ***Canada Evidence Act*** exception is broader than the one found in the common law because it does not limit admissibility to records made pursuant to duty.

Double hearsay occurs if the record itself relies on the hearsay statements of others -42 (3) ***Evidence Act (BC) –*** this affects weight but not admissibility. There is no issue where there statement is made by someone else who is under an employment duty. But when it is a third party that is providing information to the person under a duty record? Unclear but in JOHNSON v LUTZ NYCA, the court found that both people need to act in the regular course of business.

#### SPONTANEOUS DECLARATIONS (RES GESTAE)

There are numerous hearsay exception that stem from this principle. All of them view that reliability is satisfied as the statement is spontaneous without time for concoction and necessity is accomplish by the fact there is no other equally satisfactory source (witness need not be unavailable). Still admissible as exception, but as KHAN shows, often easier to go through principled approach.

STATEMENTS OF PRESENT PHYSICAL CONDITION

Statements of physical sensation describing current condition (not past) are admissible as evidence only of the existence and duration 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), as per SAMUEL.

STATEMENTS OF PRESENT STATE OF MIND

Where a person describes his or her present state of mind (emotion, intent, motive, plan), the person’s statement to that effect is admissible where the state of mind is relevant and the statement is not made under circumstances of suspicion (STARR). Note that such statements are often not offered for their truth value (just as proof they were made) and hence are not hearsay.

**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 why he was with other woman)

**Intention is key. There is a distinction between explicit statements and those that require INFERENCES (are not hearsay because not about truth purpose?).**

* 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, the **majority** of the court admitted the statement to show that **V** feared **A** and only **A**; **AND** that it raised an inference that **A** had a motive to harm **V**. This is **relevant** because the fact that **V** feared **A** made it more likely that **A** ultimately harmed him.
* So note that there can be different purposes for using the statement (i.e. 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.
* GRIFFIN 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.

### R v GRIFFIN & HARRIS [2009] SCC

|  |  |
| --- | --- |
| ***FACTS*** | Two accused individualswere charged with murder of **V**. **V** is involved in drug trade and owes 100k to Griffin (**A1**) and “Peter the Italian”. **V** tells his restaurant friend that he cannot pay back money. Meanwhile, **A1** on relentless search for deceased. **A1** tortures friend from restaurant to find out where **V** is. Crown theory: **A1** sets up a meeting and shoots **V**. Girlfriend IDs shooter as **A1**. Phone records place **A1** close to shooting. Court wants to use **V**’s statement made to the girlfriend that, “*If anything happens to me, it’s your cousin’s family [Griffin]”* to reveal his state of mind: he was scared of **A1** and nobody else. Court doesn’t want to use the girlfriend’s statement for truth that **A1** had motive to kill deceased; rather, wanted to show that he was (1) only scared of **A1** and (2) others therefore didn’t have motive to kill him. This is difficult because it requires asking the jury to use this statement for something than its obvious meaning, and so the potential prejudicial effect is huge. |
| ***RULING*** | Because of ***STARR*** and ***SMITH***, statement of present intention can only be used for declarant’s state of mind, not a third party. Charron finds that the girlfriend’s statement is hearsay because it was used to prove to the truth of its contents (that **V** feared **A1**), but admits it anyway because it tends to show the deceased’s state of mind (fitting within the state of mind exception) and provides circumstantial evidence of motive (as it indicates the state of the relationship between **V** and **A1** at the relevant time). She relies on past case law which states that motive includes the deceased’s attitude towards the accused and vice versa. Statement of present intention can be used to show what deceased thought of Griffin. The statement also tends to rebut **A**’s suggestion that another person was responsible for **V**’s death. The evidence could not be used to prove **A1**’s intentions, and the trial judge’s instructions to the jury on this point were clear enough. The jury should be presumed to be capable of following clear limiting instructions such as those given by TJ here – that they only use the statement for the purpose that **V** was scared of **A1**, not to show that the **V** had some way of knowing what **A1** intended.**DISSENT**Admissibility in this instance should be analyzed with regard to:* 1. The *purpose* for which the hearsay might conceivably be admitted (see list at para 61). Re. motive, the statement could not logically support the proposition that no-one else wished **V** harm. **V**’s own state of mind was irrelevant because it could not support an admissible inference. **V**’s state of mind did tend to support other evidence that **A1** wished **V** harm. But Fish and LeBel are skeptical of the jury’s capacity to separate these two uses, and the prejudicial effect is that the jury cannot help but be tempted to use this evidence for its prohibited purpose (using **V**’s statement to establish **A1**’s state of mind). This risk is too great to admit this evidence.
	2. The *necessity* is established by **V**’s death.
	3. The *reliability* concerns of perception, memory, narration, or sincerity – of which perception is the key concern in this case. There is no evidence of the basis on which **V** feared **A1** in particular, and this concern cannot be alleviated by cross-examination. The **V** may have been be unusually paranoid, or simply unaware of who was after him. This is a problematic argument, because corroborating evidence is allowed in this analysis, post-***KHELAWON***, and there was a vast amount of corroborating evidence that **A1** was using force and threatening harm to find **V**.

However, Cunliffe thinks that jury issue could still be a strong argument. |
| ***RATIO*** | 1. **Statement of present intention/state of mind exception to hearsay can only apply to declarant, not a third party.**
2. **May be that the evidence is admissible for a limited purpose. In this case, statement was admissible for purpose of showing that V feared only A1, not to demonstrate A1’s feelings towards the V.**
3. **Charron: need to trust jury to be able to navigate these differences. LeBel and Fish feel differently.**
4. **Reminder about prejudicial effects and its importance.**
 |
| ***NOTES*** | This case turns on the issue of whether hearsay evidence can be admitted to show someone else’s intention. A more principled approach in this area would be to allow necessity and reliability to be shown and if yes, then admit.This is an example where strategy of the **A1** (“we were not the only ones who had motive to kill deceased at the relevant time”) opened this us as a material issue. Absent this strategy, the statement wouldn’t have been admitted by either of the two sets of judgments. |

EXCITED UTTERANCES

A statement relating to a startling event or condition may be admitted to prove the truth of its contents if it is made while the declarant is under the stress of excited caused by the event or condition. The key principle is that the statement is made in response to an event where to possibility of concoction can be disregarded (R V CLARK ON CA) –the TJ must be satisfied of this (R V ANDREWS UKHL). See 179 for Andrews principles.

* + - CLARK(deceased was stabbed and after yelled out help ive been stabbed)
		- NICHOLAS ***–*** 911 call 10 minutes after attack allowed under this exception as sexual assault victim too traumatized to testify

STATEMENTS OF PRESENT SENSE IMPRESSION

A statement that describes or explains an event or condition made while the person was perceiving the even or condition, or immediately thereafter, may be admitted for its truth (stricter than excited utterances requirement).

## HEARSAY CASE CHARTS

### R v CZIBULKA [1996] SCC

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| ***FACTS*** | **A** convicted of the murder of his wife. The deceased had written a letter detailing abuse prior to her death. |
| ***RULING*** | **Trustworthiness Factors:** Lack of evidence of motive to fabricate was not the same as motive to fabricate.**Verdict:** Letter was excluded. |

### R v FJU [1995] SCC

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| ***FACTS*** | The father was accused of repeatedly sexually assaulting his daughter. Both were taken to the police station in separate cars and given separate interviews. No oaths were administered and neither statement was video- or audio-recorded, but in both cases, the police officer conducting the interview took notes.The daughter described the abuse allegedly inflicted by the father in great detail. After the interview, the police officer prepared a summary of her anticipated evidence (a will-say statement). According to the daughter’s statement, the most recent sexual contact between the two had been the previous evening. In the father’s interview, he confessed to the sexual assaults and gave details that corresponded very closely to those related by the daughter. He independently admitted that the most recent sexual contact had been the previous evening.At trial, the daughter recanted (explanation: she lied at the insistence of her grandmother) and the accused testified that his confession was false (explanation: fear of police brutality like he experienced in Peru).**Issue:** Is the daughter’s will-say statement admissible as proof of the truth of its substantive contents? |
| ***RULING*** | Due to the striking similarities and the lack of tainting of the statements, sufficient circumstantial reliability present so that the will-say statement was admissible as proof of the truth of its contents.The ***KGB*** requirements of oath and videotaping are not absolute. In certain circumstances, the circumstances will be sufficient to indicate threshold reliability even absent these factors.In order to use striking similarity between two statements as circumstantial indicia of reliability, the following must be ruled out: (1) coincidence; (2) collusion between declarants; (3) the second declarant basing his statement on the first statement; (4) influence of a third party, such as the interrogator. The **A** and his daughter had no opportunity to collude (separate cars, separate interviews) and the **A** was not improperly influenced by the officers who took his statement. |
| ***RATIO*** | **A threshold of reliability can sometimes be established, in cases where the witness is available for cross-examination, by a striking similarity between two statements (as long as they are untainted by collusion, deliberate crafting, and third-party influence).** |
| ***NOTES*** | Court relaxes some of the KGB requirements (being under oath or videotaped) because statement was corroborated by **A**’s confession. The enhanced reliability of the corroboration and the opportunity to cross-examine the recanting witness was sufficient to remove much of the dangers associated with prior statements.**Substitutes for Cross-Examination Factors**: Striking similarity between two declarants’ out of court statements, coupled with complainants’ availability for cross examination, ensure reliability. **Cross-examination alone** goes a long way to ensuring the reliability of a prior inconsistent statement. |

### R v HAWKINS [1996] SCC

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| ***FACTS*** | Police officer charged with obstructing justice and accepting bribes. GF changes testimony between preliminary inquiry and trial. |
| ***RULING*** | **Substitutes for Cross-Examination Factors:** Prior statements given under oath; opportunity for contemporaneous cross-examination substitute for TOF inability to assess demeanor.**Verdict:** Preliminary inquiry testimony admitted. |

### R v KGB [1993] SCC

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| ***FACTS*** | The **A** was charged with second degree murder after he allegedly stabbed the victim in the presence of 3 of the **A**’s friends. When the police interviewed the 3 friends separately, each said that the **A** admitted to them that he did the stabbing. These interviews were videotaped, but the friends were not put under oath.The trial was held in Youth Court before a judge alone. All 3 witnesses recanted. The trial judge permitted cross-examination under ***Canada Evidence Act s 9***. Each witness admitted to making the prior statement, but explained was that he lied to the police to exculpate himself from possible involvement. The trial judge believed all 3 witnesses lied under oath, but believed he was bound by precedent not to allow the prior statements into evidence as proof of the truth of their contents. |
| ***RULING*** | The (formerly absolute) rule against admitting prior inconsistent statements (PIS) as proof of the truth of their contents was grounded in the hearsay rule. Thus, admissibility of PIS should now be governed by the principled approach.**NECESSITY:**Necessity is satisfied when evidence of the same quality cannot be obtained at trial (this seems like code for necessity is satisfied whenever a witness recants and holds the prior statement “hostage”).**RELIABILITY:**We are talking about threshold reliability: ultimate reliability is for the trier of fact. There are **3 hearsay dangers** making hearsay evidence unreliable: (1) the evidence wasn’t given under oath; (2) the **D** is not in the presence of the trier of fact so that the TOF can assess demeanour; and (3) the **D** is not available for contemporaneous cross-examination.Hearsay meets the threshold of reliability where there are sufficient circumstantial indicia of reliability. In the case of prior inconsistent statements, these are present when:* + - * 1. the statement was given under oath/solemn affirmation in conjunction with an explicit warning of the consequences of lying under oath (but there will be rare cases where notwithstanding the lack of oath, the statement is reliable because other circumstances serve to impress on the witness the importance of telling the truth and are thus a sufficient substitute for the oath);
1. the statement was videotaped, as videotaping is a perfect substitute for presence in the courtroom (but there will be rare cases where something else is a sufficient substitute for videotape, such as testimony of an independent third party who observed statement being made in its entirety); and
2. the witness is available to be cross-examined in the courtroom (this is a sufficient substitute for contemporaneous cross-examination, the lack of which is the most important hearsay danger).

**OTHER REQUIREMENTS ON THE VOIR DIRE:**The burden of proof of reliability (and necessity) rests on the party desiring to admit the evidence and the standard is on a BoP.Where the PIS was made by the accused to persons in authority, the burden may be higher and the rules relating to confessions apply.Trial judge retains discretion to refuse to admit a PIS even where 3 indicia of reliability are met if the statement was made in circumstances that make it suspect. This might occur (for any witness) where malign police influence shapes content of the statement.Finally, there is a residual discretion to refuse to admit anything whose admission would bring the administration of justice into disrepute. |
| ***RATIO*** | **A prior inconsistent statement may be admitted as proof of its substantive contents if:**1. it would be admissible if used as the witness’ direct testimony (for example, no double hearsay);
2. it has sufficient circumstantial indicia of reliability: oath, presence, and contemporaneous cross-examination or sufficient substitutes;
3. it was made voluntarily if to a person in authority; and
4. there are no other factors which would bring the administration of justice into disrepute.

**If this test is satisfied, the PIS is admissible as proof of the truth of its contents without any need whatsoever to give a limiting instruction to the trier of fact. However, the judge may need to instruct the jury on gauging the credibility of the PIS (leading questions, pre-statement coaching, demeanor at all relevant times &c).** |

### R v KHAN [1990] SCC

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| ***FACTS*** | The **A** is a doctor tried for sexually assaulting a three year old patient. The patient tells her mom about the incident afterward. Since only the mother is presumed competent to testify, the statement can only come in as hearsay. |
| ***RULING*** | **Trustworthiness Factors:** 1. Statement made by child to mother almost immediately after event, so no concern about inaccurate memory.2. Child had no discernible motive to lie.3. Statement made naturally and without prompting so no real danger it was caused by mother’s influence.4. Child could not be expected to have knowledge of sexual acts.5. Real evidence confirming: semen stain on child’s clothing.**Verdict:** Hearsay admitted. |

### R v KHELAWON [2006] SCC

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| ***FACTS*** | Khelawon was accused of aggravated assault, uttering a death threat, assault causing bodily harm, and assault with a weapon. The offences involved five residents of a nursing home, where the **A** worked as a registered nurse. Four of the alleged victims died before trial from unrelated causes. The fifth was found incompetent to testify. Two of the deceased complainants, Mr. Skupien and Mr. Dinino, had given videotaped statements to police, concerning the incidents.Since the **D**s were deceased, the videotaped statements became hearsay, and the issue for the trial judge was whether or not the statements were reliable enough to be admitted. Dangers included reliability, lack of opportunity for cross-examination, possible alternative explanations and the possibility statements could have been coached by an ex-manager who hated the **A** (which could explain the “striking similarities” between Dinino and Skupien’s statements). Dinino’s statement fell far below the standards of admissibility, as it was not under oath, was not completely recorded, was mainly inaudible, and involved a police officer leading by asking questions involving “educated guesses” of what the officer thought Dinino was saying. Skupien was not under oath in his interview either, but the video recording was complete. **However, the police made no attempt to get a better statement from Skupien while he was still alive**, even though they had the opportunity to do so (police can take statements under oath from frail **D**s). There was also some suggestion in Skupien's medical files of paranoia and dementia. Elder law policy analysts disappointed with this factor, as it is common with the elderly. |
| ***RULING*** | Held that Skupien’s statement is inadmissible. While there is sufficient necessity, there was insufficient reliability by a wide margin.**NECESSITY:**Necessity is conceded by all parties, although the court points out that there is no evidence that the Crown tried to preserve Skupien’s evidence under ss 709–714 of the Criminal Code and that in an appropriate case, failure by the proponent of hearsay evidence to make all reasonable efforts to secure the evidence of the declarant in a manner that respects the rights of the other party could result in failing the necessity requirement.**RELIABILITY:**1. **TESTABILITY OR ADEQUATE SUBSTITUTES**: Despite video, distinguished from ***KGB*** because of crucial lack of **D** at the trial. Doubts also raised about adequacy of Mr Skupien’s understanding importance of telling the truth in the circumstances.2. **TRUTHFULNESS**: Nothing suggests that the circumstances made the statement more likely true. Both Skupien and Stangrat had motive to lie; Skupien had questionable mental capacity; Stangrat had ability to influence Skupien; and Skupien’s injuries were consistent with a fall. Although allegation of striking similarities between statements from two complainants (instead of the **A** and complainant) is factually different than ***FJU***, it might be a factor in some cases. Here it is not because the other statements, such as Dinino’s, had even more problems than Skupien’s. |
| ***RATIO*** | **SCC summarized and remade the principled approach to hearsay.** |
| ***NOTES*** | Given the breadth of this decision, you can cite just about any hearsay-related proposition to this case in a pinch. |

### R v SMITH [1996] SCC

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| ***FACTS*** | Daughter made multiple telephone calls to her mother the night of her murder. She spoke of her whereabouts in the company of the **A.** |
| ***RULING*** | **Trustworthiness Factors:** In relation to first two phone calls, deceased had no reason to lie to her mother, dangers of perception, memory and credibility did not arise.**Verdict:** Phone call conversations were admitted. One phone call failed because there were clear lines of cross-examination. |

## ABORIGINAL ORAL HISTORIES

**APPLICABLE SUBSTANTIVE ABORIGINAL LAW**

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).

Three tests that could arise on the exam: VAN DER PEET rights test, DELGAMUUK aboriginal title test, and the HAIDA NATION duty to consult arising from an assertion of wither.

VAN DER PEET ABORIGINAL RIGHT TEST

* + 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 (**DELGAMUUKW**)**
		- **The exercise of certain rights may also have a geographical dimension. (**MITCHELL**)**
		1. **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**)**
	+ 1. **reasonable continuity between the pre-contact practice and the contemporary claim.**

**If there is a claim that triggers the Crown’s duty to consult, evidence should show:**

(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

DELGAMUUKW ABORIGINAL TITLE TEST:

1. The land must have been occupied prior to the assertion of Crown sovereignty
2. There must be continuity between present and pre-sovereignty occupation
3. Occupation must have been exclusive at sovereignty

**HAIDA NATION** DUTY TO CONSULT TEST

Any time the Crown has knowledge of a claim to title it has a duty to consult. The nature and extent of that duty depends on the strength of the claim and how much the right might be affected. A strong *prima facie* claim attracts the greatest protection coupled with significant potential infringement, while a less substantiated claim with little potential infringement will attract less protection.

EVIDENTIARY PRINCIPLES AND ABORIGINAL EVIDENCE

In the context of Aboriginal law, oral history is the primary form of record-keeping and the goal of reconciliation in s 35 means that the rules of evidence should be flexible in service to this aim (***DELGAMUUK***) and that oral histories be placed on a equal footing with the types of historical evidence that courts are familiar with (written records). 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” and 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**)**.

However ***MITCHELL*** states that ***DELGAMUUKW***’s recognition of the need to adopt the rules of admissibility and weighing of oral history means courts should give aboriginal evidence due weight. While it should not be undervalued, neither should it be interpreted in a way that fundamentally contravenes the principles of evidence nor given more weight than it can reasonably support. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Aboriginal oral histories will be admitted if they are useful and reasonably reliable subject to exclusionary discretion of the judge (the probative value must be greater than the prejudicial effect). The evidence may be useful under two grounds:

* + 1. Do they provide evidence that would otherwise be unavailable?
		2. They may provide the aboriginal perspective on the right claimed

Reasonable reliability does not require a special guarantee of reliability but the TJ may make inquiries concerning the witness’s ability to know and testify to orally-transmitted aboriginal traditions and may be relevant to admissibility and weight. In making these determinations evidence should never be rejected due to facile Eurocentric notions of what is relevant historical evidence. 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.

Oftentimes, experts are relied upon as independent validation of oral histories – this could be problematic because doesn't this mean oral histories aren't being accepted as evidence? Court uses distinction that oral histories are speaking to fact, and expert evidence are speaking to opinion, but one could argue that 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).

ON EXAM: spell out (in general terms) the information that each source of evidence might supply and the risks of relying on each type of evidence, and how we might alleviate those risks.

#### ABORIGINAL HEARSAY/ELDER TEST (**T’SILQHOT’IN NATION**)

**INTRODUCTION**

In TSILQHOTIN 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 DELGAMUUKW 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 (NOT EXPERTS)

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 they 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, the 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/KHELAWONtest of necessity and reliability.

(A) NECESSITY (USEFULNESS IN **MITCHELL**)

Per MITCHELL, oral history evidence may be useful under two grounds:

* + - 1. Do they provide evidence that would otherwise be unavailable
			2. They may provide the aboriginal perspective on the right claimed
		- 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
		- It is necessary for aboriginal people to rely on oral history, because that’s all they have

(B) RELIABILITY

Q: How do the below meet the KHELAWON criteria of inherent trustworthiness and substitutes from cross-examination, keeping in mind the Constitutional nature?

* Note that per MITCHELL, as interpreted by Vickers, a TJ does not always have to do a reliability analysis, it is within his discretion.

A: Begin with what aboriginal community says to measure the reliability, following TSILQHOT’IN and DELGAMUUKW

1. Personal information concerning the witnesses’ circumstances and ability to recount what other have told him/her;
2. Who told the witness about the event or story;
3. The relationship of the witness to the person from whom he or she learned of the event or story;
4. The general reputation of the person from whom the witness learned of the event or story;
5. Whether that person witnessed the event or was simply told of it;
6. 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.

NOT IN **TSILQHOT’IN** BUT STILL APPLICABLE

1. Can look at corroborating evidence (KHELAWON), but this is not required (as it was in BENOIT).
	1. **Problematic** in the Aboriginal context because it’s often too difficult to find corroborating evidence. The evidence provided shouldn’t be discredited just because nothing else can corroborate it.
2. Newman: suggests inquiry into witnesses’ roles in preparing for litigation.
	1. **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**? Vickers J approach does not clarify this.

On p 283 Vickers J lays out what should be considered in the preliminary inquiry of reliability mirroring the factors above.

**(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.

Newman – validity (corroboration), reliability (repeatability), and consistency are key in oral history cases. The approach by Vickers is a good effort at practical reconciliation.

***BENOIT v CANADA [2003] FCA***

Leave to appeal to SCC was dismissed, but note that this doesn’t equal endorsement. Treaty interpretation case in relation to tax exemption (similar to MITCHELL). Nadon J concluded that:

* 1. ***MITCHELL*** requires a TJ to inquire into a witness’s ability to testify – in other words, a preliminary hearing (as Newman states, this is probably good practice).
	2. From historiography (ie practice of history) point of view, Nadon J held that corroboration of oral history is required. Thus, oral history standing alone is not enough. This is very inconsistent with ***DELGAMUUKW***, which states that oral history should be given weight especially in light of the difficulties Aboriginal groups face in bring evidence. This was critical to ***TSILHQOT’IN***, because they do not use physical objects to record history (like totem poles).

***BENOIT***has been heavily criticized, and has not really been followed. It has been interpreted in different ways.

### TSILHQOT’IN NATION v BC [2007/2012/2013] BCSC, BCCA, SCC

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| ***FACTS*** | This litigation started over two decades ago, when the Tsilhqot’in Nation went to court to save some of its last intact traditional lands from industrial logging. The Claim Area comprises some 438,000 hectares of territory in the Chilcotin region of BC.The BCSC held that the Tsilhqot’in people hold Aboriginal rights to hunt, trap and trade throughout the entire Claim Area, including the right to capture and use wild horses, and that the Tsilhqot’in Nation had proven Aboriginal title to approximately 40% of the Claim Area. The BCCA held that Tsilhqot’in only held territory in relation to areas where they had intensive occupation and use, a much smaller area than had previously been identified in the BCSC decision. At SCC (heard last in Nov. 2013), the appellants argued that the concept of “intensive occupation and use” is inherently western/non-aboriginal. |
| ***RULING*** | As claimants to Aboriginal rights and title, Tsilhqot’in must demonstrate:* exclusive occupation of land prior to contact;
* community should be able to show that other First Nations communities that pre-existed contact did not have claims to the same area;
* must be reasonable continuity between pre-contact practice or occupation and contemporary practice or occupation (from ***VAN DER PEET*** and ***DELGAMUUKW***: historical factors like residential schooling or smallpox epidemics should not stand in the way of a successful claim)

Canada suggested the right approach was oral history was a test for admissibility similar to that for expert witnesses. A *voir dire* or preliminary stage should exist, wherein the Tsilhqot’in witnesses are subjected to the sorts of qualification inquiries that are normally applied to expert witnesses. This would guarantee necessity and reliability. This is an interesting proposal because within Aboriginal communities, there is a question whether elders should be viewed as “experts”.BC argued that the court permit hearsay evidence on genealogy and traditional activities or practices based on a *voir dire* establishing the necessity and reliability of the evidence. BC also argued that the court only permit hearsay evidence on past events based on a similar, two-stage process:1. Court hears from expert witness (likely an anthropologist) who can speak to customs and the preservation of knowledge. The role of this witness is to educate the court about mores re: passage and preservation of knowledge within the community.
2. Then, the court hears from aboriginal witnesses in a *voir dire*. That is, experts would “define the field” and aboriginal people could come and share their stories. Then, if trial judge satisfied, it can become testimony and evidence in the case.

Both CAN and BC wanted to minimize amount of hearsay evidence that Vickers J would hear. Their proposals would **extend the length of the trial** and **emphasize necessity** – if there’s another way, then that should be used. Tsilhqot’in argued that the admissibility and reliability of oral history evidence cannot be determined in the abstract, and the court must carefully assess all relevant factors.Vickers J did not establish a formal process using *voir dire*, but held that the admission of oral history hearsay evidence was to be determined based on the application of the principled approach, with the added proviso that courts do so in light of the “promise of reconciliation embodied in s 35(1).” [**287**] Vickers J indicated a preference for non-hearsay testimony of an event if witnesses were alive and able to appear before the court, but accepted the necessity of hearsay testimony in other circumstances. Reliability will be a focus of the court, which will inquire into:1. The witness’ circumstances and ability to recount what others have told them
2. Who it was that told the witness about the event or story
3. The relationship of the witness to the storyteller
4. The general reputation of the storyteller
5. Whether the storyteller witnessed the event or was told of it
6. Any other matters that might bear on the evidence’s reliability

Expert anthropologist’s evidence provides background, and information about how community organizes its memory practices; however, the court can revisit this if under cross-examination new information emerges. To consider the reliability of oral history evidence in terms of both admissibility and weight, Vickers J established a two-stage process:1. **At the outset of the trial, the court will be provided with a detailed statement about the nature of the oral histories and how that evidence fits into the case and will be managed.**
2. **When a witness is called to give hearsay evidence, counsel should outline the nature of the evidence to be heard. Then, before the witness can testify, the court should have a preliminary examination of the witness on the reliability factors above. Admissibility could be challenged at the end of the inquiry, or there could be arguments on weight at the close of the trial.**

Vickers trying to understand necessity and reliability in context of ***VAN DER PEET*** test. The substantive requirements of making s 35 claims make this difficult. |
| ***RATIO*** | Outlines hearsay analysis for oral history evidence. |
| ***NOTES*** | Strict precedential value: stare decisis applies w/in lower BC courts; however, other provinces are not bound. |

###  R v VAN DER PEET [1996] SCC

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| ***FACTS*** | Dorothy Van der Peet, a member of the Stó:lō First Nation in British Columbia, was charged with selling salmon (10 of them!) that had been caught under a food-fishing license. Such a license permitted Aboriginal people to fish solely for the purposes of sustenance and ceremonial use, and prohibited the sale of fish to non-Aboriginal people. Van der Peet challenged the charges, arguing that as an Aboriginal person, her right to sell fish was protected under Section 35 of the Constitution Act. |
| ***RULING*** | In applying this test to the case at bar, Lamer identifies the specific right claimed as the right to exchange fish for money – therefore it is this right that must be characterized as an integral part of the distinctive culture of the Stó:lō community. Even though he finds that the lower court judges did not apply the proper legal framework (the newly formed test), the findings of fact indicate that the Stó:lō did not exchange fish for money until after the Europeans came and thus the claim cannot be made out. Further, if the right did exist, it was only incidental to the culture. This is indicated by the fact that the particular community in this case had a band level of societal organization, and there were no members of the tribe working in the exchange of fish.As there was no aboriginal right found, Lamer does not proceed to the rest of the Sparrow test. |
| ***RATIO*** | ABORIGINAL RIGHT TESTIn order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.1. Proof of the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right,
2. that this practice, custom or tradition was “integral” to the pre-contact society in the sense it made it distinctive, and
3. there must be reasonable continuity between the pre-contact practice and the contemporary claim.
 |
| ***NOTES*** | Factors that must be considered in the application of this test:1. the perspectives of the aboriginal peoples themselves, framed in the Canadian legal and constitutional structure;
2. the precise nature of the claim;
	* after the claim is specified, it must be determined if there is enough evidence to support the claim
	* factors to consider include:
		1. nature of the action;
		2. nature of the regulation;
		3. the tradition or custom being relied upon to claim the right
	* the activities might be a modern form of a practice, tradition or custom
3. to be "integral", the custom or tradition must be of a central significance to the society
	* the claimant must do more than prove that the practice took place - it must be demonstrated as a significant part of their distinctive culture
	* these elements cannot be things common to all human societies - they must be the defining and central attributes of the society in question, i.e. without this practice or tradition, would the society be fundamentally altered
4. aboriginal rights exist in practices, customs and traditions that have continuity with those that existed prior to contact
	* the relevant time period is the time prior to the arrival of Europeans, not prior to the Crown's assertion of power
	* the claimant does not need to provide conclusive evidence connecting the practice all the way from pre-contact times - the activities need only be rooted in pre-contact societies
5. courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims - the courts cannot undervalue the evidence presented by aboriginal claimants simply because it does not adhere precisely to the common laws of evidence
6. aboriginal rights claims must be adjudicated on a specific rather than general basis - the specific facts of each case are very important, and each aboriginal society has different rights
7. for something to be an aboriginal right it must be of independent significance to the culture where it exists, i.e. customs that are integral to the aboriginal community will constitute aboriginal rights, but those that are merely incidental will not
8. aboriginal rights must be customs, practices or traditions that are distinctive, not distinct
	* the practice does not need to be unique, it just needs to be a part of what makes the aboriginal community a distinctive culture
9. European influence is only relevant if the practice is integral because of the influence
10. courts must consider the relationship between the aboriginals and the land, and the distinctive societies and cultures of aboriginal peoples
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### DELGAMUUKW v BRITISH COLUMBIA [1997] SCC (sup 50)

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| ***FACTS*** | Claim to title by the Gitksan and the Wet'suwet'en Nation. The Gitksan and Witsuwit'en used their oral histories (adaawk, kungax and relaying what ancestors had told them) as principal evidence in the case. TJ admitted the oral histories but gave them no weight. Tj excluded territorial affidavits ( as not meeting the reputation exception to hearsay – largely due to the fact that the reputation was not known to the aboriginal community at large and their content was disputed, and the fact that there were discussions about claims for rights in these conversations).  |
| ***RULING*** | The TJ and BCCA erred in giving the aboriginal evidence no weight. Claims of AT are always disputed and contested and as such this fact cannot determine admissibility. McEachearn CJ of the BCCA found that he could not rely on some of the affidavits because the affiants had a strong interest in the outcome, and their content was disputed - the SCC found that this was unfair because these affidavits were required by the Government's dispute of the claim. The reputation exception does not require that the aboriginal community at large is aware of a member’s reputation and the fact that claims have been actively discussed (would be perverse to hold the fact that BC has rejected any claim as pointing towards inadmissibility of this evidence)..  |
| ***RATIO*** | Oral histories violate the hearsay rule, and are also tangential to the ultimate purpose of establishing historical truth. The SCC recognized for the first time that section 35 can extend to aboriginal title as well as rights, and how oral traditions and records *can* provide evidence for their claims. As per VAN DER PEET the ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims. Oral histories should be put on an equal footing with other types of evidence in order to manifest the promise of reconciliation in section 35. The SCC also found that courts can't undermine oral history affidavits because this would undermine the entire process. TEST FOR ABORIGINAL TITLE:1. **The land must have been occupied prior to the assertion of Crown sovereignty (paras 144-151)**
2. **There must be continuity between present and pre-sovereignty occupation (paras 152-154)**
3. **Occupation must have been exclusive at sovereignty (paras 155-159)**
 |
| ***NOTES*** | **The land must have been occupied prior to the assertion of Crown sovereignty (paras 144-151)*** Applicable time frame is theperiod prior to contact, used in adjudicating ARs claims to engage in activities, is an inappropriate time frame in AT cases:
* Because Aboriginal title is a burden on the Crown’s underlying title, which was gained only upon the Crown’s assertion of sovereignty, it follows that Aboriginal title crystallized at that time
* Under the CL, the physical fact of occupation or possession suffices to ground AT without proof that the land was integral to Aboriginal society prior to contact
* The date of sovereignty can be established with greater certainty than the date of contact
* **Occupancy (paras 146-151)**
* Both the CL and the Aboriginal perspective on land, including but not limited to Aboriginal legal systems, are relevant for purposes of establishing occupancy
* With respect to the former, the fact of physical occupation proves legal possession of the land, which in turn grounds title to it
* Such occupation can be established in many ways, including construction, cultivation and resource exploitation; when assessing whether occupation is sufficient to ground title, factors such as the size, manner of life, resources and technological capacity of the claiming group should be considered
* Since the requirement of pre-sovereignty occupation is sufficient to establish the central significance of the land to the culture of the claiming group, the test for AT need not explicitly include the latter element

**There must be continuity between present and pre-sovereignty occupation (paras 152-154)*** + - In recognition of the potential scarcity of conclusive evidence of pre-sovereignty occupation, a group claiming AT may prove such occupation through evidence of present occupation, supplemented by evidence of continuity
		- The claiming group need not establish an unbroken chain of continuity, but rather, substantial maintenance of their connection to the land (para 153)
		- Provided this substantial connection has been maintained, a claim to AT need not be precluded by alterations in the nature of the occupation between sovereignty and the present

**Occupation must have been exclusive at sovereignty (paras 155-159)** * + - This requirement, like occupation, is proved with reference to both CL and Aboriginal perspectives
		- Thus, notwithstanding the CL principle of exclusivity linked to fee simple ownership, the test for exclusive occupation in AT claims must consider the context of the Aboriginal society at sovereignty
		- In this light, exclusive occupation can be demonstrated, depending on the circumstances, even if other Aboriginal groups were present on or frequented the lands claimed
		- The exclusivity requirement does not preclude the possibility of joint title shared between two or more Aboriginal nations, for instance where more than one group shared a particular piece of land, recognizing each other’s entitlement to the exclusion of others
		- Evidence of non-exclusive occupation may still establish shared, site-specific ARs short of AT, for example on lands adjacent to those subject to a title claim and shared for hunting by a number of groups
 |

### MITCHELL v MNR [2001] SCC

|  |  |
| --- | --- |
| ***FACTS*** | Chief Mitchell asserts he has a customary right to bring goods and services (not just for personal use) across the border without paying customs. The trial judge finds that this right exists, but the SCC overturns this decision on the basis that the evidence brought by the aboriginal community should be examined critically. |
| ***RULING*** | The Court held that Aboriginal histories may be useful because they may offer evidence of ancestral practices and their significance, and they may provide the aboriginal perspective on the right claimed. In determining the reliability of oral histories, trial judges must reject facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions and not undervalue the evidence. However, nor should they overvalue the evidence; the VAN DER PEET approach (i.e., a flexible approach to evidence for aboriginal claims) does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. **In this case the Court held** that the TJ made a palpable and overriding error as the evidence of treaties that made no reference to pre-existing trade and the mere fact of Mohawk involvement in the fur trade did not establish an ancestral practice of transporting goods across the St. Lawrence River for the purposes of trade.There was evidence of regular trade on an east-west axis, but *not on a north-south axis*, and thus the evidence did not support the existence of a right to trade across the border without paying duty taxes. |
| ***RATIO*** | MITCHELLholds that evidentiary standards aren't now looser, but that Eurocentric standards about history and record keeping should not prejudice the kinds of evidence that will be admitted and the weight they receive. Aboriginal oral histories will be admitted if they are useful and reasonably reliable subject to exclusionary discretion of the judge.  |
| ***NOTES*** | **Be very rigorous** to make sure that the evidence goes to the particular material point, and not just to the broader abstract picture. |

### HAIDA NATION v BC (MINISTER OF FORESTS) [2004] SCC

|  |  |
| --- | --- |
| ***FACTS*** | In DELGAMUUKWthe SCC unequivocally established that AT was a property right, with economic implications that had not been extinguished. BC took the position that DELGAMUUKWdidn't prove any AT, just sent the Gitxan to a new trial. As such there'd be no change in treaty mandates - negotiations would continue as before. Haida were among the first nations that were told that nothing had changed in their relationship with the province. Haida are unique in that they are the only indigenous people on Haida Gwaii, so there are no overlapping claims of AT. Haida decided to begin an action seeking a declaration that they had AT to Haida Gwaii and challenged the provincial government's authority to issue tree farm licenses (the primary way logging rights are granted - exclusive licenses that are renewable every 21 years).The Haida took the position that the extent to which logging had taken place on Haida Gwaii was unsustainable. |
| ***RULING*** | Held for the Haida Nation. Haida Nation argued that without consultation, their AT will be meaningless as they will receive it without resources crucial to their culture and economy. The government of BC argued that prior to the Haida formally proving their title, the province should manage the forests for the good of all British Columbians and the Haida have no legal right to be consulted or have their needs and interests accommodated. The Court found that the province's position was not in accordance with the honour of the Crown. Where there is a strong *prima facie* case for an AT claim and the adverse effects of the government's proposed actions impact it in a significant (and adverse) way, the government may be required to accommodate. This may require taking steps to avoid irreparable harm or minimize the effects of the infringement.Both sides are required to act in good faith throughout the process. The Crown must intend to substantially address the concerns of the Aboriginal group through meaningful consultation, and the Aboriginal group must not attempt to frustrate that effort or take unreasonable positions to thwart it.On the facts of the case, the Court found that the Haida Nation's claims of title and an Aboriginal right were strong, and that the government's actions could have a serious impact on the claimed right and title. Accordingly, the Crown had a duty to consult the Haida Nation, and likely had a duty to accommodate their interests.The Crown's duty of good-faith consultation does not extend to third parties, and cannot be delegated to them by the Crown. This is not to say that third parties cannot be liable to Aboriginal groups in negligence, or for dealing with them dishonestly. However, it does mean that the legal obligation of consultation and accommodation is shouldered exclusively by the Crown. |
| ***RATIO*** | Where there is a prima facie case for an AT claim, and the government has notice of it, the honor of the Crown creates for both the federal and provincial government a legal duty to consult and accommodate AP. |
| ***NOTES*** | Very little incorporation of the aboriginal perspective in the reasoning, despite the result. The duty to consult has since been recognized by the SCC as a constitutional one. In-court politics: cost of unanimous decision was no imposition of duty on corporations, only on the government. |

#

# WITNESSES AND TRUTHFULNESS

Cross-examination has two basic goals:

1. Elicit favorable testimony
2. Undermine unfavorable testimony

Same admissibility rules apply to cross-examination, but this speaks to managing the trial. In the criminal context, the Crown goes first – they call witnesses, conduct direct examinations and try to bring sufficient evidence to prove each element of the offence, and the defence can cross-examine their witness. Crown can re-examine (only on issues raised by cross-examination). Then, Crown will announce case is closed, and the defence makes its case. In civil cases, the key difference is that the plaintiff goes first. The cross-examination of the accused has strong constitutional dimension as a fair trial principle. This same dimension doesn’t exist in civil trials.

TRIBUNALS

Tribunals may not follow the adversarial model of courts at all. Some (particularly those seeking to expand access to justice, like human rights, consumer rights, etc.) are much less formal, and will allow the witnesses to give their evidence without questioning from a lawyer. When looking at a tribunal, it is important to refer to its enabling legislation to determine what rules of evidence they employ. Most legislation gives them discretion, and courts have said tribunals should choose a principled model suited to truth-seeking in their context.

## KEY PRINCIPLES

1. **Counsel must have a good faith basis for cross-examination**

In LYTTLE, the SCC stated that belief could be that witness’ language is incomplete or certain, and counsel needn’t be certain that the evidence is admissible. They must just believe that there is a reasonable basis to put the question forward. This is an important ethical principle, especially when cross-examining sexual assault complainants. Lawyers have an ethical obligation not to mislead the court and the Crown has a duty not to seek conviction at all costs but to assist the court in reaching the truth. If the judge or opposing counsel doubt that there is a good faith basis for asking questions, the court can hold a *voir dire* and ask counsel on what basis the questions are being asked. Judge can intervene on their own, but often this will arise due to an objection by opposing counsel. This rule has a great deal of play when the Crown cross-examines the **A** due to the tighter restrictions.

R v CW: the Crown suggested the **A** was a Satanist. The ONCA held that the Crown should not cross-examine the A based on info they have that would otherwise be inadmissible. This standard is due to constitutional protections. If info would be too prejudicial to be included in the Crown’s case, shouldn’t form basis of cross-examination.

1. Cross-examination is constrained by principles of relevance and materiality

Questions raised on cross-examination must have some sort of relevance or materiality.

1. Crown cannot try to prove guilt of accused based on their bad character

The Crown can’t use the **A**’s prior bad character in cross-examination to suggest that they’re the type of person to have committed this offence. **There is an exception,** if the **A** says something in examination in chief that suggests that they are of good character, then the Crown is able to neutralize this claim. Jury will be warned to use this only for purpose to disbelieve **A**’s statements that he’s not of this character. Court will be careful in managing this balance.

R v CAMERON: **A** is charged with murder. The Crown was able to prove drug deal in order to explain why the murder happened. When the **A** said he was a good person, the Crown was able to outright state that testimony was a lie.

## KEY RULES

1. BROWNE v DUNN

If counsel wants to make an argument against a witness' testimony (i.e. they're lying), then counsel must confront the witness with the basic outlines of that argument during their cross-examination in fairness. This rule only applies to significant matters, and counsel does not need to put every detail of the argument to the witness, just the general idea. If counsel does not do this, then TJ may stop them from making the argument, or recall the witness so that the question can be asked and answered. In some cases, the TJ may waive the rule, but in cases where there is a credibility contest this is very unlikely.

1. Cross-examination on prior inconsistent statements

This is the only exception to the rule that the party calling the witness cannot cross-examine them.

Consider a witness who testifies at trial less favorably to the party calling them than they did in previous statements (i.e. a Crown witness changes their testimony). Under ordinary rules, the Crown could not ask leading questions on substantive issues in direct examination. But where there are prior inconsistent statements, then the Crown can go through a process to begin cross-examination of their own witness under s 9(1) and 9(2) of the Canada Evidence Act, as happened in KGB:

1. Counsel must advise the court that they are bring an application under s 9(2)
2. If there is a jury, the jury leaves the room and a *voir dire* begins
3. Counsel shows the judge the statement, drawing their attention to the inconsistencies
4. If the judge agrees that there are inconsistencies, he invites counsel to prove the statement
5. The witness is asked if they made the statements. If they do, the statement is proved. If they deny it, other evidence can be called to prove it.
6. Opposing counsel has the right to cross-examine the witness as well. Opposing counsel may try to show that even if the statement was made by the witness, there are circumstances that would make it improper to allow counsel to present it to the jury during cross-examination.
7. The judge decides whether the statement was made and whether the ends of justice would be best attained by allowing counsel to cross-examine their own witness.

Sections 10 (written), 1 and 11 (oral) of the Canada Evidence Act also allow counsel to cross-examine the witness on their prior inconsistent statements. The formula requires confirming the evidence the witness has given in court that day, then drawing their attention to the inconsistencies. If you want to suggest that the prior statement was true, the witness will likely not agree that it is true. If you want to use a prior inconsistent statement to both impugn the witness' credibility, as well as suggest that the prior statement was true, then you need to satisfy s 10 or 11 of the Canada Evidence Actas well as hearsay analysis (either a categorical exception or the principled approach).

**Unless you pass the hearsay analysis, the prior inconsistent statement can only be used to damage the witness' credibility, and not for the truth of its contents.**

# REVIEW & SYNTHESIS

## A. OVERVIEW

1. FOUNDATIONAL APPROACH
2. **Materiality**

Materiality is about legal issues of the case. Primary materiality goes to a question at issue in the case. Secondary materiality goes to a question that is not itself at issue in the case, but is relevant to a central issue (i.e. credibility).

**On the exam,** it is useful to identify primary materiality because it helps to clarify the rest of the analysis, particularly with respect to necessity and s 24(2).

1. **Relevance**

Evidence which has any capacity to make a material proposition more or less likely.

CORBETT & SEABOYER: it doesn’t matter how much more likely it makes it.

CORBETT: unless evidence is clearly irrelevant, even if the relevance is doubtful, just presume relevance and move on to exclusionary rules.

Relevance is about the *logic* of the case, and speaks to the logical reasoning used to get from a piece of evidence to the material proposition (from fact to legal conclusion). Eg: **A** saying, “I killed her” re: his deceased wife is directly relevant to *mens rea*.

**Direct relevance**: a piece of evidence which, if accepted, resolves a material question for the court. However, doesn’t *have to* be accepted. Not about whether evidence is truthful or reliable.

**Circumstantial relevance:** evidence which requires one to draw an inference to get from evidence to material issue. For example, if prior to child’s death the mother is heard saying, “I can barely manage this child. I could kill them,” this could be used as circumstantial evidence to draw inference that mother’s intent to kill carried over to *actus reus* in the offence.

OSOLIN & SEABOYER: the fact that a complainant consented to similar sex in the past, standing alone, doesn’t speak to consent. This fact has not no logical relevance. This appears to be a policy driven rule, because the relevance of such facts can be overplayed by the TOF.

**On the exam,** identify whether evidence is direct or circumstantial because once get the analysis proceeds to necessity and probative value, the difference matters.

Above two stages help set things up. Next two stages are where the real work is.

1. **Absence of an exclusionary rule**

Evidence only admissible in absence of an exclusionary rule. This is the bulk of this term.

1. **Prejudicial effect vs. probative value**

The judge has a general discretion to exclude evidence where the prejudicial effect of hearing that evidence outweighs its probative value.

SEABOYER EXCEPTION*:* if the **A** tenders evidence in their defence, the prejudicial effect must ***significantly*** outweigh probative value in order for the judge to exercise their general discretion to exclude. This is a result of the **A**’s s 7 right.

NOTE: Where exclusionary rules incorporate these factors, no need to do it again – just say PV v PE has already been addressed. **Exclusionary rules where this analysis is built in**: expert evidence; s 24.2 (reliability and risks associated w/ evidence). Otherwise, use this in *every* case.

**Probative value**: speaks to how far a piece of evidence takes you, strengths in terms of inherent reliability and how central of an issue it goes to. Primarily material evidence is more probative than secondarily material evidence. Similarly, direct evidence has more probative value than circumstantially relevant evidence.

**EXAMPLES**: look at GRANT (reliability of gun and what it does in this case) andHARRISON (relevance of cocaine) for examples of how probative value is analyzed.

**Prejudicial effect**: this is not about being “bad” for one side or the other, but measuring the possibility of distorting the trial process.

POTVIN*:* prejudicial effect can arise in one of two ways:

1. **Moral prejudice**: evidence may make accused person sound so bad that TOF will want to punish them for being a bad person and not for being guilty w/ the offence with which they are charged. This is a greater concern when the TOF is a jury.
2. **Reasoning prejudice**: this is the risk that evidence will be overvalued by the TOF. **Example**: jurors who hear info about sexual complainants tend to give too much weight to past sexual activities. Reasoning prejudice is often interwoven with moral prejudice.

**Example**: the Crown wants to introduce evidence that accused seen by psychiatrist and was diagnosed as a psychopath. The jury may think that accused committed the offence because of this diagnosis, and therefore assign too much weight to this fact.

**Example**: in JRJ, the defence wanted to use science to say **A** was not part of class of persons to commit an offence like this. Jury would overvalue this evidence, despite the fact that it is based on potentially unreliable science.

Expert evidence has potentially introduced a third category, related to *costs*:

1. **Trial time, confusion, and possibility of opening door to new evidence**: courts are more likely to exclude evidence that will consume excessive court time and resources. (EXAMPLE?)
2. INFORMATION GATHERING

The core principle here is facilitating the truth-seeking function of the court by ensuring that parties have access to the information that they need to make their case. One debate is when access to information yields to other principles, such as the need to protect national security.

Know the rule in STINCHCOMBE and have a general awareness of rules in BCSC Rule 7.

Be aware of the special principles applying to aboriginal rights & title cases pursuant to MITCHELLand DELGAMUUKW*.*

ON EXAM:

Crim disclosure - know basic STINCHCOMBE principles, Crown obligation (obliged to disclose any evidence relevant to investigation). No corresponding obligation on accused to disclose (except in some limited circumstances - eg expert evidence).

BCSC Rule 7 governs civil discovery in BC. Imposes on both parties an obligation to list all relevant documents. Ongoing obligation (must update if new evidence, or realizes forgot to disclose something).

Know how in DELGAMUUKW, SCC recognizes particular challenges presented to ab ppl in exercising or enforcing con rights under s 35. Given history of colonialism and their cultures, important to admin rules of evidence w due regard to these histories. Eg hearsay re: oral history evidence. In DELGAMUUKW and MITCHELL, don’t use Eurocentric biases when evaluating evidence. SCC found TJ erred in not placing weight on oral history.

MITCHELL*:* limit - evidence cannot be strained to carry more weight than it can bear. In this case, Q was whether Mohawk community had pre-contact practice of trade across St. Lawrence. Considerable weight of the evidence was against that conclusion.

1. PRIVILEGE

This 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. This rule is triggered when a party wishes to prevent communications from being used or disclosed, because of the nature of the relationship between the communicators.

Two types:

(1) **Class privileges** (we focused on solicitor-client and litigation privilege, particularly BLANK v CANADA). ON EXAM: know basic criteria as set out in BLANK and P&S. Also, be aware of what’s likely to meet these privileges.

(2) **Case-by-case privileges** (especially NATIONAL POST and the part of P&S that discusses MA v RYAN). 4 Wigmore criteria, adopted in GRUENKE and articulated by NATIONAL POST. **EXAM**: know Wigmore criteria. Know how MA v RYAN and NATIONAL POST discuss the 4th criterion. Most work done at 4th stage - balancing of interest in protecting relationship (both re: specific relation and general/generic relationship) and legitimate public interest in getting at the truth of the matter (sometimes, court views this in light of the specific case but sometimes views this more generally).

Classically, case-by-case: journalists, psychiatrists, medical doctors, those who claim a religious privilege.

1. EXPERT EVIDENCE

The key principle here 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.*

ON EXAM: state which approach you’re using.

The MOHAN test (reformulated in ABBEY) is the key admissibility test. Rely on the ABBEY formulation, but note that it does order things differently from the SCC in MOHAN. Key concepts to understand and apply include the concept of reliability (including the difference between threshold and ultimate reliability), necessity and qualifications. Revise the Cunliffe paper and note differences between the ABBEY approach described in Cunliffe and the approach suggested by P&S. You may choose to use either approach. Recall that there is an exception to the hearsay rule for evidence given by an expert.

ABBEY: Doherty ID’s set of procedures to use in determining admissibility of evidence.

(1) The burden is on party who wants to use the expert evidence.

(2) Delineate the proposed opinion (i.e. get clear sense of what expert proposes to say & what work it’ll do in the case). Cunliffe thinks it’s helpful to do materiality and relevance at this stage (ie delineating proposed opinion). Doherty ID’s materiality and relevance as 2 of the 4 conditions. Can follow Doherty or Cunliffe on this point. If you use Cunliffe’s approach, just state that you’re using Doherty’s framework but you’re organizing it differently.

(3) Third stage of Doherty: consider preconditions to admissibility:

* 1. opinion relates to a subject that is properly the subject of expert opinion (eg *DD* - judicial instruction to jury sufficient to tell them about concerns re: child sexual assault cases - not necessary to have expert). This speaks to **necessity**. P&S would also add second piece of necessity: definition of necessity as provided by MOHAN. In MOHAN, Sopinka provides three types of necessity:
	2. That necessity is about either expert deals w/ subject which ordinary ppl will not get to the right result;
	3. Is outside of the experience and knowledge of judge and jury (eg LAVALLEE);
	4. Technical and requires explanation (eg DNA) (see 194-5). P&S state we should consider the above at this stage. Can follow P&S here, which is consistent w/ *Mohan*, or do it later in the analysis (as Doherty did, which is probably also consistent w/ MOHAN).
1. Witness must be qualified to give the opinion. MOHAN: bare or minimal requirement. Expert needs some knowledge that goes beyond ToF. Cunliffe: nature of qualifications are important to ask at the balancing stage
2. Opinion doesn’t contravene another exclusionary rule. Note: hearsay offers an exception
3. Materiality and relevance question

These 4 preconditions: some are easy, some difficult. **EXAM**: even if you find there’s an issue at the earlier easy questions, continue on to balancing.

Last stage: TJ must decide whether the *benefits of the evidence outweigh the potential harm*, or, a la MOHAN, do the benefits outweigh the cost?

At this stage, we need to do the reliability analysis. Use the definition of legal reliability as defined in Cunliffe’s paper, where it is a measure of:

* + 1. The extent to which expert methods and techniques can do what they purport to do;
		2. The capacity of an individual expert witness to apply those methods and techniques; and
		3. Whether an appropriately qualified expert witness has properly applied the appropriate methods and techniques in the particular case.

Use this to frame discussion. Re: probative value, think: how central is this to the case? Think about objectivity and impartiality of the expert if you have concerns. Also, re: how much reliability evidence has, think about experience and qualifications of expert. Note on experience: not all types are equally suited to Q before the court.

Onto costs: think about prejudicial effects and notion of costs in terms of trial time and potential confusion. Risk of confusion, ABBEY: risk that jury will misunderstand is one of the biggest costs. Still think about this issue, even if it’s a judge-alone trial. Doherty says cost/benefit analysis must involve a consideration of necessity. This is because necessity can also be understand as a measure of the centrality/importance of the evidence, which is important when weighing costs/benefits. P&S would have this as a precondition.

1. SELF-INCRIMINATION

The key principles are fairness to **A**, the common law principle that the Crown must prove its case before **A** has an obligation to respond, and reliability. These rules are triggered when **A** confesses or makes an admission, and vary according to who receives the confession and in what circumstances.

Note the complicated interplay between s 7 of the Charterand the common law OICKLE principles (SINGH). Section 10(b) Charteris also relevant. Make sure you know when to apply each rule:

* OICKLE applies whenever accused gives statement to person in authority. Two elements to this:
	+ - 1. accused knows they are in authority and
			2. that knowledge/belief is reasonable.

In Mr. Big context, OICKLE will not apply bc accused won’t believe they’re talking to person in authority. SINGH: when OICKLE applies, s 7 has no further role to play in relation to the confession itself. However, re: derivative evidence, there is a further role because CL doesn’t exclude derivative evidence.

**If** OICKLE **doesn’t apply and s 7 applies:**

S 7 triggered if **A** is under arrest or detention. If OICKLE doesn’t apply, then per *Otis*, the court looks at planting an undercover officer into cell with the A and looks at line between casual conversation and something akin to interrogation. The latter engages s 7 and will be breached if they managed to get that admission.

If statute req’s accused to make a statement. Eg ICBC claims: if accused must explain how accident happened. S 7 will operate to prevent that statement from being used against accused

Be aware of SINGH ratio.

OICKLE: key concern is *reliability* and the risk of false confession. The Q that the court is req’d to ask and Crown is req’d to satisfy BRD is whether the accused person gave the statement *voluntarily*. OICKLE then focuses on whether accused person’s will was overborne. Court ID’s # of things to look at in considering whether will overborne:

* + - 1. Whether accused confessed because of threats, intimidation, or implicit promise of lenience or some sort of advantage. Inducements: things outside the control of officers don’t qualify for OICKLE.
			2. Oppressive circumstances. Look at HOILETTE, where the accused was left naked in cold cell, w/out tissues. This shows that there is a high threshold for oppressive circumstances. OICKLE’s facts didn’t satisfy the oppressive circumstances req.
			3. Operating mind - WHITTLE illustrates high threshold. Here, schizophrenic man

Court will look for one or combo of the above. Consider them in tandem.

* + - 1. Police trickery - separate from others. Focuses on behaviour/actions of police. Provides examples of truth serum injected into diabetic.
1. IMPROPERLY OBTAINED EVIDENCE

Core principle according to GRANT is to maintain the repute of the administration of justice, including the rule of law and respect for Charter rights. Note the narrow definition of whose views are relevant to this notion. To trigger s. 24(2), A must show (balance of probabilities) that his/her personal Charter rights were violated, and that there is a sufficient connection between the breach and the relevant evidence. If these thresholds are satisfied, then according to GRANT, the court must consider the seriousness of the breach (focus on police conduct), the impact of the breach on the Accused (focus on A), and the interest in adjudicating the case on its merits (the seriousness of the charge does not affect this factor). Know the principles and concepts underlying this test, and be able to apply them.

**THRESHOLD Q’S:**

(1) Must ask whether that person’s Charter rights were breached. ON EXAM: if it states that accused wasn’t told of their right to silence, ID this as a breach. A la GRANT, know the criteria for defining detention. Know gf’s apt example. However, things like a s 8 breach or something we haven’t covered, she will tell us that it is a breach.

(2) Must be sufficient connection btwn breach of that right and evidence. Causal connection: HARRISON - cocaine found bc police officer failed to accord him his rights in unconstitutional stopping of the car. GRANT. Temporal connection: STRACHAN - no causal relationship (valid warrant but refused to allow accused to call his lawyer. They found what they would’ve found anyway. Court viewed this as sufficient connection). GOLDEN - s 8 privacy right breached, strip search.

Previously, if conscriptive evidence and threshold Q’s satisfied, evidence was excl’d. After GRANT, we know that key principle, as articulated in 24(2), is the need to maintain the good repute of the admin of justice. Must ask: if a reasonable person, aware of Charter rights, would have a problem w/ the way in which the evidence was obtained. GRANT: once you get to 24(2) analysis:

* + 1. seriousness of breach - focus on police conduct
		2. impact of breach on accused’s Charter rights - particular vulnerabilities may be relevant
		3. public interest in adjudication of case on its merits - seriousness of charge is *not* a relevant factor. Importance of evidence to Crown case deals w/ whether court can get to the truth and how far evidence takes us towards ultimate issue in the case.

Must balance these to see whether admission or excl is better. GRANT - talks about categories of evidence and how they might play out (eg statements, bodily, derivative, and real evidence). HARRISON also provides examples.

1. HEARSAY

The key principle here is the search for the truth through the adversarial process. The hearsay rule is triggered when a party seeks to introduce an out of court statement for truth purposes (watch for tricky examples – identifying hearsay is worth practicing).

Since KHAN, STARR*,* MAPARA the core concepts are necessity and reliability. Make sure you can explain the relationship between established categorical exceptions and the principled approach, and have a very strong grasp of how necessity and reliability are described in KHELAWON and other cases, and of the relationships between these concepts.

1. WITNESSES AND TRUTHFULNESS

The key principle here is the search for truth through the adversarial process. This rule is triggered when you wish to suggest that a witness is lying or cannot be believed. Note a close interplay with hearsay if prior inconsistent statements are at stake.

Mostly regulated by statute – CEAss. 9 – 11, BCEA ss. 13 – 16, Rules 12-5(29), (30) and (54).

## PRACTICE EXAM

ON EXAM**: know elements of murder & negligence**

**Murder**

**222. (5)** A person commits culpable homicide when he causes the death of a human being,

1. by means of an unlawful act;
2. by criminal negligence;
3. by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or
4. by wilfully frightening that human being, in the case of a child or sick person.

**Criminal Negligence**

**219. (1)** Every one is criminally negligent who

* 1. in doing anything, or
	2. in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

*Definition of “duty”*

 **(2)** For the purposes of this section, “duty” means a duty imposed by law.

*Causing death by criminal negligence*

**220.** Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

1. where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
2. in any other case, to imprisonment for life.

|  |  |
| --- | --- |
| *ACTUS REUS* | *MENS REA* |
| Conduct | Intentional or reckless act or omission |
| Circumstances | Knowledge or willful blindness of circumstances |
| Consequences | Intend or be reckless as to the consequence |
| Causation |   |

Materials you can bring in are:

* + P&S
	+ Course materials
	+ Class notes
	+ CANs you make

State your assumptions and missing facts in case you slightly misread the facts.

Exam format:

* + 1 fact scenario
	+ 2 questions (not necessarily equally weighted)
	+ Asked to analyze the admissibility of a couple of things
	+ She will examine you on something that goes beyond what we've read and you will have to make a prediction of what the court will do based on the foundational approach and other principles (constitutional protections for the accused, desire to enable the state's capacity to investigate crime while protecting individual rights, etc.)
	+ Can cite case law and legislation simply (Baldree, *s 9 CEA*)

Marking rubric:

* + Don't just argue by analogy - identify differences as well
	+ Don't make any errors in the law
	+ Make comprehensive arguments on both sides
	+ Predict how unsettled areas of the law are going to shake out based on the principled approach
	+ **On exam, point out potential rules that apply, then explain how they function, then choose the right rule and explain your decision.**

This is not a court. SCC precedents aren't necessarily applicable here, but the principles certainly are. This paragraph gives you the test and the governing principles. Section 7 doesn't play in this tribunal context, but the tribunal gives the right to cross-examine anyway.

"The principles here are determined by the World Anti-Doping Code and I will be guided by them in my analysis."

There is some interaction between the two pieces of evidence - if one is admissible, it can act as corroboration for another.

* + **Admissibility of the disputed paragraph in Darville’s statement**

Start with where the statement is made, in what circumstances was it made, and when was it made. Then proceed to break the statement into component parts and analyze materiality and relevance. Some parts are secondarily material to Brasfort's denial because they tend to enhance the reliability of the expert evidence. Other parts are primarily material to the proposition that Brasfort was doping and, if true, have considerable probative value.

The primarily material component is directly relevant. The secondarily material component is strongly circumstantially relevant.

Could also start by asking whether this tribunal has a hearsay rule at all (right to cross-examine vs relevant and reliable). The language here suggests that there will be a if hearsay will be allowed, it will be allowed based on the principled approach we've studied. **CONTEXT REALLY MATTERS** - where you are determines how your analysis will proceed.

The third stage of the principled approach seeks to identify exclusionary rules that might apply: hearsay. So why is it hearsay? Start with **KHELAWON**, lay out the three defining features that Charron identifies (point out that lack of opportunity for contemporaneous cross-examination is a danger) and apply them.

Any categorical exceptions? Not really. Even if a categorical exception does apply, can prefer the principled analysis.

Necessity analysis will be the same for both components, but the reliability analysis might vary. Necessity has two types, witness and testimonial unavailability. Witness unavailability is relevant here - while Darville is not dead and he is competent to testify, he is another jurisdiction and refuses to travel to testify. You'd want to be satisfied that Canada had exercised its due diligence in ensuring that there aren't . But he could testify via video-conference since this is just a tribunal. In **KHELAWON**,Charron focuses on whether there is another way to have the witness testify, suggesting that skype in this case would be key. Where there is witness unavailability and the possibility of some other channels, this lessens the necessity of this evidence and correspondingly stiffens the reliability required.

There are two clear types of reliability: substitutes for cross-examination and inherent trustworthiness. Substitutes for cross-examination (**KGB**, **OJU**) determined by whether it's under oath, if there's a complete recording of the statement, and whether there were substitutes for contemporaneous cross-examination. In this case, it is a sworn affidavit (under oath) and it is a full affidavit (complete recording). However, there are no substitutes for cross-examination here and Brasfort would not be able to cross-examine Darville **(KEY DANGER).** Could argue that there should be cross organized via video conference. This presents dangers in that the trustworthiness of the contents cannot be tested - is Darville telling the truth? Brasfort will argue there are considerable reasons to doubt Darville's sincerity: animosity based on prior disagreement which caused Brasfort to leave the team; credibility is damaged because he is a drug cheat. This second point can be rebutted by arguing that this doesn't damage his credibility because this affidavit is against Darville's interests, he has already been reprimanded and his status as a drug cheat make him an expert on the subject. In **KHELAWON**, **A** had identified credibility issues (paranoia, dementia), and they were greater than in this case.

What about inherent trustworthiness? Darville participated in a conspiracy to cheat over a lengthy period of time. In **CZIBULKA**, the court held that if motive can't be proven or disproven, then it is a neutral factor (criminal context). Darville gives a great deal of detail which inherently can be checked - this statement has a high capacity to be tested. **Corroborating evidence**: important potential source of corroboration is Ashenden's findings. One huge concern here is dependence - if Ashenden knew what was in Darville's statement or Darville knew what was in Ashenden's report, this undermines the strength of the corroboration **(KEY DANGER)**.

Prejudicial effect vs probative value: reasoning prejudice is not high due to lack of jury, moral prejudice mostly applies to Darville, only to Brasfort on the acts he is charged with. Unlikely that the discretion to exclude on this basis will be exercised.

Probably right to admit this evidence because this is a tribunal setting on a balance of probabilities, and so the dangers, while real, are not sufficient to outweigh the tribunal's focus on relevance and reliability. While Brasfort would not get the opportunity to cross-examine Darville, this could be leavened by weighing the evidence lower. Weight would be determined by the motive issue and would want to be cautious

* + **Admissibility of the Ashenden’s expert report and testimony**

Ashenden's statement is primarily material in the blood test for EPO on more than one occasion (intention). Ashenden's testimony is directly relevant to the presence of EPO in Brasfort's bloodstream and circumstantially relevant to the question of intention (but this offence is strict liability). Exclusionary rule that applies is the expert evidence rule - does it apply at this tribunal in the same way as it does elsewhere given the tribunals' statutory principles? Reliability is prioritized by the statute, and reliability is at the heart of the **ABBEY** and the **MOHAN** analyses.

The principles guiding the admissibility of expert evidence were outlined in **ABBEY** and reformulated in **MOHAN**. Time permitting, give a summary of the expert evidence to delineate its scope - Ashenden ran a test, describe the test, the test hasn't been reviewed for its reliability but its underlying theory suggests this won't be an issue. The first analysis is **necessity** - scientific testing (like DNA) are sufficiently technical that the tribunal members might need assistance in evaluating the test results. Tribunal members. The second analysis is **qualification** - **MOHAN** says that qualification is a relatively low standard (does the expert have any experience that goes beyond the trier of fact's) and so this is satisfied in this case. The opinion must not violate another exclusionary rule - satisfied - and must have logical relevance to a material issue - satisfied.

In **ABBEY**, the court examines whether the probative value outweighs the prejudicial effect. As per **MOHAN**, "Is it worth what it costs?" This evidence goes to a central issue, as the evidence if accepted shows the presence of artificial EPO on six separate occasions. What about reliability? The development of Ashenden's tests appears highly reliability, but the application to Brasfort is more problematic. Reliability has three types: how well does this technique do what it purports to do, how well can this expert witness apply this test, whether this technique was properly applied in this case. The first two are very high (increased by peer review), but the big reliability concern is whether this test works as well on 6 year old samples as it does on fresh samples. Would want to know the independence of the Australian Institute of Sport, and Ashenden's qualifications (turns out they are high, but don't assume). Would also want to know if Ashenden stands to gain from Brasfort being convicted.

Can you use other evidence to corroborate expert evidence? **ABBEY** suggests you can't, but **MOHAN** and **KHELAWON** suggests that you can. Bring in arguments from Cunliffe's article. But this tribunal is not bound directly by **ABBEY**. As discussed above, Darville's evidence, if independent, assists the reliability of Ashenden's evidence.

What are the prejudicial risks of Ashenden's testimony? Relying on scientific experts creates a danger that excessive weight will be given by the trier of fact to his evidence because of a lack of understanding. But this is mitigated by the fact that

**ABBEY** then turns to the question of necessity: is this evidence more than merely helpful? Yes, as while there is some reliability concern based on the age of the sample, this is insufficient to exclude the evidence and this should be examined during the trial and these reliability concerns go to weight.

## FLOWCHARTS

#### PRIVILEGE

MEMO 9

1. **How do we get access to the files?**

Ask the psychologist first and see if they are willing to disclose those records (also important to give notice to the **D**'s counsel that the request has been made), and if not then subpoena those records. The psychologist will likely refuse based on the *Privacy Act* and their own professional regulations, then there will be a Chambers hearing. In **M(A) v RYAN**, even where there are court rules about disclosure, the common law and privilege will override those rules. This does not apply to statutory rules (though these are still bound by the Charter).

1. **Relevance, materiality, judicial discretion**

|  |  |
| --- | --- |
| **Before Jain's Death** | **After Jain's Death** |
| Evidence of antagonistic relationship(high probative value - goes to motive, which is always relevant, as per **LEWIS**) | Evidence of a change in demeanor(low probative value, only medium if there's something very particular about it) |
| History of family violence or self-harm(low probative value - would rely heavily on expert evidence to establish inferential link) | Discussion of night of Jain's disappearance(high probative value, whether or not we think she was telling the psychologist the truth) |
| Any discussions with the co-accused regarding Jain(high probative value) | Feelings of guilt(low probative value, unless very specifically expressed) |
| History of medication or prior diagnosis(depends - ASBD: high, depression: low, bipolar/borderline: medium) | Discussion of emotional response to what happened(low to medium probative value, unless the emotional response is very particular) |
| Relationship with authority(low probative value) |   |

TJ would likely admit material disclosures with high probative value (such as the evidence of an antagonistic relationship with Jain, or discussion of the night of Jain's disappearance), but likely redact those records with low probative value. This is likely a question of fact, and so there would only be grounds for an appeal if the TJ's decisions on this matter were patently unreasonable. Crown will argue that more evidence has higher probative value, while the defence will argue that more evidence has lower probative value. There will be an application of the foundational approach before the trial at this point, as well as another application when either side attempts to admit this evidence.

1. Wigmore **criteria**
	1. Parties have an expectation of confidence (M(A) v RYAN - just because there was some expectation that the records might be disclosed is not enough to displace this expectation)? *Yes.*
2. Confidentiality must be essential to the relationship

The **D** was ordered to see the psychologist by the headmaster - is there the same necessity of confidentiality? Was the school expecting to have access to the psychologist's records? Should discuss these questions with the headmaster to determine the nature of the relationship - most likely not.

1. The relationship must be one that the community "wishes to sedulously foster" (ie. values and wishes to protect)

Crown often makes arguments about the value of counseling.

1. Weigh the injury to the relationship caused by disclosure against the benefit to be gained by correct disposal of the litigation (P&S, p 254).
* Correct disposal of litigation: Recall from National Post, Binnie stated that the benefit of disclosure is broader than just the correct disposal of litigation. If there is a plausible possibility that the info may be in the record, then that should be valued to be consistent w/ the need to conduct a complete criminal investigation.
* Injury to relationship: From MA v Ryan, we know that we can think about this question on a number of levels:
* JS & Psych: would unlikely to continue; could be negative for JS’s mental health and may prevent her from pursuing future therapeutic assistance. Also, Quesnel is a small town: may be difficult to access another psych.
* Generic relationship: student community may be affected bc, if they have a practice of referring troubled students to counseling, disclosure may have immediate effects on this in general terms bc other students may be unwilling to trust therapeutic relationship in general
* Building on McLachlin’s comments in MA v RYAN on the societal good of therapy, would argue that society has an interest in rehabilitating youth before the enter the crim justice system
* MA v RYAN: we need to pay attention to equality and privacy Charter rights. Would not be susceptible to s 1 analysis, bc it’s about Charter values being taken into account in weighing of the factors. Harm to privacy is a per se harm - it is about “psychic harm” that will ensue to the fact that JS provided info and it was later revealed. Re: equality - therapeutic records and diaries, women are far more likely to seek therapy and to keep diaries. Some feminists make argument that diff in way in which women engage w/ their mental health should be taken into account when deciding whether or not to disclose, bc of the existence of the right to silence.
* Predictions of where the court will side on the balancing of these two factors: will prob disclose some records but redact things of low probative value bc would be unduly prejudicial. Recall from MA v Ryan, two stage process: records given to judge, then judge decided. Likely here that TJ would look at the notes, records and would decide on what should be further disclosed.

Note, if appealed, TJ’s decisions re: disclosing certain info is a question of fact. Would need to be patent and unreasonable error of TJ in order to be reviewable by appellate court.

#### EXPERT EVIDENCE

MEMO 11

**THRESHOLD CONDITIONS**

1. Before beginning on an admissibility inquiry, it is crucial to delineate the scope of proposed expert evidence: what terminology will they use, where does their expertise fit within the case, what is the scope of their qualification. It is very helpful to consider materiality at this stage.
2. The burden of proving admissibility (on a balance of probabilities) lies on the party seeking to rely on the evidence

**PRECONDITIONS**

1. Opinion must relate to a subject that is properly the subject of expert opinion [necessity - can TJ give a warning which would be as effective as the expert evidence, such as eyewitness reliability warnings, as per R v D(D)] - is the opinion helpful to the court?
2. The witness must be qualified to give that opinion. The qualification standard is modest, but can be relevant to the later the prejudicial effect/probative value analysis.
3. The opinion must not contravene another exclusionary rule.
4. The opinion must have logical relevance to a material issue at trial (can go first as well). Not concerned with *how* much more likely (ie. probative value), just the binary question of relevant or not.

**BALANCING**

1. The trial judge must decide whether the benefits of the evidence outweigh its potential harms:
	* Probative value is determined by two factors: (1) the probative potential of the evidence and (2) the significance of the issue to which the evidence is directed. This includes a consideration of reliability - the subject matter of the evidence, the methodology used by the expert, the expert's own expertise and the impartiality and objectivity of the expert. The further you travel from primary materiality into secondary materiality, the lower the probative value will tend to be. Probative value of expert testimony is centrally concerned with the reliability of this testimony (as per TROCHYM) - this is the stage to do this.

**Reliability**

1. The extent to which expert methods and techniques can do what they purport to do (arson, dingo baby)
2. The capacity of an individual expert witness to apply those methods and techniques
3. Whether an appropriately qualified expert witness has properly applied the appropriate methods and techniques in the particular case (DNA contamination)
* Costs include the consumption of time and money, risk of prejudicial effect (the potential for moral [**A** is a bad person and should be punished] and reasoning [overweight evidence] prejudice) and confusion. In the context of expert evidence, the most likely prejudicial effect is reasoning prejudice that overvalues the expert evidence. Confusion is closely associated with reasoning prejudice, but is also an independent concern.

In R v T UK [2010] (terrorism case with most of it redacted), a forensic scientist purported to be able to identify that there was "moderate scientific support" that the **A**'s shoe had created the shoeprint found at the scene of the crime. But what the fuck does "moderate" mean? Very variable in its interpretation, and thus a source of **confusion**.

* The cost-benefit analysis demands attention to necessity, and this is the appropriate time to have regard to this MOHANcriterion. In considering necessity, the trial judge should also consider whether other aspects of the trial process such as the jury instruction provide the jury with the tools necessary to come to a determination about the facts.

**DR. ROGER TRIENIS**

1. **SCOPE:** Dr. Trienis seeks to testify that there is a condition called Predisposed Bully Syndrome (PBS), that PBS is a genetic predisposition, that PBS affects adolescents, that sufferers of PBS form the intention to commit violence and that Stuart likely suffers from PBS.
	* Materiality: capacity to form intention, likelihood of committing violence, identity of Meera Jain's killer, distinguishes from alternative suspects.
2. **BURDEN:** As the Crown seeking to rely on this evidence, the burden of proving admissibility lies on us.
3. **NECESSITY:** Is this something with which the jury needs an expert's help? Yes, juries aren't familiar with psychological research. Is psychology a recognized field? Yes.
4. **QUALIFICATION:** Dr. Trienis is qualified as a professor of psychology, and he specializes in adolescent. Does he have clinical experience? This is likely. Is he qualified to make a diagnose based on a review of their paper records and a single recorded interview? This is less likely. Also he makes claims about genetics, and this is probably outside his scope of expertise. Also Dr. Trienis has only ever testified for the Crown, so there may be some question about his independence. Courts tend to be deferent at this point, though, and deal with independence at the balancing stage.
5. **EXCLUSIONARY RULE:** *Rule against similar act evidence*: Dr. Trienis' evidence relies on the fact that Stuart has committed violent acts in the past. In this case, the Court would likely find an exception to the similar act rule because the prior violent acts are much less serious than murder. *Rule against hearsay*: Dr. Trienis is relying on hearsay. But the hearsay rule doesn't apply, so long as the expert uses the hearsay to form their opinion.
6. **LOGICAL RELEVANCE**: Yes, this evidence is relevant to material issues.
7. **COST-BENEFIT ANALYSIS:**

PROBATIVE VALUE: (1) The **significance** of the identity of the killer is high, but the materiality of Stuart's capacity to form intention is uncertain (**A** may argue that they were not the killer). (2) The **probative value** is probably relatively **low**. How far the evidence takes you depends on what the expert is going to say and any limits on what they can say. In this case, Dr. Trienis is not able to make an absolute diagnosis, and his diagnosis is not that she is a killer, just that she has a predisposition to violence - this means it is circumstantial evidence and therefore less probative. It doesn't take us very far in establishing Stuart's identity as the killer: how many teenagers suffer from PBS, how many other suspects suffer from PBS, what is the correlation between PBS and murder, what is the likelihood that Stuart *actually* has PBS?

RELIABILITY: Trienis' evidence is largely clinical, aside from his claims regarding the existence of PBS and its correlation with violence (DAUBERT). (1) The extent to which expert methods and techniques can do what they purport to do: can Dr. Trienis actually diagnose based on so little evidence? Can Dr. Trienis articulate the criteria he uses to assess whether he is right or wrong? Can he respond to controversies within the field? It is not sufficient that his evidence has been admitted before (as per MOHANand TROCHYM). (2) The capacity of an individual expert witness to apply those methods and techniques: want to carefully consider anything Trienis says about genes - this is probably outside the scope of his expertise. (3) Whether an appropriately qualified expert witness has properly applied the appropriate methods and techniques in the particular case (DNA contamination).

PREJUDICIAL EFFECT: There is a risk of reasoning prejudice due to the jury inferring that because Stuart is a bully that she committed the murder, and thereby overweight the evidence. This is an error caused by mistaken base rates - there is likely not a strong correlation between bullying and murder. There is also a risk of moral prejudice because of the moral panic in the media over bullying and the jury wanting to punish Stuart for that, rather than for murder. There are also costs in terms of time and money with a battle of experts between the defence and the Crown. There will also have to be extensive *voir dires*. Dr. Trienis' wording that Stuart "likely" suffers from PBS could cause confusion with the jury - how likely is "likely"?

NECESSITY: Does this add anything beyond the evidence that Stuart was a bully, which is already in? Crown will argue that it links this behaviour to the crime in question. Reliability will be key here.

#### SELF-INCRIMINATION

MEMO 14

Identify that both the common law confession rule and the section 7 right to silence apply to this confession/statement, and then identify that SINGH tells us how to approach such a situation (i.e., look to the common law confession rule first because it his more favourable to the accused and, in this situation, where the accused knew she was speaking to a person in authority, the tests are functionally equivalent).



OICKLEconfession rule:

1. Statement made? Yes.
2. To a person the accused reasonably believed was a person in authority? Possibly not – statement appears to be directed at her mother, who has no ability to influence the authorities’ decision-making. However, her mother also told Jennifer to tell “them” (presumably the police) where she was that night. There was an officer in the room when Jennifer “confessed,” and so she probably knew that she was not merely making a statement to her mother. Focus on principle: the principle underlying the *Oickle* rule and the section 7 protection is to protect the accused’s ability to make a meaningful choice whether to speak or remain silent in the face of the overwhelming power of the state. In this case Jennifer is in police custody, and her statement is made in the presence of a police officer. Jennifer is aware of this context, and so it is likely that the Crown will not be able to raise a reasonable doubt that Jennifer reasonably believed she was making a statement to a person in authority.
3. Was the accused’s will overborne by:
	1. Inducements/threats: Appeals to emotion/morality are acceptable, but Sgt. Poulton also told Jennifer that she could “make things better” for herself and for others. This is close to the language Iacobucci flags as problematic in *Oickle*. He also says that it is up to her “how long this takes,” which could be construed as a threat to keep her in custody and continue questioning her until she speaks. There is a reasonable argument to be made that Jennifer’s will was overborne by these threats/inducements.
	2. Oppressive circumstances: A 5 hour interrogation is acceptable. Jennifer was perhaps vulnerable (because of her youth) to the extent that otherwise non-oppressive circumstances combined to overbear her will. These circumstances would include the length of the interrogation and the fact that she did not know the charge. Even so, it is unlikely that these circumstances were sufficiently oppressive to overbear Jennifer’s will.
	3. Lack of operating mind: no evidence that Jennifer suffered from lack of an operating mind to the extent that she did not know that she was speaking to a person in authority and that consequences might follow (*Whittle*).
	4. At this stage it is appropriate to think of the warning analysis mentioned in *Singh*. Charron J held that the absence of proper warnings can be important in the determination of the accused’s ability to choose whether to speak, but that it is not determinative. In this case, Jennifer was not informed of her right to silence or of the specific offence for which she was being arrested. She was however advised of her s. 10(b) right to consult counsel, and that she was under arrest. Is there a reasonable doubt about whether Jennifer knew she had a right to refuse to answer the police’s questions? Given the jurisprudence on this issue, it is questionable that Jennifer’s will was overborne by the lack of these warnings.
4. Was there police trickery that would shock the community? The police told Susan that they hoped she would convey to Jennifer that she needs to cooperate with the police. They also told her that Jennifer had been arrested for murder and that there was strong evidence. Jennifer did not have this information, however. By telling her mother more than they told Jennifer, the police may have tricked Jennifer into making an incriminating statement.

#### IMPROPERLY OBTAINED EVIDENCE

MEMOS 15+16

* + Were her Charter rights breached?
		- Did Stuart believe she had no choice but to accompany the police when she was asked to accompany them to the police station? If so, problematic because they gave her no warnings.
		- Was Stuart under investigative detention when she was first interviewed? If so, problematic because the police failed to inform her of her right to counsel under s 10(b).
		- Was this an investigative detention under s 9? Under MANN, the police must have reasonable grounds to detain Stuart in order to do so. Under GRANT, an investigative detention is triggered if Stuart would have reasonably believed herself to be detained.

MODIFIED OBJECTIVE TEST**:** would a reasonable person in her circumstances felt free to walk away? 3 factors: the nature of the police conduct; and other relevant circumstances like the suspect's vulnerabilities. If the court were to ask the police officer if they would have let the suspect go if she had run away.

* + When Stuart jogged away from the police, she was told to stop - she had tried to escape before and failed.
	+ The police put Stuart in the police car.
	+ The police radio'ed "no need of alternative measures" which suggests a willingness to arrest her if necessary.
	+ Stuart is only 18 and is therefore relatively vulnerable. While she has a disciplinary history with the school, she has no history with the criminal justice system.
	+ On balance, it is likely that there was an investigative detention when the police asked Stuart to accompany them to the police station.
	+ As soon as an investigative detention begins, the police must inform the suspect of their right to counsel under s 10(b), why they are being detained under s 10(a) and their right to silence under s 7. All of these flow from the original s 9 infringement (arbitrary detention), as in GRANT.
	+ So Stuart's Charter rights were breached.
	+ Was any evidence derived from the breach?
		- What evidence are we concerned with here? The statements by the accused, both the blurting out to her mother as well the earlier corroboration of other evidence.
		- There is a temporal connection because this evidence was obtained contemporaneously with the Charter breach. What about the final confession to the mother, which occurred after the s 10(b) warning? According to WHITWER, sufficiently strong connections to the earlier defect can contaminate statements after the police warned. Analogous in this situation because it is the same people in the room, and it is a continuous interaction despite the s 10(b) warning - there was no break for Stuart to speak to a lawyer. **This would be an issue**, while the earlier evidence would definitely be contaminated.
	+ GRANTanalysis
		- **Seriousness of the Charter-Infringing Conduct:** The breach does not seem deliberate. But there is a pattern of breaches in relation to the treatment of Stuart (more serious). When Grant was arrested, there was ambiguity as to when investigative detention began and so the court gave the police the benefit of the doubt, but also said that they would not do so in the future. Seems likely that the court would not look kindly on the police's failures to warn in this case.
		- **Impact of the Breach on the Charter-Protected Interests of the A:** Stuart is more vulnerable due to her youth as in GRANT, so the impact is heightened because they were both in need of being informed. **Speculative:** Stuart was in the police station, not on the street as in GRANT, and this would likely increase the impact on the **A**. Conversely, in GRANTthe police were very confrontation with the **A**, while that is not so much the case here. Also, in GRANTthere was no basis to detain the suspect while there was here - older court wouldn't have thought this was relevant, current court is more likely to take plausibility of investigation into account. Overall? Moderate.
		- **Society's Interest in an Adjudication on the Merits**: Focus is on the reliability of incriminating statements here. If the evidence is likely to be unreliable, this is a strong reason to exclude it. The reliability in this case is likely low for what she blurted out to her mother (ambiguous what she was even admitting to, emotional), weighing in favor of exclusion. These reliability concerns could be explored during the trial, but would require putting Stuart on the stand which she is not required to do under s 7. In relation to the earlier statements, the reliability is likely higher, which militates in favor of inclusion. Under COLLINS/STILLMANconscriptive statements were automatically excluded, and Stuart's evidence in this case would also be conscriptive, thereby increasing the impact. The court in GRANTexpect that conscriptive statements will continue to be excluded under the GRANTframework, which favors exclusion here as these statements are conscriptive. Nuance here: the court is seeing the denial of rights which leads to conscriptive statements as always a serious matter, and so will be looking for something unusual in order to justify admitting them, against the COLLINS/STILLMAN approach.

Difficult to apply this approach objectively - on the exam she will be looking for analogies to cases.

What about the importance of the evidence? ON THE EXAM, flag what assumptions you are making or what facts that you are missing.

#### HEARSAY

1. Begin by defining the materiality and relevance of the evidence at stake.
2. Is the evidence hearsay? Identify separate levels of hearsay. MAPARA requires separate analysis for each level of the hearsay. Each level must be admissible in order for double hearsay statement to be admissible.
	1. A statement made at a different time and place;
	2. Being used for its truth content

***BALDREE***: cops want to use phone call placed to cellphone confiscated from the **A** as evidence that **A** is a drug dealer.

1. Danger arising from no opportunity for contemporaneous cross-examination

ON THE EXAM**:** If you have an out-court statement, and you want to use this out-of-court statement, engage in the hearsay analysis, and if you're not sure, treat it as hearsay and move on.

1. If the evidence is hearsay, does the evidence fit within a categorical exception to the hearsay rule?
2. If it fits within an exception, can the party resisting admission show that elements of the *exception* do not meet standards of necessity or reliability? **If yes**, the evidence is inadmissible.

**CATEGORIES WHICH HAVE MET THE NECESSITY & RELIABILITY ANALYSIS**: CUNLIFFE & BOYLE, S233-234

1. Prior identifications
2. Co-conspirators' statements
3. Declarations in the course of duty
4. Statements of present intention
5. Can the party resisting admission prove that *this evidence* is not necessary or reliable? (***MAPARA***: "rare exception") **If yes**, the evidence is inadmissible.

ON THE EXAM**:** Focus on the necessity and reliability analysis, as the categorical exceptions and the shifting burdens can become a timesink.

1. If it doesn't fit within an exception, does the evidence the principled exception requirements of necessity and reliability?
	1. For necessity, either witness unavailability or testimonial unavailability are required.
	2. Reliability is cumulative, based on circumstantial trustworthiness and substitutes for cross-examination. As per ***KGB***, for circumstantial trustworthiness it is ideal that the witness made the statement under oath, that they were warned of the consequences of making a false statement, and capacity to cross-examine the witness (especially crucial against the **A** in criminal context, due to PoFJ under s 7). The other substitute for cross-examination is contemporaneous recording. In ***STARR***, the court held that indicia of reliability from external evidence are not allowable. In ***KHELAWON***, the court reverses this position, finding that corroborating evidence is allowable.
		* ***SMITH***: girl made a number of phone calls to her mother. First two phone calls are admissible because she had no motive to be dishonest, last phone call isn't because she did.
		* ***KHAN***: 3 year old girl didn't have the capacity to lie about sexual assault most likely.

 **N+R=1**

Higher necessity can substitute for lower reliability to some extent, and vice versa. There is a minimum level of reliability required, however, particularly in criminal cases as mandated by s 7.

1. Notwithstanding the answers to all the other questions, even if the court finds the hearsay evidence to be admissible, it may be excluded based on the general discretion to exclude where prejudicial effect outweighs probative value.