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General Principles of Evidence

General Evidence Principles

1. **Admissibility**: Is it admissible? This determination is made by the trial judge
    - Does the evidence have probative value (relevant + material)?
    - Is there any prejudicial effect?
    - Determine PV in relation to PE to determine if PV > PE
2. **Limitations**: Are there any limitations? The evidence can be subject to special rules after it has been admitted. Ex: it can only be used to determine credibility, not guilty. *What is the purpose of admitting?*
3. **Weight**: What weight should be given to it? Jury can be told to be cautious about using certain types of evidence

Policy for strong evidentiary rules: weak evidentiary rules can result in wrongful convictions

Sources of Evidentiary Rules [these sources reflect the principled nature of evidence law]:

1. Statute
2. The common law
3. The Charter

The law of evidence represents a tension between the search for the truth and justice. It is arguable which one is the primary goal of evidence rules.

Assessing Probative Value and Prejudicial Effect:

Fundamental Rule of Evidence: **all evidence which is relevant and material is admissible until proven otherwise**. There is an overarching presumption in favour of admissibility. ***R v FFB.*** However, it is important to note that several areas are presumptively in admissible.

Presumptively Admissible	Presumptively In-Admissible
Eyewitness identification	Extrinsic misconduct evidence
Fact of a prior conviction (***Corbett*** hearing)	Expert Opinion
Child witness	Prior inconsistent statements
Confessions of the accused	Hearsay
Information where a non class privilege is claimed	Statement obtained in breach of Charter rights
	Evidence of silence

Each piece of evidence must pass the **probative v prejudicial** test [remember this factors into every evidentiary analysis!].
FOUNDATIONAL PRINCIPLE: If the PV exceeds the PE, it is admissible.

Probative	Prejudicial
Concerns BOTH relevance and materiality **Relevance:** Does it make something more or less likely? **Materiality:** Concerns a matter in the proceeding Test: the evidence tends to increase or decrease the probability of a fact in issue *there is no minimum threshold for PV	There are two main forms of prejudice: Prejudice against the **accused:** • It might affect the TOF's **reasoning** process. • It might affect the TOF on an **emotional** level (ex: bad character • It might indirectly affect reasoning by, for instance, drawing the trial out so long that the TOF forgets (consider how much evidence) • about other important evidence or distinctions. Prejudice against the **administration of justice**: • Could harm the public confidence in justice system • Could set a dangerous long term precedent Also prejudice to the **broader community**
Analysis: (i) break down all the facts that Crown must prove, (ii) make sure each relates to a fact at issue, (iii) show there is some PV, and (iv) make sure PV outweighs PE	

R v Mullins

There is no finding of factual innocence because it is not within the purpose of the criminal law, a criminal trial is to determine whether the Crown has proven its case BARD

- Declines to grant a third verdict of innocence, apart from guilty/not-guilty [*involved a wrongful conviction related to a child murder based on flawed expert evidence*]
- Finds that the Court has no jurisdiction (which comes from statute) to make a declaration of innocence
- Would also change the meaning of not guilty, and create two classes of people, those who were factually innocent and those who benefited from the presumption of innocence and the high standard of proof BARD

Role of the TJ: : Doesn't need to be entirely passive, can ask witnesses questions, interrupt them and if necessary call them to order→ the judge may and must intervene for justice to be done

Can the judge comment on the evidence? Considered in:

R v Lawes:

- A Tj is entitled to comment on evidence while instructing the jury,
- Just need to make it clear that the opinion is given as evidence and not direction
- Found not to contravene right to trial by jury in 11 (f)→ will sometimes have to make comments that are desirable or required or to direct jury to focus on critical issues

- Also required to make clear to the jury that there are not bound by the judges view, and that the judges opinions are not stronger than what the facts warrant and the opinions are not overstated to the point where it is likely that the jury will be overawed by them

R v FFB

All relevant evidence is admissible unless it is barred by a specific exclusionary rule.

Accused was charged with sexual assault; Crown can thus call evidence related to the assault. The Crown called other evidence from same witnesses of controlling and violent behavior of the accused.

Bad character evidence is admissible if:

1) It is relevant to some other issue beyond disposition or character;
   - In this case, The EME evidence was relevant because it went to why disclosure was so late—fear of the accused
2) The probative value outweighs the prejudicial effect
   - Clear that you can't lead evidence just to show that he was a bad guy, but it had probative value to the issue raised by the defence

- A new trial was ultimately ordered because no limiting instruction was given, ex: you heard evidence of the accused alleged domineering acts, you were given that evidence for a specific purpose (to evaluate why they waited to complain);

Disclosure:

- **General Rule (criminal context): Must turn over the entire investigative file to the Defence *Stinchcombe*-**must turn over all the information because doing so if in the interests of justice and Charter values, i.e RFAD
- **Defence**: doesn't have the same obligation, except with alibi and expert evidence

R v Seaboyer

Difference between the defence and pros. evidentiary standards in criminal proceedings

- Crown evidence is admissible when the probative value of the evidence **exceeds** its PE
- Defence evidence is admissible as long as the prejudicial effect does not **substantially outweigh** the probative value [wards against wrongful conviction and supports RFAD]

When to deal with evidentiary issues: (i) primarily before trial (pre-trial motions), (ii) evidentiary rulings *during* trial, or (iii) on appeal

The Burden of Proof

Evidence must be considered AS A WHOLE; do not apply the BARD standard to each piece of evidence as a whole.

Rather, consider the evidence together ***R v Morin***.

The jury should be instructed that the facts are not to be examined separately and in isolation with reference to the criminal standard

Per ***R v Starr***: BARD is closer to AC than BOP

Credibility and its relation to reasonable doubt

R v W (D)→Formula for the standard of weighing two competing cases in a criminal case:

1) If you believe the evidence of the accused, you must acquit
2) If you do not believe the testimony of the accused but you are left in reasonable doubt, you must acquit
3) Even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence, which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused

In the civil context, the judge is deciding whether a fact occurred on the BOP; WD Standard is not appropriate

Principle: Don't ignore evidence that you don't necessarily accept but raises a reasonable doubt

Was at one point included in jury instruction publications→ get rid of evidence you don't accept, then focus on rest of evidence for your deliberations. This is the wrong approach

Types of Evidence

Direct Evidence

Direct evidence is evidence that is directly available to be used *without* drawing any further inference.
Examples: eye-witness testimony where the witness sees the accused commit the offense. If you accept that evidence, you don't have to do anything further with it to convict.

Source of error:
1) Reliability – the witness is mistaken;
2) Credibility – the witness is lying

Circumstantial Evidence
Evidence that requires the TOF to make a further inference
Sources of Error:

1. Reliability
2. Credibility
3. Drawing the wrong inference – multiple plausible inferences can be drawn from the same circumstantial evidence even if it is reliable and correct. Is the only reasonable inference to be drawn.

Example: see someone with a knife standing over the body of someone

Special rules about circumstantial evidence
Where the evidence is entirely circumstantial, and in a criminal context, judges will give a special instruction

- In order to convict on the RD standard have to be convinced that the evidence as a whole supports the inference that the accused is guilty, and that there is no other reasonable inference [***R v Dhillon***]
- Admissibility of individual pieces of circumstantial evidence
    - Requires: **proof of underlying facts + the inference must logically flow**
    - Can't present circumstantial evidence that only gives rise to speculative inferences (***Munoz***)
    - If it is too speculative it will have insufficient probative value to be admitted
    - Where is the dividing line between a speculative and a reasonable inference? You don't subject each piece of evidence to a piecemeal test. Have to look at all the evidence together
    - For the individual evidence to be admitted doesn't require that it's the only reasonable inference [***Munoz***]. (that's just the standard for a conviction at the end)

R v Munoz*:*
A reasonable inference requires i) proof of underlying facts; ii) inference must logically flow
Accused were on trial for conspiring to kill F's wife. There was no direct evidence implicating the accused → all three men had been housed in the same detention centre. Crown's sole witness said he discussed with the accused depositing 1k with the accused lawyer. Did not discuss conspiracy.

- An inference is a deduction of fact, which may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that **may**, not **must** be drawn in the circumstances
- There are two ways in which inference drawing can become impermissible speculation
    - 1) **Primary facts must be established by the evidence→** if they are not, then any inferences drawn will be speculation
    - 2) **The proposed inference cannot be reasonably and logically drawn from the established primary facts**
        - Note not possible to find a bright line, but it is drawn by laws of logic
        - However, requirement of logical probability does not mean that the only reasonable inferences that can be drawn are the most obvious or the most easily drawn
- Thus, for the inference to be reasonable, the underlying facts have to be established, and the inference must logically flow. If it is a mere possibility, then it is more likely speculative. It does not have to flow easily.

Essentially, law of evidence is governed by inductive reasoning; it is the process by which we draw a logical connection between proposed evidence and a material fact

Real/Demonstrative Evidence

Real evidence: physical objects actually involved in the case that can be presented in Court, ex: blood spatter, bullet casings

- This type of evidence will have to be authenticated, ex: taking photos of crime scene, proven chain of custody

Core principles for photos and video:

- Per ***R v Penney***, to be admissible, is **it be authenticated under oath? Is it somehow misleading such that it is prejudicial?**
- As above, needs authentication in front of the jury; may have to hire an expert to say it hasn't been photoshopped; but doesn't need an independent witness [***Nikolovski; Schaffner***]
- Real/demonstrative evidence is generally highly probative (***Nikolovski***)
- Can be very powerful because of appearance of neutrality
- Danger is in the inherent prejudicial impact that can be inspired by very graphic videos/photos
- In order to secure admissibility, need to show that the evidence demonstrates something that something less graphic could not (***Kinkead***)
- Judge can edit, once again admissibility is not an all or nothing proposition [***Kinkhead***]

R v Nikolovski

Supreme Court endorses video evidence; admissible as natural extension of photos.

Accused was convicted of robbing a convenience store. Sole witness could not identified with any certainty the person in the videotape as the accused. TJ relied on own comparison btw the accused and robber to conclude accused was the robber.

At issue: can the videotape alone provide the necessary evidence to enable the trier of fact to identify the accused as the perpetrator of the crime?

- Video is generally neutral, independent, and it doesn't have trouble remembering.
- Video evidence isn't always admissible. Depends on things like quality of the video, length of video, whether it gives a clear picture of events and the perpetrator.
- A trier of fact should not be denied the use of a videotape because there is no intermediary in the form of a human witness to make some identification of the accused; can be used as sole basis to ID Accused
- Also can be used to determine whether the crime happened
- The weight to be assigned to the evidence depended on: degree and clarity and quality of the tape, the length of time the accused appears on the videotape
- Jury should be instructed specially when asked to identify the accused in this manner: must consider whether it is of sufficient quality and shows the accused long enough for them to conclude that identification has been proven BARD
- In this case, it didn't matter that the clerk couldn't identify A; she was concerned with self preservation, not identification

R v Schaffner

Appellant found guilty of stealing money from NS Liquor Commission, video surveillance depicted irregularity in conjunction with the appellant

Appellant argued that shouldn't be admissible on the basis that photo evidence must be verified by oath by a witness as to accuracy and fairness; argued same principles should apply to video evidence

- Court: photo is admissible if it accurately represents facts i+ s not tendered to mislead and is verified on oath by a person
- Here, the police officer described the equipment, its location, reasons, operation
- TJ considered appropriate factors; tapes were properly authenticated

R v Penney

To be admissible, needs

1. **Is it authenticated under oath?** Ie is it what alleges itself to be. Also has to capture some relevant issue.
    - One way to authenticate it is to have the person who filmed/photographed testify
    - If the recording is automated, you can get someone who is familiar with the system, or someone who is an expert, to authenticate it
    - Otherwise, you can show it to someone who was there, and get them to verify that this is footage of the event.

2. **Is it somehow misleading such that it is prejudicial**
    - It can be enhanced, digitally altered, filmed from a misleading perspective
    - If it is misleading, the probative value is lessened and the prejudicial value is increased

In this case the video was flawed because there wasn't a continuous chain of events, was selective about what images to tape (selected the most gory ones), was left at a place where it could have been altered for 10 months. The probative value depends what purpose you want to use it for. If it was an issue of identity, the tape would have had more probative value. Note that most video problems will go to *weight*

R v Kinkead

Crown wants to present a lot of graphic evidence; juxtapose the dead bodies with a picture of the victims in good health. Crown argued that some of the images help establish their theory that one of the victims was an intended target while the other was just killed for being a witness.

- A lot of it had both probative and prejudicial value. Some of the pictures were more probative and therefore admissible, and some were more prejudicial, so not admissible. Judge can edit. Defense can make admissions that render the photo evidence unnecessary and therefore not probative. But just because the defense makes an admission doesn't necessarily mean that the evidence is not probative

Documentary Evidence

- **Need to be authenticated**, can do so by calling the suggested writer, by calling one who saw him write the document or who has an awareness of his handwriting…by expert testimony or by admission of authenticity, also if they are in the possession of the accused.
- Get someone to testify that they created the document
- The location of the document might authenticate it
- Get someone who is familiar with the substance of the document to testify to its accuracy. For example someone who was at a meeting or interview can authenticate the minutes

Demonstrative Evidence

Evidence that is a representation of the object

- Tools to assist the trier in understanding the evidence. For example, charts, models. As opposed to real evidence, which is the evidence itself
- The main concern is that the demonstration will distort the fact finding process; thus must be an accurate representation
- Section 8 of *Canada Evidence Act*
    - Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting those writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.
- In some instances, documents can be authenticated by circumstantial evidence, ex: if a document is over 30 years old, no circumstances indicating fraud, and is produced from a place where its custody is natural and the circumstances call for it to be presumed authentic; the courts were also moved by the fact that circ would be necessary as maker/eye witness would no longer be avilable

Best Evidence Rule: when the terms of a document are material, proof of the terms of the document must be by production of the original, i.e: **the party must produce the best evidence that the nature of the case will allow**. Courts have moved away from an overly technical application of this rule—could hamper inquiry without advancing the cause of the search for the truth

R v Macdonald

Highlights the dangers of demonstative evidence; one side of a disputed set of facts will not be admissible (PE)

Police reconstructed the crime scene, a failed takedown

- Judge found that it wasn't really subjective, just seen from the cops POV. Also had a number of inaccuracies and differences from original take down, which distorted the picture the jury got
- Was a depiction of one's side's demonstration of disputed facts. Slowed down at parts. Especially important when Crown has more resources than accused—TJ should have considered this prejudice more when he admitted

McCutcheon v Chrysler Canada Ltd.
Highlights value of neutral presentation; factors can go to weight
Concerned the admissibility of a pre and post accident gait of the Plaintiff—objection was that the video had appearance of authenticity that may not exist

- The plaintiff and his wife testified to the accuracy, no dispute about the technology
- Defence argued very prejudicial
- Judge found it was present accurately and neutrally (ex: no editorializing)
- The involvement of the plaintiff in the video would go to weight

R v Collins
Experiment evidence is generally admissible subject to PV/PE
Accused charged with criminal negligence causing death for shooting at a lake and hitting a boy. Crown lead evidence of an experiment where a cop shot rifle from same position and most bullets hit the general area of the kid. Control experiment.

- Experiment evidence will generally be admitted if it is relevant to an issue in the case, subject to the judge's discretion to exclude evidence where the prejudicial effect outweighs the probative value.
- Here, the evidence was introduced to show how bullets richochet off water
- Relevance will usually depend on degree of similarity between replication and original. The evidence was relevant and material and there was no evidence of prejudice.

Extrinsic Misconduct Evidence: Bad Character of the Accused

Extrinsic misconduct evidence is evidence lead to demonstrate that either the accused or the witness was involved in bad behavior unrelated to the charge being adjudicated.

Bad Character of the Accused
Criminal Context: **EME showing the bad character of the accused is presumptively inadmissible.** Evidence of misconduct beyond what is alleged which does no more than blacken the accused's character is inadmissible. Proof of general disposition is a prohibited purpose. **[*Handy*].**

Bad character evidence engages two distinct types of prejudice: i) **reasoning prejudice** (can put more weight on evidence than logic justifies); ii) **moral prejudice** (convict the accused for being a bad guy)

General Inadmissibility
The test for admissibility per ***B (FF)***; ***Cuaadra***
Such evidence is admissible where:

1. It is relevant to some other issue beyond the disposition of the character of the accused; and
2. The probative value outweighs the prejudicial effect
    a. *There is a potentially high degree of prejudice and the probative value must be very high to warrant admission.

Examples of exceptions to general inadmissibility include: i) Motive [***R v W(L)***] that helps to assess witness credibility, but some past bad blood isn't going to be enough to jump from animus to motive [***R v Johnson***]; ii) where the accused puts their character in issue; iii) where the evidence constitutes similar fact evidence; iv) where the evidence suggests that a third party committed the offence

R v W (L)
Example of admissible EME re bad character, motive often used to avoid exclusionary rule
Complainant met appellant over the phone, moved to Canada to join him. He was convicted of assault, couple got back together after he vowed to change his ways. Complained that he began to abuse her again, and the appellant challenged the allegations arguing that she had a motive to fabricate the offences and that he sex btw them was consensual. Appellant did not testify.

- Court found that the circumstances dictated the admissibility of prior discernible conduct evidence
- In particular, the evidence was admissible because it was part of a narrative, as evidence of motive or animus and **was relevant in assessing the complainant's credibility, re: why she didn't leave or disclose the abuse earlier**
- Also risk of prejudice greatly reduced because it was a trial by judge alone

R v Johnson

Motive evidence is not automatically admissible, must engage in probative/prejudicial balancing

- When motive is at issue, a different analysis is required; evidence of an accused's motive is relevant as it impacts both identity and intent; Evidence establishing motive is normally admissible
- However, whereas evidence establishing motive is normally admissible where it arises from prior bad conduct it is not automatically admissible, **must balance PV/PE**
- It is **not enough** for the Crown to identify some past conflict between an accused and a victim and speculate that it establishes animus and therefore motive

R v Cuadra

EME tending to show the bad character of the accused may be admissible despite the general rule if it is relevant to some other issue and its probative value outweighs its prejudicial effect

Cuadra accused of aggravated assault in which he stabbed the victim. Cuadra claimed he never had a knife and thus couldn't have done the stabbing. A Crown witness testified that he saw Cuadra holding the knife just before the stabbing. testimony was inconsistent with Services prior statement from the preliminary inquiry**. Put the witnesses credibility into issue.** Crown tried to explain why witness; bad character evidence of prior acts of violence, which made the witness scared. One beating came before the inconsistent testimony, one of them after

- First step is to determine whether the evidence is relevant to some other issue than the bad character (here it is relevant to Ws credibility). Second step is probative vs prejudicial weighing.
- The first, but not the second act of violence is admissible because it occurred before the prior inconsistent testimony, so it **probed more into why he was afraid**.
- Jury instructed to limit the evidence to credibility of W.

1. When the accused puts his or her character into issue

- This can be a strategic tool if you really are a good person, but as counsel be aware of "dirt" on your client
- If, either by calling witnesses on his part, or by cross-examination of the witness for the Crown, the accused relies upon his own good character, it is lawful for the prosecutor to give the previous conviction in evidence (***R v Shrimpton***)
- ***R v McFadden*****:** Involved murder cases where Crown's theory was he killed the victim in the course of a sexual assault. Put his character in question when he said "*I have the most beautiful wide, I worship her*"—placing sexual morality in issue.
    - An accused may adduce evidence on good character by (1) calling witnesses (2) cross examination of Crown Ws (3) testifying. Can normally only adduce evidence of his general reputation, not specific acts (except with testimony)
- ***R v McNamara:*** you don't put your character into question by denying allegations, unless in the denial you suggest that you would not have done those things because you are a person of good character.
- ***R v Shortreed***: you don't put your character in issue by denying guilt, ex: I've never assaulted anyone
- ***R v P (N.A):*** When the Crown's case depends on providing a lot of context, like family history, the accused is entitled to some latitude in giving his version of the events without putting his character into issue. In this case, a large part of the Crown's case involved a description of the relationship btw MP and the respondent, and he was entitled to give his version of the relationship wo putting his character in issue

2. When the evidence constitutes similar act evidence

SFA rule is both a rule of exclusion and a rule of restricted admissibility. This type of evidence is introduced to prove that an accused did an act with similar facts to the crime currently charged with. SFE promotes propensity reasoning. There are two types: i) general [**forbidden always; moral prejudice]** and ii) specific

In exceptional circumstances, evidence may be lead to show that the accused is precisely the type of person who would commit a particular crime→ speaks to an **improbability of coincidence! Evidence of** previous misconduct may be so highly relevant that PV > PE.

SFA is presumptively inadmissible, the **onus is on the prosecution** to satisfy the TJ on BOP that PV > PE.

Steps in the analysis; per ***Handy***

STAGE 1: Determining probative value

1. **Look to the possibility of collusion** btw the witness and the claimant—where evidence depends on unlikelihood of coincidence, evidence of collaboration btw those persons will undermine entirely PV of the evidence (exists on a spectrum, can be deliberate or unconscious).
2. **Identify the issue in question**—*the broader the issue the higher the threshold for PV*
3. The **extent to which the proposed evidence supports the desired inferences**: the connectedness between the similar fact evidence and the desired inferences. *this is the "principal driver of PV*

   Factors can include but are not limited too:
   a. Proximity in time of the similar acts
   b. Extent to which the other acts are similar in detail to the charged conduct
   c. Number of occurrences of the similar acts
   d. Circumstances surrounding or relating to the similar acts
   e. Any distinctive features unifying the incidents
   f. Intervening events

4. Examine the **strength of the evidence** that the similar acts occurred; *the more believable the similar fact evidence is the more PV it has; consider credibility of witness (in **Handy** the witness has serious motive to lie*). Must also be reasonably capable of belief to be admitted.

5. **Materiality of the evidence**—"similar fact evidence of a minor issue may be excluded for reasons of overall prejudice"

Need high probative value with compelling similarities!

STAGE 2: Determining prejudicial effect
There is prejudice inherent in all SFE.
Handy *discusses* ***2 kinds of prejudice****:*

1. Moral prejudice: jumping to conclusion of guilt based on previous conduct, and
2. Reasoning prejudice: becoming distracted from the issue at bar by the past incidents (can involve a new witness, greatly expand trial record [this increases PE; however a more simple thing like a video wouldn't)

STAGE 3: Balance the two!

Evidence of Habit and Similar Acts

Evidence of Habit: this is considered to be circumstantial evidence; evidence of how a person acted on a particular occasion is evidence of a circumstance where we ask a trier of fact to infer that the person acted a similar way in the case at hand. If you have evidence that a person always acted in a particular way that is considered to be probative; if it is occasional that could be less probative

Distinction between character and habit: character is a generalized description of a person's disposition, or of the disposition with respect to a particular trait; habit is ones regular response to a situation with a particular type of conduct. **Evidence of habit has greater probative value.**

Must draw a distinction btw evidence that will discredit the accused and conduct that will now. Discredibility will trigger the application of the similar fact evidence rule [admissibility of prior misconduct or EME]

Belknap v Meakes
Habit should be admissible as a substitute for present recollection

R v Watson
At trial rejected the evidence of habit that the victim always carried a gun (accused wanted to raise self defence) there was no evidence that there had been a gun or that one had been fired.
Evidence of habit involves an inference of conduct on an occasion based on a pattern of past conduct
This is distinct from disposition—which is an inference of the existence of a state of mind

Draws a distinction from ***Scopelliti*****:** wanted to demonstrates that the deceased was physically aggressive an that he acted that way, this was evidence of disposition
Habit generally easy to get in than disposition

Devgan v College of Physicians and Surgeons
Dr charged with professional misconduct relating to treatment of terminally ill patients, charged high fees and did not accurately explain chance of success.

- Argued on appeal that the committee had erred in excluding evidence about what he told other patients about a cure as relevant tot eh issue of what he told these patients
- Found that the fact he told three other patients nothing about a cure wasn't enough to establish a habit

[R v B(L)]

- In considering whether the bad character exclusionary rule applies in criminal cases, what matters is whether the evidence can be characterized as habit but whether it is discreditable

Similar Fact Evidence & Identity
Link to the accused: Per ***Arp*****—**where SFE is adduce to prove identity: then evidence linking the accused to each similar act relevant to the issue of identity for the offence being tried. Suggestion that linking the A to the SA must also link the acts to the accused goes too far
The jury should determine on a BOP whether the similarities btw the acts establishes the two counts were committed by the same person→ if that threshold is met, then the jury can consider all the evidence relating to the similar acts to determine whether, BARD the accused is guilty
The general rule that prelim findings of fact may be departed from in those certainly rare occasions when admission of the evidence may itself have a conclusive effect with respect to guilt

Note that a prior acquittal cannot be used for SFE in a subsequent trial; fundamental principle that an accused cannot repeatedly defend himself against the same allegations [affirmed by SCC].

Johnson v Bugera
Parties were involved in a car accident, R died and S was in a coma and couldn't remember. J wasn't hurt said he had a clear memory and claimed S was driving. Owed by S's wife B. Accident occurred while driving at a high speed. J had a remarkable record for speeding, was not taken into account by the TJ.

- The heart of what was being litigated was who, on a BOP was driving.
- Start with proposition that all relevant evidence is admissible
- Finds that the speeding record was highly relevant and admissible because it was very probative that he was likely the driver

3. When the accused leads propensity evidence to suggest that a third party committed the offence

Evidence of Good Character of the Accused

Good character of the accused in the **criminal context**:
R v Tarrant: Evidence of good character is relevant where it has bearing on **the probability of the accused committing** the offence; relevant to credibility and can in some instances, raise a reasonable doubt.
R v Profit: school principal was convicted of sexual offences involving students. The case had a large body of character evidence; as a matter of weight it was determined that the fact that sexual offences occur in private is diminished wrt to morality in such cases

Good character of the accused in the **civil context**:

- Unless the character of a party in a civil proceeding is directly in issue, or the civil case raises allegations of a criminal nature, good character evidence can't be called [***Rawdah v Evans***].
- Evidence demonstrating the bad character is presumed as circumstantial proof of what happened must satisfy the similar fact evidence rule to be admissible. Although that rule operates more generously than in criminal context

- Good character evidence is generally admitted in criminal cases because of the presumption that a person of good character would not commit a crime; but in civil cases such evidence is with equal good reason not admitted

Rawdah v Evans

Character evidence in civil proceedings is inadmissible unless character is directly in issue.

In action for damages where liability was admitted, plaintiff moved to call three friends to talk about his general reputation for honesty. Defendant demonstrated that he was exaggerating pain; Court found it wouldn't be PV because there were other reasons apart from dishonesty why he might do so.

- Except in restricted circumstances where character is directly in issue, the law holds that evidence of a litigant's character is inadmissible
- Sole issues found to be the extent of the plaintiff's injuries and the compensation to which he is entitled
- Ex: if a will is impeached for fraud, not allowed to prove good character
- May be germane in the context of a civil assault or defamation

Robertson v Edmonton (City) Police Service

General evidence of good character is rarely admissible in civil cases unless it amount to similar fact evidence

P was Detective, alleged that the Police Service had been infiltrated by Outlaw Motorcycle Gang. investigation determined that dozens of allegations involved innocent contact and found one incident of the police buying drugs from the gang. Chief of police sought costs against P's lawyers for his aggressive litigation style

To respond, lawyer wanted to call evidence about his legal practice

- The fact that a litigant may have done good deeds on a period occasion is little evidence that they did not do a bad deed
- Habit can be probative when someone responds in a regular mechanical way to a particular set of circumstances, ex: a doctor
- But habit of acting reasonably and properly **just equals evidence of good character**
- Evidence of the way E behaved In his past career he was good or bad does not probative whether he was good or bad in case at hand

Post Offence Conduct

Post offence conduct is circumstantial evidence that arises after the incident. It is conduct of the accused after the offence that may give rise to a reasonable inference of guilt. Can also go to intent (ex: burned body to cover up stab wounds). It is generally related to the accused's attempts to avoid detection and or successful prosecution, i.e acting how a guilty person might act. Examples: burning cell phones, running from the scene.

Per NH, problems with this type of evidence include: i) a jury may not think of other explanations other than guilt [ex: running from the scene for another reason]; ii) concerned that it becomes over-emphasized (ex you didn't cry so you must be guilty); iii) can become **speculative** (do sad people always cry? Sometimes NO)

POC conduct will not be excluded because it supports multiple inferences; but can be inadmissible where the inference that the Crown wants is only speculative [***R v White***]. Can go to basic culpability but not level of culpability.

R v White

POC must be able to draw a **reasonable inference** of guilt (cannot be speculative) in order to have PV and be admitted as evidence; reiterates evidence considered as a whole; shouldn't be on BARD standard; circumstantial inference is not inadmissible because there are multiple inferences

White and Cote both charged with C's murder. They both misses parole type meetings and arrest warrants. Fled from the police and were seen throwing away a gun

- Evidence should not be put to the jury unless it is relevant to the determination of a live issue in the case [Arangoli] (in A it couldn't go to culpability)
- However, evidence of post-offence conduct may still be used for other purposes where appropriate, such as to connect the accused to the scene of the crime or a piece of physical evidence, or to undermine the credibility of the accused.
- As a general rule, it is up to the jury to decide whether the post-offence conduct relates to the charged offence and thus an Arcangioli-style instruction is only available in limited circumstances.

- Unlike in Arcangioli, here the accused have denied any involvement in the facts underlying the charge (i.e. the issue is ID). In such cases, normally the interpretation of post-offence conduct is for the jury.
- Just because there could have been more than one reason why he threw the gun away doesn't mean that it should be inadmissible

All the post-offence conduct in issue in this case is relevant to the question of whether the accused killed Chiu.

R v Peavoy

POC will generally have no PV when looking at degrees of culpability, but may be used to rebut

In this case, POC used by Crown to rebut defence of intoxication by showing high level of coordination/functioning by A. It was not used to distinguish between murder/manslaughter.

- A person is equally likely to run if guilty of manslaughter versus murder
- Sometimes A will lead a defence that MR was lacing b/c POC shows acting without culpability
- **Where ID is not in issue and A admits to actus reus but defence puts mens rea in issue (SD, intox, etc), POC evidence can be introduced to rebut A's statement that s/he was acting without culpability**
- **Ex: showing consciousness of mind. Purposeful acts that demonstrate you knew what was going on**
- First, establish that one reasonable inference that can be drawn from POC is that A is guilty
- Second, according to ***White***, POC cannot be used to distinguish level of culpability HOWEVER can use POC to rebut defences → goes to jury instruction due to limited permissible purposes
- **-should give limiting instruction that can't go to level of culpability**

R v SBC

Where you could reasonably infer from POC that A is not guilty, then evidence has PV and should be admissible (unless substantially outweighed by PE); In some circumstances can bring in POC supportive of innocence

Complainant was raped and beaten, only issue at trial was identity. Accused voluntarily provided the police with samples and additionally turned over his clothes and offered to take a polygraph test

- Influenced by the ***Seaboyer*** standard
- Certain forms of POC where one reasonable inference is innocence are admissible due to high level of PV—here on totality PV was high
    - *NOT declarations of innocence or stand alone offer to take polygraph tests (these are always inadmissible)*
- This does **not** mean that an absence of POC indicating innocence can be led to indicate guilt
    - Remember, there is no requirement to comply with an investigation and to lead such evidence would be speculative and against a person's legal rights

Failure to cooperate can't be lead as consciousness of guilty (except where the accused puts it in issue)

R v White #2

POC can go to basic culpability but not level of culpability; flight after shooting the victim could be suggestive of an intentional killing

White shot M, then fled the scene. At trial the prosecution suggested that he ran because he was guilty and intended to kill him.

- Appeal was based on the fact that the judge failed to give a limiting instruction that POC can't go to intend
- The only live issue in the case was intent
- Judge dismisses the appeal
- ***White*** can't help with murder/manslaughter [above principle], the Crown agreed but said immediate flight is different from non-immediate flight. Wasn't really related to the flight rather that you could draw an inference of intent from the immediate flight; if it was an accident, then you wouldn't flee right away
- It was one possible reasonable inference that the person who intended would be able to react quicker than the one who didn't know the gun would go off.
- The Court will take a fairly broad view of one potential reasonable inference.
- If the Crown was trying to use the flight, it was gone!
- **Most important principle: POC can go to basic culpability but not level of culpability**

Bad Character of the Witness

Canada Evidence Act (*CEA*), Section 12; pp.

> **12.** (1) A witness may be questioned as to whether the witness has been convicted of any offence … but 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 certificate containing … indictment and conviction,

Purpose: goes to assessment of the credibility of the witness. Courts have accepted, even though it is probably of limited weight (juries are instructed it is one factor in credibility), criminal record can have some relevance to credibility. (even though are rule breaker less likely to be honest?)

When the witness is the accused: ***Corbett*** reads in discretion; an accused's record creates a risk of propensity reasoning. TJ can edit, or axe record for accused that has testified. A ***Corbett*** hearing will determine what offences, if any can come in.
Because it is a witness and not the accused, you can also look at other bad conduct that could relate to honesty issues→ cross-examination can go on for awhile about all the terrible things the Crown witness has done. **Much more discretion with non-accused witness**

Factors to consider:

1. **Similarity**; (*When a similar offence, there is a temptation for propensity reasoning, thus similar weighs against admissibility, dissimilarity weighs in favour*)
2. **Remoteness in time** from the case before the court (ex: if it happened a long time ago, and they haven't done anything sine, they less likely to be admitted);
3. Whether the case boils down to a **credibility contest** between the accused and another witness or witnesses; (*becomes a distorted picture when there is criminal record evidence adduced regarding a Crown witness and not against the accused; NH: this can be an important factor*)
4. **Type of conviction** – either its seriousness or its length – evinces disrespect for society's rules and laws that suggest a person with such attitudes would not hesitate to lie under oath (ex: fraud, something with inherent dishonesty).

If it comes in, don't get into details of convictions and jury receives limiting instructions!

R v McFadyen
Where very distant in time, high chance of prejudice
*Accused convicted by jury on sexual assault; appealed on basis that the TJ dismissed **Corbett** application and he was CE'd on his criminal record. At trial credibility was the central issue.*

- Corbett process requires weighing of factors relating to PE and PV; against the backdrop that the general course of preference is for the jury to have all the information, but also needs clear direction on use of that information
- Balancing in this case results in exclusion of record
- The convictions were for 14 years earlier; High prejudice given they were similar

R v Cullen
With witnesses other than the accused, there is more freedom during cross-examination to introduce general bad past acts

> Involved a couple, boyfriend accused of assaulting her with a truck. TJ allowed complainant to testify that he assaulted her, but he had been acquitted [this was an error]; also denied to admit evidence that the complainant possessed burglars tools, something she had received a conditional discharge and no criminal charge for; **A person involved in such** an offence is a person who could be considered to have been involved in discreditable conduct [an error not to admit; should have heard this evidence]

- For the purposes of challenging a witness's credibility, it is permissible during cross to demonstrate that the witness has been involved in discreditable past conduct, not limited to criminal convictions

The *Vetrovec* Witness

Is there a point at which the worst of the worst evidence might be excluded? ***R v Murrin:*** even seriously unreliable evidence will be admitted

Who is a Vetrovec witness? Possible indicia include: (revise with ***Khela*** test]

- Numerous prior inconsistent statements
- Criminal history, particularly convictions for fraud or dishonesty
- Bias or vested interest in the outcome (ex: plea bargain)
- and whether they failed to come forward with evidence for some unexplained time.
- Jailhouse informant
- *Occasionally, a single factor can put you in this category, ex: massive deal from the Crown, but generally is a fact specific inquiry]

Vetrovec witness categorization TEST: 2 part test ***Khela***

1. What is the degree of problems with W's inherent trustworthiness?
    - Need one or more of the following:
        - Have they been involved in any criminal activity?
        - Do they have an unexplained delay in coming forward with evidence?
        - Did they lie to authorities?
        - Has W sought a benefit for testifying?
        - Is there any evidence W selectively disclosed his or her evidence?
        - Has there been a series of inconsistent statements?
    - Sometimes the presence of one strong factor can be determinative
    - This is an objective evaluation
2. How important is the W to the Crown's case?
    - Threshold depends on how critical W's testimony is in determining guilt
    - The more important the person is to the case, the fewer credibility problems you need to trigger caution
    - The less important the person is to the case, the more credibility problems you need to trigger caution

Don't want to exclude but want to give trier of fact the ability to deal with it in a special way that mitigates against real risk of wrongful conviction

R v Vetrovec

- Basically got rid of special rule regarding accomplices
- Should assess whether there are factors that might impair credibility
- Something in the nature of confirmatory evidence should be found before TOF relied on testimony from a witness who occupies a central position in the case but can be suspect by virtue of being an accomplice, complainant or of bad general character—whether evidence properly weighed overcame its suspicious roots
- Need "clear and sharp" warning to attract the attention of the juror to the risks of adopting without more the evidence of the witness

R v Murrin

Highlights importance of assessment of reliability by the jury; highly reluctant to exclude

- IN response to the argument of counsel that Vetrovec witnesses should be as a rule, excluded; uses examples of many areas in the law of evidence where unreliable stuff gets admitted; demonstrates respect for the role of the jury
- Witness testimony is presumptively admissible (subject to PV/PE balancing)
- I have an obligation to exclude evidence where its admission would be unfair to the accused. Unfairness in this sense has never been equated with reliability. It is not unfair for a judge to admit evidence, which he considers unreliable unless there is some particular prejudice to the accused flowing from its admission.

R v Khela

Corroborative evidence needs materiality and independence

Accused's charged; VW jailhouse informers; other evidence given by the VW girlfriends, whom they had time to collude with

Purpose is to alert the jury to the danger of relying on unsupported evidence on unsavoury witnesses and explain the reasons for special scrutiny of their testimony

4 part content to jury instruction on VW:

1. **Draw attention of the jury to the evidence requiring special scrutiny** *(the VW evidence)*
2. Explain **why this evidence is subject to special scrutin**y *(why the VW is in the VW category)*
3. Caution jury that they are entitled to rely on that unconfirmed evidence on its own **to convict but it can be very dangerous to do so**
4. ****Corrborative Evidence**** That the jury in determining the veracity of the suspect evidence should look for evidence from another source that can restore VW testimony to a level that is safe to rely on
    - ***Khela*** finds 2 requirements for confirmatory evidence:
        - CE must go to **MATERIAL** part of VW evidence – *defined as "important" or "not peripheral"*
            - Individual items of confirmatory evidence don't have to implicate the accused
            - When looked at in the context of the case as a whole, "the items of confirmatory evidence should give comfort to the jury that the wintess can be trusted in his or her assertion that the accused is the person who committed the offence
        - **CE needs to be **INDEPENDENT** of VW – *not tainted or influenced by the VW* [para 39]
            - was really important in this case because there was opportunity for them to collude
        - May need to comment further on independence or materiality depending on the circumstances
        - NH thinks Judge should instruct the jury, the worse they are, the better quality of evidence you need before you convict + even if you find corroborative still exercise caution
        - While the law might say that a VW can back up a VW, to get to a conviction you won't be satisfied unless you get evidence of a particular quality

- Thus you have to decide that other parts of the story being backed up give you confidence in that disputed part of the evidence → must assess whether it is sufficient that you can use that testimony
- You will want confirmatory evidence that is very reliable

Identification Evidence:

Presumptively admissible; most issues will probably go to weight

R v Gonsalves

ID evidence doesn't need to be perfect, flaw goes to weight, reqs for photo line up

Involved a gunpoint robbery by three men, one of which was the accused

- **LIMITING INSTRUCTION:** prosecutions involving identification of a stranger, raise an alert as to the well-recognized dangers inherent in such evidence and the risk of a miscarriage of justice through wrongful conviction; can be notoriously unreliable
- It can be appropriate it some circumstances for the TOF to convict on one piece of evidence
- Questionable ID proceedings may not be fatal to the evidence itself
- Sometimes Courts look for the existence of confirmatory evidence
- Any flaws in procedure go to the issue of **weight** and not subject to *Charter* relief; ID evidence doesn't have that much weight
- In some cases, a failure to mention distinctive characteristics of a suspect in an initial description to the police may be quite material to the reliability of an identification. On the other hand, convictions have been upheld in circumstances of an eyewitness' initial omission of a distinguishing characteristic
- Photo line-up evidence also admissible but line-ups need to be conducted carefully/stringently
    - Should be close to the event
- Minimum 10 photos and shown one at a time without saying which is last
- Video or audio recording of the interview
- Person running the line-up should not know who the suspect is
- Essentially: Proper photographic procedure + detailed description from early on → you can bring eyewitness evidence into the trial

- Then judge will give initial instruction, then mentions as exception to general rule you are allowed to consider prior statements + photo line up; judge will run jury through relevant things to consider [ex: how much time did they have to see them, was original description vague; how did it link to the accused]

Judicial Notice

A party must prove the elements of the offence and bring evidence on each element, however, exceptionally some facts can be deemed to be established, ex: Toronto is in Canada, LSD is harmful, i.e: a judge doesn't need to be informed of these facts by evidence

Counsel will have a checklist of essential elements of the offence: will figure out what they have to call
General rule: anything you need to establish you call evidence on
Judicial notice→ proving a fact without leading evidence
TEST: "notorious or indisputable fact" or "not subject to reasonable dispute"

JN can be used: 1) where you failed to call evidence, can attempt to use judicial notice; 2) and if it was going to be disputed they were going to have to call a lot of evidence, ex: Zundel wanting to challenge that there was a Holocaust

CTV Case: people are more reluctant to give video statements if they are going to be available to the media afterwards [can you rely on that without any evidence? That isn't sufficient] The fact of the appeal demonstrates that people are debating what the judge concluded as a fact

- Sets out test as being whether a properly informed reasonable person as not subject to reasonable dispute.
- The closer it is to the matter in issue the less scope there is for judicial notice

Opinion Evidence

Challenges include:

- Cost;
- Potential bias of experts (ex: ones often called by defendant firm; have the experts come to advocate
- Un-level playing field (one side has more money).
- How to weigh two diametrically opposed experts

Presumptively IN-ADMISSIBLE! Need to apply to the Court to have it come in

For admissibility: meet statutory requirement + common law admissibility requirement
A layperson can give opinion on something that is within common knowledge [***Graat***]

Abbey framework:

STAGE 1: ***Mohan*** PRECONDITIONS that must be met; i.e: necessary things you have to have: None of the preconditions are in dispute.

- **1) Must meet the test of an expert** [**TEST**: has to be more knowledge than average person in the relevant area] This is not a high threshold. The opinion or methodology must be grounded in science [***McIntosh***].
- **2) Does it go to a relevant issue?**
  - If it goes to a fact in issue, PF admissible
  - Think about what the evidence actually is, ex: one piece of circ. evidence
  - Can consider something like post-offence conduct at this stage
- **3) Necessity:** this is the single most common area for excluding expert evidence. Necessary = **helps the trier of fact understand the issue!** Subject matter: are ordinary people unlikely to form a correct judgment about it if unassisted by persons of special knowledge
  - **Where usurps function of jury, it is unnecessary;** ***Klymchuk***-FBI expert concluding crime scene was staged—inference is reserved for the TOF
  - **Must be outside juries normal experience**—ex: juries know when people are stressed they have memory problems ***Perlett***; coercion could be present in Mr. Big scenario [***Osmar***]
- **4) Is it excluded by another exclusionary rule? [**ex: extrinsic misconduct]

- **5) Is there foundation? *Palma*** added this—expert testimony must have foundation in the evidence, ex: if he was drunk this would happen but no evidence he drank. If not all foundation, then that goes to weight [***Lavellee***]

STAGE 2: GATEKEEPER: Involves weighing of PV/PE—evidence that meets ***Mohan*** can still be excluded
Lists some potential factors:

- **Reliability** issues
- Potential to **confuse** the jury
- **Cost** to the system
- Is the expert able to articulate the evidence in a way that makes it **accessible** to TOF
- **Does it usurp TOF? If you have to go to ultimate issue you can, but be very careful**
    - **Ex:** someone is NCR or not
    - ***Bryan***: cop saying 3gm coke + cash = strong inference of trafficking was ok
- Make sure to limit to proper scope of opinion
- Does this particular expert demonstrate **bias**? Ex: always say the injury was pre-existing
- Does it offend rule against oath helping? **Expert evidence cannot be brought in to directly determine credibility** [maybe saved if limiting instruction]
    - ***Llorenz***-credibility evidence can only be admissible if it goes to come ultimate purpose; Hypothetical can help
- NOVEL SCIENTIFIC METHODS [per ***R v JLI***] :
- i) has the theory been tested, can it be? Ii) has it been subject to peer review/publication?; iii) Is there a known potential rate of error? Iv) has it become generally accepted practice?

Statutory Rules

Statutory Requirements: developed a requirement to exchange expert reports in a timely way.
s. 657.3 of the *Criminal Code*; expert evidence can come in affidavit form. Court may require that person attend for examination. Also have to give notice to the other side and provide them with report.

- The number one reason that expert evidence is inadmissible related to the statutory time requirements (expert evidence requires timely and standardized disclosure);

Common Knowledge

Issue arises when you have a layperson giving an opinion. "*Witness, give me the facts, not your opinion*!"
The difficulty of speaking in pure facts has led to the lax application of the opinion rule. This is justified by the i) impossibility of speaking to only facts and ii) the absence of any justification for totally excluding opinion testimony in the form of reasoned conclusions from witnesses.

Graat v R (1982) SCC

Involved police constable who saw G driving erratically and smelled alcohol on his breath. Was too late to take to take breath samples as the accused asked to be taken to the hospital.
A witness can provide an opinion on something that is within common knowledge/every day experience and does not require expert qualifications.

- Not only can eye-witness opinion be helpful to the trier of fact but not allowing it can be dangerous because the absence of that evidence may indicate to the jury that the evidence was not present
- **Limitations**: ordinary eye-witness opinion cannot get into expert evidence area, cannot be based on speculation, can be undermined in cross-examination, can be too prejudicial, and can never be given as a legal standard (can't answer a question of law)
- Ex: "he was angry" How do you know he was angry? Stamping, clenching

General Rules for Experts

R v Mohan

Case involved a pediatrician who was charged with four counts of sexual assault; counsel wanted to call a psychiatrist who testified that the prep would have been committed by a specific class of offender, the characteristics of which the accused did not meet. It created probative/prejudicial framework core test for experts—**key thresholds to be met for admissibility**
ONUS is on the party leading evidence to demonstrate PV

TEST:

1. **RELEVANCE:** PF admissible if it goes to a fact in issue, however the inquiry can be considered as "whether its value is worth what it costs" in terms of the impact on the trial process. Also, it is going to confuse and confound the jury and will the jury be able to objectively assess it. NH: this threshold is usually not a problem (parties won't spend money on irrelevant info)

2. **NECESSITY in assisting the trier of fact:** this is the single most common area for excluding expert evidence. Necessary = **helps the trier of fact understand the issue!** The expert is *necessary* in the sense that it helps the trier of fact draw inferences they would otherwise be unable to draw. The test is not helpfulness! Must be outside the knowledge of the ordinary trier of fact! If the TOF can form their own conclusions without help, then the opinion of an expert is unnecessary.
   - Also important, as it is with relevance to ensure that the evidence will not overwhelm the jury
   - **NH Example:** Accused charged with marijuana possession for trafficking, he says it was personal use. Scales were found and a money counter and a bunch of stuff for individually packing the drugs. The Crown might argue: don't need help of an expert to make an inference of trafficking. Defence might want to bring in an expert: chronics want to package for each day and measure with a scale. Judge might say: helpful to have extra expert, but probably not NECESSARY to bring in an expert.

3. **Must be given by a PROPERLY QUALIFIED EXPERT:** Must be a witness who is 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. Don't call a barely qualified expert, it will backfire.

4. **Doesn't trigger any exclusionary rules!** For example, general evidence of disposition to commit a crime where the accused has not placed their character in issue.
   a. NH: problem with ***Mohan***. This fourth issue isn't very well defined.

Additional concerns mentioned in ***Mohan:*** worried about someone coming in with a whole bunch of expertise and awards and usurping the function of the jury. This is particularly high when the expert is going to the ultimate issue. Also, the case doesn't give a place to deal with reliability. The main exclusionary device is necessity.

NOVEL SCIENTIFIC EVIDENCE

Expert evidence can be labeled novel where: (i) there is **no established practice among courts of admitting evidence of that kind** or (ii) where the expert is **using an established scientific theory/technique for a novel purpose**.

R v JLI (2000) *SCC*-

establishes test for novel scientific methods

Involved admissibility of a test of the accused penis when shown certain sexual images. He was accused of sexually assaulting two young boys.

2 step TEST for admissibility:

1. Can the evidence satisfy the *Mohan* factors?
   - Qualified expert, relevance, necessity, any other PV/PE issues
2. Is the science in question sufficiently reliable to be put toward the court?

   4 factors [adopted from US Supreme Court]:
   - Has the theory/technique been tested? Can it be?
   - Has it been subject to peer review/publication?
   - Is there a known potential rate of error?
   - Has it become a generally accepted practice within the scientific community?

- Court takes its gatekeeper role seriously → does not want to allow in evidence that may turn out to be bogus in the future and distort cases in the interim
- This case set high threshold for novel scientific evidence + offered some language for being careful w/ all experts

Necessity

R v McIntosh

Expert opinion should only be admitted when it is established that the opinion is based on a body of knowledge that is shown to be scientifically recognized and reliable

Accused were convicted of various offences as a result of the robbery. TJ refused to admit expert evidence related to eyewitness identification (accused had been convicted on that basis)

- Courts are too quick to defer to experts in behavioral science on the matter of fact finding
- Also need to ask if the subject matter of testimony admits of expert testimony
- Concern about whether "psychology of witness testimony is a appropriate area for opinion evidence at all
- **Test**: first prerequisite to the admission of expert evidence is that the opinion or methodology must be grounded in science. Must rest on established organizing principles and demonstrate a truth that emerged from an identifiable discipline.
- The expertise of the expert can be gained by formal study, practical experience, or both. The competence of the witness to give expert evidence does not depend on how the skill was acquired, only that it has been gained

R v Klymchuk

ONCA 2005

Where EE usurps function of jury it will become unnecessary

Concerns expert evidence that a crime scene was "staged"; want to make crime scene look like a random act, robbery etc, want to make it look like forced entry but they had the key.

Courts have accepted that an expert can come up and talk about what are features of a staged crime scene.

- The FBI expert didn't want to stop there—said, therefore, it was staged and it was someone like the accused who was a close family member.
- The excerpt in the case drew the line and said that was too far—**the inference of who did it was for the trier of fact**
- Court ordered a new trial because the expert went beyond assessing the crime scene and started talking about possible motives for the murder [not necessary + usurps role of the jury + has reliability problems]

R v Perlett 2006 ONCA

Must be outside jury's normal experience to be admissible

Accused of killing his parents but saying it was the third party invading the house who did it. Issue on appeal was whether or not the TJ had erred in excluding the evidence of an expert on issue of memory

- Court held that it was within the normal experience of jurors that people have faulty perceptions and memories of brief and stressful events.
- Her evidence was also found to be very vague and didn't provide specificity about what percent of the population harbours the misconception about how people remember traumatic events
- It might be helpful, but not at the point of being **necessary**

R v Osmar 2007 ONCA

Evidence wasn't about matters which people are unlikely to form a correct judgment

- Defence wanted to introduce evidence about why someone would falsely confess in a Mr. Big situation
- Arguing jury needs expert evidence about the psychological pressures put on someone to make it seem like a rational choice; and that these confessions are generally unreliable because of the coercion.

Court: Jury could draw those inferences without that help

Ultimate Issue

Expert witnesses cannot express opinions on the very matter to be decided by the trier of fact

No witness should be permitted to give opinion that witness is innocent or guilty or for example, liability

R v Bryan

no prohibition on evidence going to ultimate issue; must satisfy ***Mohan*** and can only be excluded on that bases

Accused was convicted of possession of cocaine for the purposes of trafficking and possession of proceeds of crime. One ground of appeal dealt with the evidence of an expert witness.

Police officer testified as an expert witness to the fact that the accused had 3 grams of cocaine on his person and $1500 and stated that there was a strong inference that someone in those circumstances would be in possession for the purpose of trafficking and that there would be a strong inference of possession for the purpose of trafficking.
On appeal: whether or not the facts alleged by the Crown goes to the ultimate question for the jury
Evidence was properly admitted; there is no general rule barring expert evidence on the ultimate isuse
If so, will be excluded on relevance or necessity

CREDIBILITY OF A VICTIM
Assessing witness credibility has been a dangerous area in expert evidence (do not want experts telling trier of fact who to believe). The justice system thinks **credibility is within the scope of the trier of fact's ability** and an essential part of their role.

Rule (against "oath helping"): Expert evidence cannot be brought in directly to determine credibility

Exception: In certain types of issues that do not go directly into an individual witness's credibility and are beyond the scope of common knowledge, expert evidence is admissible

- *Ex. With children witnesses' inconsistencies*
- Courts will require that the expert evidence be presented indirectly → *CANNOT say, "I sat down with this child, I am an expert, I believe him or her"*

R v Llorenz
Evidence regarding credibility will only be admissible unless that evidence has some legitimate purpose
Demonstrates a concern about expert witness going to the ultimate role of the jury and usurping the TOF. Involved allegations of long-term sexual abuse. Victim's psychiatrist was called and testified that she was credible in an obvious manner.

- Much of his evidence was admissibility or potentially admissible, and the problems were in the way that it was led. Evidence went from something that could help the jury assess credibility and went over the line into something that said: "I'm an expert, she is credible, convict"
- "So there is a high degree of internal consistency, high enough for me to be quite confident in the diagnoses" this was the statement that sewered him
- So Crown led that abuse was disclosed and also used him to give the jury tools in assessing her credibility.
- If the evidence had admissible aspects, what is the problem? He started applying it to the facts of the case and saying she met these criteria
- It was important in this case to lead evidence in this area without going back to how he might have applied it to this individual person. Permissible for it to contribute to the narrative and maybe that the victim's condition was consistent with sexual abuse.
- Note that oath helping evidence can b e admitted if it has some other legitimate purpose such as diagnosis of the complainant's condition and explanation of her behavior
- When it is delayed disclosed evidence may be admitted to explain the delay (waiting to tell police because..)
- Admission of this kind of evidence raises the serious possibility that a trier of fact, particularly a jury, will have difficulty in making the important distinction between using the evidence for the permissible purpose of supporting the truth of the complainant's statements, on the one hand, and using it for the impermissible purpose of showing that the complainant is a truthful witness
- That all might have been saved if a clear limiting instruction had been given. There was an insufficient jury instruction in light of what was read—needed to be told that the evidence not be used for the purpose of bolstering the complainant's credibility

Foundation
Experts are confined to expression of opinion based on facts proved at the trial, proved by the expert when he has had personal observation or proved through testimony of other witnesses, with the opinion drawn out based on assumption of their truthfulness using the device of hypothetical.

Expert testimony must have foundation in the evidence

- **Ex:** young kid drinks 8 beers they wouldn't know what they were doing, but NO EVIDENCE he drank anything. If no evidence of the facts then the expert opinion has no business being there!

However, there is an exception where an opinion may be expressed through based on facts that are not otherwise proven (ex: statements made to him pre-trial).

R v Jordan
Courts should take a reasonable approach to scientific proof, can lead to absurdities if followed too rigorously
Accused was found with "heroin" on his person on a return flight from Tokyo in YVR. The accused argues that there is no reliable evidence that what was found is heroin.
Clark, an expert testified that the substance was heroin. He had not done the test himself, however, other analysts in the Vancouver lab did it. Defence argues this is hearsay.
However, the Court rejects this argument. IN doing so, they state that not all knowledge needs to be proved by primary research Rather, after testing and observation, some pragmatic conclusions legitimately arise which need no further verification from original sources

R v Lavalee
Is there is some foundation but also some evidence missing will go to weight
Battered woman defence case
Expert prepared psych report at defence request, included things for which there was no admissible evidence, ex: additional incidences of abuse (testifies part of battered woman to lie about source of injuries)
Principles:

- An expert opinion is admissible if relevant, even if based on second hand evidence
- The second hand evidence is admissible to show the information on which the opinion is based, not going to the existence of the facts
- When psychiatric opinion is based on hearsay, problem of weight
- Before any weight can be given, the facts upon which the opinion is based must be found to exist (this doesn't mean every fact, rather there must be some admissible evidence to establish foundation for the expert's opinion)

R v Worrall (2004) Ont SCJ
Expert may base his or her opinion on second-hand information. When that information is admitted and the second hand information is not otherwise proven the weight will vary from reduced to none.
There are two separate situations:

I) Evidence that an expert obtains wi their scope of expertise [*doesn't require independent proof*]
II) Evidence that an expert obtains from party to litigation about a matter directly in issue [*this is inherently suspect and requires independent proof*]

In this case, fell within the first scenario. Wasn't required to call the techs who had conducted tests regarding whether or not the deceased had heroin in his or her blood.

A New Framework for Admissibility
R v Abbey 2009 ONCA
Victim was killed in what the parties agreed was a gang shooting. Accused was a member of a rival gang. strong evidence that killing was result of a dispute. Evidence included testimony on the culture of Canadian street gangs, testify that within gang culture, a teardrop tattoo means one of three things— that:

1. a fellow gang member or family member has recently died;
2. the tattooee has done time in prison; or
3. the tattooee has murdered a fellow gang member.

As there was evidence to the effect that no one in Abbey's family or gang had died and that he had never been in prison, the Crown wanted Totten to testify that based on his knowledge and the Crown's assumptions, the teardrop tattoo meant that Abbey had killed a rival gang member, which could only mean that he had killed the victim

STAGE 1: PRECONDITIONS that must be met; i.e: necessary things you have to have: None of the preconditions are in dispute.

- **Must meet the test of an expert [TEST: has to be more knowledge than average person in the relevant area]:** Is Totten a qualified expert? Yes .

- **Does it go to a relevant issue?** Is the evidence logically relevant? Yes .
- **Necessity:** Subject matter: are ordinary people unlikely to form a correct judgment about it if unassisted by persons of special knowledge Yes .
- Is it excluded by another exclusionary rule? No .
- **Is there foundation?**

STAGE 2: GATEKEEPER: second balancing of factors [this allows evidence that technically meets these criteria, but the evidence is still too flawed to come in]
Involves weighing of PV/PE
This is where the judge can engage the gatekeeper status, lists some potential factors:

- Reliability issues
- Potential to confuse the jury
- **cost**
- Is the expert able to articulate the evidence in a way that makes it accessible to the trier of fact
- How is it presented? If it can be, in a manner that **doesn't usurp the trier of fact**?
- Does this particular expert demonstrate bias? Ex: always say the injury was pre-existing
- The second stage factors can also relate back to the first and inform, for example, the degree of expertise that they have
- Also, where you don't have to go to ultimate issue, DON'T DO IT; and it will weigh heavily against admissibility. IF you *have* to go to ultimate issue, in accordance with ***Mohan*** will be VERY strict, [ex: reliability + evidence presented in a confusing way; probably knocked out]
- Sometimes will have go to ultimate issue: ex: someone is NCR or not NCR
- The strong connection urged by the Crown in its default position between the desired opinion and the ultimate issue was a cause for concern.
- However, the Crown's default position misconceived the true nature of Dr Totten's expertise and the role he could legitimately play in assisting the jury. He could not speak to the reason that Abbey got the tattoo, but could speak to gang culture and identify the potential meanings of the tattoo.
- So basically, if the opinion was limited to its proper scope (the Crown's secondary position), it had high reliability and necessity and thus was admissible.

Held: If limited to the Crown's second proposal (identifying only the three possible meanings), the evidence is admissible.

HYPOTHETICAL

- **Counsel thus leads expert on the factors and expresses hypothetical**

Benefits of using a hypothetical:

1. **Aren't actually applying the evidence to the specific accused**
2. **Emphasizes that these are hypothetical facts that the jury will need to ensure these hypothetical facts are borne out in this case** [i.e making sure to find that the accused actually drank six beers]
3. Also avoid ***Lorenz*** problem, because sometimes the expert has interviewed the accused→ hypothetical avoids the chance they will make an inference about their own conclusion based on personal experience

Witnesses

Ability to Testify

There is a general rule that almost every witness is both COMPETENT and COMPELLABLE [*low threshold*]

- Threshold for witnesses to be able to testify:
  - COMPETENT: the person is qualified or capable of giving evidence.
  - COMPELLABLE: ex: are they in Australia?
- Why: **the search for the truth!** Assume that people are able to contribute.
- One of the only people who is considered competent, but not compellable is the accused, who is capable of making a decision NOT to testify
- Usually all potential witnesses are allowed to testify, their frailties are left as a matter of credibility for the TOF to assess
- Only in very exceptional cases where they admit they won't have to come forward and testify

Competence, Oaths, and Compellability of Witnesses

Requirement to put witnesses under oath: must be brought home to the witness how solemn the occasion is, and how different it is [ex: no exaggerations; the oath may have an impact of making sure their testimony is making sure their testimony is more credible and reliable].

- It also subjects people to prosecution for deliberately lying under oath.
- *Canada Evidence Act* supplements the common law requirement for an oath, but doesn't stipulate what it requires [ex: doesn't have to be through the bible]

R v Kalevar 1991 Ont Gen Div

Accused charged with theft under 1,000; represented himself. When he came to testify he refused to give under oath or affirmation, conviction entered

- Multicultural society requires an acknowledgement that the Judiac Christian form of oath is not necessarily the only form of religious oath to be administered, persons should not automatically be given affirmation as the only alternative

R v Wiebe 2006 ONCA

Defence disclosed emails that has been sent to the appellant from excluded defence witness; offered rationale as to why a Christian would affirm rather than swear an oath (which is what A did in the proceedings as a Christian)

- The emails were found to be relevant to A's credibility; raised issue as to whether some of his evidence had been coached
- He testified that he never read the emails. Insufficient grounds for mistrial

CEA, Sections 13-16.1

Canada Evidence Act

13. Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person.

14. (1) A person may, instead of taking an oath, make the following solemn affirmation: I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth. (2) Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.

15. (1) Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful… shall permit the person to make a solemn … has the same force and effect as if that person had taken an oath. (2) Any witness whose evidence is admitted or who makes a solemn affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn.

ADULT WITNESSES

Canada Evidence Act, s. 16: Ways to challenge competency of some witnesses

Persons over 14 are assumed competent to testify. An inquiry into their competent will only be undertaken when the proposed witness competency is challenged, and the Court is satisfied that there is an issue re capacity to testify.

Capacity means that the witness must understand the path or affirmation, and be able to communicate the evidence [16(1)]. Understanding an oath or affirmation means that they must understand the *moral obligation* to speak the truth; and communication of the evidence means capacity to "perceive, remember and communicate the evidence".

þ If the witness means these two requirements, they can testify [16 (2)]

ý If the witness doesn't understand oath or affirmation, but has capacity to give evidence, they can testify on "promising to tell the truth " [16 (3)] Note that they must still be able to communicate the evidence.

R v Parrott 2001 SCC

Accused charged with offences relating to a woman who suffered from Down's Syndrome. Complainant made statements to the police when she was found, and to the Dr who examined her, conducted a videotaped interview. Issue concerned the admissibility

of these statements—TJ found through expert evidence that she didn't understand the nature of the oath nor could communicate her evidence.

- Expert evidence was ruled admissible that addressed her competency as a witness. On that basis, the judge did not hear from the complainant
- However, SCC thought that the expert evidence was unnecessary; TJ was perfectly suited to address competence; "meat and potatoes" of TJ existence. Absent expert evidence and having heard from her, no basis on which to introduce out of court statements, as they were found to be unnecessary

R v I (D) 2012 SCC—reads in inability to question mental incapable person on their understanding of the nature of the promise to tell the trust into section 16 (3) CEA

Involved a mentally challenged woman who alleged that she had been sexually assaulted by her mother's partner. Her capacity to testify was raised on voir dire. TJ went into question her on her understanding of true, false, moral and religious duties.

- Accused argue that a mentally disabled person testifying under a promise to tell the truth must understand the nature of a promise to tell the truth
- Court rejects: all that is required is that i) the witness be able to communicate the evidence and ii) promise to tell the truth
- Court disposes of the argument that the promise becomes an empty vessel; note that a promise brings home the seriousness
- Section 16.1 (7) protection should be read in from children section for adults with mental ability of children; just because they didn't put it in the act doesn't mean they didn't mean too (ummm)
- Basically—concludes that because there is no difference btw someone w mental capacity of a 6 year old and a six year old—there should be in the CEA
- Policy: want justice for crimes committed against the mentally disability; high risk of assault
- To determine if they can communicate, requires the TJ to explore in a general way whether she can relate concrete events by understanding and responding to questions; ex: T v F in everyday statements

CHILD WITNESSES **Basically for kids: promise, some understanding of it and an ability to communicate**

Canada Evidence Act, s. 16.1:

All child witnesses < 14 years old are presumed competent to testify [16.1 (1)]

The child witness evidence will be received if they are able to understand and respond to questions [16.1(3)] *in practice, ask about non-contentious past event*

An inquiry into competence will be undertaken when the proposed witness competency is challenged or when the court is satisfied that there is an issue as to the Child's capacity; the onus is on the challenging party [16.1 (4-5)]

- Best practice to consider competency before the child takes the stand to avoid risk of mistrial

Child witnesses cannot take an oath or affirmation; permitted instead to testify on promising to tell the truth; no inquiry will be allowed into promise to tell the truth [16.1 (6-7)]

- Such an inquiry had previously excluded competent child witnesses
- Thus creates a lower admissibility threshold and leaves the issue to weight before the TOF
- **You can question the child, but not as part of an admissibility determination**

R v W (R) 1992 SCC

Child must understand the basis of the oath; confirmatory evidence not required, significant deference to credibility

Two children have testified about sexual assault and there was a conviction, can ask Court of Appeal (CA) to apply to overturn verdict based on unreasonable verdict. CA found serious inconsistencies in children's evidence; thought it was an unsafe conviction wherein the testimony was too flawed to substantiate a conviction

- First, SCC requires that a CA must give VERY significant deference to credibility finding. But in exceptional circumstances CA may re-weigh findings on credibility.
- Standard: could a reasonable TJ have convicted? (NOT whether the appellate judge themselves would have convicted)
- SCC also rejected the idea that confirmatory evidence was required for children's testimony to be admissible, and cautioned that as judges don't be too quick to apply adult tests, particularly in looking at issues such as timing (children may remember different) and give less weight to inconsistencies in that regard
- However, the c**hild must understand the basic nature of the oath [section 16 of the CEA]**
- Also, there is a basic requirement that the witness has an ability to communicate evidence to the trier of fact

Comparing Section 16.1 and Section 16

- Section 16 contains no reference to answering questions, but rather talks about whether the person is able to communicate their evidence;
- Provides two options, and has no sections prohibiting questions about the promise to tell the truth [in absence of this, assumed you could]

R v Levogiannis 1993 SCC-

Children's evidence is critical to get out in Court

Accused charged with touching child sexually, child witness per 486 of the *Criminal Code* wanted to testify behind a screen that blocked their view of the accused. A challenges that it breaches his RFAD

- This section of the code recognizes the difficulties that kids may face in confronting accused
- Argues that because the child is protected by the screen, jury may make an inference of guilt; judge refers to ***Corbett*** and strong presumption that juries are able to take instruction
- On the contrary some Crown don't use them because they think they make the child look unreliable

Spousal Competency

CEA, Section 4

Where there is a valid and subsisting marriage, one spouse may not be called against the other.

Does not apply to common law couples, or where the couple is irreconcilably separated (per ***Salituro***, no marital harmony to maintain)

In a civil matter: spouse is compellable for any party to the action

In a criminal case: spouse is a "competent witness for the defence", ex: *evidence related to an alibi*

Exceptions to spousal compellability:

- Per 4 (3) the Spouse can't be disclosed any communication during marriage, but if they chose to they can
- Also for the Crown when the accused is charged with an offence under 4 (2) and 4 (4)
    - 4 (2): 136(1) of the *Youth Criminal Justice Act* or with an offence under any of sections 151, 152, 153, 155 or 159, subsection 160(2) or (3), or sections 170 to 173, 179, 212, 215, 218, 271 to 273, 280 to 283, 291 to 294 or 329 of the *Criminal Code*
    - 4 (4): of sections 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269 where complainant is under 14
- Also under the common law exceptions under 4 (5) of the CEA:
- These apply when:
  (1) the accused is charged with an offence involving the **spouses person, health or liberty**
  (2) even though there is no charge, **evidence reveals that the accused threatened the spouse's person, liberty or health**, or
  (3) **violence** against the spouses child

R v Couture 2007 SCC- **affirms the existence and scope of spousal privilege**

C convicted of two counts of second degree murder wrt to 1986 killing of ex gf/friend. Convictions based in part on two out of court statements made by his spouse to police, who indicated that he had confessed to her he killed the two women (happened while she was his volunteer coordinator while he was incarcerated)

At issue: whether the out of Court statements of the spouse are admissible on the principled exception to the hearsay rule

Held: Conviction overturned

- Spousal testimony raises issues of competence, compellability and privilege that are governed by combination of CL principles and statutory provisions.
- None of the exceptions applies; Marriage btw DC and A was valid and subsistent, D was neither competent or compellable to testify for the Crown
- Question of whether they can be compelled is somewhat unsettled; assumes can be compelled ; competent witness is generally a compellable witness
- Pro spousal rule: likely to be more productive of family discord; threats

- On other hand, Charter values of quality and choice support idea of giving them the choice [**argument against if chose to do so on exam**]
- Rationale: don't want to disrupt marital harmony; humiliation of being condemned by life partner. Ultimately the PV is outweighed by a societal value, which will occasionally impede the search for the truth, **marital harmony**

COMPELLABILITY OF THE ACCUSED

The accused is not compellable; per 11 (c) Crown or co-accused cannot compel an accused to testify

ORDER OF WITNESSES

In a civil case the Court has no power to call a witness, but in criminal case may do so when seen as necessary in the interests of justice.

Cook: No specific right to face your accuser; Crown doesn't have to call witnesses

- A convicted of assault causing bodily harm; NBCA held he had right to face accuser
- L'Heureux Dube held that there was no duty upon the Crown to call witnesses, nor a specific duty to call the complainant
- How the case should be presented should be left to the Crown, absent proof of absence of exercise of discretion
- Judge can't launch an investigation, but can intervene for purpose of clarification of the evidence

R v P (TL): Calling the accused last does not necessarily diminish their credibility

A convicted of robbery, she called witnesses at the trial to establish an alibi, D called accused as its last witness and she denied any involvement in the robbery, TJ commented that little weight should be given to accused upon Cross examination because all other evidence in the case had been heard by the accused

Held: New trial ordered

While this could be true in alibi cases where the accused is called last, it may diminish credibility but does not necessarily do so. A is entitled to have his or her evidence heard in full.

Direct Examination

Examination in Chief = where the witness is being questioned by the party who has called her. It can also describe the method of questioning that the party calling a witness is entitled to use in normal circumstances [exam note: be super clear on who is interrogating who, if it is cross or chief]

Leading Questions

Leading Questions—Cannot provide leading questions to your own witness

Leading questions are questions, which directly or indirectly:

1) **Suggest to the witness the answer** he is to give. For example, a question that only has a yes/no answer can be considered to be a leading question; putting a basic proposition to the witness—essentially counsel is providing the evidence; or;

2) also be phrased to assume the truth of a fact, ex: "when did the accused stop spanking the child"

They are prohibited because there is an assumption that the party who calls the witness will have had more time with them, does not provide an opportunity to observe their demeanor and tone; and being under oath may cause them to give a more or less accurate recollection

EXCEPTIONS to the rule against leading questions:

- Introductory, formal or undisputed matters-- *ex: Mrs. Smith you are 34 and you have two children.*
- For the purpose of identifying persons or things—*have you seen this gun?*
- To allow one witness to contradict another regarding statements made by that other—*If Mr. J said you were driving at 7, would that be correct*
- Where the evidence is either hostile to the questioner or unwilling to give evidence
- Where it is seen, **in the TJs discretion**, to be necessary to refresh the witnesses memory
- Where the witness is having difficulty communicating on account of age, education, language or mental capacity--**note lower threshold for admissibility for these categories + increased discretion*
- Where the matter is complicated, and in the opinion of the TJ, the witness deserves some assistance to determine what subject the questioner is asking about—ex: *expert evidence*

R v Rose 2001 ONCA-example of leading questions getting kicked out; new trial
TJ has discretion to allow leading questions whenever necessary in interest of justice. But not here!
Crown used leading questions, DC objected, continued. Failure of DC to renew objection was not fatal

- All incriminating evidence came in through leading questions; raises spectre that it came in for the purpose of meeting the expectations of the Crown and the police

Refreshing a Witness's Memory

Present Memory Revived: Subject to an exclusionary discretion where doing so would be too suggestive a witness may consult any document while testifying as long as the document sparks an actual recollection of the event recorded, the witness can present oral testimony about the event remembered.

Past Recollection Recorded: A witness may, with leave of the Court refresh her memory in court from a document or an electronic record that was recorded reliably.
Requirements, per *Wigmore*, affim'd in ***Fliss*** are that:

1. The past recollection must have been recorded in some reliable way
2. At the time [he made or reviewed the record, his memory] must have been sufficiently fresh and vivid to be probably accurate
3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time [he reviewed it]. The usual phrase requires the witness to affirm that he "knew it to be true at the time"
4. The original record itself must be used if it is procurable

R v Wilks **(2005) Man CA**
Accused was involved in a car accident and received income replacement benefits from an insurer, case manager for the insurer met with her and rook notes that were summaries rather than verbatim accounts of what were said, which he then entered into the computer. He became suspicious of her and found out she was being fraudulent wrt to her condition. He was permitted to refresh his memory from his computer notes, and relied on them heavily at trial.

- There are two possible aids to help a witnesses memory:
- i) assist the witness by reviving his or her memory;
    - few restrictions on what can be used to jog someone's memory
- ii) be a record of the fact, previously made and now attested to as an accurate record
    - must meet necessity and reliability thresholds
- In Fliss, officer basically read excluded transcripts. It would have been ok for him to use them to refresh a genuine memory, but unacceptable for him to read them.
- You don't want an inadmissible past memory getting into Court!
- In this case, insufficient testimony regarding how and when the notes were made

R v B (KG) **(1998) ONCA** Can refresh memory with non-contemporaneous statements out of court; goes to weight
Accused was charged with second degree murder, first trial he was acquitted. Tried to argue that Tj erred because he permitted witnesses to refresh their memory with statements they had given to the police 2.5 years after the meeting where the accused confessed to them. They refreshed their memories with this statement well before the trial

- Found that there was no problem with them doing so
- It is another factor to be assessed in weighing the reliability

*R v Mattis (*1998) Ont Gen Div
Accused was charged with trafficking in cocaine.
It became clear that the officers had copied each other's notes, upon which they relied heavily
If you are using someone else's notes to refresh your memory, it isn't actually your memory that is being refreshed
Absent confirming evidence, would be dangerous to base conviction on evidence of these officers

Cross-Examination
Cross-examination is a vehicle for testing the evidence. To be effective it is important that you have knowledge of the file.

The basic purpose of cross examination are threefold: 1) **bring out additional facts**; can use leading questions, put propositions to them [*policy*: they aren't your witness, can't coach]; 2) **Challenge credibility [**they could be exaggerating**]; 3) Challenge the reliability of their perceptions [**how much weight can really be put on that testimony?]
***CEA*, Section 10**

Cross-examination as to previous statements
10. (1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention 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, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

Deposition of witness in criminal investigation
(2) A deposition of a witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be 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.

Re-Examination

R v Lyttle 2004 SCC RFAD mandates a broad right to cross examination, but it is not unlimited
Victim was allegedly beat up by a bunch of people, including the accused. The accused alleged that the victim was beat up in a drug deal gone wrong and only accused him to protect drug associates. TJ didn't allowe accused to put the theory to witnesses without evidence to support the theory. Accused was convicted; SCC orders new trial.

- You can't generally put a statement to the accused without supporting evidence
- However, when operating on a good faith basis, which is "a function of the information available to the cross-examiner his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness. It can be incomplete or uncertain, but it can't be reckless or false" Basically = **good faith**
- NH: Defence counsel often push the envelope on this point; intuition can relegate this to be a low standard and difficult test in application

R v R (AJ) 1994 ONCA
The accused was convicted of incest and appealed based on the prejudicial effect of the Crown's cross-examination.

- Crown counsel engaged in a variety of problematic conduct; asked the accused to explain why certain witnesses were testifying again him and why they were lying (this has a relevance problem + particularly with Crown that can result in reversing the burden of proof—gives TOF the impression that the accused has to provide an explanation)
- Crown also got into probative/prejudicial problems during cross exam—was getting into areas of general propensity; which isn't admissible if you try and call it + not admissible during cross exam. Operates to put inadmissible evidence before the Trier of Fact
- The tone was also critical—sarcastic and designed to humiliate and denigrate
- You need a strong cross, but this 'crossed' the line ;)

Rule in ***Brown v Dunne***

- **You can't rely on a position contrary to what a witness was saying unless you put that proposition to them**

R v McNeil-a breach of the rule in Brown v Dunne can lead to i) recall; ii) adverse inference
Accused takes the stand and says I wasn't involved, Crown witness was involved and he did it for someone named "Killer". When that Crown witness was on the stand but it was never put to him if you had a conversation with accused and told him you did it for "Killer".

- The remedy for a breach of the rule in *Brown v Dunne* is recall
- When that isn't possible an alternative remedy is **adverse inference** Judge can say:
    - 1) in considering this witnesses credibility you should know that propositions were put to that they were never put to them (then they get a credibility bonus in a sense; and may also say put very little weight on the attack on their evidence give that they weren't confronted by it;
- OR 2) judge can say I am going to put less credibility on that proposition

Re-Examination

- The general course of things is that a witness is called, provides evidence and is then cross examined
- Trials can become incredibly inefficient is for parties to be doing things out of turn; it can also be incredibly prejudicial
- The general purpose of re-examination is not to reiterate your evidence. Part of the purpose is to clarify something that was brought up for the first time in cross-examination.
- Example, the defense establishes that a witness had several beers the night of the evidence, inviting the inference that their perception was affected. The Crown could then ask questions to clarify that the witness is an alcoholic and was unaffected by several beers.

R v Sipes

- Smart J citing Watt J:
- It is fundamental that the permissible scope of re-examination is linked to its purpose and the subject-matter on which the witness has been cross-examined. The purpose of re-examination is largely rehabilitative and explanatory. The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are considered damaging to the examiner's case. The examiner has no right to introduce new subjects in re-examination, topics that should have been covered, if at all, in examination in-chief of the witness. A trial judge has a discretion, however, to grant leave to the party calling a witness to introduce new subjects in re-examination, but must afford the opposing party the right of further cross-examination on the new facts.

Collateral Facts / Rebuttal Evidence:

Counsel in cross is entitled to ask questions about matters relevant to material issues in the case, but is also entitled to ask questions about other matters that may be relevant to the witnesses credibility, these questions are subject to the discretion of the TJ. But in interests of judicial economy, should be content with answers to collateral facts. Thus:

Collateral facts rule: forbids the introduction of extrinsic evidence, which contradicts a witness's assertion about collateral facts

This rule can be difficult to apply in practice. Non-collateral facts are generally considered to be matters relevant to a material issue and facts relevant to a testimonial fact. Facts which are independently provable also fall into this category.

R v Krause-Test for Rebuttal evidence

Accused was questioned by police about a fatal stabbing and charged with murder. At the trial on voir dire, the answers of the appellant were held to be voluntary.

- As a **general rule**, Crown cannot split its case and bring in new evidence. However, rebuttal evidence can be admitted if it meets the following criteria:
    - **New significant matter** raised during the defence's case
    - **That could not have been reasonably foreseen**
    - **It must relate to a principal issue of the case,** cannot be collateral (Collateral evidence rule)
- Where the new matter is collateral, no rebuttal will be allowed
- Collateral evidence rule only applies to rebuttal evidence (not cross)

R v Cassibo

Counsel is entitled to cross examine a witness called by the opposite party on collateral facts affecting credibility; but can't contradict the answers of the witness with respect to collateral matters by the evidence of other witnesses

Statement Evidence

Prior Inconsistent Statements

Prior inconsistent statements: If a W provides a statement in court that differs from a previous statement given, this is a classic case of prior inconsistent statements and impacts W credibility

Prior consistent statements: As a **General Rule**, prior consistent statements are not admissible evidence because they are prejudicial, self-serving, have low PV, and extend litigation times.

- Some **Exceptions**:
    - For the purpose of supplementing the narrative and showing consistency of conduct usually in the context of sexual abuse/assault. Part of correcting the bias against victims of sexual assault.
        - If the ToF has some chronological cohesion about how the allegation came, they might draw some negative inferences, such as 'this wasn't brought up earlier so it must be fabricated. So the exception is that you can lead evidence of the disclosure of the abuse. The purpose of the evidence is just to provide some chronological context, so the details are inadmissible. The details are prejudicial, because they invite an analysis of consistency, and they don't have probative value.
    - i. Where it has been suggested that a W has recently fabricated portions (or all) of their evidence (***Stirling***)
    - ii. **Statements of the accused around the time of their arrest:** Many jurors would expect that if an innocent person was arrested they would be surprised and say something. That is generally inadmissible as a prior consistent statement. Denials at the time of arrest can be admissible can be provided that the accused is willing to take the stand. The fact that the accused takes the stand acts as a safety valve

Need to give W notice under CEA s. 10 before taking them to their statement.

R v Stirling Prior consistent statements can be admitted to disprove allegations of fabricated evidence but they can only be used to show that the evidence was not fabricated, and are not admissible for their content

Issue was whether the accused was actually driving the car when the accident injured the complainant. At some point the witness (other survivor in the car who could have been driving) filed a civil claim against the defendant. Raises the issue of the witness having a monetary motive to lie about defendant driving.

- In this case the consistent statement that was made prior to the civil suit was admissible because it shows that the witness's story was the same before there was a motive. His position was consistent before the triggering event. The statement was admissible to rebut the allegation made by the defense.
- But the fact that he was consistent still doesn't go towards the statement's truth.

R v Ellard

- The timing of the prior consistent statements is central to whether they are admissible
- Also will be a limiting instruction because there is a danger that the repetition of prior statements will bolster a witnesses credibility

R v Tat

- Where there is an in-court identification, prior consistent statement of identification are probative/admissible
- TOF to consider weight; circumstances surrounding prior identification important

R c Dinardo

- Further exception is where prior consistent statements may be admissible as part of the narrative: helping the TOF understand how the complainant's story was initially disclosed
- Here, they were too prejudicial to the accused and bolstered the credibility of the accused (weren't admissible under an hearsay exception)

R v Curto

- Prior inconsistent statements are not admissible for their truth

- The probative value is that the statement was made
- MUST WARN THE JURY of the limited use (reversible error)

*basically only admissible for the fact that it was made, in Ay, only the fact that it was made and not its contents was admissible

R v Edgar

- Other exceptions include where accused prior statement is relevant to state of mind at the time the offence was committed
- Also where there is a mixed statement that is partially inculpatory and exculpatory
- Also res gestae
- Spontaneous exculpatory statement made by an accused person upon or shortly after arrest may be admitted as an exception to the general rule excluding prior consistent statements for the purpose of showing the reaction of the accused when first confronted with the accusation, provided the accused testifies and can thus be cross-examined
- Not strictly admitted for the truth of what was said, but rather as evidence of the reaction of the accused (relevant to credibility)

*NOTE: not where there is opportunity to "think things out"

Attacking Credibility of Own Witness

You may want to challenge your own witness when they go totally off track, however there is a general rule is you can't attack your own witness, put leading questions to them.

The CEA provides a two-step process, where certain conditions are met, you can cross-examine your own witness about the change in their evidence.

CEA 9 (1) and 9 (2)

> **9.** (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 the last mentioned 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.
>
> (2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

- Allows you to conduct a broader cross-examination of the witness. You use it when you need to bring down the credibility of your own witness because they have given evidence that is contrary to what you expected.
- Witness must be adverse, not merely inconsistent. A witness is adverse when they have switched sides of the litigation; witness has changed camps. A lot of this can be based on the demeanor of the witness
- Single most important factor for finding adversity can be an inconsistent statement where there is no reasonable explanation for the change.
- Can't use 9(2), have to use 9(1) for a prior inconsistent oral statement.
- Re 9 (2) the statement is not admissible for it's truth. Potential problem with jury hearing prior statement that is not admissible for it's truth.

Section 9 Process:

- Try refreshing W memory with prior statements
- If unsuccessful, apply for s. 9(2)

  - Allows you to cross-examine your own W about difference between current and prior statements and get an explanation for inconsistencies
  - First, you need an inconsistent statement
  - Components of s. 9(2) from *Milgaard:*
    - Have to find statement was reduced to writing
    - Have to find inconsistency on significant matter(s)
    - The cross-examination that is permitted is limited to inconsistencies (prior statement is inadmissible)
    - Cross must be in the interests of justice (and will require a jury instruction)
  - Unless W adopts prior statement, TJ must tell jury statement is not being used for its truth
- If W becomes adverse or hostile to party leading them, apply for s. 9(1)
  - S. 9(1) gives ability to broadly cross-examine and attempt to reduce W credibility to zero once they have proved to be adverse
  - Only logical to pursue when W is adverse, not if they just give you nothing (ex. claim no memory)

R v Figliola

"Adverse Witness" = W who gives evidence unfavourable or opposed to the interest of the party that called him or her. Most common when a W starts to contradict his or her past testimony

"Hostile Witness" = W that does not wish to tell the truth due to motivation to harm party that called him or her or to assist the opposing party, they are antagonistic

There is a common law right to examine at large with leave of TJ if there is a finding of hostility (not affected by section 9)

R v S (CL)

The remedy of allowing the Crown to cross-examine its own witness is discretionary. There is always a danger that the evidence will be evaluated for its truth. Whether the discretion should be exercised might depend on the specific context, such as the circumstances under which the prior statement was obtained.

The crown's expectation can also be a factor to consider.

R v Milgaard-

Procedure under 9 (2)

- Under 9 (2) the cross exam is limited to the inconsistencies in the statement
- The consideration and disposition of a 9(2) application should not be made in the presence of the jury
- Shuold send them out for the application, consider the application, and determine whether there is inconsistency. If so, counsel needs to prove the statement, If witness admits then opposing party should have right to cross exam about circumstances regarding the statement
- A similar right to cross-examine should be granted if the statement is proved by other witnesses. It may be that he will be able to establish that there were circumstances which would render it improper for the learned trial judge to permit the cross-examination, notwithstanding the apparent inconsistencies. The opposing counsel, too, should have the right to call evidence as to factors relevant to obtaining the statement, for the purpose of attempting to show that cross-examination should not be permitted.
-
- Cross exam must be done in the presence of the jury
- **Judge has ultimate discretio**n to allow or deny s. 9(2) cross, even if criteria are met if prior statement is too prejudicial
- **Must instruct the jury** → make very clear that unless W adopts the prior statement, it is not evidence to be used for its truth
- *In this case, W was telling the truth in trial and had lied in prior statement, A was wrongfully convicted*

Milroy and Rouse v R [1978] SCC

If a W pretends not to remember a statement, it can be grounds for cross-examination under .s 9(2)

W has changed testimony on the stand (not long after giving previous statement) and is now claiming no memory.

- BCCA consider this a s. 9(1) case
  - Determine that adversity is not enough to trigger s. 9(1), need to point to some positive evidence that indicates need for reduction of W credibility (*Not uniformly adopted but can argue this route*)
- SCC consider this a s. 9(2) case

- Meets the *Milgaard* criteria
- Where the W legitimately says they remembered then and do not now, it is not an inconsistency for 9(2)
- Court finds that under s. 9(2), where you have to show an inconsistency, forgetting can cause an inference of lying (judicial discretion) which can trigger s. 9(2)

Hearsay

Definition of hearsay ***R v Khelawon***

(1) the fact that an out of court statement is adduced to prove the truth of its contents and
(2) the absence of a contemporaneous opportunity to cross examine the declarant

Absent an exception, HEARSAY IS PRESUMPTIVELY INADMISSIBLE [this is related to the lack of oath and absence of opportunity for cross examination or testing of the evidence]

Hearsay can be admitted on one of three bases [follow these steps in order; conceivable possible to be admissible on old exception but not pursuant to the principle approach:

1. **According to a statutory exception**
2. **Under an existing hearsay exception** which include: past recollection recorded, statements contributing to the narrative, business records, declarations against interest, dying declarations, declarations in the course of duty, spontaneous declarations, state of mind, oral history in AT cases, co-conspirator exception, spousal exception and prior testimony
3. **According to the principled approach**, which assesses reliability and necessity. "Necessity" is satisfied where it is reasonably necessary to present the hearsay in order to obtain the declarant's version of events. "Reliability" is threshold reliability, which is for the trial judge, who determines whether the hearsay statement exhibits sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the statement.

What is Hearsay

ANALYTICAL STEPS to determine whether or not something is hearsay:

1. **Who is the declarant**?
   - Usual scenarios are: witness is holding statement hostage (prior inconsistent statements) and witness is unavailable
2. **What does the statement assert**?
3. **What is the purpose of tendering the assertion**?
   - **Can ask: does the truth matter for what you want to use it for?**
   - If just for the fact it was said, Ex: order take out, go to pick it up, door is closed they say it's a kitchen fire. Caused the person to turn around *whether or not it was true.* Problem when statement is to prove there is a fire.
4. **If it is to prove the truth of the assertion, there is a hearsay problem**!
   - "Truth of its contents": It is not hearsay if the value of the words doesn't rest on the credibility of the out-of-court observer! Must be brought in for truth of contents
   - Ex: police officer testifies he received a call that someone was driving a car away from a local bar was very drunk. Not hearsay if admitted to prove the fact that he had grounds to stop the car (very fact it was made) but would be if it was adduced to **prove someone was drunk** (would need to test reliability)
   - **Example:** ***Balzter—*** "look out the aliens are firing" the fact it was said to explain that it reflects their state of mind. We don't really think there are aliens. Using it for the fact that it was said.
5. *****IS IT OTHERWISE ADMISSIBLE**?****
   - Ex: is it EME, post offence conduct, eyewitness etc?

R. v. Baltzer-**when considering whether something is hearsay, consider the use to which it is put!** If the relevance is in the fact that the statement was made, then ✔ if the statement contains a relevant fact then hearsay!

The accused wanted to enter into evidence conversations which took place btw the appellant and other persons; argued he wanted to introduce them not to prove the truth of what was said, but only to establish that certain things were said; the relevance being the state of mind of the accused

TJ ruled inadmissible

6. It is possible that hearsay evidence be admissible for some other purpose than to prove the facts stated; but jury must get clear direction in that regard
7. It is not the form of the statement that gives it hearsay or non-hearsay values; **rather the use to which it is put**
8. In the case, the jury should have all relevant evidence regarding an accused state of mind and here the appellant sought to admit on the basis that it was relevant to defence of insanity—comments were alleged to be of a "weird nature"
9. Purpose was not to prove the truth of what was said!

Absence of contemporary cross-examination: Ex: W testifies that he accused was her assailant; at trial W testifies he is not. Crown wants to admit out of court statement as proof of the fact that the accused did assault W. In those circumstances, the trier of fact is asked to accept the out of court statement over the sworn testimony of the witness.

- The out of court statement can raise many reliability issues, ex: did she have a motive to lie, what condition was she in?
  - Challenge: **no opportunity to cross examine the witness contemporaneously with the making of the statement**
  - Thus, witnesses out of Court statement falls wi general exclusionary rule even when declarant is before the Court

5. Is it admissible on any of the exceptions enumerated below?

Traditional Hearsay Exceptions

Declarations against interest

Principled basis for this is necessity (the declarant is unavailable) and reliability (unlikely to make a declaration adverse to own interest)

R v Demester

extension of declaration to include penal interest; key factor is vulnerability

Guiding principles to determine whether a declaration is against penal interest (in addition to the factors relevant to determining whether something is a proprietary or pecuniary interest)

(1) Declaration would have to be made to a person and in circumstances that the declarant would have apprehended the vulnerability to penal consequences (ex: wouldn't be met if you said it to a friend)
(2) Vulnerability to penal consequences not be too remote (here, affecting likelihood of parole many years down the line was found to be too remote)
(3) Declaration sought to be given in evidence must be considered in its totality; if the weight is in favour of the declarant—it is not against his interest
(4) In a doubtful case, a Court might properly consider whether or not there are other circumstances connecting the declarant with the crime and whether or not there is any connection btw the declarant and the accused
(5) The declarant must be unavailable by reason of death, insanity, grave illeness which prevents giving od testimony

R v Lucier

declarations with an inculpatory effect on the accused will not be admissible

A was charged with arson as a result of the destruction of his house by fire. Fire was set by a friend of the accused who was badly burned in the fire, interviewed by police that he set the fire and did so because the accused paid him to do so. He died and Crown sought to introduce his declarations as being against penal interest and therefore admissible.

- Court here drew a distinction btw declarations against penal interest that have an inculpatory v exculpatory effect
- The authorities that provided for admission of declaration against interest were not held to apply when the statement had an inculpatory effect on the accused
- The statements of the friend were therefore inadmissible; he couldn't have the opportunity to cross exam and his conviction was overturned on that basis

Dying Declarations

In a criminal case, a dying declaration of a deceased person is admissible for the prosecution or the defence when:

- The deceased had a settled, hopeless expectation of almost immediate death [subjective]
- Statement was about the circumstances of the death

- Statement would have been admissible if the deceased had been able to testify and
- The offence involve is the homicide of the deceased

Principled exception based on necessity (declarant is dead) + reliability (no motive to lie)
Specifically geared towards situations where someone is dying and with their last breath they identify their killer. Currently confined to homicide cases, but possible to expand.

R v Aziga
Accused is alleged to have sex with woman without disclosing that he was HIV positive; Crown wanted to admit the deathbed declarations of the women

- Court was satisfied that in the case of Barnes she had a settled hopeless expectation of death in light of all the circumstances (she had said…I'm not sure how long.. but acknowledged she was terminal and was aware death was impending)
- Also testimony of other woman; in state where she could no longer speak

DECLARATIONS IN COURSE OF DUTY
At common law, declarations either oral or written are admissible for their truth where (1) made reasonably contemporaneously (2) in the ordinary course of duty; (3) by persons having personal knowledge of the matters; (4) who are under a duty to make the record or report (5) who have no motive to misrepresent the matters recorded

- Not as important anymore; due to statute regarding business records

Reliability: If it's part of your duties, you already have a motive for being truthful and accurate – you could be fired if you don't

Ares v Venner: hospital records made by someone having a personal knowledge of the matters being recorded and under a duty to make the entry should be received in evidence as *PF* proof of the facts stated therein

R v Larsen SCC 2001-declarations in course of duty must be contemporaneous
Accused was charged w first degree murder; Crown applied for a ruling that an autopsy report and supplemental report were admissible in evidence; pathologist who made it had died; deferred decision on cause of death for 14 months, at which a later time in a supplemental report he declared that the victim had died of asphyxiation;
At issue: are the autopsy report and supplemental report admissible as declarations made in the course of duty?

- Requirements for common law admissibility of declarations made in the course of duty:
  - An original entry; made contemporaneously; in the routine; or business; by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it; who had a duty to make the record and who had no motive to misrepresent
- Autopsy report was admissible; but supplementary report wasn't on the basis that it lacked contemporaneity

SPONTANEOUS DECLARATIONS
This involves circumstances where it's unlikely to be made up because there has been no time to think through any reasons to make it up. Also, it can be sort of part of the act itself. Doesn't need to be perfectly contemporaneous with act, per ***R v Clark.***

R v Bedingfield (1879)-old law requiring narrow contemporaneity
Accused was charged with murder; deceased came out of the house with her throat cut, said something pointing at the house. Was what she said admissible?

- Not admissible as part of *res gestae* because it was not part of anything done, or something said while something was done, but something said *after* something was done
- Wasn't admissible as a dying declaration as it wasn't clear she knew she was dying

R v Clark 1983 ONCA-the declaration must be sufficiently contemporaneous to preclude concoction but not strictly contemporaneous
On the Accused's trial for murder, spontaneous utterances by the deceased made shortly after she had been injured by the accused when the accused was still present: "Help I've been murdered, I've been stabbed" were admitted as evidence of truth of

the facts stated. The deceased was the new wife of the accused's ex husband. They got into an altercation and the deceased ended up stabbed; appellant testified that the deceased was holding the knife first.

- Must be sufficiently contemporaneous to prohibit concoction
- And must explain or form part of a physical act
- But doesn't have to be narrowly contemporary; most important is that is precludes concoction or distortion. Here it was sufficient that they were contemporaneous with the events as they were unfolding
- Basically overturns ***Bedingfield***

STATE OF MIND; INTEREST

Where a person describes his or her present state of mind (emotion, intent, motive, plan) the person's statement to that effect is admissible where i) the state of mind is relevant and ii) the statement is made in a natural manner and iii) not under circumstances of suspicion.

- Use the words said to draw inference from **person's state of mind.**
- Debate whether or not this a true hearsay exception. It isn't using something for its exact truth, rather using the words that were said to draw a further inference about the person's intention/state of mind.
- Hearsay light: has a limited purpose; can't be that a particular fact happened
- Need a limiting instruction; only can draw an inference that the person is worried. Could edit to take out really prejudicial part ex: can't prove that he beat her
- Can include i) direct state of mind and ii) intention to do something

R. v. Panghali; pp. 804-807-*using diary evidence to draw a general inference she is in a worried state about her husband—a state of mind of fear*

Charged with murder of his wife; found burned to death and strangulation was cause of death
Concerns the admissibility of various writings, which are agreed to be the deceased in a search of her home after her death; Challenging to assert the date of the writings
Crown seeks admission of the writings to show (1) Panghali's state of mind; and what the Crown describes as the couple's deteriorating relationship in which Mr. Panghali emotionally abused her
Wants to submit as evidence of his motive and animus toward his wife; Writings are on a variety of topics; including their relationship

Are the writings admissible "state of mind evidence"?

- It is well established that the deceased state of mind may be relevant as "one link in a chain of reasoning which could lead to a finding that the accused had a motive to kill"
- Per Doherty J in *R. v. P.(R.)*: dissatisfaction of the deceased with her relationship and determination to end the relationship increased the likelihood that the accused had a motive to cause her death, whether or not the accused knew of the deceased's state of mind or her intentions
    - Relevance is a matter of logic in light of the judges own understanding of human conduct
    - Is also situational and depends not only on the ultimate issue but also on other factual issues which either of the litigants raises as relevant to the ultimate issue
    - The chain of reasoning is that the mental state means that it is more probable the relationship was bad, more probable the accused had motive ascribed to him by the Crown, and more probable that motive existed than would be the case if the triggering event did not occur
- In this case, would be relevant on the basis of going to the husband's motive
- Judge finds that state of mind evidence is hearsay, because goes to the truth of her state of mind
- ***R v Griffin*** confirms that state of mind evidence may be admitted under an exception to the hearsay rule: (victim had stated, if something happened to me, it was Griffin)
    - "As this Court stated in *Starr*, declarations of present state of mind are admissible under the traditional exception to the hearsay rule where the declarant's state of mind is relevant and the statement is made in a natural manner and not under circumstances of suspicion"
- While not subject to the principled approach analysis; they must have a measure of trustworthiness
    - Application: the wife's writings appear to be sincere
- Held writings are relevant and are admissible under a traditional exception to the hearsay rule to provide evidence of Ms. P's state of mind

Whether the writings are admissible as evidence of the events and conduct they report, and

- Examines on a principled basis; classic hearsay evidence for which no traditional exception applies
- Parties agree that the evidence is necessary because Ms. P cannot testify
- Court: doesn't meet the reliability threshold because they are Ms. P's subjective interpretation and analysis of the events and conduct she describes and not a report from an objective perspective

R v Starr SCC 2000

Accused charged with shooting C and W on the side of the road; G was a jealous girlfriend who asked C why he was out with W; said he had to go to an Autopac scam with Robert (the accused)

- Theory of the Crown at trial was that it was a gang -related execution and had used the scan to get C into the countryside
- TJ found G's testimony regarding the scam was admissible as hearsay exception under "state of mind" exception
- Hearsay is not generally admissible to show the intentions of a third party;
    - There is no support in Canadian jurisprudence that statements od intention are admissible against someone other than the declarant
    - There are good reasons against allowing statements od present intention to be used to prove the state of mind of someone other than the declarant; multiples danger of being unable to cross examine
    - Statements of joint intention are only admissible to prove the declarant's intention
- TJ erred in admitting cook's statement to G under the present intention exception and not limiting it:
    - Statement had no indicia of reliability since it was made under circumstances of reliability
    - TJ failed to instruct the jury that the statement was only admissible as evidence regarding the intention of Cook and was more prejudicial than probative
- Suspicious circumstances: they had been in a relationship with each other; said in heated context
- Prejudicial effect: TJ did not make a finding on reliability; but PE outweighed PV; was a number of inferences that could have been drawn based on the evidence; Appellent was in the car that followed him; went with cook as a plan to lure him and kill him

The Principled Approach

NECESSITY	THRESHOLD RELIABILITY
This requirement is satisfied where on a balance of probability, it is "reasonably necessary" to present the hearsay evidence in order to obtain the declarant's versions of events -reasonable efforts have been made and you can't get the person (ex: phoned every relative); -where there has been a radical change in evidence that can also create necessity -can do if denied on 9 (1) or 9(2)	This is a threshold reliability, which the TJ must determine on a BOP. The function is to determine whether the particular hearsay statement **exhibits sufficient indicia of reliability** to afford the TOF a satisfactory basis for evaluating the truth of the statement Threshold reliability asks whether or not there are substitutes for the oath! If there is we are more likely to give

Substitutes for reliability per *KGB* **[**consider together, not having a good substitute for any one of them could be a huge problem**; but don't have to meet every substitute]**:

Spectrum of Substitutes for **Oath**: (Best to worst)

- The oath was given to the person before they made the statement and they were warned against the consequences of perjury
- There was no oath, but there was a PO that emphasized to the W that they need to be exactly correct in their statement and this was serious
- Someone just wrote out something with no instructions
- Causal comment made to a friend

Spectrum of Substitutes for **Presence**: (Best to worst)

- Videotape and Audio: you can see their body language, tone, etc. [benefit of demeanor]
- Police officer describes them

- Audio only
- Careful written out statement in witnesses own hand
- Someone writes out what the witness said
- A friend calls the police stating that last week their friend told them something

Spectrum of Substitutes for **Ability to Contemporaneously Cross-Examine the Witness**: (Best to worst)

- Being able to cross-examining the witness at trial – you have a chance to cross them
  - In KGB, the W abandoned their prior statement, and while they weren't cross examined the witness when they made the statement, but they can x-examine them when they get to trial
- Witness is dead and they cannot be crossed at trial

Should look at the reliability of the content of the statement rather than atmosphere; more holistic. Is there other corroborating evidence for the content of the statement?

Khan: corroborative evidence; no motive to lie
Smith: no motive to lie
Lookd at content; was it likely to be true!

R v U(FJ)(1995) SCC – Similar out of court statements can be compared with each other to establish reliability
A's prior admission was in evidence. Complainant had made a statement pre-trial which matched a lot of A's statement. At trial, A says previous admission was bogus and complainant denies events.

- Lamer J found what was important was the similarity of the two independent statements
- One possible explanation, in the absence of collusion or coincidence, is that the statements are true
- So the threshold of reliability could sometimes be established by striking similarities between two prior independent statements

R v Khelawon [2006] SCC – When assessing the threshold reliability of a statement, the court can also consider **inherent trustworthiness**

- Strong language that hearsay is presumptively inadmissible and some high thresholds must be met but those are not limited to the circumstances the statement was given in (***KGB***), can also look at inherent trustworthiness.
- Absence of cross exam continues to be an important factor
- A number of factors can be drawn out of this trustworthiness analysis of threshold reliability:
  - Motive(or absence of motive) to lie? Freshness/staleness of events from time of reporting? Look at narrative/flow/logic of statement. Look at interactions between questioner and statement-maker *(ex. leading questions)*. Look for corroborating evidence.
- We are looking for trustworthiness of the statement, not the person making it
- Court is still very wary of absence of cross-examination (wonder how trustworthiness would have been impacted on cross, especially if story has some frailties)

Principled Approach to Hearsay TEST:

1. Hearsay is presumptively inadmissible
2. Do you need it for its truth? *If yes,*
3. Is the content of the statement otherwise admissible (PV>PE)? *If yes,*
   a. Ex: no general propensity
4. Can the party leading the evidence establish on BP that the statement is not a product of state coercion? *If yes,* [can get kicked out alone on this basis-under N or R or IT factors]
5. Does it fit within a statutory exception? *If no,*
6. Does it fit within a CL exception? *If no,*
7. Can the party leading the evidence establish on BOP that admitting the statement is **necessary**:
   i. Must be necessary to discovering the truth
   ii. Must be necessary in enabling all relevant and reliable info to be put in front of the court
      (i) Inability of W to testify in court

(ii) W radically changes testimony and washes hands of previous testimony

8. Can the party leading the evidence establish on BP that statement is **reliable**:
   i. ***KGB*** asks for closest fit to three indicia of courtroom testimony
      (i) Oath or solemn affirmation
      (ii) Physical presence to allow observation of declarant
      (iii) Ability for contemporaneous cross-examination of declarant
   ii. Similar out of court statements can be compared with each other to infer reliability (***U(FJ)***)
   iii. If ***KGB*** criteria are not met, consider inherent trustworthiness (***Khelawon***)
      (i) Does the content carry with it such strong indications of truth that we think it meets threshold reliability and can go to the jury?
      (ii) Is there any motive for W to lie? [NH this can play a huge role, ex: ***Khan***
      (iii) Also content itself, does it seem logical?
      (iv) Also look at contemporaneity (how soon afterwards have they spoken?)
      (v) Were there leading questions?
      (vi) Was there coercion [*probably most likely to see here, more probable to be used as weighing rather than pure strike as judges need high std to kick out on coercion alone]*
      (vii) Is there any corroborative evidence to support the truthfulness? Ex ***Khan***
      (viii) Does it cry out for certain questions to be asked? (*relates to CE*)
   iv. The tests can be complimentary in establishing the balance to pass the threshold of reliability
9. PV versus PE must be satisfied
   - At this stage, may look at the witness relating the statement and exclude in exceptional circumstances on this basis (because W is not the focus, statement is)

Statutory Exceptions

Statutory exceptions will trump the above process because they tell you the parameters of inclusion so you do not need to do analysis. Parliament has decided, in certain instances, there will be a statutory basis for letting in evidence. One example is **business type records**. *note there are more exceptions in the civil section.

Documents presented in evidence for their truth are hearsay because the document is speaking to the event

- In essence, it is an out of court statement
- It is second-hand evidence, it is a comment on the scene
- But business type records are presumed to be reliable b/c common sense that there is a careful process of recording in business circumstances that make them more likely to be trustworthy

Canada Evidence Act, s. 30: Business Records

30. *(1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.*

(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

(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.

(12) In this section, "business" means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or

elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government

R v Wilcox(2001) NSCA – Start with the statute, then CL, then N/R analysis
Question at issue was whether a record created more for personal basis within "usual and ordinary business"? Court goes through the 3 potential avenues for admitting a business document.

- **Statutory exception to hearsay –** Inadmissible under s. 30 b/c made under employee's own initiative (against orders not to make a document), not in "usual and ordinary course of business"
- **CL exception to hearsay –** Inadmissible b/c employee had no duty to make the record (duty to make a record is a key element of the CL exception
- **Principled approach** - ADMISSIBLE as while did not quite meet the first 2 exceptions, it was very consistent with the principles of those exceptions
    - **Necessity:** No other means to get at the evidence as the employee does not have an independent recollection of each transaction
    - **Reliability:** Professional method was used, created on a routine basis, employee has no motive to lie, there is no dispute as to record's validity
- Example of when "close" can be meaningful b/c can supplement N/R analysis with attributes of statute and CL that you do meet for increased reliability

Prior testimony exception
At common law, when a witness has given testimony in a previous proceeding and the opposing party has had the opportunity to cross examine it can be admitted in a subsequent suit btw the same parties or those claiming under then. [necessity because witness is unavailable and the fact that the statement was given under oath and was CE'd]
Statutory version present in section 715 of the Criminal Code
(1) Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the 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 accused did not have full opportunity to cross-examine the witness.*

R v Potvin SCC 1989
Potvin and two others were charged with second-degree murder. Crown proceeded against Potvin first,
One of the other testified at Potvin's preliminary inquiry but not at his trial. Crown succeeded in having witness testimony taken at prelim admitted into evidence.
-Court confirmed it is opportunity of Cross examination that is crucial; opportunity is not missed because cross exam may have been different at pre-lim
-provides that it be read as evidence, not accepted as evidence
-judge has large discretion—word "may" means that discretion to exclude evidence may be exercised 1) when there was unfairness in the manner in which the evidence was obtained; or 2) where the admission would affect the fairness of the trial itself—whehre highly prejudicial to the accused but only of marginal probative value. But shouldn't be used to undermine authority of section

Admissions and Confessions

Formal Admissions

An important part of the civil and criminal processes are determining the disputed facts. Trial usually starts with the TJ giving a list of admissions. If facts are not admitted they will have to be proven through evidence.

Admissions get around hearsay

Formal Admissions:

"Formal admissions" = A party, in consultation with the other party, agrees that certain things are conclusively proven (i.e. undisputed)

- Counsel needs specific client instruction to make admissions
- Judge cannot order admissions

2 good reasons to make an admission:

1. It is in the interests of justice to do so – *saves court time and resources*
2. Strategic interest – *can be used strategically prevent jury from hearing about prejudicial evidence*

Criminal Code, s. 655: Admissions at trial
Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

Castellani v The Queen (1969) SCC – Cannot force another party to admit something and cannot force someone to agree to an admission

- In the criminal context, admissions are a response to allegations made by the Crown
- It is up to the Crown to state the facts and charges and it is up to the defence to admit to them or not
- Defence cannot make an admission if Crown is unwilling to accept it
- Counsel needs specific instruction from client to make admissions and both parties must agree on the wording
- The purpose of section 562 therefore is to eliminate the necessity on the trial of an indictable offence the proof by the Crown of any fact it desires to prove and which the accused is prepared to admit

R v Proctor SCC (1991) The Crown can't reject an admission just to keep an issue alive artificially
Accused charged with first-degree murder; Crown wanted to introduce similar fact evidence regarding two similar attacks made by the accused on two teenagers a few weeks after the killing
The Crown refused to accept a admission regarding the identity of the killer as it wanted to introduce evidence relevant to identity (this similar fact stuff)

- While it is true that admissions must be accepted by the Crown [***Castellani***], they can't be rejected to keep an issue alive artificially
- The Crown should not be allowed to gain entry for prejudicial evidence by refusing to accept admissions

Informal Admissions

Probative Value
Informal admissions are admissions of the party to the proceedings made outside of the Courtroom

This type of evidence has a high probative value (the accused saying something about themselves); any circumstances regarding reliability/credibility will go to weight, *not* admissibility

The accused cannot lead his or her own statements (rule regarding prior consistent statements)

These types of statements can range from *implied statement* to *confession*.

Informal admissions are not hearsay evidence:

- This is informal statements the accused said previously, contrasted with hearsay, which is leading something a witness said prior to trial or any statement from a non-accused

R v Hunter (2001) ONCA-partial overheard statements are only admissible if full context is present; limited probative value and high prejudicial effect otherwise
Was the accused (of killing a police officer) statement that he "had a gun but didn't point it" admissible as overheard by a passerby?

- Cites case where "I killed David" was inadmissible on the basis that was all that was overheard. Extremely prejudicial + lacking context
- The reasoning is that context plays a very important role in spoken words
- Only possible basis for admission could have been the admission by the accused that he had a gun
- But wo the surrounding words it would be impossible for a jury to conclude it was a proper admission
- **When only a "snippet" overheard statement is inadmissible;** Courts will be zealous on this point

While admissions are generally considered to be an exception to the hearsay rule; they do not share the same attributes as the others, namely trustworthiness and necessity.

Khelawon seems to suggest that the necessity and reliability inquiry should not occur.

Per ***Capital Trust Co v Fowler***, if an adversary choose to introduce a statement by the party-opponent he must introduce all of the statement and not just the portion which favours him; the admission must be used in its entirety.

Prosecution is also not obliged to admit all admissions of the accused

R v Phillips (1995) Ont Gen Div self-serving admissions after time for reflection shouldn't be admitted
Accused charged with the murder of a police officer; he was picked up and said "I guess I really did it this time" and also asked the arresting officer "Who is the guy I murdered". He then was interviewed by the police once he arrived at the station and adduced several defences, ex: it was drugs, alcohol, mistaken self defence, took a swing at someone.
At issue: Is it one whole statement admissible as one or is it severable?
Defence argues that it should go to the jury as one; Crown argues that the evidence is self-serving and not explanatory of his original statements to the officers

- Authority militates against the admissibility of self serving evidence when you have had time for reflection
- There were both time for reflection btw the two statements and had received legal advice
- Crown may be required to lead two statements if there is a strong link between statements that they are essentially one statement as a whole—but here there wasn't enough to make them admit it!

R v Streu (1989) SCC-once it is established an admission is made, there is no basis for treating it differently than if it had been made in a witness box. A party making an admission may adopt a hearsay statement as his or her own for the purpose of admitting the facts therein
Accused convicted of possession of stolen property, sold property to an undercover police officer, in conversation with PO admitted that the tires and rims belong to a friend who had "ripped them off". Absent this statement there wouldn't be enough to prove that the items were in fact stolen.

- Court of appeal found that the statement of the accused was not proof that the items were stolen
- However, when an admission is made, the party making the admission has satisfied themselves as to the reliability of the statement (the party against whom the evidence is rendered has the opportunity to test the evidence?)
- Any evidentiary weakness becomes a matter of weight
- On the other hand, a statement is not admissible as proof of the truth of its contents if the party simply reports a hearsay statement without either adopting it or indicating a belief in its truth.
- Here, should have been admissible because clearly they were relying on it as being true

Voluntariness Rule
While you don't have to go through the same hurdles wrt to admissions as you do with hearsay, **voluntariness** will be a key hurdle.

The voluntariness rule: All statements made to a person of authority must be proven to be free from fear of prejudice, hope of advantage and other factors (oppression, operating mind, trickery)

Where there is a statement made to persons of authority, the Crown must prove BARD in a *voir dire* that the statement was voluntary or it will be inadmissible. (Recall that the accused can waive such an inquiry)

Elements: (i) Standard of proof = **BRD for each statement** unless waived by A, (ii) **Crown must pursue through voir dire**, Defence can make explicit in-court admission of voluntariness, and (iii) voluntary statement must be knowingly **made to a state representative** who can influence the case

CAUTION: if there is no evidence of voluntariness and the statement comes in = a reversible error

Why have the rule? Unreliable statement threatens the search for the truth (associated with wrongful convictions) and the integrity of the justice system must be preserved.

If there is no evidence of voluntariness but the statement is admitted anyway, it constitutes a reversible error and will be overturned on appeal

R v Oickle (2000) SCC Establishes the test for voluntariness
Accused was accused of setting fire to his fiance's house; was interviewed from 3pm until 11pm; put in a cell to sleep at 2:45; taken around to a re-enactment at 6:00am. Charged with arson, Tj ruled on a voir dire that the accused statements were voluntary and admissible; CA overturned. SCC→ admissible
At issue: common law limits on police interrogation. Did the police improperly induce a confession?

- Key to the reasoning was that the accused knew he could leave; got food and drink
- They were not hostile aggressive or intimidating
- Goals of the confession rules: protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes.
- Should be considered in light of unsavory history of police interrogations; but must also understand how false confessions occur
- There are consequently a number of factors that the trial judge must assess regarding the voluntariness of confessions:
- **Were there threats or promises**? – *"fear of prejudice or hope of advantage"***
    - **Hope of advantage** – *not every inducement makes an admission involuntary*
        - Quid pro quo involving legal advantage is not allowed—this would raise spectre of confession merely in order to gain the benefit offered by the interrogator
        - Moral inducements are okay – *"you will feel better", "do it for your family/God", "take responsibility"* (inducement offered is not in control of the police officers)
        - Be careful with inducements in the middle that may be construed as leaning toward moral becoming legal – *"your life won't be over, you will still be able to do this" (may imply short prison time)*
        - Can offer psychiatric help but not in exchange for anything
    - **Fear of prejudice** – *can be direct or indirect*
        - Direct: "Talk or you will be hurt"
        - Indirect: "If we knew more about this, we could put you in protective custody"
- Basically, police usually offer some sort of inducement in an effort to convince the suspect it is in their best interest to confess—the threshold of impropriety is crossed when the inducements are strong enough to raise a reasonable doubt about whether the will of the subject has been overbourne
- **KEY:** look for a quid pro quo offer in terms of a threat or a promise
- Was A in **oppressive environment/conditions**? [danger of making a stress-compliant confession to escape the conditions]

- If oppressive environment/conditions are linked to an admission, it is inadmissible
  i. *Examples: no food, inadequate clothing, very cold (Courts have indicated needs to be more extreme than lengthy questioning)* in this case he had food etc.
- Exaggeration of evidence or leading false evidence does not automatically result in involuntariness but dangerous b/c can impact voluntariness

- Must show A had **operating mind** - *awareness*
  - There is a basic assumption that A has ability to control/decide to confess or not but if there is some indication that A does not have an operating mind, admission may be inadmissible
  - Basically they just need to know what they are saying and that it can be used to their detriment
- Was there any other police trickery?
  - Broad category designed to protect the reputation of the justice system (while still related to voluntariness)
  - Confession/admission will be inadmissible is obtained through a method that would **shock the conscience of the public**
    - **Ex:** injecting truth serem into a diabetic pretending it was insulin; posing as a legal aid lawyer
    -

*case has been critiqued as enabling coercive investigation

R v Grandinetti [2005] SCC – If A believed the undercover cop was a criminal, will not meet the authority requirement

- Court determines a person in authority is someone who A believes to be in a position of power to influence the prosecution or investigation
- "Persons in authority rule": based on two fundamentally important concepts; need to ensure reliability of the statement + need to ensure fairness by guarding against improper state coercion
- PIA is a threshold determination that must be met before moving on to voluntariness analysis
- TEST: **subjective;** based on the A's perception of the person whom they are making the statement too. **Did the accused belief that either in refusing to make a statement to the person would result in prejudice or favourable treatment?** This is also qualified by an objective element; must be a reasonable belief that they are speaking to someone in authority
  - This person is someone the confessor believes to be an agent of the police/prosecutor
- If person in authority is not found then it is unnecessary to have a voir dire on voluntariness
- If A confesses to an undercover officer that s/he thinks can influence his or her murder investigation by enlisting corrupt police officers, the state's coercive power is not engaged

USE IN MR. BIG CONTEXT-If voluntariness isn't an issue then how can you try to get it excluded?

- Per section 7, fairness of a trial can be undermined where there is patently unreliable evidence or state misconduct which brings into the integrity of the Court system (**public would lose confidence in the system)**
- If sometimes information about a violent atmosphere, then it should be given little or no weight
- BUT exclusion: para 36: "There is no doubt that statements can sometimes be made in such coercive circumstances that their reliability is jeopardized even if they were not made to persons in authority"

EVIDENCE OF A THIRD PARTY PERPRETATOR:
This is generally admissible but has to meet the probative/prejudicial balancing
Has lowered defence standard; ***Seaboyer***
This type of evidence has a chance of being a significant red herring;
Ex: it was someone else (ex: Robert Pickton was a known criminal at the time), and then can lead propensity evidence about their generally violent acts (can be substantially outweighed by prejudice)
Have to show it was a sufficient connection not just mere suspicion; i.e can't make unfounded allegations that there was a third party perpetrator

Admissions of Co-Accused

Admissions of A are only admissible against A. So if A, B, and C are all charged and A gives a confession that implicates all of them, it is only admissible against A (jury instruction will specify this).

Policy: would create an incentive to confess a little bit and blame it all on the other person; creates a motive to make the other person more responsible than you + you may not take the stand as the accused so you can't argue against it; never get to cross examine on them on why the confession might be bogus

A Court has four options:

1. Sever the trials;

2. Exclude the confession altogether;
   - Continues theme that the course isn't necessarily an "all or nothing game"
   - Essentially edit out part where they talk against B

3. Edit out the offending admission; or

4. Allow the inadmissible statement but give limiting instructions to the jury
   - Can leave a serious risk of prejudice, but happens given the high presumption that juries comprehend and follow complex legal instructions
   - Ex: Forget about it when you consider case as a whole, consider confession only in case about A and forget about in case against B

R v Grewall [2000] BCSC – Confession of A is not admissible against co-A + an example of editing
Judge instructed jury to use confession for certain things but ignore for others – not to be used against co-A. Crown did not want confession to be edited, wanted the entire context to make the confession stronger. Court denied. Short edit was done of confession that Judge found would not affect the overall statement.

- "An out-of-court confession is only admissible against the A who made the statement. It is not admissible against the co-A" [para 28]
- Judge has to perform careful balancing → do not want to undermine the evidence but should remove parts that can be safety removed to protect other As
  - Becomes more challenging when confession is littered with references to co-A (editing may make evidence unreliable)
- Judicial discretion to admit in full, edit portions, or exclude entirely

Exclusion of Evidence Under *the Charter*

Section 24(2) of the *Charter*
First, consider was there a breach? Ex: s. 8, 10 (b)

Second, was the evidence obtained through that breach?

Third, would the admission of the evidence bring the administration of justice into disrepute? (note that the Court may overlook a very technical breach)

- Administration of justice into disrepute—that is a reasonable person who keeps up to date on the justice system

Grant considers whether the admission of evidence would bring the administration of justice into disrepute

R. v. Grant
There are **3 main factors to consider and balance** when enquiring whether the admission of evidence will bring the administration of justice into disrepute:

1. The seriousness of the Charter-infringed state conduct – *an assessment of how bad the conduct was of those that committed the Charter violation*
   - Spectrum: technical and reasonable "good faith" mistake ←→ intentional omission ("bad faith breach")
   - How much willfulness was involved? Were they making a reasonable attempt to follow the law? Was there a pattern of abuse?

2. The impact on the Charter-protected interests of the A – *the degree to which the violation impacted A's interests from the perspective of A*
    - Ask: How intrusive was the violation?
    - Ex: work desk v home computer

3. Society's interests in an adjudication in the merits – *if the evidence is seen as very reliable, despite the Charter breach, this factor will weigh heavily for admission*
    - Assumes society will be particularly concerned with the exclusion of reliable evidence (**important factor)**
    - I.e how important is the evidence for the trial? Will a murderer be walking?

Four categories of evidence for the purposes of Charter breaches:

1. **Statement evidence [strong presumption that this is out]**

- Right against self incrimination is a very strong Charter right

2. **Bodily evidence**

- Basic principle is that the more invasive the bodily evidence the less admissible it will be; important to consider that there are a range of circumstances
- Examples of less invasive: a technical violation where they plucked hair on the wrong day; and Courts have also ruled that a breath sample is not very invasive at all
- Can become a more serious breach when it is deliberate, ex: blood test

3. **Non-bodily physical evidence** and;

- Consider how invasive the breach is, ex: pat down v strip search
- Where excluded is massively negligent police behavior

4. **Derivative evidence:** discovered as a result of an unlawfully obtained statement—related to statement evidence

- The evidence is obtained derivative of a Charter breach (threaten with a gun, they say where the evidence is)
- Basic analytical steps": 1) was there a breach? 2) was it discovered because of the breach? 3) was it otherwise discoverable?

Privilege Against Self-Incrimination

Police Custody

Right to silence flows from right to not self-incriminate.
The law in this area is difficult to apply; it is challenging to ascertain when police have gone too far

Police Custody

R v Singh[2007] SCC – S. 7 right to silence in custody issues are covered under voluntariness
A had consulted with counsel (no s.10(b) violation) and said he was engaging his right to remain silent 18 times. Authorities continued to speak to him (5-6 hour interrogation) and he identified himself in a picture at the crime scene.

- Critical balancing act between state and individual interests in this area
- Court makes clear that the right to remain silent is not equal to the right to not be spoken to by state authorities
- CL rules set out a balance that is protective of A's right but also recognizes that police need to diligently investigate crimes
- Interrogations w/ legitimate police means can continue despite A's expression of desire to remain silent
- **Ultimate question:** A must make a free choice, however, a "free choice" is not equal to the "best choice"
- Number of factors (none are determinative) may show a person's right to make a free choice had broken down:
    - Number of time person expressed desire to remain silent
    - If police told or implied that A had to provide a statement (very contextual)
    - The impact that continued interrogation has on A (vulnerable A versus sophisticated A)

Dissent: *Singh* was in total control of the police; asked to be returned to his cell

Per Nfld. Court of appeal in *Hart*, the majority widened the application of the pre-trial right to silence to cover cases where the accused is not physically in detention but is equivalently in control of the state (coerced Mr. Big confession)

Out of Custody
There is a common law right to silence that generally applies in society; there is no general obligation to assist law enforcement or the gov't Equating silence with guilt fundamentally undermines Charter rights!

P 510: "absent a statutory requirement to the contrary individuals have a right to choose whether to speak to the police if they are not detained or arrests; CL right to silence exists anytime they interact with a person of authority whether detained or not"

"Statutory requirement to the contrary" there are exceptions; ex: showing your drivers licenses; in some instances society has decided you do need to speak to the police or some other authority at a certain time

R v Turcotte (2005) SCC – Silence in the face of police questioning cannot be used as evidence of guilt
A went to police station and asked for car to be dispatched to a ranch but did not explain why. Answered some questions but then stopped talking. Three people were found murdered at the farm

- Right to silence would be an illusory right if the decision not to speak to the police could be used by the Crown as evidence of guilt
- "A refusal to assist is nothing more than the exercise of a recognized liberty and, standing alone, says nothing about the person's culpability"
- There is a strong CL right to silence that operates when a person is not in detention or in custody
    - A person has a right to stop talking at any time, and
    - Cannot draw a negative inference from stopping
- **Every person, absent a statutory exception, retains a CL right to remain silent**
- Silence may be admissible to go to narrative (signalling when the conversation stopped); it can also be admissible when the defence raises an issue that makes the accused's silence relevant, ex: saying we cooperated
- In these types of situations, should give jury instruction b/c there is a natural tendency to infer guilt from silence

R v Prokofiew-give instruction where there is a concern that the jury will draw a conclusion from the accused's silence
Co-accused charged with conspiracy to defraud; question for the Court was whether or not both accused were aware of the fraudulent nature of the scheme. P did not testify but was implicated by S. Counsel for S asked jury to infer his guilt from failure to testify.

- 4(6) of the CEA does not prohibit a TJ from affirming an accused right to silence
- TJ should provide an instruction where there is a realistic concern that the jury may place evidential value on an accused's person right to testify
- **Silence cannot be used as evidence of guilt**
- Confident that the jury instruction in this case would have made it clear to the jury that silece at trial did not constitute evidence
-

Witnesses
Sections 11(c) and 13 of the Charter

- 11—Any person charged with an offence has the right: c) not to be compelled to be a witness in proceedings against that person in respect of the offence
- 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.

Accused historically could not testify; CA made accused competent for the defence
But up to the accused as to whether or not they would go in the box
No witness can refuse to answer a question on the grounds that it would criminate, but rather that that testimony couldn't be used against them in later proceedings

Riley v Henry Section 13 shouldn't protect an accused from cross-examination when they have chosen to testify one way at trial and then differently on re-trial
Purpose of section 13 is to protect individuals from being indirectly required to incriminate themselves

R v Nedelcu*i*-canvasses scope of s. 13 protection; must be incriminating in the sense that it could be used against you to go to guilt
Accused took a fellow employee for a motorcycle ride on company property, there was a crash. P wasn't wearing a helmet and suffered permanent brain damage. Accused suffered minor brain damage. At criminal trial for dangerous driving causing bodily harm, Crown sought to cross-examination on discovery in a civil suit by P and his family. In civil suit he said he had no memory of accident; in criminal he gave detailed account of how accident occurred.
TJ allowed Crown to cross exam on statement re: credibility on the basis that s. 13 of the Charter did not apply to compelled discovery in a civil case—his situation did not meet the rationale of compulsion according to the TJ

- This is not a case for section 13; a party seeking to invoke s. 13 must establish that he or she gave incriminating evidence under compulsion at the prior proceedings.
    - Quid = incriminating evi the witness ahs given at a prior proceeding where the witness could not answer; and quo = the states side of the bargain; they have undertaken to not use evidence to incriminate in any other proceeding
- Incriminating evidence is evidence given by the witness at the prior proceeding that the Crown could use at the subsequent proceed
- Distinguishes the present circumstance—evidence given by the witness in a prior proceeding could not be used by the Crown at the subsequent proceeding to prove the witnesses guilt on the charge for which he or she is being tried—there was no quid/quo
- the law clearly indicates that evidence may be considered incriminating at the time the Crown seeks to use the evidence in a subsequent hearing, rather than the time the evidence was initially given. This point emphasize that there may be times when seemingly exculpatory evidence "may become 'incriminating evidence' at the subsequent proceeding, thereby triggering the application of s 13."
- In the view of the majority, the facts of this case did not entitle Nedelcu to the protection of s 13 of the Charter because his statement that he could not remember anything from the night of the accident could not be used to prove his guilt at trial. While Moldaver J. recognizes that the introduction of Nedelcu's "inconsistent discovery evidence might lead the triers of fact to reject his trial testimony," he maintained that a rejection is not sufficient to transform the statement into an incriminating one for the purposes of s 13
- ***Riley v Henry*** held that you can't use it for credibility (bright line); now ***Nedelcu*** has modified that

Note: when you are compellable in a criminal trial and then charged in a civil proceeding you don't get section 13 rights; can use criminal conviction in civil
Statutory Obligations

- Section 13 doesn't protect you from statutory compulsion
- Ex: *Motor Vehicle Act*; *Insurance Act:* statute compels you to tell ICBC what happens
- Also, securities trading. Did you do it based on inside information?
- In a non-criminal proceeding, we can force you to talk in some instances!
- **But what about right under self-incrimination under section 7 + right to silence?**
- *BC Securities v Branch:* case wherein they were trying to make traders talk pursuant to legislation
- SCC: balancing act! We can make you talk and then use section 7 to give you your criminal law protections; can't have a full right to silence society!
- You get use and derivative use (can't find evidence based on what you say) protection
    - Derivative use is subject to otherwise discoverable doctrine mentioned in previous class

Re Application under s. 83.28 of the Criminal Code [2004] SCC – If an individual is compelled to give a statement pursuant to some statutory authority, that individual will have to provide that statement but will get use and derivative use protection under s. 7 of the Charter

- Section 83.28 of the Criminal Code says you care compelled to provide information where there is a legitimate public policy angle (happens in the context where there is an ongoing terrorism plot and plot has happened and we are investigating)

- Requires a judge to participate—**violates judicial independence** (judges are usually an arbiter of things; not in a secret hearing where you are trying to force a person to talk)→ this put the judge in a role as a "super police officer"
- This was resolved through statutory interpretation; the witness who is pulled in and has a lawyer (can rule on objections to questions); although limited space for refusing, basically just privilege—and judicial independence resolves through "guardian of the rule of law"
- This is an example of trumping the CL right to silence through statute (while factual distinct from *MVA, Branch* it is the same rationale—a legitimate public policy for making someone talk)
- But under s. 7 of the Charter and the parameters of the legislation, you are protected from direct use and derivative use of that information against you
- One exception to derivative use is inevitable discovery – *if Crown can show the evidence was independently discoverable* **(note: they did not include otherwise discoverable clause)**
- There could be a constitutional exception in rare case where you could show there was a criminal law purpose for bringing that person in to talk (an abuse of process) – *i.e. the government is only compelling the statement for the one reason of wanting to get evidence on a person they could envision using in a criminal trial*

Privilege Based on Confidential Relationships

We limit the search for the truth where it could run up against certain relationships in our society where we think confidentiality is important. **If something is privileged, it is presumed to be inadmissible**.

Class Privilege - Solicitor-Client

"The first duty of an attorney is to keep the secrets of his client"

The privilege belongs to the client, not the attorney

The consequence = i) you cannot talk about what is privileged; ii) it is inadmissible

General Rule: SCP is based on an idea that (i) you are making a communication to a lawyer, (ii) that is intended to be in confidence, and (iii) needs to be based on seeking legal advice

- One way to circumvent SCP is to show the information was not given in confidence or was not legal advice

Descoteaux v Mierzwinski

A lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential

Issue was regarding the Courts ability to search lawyer's officers in view of the confidential nature of their files—police wanted to seize the form filled out by an individual to obtain legal aid for the purpose of proving that he lied about his application

Right to confidentiality

- The right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client
- A lawyer who communicates a confidential communication to others wo his client's consent could be sued
- When is it invoked? When legal advice of any kind is sought communications related to that purpose are protected
- Exceptions: must be made in context of professional relationship; must be made to lawyer or assistant; to facilitate commission of a fraud will not be confidential

Statement of rules set out by the Court:

1. Confidentiality of communications btw solicitor + client may be raised when any circumstances where the documents might be disclosed without the lawyers consent
2. Unless the law provides otherwise, a conflict should be resolved in favour of confidentiality
3. When law gives someone authority to do something which might interfere with confidentialiy, the decision to do so should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought

- Confidential information btw lawyer and client can be introduced the judge must be satisfied with rule 3

- Confidentiality in present: engaged as soon as client has first dealings with lawyers office (thus documents when deciding whether they will provide services form part of privilege)
- Here the document attracted privilege but because of its association with a crime it was an exception (everything on the form that doesn't relate to that crime is still privileged)

Blood Tribe: recent statement of the SCC zealously guarding solicitor client privilege

Litigation Privilege
Privilege attaches to documents prepared for litigation; would be hard to conduct litigation without such privilege
TEST: is the document created for the **dominant** purpose of litigation
For the Crown, little of what they do is covered by solicitor client privilege, the gov't doesn't have the traditional role
There is however, overlap btw the privileges, ex: interviewing the client

Blank v Canada (Minister of Justice) **(2006 SCC-litigation privilege expires with the litigation of which it was born**
Blank and a company were charged with regulatory offences which were both subsequently quashed by the Crown. Blank and the company eventually sued the federal gov't for fraud, conspiracy, perjury and abuse of process. B wanted access to the records pertaining to his prosecution. Gov't argued that they were subject ot litigation period. SCC addressed the question of whether that privilege still applied when the litigation had ended
At issue: lifespan of litigation privilege
HELD: Litigation privilege expires with the litigation it is associated with; the Ministers claim that it is subject to litigation privilege fails

- Differences btw solicitor client privilege and litigation P: i) SC applies only to confidential communication btw client and solicitor; LP applies to communications of a non-confidential nature btw the solicitor and third parties; SCP applies as btw the relationship; and LP applies only in course of relationship; and iii) the underlying purpose is also different, SCP is designed to ensure access to legal advice and LP is based on investigation and preparing for a case
- In short, they cannot be treated as two branches of the same tree. They have different legal consequences and different policy considerations
- Once LP has ended; the necessary "zone of privacy" is no longer necessary
- **CL litigation privilege comes to an end, absent closely related proceedings upon termination of the litigation that gave rise to the privilege**
- However, agrees of the possibility of defining litigation more broadly than the particular proceeding which gave rise to the original litigation
- So would include proceedings that raise issues common to the initial action, and share its essential purpose
- But still limited by the principle of "the need for a protected area to facilitate investigation and preparation of a case for trial by adversarial advocate"
- In this case, the cause of action comes from a different juridical source so privilege is not available; and would not protect, in any event evidence regarding abuse of process or other similarly bad conduct
- Can be granted access where privilege applies where there is a *prima facie* showing of actionable misconduct
- Access will not be automatic or uncontrolled (fear of dissenting CA judge) because if it involves the same parties and same source privilege will apply; and second legal advice privilege will still apply (solicitor's client privilege?)
- Also notes the incongruity of the outcome that if LP was found in civil proceedings to insulate Crown from disclosure it was bound but failed to provide in criminal proceedings that have ended
- Test for litigation privilege remains dominant purpose

NOTE: per NH, this is very controversial, parties to litigation want to be able to record, ex: impressions of witnesses. Was the litigation really from a different juridicial source?

Other Confidential Relationships
There are class privileges such as solicitor client, spousal, but other case by case privileges. Permits court to retain discretion in area like doctors

R v Gruenke (1991) SCC

Accused was convicted of first-degree murder; evidence she provided to her pastor was found to be directly supportive of the Crown's theory of what happens. She was convicted at trial; upheld on appeal.
At issue: should there be a common law PF privilege for religious communications or should such claims of privilege be dealt with on a base by case basis

TEST for privilege:

1. The communication arose in confidence that the communication would not be disclosed.
2. The confidence is essential to the relationship in which the communication arose.
3. The relationship is one that must be sedulously fostered in the public good.
4. The public interest served by keeping the communication secret outweighs the public interest in getting at the truth.
    a. This is the most important factor and where the balancing takes place
    b. Most scenarios will meet the first three, but the "heavy lifting" takes places on this last factors
    c. The seriousness of the case will have a large significance
    d. Also, how well you meet the first three will influence analysis under number 4
    e. The arrangement btw the parties can also strongly influence the outcome, ex: journalist-informant relationship

Common law, PF privilege

- To provide a class privilege in this manner would be departure from the fundamental principle that all relevant evidence is admissible
- In this case, religious communications can be distinguished from one such example of class privilege (solicitor client) on the basis that protecting religious communications in this manner is not inextricably linked with the justice system in the same way that SCP is

Case by Case privilege
Thus will apply Wigmore criteria (above) on a case-by-case basis
Here, not satisfied

- Did not originate in confidence that communication would not be disclose
- No evidence that it was intended to be confidential

L'Heureuz Dube dissented to the effect that it would be more in line with Charter values to have a class privilege for such communications; would encourage development of spiritual relationships (may not confess if you are unsure whether or not the communication is protected)

NOTE: Que and NFld have legislated class privilege

Settlement Discussions
Encouraging settlement is good police; the rationale is "getting it done"; avoids use of both party and systemic resources; thus communications and documents regarding settlement are subject to privilege

Privilege for without prejudice communications
Middlekamp v Fraser Valley Real Estate Board (1992) BCCA-recognition of settlement privilege in civil context
Plaintiff complained about the conduct of the defendant real estate board; the Director of the Competition Act referred the matter to AGC who proceeded by way of information. There was a consent prohibition order made in Federal Court. During negotiations the parties exchanged documents, in P's civil action they sought disclosure, board claimed privilege on the basis that they were made on a without prejudice basis. Order to produce docs was made.

- There is no effective protection short of privilege for these types of documents; must be granted to ward against prejudice
- Public interest in the settlement of disputes requires "without prejudice" documents created for the purpose of settlement negotiations be privileged
- This is a class privilege
- Privilege extends to production to other parties to the negotiation, strangers, admissibility and whether or not a settlement is reached
- Basically turns on the public interest of encouraging settlements

In ***BCH v Air Products Canada;*** settlement privilege extends to agreements themselves

R v Pabani (1995)-civil settlement privilege doesn't apply in the criminal context
The accused was convicted of murdering his wife. Prior to her death, a mutual friend tried to assist them in reconciling their differences. Statements made to this friend, where A admitted to previous abuse were admitted into evidence. On appeal, tried to argue that these statements should be inadmissible on the basis of the common law privilege regarding settlement talks in civil proceedings.
Held: privilege cannot be invoked

- There is no common law position recognized by the criminal law upon which the statements could be protected.
- There is no recognition of the criminal law of without prejudice
- Shouldn't be protected during reconciliation process in the context of a subsequent criminal proceeding

R v Lake Ont Gen Div (1997)importance of plea bargaining
Accused was charged with murder; young person was charged separately with the murder in youth court. The Crown at the accused's trial called the young person as a witness. Testimony supported some aspects of the Crown's theory, it also rebutted. Crown applied for a ruling that the young person's instructions to his lawyer were made admissible at trial.

- Crown position was that if in the course of resolution discussions (plea bargaining) that if a lawyer attributes statements to his or her clients both discussions and statements are no longer protected by privilege
- Court: privilege recognized at common law relates to the public interest in preserving plea negotiations as an essential element of the administration of justice
- Granting the Crown's ruling would have a "profound chilling effect upon resolution discussions"; would do irreparable damage to the proper administration of justice
- Held: resolution discussions took place must remain privileged

Exceptions
Exceptions to class privilege
4th factor is inherently built in in case by case as exception

Inadvertent disclosure
Airst v Airst 1998 Ont Gen Div
During pre trial proceedings, two letters from one party's lawyer were sent along with an ordered evaluation report inadvertently. Wife claimed privilege was waived
Inadvertent disclosure should not override privilege in all instances
Factors:

- Ways in which the documents came to be released
- Whether there was a prompt attempt to retrieve the documents after the disclosure was discovered, the timing of the discovery, timing of application, the number and nature of third parties, impact on fairness

Public Safety-Future Harm Exception
Smith v Jones
Accused was charged with an offence; and was planning to do something worse (failed murder attempt), Defence referred witness to expert to get a report; referral at time it is made is covered by solicitor client privilege.
Expert hears about planning of future crimes; believes person is an active threat
Defence decides to plead guilty,
Dealt with the issue: should that report be disclosed?

- Disclosure ended up getting him an indeterminate dangerous offender
- **You can disclose where there is a very significant public threat**
- S-C privilege isn't an **absolute privilege**
- It doesn't come with any protection with use or derivative use (agree with
- It is at a high threshold and there has to be a serious risk
- TEST:
    - 1) clear risk to an identifiable person or group of persons

- 2) there is a risk of serious bodily harm or death (i.e stealing wouldn't quite be enough)
- 3) that the danger is imminent

Innocence at stake exception
Sometimes we are willing to risk wrongful conviction to preserve solicitor client privilege

R v McClure
Accused was a librarian and teacher at school attended by JC in the mid 1970s. In 1997, the accused was charged with sexual offences against 11 former students. After his arrest, another student came forward; and also brought a civil action. Accused wanted production of his civil litigation file to i) determine the nature of the allegations and to assess his motive to fabricate. TJ ordered the production
TJ used third party therapeutic records test; should have used innocence at stake

A**. THRESHOLD QUESTION**:
1. the information sought from solicitor-client communication must be unavailable from any other source; and
2. the accused must be otherwise unable to raise a reasonable doubt.

B. **INNOCENCE AT STAKE TEST**:
1. STAGE 1: the accused seeking production must demonstrate an evidentiary basis to conclude that a communication exists that could raise a reasonable doubt as to his guilt.
2. STAGE 2: if such a basis exists, the trial judge must examine the communication to determine whether it is likely to raise a reasonable doubt.

R v Campbell and Shirose
Arose in response to the difficulty of prosecuting big drug traffickers. Witnesses are usually involved in drug transaction itself. Getting higher level people through undercover selling operation

- This is a reverse sting where you are posing as a seller
- Evidence should be thrown out because the way the evidence is collected is so offensive
- Police sought legal advice form DOJ
- Defence sought access to those communications
  - Argument: those aren't real lawyers
  - Binnie J says: this was clearly a solicitor client relationship
- If you are giving your client illegal advice that isn't covered
- **Waiver**: the client controls the privilege; sometimes clients will officially waive privilege (ex: my lawyer gave me advice, here is what it is)
- Manner in way privilege can be waived: i) explicit; ii) implicit
- Ex: they put it in issue. Cilent may say "I talked to my lawyer and he said it was fine"; sometimes a client either in pleadings or on the stand will use their discussions to help their case. This can waive privilege and grant broad discovery right to see if it is true