Evidence, Fall 2013 (Cunliffe)

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# Introduction

## History

* Pre-1970s, very complicated, inflexible, and bewildering rules of evidence. The SCC began to intervene. Up until the 1990s, had only intervened 3 times: hearsay, privilege and corroboration. Then, in 1990s, a series of SCC cases on necessity/reliability allowed greater latitude for receipt of hearsay evidence.
* The SCC signaled that Cts should consider evidence law in light of **underlying policies** which led to the creation of the rules.
  + *Charter* values also shape the law of evidence (think of *R v Tran*)
* Shift to a more flexible approach. The shift in Canada has not been led by the legislature, but by the direction of the SCC, post Charter.

Rules: Universal, inflexible, rigid, inconsiderate of context, predictable.

Principles: Contextual, guidelines, unpredictable, expensive.

## Values at Play

### Charter and self-incrimination

Charter rights are given broad, purposive readings in order to achieve substantive justice.

### Goals informing law of evidence

1. **Search for truth**: achieving a result congruent with the facts
   1. Very important goal—has been described as *raison d’être*
   2. Not a goal at the expense of all others
      1. Think of the burden—BARD; if Crown fails to establish BARD, that doesn’t mean that the Ct thinks that the accused is innocent
      2. In sexual assault cases, the asymmetry results in an acquittal rate of 68-72%
2. **Fair trial for an accused**
3. **Efficiency of the trial process**
   1. This is undermined by the shift from rules to principles
4. **Maintaining certain relationships considered special in society**
   1. This is a larger social purpose
   2. Also gov’t relations w/ other foreign powers (s. 38 CEA) – lose important evidence for this purpose
5. P**reserving integrity of the administration of justice**

### Accused’s right to full answer and defence

Rules may be relaxed in favour of the accused person in order to prevent a miscarriage of justice.

### Wrongful convictions

*R v Handy* (2002 SCC): if the prejudicial nature of evidence is greater than the probative value, the evidence should be excluded. If the probative value of evidence is greater than the prejudicial effect, the evidence should be admitted.

**Vetrovec warning**:

1. Certain witnesses require special scrutiny
2. Must identify those characteristics of the witness
3. Jury is entitled to act on unconfirmed evidence of the witness but is told that it’s dangerous to do so
4. Jury cautioned to look for independent, corroborating evidence

# Foundational Approach

## Basic Approach

1. Is the evidence **material**?
   1. What is the evidence designed to prove?
      1. Is it an element of the offence of a defence (something which must be proven)? 🡪 **primary materiality**
      2. Is it an element which assists the ToF in deciding on a primary issue? 🡪 **secondarily material**
2. Is the evidence logically **relevant**? (either proves or disproves)
   1. If accepted, does it tend to make a legal conclusion more/less likely, not relevant by how much (*Seaboyer; Corbett*)
      1. If believed, it would resolve a material issue (**direct relevance**)
      2. If believed, you would still need an inference to resolve a material issue (**circumstantial**)
   2. It should be assessed in context of other evidence and the case as a whole (*Monteleone*)
   3. If unsure, generally continue the enquiry (*Corbett*) unless the inference goes to a pervasive myth about human behaviour which should be excluded (*Seaboyer*)
3. **Should it be excluded on the basis of an exclusionary rule?**
   1. These will be applied more leniently to allow the admission of important defence evidence (*Williams*); *Charter* may also require technically inadmissible evidence to be rec’d (*Felderhof*)
   2. **Incriminating statement to person in authority**
      1. **Charter violation 🡪 improperly obtained evidence (s. 24(2)**
   3. **Expert evidence**
   4. **Hearsay**
4. Should it be excluded based on the residual discretion of the judge to exclude evidence where prejudicial effect outweigh the probative value?
   1. **Don’t go through this step if expert evidence or s. 24(2)**
   2. Prejudicial effect: is there a possibility of distorting the trial process?
      1. Moral prejudice: the accused is a bad person and should be punished (*Potvin*)
      2. Reasoning prejudice: the evidence is given more weight than it deserves (*Valley—*accused; *Osolin* – another party or Crown)
   3. Probative value
      1. The strength of the inferences which may be drawn from the evidence
         1. Primarily material is higher
         2. Direct relevance is higher
      2. The reliability of the evidence
      3. The credibility of the proposed evidence
   4. Can prejudice be removed by judicial directions?
   5. What’s the effect on cost and efficiency?
   6. For DC evidence (crim’l): the evidence may be excluded only if the probative value is *substantially* outweighed by the prejudicial effect (*Seaboyer*)
      1. *Cf* non-crim’l where it’s just “outweighs”
      2. This is due to the constitutional status of full answer and defence (s. 7)
   7. A reviewing court will be very deferential on this residual discretion to exclude (*Terry*)
   8. The courts should exercise restraint in applying this exclusionary discretion due to:
      1. Need for full answer and defence
      2. Principle of access to evidence
      3. Respect for the jury’s role
      4. Importance of judging evidence in context
   9. The court can exclude evidence in its entirety or:
      1. Edit out prejudicial info
      2. Permit it to be lead but warn jurors of potential prejudicial effect and instruct where the problem may lie

Much of what we discuss is admissibility by the judge; however, keep in mind that the ToF ultimately weighs the evidence, not the judge who decides admissibility. They weigh believability (credibility, reliability of evidence) and informativeness (to what extent does info inform them).

## Materiality

Is the evidence material to a question in the trial? A question of law, reviewed on the stnd of correctness.

### Primary materiality

* Is the evidence directed to **a matter in issue in the proceedings**? One of the primary questions which arise in issue? (e.g. identity, causation, actus reus).
* Primarily material issues are those which must be proven during the course of the trial. They are usually defined in the pleadings/charge sheet.

### Secondary materiality

This is evidence which assists the ToF in deciding on the primary issue (e.g. credibility/honesty or reliability/accuracy of a witness).

## Relevance

Does the evidence make a fact *more or less likely*? This goes to logical relevance. A question of law, reviewed on the stnd of correctness.

### Direct relevance

**If** the evidence is **believed**, it **resolves a material issue.**

### Circumstantial relevance

* Evidence that proves **circumstances** but which will **require an inference to go to a material issue**.
* At this stage, the threshold for relevance is not too high because it’s not always immediately apparent how it will fit with other evidence. However, if a desired inference is too speculative or equivocal, the evidence will be irrelevant.

## Types of offences that might come up

\*identity and motive are always relevant\* Also ask: mens rea? Actus rea? Causation?

**Homicide**: causation, *actus reus*, intent, motive

**Aboriginal** **rights**: *Van der Peet*

1. Proof that the right/title existed at contact
2. With proof of reasonable continuity
3. The practice, custom or tradition must be integral to the distinctive culture

**Aboriginal** **title**: *Delgamuukw*

1. Land occupied prior to sovereignty
2. If present occupation is used to support the claim, there must be continuity b/w past and present occupation
3. Occupation must be exclusive at sovereignty

Pre-trial Matters:

# Information Gathering

## Civil Discovery

1. **Value**: facilitating the truth-seeking function
2. **Trigger**: all parties of record in a civil action (w/in 35 days from the pleadings being filed)🡪 **automatic**
3. **Duty upon whom**: both parties🡪 **mutual**
4. **Substance of the duty**: (Rule 7-1)
   1. Discover all relevant documents in possession
      1. This can result in a lot of doc.s. which is $$
   2. If there are new documents or amendments, must provide discovery on a rolling basis
   3. Need to prepare a list of documents
5. **Consequence** of not discovering all documents:
   1. Other party may request a document (with reasonable specificity) and require that non-discovery be addressed
   2. The document *cannot be relied upon* in proceedings Rule 7-1(21)

### BCSC Rule 7-1

*List of documents*

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

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

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

*…*

*Claim for privilege*

(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.

*Nature of privileged documents to be described*

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

*…*

*Amending the list of documents*

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

(a) it comes to the attention of the party serving it that the list is inaccurate or incomplete, or

...

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

*Party may demand documents required under this rule*

(10) If a party who has received a list of documents believes that the list omits documents or a class of documents that should have been disclosed under subrule (1) (a) or (9), the party may, by written demand, require the party who prepared the list to

(a) amend the list of documents,

(b) serve on the demanding party the amended list of documents, and

(c) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

*Party may demand additional documents*

(11) If a party who has received a list of documents believes that the list should include documents or classes of documents that

(a) are within the listing party's possession, power or control,

(b) relate to any or all matters in question in the action, and

(c) are additional to the documents or classes of documents required under subrule (1) (a) or (9),

the party, by written demand that identifies the additional documents or classes of documents with reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed, may require the listing party to

(d) amend the list of documents,

(e) serve on the demanding party the amended list of documents, and

(f) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

*Response to demand for documents*

(12) A party who receives a demand under subrule (10) or (11) must, within 35 days after receipt, do one of the following:

(a) comply with the demand in relation to the demanded documents;

(b) comply with the demand in relation to those of the demanded documents that the party is prepared to list and indicate, in relation to the balance of the demanded documents,

(i) why an amended list of documents that includes those documents is not being prepared and served, and

(ii) why those documents are not being made available;

(c) indicate, in relation to the demanded documents,

(i) why an amended list of documents that includes those documents is not being prepared and served, and

(ii) why those documents are not being made available.

*Application for production of documents*

(13) If a party who receives a demand under subrule (10) or (11) does not, within 35 days after receipt, comply with the demand in relation to the demanded documents, the demanding party may apply for an order requiring the listing party to comply with the demand.

*Court may alter requirements*

(14) On an application under subrule (13) or otherwise, the court may

(a) order that a party be excused from compliance with subrule (1), (3), (6), (15) or (16) or with a demand under subrule (10) or (11), either generally or in respect of one or more documents or classes of documents, or

(b) order a party to

(i) amend the list of documents to list additional documents that are or have been in the party's possession, power or control relating to any or all matters in question in the action,

(ii) serve the amended list of documents on all parties of record, and

(iii) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

*Inspection of documents*

(15) A party who has served a list of documents on any other party must allow the other party to inspect and copy, during normal business hours and at the location specified in the list of documents, the listed documents except those documents that the listing party objects to producing.

*Copies of documents*

…

*Order to produce document*

(17) The court may order the production of a document for inspection and copying by any party or by the court at a time and place and in the manner it considers appropriate.

*Documents not in possession of party*

(18) If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:

(a) production, inspection and copying of the document;

(b) preparation of a certified copy that may be used instead of the original.

Order by consent

…

*Inspection of document by court*

(20) If, on an 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.

*Party may not use document*

(21) Unless the court otherwise orders, if a party fails to make discovery of or produce for inspection or copying 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.**

*Determination of issue before discovery*

(22) If the party from whom discovery, inspection or copying of a document is sought objects to that discovery, inspection or copying, the court may, if satisfied that for any reason it is desirable that an issue or question in dispute should be determined before deciding on the right to discovery, inspection or copying, order that the issue or question be determined first and reserve the question of discovery, inspection or copying.

## Criminal Disclosure

Criminal disclosure is **asymmetric** (*Stinchcombe*). The obligation rests on the Crown, who should not seek to obtain conviction. Only the defence has an **adversarial role**, therefore, no obligation to disclose (with 2 exceptions – expert evidence and alibi).

**By the Crown**:

* **Value**: Truth-seeking primarily (but also fairness to the accused, full answer and defence, reduce surprises)
* **Trigger**: At the request of the Accused (*Stinchcombe; Marshall*). However, it is **continuous** as new evidence comes in (*Stinchcombe*). Prior to A’s plea and prior to deciding how they will be tried (judge or jury).
* **Crown discretion**: Some w/ respect to timing (enough info to charge) and privilege (e.g. witness identity needs to be protected) - *Stinchcombe*
* **Content**: must be complete, including all “relevant materials” (broad), even that which the Crown will not rely upon (*Stinchcombe*). It includes dead ends. In some cases, the Crown may need to push the police for more information.
* **If D is dissatisfied**, they may request that a judge review disclosure to ensure it has been appropriate.

**By the Accused/Defence:**

* General rule: D has **right to remain silent**
* Exception:
  + Disclose **experts** to be relied upon and basic info about testimony (s. 657.3 of CC)
  + Disclose **alibi** evidence early enough that Crown can investigate (*MBP*)

### R v Stinchcombe – 1991 SCC

**C**: Theft, breach of trust, and fraud of a client,

**F**: S is the lawyer and trustee. DC’s position is that S was a business partner with his client whom he was charged with defrauding. S’s former secretary, W, gave evidence favourable to S at a preliminary hearing. Later but prior to trial, the RCMP took a tape-recorded statement from W during a private interview. During trial, the Crown took a further written statement from W. DC requested disclosure of both statements and was refused. The Crown also refused to call W at trial. DC made an application that the Crown disclose the content of both statements. The Crown provided no basis for resisting production other than saying that W was not creditworthy.

**P/H:** The trial judge dismissed S’s application on the ground that the Crown had no obligation to disclose the contents of the statements. S was convicted.

The AB CA dismissed his appeal from conviction without issuing reasons.  
**D**: Crown allowed the appeal and ordered a new trial with the 2 statements disclosed.

**I**: What is the nature of the disclosure duty of the Crown?

**A (cf civil):** Even in civil proceedings, the element of surprise has been done away with. Although it’s an adversarial process, full discovery is found to better serve justice.

**A** (roles of the parties): Fundamental dif b/w role of DC and Crown. The former may remain adversarial, the latter may not. The Crown’s role is to lay before the jury all credible and relevant evidence. It may firmly argue but must be fair, within its public duty, with no considerations of winning or losing. The fruits of the investigations of the Crown are public property.

**A** (policy): this will decrease delays because there will be no disclosure-hearings, earlier withdrawals of charges, earlier guilty pleas, fewer wrongful convictions, & **full answer and defence (s.7).**

**A (**DC rqst): DC must request disclosure to trigger the obligation. The Crown should advise self-rep’d litigants. If there is a failure, it should be brought to the Ct ASAP to remedy any prejudice and avoid a new trial.  
**\*\*R**: There is an asymmetrical duty to disclose imposed on the Crown and triggered by the request of the accused. Disclosure should be complete (including evidence Crown won’t rely upon) with only some discretion as to timing and privilege when an informer’s identity is at stake. This duty is not imposed on DC who should maintain their adversarial role.

## First Nations Claims

### Possible sources of evidence:

* Oral histories of the FN (based upon internal policy of who is permitted to speak the history)
* Cultural representations in physical form (*these seem to be given greater weight by Ct*)
* Current FN practices and use
* Anthropologists, archaeologists, and other academics (*problematic—are they being used to corroborate? Are they given more weight?*)
* Documents from contact
* Records and diaries of early settlers and missionaries

### R v Van der Peet – 1996 SCC (Test for AR)

**F**: V was a member of the Sto:lo; she was charged with illegally selling 10 salmon caught under an Indian food fishing licence, contrary to s 27(5) of the *BC Fishery Regulations*. V argued that the regulations infringed her AR to sell fish and were therefore invalid.

**I**: Does s. 35(1) AR recognize the Sto:lo’s right to sell fish?

**D**: No. The ARs of the Sto:lo include the right to fish for food and ceremonial purposes—not the right to sell fish. A conviction was entered.

**\*A (Aboriginal rights):**

1. Proof that the right/title existed at contact
2. With proof of reasonable continuity
3. The practice, custom or tradition must be integral to the distinctive culture

**R**: The rules of evidence must be tailored to consider the inherent evidentiary difficulties in adjudicating FN claims.

### Delgamuukw v BC – 1997 SCC (Test for AT)

**P/H**: Trial J found adaawk + kingox as admissible but gave them no independent weight because he said it was not literally true, and confounded belief with fact, including materials classified as mythology and romantic views of history.

**A (**issues w/ trial decision): The result of McEachern’s approach was to systemically undermine and undervalue the oral history of FN people, requiring precision and definitiveness which created a nearly impossible burden of proof.

**Test (Aboriginal title)**:

1. Land occupied prior to sovereignty
2. If present occupation is used to support the claim, there must be continuity b/w past and present occupation
3. Occupation must be exclusive at sovereignty

**I**: How can a society with a large oral history displace the evidentiary burdens placed upon it to meet the VDP test?

**\*R**: FN histories should not be dismissed simply because they contain elements which some might dismiss as mythology.

**\*R2**: The Constitution requires that the rules of evidence be adapted to accommodate FN evidence, placing it on equal footing; otherwise, the burden on FN claimants for land/rights claims would be impossible.

**R3**: To give FN evidence no independent weight perpetuates injustice and systemically undervalues their oral histories.

### Mitchell v MNR – 2001 SCC

**F**: Grand Chief Mitchell (M) was charged with violating the *Canada Customs Act.* M claimed that the Mohawks of Akwesasne had an aboriginal right to convey goods across an int’l boundary for the purposes of trade.

**I**: Is the right to convey goods across int’l boundaries for the purposes of trade an aboriginal right within the scope of s. 35(1)?

**A**: The (perceived) issue by the SCC was that the evidence went to trade, generally, not to north-south trade. The evidence only suggested east-west trade.

**\*R**: When weighing FN evidence, excessive weight should not be confused for the requirement of due weight. The evidence should not be strained more than it can usefully bear.

Critique: more rigorous treatment of FN evidence?

# Privilege

## General Principles

Privilege is asserted before trial, and if it’s successful, the information never gets into court and there is no relevance inquiry. The court can uphold the privilege, allow partial discovery, or whole discovery.

**Privilege is inimical to the search for truth** because it results in the exclusion of otherwise relevant and reliable evidence. There must be compelling reasons before a privilege is recognized—this is an **overriding social concern about relationships.** As such, the existence of privilege is more a matter of **policy**. Courts have been willing to give fairly broad scope to solicitor-client privilege because of the ethical obligations of lawyers (not misleading the court). The **purpose** is **utilitarian—serve the greater good**.

## Waiving Privilege

* Always ask: **who holds the privilege**? Only that person may claim or waive privilege if they understand the consequences of the waiver (*Perron*).
* What if a trial judge:
  + Erroneously overrides a witness’ claim to privilege?
    - The right belonged to the witness so neither party has a right to appeal
  + Erroneously allows a claim to privilege?
    - The party deprived of the evidence has grounds to appeal.
* Privilege may be waived i**mplicitly** or **explicitly**
* **Implicit waiver**:
  + Implied intention, e.g. if a party opens the door to their privilege for their own sake, the door may remain open
    - Consideration of the value of fairness + consistency
    - A party cannot use privilege as both a sword and a shield
  + Arguing that you acted on good faith pursuant to legal advice always waives privilege (*Shirose*)
* The traditional CL approach has been that when **privileged** information is **disclosed**, even **inadvertently**, the communication is admissible. This was b/c privilege extended to the source, not the information *per se*. It was the responsibility of those involved in the privileged relationship to protect it from communication.
* Modern approach: recognizes privilege as a substantive rule designed to protect confidentiality.
  + In civil cases: a case-by-case judgment
    - Counsel may be removed if they become aware of privileged info
  + In crim’l cases: full answer and defence (s. 7)
    - Privilege benefits the accused: accidental slips erode public confidence in the fairness of the crim’l justice system.
    - Privilege benefits someone other than the accused:
      * Privacy interests rarely suppresses information that is helpful to the accused

## Case-by-Case Privileges

There has been a **move away** from finding new class privileges. The courts prefer the **flexibility** of assessing privilege on a case-by-case basis. In *Gruenke* the court noted that it would be slow to recognize a new class privilege. The *National Post* Court came close to suggesting that any new class privilege must be recognized by Parliament.

***Prima facie* assumption**: no privilege, communications are admissible.

**Onus**: The party seeking exclusion

**Test**: Wigmore criteria

### Wigmore Test

At **each step**, consider the specific relationship and the general relationship.

1. An expectation of confidence (*M(A) v Ryan*)
   1. A theoretical possibility of disclosure is insufficient to vitiate this expectation (*Ryan*)
   2. Includes explicit promise of secrecy (*National Post*)
2. Confidentiality must be **essential** to the relationship
   1. *National Post*: this is somewhat undermined by the impossibility of complete certainty
   2. Confidentiality is the *raison d’etre* (*National Post*)
   3. Consider the relationship specifically and generally (*Ryan*)
3. The general relationship must be one that the community values and wishes to protect
   1. Does the community as a whole have a stake in the rel’nship?
4. Weighing: the injury from disclosure must be greater than the benefit of the correct disposal of the litigation
   1. This is the “heavy work” (*National Post*)
   2. Weigh specific and general relationship (*Ryan*)
   3. Benefits of correct disposal:
      1. A criminal case will weigh more heavily than a civil case
   4. Injuries from disclosure:
      1. The court may consider broader *Charter* values like ss. 8 (privacy) and 15
      2. You can consider the short-term harm to the parties and the long-term injury to the professional relationship (*Ryan*)
      3. The “exceedingly marginal” nature of the evidence may weight against disclosure (*Letourneau*)
   5. *National Post* criteria:
      1. the nature and seriousness of the offence under investigation
      2. the centrality to the dispute of the evidence sought
      3. the potential probative value of the info
      4. the type of info sought (e.g. physical evidence)
      5. purpose of the investigation (e.g. terrorize/silence a journalist)
      6. whether the info sought is available from another source
      7. the degree of public importance of the story and whether the story is already in the public domain

### M(A) v Ryan – 1997 SCC

**F**: 17yo P was sexually assaulted by her 1st psychiatrist (Defendant, Ryan) when she was 17yo and under his care. He was criminally convicted of indecent assault. P brought a subsequent civil action for damages based on psychological and emotional trauma. After the assault, P began to see a 2nd psychiatrist (Psych2) and expressed a keen interest in keeping their communications confidential. The defendant sought production of Psych2’s records. The claim of psychiatrist-patient privilege was raised.

**P/H**: The Master found that b/c P and Psych2 recognized that notwithstanding their desire of confidentiality, records may someday be order, they failed the 1st stage of the Wigmore test. Production was ordered.

**A**: During the balancing stage, the majority (MacLachlin) considered Charter values of privacy (s. 8) and equality (s. 15) when considering the injuries of disclosure. With respect to the benefit in the proper disposal of the litigation, it was noted that the discovery interest of the defendant in a civil trial is much less than the interest in disclosure during a criminal action. For the vast majority of criminal cases, the correct disposal of charges dominates the balancing act.

**D**: The privilege was not found, partial disclosure was ordered. Ryan was not permitted to see the records. Psych2’s notes and records were disclosed but not her notes to herself. Copies were not to be made and disclosure to other people was not permitted.

**Analysis (Wigmore)**:

1. Expectation of confidence – a theoretical possibility of forced disclosure will not vitiate the expectation.
2. Confidentiality is necessary to the rel’nship.
3. The community values the psychiatrist-patient rel’nship b/c the mental health of the citizenry should be protected and fostered
4. Weighing:
   1. For disclosure (resolution of case on its merits):
   2. Against disclosure (injury to the rel’nship):
      1. The general rel’nship of patient-psych was considered
      2. Also Charter values including: privacy (for its own sake) and equality (victimization of sexual assault complainants)

**R**: The interest in the correct disposal of litigation/charges is greater in a criminal case than a civil one.

**R2**: The mere possibility that communications may someday be divulged does not negate the 1st Wigmore criterion. Absolute and indefinite protection need not be given when the confidences are made.

**R3**: There is no class privilege for psychiatrists and their patients.

**R4**: The court may grant full or partial privilege—in this case, only partial discovery was ordered.

### R v National Post

**F**: A source, X, had given a journalist (M) information. The first bit of info given (that Chretien had called a government agency DM who granted loans to vouch for a business in his riding) was true. X later gave M bank records which purportedly showed that Chretien had a direct-financial link in the granting of that loan. First, the bank said that it was forged and then that it was confidential and could not be published. The National Post sat on it and eventually reported it after other news agencies started reporting. The bank complained to the RCMP that there was a forgery. Forgery is not a crime until it is put into circulation (you need to *utter* the forgery). Therefore, the actus reus is in the placing a forgery in circulation. Retroactively, M changed the terms of the confidentiality agreement.

**A** (physical evidence): This was not a normal journalist-source case; here the info from the source was actually physical evidence that went to the *actus reus* of a crime.

**A**: At the weighing stage (4th criterion—the heavy work), cts considered:

1. the nature and seriousness of the offence under investigation
2. the centrality to the dispute of the evidence sought
3. the potential probative value of the info
4. the type of info sought (e.g. physical evidence)
5. purpose of the investigation (e.g. terrorize/silence a journalist)
6. whether the info sought is available from another source
7. the degree of public importance of the story and whether the story is already in the public domain

**R**: There is no class privilege for journalist-source relationships.

**R2**: The onus throughout the Wigmore case-by-case analysis is on the party seeking to assert privilege.

## Class Privileges

**Trigger**: Once the relationship is established, *prima facie* presumption that the communications are privileged and inadmissible.

**Onus**: The onus is on the party urging admission to show that the communication should not be privileged.

**Three notable privileges:**

1. Spousal communications
2. Solicitor-client communications
3. Settlement discussions

### Canada Evidence Act, s. 4(3) – Spousal Privilege

No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

Note: Also applies to same-sex marriages; terminates upon divorce

# Solicitor-Client Privilege

**This is the highest privilege** + warrants the most protection (*Brown*).

Wigmore outlined the scope as:

1. Where legal advice of any kind is sought
   1. (*more than casual conversation and must be legal, not purely business matters)*
2. from a professional legal adviser in his/her capacity as such
   1. *(incl. clerks and secretaries)*
3. the communication relating to that purpose
   1. *(communications include any fact or information so long as it arose out of the S-C rel’nship and is connected to that rel’nship—presumed to be privileged)* 
      1. May be issues with in-house counsel giving business advice (*Shirose)*
   2. *Privilege cannot be used to shield the client from disclosing otherwise non-privileged materials nor does privilege apply to physical objects.*
4. made in confidence
   1. a 3rd-party who lacks a common interest cannot be present (*Pritchard*)
5. by the client
6. are at her instance permanently protected
   1. *(permanent in that they survive the relationship and even the life of the client – exceptions Wills Variations where contents are in dispute and disclosure serves the interests of the deceased client)*
   2. Unless it would in the privilege-holder’s interest to disclose after death with wills issues (*Jack*)
   3. Other exception: public safety, innocence-at-stake
7. from disclosure by herself or by the legal adviser
8. unless the protection be waived by the client

There are 3 important negations/exceptions:

1. Negation: communication to further crime
2. Exception:
   1. innocence-at-stake
   2. public safety

## Communications in Furtherance of Crime or Fraud (Negation)

Privilege does not protect

1. Communications which are themselves crim’l (e.g. conspiracy to commit fraud); and
2. Legal advice obtained to facilitate the commission of crime.
   1. Legal advice to avoid future wrongs is obviously permissible
3. This is assessed by looking at the client’s intent
4. It is not a black hole to obscure one’s misconduct; evidence of abuse of process should be disclosed (*Blank*)

## Innocence-At-Stake Exception

**No privilege is absolute**. Even S-C privilege may be overridden as a last resort, if it is **absolutely necessary**. The **test is absolute necessity**.

### McClure Test (from R v Brown)

Part 1: Threshold test – the accused must establish:

1. Info he/she seeks from the S-C communication is not avl. from any other source; and
2. he/she is **otherwise unable to raise a reasonable doubt**.

Part 2: Innocence at stake test:

1. Accused (who is seeking production of a S-C protected communicated) must demonstrate an **evidentiary basis** to conclude that a communication exists that *could* raise a reasonable doubt.
   1. mere speculation as to what a file might contain is insufficient (*R v Brown*)
2. If such an evidentiary basis exists, **trial judge** should **examine the communication** and determine whether it *is likely* to raise a reasonable doubt as to the guilt of the accused.
   1. Because it must raise a reasonable doubt, the evidence must go to one of the elements of the offence
   2. It cannot be evidence used to advance an ancillary attack on the Crown’s case or evidence that seeks to bolster or corroborate evidence

Timing of application

A McClure application **may be brought at any time** throughout the trial and it may also be brought **more than once**. The application should **only** be allowed when the trial judge thinks that the accused will be **unable to raise a reasonable doubt w/o the evidence** protected by privilege.

Policy

The need for DC to show (under Pt 1, item 2) that otherwise DC would be unable to raise a reasonable doubt is **prejudicial** to their position because they **denigrate their own case** and the application may be denied.

Also, if a judge gets it wrong and guesses “acquittal” but a jury convicts, the McClure application could presumably be reviewed anew at the court of appeal.

### R v Brown – 2002 SCC

**C:** murder

**F**: Benson had told his girlfriend (DR), with whom he had a stormy relationship that he had committed the offence. DR told p.o. but the investigation was fruitless. Brown was later accused of the offence on the basis of circumstantial evidence and a jailhouse informant.

**P/H:** Brown brought a motion to compel production of 3rd-party S-C communications b/w Benson and his lawyer. The trial judge granted the application and ordered the production of some documents. Benson appealed to the SCC.

**D**: Appeal allowed

**A**: DR’s testimony was inadmissible for hearsay. S-C is a greater exclusionary rule than hearsay. Therefore, DR’s testimony should have been admitted first. Even though there were arguments about the credibility of DR’s evidence (she was drunk at the time), the court held that quality of evidence is not a factor.

**R (majority)**: Some rules of evidence may be app’d w/ something less than the usual degree of rigour in order to avoid a wrongful conviction. Trial judges should determine the admissibility of other potential sources of info. before overriding the S-C privilege.

**R (minority)**: If one of the most stringent exclusionary rules (S-C) is to yield to the concern of convicting the innocent, other rules, such as hearsay, should yield first.

**R**: Safeguards for protecting 3rd parties whose privileged communications are produced:

1. Judge should order production of only those communications which are necessary to allow the Accused to raise a reasonable doubt—other portions of the communications should not be disclosed
2. The communications should not be turned over to the Crown.
3. If the communications are used by the Accused, the 3rd-party privilege holders is protected under the *Charter* so that the communications may not be used in a subsequent case against the privilege-holder.

## Public Safety Exception to S-C Privilege

This **exception is also recognized** for **all other privileges** (given that S-C is the highest of all privileges).

When public safety is involved so that **death or serious bodily harm is imminent**, the S-C privilege should be set aside. There are 3 factors to determine whether public safety outweighs S-C privilege:

1. Clarity: is there a clear risk to an identifiable person or group of persons?
2. Seriousness: is there a risk of serious bodily harm or death?
3. Imminence: is the danger imminent?

### Smith v Jones – 1999 SCC

**C:** aggravated sexual assault (victim: prostitute)

**F**: DC referred his client (the accused) to a psychiatrist in preparation of a guilty plea. During the interview, the accused explained to the psychiatrist his plan to kidnap, rape, and murder other prostitutes. The psychiatrist informed DC that A was a dangerous individual who would likely reoffend. The psychiatrist was acting as an agent for DC so he went to court for a declaration that he be entitled to disclose the communications made to him by the accused (in contravention of S-C privilege which attached, re: agency).

**A (maj.)**: The clarity, seriousness, imminence test was applied. The psychiatrist was allowed to provide his opinion and the communications relevant to the imminent risk. Result: accused’s confession as to what he did and his intent were disclosed.

**A (dissent)**: Disclosure should have been limited to the psychiatrist’s opinions. Problematic that accused’s own words were used against him to his detriment. There is a difference b/w warning the authorities and using the accused’s words against him.

**D**: Accused was sentenced as a dangerous offender

**Obiter**: S-C privilege extends to agents of either the solicitor or client.

**R**: The test for the exception to privilege on account of public safety is clarity, seriousness, and imminence.

# Litigation Privilege

## Litigation Privilege v Solicitor-Client Privilege

|  |  |  |
| --- | --- | --- |
|  | **S-C privilege** | **Lit’n Privilege** |
| Rationale | Protect the relationship | Facilitate the adversarial process |
| Exists when: | A client seeks legal advice, regardless of litigation status | Only in the context of litigation |
| Time period: | Permanent, survives termination of the relationship or death of client | Temporary, ending with litigation |
| Made in confidence? | Yes, it must be made in confidence, that’s the purpose (protect client confidences) | No—the communications need not be made in confidence |
| Status | The highest privilege, override unlikely | Far more likely to be truncated |

### Blank v Canada – 2006 SCC

**F**: The applicant was charged w/ various regulatory offences. The charges were quashed, renewed by indictment and ultimately stayed at the behest of the Crown. The applicant then commenced civil proceedings for, *inter alia*, perjury and abuse of statutory authority. The applicant brought requests, motions and *Access to Information Act* applications for disclosure of Crown materials relating to the conduct of the criminal proceedings. The requests were denied on the ground of solicitor-client privilege, and the Information Commissioner upheld the Crown's right to withhold the doc.s from release pursuant to the privilege exception.

**COA:** The applicant sought judicial review of the decision of the Information Commissioner.

**P/H**: On JR, LP and “advice privilege” were distinguished. The judge held that "litigation privilege" expires when the lit’n for which the doc.s were created was at an end. The judge ordered that the applicant was entitled to release of the doc.s related to criminal proceedings once those proceedings had been stayed. The Crown unsuccessfully appealed to the CA. The Crown appealed to the SCC

**D**: Appeal dismissed. Crown had to disclose

**I**: What is the temporal nature of lit’n privilege? Does it survive the termination of lit’n?

**A (overlap)**: LP does not give automatic access to gov’t briefs b/c the privilege remains so long as same/related parties or same/related source in subsequent lit’n. Also, not uncontrolled because there is overlap w/ SCP, so that when lit’n ends, the info may still be privileged where that overlap occurs.

**A (policy)**: Solicitor-client privilege and litigation-privilege are *not* braches off the same tree. They are animated by dif policy considerations. SC goes to a rel’nship—society entrusts lawyers to advance clients’ interests and to discharge their duties, lawyers need to be able to give confidence to their clients. The confidential rel’nship is necessary and essential for the effective administration of justice. LP is animated by the need to promote efficacy of the adversarial process, therefore, it extends to unrepresented litigants and their communications w/ third parties (“zone of privacy”)

**R1 (LP)**: Litigation privilege is refers to a class of activity (and not a general relationship) taken in preparation for litigation. It provides a temporary zone of privacy for those preparatory matters. The zone of privacy does not extend before or after the activity—only during preparation for litigation. The privilege extends to those who are self-represented. It goes to an important principle of fairness—some privacy while preparing one’s case.

**R2 (SCP)**: S-C privilege is explained by the possession of confidential information. It extends indefinitely unless the client has waived the privilege.

**R3**: After proceedings and appeals come to an end, the litigation privilege terminates. This is the case unless there is subsequently anticipated lit’n which involves the same or related issues or the same/related parties. If a similar/same party is involved in subsequent lit’n but the lit’n is of a different jurisdicial source, LP does not extend. Lit’n does not extend to lit’n strategies after lit’n has terminated.

**R4**: Even though LP may exist, materials sought may still be disclosed if the party seeking disclosure can *prima facie* show actionable misconduct of the other party in relation to the proceedings with respect to which LP is claimed.

**R5**: The test for LP is the dominant purpose test: were the documents created for the dominant purpose of litigation?

## Litigation Privilege

The **purpose** of the privilege has nothing to do with confidences. It has to do with the zone of privacy for the work product in anticipation of litigation. It is aimed at:

1. Communications (e.g. documents)
   1. *Do not need to be confidential*
2. Between a lawyer (*or agent of client)* and a 3rd party are privileged if
3. At the time of making the communication the litigation was commenced or anticipated
   1. Does not apply to the preparation for an inquest (*HBC v Cummings*)
4. And the dominant purpose of the communication was for use in (or advice on) litigation (*Waugh v British Railways; Blank*)

**Trend**: greater disclosure.

**Scope**: Restricted to the zone of litigation in preparation of litigation. There is no privilege to witnesses, although perhaps to signed statements by witnesses. Does not include inquests which are non-adversarial, fact-finding proceedings. Terminates after the matter is settled (including appeals). W/ mass torts, all claims must have settled (if common process/documents—does not apply if particular document for particular claimant).

**Agents + third parties:** Always ask: what is the true nature of the function of the third-party retained? Is it essential to the operation of the solicitor-client relationship?

### Smith v Jones

**F**: Third-party psychiatrist was hired by the solicitor to interview the client and determine his mental condition.

**R**: In assessing whether a third-party is an agent for the solicitor, and therefore caught under the S-C privilege, or a third-party within the meaning of litigation privilege, one must apply the functional approach: what is the true nature of the function of the third party? Is it essential to the existence and operation of the S-C relationship? If yes, S-C.

## Copied documents

### Regional Municipality of Ottawa-Carleton v Consumers’ Gas – Ont Div Ct (cited in Blank)

**R**: Should copies be privileged? It will depend on the manner in which they are made. If:

* Copies are mere collections, which, if they were not copied, would need to be disclosed, they will not attract the litigation privilege
* Copies flow from the research, skill, and knowledge, revealing the lawyer’s case theory, that enters into the zone of privacy protected by the litigation privilege.

## The Implied Undertaking Rule

The **common law** **implied undertaking** (UI) rule applies to documents disclosed in the course of **civil** discovery. It does not apply to crim’l proceedings (*Wagg*).The receiving party has a UI made to the court that they will not use the documents for anything other than the present action. If **breached**, the party will be in contempt of court. However, once revealed in open court, the document may be used in a later action (s. 2(b) value).

A party seeking to use the doc. for another purpose must first make a motion to the Ct and seek leave to do so. The applicant must demonstrate on a balance:

1. existence of a public interest
2. of greater weight than the values the implied undertaking rule is designed to protect

Policy: This is so because

1. Privacy Rationale: discovery process amounts to state-sanctioned invasion of privacy—Cts want to limit the use of that info in future lit’n, and
2. Efficiency of Civil Lit’n Rationale: encourage more complete and candid discovery if there is no fear that the materials will be used in collateral matters.

### Juman v Doucette – 2008 SCC

Guide to balancing competing interests:

1. the IU rule is not absolute *but* should not be too readily set aside
2. competing values must be identified
3. prejudice to parties should be considered
   1. If 2nd action has same/similar parties and same/similar issues🡪 prejudice is virtually non-existence, leave is generally granted
   2. If 2nd action is wholly unrelated, Cts will be far more resistant
4. IU should not shield contradictory testimony (witnesses should not be allowed to play games)

### P(D) v Wagg – 2004 Ontario CA

**F**: Accused was acquitted at trial for sexual assault. Accused wanted to bring an action in defamation against the complainant and use the statements she gave to investigators.

**I**: Is there an IU when information is disclosed to DC during criminal matters?

**A**: Observations (not findings)—perhaps good reason for thinking IU applies in crim’l matters

1. The IU rule under CL (or statute) does not apply to crim’l disclosure
2. The guiding principle is that a party gives access to info for a *particular purpose*, which implies that it is not to be used for another purpose
3. There are policy reasons for recognizing IU rule for DC, notably the highly personal nature of info about 3rd parties that is made avl. to the defence
4. Disclosing bodies (i.e. Crown, police) must first be given notice in case they wish to resist production
5. If one party possesses the Crown materials, fairness dictates that they be produced for the other side
6. Any info. used in Ct should generally be produced, subject to special concerns (e.g. confidential medical records)

Admissible? (Exclusionary Rules)

# Expert Witnesses

Expert evidence straddles the pre-trial/trial time period: there are notice requirements before trial.

## General Features

**Values**: Reliability is the central concern w/ expert evidence (*Trochym; Abbey*). It’s also concerned with efficiency of the trial process, and the need to strike a **balance b/w truth-seeking** and **reliability**.

**Onus**: on the party seeking admission (on a balance). Theoretically, it is presumptively inadmissible. However, in reality, admissibility is somewhat precedential, with certain types of evidence being routinely admitted. In those cases, the party wishing the challenge admissibility usually needs to show a reason why they want to challenge (*Trochym*).

**Precedential value**: theoretically none; this is a case-by-case analysis.

**Voir dire**: whenever admissibility is objected to, that must be on a *voir dire*. In other cases, a voire dire is not necessary (*Mohan*)

**Partial or full admission**: the judge has that discretion.

**Context**: civil, administrative, or criminal; judge or jury. However, test may be more rigorous in the context of a criminal law case *cf* an admin law case (*Nassiah*). Defence evidence may be given a more generous application of the test (*R v Bell*).

**\*Risks** (*Mohan*): (i) ToF will simply adopt the expert opinion absent adequate scrutiny due to the impressive credentials, (ii) ToF won’t understand the evidence, and (iii) time and resources

## The Mohan Test

1. The expert evidence must be **logically relevant** to a material issues in the sense that PV>PE
   1. Is it logically relevant—tends to prove or disprove a material issue?
   2. PV>PE?
      1. benefits include probative value (legal relevance is most important)
         1. extent to which expert methods can do what they purport to do;
         2. capacity of an individual expert witness to apply those methods; and
         3. whether an appropriately qualified expert witness properly app’d appropriate methods in the particular case.
      2. costs are:
         1. prejudicial effect
         2. inordinate amount of time
         3. misleading to the trier of fact in the sense that its effect is out of proportion with its reliability
         4. Includes consideration of the impact that expert qualifications and scientific language may have on the trier of fact—viewed as virtually infallible and given more weight than it deserves
2. The expert evidence must be **necessary** in assisting the trier of fact
   1. Necessity should not be judged too strictly—but more than merely helpful
      1. EE is necessary to provide technical info
      2. EE is necessary because the ToF is unlikely to come to the correct conclusion
      3. EE is necessary b/c it relates to something not well understood by an ordinary person (*R v Lavallee*)
   2. For most EE, the test is necessity (as above), but for novel science, it’s the *Daubert* factors:
      1. Has the method been tested?
      2. Has it been subjected to peer review?
      3. What are the error rates of the method?
      4. What is the degree of acceptance enjoyed by the method within its field?
3. Absence of an exclusionary rule
   1. Exception: hearsay may come in through expert opinion
4. The expert must be properly qualified
   1. knowledge or experience beyond that of the trier of fact

### R v Mohan – 1994 SCC

**F**: The accused was a pediatrician charged with 4 counts of sexual assault on four of his female patients. DC sought to call a psychiatrist who would testify that the perpetrator of the offences alleged to have been committed would be one of a limited and unusual group of individuals, and that the accused did not fall within that narrow class because he did not possess the characteristics belonging to that group. The trial judge held a *voir dire* and ruled that the evidence tendered on the *voir dire* would not be admitted. He held that there was insufficient scientific data, no literature, and if admitted, would be merely character evidence of a type that is inadmissible and not within the proper sphere of expert evidence.

**P/H:** The jury found the accused guilty as charged. The Court of Appeal allowed the accused's appeal, quashed the convictions and ordered a new trial, upon a finding that the rejected evidence was admissible on two bases. On the first basis, given that similar fact evidence was admitted showing that the acts compared were so unusual and strikingly similar that their similarities could not be attributed to coincidence, the testimony was admissible to show that the offences alleged were unlikely to have been committed by the same person. On the second basis, it was admissible to show that the accused was not a member of either of the unusual groups of aberrant personalities that could have committed the offences alleged. The Crown appealed.

**D**: Appeal allowed

**A** (test): admission of expert evidence depends on (a) relevance, (b) necessity in assisting the trier of fact, (c) absence of any exclusionary rule, and (d) a properly qualified expert.

1. Relevance is the threshold requirement;
   1. *Prima facie* admissibility: Is it so related to a fact in issue that it tends to establish it (logical relevance)?
   2. Cost-benefit analysis: is the evidence worth what it costs?
      1. benefits include probative value
      2. costs are:
         1. prejudicial effect
         2. inordinate amount of time
         3. misleading to the trier of fact in the sense that its effect is out of proportion with its reliability
         4. Includes consideration of the impact that expert qualifications and scientific language may have on the trier of fact—viewed as virtually infallible and given more weight than it deserves
2. Necessity in assisting the trier of fact;
   1. more than helpful, but not too strict a standard
   2. provide information likely outside of the experience and knowledge of a judge or jury
   3. Might assist:
      1. on a subject matter that ordinary people are unlikely to form a correct judgment about
      2. assist trier of fact in understanding technical nature of the matters
   4. Also involves a consideration in light of the potential to distort the fact-finding process
      1. consider whether it will overwhelm the jury (but you can possibly avoid that with good instructions to the jury)
      2. do not allow so many experts so that it is a contest of experts and the trier of fact merely the referee
3. Absence of an exclusionary rule
4. A properly qualified expert: witness must be shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify

**A**(novel science): subjected to special scrutiny for the basic threshold of reliability and it must be *essential* in the sense that the trier of fact would be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on the ultimate issue, the stricter the application of the principle.

## The Abbey revision of *Mohan* (Doherty, JA – 2009 ONCA)\*\*\*

**Values:** Balance **truth-seeking** with **reliability** (also trial efficiency…)

**Stage 1: Preliminary steps**

1. **The burden** (on a balance) lies with the party offering the EE.
   1. Even w/ the Crown—it’s a balance, not BARD
   2. It is *prima facie* inadmissible
2. **Delineate the scope of the opinion** that will be presented.
   1. Which issue does it address?
   2. Which terminology will be used?
      1. Which may not be used
   3. How is it that this person comes before the court with this expertise?
      1. Their background/qualifications and where does this fit w/ the case
   4. Why? Just Goudge report recommended this step, stemming from inquiry into forensic paediatric pathology in ON. Off the bat, you’ll get a sense of what the expert is actually qualified to do and know when they step outside of that qualified area (w/ Charles Smith—Smith had no training in psychology but frequently testified using pop-psychology about homicidal parents—many wrongful convictions)

**Stage** **2**: **4 preconditions** (*this has been changed from Mohan b/c it’s simply easier to deal with these first, the hard work is in the final stage*)

1. Is the opinion logically relevant to a material issue?
   1. Identify relevance and materiality—this is Cunliffe’s suggestion because it’s better to get these squared in your mind before continuing (P&S put it last)
   2. You want to ensure logical relevance—that it makes a matter in issue more or less likely
2. Does the opinion relate to a subject that is properly the subject of expert opinion?
   1. Since *Mohan*, we’ve now bifurcated the **necessity** analysis.
      1. *Abbey* advised to only ask: is this a matter which could be effectively covered by the trial judge’s warning to jurors (*R v DD)*?
         1. But do not consider if there’s already an expert on the topic (P&S)
      2. According to Paciocco & Stuesser, here you should also consider whether it’s one of the following (but you can move this to PV, according to Cunliffe—fits better there):
         1. Ordinary people are unlikely to form a correct judgement w/o assistance (e.g. causation)
         2. Ordinary people do not have the knowledge or experience to understand (R v Lavalle)
         3. Technical nature of the info requires explanation (e.g. DNA analysis)
3. Is the witness qualified to give the particular opinion?
   1. Qualifications is a modest standard—it’s simply experience or knowledge beyond the ToF (*Mohan*)
   2. Must be sufficiently independent to offer expert advice (*Deemar*); cannot assume an advocacy role—that may result in disqualification (or less weight)
      1. See Rule 11-2(1) of BC Supreme Court Civil Rules
4. Is the opinion in contravention of another exclusionary rule?

**Stage 3**: Gate-keeping stage - **Analyze the substance of the opinion in context**. This is where you ask**: is the evidence worth what it costs** (*Mohan*)? However, it’s drawn out in *Abbey* into 3 steps.

1. Benefits: the sum of the probative potential of the evidence *and* the significance of the issue to which the evidence is directed
   1. “Influence” in P&S – (i) how cogent the evidence is at proving the thing it is offered to prove; (ii) how live the issue, and (iii) the extent to which it is based on proven facts (*cf* factual assumptions)
      1. With secondary materiality and circumstantial relevance—this decreases
      2. General psychology will have less value than specific psychology (e.g. people tend to… *cf* the witness did…)
         1. This is because it requires an inference that the particular individual is like the general group🡪 less direct
      3. Evidence going to reliability of a witness (secondary materiality) is not as significant an issue as evidence going to *actus reus* (primary materiality)
   2. **Reliability** is the central concern with expert testimony (*Trochym; Abbey*). It should be assessed any time reliability is fairly raised (*Troychm*). If there is a well-established history of admissibility, the judge may assume it’s reliable (*Trochym).* Consider the following 3:
      1. Can the expert method do what it purports to do?
         1. E.g. the fetal hemoglobin test in *Chamberlain* (dingo-baby) could detect fetal hemoglobin but it was not specific—it also picked up chocolate milkshake and could not differentiate!
      2. Does the particular expert witness have the capacity to apply *that* method?
         1. Courts don’t always do this (e.g.) *Aikin*) but they should do it to be more robust.
         2. E.g. Charles Smith was a pediatric pathologist, not a forensic pathologist. As a result, he wasn’t good at doing certain forensic things that required a specialist who knew not to contaminate, etc.
      3. Has the qualified expert properly applied the method in this particular case?
         1. E.g. *Jama* – young black man was convicted of raping a woman who had passed out in a toilet stall. The DNA pointed to the accused and he went to prison despite all of the other evidence suggesting he was innocent. Later, contamination of the rape kit was discovered.
      4. Against what should you measure the expert’s application, etc.?
         1. Novel hard science. Mohan, “it must be essential”—so the necessity and reliability enquiries are even stricter. Use Daubert factors:
            1. Measurable error rates;
            2. Peer review of results;
            3. The use of random sampling; and
            4. The ability of the tester to replicate his or her results
         2. If the hard science is subject to the scientific method of testing and has not been, that might reduce reliability
         3. Social science (not *Daubert*): use the standards of the field – *Abbey* provided the following:
            1. To what extent is the field in which the opinion a recognized discipline?
            2. To what extent is the work within that field subject to quality assurance and independent review? (e.g. peer review)
            3. What are the particular expert’s qualifications within that discipline?
            4. To the extent the opinion rests on accumulated data, was that data accurately stored and recorded?
            5. To what extent are the reasoning processes underlying the opinion explained by the witness so that the jury can critically examine?
            6. To what extent has the expert arrived at her opinion using methods accepted by those working in the field?
            7. To what extent do the accepted methods promote reliability of the info relied upon by the expert?
            8. Has the witness honoured the boundaries of her discipline when advancing the opinion?
            9. To what extent does the opinion rely on data gathered independently from the lit’n process?
   3. **Necessity** revisited (bifurcated in *Abbey*)—does it help the ToF:
      1. Ordinary people are unlikely to form a correct judgement w/o assistance (e.g. causation)
      2. Ordinary people do not have the knowledge or experience to understand (R v Lavalle)
      3. Technical nature of the info requires explanation (e.g. DNA analysis)
         1. This is characterized as a sliding scale/judgement call by P&S, re *Abbey*
   4. P&S: also consider believability, which includes consideration of impartiality (as well as application of method and credentials—above)
2. Costs (*Mohan*)
   1. inordinate amount of time
      1. if you allow 1 expert, you’ll probably need an expert from the other side
   2. prejudicial effect
      1. moral prejudice: the accused is a bad person so we’ll punish her
      2. reasoning prejudice: give too much weight to the evidence
         1. e.g. *Jama* – DNA evidence above everything else
   3. Includes consideration of the impact that expert qualifications and scientific language may have on the trier of fact—viewed as virtually infallible and given more weight than it deserves, consider:
      1. The impressive credentials
      2. The complex materials underlying the opinion
      3. Jargon
3. Cost-Benefit Analysis: weigh benefits with costs—is it worth what it costs?

Outcome: note, whole or partial admissibility (or complete inadmissibility) is possible.

## Novel and Challenged Science

**Novel science**: **no established practice** among courts of admitting evidence **of that kind** *or* that kind of evidence for that **new purpose**. To be admissible, novel science must:

* Be essential—the ToF couldn’t make a satisfactory conclusion w/o it; it is subject to **special scrutiny** (*Mohan*)

**Challenged science**: established practice may be challenged if:

* the theory or technique was not previously closely scrutinized
* changes in the base knowledge (underlying assumptions)

Canadian courts have not heeded the warning from the National Academy of Science about the reliability of forensic science. Most evidence goes in without a reliability analysis. It’s done on somewhat of a precedential basis. If the opposing party wishes to object to the reliability of expert evidence that is regularly accepted by the court, they usually need to give a reason why they want to challenge it (*Trochym*).

**Summary**: Special scrutiny where the expert evidence is predicated upon:

1. a theory that is novel in the sense that Cts have not developed an **established practice** of admitting it
2. established practice is being **put to a novel use**
3. realistic basis for challenging the underlying theory

## Statutory Provisions

### Canada Evidence Act, s. 7 (limit on # of expert witnesses)

s. 7: Any party in any proceeding that wants to **examine more than 5 opinion witnesses** **must get leave of the court** or person presiding in order to do so. Otherwise, they may examine no more than 5.

### Canada Evidence Act, s. 8 (handwriting comparison)

s. 8: Witnesses are permitted to compare a dispute writing to one which the court is satisfied is genuine. The witness’ evidence may be submitted as proof of the genuineness of the disputed writing sample.

### BC Evidence Act ss. 10-12 (for admin’ve hearings, not SC or CA)

**s. 10** (1)… “proceeding" includes a quasi-judicial or administrative hearing but does not include a proceeding in the Court of Appeal, the Supreme Court or the Provincial Court.

(2) This section and section 11 **do not apply to proceedings of a tribunal**, commission, board or other similar body that enacts or **makes its own rules** for the introduction of expert evidence and the testimony of experts, and if there is a conflict… those rules apply.

(3) A statement in writing setting out the opinion of an expert is admissible in evidence in a proceeding without proof of the expert's signature if, at least 30 days before the statement is given in evidence, a copy of the written statement is furnished to every party to the proceeding that is adverse in interest…

(4) The **assertion of qualifications as an expert in a written statement is proof** of the qualifications.

(5) If the written statement of an expert is given in evidence… any party… **may require** the **expert** to be **called as a witness.**

(6) If an **expert has been required to give evidence under subsection (5)** and the person presiding at the hearing is of the opinion that the evidence obtained **does not materially add** to the information in the statement furnished under subsection (3), the person presiding may order the **party that required the attendance** of the expert to **pay, as costs, a sum the person presiding considers appropriate**.

s**. 11** (1) A person **must not give**, within the scope of that person's expertise, **evidence** of his or her opinion **in a proceeding** unless a **written statement of that opinion** and the **facts** **on which** that opinion is **formed** has been **furnished**, at least 30 days before the expert testifies, to every party that is adverse in interest…

(2) Despite subsection (1), the person presiding in a proceeding may, on his or her own initiative or on the application of a party, do one of the following:

(a) if the statement has not been furnished, order that the expert may testify;

(b) if the statement was furnished less than 30 days before the expert is to testify, order that the expert may testify;

(c) order that the expert must be allowed to testify if the statement is furnished within a time less than 30 days before the expert is to testify, and specify the time;

(d) if it appears that a party will tender the evidence of an expert in the proceeding, order that a statement be furnished at a time earlier than 30 days before the expert is to testify and specify the time by which the statement must be furnished.

(3) For the purpose of proving that a copy of a written statement was furnished to a party to a proceeding, the person presiding at the hearing may accept an affidavit made by the person who furnished the statement.

**s. 12** Section 11 does not apply in proceedings to enforce a law in which punishment by fine, penalty or imprisonment may be imposed.

### Criminal Code, s. 657.3 Expert Testimony

(1) In any proceedings, the evidence of a person as an expert may be given by means of a **report** accompanied by the **affidavit** or **solemn declaration** of the person, setting out, in particular, the **qualifications of the person** as an expert if

(a) the **court recognizes that person as an expert; and**

(b) the party intending to produce the report in evidence has, before the proceeding, given to the other party a copy of the affidavit or solemn declaration and the report and **reasonable notice of the intention to produce** it in evidence.

(2) Notwithstanding subsection (1), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of any of the statements contained in the affidavit or solemn declaration or report.

(3) For the purpose of promoting the fair, orderly and efficient presentation of the testimony of witnesses,

(a) 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 or judge, **give notice** to the other party or parties of his or her intention to do so, accompanied by

(i) the **name** of the proposed witness,

(ii) 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

(iii) a statement of the **qualifications** of the proposed witness as an expert;

(b) in addition to complying with paragraph (a), 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

(i) a **copy of the report**, if any, prepared by the proposed witness for the case, and

(ii) 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

(c) 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 any other party,

(a) 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;

(b) 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

(c) order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness’s testimony, unless the court considers it inappropriate to do so.

(5) If, in the opinion of the court, a party who has received the notice and material referred to in subsection (3) has not been able to prepare for the evidence of the proposed witness, the court may do one or more of the following:

(a) adjourn the proceedings;

(b) order that further particulars be given of the evidence of the proposed witness; and

(c) order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness’s testimony.

(6) If the proposed witness does not testify, the prosecutor may not produce material provided to him or her under paragraph (3)(c) in evidence without the consent of the accused.

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

## BC Supreme (Civil) Court Rules – Part 11 Evidence of Experts

### Rule 11-2 Duty of Expert Witnesses

**Duty of expert witness**

(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.

**Advice and certification**

(2)  If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she

(a) is aware of the duty referred to in subrule (1),

(b) has made the report in conformity with that duty, and

(c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

### Rule 11-3 Appointment of Joint Experts

**Appointment agreement**

(1)  If 2 or more parties who are adverse in interest wish to or are ordered under Rule 5-3 (1) (k) to jointly appoint an expert, the following must be settled before the expert is appointed:

(a) the identity of the expert;

(b) the issue in the action the expert opinion evidence may help to resolve;

(c) any facts or assumptions of fact agreed to by the parties;

(d) for each party, any assumptions of fact not included under paragraph (c) of this subrule that the party wishes the expert to consider;

(e) the questions to be considered by the expert;

(f) when the report must be prepared by the expert and given to the parties;

(g) responsibility for fees and expenses payable to the expert.

…

**Role of expert appointed under this rule**

(7)  Unless the court otherwise orders on an application referred to in subrule (8), if an agreement is made under this rule for a joint expert to give expert opinion evidence on an issue, the joint expert is the only expert who, in relation to the parties to the agreement, may give expert opinion evidence in the action on the issue.

…

### Rule 11-4 Appointment of Own Experts

**When each party may retain their own experts**

(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 11-5 Appointment of Court’s Own Expert

**Appointment of experts by court**

(1)  Subject to this rule, the court may, on its own initiative at any stage of an action, appoint an expert if it considers that expert opinion evidence may help the court in resolving an issue in the action.

### Rule 11-6 Expert Reports

**Requirements for report**

(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) and must set out the following:

(a) the expert's name, address and area of expertise;

(b) the expert's qualifications and employment and educational experience in his or her area of expertise;

(c) the instructions provided to the expert in relation to the proceeding;

(d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;

(e) the expert's opinion respecting those issues;

(f) the expert's reasons for his or her opinion, including

(i)  a description of the factual assumptions on which the opinion is based,

(ii)  a description of any research conducted by the expert that led him or her to form the opinion, and

(iii)  a list of every document, if any, relied on by the expert in forming the opinion.

**Proof of qualifications**

(2)  The assertion of qualifications of an expert is evidence of them.

**Service of report**

(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, with leave of the court under Rule 11-3 (9) or otherwise, to tender the expert's report at trial, or

(b) if 2 or more parties jointly appointed the expert, by each party who intends to tender the expert's report at trial.

**Service of responding report**

(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.

# Self-Incrimination - Intro

## \*\*Key principle is fairness to the accused\*\*

**Rules against self-incrimination**: rules relating to the principle against self-incrimination *within/during formal proceedings*.

**Right to silence**: rules relating to the principle of self-incrimination *outside of formal proceedings*

## Values underlying the principle

The idea that **self-incrimination is offensive** rests on:

* 1. ideas about **privacy** (where inner thoughts are *very* private),
  2. the **inherent dignity of individuals**,
  3. **preventing abuse of state power**, and
  4. avoiding **risk** of **unreliable** information through compelled testimony.

At the heart of self-incrimination, is that individuals should have a **choice** whether or not to cooperate in the state in a case against them *unless and until* the Crown proves that they have violated a pre-existing law.

## Basic rules: CL and Charter

The principle against self-incrimination has informed several CL rules:

1. Privilege against self-incrimination (witness may refuse to answer Qs in a proceeding if they may incriminate the witness)
2. Right of accused to choose whether to testify at trial
3. Rule excluding involuntary confessions.

Section 24 (2) of the *Charer* requires judges to exclude unconstitutionally obtained evidence if the admission would bring the administration of justice into disrepute.

## Real versus Testimonial Evidence

All three **CL rules** (above) go to **testimonial self-incrimination** (*cf* “real evidence”, i.e. DNA) because the **former is susceptible to unreliability if compelled** *and* the former creates new, **previously unavl. evidence**. The former is also seen as more **private**.

The ***Charter*** exclusion rule applied to both **testimony** and **real evidence** because the underlying idea is that individuals should be able to **choose** whether to participate in their own conviction.

*R v Grant* (SCC 2009) found that previous s. 24(2) authority wrongly equated bodily evidence with statements. Communicative info was held to warrant greater legal protection than other forms of compelled protection. This has left the divide slightly unclear, but what is clear is:

1. **Compelled communicative evidence** is **more aggressively protected** than real evidence which can be gathered without the participation of the accused
2. **Self-incrimination does not apply to pre-existing items of real evidence** w/ exception of bodily samples. Therefore, protection is extended to the **compelled *creation of information*** not the compulsory disclosure of pre-existing information (e.g. accused has to hand over pre-existing documents/evidence)
3. **Protects only against incrimination**, not other uses

# CL Confession Rule: Right to Silence

## Confession Rule: Voluntariness + Intro

Central animating principle is **voluntariness.** Historically, **reliability** has also been important. (\*\*key principle **FAIRNESS TO THE ACCUSED\*\***)

The confession rule seeks to ensure that statements are admitted into evidence only where the accused has made a meaningful choice to speak (*Hebert*). Goals:

1. Reduce risk of **unreliable** evidence🡪miscarriage of justice,
2. Preserve **fairness** in criminal law,
3. **Vindicate violations** of right to silence.

**Trigger:** Statements made by the accused to persons he or she reasonably believes to be in authority.

**Onus:** The Crown must establish BARD *in all the circumstances* that the will of the accused to remain silent was not overborn by (i) inducements, (ii) oppressive circ.s, (iii) lack of an operating mind, (iv) a combination of i – iii, or (v) police trickery.

**Police trickery** is considered on its own. It relates to involuntary statements obtained in a manner so appalling as to shock the community. This goes to protecting the interests in the **integrity of the administration of justice**.

## Where the Accused Remains Silent

**General rule:** The CL and s. 7 right to remain silent at the investigative stage exists at all times against the state, applying anything anyone interact with a person in authority, whether detained or not. According to *Turcotte*—some, all, or none of the information may be disclosed by the accused.

**Trial:** No adverse inferences are permissible based on exercise of right to silence.

**Exceptions**: At times, evidence of the accused’s silence is admissible if:

* It is a necessary part of the narrative surrounding admissible evidence or it’s necessary to understand the admissible evidence (*Turcotte*)
  + E.g admissible police convo w/ accused included some exercises of silence; Crown psychiatry report could be explained as being based on only some evidence *cf* that of the defence b/c the accused told some things only to defence psych, and not Crown
* If a defence tactic opens the door, evidence of silence can be used in rebuttal by the Crown (e.g. claiming to have cooperated w/ police or shared particular info)
* Alibi cases: accused must give police reasonable notice, which normally requires that accused spoke to counsel (poss. that counsel considered the matter after full disclosure)
* Co-accused has right to full answer and defence and may challenge the credibility (only, not guilt) of the accused by using their pre-trial silence against them

**Jury warning:** In these cases where the trial judge does allow evidence of silence to be admitted, the jury instruction will require the judge to instruct on the proper purposes to which the evidence may be used, the dangers of using it, and the impermissible inferences that must not be drawn. They must also advise the jury that it may *not* be relevant to credibility and may simply reflect the legal advice rec’d by the co-accused.

## Where the Accused Makes an Admission: The CL Confessions Rule

The confessions rule is meant to ensure a meaningful choice to speak (**voluntariness**).

The court in *Oickle* rejected the fixed and narrow rules and introduced a contextual approach. The test seeks to respect the twin goals: protecting the rights of accused persons without unduly limiting society’s need to investigate and solve crimes.

* Balance
  + Rights of the accused (prevent miscarriages of justice)
    - reduce risk of unreliable evidence
    - preserve fairness in adversarial criminal trial process
    - vindicate the right of the accused to remain silent
  + Society’s interest in investigating crime
    - police questioning is a legitimate and effective tool
    - do not want to squander important evidence

**The components of the rule**:

* (1) *Most* statements made to a person in authority
  + Not statements made pursuant to statutory compulsion
  + Not statements that form the *actus reus* of an alleged offence (e.g. refusing breathalyzer)
* (2) Statements made to a person in authority
  + (A1) If it’s a police trickery case, it must be a state agent b/c the category is concerned with conduct that would shock the community and have a deleterious impact on the integrity of the crim’l justice system
  + (A2) If inducement or oppression, the real concern is the accused person’s state of mind—whether they had a choice to speak. The question here is “whether the accused, based on her [reasonable] perception of the recipient’s ability to influence the prosecution believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment.”
    - Notice this is subjective—if the accused spoke to an **undercover agent** whom they did not believe to have authority over the outcome of their case, that was **not excluded**
    - However, the person must believed to be an agent of the state, even if they have no real authority; it cannot be an agent of organized crime
  + (A3) Operating mind: further divided into cases of inhibited operation of mind cases (functioning of mind affects influence of inducements or oppression) and pure inoperative mind cases (where the mind of the accused isn’t operating due to an internal or subjective state, e.g. mental illness or intoxication)
    - Inhibited operation of mind: subjective test to determining “person in authority” – what is the impact of the power of authority on the accused, given her mental condition?
    - Pure inoperative mind: the concern is with the malfunctioning of the mind – what is the impact of the condition? It’s irrelevant that the person was in authority.
  + (B) Procedure: you only hold the *voir dire* if the relevant standard for “person in authority” is met (w/ exception of pure inoperative mind).
    - If the statement was clearly to a po or prison official, a *voir dire* will be held unless the accused waives the *vd* by admitting voluntariness.
    - If the statement was made to someone who is not objectively in authority, then the accused must show a realistic basis for believing the person was in concert with the authorities.
    - Once this person in authority hurdle is met, the Crown has the burden of proving voluntariness BARD.
* (3) Crown must establish BARD in light of all the circ.s
  + 1st step: Modest burden on Crown to show that a statement was made. A judge may exclude a statement if it’s poorly recorded.
  + 2nd step: Heavy burden on Crown of proving BARD that the statement made was voluntary
    - Material gaps in evidence at the *voir dire*, including the failure to call some material witnesses, may lead to a finding that a reasonable doubt remains
* (4) Crown must establish that the will of the accused was not overborne
  + *Oickle* reinforced causation: was the inducement (or other improper pressure), standing alone or in combo w/ other factors, strong enough to raise a reasonable doubt about whether the will was overborne?
  + Must consider: (i) intensity of the pressure and (ii) ability of particular accused to resist that pressure (the latter stnd considering personal characteristics and experiences)
* (5) The will of the accused was not overborne by inducements
  + Was there a *quid pro quo* (this for that) offer by interrogators, regardless of whether it takes the form of threat or promise of advantage?
    - NOT spiritual or moral inducements
    - Offering psychiatric help or other counseling in exchange for a confession is not as strong an inducement as an offer of leniency
  + Contextual approach such that not all inducements are inappropriate—it must be strong enough (alone or in combo w/ other factors) to raise a reasonable doubt about whether the will was overnborne
  + This test is not so dramatic that the accused must lose any meaningful ability to choose to remain silent—that’s too high a stnd, defeat purpose
* (6) The will of the accused was not overborne by oppressive circ.s
  + This goes to whether there is an atmosphere of oppression created by the authorities—can be seen alone or in context w/ other inducements/circs
  + Two types: (i) stress-compliant confession (made to escape bad circ.s) and (ii) oppressed accused begins to doubt own memory and believe po allegations
    - (i) Stress: pretty high, recall *Hoilett* (homeless man, left naked, one hour sleep, intoxicated, deprived of clothes and a Kleenex)
  + Police may lie but if they lie or fabricate evidence during an interrogation, this can contribute to oppressive circ.s
    - *Hammerstrom*: evidence excluded b/c police were v aggressive in their questioning so that the accused believed he was seen on camera and that there was no effect to his protestations of innocence
* (7) The will cannot be overborne by the lack of an operating mind
  + Test: Did the accused person possess a degree of cognitive ability so as to understand (i) what he or she is saying and (ii) that it may be used as evidence in proceedings against him/her? The accused need not be able to make a wise choice or a choice that is in their best interest.
  + Suffering shock = excluded: *Ward*
  + Hypnotized statement = excluded
  + Intoxication or mental illness = MAYBE, *Whittle*
  + *Whittle*, who was an actively hallucinating schizophrenic (i) understood what he was saying and (ii) knew the statements could be used against him so despite being “very mentally unstable”, it was not thrown out on the operating mind category
  + \*Text suggests considering pure inoperative mind as a separate inquiry b/c it goes to the effect of the functioning of the internal mind of the accused *rather than* the conduct of the authorities but if you’re dealing with an inhibited operation of minds case, the mental impairment may be an important factor in deciding whether an inducement or oppressive circ by a state agent caused the will to be overborne
* (8) Police trickery – conduct that is so appalling it would shock the community
  + The concern is *not* the will of the accused, the primary concern is the maintenance of the integrity of the crim’l justice system
  + Courts will be wary not to unduly limit police techniques
  + *Oickle*, e.g.s: (i) pretending to be a priest or legal aid lawyer (ii) injecting truth serum into a diabetic on the pretense that it is insulin
  + *Rowe*: accused engaged in a ritual in which his confession was induced by a Jamaican spiritualist; he participated in order to avoid apprehension, not for spiritual purposes
  + *Omar*: Mr Big scam wherein accused was tricked into bragging about his criminal exploits as a way to gain favour w/ a gangster—would not shock community

### R v Oickle – 2000 SCC

**F**:8 fires set during a similar time period, with similar facts in a small town in Nova Scotia. A list of 7 – 8 suspects were asked to voluntarily submit to a polygraph test. After initial suspicion, O submitted. Prior to taking the test, he was given a pamphlet on the test, signed a consent form, advised of his right to silence, right to a lawyer, and that he could leave at any time. The administering officer advised O that he had failed the test and continued questioning for one hour. O asked if he admitted to one fire, if he could go home. The police officer advised that he could leave at any time. 4 hours after coming in for the polygraph, O admitted to setting one fire. About 6 hours after coming into the station, he said he was tired and wanted to go home to bed. He was advised that he could *not* go home, that he was under arrest, and that he could have a lawyer if he wanted. The questioning continued. At that point, O had only confessed to 1 fire. At 11pm (8h later), he confessed to 7 of the fires. The next morning he re-enacted 7 of the fires; he was again advised of his *Charter* rights.

**P/H**: At trial, the judge found on a *voir dire* that the evidence was admissible and voluntary. He was convicted on 7 counts of arson.

On appeal, the statements were found to be involuntary and therefore inadmissible. The respondent’s appeal was allowed. The confessions were excluded, convictions overturned, and acquittals entered.

**D**: The Crown appealed; Appeal allowed

**A**: The CL confessions rule has developed to include (*Hebert*):

1. *Ibrahim* rule: gives the accused a negative right: not to be tortured or coerced into making a statement by threats or promises held out by a person who is and whom he subjectively believes to be a person in authority
2. Operating mind doctrine: absent the hope of advantage or fear or prejudice, was the statement free and voluntary? Includes a broader conception of voluntariness to include:
   1. shock
   2. hypnosis
   3. complete emotional disintegration
   4. “atmosphere of oppression”

**A** (s. 7 v CL rule): Does the Charter subsume the CL rules? *no*—here’s why:

* Burden: CL rule requires Crown to prove BARD that the confession was voluntary—this is more favourable. Charter requires the accused to show on a balance a violation of their Charter right.
* Scope: CL rule applies whenever a person in authority questions a suspect—this is broader. Charter rights, like s. 10 for example, applies only in the context of arrest or detention.
* Remedies/evidence excluded:
  + Permissive or obligatory: when the CL rule is violated, the CL rule *always* warrants exclusion. When a Charter right is violated, evidence *may* be excluded under s. 24(2) but *only if* admitting would bring the administration of justice into disrepute.
  + Derivative evidence: The CL applies only to the statement. The Charter applies also to derivative evidence.

**A** (policy): the court goes through to restate the confessions rule because they are concerned with the diversity of approaches *and also* the concern about the problem of false confessions. Involuntary confessions are more likely to be unreliable. Some individuals make be particularly sensitive to police presenting fabricated evidence either because it may persuade them that they did it or they might think that protestations of innocence are futile. There are other background traits which may make individuals vulnerable and particularly compliant, which may then lead to false confessions. The problem with false confessions is that once triers of fact hear them, they cannot understand why someone would falsely confess and are highly persuaded by them. False confessions are usually the consequence of bad police practices or criminality. Videotaping interrogations is helpful in this respect.

There are twin goals to the confessions rule (i) protecting the rights of the accused (ii) without unduly limiting society’s need to investigate and solve crimes. Courts should always remember these goals when applying the CL confession rule.

**A (contemporary CL rule**): The underlying principle is voluntariness, overlapping with reliability. As such, the principle of voluntariness always governs and justifies an extension of the rule in situations where involuntariness has been caused otherwise in a way that is serious enough to bring the principle into play. The trial judge should consider the following when reviewing a confession, being particularly sensitive to context:

1) Threats or promises

* this is the *Ibrihim* factor: imminent threats of torture and violence are obviously clear
* Hope of advantage:
  + (very strong) leniency from the courts—will lead to exclusion in all but the most exceptional circumstances
  + (less strong, look at circ.s) offer of psychiatric assistance or counseling
    - Offer to see gf was not sufficient in *Oickle*
  + offers of benefit to another person—determined through:
    - nature of the benefit
    - the relationship b/w that person and the accused
    - all of the surrounding circ.s
    - does it tend to induce the accused to make an untrue statement?
* Fear of prejudice:
  + overt threats of violence
  + veiled threats: “it would be better for you if you told” – implies dire consequences upon refusal
    - requires a contextual analysis –consequences aren’t always fatal to admissibility
    - should only be excluded when the circ.s reveal an implicit threat
* *does not include the use of spiritual or moral inducements* because p.o. have no control over the suggested benefit (whereas they can be seen to have control over things like lighter sentencing)
* Recall that most confessions are not spontaneous and require some police inducement so should only be excluded if they raise a reasonable doubt about whether the will of the subject has been overborn
* More than looking for a threat or promise, look for a *quid pro quo* offer by interrogators

2) Oppression: when conditions are so oppressive and distasteful to induce a stress-compliant confession to escape the conditions (overbearing the will). Includes inhumane conditions such as deprivation of food, water, clothing, sleep, or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time. Use of fabricated evidence (which may lead suspect to believe protestations of innocence are futile, albeit true) is not enough on its own but it can be included in the calculus to determine whether the confession was voluntary.

* *R v Hoilett* – homeless man, high on crack and drunk is left in a cold cell for 1.5 hours without any clothing (taken by p.o. for forensic analysis) and it was too cold for him to sit down so he had to stand. He was given thin, paper-like clothing after awhile. He was woken up a few hours later (at 3am) and interrogated. His requests for warmer clothes and a Kleenex were denied. Despite knowing that he had a right to silence and he received no threats/promises, he talked because he thought the police might give him some warm clothes and cease the interrogation.
* this is *not* a discrete inquiry

3) Operating Mind – requires no higher degree of awareness than (i) knowledge of what the accused is saying and (ii) that she is saying it to a police officer who can use it to her detriment

* this is *not* a discrete inquiry
* goes to voluntariness: not voluntary if induced by other circ.s

4) Other police trickery: concerned with the conduct of the authorities in relation to reliability (not reliability broadly). The more specific objective, beyond voluntariness, is maintenance of the integrity of the criminal justice system. Although police may use tricks and deceit, the object is to vigorously repress conduct by police that would shock the community (e.g. pretending to be a legal aid lawyer).

* this is a distinct inquiry from the other headings

**A** (values): while oppression and inducements go to reliability, operating mind is broader conception of voluntariness. All in all, voluntariness is the touchstone of the rule. If a confession is involuntary for any reason, it is inadmissible.

**A** (findings): A finding of voluntariness is a finding of fact and should not be overturned without a palpable and overriding error.

**R** (CL confession rule): A confession will be inadmissible if it is made under circ.s that raise a reasonable doubt as to voluntariness on the part of the person making the admission. Subsequent statements made to persons in authority will also be inadmissible if: (i) the factors that tainted the 1st statement are still operating at the time of the subsequent statement, and (ii) making an involuntary statement was a substantial factor in the decision to make a subsequent statement.

**R2**: The *Charter* right does not subsume the CL right.

## Statements made under the *Youth Criminal Justice Act*

If an accused person is under the age of 18, the Crown must prove BARD (i) voluntariness AND (ii) compliance with s. 146 of the *Act*.

## The General Discretion to Exclude

Judges have a broad, general discretion to exclude technically admissible evidence in order to preserve trial fairness. The SCC has provided little guidance. The one category that is clear is when prob value>risk of prejudice, in context of voluntary confessions to persons in authority.

This *may* catch admissions obtained on the basis of misconduct which falls short of the “shocks the conscience” test. But the standards are unclear.

# Section 7, Pre-Trial Right to Silence

## Self-Incrimination in the Charter

### Charter 11(c), 13 – non-compellability + self-incrimination

**s. 7**: right to silence

**s. 10(b)**: right to counsel

**s. 11(c):** Any person charged with an offence has the right… **not to** **be compelled to be a witness** in proceedings against that person in respect of the offence;

**s. 13:** A **witness** **who testifies in any proceedings** has the right not to have any **incriminating evidence** so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

## How does s. 7 supplement the CL?

**When a person is detained and knows that she/he is speaking to a person in authority, s. 7 and the *Oickle* rule are “functionally equivalent”. If voluntary, no further s. 7 scope. The CL rule should be preferred due to the easier burden for the accused and the automatic remedy (*Oickle*).**

Here are situations where you would prefer the s. 7 approach:

### Undercover/detained Statements (Hebert)

**Purpose**: voluntariness

**Application**: Statements actively elicted from a detained suspect by an undercover state agent (*Hebert*). Applies regardless of whether the accused tells the po that she wishes to remain silent (*Liew*). Does not apply to legitimate fellow inmates (*Hebert*). It must be an undercover state agent (*Hebert*).

**Hebert rule** – requires *causation*. To test causation, there are 2 factors: (i) nature of the convo (ii) exploitation of a rel’nship of trust.

(i) Look at the **nature of the conversation**. During the conversation, did the undercover police officer remain within the role that he/she was enacting?

**Yes** – po allowed natural convo to develop in the fashion that someone in that role (i.e. a fellow detainee) would have conversed. In that case, no causation, and the admissions are voluntary. Also the po may “shift” the conversation to an incriminating subject (*Liew*).

Hebert rule is NOT violated

**No** – po either engaged in something akin to an interrogation or engaged in a convo to provoke an admission that was outside of a naturally developing convo that two detainees would engage in.

Hebert rule is violated

(ii) **Exploitation** of a rel’nship of trust: Did the state agent assume a special rel’nship w/ the accused that was of a nature that the accused would reasonably believe that his/her statements would not end up in the hands of the authorities? Simply posing as a fellow inmate is insufficient (*Liew*).

**Yes**—Hebert rule is violated

### Derivative evidence

**CL**: real evidence discovered on the basis of an involuntary confession is nevertheless admissible (*St Lawrence* rule)

**Charter**: real evidence discovered on the basis of an involuntary confession *may* be excluded under s. 24(2).

*may* exclude entire involuntary statement as well as otherwise undiscoverable evidence derived from it

### Statutorily compelled statements (Whyte)

**Purpose**: reliability; dignity interests

**Application**: Only applies if the statement would compromise the purpose underlying the principle against self-incrimination. Requires a contextual analysis of:

1. Whether the statement is a product of “real coercion”;
2. Adversarial relationship w/ the state at the time the statements was made (*Fitzpatrick*);
   1. If accused voluntarily entered into a regulated activity, that won’t count
3. Whether the risk of an unreliable confession arises; and
4. Whether the leg’n itself increases the risk of state abuse.

*R v White* – W’s compelled statement to vehicle insurance company that she was the driver of a car could not be used against her when she was criminally charged with failing to remain at the scene of an accident—“use immunity”

### Canadian Evidence Act, s. 5 – Incriminating questions + Answer not admissible against witness

**5.** (1) **No witness shall be excused** from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a **witness objects to answer on the ground that his answer may tend to criminate him**, or may tend to **establish his liability to a civil proceeding** at the instance of the Crown or of any person, and **if but for this Act**, or the Act of any provincial legislature, **the witness would therefore have been excused from answering the question,** then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given **shall** **not be used or admissible in evidence against him** in any criminal trial or other **criminal** proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

### BC Evidence Act, s. 4 – Witness must answer incriminating question + answer inadmissible against same

 (1) In this section, **"witness"** includes any person who testifies in the course of any proceedings authorized by law.

(2) A witness **must not be excused from answering a question or producing a document** on the ground that the answer or the document may tend to **incriminate** the witness or any other person, or may tend to establish his or her **liability** to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act.

(3**) If a witness objects to answering** a question on any of the grounds referred to in subsection (2), and if, **but for this section or any Act of Canada, the witness would have been excused** from answering the question, then, although the witness is by reason of this section or by reason of any Act of Canada compelled to answer, the answer given **must not be used or receivable in evidence against that witness in any civil proceeding** or in **any proceeding under any Act**.

## Case Law: ss. 7 + 10(b)

### R v Singh – 2007 SCC

**F**: Accused was arrested for second degree murder of innocent bystander killed by stray bullet while standing inside doorway of pub — Accused was given proper Charter and official police warnings and privately consulted with counsel in person and by phone. During course of two subsequent police interviews, accused stated on numerous occasions (18 times) that he did not want to talk about incident — Interviewing officer affirmed the right to silence but persisted in trying to get accused to make statement. Accused spoke freely about some matters (religion, background, etc.) but would become far less forthcoming when the discussion turned to the incident in investigation. Accused made number of incriminating statements, mainly that he identified himself in pictures as the man with his hat on backwards. Those statements later became probative of issue of identification at trial.

**P/H:** On voir dire to determine admissibility of statements, trial judge was satisfied that statements were voluntary and that breach of accused's right to silence had not been proven — Trial judge found that probative value of statements outweighed any prejudicial effect — Statements were admitted and accused was convicted by jury. BCCA upheld trial judge's ruling and affirmed conviction. On appeal, S conceded that his statements were voluntary and the CA did not think it necessary to carry-out the “double-barreled” test for admissibility by also inquiring into s. 7 in the context of an investigatory interview with an obvious person in authority.

**Charron, J. – majority (+4)**

**I: What is the interplay between the confessions rule and the s. 7 right to silence?**

**I2**: Do courts need to carry-out the double-barreled test for admissibility in the context of a voluntary statement made to a person in authority during detention? (*no*)

**D**: SCC did not find that the BCCA erred in law; appeal dismissed

**Argument (S)**: he argued for an American-style approach to s.7, that the p.o. would need to inform of the right to silence and once a detainee states that he or she wishes to exercise that right, absent a signed waiver, the p.o. would need to cease interviewing the detainee.

* Court dismissed this approach b/c it ignored the “critical balancing of state and individual interests which lies at the heart” of s. 7 decisions
  + Overshoots protection afforded – unlike right to counsel which is in the hands of police when the person is detained, the right to silence bears upon the accused so the police do not need to “hold off’ on questioning as they would with the right to counsel (until they allow that right to be realized) because it is within the control of the accused
  + Ignores the state interest in the effective investigation of crime
    - *Hebert* found that a proper balance needed to be achieved b/w it and the individual’s right to silence
    - Accused/detained person is an important source of information in the investigation so it is in the public interest for that person to be questioned
  + If the accused retains counsel, questioning may occur without counsel present. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.
  + Also, the right only applies after detention
* S argued against po leeway after he expressed wish to be silent and only speak with counsel present. Court shut that down by saying:
  + 1) use of legitimate means of persuasion is permissible and is part of the balancing of interests
  + 2) The police cannot ignore the right to silence nevertheless and a contextual analysis will reveal whether the po did nevertheless infringe that right to silence, resulting in an involuntary statement

**A (policy/values)**: Historically, the CL confessions rule was concerned with reliability of confessions. It contained the right to silence pre-Charter. Today, both Charter and CL rule are concerned with principle against self-incrimination.

**A (CL confession rule)**: Contains the right to silence, but not the right not to be spoken to by the state. The importance of police questioning during an investigation cannot be doubted. However, information from police investigations is only useful if it is reliable. Therefore, the rule has always been concerned with false confessions. That’s why the Crown must prove BARD the voluntariness of the statement. Other interest informing the rule have been (ii) individual’s freedom of will, (iii) law enforcement obeying the law, and (iv) overall fairness in the criminal justice system.

**A (*Charter*)**: The focus is on the conduct of the po and the effect it has on the suspect’s ability to exercise free will. The test is objective but the individual characteristics of the accused are relevant.

**\*A (*Charter* rel’nship to CL rule):** Charter does not subsume CL rule. Only in the context of an obvious statement to a person in authority when the person is detained will be functionally equivalent. In most cases, CL provides greater protection but s. 7 provides residual protection in some situations: (i) statutorily compelled statements (*White; Jones*), (ii) derivative evidence (*Burlingham*), (iii) cross-examining an accused on his/her prior decision to exercise the right to silence, and (iv) detained statements may be excluded even though they are otherwise voluntary (undercover agent posing as cell-mate to gain a statement despite the decision of the accused to exercise their right to silence - *Hebert*).

**R**: In the context of a police interrogation of a person in detention, where the detainee knows that he or she is speaking to a person in authority, the two tests are functionally equivalent. It is best to do the CL test because the burden is favourable to the accused and the remedy is automatic. As a function of that burden, where a confession has survived a thorough inquiry into voluntariness, a s. 7 application cannot succeed.

**R2**: A police warning about the right to silence and to counsel is an important factor in determining the voluntariness of a confession; however, it is not decisive and as with all other things, requires an examination of the context, including whether or not the right to counsel has been exercised.

**R3**: The number of times that the accused asserts the right to silence is relevant but not determinative, it goes to the larger question of whether A’s will was overborn, vitiating voluntariness. Where the accused can be shown to be exercising DM power (e.g. deciding what he/she will or will not answer), voluntariness is present. It’s important whether the accused blurts out an answer or makes selective disclosure.

**R4**: The right to silence is only contravene if the accused is denied the choice whether to speak or remain silent. This is a contextual inquiry which considers A’s cognitive abilities (*Otis*). Police persuasion in the face of repeated assertions does not, in itself, deny the right (*cf dissent interpretation of s. 7 as right not to be persistently pressured in face of s. 7 assertion*).

**Fish, J (+3) – dissent**

**F**: S asserted his right to silence 18x before making the incriminating statement. The interrogator admitted that he persisted with questioning in “an effort to get S to confess, *no matter what*.” The interrogator urged S to forsake his counsel’s advice.

**I**: Does “no” mean “yes” where a po interrogator refuses to take “no” for an answer from a detainee under her total control? (*no*) Pursuant to s. 7, may the police interrogators insidiously undermine the unequivocally asserted right to silence of a detainee? (no)

**D**: Would have dismissed the appeal and ordered a new trial. Found that the interrogator’s conduct “unfairly frustrated S’s decision on the question of whether to make a statement to the authorities” which, pursuant to s. 24(2), means that the statement was obtained in a manner that infringed or denied S’s right to silence. Authorization of the statement would bring the administration of justice into disrepute.

**A (ss. 7 – 10(b) cxn)**: In urging S to speak despite his counsel’s advice to the contrary, the interrogator not only deprived S of his right to silence, but also the intended benefit of his right to counsel. Sections 7 and 10(b), read together, confirm the right to silence in s. 7 and shed light on its nature (b/c it allows accused to understand right to silence). The right to silence involved a negative right to be free of coercion and a positive right to make a free choice as to whether to remain silent or speak to authorities. The essence of the s. 7 right is free choice. That right to free choice comprehends a right to consult counsel, be informed of consequences of options, and that the actions of the authorities will not unfairly frustrate the decision of whether or not to speak to authorities.

**A**: if continued resistance by one person under the dominance or total control of another (as S was) appears to be futile, that is a failure of the disregarded assertion of the right to assertion of the powerless detainee. It’s unimportant that S said “no” 18x, the approach is purposive: a right needs to be respected after it has been firmly and unequivocally asserted any number of times.

**A (CL v s. 7 – underlying purpose**): Neither subsumes the other, although there may be some overlap. CL rule is concerned w/ reliability of confessions and integrity of crim’l justice system. Charter aims to constrain gov’t action to conform w/ individual rights and freedoms, as is necessary in a democratic, functioning society in which the basic dignity of all is recognized. Therefore, s. 7 is interpreted to secure detainee has “right to make a free and meaningful choice; whereas, CL rule is concerned with the operating mind and whether their will was overborn. If the police try to get a statement at all costs, ignoring the detainee’s decision to exercise their right to silence, the detainee may be denied free and meaningful choice, particularly if they think that their choice is futile and of no practical effect. This is particularly important given the power imbalance b/w state and individual.

**A** (impact on investigation of crime): no evidence to support this contention. US’s system of *Miranda* rights which seeks to ensure that the right to cut off questioning is scrupulously honoured has not led to the devastation of the American criminal justice system. In any event, po may still investigate potential witnesses and those witnesses may comply but may also go home and refuse to answer; prisoners cannot escape and are powerless to end interrogation.

Para 84: “Neither of these rights has been given constitutional protection *on the condition that it not be exercised*, lest the investigation of crime be brought to a standstill” The policy of law should be to facilitate, not frustrate, the effective exercise of rights. Charter rights are not constitutional placebos.

**R**: The focus of the s. 24(2) exclusion inquiry on the basis of an alleged s. 7 violation of the right to silence, the courts should inquire into whether the accused person was deprived of their right to freely choose whether or not to speak to police. This free choice is intimately connected to the right to counsel, given that the accused must know of the consequences of their potential actions and their right not to respond. Further, if the police unfairly frustrate the right to free choice of the accused (by persistently show right to silence has no practical effect), a statement that is otherwise voluntary under the CL rule may nevertheless be in violation of s. 7.

### R v Sinclair

**F**: The accused spoke to legal aid, expressed desire to remain silent + was presented w/ fabricated evidence. He mentioned at one point that he was confused and wanted to speak to a lawyer again.

**I**: What is the minimum required by s. 10(b)?

**R**: There’s no right to have a lawyer present the entire time that you speak with po; the initial contact w/ a lawyer is sufficient to meet s. 10(b). There are limited circumstances where the accused should be allowed to speak w/ a lawyer again.

# Improperly Obtained Evidence

## Evolution of the inadmissibility of some improperly obtained Evidence

The Charter

**Value**: Preserve public confidence in the **administration of justice** (i.e. courts), including the **rule of law** and **respect for *Charter* rights**. The goal is not to punish police.

*Stillman* (1997): automatic exclusion of unconstitutionally obtained “consriptive evidence”. Conscriptive evidence is that which arises when the police compel the accused to use her body to provide evidence. This would include verbal statements, bodily samples, and other uses of the body (e.g. DNA, breathalyzer, etc.)

* Result: rigid 2-box approach: conscriptive or not

*Grant* (2009): rejected that rigid approach; however, it continues to consider similar factors.

## Application for Exclusion under s. 24(2)

Technical components:

1. application,
   1. courts are less formalistic when it’s a crim’l trial and the app’n is self-rep’d
   2. however, some will hold that there must be formal notice of the motion to be served/filed
2. to court of competent jurisdiction,
   1. this is a superior court, not a prelim hearing
3. brought by anyone whose Charter rights/freedoms have been infringed or denied.
   1. Must be applicant’s *personal Charter rights*—not those of their accomplice (*Paolitto*) or romantic partner (*Edwards*)
   2. Must have been violated by a Canadian state agent
      1. Not a private individual, not an American state agent
      2. However, it could be a 3rd party acting for Canadian authorities, such as a medical doctor taking a blood sample by police. The test when a 3rd party civilian is alleged to be a state agent: would the Charter violation have taken place in that form/manner if not for the involvement of a state agent?

### Charter s. 24

*Enforcement of guaranteed rights and freedoms*

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

*Exclusion of evidence bringing administration of justice into disrepute*

(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**.

## Current Law

1. Preliminary step: **Accused** must **establish** on a balance that personal *Charter* right has been breached by a state agent (standing under s. 24(1)). See technical components above.
   1. S. 9 (Grant): right not to be arbitrarily detained
   2. S. 7: right to life, liberty, security of the person and not to be deprived thereof except w/ principles of NJ (i.e. right to silence)
   3. S. 10(b) (Grant): right to counsel upon being detained/arrested
   4. S. 8: right to be secure against unreasonable search or seizure
      1. Broader interest in privacy, incl. info privacy
      2. Hierarchy of interests:
         1. Most intrusive: Bodily integrity, e.g. pat-down searches (*Golden*)
         2. Pockets
         3. House (interpreted w/ property law principles—not your partner’s house)
         4. Hotels, lockers at bus stations, etc. (gives homeless people less protection than home-owners)
         5. Garage, outdoor spaces, car
2. Exclusionary requirements (s. 24(2)):
   1. Was the evidence obtained in a manner that breached the Charter right?
      1. This is the *causation* question, although Cts take a generous and purposive approach. There is no need for a strict causal rel’nship (*Wittwer*)
      2. Must be a sufficient cxn, given temporal, contextual, causal, or a combo of the 3 so that it can be said to be part of the same transaction/course of conduct
         1. **Causal connection**: where unconstitutional investigative techniques lead to the discovery of evidence (including derivative evidence)
            1. Cannot be too remote. Police learned of witness during unconstitutional search then asked witness for statement, witness agreed. That was too remote b/c finding the witness didn’t make the testimony avl, the witness agreeing made the testimony avl (*Goldhart*).
         2. **Temporal/Contextual connection**
            1. Violation should precede discovery (may be okay if during the course; *Therens*)
            2. Temporal alone is not sufficient, there must be some sort of factual cxn: for e.g., part of the same detention

In *Flintoff*, where an accused was pulled over, the po took a breath sample and strip searched for no apparent reason. The latter was a violation but the breath sample was also “obtained in a manner”

*Strauchan*, where an accused was denied the right to call his lawyer while the po were carrying out a valid search warrant, the evidence from the search warrant was thrown out due to the violation of s. 10(b) b/c there was enough of a temporal cxn to be “obtained in a manner”

* + - 1. **Overall evaluation** – link may be broken by events
         1. In *Oullette*, accused was not warned of right to counsel but he exercised it anyways🡪 this ameliorates the breach
         2. In *Wittwer*, accused gave incriminating statement, po realized mistake and gave warnings then asked for a “new” statement; the subsequent statement was also found to be tainted
    1. If this is shown, the evidence has been tainted by the Charter breach, meeting the requirement for “obtained in a manner”
  1. Would a reasonable person, fully informed of all the circs and the underlying Charter values, conclude that the admission of evidence could bring the administration of justice into disrepute? The goal is the long-term maintenance of integrity and public confidence in the justice system. To answer the question, the trial judge must apply **the *Grant* test**. Each factor is *ex ante* of equal weight but if any pulls considerably in one direction, it will likely go that way. Weigh:
     1. **Seriousness of the Charter breach**
        1. Assess blameworthiness of state conduct
           1. **Deliberateness** - Locate on “the fault line”—on a spectrum

Unknowingly; In good faith? (*Grant*)

Deliberate? Flagrant? Willful?

E.g. *Harrison* – po does search b/c he doesn’t want to look like an idiot (he realized he made a mistake) and he lied on the stand🡪 very serious

* + - * 1. Systemic, institutional conduct?

If systematic (e.g. po handbook got it wrong), it could go either way, either: More egregious b/c the violations were numerous (far more ppl will have been affected than are before the court)

*Wong*: got legal advice but law was uncertain – mitigating

*Harrison*: evidence of systemic or institutional abuse – increases seriousness

* + - * 1. Is the breach part of a larger pattern of Charter violations committed during the investigation of the *particular* accused?

This is worse—compounded effect (*Feeney*)

* + - 1. Degree of departure from Charter standards
         1. Major degree (*Harrison*)
         2. Minor or technical (*Wise*)
         3. If it exploits the vulnerability of the accused, more intense (*Evans –* mentally challenged accused; *Clarkson* - intoxicated)
      2. Presence of extenuating circ.s
         1. Necessity – evidence may be lost

Need a particular foundation for believing there is urgency (*Feeney*)

Only okay if inadvertent—does not excuse intentional violation (*Silveira*)

* + - * 1. Emergency – public or police safety

More generous approach (*Strachan* – volatile situation; *Golub* – Uzi submachine gun in house)

* + 1. **Impact on the Charter-protected interests of the accused.** Consider each *Charter* infringement separately then consider the cumulative effect.
       1. The impact is assessed based upon the kind of evidence which is sought to be admitted:
          1. Statements by the accused = impact is high such that they are presumptively inadmissible. Exceptions:

The breach was technically defective but had no real effect on the decision to speak (e.g. spoke to a lawyer anyways)

E.g. *Hachez* – he refused to contact counsel and confessed to the crime for which he was arrested. Po then asked about other crims w/o giving another warning—his statements were included b/c defect was only technical and he probably would have made the statements anyways

Spontaneous statement that would have been made anyways (*Harper* – walked into po stn and blurted confession)

* + - * 1. Bodily samples:

Impact depends on the degree to which privacy, bodily integrity, and human dignity and compromised.

E.g. discarded urine is low (*Ramage*)

Breath samples are non-intrusive (Grant)

Hierarchy: did you pluck a hair or strip search?

* + - * 1. Non-bodily physical evidence: impact turns mainly on the manner of discovery *and* the degree to which that undermines Charter-protected privacy interests.

e.g. warrantless search but also strip searches (I guess b/c the evidence is not a product of the body (e.g. drugs) but may involve a search of the body)

Hierarchy of privacy interests

Personal computer – very intrusive (*Morelli*)

Strip searches vary in intrusiveness depending on (*Golden*):

Where the strip search took place

The nature of the physical contact

Relative sex of the subject *cf* those who participated or were present during the search

* + - * 1. Derivative evidence: real evidence obtained through unconstitutionally obtained statements, therefore fairly high impact unless:

The breach had no impact on the accused making an informed choice about whether to speak to authorities

It can confidently be said that the statement would have been made anyways

Discoverability: It can confidently be said that the derivative evidence would have been discovered anyways (decrease impact)

* + - 1. Also plays into the hierarchy of interests (e.g. s. 8, body>house)
      2. Framework is likely broad enough to include the vulnerability of the particular accused
    1. **Weighed against society’s interest in the adjudication of the case on its merits**. (Prof says this is more likely to do with the probative value rather than society’s interest). Varies according to:
       1. Reliability of the evidence
          1. *Grant*: gun was highly reliable
          2. Types of evidence:

Statement – reliability could go either way

Bodily – highly reliable

Non-bodily physical evidence – usually reliable

Derivative evidence – high

* + - 1. Importance of the evidence to the case of the Crown
         1. *Grant*: gun was essential to the case
         2. Would it gut the prosecution? (*Grant*)
         3. Even if crucial, it is not determinative (*Buhay*)
      2. Seriousness of the offence is a “valid consideration” but it can go either way so it doesn’t affect the outcome🡪 neutral (*Grant*)
         1. Paciocco + Stuesser: in practice, courts seem to be less apt to exclude handgun evidence; also BCCA commented on seriousness of a large-scale grow-op in choosing admissibility (*Chuhaniuk*)
    1. **Balance the three—but not capable of mathematical precision**
  1. If found to bring the administration of justice into disrepute, there is a constitutional obligation to exclude (non-discretionary).

### R v Grant – 2009 SCC

**C**: 5 firearm offences

**F**: Two plain-clothes police officers, patrolling area with four high schools and known swarmings, robberies and drug activity, saw an 18-year-old black man (G) walk past them in manner they considered suspicious (staring at unmarked cruiser for a really long time and fidgeting). Officers asked uniformed officer in area to speak with accused. Uniformed officer stood in accused's path and asked some casual questions and for his ID. Uniformed officer told him to keep his hands in front of him, and began questioning him. Plain-clothes officers arrived and stood behind uniformed officer. G was not surrounded but there were 3 officers. Accused admitted he had small amount of marijuana and loaded firearm. G was arrested and searched. The marijuana and loaded firearm were seized. Then, G was advised of his right to counsel and taken to the p.o. stn.

**D**: Appeal allowed in part (on other grounds). SCC found s. 9 infringement. However, effect of admitting evidence would not greatly undermine public confidence in RoL and evidence was properly admitted.

**I**: What is the s. 9 test for arbitrary detention?

**I2**: When should evidence be excluded on the basis of s. 24(2)?

**A** (should evidence be excluded pursuant to s. 24(2)?): In considering s. 24(2) Charter application, court was required to assess and balance effect of admitting evidence on society's confidence in justice system having regard to three factors, including seriousness of Charter-infringing state conduct, impact of breach on Charter-protected interests of accused, and society's interest in adjudicating case on its merits. While impact of infringement of accused's Charter rights was significant, officers were operating in circumstances of legal uncertainty and mistake was neither deliberate nor egregious, therefore effect of admitting evidence of firearm would not greatly undermine public confidence in rule of law. Evidence was properly admitted.

**A (s.24(2) – purpose)**: preserve public confidence in the administration of justice (i.e. courts). The “public” is considered the reasonable, informed person who knows and accepts *Charter* values.

**A (Collins/stillman)**: Was an all-or-nothing approach where if evidence was conscriptive (real evidence or statement), it was excluded. The court prefers principles over bright-line rules so changed the law.

**A (principled approach**): The purpose is to enforce po standards, preserve public confidence in the courts (most important), and ensure the accused has a fair trial. \*the test is above\*

**\*R (test, s. 9 detention):** Detention under ss. 9 and 10 refers to suspension of individual’s liberty interests by a significant physical or psychological restraint. **Detention occurs when**:

1) There is a physical suspension of liberty interests

2) There is a psychological suspension of liberty interests either due to:

a) a legal obligation to comply with the restrictive demand; or

b) given all of the relevant circumstances, would a reasonable person in G’s position have concluded that his or her right to choose how to interact w/ po had been removed? The Ct *may* look to the following factors:

i) how the individual would **reasonably** perceive the circumstances giving rise to the encounter (e.g. police providing general assistance? police singling out an individual for focused investigation?—objective test, accused need not testify)

ii) The nature of the police conduct, incl.

(a) language used,

(b) use of physical contact,

(c) location of interaction,

(d) presence of others, and

(e) duration of the encounter

iii) The particular characteristics/circumstances of the individual, where relevant (e.g. age, physical statute, minority status, level of sophistication).

**R2** (**s. 10(b)**): Frequently when s. 9 is violated, s. 10(b) will also be violated.

**R3**: Test for the s. 24(2) exclusion of illegally obtained evidence (see above) + directions for specific types of evidence (e.g. bodily, etc.) also integrated above.

Note: In this case, the factors likely could have gone either way, but the fact that the trial J included tipped in favour of inclusion b/c a trial J should only be overridden on this decision (which is a finding of fact) if there is a palpable and overriding error.

# Hearsay

## Defining Hearsay

**KEY PRINCIPLE\*\* SEARCH FOR TRUTH**\*\*

**Hearsay definition**

1. An “out-of-court statement” (different time, different place) - ***Evans***
2. Admitting for the truth of its contents – *Evans*
3. Which is dangerous *inter alia* due to the absence of contemporaneous cross-examination - ***Khelowan***

Double hearsay: I was told by X, who heard it from Y.

* Subject to the same analytical approach but you must identify *each layer* of hearsay and submit it individually to the analysis (***Mapara***)

Implied assertions: I knew “fact-x” because I saw Y do “action-x” (e.g. I knew that my cousin was isolating my uncle in order to unduly influence him b/c my cousin told me not to visit my uncle – ***Thompson Estate***– 2004 BCSC)

* This is hearsay and undergoes the same analysis
* E.g. pointing (*Perciballi*) or nodding
* But, for *Baldree* + *Edwards* (po intercept call on accused’s phone where “customers” call asking for drugs—wish to use to show accused is a drug dealer), those were found to be original circumstantial evidence and *not* hearsay

Declarant later becomes a witness

* If declarant remembers + adopts the prior out-of-court statement, no problem, not hearsay
* If declarant recants or cannot recall, that’s hearsay! – ***Khelowan***

**Issues with hearsay**

Both oral and documentary testimony (hearsay or not) has potential weaknesses and may lack reliability. There are:

* Communication failures (semantic uncertainty),
* Insincerity,
* Faulty memory, and
* Earnest misperception.

The court reassures itself with protections: oaths, observing witness demeanour, the availability of contextual info, and cross-examination. With hearsay evidence, the above dangers are exacerbated without these reassurances.

**Statute allowing hearsay**

Context is extremely important in the hearsay analysis. The following are examples of contexts where hearsay may be admitted due to statute:

1. *Extradition Act*: document summarizing all evidence available is given to the judge; permissible so long as the substance of each item of evidence is admissible in Canadian evidence law (***Anekwu*** 2009 SCC).
2. *Criminal Code* (s. 723(5)): hearsay evidence is admissible in sentencing proceedings, although Ct may compel a person to testify in the interests of justice. In ***Zeolkowski*** (1989 SCC): hearsay evidence will be admitted in sentencing proceedings but the frailties of the evidence are a matter of weight.
3. BC’s *Child, Family and Community Service Act* (s. 2) – court may admit any hearsay evidence it considers reliable
   1. The necessity reliability analysis shifts to the “weight” inquiry (***BK v BC***)

## Framework (*Khelowan*)

1. Is it an out-of-court statement used for truth purposes (and without contemporaneous cross—danger)? If yes, presumptively inadmissible as hearsay.
   * + Burden – party seeking exclusion
2. The traditional exceptions remain presumptively in place (*Starr*). If a traditional exception can be established, it’s admissible.
   * + Burden – party seeking inclusion
3. A hearsay exception can be challenged w/ indicia of necessity and reliability. The exception may be modified (or abolished) to bring it into compliance.
   * + Burden – party seeking exclusion
4. In “rare cases”, evidence falling w/in an existing exception may be excluded if the indicia of necessity and reliability are lacking in the *particular circs of that case (Mapara*).
   * + Burden – party seeking exclusion
5. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*🡪 principled approach
   * + Burden – party seeking inclusion

Recall that the judge, as gatekeeper, may still exclude evidence where **PE>PV** (in foundational approach). This requires a valid articulation of the prejudice (*Nicholas*).

# Categorical (Traditional) Exceptions to Hearsay

The categorical exceptions remain presumptively in place (*Starr*). However, they may be challenged with the indicia of necessity and reliability, either as it applies to the category in generally, or “rarely” to the particular circumstances of the case (*Mapara; Khelowan*)

## Prior Testimony (from prior proceedings)

At CL, these are admissible if:

1. The witness is unavailable
2. The parties are substantially the same (*but problematic if crim’l – civil change, b/c Crown*)
3. The material issues are substantially the same; and
4. The person against whom the evidence is used had the opportunity to cross-examine the witness at earlier proceedings (*Walkerton*)

This has been **superseded by statute**.

* **Civil**: broad right to admit hearsay evidence from prior proceedings. Does not need the same parties.

### BCSCR 40(4) – use of transcript or other proceedings

Where a witness is **dead**, or is **unable to attend** and testify because of **age**, **infirmity**, **sickness** or **imprisonment** or is out of the **jurisdiction** or his or her **attendance cannot be secured by subpoena**, the court **may permit a transcript** of **any evidence of that witness** taken in any proceeding, hearing or inquiry at which the evidence was taken under **oath**, **whether or not involving the same parties** to be put in as evidence, but **reasonable notice shall be given of the intention** to give that evidence.

* **Criminal**: higher bar than civil. (1) sets specific grounds (2) requires it to be the same charge (e.g. retrial or prelim hearing only). The accused has the onus of showing that they did not have full opportunity to cross-examine the witness (*Potvin*). This is the opportunity, not whether in fact counsel took advantage of the opportunity (*Potvin*). So if the failure is of the accused, too bad. But if the failure is for any other reason (judge, witness, etc.) then DC should establish the lack of a full opportunity.

### Crim’l Code, s. 715 – Evidence at prelim inquiry may be read-in at trial

(1) Where, at the trial of an accused, a person whose evidence was given at a previous trial [or investigation] on the same charge… **refuses to be sworn or to give evidence**, or if facts are proved on oath from which it can be inferred reasonably that the person

(a) is dead,

(b) has since become and is insane,

(c) is so ill that he is unable to travel or testify, or

(d) is absent from Canada,

and where it is proved that the **evidence was taken in the presence of the accused**, it may be **admitted** as evidence in the proceedings **without further proof, unless** the accused proves that the ac**cused did not have full opportunity to cross-examine the witness.**

(2) Evidence that has been taken on the preliminary inquiry or other investigation of a charge against an accused may be admitted as evidence in the prosecution of the accused for any other offence on the same proof and **in the same manner in all respects**, as it might, according to law, be admitted as evidence in the prosecution of the offence with which the accused was charged when the evidence was taken.

## Prior Convictions (of other party or 3rd party)

At CL, evidence of a prior conviction (or prior findings in civil proceedings) could be used offensively to assert a claim (*Simpson* – civil claim after crim’l charges for battery) or defensively to resist a claim (*Demeter* – insurance company). Proof is *prima facie* established and is not readily displaced due to the interest in not relitigating decided issues (*Toronto v CUPE*). Circumstances where proof may be rebutted (*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.

Proof of an **acquittal** is *not* admissible as proof that the party did not commit the offence due to the high standard of proof (*Rizzo*).

**Civil cases**: s. 71 of the BC Evidence Act allows a party to introduce proof that the witness (or party) was convicted of an offence.

### BC Evidence Act, s. 71 - Evidence of previous conviction admissible in subsequent proceeding

(1) In this section:

"conviction" means a conviction

(a) that is not subject to appeal or further appeal, or

(b) for which no appeal is taken;

…

(2) Subject to subsection (3), if

(a) a person has been convicted of or is found guilty of an offence anywhere in Canada, and

(b) the commission of that offence is relevant to any issue in an action,

proof of the conviction or the finding of guilt, as the case may be, is admissible in evidence to prove that the person committed the offence, whether or not that person is a party to the action.

(3) If the action in subsection (2) is conducted before a jury, a party has the right to argue at trial, in the jury's absence, that introduction of the evidence… PE>PV

(4) Subsection (3) does not apply to actions for defamation.

(5) A certificate containing the substance and effect of the charge and of the conviction or finding of guilt… purporting to be signed by

(a) the officer having custody of the records of the court in which the offender was convicted or found guilty, or

(b) a person authorized to act for the officer,

is, on proof of the identity of a person named in the certificate as the offender, sufficient evidence of the conviction of that person or the finding of guilt against that person, without proof of the signature or of the official position of the person purporting to have signed the certificate.

(6) If proof of the conviction or finding of guilt of a person is tendered in evidence under subsection (2) in an action for defamation, the conviction or finding of guilt of that person is conclusive proof that that person committed the offence.

(7) If proof of a conviction or a finding of guilt is admitted in evidence under this section, the contents of the information, complaint or indictment relating to the offence for which the person was convicted or found guilty is admissible in evidence.

(8) Subject to subsection (6), the weight to be given to the conviction or finding of guilt must be determined by the judge or jury, as the case may be.

### BCEA, s. 15 – questioning a witness as to (prior) convictions

(1) Subject to subsection (4), a witness may be questioned as to whether the witness has been convicted of an offence… and if the witness denies the fact or refuses to answer, the opposite party may prove the conviction.

(2) On proof of the identity of the witness as the convict, a certificate that

(a) contains the substance and effect of the indictment and conviction for the offence, and

(b) is signed by

(i) the registrar or clerk of the court, or other officer having the custody of the records of the court at which the offender was convicted, or

(ii) the deputy of a person under subparagraph (i),

is sufficient evidence of the conviction of the witness, without proof of the signature or of the official position of the person signing the certificate.

…

(4) Subsection (1) **does not apply to the questioning of a witness in a civil proceeding conducted before a jury**, if the judge thinks that the **questioning** of that witness would **unduly influence the jury**.

### CEA, s. 12 – Examination as to previous convictions

(1) A **witness may be questioned** as to whether the witness has been **convicted** of any offence… including such an offence where the conviction was entered after a trial on an indictment.

(1.1) If the witness either **denies** the fact or **refuses** to **answer**, the **opposite party may prove** the conviction.

(2) A **conviction may be proved** by producing

(a) [a cert. containing substance of indictment or a copy of a summary conviction signed by a clerk or an officer with custody of the records] and

(b) proof of identity.

## Admissions of a party

This is treated as an exception to hearsay (*Couture* – SCC). Wigmore suggested this isn’t hearsay. The better view is that anything a party has done or said can be used against them and is not subject to the necessity/reliability analysis (*Foreman; Terrico*), so long as it is material and relevant.

A party may introduce into evidence against an opposing party any relevant

* Statement made by the opposing party
  + If the party accepts what a 3rd party says in adopting the statement (e.g. stolen goods), that works (*Streu*)
* Act of the opposing party
* Silence, need:
  + A statement is made in the presence of the party
  + In circs in which the party would be expected to respond
  + The party’s failure to respond could reasonably lead to an inference that the party adopted the statement
  + Probative value must outweigh prejudicial effect (*Tanasichuk*)
  + Not to a person in authority due to right to silence which cannot be used against accused (*Eden*)—includes selective silence (*Turcotte*)
* Vicarious admissions (employees or agents)
  + This is unsettled—safest to go the principled approach (BC (*Morrison*), only need to be performing duties; England: speaker needs to have express authority)
* Statement by a co-conspirator in furtherance of a conspiracy

**Formal admissions** (e.g. written documents in court, guilty plea) are not readily withdrawn. (can be made by accused by s. 655 CC)

**Informal admissions** are not conclusive and may be explain or contradicted (*Baksh*).

## Declarations in the course of duty

At CL, admissible if:

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; (*Monkhouse*) and
5. who has no motive to fabricate (*Ares v. Venner* 1970 SCC).

At CL, the person had to be dead. Today, no. Even if the witness is available, not necessary (*Ares* – nurses notes).

There is a **trend towards the principled approach** (*Larsen*).

**Statutory exceptions** eclipse but do not replace the CL. They are confined to writings and facts (not opinion). For s. 30(10) of CEA, it’s difficult to generate evidence in anticipation of litigation (*Setak*). Also see s. 42 of *BCEA*.

### CEA, s. 30 – Business records to be admitted into evidence

(1) If a business record made in the ordinary course of business contains info that would otherwise be admissible as oral evidence in a proceeding, that record is admissible.

(2) If a business record (made in ordinary course of business) doesn’t contain info about a matter that one would reasonably expect to be recorded in those records, the court can admit the record for the purpose of establishing that the matter did not occur or exist.

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy’s authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

(a) an affidavit of each of those persons…; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

(4) Where production of any record… described in subsection (1) or (2) would not convey to the court the info contained in the record… because it was kept in a form that requires explanation, a transcript of the explanation… is admissible…

(5) Where part only of a record is produced… the court may examine any other part of the record and direct that… the other part be produced by that party…

(6) For… the purpose of determining the probative value, if any, to be given to information contained in any record… the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

(7) Unless the court orders otherwise, no record or affidavit shall be admitted [unless they have] given notice… to each other party to the legal proceeding and… produced it for inspection by that party.

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

(9) Subject to section 4, **any person** who has or **may reasonably be expected to have knowledge** of the making or **contents of any record** produced or received in evidence under this section may, with leave of the court, be **examined or cross-examined** thereon by any party to the legal proceeding.

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(a) such part of any record as is proved to be

(i) a record made in the course of an investigation or inquiry,

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

(iii) a record in respect of the production of which any privilege exists and is claimed, or

(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(b) any record the production of which would be contrary to public policy; or

(c) any transcript or recording of evidence taken in the course of another legal proceeding.

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

…

(b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

### BCEA, s. 42 – Admissibility of business records

Admissibility of business records

(1) In this section:

"statement" includes any representation of **fact**, whether made in words or otherwise.

(2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if

(a) the document was made or kept in the usual and ordinary course of business, and

(b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.

(3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.

(4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.

(5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

## Out-of-court prior identifications by a witness

May be admitted for truth of their contents if (i) witness makes an in-court identification or (ii) no in-court identification but testifies as to accuracy of prior identification (*Swanson*). What’s important is the witness may be cross-examined.

If a statement of identification is recanted, admissibility is dealt with under the KGB analysis (*Devine*). If the witness cannot recall, then you must go the *Khan* route (principled approach?).

## Spontaneous statements

Reliability is based on the spontaneity (no time to fabricate) and necessity is based on expediency (no equal source of evidence elsewhere).

**Present physical condition**: e.g. complaining of soreness or grimacing. Does not include statements of past pain or cause of pain. It is the utterance of a bodily sensation (*Samuel*).

**Statement of present mental state**: it can only be used to prove the mental state of the declarant—not a third party (*Starr; Griffin*). It can also be used to show the state of mind of the declarant with respect to the nature of a relationship with a third party (*Griffin*). This requires a careful limitation instruction (*Griffin*).

**Excited utterances**: this is when a statement is made due to the stress of excitement caused by a surprising event. These no longer need to occur in the same transaction as was the case in *Clark*. In *Nicholas*, a call to police 10 minutes after a sexual assault was an excited utterance. It needs to be sufficiently spontaneous and overcome the possibility of concoction, which occurs when the event is so unusual to dominant the thoughts of the victim and lead to an instinctive reaction (*Andrews* – House of Lords).

**Statement of present sense impression**: this is where a party described an event simultaneously but is not under “excitement/shock”. This hasn’t been expressly accepted in Canada. It would be a party simultaneously describing (calmly) that a car is flying past them and they’re going the speed limit.

### R v Griffin – 2009 SCC

**F**: The victim, accused G and accused H were involved in the business of drug trafficking. The victim was heavily indebted to G following drug-related transactions that had gone sour. The victim was told that should he fail to pay his debt, he would be killed. The victim was unable to pay back that debt and G and H started looking for him. The victim feared for his life and told his girlfriend that "if anything happens to me, it's your cousin's family". The victim's girlfriend immediately understood that the victim was referring to G. Later, the victim was shot 3 times and died in front of his girlfriend and another witness while H acted as the lookout. There was a ton of other circumstantial evidence: the victim owed G $100,000, the victim told a friend he could not pay and later, that friend was tortured in a basement by G who was searching for the victim. G was on a “relentless search” for the victim. Cellphone towers also place him near the scene at the time of the murder. G’s defence was that there were many other people after the victim (who was in the drug trade and in trouble).

**C:** 1st degree murder.

**P/H:** At trial, the judge admitted the statement made by the victim to his girlfriend. The judge provided a limiting instruction to the jury on the statement made by the victim to his girlfriend (i.e. that it should be used for the victim’s state of mind—not G’s). G was convicted of first degree murder and H was convicted of the included offence of manslaughter.

The accused successfully appealed at the CA. A new trial was ordered.  
The Crown appealed to the SCC.

**Charron** – majority (+4)

**D**: Appeals allowed, convictions restored

**A**: The evidence was used to show the victim’s state of mind. That was relevant to both motive and identity. It was correct in law for the trial judge to instruct the jury to limit the use of the statement. The CA’s concerns about misleading the jury (ie they wouldn’t be able to mentally distinguish b/w the purposes to which they were supposed to use the evidence) is contrary to the way that jurors are to be treated.

**A**: The statement about the victim’s statement of mind went to the nature of the relationship between the victim and G—which was very sour at the time that the victim went into hiding. The fact that the victim believed that he only had G to fear about was relevant because it was an important part of the circumstantial evidence that went to the motive of G.

**R**: Evidence of the victim’s state of mind, insofar as it goes to the nature of the relationship between the victim and the accused, is relevant to motive. The relationship b/w the victim and the accused is always relevant.

**R2**: A statement of the present intention of the declarant cannot be used for the purpose of showing the state of mind of a third-party, including the accused.

**R3**: The intelligence of the jury should be trusted in terms of understanding instructions.

**Fish + Lebel** – dissent

**D**: *Would have* dismissed the appeals and affirm the CA’s order for a retrial.

**A (prejudice – limiting use of statement)**: The great risk of prejudice of admitting the victim’s statement could not be attenuated by the judge’s limiting instruction to the jury.

**A**: Went through the 4 purposes for which the evidence could be used. Found that it would be impermissible for it to be used to infer the state-of-mind of a third party or the accused. It could not be used to suggest that the victim was afraid of G b/c that is irrelevant (does not tend to make the matter at issue more or less likely). 4th, it could have been used to bolster other circumstantial evidence but that failed on PV<PE. It would be too tempting, even with a jury warning, for the jurors to use it for impermissible purposes (e.g. G’s motive).

**R**: It would be impermissible to use hearsay evidence for the purpose of suggest the state-of-mind of a party other than the declarant.

**R2**: Each hearsay statement must also be relevant + material, as well as pass the ultimate discretion of whether PV>PE.

# Hearsay: The principled approach

This “residual exception” to the hearsay rule began with ***Khan*** and its general application was confirmed in ***Smith***. Hearsay must be:

* **Necessary** to allow the Ct to find the truth of the matter in issue (*Smith*) and
* **Sufficiently reliable** to overcome traditional hearsay dangers (*Khelowan*)
* N+R=1 (but prof: not entirely correct, must be a minimum reliability, not perfectly fungible)

*This is established on a case-by-case basis so there is no precedential value* (except insofar as necessity or reliability are defined).

Also the **ToF** is charged with giving weight to evidence so if the criteria of necessity and reliability are satisfied, the lack of testing by cross-examination will go to weight, not admissibility (*Smith*).

The **principled approach *is not used* when**:

1. Oral history evidence is admissible to held in an AR/AT claim if it meets “requisite stnds of usefulness and reliability” w/ sensitivity to the FN perspective and fidelity to CL concepts (*Marshall*)
   1. Oral evidence should not be assessed with “facile assumptions based on Eurocentric traditions” (*Marshall*)
   2. Does not need to be corroborated in order to get any weight (*Williams; Delgamuukw*)
   3. Should not be given more weight than it deserves (*Mitchell)* and should be assessed in light of other evidenced (*Benoit*)
2. An expert opinion based on a hearsay statement is admissible to explain how the expert has reached her conclusions (*Abbey*). However, in assessing weight of the opinion, the court must decide whether at least some of the facts used to form that opinion have been proven (*Lavallee*)

### R v Khelawon – 2006 SCC

*Principled appl’n of the exception to hearsay*

**F**: S, 81-year-old resident of nursing home, was discovered in his room by staff (the cook), badly injured. S advised the book that K, manager of nursing home, had beaten and threatened him. The cook took S home for several days to her house. Following those few days, S visited doctor and said he'd been hit in face and body with cane or pipe. Doctor found that injuries were consistent with S's account but that they also could have been caused by fall. S had a medical history of depression, anger, paranoia, weakness, and dizziness. On the following day, the cook took S to the po station and S made videotaped statement at p.o. station but was not under oath. There was no cross. S was warned about the importance of telling the truth. During the statement, S was generally responsive but also complained of poor management of care-home. There was some corroborating evidence (his stuff was found in garbage bags). 4 other residents also gave videotaped statement at the po station. K and the cook were on bad terms—the cook had recently been given notice by K. The doctor opined that the cook may have coached the statement. At the time of the trial, all of the complainants were either dead or incompetent. There was a Criminal Code mechanism by which the police could have secured more trustworthy testimony due to witness frailty, but they did not.

**P/H:** At trial, judge admitted all 5 videotaped statements, largely based on the extreme similarity between the statements. K was convicted on charges relating to S and D and acquitted of charges relating to other residents.

K successfully appealed his conviction. CA found that trial J erred in admitting the videotaped statements.

The Crown appealed to the SCC (but only for the assault against Mr. S)

**D:** Appeal dismissed. The threshold of necessity was met. The threshold reliability was insufficient to overcome the danger of prejudicial effect outweighing probative value.

**A**: Hearsay is:

1. A statement made in another time and place (“out-of-court”)
2. Which is adduced to prove the truth of its contents
3. And an absence of contemporaneous cross-examination

**A (threshold reliability)**: All relevant factors should be considered in assessing threshold reliability, even those matters only relevant to ultimate reliability. This statement failed to meet reliability because: (i) mental incompetence raised doubt whether he understood the consequences of making the statement, (ii) the complainant might have influenced the cook, (iii) the complainant might have been influenced by his underlying dissatisfaction with the nursing home, (iv) it was possible that his injuries were caused by a fall rather than a beating, and (v) he was unavailable for cross-examination. The trial judges reliance on striking similarity was inappropriate—that only applies to individuals observing the same incident—not different incidents. It’s possible that striking similarity might operate but only if each were also substantively admissible.

**A (values)**: Trial fairness includes the constitutional right to make full answer and defence but also has broader societal concerns, such as having the truth come out in the trial process. Necessity relates to society’s interest in getting at the truth. Reliability seeks to ensure the integrity of the trial process; if evidence is insufficiently reliable, it won’t overcome the dangers of not being able to cross-examine it. Even if a hearsay statement is sufficiently necessary and reliable, the judge may exercise discretion and decide to exclude it if PV<PE.

**A (ultimate v threshold reliability**): The trial J should only judge threshold reliability when assessing admissibility in the *voire dire*. Questions of ultimate reliability must be left to the ToF upon consideration of the entirety of the evidence. This is a constitutional imperative in crim’l law. When considering any factor with threshold reliability, the real question is how it relates to the hearsay danger and if there are any means to overcome that danger.

**R (values)**: One of the underlying rationales for the general exclusion of hearsay is the difficulty with challenging and assessing reliability. However a rationale for the flexible principled approach is to avoid the unwarranted loss of valuable evidence. In the context of the principled approach, courts will always assess whether the dangers of hearsay have been overcome by indicia of reliability.

**R2**: The central underlying concern of hearsay is the inability to test the evidence. The optimal way of testing evidence is through the adversarial system in which evidence is given in court, under oath, and under the scrutiny of contemporaneous cross-examination.

**R3**: Reliability should be contextually analyzed on a case-by-case basis, assessing whether there are indicia of reliability such as inherent trustworthiness (corroborating evidence, no motive to lie) or the KGB factors such as a videotaped statement, made under oath, with an opportunity for cross-examination.

**R4**: In considering necessity, the court may consider whether the party seeking to tender the hearsay evidence attempted to take reasonable steps to secure the evidence in a way that would have overcame the hearsay dangers.

**R5 (framework)**:

1. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions remain presumptively in place (*Starr*)
2. A hearsay exception can be challenged w/ indicia of necessity and reliability. The exception may be modified to bring it into compliance.
3. In “rare cases”, evidence falling w/in an existing exception may be excluded if the indicia of necessity and reliability are lacking in the *particular circs of that case (Mapara*).
4. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

**R6**: The accused’s ability to cross-examine (in order to make full answer and defence) has constitutional status. That was a decisive factor in this case.

### R v Khan

**F**: Mother visits doctor and leaves 3yo daughter alone w/ DR while changing. In the car, daughter tells mother about sexual assault 30 minutes later in the car. There’s semen and saliva on her sweater. This case is pre-DNA. A psychiatrist provides evidence that she wouldn’t be able to make this stuff up

**A**: This satisfied necessity b/c the child was incompetent to testify. This satisfied reliability b/c of circ.s in which it was made, mainly, that (a) child had no motive to lie, (b) the daughter’s story was natural and without prompting, (c) she could not have been expected to know about those sexual acts, (d) her statement was corroborated by real evidence, and (e) she made the statement almost immediately after the event.

**R**: The inherent trustworthiness of a statement may be used to establish reliability if there was no motive to lie and corroborating evidence.

**R2**: First case to use principled approach

**R3**: The necessity standard requires reasonable necessity.

### R v Smith – 1992 SCC

**C:** murder

**F**: K (victim) told her mother that she was with Smith on the night of her murder. She called her mother 4 times and told her that.

**A**: Ct analyzed the reliability of her phone calls, looking at the circumstances and whether she had a motive to lie. Court found that she was capable of deceit (given that she was using a fake name and stolen credit card). She might have lied about S returning to the hotel, she might have lied to prevent her mother from sending someone to pick her up. Court did not decide whether she lied but found that the statement could not be changed under cross-examination and so its admission could not be justified.

**R**: The principled approach in *Khan* have greater application.

### R v Starr – 2000 SCC

**R**: Reaffirmed the continued relevance of existing hearsay exceptions and their value in adding predictability and certainty. However, necessity and reliability remain the touchstones of admissibility so existing hearsay exceptions will be subject to those standards and may be abolished or modified.

**R2**: The present intention exception to hearsay was modified in accordance w/ necessity and reliability. It now requires that the statement was also made in a natural manner and not under circ.s of suspicion.

### R v Mapara – 2005 SCC

**C**: First degree murder

**F**: Contract killing involving the co-conspirator’s exception to hearsay.

**R**: The governing framework of necessity and reliability which underlies the principled approach was outlined:

1. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule.
   1. The traditional exceptions remain presumptively in place.
2. An established hearsay exception may be challenged using the principled approach (necessity and reliability). The exception can be modified as necessary to bring it into compliance w/ the principled approach.
3. 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.
4. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

## Necessity (“Reasonable Necessity” (*Khan*))

1. The evidence must be **reasonably necessary** (*Khan; Khelowan*). This is **more flexible** than death or incompetence of a witness.
2. The **goal** is to promote the **social interest in the search for trust** (*Khelowan*)
3. What’s the **context**?
   1. **Criminal**: the analysis is tipped in the favour of the accused by relaxing the standards to allow full answer and defence
   2. **Civil**: necessity may incorporate considerations of expediency if it would be expensive or burdensome to call the witness
4. Necessity is general: can the court get at the truth (*Smith*). It does not refer to a specific partisan purpose. Therefore, it may require that the party seeking admission have made **reasonable efforts** to obtain direct evidence and protect the integrity of the trial process.
   1. In *Khelowan*, the court noted that necessity may consider whether the party seeking admission took all reasonable efforts to secure the evidence in order to preserve the rights of the other party.
   2. This will not bar a finding of necessity (*Port Chevrolet*)
   3. The unlikelihood of a witness cooperating without demonstrably making an effort to secure cooperation is insufficient (*Simpson*)
      1. In *Simpson* (ONCA), an undercover po’s non-contemporaneous written notes were inadmissible b/c Crown didn’t show that they tried to call a co-conspirator to give the evidence.
5. Necessity relates to a particular witness’ evidence; it’s irrelevant if other evidence from other witnesses is available.
6. Necessity is judged at the time the evidence is being adduced
7. What type of necessity (*Khelowan*)
   1. **Witness unavailability**
      1. Death (*Khelowan*)
      2. Incompetence (*Khan*)
      3. A real possibility of psychological trauma if witness is forced to testify (*Nicholas*)
         1. Does not require proof of trauma but it is more than fear or disinclination (*WJF*)
   2. **Testimonial unavailability**
      1. Recanting witness (*KGB*)
      2. A young child who clamps up (*WJM* – 6yo)
      3. Witness can no longer remember

### R v Nicholas – 2004 ONCA

**F**: Complainant was sexually assaulted. She did not see her assailant because her face was covered with a pillow. She called 911 and her message was recorded. Six hours later, she also gave the po a videotaped statement. She could only testify to the fact of her sexual assault, not identity. Her psychiatrist testified that she was too traumatized to testify and that she had PTSD and might commit suicide if forced.

**I**: Was the hearsay evidence reasonably necessary?

**D**: yes

**R**: The witness is unavailable if there is a real possibility of psychological trauma.

## Threshold Reliability

1. The **goal** is to ensure that evidence is sufficiently reliable to overcome the dangers arising from the difficulty of testing the statement.
2. The **value** is the integrity of the trial process (i.e. fairness to the accused)
   1. The right to full answer and defence (including cross examination) has constitutional status for an accused person (*Khelowan*)
3. The **factors** used to consider **threshold** reliability (i.e. admissibility by judge-gatekeeper) are the same as those used to consider **ultimate** reliability (i.e. weight by ToF) – *Khelowan* (overturned *obiter* in *Starr*).
4. There are two ways to establish reliability, both of which may be considered together (*FJU*):
   1. **Testability**: are there adequate substitutes for testing the evidence (*Khelowan*)?
      1. Testability should be assessed first since it is an easier/narrower test and if it is met, there is no need to inquire into inherent trustworthiness (*Hawkins*)🡪 but should b/c they can combine
      2. Adequate substitutes include:
         1. The statement is made under oath (*KGB*)
         2. The statement was **recorded** (videotaped or audio-recorded) (*KGB*)
         3. There was **contemporaneous** **cross-examination** (*Hawkins*)
         4. The person is **now available to be cross-examined** in court on making that out-of-court statement (*KGB*)
      3. This is not a formula
   2. **Inherent trustworthiness**: there’s something about the circumstances of the statement which speak to the truth.
      1. Consider whether the statement was made:
         1. Spontaneously (*Khan*)
         2. Naturally (*Khan*)
         3. Without suggestion (*Khan*)
         4. Reasonably contemporaneously with the events (*Khan*)
         5. By a person who had no motive to fabricate
            1. If there is an absence of motive, then motive is a neutral factor (*Czibulka*)
            2. This goes to the motive of the declarant, not the receiver (*Smith*)
         6. By a person with a sound mental state
         7. Against the person’s interest in whole or in part
         8. By a young person who would not likely have the knowledge of the acts alleged (*Khan*)
         9. Whether there is corroborating evidence (*Khan*)
      2. Also consider safeguards that would expose fabrications (Paciocco + Stuesser):
         1. Was the person under a duty to record the statements
         2. Was the statement made to a public official
         3. Was the statement recorded
         4. Did the person know the statement would be publicized
      3. This is a high standard. There must be a “certain cogency about the statement that removes any real concern about truth and accuracy” (*Couture*)
   3. **Substitutes** and **inherent trustworthiness** may combine to establish reliability (*FJU*)
      1. Striking similarity b/w statements, coupled w/ cross-examination (*FJU*)

### R v KGB – 1993 SCC

**F**: The young accused and his brother are walking together when a car of 4 young men pull up and they begin to fight. One of the 4 is stabbed to death. The other 3 boys give statements under oath at a po stn with a parent present (some a lawyer) in which they note that the accused did the stabbing. At trial, they all recant.

**A:** Hearsay will arise when (a) a witness gives an out-of-court statement, (b) which is adduced for the truth of its contents, *but* (c) does not appear before the court to repeat or adopt that statement under oath.

**R**: Necessity should not be equated with witness unavailability. It is more flexible, including testimonial unavailability.

**R2**: Reliability will be sufficient in circumstances where (i) the statement is made under oath or solemn affirmation with a warning of the significance of same, (ii) the statement is fully videotaped, and (iii) there is an opportunity to cross-examine. There might also be other circumstantial guarantees which render statements substantively admissible on the basis of reliability. Threshold reliability seeks to ensure the procedural safeguard—that the statement isn’t exceptionally dangerous on account of an inability to uncover untrustworthiness. The ToF ultimately must ultimately decide whether the evidence is reliable and deserves weight.

### R v FJU – 1995 SCC

**F**: The complainant told the po that her father was having sex with her almost every day. She gave considerable detail and described 2 physical assaults. The interviewing po attempted to tape the interview but the tape recorder malfunctioned so he subsequently prepared a summary based partly on notes and partly on his memory. Immediately after, the same officer interviewed the accused but did not tape the interview. The father admitted to having sex with his daughter “many times”, described similar acts and 2 physical assaults. At trial, the complainant recanted and the father denied making any such statement to the po.

**A**: The statement was not made under oath, not videotaped, but there was opportunity for cross examination. Her statement was also given independently and was strikingly similar to that of her father; the only likely explanation was that they were both telling the truth.

**R:** Necessity and reliability must be interpreted flexibly, not becoming a rigid pigeon-holing analysis.

### R v Hawkins – 1996 SCC

**F**: H, a police officer, was charged with corruption and obstructing justice. His gf (now wife) made a statement at a preliminary inquiry which implicated H. It was made under oath, recorded, with contemporaneous cross-examination. At the later trial, she was incompetent due to the spousal incompetence rule.

**R**: Where there are adequate substitutes for testing the evidence, such as an oath, recording, and contemporaneous cross-examination, that is sufficient to meet reliability (due to testability). There is no need to further inquire into inherent trustworthiness.

## Prior Inconsistent Statements of non-party Witnesses

These are admitted under the **principled approach on a case-by-case basis** (*Khelowan*). This occurs when a witness recants (*FJU*).

At CL, these were inadmissible for truth purposes unless adopted by the witness. If they weren’t adopted, they could only be used to challenge credibility.

Necessity is met if the **witness recants** (*FJU*). In considering reliability, look to whether the “optimal conditions” set out in *KGB* are met. These are not prerequisites.

* Oath or solemn affirmation with a warning about consequences of same
* Statement is videotaped in its entirety
* Opposing party has full-opportunity to cross-examine
  + A full opportunity does not occur when the witness denies or cannot recall the statement; but, recanting with an explanation for the recant meets the “fullness” element
  + When this is fulsome, the other indicia of reliability are less necessary; when it is limited, the other indicia must be strong
* Other indicia of reliability may be used if they address the fear of fabrication (e.g. unacknowledged oral statement should be excluded

Inherent trustworthiness may be met if two prior out-of-court statements by different parties about the same event (*cf different – Khelowan*) are **strikingly similar** (*FJU*). However, to admit prior inconsistent statements for their truth due to striking similarity, both statements must be admissible.

In KGB, it was envisioned that counsel would first exhaust the **s. 9 procedures**.

* First, the party should state its intention to tender the prior inconsistent statement and then a *voir dire* will begin.
* Calling party bears burden on a balance of admitting the prior inconsistent statement for its truth
* The calling party must show threshold reliability on a case-by-case basis
* Must show voluntariness on a balance if the statement was made to a person in authority (and no other factor that would bring the administration of justice into disrepute)
* Judge must decide and give reasons

### CEA, s. 9 – adverse witnesses

(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony… [but before introducing that evidence, the prior inconsistent statement will be particularized for the witness and he will be asked whether or not he made the statement].

(2) Where a p. producing a witness alleges that the witness made [a prior written or audio/video recorded statement], inconsistent with the witness’ present testimony, the ct may, w/o proof that the witness is adverse, grant leave to that p. to cross-examine the witness as to the statement and the court may consider…. whether in the opinion of the court the witness is adverse.

Note: subsection 2 has been given judicial interpretation to allow the party to prove the previous inconsistent statement, although the statutory language seems to suggest otherwise. (2) is more broad and flexible than (1) which is very limited. However, (2) needs written or recorded statements; whereas (1) will also apply to oral statements. Notes from a convo taken by someone else that is less than a complete transcript does not fall into (2). The process for (2) is (*Milgaard*):

1. Counsel must advise that she is bringing a subsection 2 application
2. *Voir dire* begins
3. Counsel shows the judge the statement and points to inconsistencies
4. If judge agrees, he/she invites counsel to prove the statement
5. The witness is asked if he made the statement—if he admits, it’s proven. If he denies, counsel may use other evidence to prove that he did.
6. Opposing counsel may cross and show reasons why it would be improper to allow the evidence to be presented before the jury.
7. The judge decides whether the statement was made and whether the ends of justice would be best serve by allowing the cross-examination

## Hearsay in FN context

This is not a different category of hearsay, just a particular application in the context of s. 35 litigation.

### Newman article

There is a broad mission of reconciliation present in the jurisprudence dealing with the interaction of evidence law and FN oral history.

Although Vickers J in *Tshinlquot’in* was careful to restrict his application of evidence law to the case at hand, Newman argued that the informal process developed is more generalizable.

### Tshilquot’in Nation v BC – 2004 BCSC

**F**: P brought an action seeking declarations of AR + AT. P was a culture with only oral histories; none were written or physical (e.g. totem poles). Defendants Canada and BC objected to admissibility of hearsay evidence (oral histories). The trial was supposed to last at least 2 years and on top of that, the defendants wanted the court to adopt a formal procedure to determine the admissibility of oral history and tradition evidence.

**R1**: Where counsel intends to introduce oral histories of FN people, which is a form of hearsay, counsel should outline at the outset of the case how the oral history was preserved, who is entitled to relate the history, community practices with respect to safeguarding the integrity of the oral history, who would be called at trial to relate such evidence, and the reasons that said witnesses were being called to testify.

**R2**: FN hearsay evidence should be treated like other hearsay evidence, subject to the s. 35 promise of reconciliation. It doesn’t require a *voir dire*. He used an informal process:

1. Introductory remarks: Counsel should make it’s introductions outlining the evidence and witnesses (R1)
2. Preliminary inquiry:
   1. The court should assess whether the necessity and reliability requirements of admissibility have been met
      1. Necessity is met due to death of persons involved
      2. **Reliability** is assessed by a preliminary examination concerning (conducted by PC):
         1. Personal attributes of the witness relating to her ability to recount hearsay evidence of oral history
         2. Witness’ sources generally
         3. Witness’ relationship to sources
         4. The general reputation of the source
         5. Whether the source witnessed the event or was told of it; and
         6. Any other issue relevant to reliability
      3. DC has the opportunity to challenge admissibility after the preliminary inquiry or they may save arguments based upon weight until the conclusion of the trial.

**R3**: The test for AR is: (look at VDP, btr)

* Practice of rights at pre-contact
* Reasonable continuity to contemporary practice
* Practice is integral to distinctive culture

# Cross-Examination and Credibility

**\*KEY PRINCIPLE IS THE SEARCH FOR TRUTH IN ADVERSARIAL SYSTEM\***

## Cross-Examination

Cross-examination is a **vital component of adversarial process**. For the **accused**, it is part of the **s. 7 *Charter*** right to full answer and defence (*Lyttle*). Therefore cross-examination by DC in the crim’l context has constitutional status—the same cannot be said for civil or admin’ve cases.

In Canada, we follow the English Rule, wherein you can inquire into any relevant matter, either (1) eliciting favourable testimony or (2) discrediting the witness (or their testimony).

**Admin’ve tribunals**: Many have their own procedural rules. You need to look at enabling leg’n. Some might be far more flexible due to the goal of access to justice.

**Leading questions** are permitted on cross, unless the witness is partial to the party conducting cross.

**Collateral facts rule**: you cannot present evidence to contradict a witness on a collateral matter. Generally, when they answer a question relating purely to credibility, that’s it. This is not due to a lack of relevancy, but due to efficiency. It may confuse the ToF by adding distracting side issues, may take undue time to deveop, and may unfairly surprise the witness. However, it’s at the discretion of the trial judge to allow the evidence if its probative value is not outweighed by the counterbalancing policy concerns; for DC, the counterbalancing concerns must significantly outweigh the value in receiving the evidence. Therefore, if the collateral fact is sufficiently valuable and sufficiently important to issues before the court, outweighing the dangers (confusion, time, unfair surprise), it should be allowed. This is a more flexible approach, rather than the categorization of types of collateral facts (*Phipson* approach); it should be done on a case-by-case basis.

Briefly, Phipson categories were (i) bias, interest, corruption—always relevant to reliability, colours witness’ whole testimony (*Hitchcock*); (ii) previous convictions; (iii) reputation as to trustworthiness (e.g. bad reputation); (iv) expert opinion on reliability of witness.

**Limitations on cross**: must be relevant, cannot be repetitive or harassment; cannot put questions to the witness where the prejudicial effect outweighs the probative value. The cross-examiner must have a **good faith basis** for asking the question. It might involve uncertain information from which the cross-examiner nevertheless thinks may be part of a hypothesis that is honestly advanced on a reasonable inference, experience, or intuition. It cannot be recklessly advanced, nor can the cross-examiner advance information that is knowingly false. This goes to the ethical obligations of lawyers not to mislead the court. The court may order a **voir dire** if a line of questioning seems tenuous or suspect, in order to obtain counsel’s assurance that a good faith basis exists. The key parameters are relevancy and materiality.

**Limits on Crown in cross of the Accused**: Crown cannot ask the accused about the veracity of Crown witnesses in order to undermine the presumption of innocence (e.g. why would she say that?). It’s **very** **important** that the Crown has a **good-faith basis** for asking a question—should not use information for which the Crown has doubt and should not rely on evidence that is too unreliable. While other witnesses can be asked about discreditable conduct and associations, the accused cannot. The exception is when the accused introduces good character evidence, which the Crown can attempt to neutralize, but may not seek to destroy the accused (*R v MM*). The discreditable conduct of the accused may be introduced if it is a vital part of the context and background and incidentally reflects bad character (*R v Cameron*, e.g. A was a drug dealer (theory, A was the dealer of the victim, who was murdered).

**Failure to cross-examine: the rule in *Brown v Dunn*:** A party who wants to impeach an opponent’s witness must direct the witness to that fact by appropriate questions during cross. This is a matter of fairness. There are no fixed consequences. They may range from re-calling the witness, to giving less weight to the contradictory evidence/submission, or rejecting the evidence altogether. When the Crown failed to cross-examine the accused after what appeared to be reasonable exculpatory testimony, that was found to be tantamount to acceptance of the accused’s version (*R v Christensen*). Examples are making a statement in closing about how the complainants (who were all called as crown witnesses) had actually colluded to invent the story of their sexual assaults, but the DC failed to put that theory to the complainants.

**Prior inconsistent statements**: these may be used to impeach the credibility of the witness or reliability of testimony; they may never be used for the truth of their contents unless they are adopted by the witness (or used as hearsay, e.g. *R v KGB*). Fairness demands that the statements be put to the witness. Steps:

1. Counsel must ask witness to confirm present testimony in order to clarify and show inconsistencies.
2. Counsel must then confront the witness with the prior statement.
   1. If oral, requires “the circumstances of the supposed statement, sufficient to designate the particular occasion”
3. The prior statement must be put to the witness to show the inconsistency.
4. The witness may be asked to adopt the prior inconsistent statement. If the witness refuses, it goes to credibility. If the witness is a party (or the accused), it can be admitted for the truth of its contents.
   1. If the non-party witness refuses, the cross-examiner may be allowed to call evidence to prove the statement. But for collateral matters, that won’t be allowed—it can only go to credibility.

## Bad Character + Prior convictions

### Criminal Code, s. 666 – evidence of character

Where, at a trial, the **accused adduces evidence of his good character**, the prosecutor may, **in answer** thereto… adduce evidence of the **previous conviction** of the accused for any offences…

### CEA, s. 12 – Examination as to previous convictions

(1) A **witness may be questioned** as to whether the witness has been **convicted** of any offence… including such an offence where the conviction was entered after a trial on an indictment.

(1.1) If the witness either **denies** the fact or **refuses** to **answer**, the **opposite party may prove** the conviction.

(2) A **conviction may be proved** by producing

(a) [a cert. containing substance of indictment or a copy of a summary conviction signed by a clerk or an officer with custody of the records] and

(b) proof of identity.

### BCEA, s. 15 – questioning a witness as to convictions and proving convictions

(1) Subject to subsection (4), a **witness may be questioned [about prior convictions**] and if the witness **denies** the fact or **refuses** to answer, the **opposite party may prove the conviction**.

(2) On **proof of the identity of the witness** as the convict, a certificate that

(a) **contains the substance and effect** of the indictment and conviction for the **offence**, and

(b) is **signed** by

(i) the **registrar** or clerk of the court, or other officer having the custody of the records of the court at which the offender was convicted, or

(ii) the **deputy of a person** under subparagraph (i),

is **sufficient** **evidence** of the **conviction** of the witness…

(4) Subsection (1) **does not apply to the questioning of a witness in a civil proceeding** conducted before a **jury**, **if** the judge thinks that the questioning of that witness would **unduly influence the jury**.

## Cross-examination of Prior Inconsistent Statements

### BCSC Rule 40 (22) – any party may contradict testimony

A party may **contradict or impeach the testimony of any witness**.

### CEA, s.10 – cross examination as to previous statements

(1) On any trial a witness may be cross-examined as to previous statements [written or recorded] without the witness being… given the opportunity to… take cognizance of the statements, but, if it is intended to contradict the witness, the witness’ attn. must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness and the judge… may require the production of [the statement] for the purposes of the trial as the judge thinks fit.

(2) A deposition of a witness… before a justice on the investigation of a crim’l charge… signed by the witness and the justice, returned to and produced from the custody of the proper officer shall be presumed, in the absence of evidence to the contrary, to have been signed by the witness.

### CEA, s. 11 – cross examination as to previous oral statements

Where a witness, on cross-examination as to a former statement… inconsistent with his present testimony, does not admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

### BCEA, s. 13 – cross examination of witnesses as to previous statements in writing

(1) Subject to subsection (2), a **witness may be cross examined as to previous statements** made by that witness in writing, or reduced into writing, relative to the subject matter of the proceedings, **without the writing being shown to that witness**.

(2) If it is **intended to contradict the witness** by the writing referred to in subsection (1), the **attention of the witness must, before the contradictory proof can be given**, be **called to those parts of the writing** that are to be used for contradicting the witness.

(3) At any time during the proceedings, the judge… may

(a) **require the production of the writing**… for his or her inspection, and

(b) after that, **make use of the writing for the proceedings as he or she thinks fit**.

### BCEA, s. 14 – proof of prior inconsistent statement made by witness

(1) Subject to subsection (2), if a witness, in cross examination as to a **former [inconsistent] statement**… **does** **not distinctly admit to making the statement**, proof may be given that the witness did in fact make that statement.

(2) Before giving the proof referred to in subsection (1),

(a) the **circumstances of the supposed statement**, **sufficient** to designate the **particular** occasion, m**ust be mentioned to the witness**, and

(b) the **witness must be asked whether or not the witness made the statement**.

## Cross-Examining One’s Own Witness

Generally speaking, one cannot cross-examine one’s own witness. To do so, one first needs a ruling from the trial judge. This means that you cannot ask leading questions.

A **hostile** witness is one where the witness is incapable of steering a path to accurate or complete info because the witness is not co-operating. This may be due to a hostile animus or an interest contrary to that of the crown (e.g. fear of the accused and self-preservation). The trial judge must simply be satisfied that a hostile animus exists due to demeanour, attitude or the substance of the evidence. The chief examiner need not show a motive for this hostility. This is the CL stance. Some case law has been very rigid, insisting an actual hostile animus, so that if the witness lies politely, that’s insufficient.

By statute, one can cross-examine one’s own witness if they are **adverse**. This is broader and can encompass some of the downfalls of the rigid CL requirement of hostility. Adverse evidence is unfavourable in the sense that it is opposite to the position taken by the party calling the witness. The trial judge must be satisfied that the witness is adverse either due to their demeanour or attitude, their credibility, the materiality of the inconsistencies with prior statements, and the circumstances in which the statements were made. If the court gives the party leave, they may contradict the adverse witness.

**Scope** of the cross of adverse/hostile witnesses is unclear—there should be law reform. P&S thought it should include the ability to challenge the credibility of the harmful evidence *and* attempt to provoke helpful evidence.

**Implications for KGB application**: In KGB, it was envisioned that counsel would first exhaust the s. 9 procedures (subsection 1 is similar to that in subsection 2) and then if that fails, would then tell the court that they are using it to impeach the credibility of the witness and for the truth of its contents and then go through the hearsay analysis. However, the BCCA in *Glowatski* held that this was not a matter of law and if on the facts of the case satisfy s. 9 (indicia of reliability, agrees statement made, but forgets contents (necessity)).

### CEA, s. 9 – adverse witnesses

(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony… [but before introducing that evidence, the prior inconsistent statement will be particularized for the witness and he will be asked whether or not he made the statement].

(2) Where a p. producing a witness alleges that the witness made [a prior written or audio/video recorded statement], inconsistent with the witness’ present testimony, the ct may, w/o proof that the witness is adverse, grant leave to that p. to cross-examine the witness as to the statement and the court may consider…. whether in the opinion of the court the witness is adverse.

**Note (steps)**: subsection 2 has been given judicial interpretation to allow the party to prove the previous inconsistent statement, although the statutory language seems to suggest otherwise. (2) is more broad and flexible than (1) which is very limited. However, (2) needs written or recorded statements; whereas (1) will also apply to oral statements. Notes from a convo taken by someone else that is less than a complete transcript does not fall into (2). The process for (2) is (*Milgaard*):

1. Counsel must advise that she is bringing a subsection 2 application
2. *Voir dire* begins
3. Counsel shows the judge the statement and points to inconsistencies
4. If judge agrees, he/she invites counsel to prove the statement
5. The witness is asked if he made the statement—if he admits, it’s proven. If he denies, counsel may use other evidence to prove that he did.
6. Opposing counsel may cross and show reasons why it would be improper to allow the evidence to be presented before the jury.
7. The judge decides whether the statement was made and whether the ends of justice would be best serve by allowing the cross-examination

### BCSC Rule r. 40(21) – examination of a witness

The **court may permit** a party

(a) to examine a witness…

(i) by use of a **leading Q**

(ii) by referring the witness to a **prior statement**

(iii) Respecting the **interest of the witness** in the **outcome** of the **proceeding**, or

(iv) Respecting any **rel’nship** or **cxn** b/w the **witness** and a **party**, or

(b) to cross-examine a witness, either generally or w/ respect to one or more issues.

### BCEA, s. 16 – impeachment and contradiction of witness

(1) A **party producing a witness must not impeach the credibility** of the witness by **general evidence of bad characte**r, but if, in the opinion of the judge… the **witness proves adverse**, that party may

(a) **contradict the witness by other evidence**, or

(b) subject to subsection (2) and **by leave of the judge** or person presiding, **prove that the witness made at other times a statement inconsistent with the present testimony** of the witness.

(2) Before giving the proof referred to in subsection (1) (b),

(a) the **circumstances of the supposed statemen**t, sufficient to designate the **particular** occasion, must be **mentioned to the witness**, and

(b) the **witness must be asked whether** or not the witness **made the statement**.