EVIDENCE

Course Summary

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USING THIS SUMMARY

This document is designed be useable both on-screen in your PDF viewer and in printout form. When using it online, keep in mind that most of the document is hyperlinked so you can jump around to case briefs, statutory sections, and so on. If you followed one or more hyperlinks and you want to get back to where you were before, use ALT+← (Windows) or ⌘+← (Mac OS).

The general structural idea is as follows. The numbered chapters (1–10) follow the chapter structure of the course as closely as possible. These sections attempt to summarize the content of the corresponding course chapter, with hyperlinks to the relevant case briefs and statutory sections. Following the numbered chapters, all of the cases from the course are briefed in the case chart. Following that, there is a statute chart which excerpts the legislative provisions we looked at in the course, often with cross-references to the interpreting cases. Finally, the index of cases provides an index of hyperlinks to each case briefs plu a couple of keywords about what is in the case.

CONTENTS

1. Introduction to Evidence

Hello, and welcome to the law of evidence! In a nutshell, this course is about three questions:

1. Can an item of evidence be received in court?
2. If so, what limits are there on what the evidence may be adduced in proof of?
3. Can someone be forced to testify, or to provide some other evidence?

Beginner's Guide to Key Concepts

Receivability

To be receivable in court, an item of evidence must meet all three of the following criteria: ***Palma [R v]***.

1. relevance;
2. materiality;
3. admissibility;

Evidence is ***relevant*** if it tends to make the existence of a fact in proof of which it is offered more or less likely. Relevance is a question of logic and human experience and is not a legal concept *per se*. Evidence is ***material*** if it is relevant to an issue before the court. Materiality is a function of the governing substantive and procedural law. Because this course deals predominately with criminal cases, evidence will generally have to be material to an issue such as ID, *actus reus*, *mens rea*, or sub-facets of these issues. Finally, evidence is ***admissible*** if it satisfies the rules and policies of the law of evidence. The basic framework for all of these rules and policies is defined in the Probative/Prejudicial Balance (below).

The first fundamental rule of evidence is this: all evidence which is relevant and material is admissible until proven otherwise. There is an overarching presumption in favour of admissibility.

Presumptive [In]admissibility

Evidence can be subdivided into a number of categories. A given item of evidence may be simultaneously a member of several categories. The law maintains a set of presumptions with respect to these categories of evidence. The following chart lists various categories of evidence studied in this course for which there is a presumption in favour of or against admissibility.

Presumptive Admissibility Chart

Class	Case	Juris.	P		
Extrinsic misconduct	***Cuadra [R v]***	1998 BC/CA	90		×
Eyewitness identification	***Gonsalves [R v]***	2008 ON/CA	95	✓	
Fact of a prior conviction (but only in respect of credibility)†	***Corbett [R v]***	1988 CA/SC	90	✓	
	Canada Evidence Act s 12	RSC 1985	141		
Expert opinion	***Mohan [R v]***	1994 CA/SC	117		×
	Abbey v R	2009 ON/CA	80		
Child witness	***JZS [R v]***	2008 BC/CA	106	✓	
	Canada Evidence Act s 16.1	RSC 1985	143		
Witness with mental incapacity	***Canada Evidence Act*** s 16	RSC 1985	142	?	?
Prior consistent statements	***Stirling [R v]***	2008 CA/SC	132		×
Hearsay	***Khelawon [R v]***	2005 CA/SC	108		×
Confessions of the accused	***Murrin [R v]***	1999 BC/SC	118	✓	
	Palma [R v]	2000 ON/SC	122		

Class	Case	Juris.	P		
Statement‡ obtained in breach of *Charter* rights	*Grant [R v]*	2009 CA/SC	97		×
Evidence of silence	*Turcotte [R v]*	2005 CA/SC	136		×
Information in respect of which a non-class privilege is claimed*	*National Post [R v]*	2010 CA/SC	119	✓	

†: A *Corbett* hearing is typically given to decide admissibility

‡: Note that it says statement evidence, not any kind of evidence

*: It is also presumptively compellable.

Probative/Prejudicial Balance

Probative Value

> *In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received, unless its exclusion can be justified on some other ground.*
>
> —Supreme Court of Canada, *Seaboyer [R v]*

Evidence which is both logically relevant and material is said to have ***probative value***. There is no minimum amount of probative value: *Arp [R v]*. Once it is established that evidence has probative value, it is in unless, some other rule excludes it.

Prejudicial Effect

As well as having probative value, evidence may have some ***prejudicial effect***. This is a very general term, which has two different meanings:

1. If the evidence is received, it might prejudice the trier of fact to find ***against the accused*** (or, more generally, one of the parties to the litigation) for reasons unrelated to applying logic, common sense, and the law.
    - It might affect the TOF's reasoning process.
    - It might affect the TOF on an emotional level.
    - It might indirectly affect reasoning by, for instance, drawing the trial out so long that the TOF forgets about other important evidence or distinctions.
2. If the evidence is received, it might have a prejudicial effect ***on the administration of justice***.
    - It might harm the public's trust in the courts or the ***rule of law***.
    - It might help obtain the truth in this particular case, but set a precedent (for instance by permitting coerced confessions) that is likely to obscure the truth more than it reveals it in the ***long-run***.

The Balance

The theory of evidence in a nutshell is that evidence will be received if its probative value outweighs its prejudicial effect. All of the various rules and presumptions of evidence are based on this principle. This is another way of stating the "first fundamental rule" mentioned in the section on Receivability (above).

Criminal Context

In the criminal context, a differential standard is applied to evidence, depending on whether it is led by the Crown or by the defence: *Seaboyer [R v]*.

- Crown evidence is admissible ⇔ the probative value of the evidence ***exceeds*** its prejudicial effect.
- Defence evidence is admissible as long as the prejudicial effect does not ***substantially outweigh*** the probative value.

Civil Context

The civil context is discussed in ***Johnson v Bugera***. See Civil Trials (p 29) under Different Evidentiary Contexts.

The "Let It All in" Debate

If an item of evidence is not admitted in court, the trier of fact will obviously not be able to consider that evidence at all. On the other hand, as soon as the evidence is admitted, it is available to the TOF to be used. It is the prerogative of the trier of fact to decide how much ***weight*** to accord to the evidence. If the trier of fact does not believe a witness, that witness' evidence will be given very little weight, or no weight.

Often, evidence will be of questionable ***reliability*** or will have some other significant ***prejudicial effect***. There is some debate about the extent to which highly unreliable or prejudicial evidence should be admitted.

On one hand, some judges have been in favour of admitting everything so that the TOF can decide based on the whole picture. On this point of view, the central question is the weight which the TOF accords to the evidence. It is thought that appropriate instructions can guide a jury in this weighting process, and that juries will heed instructions from the trial judge about the purposes to which the evidence may legally be put. This position is exemplified by Dickson CJC in ***Corbett [R v]***:

> *Rules which put blinders over the eyes of the trier of fact should be avoided except as a last resort.*

The other point of view acknowledges that some evidence is inherently too dangerous to put before the jury, lest its reasoning be tainted, and thus that judges have a legitimate ***gatekeeper role***. **This seems to be NH's position, and the reason that he put the *Penney [R v]* excerpt in the Chapter 1 materials**. Unreliable or otherwise highly prejudicial evidence has caused many wrongful convictions in the past. Thus "***collective wisdom of the ages***", embodied in the rules of evidence, should not be lightly discarded in favour of a modern trend.

Sources of the Law of Evidence

There are three sources of the law of evidence in this course:

1. the common law;
2. ordinary statute law; and
3. the ***Charter***.

The ordinary statutes which concern us in this course, dealing as it does predominately with the criminal law, are the ***Canada Evidence Act*** (p 140) and the ***Criminal Code*** (p 147). The part of the ***Charter*** which bears on the law of evidence is the part on legal rights, in particular ss 7–13.

Purpose of Admitted Evidence

It is extremely important to remember that admissibility is not usually a binary decision. Often the question is not: "can this evidence be heard or not?" but rather "can this evidence be heard for a specific ***purpose*** or not". In many cases, evidence might be admissible as probative of one material issue (for example, the credibility of the accused, or the credibility of some other witness) but inadmissible for any other reason. When evidence is admissible for a specific purpose, but may only be used for that specific purpose, it is vital that an appropriate jury instruction be issued so that the jury does not put the evidence to inappropriate use. Bad jury instructions are a frequent source of reversible error even when evidence was not improperly received.

From an ***exam point of view***, this is key because just as a judge is going to get reversed if he fails to instruct the jury about the proper uses of evidence, you are going to suffer in grading if you fail to instruct the examiner about the proper uses of evidence—even if you are right about the overall question of receivability. Make sure you mention jury instructions where appropriate!

GENERAL PRINCIPLES OF THE LAW OF EVIDENCE

A number of "general principles" recurred throughout the cases and throughout NH's **discussion on the cases**. These principles will be useful to have in mind on the exam.

Qualified Search for the Truth

The judicial process has been described as a qualified search for the truth. The dominant concern is to get at the truth in the instant case. However, the law has a number of other polices which may come into conflict with the search for the truth and to which the search for the truth may have to give way. This principle is at work in just about every case, but here are a few examples:

Case/Statute	Juris.	P	Key Points
Noël [R v]	2002 CA/SC	120	The dominant purpose of the rules of evidence is to obtain the truth in the particular case. However, this purpose may from time to time have to give way to other important societal goals.
Grewall [R v]	2000 BC/SC	98	When co-accused wage cutthroat defences, the only way to get the truth out may be via a joint trial, as otherwise they may all say different things in their individual trials and it is possible that none of the juries have all the evidence they need to reach the right verdict.
Grant [R v]	2009 CA/SC	97	Exclusion of evidence under the ***Charter*** is partly concerned with the long-term repute of the administration of justice.

No Distorted Picture Principle

One of the goals of the rules of evidence is to prevent the trier of fact from having to decide based on a distorted picture of the evidence. Certain admissibility decisions are based in part on this principle, which is related to the Opening the Door Principle (below).

Case/Statute	Juris.	P	Key Points
Penney [R v]	2002 NF/CA	125	The editing of the videotape gave it the potential to mislead and eliminated any probative value it had on the only issue it was submitted in proof of.
Cuadra [R v]	1998 BC/CA	90	As in ***B(FF) [R v]***, a key reason for the test for admissibility of extrinsic misconduct evidence appears to be avoiding a distorted picture.
Corbett [R v]	1988 CA/SC	90	Had Corbett's criminal record not been revealed, the jury would have been left with the quite incorrect impression that, while all the Crown witnesses were hardened criminals, the accused had an unblemished past.
Maves v Grand Trunk Pacific Rwy Co	1913 AB/SC	114	One of the policy rationales behind the General Rule on Leading Questions (p 34) is the avoidance of a distorted picture.
Hunter [R v]	2001 ON/CA	102	Partially-overheard inculpatory statements taken out of context are inadmissible.

Opening the Door Principle

This principle is related to the No Distorted Picture Principle (above) and the importance of trial fairness is the principle that a party can "open the door" to certain otherwise inadmissible evidence by the conduct of his own case. The logic behind this idea is based on the same old principles of ***relevance*** and ***materiality*** discussed in Receivability (above). Essentially, a given item of evidence might be inadmissible because it is not probative of any issue that is before the court, or because its prejudicial effect is too great with respect to the only issue it is probative of. For example, evidence of silence is not generally probative of guilt or innocence. However, if the accused ***makes an issue***

of something that the evidence ***is*** relevant to, it will suddenly become admissible, although only for the specific purpose for which it is relevant.

Case/Statute	Juris.	P	Key Points
Swain [R v]	1991 CA/SC	133	• In our adversary system, which is founded on the respect for the autonomy of human beings, an accused person must be allowed control his own defence. • ∴ The Crown may not raise the question of mental disorder unless the accused puts his sanity in issue (until after a guilty verdict is returned).
B(FF) [R v]	1993 CA/SC	83	Several aspects of the accused's defence, including his attack on the ***credibility*** of the complainant based on the delay in making the complaint, put certain otherwise inadmissible extrinsic misconduct evidence into play.
Dhillon [ON] [R v]	2002 ON/CA	93	The second issue in this case was the admissibility of hearsay bad character evidence. While it was ultimately ruled inadmissible, the defence opened the door to this evidence by questioning the diligence of the police investigation.
Stirling [R v]	2008 CA/SC	132	By suggesting that Harding had certain motives to fabricate his testimony, the accused opened the door to admission of Harding's prior consistent statements.
Griffin [R v]	2009 CA/SC	99	Although it was not determinative, defence's theory that several other people had ***motive*** to kill the victim (Poirier) increased the probative value of the contested circumstantial evidence that Poirier feared Griffin.
Henry [R v]	2005 CA/SC	101	When an accused chooses to take the stand on a retrial on the same indictment, he opens the door to the prosecution's use of his testimony from the prior trial.
Shirose [R v]	1999 CA/SC	129	The RCMP waived solicitor-client privilege to the legal advice obtained from the DOJ by advancing a defence of good faith which ***depended on the content*** of that legal advice.
Turcotte [R v]	2005 CA/SC	136	Evidence of silence is presumptively inadmissible. However, examples are given of ways that the accused can put his silence in issue.

Note: Another way in which the accused can influence what evidence is admissible is by making Formal (or Judicial) Admissions (p 57). This has an effect opposite of opening the door. Instead of creating new issues which evidence might be probative of, it eliminates live issues, thus reducing the body of possible admissible evidence.

Improper Reasoning by the Jury Principle

Sometimes, evidence will need to be excluded, pared down, or subjected to a limiting instruction in order to prevent the jury from engaging in improper reasoning (which is really just a kind of ***prejudice***). Here are a few examples where this has come up:

Case/Statute	Juris.	P	Key Points
Kinkead [R v]	1999 ON/SC	109	While LaForme J mentioned that in his experience juries do not usually become horrified or inflamed by graphic and disturbing evidence, it was important to be cautious in any case. The Crown's evidence was accordingly pared down.
Handy [R v]	2000 CA/SC	100	The risks of similar fact evidence include moral prejudice and reasoning prejudice on the part of the jury.

Admissibility is Not All or Nothing Principle

A crucial and recurring idea is that the admissibility of evidence is not an all or nothing proposition. This means several things:

- When the admissibility of "divisible" evidence is being concerned, it is possible to admit a part of the evidence rather than all of it or none of it.
- Any evidence which is received in court does not need to be blindly handed off the jury. It is the duty of the trial judge to instruct the jury on the proper use of the evidence and the issues of which it is legitimately probative.

The following cases provide examples in which evidence desired by one party has been pared down and only a part admitted.

Case/Statute	Juris.	P	Key Points
Cuadra [R v]	1998 BC/CA	90	Extrinsic misconduct evidence of the first episode (the beating that occurred before Service, the Crown witness, gave his statement to the police) was admitted as probative of Service's ***credibility***. The second episode was excluded.
Kinkead [R v]	1999 ON/SC	109	Some evidence was allowed, some excluded, and some allowed in modified form (e.g. life-sized photos reduced to 8x10s, video shortened).
Abbey v R	2009 ON/CA	80	The trial judge is not limited to accepting or rejecting the expert opinion evidence tendered by one party or the other. The trial judge may ***admit part*** of the proposed opinion, modify its ***nature or scope***, or ***edit the language*** used to frame the opinion.
Grewall [R v]	2000 BC/SC	98	The offending hearsay is deleted from the telephone transcript, but the remainder, including an admission by the accused SG, is allowed.

TYPES OF EVIDENCE

Direct Evidence vs Circumstantial Evidence

Evidence can be classified into two broad categories, which are described in the ***Dhillon [BC] [R v]*** case:

1. direct evidence; and
2. circumstantial evidence

Of the two types of evidence, circumstantial evidence seems to be far more common.

DIRECT EVIDENCE

Direct evidence is evidence going directly to the proof of an actual fact in issue. For instance, suppose the only issue in a murder trial is ID. If an eyewitness testifies: "I saw the accused shoot the victim", that is direct evidence. There are two possible sources of error in direct evidence:

1. The witness may be lying.
2. The witness may be mistaken.

Mistake can be based on problems of perception or memory. Mistake is surprisingly prevalent in eyewitness testimony, particularly in terms of ID evidence—a problem which is exacerbated by the length of time cases now take to go to trial—and for this reason, in-court ID evidence has very little value. See Other Dangerous Evidence: Eyewitness Testimony (p 22).

As well as direct eyewitness evidence, ***Nikolovski [R v]***-style videotape evidence and even photographic evidence in appropriate cases could provide direct evidence as well. Depending on what is sought to be proved, even other types of evidence could potentially be classified as direct.

EXAMPLE

Suppose a woman is on trial for murder. It is alleged that she killed a man by stabbing him to death. A witness testifies that he saw the accused stab the victim with a knife. This is direct evidence that the accused stabbed the victim.

Circumstantial Evidence

Circumstantial evidence does not go directly to any fact in issue. Instead, it is indirect evidence of circumstances from which an ***inference*** must be drawn which may lead to the proof of a fact in issue. There are three possible sources of error in circumstantial evidence:

1. The witness may be lying.
2. The witness may be mistaken.
3. The trier of fact may draw the wrong inference.

Example

Take the same accused as above, and the same allegation that she killed a man by stabbing him to death. A witness testifies that he heard a noise and went into the room where he found the accused standing over the body of the victim with a knife in her hand. This is circumstantial evidence that the accused stabbed the victim.

Direct versus Circumstantial Evidence

On TV, the phrase "your case is entirely circumstantial!" is shorthand for saying that it is weak. However, a circumstantial case could also be stronger than a case based only on direct evidence. Witnesses may contradict each other, but the circumstances are often not in dispute: ***Dhillon [BC] [R v]***. The two types of evidence may of course be complementary.

Case/Statute	Juris.	P	Key Points
Dhillon [BC] [R v]	2001 BC/CA	92	Definitions of direct and circumstantial evidence.
Griffin [R v]	2009 CA/SC	99	• The girlfriend, Jennifer Williams provided direct evidence that the accused Griffin shot the victim Poirier. • A priest saw a man fire three shots, but could not identify the shooter. His direct evidence was not very useful. • There was considerable circumstantial evidence against Griffin. • The case against the second accused, Harris, was entirely circumstantial.

Use of Evidence

Case/Statute	Juris.	P	Key Points
Robert [R v]	2000 ON/CA	128	There is no obligation on the accused to prove any facts. The most the accused needs to do is raise a reasonable doubt, which entails no more than showing a **reasonable possibility** that the prosecution's case is wrong.
Baltrusaitis [R v]	2002 ON/CA	85	A verdict of guilty needs to be based on proven facts BUT a verdict of not guilty need not be based on any facts at all. If the TOF does not believe anyone, for instance, a verdict of not guilty is required.
White v The Queen	1998 CA/SC	138	The Court rejected the idea that the jury should consider post-offence conduct separately from the other evidence to determine whether it reflected "consciousness of guilt" BRD.

Real Evidence versus Demonstrative Evidence

Another useful classification of evidence is terms of its form. Evidence may be:

1. testimonial;
2. real (physical); or
3. demonstrative.

Physical Evidence

Real evidence is another name for ***physical evidence***. It is introduced at trial to prove a fact in issue based on its physical characteristics. For example, the gun taken from Grant in ***Grant [R v]*** was physical evidence, as were the

documents in possession of Andrew McIntosh in ***National Post [R v]***, which were sought for DNA and other forensic purposes.

Demonstrative Evidence

Demonstrative evidence is evidence in the form of a representation of an object. Examples of demonstrative evidence include Videotapes (below), Photographs (p 12), x-rays, movies, sound recordings, diagrams, forensic animation, maps, drawings, graphs, animation, simulations, and models. Like Documents (p 12)—and presumably physical evidence as well!—demonstrative evidence must be ***authenticated*** as a precondition of admissibility.

Videotapes

Case/Statute	Juris.	P	Key Points
Nikolovski [R v]	1996 CA/SC	119	A videotape of the scene of a crime that has not been altered or changed is generally admissible. It may be a ***silent***, trustworthy, unemotional, unbiased and accurate ***witness*** with ***complete*** and ***instant recall*** of events.
Penney [R v]	2002 NF/CA	125	There were two problems with the videotape sought to be admitted: 1. The prosecution failed to authenticate it. 2. It had potential to mislead and lacked probative value in relation to the fact purported to prove.
Kinkead [R v]	1999 ON/SC	109	The video of the crime scene was admitted subject to being edited to be significantly shorter.

Photographs

Case/Statute	Juris.	P	Key Points
Kinkead [R v]	1999 ON/SC	109	The photographs were relevant and did not present a distorted picture of the crime scene. Their admissibility was determined based on a case-by-case probative/prejudicial balancing.

Documents

Documents are another form of evidence. They are not generally physical evidence, as they are usually sought to be admitted for the truth of their contents rather than as proof of some fact based on their physical properties. Like Demonstrative Evidence (above), documentary evidence must be ***authenticated*** as a precondition to admissibility.

Case/Statute	Juris.	P	Key Points
Lowe v Jenkinson	1995 BC/SC	112	Transcript of the interview between the defendant and the ICBC adjuster was inadmissible because it was not authenticated.
Wilcox [R v]	2001 NS/CA	138	Don't forget that as well as meeting the business records exception, a business record must be authenticated, as it is a document!
National Post [R v]	2010 CA/SC	119	The documents were physical, not documentary, evidence. The RCMP wanted them for forensic analysis—to search for DNA and so on…

Judicial Notice

Suppose a party forgets to adduce evidence to prove a point in issue, or wishes to dispense with adducing evidence because it believes the point is so obviously true. When can that party ask the court to take judicial notice of that point? ***Olson v Olson*** sets out a very ***strict test***.

Case/Statute	Juris.	P	Key Points
Olson v Olson	2003 AB/CA	122	A court may take judicial notice of facts that are either ***so notorious*** or so generally accepted ***as not to be the subject of debate*** among reasonable people.
Penney [R v]	2002 NF/CA	125	¶ 24: The effect of changes in format on a videotape is not an issue that a court may properly take judicial notice of. An expert is needed to give evidence to displace the presumption that a change in format is an alteration making the video inadmissible.

OTHER ISSUES

Our Adversarial System of Trial

> *Given that the principles of fundamental justice contemplate and adversarial and accusatorial system of criminal justice which is founded on respect for the autonomy and dignity of human beings, it seems clear to me that the principles of fundamental justice must also require that an accused person have the right to control his or her own defence.*
>
> —Lamer CJC, ***Swain [R v]***

Case/Statute	Juris.	P	Key Points
Swain [R v]	1991 CA/SC	133	The accused has the right to control the conduct of his defence.
Smuk [R v]	1971 BC/CA	131	The accused has the right to control the order in which he testifies, if at all, and his testimony cannot be prejudged.
Iolivet [R v]	2000 CA/SC	104	• Crown is under no obligation to call a witness it considers unhelpful to the prosecution's case. • Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds ***as long as*** it doesn't cause ***unfairness*** to the accused.

Discovery in Criminal Cases

Recall that *R v Stinchcombe* laid down the rule that the Crown must disclose all ***relevant*** evidence in its possession, whether inculpatory or exculpatory. What happens if it fails to do this?

Case/Statute	Juris.	P	Key Points
Taillefer [R v]; R v Duguay	2003 CA/SC	134	A failure to disclose in accordance with *Stinchecombe* is not, by itself, sufficient to overturn a guilty verdict (or guilty plea). The accused must show there was a reasonable possibility that the failure to disclose affected the outcome or the overall fairness of the trial process. In particular: 1. Different outcome analysis considers the ***direct effect*** of the evidence on the jury. 2. Fairness of the trial assesses whether the new evidence might have opened up ***new avenues of investigation*** for the defence.

Causes of Wrongful Convictions

One of the paramount concerns of the law is the avoidance of wrongful convictions. Here are a few common causes of wrongful convictions which we canvassed in the course:

- general propensity reasoning;
- unreliable eyewitness identification (particularly of strangers);
- unconfirmed testimony of manifestly unreliable witnesses (see The Vetrovec Witness);
- experts going beyond the limits of their expertise (mentioned in ***Abbey v R***);
- unreliable confessions: ***Oickle [R v]***, ***Grant [R v]***, ***Singh [R v]***

2. Extrinsic Misconduct Evidence

Extrinsic misconduct evidence is evidence that the accused, or a witness, was involved in some unsavoury activity which is unrelated to the charges being tried. **The point of leading such evidence is often**, in the words of NH, **to show that the accused or the witness, as the case may be, is a real bad dude**. Is this permitted?

BAD CHARACTER OF THE ACCUSED

> *Where the evidence sought to be adduced by the prosecution concerns "a morally repugnant act committed by the accused, the potential prejudice is great and the probative value . . . must be high indeed to permits its reception.*
>
> —McLachlin J, cited in ***B(FF) [R v]***

General Admissibility

GENERAL RULE

Extrinsic misconduct evidence tending to show the bad character of the accused is ***presumptively inadmissible***.

TEST FOR ADMISSIBILITY

According to the test set out by Iacobucci J in ***B(FF) [R v]***, such evidence is admissible when:

1. relevant to some ***other issue*** beyond the disposition or character of the accused; and
2. the probative value outweighs the prejudicial effect.

Note that the No Distorted Picture Principle operates as a justification for the above test for admissibility. For instance, consider the following quotation from p 2-010 in the *Cuadra* case:

> *Defendant thus seeks to have the best of both worlds; he impeaches the witness with a prior inconsistent statement and then seeks to restrain the state's inquiry into the reasons why the witness made the prior inconsistent statement.*

Thus the conduct of the defence might put the accused's character in issue, or it might strengthen the probative value of evidence which reflects badly on the accused's character in relation to some other issue.

Case/Statute	Juris.	P	Key Points
B(FF) [R v]	1993 CA/SC	83	The extrinsic misconduct evidence became ***relevant*** because the defence opened the door.
Cuadra [R v]	1998 BC/CA	90	The extrinsic misconduct evidence was relevant to Service's ***credibility***. The first, but not the second, act of violence was admitted based on the *B(FF)* test.
Dhillon [ON] [R v]	2002 ON/CA	93	The Crown must be given a fair opportunity to rebut allegations of inadequate investigation, subject to the usual limitations that the probative value of the evidence must outweigh its prejudicial effect. Thus, the evidence must be relevant to more than the general bad character of the accused.

Similar Fact Evidence

Similar fact evidence is a subtype of extrinsic misconduct evidence. It is evidence tending to prove that the accused previously did an act with similar facts to the crime he is currently charged with. Similar fact evidence ***normally*** has only one ***purpose***: to promote propensity reasoning. Propensity reasoning can be subdivided into two classes:

1. general propensity reasoning; and

2. specific propensity reasoning

General Propensity Reasoning

General propensity reasoning is ***never*** allowed. Never, ever.

General propensity reasoning is based on the idea that a person has a "general" disposition or propensity for theft, violence, or perhaps just crime in general. It has historically been a major cause of wrongful convictions. It is based solely on the bad character of the accused. It is an aspect of ***moral prejudice***, which is discussed further in ***Handy [R v]***. The policy of the law is to avoid it.

Similar fact evidence is rarely completely irrelevant to the offence charged and will thus generally have some small amount of ***probative value***. However, the ***prejudicial effect*** from possible general propensity reasoning by the jury normally outweighs it. Thus, according to ***Arp [R v]***, SFE is normally excluded on grounds of inadmissibility, not irrelevance. As with most evidence, the admissibility of SFE may change if the SFE becomes relevant to some other issue than the general bad character of the accused.

It should be noted that in addition to the dangers created by general propensity reasoning, the leading of similar fact evidence will often consume large amounts of court time, creating additional prejudice.

Specific Propensity Reasoning

Despite the general rule against propensity reasoning, in ***exceptional circumstances***, evidence may be led to show that the accused is **PRECISELY THE TYPE OF PERSON** who would commit a particular crime. The theme for these exceptions, according to NH, is the **improbability of coincidence**. This can be seen in the following quotation from *R v Handy* (p 2-025):

> *In order to be admissible, however, it would be necessary to conclude that the similarities were such that absent collaboration, it would be* ***an affront to common sense to suggest that the similarities were due to coincidence****.*

Even if the accused is charged with one particular incident, and we know that another person is alleging that the accused did the same thing to him at a highly precise degree of similarity, the evidence of the second person may be admissible if it shows a ***specific propensity*** to do a specific act in specific circumstances. While phrases like *modus operandi* and "calling card" come to mind, *Handy* says that the specific propensity ***need not be one unique trait***, but could be a number of facts that, when grouped together, are highly unique.

Be Careful!

The general criteria for admissibility of similar fact evidence are that it has to be ***relevant to some other issue*** than the bad character of the accused and the probative value must outweigh the prejudice. However, the courts are quite clear that propensity evidence is still propensity evidence, and is always dangerous. It would be wise to keep this quote from Binnie J in *R v Handy* ¶ 61 in mind when you encounter such evidence on an exam, rather than just concluding: it's specific propensity, so it's all good!

> *[W]hile identification of the issue defines the precise purpose for which the evidence is proffered, it does not (and cannot) change the inherent nature of the propensity evidence, which must be recognized for what it is. By affirming its true character . . . the Court keeps front and centre its dangerous potential.*

Jury Instructions

If the Crown can get specific propensity evidence admitted, the jury instructions will be highly favourable to the Crown, since jurors will be instructed that they ***may*** draw an inference from a specific propensity. Moreover, as both

NH in class and Binnie J (¶ 138 of *Handy*) point out, **admission of SFE is as close as a judge can come to singlehandedly deciding the outcome of a case**.

Independence

The probative value of specific propensity evidence is driven by the improbability of coincidence when two people ***independently*** report events with extraordinary similarity. If such people are ***not independent*** of each other (say because of a TV news story, a concerned citizen's meeting, or a discussion between witnesses, &c), this creates another potential source of similarity besides both people having experienced the same event. One may have influenced the other's story.

In ***Handy [R v]*** (p 100), the defence succeeded in raising an air of reality to its theory of ***collusion*** between the complainant and the accused's ex-wife. The Crown's failure to rebut this air of reality on the balance of probabilities, constituted one of the independent grounds for excluding the SFE.

Test for Admissibility

Separately from the requirement of independence, the probative value of SFE must outweigh its prejudicial effect.

The Issue in Question

What, precisely, is the SFE supposed to establish that the accused has a specific propensity for? This must be determined at the outset. In ***Handy [R v]***, Binnie J says that this issue should not be defined too broadly, and takes care to narrow the Crown's characterization of the issue ("credibility") to the more precise question of whether the consent component of the *actus reus* was established. The *Handy* factors (below) aid in evaluating whether the SFE is indeed capable of answering this question.

The Handy Factors (Probative/Prejudicial Balance)

The *Handy* factors are evaluated in three stages in ***Handy [R v]***:

1. Factors connecting the similar facts to the events in the charge are evaluated to determine:
    - whether the similar facts are capable of supporting the inferences sought to be drawn; and
    - the strength of the proof of the similar facts themselves.

    If the SFE is not capable of supporting the inferences sought to be drawn, or the proof of the similar facts is weak, the evidence is inadmissible. Otherwise, the second stage is done.
2. Factors contributing to prejudice are evaluated.
3. The probative value of the SFE, as determined in stage 1, is balanced against the prejudicial effect, as determined in stage 2. If the prejudice outweighs the probative value, the evidence is inadmissible.

Probative	Prejudicial
Factors connecting SFE to events in the charge 1. Proximity in time of the similar acts to the events in the charge. 2. Physical conduct, looking at similarities ***as well as differences***. 3. Number of occurrences of the similar acts. See, e.g., ¶ 128 in *Handy*. 4. Circumstances surrounding the incident. This factor played a big role in *Handy* (see ¶¶ 129–30). 5. Distinctive features unifying the incidents. This seems to mean additional distinctiveness beyond the	• There is an inherent level of prejudice in all SFE. • However, the level of prejudice may go up or down. It might go up, causing even more stringent requirements of compelling similarities, or down, requiring somewhat lower levels of similarity. • Factors which may move prejudice up or down: ○ **Reasoning prejudice** the SFE may make the proceedings much more complex and cause confusion: an alleged SF event likely involves a new witness, and possibly supporting

existence of similar facts. 6. Intervening events: this doesn't seem to be terribly important, as the example Binnie J gives is "supervening physical incapacity". NH: **A very high level of probative value with compelling similarities is required**.	witnesses, **expanding the trial record greatly**. On the other hand, simple evidence (say video) might move prejudice down. ○ **Moral prejudice**: the jury may slip into general propensity reasoning. This risk is ever-present but as with reasoning prejudice, moral prejudice can go up or down depending on the specific evidence. For example, more inflammatory evidence would push it up.
Strength of the proof of the SFE (quality of evidence)	
Test: the evidence must be **reasonably capable of belief** in order to be admitted.	

Identity and Similar Fact Evidence

In *Handy*, the SFE went to a component of the *actus reus*, not the issue of ID. In class, NH gave an example showing how SFE might also be used to draw an inference regarding identity:

Ex 1: Three convenience stores are robbed in the course of a week, in a certain part of town of 50,000 people. In each case, the shopkeeper is killed with a shotgun, &c &c

As the similarities grow greater, the inference becomes very strong that the same person committed all three robberies/murders.

Ex 2: Suppose at one crime scene described above, an eyewitness saw someone who looked like the accused committing the crime. At another scene, suppose the accused was seen carrying something about the size of a shotgun under his jacket. Finally, at the third scene, suppose the thumbprint of the accused was left on the register.

While the above evidence might not be enough to convict for any individual crime scene, the evidence from all three taken together could be enough to establish the identity of the accused as the perpetrator of all three crimes.

Relevant Cases

Case/Statute	Juris.	P	Key Points
Arp [R v]	1998 CA/SC	82	Evidence of propensity or disposition may be ***relevant*** to the crime charged, but is usually ***inadmissible*** because its slight ***probative*** value is outweighed by its highly ***prejudicial*** effect.
B(FF) [R v]	1993 CA/SC	83	Contains the general test for admissibility of extrinsic misconduct evidence which is cited in both *Cuadra [R v]* and *Handy*.
Handy [R v]	2000 CA/SC	100	The similar fact evidence of 7 alleged incidents of sexual assault against the accused's ex-wife was inadmissible for two independent reasons: first, the Crown failed to rebut the air of reality of collusion; and second, the prejudice outweighed the probative value when applying the *Handy* factors.
Mohan [R v]	1994 CA/SC	117	While not about similar fact evidence *per se*, the defence sought to adduce expert evidence with the goal of causing the jury to engage in ***exculpatory*** specific propensity reasoning. See also *J-LJ [R v]*.

Post-Offence Conduct

Post-offence conduct (which is the new, neutral, term for "consciousness of guilt" evidence) is a particular kind of ***circumstantial evidence***. The idea is that if, after an offence has been committed, the accused does something that is consistent with how a guilty person might act, it may constitute circumstantial evidence from which the inference can be drawn that the accused has a guilty mind. This can lead to the further inference that the accused committed the crime—ID was at issue in *White* and *B(SC)*—or that, having admitted the *actus reus*, that the accused had the requisite *mens rea*, as in *Peavoy*. A common type of POC, but by no means the only one, is flight.

Note that because POC is a kind of Circumstantial Evidence (p 11), it is susceptible to the third type of error which affects that type of evidence: incorrect inference. **However, POC will not be excluded just because it is capable of multiple inferences**. The ultimate inference is up to the trier of fact.

Case/Statute	Juris.	P	Key Points
Arcangioli [R v]	1994 CA/SC	81	Where evidence of flight from the scene is ***not reasonably capable*** of supporting the needed inference—as when the accused admits to the *actus reus* of one offence at the scene but not another one—the jury must be instructed that the evidence of flight has no probative value.
White v The Queen	1998 CA/SC	138	Where post-offence conduct is ***relevant*** to a question in issue (such as ID), an *Arcangioli*-style instruction is not needed.
Peavoy [R v]	1997 ON/CA	124	• POC can be used to infer culpability, for example where the accused claims to have acted in self-defence. • However, where the accused admits the *actus reus* and the only live issue is the level of *mens rea*, POC is not relevant if it is equally consistent with both possible levels of *mens rea*. (Fully analogous to ***Arcangioli [R v]***).
B(SC) [R v]	1997 ON/CA	85	Admissibility of POC to support an inference that the accused ***did not*** commit the crime alleged ("**consciousness of innocence**") should be principled. If the POC is relevant and its probative value is not substantially outweighed by its prejudicial effect (or some other evidentiary rule), it should be received.
Turcotte [R v]	2005 CA/SC	136	Refusing to answer police questions—even when the accused answers some but refuses to answer others—is not probative of guilt. It is not probative because the accused is merely exercising a ***right*** not to speak.

BAD CHARACTER OF THE WITNESS

Don't be fooled by the name of this section. The accused may, at his election, become at witness in his own defence. The subsection on Prior Convictions (below) is mainly concerned with prior convictions of the accused, while the second subsection on Other Discreditable Conduct (p 19) is mainly concerned with ordinary witnesses.

Prior Convictions

Section 12 of the ***Canada Evidence Act*** states that "a witness" may be questioned about whether he has any prior convictions (and if he denies them, the opposite party may prove them). The use of the general term "a witness" seems to make no distinction between ordinary witnesses and the accused. This became an issue in ***Corbett [R v]***.

USE OF PRIOR CONVICTIONS WHEN THE WITNESS IS THE ACCUSED

The courts have interpreted section 12 so that when the witness is the accused, he may only be questioned about prior convictions for the purpose of impeaching his ***credibility***. Moreover, a majority of the judges "read into" the provision a ***residual discretion*** on the part of the trial judge to exclude evidence of prior convictions where the probative value of the evidence is exceeded by its prejudicial effect. NH calls this a **creative statutory interpretation**.

La Forest J identified 4 factors to consider in determining whether to exercise this discretion:

1. ***Nature*** of the prior conviction. If it involved dishonesty (fraud/theft/deceit), it is more likely to be useable in impeaching credibility.
2. ***Similarity*** of the prior conviction to the charged offence. This is ***counter-intuitive***. A higher degree of similarity increases the prejudicial effect, and makes admissibility less likely because it may cause the jury to engage in general propensity reasoning. A conviction for a less similar offence is more likely to be admitted.
3. ***Time lapse*** (the remoteness or nearness of the prior conviction). Even a conviction involving a fraud or stealing, for example, if it occurred long ago and has been followed by a legally blameless life, should generally be excluded on grounds of remoteness, per La Forest J.

4. Whether the defence has made a ***deliberate attack*** on the credibility of a Crown witness, particularly if the resolution of the case boils down to a credibility contest between the accused and that witness. This falls under the No Distorted Picture Principle (p 8).

NH adds: **if questioning a witness about his prior convictions has no purpose other than to show that he's a bad dude, it will likely not stand up to a *Charter* challenge under ss 7 & 11(d)**.

Benefits to the Accused under Courts' Interpretation of Section 12

The accused gets the following benefits under the SCC interpretation of s 12:

1. Before a prior conviction can be brought in, the accused gets a *Corbett* Hearing to determine whether it will be admitted at all (according to the 4 factors listed above).
2. If evidence of the prior conviction is admissible then:
   (a) Generally the details of the conviction are inadmissible. Only the fact of the conviction is admissible.
   (b) Fact of the conviction is admissible only for the purpose of testing the accused's credibility.

Relevant Cases and Statutory Provisions

Case/Statute	Juris.	P	Key Points
Canada Evidence Act s 12(1)	RSC 1985	141	• A ***witness*** may be questioned as to whether the witness has been convicted of any offence. • In the case of an accused, the courts have interpreted this to mean that the accused may be questioned, but only for the purposes of impeaching his ***credibility***: *R v Corbett*.
Canada Evidence Act s 12(1.1)	RSC 1985	141	If the witness denies having prior convictions, the opposite party may prove the conviction.
Corbett [R v]	1988 CA/SC	90	• *CEA* s 12 is constitutional in respect of an ***accused***—it does not infringe s 11(d) of the *Charter*. • However, the trial judge retains a residual discretion to exclude questioning about priors where the prejudicial effect outweighs the probative value.

Other Discreditable Conduct

This subsection relates predominantly to the discreditable conduct of ordinary witnesses. **We breezed through it in almost no time in class**. The main points are that:

1. *CEA* s 12 applies only to convictions. Thus any other evidence of extrinsic misconduct on the part of the accused is subject to the general rules on extrinsic misconduct evidence.
2. Any ordinary witness may be cross-examined with respect to any discreditable conduct.

Case/Statute	Juris.	P	Key Points
Cullen [R v]	1989 ON/CA	91	1. Conduct leading to a charge of which the accused has been acquitted cannot be proved against him as a similar act. 2. Any ***ordinary witness*** may be cross-examined with respect to discreditable conduct.
Titus v R	1983 CA/SC	135	Cross-examination of a Crown witness concerning an outstanding indictment against that witness ***is proper and admissible*** for the purpose of showing a possible motivation to ***seek favour*** with the prosecution
Seaboyer [R v]	1991 CA/SC	128	Evidence of the discreditable conduct of Crown witnesses would surely be subject to the *Seaboyer* standard.

The *Vetrovec* Witness

This is a peculiar section. It concerns the convergence of two topics:

1. Informal Admissions (p 57) of the accused; and
2. discreditable conduct of ordinary witnesses.

Normally, the evidence of a witness with credibility problems will not be found inadmissible. Credibility is an issue for the trier of fact to assess. A *Vetrovec* witness is a witness with such severe credibility problems that it raises the question: is there at point at which a witness loses the right to testify because he is so inherently and completely incredible that it might be very difficult to know if he is telling the truth?

NH **says that there is a point at which the worst of the worst of the worst of the worst evidence might be excluded, but *Murrin [R v]*** makes clear that the **general rule** is that even seriously unreliable evidence will be admitted. However, because this kind of testimony has been linked to wrongful convictions, a **middle ground** was chosen between the extremes of excluding the testimony altogether and allowing the witness to testify without comment. That middle ground is the Vetrovec Instruction (below).

Who "Qualifies" as a *Vetrovec* Witness?

Before issuing a *Vetrovec* warning, the trial judge must determine whether an unsavoury witness is a *Vetrovec* witness. This is a ***contextual*** inquiry, taking into account all the circumstances of the case. The question is whether the witness has such severe credibility problems that it would be dangerous to convict based on his testimony alone.

Indicators of a serious inherent lack of credibility include:

- numerous ***prior inconsistent statements***;
- criminal history, particularly ***convictions for offences of dishonesty***, like fraud and perjury; and
- ***bias***, or a massive ***vested interest in the outcome*** (as, for example, in the case of plea bargains or other possible advantage to be gained; see also ***Titus v R***).

The inquiry is fact-specific. **If the accused has particularly severe problems in only one of these areas, it might add up to a *Vetrovec* witness. On the other hand, where many factors are present but less serious, the combination of less severe factors could lead to a *Vetrovec* finding**.

The Jailhouse Informant: One Particular Class of *Vetrovec* Witness

In two of the four cases we studied—***Murrin [R v]*** and ***Dhillon [ON] [R v]***—the *Vetrovec* witnesses were ***jailhouse informants***. Typically, a jailhouse informant will testify that an accused confessed to him in prison (confessions of the accused are ***presumptively admissible***). While there is rarely an explicit or obvious *quid pro quo* from the authorities, the courts have recognized that there is an ***institutional understanding*** such that jailhouse informants often get informal rewards for their evidence. Moreover, wrongful conviction inquiries have shown that prisoners are extremely ***resourceful*** at getting the details of the investigation in order to invent a plausible confession. For these reasons, the various provinces now have special procedures in place which require Crown prosecutors to seek approval from an independent tribunal before leading the evidence of a jailhouse informant.

As the criteria above make clear, a witness need not be a jailhouse informant to qualify for a *Vetrovec* warning. The witnesses in ***Khela [R v]*** and ***Jolivet [R v]*** do not appear to have been jailhouse informants.

Vetrovec Instruction

Purpose of the *Vetrovec* Instruction

When a *Vetrovec* witness has been identified, the trial judge must deliver a "***clear, sharp warning***" to alert the trier of fact to the dangerous quality of the witness' evidence: Dickson CJC, *R v Vetrovec*. Per Fish JA in ***Khela [R v]***, the warning has two purposes:

1. to alert the trier of fact to the ***danger*** of relying on this type of evidence; and
2. to give the trier of fact a ***tool*** to assess the reliability of the witness.

The *Vetrovec* warning focuses on the presence or absence of confirmatory and corroboratory evidence supporting what the witness is saying.

Content of the *Vetrovec* Instruction

There is no fixed formula for a *Vetrovec* instruction, but it must achieve the following (set out in ***Khela [R v]*** at ¶ 37):

1. ***isolate*** the witness' testimony from the rest of the evidence: "I am now going to give you some special instructions about Mr Smith. . ." (this runs contrary to the normal rules of evidence, which emphasize a holistic approach);
2. ***explain*** to the jury why the witness' evidence is subject to ***special scrutiny***;
3. ***caution*** the jury that it is ***dangerous*** to convict on unconfirmed evidence of this sort but that the jury is entitled to do so if it is satisfied that the evidence is true; and
4. ***instruct*** the jury, when assessing the truthfulness of the witness, to look for evidence ***from another source*** tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused.

The components of the critical fourth part of the instruction are ***independence*** and ***materiality***. The meaning of independence is pretty clear (it must come from a different source who was not colluding), but what does materiality mean?

If the testimony goes only to a peripheral part of the witness' story, then it is not material. However, ***Khela [R v]*** says that the confirmatory evidence need not be direct evidence of the accused's involvement. This is odd. **The trial judge should instruct the jury to keep firmly in mind the limited disputed issues** and the jury should look for evidence confirming the *Vetrovec* witness' story on those limited issues ***despite*** the fact that the confirmatory evidence need not implicate the accused!

Relevant Cases

Case/Statute	Juris.	P	Key Points
Murrin [R v]	1999 BC/SC	118	Evidence isn't unfair to the accused just because it is unreliable. Assessment of reliability is best done by the designated TOF, the jury.
Khela [R v]	2009 CA/SC	107	It was particularly important to instruct the jury on ***independence*** because of the defence allegations of ***collusion*** between the *Vetrovec* witnesses Sandoval and Stein and their girlfriends.
Dhillon [ON] [R v]	2002 ON/CA	93	• Evidence tending to prove the fact that the accused and the witness had an opportunity to talk is not capable of being confirmatory. • NH: That evidence was **peripheral**. This decision narrows the scope of materiality.

OTHER DANGEROUS EVIDENCE: EYEWITNESS TESTIMONY

This is an extremely peculiar place to discuss eyewitness testimony, but the logic of the syllabus seems to be that this Chapter is as much about "dangerous" evidence as about extrinsic misconduct evidence!

Stranger Identification

The most dangerous kind of eyewitness identification is identification of strangers. When the person identified is unknown to the witness, the risk of honest but inaccurate identification is high. This type of evidence is strongly linked to wrongful convictions. Nevertheless, a policy decision has been made that such evidence is **presumptively admissible**. The jury is tasked with assessing credibility and reliability.

If a question involving eyewitness identification comes up on an exam, make use of the facts in the fact pattern (and any other obvious ones you can think of) to comment on the ***weight*** to be accorded to it. Consider lighting conditions, circumstances of stress, time between the incident and identification, specificity of the witness' description, whether any distinctive features were correctly identified, whether there is confirmatory evidence, &c.

Prior Descriptions

If the witness gives a precise prior description of the suspect and then subsequently manages to pick him out of a photo line-up, this can be strong ID evidence.

Photo Line-Ups

The ***Gonsalves [R v]*** case involved a photo-line up. These are the current best practices for conducting a photo line-up:

- there should be at least 10 subjects in the photo pack;
- the conduct of the photo line-up must be recorded on ***videotape***, or at least audiotape;
- the line-up should be conducted by a ***double-blind administrator*** who tells the witness beforehand that he is not involved in the investigation and does not know who the suspect is;
- the line-up must be presented ***sequentially***, not handed over as a package; and
- the officer conducting the line-up must not do anything to bias or reinforce the witness' suspicion about any of the photos.

Common sense! According to *Gonsalves*, flaws in the conduct of the photo line-up go to the ***weight*** of the evidence, not its admissibility.

Relevant Cases

Case/Statute	Juris.	P	Key Points
Gonsalves [R v]	2008 ON/CA	95	• In-court identification gets very little weight. • When a photo line-up is tainted by incorrect procedures, the flaws go to weight, not admissibility. • Criteria for a photo line-up are given.
Swanston [R v]	1982 BC/CA	133	• An extrajudicial eyewitness identification is admissible as an exception to the general rule against admitting prior consistent statements. • Such identification is admissible not only to confirm an in-court identification, but as independent evidence going to ID.

3. Opinion Evidence

The term opinion evidence is generally used to refer to ***expert*** opinion evidence, also known as expert evidence. However, there are other kinds of opinion. The general position of the law appears to be that opinion evidence is inadmissible, but that there are several exceptions to this rule:

1. the "compendious statement of facts" exception, a.k.a. ***common knowledge***; and
2. the "expert witness" exception

Common Knowledge

Non-experts may give their opinions on matters within the ***everyday experience of ordinary people***: ***Graat [R v]***.

This is because such an opinion is really just a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly.

There are certain caveats. A non-expert may not:

- speculate;
- stray into the realm of opinion which would require a specialized expert; or
- state his opinion in terms of a legal standard.

Case/Statute	Juris.	P	Key Points
Graat [R v]	1982 CA/SC	95	It is well-established that a non-expert witness may give evidence that someone was ***intoxicated*** (as in this case), just as he may give evidence of age, speed, identity, or emotional state.

Expert Evidence

The traditional witness testifies that he heard or saw something relevant to the issues before the court. Not so the expert witness, who is an outside witness not directly involved with the events that are the subject matter of the trial. Expert witnesses are brought in and paid by one of the parties for the purpose of bolstering that party's case. The ***purpose*** of the expert witness is to provide ***assistance*** to the trier of fact. They are an inevitable incident of the legal system because it uses generalist triers of fact who may need ***assistance*** in ***drawing inferences*** about issues which are beyond their knowledge.

General Rule on Expert Opinion Evidence

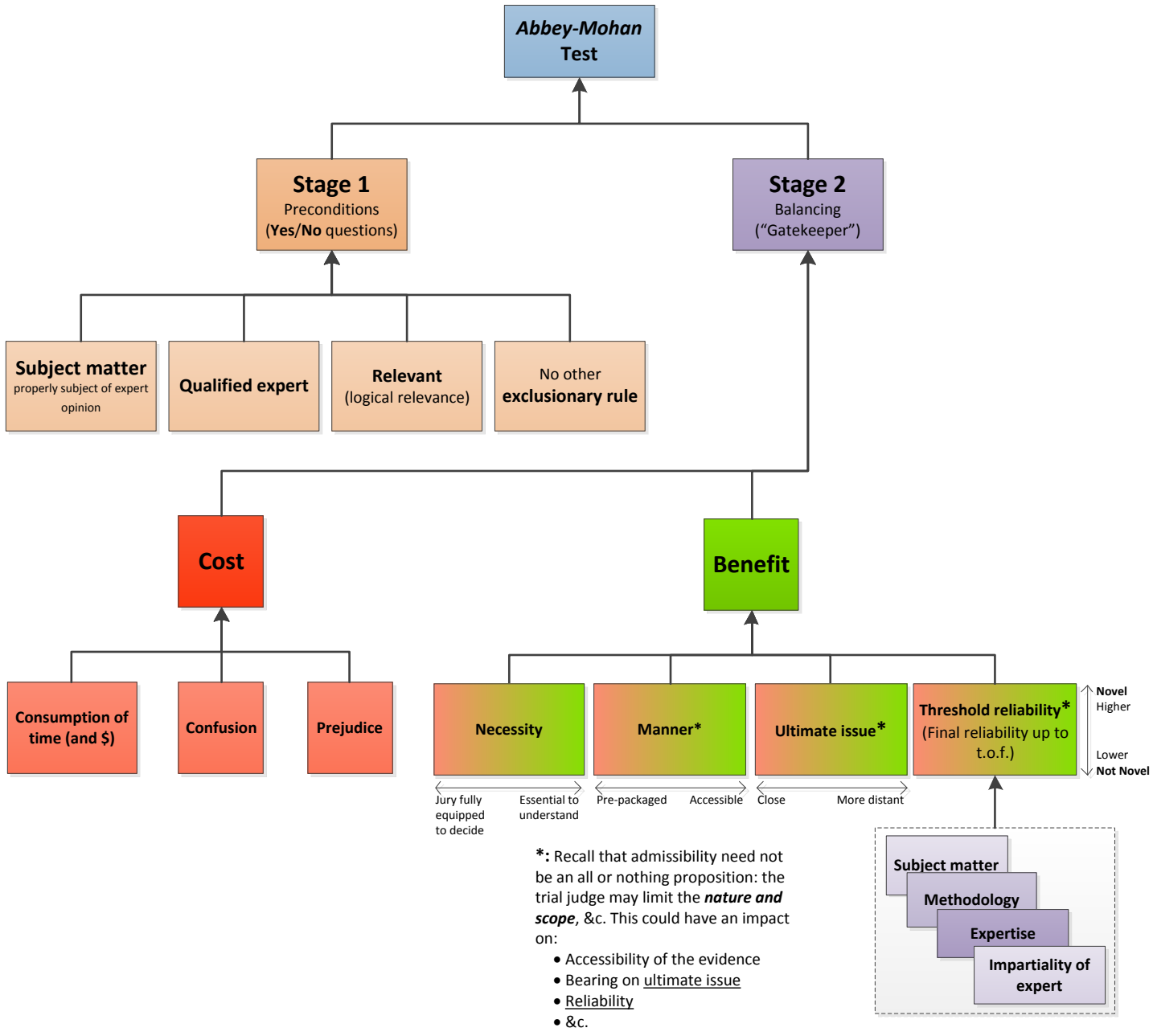
Expert opinion evidence is ***presumptively inadmissible***. The party tendering the evidence must establish its admissibility on the balance of probabilities: ***Abbey v R*** at ¶ 71.

The test for admissibility of expert evidence was first set out in ***Mohan [R v]***. **It is essentially a framework for probative/prejudicial balancing**. According to Doherty JA in *Abbey*:

> *Mohan replaced what had been a somewhat laissez faire attitude toward the admissibility of expert opinion evidence with a principled approach that required closer judicial scrutiny of the proffered evidence.*

The exact subject matter of the *Mohan* test was rephrased up by Doherty JA in ***Abbey v R***. **NH prefers the *Mohan* test as formulated in *Abbey***.

THE *ABBEY-MOHAN* TEST



STAGE 1: PRECONDITIONS

The first stage of the *Abbey-Mohan* analysis requires testing 4 preconditions. These are relatively easy yes/no questions which must all be answered in the affirmative to proceed:

1. Is the subject matter ***properly the subject of expert opinion***?

   The TEST here is from *Mohan*: the subject matter must be such that ordinary people are unlikely to form a correct judgment about it.

2. Is the witness a properly ***qualified expert***?

   The TEST is not difficult, but probably best done by analogy to the other cases. **Note that while the threshold for "expertise" may be low, a bad expert can hurt a case due to the magic of cross-examination**.

3. Is the proposed evidence ***logically relevant*** to a material issue?
4. Is the evidence ***otherwise admissible*** (not barred by any other exclusionary rule)?

Stage 2: Gatekeeper Analysis

After the 4 preliminary questions from the first stage have been answered, the next step is to perform the cost/benefit analysis necessary to decide whether the evidence should be admitted. This requires considering the various pure ***costs*** associated with expert evidence as well as the ***benefits*** that will flow from it.

Costs

Costs include:

- consumption of time (and money);
- prejudice;
- confusion caused by unduly protracting and complicating the proceedings; and
- the jury abdicating its fact-finding role and attorning to the opinion of the expert;

See also: 6 Risks of Expert Evidence (p 28)

Benefits

To determine the benefits associated with the evidence, it seems necessary to take a holistic approach and weigh:

- The degree of ***necessity*** of the evidence: how essential is it to the jury's understanding? Does the jury need assistance to draw the correct inference? **Note that courts are tending to assume that juries possess a broad range of knowledge**: ***Corbett [R v]***.
- The ***manner*** in which it is presented: is it closer to being pre-packaged, or accessible?
- How close is the evidence to the ***ultimate issue***?
- Does the evidence meet a ***threshold of reliability*** to have sufficient probative value? This threshold will depend on whether we are dealing with:
    - "ordinary" expert evidence, as in ***Abbey v R***; or
    - Novel Scientific Evidence (p 27), as in ***J-LJ [R v]*** and *Mohan* itself

Relevant Cases

Case/Statute	Juris.	P	Key Points
Mohan [R v]	1994 CA/SC	117	Dr Hill's testimony is ***inadmissible*** because his profiles were not standardized enough that it could be said that one of them matched the supposed profile of the offender in this case.
J-LJ [R v]	2000 CA/SC	103	Dr Beltrami's evidence failed to meet the threshold of ***reliability*** for novel scientific evidence. It was also close to the ***ultimate issue*** and presented in a ***pre-packaged*** manner, both of which weighed against it.
Abbey v R	2009 ON/CA	80	Dr Totten's evidence was admissible as long as the ***scope and language*** was properly restricted.

Basis and Weight of Expert Opinion

The expert cannot make admissible the assumptions on which the expert opinion is based. Consider the following example:

> You want to call an expert to answer a hypothetical question: "Suppose a 14-year old who is an inexperienced drinker consumed 12oz of hard liquor in a one-hour period. What might his level of cognitive impairment be?"

All of the circumstances referred to in the question are assumptions.

Does Every Assumption Have to Be Led as Admissible Evidence?

In *R v Lavallée* (our favourite battered wife case, cited in ***Palma [R v]***), the defence psychiatrist who was called to give his expert opinion that the accused thought her life was in imminent danger based his opinion in part on a 4-hour out-of-court interview with the accused. During his testimony, he recounted some of the details of what she told him during the interview. There was no admissible evidence for these details.

The Supremes held that ***if some of the assumptions relied on by the expert were led as admissible evidence***, but some were not, then the expert opinion is admissible and the only issue is one of ***weight***. The jury is to be instructed that it ***may, not must***, ignore the expert's opinion because the expert relied on some evidence which was not put before the jury.

Hypothetical Questions

There is a danger that experts may usurp the responsibility given to the TOF. When counsel asks questions of the experts which incorporate assumptions about the case, it may send the message to the TOF that these assumptions are the actual facts of the case when they may be live issues!

Counsel is thus generally required to put its questions to the expert in hypothetical form, which has the advantage of reminding the TOF that the assumptions are not necessarily settled and it is responsible for deciding each issue. This practice is also useful as a general reminder that the answer must be treated with skepticism.

However, in ***Bleta v The Queen***, the SCC held that a trial judge has ***discretion*** to admit an expert opinion which is not based on a hypothetical question if the ***nature and foundation*** of the opinion has been ***clearly indicated*** to the jury ***by other means***.

Relevant Cases

Case/Statute	Juris.	P	Key Points
Palma [R v]	2000 ON/SC	122	Citing *R v Lavallée*: 1. If 100% of the expert's opinion is based on Hearsay, the opinion is inadmissible. (But this is practically impossible). 2. Where the opinion is based in part on suspect information and in part on admissible evidence, the matter is purely one of ***weight***.
Bleta v The Queen	1964 CA/SC	86	A trial judge has discretion to admit an expert opinion which is not based on a hypothetical question if the ***nature and foundation*** of the opinion has been ***clearly indicated*** to the jury ***by other means***.

Particular Matters

Test for Expert Behavioural Profile Evidence in Particular

In both ***Mohan [R v]*** and ***J-LJ [R v]***, the defence attempted to lead expert evidence to prove that sexual offences alleged to have been committed by the accused had to have been committed by someone who fit a specific behavioural profile and that the accused did not fit that profile:

$$(\text{Perpetrator} \in \text{group}) \wedge (\text{Accused} \notin \text{group}) \Rightarrow \text{Perpetrator} \neq \text{Accused}$$

The evidence was found ***inadmissible*** in both cases. After *J-LJ*, this type of evidence must meet the test for Novel Scientific Evidence (p 27). In addition, per Binnie J in *J-LJ*, the evidence must establish that:

1. the expert is using a ***standard profile*** which wasn't put together on an *ad hoc* basis for the purpose of the particular case; and
2. the profile clearly identifies the ***distinctive psychological elements*** which separate the deviant perpetrator from other people.

Opinion Evidence on Credibility

One of the basic principles of the law of evidence is that ordinary people are particularly well-suited to determining whether someone is being truthful. Credibility is the paramount issue which is considered to be wholly within the expertise of the TOF. The courts are thus particularly suspicious of opinion evidence—whether from experts or not—which would ***usurp*** the TOF's responsibility to determine credibility. Such evidence is referred to as ***oath-helping*** and is ***generally inadmissible***, unless it is relevant to some issue beyond credibility and its probative value outweighs its prejudicial effect.

Note that oath-helping evidence ***may*** be admissible if it is led for some other legitimate purpose. However, this argument did not succeed in *Llorenz*:

> *I do not take Burns to hold that oath-helping evidence should necessarily be admitted simply because it is led for another purpose. When considering the admissibility of such evidence, a court must still weigh its probative value in relation to its legitimate purpose, against its prejudicial effect.*

Case/Statute	Juris.	P	Key Points
Llorenz [R v]	2000 ON/CA	110	• Dr Voysey's evidence, taken as a whole, communicated to the jury the clear message that he believed the complainant's allegations of sexual abuse. • In cases like this one which turn on which one of two witnesses the jury believes, there is a danger the jury may attach significant weight to oath-helping evidence even if instructed to do otherwise.
Ay [R v]	1994 BC/SC	82	Constable Logan's statement that he "certainly would have no problem with the victim's credibility" was inadmissible oath-helping.

Novel Scientific Evidence

The threshold of reliability for novel scientific evidence is higher than for expert evidence which is not in this category. Novel scientific evidence must be subjected to ***special scrutiny*** (***Mohan [R v]***) and the courts are expected to take seriously their gatekeeper role (***J-LJ [R v]***).

4 Factors to Consider for Novel Scientific Evidence

J-LJ [R v] lists out four factors to consider when evaluating the admissibility of novel scientific evidence. Note that these are only factors! They do not all need to be present to admit the evidence. Binnie J is clear that ***the generally accepted criterion cannot be determinative*** since "it was once accepted by the highest authorities of the western world that the earth was flat." On the other hand, as NH notes, many types of new and novel scientific theories have been found to be utterly incorrect. **Thus the courts need to be very careful to avoid relying on "ironclad" tests which always work . . . until they cause a wrongful conviction**.

1. whether theory or technique can be and has been ***tested***;
2. whether the theory or technique has been subjected to ***peer review*** and publication;
3. the ***known or potential rate of error*** or the existence of ***standards***; and
4. whether the theory or technique used has been ***generally accepted***.

Relevant Cases

Case/Statute	Juris.	P	Key Points

Case/Statute	Juris.	P	Key Points
J-LJ [R v]	2000 CA/SC	103	Dr Beltrami's novel use of the penile plethysmograph as a forensic tool (in conjunction with personality tests) was a novel use. It failed to meet the threshold of reliability.
Abbey v R	2009 ON/CA	80	Dr Totten's evidence was not a novel scientific theory. It was not scientific. It was not novel. And it was not a theory

Limiting Admissibility of Expert Evidence

6 Risks of Expert Evidence

DD [R v] lists 6 risks of expert evidence which make it advisable to limit its admissibility:

1. experts may ***usurp*** the province of the jury (the TOF may attorn to the opinion of the expert and abdicate its fact-finding role)
2. experts are highly ***resistant to cross-examination***;
3. expert opinions tend to be largely ***based on unsworn evidence*** which is not before the court;
4. expert evidence is ***time-consuming*** with all the attendant difficulties (waste of court time, jurors forgetting evidence or becoming unavailable, &c); and
5. expert evidence is ***expensive*** both to public and private parties (especially if one must compete with the Crown);
6. a trial has a tendency to degenerate into a "***contest of experts***" with the TOF acting as referee in deciding which experts to accept.

Witnesses We Like and Witnesses We Don't Like

Because of the risks associated with expert evidence (to which could be added that **experts may be looking to support the party who is paying the bills**), the Supremes started to clamp down on the amount of expert evidence admitted at trial, beginning with the *Mohan [R v]* case. The following quotes from Fish J in *DD* show how the Court feels about experts versus ordinary witnesses.

A basic tenet of our law is that the usual witness may not give opinion evidence, but testify only to facts within his knowledge and experience. This is ***a commendable principle****.*

Despite the emergence of the exception, it has been repeatedly recognized that the admissibility requirements of expert evidence do not eliminate the dangers traditionally associated with it. Nevertheless, ***they are tolerated in those exceptional cases*** *where the jury would be unable to reach their own conclusions in the absence of assistance from experts with special knowledge.*

Relevant Cases

Case/Statute	Juris.	P	Key Points
DD [R v]	2000 CA/SC	92	• NH: a **declaration of war on experts**. • Evidence reflecting the current state of the law merely reflects an undeniable proposition. It has no technical character whatsoever.
Mohan [R v]	1994 CA/SC	117	Per *J-LJ*: Trial judge must take seriously the role of gatekeeper.
J-LJ [R v]	2000 CA/SC	103	Admissibility of expert evidence should be scrutinized at the time it is proffered, and ***not allowed too easy an entry*** on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.
Parrott [R v]	2001 CA/SC	123	At the time expert testimony (as to complainant's testimonial competence) was called, it had not been shown that the testimony was ***necessary***.

4. Different Evidentiary Contexts

Civil Trials

General

One key difference between civil and criminal proceedings is that civil proceedings are not governed by the federal evidence rules. Instead of using the ***Canada Evidence Act*** and the ***Criminal Code***, they are governed by the BC *Evidence Act* and the rules of court for civil proceedings. We are not responsible for those rules in this course. Despite these differences, the general concept of probative/prejudicial balancing is equally applicable in the civil context.

Case/Statute	Juris.	P	Key Points
Johnson v Bugera	1999 BC/CA	104	• There is probably no difference between probative/prejudicial balancing in the criminal and civil contexts. • Except that there may be a heightened concern in criminal cases, especially those tried before a jury, to avoid prejudicial evidence.

Collateral Evidence Rule

On cross-examination, subject to the trial judge's discretion to disallow any question which is ***vexatious*** or ***oppressive***, a witness can be asked literally anything to test her credibility. However, cross-examining party is subject to the collateral evidence rule. Where the witness is asked a question on cross-examination which is irrelevant to the facts in issue and asked purely for the purpose of testing her credibility, the cross-examining party is bound by her answer and may not lead evidence to contradict her.

Case/Statute	Juris.	P	Key Points
Tsoukas v Segura	2001 BC/CA	135	Authority for the collateral evidence rule.
Krause [R v]	1986 CA/SC	110	Explains the very similar Rule against Rebuttal on Collateral Issues (p 39)

Judge-Alone Trials

Trials before a judge alone are governed by exactly the same rules of evidence as other trials. However, the trial may play out differently for several reasons. Two reasons which arose in the ***Malik [R v]*** case are:

1. Trial judges hear the gist of the evidence on *voir dire* when they are deciding upon admissibility. For this reason, there may be no point excluding certain evidence which would be inadmissible in a jury trial.
2. Trial judges receive special training to consider evidence only for its proper evidentiary value.

Case/Statute	Juris.	P	Key Points
Malik [R v]	2003 BC/SC	113	When accused Air India conspirators Malik and Bagri re-elected for a trial by judge alone, an order requiring a witness to self-censor was lifted.
Cassibo [R v]	1982 ON/CA	88	In this judge-alone trial, the parties agreed that evidence adduced on the *voir dire* would form part of the trial record.
Allison v R	1991 BC/CA	81	Another example of a judge-alone trial.

Competence and Compellability of Witnesses

Competence and Compellability

A witness is ***competent*** if his evidence can be received in court. A witness is ***compellable*** if he can be forced to testify on pain of a contempt proceeding.

In this course, we looked very briefly at the competence and compellability of spouses. We spent more time on the competence of children under 14, which seems like the most important topic, as well as a short time on the competence of people who lack mental capacity.

Spousal Competence and Compellability

Case/Statute	Juris.	P	Key Points
Canada Evidence Act s 4(1)	RSC 1985	140	The spouse of an accused is a ***competent*** witness for the defence.
Canada Evidence Act s 4(3)	RSC 1985	140	The spouse of an accused cannot be ***compelled*** to testify about communications during the marriage.
Canada Evidence Act s 4(2) & 4(4)	RSC 1985	140	The spouse of an accused can be compelled to testify against the accused regarding certain offences under the *Youth Criminal Justice Act* and the *Criminal Code*, subject, presumably, to s 4(3).

Children under 14

The competence of children under 14 is the subject of section 16.1 of the *Canada Evidence Act*. Children under 14 are ***presumed*** to be competent to testify. If a party challenges the competence of a child witness, the onus is on that party to demonstrate that the child cannot ***understand and respond to questions***. The ability to understand and respond to questions is a very low threshold for the child to meet, certainly lower than the "communicate the evidence" threshold under *CEA* s 16.

Moreover, the child ***may not*** take an oath or solemn affirmation but instead must testify under a ***promise to tell the truth***. If the child can understand and respond to questions and has promised to tell the truth, his evidence is admissible. The opposing party may not question the child on his understanding of the nature of the promise for the purpose of determining admissibility—the making of the promise is determinative of admissibility. However, that party may ***cross-examine*** the child on his understanding of the promise at trial, and this cross-examination may properly be taken into account by the jury in assessing the ***weight*** to accord to the child's evidence.

Case/Statute	Juris.	P	Key Points
Canada Evidence Act s 16.1	RSC 1985	143	Competence of children under 14.
JZS [R v]	2008 BC/CA	106	• Affirms the constitutionality of s 16.1, in particular the inability to question the child on his understanding of the promise. • **Parliament need not provide the fairest trial the accused could imagine under the right to make full answer and defence and s 11(d) of the *Charter*. ∃ other interests at stake (such as the search for the truth).**

Mental (In)Capacity

While sections 16 and 16.1 are similar, it is somewhat easier for a party to have a person with a mental capacity problem declared incompetent than a child witness under 14 years of age. The following are the key differences between the two provisions:

	Mental Incapacity *Canada Evidence Act* s 16		Child under 14 *Canada Evidence Act* s 16.1	
Presumption of competence	×	/	✓	16.1(1)
Standard of competence	Communicate the evidence	16(1)(a)	Understand and respond to questions	16.1(3)
How inquiry initiated	Challenge competence	16(1)	Satisfy the court there is an issue	16.1(4)
Burden during inquiry	On party challenging	16(5)	Unclear	16.1(5)
Oath or solemn affirmation	Default option	16(2)	Prohibited	16.1(2)
Promise to tell the truth	Backup option	16(3)	Default and only option	16.1(6)
Questioning promise	Not permitted: *DAI [R v]*	/	Not permitted	16.1(7)

STANDARD OF COMPETENCE

The "communicate the evidence" standard is apparently slightly more stringent than the "understand and respond to questions" standard, apparently requiring the ability to ***perceive and recollect events*** in addition to the capacity to understand and respond to questions: see notes at the bottom of the case brief for ***JZS [R v]***.

RELEVANT CASES

Case/Statute	Juris.	P	Key Points
Canada Evidence Act s 16	RSC 1985	142	Competence of witnesses with mental disabilities.
Canada Evidence Act s 16(3)	RSC 1985	142	In *R v DAI*, the promise to tell the truth under this section was interpreted to prohibit questioning on the abstract understanding of the ***promise to tell the truth*** for the purpose of determining admissibility.
DAI [R v]	2012 CA/SC	91	Provides the above interpretation for s 16(3).
JZS [R v]	2008 BC/CA	106	By analogy to *JZS*, you would of course be able to cross-examine the witness at trial on his understanding of the promise.
Parrott [R v]	2001 CA/SC	123	The Crown took the somewhat unusual step of applying to have its own witness, the complainant, declare incompetent under s 16.

OATHS AND SOLEMN AFFIRMATIONS

Case/Statute	Juris.	P	Key Points
Canada Evidence Act s 14	RSC 1985	142	Instead of swearing an oath before giving evidence, a person may make a solemn affirmation, which has the same effect as swearing an oath.
Canada Evidence Act s 15	RSC 1985	142	Instead of swearing an oath before making an affidavit or deposition, a person may make a solemn affirmation, which has the same effect as swearing an oath.

5. Examination of Witnesses

Calling Witnesses

Order of Calling Witnesses

The parties have control over the conduct of their cases, a principle which is related to Our Adversarial System of Trial (p 13). Nevertheless, there is a danger that if a witness is able to sit in the courtroom and listen to the evidence of the other witnesses, he may be able to tailor his testimony to fit the other evidence and thus lie convincingly. For this reason, the parties routinely seek and obtain orders excluding witnesses from the courtroom until they have given their testimony.

The accused is clearly a potential witness, and one who has the privilege of sitting in the courtroom and listening to the entire case. There is thus a risk that the accused may tailor his testimony. Can the Crown oblige the accused to testify first in the defence case, if he is going to testify at all, in order to minimize his capacity to customize his evidence? The case of ***Smuk [R v]*** says no. Not only no, but the credibility of the accused may not be prejudged.

Note that ***Smuk [R v]*** was decided in 1971 and is framed in common law terms. If a similar case arose nowadays, it would in all likelihood be decided in terms of sections 7 and 11(c) of the *Charter*.

Failure to Call a Witness

What if the Crown declares that it will call a witness but then reneges and does not call him? This issue was dealt with in ***Jolivet [R v]***. The threshold question is ***motive***: did the Crown have an improper motive for deciding not to call the witness? Once this question is decided, it is necessary to determine what ***mischief*** or prejudice was suffered by the defence in order to pick the appropriate ***remedy***.

Motive

The trial judge must decide whether the Crown action:

1. was a ***perverse*** or oppressive exercise of prosecutorial discretion amounting to an ***abuse of process***;
2. did not amount to an abuse of process but still gave rise to ***concern*** over the Crown's motive; or
3. was purely the stuff of everyday trial tactics.

A remedy may be available in each case, but the strength of the remedy clearly decreases with the severity of the Crown conduct. Some kind of remedy may be available even if the Crown is blameless if its actions nonetheless resulted in ***unfairness*** to the accused.

It was held in *Jolivet* that if the Crown gives an explanation for the change of tactics and this explanation is believed by the trial judge, it amounts to a finding of fact that the Crown gave a truthful explanation. Moreover, concern about the ***truthfulness*** of a witness is not a ***perverse*** consideration.

Mischief and Remedy

In *Jolivet*, Binnie J poured cold water on the idea of obliging the Crown to call the witness, as this would disrupt the inherent balance in Our Adversarial System of Trial (p 13). Thus, the following remedies are available in decreasing order of strength:

1. Trial judge could call the witness himself.
2. Trial judge could instruct the jury that it may draw an ***adverse inference***.
3. Defence could comment on the failure to call the witness in its closing arguments.
   (a) Defence could invite the jury to draw an ***adverse inference*** (stronger remedy); or
   (b) Defence could invite the jury to infer that the witness would have been ***unhelpful*** to the Crown's case (weaker remedy).
4. Nothing at all could be done, relying on the jurors to remember the unfulfilled promise and draw their own conclusions.

The first and second remedies are only available in extraordinary circumstances, where there are concerns about the Crown's ***motive*** (first and second motive possibilities). Where there is no improper motive, but there is an element of ***unfairness*** to the accused, this seems to leave the third remedy. Whether the defence is entitled to invite an ***adverse inference*** or merely make an ***unhelpfulness*** comment depends on how much prejudice was suffered by the accused. In ***Jolivet [R v]***, because it was known that Bourgade was going to give inculpatory, not exculpatory, evidence, an ***adverse inference*** would not have been justified. However, the Crown's comments might have led the jury to believe that the Crown case was stronger than it really was, so an ***unhelpfulness*** comment was warranted…

Why Would You Not Call the Witness Yourself?

There is nothing stopping any party from calling any witness. If the Crown won't call the witness, the defence could do so. The party calling the witness is restricted to Direct Examination (p 33), however, which is less effective than Cross-Examination (p 37), particularly when the witness is unfriendly. There is, of course, the possibility of having the witness declared ***hostile***.

Other Contexts

NH makes the following remarks. **Likely none of these remedies would be available to the Crown against the accused given the accused's constitutional right not to lead any evidence at all. In the civil context, the trial judge would likely not call the witness, but the adverse inference remedy would be preferred**.

Relevant Cases

Case/Statute	Juris.	P	Key Points
Smuk [R v]	1971 BC/CA	131	• The accused is completely free to decide if he will testify and if so, in what order or sequence he will testify. • The credibility of a witness cannot be prejudged by the court.
Jolivet [R v]	2000 CA/SC	104	Where Crown's explanation for not calling a promised witness is ***accepted*** by trial judge, defence ***may not*** ask jury to draw an adverse inference ***but may*** invite it to infer that witness would have been unhelpful to Crown's case.

Direct Examination

The process of examining a party's own witness in chief is called direct examination. The rule on leading questions is the same in direct examination, Re-Examination (below), and examining witnesses called to give Rebuttal Evidence.

Leading Questions

There is no easy definition of leading questions. The most obvious leading questions are those for which yes or no is the answer. However, leading is a more general concept that involves "**feeding chunks of evidence**" to the witness.

> *Where "Yes" or "No" would be conclusive on any part of the issue, the question would be equally objectionable; as if, on a traverse of notice of dishonour of a bill of exchange, a witness were led either as to the fact of giving notice, or as to the time when it was given. . . . Thus, on an indictment for murder by*

> *stabbing, to ask a witness whether he saw the accused, covered with blood and with a knife in his hand, coming away from the corpse, would be in the highest degree improper though all the facts embodied in this question are consistent with his innocence.*
>
> —Beck J, ***Maves v Grand Trunk Pacific Rwy Co***

Maves also warns that leading is a relative, not an absolute, term. What may be leading in one context may not be leading in another.

General Rule on Leading Questions

- On ***material*** points, one ***may not*** lead one's own witness.
- However, on points that are ***merely introductory*** and form no part of the substance of the inquiry, one ***should*** lead.

(NH adds that **leading questions may be asked where it is mutually agreed upon by counsel**)

Policy Rationale

The policy on leading questions is based on the theory that a party's own witness is biased in favour of that party (this is why one is permitted to lead a hostile witness). *Maves* advances three justifications:

1. because the party's own witness is ***biased*** in favour of that party and hostile to his opponent;
2. the party calling a witness has an advantage over his opponent because he knows beforehand what the witness will prove, or is expected to prove, and could consequently lead the witness only to points favourable to his side and thus put a ***false gloss*** on the whole; and
3. witnesses may honestly assent to leading questions which fail to express their whole meaning, even if they would have expressed things differently in their own words.

The first rationale is the principal one.

Five Exceptions to the Rule against Leading Questions

Maves v Grand Trunk Pacific Rwy Co names five exceptions to the general rule. A party may lead his own witness on material matters when:

1. for the purpose of ***identifying*** persons or things (the witness' attention may be directly pointed at them);
2. when one witness is called on ***to contradict another witness as to expressions*** used by the latter, but which he denies having used (the former witness may be asked "did the other witness use such and such an expression?");
3. at the trial judge's discretion when the witness is ***hostile*** or unwilling to give evidence (to do otherwise would contradict the policy rationale of the rule);
4. where the inability of a witness to answer questions put in the regular way can fairly be attributed to a ***defective memory***; and
5. where the inability of a witness to answer questions put in the regular way arises from the ***complicated nature of the matter*** on which he is being interrogated.

The fourth exception was at issue in *Maves*. Ferguson J also mentioned in ***Shergill [R v]*** that the trial judge should consider whether it is preferable to relax the rule on leading questions before resorting to refreshing the witness' memory via Present Memory Revived (PMR) (p 35).

Relevant Cases

Case/Statute	Juris.	P	Key Points
Maves v Grand Trunk Pacific Rwy Co	1913 AB/SC	114	General authority on leading questions.

Refreshing a Witness' Memory

The Forgetful Witness

Given the length of time a case takes to get to trial these days, and the duration of modern trials themselves, witnesses may legitimately have had a true memory of an event or ***detail*** that gets forgotten by the time the witness gets on to the stand†. Another problem occurs because police officers are frequent witnesses at trial, but may have many investigations ongoing simultaneously, or in the interval before the trial, making recollection more difficult. Because these details may be absolutely crucial to the resolution of the trial, the law has developed two conceptually distinct techniques to address the problem:

1. Present Memory Revived (PMR)
2. Past Recollection Recorded (PRR)

†: Although whether we believe that the witness actually forgot will have to take into account the witness, the detail, and the amount of time elapsed—see for example ***McInroy and Rouse [R v]***.

Present Memory Revived (PMR)

Unlike PRR, PMR is actually concerned with ***refreshing*** the witness' memory. The idea behind PMR is that the witness still retains an imprint of the memory, but that he cannot conjure it up without a ***trigger***. PMR seeks to provide the witness with a ***spark*** to revive that ***latent*** memory. The following from ***Shergill [R v]*** illustrates the difference:

> *In the case of past recollection recorded, it is the earlier note that is speaking. The earlier out-of-court statement is received as evidence of its truth, under the guise of refreshing memory, as an exception to the hearsay rule. If, on the other hand, we have a true case of the memory being refreshed, the evidence is the testimony of the witness and not the note earlier made.*

Test for Admitting PMR

1. Has the witness forgotten something ***material***?
2. Is the witness' ***memory exhausted***?†
3. Is this ***legitimately*** a case of ***refreshing*** memory and not adducing PRR?
4. Is the proposed memory trigger ***appropriate***?

   This is a discretionary balancing exercise. Will the proposed trigger legitimately refresh memory, or is it more likely to taint the witness? The following factors should be considered. None of them are determinative.

   (a) ***contemporaneity*** (not required in *Shergill*: the trigger was made 6 ½ years after the event);
   (b) ***creator*** of the document;
   (c) whether the witness ***verified its accuracy***;
   (d) whether it is ***reliable***; and
   (e) whether it could be ***too suggestive*** or distortionary.

†: The trial judge should consider relaxing the rule against leading questions before proceeding to PMR.

It would be useful to be familiar with the difference between Ms Kaur's police statement and the verbatim transcript in the *Shergill* case in order to reason by analogy if arguing about the admissibility of PMR on an exam.

Case/Statute	Juris.	P	Key Points
Shergill [R v]	1997 ON/GD	129	• Authority for the test for admitting PMR, as well as the procedure to follow. • NH says ***Shergill* strikes a balance between two extreme schools of thought** (one says anything at all may serve as a trigger, while the other one says only contemporaneous documents authored by the witness will work). • The "trigger", a verbatim transcript from the preliminary inquiry, was made 6½ years after the alleged offence and preferred to an earlier statement taken only 6 years after the alleged events.

Past Recollection Recorded (PRR)

Unlike PMR, PRR does not actually involve refreshing memory at all. Rather, it is a procedure to follow when it has proved impossible to refresh the witness' memory. It involves entering an out-of-court statement made by the witness into evidence as proof of the contents of that statement. In other words, it operates as an exception to the Hearsay (p 45) rule.

Test for Admitting PRR

The following 4-point test is an amalgamation of the tests described ***IR [R v]*** and ***Fliss [R v]***:

1. Absence of Memory: the witness must have ***no memory*** of the recorded events.
2. Reliable Record: the past recollection must be recorded in some ***reliable*** way.
   (a) The witness must have prepared the record OR reviewed it for accuracy if someone else prepared it.
   (b) The original record must be used if it is available.
3. Timeliness: at the time, it must have been ***sufficiently fresh and vivid*** to be probably accurate.
4. Present Voucher of Accuracy: The witness must now be able to assert that the record accurately represented his knowledge and recollection at the time.

   Usually, the witness must ***affirm*** that he "***knew it to be true at the time***".

Case/Statute	Juris.	P	Key Points
IR [R v]	2003 ON/CA	105	A police statement given 16 hours after the incident was considered sufficiently fresh and vivid for PRR.
Fliss [R v]	2002 CA/SC	94	• The PRR criterion which was apparently failed was the present voucher as to accuracy. • However, it seems that the ***Charter*** violation was a separate issue having nothing to do with PRR.

A More Severe Remedy

PRR is a more severe remedy than PMR and typically will not be attempted until PMR has been tried unsuccessfully. One problem faced by PRR is the lack of the three circumstantial indicia of reliability given in ***B(KG) [R v]***: the statement is often not under oath, not videotaped, and not subject to contemporaneous cross-examination. It is for this reason that the requirements for timeliness and reliability are strict for PRR where they are more flexible in PMR.

Police Notes are PRR

According to NH, there is almost a presumption that certain types of witnesses may use memory aids in certain types of proceedings. **For example, there is almost a presumption that police officers will be permitted to rely on their notes in proceedings in provincial court**. The "applications" to the trial judge to use these memory aids may be extremely informal. For example, the officer on the stand could just ask the trial judge, "May I have permission to rely on my notes?" Are these notes PMR, or PRR? Ferguson J explains at ¶ 35 of *Shergill*:

> *The usual situation where a police officer asks to refer to his or her notebook is an example of past recollection recorded and not of refreshing memory.*

CROSS-EXAMINATION

> *Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the* ***search for truth****. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion, or to elicit vital information that would otherwise remain forever concealed.*
>
> *That is why the right of the accused to cross-examine witnesses for the prosecution—without significant and unwarranted constraint—is an essential component of the* ***right to make full answer and defence****.*
> —Major and Fish JJ, ***Lyttle [R v]***

Leading questions are permitted in cross-examination, which is the examination of a witness called by the other party. In special circumstances, the party may cross-examine its own witness, as when the witness has been declared hostile by the trial judge, or when a successful application has been made under s 9 of the ***Canada Evidence Act***.

On an ***exam***—assuming example cross-examinations are given at all—something to be alert for is the substance of the question put to the witness: is the question designed to elicit a response which is itself inadmissible, as in the ***Howard [R v]*** case?

General Rule on Cross-Examination

Case/Statute	Juris.	P	Key Points
Tsoukas v Segura	2001 BC/CA	135	On cross-examination, subject to the trial judge's discretion to disallow any question which is ***vexatious*** or ***oppressive***, a witness can be asked literally anything to test her credibility.
Lyttle [R v]	2004 CA/SC	112	A question can be put to a witness in cross-examination regarding matters that ***will not be proved independently*** provided that counsel has a ***good faith basis*** for putting the question.

DEFINITION OF THE GOOD FAITH BASIS

A ***good faith basis*** is a function of the information available to the cross-examiner, his belief in its accuracy, and the purpose for which it is used. Information may be incomplete or uncertain, as long as the questioner doesn't put suggestions ***recklessly*** or which he ***knows to be false***.

The questioner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience, or intuition. If a line of questioning is suspect, trial judge may conduct a *voir dire* to ensure that a ***good faith basis*** exists.

"Rule" in *Browne v Dunn*

The rule in *Browne v Dunn* requires a cross-examiner to give ***notice*** to those witnesses whom the cross-examiner later intends to impeach (i.e. by leading evidence to contradict them).

The ***rationale*** for the rule is that witnesses must be treated fairly. It isn't fair to a witness to impeach him before he has been given an explanation, while he is in the box, to make any explanation which is open to him. It is a rule of professionalism, fair play, and fair dealing with witnesses.

Case/Statute	Juris.	P	Key Points
Carter [R v]	2005 BC/CA	87	Although the defence did not give notice to the complainants of every detail on which it intended to contradict them, the defence position—that the alleged contact did not happen or was consensual—was ***clear from the outset***. Thus there was ***no violation*** of the rule in *Browne v Dunn*.

Case/Statute	Juris.	P	Key Points
Lyttle [R v]	2004 CA/SC	112	The trial judge misapplied the rule in *Browne v Dunn*. It does not require a party to lead evidence supporting the questions it puts in cross-examination. Actually, the trial judge seems to have gotten the rule completely backward!

RE-EXAMINATION

Re-examination is examination of the party's own witness after the witness has been cross-examined. There is no automatic right to re-examine one's witness. It all depends on what came out in cross-examination. Where there is a right to re-examine, leading questions are generally not permitted.

General Rule on Re-Examination

The general rule comes from ***Moore [R v]***. Three conditions form a "test" for the right to re-examine, and the re-examination is governed by two rules.

"TEST" FOR THE RIGHT TO RE-EXAMINE

1. The right to re-examine exists only where there has been a cross-examination.
2. It must be ***confined*** to matters arising in cross-examination.
3. It arises only where the witness gave ***material*** (new) evidence on cross-examination.

RESTRICTIONS ON RE-EXAMINATION

1. New facts may not be introduced.†
2. Leading questions may not be asked.‡

† However, leave may be requested from the trial judge to introduce new facts. The opposite party then gets an opportunity to re-examine on those facts.

‡ However, in a proper case, the trial judge might grant leave to the party to ***cross-examine*** his own witness on a ***prior inconsistent statement*** at the re-examination stage. See below.

Cross-Examination of the Party's Own Witness at the Re-Examination Stage

In a "proper" case, a trial judge may, in the exercise of his discretion, grant leave to counsel to cross-examine his own witness on a ***prior inconsistent statement*** even at the stage of re-examination where the witness in cross-examination has given evidence on a ***material*** matter which is contrary to a prior statement: ***Moore [R v]***. It seems that ***Cassibo [R v]*** was such a "proper" case.

See also: Prior Inconsistent Statements (p 53)

Case/Statute	Juris.	P	Key Points
Moore [R v]	1984 ON/CA	118	• Primarily because Hogan gave no evidence on a material matter during cross-examination, the Crown was not permitted to cross-examine at the stage of re-examination. • Should it have been permitted to re-examine at all, given the test?
Cassibo [R v]	1982 ON/CA	88	Although it happened on a *voir dire* in the context of an application under s 9(1) of the ***Canada Evidence Act***, counsel was permitted to cross-examine Mrs Cassibo regarding testimony elicited by the defence cross-examination and inconsistent with her prior statement.

REBUTTAL EVIDENCE

Re-examination is a reaction to the opposing party's cross-examination of one's own witness and involves examining that same witness after the other party has finished cross-examining him. On the other hand, rebuttal evidence is a

reaction to the defence case. There are two possibilities: (1) the Crown or plaintiff may wish to rebut evidence elicited by its own cross-examination of a defence witness, or (2) the Crown or plaintiff may wish to react, at the close of the defence case, to the case as a whole.

Like re-examination, there is no automatic right to call a rebuttal witness. Another similarity with re-examination is that the party calling the rebuttal witness is not permitted to lead that witness.

General Rule on Rebuttal

> *The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce evidence and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings (or in a criminal case, the indictment). . .*
>
> —McIntyre J, ***Krause [R v]*** at casebook p 5-077

"Test" for the Right to Call Rebuttal Evidence

Conditions for rebuttal at the **CLOSE OF THE DEFENCE CASE**	Conditions for rebuttal after **CROSS-EXAMINATION**
1. The defence has raised some new matter or defence. 2. The Crown or plaintiff had no opportunity to deal with it. 3. The Crown or plaintiff could not reasonably have anticipated it.	1. Something new, in the sense that the Crown or plaintiff had no opportunity to deal with it in its case-in-chief emerges on cross-examination. 2. The new matter concerns an issue essential for the determination of the case. 3. The Crown or plaintiff could not reasonably have anticipated it.

Policy Rationale

> *The rule prevents **unfair** surprise, **prejudice** and confusion which could result if the Crown or the plaintiff were allowed to split its case. . . . The underlying reason for the rule is that the defendant or the accused is **entitled** at the close of the Crown's case to have before it the full case for the Crown so that it is **known at the outset what must be met** in response.*
>
> —McIntyre J, ***Krause [R v]*** at casebook p 5-077

Rule against Rebuttal on Collateral Issues

Even where a new matter is raised—either on cross-examination of a defence witness or in the defence case—but the matter is ***collateral***, that is, ***not determinative*** of an issue arising in the pleadings or the indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed.

Case/Statute	Juris.	P	Key Points
Krause [R v]	1986 CA/SC	110	The Crown wished to lead rebuttal evidence to contradict evidence elicited from the accused on cross-examination for the purpose of impeaching his ***credibility***. Credibility was a collateral matter, no rebuttal was permitted.
Tsoukas v Segura	2001 BC/CA	135	The Collateral Evidence Rule (p 29) is very similar.

6. Statement Evidence

PRIOR CONSISTENT STATEMENTS

A prior consistent statement is just what it sounds like. It is a previous statement, perhaps made to the police or another witness, in which the witness said the same thing that he testifies to at trial.

General Rule on Prior Consistent Statements

The general rule is set out in ***Ay [R v]***:

> A witness may not be called to prove that another witness has made a prior statement consistent with the evidence which such other witness gives at trial.

POLICY RATIONALE

Prior consistent statements (1) lack probative value; and (2) are self-serving. The concern is that the jury will draw unwarranted inferences of truthfulness from a witness' consistency with what was previously said.

Exceptions to the Rule against Prior Consistent Statements

There are a number of exceptions to the general rule:

1. the Recent Fabrication Exception (below): ***Stirling [R v]***;
2. the Narrative Exception: ***Ay [R v]***;
3. the Prior Identification Exception: ***Swanston [R v]***;
4. statements on arrest†; and
5. statements made on recovery of incriminatory articles†.

†: The latter two exceptions are mentioned in *Ay* at p 6-009 of the casebook. I include them for completeness.

With the exception of the prior identification exception (which is also an exception to the hearsay rule!), the exceptions to the rule against prior consistent statements do not permit the statement to be admitted as proof of the truth of its contents. A jury instruction is required to make this clear, especially where the content of the statement is revealed.

RECENT FABRICATION EXCEPTION

The word "recent" in the recent fabrication is ***misleading***. There doesn't have to be anything recent about the fabrication. The issue is not how recent the fabrication is alleged to be, but the allegation that the witness made up a false story. For a prior consistent statement to be admitted on the basis of this exception does not require an explicit allegation of fabrication. If the circumstances of the case reveal that the opposing party takes the position that there has been a prior contrivance, a PCS may be admitted.

The ***probative value*** of the statement comes from its ability to show that the witness' story was the same even before a motivation to fabricate arose. The prior statement is not admitted as proof of the truth of its contents, but merely because it is probative of the issue of ***credibility***. A jury instruction would thus be required.

Case/Statute	Juris.	P	Key Points

Case/Statute	Juris.	P	Key Points
Stirling [R v]	2008 CA/SC	132	The prior consistent statements are admissible to show that Harding's story didn't change as a result of a new ***motive to fabricate***, but not for the truth of their contents (i.e. not to prove that he is telling the truth).
Cassibo [R v]	1982 ON/CA	88	Rosetta and Darlene's claims to have told their mother when they were age 12 was separately admissible under the recent fabrication exception to address the defence claim that they concocted their stories after reading the magazine.

Narrative Exception

> *The fact that the statements were made is admissible to assist the jury as to the sequence of events from the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness.*
>
> —Finlayson JA, cited in *Ay [R v]*

It is a basic principle that evidence which would be otherwise inadmissible may become admissible it is relevant to some ***live issue***. Furthermore, a certain amount of evidence may need to be admitted in order to provide ***context*** so that the jury can understand what happened, without which understanding it may be unable to properly assess the evidence. Both of these considerations seem to converge in the narrative exception to the rule against prior inconsistent statements.

Prior Sexual Assault Complaints

The only case we studied was *Ay [R v]*, which was a ***sexual assault complaint***, the kind of case which is almost inevitably a ***credibility competition*** between two witnesses. As with the recent fabrication exception, the issue is the ***credibility*** of a witness, in this case, the complainant.

Admissible and Inadmissible Evidence

- The relevant and material matters which are admissible are:
  - the ***fact*** that a prior complaint was made;
  - ***when*** it was made; and
  - ***why*** it was or was not made in a timely fashion.
- The prior complaint must be described in ***general terms only***, omitting details of what was actually said.
- The ***content*** of the statement is ***inadmissible*** unless relevant for some other purpose such as providing the necessary context for other probative evidence.

Permissible and Impermissible Purposes

Impermissible	Permissible
• Proof of the truth of the content, or implicit content, of the PCS • Enhancing the credibility of the complainant by proof that she made an earlier statement corroborating her current testimony	• Context for other probative evidence • Assessing complainant's credibility by examining whether events are consistent with the conduct of someone who is telling the truth.

Jury Charge

Even in cases where the evidence is strictly confined to the fact that a prior complaint was made, without any reference to its content, it is ***essential*** that the trial judge ***instruct*** the jury that such evidence is admitted only to assist its understanding of what happened and cannot be used as proof of the truth of its ***implicit*** content: *R v Ay*.

Relevant Cases

Case/Statute	Juris.	P	Key Points
Ay [R v]	1994 BC/SC	82	The evidence had ***no probative value*** except for the purpose for which it was inadmissible, namely: the inference that a prior consistent statement makes the truth of sworn testimony more probable.

Case/Statute	Juris.	P	Key Points
Turcotte [R v]	2005 CA/SC	136	While not a case about prior consistent statements, otherwise inadmissible evidence of Turcotte's silence was admissible as an inextricable part of the narrative. See Our Old Friend, the Narrative (p 71) under the Right to Silence.
Cassibo [R v]	1982 ON/CA	88	One of the purposes for which Dr Voysey's testimony would have been proper was to provide narrative and context.

Prior Identification Exception

As we know from *Gonsalves*, an eyewitness will likely give a police statement describing the suspect in a crime relatively soon after it occurs. The witness may then, again relatively promptly, be asked to identify the accused in a photo line-up or by some other method. These ***prior extra-judicial identifications*** may occur months or even years before the court system gets around to trying the case. In the meantime, memories fade, or become irretrievably tainted.

> *Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached . . . evidence of an extra-judicial identification is admitted regardless of whether the testimonial identification is impeached, because* ***the earlier identification has greater probative value*** *than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition of the witness' mind . . .* ***The failure of the witness to repeat the extra-judicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances****.*
>
> —Nemetz CJBC, ***Swanston [R v]***

Unlike the other exceptions to the rule against PCS, prior identification evidence is ***admitted for the truth*** of its contents. It is thus also an exception to the hearsay rule. This is discussed in Prior Identification Evidence (p 48) under Common Law Exceptions to the Hearsay Rule.

Case/Statute	Juris.	P	Key Points
Swanston [R v]	1982 BC/CA	133	Evidence of prior extrajudicial identification is admissible not only to corroborate an identification made at trial, but as ***independent evidence*** going to ID.
Gonsalves [R v]	2008 ON/CA	95	• In-court identification is to be accorded very little weight by the TOF. • Prior identification evidence from the photo line-up was admitted and used.

Attacking the Credibility of the Party's Own Witness

We know already that absent certain particular circumstances, a party may not cross-examine its own witness. Similarly, a party is prohibited by section 9 of the ***Canada Evidence Act*** from impeaching the credibility of its own witness, once again absent certain special circumstances.

Common Law Rule on Hostile Witnesses

At common law, the trial judge had a discretion to permit counsel to cross-examine his own witness if, in the opinion of the trial judge, the witness was ***hostile***.

Section 9(1) of the *CEA*, which has been held to have a distinct purpose from section 9(2), does not mention cross-examination. Does the *CEA* eliminate the trial judge's common law discretion to permit cross-examination of the witness if in the judge's opinion he is hostile? ***It does not***: ***Wawanesa Mutual Insurance v Hanes***, ***Cassibo [R v]***.

It was unclear whether a PIS could be proved against a witness by calling other witnesses in the event he denied making it. This has been clarified under section 9(1) of the *CEA*.

Statutory Regime

Section 9 of the ***Canada Evidence Act*** provides a statutory framework defining the circumstances under which parties can attack the credibility of their own witnesses. The most common, but not necessarily the only, way of attacking credibility is using evidence of ***prior inconsistent statements***. Section 9 has two subsections: ss 9(1) & 9(2).

Relationship between Subsections 9(1) and 9(2) of the *CEA*

	Canada Evidence Act s 9(1) p 140	***Canada Evidence Act*** s 9(2) p 141
Purpose	• Codifies the common law • Clarifies that a PIS may be proved by calling other witnesses	Exception to s 9(1) which allows cross-examination on a PIS without declaring the witness adverse: ***Milgaard [R v]***
What it enables	Two different things: 1. Contradicting the party's own witness by other evidence, if witness declared adverse 2. Proving a PIS, with leave of the court	Only one specific thing: cross-examining the witness as to a prior inconsistent statement
Type of PIS allowed	No restrictions: ***Cassibo [R v]***	Only the following types of statement: 1. in writing; 2. reduced to writing; 3. on audiotape; 4. on videotape; 5. "or otherwise"
Mentions cross-examination	No, but cross-examination permitted at common law if witness hostile. See Common Law Rule on Hostile Witnesses (above).	Explicitly mentions cross-examination, but only "as to" the PIS.
Scope of cross-examination	Not restricted: ***Milgaard [R v]***	Limited to the PIS: ***Milgaard [R v]***
Other		Cross-examination may be used for the purpose of deciding whether a witness is adverse under s 9(1)

CEA Subsection 9(1)

Meaning of Adverse

The term ***adverse*** under *CEA* s 9(1) is not limited to outright hostility, but also includes a witness who, although not hostile, is unfavourable: *Cassibo* citing *Wawanesa*.

In Using a Prior Inconsistent Statement to Determine whether a Witness is Adverse. . .

. . . a trial judge should:

1. satisfy himself upon any relevant material presented to him that ***the witness made the statement***;
2. consider the relative ***importance*** of the statement; and
3. consider whether it is ***substantially inconsistent***.

Relevant Cases and Statutory Provisions

Case/Statute	Juris.	P	Key Points
Canada Evidence Act s 9(1)	RSC 1985	140	General provision on attacking the credibility of the party's own witness.
Wawanesa Mutual Insurance v Hanes	1961 ON/CA	137	• CEA s 9(1) does not contemplate the ***indiscriminate admission*** of PIS! • Factors to consider in deciding whether to declare a witness adverse based on a PIS.

Case/Statute	Juris.	P	Key Points
Cassibo [R v]	1982 ON/CA	88	• An inconsistent statement will not always be enough to ground a finding that a witness is adverse under *CEA* s 9(1). • However, in other cases a judge may be warranted in declaring a witness to be adverse solely on the basis of a prior inconsistent statement. • The judge is also entitled to take into account other facts. In this case, that includes the ***motive*** Mrs Cassibo had to support the defence (her wish to prevent her husband from going to jail). • The trial judge was entitled to hold that Mrs Cassibo was adverse on the facts of this case.

CEA Subsection 9(2)

Case/Statute	Juris.	P	Key Points
Canada Evidence Act s 9(2)	RSC 1985	141	An exception to the need to declare a witness adverse before cross-examining him on a PIS, *per Milgaard*.
Milgaard [R v]	1971 SK/CA	116	• The right to cross-examine under s 9(2) is ***limited*** to the inconsistencies disclosed in the statement. • Failure to follow the *Milgaard* procedure is not a reversible error if nothing takes place before the jury which would not have happened anyway.
McInroy and Rouse [R v]	1978 CA/SC	115	Where a witness claims not to remember events contained in her written statement and the trial judge does not believe her, this is evidence of an inconsistency within the meaning of section 9(2) of the ***Canada Evidence Act***.

Milgaard Procedure for Determining Applications under Section 9(2)

1. Counsel advises the court he wants to make an application under s 9(2).
2. The court directs the jury to retire.
3. Counsel produces the alleged statement meeting the criteria of s 9(2)—in writing, reduced to writing, audiotape, videotape, or "other".
4. Trial judge examines the statement to see if there is an inconsistency.
5. Counsel proves the statement. This entails asking the witness and, if the witness denies making it, proving it by other evidence.
6. Counsel opposite is permitted to cross-examine any witness, including the witness being impeached, who is used to prove the statement.
7. The judge decides whether the cross-examination under s 9(2) will be permitted and recalls the jury.

Jury Instructions

Like Prior Consistent Statements (p 40), prior inconsistent statements introduced to impeach the credibility of the party's own witness are ***not admissible as evidence of the truth*** of their contents. Thus when a party proves a PIS under section 9(1), the jury must be instructed that the PIS may only be used in assessing the credibility of the witness. Furthermore, when a party cross-examines a witness on a PIS under section 9(2), the jury must be instructed that the evidence given on the cross-examination is not admissible as proof of its ***implicit*** contents and, again, may only be used in evaluating the credibility of the witness.

Note: If a party desires to introduce a prior inconsistent statement as truth of its contents, it must be brought in as an exception to the hearsay rule. See Prior Inconsistent Statements (p 53) under the Principled Approach to Hearsay.

7. Hearsay

> *Essentially it is not the form of the statement that gives it its hearsay or non-hearsay characteristics, but the use to which it is put. Whenever a witness testifies that someone said something, immediately one should ask,* ***"what is the relevance of the fact that someone said something."***
>
> —MacDonald JA, ***Baltzer [R v]***

WHAT IS HEARSAY?

> *Evidence of statement made to a witness by a person who is not himself a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.*
>
> —Mr. L.M.D. de Silva, ***Subramaniam v PP***

The Supreme Court's official definition of hearsay is given in ***Khelawon [R v]*** at ¶ 56:

1. an out-of court statement is hearsay if
2. it is adduced to prove the truth of its contents; and
3. there is no opportunity for a contemporaneous cross-examination of the declarant.

Hearsay is ***presumptively inadmissible***. However, unlike all other out-of-court statements, if hearsay is admitted in evidence, it does not require a limiting instruction because the entire purpose of admitting it is to prove the truth of its contents.

Double Hearsay

Double hearsay is an additional "level" of hearsay—in other words, the out-of-court statement is itself merely repeating a ***second*** out-of-court statement heard from someone else!

> *[E]ach level of double hearsay must fall within an exception, or be admissible under the principled approach . . . The second level of hearsay must also be admissible.*
>
> —Iacobucci J in *R v Starr*, cited in ***Griffin [R v]*** at ¶ 57

EXAMPLE OF DOUBLE HEARSAY

> *If the witness' prior statement merely repeated the direct evidence of another person ("X said he saw Y fire the gun"), such a statement, even made with circumstantial guarantees of reliability, will not be substantively admissible for the truth of the evidence of that other person.*
>
> —Lamer CJC, ***B(KG) [R v]***

Hearsay Dangers

The dangers of hearsay depend a bit on who you ask. Here are two takes on this issue.

Charron J in ***Khelawon [R v]***	Lamer CJC in ***B(KG) [R v]***
Attributes of the declarant which cannot be tested: 1. perception 2. memory 3. credibility	Absence of: 1. an oath 2. the declarant in front of the TOF (presence) 3. contemporaneous cross-examination

Admissions of the Accused

Throughout this chapter, you will notice that none of the cases deal with evidence of admissions of the accused. This is explained in the next chapter in the section on Probative Value of Informal Admissions (p 57).

Circumstantial Evidence of State of Mind

We looked at 3 cases, *Baltzer*, *Ratten*, and *Griffin*, which are classified under "circumstantial evidence of state of mind" on the syllabus. These cases are very different and address 3 very different factual scenarios. The cases shade from clearly not hearsay at all (*Baltzer*) to technically not hearsay (*Ratten*) to apparently hearsay, but meeting an established common law exception (*Griffin*).

Case/Statute	Juris.	P	Key Points
Baltzer [R v]	1974 NS/SC	86	• The evidence sought to be admitted was of the accused saying crazy things. • There was no question of the statements "of a weird nature" being used to prove the truth of the statements—they were only being adduced to show that the accused might have been insane. • Out-of-court statements in this case are clearly ***not hearsay*** at all.
Ratten v The Queen	1972 Aus/PC	126	• The evidence sought to be admitted was of a female voice saying "Get me the police please" and being hysterical. • As it was ostensibly only being brought to show that a female was at the time in a ***state of emotion or fear***, it is ***not hearsay*** for the purpose for which it is admitted.
Griffin [R v]	2009 CA/SC	99	This case is a bit more difficult than the other two. The witness reported that the victim, Poirier, told her: If anything happens to me it's your cousin's family. Under the circumstances, this was logically equivalent to: I am fearful Griffin will harm me. Charron J seems to admit that as it was being adduced to prove the truth of the fact that Poirier feared Griffin, it was ***true hearsay***, but fit within the common law exception for Declarations of Present State of Mind (below).

Exceptions to the Hearsay Rule

Before the modern Principled Approach to Hearsay (below), the only way to get hearsay in was to meet one of the many existing exceptions to the hearsay rule, which NH refers to as "**a bunch of little boxes**" and which Lamer CJC has deprecated as "technical categorical requirements" and "a rigid pigeon-holing analysis". Nevertheless, these exceptions remain presumptively in-place, per ***Mapara [R v]***, and it is appropriate to begin our discussion here.

Table of Hearsay Exceptions

	Exception	Common Law	Statute
1.	**Business Records Exception**	Page 47 in this section ***Wilcox [R v]***	Page 49 in this section ***Canada Evidence Act*** s 30 (p 143)
2.	**Declarations against Interest**	Page 47 in this section ***O'Brien [R v]***, ***Brown [R v]***	
3.	**Declarations of Present State of Mind**	Page 48 in this section ***Griffin [R v]***	
4.	**Dying Declarations**	Page 48 in this section	
5	**Past Recollection Recorded**	Page 48 in this section ***JR [R v]***	
6.	**Prior Identification Evidence**	Page 48 in this section ***Swanston [R v]***	
7.	***Res Gestae***	Page 49 in this section	

8.	**Statements of Intent**	Page 49 in this section ***Griffin [R v]***

Common Law Exceptions to the Hearsay Rule

Business Records Exception (Common Law)

The common law business records exception is discussed in ***Wilcox [R v]***. An out-of-court record containing:

1. an original entry;
2. made contemporaneously;
3. in the routine;
4. of business;
5. by a person who had a ***duty*** to make the record; and
6. by a person who had ***no motive*** to misrepresent

will be admissible as proof of the truth of its contents. The ***duty*** requirement contributes a circumstantial guarantee of truth based on the assumption that a declarant would fear censure and dismissal should an employer discover an inaccuracy in the statement.

Be careful with business records. As well as being hearsay, they are real evidence in form of Documents (p 12). What does this mean?

Case/Statute	Juris.	P	Key Points
Wilcox [R v]	2001 NS/CA	138	Kimm was not under a ***duty*** to keep the record (quite the opposite), so one of the key reliability indicators under the common law exception is not met. The exception does not apply.

See Also: Business Records Exception (Statutory) below

Declarations against Interest

To be admissible as a declaration against a person's financial or penal interests, the declaration which is sought to be adduced as hearsay must, according to ***O'Brien [R v]***:

1. have been made to such a person and in such circumstances that ***the declarant should have apprehended*** penal (or pecuniary) consequences as a result; and
2. the vulnerability to ***consequences must not be too remote***.

The guarantee of trustworthiness of a declaration against interest flows from the fact that it is to the deceased's ***immediate prejudice***. To be admissible, the declarant must realize that the declaration may well be used against him. NH comments that **confessing to a loyal friend likely doesn't count**, which suggests that the girlfriend's hearsay in *Brown* would not have met the criteria of the exception.

Case/Statute	Juris.	P	Key Points
O'Brien [R v]	1978 CA/SC	120	The hearsay failed to qualify as a declaration against interest because Jensen clearly took steps to avoid penal consequences.
Brown [R v]	2002 CA/SC	87	While the issue did not need to be decided, Benson's confession to his girlfriend had some of the hallmarks of a declaration against interest. (This does not mean it was one, though—it just means it might have been one!)

Declarations of Present State of Mind

To be admissible under the exception to the hearsay rule for declarations of present state of mind, the statement sought to be brought in as hearsay must meet the following criteria set out in ***Griffin [R v]***.

1. The declarant's state of mind must be ***relevant***.
2. The statement must be made in a ***natural manner***.
3. The statement must ***not*** be made ***under circumstances of suspicion***.

Case/Statute	Juris.	P	Key Points
Griffin [R v]	2009 CA/SC	99	Poirier's declaration was admissible as a declaration of his present state of mind (fear of Griffin) ***but not*** as evidence of Griffin's state of mind (in this capacity it was double hearsay, at best).

See also: Circumstantial Evidence of State of Mind (above), Statements of Intent (below)

Dying Declarations

If a dying declarant croaks "Jimmy shot me" while expiring, hearsay evidence of this dying declaration is admissible. The reliability of the statement is thought to flow from the fact that a dying person has lost all reason to lie. This seems like a prime candidate for a tricksy exam question in which the common law requirements are met, but the facts would fail the test of necessity and reliability.

Past Recollection Recorded

There is no point rehashing this here. Please see Past Recollection Recorded (PRR) on page 36 under Refreshing a Witness' Memory.

Case/Statute	Juris.	P	Key Points
JR [R v]	2003 ON/CA	105	NB's second police statement, taken 16 hours after her ordeal, met both the criteria for PRR and for admission under the principled approach to hearsay.
Fliss [R v]	2002 CA/SC	94	Apparently police officer's reading the corrected transcript into the record failed the present voucher of accuracy requirement for PRR.

Prior Identification Evidence

Recall that evidence of extra-judicial identification is admissible as an exception to the rule against prior consistent statements: see Prior Identification Exception (p 42) under Prior Consistent Statements. This evidence is simultaneously an exception to the hearsay rule. The discussion on the Principled Approach to Hearsay (below) will make clear that the principal danger of hearsay evidence is considered to be inability to cross-examine the declarant. This statement from Swanston (casebook p 6-029) is thus topical:

> *[T]he principal danger of admitting hearsay evidence is not present [in the case of prior extra-judicial identifications] since the witness is available at trial for cross-examination.*

It is worth pointing out that one of the prior identifications by Dr Cantor in *Swanston* was made at a preliminary hearing. This suggests that another circumstantial indicator of reliability was present: the oath.

Case/Statute	Juris.	P	Key Points
Swanston [R v]	1982 BC/CA	133	The prior identifications from the police line-up and the ***preliminary hearing*** were admissible as independent evidence going to ID.
Gonsalves [R v]	2008 ON/CA	95	The prior identifications from the photo line-ups conducted with both witnesses were admissible and any flaws in the procedure went to weight.

Res Gestae

The *res gestae* exception is based on the belief that, because certain statements are made naturally, spontaneously, and without deliberation during the course of the event, they leave little room for invention by the declarant and little room for misunderstanding by the witness hearing them. *Res gestae* includes:

1. words or phrases that either form part of, or explain, a physical act; and
2. exclamations that are so spontaneous as to belie concoction.

NH gave the following examples: "**MY HAND IS BURNING!**" and "**THE HOUSE IS ON FIRE!**"

Statements of Intent

My reading of ***Griffin [R v]*** is that a statement of intent is just a particular subcategory of a declaration of present state of mind, so please see: Declarations of Present State of Mind (p 48). The example NH gave was a statement to the effect that "**I'm going to the gas station and I'll be back in half an hour**."

Statutory Exceptions

In NH's view, it makes the most sense to **consider whether statutory exceptions apply first**, then proceed to look at common law exceptions, and finally to consider the principled approach.

Business Records Exception (Statutory)

Section 30 of the ***Canada Evidence Act*** contains a statutory version of the business records exception with significantly looser standards than the common law exception. The main requirement is that the record be made in the ***usual and ordinary course of business*** (subject of course to the regular common law requirements that it not be barred by any other rule, and that it be properly authenticated).

In ***Wilcox [R v]***, one of the issues canvassed by Cromwell JA was whether the deliberate omission from section 30 of a requirement that it be in the ***usual and ordinary course of business*** to make such a record (this is a subtly different requirement than that the record be made in the usual and ordinary course of business) expanded the scope of the statutory exception to include a private record kept against the employer's instructions. Cromwell JA considered this to be such a difficult question that it made more sense to eschew the statutory rule and use the principled approach.

Case/Statute	Juris.	P	Key Points
Canada Evidence Act s 30(1)	RSC 1985	143	Permits records made in the ***usual and ordinary course of business*** which would be admissible if made orally to be admitted.
Canada Evidence Act s 30(10)	RSC 1985	145	Exceptions to the exception. BRE does not encompass, *inter alia*, records made in the course of investigations and legal proceedings and records in respect of which privilege is claimed.
Canada Evidence Act s 30(12)	RSC 1985	145	Definitions.
Wilcox [R v]	2001 NS/CA	138	Where the record in question is a private record kept against the employer's instructions, it is a close case and best to use the principled approach.

See Also: Business Records Exception (Common Law) above

Principled Approach to Hearsay

The Supremes decided to remake the law of hearsay along a "principled approach". The old exceptions remain presumptively in place (*Mapara*), but they are required to conform to the overarching principled framework. The principled approach can also be used to admit certain hearsay evidence that does not meet any of the existing exceptions.

As NH points out, **the principled approach comes with pros and cons**. ***On the pro side***, it is in principle (heh!) a bit better aligned with the search for the truth and is less technical. Furthermore, it addresses two of the concerns with the old approach: that good evidence was being kept out, and that the exceptions were being twisted in ways that were, well, unprincipled (you see what I'm doing here, right?) in order to get evidence in. ***On the con side***, it is more time-consuming and less predictable. NH hinted that **it may be one of the factors behind the insanely long time cases now take to go to trial**.

Test of Necessity and Reliability

The principled approach uses a test of necessity and reasonable reliability. This means that the hearsay evidence must be:

1. necessary; and
2. meet a threshold of reliability.

This is, of course, just a hearsay-specific way of saying that the probative value of the evidence must exceed its prejudicial effect.

Two things must be kept firmly in mind. First, ***ultimate reliability is for the trier of fact*** to decide. Second, necessity cannot be evaluated in isolation from threshold reliability, nor can threshold reliability be evaluated in isolation from necessity: ***Khelawon [R v]***. More reliable evidence may become more necessary, and as the necessity of the evidence goes down, the reliability threshold may go up.

Necessity

Necessary does not mean necessary to the prosecution's case: *R v Smith*. Although I couldn't find it spelled out anywhere, it seems that it must mean necessary to the search for the truth… There are two general classes of necessity, according to Wigmore (cited in *Wilcox*):

1. The person whose assertion is offered may now be dead, or out of the jurisdiction, or otherwise unavailable for the purpose of testing.
2. The assertion may be such that we cannot expect, again, or at this time, to get evidence of the same value from the same or other sources. Wigmore: "The necessity is not so great, perhaps hardly a necessity, only an expediency or convenience can be predicated. But the principle is the same."

A Flexible Definition

The necessity criterion is to be given a ***flexible*** definition and not to be equated with the unavailability of the witness: ***Khelawon [R v]***.

Testimony, not Witness

In cases where a party seeks to adduce Prior Inconsistent Statements (below) as proof of the truth of their contents—in other words, the ***B(KG) [R v]*** scenario—necessity is based on the unavailability of the testimony, not the witness. This corresponds with the second Wigmore category cited in *Wilcox*. Many established hearsay exceptions do not rely on the unavailability of the witness. The business records exception and the past recollection recorded exception are two examples where it is the testimony, not the witness, which is unavailable.

Relevant Cases

Case/Statute	Juris.	P	Key Points
Parrott [R v]	2001 CA/SC	123	Complainant's out-of-court video statement was not necessary because the trial judge failed to assess whether she had the capacity to give evidence in court.

Case/Statute	Juris.	P	Key Points
Pelletier [R v]	1999 BC/CA	125	• Cole's hearsay testimony of what Albert Kong told him during their telephone conversation was not necessary because the Crown failed to make reasonable efforts to get Kong's testimony. • Fear or disinclination to testify, without more, do not constitute necessity.
B(KG) [R v]	1993 CA/SC	84	In the case of prior inconsistent statements, it is patent that we cannot expect to get evidence of the ***same value*** from the recanting witness or other sources. The recanting witness holds the prior statement ***hostage***. The ***different value*** of the evidence is found in the fact that something has radically changed between the time when the statement was made and the trial.
Khelawon [R v]	2005 CA/SC	108	• It is conceded that necessity is present. However, in examining necessity in an appropriate case, the court may question whether the proponent of the evidence made ***all reasonable efforts*** to secure the evidence in a manner that preserves the rights of the other party (for instance, by preserving the evidence of an elderly person under ss 709–714 of the *Criminal Code*). • Necessity and reliability should not be considered in isolation: one criterion may impact on the other.
Wilcox [R v]	2001 NS/CA	138	It is necessary to adduce the hearsay because the detailed nature of an ***accounting record*** does not lend itself to a witness having an ***independent recollection*** of the entries in the record and because any testimony on the record is based on the writing contained within it.
Brown [R v]	2002 CA/SC	87	There was a significant degree of necessity to the girlfriend's hearsay evidence.

RELIABILITY

In ***Khelawon [R v]***, Charron J summarized the case law on reliability under the principled approach. She concluded that reliability can be supported on either one of two completely different criteria:

1. **INHERENT TRUSTWORTHINESS**: Circumstances at the time the declaration was made that make it more likely that the declarant was being truthful. (This is the reliability basis for most of the common law exceptions to the hearsay rule).
2. **SUFFICIENT TESTABILITY**: Circumstances either making the hearsay evidence sufficiently testable by the trier of fact, or which provide adequate substitutes for testability.

It appears to me that the second "category" of considerations is actually two different, although related, concepts as well:

(a) testability of the hearsay at time of trial (i.e. where the declarant is available to be cross-examined); and
(b) substitutes for testability at time of declaration (i.e. oath, contemporaneous cross-examination, &c).

In any case, per Charron J, neither of considerations #1 or #2 are exclusive of the other. Either consideration, or both considered together, could ground a finding of reliability.

RELIABILITY FACTORS

Inherent Trustworthiness	Sufficient Testability OR Adequate Substitutes
1. presence or absence of motive to lie 2. probability of accurate memory • time between events and declaration • other circumstances affecting accuracy of memory or perception at time of events 3. danger of third party influence leading the declarant to concoct the statement 4. whether possession of special knowledge by the declarant, as evidenced by the declaration, makes it	**SUFFICIENT TESTABILITY** 1. presence of declarant at trial for cross-examination 2. videotape or other record of statement simulating presence of the trier of fact at time the statement is made (or adequate substitute) **ADEQUATE SUBSTITUTES FOR TESTABILITY**

Inherent Trustworthiness	Sufficient Testability OR Adequate Substitutes
more likely that the declaration is true 5. existence of real corroborating evidence 6. existence of striking similarities with other statements where coincidence, collusion, or other tainting could not realistically be a factor 7. non-existence of clear lines of cross-examination	1. oath, solemn declaration, or solemn affirmation plus warning of consequences (or sufficient substitute in all the circumstances) 2. contemporaneous cross-examination, as at a preliminary inquiry

TABLE OF RELIABILITY FACTORS AS APPLIED IN THE CASE LAW

The following table summarizes the cases discussed in *Khelawon*, plus the case of *Parrott*, which is not treated in *Khelawon* but which has some *obiter* from Binnie J touching on the issue of reliability. In all the cases in the table below, with the exception of *Khelawon* itself, reliability was found to exist. (In *R v Smith*, some of the phone calls were found to be reliable while others were not).

Case	Juris.	P	Inherent Trustworthiness	Testability OR Adequate Substitutes
Khan [R v]	1990 CA/SC	/	1. Statement made by child to mother almost immediately after event ⇒ no concern about ***inaccurate memory***. 2. Child had no discernible ***motive to lie***. 3. Statement made naturally and without prompting ⇒ no real danger it was caused by mother's ***influence***. 4. Child could not be expected to have knowledge of sexual acts ⇒ peculiar stamp of reliability. 5. Real ***evidence confirming***: semen stain on child's clothing.	
Smith [R v]	1992 CA/SC	/	**TWO PHONE CALLS WERE OK:** 1. No ***motive to lie***. 2. Traditional hearsay dangers—perception, memory, credibility—not present. **ONE PHONE CALL FAILED!** **Because there were clear lines of cross-examination.**	
B(KG) [R v]	1993 CA/SC	84		1. Out-of-court statement ***videotaped***. 2. Declarant available at trial for ***cross-examination***.
U(FJ) [R v]	1995 CA/SC	136	***Striking similarities*** between declarant's statement and independent statement of her father.	Declarant available at trial for ***cross-examination***.
Hawkins [R v]	1996 CA/SC	/		• Entirely determined based on adequate substitutes, as witness not available to testify at trial. • Generally, a witness' testimony before a ***preliminary inquiry*** will satisfy threshold reliability since given under oath subject to contemporaneous cross-examination in a hearing involving same parties and mainly same issues.
Parrott [R v]	2001 CA/SC	123	1. No possibility of ***mistaken identity***. 2. No discernible ***motive to lie***. 3. Possibly no mental capacity try to lie. Had reliability been in issue in this case, declarant's ability to perceive accurately and recall and recount faithfully would still have required consideration.	

Case	Juris.	P	Inherent Trustworthiness	Testability OR Adequate Substitutes
Wilcox [R v]	2001 NS/CA	138	1. No ***motive to lie***. 2. ***Routine*** nature of Crab Book's ***creation***. 3. ***Relied on*** for business purposes. 4. During the time period allegedly covered by the record, no fisherman disputed any payment based on it.	Declarant available at trial for ***cross-examination***.
JR [R v]	2003 ON/CA	105	1. Statement made when events fresh in declarant's mind ⇒ no concern about ***inaccurate memory***. 2. Statement made voluntarily. No leading questions ⇒ no danger statement made ***under police influence***. 3. Trial judge found ***no contamination*** of declarant's recollection by friend MR. 4. Statement ***accurately recorded***.	1. Although statement itself not under oath, declarant testified under oath that she was being truthful and accurate when she made the statement. 2. Declarant available at trial for ***cross-examination***.
Khelawon [R v]	2005 CA/SC	108	**INDEPENDENT FAIL!** **1. Possibility of injuries caused by fall.** **2. Mental capacity of declarant in issue.** **3. Third party's obvious motive to discredit accused and ability to influence declarant.** **4. Declarant's own separate motives to lie based on his "rambling complaints".** **5. Striking similarity with other complainants' statements not helpful as those statements had even more problems than declarant's own.**	**INDEPENDENT FAIL!** **1. No adequate substitutes. Mere video without oath or availability of declarant at trial does not cut it.** **2. Oath and simple "yes" in response to police officer's question as to whether declarant understood importance to tell the truth do not give much insight into whether declarant understood consequences to accused of declarant's statement (in circumstances of this case).**

Prior Inconsistent Statements

In cases where party seeks to adduce prior inconsistent statements as proof of the truth of their contents, as in *B(KG)* and *U(FJ)*, the sufficient testability arm of the *Khelawon* reliability inquiry tends to be more relevant than the inherent trustworthiness arm. It is important to keep in mind in these situations that:

1. The PIS sought to be admitted must be otherwise admissible. It cannot offend any other rule of evidence, for instance, by being Double Hearsay (p 45).
2. The evidence involves certain Special Concern over Reliability not present in other forms of hearsay.

Special Concern over Reliability

> *The reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one statement from the declarant is tendered. In other words, the focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial. . .*
>
> —Lamer CJC, ***B(KG) [R v]***, cited at ¶ 78 of ***Khelawon [R v]***

Circumstantial Indicia of Reliability

In ***B(KG) [R v]***, Lamer CJC identified 3 circumstantial indicia of reliability to consider when evaluating the testability of the statements. These indicia are aimed at negating the Hearsay Dangers (p 45) as identified by Lamer CJC.

1. whether the statement was made under ***oath*** (or there were sufficient substitutes);
2. whether the statement was ***videotaped***, simulating the TOF's presence during the statement, or whether there is some sufficient substitute allowing the TOF to assess the demeanour of the witness; and
3. whether the witness was subjected to ***contemporaneous cross-examination*** (or there was a sufficient substitute).

NH has identified the cross-examination issue as "**the trump card**". This is supported by the following table:

Factor	*B(KG) [R v]*	*U(FJ) [R v]*
Oath	×	×
Presence (Demeanour)	Videotape	×
Cross-Examination: The Trump	✓	✓
Other	×	Striking similarities

Oath

The absence of this factor is obviously not determinative, as it was not present in either *B(KG)* or *U(FJ)*. NH suggests the following **spectrum**:

LESS RELIABLE ←					→ MORE RELIABLE
Totally and ridiculously informal	Fairly informal	No oath, truth not emphasized, but formal interview	No oath, but formal interview, importance of truth emphasized	Oath administered, not told of consequences	Oath administered, person told consequences

Case/Statute	Juris.	P	Key Points
Khelawon [R v]	2005 CA/SC	108	Although *Khelawon* was not a PIS case, Mr Skupien was asked if he understood that it was important to tell the truth.

Presence (Demeanour)

When a witness is on the stand and the TOF is present, his verbal and non-verbal cues, and the relationship between the interviewer and the witness, assist the TOF in assessing the witness' credibility. By definition, however, the TOF could not have been present during the giving of a PIS. Therefore, this factor always requires a substitute. In *B(KG)*, Lamer CJC suggests these substitutes in decreasing order of effectiveness:

1. videotape; or
2. testimony of an independent third party who observes the making of the statement in its entirety, with respect to the demeanour of the declarant.

In *B(KG)*, not only was there a videotape, but it involved a medium-length shot of the witness facing the camera with a PIP close-up of the witness' face. Thus according to Lamer CJC, "the evidence cease[d] to be hearsay in this important respect, since the declarant could be brought before the trier of fact." The absence of this factor is not of itself determinative, as the *U(FJ)* shows, although one must note that *U(FJ)* made up for this with the striking similarities feature.

Cross-Examination: The Trump

> *[T]his is the most important of the hearsay dangers. However, in the case of prior inconsistent statements, it is also the most easily remedied.*
>
> —Lamer CJC, ***B(KG) [R v]***

> *[39] Cross-examination alone, therefore, goes a substantial part of the way to ensuring that the reliability of a prior inconsistent statement can be adequately assessed by the trier of fact. . . . [I]n certain particular circumstances, a prior inconsistent statement could be admitted even in the absence of an oath and a video record,* ***although not in the absence of cross-examination****. . .*
>
> —Lamer CJC, ***U(FJ) [R v]***

Lack of contemporaneous cross-examination can be remedied by cross-examination of the declarant at trial. There is not much to add to the above quotations except that the facts of *B(KG)*, *U(FJ)*, and even *Khelawon* (in which cross-

examination was impossible because Skupien was dead) tend to support NH's view that **the ability to cross-examine at trial is the trump card**. And of course with PIS, cross-examination is always possible!

RELEVANT CASES

Case/Statute	Juris.	P	Key Points
B(KG) [R v]	1993 CA/SC	84	There was no oath, but as the statements were videotaped and the witnesses were available for cross-examination, "it may well be" that a new trial judge would find sufficient circumstantial indicia of reliability.
U(FJ) [R v]	1995 CA/SC	136	Although there was no oath or videotape record, the striking similarities between the statements of father and daughter, in conjunction with the daughter's availability for cross-examination, gave her statement sufficient circumstantial indicia of reliability.
Khelawon [R v]	2005 CA/SC	108	• Neither *B(KG)* nor *U(FJ)* create categorical exceptions to the hearsay rule based on fixed criteria. • Citing *B(KG)* with approval: ***reliability*** concern is ***sharpened*** in cases of PIS because the TOF is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered.

Common Law Exceptions and the Principled Approach

Despite the principled approach, the existing common law and statutory exceptions remain presumptively in place. The manner in which the traditional exceptions interoperate with the principled approach is explained in ***Mapara [R v]***. In a nutshell, hearsay is anywhere and everywhere ***presumptively inadmissible***. If it falls under an existing exception, it flips to presumptively admissible, subject to the exception as a whole (or the operation of the exception in the specific case) being challenged under the principled approach. Finally, even if it doesn't fit under an existing exception, all hearsay is eligible to be admitted under the principled approach.

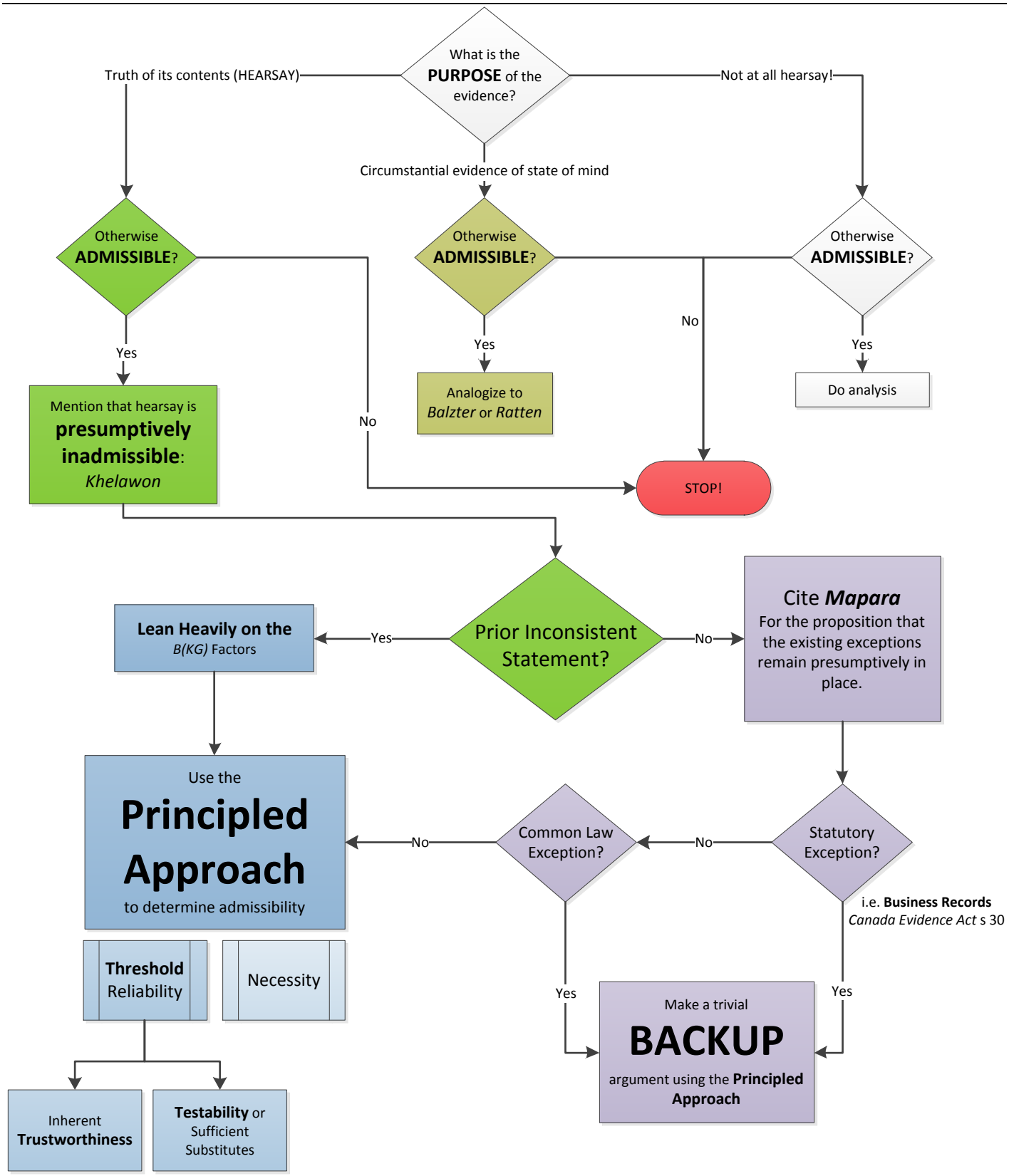
Case/Statute	Juris.	P	Key Points
Mapara [R v]	2005 CA/SC	113	Authority for the interoperability between the principled approach and the traditional common law/statutory exceptions.

ORAL HISTORY IN ABORIGINAL TITLE CASES

We passed over this issue relatively quickly in class.

Case/Statute	Juris.	P	Key Points
Mitchell v Canada (MNR)	2001 CA/SC	116	• To be admissible, oral history evidence must meet the threshold test of ***usefulness*** and ***reasonable reliability***. • It must be given ***due weight*** but not interpreted or weighed in a manner that contravenes the principles of the law of evidence.

HEARSAY ANALYTICAL FRAMEWORK



8. Admissions and Confessions

Formal (or Judicial) Admissions

Formal admissions, otherwise known as judicial admissions, are admissions worked out by agreement between the parties at trial. There is currently no obligation on either side to admit any facts. However, NH mentioned that **this might become necessary at some point due to the insanely long period of time trials are now taking** and the fact that every point in issue must be proved in evidence. This means that a party who isn't willing to admit facts that the other side is capable of proving can drag trials out for an extended period of time.

Something NH stressed throughout the term is that **formal admissions of the accused can have an important effect on the admissibility of evidence**.

Case/Statute	Juris.	P	Key Points
Criminal Code s 655	RSC 1985	147	An accused on trial for an indictable offence ***may*** admit any fact ***alleged*** against him in order to dispense with having to prove it.
Castellani v The Queen	1969 CA/SC	89	An accused may not force the Crown to accept an admission.
Arcangioli [R v]	1994 CA/SC	81	Cited in *White*: the admission made the POC inadmissible.
White v The Queen	1998 CA/SC	138	The admission failed to make the POC inadmissible.

Informal Admissions

An informal admission is any admission that is not formally agreed between the parties during the judicial process. This is a giant category that includes everything from confessions to undercover police officers, confessions during police interrogations, and offhand remarks to your regular old criminal henchman friends.

Probative Value of Informal Admissions

Admissions of the Accused Are Not Hearsay

Admissions of the accused are ***presumptively admissible***. According to *Palma*, it is doubtful whether they are even hearsay at all.

Case/Statute	Juris.	P	Key Points
Palma [R v]	2000 ON/SC	122	• Admissions of the accused are presumptively admissible (subject of course to the Confessions Rule and the s 7 right to silence). • Their admissibility rests on the theory of the adversary system.
Murrin [R v]	1999 BC/SC	118	Because confessions are presumptively admissible, the evidence given by the jailhouse informants is admissible unless excluded by another rule of evidence.

Crown Must Tender the Entire Explanation

The Crown is not permitted to tender in evidence only the part of an accused's admission which is convenient to the Crown case. If there are exculpatory aspects to the admission, they must be adduced as well, or the entire admission is inadmissible.

Case/Statute	Juris.	P	Key Points
Palma [R v]	2000 ON/SC	122	When the Crown adduces admissions, it must take the good with the bad. It is evidence of its truth both for and against the accused.
Allison v R	1991 BC/CA	81	As a matter of fairness, the Crown may not put into evidence only a part of an accused's admission/confession/explanation. It must tender the entire explanation (if otherwise admissible) or none at all.

Partial Overhears

Occasionally, a witness overhears the accused making what sounds like an inculpatory statement but the statement is heard only partly or out of context. The only relevance of such a statement is as proof of the truth of the inculpatory statement. However, if it is possible that the significance of the statement would change dramatically if it was placed in its full context, then the statement has essentially no probative value and a significant prejudicial effect. This type of partially overheard statement is thus generally inadmissible.

Case/Statute	Juris.	P	Key Points
Ferris [R v]	1994 CA/SC	94	Evidence that a police officer heard the accused say "I killed David" out-of-context is not admissible.
Hunter [R v]	2001 ON/CA	102	Evidence that DiCecco heard the accused say "I had a gun but I didn't point it" out-of-context is not admissible.

Confessions

A confession is a particular kind of admission of the accused—an admission of culpability! Recall that Admissions of the Accused Are Not Hearsay (see above) and they are ***presumptively admissible***.

Confessions Rule

There is a long-standing rule at common law that confessions of the accused to the police must be voluntary. This rule is an example of where the common law provides additional protections on top of the *Charter*. Section 7 provides the bare minimum below which the law must not fall, but typically the confessions rule provides the most robust protection (there are, however, some exceptions in which the Privilege against Self-Incrimination anchored in section 7 fills some gaps not covered by the confessions rule). In addition to providing protection in more fact scenarios than the *Charter*, the confessions rule is more robust in another sense. A confession obtained in violation of the confessions rule is OUT. ***Inadmissible***. The trial judge has **no discretion** to allow it to be used. In contrast, evidence obtained in violation of *Charter* rights is only excluded on a successful argument that its admission will "bring the administration of justice into disrepute".

Policy Objectives of the Voluntariness Rule

There are two overarching policy goals:

1. protecting against wrongful convictions by avoiding false confessions;
2. maintaining the integrity of the justice system (this is the motivation behind the rule against "other police trickery" that would "shock the community");

However, these goals are to be pursued in a way that ensures that the police are not unduly limited in their ability to investigate and solve crimes:

> *In defining the confessions rule, it is important to keep in mind its* ***twin goals*** *of protecting the rights of the accused* ***without*** *unduly limiting society's need to investigate and solve crimes. . . . Although improper police questioning may in some circumstances infringe the governing [confessions] rule it is essential to bear in mind that* ***the police are unable to investigate crimes without putting questions to persons****.*
>
> —Iacobucci J, ***Oickle [R v]***

Despite the important role that the confessions rule plays in ensuring reliable confessions, it is crucial to note that **the inquiry isn't into whether the particular confession is reliable, but whether it was voluntary under the circumstances**! Whether the statement appears to be true is neither here nor there.

Confessions Rule Analysis

At a high level, there are two questions under the confessions rule.

1. The threshold question: was the confession made to a ***person in authority***? —***Grandinetti [R v]***
2. If so, was the confession ***voluntary***? —***Oickle [R v]***

The test for whether a confession was made to a person in authority has both subjective and objective components:

A. The accused must ***believe*** that the receiver of the statement was acting on behalf of the police or prosecuting authorities (note that it is not necessary that the accused believe the receiver is himself a peace officer, prison guard, Crown attorney, &c).
B. This belief must be ***reasonable***. It is not enough that the accused believe that the receiver can influence the course of an investigation or prosecution. The receiver must himself be acting on behalf of the state.

The factors influencing the ultimate voluntariness are more complex and are discussed in Factors Contributing to Involuntary Confessions (below).

Burden and Standard of Proof

The evidentiary burden is initially on the accused to demonstrate that whether the receiver of the confession was a ***person in authority*** is a valid issue. Presumably, this is equivalent to raising an air of reality and would be done to the civil standard.

Once the accused has discharged the above burden, the onus shifts to the Crown. The Crown must prove:

1. that the receiver of the confession was not a ***person in authority***; or
2. that the receiver having been a person in authority, the confession was entirely ***voluntary***.

The Crown must prove these facts ***beyond a reasonable doubt*** before the confession can be admitted. This is another way in which the common law provides more protection than the *Charter*: once the accused has raised an air of reality, the Crown must prove that the confessions rule was met beyond a reasonable doubt. In contrast, the burden to prove violation of a *Charter* right rests with the accused, to the civil standard, throughout.

Factors Contributing to Involuntary Confessions

The overarching question is: was the confession ***voluntary***? *Oickle* stresses time and again that there is no hard rule attaching to any factor. The inquiry is contextual. In answering this question, *Oickle* suggests 4 factors:

1. Threats or Promises;
2. Oppression;
3. Operating Mind; and
4. Other Police Trickery.

Threats or Promises

OK	Not OK

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

OK	Not OK
	○ Look for a *quid pro quo*: there must be a ***causal link*** between the improper inducement and the actual decision to talk.

Oppression

An atmosphere of oppression might contribute to an involuntary confession. Factors could include:

- ***physical*** oppression, such as depriving the suspect of sleep or food, or leaving him naked in a cold cell;
- denying access to counsel;
- excessively aggressive or intimidating questioning over a prolonged period of time;
- presenting the accused with ***exaggerated or made-up evidence***.

Operating Mind

There might be other circumstances that deprive the accused of an operating mind with which to make a free choice whether to confess.

Other Police Trickery

The test here is whether the police conduct would "***shock the conscience of the community***". An example given in *Rothman* (cited in *Oickle*) is of a police officer pretending to be a chaplain or a legal aid lawyer in order to extract a confession. Note, however, that eliciting a confession by putting an undercover police officer in a cell with the suspect does not violate the confessions rule or the "shock the conscience of the community" test (although it does violate the residual section 7 right to silence: ***Hebert [R v]***). NH figures that **most police conduct which is fundamentally unfair and contrary to the administration of justice will probably fit into one of the other three categories**. If not, other police trickery is the catch-all bucket.

WHAT IF THE CONFESSION IS MADE TO A PERSON NOT IN AUTHORITY?

NH **points out a quotation from Abella J at ¶ 36 of *Grandinetti [R v]***:

> *[S]tatements can sometimes be made in such coercive circumstances that their reliability is jeopardized even if they were not made to a person in authority. The admissibility of such statements is filtered through exclusionary doctrines like abuse of process at common law and under the Canadian Charter of Rights and Freedoms.*

The **example** NH gave in class was of a Mr Big operation in which, while the police officers were safely undercover, they extracted the confession by pointing a gun to the head of the accused and screaming at him that they would kill him if he didn't come clean to them.

CASES

Case/Statute	Juris.	P	Key Points
Grandinetti [R v]	2005 CA/SC	96	General authority for everything about ***persons in authority***.
Oickle [R v]	2000 CA/SC	121	General authority for everything about the ***voluntariness*** aspect of the confessions rule.
Singh [R v]	2007 CA/SC	131	Some clarification on the relationship between the confessions rule and the s 7 right to silence.

ADMISSIONS OF CO-ACCUSED IN JOINT TRIALS

> *Where accused are tried jointly, each is entitled to the constitutional protections inherent in the right to a fair trial. . . . An* ***accused's right to a fair trial does not, however, entitle [him] to exactly the same trial as [he] would have had had he been tried alone****. In joint trials, one accused may elicit evidence or make submissions in support of his defence that are prejudicial to the other accused and could not have been*

> *elicited or made by the Crown. In those cases, the **respective rights** of each accused must be **balanced** by the trial judge so as to preserve the **overall fairness** of the trial.*
> —Doherty JA, cited in ***Grewall [R v]***

The ***Grewall [R v]*** case is authority for just about all aspects of joint trials, including issues of severance and editing confessions that implicate co-accused.

JOINT TRIALS

There is a ***presumption*** that people accused of joint commission of a crime will be tried together. The policy reasons leading to this presumption include generating economies of scale. The ***search for the truth*** is another critical policy consideration. This concern is amplified when the co-accused are blaming each other for the crime. Since it an axiom of our ***adversarial system*** of trial that the truth of an allegation is best tested through a process which requires the accuser to confront the accused, joint trials typically advance the search for the truth.

As suggested by the quotation of Doherty JA above, joint trials do not do away with the rules of evidence! The most crucial such rule is that out-of-court admissions by an accused are admissible against that accused, but not the co-accused. The reason is simple: *per* ***Palma [R v]*** (e.g.), out-of-court admissions of an accused aren't really hearsay at all and are admissible in evidence as proof of what the accused admitted. One the other hand, the out-of-court statement of an accused implicating some other person do not have the indicia of reliability that an admission has and are merely hearsay (though presumably such an admission might occasionally be admissible under the principled approach).

The most significant example of the problem that arises from this principle occurs when an accused, A, makes a self-serving "confession" admitting some minor infractions and then accuses B of doing all the real heavy stuff. Then A exercises his right not to testify, doesn't even take the stand, and thus cannot even be cross-examined.

There are four ways to deal with a confession by A that names B:

1. sever the trials;
2. exclude the confession altogether;
3. edit out the offending admission; or
4. allow the inadmissible statement but give limiting instructions to the jury

SEVERANCE

NH says that **normally a confession problem like this has not been held to be enough to sever the trials**. This is pretty consistent with *Grewall*. One thing *Grewall* does say is that when a statement to be tendered by the Crown against one co-accused has the potential to be ***strongly prejudicial***, the SCC has held that the better course is to hold a separate trial.

EXCLUDING THE CONFESSION ALTOGETHER

Normally the courts are reluctant to do this, since a confession is highly probative against the person making it.

EDITING

Editing is more difficult when undertaken with a live witness, easier when done with a recording or written statement. However, there are always issues of ***context***: will the deletions shred the probative value of the statement by making it impossible to understand what is going on? Like many other things, editing is ultimately a ***balancing*** problem.

LIMITING INSTRUCTION

Limiting instructions may well, as NH believes, **leave a substantial risk of prejudice to the co-accused named by the confessor**. On the other hand, as many judges argue (including in *Grewall* at ¶¶ 44–45), our jury system presumes that juries will understand and follow complex legal instructions. If they do not, or cannot, there is a serious problem with our legal system relying on them.

CASES

Case/Statute	Juris.	P	Key Points
Grewall [R v]	2000 BC/SC	98	• An out-of-court confession is only admissible against the accused who made the statement. It is not admissible against any co-accused. • One out-of-court statement implicating the other two co-accused was edited out. Another controversial statement that provided possible evidence of a conspiracy was not edited out but was subjected to a limiting instruction.
Malik [R v]	2003 BC/SC	113	On re-election to trial by judge, an order that a witness self-edit became unnecessary.

PRIOR STATEMENTS VERSUS CONFESSIONS

There are some similarities between prior statements and confessions. On an exam, not only confessions but also prior out-of-court statements of other witnesses that are convenient to the Crown's story should set off alarm bells. Be alert to the possibility that coercive or inappropriate interrogation techniques were used to elicit unreliable prior statements from Crown witnesses:

> *Even where there has been a warning and oath administered, and the statement videotaped, or sufficient substitutes established, the trial judge will still have the* ***discretion*** *to refuse to allow the jury to make substantive use of the statement.* ***Prior statements share many characteristics with confessions****, especially where police investigators are used. . . . [M]align influences on the witness by police may precede the making of the statement and shape its content, in the same way that confessions may be suspect if coerced by police investigators. . .*
>
> *. . . [The trial judge] must examine the circumstances under which the statement was obtained, to satisfy himself that the statement supported by the indicia of reliability was obtained* ***voluntarily*** *if to a* ***person in authority****, and that there are no other factors which would tend to bring the administration of justice into disrepute if the statement was admitted as substantive evidence.*
>
> —Lamer CJC, ***B(KG) [R v]***

9. Exclusion of Evidence under the Charter

The ***Grant [R v]*** case establishes a flexible test for determining whether evidence obtained in breach a ***Charter*** right should be excluded under section 24(2). This requires careful attention to whether the admission of the evidence would "bring the administration of justice into disrepute".

Introductory Issues for Charter Exclusions

The *Grant* framework depends on a number of introductory concepts.

- Different *Charter* rights protect different interests.
- Evidence obtained in breach of the *Charter* is classified in terms of 4 categories. These categories assist in applying the *Grant* test in terms of the interests protected by the rights that were violated.
- The pre-*Grant* distinction between conscriptive and non-conscriptive evidence was abolished in *Grant*. However, this paradigm seems ripe for a short-answer question of the form: "Why is the new *Grant* framework better than the old conscriptive/non-conscriptive system?"

Interests Protected by Charter Rights

Charter rights protect different interests. There is a sort of hierarchy of interests, with protection against ***testimonial*** self-incrimination and the right to silence seeming to be at the top, while privacy, bodily integrity, and human dignity seem to be accorded slightly less importance. Where an interest is invaded, there are also degrees of invasion. For instance, the unlawful search of a person's home is considered to be a more severe invasion of the privacy interest than a search of the person's place of business or his car.

The following table is helpful in breaking down these concepts, although it isn't meant to be definitive.

Interest	Right Involved	P	MORE SERIOUS ← → LESS SERIOUS		
Freedom to make a meaningful and informed choice	***Charter*** s 9	146	Overt coercion	Subtle coercion: see ***Grant [R v]***	Casual conversation
	Charter s 10(b)	146			
Protection against testimonial self-incrimination	***Charter*** s 7	146	Interrogation	Pointed questions: see ***Grant [R v]***	Volunteered information
	Charter s 10(b)	146			
Privacy	***Charter*** s 8	146	Search home		Search car or place of business
Bodily Integrity	***Charter*** s 8	146	Forcibly take blood samples Forcibly take dental impression		Forcibly taking breath sample Fingerprinting Iris recognition technology
Human Dignity	***Charter*** s 8	146	Strip search or Body cavity search		Plucking a head hair

Categories of Evidence for the Purpose of Charter Breaches

Four the purposes of *Charter* breaches, four categories of evidence are enumerated in ***Grant [R v]***:

1. statement evidence;
2. bodily evidence;
3. non-bodily physical evidence; and

4. derivative evidence.

Statement evidence remains ***presumptively inadmissible*** under the *Grant* framework although the test still needs to be applied to arrive at a final determination. There doesn't appear to be a presumptive outcome for the other categories. The balancing test must be applied taking into account all of the circumstances of the case.

Derivative Evidence

Derivative evidence is physical evidence which is discovered ***as a result of*** an unlawfully obtained statement. It is thus heavily ***related to statement evidence*** and may engage the same interests engaged by statement evidence as well as, potentially, other interests.

Discoverability

The doctrine of ***discoverability*** attempts to classify derivative evidence based whether it would have been discovered in the absence of the *Charter*-infringing statement. Where derivative evidence is otherwise discoverable, the impact of a *Charter* breach on the accused's interest against testimonial self-incrimination is lessened. Conversely, when it is clear that the derivative evidence would never have been discovered but for the *Charter* breach, the impact of the *Charter* violations is more severe. Where it cannot be determined if the evidence was otherwise discoverable, it is not supposed to have any impact on the s 24(2) analysis: ***Grant [R v]*** at ¶ 122. See also the Summary Table, below at p 67.

According to ***Re Application under s 83.28 of the Criminal Code***, the onus is on the Crown to establish discoverability on BOP. See also Derivative Use Immunity (p 74).

Case/Statute	Juris.	P	Key Points
Grant [R v]	2009 CA/SC	97	The gun was not otherwise discoverable.
Re Application under s 83.28 of the Criminal Code	2004 CA/SC	127	The onus is on the Crown to establish discoverability on BOP.

Interaction of Charter Interests and Categories of Evidence

There are two reasons for enumerating the categories of evidence.

1. Different categories engage different ***protected interests***. Bodily evidence and non-bodily physical evidence engage various interests protected by section 8, but not those related to protection against ***testimonial*** self-incrimination, the right to silence, &c.
2. Different categories have different levels of ***reliability***. In particular, statements obtained in breach of the principle against self-incrimination and the freedom to make an informed choice tend to be less reliable than physical evidence and, moreover, the unreliability of this type of statement is linked to the *Charter* breach.

These considerations affect the application of the 3 *Grant* factors discussed below.

Conscriptive versus Non-Conscriptive: An Obsolete Paradigm

Before *Grant*, the cases made a distinction between conscriptive and non-conscriptive evidence. ***Conscriptive*** evidence was named for the idea of "conscripting the accused against himself" and included statement evidence as well as bodily evidence. Conscriptive evidence obtained through a *Charter* violation was almost automatically thrown out under s 24(2). On the other hand, ***non-conscriptive*** evidence was physical evidence that was not "created" by getting the accused to provide evidence against himself. It included, for example, drugs found in a pocket searched in breach of the *Charter* or a murder weapon found in a house searched without a warrant.

NH says that **like the old hearsay rules, the conscriptive/non-conscriptive framework was a bit categorical but did provide the benefit of certainty**. For instance, the Crown would typically not even attempt a s 24(2) argument to admit conscriptive evidence. However, the formula came under criticism because:

- there was an almost irrebuttable presumption that conscriptive evidence was out;
- this was particularly frustrating with bodily evidence, and in particular, breathalyzer samples; and
- it ignored the balancing that is clearly called for in the body of s 24(2) itself.

MODERN *GRANT* BALANCING TEST UNDER SECTION 24(2)

The new exclusion test developed in ***Grant [R v]*** recognizes that the evidence obtained in breach of the *Charter* is only to be excluded under s 24(2) where it would bring the administration of justice into disrepute.

Purpose of Section 24(2)

The following principles from *Grant* explain the purpose of s 24(2):

- it must be understood in the **long-term** sense;
- it is ***prospective***: it recognizes that the *Charter* breach has already damaged the administration of justice and seeks to avoid further damage;
- it is not aimed at punishing the police or providing compensation to the accused, but at systemic concerns;
- it is concerned with what the ***signals*** the courts are sending to the ***public***; and
- it embraces maintaining the ***rule of law***.

Grant Test: 3 Lines of Inquiry

The *Grant* test for exclusion of evidence under s 24(2) of the ***Charter*** requires balancing 3 "lines of inquiry":

1. seriousness of the *Charter*-infringing state conduct;
2. impact on the *Charter*-protected right of the accused; and
3. societal interest in a trial on the merits.

NH says that **the first and second lines of inquiry could be collapsed**. I'm not so sure about this however, as factor 1 seems to be seriously concerned with the subjective behaviour of the police and doesn't vary much according to the different categories of evidence, while factor 2 is more objective and depends on the particular interests engaged.

SERIOUSNESS OF THE STATE CONDUCT

This line of inquiry aims to ensure that the courts do not send a message to the public that the courts condone state deviation from the ***rule of law***. The following factors are relevant:

- severity of the misconduct;
- degree of ***wilfulness*** involved: deliberate or reckless is worse than negligent, which is worse than a truly inadvertent mistake;
- extenuating circumstances;
- whether there is a ***pattern of abuse***.

The following example spectrum was suggested by NH:

MORE SERIOUS ◄——————————————————————► **LESS SERIOUS**

MORE SERIOUS ←				→ LESS SERIOUS
Deliberate and obvious *Charter* breach: wilful misconduct, bad faith	An honest but unreasonable mistake: negligence.	A more substantial breach, but there was some good faith because a reasonable mistake was made—say the law was not entirely clear as in ***Grant [R v]***—or the police were trying to preserve evidence.	Technical breach—officer was on the property too late—but the officer's behaviour wasn't all that reasonable. The officer just didn't bother to check the time.	Good faith technical breach. Say a police officer was on the property slightly later than authorized in the warrant because his watch stopped: • Mistake was an honest mistake (didn't think he was violating the *Charter*) [**subjective**]; and • Mistake made by the officer has a reasonable explanation [**objective**]

Impact of the Breach on the Charter-Protected Interests of the Accused

This line of inquiry aims to ensure that the courts do not send a message to the public that ***individual rights*** are ***illusory*** and provide no protection against the state. The difference between this line of inquiry and the inquiry into the seriousness of state conduct seems to be that rather than being concerned with the subjective attitudes of the state actors, it is concerned with the objective effect on actual protected interests engaged.

One violation that is considered to have a profound impact is a statement obtained in violation of the principle against ***testimonial*** self-incrimination.

Society's Interest in a Trial on the Merits

Unlike the other two lines of inquiry, which are concerned with the impact of admitting the evidence on the administration of justice, this inquiry addresses the issue that ***excluding*** the evidence may bring the administration of justice into disrepute. While the Court stipulated that there should be a "broad inquiry into all the circumstances, not just the reliability of the evidence", it identified ***reliability*** and ***the prosecution case*** as the two main concerns (both of these factors were applied to the facts, as well as identified), while downplaying the importance of the seriousness of the offence.

Reliability

Higher levels of reliability tend to weigh more heavily in favour or admission, while lower reliability tends to weigh against admission. This factor thus weighs more heavily against statement evidence than against bodily, non-bodily physical, and derivative evidence.

Importance of the Evidence to the Prosecution's Case

The importance of the evidence to the Crown case is also a factor. If the Crown's whole case is based on one piece of highly unreliable evidence, then admission of that evidence would more likely bring the administration of justice into disrepute. On the other hand, if the evidence is highly reliable and the Crown's case would collapse without it, this points toward admissibility.

The Crown case factor is more than a proxy for reliability. It could be the nail in the coffin for unreliable evidence, or tip the scales in favour of admissibility in hard cases involving otherwise reliable evidence.

Seriousness of the Offence is a Non-Factor

In ***Grant [R v]***, the Supremes are ambivalent about using the seriousness of the offence as a factor. They say it ***may*** be a valid consideration, but it cuts both ways (¶ 84). In *Grant* itself, the Crown argued that gun crime was a serious offence and thus the evidence should be admitted, while Grant argued that the seriousness of the charge made it all the more necessary that his rights be respected (¶ 139). The Court "did not find this factor to be of much assistance".

Framework of Analysis

Admission or exclusion of evidence under the Charter is a two-step process. First, the breach of a *Charter* right must be established by the accused on the balance of probabilities. Only after this has been done does the analysis proceed to the *Grant* balancing test under s 24(2).

Relevant Cases and Statutory Provisions

Case/Statute	Juris.	P	Key Points
Charter s 9	1982 UK	146	Per *Grant*, as well as overt detention ∃ 2 kinds of psychological detention: 1. where there is a legal requirement to comply with a direction or demand; and 2. where there is no legal requirement, but a reasonable person would conclude he was not free to go and had to comply. A brief investigative detention requires ***reasonable suspicion*** (just short of reasonable and probable grounds) in order to avoid being ***arbitrary***.
Charter s 10(b)	1982 UK	146	The right to counsel is triggered immediately upon detention: *Grant*.
Charter s 24(2)	1982 UK	146	For evidence to be excluded, it must be (1) obtained in violation of the *Charter*; and (2) its admission must bring the administration of justice into disrepute per *Grant*.
Grant [R v]	2009 CA/SC	97	The three officers' questioning of Grant crystallized into a type 2 psychological detention. Since there was ***no reasonable suspicion***, it was an arbitrary detention. Since officers didn't know this, they did not inform about right to counsel and ss 9 & 10(b) were violated. However, the balance of factors under s 24(2) supports admission of the gun.
Hebert [R v]	1990 CA/SC	101	In the circumstances, a confession obtained in violation of the s 7 right to silence would bring the administration of justice into disrepute.

Summary Table

	Statements	Bodily	Non-Bodily Physical	Derivative
Charter Rights/Interests	• Principle against testimonial self-incrimination • Right to silence • Freedom to make a meaningful and informed choice s 7 s 9 s 10(b)	• Bodily integrity • Human dignity • Privacy s 8	• Privacy • Bodily integrity • Human dignity s 8	• Principle against testimonial self-incrimination • Right to silence • Freedom to make a meaningful and informed choice s 7 s 9 s 10(b)
Presumptions	**Inadmissible**	N/A	N/A	N/A
INQUIRY 1: Seriousness of State Misconduct	∃ a heightened concern with police conduct in obtaining statements from suspects	(Don't forget the possibility of a pattern of abuse!) SEVERE, DELIBERATE EGREGIOUS ← → MINOR, INADVERTENT GOOD FAITH		
INQUIRY 2: Impact on the Protected Right	• Violation militates in favour of exclusion • BUT where a person is clearly informed of his choice to speak to the police but compliance with s 10(b) is technically defective, impact may be reduced.	See Interests Interests Protected by Charter Rights (above, p 63). (NH says that **where this evidence is important to the case and reliable, most of the heavy lifting gets done under INQUIRY 1, not INQUIRY 2**. Absent the most serious impact on the protected right, the state misconduct must be very far along toward negligence/deliberateness.		• The more likely the evidence is ***otherwise discoverable***, the less the impact on the interest against self-incrimination. • Converse is also true. • Where we cannot determine with confidence whether it would have been discovered absent the

			violation, this factor has no impact.
INQUIRY 3: Societal Interest in a Trial on the Merits	Often **unreliable**	Reliability is not related to *Charter* breach	

Possible Exam Short Answer Question

What happens when there's a more traditional section 10(b) breach such as during an interrogation and the evidence given in the statement can be backed up by numerous elements of corroborating evidence that could only have been known to the perpetrator and the accused? Is there a point at which the *reliability* of the statement is so high that the balance on what was formerly called a "conscriptive statement" will tilt in favour of admissibility?

10. Privilege

PRIVILEGE AGAINST SELF-INCRIMINATION

Right to Silence

People in Canada have a right to silence. The baseline is protected by section 7 of the *Charter*. In addition, absent any statute or rule of law compelling a person to speak, there is a general right to silence at common law.

SILENCE AND THE *CHARTER*

The ***Charter*** right to silence was first recognized in ***Hebert [R v]***. It should be thought of in the ***Oickle [R v]*** sense of a bare minimum below which the law cannot drop. Unlike the Confessions Rule (p 58), which is a common law protection operative whenever a person speaks with someone he reasonably believes to be a person in authority (whether in or out of detention), the section 7 right to silence is only triggered upon detention: ***Singh [R v]***. This is consistent with the overall scheme of the *Charter* legal rights, which typically require a detention in order to be engaged.

A RESIDUAL PROTECTION

Charron J repeatedly refers to the section 7 right to silence as a ***residual*** protection in *Singh*. There are two reasons for this:

1. It is only triggered on detention: ¶ 32.
2. In the context of a police interrogation of a person in detention where a detainee knows he is speaking to a person in authority, it is functionally equivalent to the ***confessions rule*** (but we also know that the confessions rule provides greater protections due to the burden and standard of proof and the categorical nature of the outcome).

Thus the section 7 right to silence is really only useful in non-standard situations, such as the one that occurred in ***Hebert [R v]***.

WHERE DO WE DRAW THE LINE?

> *[T]he law as it stands does not permit the police to* ***ignore*** *the detainee's freedom to choose whether to speak or not, as contended. Under both common law and Charter rules,* ***police persistence*** *in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a* ***free will*** *to speak to the authorities.*
>
> —Charron J, ***Singh [R v]*** at ¶ 47

Part of the *Singh* case was taken up with explaining why Singh's section 7 rights were not violated while also pointing out that there may be similar situations on different facts in which it might be violated. **In class, NH focused on the question of where we draw the line** and proposed 4 factors to consider in making this determination. One would think, however, that these factors would fall under the ***Oickle [R v]*** voluntariness analysis. This is because the section 7 right covers the same fact scenarios as the confessions rule in the context of the standard interrogation situation, but suffers from the defects discussed above. In any case, here are NH's factors:

1. **vulnerability of the accused;**
2. **amount of times the accused's refusal to speak was disregarded;**

3. **how clearly the right not to speak was set out and perhaps even re-emphasized;**
4. **length of time of the interview (in combination with the accused's desire to end it).**

NH says: **obviously, if it was a 16-hour interview, the person was barely conscious from fatigue, and has asserted his right to silence 300 times, there is going to be a violation of the right to silence. Where do we draw the line?**

Again, this would be better dealt with under the confessions rule analysis.

Relevant Cases and Statutory Provisions

Case/Statute	Juris.	P	Key Points
Charter s 7	1982 UK	146	Source of the constitutionalized right to silence. The onus to prove is, of course on the accused, on the balance of probabilities.
Hebert [R v]	1990 CA/SC	101	Undercover officer placed in accused's cell ***elicited*** a confession. The confession was excluded because it violated the right to silence and admitting it would have brought administration of justice into disrepute.
Singh [R v]	2007 CA/SC	131	Despite asserting his right to silence 18 times and Sergeant Attew's determination to get him to confess ***no matter what***, confessions rule not violated. There was no point conducting a separate section 7 inquiry.
Sinclair [R v]	2010 CA/SC	130	In general, s 10(b) does not mandate the presence of defence counsel throughout an interrogation.
Charter s 24(2)	1982 UK	146	Evidence obtained in violation of the right to silence will only be excluded if admitting it would bring the administration of justice into disrepute according to the *Grant* test.
Grant [R v]	2009 CA/SC	97	See also: Modern Grant Balancing Test under Section 24(2) (p 65)
Oickle [R v]	2000 CA/SC	121	Common law Confessions Rule (p 58)

Silence at Common Law

> *In general, absent a statutory requirement to the contrary, individuals have a right to choose whether to speak to the police, even if they are not detained or arrested, The common law right to silence exists at all times against the state, whether or not the person asserting it is within its power or control. Like the confessions rule, an accused's right to silence applies any time he interacts with a person in authority, whether detained or not.*
>
> —Abella J, ***Turcotte [R v]*** at ¶ 51

> *In Canada the right of a suspect not to say anything to the police . . . is merely the exercise by him of the general right enjoyed in this country by anyone to do whatever one pleases, saying what one pleases or choosing not to say certain things, unless obliged to do otherwise by law. It is because no law says that a suspect, save in certain circumstances, must say anything to the police that we say that he has the right to remain silent, which is a positive way of explaining that there is on his part no legal obligation to do otherwise.*
>
> —Lamer J, *Rothman v The Queen*, cited in *Turcotte*

Note the qualification "absent a statutory requirement to the contrary": there do exist statutory requirements to speak, as we will see in ***Re Application under s 83.28 of the Criminal Code***.

General Rule on Evidence of Silence

What comes out of ***Turcotte [R v]*** is that the ***right*** to be silent couldn't well be a ***right*** if evidence of silence could be adduced against the accused as proof of guilt. This would be equivalent to creating a ***duty*** to answer police questions. The fact that there is no duty to speak to police severs any link between silence and guilt. Thus, as a general proposition, evidence of the silence of an accused will have ***no probative value*** and be inadmissible for that reason.

Exceptions to the General Rule that Evidence of Silence is Not Admissible

As with most rules of evidence, there are exceptions. Again, as usual, these generally occur when silence becomes relevant to some other issue and the probative value of the evidence with respect to that issue outweighs its prejudicial value. The following examples were given in ***Turcotte [R v]***. The second, third, and fourth examples are manifestations of the Opening the Door Principle (p 8).

Case Name	Juris.	Description

Case Name	Juris.	Description
R v Crawford	1995 CA/SC	Crawford had not given a statement to the police, but his co-accused had done so. At trial, both co-accused blamed each other. Crawford testified in his own defence. Counsel for his co-accused was permitted to cross-examine Crawford on his failure to make a statement to the police on the theory that the right to silence must yield to the right to make full answer and defence.
R v Lavallée	1980 ON/CA	Evidence of silence admissible to rebut accused's attempts to emphasize his co-operation with the authorities.
R v Ouellette	1997 AB/CA	Evidence of silence admissible to rebut accused's claim to have denied the charges against him at the time he was arrested.
R v MCW	2002 BC/CA	Evidence of silence admissible where defence theory is mistaken identity and a flawed police investigation.
R v Cleghorn	1995 CA/SC	Evidence of silence admissible where accused failed to disclose his alibi in a timely or adequate manner.
Turcotte [R v]	2005 CA/SC	Evidence of Turcotte's refusal to answer questions is admissible as an inextricable part of the ***narrative***.

Note: If evidence of silence is admissible as probative of some issue, then a clear limiting instruction will be needed to inform the jury not to use it inappropriately, for example, as evidence of guilt.

Our Old Friend, the Narrative

It bears emphasis that, as well as being an exception to the rule against admitting prior consistent statements (see p 40 and also the case ***Ay [R v]***), the evidence of Turcotte's silence was admitted as an ***inextricable part*** of the narrative. This seems like it is a general evidentiary concept—when something is inextricably part of the narrative, it will be usually be admitted, subject to a careful limiting instruction.

Relevant Cases and Statutory Provisions

Case/Statute	Juris.	P	Key Points
Turcotte [R v]	2005 CA/SC	136	Turcotte's refusal to answer police questions could not be used by the jury to draw an inference of guilt, either under the guise of "post-offence conduct" or "state of mind evidence".

Protection of a Witness

Section 13 of the *Charter*

The first three parts of this subsection on section 13 deal essentially with the use to which an accused's prior statements made at a previous trial can be put. The final section, Derivative Evidence and Section 13, briefly the application of s 13 to derivative evidence.

Purpose of Section 13 (Operative Concept: *Quid Pro Quo*)

The purpose of section 13 of the *Charter* was set down in *R v Dubois* (1985 CA/SC) and reaffirmed in ***Henry [R v]***:

> *[T]he purpose of s 13, when the section is viewed in the context of ss 11(c) and (d), is to protect individuals from being indirectly* ***compelled*** *to incriminate themselves. . .*
>
> —Binnie J, ***Henry [R v]*** at ¶ 2

The operative concept under section 13 is *quid pro quo*: when a witness who is ***compelled*** to give evidence in a court proceeding is exposed to the risk of self-incrimination, the state offers protection against subsequent use of that evidence in exchange for his full and frank testimony.

Current Law on Section 13

> *It must be recognized that a witness who was also the accused at the first trial is at both trials a voluntary rather than a compelled witness, and therefore does not offer the same* ***quid pro quo****.*

> —Binnie J, ***Henry [R v]*** at ¶ 33

There are three scenarios of relevance to ***Charter*** s 13 (the X/X shorthand is mine):

1. **W/A**: a compelled witness at the trial of some other accused becomes the accused in his own right in a second trial;
2. **A/A$_S$**: the second trial is a retrial of the accused on the same indictment as the first trial and the accused chooses not to testify in his own defence at the retrial; and
3. **A/A$_V$**: the second trial is a retrial of the accused on the same indictment as the first trial and the accused ***volunteers*** to testify in his own defence at the retrial.

Clearly, there is a *quid pro quo* in the first case, but not in either of the two other cases. Thus section 13 protects the first, but not the other two accused. However, section 11(c) must also be considered. The following table summarizes the law, which is laid out in ***Henry [R v]***:

1	**W/A**	***No prior testimony*** is admissible, either as part of the Crown's case-in-chief or on cross-examination.
2	**A/A$_S$**	• ***No prior testimony*** is admissible as part of the Crown's case-in-chief, as this would have the effect of conscripting the accused to testify against himself in violation of s 11(c). • Section 13 has no application. • If the accused chooses to testify, this scenario morphs into **A/A$_V$**.
3	**A/A$_V$**	Since the accused has volunteered to testify on the retrial, ***all of his prior testimony*** is admissible on cross-examination, both to impeach credibility and to incriminate the accused.

Case/Statute	Juris.	P	Key Points
Charter s 13	1982 UK	146	Protects a witness from having his compelled testimony used to incriminate him in ***any other proceedings***, with the exception of prosecutions for perjury &c.
Charter s 11(c)	1982 UK	146	Protects an accused from self-incrimination.
Henry [R v]	2005 CA/SC	101	• Defines the purpose of s 13. • Clarifies the application of s 13 to the three cases: A/A$_S$, A/A$_V$, and W/A.
Noël [R v]	2002 CA/SC	120	The result of *Noël* was affirmed in *Henry*. However, *Henry* conclusively eliminates the possibility of cross-examining the accused on his prior testimony in the W/A scenario. The door allowing cross-examination in this scenario had been left slightly ajar in *Noël*.

History of Section 13 Cases

The *Henry* case cleaned up the section 13 law, which had become convoluted and was failing to reflect the purpose underlying s 13. NH mentioned in class that he **does not think that *Henry* ought to have completely eliminated the narrow possibility, previously allowed under *Noël*, of cross-examining a W/A$_V$ scenario accused on his prior statement for the purpose of impeaching his credibility**. Thus this topic is ripe for an exam short answer question. To this end, the following table briefly summarizes the earlier cases:

Case	Juris.	Scenario	Key Points
Dubois [R v]	1985 CA/SC	**A/A$_S$**	The accused was charged with second degree murder. At his first trial, he admitted killing the deceased but alleged justification. At the retrial, as part of its case-in-chief, the Crown read in the accused's testimony from the first trial over the objections of defence counsel. • SCC concluded that "other proceedings" included a retrial on the same indictment and "witness" included an accused testifying voluntarily (i.e., on these facts, at the first trial) in his own defence. • The Court thus found a violation of s 13 but apparently did not consider s 11(c).
Mannion [R v]	1986 CA/SC	**A/A$_V$**	Unlike in *Dubois*, the accused was a volunteer at ***both*** trials on the same indictment, but the SCC did not note this distinction. The Crown cross-examined the accused in a manner clearly calculated to ***incriminate*** him. This was held to be a violation of s 13.

Kuldip [R v]	1990 CA/SC	**A/A$_V$**	The difference between *Mannion* and *Kuldip* is that in *Kuldip*, the Crown did not attempt to incriminate the accused with the prior testimony but merely attempted to impeach his credibility. This was held not to violate s 13.
Noël [R v]	2002 CA/SC	**W/A$_V$**	The accused had testified as a compellable witness at his brother's murder trial about his complicity in the murder. At his own trial, he changed his story and denied complicity. In cross-examination, the Crown put to him statement after statement that he had made at the earlier trial, which he acknowledge having made, and which were virtually conclusive of his guilt. • SCC assumed that the *Kuldip* rule also applied to **W/A$_V$** situations. • However, as the Crown had clearly used the prior statements to incriminate the accused, as in *Mannion*, a violation of s 13 was found. • In *obiter*, the Court narrowed the scope of the *Kuldip* cross-examinations. After *Noël*, even credibility could only be impeached if the prior statement put to the accused was ***innocuous*** at the first trial and still ***innocuous*** with respect to the issue of guilt at the second trial.
Henry [R v]	2005 CA/SC	**A/A$_V$**	• Overturned the law and outcome of *Mannion*. • The results of all of the other cases remain as good law, but the reasons for reaching those results would be different for all of *Dubois*, *Kuldip*, and *Noël* post-*Henry*.

The substance of NH's **complaint is that maybe ∃ some case ∈ { W/A$_V$ } in which the *Kuldip-Noël* ability to cross-examine on innocuous details of the prior statement would allow the Crown to impeach the accused's credibility without tainting the jury with any evidence that bears on the issue of guilt.**

Derivative Evidence and Section 13

Section 13 obviously does not protect the witness from being charged with a different offence than the one he describes in his testimony. Moreover, it does not protect the witness from being charged with the same offence as long as the evidence used by the Crown is obtained ***independently***. The Crown may prosecute the witness as long as it does not use evidence ***derived from*** the compelled testimony.

There doesn't appear to be a lot of case law on this issue and we weren't assigned any readings. Given that *Charter* rights are to be interpreted ***purposively*** and the right would be totally gutted if any derivative evidence got in—and also given the fact that ***Henry [R v]*** shows that section 13 is being taken very seriously in **W/A** scenarios—one can assume that the courts would treat possible derivative evidence issue strictly. Would the Crown be required to prove BRD that it obtained the evidence independently?

Note that in ***Grant [R v]***-type scenarios involving breaches of *Charter* rights, it isn't clear whether there is an onus on the Crown to prove the discoverability of the evidence and even if it is not otherwise discoverable, this is merely an aggravating factor in the section 24(2) balancing and not conclusive. But the crucial difference with *Grant* is that the testimony is not ***compelled***. Surely in cases such as *Henry*, *Re Application*, and *Brown*, the fact that derivative evidence would be derived from compelled testimony, not merely a confession in a rights-breaching scenario, makes derivative evidence conclusively inadmissible. . . See below, as well.

Compelled Testimony

We know from ***Turcotte [R v]*** that there is a general right to silence at common law (p 70). We know furthermore that the common law can be overridden by statute. Therefore, a person can be compelled to speak by statute. We also know from ***Singh [R v]***, and the ***Hebert [R v]*** case which it cites, that there is a constitutional right to silence protected by section 7 which kicks in in the context of a criminally accused. Is there any constitutional protection of the right of an ***ordinary witness***, as opposed to an accused, to remain silent? The *Re Application* case helps to answer this question.

Section 7 Liberty Interest

A statutory compulsion to testify, even for someone who is not a criminal accused, engages the ***liberty interest*** under section 7 of the ***Charter***. There is an encroachment on the liberty interest at the moment of compelled speech. As we know from the text of s 7, this interest can only be infringed upon in accordance with PFJ.

Re Application emphasizes the right against self-incrimination is a PFJ (¶ 69). Thus a person cannot be compelled to speak in violation of the right against self-incrimination and to this end, testimonial compulsion is invariably linked with ***evidentiary immunity***

Three Constitutionally-Protected Procedural Safeguards

There are three procedural safeguards, enumerated in *Re Application*, which ensure evidentiary immunity for someone who is compelled to testify:

1. use immunity;
2. derivative use immunity; and
3. constitutional exemption.

Use Immunity

Use immunity is self-explanatory. It means you cannot use the compelled testimony as evidence against the witness in a subsequent proceeding.

Derivative Use Immunity

Derivative evidence has already been discussed in Chapter 9 in the context of the ***Grant [R v]*** case (see in particular p 64). However, derivative use immunity as seen in *Re Application* and *Brown* is stronger than the derivative evidence "factor" in the *Grant* balancing test. The general rule is that compelled testimony cannot be used to obtain other evidence to use against the witness in a subsequent proceeding unless that evidence is ***otherwise discoverable***. *Re Application* (at ¶ 72) indicates that the onus is on the Crown to establish the discoverability of derivative evidence on BOP. However, the SCC interpreted the statutory provision at issue in *Re Application* itself as providing ***absolute*** derivative use immunity. This means that evidence derivative obtained under *Criminal Code* s 83.28 may not be used to incriminate the witness in a subsequent proceeding even if the Crown can establish that it was otherwise discoverable on BOP.

Constitutional Exemption

The constitutional exemption from compelled testimony is available under s 7 of the *Charter* where the compulsion is ***undertaken*** or predominately used to obtain evidence ***for the prosecution of the witness*** (i.e. the very witness who is being compelled to testify). The Supremes did not find that this exemption was engaged in *Re Application* because there was no evidence that the predominant purpose of the investigative hearing was to obtain evidence for the prosecution of the unnamed witness in question.

Relevant Cases and Statutory Provisions

Case/Statute	Juris.	P	Key Points
Re Application under s 83.28 of the Criminal Code	2004 CA/SC	127	A potential witness in the Air India trial was compelled to attend an investigative hearing. The SCC had no problem with this, **taking the Crown at its word that there is a valid state purpose**. The constitutional exemption was not engaged.
Charter s 7	1982 UK	146	Compelled testimony requires three constitutionally-protected procedural safeguards: 1. use immunity; 2. derivative use immunity; and 3. the constitutional exemption from testifying

Case/Statute	Juris.	P	Key Points
Criminal Code s 83.28(10)(b)	RSC 1985	147	Interpreted as providing absolute derivative immunity for evidence obtained during an investigative hearing.

PRIVILEGE ATTACHING TO CONFIDENTIAL RELATIONSHIPS

When a relationship is privileged, the evidence which falls within that relationship is ***non-compellable***. Not only is it not admissible in court, but the person who is in possession of that evidence cannot be ***compelled*** to testify in court.

On a broad level, there are essentially two types of privilege:

1. Class Privilege (below); and
2. Other Confidential Relationships (ad hoc Privilege), which is discussed beginning at p 78.

As we will see, evidence protected by class privilege is presumptively ***non-compellable***, subject only to certain exceptions. On the other hand, where a confidential relationship is otherwise alleged, the evidence is presumptively ***compellable*** and the party seeking to have the privilege recognized must establish, according to a balancing test, that the evidence should not be given according to the particular circumstances of the case.

Class Privilege

> *Class privilege necessarily operates in derogation of the judicial search for the truth and is insensitive to the facts of the particular case. Anything less than blanket confidentiality . . . would fail to provide the necessary assurance to the solicitor's client or the police informant to do the job required by the administration of justice. . . . It is likely that in the future such "class" privileges will be created, if at all, only by legislative action.*
>
> —Binnie J, ***National Post [R v]***

Recall that we sometimes choose to reject evidence not because it may cause immediate prejudice to the accused, but because of potential prejudice to the justice system or **other societal values**. Examples of this can be seen in the Qualified Search for the Truth (p 8) as well as the law's approach to Exclusion of Evidence under the Charter (p 63).

Class privilege is another example of this phenomenon. Essentially, the law treats the preservation of the global integrity of the privileged relationship as being more important than the search for the truth in the particular case, up to a certain point (i.e. subject to certain exceptions).

There are currently two types of class privilege at common law:

1. Solicitor-Client Privilege (p 75); and
2. informant privilege.

Binnie J made clear in ***National Post [R v]*** that new classes of privilege will likely have to be created by legislative action, since the courts will not likely create them (¶ 42). Arguably, non-compellable spousal communications under s 4(3) of the ***Canada Evidence Act*** (p 140) are an example of such legislative action.

SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege is the only class privilege which we actually studied in cases (*Shirose* and *Brown*). If the client does not waive solicitor-client privilege, it is very expansive: there is **almost an irrebuttable presumption** that privileged communications are not compellable and the privilege has been described as having **constitutional dimensions**. Since it is one of only two kinds of class privilege (the other being informant privilege), it has come under heavy criticism that judges are essentially giving special status to the legal profession because they are members of it.

There are essentially four issues to understand:

1. What is the Extent of the Privilege?
2. Who Owns the Solicitor-Client Privilege?
3. What is the Test for Solicitor-Client Privilege? (It is crucial to recognize that not all communications between a lawyer and another person, or even a lawyer and his client, are privileged).
4. Is Waiver of Solicitor-Client Privilege possible?
5. What are the Exceptions to Solicitor-Client Privilege?

What is the Extent of the Privilege?

The privilege applies to all communications (including documents) which are made under the privileged relationship.

Who Owns the Solicitor-Client Privilege?

The client "owns" the solicitor-client privilege and is the only person permitted to waive it. This is made clear in *Shirose* and re-emphasized in *Brown* and *National Post*.

Test for Solicitor-Client Privilege

Not all communications with a lawyer are privileged. For instance, many lawyers in private practice are valued as much for their raw business sense as for their business acumen. If they are giving business, rather than legal, advice, the communications will not be privileged. The test, as stated in ***Shirose [R v]*** and paraphrased by NH is that there must be:

1. **communications between a lawyer and his client;**
2. **intended to be confidential;**
3. **for the purpose of obtaining legal advice**

Such communications will be non-compellable unless the privilege is waived or it falls under one of the two exceptions.

Waiver of Solicitor-Client Privilege

Since the privilege belongs to the client, only the client may waive it. This waiver may be ***explicit*** ("I give my permission to put the communications into evidence") or ***implicit***, which may occur if the client puts the content of the communications in issue.

Implicit waiver occurred in ***Shirose [R v]***, because the RCMP implied that the contents of the privileged communications supported its claim to have acted in good faith. Implicit waiver falls under the general Opening the Door Principle (p 8) of the law of evidence. There was also possible implicit waiver in ***Brown [R v]*** because Benson exposed his solicitor-client communications to his girlfriend. Although this did not need to be decided in *Brown*, one could argue that it was a more obvious case of waiver than *Shirose*.

Exceptions to Solicitor-Client Privilege

In addition to voluntary waiver of privilege, there are two mandatory exceptions to solicitor-client privilege:

1. the future crimes and fraud exception (***Shirose [R v]***); and
2. the innocence at stake exception (***Brown [R v]***).

Future Crimes and Fraud Exception

There is an exception to the confidentiality of solicitor-client communications where the communications are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime (***Shirose [R v]*** is

the authority for this exception). However, privilege is ***not automatically destroyed*** if a transaction turns out to be illegal. For this reason, there must be evidence of the following:

1. the client was ***knowingly*** pursuing a criminal purpose; and
2. the lawyer provided advice to ***facilitate*** this purpose, as either a ***dupe*** or a ***conspirator***.

The knowledge requirement minimizes the risk that communications will turn out to be unprivileged just because the subject matter ultimately turns out to be illegal.

In ***Shirose [R v]***, Binnie J discussed two possibilities:

1. *ex ante* knowledge on the part of the client can prevent the privilege from coming into existence; and
2. criminal intent formed subsequent to the advice could defeat the privilege.

Binnie J found that the first possibility did not occur, because Cpl Reynolds studied the lower court decision in *Lore* and could not have been said to have known that the intended conduct was unlawful at the time he consulted Mr Leising. However, if *Shirose* had not been settled on waiver grounds, Binnie J would have ordered that any documentation of the legal advice given by Mr Leising to Cpl Reynolds be given to the trial judge to determine whether the second possibility had occurred.

Innocence at Stake Exception

Solicitor-client privilege will yield where the innocence of an accused is at stake. However, the interpretation of the ***McClure [R v]*** innocence at stake test given in ***Brown [R v]*** shows that the fact that evidence which could be obtained from privileged communications would be better than other evidence, or might buttress other evidence, is not enough. As NH says, **it is inherent in the test that we are willing to take some risk of wrongful convictions to preserve the solicitor-client relationship**.

Test for Innocence at Stake

The test, set out in ***McClure [R v]***, is as follows:

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 which ***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.

What Happens When Privilege Yields Because Innocence is at Stake?

Privilege holders whose communications are disclosed under the ***innocence at stake*** exception have are protected by the residual ***principle against self-incrimination*** under s 7 of the ***Charter***, according to ***Brown [R v]***. This means that privilege holders get Use Immunity and Derivative Use Immunity. They do not, however, get ***transactional immunity***, which would be total immunity from prosecution for any crimes disclosed in the communications, regardless of whether ∃ otherwise discoverable evidence of those crimes.

Relevant Cases and Statutory Provisions

Case/Statute	Juris.	P	Key Points
Shirose [R v]	1999 CA/SC	129	• The RCMP implicitly waived privilege to the DOJ advice by putting in issue Cpl Reynold's good faith and then asserting his reliance on the DOJ advice to buttress that position. • If there had not been waiver, the trial judge would have had to investigate whether the future crimes and fraud exception applied.
McClure [R v]	2001 CA/SC	115	Authority for the two-stage (plus threshold question) ***innocence at stake*** test.
Brown [R v]	2002 CA/SC	87	• The trial judge's decision to grant the accused access to communications under the *McClure* test was premature for a number of reasons. • When privilege yields to the ***innocence at stake*** exception, the holder of the privilege gets ***use*** and ***derivative use***, but not transactional, immunity.
Charter s 7	1982 UK	146	The residual principle against self-incrimination protects privilege holders whose communications are disclosed under a *McClure* application.

Other Confidential Relationships (*ad hoc* Privilege)

All communications which are not protected by class privilege are ***presumptively compellable*** and ***presumptively admissible*** in evidence (as long as they aren't excluded by any other rule, of course!). At common law, however, non-compellable confidential relationships can be established on a ***case-by-case*** basis according to the Wigmore criteria for establishing case-by-case privilege.

Since, unlike class privilege, case-by-case privilege is given at the discretion of the trial judge, buzzwords like ***flexibility*** and ***balance*** become important. Generally on the no-disclose side of things you'll have a *Charter* value like freedom of religion (pastor/penitent) or freedom of the press (journalistic sources) and on the other you'll have the obligation of all citizens to give relevant testimony with respect to criminal conduct, the judicial search for the truth, &c.

Wigmore Criteria for Case-by-Case Privilege

The burden of persuasion is on the party resisting disclosure to establish the following four criteria, which were enumerated in ***National Post [R v]***.

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.

The fourth criterion does most of the work, *per* Binnie J in *National Post*. In particular, the weighing up at the fourth stage must include the following four factors:

(a) the nature and seriousness of the ***offence***;
(b) the ***probative value*** of the evidence sought to be obtained;
(c) the public interest in respecting the confidence; and
(d) the underlying ***purpose of the investigation***.

If there is evidence that the investigation was ginned up, for instance, to silence a journalistic secret source, this will weigh against disclosure. On the other hand, if keeping the information secret undermines the purpose of the privilege claimed (for instance, where a journalist protects a secret source who is duping the journalist into publishing fraudulent documents) this will weigh in favour of disclosure.

Journalistic Privilege and Search Warrants

In ***National Post [R v]***, Binnie J held that case-by-case privilege, when applied to journalistic secret sources, is not necessarily limited to testimony (i.e. limited to the time at which the testimony is sought to be produced in court). In appropriate cases, it can also be asserted against a search warrant.

Relevant Cases

Case/Statute	Juris.	P	Key Points
National Post [R v]	2010 CA/SC	119	The Wigmore criteria are laid out and applied to facts involving protecting the identity of a journalistic source.

11. Case Chart

Abbey v R

2009 ON/CA

Facts Abbey stood accused of murdering the victim, who, he believed, was a member of a ***rival gang***. After the murder, Abbey had a ***teardrop tattoo*** inscribed under his eye. The Crown proposed to have Dr Totten, an expert in 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. However, Dr Totten's report and evidence made it clear he was not in a position to identify the reason the accused had a tattoo inscribed on his face.

The Crown's less ambitious alternative position was that Dr Totten be allowed to identify the three possible meanings of the tattoo without giving his opinion as to which meaning applied in this case.

Issue

1. Is all the testimony required for the Crown's default proposal admissible?
2. If not, is the Crown's alternative proposal admissible?

Analysis Doherty JA proposed a two-step process to applying the ***Mohan [R v]*** test. See: General Rule on Expert Opinion Evidence (p 23).

- **STAGE 1: Preconditions**: None of the preconditions are in dispute.
  - Subject matter: are ordinary people unlikely to form a correct judgment about it if unassisted by persons of special knowledge (***J-LJ [R v]***,¶ 30)? **Yes**.
  - Is Totten a qualified expert? **Yes**.
  - Is the evidence logically relevant? **Yes**.
  - Is it excluded by another exclusionary rule? **No**.
- **STAGE 2: Gatekeeper**
  - 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.

Ratio Admissibility is not an all or nothing proposition: a trial judge is obliged to take an active role in framing the ***scope and language*** of the proposed expert opinion evidence.

Note Although it this part was edited out of the casebook version, Doherty JA refused to accept the trial judge's characterization of Dr Totten's evidence as a ***novel scientific theory***:

> *[116] . . . It was not scientific. It was not novel. And it was not a theory. . . . Dr. Totten's evidence could no more be regarded as a "scientific theory" than would evidence from a properly*

qualified expert to the effect that wearing certain clothing in a particular culture indicates that the wearer belonged to a particular religious sect.

[117] The proper question to be answered when addressing the reliability of Dr. Totten's opinion was not whether it was scientifically valid, but whether his research and experiences had permitted him to develop a specialized knowledge about gang culture, and specifically gang symbology [thank you, Willem Dafoe!], that was sufficiently reliable to justify placing his opinion as to the potential meanings of the teardrop tattoo within that culture before the jury

Allison v R

1991 BC/CA

Facts The accused was charged with breaking and entering after a police officer arrested him, in a cannery building that was closed for Dominion Day, carrying a homemade crowbar on his belt. The accused gave an explanation to the police officer, alleged to be ***exculpatory***, as to why he was in the cannery building. At trial, the officer gave evidence for the Crown and the officer recounted the part of the accused's explanation that was ***inculpatory***. When defence attempted to elicit from the officer the ***exculpatory*** parts of the explanation, the Crown successfully objected.

Because the defence was not able to elicit the full explanation from the police officer, the accused was forced to take the stand to give his explanation. This opened him up to cross-examination on, *inter alia*, his prior convictions, and his story was not believed by the trial judge.

Issue Can the Crown adduce into evidence only the part of an accused's explanation that suits its purposes and then object to the remainder?

Analysis
- If balance of the explanation had been given, the accused might not have found it necessary to give evidence.
- It is often better for accused not to testify, particularly where he has a criminal record like this accused did.
- Given the fact that accused's testimony was not believed, it is impossible to say that the trial judge could not have had a reasonable doubt had the full explanation been heard and the accused not forced to testify.

Held Trial judge's decision to prevent the police officer from recounting the remainder of the accused's explanation was a reversible error.

Ratio As a matter of fairness, the Crown may not put into evidence only a part of an accused's admission/confession/ explanation. It must tender the entire explanation (if otherwise admissible) or none at all.

See Also ***Palma [R v]***, Probative Value of Informal Admissions (p 57), ***Hunter [R v]***

Arcangioli [R v]

1994 CA/SC

Facts The accused was charged with committing an aggravated assault [a stabbing] against the victim. The accused admitted committing a common assault [punching the victim] and then fleeing the scene of the crime. The accused testified that he fled when he saw S, another person, stab the victim. The issue was thus not ID, but the *actus reus* of the offence committed by the accused.

Issue What jury instruction, if any, is to be given to the jury regarding the accused's flight from the scene?

Analysis The evidence of flight from the scene has no probative value, since it is not reasonably capable of supporting the inference that the accused committed aggravated assault rather than common assault.

Ratio Where evidence of flight from the scene is ***not reasonably capable*** of supporting the needed inference—as when the accused admits to the *actus reus* of one offence at the scene but not another one—the jury must be instructed that the evidence of flight has no probative value.

Note This is not part of the readings. However, as it is cited in both ***White v The Queen*** (p 138) and ***Peavoy [R v]*** (p 124), it makes sense to pull it out. On an exam, you would have to cite as *R v Arcangioli*, cited in *White*.

Arp [R v]

1998 CA/SC

Issue What are the grounds for excluding extrinsic misconduct evidence?

Analysis
- Some extrinsic misconduct evidence might be wholly irrelevant to the crime being charged.
- However, evidence of propensity or disposition of an accused to a particular behaviour is often ***relevant***, although it is often of little probative value.
- Thus the ***usual*** reason why such evidence will be excluded is not because it is irrelevant, but because the significant prejudicial effect grossly outweighs the probative value.

Ratio This case is "about" the admissibility of similar fact evidence. The short excerpt we got is placed in the introductory chapter of the casebook for the purpose of illustrating the concept that **there is no minimum probative value required** for evidence to be relevant (this seems to be what NH wants us to take away).

See Also ***Seaboyer [R v]***, ***B(FF) [R v]***, ***Penney [R v]***, ***Palma [R v]***, Probative/Prejudicial Balance (p 6)

Ay [R v]

1994 BC/SC

Facts The accused, who was the complainant's babysitter's husband, was charged with 27 sexual assaults against the complainant while she was between 5 and 17 years old. The complainant did not make any complaints to the police until she turned 30. As the accused denied all accusations, ***credibility*** was the core issue.

Constable Logan, who took the complainant's initial statements, testified for the Crown, as did the complainant's mother. The wife of the accused and 3 family friends testified as character witnesses for the accused. The evidence given at trial included:

1. Constable Logan's testimony:
    a. **Examination-in-chief (Crown)**: Constable Logan testified as to the procedure he used to take the statements; the amount of time it took to take them (the first interview took 5¼ hours); and the emotional state of the complainant while giving them (it varied between anger and distress).
    b. **Cross-examination (defence)**: Although the question did not at all solicit this answer, the Constable testified that he "certainly would have no problem with the ***victim's credibility***".
2. Complainant's evidence-in-chief for the Crown: The complainant testified that she told her mother about the alleged assaults when she was 24, that her mother did not initially believe her; but that her mother believed her once she gave details of "instances and things".
3. Complainant's mother's testimony:
    a. **Examination-in-Chief (Crown)**: Counsel asked whether the mother received any details regarding the alleged assaults, to which the mother replied that she only knew about "the times that [the accused] threatened her and beat her".
    b. **Cross-examination (defence)**: A reply with substantially the same information was given.
4. Crown's cross-examination of defence witnesses: For each defence witness, Crown counsel made reference to the length of the transcripts of the complainant's police statements (one was 80 pages, the other 50 pages) and demanded to know why the complainant would make up such a long story.

No objection was taken to the above evidence at the time it was given, and the trial judge did not charge the jury with respect to any of it.

Issue
1. Was the above evidence admissible?
2. If not, could the prejudice have been eliminated by a proper caution by the trial judge?

Analysis
- Constable Logan's comment on the "***victim's credibility***" was inadmissible ***oath-helping***.

- The remainder of the evidence had no probative value except for the purpose for which it was ***inadmissible***, namely: the inference that a prior consistent statement makes the truth of sworn testimony more probable.
    - While the Crown's questions on cross-examination regarding the length of the statements were not themselves evidence, they had the effect of repeatedly suggesting to the jury that complainant had given long and detailed prior statements consistent with her sworn evidence.
- Some evidence of prior consistent statements is necessary in cases like this in order to establish the overall narrative and falls under the Narrative Exception (p 41).
    - Even for evidence that falls within the narrative exception, a jury caution is needed.
    - The testimony described above included evidence of ***content***, in various ways, and ought not to have been admitted.

Held The evidence was inadmissible. The trial judge ought to have cautioned the jury not to use the evidence of PCS.

Ratio

1. The ***fact*** that a prior complaint was made, when it was made, and why it was or was not made in a timely fashion is admissible to establish the conduct of the complainant. However, the ***content*** is inadmissible unless relevant for some other purpose such as providing necessary ***context*** for other probative evidence.
2. Even in cases where the evidence is strictly confined to the ***fact*** that a prior complaint was made, trial judge must instruct jury that the evidence may only be used to understand the sequence of events and not as proof of their implicit contents (***truth***) or as corroborating the complainant's testimony at trial (***credibility***).

See Also ***Stirling [R v]***, Prior Consistent Statements (p 40), ***Llorenz [R v]***, ***Turcotte [R v]***

B(FF) [R v]

1993 CA/SC

Facts The accused acted as a babysitter for his sister's children and was charged with assaulting one of them. He claimed at trial that: (1) he was just a benevolent babysitter; (2) the complainant child was not ***credible*** because she waited so long to bring the charges; and (3) that the child's physical injuries might have been caused by the child's abusive mother. The prosecution brought in testimony of the two other children to the effect that the accused exercised violent control over the family. The trial judge did not give the jury any instructions with respect to this evidence.

Issue Was evidence given by the two minors inadmissible because:

1. it was irrelevant to any issue other than the accused's character; or
2. its prejudicial effect outweighed its probative value?

Did the trial judge err because:

3. he failed to give the jury special instructions about the use they could make of the minors' testimony?

Analysis

- Given the various theories raised by the defence, the ***extrinsic misconduct evidence*** did more than simply show that the accused was the sort of person likely to commit the offences in question.
    - It was relevant to several important issues.
    - NH highlights, in particular, **the fact that the evidence tends to explain why the complainant was too frightened to press charges until much later**. It also tends to rebut the other two defence theories.
- In this case, the probative value of the evidence outweighs its prejudicial effect.
- However, trial judges are under an ***obligation*** to ***properly instruct*** juries as to the use they can make of evidence which is highly prejudicial to the accused. The trial judge failed to do that here.

Held The evidence was admissible, as it was relevant and the probative value would have outweighed the prejudicial effect if proper limiting instructions had been given. As they were not, a new trial is ordered.

Ratio The conduct of the accused's defence may alter the probative/prejudicial balance of evidence.

See Also Opening the Door Principle (p 8), ***Arp [R v]***, ***Seaboyer [R v]***, ***Penney [R v]***, ***Palma [R v]***

B(KG) [R v]

1993 CA/SC

Facts The accused was charged with second degree murder after he allegedly stabbed the victim in the presence of 3 of the accused's friends. When the police interviewed the 3 friends separately, each said that the accused admitted to them that he did the stabbing. These interviews were ***videotaped***, but the friends were not put under oath.

The trial was held in Youth Court before a judge alone. All 3 witnesses recanted. The trial judge permitted cross-examination under ***Canada Evidence Act*** s 9. Each witness admitted to making the prior statement, but ***explained*** was that he lied to the police to exculpate himself from possible involvement. The trial judge believed ∀ 3 witnesses ***lied under oath***, but believed he was bound by precedent not to allow the prior statements into evidence as proof of the truth of their contents.

Issue Are the prior inconsistent statements admissible as an exception to the hearsay rule?

Analysis The (formerly absolute) rule against admitting PIS as proof of the truth of their contents was grounded in the hearsay rule. Thus, admissibility of PIS should now be governed by the principled approach.

NECESSITY:

Necessity is satisfied when evidence of the same quality cannot be obtained at trial (this seems like code for necessity is satisfied whenever a witness recants and holds the prior statement "hostage").

RELIABILITY:

- Note that we are talking about ***threshold*** reliability: ultimate reliability is for the trier of fact.
- There are 3 "hearsay dangers" making hearsay evidence unreliable: the evidence wasn't given under ***oath***; the declarant is not in the ***presence*** of the trier of fact so that the TOF can assess demeanour &c; and the declarant is not available for contemporaneous ***cross-examination***.
- Hearsay meets the threshold of reliability where there are sufficient ***circumstantial indicia of reliability***. In the case of prior inconsistent statements, these are present when:
    1. the statement was given under ***oath***/solemn affirmation in conjunction with an explicit warning of the consequences of lying under oath (but there will be rare cases where notwithstanding the lack of oath, the statement is reliable because other circumstances serve to impress on the witness the importance of telling the truth and are thus a sufficient substitute for the oath);
    2. the statement was ***videotaped***, as videotaping is a perfect substitute for presence in the courtroom (but there will be rare cases where something else is a sufficient substitute for videotape, such as testimony of an independent third party who observed statement being made in its entirety); and
    3. the witness is available to be ***cross-examined*** in the courtroom (this is a sufficient substitute for contemporaneous cross-examination, the lack of which is the most important hearsay danger).

OTHER REQUIREMENTS ON THE VOIR DIRE:

- The burden of proof of reliability (and necessity) rests on the party desiring to admit the evidence. The quantum of proof is balance of probabilities.
- Where the PIS was made by the ***accused*** to persons in ***authority***, the burden may be higher and the rules relating to confessions apply.
- Trial judge retains discretion to refuse to admit a PIS even where ∀ 3 indicia of reliability are met if the statement was made in circumstances that make it suspect.
    - This might occur (for any witness) where malign police influence shapes content of the statement.
    - Finally, there is a residual discretion to refuse to admit anything whose admission would bring the administration of justice into disrepute.

Held A new trial is ordered: the only circumstantial indicator of reliability that is not present is the ***oath***, but "it may well be" that the judge in a new trial would find a sufficient substitute for the oath and warning.

Ratio A prior inconsistent statement may be admitted as proof of its substantive contents if:

1. it would be admissible if used as the witness' direct testimony (for example, no double hearsay);
2. it has sufficient ***circumstantial indicia of reliability***: oath, presence, and contemporaneous cross-examination or sufficient substitutes;
3. it was made voluntarily if to a person in authority; and
4. there are no other factors which would bring the administration of justice into disrepute.

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

See Also ***U(FJ) [R v]***, Prior Inconsistent Statements (p 53) under the Principled Approach to Hearsay (p 49), Prior Statements versus Confessions (p 62)

B(SC) [R v]

1997 ON/CA

Facts The complainant was raped and beaten. The only issue at trial was identity. The accused voluntarily—and without exercising his right to counsel—provided the police with blood, saliva, head hair, pubic hair, and fingernail samples. In addition, he turned his clothing over to the police and offered to take a polygraph test.

The Crown challenged the admissibility of the accused's offer to take the polygraph test, arguing that as the results of a polygraph test are inadmissible, an offer to take one has no probative value.

Issue What probative value should be accorded to an accused's offer to take a lie detector test?

Analysis

- It should be obvious from the type of issue here that the answer will turn on the unique facts of the case!
- An offer to take a polygraph test has probative value ***only to the extent*** that it ***reasonably yields the inference*** that the accused was prepared to do something that a guilty person would not be prepared to do.
- At a minimum, this requires that the accused believe the test could be used against him at trial.
    - In this case, there is no evidence of any such belief.
- Other factors are relevant to probative value as well: what did the accused know about the accuracy of the test? Did the accused believe he could fool the machine? Was the offer a *bona fide* one? &c &c
- If the offer to take the polygraph stood alone, it would have no probative value.
- However, evidence goes far beyond a mere offer to take a polygraph. Upon arrest, the accused voluntarily provided numerous samples in full knowledge that he stood charged of a rape that had occurred the previous day and that the samples he provided would be examined by experts to determine if it linked him to the crime.

Held The POC, considered in its totality, has some probative value, which is not substantially outweighed by its prejudicial effect. It should be admitted.

Ratio The admissibility of POC to support an inference that the accused ***did not*** commit the crime alleged should be approached on a principled basis. If it is relevant and its probative value is not substantially outweighed (***Seaboyer [R v]***) by its prejudicial effect or some other evidentiary rule, it should be received.

See Also Post-Offence Conduct (p 17), ***White v The Queen***, ***Peavoy [R v]***, ***Oickle [R v]***

Note In addition to the POC issue, accused attempted to lead evidence from a Dr Montayne to the effect that he was not the type of person capable of committing the attack. This evidence is similar to that at issue in ***J-LJ [R v]***.

Baltrusaitis [R v]

2002 ON/CA

Facts The trial judge instructed the jury as follows:

> *You will base your findings on the evidence heard here and the exhibits introduced. Your*

acceptance of evidence as truthful and accurate transforms what has been evidence into fact. ***It is the facts upon which you base your verdict.***

Issue Does the impugned instruction incorrectly reverse the burden of proof?

Analysis The instruction reverses the burden of proof. Whereas a verdict of "Guilty" can only be based on evidence found to be both credible and reliable, the same is not true for a verdict of "Not Guilty".

Held Despite the isolated bad passage cited above, the remainder of the trial judge's charge made clear to the jury that it was to consider the ***whole*** of the evidence and that if, after doing so, it was left with a reasonable doubt as to the guilt of the accused, it must acquit. Thus the conviction is upheld.

See Also ***Robert [R v]***, Use of Evidence (p 11)

Baltzer [R v]

1974 NS/SC

Facts Baltzer, accused of murder, raised the defence of ***insanity***. The defence wanted to lead evidence of conversations that took place between Baltzer and several other persons in which Baltzer made comments "***of a weird nature***". The position of the defence is that these conversations were not hearsay and were relevant to the issue of ***insanity***.

Issue Are the conversations (led to show comments "***of a weird nature***" made by the accused) inadmissible ***hearsay***?

Analysis
- Conversations the accused had with others, if ***of a weird nature***, are relevant to the issue of insanity.
- Moreover, they are being introduced to prove that the accused said certain weird or peculiar things, not to prove the truth of what was said.

Held The conversations are not hearsay.

See Also ***Ratten v The Queen***, ***Griffin [R v]***, Circumstantial Evidence of State of Mind (p 46), ***Subramaniam v PP***, Hearsay (p 45)

Bleta v The Queen

1964 CA/SC

Facts Bleta stood accused of second degree murder. He killed the victim by stabbing him in the neck (admitted, and supported by uncontested testimony of a number of eyewitnesses). Bleta's defence was ***automatism*** caused by a blow to the head. The evidence regarding the blow to Bleta's head was ***uncontested***. Several Crown witnesses reported that after the blow, Bleta staggered and appeared dazed (not all eyewitnesses testified to this effect, but the testimony of those who did was ***uncontested***).

To support the automatism claim, the defence called psychiatrist Dr Stokes. Dr Stokes did not examine Bleta until ***3 months after the incident***, but he attended the trial and listened to all the evidence regarding Bleta's head injury. In examining Dr Stokes, counsel for the defence did not follow the established practice of asking a ***hypothetical question***, but asked Dr Stokes his views of the evidence given by the eyewitnesses. The Crown did not object.

Dr Golab, the Crown expert, saw Bleta 5½ hours after the killing and pronounced him normal and well-oriented. The judge clearly instructed the jury that it was free to accept or reject Dr Stokes' evidence in whole or in part.

Issue Was Dr Stokes' evidence inadmissible because it was not in the proper form (i.e. a hypothetical question)?

Analysis
- It is within the discretion of a trial judge to insist that the foundation of an expert opinion be laid by way of ***hypothetical question*** if he feels this is the best way of ensuring the matter is understood by the jury.
- However, the trial judge also has ***discretion*** to permit an opinion not based on a ***hypothetical question*** to go to the jury if the nature and foundation of the opinion has been clearly indicated by other means.
- It was clear to the jury that Dr Stokes' opinion was based on the uncontradicted evidence of Crown witnesses.
- Dr Golab's evidence might have been seen by the jury as substantially weakening Dr Stokes' opinion; the Crown

did not object at trial; and the jury charge clearly explained that the jury could reject Dr Stokes' evidence.

Held Dr Stokes' evidence was admissible (in particular, within the discretion of the trial judge to admit).

Ratio A trial judge has discretion to admit an expert opinion which is not based on a hypothetical question if the ***nature and foundation*** of the opinion has been ***clearly indicated*** to the jury ***by other means***.

Note This seems like an odd result to me. Would Ritchie J have been so understanding if this was an appeal of a conviction due to Crown conduct, rather than a Crown appeal of an acquittal?

See Also Hypothetical Question (p 26), ***Palma [R v]***

Brown [R v]

2002 CA/SC

Facts Benson's girlfriend claims that 3 weeks after the victim was found stabbed to death, Benson told her two things: (1) that he had committed the murder; and (2) that he had also confessed to his lawyer. After an extensive effort by the police, the Benson investigation was dropped and he was never charged.

Subsequently the accused, Brown, was arrested and charged with the murder. Brown successfully brought a *McClure* motion for disclosure of Benson's communications with his solicitor. Benson appealed to the SCC.

Issue
1. Should Benson's privileged communication be disclosed under the innocence at stake test in this case?
2. If so, what protection, if any does Benson get against what is essentially compelled self-incrimination?

Analysis
- *McClure* exception is supposed to be a last resort when there is a genuine risk of wrongful conviction.
- In this case, the motions judge ***misapplied*** the first part of the ***threshold test*** (the information may not be available from any other source). He should have held a *voir dire* to determine:
  - whether the girlfriend's hearsay evidence of Benson's confession was admissible:
    - under the Declarations against Interest (p 47) exception at common law; or
    - under the principled approach (as it was clearly ***necessary***!); and
  - whether Benson had ***waived*** his privilege by telling his girlfriend about the confession.
- If on re-application, the motions judge still ordered production of the privileged evidence, Benson must be protected under the residual ***principle against self-incrimination*** under ***Charter*** section 7.
  - This requires use and derivative use immunity.
  - But not transactional immunity!

Held The motions judge's grant of access to the disclosed materials was ***premature*** in this case.

Ratio A *McClure* application should only be successful if the accused does not have access to information that will be admissible at trial.

Note NH says that **it is inherent in this case that we are willing to take some risk of wrongful convictions to preserve the solicitor client relationship**.

See Also ***McClure [R v]***, ***Charter*** s 7 (p 146), Innocence at Stake Exception (p 77) under Solicitor-Client Privilege, ***Shirose [R v]***, ***National Post [R v]***, ***O'Brien [R v]***, ***Re Application under s 83.28 of the Criminal Code***

Carter [R v]

2005 BC/CA

Facts The accused was charged with some kind of sexual assault. The position of the defence ***from the outset*** was that the alleged events did not happen and that, even if they did, they were consensual. During the defence case, the defence led evidence of certain ***details*** contradicting complainants' stories that were not put to the complainants during cross-examination.

In closing arguments, the Crown invited the jury to draw an adverse inference on the credibility of the accused, essentially because the defence did not contradict the complainants on the details on cross-examination.

Issue

1. Was the "rule" in *Browne v Dunn* violated?
2. If so, was the Crown entitled to invite the jury to draw an adverse inference on the accused's credibility?

Analysis

- The application of the principle must be tailored to the facts of the case. There is no absolute rule.
- The reasons for judgment imply that non-confrontations could undermine the credibility of the accused, but that it depends on the precise circumstances:
    - Sometimes the position of the defence on matters on which the ***complainant*** was not cross-examined will be clear even without cross-examination.
    - In other circumstances, areas not addressed will not be significant in the overall context of the case.
    - However, where a ***central feature*** of a witness' evidence is left untouched, or even implicitly accepted, the absence of cross-examination may have a negative impact on the accused's credibility.

  Clearly, this case fits into the first or second of the above categories.
- The Crown may only invite juries to draw inferences against the credibility of the accused because of a "non-confrontation" by the defence in the clearest of cases (of which this is not at all one!).

Held The "rule" was not violated, and the Crown was not entitled to invite the adverse inference. New trial ordered.

Ratio Where a witness is given every opportunity to address the defence position during cross-examination, there is no violation of the "rule" in *Browne v Dunn* just because the defence leads direct evidence of ***details*** that were not put to the witness.

Note The main policy reason for this principle appears to be treating witnesses fairly by not impugning their truthfulness without first giving them a chance to respond (see ***Lyttle [R v]*** (p 112) ¶ 64 and *Carter* at ¶ 55). This explains the flexibility and fact-specific nature of the "rule".

See Also ***Lyttle [R v]***, "Rule" in Browne v Dunn (p 37), Cross-Examination (p 37)

Cassibo [R v]

1982 ON/CA

Facts Rosetta and Darlene accused their father of constant incestuous sexual assault over six year period. They both testified at trial that the assaults ended when they told their mother, Mrs Cassibo, about them (at this time they were age 12) and she subsequently stopped leaving them alone with their father.

Mrs Cassibo gave an interview to two police officers in which she corroborated the daughters' claims that they told her about the assaults when they were 12. One officer took notes during the interview and afterward, but they did not take a written statement from Mrs Cassibo nor did she sign or otherwise acknowledge their notes. At the interview and subsequently, Mrs Cassibo seemed genuinely concerned that her husband not go to jail.

At the trial, Mrs Cassibo testified for the Crown. She denied the daughters' claim that they had told her about the assaults. The trial judge found that she showed an apparent attitude of hostility toward her daughters. On cross-examination, Mrs Cassibo testified that she found a magazine containing a story entitled "My Daughter's Lies Sent My Husband to Prison!" in Darlene's bedroom after the daughters ran away from home.

On re-examination, Crown counsel told the judge he wished to question Mrs Cassibo about her prior statement. A *voir dire* was held to determine whether Mrs Cassibo was an ***adverse*** witness under section 9 of the *CEA*. During the *voir dire*, Crown counsel cross-examined Mrs Cassibo on her prior statement and at the close of the *voir dire*, the trial judge declared her to be ***adverse***. As this was a judge-alone trial, both counsel agreed that the evidence taken on *voir dire* would form part of the trial and thus Crown's re-examination was completed.

Issue

1. Does s 9(2) of the *CEA* limit s 9(1) so that it only applies to statements in writing or reduced to writing?*
2. Was a declaration that Mrs Cassibo was adverse within the discretion of the trial judge?

3. Was Crown counsel permitted to introduce evidence of Mrs Cassibo's prior statement on re-examination?
4. How should the evidence of a prior inconsistent statement be used in this case?

Analysis

PRELIMINARY

- Section 9(2) is an exception to section 9(1) and does not limit it: ***Milgaard [R v]***
- Section 9 does not affect the ***common law*** right of a party to cross-examine his own witness if in the judge's opinion the witness is hostile.
- The police notes do not count as a "statement in writing or reduced to writing" so 9(2) does not apply.
- The Crown was ***duty bound*** to explain why the assaults complained of in the charges ceased and thus was probably obligated to bring to light the prior statement.

DISCRETION TO DECLARE WITNESS ADVERSE UNDER SECTION 9(1)

- An inconsistent statement will not always be enough to ground a finding that a witness is adverse under *CEA* s 9(1). However, in other cases a judge may be warranted in declaring a witness to be adverse solely on the basis of a prior inconsistent statement.
- The judge is also entitled to take into account other facts. In this case, that includes the ***motive*** Mrs Cassibo had to support the defence (her wish to prevent her husband from going to jail).
- The trial judge was entitled to hold that Mrs Cassibo was adverse on the facts of this case.

RE-EXAMINATION

- It is open to the Crown to introduce evidence of the PIS on re-examination ***because*** the defence elicited the claim from Mrs Cassibo on cross-examination that her daughters never complained to her.
- Moreover (implied by *Little* case cited at p 6-055) on other facts it would be open to the Crown to call a witness to prove the PIS.

USE OF THE STATEMENT

- The evidence of the PIS merely affected Mrs Cassibo's ***credibility***.
- However, if this was part of the trial judge's decision to reject her testimony, then it removed a barrier to the acceptance of Rosetta and Darlene's testimony that they complained, which in turn would strengthen their credibility by removing a negative inference that could be drawn from their failure to complain.

Held Trial judge's guilty verdict upheld.

Note *: Section 9(2) has since been amended to include as well: statements recorded on audiotape, videotape, or otherwise.

See Also ***Canada Evidence Act*** s 9(1) (p 140), ***Wawanesa Mutual Insurance v Hanes***, Statutory Regime (p 43) under Attacking the Credibility of the Party's Own Witness, ***Milgaard [R v]***, ***McInroy and Rouse [R v]***, Recent Fabrication Exception (p 40), ***Stirling [R v]***, Re-Examination (p 38), ***Moore [R v]***

Castellani v The Queen

1969 CA/SC

Facts Castellani was accused of murdering his wife. His counsel prepared a list of 8 admissions. The Crown accepted 7, but not the eighth, which was framed rather self-servingly to benefit the accused.

Issue Can the accused insist on the Crown accepting an admission?

Analysis The accused cannot frame the wording of the allegation to suit his own purposes and then insist on admitting it.

Ratio It is for the Crown, not for the defence, to state the fact or facts which it alleges against the accused of which it seeks admission. Another way to put this is that the accused can't force the Crown to accept the admission of any fact until the Crown has alleged that fact (but the Crown is free to accept such admissions).

See Also ***Criminal Code*** s 655 (p 147), Formal (or Judicial) Admissions (p 57), ***Kinkead [R v]***

Corbett [R v]

1988 CA/SC

Facts While Corbett was on parole from a previous sentence for second-degree murder, he allegedly shot and killed Réal Pinsonneault. Corbett had several other previous convictions for armed robbery, car theft, etc. Two Crown witnesses, Marcoux and Bergeron, had lengthy criminal records as well. As Corbett denied the murder and M & B claimed to have seen Corbett commit it, the case turned on ***credibility***.

At trial, both M & B were "forcefully cross-examined" by defence counsel, who "made much" of their prior criminal records. The defence tried to keep Corbett's priors out of evidence, claiming ***Canada Evidence Act*** s 12 (p 141) contravenes the *Charter*.

Issue Can Corbett be cross-examined on his prior convictions?

Analysis

- What lies behind *CEA* s 12 is a legislative judgment that prior convictions bear upon the ***credibility*** of a witness.
- Prior convictions are simply evidence for the jury to consider, along with everything else, in assessing the ***credibility*** of the accused.
- Concealing the prior criminal record of an accused ***who testifies*** deprives the jury of information relevant to credibility and creates a serious risk it will be presented with a ***misleading picture***.
- Despite the contention that the jury cannot be trusted to avoid ***general propensity reasoning*** when faced with evidence of priors, the best way to balance and alleviate risks is to give the jury all the information but at the same time, give a ***clear direction*** as to the limited use they are to make of such information (NH flags **Dickson CJC's "great confidence" in jury following limiting instructions**).

Held In this case, with especial regard to the "deliberate attack on the ***credibility*** of Crown witnesses, largely based on their prior convictions" and the centrality of ***credibility*** to the case, Corbett's criminal record must be admissible.

Ratio

1. Section 12 of the ***Canada Evidence Act*** is constitutionally valid as it relates to the accused: the accused may be questioned about prior convictions for the purpose of assessing his credibility.
2. Despite the plain wording of s 12, the trial judge retains discretion to exclude evidence of prior convictions where the prejudicial effect outweighs the probative value. See: Use of Prior Convictions When the Witness is the Accused (p 18).

See Also Bad Character of the Witness (p 18), ***Cullen [R v]***, ***Titus v R***

Note I'm not sure about this, but if the accused does not testify, there might actually be no way for the Crown to get his priors into evidence…

Cuadra [R v]

1998 BC/CA

Facts Cuadra was accused of an 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, Service, testified at trial that he saw Cuadra holding the knife just before the stabbing. This testimony was ***inconsistent*** with Service's ***prior statement*** from the preliminary inquiry, in which he testified under oath that Cuadra never had a knife.

As this represented a serious credibility problem for a Crown witness, the Crown wanted Service to testify as to two prior acts of violence by Cuadra ("classic extrinsic misconduct evidence") in order to advance the theory that Service first lied because he was ***afraid*** of being harmed by Cuadra. The acts of violence were:

1. a vicious beating perpetrated by Cuadra ***before*** the stabbing that is the subject of this trial; and
2. another violent attack by Cuadra that occurred ***after*** the prior inconsistent testimony was given.

Issue Is testimony on one or both of the above acts of extrinsic misconduct admissible?

Analysis

- The first step (based on the ***B(FF) [R v]*** test) is to ensure the evidence is ***relevant to some other issue*** than the bad character of the accused.
    - In this case it is, since it can help the Crown rehabilitate Service's credibility by showing that he lied initially because he was afraid of the violence Cuadra was capable of.
    - Therefore, the evidence has probative value.
- The second step is to conduct a ***probative/prejudicial balance***.

Held The first, but not the second, prior act of violence is admissible because it occurred before the prior inconsistent testimony was given and is thus relevant to Service being ***afraid*** to tell the truth about the knife.

A jury instruction to limit the use of the evidence to the credibility issue is required to ensure that probative value outweighs prejudice.

Ratio Extrinsic misconduct evidence 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 prejudice.

See Also In ***Kinkead [R v]*** (p 109), the judge similarly did not take an all-or-nothing approach. In ***B(FF) [R v]*** (p 83), extrinsic misconduct evidence was allowed in because the defence "opened the door".

Cullen [R v]

1989 ON/CA

Facts The complainant, Lorraine Beutler alleged that Cullen assaulted her by threatening to run her over with a pick-up truck. The two had had a "tumultuous" relationship.

The Crown wanted to lead certain evidence against Cullen relating to an allegation that he had seriously assaulted Beutler two years earlier. Cullen had been acquitted of the charge arising from those events. Separately, the defence wanted to cross-examine Beutler on a charge ***against her*** for possession of burglary tools which had been disposed of by way of conditional discharge some time before Cullen's trial.

Issue

1. Is the Crown permitted to prove the alleged assault for which Cullen had been acquitted?
2. Is the defence permitted to attack a Crown witness' credibility by cross-examining her regarding the charge for possession of burglary tools for which she got a conditional discharge?

Held The Crown is not permitted to lead evidence relating to the charge for which Cullen was acquitted. However, the defence is permitted to cross-examine Beutler regarding the burglary tools.

Ratio

1. Conduct leading to a charge of which accused has been acquitted cannot be proved against him as a similar act.
2. Any ***ordinary witness*** may be cross-examined on discreditable conduct. The restrictive interpretation that s 12 of the ***Canada Evidence Act*** is given for accused persons does not apply to ordinary witnesses.

See Also ***Titus v R***, Other Discreditable Conduct (p 19), ***Corbett [R v]***

Note We passed over this case, as with ***Titus v R*** (p 135), in about 2 minutes of class time. **NH did not appear to think it tremendously important**. Note as well that, again, this case turns on ***credibility***.

DAI [R v]

2012 CA/SC

Facts For children under 14, s 16.1(7) forbids questioning the child about her abstract understanding of the obligation to tell the truth for the purpose of determining the admissibility of the evidence. There is no equivalent subsection under s 16. Section 16(3) reads:

> A person referred to in subsection (1) who ***does not understand*** the nature of an oath or a solemn affirmation but is ***able to communicate the evidence*** may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

Before this case, some authorities required that people with mental disabilities understand the nature of the promise to tell the truth in order to testify.

Issue Does section 16(3) of the ***Canada Evidence Act*** require that people with mental disabilities have an abstract understanding of the obligation to tell the truth?

Ratio A person with a mental disability testifying on a promise to tell the truth under s 16(3) need not have an abstract understanding of the obligation to tell the truth.

See Also ***Canada Evidence Act*** s 16(3) (p 142), Mental (In)Capacity (p 30) in Competence and Compellability, ***JZS [R v]***, ***Parrott [R v]***

DD [R v]

2000 CA/SC

Facts The child who was allegedly sexually abused by the accused delayed considerably before bringing a complaint. The Crown wanted to call an expert witness (who had never interviewed the child) to give a general explanation that there are many reasons why children who have legitimately suffered abuse might not promptly bring a complaint.

It is currently the law of Canada that delay in making a complaint of sexual abuse cannot, without other evidence, ground an adverse finding of credibility against the complainant.

Issue Can an expert witness to be called to give an opinion which in its essence reflects the current state of the law?

Analysis

- Expert evidence is only ***necessary*** to provide a "ready-made inference" which the trier of fact, due to the technical nature of the facts, is unable to formulate.
    - Evidence reflecting the current state of the law merely reflects an undeniable proposition.
    - It has no technical nature whatsoever.

Held The expert testimony fails the ***necessity*** requirement and is therefore ***inadmissible***.

Ratio There is nothing unique or scientifically puzzling about evidence which merely reflects an undeniable proposition. It is properly the subject of a simple ***jury instruction***, not expert testimony.

Note

- *DD* is theoretically distinguishable from ***Llorenz [R v]*** by the fact that the expert in this case was going to give a general opinion without having interviewed the complainant. But even had the witness interviewed the child, it seems unlikely that the testimony would be admissible merely for the opinion the Crown was seeking.
- NH considers *DD* to be a **declaration of war against experts**.
- NH says **the same logic as used in this case would hold where the defence tried to bring in expert evidence to testify to the unreliability of direct eyewitness evidence**.

See Also Limiting Admissibility of Expert Evidence (p 28), ***Abbey v R***, 6 Risks of Expert Evidence (p 28), ***Parrott [R v]***

Dhillon [BC] [R v]

2001 BC/CA

Issue

1. What is the difference between direct and circumstantial evidence?
2. What are the sources of error in direct evidence?
3. What are the sources of error in circumstantial evidence?
4. Which kind of evidence is more reliable?

Analysis

1. ***Direct*** evidence is evidence which goes directly to the proof of a fact in issue, without need for inference: "I saw the accused stab the victim with a knife." ***Circumstantial*** evidence is indirect because an inference is required to prove the fact in issue: "I walked into the room and saw the accused standing over the victim holding a knife."
2. There are two sources of error in ***direct*** evidence. The witness may be
    a. lying; or

b. mistaken

3. ***Circumstantial*** evidence adds a third source of error to the above two: the wrong inference may be drawn.
4. It depends. However, "[s]ometimes circumstantial evidence is more persuasive than direct evidence. The evidence of one witness may contradict that of another, but the circumstances . . . are often not in dispute."

Note This case is purely illustrative and you probably won't have to cite it for anything, unlike the other *Dhillon* case: ***Dhillon [ON] [R v]*** (below).

See Also Direct Evidence vs Circumstantial Evidence (p 10), ***Robert [R v]***, ***Baltrusaitis [R v]***

Dhillon [ON] [R v]

2002 ON/CA

Facts Dhillon was accused of murdering the victim, Sandhu, by ringing Sandhu's doorbell and shooting him when he opened his front door. A key part of the Crown case was the testimony of B.S., a ***jailhouse informant*** with 43 prior convictions, ***34 for offences of dishonesty***. B.S. had also offered to be a police informant in at least one other case, and the ***police declined to use*** his alleged evidence on that occasion. B.S. came forward a year after sharing a cell with Dhillon claiming that Dhillon confessed to him. Like Dhillon, B.S. was a Sikh. They had a common ethnic origin, common language, and shared the common attribute of being strangers in a foreign land. No evidence of an ***obvious*** benefit to B.S. for testifying was led at trial.

During the trial (separately from the testimony of B.S.), the defence wanted to show that the police investigation was inadequate and that the police zeroed in on Dhillon as a suspect too early. The defence was concerned that cross-examination of the police on these lines would ***open the door*** for the Crown to lead ***hearsay*** evidence from police witnesses on Dhillon's prior history, including his alleged involvement in drug smuggling. The defence did not allege that a particular suspect was more likely than Dhillon to have committed the crime but confined itself to alleging that the police investigation was inadequate.

Issue

1. Do attributes that would make the accused ***more likely to confide*** in a *Vetrovec* witness count as ***confirmatory evidence*** (For example, commonality of language, or some aspect of trust)?
2. What Crown evidence is admissible to rebut the general theory that a police investigation was inadequate?

Analysis

- B.S. is the ***quintessential*** *Vetrovec* witness.
- The only evidence capable of confirming B.S.'s evidence was B.S.'s claim that Dhillon confessed to looking through the front window of the house before ringing the doorbell, since only someone who was there would know there was such a front window. However, this evidence is ***weak***, particularly since B.S. had been out of jail before he turned informant and could have investigated the *locus in quo* himself.
- While defence attacks on the police investigation may open the door to hearsay evidence to rebut these allegations, the ***probative value*** of the evidence must outweigh its ***prejudicial effect***. Evidence of the ***general bad character*** of the accused might be relevant where it is used to establish a ***link*** between the police case against the accused and its abandonment of other leads.
- Where such a ***link*** is not sought to be shown, the general bad character evidence has no probative value.

Held Evidence that the accused was more likely to confide in B.S. is not confirmatory, and in this case the general bad character evidence is not admissible to rebut an allegation that a police investigation was inadequate.

Ratio

1. Evidence suggesting that an accused was more likely to confide in a *Vetrovec* witness is not capable of being confirmatory, since even in that case, the question is not ultimately whether the accused did confide, but the truthfulness of the *Vetrovec* witness's account of that confidence.
2. The Crown must be given a ***fair opportunity to rebut*** allegations of inadequate investigation, subject to the usual limitations that the probative value of the evidence must outweigh its prejudicial effect. Thus, the evidence must be ***relevant*** to more than the general bad character of the accused.

Note
- With regard to the issue of confirmatory evidence in *Vetrovec* warnings, NH **says that *Dhillon* expands the idea of peripheral-ness and narrows the scope of materiality**.
- This is one of those cases, like ***Kinkead [R v]*** that bears re-reading in the days before an exam, since it is difficult to capture all its nuances in a case brief.

See Also ***Khela [R v]***, The Vetrovec Witness (p 19), ***Murrin [R v]***, Bad Character of the Accused (p 14), Opening the Door Principle (p 8)

Ferris [R v]

1994 CA/SC

Facts Accused was arrested for murder and taken into police custody. He was permitted to ***telephone*** his father from the police station. A police office walked past the accused while he was on the phone. On the first occasion, the accused was overheard to say "***I've been arrested***" and on the second occasion, "***I killed David***". The policeman heard the accused talking before, after, and in between the two sets of quoted utterances, but apart from the two quoted phrases, he could not tell what was said.

Issue Is the police officer's evidence about the two phrases he overheard admissible?

Analysis
- The only possible relevance the words could have is as an admission by the accused that he killed David.
- Yet the policeman did not hear context of the surrounding words. There are myriad examples, such as "They accused me of killing David" that would leave the part which was overheard without probative value.

Ratio Admissions of the accused that are overheard out of context have such tenuous probative value and such a great prejudicial effect that they should be excluded.

Note This case isn't actually part of the readings. You should cite it as *Ferris,* cited in ***Hunter [R v]***.

See Also ***Hunter [R v]***, Partial Overhears (p 58), Probative Value of Informal Admissions (p 57), ***Palma [R v]***, ***Allison v R***

Fliss [R v]

2002 CA/SC

Facts The police got a ***warrant*** to record a conversation with Fliss. During the conversation, Fliss confessed to a murder in significant detail. The "wired" officer in question did not make any independent notes because the conversation had been recorded according to what appeared to be a valid warrant. The day after the conversation, the officer listened to the recording and made "***corrections***" to the transcript of it based on his recollection of the events. After these "corrections", there remained 89 places in the 50-page transcript in which the word "***inaudible***" appeared without having been filled in. The officer's testimony showed that he had only ***partial*** recall at the time of the corrections: "I could recall ***parts*** of it and put corrections in it that may have been inaudible on the tape."

The trial occurred 17 months later. The officer could no longer remember the level of detail desired by the Crown (he said he could remember the "***gist***" and the "***general situation***"). The trial judge ruled that the ***warrant*** had been wrongly issued and excluded the recording and transcript under ss 8 & 24(2) of the ***Charter***. The trial judge nevertheless permitted the officer to give testimony by basically reading the corrected transcript into the record.

Issue Was the officer at liberty to recite the entire transcript to the jury because, the day after the recording, he had a substantial recollection of ***parts*** of the conversation?

Analysis
- The officer was entitled to ***refresh*** his memory by reviewing the corrected transcript, but this is clearly not what happened.
- The evidence also failed to meet the Test for Admitting PRR (p 36):
    - The officer did not ***affirm under oath*** that he knew the transcript to be true at the time.
    - Binnie J seems to be equally or more perturbed that the evidence of the officer had only a partial

recollection of the events described in the transcript afterward, as evidenced by the fact that he could not correct all the "***inaudibles***", which leads to an inference that he also didn't remember parts on the transcript not marked "***inaudible***". It isn't really clear whether this falls under the test, but it seems to rebut the "fresh and vivid" criterion.

Held Allowing the officer to read the whole transcript into evidence, including the parts that he did not recall the day after the conversation, violated the ***Charter***.

Ratio Where there is evidence that the witness had only a partial recollection of the events purportedly described in the PRR record, the Test for Admitting PRR is not met.

Note
- NH says that, ironically, **if the officer had just made detailed notes of the conversation, he would have been able to get them into evidence under PRR even though they likely would have been less reliable**.
- On another case with the same facts except for the ***Charter*** violation (if that is imaginable), maybe the evidence would have gotten in? ¶ 66 shows that the ***Charter*** was a driving force in the decision.

See Also ***JR [R v]***, Past Recollection Recorded (PRR) (p 36), Refreshing a Witness' Memory (p 35), Hearsay (p 45)

Gonsalves [R v]

2008 ONCA

Facts Mirza and Iwashita sold audio speakers out of a van. They were robbed at gunpoint by three men, one of whom they identified as the accused. M&I both got good looks at accused as he approached the van. M also got out of the van and spoke to the accused for 5 minutes before the robbery. M&I reported the robbery to the police.

Immediately after the robbery, M&I separately gave consistent verbal descriptions of the accused to the police (these descriptions were relatively general, but were consistent with the accused's age, height, ethnicity, and clothing. 11 days after the robbery, M&I separately identified the accused in a 12-pack photo line-up in which the photos were presented ***sequentially***, in an ***impartial*** manner, and the complainants were informed they did not have to pick any photo. Both M&I identified the accused in court.

However, the line-up was not video- or audiotaped, the officer did not show photos #11 & #12 after the accused was identified as photo #10; and the line-up was not done with a "***double-blind***" administrator (an officer independent of the investigation and ignorant whether or not the suspect is in the photo pack).

Issue
1. What weight should be given to an in-court ID of the accused by an eyewitness?
2. What happens when identification evidence is tainted by inappropriate procedures?
3. Were the deficiencies of the photo line-up in this case sufficient to render the identification unreliable?

Held The identification, taking into account all the circumstances in the present case, was ***reliable*** despite some failures to follow the most up-to-date procedures for the conduct of photo line-ups. Accused found guilty.

Ratio
1. In-court identification of the accused by an eyewitness should be accorded little weight.
2. When identification evidence is tainted by inappropriate procedures, it is not subject to s 24 *Charter* relief and therefore inadmissible. The flaw goes to the issue of ***weight***.
3. Some deficiencies in the conduct of a photo line-up will not necessarily render the identification unreliable.

Note This case provides a very solid overall review of the law of eyewitness evidence by C Hill J, of *Hill v Scientology* fame. For this reason, a useful case for re-reading close to exam time. Also, the accused was a ***stranger***.

See Also Other Dangerous Evidence: Eyewitness Testimony (p 22), ***Swanston [R v]***

Graat [R v]

1982 CA/SC

Facts Graat was returning home from a sailing party at which he had been drinking. Initially, Graat's friend Wilson was

driving and Graat was dozing in the back seat. After Wilson drove himself home, Graat took over driving.

Graat was pulled over after driving erratically. The officer who pulled him over and the desk officer at the police station both testified that Graat's ability to drive was "impaired by alcohol", but there was no breathalyzer evidence. Graat testified in his own defence. Wilson testified that he would not have allowed Graat to drive home had he thought Graat was too drunk to drive.

Issue

1. Are the two officers' opinions that Graat was too drunk to drive inadmissible as opinion, rather than fact?
2. Is the officers' evidence inadmissible because "impaired by alcohol" is a legal test from the *Criminal Code* and they are not qualified to give expert evidence on a legal issue?

Analysis

- There is no clear line between fact and opinion.
- A non-expert may give evidence that someone was intoxicated, and to a particular degree, just as he may give evidence on speed, identity, or emotional state &c &c.
    - This is because it may be difficult for the witness to narrate his factual observations individually.
    - The opinion simply allows a witness to give a ***compendious*** statement of facts that are too subtle and too complicated to be narrated distinctly.
- If non-expert evidence is excluded, the defence may be seriously hampered, since the accused would be denied the right to call witnesses such as Mr. Wilson to testify that he was not, in their opinion, impaired.
- Degree of intoxication and ability to drive can be resolved on the basis of ***common ordinary knowledge and experience***. An ordinary person has the necessary expertise, and a police officer's opinion is no more expert than that of a lay person.

Ratio

1. Non-expert witnesses may give direct evidence of their opinions on matters of ***common ordinary knowledge and experience*** (such as, for example, degree of impairment by alcohol and ability to drive).
2. Impairment is a question of fact and does not become a question of law just because the draftsman of the *Criminal Code* happened to use the ordinary English phrase "ability to drive . . . impaired by alcohol".

See Also Common Knowledge (p 23)

Grandinetti [R v]

2005 CA/SC

Facts RCMP suspected Grandinetti (G) of the murder of his aunt Connie (C). Lacking solid evidence, they began a "Mr Big" operation using 3 undercover cops. At no time was G aware of the true identity of the officers. It was not easy to get G to confess. Finally, the undercovers told G that the ongoing investigation of G for C's murder was a liability to their fictitious criminal organization. They ***forcefully suggested*** that he come clean to them so they could use their ***corrupt police contacts*** to influence the investigation away from G. In this manner, the undercovers got G to show them the *locus in quo* and obtained a confession, which they were able to record.

G raised the ***defence of third party involvement***. The defence alleged that Papin (P) had motive, opportunity, and propensity to murder C. Motive was said to arise from a threat that P made to C more than a year before the murder and C's subsequent statements that she feared P. Opportunity was said to come from the fact that P was released from prison 3 days before C's death. There was "ample" evidence of a significant number of incidents showing that P had a ***general propensity*** for violence.

Issue

1. Is Grandinetti's confession potentially inadmissible because it was made to persons in authority, thus requiring the Crown to prove that G confessed voluntarily?
2. Is the evidence regarding Papin admissible under the defence of third party involvement?

Analysis **PERSON IN AUTHORITY**:

- Policy rationale: avoid the unfairness and unreliability of admitting statements made when accused believes himself to be under the coercive power of the state.

- The test is largely subjective but has an objective component (honestly believe on reasonable grounds).
- There is no fixed catalogue of people who qualify as persons in authority, so case-by-case analysis is required, but the accused must believe the receiver is ***acting on behalf of*** the authorities. Ability to corruptly influence an investigation is not enough.

DEFENCE OF THIRD PARTY INVOLVEMENT:

The fact that P was released from prison 3 days before the murder, on its own, is "palpably unprobative". Theory on motive amounts to a chain of speculation joined by gossamer links. General propensity evidence without any reasonable links to the murder is inadmissible.

Held The confession is admissible but the third party involvement evidence is not.

Ratio

1. When the accused confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt police officers, the state's coercive power is not engaged.
2. If there is an insufficient connection between the third party and the crime, the defence of third party involvement will lack the requisite air of reality and the evidence purportedly supporting it is inadmissible.

Note NH highlighted **something pointed out by Abella J at ¶ 36**: "statements can sometimes be made in such coercive circumstances that their reliability is jeopardized even if they were not made to persons in authority".

See Also ***Oickle [R v]***, ***Grewall [R v]***, Admissions and Confessions (p 57), ***Fliss [R v]***, ***Singh [R v]***, ***Lyttle [R v]***

Grant [R v]

2009 CA/SC

Facts Three cops on neighbourhood patrol duty were charged with ensuring a safe student environment around 4 schools. The two undercovers drove past Grant, an 18-year old black man who stared at them unusually intensely. They sent the third cop, a uniform named Gomes, to talk to Grant. They wanted to know whether Grant was a student at one of the schools they were assigned to monitor. Gomes "initiated a chat", blocking Grant's path in the process.

At one point in the chat, Grant nervously adjusted his jacket. This prompted Gomes to ask him to "***keep his hands in front of him***". At this point, the two undercover cops walked up to see if everything was OK. They took up "***tactical positions***" behind Gomes, further blocking the path, and ***flashed their badges***. The cops admitted not having reasonable suspicion at this point of any criminal activity. Gomes then embarked on a ***pointed line of questioning*** that caused Grant to volunteer that he was carrying a ***gun***. The cops then arrested Grant and charged him with a series of firearms offences. There was no suggestion of any racial profiling or inappropriate discrimination.

Issue

1. Did the cops arbitrarily detain Grant in violation of section 9 of the ***Charter***?
2. If so, did they breach Grant's section 10(b) right to counsel?
3. If either of Grant's ***Charter*** rights were breached, should the gun be excluded from evidence at Grant's trial under section 24(2) of the *Charter*?

Analysis **STAGE 1**: Breach of ***Charter*** Rights

- Detention within the meaning of s 9 includes ***psychological*** detention as well as regular old detention. This comes in two flavours:
  - where the individual has a legal obligation to comply with police directions; and
  - where the individual has no legal obligation, but a reasonable person would conclude by reason of the state conduct that he has no choice but to comply.

  Not all police questioning will be a psychological detention.
- While Gomes telling Grant to "***keep his hands in front of him***" was inconclusive by itself, a detention crystallized when this was combined with the other two officers ***flashing their badges*** and Gomes' ***pointed questioning*** driven by particularized suspicion (but not reasonable suspicion). Grant's youth and inexperience were factors.
- Short-term psychological detention is arbitrary when it is not justified by legal grounds or reasonable suspicion

(reasonable suspicion is a slightly lower standard than reasonable and probable cause).

- Since there was no reasonable suspicion, the detention was arbitrary and s 9 was violated.
- Since s 10(b) rights kick in immediately on detention, s 10(b) was also violated.

STAGE 2: Section 24(2) Analysis

The gun was ***derivative evidence*** because it was obtained as a result of the accused's own incriminating statements, thus temporally and causally related to the *Charter* breaches. Moreover, it was ***not*** otherwise discoverable since the police would not have found it but for the admission they elicited from Grant.

A. Seriousness of the State Conduct (p 65): Cops went too far, but this was an understandable mistake. They did not believe they were detaining Grant. The breach was neither deliberate nor egregious and would not greatly undermine public confidence in the rule of law.
B. Impact of the Breach on the Charter-Protected Interests of the Accused (p 66): The subtly coercive situation deprived Grant of his freedom to make an informed choice as to how to respond. The impact of the breaches was not severe, but more than simply minimal. The ***non-discoverability*** of the gun ***aggravates*** the breach.
C. Society's Interest in a Trial on the Merits (p 66): The gun is both highly ***reliable*** evidence and ***essential*** to the Crown's case. The seriousness of the offence cuts both ways and is unhelpful.

The fact that the officers were operating under legal uncertainty and not aware they were breaching Grant's rights tips the balance in favour of admissibility. This case will render such conduct less justifiable going forward.

Held Although the cops did not know they were detaining Grant, they breached his ss 9 & 10(b) rights. However, it would not bring the administration of justice into disrepute to admit the gun, so it is admissible.

Note *Grant* defines an extensive balancing test for excluding evidence under s 24(2). The legal principles involved are discussed at great length in Modern Grant Balancing Test under Section 24(2) on p 65.

See Also ***Charter*** ss 9, 10(b) & 24(2), Exclusion of Evidence under the Charter (p 63), ***Singh [R v]***, ***Turcotte [R v]***, ***Fliss [R v]***

Grewall [R v]

2000 BC/SC

Facts A joint trial was held for the three men, AG, SG, and ST, who were accused of murdering AG's wife B. The Crown had obtained, via wiretap, a lengthy ***telephone*** conversation between SG and his sister KG. Counsel for each of the co-accused objected to the following statement made during the conversation (**#1**):

> **KG**: [ST] goes that [AG] said he was gonna pay [ST] so much money that if he does it and then he goes that [AG] planned it, you [*i.e. SG*] pulled the trigger, and he drove the getaway car.

Counsel for SG and ST also objected to the following, which occurred a little further on in the conversation (**#2**):

> **SG**: And I'm gonna tell it how, why [ST] did it and where he did it you know.

Issue

1. Are either of statements #1 or #2 inadmissible?
2. If so, what is the proper remedy? (Jury instruction, editing tape of the conversation, or ordering severance?)

Analysis **STATEMENT #1**:

- It is an out-of-court statement by KG reporting what ST said about AG and SG.
- So despite being an admission by ST, it is hearsay in respect of two co-accused: AG and SG.
    - Note that it is actually double hearsay: the recorded conversation is of out-of-court statement made by KG (first level of hearsay) recounting what ST said about AG and SG (second level of hearsay).
- It is capable of dealing highly prejudicial splash damage to two co-accused merely to get a bit of probative evidence against another one. It is probably not realistic to expect that a limiting instruction would fix this.

STATEMENT #2:

- On the other hand, statement #2 is ***not hearsay at all***!

- This is because it is merely an admission of an accused (SG): ***Palma [R v]***. It does not even purport to report anything that the other two accused, or anyone else, said, for their truth or otherwise.
- However, since admissions are only admissible against the particular accused who made them, this requires a specific and clear limiting instruction to the jury that it cannot be used as evidence of ST's involvement.

Held Statement #1 is completely ***inadmissible*** hearsay and will be ***edited out***. Statement #2 is ***admissible against SG*** (because he made it) as evidence of a possible conspiracy, but ***not against ST***.

Ratio An out of court confession is only admissible against the particular accused who made the statement. It is not admissible against the co-accused.

Note This case is general authority for the issues surrounding joint trials, but most of the law has been pushed into Admissions of Co-Accused in Joint Trials (p 60) in order to keep this case brief, well, . . . brief.

See Also ***Malik [R v]***, Hearsay (p 45)

Griffin [R v]

2009 CA/SC

Facts Griffin was accused of murdering Poirier over a drug debt. The issue at trial was ***identity***. The Crown's theory was supported by direct and circumstantial evidence. A comment that Poirier made to his girlfriend Jennifer Williams a few days before the murder belonged to the latter category: "If anything happens to me it's your cousin's family". By this, Williams understood that Poirier meant Griffin.

The defence advanced a theory that several people other than Griffin might have had motive to kill Poirier.

Issue Is Poirier's out-of-court comment to Williams inadmissible hearsay?

Analysis

- Since Griffin is the third party in the chain Williams ← Poirier ← Griffin, if the evidence was tendered to prove Griffin's intentions, it would be inadmissible double hearsay unless it fit into an exception or was admissible under the principled approach. Considered as double hearsay, it does not fit any exception or the principled approach, so it is not admissible as proof of Griffin's intentions.
- Poirier's statement was tendered as evidence of the fact that Poirier himself feared Griffin.
    - Tantamount to a statement by Poirier: "I am afraid of Griffin". It is similar to ***Ratten v The Queen***, although to me it seems a bit closer to being ***hearsay***.
    - However, it is admissible under the ***state of mind*** exception to the hearsay rule.
- The statement was indirectly relevant to ID because it was relevant to ***motive***:
    - The state of the relationship between a deceased and an accused in the time period leading up to the former's murder is ***probative*** of the issue of motive.
    - In turn, that evidence of motive is relevant and admissible particularly where, on the issues of identity and intention, the evidence is purely circumstantial.
- Poirier's state of mind took on an elevated importance in light of the defence argument: Poirier's ***particularized fear*** of Griffin was evidence that tended to rebut the defence proposition that someone other than Griffin had a motive to kill Poirier.
- This evidence clearly requires a careful ***limiting instruction***. The jury must:
    - use the testimony only as evidence of Poirier's state of mind and not to support an inference of Griffin's intention; and
    - (as with all hearsay), carefully assess the credibility of the witness (i.e. Williams) recounting the utterances of the unavailable witness (i.e. Poirier).

Held Poirier's declaration of his state of mind is admissible as an exception to the hearsay rule.

Ratio An out-of-court statement adduced as proof of the present state of mind of the declarant is admissible as an exception to the hearsay rule if:

1. the declarant's state of mind is ***relevant***;
2. the statement was made in a ***natural manner***; and
3. the statement was ***not*** made ***under circumstances of suspicion***.

See Also Declarations of Present State of Mind (p 48), ***Baltzer [R v]***, ***Ratten v The Queen***

Handy [R v]

2000 CA/SC

Facts The accused was charged with sexual assault causing bodily harm on the victim. As the accused claimed the sex was consensual, the case ultimately turned on ***credibility***, and the Crown sought to prove that the accused had a propensity to inflict injuries during sex ***and*** would not take ***NO*** for an answer. To this end, the Crown sought to introduce evidence from the accused's ex-wife about ***seven incidents*** with "similar facts" to the alleged offence against the complainant in this case.

There was some evidence of ***collusion*** between the complainant and the ex-wife. Among other things, the ex-wife told the complainant—before the alleged sexual assault—that the complainant could get $16,500 from the Criminal Injuries Compensation Board and "all you have to say is that you were abused".

Issue
1. How does the evidence of ***collusion*** affect admissibility of the similar fact evidence advanced by the Crown?
2. What is the test for admissibility of similar fact evidence?

Analysis
- While trial judges are often called upon to distinguish between issues of admissibility and issues of weight, in considering SFE, it is impossible to draw a clear line since admissibility depends on weight.
- **COLLUSION**:
  - In the case of specific propensity evidence, the ***probative value*** is entirely based on improbability of coincidence. For this reason, issues like possible ***collusion*** need to be factored into probative value, since collusion destroys the very independence on which the improbability of coincidence is based.
  - The evidence went beyond mere opportunity: it is the "whiff of profit".
- **APPLICATION OF THE HANDY FACTORS**:
  - The narrow issue in question is not ID or *mens rea*, but the *actus reus*, since the accused claims that the complainant consented and the *actus reus* requires lack of consent. This broadly turns on credibility.
  - Probative value:
    - ***Proximity in time*** to similar acts: the alleged offence took place only a few months after the ex-wife's seven alleged events. This factor points toward admissibility.
    - ***Similarity*** to previous acts: there were significant ***dissimilarities***.
    - ***Number*** of occurrences of previous acts: 7 is a big number, pointing toward admissibility.
    - ***Circumstances*** surrounding or relating to similar acts: in this case, this may be most crucial feature since ex-wife and accused had been in a long-term relationship with long periods of consensual sex, while the complainant is alleging a one-night stand in a motel room.
    - ***Distinctive*** features: other than alleged repetition, acts had no highly distinctive features.
    - ***Intervening*** events: none were involved in this case.
    - ***Quality*** of the evidence that similar acts actually occurred: the accused did not admit them and mounted a sustained attack on the ex-wife's credibility. In cases not involving SFE, this would normally be left for the jury. However, with SFE admissibility is bound up with and dependent on probative value and the judge must believe that the evidence is reasonably capable of supporting the inference desired. In this case, while the SFE might raise an inference about the accused's behaviour with his ex-wife, it does not appear capable of raising the inference that he wilfully proceeded in the same way in this case.
  - Prejudice
    - ***Moral prejudice***: the SFE is highly inflammatory, especially because it alleged a pattern of

domestic sexual abuse that might be seen to be worse than one-off drunken acts in a motel room. There is significant potential for moral prejudice.
    - ***Reasoning prejudice***: there is great potential that the jury will be distracted from its focus on the charge itself, and that this will be aggravated by the time consumed leading the SFE.
  - Prejudice outweighs probative value, so this evidence would be excluded even if the (determinative) collusion issue had not already dictated exclusion.

Held The similar fact evidence in this case must be excluded altogether (admissibility, not weight) because:

1. Defence established an air of reality to the allegations of collusion which the Crown failed to rebut. This is determinative of inadmissibility on its own.
2. As a separate and independent ground of inadmissibility, the prejudicial effect of the evidence outweighed its probative value based on the *Handy* factors.

Ratio

1. Where there is an ***air of reality*** to allegations of collusion in similar fact evidence, the onus is on the Crown to show, on the ***balance of probabilities***, that the SFE isn't the product of information sharing in order for it to be admissible.
2. See The Handy Factors (Probative/Prejudicial Balance) (p 16)

See Also Similar Fact Evidence (p 14)

Hebert [R v]

1990 CA/SC

Facts The accused declined to make a statement, so the police then put an undercover officer in his cell for the purpose of ***eliciting*** a confession. The officer successfully got the accused to incriminate himself.

Issue Did the police ruse violate the accused's section 7 right to silence?

Held The accused's section 7 right to silence was violated ***and*** the confession must be excluded under s 24(2) because its admission would bring the administration of justice into disrepute.

Ratio The police ruse violates the right to silence if the officer actively ***elicits*** the confession. However, the section 7 right is not violated if the officer is merely in passive receipt of the confession.

See Also ***Singh [R v]***, ***Charter*** s 7 (p 146), ***Charter*** s 24(2), Right to Silence, Silence and the Charter (p 69), ***Grant [R v]***, ***Oickle [R v]***

Henry [R v]

2005 CA/SC

Facts Riley and Henry were charged with murdering a man by wrapping his head in duct tape. They were tried as co-accused in two trials. After the first trial, their conviction was overturned due to a bad jury instruction and they were granted a second trial (i.e. a ***retrial*** on the same indictment). At both the first and second trials, both R and H testified in their own defences (i.e. the second trial was an **A/A$_V$** scenario for both accused).

Issue How, if at all, may the Crown use R and H's prior testimony from the first trial during the second trial?

Analysis

- The purpose of s 13 is to protect individuals from being indirectly ***compelled*** to testify against themselves. It applies when the state protects the witness as *quid pro quo* for full and frank testimony under compulsion.
- In a ***retrial*** on the same indictment (i.e. **A/A$_V$**), the *quid pro quo* underlying section 13 is not present.

Held The prior testimony of Riley and Henry can be used both to impeach their credibility and to prove their guilt.

Ratio The Crown may never lead an accused's prior testimony made during a previous trial as part of its case-in-chief, as this would violate s 11(c) of the ***Charter***. In an **A/A$_V$** scenario, and only in an **A/A$_V$** scenario, the Crown can make

whatever use it wants of the accused's prior testimony from a previous trial on the same indictment.

Note Obviously, the *ratio* must be qualified with "except in a prosecution for perjury or the giving of false evidence".

See Also ***Charter*** s 13 (p 146), ***Noël [R v]***, Section 13 of the Charter (p 71), ***Re Application under s 83.28 of the Criminal Code***, Protection of a Witness (p 71)

Howard [R v]

1989 CA/SC

Facts Howard and Trudel, were charged with murder. The police lifted footprint evidence from the *locus in quo*. There were two trials. In the first trial, Howard and Trudel were tried jointly. A new trial was ordered. Before the second trial, Trudel pleaded guilty and accepted a statement of facts that put him at the scene. During the second trial (of Howard alone), Trudel did not testify and his guilty plea was not adduced in evidence. The defence called a footprint expert who testified that the footprints found by the body of victim did not belong to (former) co-accused (and now guilty pleader) Trudel.

Issue Can the Crown ask the defence expert, on cross-examination, whether the fact that Trudel pleaded guilty and admitted being at the *locus in quo* would change his opinion that the footprints were not those of Trudel?

Held No.

Ratio Per Major and Fish JJ, ***Lyttle [R v]*** (p 112) ¶ 58:

> *Counsel should not inject bias into the application of the witness' expertise by asking the witness to take into account a fact that is corroborative of one of the alternatives he is asked to "scientifically determine".*

Note This case is not directly part of the readings but is cited and "clarified" in ***Lyttle [R v]*** (p 112) and is clearly useful to know from the point of view both of understanding how the law applies to the particular facts of *Lyttle* and generally the kinds of issues to be alert to on exams.

See Also Cross-Examination (p 37)

Hunter [R v]

2001 ON/CA

Facts Hunter was charged with attempted murder and various gun-related offences. A policeman alleged that Hunter pointed a gun at him and pulled the trigger but he heard a clicking noise and the gun didn't fire. The police story had some serious inconsistencies. Hunter denied ever having the gun. His defence was that the police assaulted him on his arrest and planted the gun on him.

The Crown sought to call a witness, Lorenzo DiCecco, whose evidence was that on the day of the preliminary hearing, he was walking past Hunter and Hunter's lawyer, who were talking together, and overheard Hunter say "***I had a gun, but I didn't point it***." DiCecco acknowledged that he had just caught that part of the conversation and agreed that there might have been conversation both before and after the overheard utterance.

Issue Is DiCecco's evidence of Hunter's out-of-context utterance admissible?

Analysis

- This is the same issue as in ***Ferris [R v]*** and gets exactly the same result.
- The Crown had argued that the DiCecco evidence (which was heard at trial) did not constitute a reversible error. One of the reasons the Court of Appeal disagreed is because at Hunter's first trial, the DiCecco evidence was not called, and the first trial resulted in a deadlocked jury.

Held The partial overhear is inadmissible. The significant prejudicial effect outweighs any tenuous probative value.

Note A second issue in this case is that the trial judge basically instructed the jury that it could draw an inference of guilt

(or non-innocence) because the accused "failed" to ask the police the reason for his arrest. This constituted an independent reversible error.

See Also ***Ferris [R v]***, Partial Overhears (p 58), Probative Value of Informal Admissions (p 57), ***Palma [R v]***, ***Allison v R***

J-LJ [R v]

2000 CA/SC

Facts The facts of this case are unspeakably awful. To make a long story short, the accused was charged with sexually assaulting two infant boys (probably his sons). There was circumstantial physical evidence suggesting the victims had in fact been assaulted. The defence wanted to call a psychiatrist, Dr Beltrami, to testify that the crimes against the victims must have been committed by a serious deviant, and that the accused did not fit the profile.

In terms of profiling the ***accused***, Dr Beltrami was to testify as to the results on two sets of tests:

A. Personality tests containing standardized questions administered in conjunction with a form of lie detector. These tests were designed to identify potential personality characteristics and ***not specifically to detect sexual disorders***. This set of tests showed, *inter alia*, that the accused had a normal childhood, had not been sexually abused, had a responsible job, and was ingenious and entrepreneurial. He often maintained sexual relationships with 2–3 women without any of them knowing about any of the others.
B. Penile plethysmograph tests designed to measure physiological responses to various standardized normal and deviant sexual scenarios. None of the scenarios were customized to fit the allegations in the charge.
    - While this type of test was often used in assessing the progress of therapy, Beltrami was attempting to ***pioneer*** using it as a ***forensic tool***. Thus this was a ***novel*** application of the test.
    - The test was able to detect a sexual deviant 47.5% of the time (meaning in a population consisting entirely of sexual deviants, false negatives would occur more than half the time).

In terms of profiling the ***perpetrator***, Dr Beltrami testified that there is no pathology that is always the same and can be categorized, but that ***normally***, certain factors emerged.

During the *voir dire*, Beltrami offered a ***packaged opinion*** but was "not prepared to share" with the trial judge the data on which he relied.

Issue What is the test for admissibility of novel scientific opinion evidence?

Analysis

- The "general acceptance" standard can't be the only factor considered in evaluating the threshold reliability of novel scientific techniques, since otherwise we would never get any new techniques at all!
- In terms of the class of inference suggested in ***Mohan [R v]*** and this case, the operative concept is "***distinctive***": the personality profile of the perpetrator must be complete enough to identify distinctive psychological elements that were "in all probability" present in the perpetrator at the time of the offence and to determine whether the accused has those attributes or does not have them.
    - In this case, the evidence on the perpetrator does not identify a sufficiently distinctive group.
    - And the tests aren't very good at establishing that the accused is not in that group.
- Dr Beltrami's hypothesis that the accused lacked the disposition to commit the charged offences asks the jury to infer that the accused did not commit them. This closeness to an opinion on the ***ultimate issue*** is another reason for special scrutiny.
- Beltrami's failure to explain the basis of his conclusion ***would be a factor*** that the trial judge could use to decide that the opinion evidence failed the ***necessity*** requirement.

Held The Beltrami evidence is inadmissible largely because it is does not meet ***threshold reliability*** requirements for a novel scientific theory and because the expert cannot explain to the trier of fact how he arrived at his conclusion.

Ratio The threshold reliability of novel scientific evidence should be approached by weighing the following factors:

1. whether theory or technique can be and has been tested;

2. whether the theory or technique has been subjected to peer review and publication;
3. the known or potential rate of error or the existence of standards; and
4. whether the theory or technique used has been generally accepted.

See Also Novel Scientific Evidence (p 27), ***Mohan [R v]***, ***Abbey v R***

Johnson v Bugera

1999 BC/CA

Analysis

I doubt that there is any difference between admissibility of evidence in civil and criminal cases, with the possible exception that in the latter class of case, particularly cases tried before a jury, there may be a heightened concern that potentially prejudicial evidence not be placed before the trier of fact unless it has significant probative value.

Note

- The excerpt goes on to state that "there is a ***paucity of jurisprudence*** on the subject".
- NH says **the driver for a lower threshold for prejudice in the criminal context is the consequence: loss of liberty**.

See Also Different Evidentiary Contexts, ***Tsoukas v Segura***, ***Malik [R v]***

Jolivet [R v]

2000 CA/SC

Facts

Jolivet was convicted of murder based largely on the testimony of a *Vetrovec* witness, Riendeau. At the trial, the Crown told the jury on two separate occasions that it would hear from a second witness, Bourgade, who would corroborate Riendeau's version of events.

- First reference to Bourgade was in the Crown's opening remarks: "you will also hear from another witness, Bourgade . . .".
- Second reference to Bourgade was during defence's cross-examination of Riendeau. Defence counsel asked Riendeau to explain the reason that Bourgade did not call Riendeau and the Crown objected that Bourgade would provide that evidence (when called by the Crown).

Crown ultimately ***decided not to call*** Bourgade, giving the "astonishing" explanation that it did not consider his testimony from the preliminary inquiry to be truthful. The ***trial judge accepted*** this explanation. The judge offered the defence the opportunity to call Bourgade to ***cross-examine*** him, but defence turned this opportunity down.

Defence wished to comment ***generally*** on Crown's failure to call Bourgade in closing remarks (essentially by asking the jury rhetorically why the Crown didn't call Bourgade). The trial judge "***effectively prevented***" this by saying that if counsel made this comment, trial judge would ***instruct the jury*** that defence could have called the witness itself. Ultimately, the trial judge gave no instruction to the jury based on Bourgade. The trial judge did give a clear *Vetrovec* warning on Riendeau: that it would be dangerous to convict on Riendeau's uncorroborated evidence alone.

∀ parties agreed that Bourgade's evidence was ***not exculpatory***; defence had received full disclosure (*Stinchecombe*) on this point. The defence merely asserted first that Crown's comments in effect put Bourgade's testimony before the jury unsworn and second, that the Crown deprived defence of the opportunity to create conflicts between the evidence of the Crown's principal witnesses that could potentially raise a reasonable doubt.

Issue

1. What ***prejudice***, if any, did the defence suffer from the Crown's failure to deliver? (What precise mischief?)
2. If there was prejudice, what was the appropriate remedy?

Analysis

- Binnie J was very clear that there could not have been an ***abuse of process*** in this case because the trial judge accepted Crown counsel's explanation. This amounted to a finding of fact that counsel's explanation was true, and such a finding requires ***deference***.
- Withholding a witness believed to be untruthful is not only ***not*** a perverse or oppressive exercise of

prosecutorial discretion, but actually protects the integrity of the judicial system.

PREJUDICE resulting from Crown's refusal to call a witness it promised to produce

- Crown is under no obligation to call a particular witness, and making a decision not to call a witness midway through the trial is the "stuff of everyday trial tactics".
    - It is not the Crown's duty to accommodate the defence case.
- However, there was some small prejudice to the defence in this case and there should be a remedy.
    - Trial judge's *Vetrovec* instruction adequately dealt with Crown's opening statement reference.
    - However, defence still had a right to comment.

POTENTIAL REMEDIES

Binnie J discussed the following possible remedies for a failure to call a witness in order of decreasing severity:

1. Trial judge could call the witness himself.
2. Trial judge could instruct the jury that it could draw an ***adverse inference***.
3. Defence could comment on the failure to call the witness in its closing arguments.
4. Nothing at all could be done, relying on the jurors to remember the unfulfilled promise and draw their own conclusions.

The first remedy would only be available in the most extraordinary circumstances and the second in circumstances scarcely less so. Concern about an improper Crown ***motive*** that does not rise to the level of abuse of process could still give the trial judge discretion to call the witness, however.

DEFENCE COMMENTS

In this case, a defence comment was the appropriate remedy. However such a comment can come in two flavours:

1. invitation to the jury to draw an adverse inference (***stronger***); or
2. invitation to the jury to infer that the witness would have been unhelpful to the Crown's case (***weaker***).

It would have been inappropriate for the trial judge to carry out his threat to instruct the jury that the defence could have called Bourgade. Normally a corrective instruction would have been appropriate only if the defence exceeded its right to comment, e.g. by inviting an adverse inference when only an "unhelpfulness" comment is warranted. Thus the trial judge erred by ***precluding the defence*** from using its appropriate remedy.

Held

- The defence suffered some prejudice from the Crown's failure to deliver on its promise and should have been allowed to invite the jury to draw an "unhelpfulness" inference in closing remarks.
- However, there is no reasonable possibility that, had the error not occurred, the verdict would have been different. Thus there was no reversible error and the conviction is upheld.

Ratio Where Crown's explanation for not calling a promised witness is accepted by trial judge, defence may not ask jury to draw an ***adverse inference*** but may invite it to infer that witness ***would have been unhelpful*** to Crown's case.

Note NH comments that **the potential remedies discussed above would almost NEVER be available against an accused due to his *Charter* ss 11(c) and 11(d) rights**.

See Also ***Smuk [R v]***, Failure to Call a Witness (p 32), Our Adversarial System of Trial (p 13)

JR [R v]

2003 ON/CA

Facts The night of October 25, NB, MR, and two other friends, were kidnapped, taken to an apartment, and viciously assaulted. On the way up to the apartment, NB had a conversation in the ***stairwell*** with one of the accused, who implied that the kidnappers had intention to kill the victims. One victim was murdered. NB was brutally burned.

By 3:24 AM October 26, NB was safely in a hospital talking to the police, but was too traumatized to give a proper statement. By 6:12 PM, ***roughly 16 hours*** after she was assaulted, NB had received medical attention and spoken

with MR at the hospital. She then gave a 1-hour statement to the police (which was ***audio-recorded*** and accurately transcribed) recounting the conversation in the ***stairwell***.

At trial, 2½ years after the events, NB could remember having the conversation in the stairwell, but not the part where the kidnapper implied an intention to kill. Efforts to ***refresh*** NB's memory ***failed***: after reading her the transcribed statement, NB testified that she still could not remember the conversation, but that at the time she made it she was trying to be accurate and truthful. The trial judge admitted the statement as PRR. The defence conducted a full cross-examination of NB.

Issue

1. Is a statement inadmissible as PRR if the witness has some recollection of the events? (i.e. is total loss of memory regarding the relevant events required for PRR?)
2. How strict is the contemporaneity requirement for PRR?
3. Was the statement unreliable because NB's statement was contaminated by her discussion with MR?

Analysis

- The present voucher of accuracy and reliable record (in this case, audio recording accurately transcribed) criteria are met.
- The trial judge found that NB's statement was not contaminated since MR was not privy to the events in the stairwell and the limited conversation at the hospital could not have interfered with NB's recollection of it.
- It was open to the trial judge to find on the facts of this case that a 16 hour gap from events to statement was within the acceptable bounds of timeliness.

Held The statement 16 hours after the fact is admissible as PRR.

Ratio

1. If the witness remembers a ***portion*** of an event but has forgotten a ***critical part***, PRR may be allowed.
2. There is no strict contemporaneity requirement for timeliness. The test is whether the events were fresh in the declarant's mind.

Note Beginning at ¶ 33 (p 5-055), O'Connor ACJO applies the principled approach in the alternative and finds the evidence admissible under that test as well. This quote from ¶ 34 is relevant to ***Mapara [R v]***:

> *Importantly, past recollection recorded is grounded in a concern for reliability, and compliance with the requirements of the exception . . . should weigh strongly in favour of admissibility under the principled approach . . .*

See Also ***Fliss [R v]***, Past Recollection Recorded (PRR) (p 36), Hearsay (p 45)

JZS [R v]

2008 BC/CA

Facts JZS was accused of sexually assaulting his two children ages 7 and 10. Both children testified behind a screen (*Criminal Code* s 486.2) under a ***promise to tell the truth*** (***Canada Evidence Act*** s 16.1, p 143).

Issue

1. Does *Criminal Code* s 486.2 violate PFJ and *Charter* s 11(d) because it ***mandates*** that a trial judge grant an application by a prosecutor for a "testimonial aid" (i.e. screen, CCTV, &c) for witnesses under 18 and witnesses with mental disabilities ***unless*** to do so would interfere with the proper administration of justice?
2. Does *CEA* s 16.1 violate PFJ and *Charter* s 11(d) because it is unsafe to receive the evidence of a child witness unless he is able to demonstrate an understanding of the ***moral obligation*** to tell the truth?

Analysis NH: **Parliament doesn't have to provide the fairest trial the accused could possibly imagine under the right to make full answer and defence and s 11(d). There are other interests at stake (such as the search for the truth).**

- The rules of evidence have not been constitutionalized into unalterable PFJ.
- For both statutory provisions, the court notes that the accused retains the right to ***cross-examine***. This captures the right to "confront your accuser" (which apparently shouldn't be taken literally), relevant to the first issue, and the ability to test the witness' moral commitment to telling the truth, relevant to the second issue.
- The rules of evidence must be considered in light of the search for the truth aspect of the judicial process.

Recent studies argue that child evidence is generally reliable but that children may need to be treated differently than adults to achieve reliability.

Canada Evidence Act s 16.1

- A child witness' evidence is now ***presumptively admissible***.
- The provision shifts the focus relating to child evidence from admissibility to reliability. Concerns about the child witness' moral commitment to telling the truth, understanding of the nature of a promise to tell the truth, and cognitive ability to answer questions about truth and lies go to ***weight***, not admissibility.

Held Both statutory provisions are constitutionally valid.

Ratio

1. *Criminal Code* s 486.2: PFJ are preserved by the right to ***cross-examine*** the child witness and the ***residual discretion*** remaining with the trial judge to ensure the proper administration of justice. Moreover, use of the screen does not undermine the presumption of innocence.
2. ***Canada Evidence Act*** s 16.1: PFJ and fairness are preserved because the accused retains the right to test the child witness' understanding of the ***moral obligation*** to tell the truth &c in ***cross-examination***.

Note

- NH says that ***Charter* s 1 does almost no work in s 7 analysis: the balancing is done under s 7 itself**.
- The "understand and respond to questions" requirement in s 16.1(3–5) is a lower bar than the "communicate the evidence" threshold in s 16(1–4), which also requires being able to perceive and recollect events: ¶ 45.
- Right to confront accuser ⊂ right to make full answer and defence ⊂ PFJ

See Also Children under 14 (p 30) in Competence and Compellability, ***Canada Evidence Act*** s 16.1 (p 143), ***Charter*** ss 7 & 11(d), ***DAI [R v]***

Khela [R v]

2009 CA/SC

Facts Khela was accused orchestrating the contract killing of Sidhu. The case against Khela rested on the testimony of two unsavoury witnesses, Sandoval and Stein, who had lengthy criminal records and were members of a prison-based gang. Khela maintained his innocence and claimed that Sandoval and his gang committed the murder and then fabricated their story in order to frame him. Additional evidence against Khela was given by the girlfriends of Sandoval and Stein, who thus had ample opportunity to collude with Sandoval and Stein in concocting their story.

Issue Need a *Vetrovec* warning explicitly mention that corroborating evidence must be ***independent*** and ***material***?

Analysis

GENERAL

- Rather than "pigeonhole" witnesses into particular categories, trial judges should consider all factors that might impair their credibility and decide on this basis whether a *Vetrovec* warning is needed.
- According to Dickson J in *Vetrovec*, no particular wording is required, but there must be a ***sharp, clear warning which*** at a minimum must:

> *focus the jury's attention on the inherently unreliable evidence. It should refer to the characteristics of the witness that bring the credibility of his evidence into serious question. It should plainly emphasize the dangers inherent in convicting an accused on the basis of such evidence unless* ***confirmed*** *by independent evidence.*

  Note that in Dickson J's original formulation, " independent" is not defined.
- The instruction to the jury must make clear the ***type*** of evidence capable of offering support.
  - NH's interpretation of this decision is that the **jury needs to be told about independence and materiality**. However, as the jury charge in *Khela* was upheld despite those two words not being used, it follows that it is the ***substantive content*** of the concepts (which must be conveyed by the charge as a whole) that must be communicated, not any particular words.
  - Overall: the difficulty with the warning given by the trial judge in this case is not the absence of the

words "independent" and "material" but its failure to clearly convey to the jury that not all evidence is capable of providing the level of comfort required for a conviction.

INDEPENDENCE

- Fish J seems quite clear (e.g. ¶ 39) that independence is always required.
- An instruction on independence is particularly important in this case because of the allegations by the defence of ***collusion*** between Stein, Sandoval, and their girlfriends.
- While the trial judge failed to do this explicitly, the charge as a whole is OK because he repeatedly reminded the jury of S & S's motive to lie and the defence's allegations that they all collaborated in concocting their stories.

MATERIALITY

- Individual items of confirmatory evidence ***need not implicate*** the accused.
- However, when looked at in the context of the case as a whole, it should give comfort to the jury that the witness can be trusted in his assertion that the accused committed the offence.

Held The problem with the *Vetrovec* instruction was not the absence of the words "independent" and "material" but the failure to convey the ideas behind them. However, this was compensated for by the charge taken as a whole.

Ratio The following "principled framework" should be used in constructing *Vetrovec* warnings:

1. the jury's ***attention*** must be drawn to the testimony requiring special scrutiny;
2. the trial judge must ***explain why*** this evidence requires special scrutiny;
3. the jury must be cautioned that it is ***dangerous*** to convict on unconfirmed evidence of this sort (but is ***entitled*** to do so if it believes the evidence);
4. the jury should be told to look for evidence ***from another source*** tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused.

In following this framework, the trial judge may need to comment further on independence or materiality aspects, depending on all the circumstances of the case.

See Also ***Dhillon [ON] [R v]***, The Vetrovec Witness (p 19), ***Murrin [R v]***

Khelawon [R v]

2005 CA/SC

Facts Mr Skupien, an elderly frail man, alleged that the accused, who was manager of S' nursing home, severely beat him. S made 3 statements: (1) to Ms Stangrat, (2) to a doctor, (3) a ***videotaped*** statement to the police. The video statement was ***not taken under oath***, but S was asked if he understood that it was ***important to tell the truth***, to which he responded "Yes". S died before the trial and the Crown sought to have the out-of-court video statement adduced into evidence.

Mentally, S suffered from paranoia and dementia and sometimes became confused. ***Physically***, he suffered from fatigue, weakness, and dizziness. S had some ***motive*** to fabricate the allegations as shown in some generalized "rambling complaints" made in the video statement, and his friendship with Ms Stangrat. Ms Stangrat also had ***motive*** to lie, as accused gave her notice of termination from her employment at the home a few weeks prior.

The circumstances of the allegations were peculiar. S first complained to Ms Stangrat, who took him to live in her apartment for a few days. They then went to visit the doctor to whom the complaints were repeated, with Ms Stangrat "helping" S describe what happened. They then went to the police. The doctor said S' injuries were equally consistent with a fall or a battery.

Crown sought to buttress its application for admission of the video statement with the hearsay video statement of another complainant, D, which had "***striking similarities***" to S'. However, D's statement fell far below the standards of admissibility, was mainly inaudible, and involved a police officer leading D by asking questions involving "educated guesses" of what the officer thought D was saying.

Issue Is Mr Skupien's video statement admissible under the principled approach to the hearsay rule?

Analysis **NECESSITY**:

Necessity is conceded by all parties, although the court points out that there is no evidence that the Crown tried to preserve S' evidence under ss 709–714 of the *Criminal Code* and that in an appropriate case, failure by the proponent of hearsay evidence to make all reasonable efforts to secure the evidence of the declarant in a manner that respects the rights of the other party could result in failing the necessity requirement.

RELIABILITY:

1. **TESTABILITY OR ADEQUATE SUBSTITUTES**: Despite video, distinguished from "*B(KG)* situation" because of crucial lack of declarant at the trial. Doubts also raised about adequacy of Mr Skupien's understanding importance of telling the truth in the circumstances.
2. **LIKELIHOOD OF TRUTHFULNESS**: Nothing suggests that the circumstances made the statement likely true.
    - Both S and Ms Stangrat had motive to lie; S had questionable mental capacity; Ms Stangrat had ability to influence S; and S' injuries were consistent with a fall.
    - Although allegation of ***striking similarities*** between statements from two complainants (instead of accused and complainant) is factually different than ***U(FJ) [R v]***, it might be a factor in some cases. Here it is not because the other statements, such as D's, had even more problems than S'.

Held Mr Skupien's statement is inadmissible. While it satisfies the necessity requirement, it epically fails reliability.

Note SCC used this case to summarize and remake the principled approach, so most of the general law is available in Principled Approach to Hearsay (p 49), rather than in this brief. Given the breadth of this decision, you can cite just about any hearsay-related proposition to this case in a pinch.

See Also Principled Approach to Hearsay (p 49), ***B(KG) [R v]***, ***U(FJ) [R v]***, ***Mapara [R v]***

Kinkead [R v]

1999 ON/SC

Facts Two sisters were murdered. The Crown theory was that one sister was killed more brutally than the other because of a personal animus against her held by the accused, while the other sister was collateral damage. The Crown also believed that the accused and his accomplice rearranged the crime scene after the murders in order to disguise it as a robbery gone wrong and thus hide their connection to the crime.

In support of its case, the Crown wished to lead a large collection of photographs, mainly taken from the scene of the crime, and an extremely long video of the crime scene taken by the police. Among the photos that the Crown wanted to lead were to life-sized portraits of the sisters while they were alive.

Issue The defence wanted to have some of the photos and the segments of the video showing the victims to be excluded as prejudicing the accused's right to a fair trial. The prejudice was said to arise from:

1. the inflammatory nature of the photos and video showing the victims, the profound extent of the wounds they sustained, and the blood depicted;
2. the number of photos and length of the video; and
3. the possibility of the photos/video distracting the jury from considering other evidence.

Analysis

- Each of the photos (and video) is ***relevant***. Moreover, they are ***not distortions*** of the crime scene. (Also there was absolutely no authentication problem).
    - Thus the admissibility of each individual item turns on a probative/prejudicial balancing.
- Some of the items (and the manner chosen by the Crown to present them) are of trifling probative value.
- The prejudicial effect of the photos and video turns on whether they are so inflammatory that they would cause the jury to loathe and hate the accused to such a degree that it could be reasonably concluded that the jury disregarded other evidence, its sworn duties, and the instructions of the Court.

- The judge relied on his experience that juries are generally not horrified to the point of hatred by scenes they expect to see from a horrific crime. However, he proceeded with caution anyway.

Held In a long list of rulings and findings, some of the evidence was allowed, some excluded, and some allowed in modified form (e.g. life-sized photos reduced to 8x10s, video to be reduced in length by half).

Note NH notes that:

- **this case illustrates that probative/prejudicial balancing is not an all or nothing test**;
- **if defence chooses to admit elements of the Crown theory that the Crown wants to adduce the evidence in support of, the probative/prejudicial balance can be fundamentally altered** (see ¶ 19 #5); and
- **even where the images met the test, the judge tried to limit what was admitted to what was necessary to show the Crown theory**.

This is "one of those cases" that it makes sense to re-read close to exam time.

See Also Photographs (p 12), ***Penney [R v]***, ***Criminal Code*** s 655 (p 147), ***Castellani v The Queen***

Krause [R v]

1986 CA/SC

Facts Krause was accused of murdering Hutter, who had attempted to buy $750 of weed from Krause. The Crown chose not to make Krause's out-of-court statements part of its case. Krause testified in his own defence. After cross-examining Krause, the Crown applied to lead rebuttal evidence on 4 points solely for the purpose of impeaching Krause's ***credibility***. The Crown's application was based on s 11 of the ***Canada Evidence Act*** (p 141). However, only 1 of the 4 points on which the Crown wanted to rebut involved a prior inconsistent statement.

Issue Is the Crown permitted to lead rebuttal evidence based on the 3 points that do not involve a prior inconsistent statement? (It is abundantly clear that rebuttal is allowed on the 4th point, as it falls squarely under s 11 *CEA*).

Analysis

- The general rule is that the Crown (or the plaintiff in civil matters) is not permitted to split its case.
  - The policy reason for this is that the accused/defendant is entitled to know the full case to be met at the outset of his response.
- Crown or plaintiff may be allowed to call evidence in rebuttal after completion of the defence case where:
  1. the defence has raised some new matter; which
  2. is material (concerns an issue essential for the determination of the case); and which
  3. the Crown (plaintiff) has had no opportunity to deal with; and
  4. the Crown (plaintiff) could not ***reasonably*** have ***anticipated*** it.
- The fact that evidence is introduced by the defence-in-chief does not make it a proper subject for rebuttal unless it is otherwise relevant to a matter other than ***credibility***.
- The Crown was entitled to cross-examine on the 3 points, but afterward it was bound by the answers and not entitled to call evidence in rebuttal.

Held The only live issue in the case was whether Krause killed Hutter. The 3 points in question were ***collateral*** and thus not the proper subject of a rebuttal.

Ratio Rule against Rebuttal on Collateral Issues (p 39): No rebuttal is permitted on an issue that is ***collateral***, meaning not determinative of the case or relevant to matters which must be proved for the determination of the case.

See Also General Rule on Rebuttal (p 39), ***Canada Evidence Act*** s 11 (p 141), ***Tsoukas v Segura***

Llorenz [R v]

2000 ON/CA

Facts The complainant allegedly endured 6 years of sexual assault at the hands of Llorenz between the ages 10–16. Two

years after the alleged abuse ended, the complainant was referred to Dr Voysey, a psychiatrist, to address "emotional and psychological difficulties". Her first allegations of abuse were to Dr Voysey. The trial was essentially a ***credibility*** contest between Llorenz and the complainant: does the jury believe him, or her?

Dr Voysey gave evidence for the Crown which included two features:

A. He referred to a document, whose ***title*** was "Factors to be Taken into Account in the Assessment of Sexual Victim Trauma Severity" (prepared by him), and which was provided to the jurors to follow along with. The document described 24 factors Voysey considered ***common in victims of sexual abuse***. He reviewed each factor and gave his ***opinion*** about whether it was present in the complainant. In his opinion, complainant matched 20/24 of the factors. During the review, Dr Voysey made a number of comments such as:
   - ". . .There was abuse over a six or more year period."
   - ". . . I believe there was some violence used in that she was hit and that she feared being hit."
   - ". . . Both terror and violence were present in this case and both alone would get her into the severe category."

B. The Crown asked Voysey to comment on ***internal consistency*** of complainant's story. His reply included:
   - "I was not determining fact, but . . . . I can . . . see if the person is more lying and trying to get away with it, which I didn't find . . ."
   - "So there is a high degree of internal consistency, high enough for me to be quite confident in the diagnoses."

Issue Should Dr Voysey's evidence have been admitted?

Analysis

- Dr Voysey's statements implied that he believed the complainant was telling the truth.
- Moreover, the title of the document and the "rather dramatic result" that the complainant manifested 20 of the 24 factors was likely to "***send a strong message***" to the jury that Dr Voysey believed the allegations.
- He made certain disclaimers, but these did not detract from the message that he believed the complainant.
- The exact line after which evidence becomes oath-helping is not clear. There is a distinction between:
  - evidence about credibility ("in my opinion the witness is truthful"), which is inadmissible; and
  - evidence about a feature of the witness' behaviour or testimony, which may be admissible even though it will likely have some bearing on the trier of fact's ultimate finding on credibility.
- Evidence is not ***necessarily*** inadmissible even if it is oath-helping:
  - it ***may*** still be admitted if directed to some other legitimate purpose;
  - however its ***probative value*** in relation to the legitimate purpose ***must*** outweigh its ***prejudicial effect***, keeping in mind its potential to distort the fact-finding process by displacing the TOF's duty to decide on questions of credibility.
    - One aspect of prejudicial effect: in cases which turn on the issue of which one of ***two*** witnesses is telling the truth, there is a danger that the jury may give significant weight to the oath-helping aspect of expert evidence.
- Dr Voysey could have testified to various legitimate purposes, such as to:
  - provide ***narrative*** and ***context*** in which the allegations were first made;
  - explain that a false complaint should not be presumed from delayed disclosure (but see ***DD [R v]***);
  - opine that the complainant's condition was consistent with sexual abuse.

  however, this admissible evidence formed a small part of the doctor's opinion and did not require extensive testimony about the 24 factors or an opinion on the internal consistency of the complainant's allegations.

Held The evidence is ***inadmissible***. Even if it were admissible, the trial judge's charge to the jury was not appropriate to instruct the jury on permissible and impermissible use of the evidence.

Ratio

> *[27] The rule against **oath-helping** prohibits the admission of evidence adduced solely to prove that a witness is **truthful**. The rule applies to evidence "that would tend to prove the truthfulness of the witness, rather than the truth of the witness's statements"*

Note There are really 2 issues in this case, as after stating that the evidence was ***inadmissible***, O'Connor JA then assumes its admissibility for the purpose of evaluating the jury instruction, which he found seriously wanting. In class, NH speculated that admitting **Dr Voysey's testimony might not have been a reversible error had there been a careful jury instruction** (although that's not really how the judgment reads), but it might be worth reviewing ¶¶ 44–55.

See Also Opinion Evidence on Credibility (p 27), ***Ay [R v]***

Lowe v Jenkinson

1995 BC/SC

Facts Counsel for the plaintiff had a document in his possession that appeared to be the transcript of an interview between the defendant and an ICBC adjuster. The document appeared official and "self-authenticating". While counsel for the plaintiff read a sentence from the transcription and the defendant admitted he "guess[ed he] said that", the defendant was never asked whether the document as a whole was authentic, nor was the document authenticated in any other manner. After the defendant finished his testimony at trial, plaintiff's counsel tried to have the purported transcription entered into evidence.

Issue Is the document admissible in evidence?

Held The document is not admissible as it was never authenticated.

Ratio The general rule is that documentary evidence is not admissible unless authenticated.

See Also Documents (p 12), ***Wilcox [R v]***

Lyttle [R v]

2004 CA/SC

Facts The victim was brutally beaten by a masked gang. The police officers who initially investigated believed that the assault was over a drug debt and that the victim was lying to them. This belief was based in part on: the victim's prior drug conviction; his admission to the police of having dealt in drugs; and the drug conviction of the acquaintance who drove him to the scene of the attack. The defence was informed of this initial position on the part of the police via the Crown's routine *Stinchcombe* disclosure.

The defence theory was that the beating related to an unpaid drug debt and that the victim identified the accused in order to protect the actual perpetrators, who were his associates in a drug ring.

Issue Is the defence permitted to cross-examine Crown witnesses on theories for which it does not intend to provide substantive evidence?

Analysis

- The right to cross-examination must be ***jealously guarded*** and ***broadly construed***.
- However, it is not limitless: counsel are bound by the rules of relevancy and may not resort to harassment, misrepresentation, repetitiousness, or questions whose ***prejudicial*** effect outweighs their ***probative*** value (this should probably be construed in light of ***Seaboyer [R v]***).
- Likewise, trial judges have broad ***discretion*** to see ensure fairness and see that justice be done. They may thus relax the rules of relevancy and tolerate some repetition where necessary.
- A ***good faith basis*** is a function of the information available to the cross-examiner, his belief in its accuracy, and the purpose for which it is used.
    - information may be incomplete or uncertain…
    - …as long as the questioner doesn't put suggestions ***recklessly*** or that he ***knows to be false***.
- The questioner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience, or intuition.
- If a line of questioning is suspect, trial judge may conduct a *voir dire* to ensure that a ***good faith basis*** exists.

Held Defence counsel had a good faith basis for its theory based, among other things, on the disclosed initial belief of the police and various other facts pointing to the victim's involvement in drug dealing. The trial judge therefore erred in refusing to allow cross-examination based on this theory.

Ratio A question can be put to a witness in cross-examination regarding matters that ***will not be proved independently*** provided that counsel has a ***good faith basis*** for putting the question.

Note
- The SCC found a ***reversible error*** essentially because the trial judge's refusal to allow the defence to cross-examine Crown witnesses along the lines of its theory without first committing to lead (direct) confirmatory evidence forced the defence to call police officers as witnesses and to forfeit its statutory right to address the jury last, which is lost if the defence leads any evidence-in-chief.
- The Supremes distinguished the case from ***Howard [R v]*** (p 102)
- "Rule" in Browne v Dunn (p 37) was mistakenly applied by the trial judge and does not fit the facts.

See Also ***Carter [R v]***, ***Howard [R v]***, Cross-Examination (p 37), ***Tsoukas v Segura***, ***Smuk [R v]***

Malik [R v]

2003 BC/SC

Facts Malik and Bagri, two accused Air India co-conspirators, were to be tried together. Some of the evidence to be given by a certain Crown witness was extremely prejudicial to Bagri and had only slight probative value in relation to the charges against Bagri. However, witness' story was highly probative with respect to Malik. Under the assumption of a trial by jury, Bagri sought and obtained a pre-trial order from the trial judge requiring the witness to ***self-censor***. Subsequently, Malik and Bagri re-elected for a trial by ***judge alone***.

Issue Can the Crown get the order requiring the witness to self-censor lifted?

Analysis

> *[A]ll potential prejudice to Mr Bagri ended with the re-election to trial by judge alone. There remains some probative value in relation to the case against Mr Malik. There is also some value in permitting the witness to testify without the proposed self-editing, better enhancing the Court's ability to assess the witness' credibility.*
>
> *The* ***Court is well aware of the nature and content of the witness' evidence from pre-trial proceedings****. The risk of a prejudicial effect flowing from the . . . anticipated references to Mr Bagri is now non-existent. Requiring the witness to replace Mr Bagri's name with "unknown person" or Mr X in her testimony would be an artificial exercise. The* ***risk of subconscious impact on the mind*** *of the trial judge is a matter of which trial judges are always . . . vigilant in avoiding. In any event, the proposed editing would do nothing to reduce that risk in the circumstances of this case.*

Held The order to self-censor is lifted: all potential prejudice to Bagri ended with the re-election to trial by ***judge alone***.

Note There seem to be two independent rationales: (1) the judge already knows the evidence from the pre-trial hearing, so there's no point; and (2) anyway, trial judges are better equipped to withstand prejudice than are juries. In this case, #2 might be a strong reason, but #1 is so wholly dispositive it is hard to say what impact #2 had!

See Also Different Evidentiary Contexts (p 29), ***Johnson v Bugera***, ***Grewall [R v]***, ***Re Application under s 83.28 of the Criminal Code***

Mapara [R v]

2005 CA/SC

Ratio Based on the *Starr* decision, the following framework emerges for considering the admissibility of hearsay:

1. Hearsay evidence is ***presumptively inadmissible*** unless it falls under an exception to the hearsay rule.
    - The traditional exceptions to the hearsay rule remain presumptively in place.
    - Thus if the evidence falls under an existing exception, it becomes presumptively admissible.

2. A hearsay exception can be ***challenged*** to determine whether it is supported by the indicia of necessity and reliability required by the ***principled approach***. The exception can be modified as necessary to bring it into compliance.
3. In ***rare cases***, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
4. If hearsay evidence does not fall under a hearsay exception, it may still be admitted under the principled approach.

See Also Common Law Exceptions and the Principled Approach (p 55), ***JR [R v]*** (p 105), ***Wilcox [R v]***, ***Khelawon [R v]***, Hearsay (p 45)

Maves v Grand Trunk Pacific Rwy Co

1913 AB/SC

Facts One of the defence's witnesses had apparently, the day before the trial, given a statement at a solicitor's office about a conversation with the plaintiff. The details in the statement were helpful to the defence. On ***direct examination*** by defence counsel, the witness apparently could not remember, at all, the details he had given the previous day.

Counsel for the defence went over the subject matter several times without eliciting the response he had been instructed he could expect from the witness. Counsel asked progressively more specific questions as to whether the witness remembered making the statement at the law office the previous day. Counsel then wanted to ask the witness if he remembered making the specific statement. Plaintiff's counsel objected that by doing so, the defence would be violating a provision of the *Alberta Evidence Act* having the same purpose as *CEA* s 9.

Issue Was defence contravening the Alberta *Evidence Act* by trying to prove a prior inconsistent statement made by his own witness when the trial judge had not found the witness to be hostile?

Analysis

- Defence counsel was not trying to prove a prior inconsistent statement. Even if he had been, he would have needed to distinctly direct the mind of the witness to the facts of the supposed conversation and get the witness' denial of those facts in order to get the proposition in respect of which he wanted to prove a prior inconsistent statement.
- Thus the ***real issue*** was not the application of the *Evidence Act*, but the extent to which counsel should be allowed to lead his own witness during examination-in-chief.
- Where, as here, the witness' memory appears to be ***entirely exhausted***, counsel should be permitted:
  - to call the witness' attention to one topic which, according to the statement, supposedly took place;
  - if this fails stimulate the witness' memory, to do the same with other topics of the conversation, if there were more than one;
  - if both of the above failed, to read from his brief his instructions as to what the statement said.

  of course, if the witness then affirmed the account given by counsel, the trier of fact would be entitled to take his unreliability into account when assessing his credibility.

Held The trial judge should have allowed counsel to lead his witness whose memory appeared ***entirely exhausted***.

Ratio The fourth of the Five Exceptions to the Rule against Leading Questions (p 34):

> *The rule on leading questions ought to be relaxed where non-leading questions fail to bring the mind of the witness to the precise point on which his evidence is desired, and it may fairly be supposed that this failure arises from a temporary inability to remember. . .*

Note

- A subtlety of this case is that the "tack" counsel should be taking is not to prove that his witness made a prior inconsistent statement (which is considered irrelevant to the point in issue, since this would be for the purpose of impeaching his own witness' ***credibility***), but merely to help his witness remember.
- The provision of the Alberta *Evidence Act* in question is very similar to ***Canada Evidence Act*** s 9 (p 140).

- This case is the authority for all the law on Leading Questions (p 33), in this course but for the most part I have stated the general law in the notes themselves rather than in this case brief.

See Also Direct Examination (p 33)

McClure [R v]

2001 CA/SC

Analysis
- Solicitor-client privilege is not absolute and may have to yield, in rare cases, to permit an accused to make full answer and defence.
- The appropriate test is one of ***innocence at stake***, which is to be invoked only where core issues going to the guilt or innocence of the accused are involved and there is a genuine risk of wrongful conviction.
- It is intended to be rare and used as a last resort.

Ratio There are three parts: a threshold question, and the two-stage innocence at stake test

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.

Note The burden in the second stage (***likely to***) is stricter than the burden in the first stage (***could***).

See Also ***Brown [R v]***, Solicitor-Client Privilege (p 75)

McInroy and Rouse [R v]

1978 CA/SC

Facts In the statement that she gave to the police, Mrs St Germaine (MSG) said that on the night of the murder, the accused McInroy told her that he had "***killed a snitch***". At the trial, which took place only 7 months later, MSG was called as a witness for the Crown. She maintained that she could not recall anything about her conversation with McInroy. The trial judge did not believe her.

Issue Is it within the discretion of the trial judge to permit the Crown to cross-examine MSG under *CEA* s 9(2)?

Analysis
- [Note that according to the *Milgaard* procedure, the prior statement must be ***proved*** inconsistent with the witness' testimony in order for the judge to permit cross-examination before the jury under s 9(2)].
- Section 9(2) is ***not*** concerned with the cross-examination of an ***adverse*** witness. It confers a discretion on the trial judge to permit, without proof that the witness is adverse, cross-examination as to a PIS.
- The task of the trial judge was to determine whether MSG's testimony was inconsistent with her statement to the police. On the facts, he was properly entitled to conclude that it was.

Held Appeal dismissed, conviction upheld, trial judge done good.

Ratio Where a witness claims not to remember events contained in her written statement and the trial judge does not believe her, this is evidence of an inconsistency within the meaning of section 9(2) of the ***Canada Evidence Act***.

Note
- At casebook p 6-060, it is stated that the trial judge followed the procedure set out in ***Milgaard [R v]*** for deciding applications under s 9(2).
- The trial judge gave an excellent charge to the jury making clear that it could only consider the evidence MSG

gave in the courtroom and that the portions of the PIS put to MSG were not to be taken as proof of the contents of the PIS, but merely to test MSG's credibility as a witness.

See Also ***Canada Evidence Act*** s 9(2) (p 141), ***Milgaard [R v]***, Statutory Regime (p 43) under Attacking the Credibility of the Party's Own Witness

Milgaard [R v]

1971 SK/CA

Facts Nichol John—one of a couple of evil lying lowlife "friends" of David Milgaard—gave a statement to the police in which she said she saw the DM stabbing the victim. At trial, she gave a sanitized version of her story that left out her claim to have seen the stabbing.

With the jury out, Crown counsel applied for leave, under s 9(2) of the ***Canada Evidence Act***, to cross-examine NJ on her prior statement. The trial judge ruled that once he was satisfied that she had given a prior statement inconsistent with her testimony, all cross-examination in respect of it should take place with the jury in. He read the prior statement, decided it was inconsistent with her present testimony, and recalled the jury.

Crown counsel then cross-examined NJ. She admitted giving the statement and acknowledged having signed each of the pages in question, but said she did not remember saying what was contained therein. Crown counsel then applied to have NJ declared ***hostile*** and the cross-examination (still over the contents of the statement) proceeded. She continued to maintain she couldn't remember until, all of a sudden, she broke down and "remembered" it all.

Issue Should the initial cross-examination of NJ on the application under s 9(2) have been done in the absence of the jury and with an opportunity for the defence to question the witness about the circumstances in which the statement was obtained, and to adduce relevant evidence?

Analysis

- Section 9(2) provides an ***exception*** to the law as stated in s 9(1).
  - Trial judge may permit cross-examination of the witness on the PIS without declaring her hostile.
  - When such permission has been granted, the right to cross-examine is ***limited*** to the inconsistencies disclosed in the statement.
  - However, if a subsequent application is made to have the witness declared ***hostile***, the judge may consider the cross-examination in making this determination. If the witness is declared hostile, the limits on cross-examination are lifted.
- The right to cross-examine under s 9(2) is not absolute. The judge has discretion to grant or withhold.
- The Milgaard Procedure for Determining Applications under Section 9(2) (p 44) should be followed.
  - But the trial judge failed to follow it.

Held Appeal dismissed. DM sent back to rot in prison for 23 years for a crime he didn't commit.

Ratio Failure to follow the *Milgaard* procedure is ***not a reversible error*** if nothing takes place before the jury that would not have happened had the procedure been followed.

See Also ***Canada Evidence Act*** s 9(2) (p 141), ***McInroy and Rouse [R v]***, Statutory Regime (p 43) under Attacking the Credibility of the Party's Own Witness

Mitchell v Canada (MNR)

2001 CA/SC

Issue What is the test for admissibility of oral history evidence?

Analysis **USEFULNESS**:

Aboriginal oral histories may meet the test of usefulness on two grounds:

1. they offer evidence of ancestral practices and their significance that is ***not otherwise available***; or

2. they provide the "***aboriginal perspective***" on the right claimed.

REASONABLE RELIABILITY:
The trial judge need not go so far as to find a special guarantee of reliability, but may need to enquire into the witness' ***ability to know and testify to*** orally-transmitted aboriginal traditions (also applicable to ***weight***).

USING THE EVIDENCE:

- In determining the usefulness and reliability of oral histories, judges must resist "facile" assumptions based on "Eurocentric" traditions (like the idiosyncratic and culturally peculiar idea of writing stuff down).
- There are no hard rules as to ***weighing*** the evidence.
    - The "aboriginal perspective" must be given due weight.
    - However, this does not negate the operation of general evidentiary principles. Aboriginal evidence is not to be weighed or interpreted in a manner that contravenes the principles of evidence law.

Held The sparse and tenuous evidence adduced in this case simply cannot support the claimed right.

Ratio Oral histories are admissible as evidence where they are both ***useful*** and ***reasonably reliable***, subject always to the ***exclusionary discretion*** of the trial judge (i.e. where the prejudicial effect outweighs the probative value).

See Also Oral History in Aboriginal Title Cases (p 55), Hearsay (p 45)

Mohan [R v]

1994 CA/SC

Facts Dr Mohan, a pediatrician, was accused of sexually four female patients aged 13–16. Counsel for Mohan wanted to call Dr Hill, a psychiatrist, to testify that the perpetrator of the alleged offences had to have been part of a ***limited and unusual group*** of individuals and that Mohan did not fall into this group as he did not possess the characteristics of the group. In other words: (Perpetrator $\in$ group) $\wedge$ (Accused $\notin$ group) $\Rightarrow$ Perpetrator $\neq$ Accused.

Dr Hill's testimony was to be to the effect that the profile of the perpetrator of the first 3 complaints was likely a paedophile, while the profile of the perpetrator of the fourth was likely a sexual psychopath, and that Mohan did not have the characteristics attributable to either of these groups. He was also of the opinion that "physicians who were also sexual offenders would be a small group". There was ***no evidence*** that the profile of a paedophile or sexual psychopath had been ***standardized to the extent*** that it could be said that it matched the profile of the offender depicted in the charges.

Issue Is the expert evidence of Dr Hill admissible?

Analysis

- Expert evidence is ***presumptively inadmissible*** and its admissibility is a question of law. (When all is said and done, as NH notes, the *Mohan* test is really a **probative/prejudicial balancing** test).
- There is a danger that expert evidence will be misused and ***distort*** the fact-finding process:

> *Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible.*

- The ***necessity*** standard should not be too low (helpfulness) or too high. The ***test*** is: does it provide information that is likely to be outside the experience and knowledge of a judge or jury?
- The expert must not be permitted to usurp the function of the TOF: the closer the evidence approaches an opinion on the ***ultimate issue***, the more stringent the other aspects of the test.

Held Dr Hill's testimony is ***inadmissible*** because the profiles were not standardized enough that it could be said that it matched the supposed profile of the offender in this case.

Ratio For "profiling" expert opinion evidence to be led, the test is: "Has the scientific community developed a ***standard profile*** for the offender who commits this type of crime?" . . . *This is explored in more detail in* ***J-LJ [R v]***.

Note *Mohan* essentially rewrote the law on admissibility of expert opinion evidence and should be the number 1 cite. However, the *Mohan* test ***as expressed in*** ***Abbey v R*** is not only ***clearer***, it is also NH's **preferred interpretation**, so I have left out the details in this brief. The two essential takeaways from *Mohan* proper are: (1) cite it for the test, and then explain you are using the formulation from *Abbey*; and (2) know the facts, which will always be useful.

See Also ***Abbey v R***, ***J-LJ [R v]***, General Rule on Expert Opinion Evidence (p 23)

Moore [R v]

1984 ON/CA

Facts Hogan and Moore allegedly robbed and murdered a cab driver. After Hogan was arrested, he gave a statement to the police admitting his participation and incriminating Moore. There were two trials. In the first trial, Hogan was convicted of second-degree murder, but Moore was granted a new trial.

During Moore's second trial, Hogan testified for the Crown. He said that he couldn't remember any of the events put to him. The Crown obtained permission, under s 9(2) of the ***Canada Evidence Act*** (p 141) to ***cross-examine*** Hogan based on his police statement, but Hogan continued to maintain that he remembered nothing. The Crown did not request permission to cross-examine Hogan on his testimony from the first trial.

The defence then ***cross-examined*** Hogan based on his testimony at the first trial, but elicited no new evidence.

Issue Can the Crown ***re-examine*** Hogan ***based on*** his testimony at the first trial?

Analysis

- The Crown's application to "re-examine" based on the testimony from the first trial is not really a request to re-examine at all: it is in substance an application at the stage of re-examination to ***cross-examine*** the Crown's own witness with respect to the testimony from the first trial.
- This is not a proper case to allow such cross-examination because:
  - **Most *important* reason**: Hogan gave no significant evidence on cross-examination.
  - Lesser reason: Crown decided not to request leave to cross-examine Hogan on his testimony from the first trial during Hogan's examination-in-chief. Crown could easily have requested this, but appears to have opted not to because the police statement did a better job of incriminating Moore.
- Note ***Cassibo [R v]*** does appear to be a proper case for such a cross-on-re-examination.

Held The Crown is not permitted to ~~re-examine~~ ***cross-examine*** Hogan at the re-examination stage based on the unique circumstances of this case.

Ratio In a proper case, a trial judge may have discretion to allow counsel to cross-examine his own witness on a prior inconsistent statement at the stage of re-examination where the witness gave evidence:

1. in ***cross-examination***;
2. on a ***material matter***; and
3. contrary to a prior statement.

See Also General Rule on Re-Examination (p 38), ***Cassibo [R v]***

Murrin [R v]

1999 BC/SC

Facts The Crown wanted to call 6 witnesses with what NH calls the **worst of the worst** credibility problems, jailhouse informants, to testify that the accused confessed to them. The defence wanted a hearing to have their evidence excluded because it claimed it could prove that it was extremely unreliable.

Issue Does a trial judge have discretion to exclude evidence merely because it is unreliable?

Analysis

- The trial judge must exclude evidence which is ***unfair*** to the accused.
- BUT: unreliable ≠ unfair

- It is not unfair for a trial judge to admit unreliable evidence unless there is some particular prejudice to the accused, beyond its lack of reliability, flowing from that evidence.
- This is because assessments of reliability are to be done by the designated TOF, the jury.

Held The evidence cannot be excluded because no prejudice is alleged beyond unreliability, and no rule of evidence permits exclusion based solely on unreliability.

Ratio Assessments of reliability are to be done by the trier of fact, the jury, and not by the trial judge.

See Also ***Khela [R v]***, ***Dhillon [ON] [R v]***, The Vetrovec Witness (p 19)

National Post [R v]

2010 CA/SC

Facts An anonymous source provided documents to a journalist, Andrew McIntosh, which allegedly linked Jean Chrétien to a conflict of interest. The police believed the documents were forged and convinced a court to give them a warrant to search the *National Post* for the documents and the envelope in which they were received. As the police were searching for ***essential physical evidence*** of alleged crimes, this was a physical evidence case, not the usual case of a journalist trying to avoid testifying about his secret sources. However, a by-product of the police getting the physical evidence would be disclosure of the source's identity.

Mr McIntosh believed his source was sincere but acknowledged that if the source had misled him, then he would not be worthy of anonymity and Mr McIntosh would unilaterally withdraw his protection.

Issue Can the *National Post* resist the search warrant on grounds of journalistic privilege?

Analysis

- Note that in cases of journalistic privilege, the identity of the source is the confidence sought to be protected.
- There are four reasons why the journalist-source relationship should not get class privilege:
  (a) How do we know who is a journalist and who isn't?
  (b) Who "owns" the privilege considering that both sides can unilaterally end it? (Contrast with Who Owns the Solicitor-Client Privilege?)
  (c) No one has yet suggested workable criteria for when the privilege is created or lost.
  (d) Class privileges impede the search for the truth.

APPLICATION OF the Wigmore Criteria for Case-by-Case Privilege (p 78)

1. Easily met—the journalist clearly promised confidence ***explicitly*** (it has to be explicit *per* Binnie J).
2. Easily met—the source ***insisted*** on confidentiality (the source must also insist *per* Binnie J).
3. ***Sedulous fostering*** introduces some flexibility:
   - "Professional" journalists get more weight because they have "greater institutional accountability".
   - Bloggers, not so much.
   - In general, relationship between professional journalists and secret sources ought to be "sedulously fostered" and no one has given a persuasive reason to discount the particular relationship in this case.
4. ***Balancing the public interest*** in protecting the identity versus the interest in getting at the truth**.** The judgment is actually horribly unclear on this point, but it seems that Binnie J believes that an alleged forgery is a ***serious*** offence, that the physical evidence might have high ***probative*** value, and that the investigation was *bona fide*.

Held The *National Post* failed to establish privilege and cannot resist warrant on the facts of this case.

See Also Other Confidential Relationships (ad hoc Privilege) on p 78, ***Shirose [R v]***, ***Brown [R v]***

Nikolovski [R v]

1996 CA/SC

Facts A convenience store was robbed. The store had an automatic security camera. The clerk present during the robbery

gave uncontradicted evidence that the video showed the entire robbery.

Issue Is videotape evidence admissible?

Analysis
- Videotape evidence is admissible in appropriate cases.
- Evidence proving that a video has not been altered or changed is a precondition to admitting it as evidence.
    - The *Penney* dissent points out that the trial judge must make this determination prior to admission.

Held The videotape evidence of the convenience store robbery is admissible.

Ratio A videotape of the scene of a crime that has not been altered or changed is generally admissible. It may be a ***silent***, trustworthy, unemotional, unbiased and accurate ***witness*** with ***complete*** and ***instant recall*** of events.

See Also ***Penney [R v]***, Videotapes (p 12)

Noël [R v]

2002 CA/SC

Qualified Search for the Truth (p 8)

Analysis ¶ 85 in LHD's dissent:

> *In "The Adversarial System: A Qualified Search for the Truth", the author forcefully defends the notion that the search for truth must be qualified in appropriate circumstances where other more valuable principles apply. Ensuring that an accused receives a* ***fair trial****,* ***deterring police misconduct****, and* ***preserving the integrity of the administration of justice*** *are all laudable goals to which this Court must strive in its rules of evidence, at times to the detriment of full access to the truth.* ***Where these goals are met, however, the search for the truth must****, in my view,* ***be the preponderant consideration****.*

The only purpose of this case is to show that the dominant purpose of the rules of evidence is to obtain the truth in the immediate case, but that this purpose may at times have to give way to other crucial goals.

See Also ***Swain [R v]*** (p 133), ***Taillefer [R v]; R v Duguay*** (p 134)

Current Law on Section 13 (p 71)

Analysis As modified in *R v Henry*, *Noël* stands for the bright-line rule that in a W/A case (i.e. at the trial of an accused who previously gave compelled testimony at the trial of some other accused), the accused's earlier compelled testimony may ***never*** be used by the Crown for any purpose.

Note NH suggested in class that **it was a mistake for *Henry* to eliminate altogether the possibility of cross-examining a W/A at his own trial based on a prior inconsistent statement**: see History of Section 13 Cases (p 72).

See Also ***Charter*** s 13 (p 146), ***Henry [R v]***, Protection of a Witness (p 71)

O'Brien [R v]

1978 CA/SC

Facts When Jensen found out that he and O'Brien were jointly charged with possession for the purpose of trafficking, he fled the country. 1½ years later, O'Brien was convicted. Jensen then returned to Canada and the charges against him were ***stayed***. 6 months after the stay, Jensen showed up at the offices of O'Brien's lawyer, Mr Simons. He told Mr Simons that he had done the crime alone and O'Brien was innocent. However, Jensen had received ***legal advice*** and refused to swear an ***affidavit***. He was only willing to testify in court so that his testimony could not be used against him in a criminal trial. Not long after this meeting, Jensen died of a drug overdose.

Mr Simons applied to the BC Court of Appeal to adduce fresh evidence in O'Brien's case with the intention of testifying as to Jensen's ***hearsay*** confession.

Issue Is hearsay evidence of Jensen's confession admissible as a declaration against interest?

Analysis
- The exception for declarations against interest applies to penal as well as pecuniary interests, as long as the statement in question is genuinely a declaration ***against interest***.
- The guarantee of trustworthiness of a declaration against interest flows from the fact that it is to the deceased's ***immediate prejudice***. To be admissible, the declarant must realize that the declaration may well be used against him (NH: **thus confessing to a loyal friend likely doesn't count**).
- But this is exactly what Jensen wished to avoid. He had no intention of furnishing evidence against himself.
- Viewed from Jensen's subjective perspective, his statements were not against interest.

Held The hearsay is inadmissible because Jensen clearly took steps to avoid penal consequences.

Ratio In order to qualify as a declaration against interest:

1. the declaration must have been made to such a person and in such circumstances that the declarant ***should have apprehended*** penal (or pecuniary) consequences as a result; and
2. the vulnerability to consequences must not be too remote.

Note Because this is an old case, Dickson J did not argue the principled approach. NH says **it would have failed the principled approach on reliability grounds**. Also, note that this is pre-*Charter* so protection against self-incrimination would be grounded in the common law, not section 13.

See Also Declarations against Interest (p 47), Hearsay (p 45), ***Brown [R v]***

Oickle [R v]

2000 CA/SC

Facts During the police investigation of 8 fires, the accused submitted to a polygraph test. The officer administering the test questioned him in a gentle and reassuring manner in order to gain his trust. At the conclusion of the test, the officer told the accused that he had ***failed*** the test. The accused was then questioned for about an hour and 40 minutes until he confessed to the first fire. He cried. He was arrested and warned of his rights. (Prior to his arrest he was consistently informed of his rights and informed that he could leave at any time).

At the police station, the accused was placed in an interview room equipped with videotaping equipment. He was questioned for another 3–4 hours until he confessed to 7 of the 8 fires. He cried some more. Police then took a written statement from the accused, which took another 3 hours, and put him in a cell to sleep around 2:45am.

At 6:00am, an officer noticed that the accused was still awake and asked if the accused would agree to a re-enactment. On the ***videotape*** of the re-enactment, the accused was informed of his rights. The police then drove the accused around town as he pointed out the locations and explained how he started the fires.

During the polygraph test and subsequent interrogation, officers:

- exaggerated the accuracy of the polygraph test;
- minimized the moral significance of the offence, but they did not minimize the legal consequences;
- repeatedly mentioned that "I think you need help" or "[m]aybe you need professional help" (but at no time did they suggest that the accused could get help only if he confessed)
- repeatedly suggested that things would be better if the accused confessed, but always in the context of moral inducements (the accused would feel better if . . . community would respect him more if . . . &c);
- suggested that they would abstain from polygraph testing the accused's fiancée if he confessed.

The accused was never denied food, sleep, water, or even so much as access to the bathroom.

Issue Was the accused's confession voluntary?

Analysis
- At no point was the accused offered any *quid pro quo* for confessing.
    - Possible exception: telling him his fiancée would not be polygraphed if he confessed. This is not a

strong enough inducement to raise a reasonable doubt as to the voluntariness of the confession.

- Simply confronting the suspect with adverse evidence (even inadmissible evidence like a polygraph test) is not grounds to exclude. Nor does exaggerating the evidence's reliability ***necessarily*** make a confession involuntary.
- The crucial point throughout is that the inquiry into voluntariness is ***contextual*** and must take into account all the circumstances of the case. No hard rules &c &c.

Held The trial judge properly considered all the relevant circumstances and her conclusion that the confession was voluntary should not be disturbed.

Note This case is general authority for the common law confessions rule, but for brevity's sake the law presented in this case is mainly summarized in Confessions Rule (p 58). Note also that ***total questioning time*** was ~9–10h.

See Also ***Grandinetti [R v]***, ***Grewall [R v]***, Admissions and Confessions (p 57), ***Singh [R v]***, ***Turcotte [R v]***, ***B(SC) [R v]***

Olson v Olson

2003 AB/CA

Facts Father and mother had a son, Christopher, before they divorced. As a result of the divorce, father was ordered to pay child support to mother for Christopher, who was a "child of the marriage". Christopher is now 19 and thus over the age of majority. He devotes 11 months of the year to training for Nordic combined skiing at a high level and is thus totally financially dependent on his mother. Father applied to court for a declaration that Christopher ceased to be a "child of the marriage" on turning 18, which would release father from child support obligation. Whether Christopher is a "child of the marriage" turns on whether his dependence on his mother stems from doing an activity that would enhance his career prospects later in life.

Issue Can a court take judicial notice of the "fact" that athletic training enhances career prospects?

Analysis

- Judicial notice is the acceptance by a court, without the requirement of proof, of the truth of a particular fact that is of such general or common knowledge in the community that proof if it can be dispensed with.
- The relationship between athletic training and career advantages cannot be demonstrated by resort to readily accessible sources of indisputable accuracy.

Held Judicial notice cannot be taken of the relationship between athletic training and career advantage.

Ratio

> *The threshold for judicial notice is strict. A court may take judicial notice of facts that are either* ***so notorious*** *or* ***so generally accepted*** *as* ***not to be the subject of debate*** *among reasonable people.*

See Also Judicial Notice (p 12)

Palma [R v]

2000 ON/SC

Receivability (p 5)

Ratio To be receivable in a criminal case, an item of evidence must be all three of:

1. relevant;
2. material; and
3. admissible

Note Note that the concept of ***probative value*** combines steps one and two above.

See Also ***Arp [R v]***, ***Seaboyer [R v]***, ***B(FF) [R v]***, ***Penney [R v]***, Probative/Prejudicial Balance (p 6)

Basis and Weight of Expert Opinion (p 25)

Issue Does every ***assumption*** on which an expert bases his opinion have to be led as ***admissible*** evidence?

Ratio
1. If 100% of the expert's opinion is based on hearsay, the opinion is inadmissible. (But this is practically impossible).
2. Where an expert's opinion is based in part on suspect information and in part on either admitted facts or facts sought to be proved, the matter is purely one of ***weight***. (The jury is to be instructed that it ***may***, not must, ignore the expert's opinion because it relied on some evidence that was not put before the jury).

Note This all comes from *R v Lavallée* (which is not itself part of the course materials).

Probative Value of Informal Admissions (p 57)

Issue What happens when Crown counsel calls a witness who reports what an accused has told him?

Analysis It is debatable whether admissions of the accused are hearsay at all. Their admissibility rests on the theory of the adversary system: what a party has previously stated can be admitted against him and it is not open to that party to complain about the unreliability of his own statements. A party can hardly object that he has had no opportunity to cross-examine himself or that he is unworthy of credibility except when speaking under oath!

Ratio When the Crown adduces such evidence, it must take the good with the bad. It is evidence of its truth both for and against the accused.

See Also ***Allison v R***, Informal Admissions (p 57)

Parrott [R v]

2001 CA/SC

Facts The accused kidnapped and allegedly raped a moderately retarded woman suffering from Down's syndrome from the institution in which she had spent the last 20 years. Crown took the unusual step (for the prosecution) of precipitating an inquiry into her testimonial competence under section 16 of the ***Canada Evidence Act***. Crown also advised that complainant had earlier made out-of-court statements to a doctor and a police officer, some of which had been videotaped. Crown applied to have these admitted without calling the complainant.

There was no contention that the complainant would be ***harmed*** by testifying, only that she was too ***incoherent*** to testify. Competing experts were called on *voir dire* to testify as to her ability to "communicate the evidence":

- Dr Gillespie, the Crown expert, met the complainant for the first time a few days before the trial. After interviewing the complainant, he testified that she was "incoherent" about the matters in issue.
- Dr Morley, a GP who had known the complainant for about 6 years said that the complainant would be difficult to understand, but could give some account of what happened to her.

Trial judge did not have the complainant called. He accepted Dr Gillespie's evidence and admitted the out-of-court statements in lieu of having the complainant testify at trial.

Issue
1. Was the expert evidence on the *voir dire* admissible under the *Mohan* test?
2. If so, were the out-of-court statements admissible under the principled approach to hearsay evidence?

Analysis **ADMISSIBILITY OF EXPERT TESTIMONY ON THE VOIR DIRE**:

- Trial judges are eminently qualified to assess the testimonial competence of a witness, a responsibility that is specifically assigned to the trial judge under section 16 of the *CEA*.
- At the time that the experts were called, ***it had not been shown*** that expert evidence was ***necessary***. Thus the expert testimony was inadmissible under ***Mohan [R v]***.
- It's possible that some form of expert testimony might have been ***shown*** to be ***necessary*** had the complainant been called, but this was not done.
- Therefore there was no admissible evidence on which to consider the necessity of the hearsay evidence!

ADMISSIBILITY OF HEARSAY EVIDENCE:

- Admission of the hearsay statements would only have been ***necessary*** if the direct testimony of the

complainant was ***unavailable*** (note that the issue is availability of the testimony, not the witness!):
    - While it is possible that Dr Gillespie was correct, it is also possible that Dr Morley was correct. The trial judge ought to have called the witness and decided for himself, especially given that there was no allegation that the complainant would be harmed by testifying.
    - There is no inflexible rule that the complainant must be put in the witness box in all circumstances.
        - The problem in this case is with evidence that was available but not given.
        - Crown must pave the way for admission of out-of-court statements by calling complainant to show that the testimonial competence she exhibited in the out-of-court statements had been lost, or by providing some other legal basis for excusing her from testifying.
- Had necessity been shown, ***reliability*** was likely present because of several circumstantial guarantees of trustworthiness: lack of any real possibility of mistaken identity, lack of any discernible motive to lie, and possibly lack of mental capacity to do so.

Held By not first hearing from the complainant himself, the trial judge double-erred: first in failing necessity under the *Mohan* test, and second in failing necessity under the principled approach. A new trial is required.

Ratio If the witness is physically available and there is no suggestion that she will suffer trauma by attempting to give evidence, that evidence should ***generally*** not be pre-empted by hearsay ***unless*** the trial judge has first had the opportunity to form his own opinion of her testimonial competence.

See Also ***Pelletier [R v]***, Principled Approach to Hearsay (p 49), ***Canada Evidence Act*** s 16 (p 142), General Rule on Expert Opinion Evidence (p 23), ***DD [R v]***, ***DAI [R v]***

Peavoy [R v]

1997 ON/CA

Facts The accused spent the day drinking with the victim, Mr. George. At some point, an argument developed. The accused testified that he stabbed Mr. George with a 6-inch filleting knife. After the stabbing, the accused testified that he washed the knife, straightened the apartment, and tried to call his lawyer.

After discovering the body, the police cordoned off the building. It required over three hours and 22 loudspeaker calls to get the accused to come out of his apartment. He raised self-defence and extreme intoxication as defences.

Issue
1. Can the Crown rely on the POC to support a conviction for second-degree murder, as opposed to manslaughter?
2. Can the Crown rely on the POC to rebut the defence of self-defence?
3. Can the Crown rely on the POC to rebut the defence of extreme intoxication?

Analysis
- Where a person admits to committing an act which resulted in death, evidence that a person hid the murder weapon or fled the scene of a homicide may, as a matter of human experience or logic, be viewed as more consistent with that person having committed a culpable homicide than with a non-culpable act.
- Depending on the circumstances, POC may be relevant to rebutting defences which rely on the absence of a culpable mental state. It is potentially ***relevant*** because it is ***circumstantial evidence*** of state of mind.

Held
1. No.
2. Yes.
3. Yes.

Ratio Where the accused admits the *actus reus* of an offence and the only question is the level of *mens rea*, POC is not relevant if it is equally consistent with both possible levels of culpability. (Fully analogous to ***Arcangioli [R v]***).

Note
- Note the factual similarity between *Peavoy* and ***Arcangioli [R v]***, where an ***admission*** narrowed the compass of an issue so as to deprive POC of relevance and the factual difference in ***White v The Queen*** where the admission did not have this effect.
- Note also that where you see "the accused ***testified*** that" you should think "***admitted***" if it is an admission of

some guilty conduct.

See Also ***B(SC) [R v]***, Post-Offence Conduct (p 17)

Pelletier [R v]

1999 BC/CA

Facts Ward and Newall did not find rehabilitation at the Campbell River drug rehab program. However, they did find love, so they decided to skip out of the joint together and go sell heroin for Albert Kong. Unfortunately, Ward owed AK money plus AK thought Ward was a rat. Ward contacted his "friend" Cole, with whom he had previously worked selling drugs for AK. Cole ***telephoned*** AK. Subsequently, AK allegedly sent the accused Pelletier to kill Ward with a heroin overdose. AK was not charged.

At Pelletier's trial for murder, the Crown wanted to have Cole recount (hearsay of) what AK said during their ***phone conversation*** in support of the Crown theory that the accused executed the hit for AK. Crown did not want to call AK as a witness and argued that leading hearsay from Cole was ***necessary*** because the two detectives on the case considered it ***pointless*** to call AK based on his background and his knowledge that he was a suspect.

Issue Is the necessity element of the principled approach satisfied if the party desiring to lead the hearsay reasonably believes the declarant will be disinclined to testify or unlikely to co-operate?

Analysis

- The police officers were likely right that it would be pointless to interview AK.
- However, when the SCC set down the "reasonably necessary" test in *Khan*, it did not mean to include the evidence of those who are simply disinclined to testify or unlikely to co-operate within ambit of necessity.

> *If one finds necessity too readily, one risks depriving the defence of cross-examination when, with more* ***diligence*** *it would have been available. A witness cannot be excused from testifying because the witness is not in the mood or is generally fearful of the process, which might create incentives for witnesses who would rather not endure the rigors of cross-examination to "clam up". . . . [F]ear or disinclination, without more, do not constitute necessity.*

Held The hearsay was not necessary. Reversible error, new trial ordered.

Ratio **Assumption that a witness will be uncooperative does not meet the requirement of necessity. A party must at least go through the process of subpoenaing the witness &c in order to meet the threshold of reasonable efforts.**

Note As an aside, the trial judge held that the hearsay evidence of the phone conversation was ***reliable*** because AK was making a statement against interest. This was not touched on in the appeal. See: ***O'Brien [R v]***.

See Also ***Parrott [R v]***, Principled Approach to Hearsay (p 49)

Penney [R v]

2002 NF/CA

The "Let It All in" Debate (p 7)

Analysis In chapter 1, the casebook has an excerpt in which Marshal JA reacts to a recent trend in which people rely on the dual ideas (1) that all relevant evidence is presumed admissible; and (2) that juries are smart, not dumb to justify allowing all relevant evidence into the trial (no exclusion for inadmissibility) and leaving its weight to be decided by "properly instructed triers of fact":

> *[65] [T]he prejudicial effect of unreliable evidence will be very difficult to erase, and the integrity of the trial process mandates [that the rules in question] not be so freely discarded. . . . [A]ssurance of fairness in the trial process requires certain otherwise admissible evidence to be excluded where its* ***inherent unreliability*** *and* ***prejudicial effect*** *supersedes any weight that may be lent to it. . . . The* ***spectre of wrongful convictions*** *requires revisiting the approach which would defer assessments of potentially prejudicial evidence . . . from inquiry into whether it*

should be admitted at all . . . to attributions of weight by the triers of fact.

Note NH agrees with Marshal JA: letting everything in and leaving it to weight:

1. **increases the length of trials**; and
2. **is strongly linked to wrongful convictions**.

See Also ***Arp [R v]***, ***Seaboyer [R v]***, ***B(FF) [R v]***, ***Palma [R v]***, Probative/Prejudicial Balance (p 6)

Real Evidence versus Demonstrative Evidence: **Videotapes** (p 12)

Facts Accused was charged with "killing a marine mammal in a manner not designed to kill it quickly". The only evidence brought by the Crown consisted of video taken by two members of the International Fund for Animal Welfare during the seal hunt. The video contained numerous ***gaps*** because the camera operator selectively taped "***the gory stuff***". After being shot, the video was transferred from mini-digital to Beta format and from Beta to VHS. It was then left in the custody of a professional editing studio for 10 months during which no steps were taken to ensure its security or restrict access to it.

At the *voir dire* on the admissibility of the videotape evidence, the trial judge did not believe the two witnesses called to authenticate the videotape. He found that they lacked credibility and lied when it suited their purposes.

Issue Is the video admissible?

Analysis

- Admissibility requirements for video are the same, by analogy, as those for photos:
  - the video must truly represent the facts;
  - it must be fair and free of any intention to mislead; and
  - it must be verified under oath by a person capable of doing so.
- Video is generally admissible, but proof it wasn't altered is a precondition to admissibility: *Nikolovski*.
- In this case, the videotape evidence fails both the ***authentication*** and "***not misleading***" aspects of the above:
  - Authentication: trial judge found the witness purporting to authenticate the tape to lack credibility. Moreover, the Crown did not call any expert to explain the effect of the format changes.
  - Potential to Mislead: *Nikolovski* is distinguished because video in that case was a "silent witness". Here, the camera was operated by a person who selectively filmed only portions of the events.
    - Absent continuous video of the killing of one seal, it is impossible to determine whether the manner used was designed to kill quickly (analogy to a series of still photographs).
    - Thus the video lacks probative value with respect to the fact it purports to prove.

Note

- The majority points out at ¶ 28 that where video is being used for the purpose of ***identification***, it may not need to be continuous. As NH puts it, **the probative/prejudicial balancing of evidence may be vastly different depending on the purpose for which it is being led**.
- Concurring opinion emphasizes that the "was it altered?" question is for the trial judge to answer, whereas the "do you believe the witnesses that the video represents what they saw?" question is for the jury.

Held The video was not admissible because the Crown failed to establish that it had not been altered, or that it depicts the scene of a crime.

See Also ***Nikolovski [R v]***, ***Kinkead [R v]***

Ratten v The Queen

1972 Aus/PC

Facts Ratten killed his wife with a shotgun but claimed it was an accident. The issue at the murder trial was ***intention***. Various circumstantial evidence surrounding the shotgun suggested an intentional homicide. In addition, there was evidence regarding two telephone calls.

1. At 1:09pm, Ratten's father called the house. The victim was heard in the background talking normally.

2. At 1:15pm, a call from the house was received at the local telephone exchange. The operator heard a female voice. The voice was ***hysterical*** and ***sobbed***. It said "Get me the ***police*** please".

Issue Is the operator's testimony regarding the outgoing (second) telephone call inadmissible hearsay?

Analysis
- Evidence is not hearsay and is admissible when it is led to establish not the truth of the statement, but the fact that it was made: ***Subramaniam v PP***.
- Evidence that the female voice calling from Ratten's house was ***hysterical***, ***sobbed***, and asked for the ***police*** is ***relevant*** as possibly showing (if the jury sees fit to draw the inference) that the deceased woman was, at the time of the call, in a state of emotion or fear (i.e. it is circumstantial evidence of her state of mind).

Held The evidence is not hearsay and is admissible as circumstantial evidence of state of mind.

Ratio When evidence of an out-of-court statement is led for the fact that it was made, the test for admissibility is ***relevance*** to an issue.

See Also ***Griffin [R v]***, ***Baltzer [R v]***, Circumstantial Evidence of State of Mind (p 46), Hearsay (p 45)

Re Application under s 83.28 of the Criminal Code

2004 CA/SC

Facts During the Air India trial (i.e. *R v Malik*), the Crown had not yet called a certain unnamed witness. The Crown caused an application to be made under s 83.28 of the ***Criminal Code***. There was evidence to suggest that the purpose of the application was to find out what the witness would say on the stand if he were called in the Air India trial.

Issue Does ***Criminal Code*** s 83.28 infringe s 7 of the ***Charter***, in particular the rights to silence and against self-incrimination?

Analysis
- The right against self-incrimination is a PFJ.
    - However, it is not absolute in the sense that incriminating testimony can be compelled.
    - But testimonial compulsion is always linked to evidentiary immunity, which requires 3 procedural safeguards:
        1. use immunity;
        2. derivative use immunity; and
        3. constitutional exemption.
- Section 83.28(10) has use immunity and ***absolute*** derivative use immunity (SCC interprets provision so as not to permit the Crown to prove the evidence was otherwise discoverable on BOP).
    - Absolute derivative use immunity is stronger than the derivative use immunity provided at common law, because at common law the Crown can get the evidence in if it shows discoverability on BOP.
    - The constitutional exemption is available under s 83.28 because it is provided by the common law.
    - Because s 83.28(10) doesn't mention extradition or deportation but these proceedings must accord w PFJ, courts must interpret it to extend to extradition and deportation hearings.
- ∄reason to believe that the ***predominant purpose*** of the investigative hearing sought by the Crown is to obtain information or evidence for the prosecution of the unnamed witness (NH says **the Court is prepared to take the state at its word that there is a valid state purpose in the absence of evidence to the contrary**).

Held The provision is constitutional and the unnamed witness can be compelled to give evidence.

Note Section 11(d) of the *Charter* does not apply to s 83.28 because the person compelled to give evidence under s 83.28 is not an accused.

See Also ***Charter*** s 7 (p 7), ***Criminal Code*** s 83.28(10) (p 147), Compelled Testimony (p 73), ***Henry [R v]***, Privilege against Self-Incrimination (p 69), Derivative Evidence (p 64), ***Grant [R v]***, ***Malik [R v]***, ***Turcotte [R v]***

Robert [R v]

2000 ON/CA

Facts Accused was charged with intentionally causing fire to a dwelling. The Crown's case was entirely circumstantial. Accused drove his lawn mower tractor into the garage. There was a loud bang and the accused's wife heard him yelling that the house was on fire. The wife testified that earlier in the day, she saw a jerry can of gasoline sitting in the garage with its top missing, but no gasoline had been spilled at the time. The accused testified that he did not recall knocking over the can. A neighbour testified that he came by as the fire was burning and he saw the jerry can standing upright as the fire burned around it. The can was totally destroyed by the fire.

While the trial judge accepted the possibility that the tractor had backfired and started the fire, he found that this would have required a significant gasoline spill. He held that such a spill was not proved, relying on the neighbour's evidence. In rejecting the defence's backfire theory, the judge held that it was "unacceptable as a ***reasonable inference*** from the ***proven*** circumstantial facts. The evidence with respect to the gas spill . . . is not present".

Issue Did the trial judge misdirect himself by reversing the onus of proof?

Analysis Accused was entitled to an acquittal if there was a reasonable doubt on all of the evidence, a conclusion which can be sustained at a much lower threshold than a "***reasonable inference***" on "***proven facts***". The trial judge took as the starting point the accused at the scene of the fire and then scrutinized the case for the defence by asking whether it established innocent cause for the fire. The accused was forced to show that an accidental cause was a "***reasonable inference***". The trial judge wrongly applied a formula for testing the Crown's case to the accused. Finally, the "***proven***" concept is wrong because there is no obligation on the accused to prove ***any*** facts.

Held Trial judge's instruction required the accused to provide a reasonable explanation for the fire based upon proven facts. The conviction is overturned.

Ratio It is for the Crown to show BRD that there is no other reasonable inference than the guilt of the accused.

Note NH says: **the judge should have asked himself whether there was any reasonable possibility that there was gasoline on the floor of the garage which could have started the fire by accident**. NH also points out that **the TOF may acquit on evidence which it doesn't believe or accept as long as it has a reasonable possibility of being true**.

See Also ***Baltrusaitis [R v]***, Use of Evidence (p 11), ***Dhillon [BC] [R v]***

Seaboyer [R v]

1991 CA/SC

Facts In this case, the SCC was considering the constitutionality of the old sections 276–77 of the *Criminal Code*, which were "rape shield" provisions. The specific facts aren't relevant to the point the casebook is trying to make, which is a general question of probative/prejudicial balancing. ***However***, it should be kept in mind that the constitutional basis on which the Court was examining these rules of evidence was ss 7 & 11(d) of the *Charter*.

Issue Do judges have a power to exclude defence evidence, as they do to exclude Crown evidence, as inadmissible?

Held

- One section was struck down as unconstitutional because it might result in excluding evidence whose probative value was not outweighed by its potential for prejudice.
- The other was upheld by the SCC because it the Court held that there is no connection between a woman's sexual history and her credibility. Thus this section was unable to exclude evidence having probative value.

Ratio ∃ differential standard, depending on whether the evidence is being led for the Crown's case or for the defence:

- For ***Crown*** evidence, if the prejudicial effect outweighs the probative value at all, it is excluded.
- For ***defence*** evidence, the prejudicial effect must ***substantially outweigh*** the probative value before it can be excluded.

See Also ***Arp [R v]***, ***B(FF) [R v]***, ***Penney [R v]***, ***Palma [R v]***, Probative/Prejudicial Balance (p 6), ***Charter*** ss 7 & 11(d)

Shergill [R v]

1997 ON/GD

Facts A Crown witness, Ms Kaur, did not speak or read English. The timeline is as follows:

- 6 years after the events allegedly forming the subject matter of the charge, Ms Kaur, made a ***statement*** to the police. The ***record*** of the statement was a summary, not a verbatim record, and it was not a record of what the writer heard the witness say, but of what an interpreter told the writer that she said.
- 6½ years after the alleged events, Ms Kaur testified at the preliminary inquiry. A verbatim ***transcript*** of her testimony at the inquiry (translated into English???) was recorded.
- 8 years after the alleged events, the trial was held.

At trial, Ms Kaur forgot several material details she had mentioned in her statement and at the inquiry.

Issue Can either the ***statement*** or the ***transcript*** be used to refresh the witness' memory?

Analysis

- There is no contemporaneity requirement for PMR.
- The statement is problematic because it was not a verbatim record and was the work of a third party (someone writing down what an interpreter said that the witness said).
- However, the transcript is OK.
- There is a ***twist*** in this case: Ms Kaur cannot read the English transcript. Thus a modified procedure is used: the witness is taken out of court and the interpreter will privately reads to her the portions of the transcript accepted for the purposes of refreshing her memory. She then comes back into court and give her testimony.
    - At ¶ 34, Ferguson J suggests the same procedure could be used to refresh from a ***video*** statement.

Held The transcript can be used to refresh Ms Kaur's memory, but the statement is problematic and may not be used.

Ratio If the following criteria are satisfied:

1. Has the witness forgotten something ***material***?
2. Is the witness' ***memory exhausted***?
    - The judge may consider it preferable to first relax the rule against leading questions: see ***Maves v Grand Trunk Pacific Rwy Co*** (p 114).
    - This would obviate the need for a document (and judging whether the document is acceptable!) and eliminate the risk of the jury learning of a prior consistent statement.
3. Is this ***legitimately*** a case of ***refreshing*** memory and not adducing PRR?
4. Is the proposed memory trigger appropriate? (A ***discretionary*** balancing exercise; contemporaneity becomes a factor to consider, as well as who created the document, whether the witness verified its accuracy; whether it is reliable; and whether it could be too suggestive or distortionary).

Then the procedure is:

- The document is placed in front of the witness without comment and the witness is asked to read the appropriate passage. The jury is not told the nature of the document or what it says.
- Counsel should then take the document from the witness and ask a non-leading question about the matter.
- Opposing counsel is entitled to examine the document and cross-examine the witness.

See Also Present Memory Revived (PMR) (p 35), ***Fliss [R v]***, ***JR [R v]***

Shirose [R v]

1999 CA/SC

Facts The RCMP mounted a "***reverse sting***" operation which involved selling illegal drugs to high-up "executives" in the drug trade. As a result, the two accused, Shirose and Campbell were proved guilty BRD of trafficking.

The reverse sting was in violation of the *Narcotic Control Act* as it stood at the time. Before sentencing, the accused applied for a stay of proceedings on grounds of ***abuse of process*** by the police. The Crown raised several defences to the abuse of process allegations, including the defence of ***good faith***.

In support of the good faith defence, the Crown led evidence from Cpl Reynolds, the officer who planned the sting, that he had read a recent lower court decision (*Lore*) on reverse stings and believed the operation was legal. On cross-examination, defence counsel elicited from Cpl Reynolds that he had sought the opinion of a DOJ lawyer, Leising, to verify the legality. Finally, the Crown advanced the position, both at the trial on the abuse of process and in the Court of Appeal, that Leising's advice had assured the RCMP that the operation was legal.

Clearly, if the defence could show that the DOJ advised the RCMP that its proposal was illegal and the RCMP deliberately disregarded this advice, it would be an ***aggravating factor*** in the abuse of process application.

Issue

1. Was the DOJ's advice to the RCMP protected by solicitor-client privilege?
2. If so, did the RCMP waive privilege over the contents of Leising's advice by seeking to prove good faith from the fact of having sought the advice?

Analysis

- Not everything done by a gov't lawyer (or any lawyer) attracts solicitor-client privilege. It must pass this test:
    1. communication between the client and the lawyer;
    2. intended to be confidential; and
    3. for the purpose of obtaining legal advice

  The communications by the DOJ lawyer to the Cpl Reynolds meet the test and are therefore privileged.
- Neither the Future Crimes and Fraud Exception nor the Innocence at Stake Exception are relevant.
- The answers elicited by defence counsel were not enough to waive the privilege, since Cpl Reynolds was merely responding truthfully to questions ***crafted*** by the defence, as he was required to do.
    - BUT, the Crown explicitly made arguments in reliance on the undisclosed advice and this was enough.
    - The Crown/RCMP made a ***live issue*** of the legal advice received from the DOJ.

Held The RCMP waived privilege when it supported its good faith argument with the ***undisclosed*** advice from the DOJ.

Ratio Solicitor-client privilege is implicitly waived if a party supports an argument by ***undisclosed*** advice from legal counsel in circumstances where the truth of the argument ***depends on the content*** of that legal advice.

See Also ***Brown [R v]***, Solicitor-Client Privilege (p 75) in Class Privilege, ***National Post [R v]***

Sinclair [R v]

2010 CA/SC

Facts After being arrested for murder, Sinclair was advised of his right to ***counsel***, and twice spoke by telephone with a ***lawyer***. He was later interviewed by a police officer for several hours. Sinclair stated on a number of occasions during the interview that he had nothing to say and wished to speak to his lawyer ***again***. The officer confirmed that Sinclair had the right to choose whether to talk or not, however, he refused to allow him to consult with his lawyer again. He also told Sinclair that he did not have the right to have his lawyer present during questioning. The officer continued the conversation. In time, Sinclair implicated himself in the murder.

Issue Does s 10(b) of the ***Charter*** give an accused who has already exercised his right to counsel by speaking to his lawyer over the telephone the right to have his lawyer present during the interrogation?

Analysis

- Despite general rule, police must give detainee an additional opportunity to receive advice from counsel where developments in the course of the investigation make this necessary to s 10(b)'s underlying ***purpose***.
- In the context of a custodial interrogation, the ***purpose*** of s 10(b) is to support detainees' right to choose whether to cooperate with the police investigation or not

Held Sinclair's section 10(b) rights were not breached.

Ratio In general, s 10(b) does not mandate the presence of defence counsel throughout an interrogation.

See Also ***Hebert [R v]***, ***Singh [R v]***, ***Charter*** s 10(b) (p 146), Silence and the Charter (p 69), ***Grant [R v]***

Singh [R v]

2007 CA/SC

Facts Singh was arrested for murder, advised of his s 10(b) rights, and privately consulted with counsel. He was then interviewed by Sgt Attew, who candidly testified at trial that his goal was to put the police case to Singh in an effort to get him to confess, ***no matter what***. The interview was videotaped.

During the interview, Singh continued to repeat that he didn't want to talk or requested to be returned to his cell. He asserted his right to silence ***eighteen*** (18) times. Each time, Sgt Attew **affirmed that Singh did not have to say anything** and stated that it was nonetheless his ***duty*** to place the evidence before Singh. Although Singh did not confess to the murder, he eventually identified himself in surveillance footage from the crime scene.

Issue Did continuing the interview after Singh had repeatedly asserted his right to silence violate s 7 of the ***Charter***?

Analysis

- When police insist on putting their case before the suspect ***no matter what*** the suspect says, they run risk of denying suspect a ***meaningful choice***. However, videotape shows Sgt Attew's bark was worse than his bite.
- There needs to be a balance between individual and state interests:
  - The individual does not have a right not to be spoken to and police questioning is crucial.
  - On the other hand, police persistence in continuing the interview despite repeated assertions by the detainee that he wishes to remain silent may well raise a strong argument that the statement obtained was not the ***product of a free will***.
- Unlike the Confessions Rule (p 58), the s 7 right to silence is only engaged upon ***detention***: ¶ 32.

Held Singh's section 7 right to silence was not violated. (And perhaps more importantly, it was voluntary BRD within the meaning of the confessions rule which is functionally equivalent in this context).

Ratio In the context of a police interrogation of a person in detention where the detainee knows he is speaking to a person in authority, the section 7 right to silence is functionally equivalent to the confessions rule.

Note NH **asks the question** Where Do We Draw the Line? (p 69) **and proposes 4 factors to consider**.

See Also ***Hebert [R v]***, ***Sinclair [R v]***, ***Charter*** s 7 (p 146), ***Turcotte [R v]***, Right to Silence, Silence and the Charter (p 69), ***Oickle [R v]***, ***Grant [R v]***, Privilege against Self-Incrimination (p 69), ***Grandinetti [R v]***

Smuk [R v]

1971 BC/CA

Facts At the close of the prosecution's case, counsel for the defence announced she was going to call her first witness, Mr Burg. Crown counsel objected, saying that the accused must testify first since otherwise he could sit in the courtroom, hear all the defence witnesses, and tailor his testimony to fit with theirs. The trial judge told the defence that it was not obliged to call the accused first, but that if it did not, the trial judge would "not consider [the accused's] evidence ***too strongly***".

Issue Was the judge's statement that he would not consider the accused's evidence "***too strongly***" if the accused did not testify first a reversible error?

Analysis

> *The accused, or counsel for the accused, is totally and completely free to decide whether or not the accused will or will not testify and if he does in what order or sequence he will be called to testify either before or after the witnesses who are called to testify for and on his behalf.*

- There is a ***presumption*** that the accused is innocent and when he testifies presumably he testifies as a witness of truth and his evidence like that of any other witness must be carefully weighed.

- The accused's evidence cannot be ***prejudged*** and no advantage or disadvantage is to be attributed to his evidence ***in advance*** because he testifies after defence witnesses have testified for or on his behalf.
- The credibility of a witness cannot be prejudged by the court under any circumstances.

Held The judge's statement is a ***reversible error*** because it ***prejudged*** the accused's credibility.

Ratio

> *[T]hat an accused person must be called first to testify and failing that, that his evidence must be suspect is a* ***monstrous theory*** *and completely . . . foreign to our jurisprudence.*

Note

- It is common practice for counsel to seek an order excluding regular witnesses from the courtroom until they have given their testimony, and these orders are generally granted by the Court.
- This case is, obviously, pre-***Charter***. The rights involved would appear to fall under ss 11(c) & 11(d) nowadays and, according to ***Swain [R v]***, PFJ and s 7.

See Also ***Jolivet [R v]***, Order of Calling Witnesses (p 32), Our Adversarial System of Trial (p 13)

Stirling [R v]

2008 CA/SC

Facts Stirling and Harding were the 2 survivors in a car accident that killed the other two occupants of the car. Stirling was charged with criminal negligence causing death. The issue at trial was whether the accused, Stirling, and not Harding was the driver of the car at the time of the accident.

From the time of the accident, Harding consistently maintained that Stirling was the driver. Some time after Harding gave statements to this effect, Harding launched a civil suit against Stirling and certain drug-related charges against Harding were dropped by the Crown.

At trial, the defence cross-examined Harding on the civil suit and dropped charges. All parties agreed that this line of questioning raised the possibility that Harding had a ***motive to fabricate*** his testimony.

Issue Are Harding's prior consistent statements admissible to rebut the suggestion of a recent fabrication?

Analysis RECENT FABRICATION EXCEPTION:

- Alleged fabrication need not actually be "recent". The ***issue*** is whether the witness made up a false story.
- There does not need to be an explicit allegation of fabrication. If it is apparent that the position of the other party is that there has been a fabrication, the exception is engaged.
- By eliminating a ***motive to fabricate***, such statements are capable of ***strengthening credibility***.
- However, the exception lacks any ***probative value*** beyond showing that the witness' story did not change as a result of a ***new*** motive to fabricate.

APPLICATION TO THIS CASE:

- Since any reasonable person would have recognized there was huge liability facing the driver, there was a visible ***motive to fabricate*** from the get-go that could not be eliminated by the PCS.
- However, to the extent that PCS' made prior to the civil suit and charge dropping eliminated ***those two particular*** motives to fabricate, they did tend to strengthen Harding's credibility.

Held The prior consistent statements are admissible to show that Harding's story didn't change as a result of a new ***motive to fabricate***, but not for the truth of their contents (i.e. not to prove that he is telling the truth).

Ratio Evidence of a prior consistent statement is admissible to show that a witness' story did not change as a result of a new ***motive to fabricate***. Where such a statement removes a ***motive to fabricate***, it will tend to strengthen the witness' ***credibility***.

See Also ***Ay [R v]***, Recent Fabrication Exception (p 40) to the general rule against Prior Consistent Statements (p 40), ***Cassibo [R v]***

Subramaniam v PP

1956 Mly/PC

Facts Under some crazy Malaysian law, the penalty for mere possession of ammunition was death, unless the accused had the ammunition against his will under a threat of **INSTANT DEATH**. The accused was found wounded and wearing a belt of ammunition. He claimed to have been captured by commie bandits who forced him to wear the belt. The accused testified in court about what the bandit leader told him (for instance, the leader said, "I am a communist").

Issue Is the accused's testimony about what the bandit leader told him inadmissible hearsay?

Analysis Evidence of a statement made to a witness by a person who is not himself may or may not be hearsay.

- It is hearsay and inadmissible when the object of the evidence is to establish ***the truth of what is contained*** in the statement.
- It is not hearsay and admissible when it is proposed to establish by the evidence, not the truth of the statement, but ***the fact that it was made***.

Held The bandit leaders' out-of-court statements are not hearsay because the evidence was led purely to show, by the fact that the statements were made, the mental state of the accused (i.e. fear for his life).

Ratio The fact that a statement was made, quite apart from its truth, may be relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

See Also What is Hearsay? (p 45), ***Baltzer [R v]***

Swain [R v]

1991 CA/SC

Facts A case of "perfect facts" in which Swain was on trial for assault causing bodily harm but subsequently reconciled with his wife and child (the victims).

Issue Can the Crown put Swain's insanity in issue against his consent? If so, it Swain may be liable for an NCRMD verdict which could subject him to indefinite detention and separation from his wife.

Analysis Lamer CJC:

> *Given that PFJ contemplate an accusatorial and* ***adversarial system of criminal justice*** *which is founded on respect for the autonomy and dignity of human beings . . . PFJ must also require that an accused person have the right to control his or her own defense.*

Ratio Because the accused has control over the conduct of his own defence, the Crown may only raise the issue of insanity either after the TOF has found the accused guilty as charged or ***if the accused's conduct of his own defense*** has put his capacity for criminal intent in ***issue***.

See Also ***Noël [R v]***, ***Taillefer [R v]; R v Duguay***, Opening the Door Principle (p 8), Our Adversarial System of Trial (p 13)

Swanston [R v]

1982 BC/CA

Facts Swanston was accused of robbing Dr Cantor. The robber visited the doctor's home on the pretense of wanting to buy the doctor's car. He came back later that night with an accomplice and they bound and gagged the doctor and robbed the house. Shortly after the robbery, Dr Cantor twice identified Swanston as the robber: once at a police line-up, and once at the preliminary inquiry. However, the trial took place 1½ years after the robbery. On the stand, although he thought that Swanston looked like the man who robbed him, Dr Cantor was unsure.

Issue Is evidence of prior extrajudicial identification of the accused admissible?

Analysis

- Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first

impeached (i.e. by imputation of a recent fabrication &c), evidence of an extra-judicial identification ***is admitted*** regardless of whether the testimonial identification is impeached because the earlier identification has ***greater probative value***.
    - Recall from ***Gonsalves [R v]*** that in-court identification will be accorded very little weight anyway.
    - Failure of a witness to repeat the extra-judicial identification in court does not destroy its ***probative value*** because this can be explained by loss of memory or other circumstances.
- As regards hearsay, "the principal danger" (p 6-029) of admitting hearsay evidence is not present since the witness is available at trial for ***cross-examination***.

Ratio Evidence of prior extrajudicial identification ***is admissible*** not only to corroborate an identification made at trial, but as ***independent evidence*** going to ID.

Note On the hearsay topic, the preliminary inquiry identification (at the very least) would have been under oath.

See Also Prior Identification Exception (p 42) under Prior Consistent Statements, ***Gonsalves [R v]***

Taillefer [R v]; R v Duguay

2003 CA/SC

Facts Taillefer and Duguay were tried for murder in 1991, several months before the *Stinchcombe* decision was handed down. It later came to light that the Crown had failed to disclose the existence of a considerable amount of evidence relevant to the defence against the charges. Taillefer was originally convicted, while Duguay originally pleaded guilty. Taillefer applied to have his guilty verdict quashed and Duguay applied to withdraw his guilty plea.

Issue What is the nature of the Crown's duty to disclose evidence in a criminal trial?

Analysis
- Crown must disclose all ***relevant*** information to the accused, whether inculpatory or exculpatory: *Stinchcombe*.
    - Crown has discretion to identify irrelevant information.
    - Crown also has discretion on timing/manner of disclosure in order to protect witnesses.
- While the right to disclosure is a component of the right to make full answer and defense, infringement of the right to disclosure is not always an infringement of the right to make full answer and defense: to ground an infringement, accused must show that there was a ***reasonable possibility*** that the failure to disclose affected the ***outcome*** at trial or the ***overall fairness*** of the trial process: *R v Dixon*.
- In applying the test:
    - The evidence is to be looked at as a whole, without trying to assess the probative value of each piece of evidence item by item.
    - The questions of possibility of a different outcome and of effect on fairness of the trial are to be considered independently.
        - Different outcome analysis considers the ***direct effect*** of the evidence on the jury.
        - Fairness of the trial assesses whether the new evidence might have opened up ***new avenues of investigation*** for the defence.
    - The reasonable possibility threshold is not terribly high.
- In applying the test to a guilty plea, the two steps are merged and the question is whether there is a reasonable possibility that a reasonable person, assessing the undisclosed evidence together with all the evidence already known, would have run the risk of standing trial.

Held Taillefer's conviction quashed and a new trial ordered. Duguay's conviction quashed and proceedings stayed.

Note Aside from mentioning the *Stinchcombe* test, **NH did not really focus on Taillefer at all in class**.

See Also ***Noël [R v]***, ***Swain [R v]***, Introduction to Evidence

Titus v R

1983 CA/SC

Facts The accused, Titus, stood accused of second-degree murder. By a strange coincidence, a Crown witness, Meihm, was under an outstanding indictment ***for a separate murder***. The same police department was investigating Titus and Meihm for different murders!

Issue Does s 12 of the ***Canada Evidence Act*** prohibit the defence in Titus' trial from cross-examining Meihm about Meihm's outstanding charge for murder?

Analysis In the present case, Meihm is neither an accused nor is it being proposed to question him concerning a previous conviction. The defence wants to enquire into his having been indicted, though not yet tried.

Ratio Cross-examination of a Crown witness concerning an outstanding indictment against that witness ***is proper and admissible*** for the purpose of showing a possible motivation to ***seek favour*** with the prosecution.

See Also ***Cullen [R v]***, Other Discreditable Conduct (p 19), ***Corbett [R v]***, ***Canada Evidence Act*** s 12 (p 141)

Note We passed over this case, as with ***Cullen [R v]*** (p 91), in about 2 minutes of class time. **NH did not appear to think it tremendously important**.

Tsoukas v Segura

2001 BC/CA

Facts Plaintiff, Tsoukas was hit by defendant's car. Defendant admitted liability, so the question to be decided at trial was damages. Plaintiff's ***credibility*** was a critical issue since the fundamental question of fact was the extent to which the accident contributed to plaintiff's injuries.

Plaintiff claimed to have been incapacitated by the accident and unable to go out shopping. On ***cross-examination***, plaintiff admitted to going shopping on a certain occasion. Counsel accused plaintiff of ***shoplifting*** on that occasion. Plaintiff admitted bare facts but ***denied*** shoplifting, characterizing the situation as accidentally "forgetting to pay".

After plaintiff's testimony, defendant called the store detective. The purpose of the testimony was to provide the detective's "observations of plaintiff's physical movements", not to contradict the plaintiff's denial of stealing. On ***examination in chief***, counsel only asked general questions about what the detective observed plaintiff doing. However, some of the witness' answers very clearly described her stealing.

Issue

1. Were the questions regarding shoplifting admissible in defendant's ***cross-examination*** of plaintiff?
2. Was the evidence given by defendant's witness, the store detective, during ***examination in chief*** admissible?
3. If any evidence was inadmissible, was there a ***reversible error***?

Analysis

CROSS-EXAMINATION of the PLAINTIFF

- On cross-examination, subject to the trial judge's discretion to disallow any question which is ***vexatious*** or ***oppressive***, a witness can be asked literally anything to test her credibility.
    - In this case, the questions on shoplifting were not vexatious or oppressive. They related to a period of time about which plaintiff had already testified and an incident she was likely to recall because she claimed to have been able to shop infrequently, and she had an exchange with the store detective.
- The probative value of the evidence outweighed its prejudicial effect.

EXAMINATION IN CHIEF of the STORE DETECTIVE

- Counsel for the defendant did not ask any improper questions.
- However, some of the witness' answers offended the Collateral Evidence Rule (p 29) because they tended to contradict the plaintiff's answer on ***cross-examination*** that she did not steal from the store.

REVERSIBLE ERROR

- In civil proceedings, the test for ordering a new trial is whether a properly instructed jury acting reasonably

would necessarily have reached the same conclusion if the evidentiary error had not occurred.
- Considering the body of evidence (of which the shoplifting was only a small part) that reflected poorly on plaintiff's credibility, a properly instructed jury acting reasonably would have reached the same result.

Held Defendant's examination of the store detective breached the ***collateral evidence rule***, but there was no reversible error so the result of the trial is upheld.

Ratio The Collateral Evidence Rule: if a question asked on ***cross-examination*** is ***irrelevant*** to the facts in issue and is asked purely for the purpose of testing the plaintiff's ***credibility***, the cross-examiner is ***bound*** by the answer (he cannot lead evidence to contradict the witness).

See Also Different Evidentiary Contexts (p 29), ***Krause [R v]***, ***Lyttle [R v]***

Turcotte [R v]

2005 CA/SC

Facts Turcotte walked into a police station and asked the police to send a car up to the ranch where he did odd jobs. The cops kept axing him "why, why?" but he refused to explain. He did answer some other questions (for instance, they asked whether an ambulance should be sent, to which he replied that it should). When a car was sent up to the ranch, the police discovered three ax-murdered corpses. They arrested Turcotte and charged him with murder. At trial, his explanation for not answering police questions was that he was in shock.

Issue
1. Is Turcotte's silence admissible as post-offence conduct?
2. Is Turcotte's silence admissible as state of mind evidence rebutting his claim to have been in shock?
3. Did Turcotte waive his right to silence by answering some, but not all, of the questions?

Analysis
- At common law, there is a right to silence. This means there is no duty to speak or cooperate with police. The absence of duty ***severs the link*** between silence and guilt.
- Thus silence will ***rarely*** be admissible as post-offence conduct because it is ***rarely*** probative of guilt.
- While Turcotte did answer some questions, he was nonetheless exercising his right to silence when he refused to answer others.
- Characterizing the silence as "state of mind evidence" as another way of admitting it is making a distinction without a difference: this is simply another way of saying that Turcotte's silence was probative of guilt.
- However, evidence of Turcotte's silence is admissible as an inextricable part of the ***narrative***, subject to the usual limiting instruction.

Held Turcotte's silence is not admissible as POC but is admissible as part of the narrative.

Ratio Silence will ***rarely*** be admissible as POC because it is ***rarely*** probative of guilt.

See Also ***Singh [R v]***, Right to Silence, Silence at Common Law (p 70), ***White v The Queen***, Post-Offence Conduct (p 17) ***Ay [R v]***

U(FJ) [R v]

1995 CA/SC

Facts The father was accused of repeatedly sexually assaulting his daughter. Both were taken to the police station in ***separate cars*** and given ***separate interviews***. No oaths were administered and neither statement was video- or audio-recorded, but in both cases, the police officer conducting the interview took notes.

The daughter described the abuse allegedly inflicted by the father in great detail. After the interview, the police officer prepared a summary of her anticipated evidence (a ***will-say*** statement). According to the daughter's statement, the most recent sexual contact between the two had been the previous evening.

In the father's interview, he confessed to the sexual assaults and gave details that ***corresponded very closely*** to

those related by the daughter. He independently admitted that the most recent sexual contact had been the previous evening.

At trial, the daughter recanted (***explanation***: she lied at the insistence of her grandmother) and the accused testified that his confession was false (***explanation***: fear of police brutality like he experienced in Peru).

Issue Is the daughter's ***will-say*** statement admissible as proof of the truth of its substantive contents?

Analysis

- ***Cross-examination*** alone goes a long way to ensuring the reliability of a prior inconsistent statement.
- Recall that the *B(KG)* requirements of oath and videotaping are not absolute. In certain circumstances, the circumstances will be sufficient to indicate threshold reliability even absent these factors.
- In order to use striking similarity between two statements as circumstantial indicia of reliability, the following must be ruled out: (1) ***coincidence***; (2) ***collusion*** between declarants; (3) the second declarant basing his statement on the first statement; (4) influence of ***a third party***, such as the interrogator.
- Father and daughter had no opportunity to collude (separate cars, separate interviews, &c) and the accused was not improperly influenced by the officers who took his statement.

Held Due to the ***striking similarities*** and the ***lack of tainting*** of the statements, sufficient circumstantial indicia of reliability present so that the ***will-say*** statement was admissible as proof of the truth of its contents.

Ratio A threshold of reliability can sometimes be established, in cases where the witness is available for cross-examination, by a ***striking similarity*** between two statements (as long as they are untainted by collusion, deliberate crafting, and third-party influence).

Note

- Commonality with Specific Propensity Reasoning (p 15): the improbability of coincidence.
- Clearly the father's confession was admissible because he was the accused.

See Also ***B(KG) [R v]***, Prior Inconsistent Statements under the Principled Approach to Hearsay (p 49), ***Handy [R v]***

Wawanesa Mutual Insurance v Hanes

1961 ON/CA

Analysis With regard to section 9(1) of the ***Canada Evidence Act***

- In an application to introduce a prior inconsistent statement under the Act, in determining whether a witness is ***adverse*** . . .
    - . . . The trial judge should consider [these factors might also be relevant to CEA s 9(2)]:
        - the testimony of the witness, the statement, and any relevant material presented to him, in order to satisfy himself that the witness made the statement;
        - the ***relative importance*** of the statement; and
        - whether the statement is ***substantially inconsistent*** with the witness's testimony.
    - If the judge finds that the witness is adverse, he must still consider whether, bearing in mind the possible ***dangers*** of admitting such a statement, admitting it would serve the ends of justice.
    - The provision does not contemplate the ***indiscriminate admission*** of inconsistent statements.
- Ultimately it is for the jury to decide whether the prior statement was made by the witness and what effect it has on the credibility of the evidence given at trial.
    - But the jury should be out while the hearing on whether the witness is adverse is done.
    - And the judge must ***instruct the jury*** that the prior statement is not evidence of the facts it contains but is for the purpose of determining the credibility of the witness' sworn testimony.
- If the judge declares the witness to be adverse, he might also permit him to be cross-examined.
- In some circumstances, a judge may be warranted in declaring that a witness is adverse solely on the basis of a previous inconsistent statement (at casebook p 6-053, as cited in *Cassibo*).

Note The entire edited excerpt from this case is cited with approval in ***Cassibo [R v]*** at casebook p 6-045.

See Also ***Canada Evidence Act*** s 9(1) (p 140), ***Cassibo [R v]***, Statutory Regime (p 43) under Attacking the Credibility of the Party's Own Witness

White v The Queen

1998 CA/SC

Facts White and Côté were charged with shooting Chiu, in Ottawa, with a shotgun and a .22 pistol. They then left town and were not seen back in Ottawa for nearly two weeks—they robbed a bank in Mississauga, 500 miles away, and stayed at a motel in Burlington. While out of town, Côté missed a scheduled meeting with a parole officer and White failed to respond to a letter regarding a similar meeting he had missed. As a result of these parole violations, arrest warrants were issued for both accused.

When they came back to Ottawa, the Ottawa police were tipped off. The two accused fled the police during a short chase. Before White was arrested, he was seen throwing a .22 pistol matching the one used in the murder under a parked car. Both accused admitted to the bank robbery in Mississauga.

Issue Should an *Arcangioli*-style instruction be given on the basis that the post-offence conduct was equally consistent with the parole violations and the admitted bank robberies and thus had no probative value?

Analysis

- *Arcangioli* stands for the proposition that a piece of evidence should not be put to the jury unless it is ***relevant*** to the determination of a live issue in the case.
    - An admission by the accused may narrow the issue in dispute considerably.
    - 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.
- ***All*** the post-offence conduct in issue in this case is ***relevant*** to the question of whether the accused killed Chiu.

Held An *Arcangioli*-style "no probative value" instruction is not needed.

Ratio Where post-offence conduct is ***relevant*** to a question in issue (such as ID), an *Arcangioli*-style instruction is not needed.

See Also ***Peavoy [R v]***, ***B(SC) [R v]***, Post-Offence Conduct (p 17), ***Arcangioli [R v]***, ***Turcotte [R v]***

Note There was a second issue: the defence claimed that the trial judge was required to instruct the jury that it should consider the post-offence conduct evidence separately from the rest of the evidence to determine BRD whether it reflected consciousness of guilt for the murder of Chiu. As per usual, this was shot down by the SCC: evidence is always to be considered as a whole.

Wilcox [R v]

2001 NS/CA

Facts Wilcox, who owned a crab wholesaling business, was charged with aiding and abetting various fishermen in exceeding their quotas. Wilcox's settlement clerk, Mr Kimm, manually kept a ledger ("Crab Book") in which he tracked the crab coming in to the business, the money paid out for it, the dates of the transactions, and the names of the fishermen involved. Kimm had not been told to keep such a record. Indeed, no one at the business knew about the ledger and Wilcox had instructed Kimm to keep computerized, rather than handwritten, records.

At trial, the Crown wanted to adduce the "Crab Book" as proof of its contents. Kimm testified that he had no independent recollection of the information recorded in the entries. He also testified that during the time period

allegedly covered by the ledger, no fisherman disputed any payment that he arrived at by relying on this record.

Issue Does a private record, kept against the employer's instructions but made and relied on by the employee in the course of carrying out his duties qualify as a document made in the usual and ordinary course of business within the meaning of section 30 of the ***Canada Evidence Act***?

Analysis

- Before taking principled approach, must see if common law or statutory exception applies (see **note** below).
- Crab Book is not admissible under the ***common law*** BRE because the common law exception requires that the employee be under a ***duty*** keep the record whereas Mr Kimm was not supposed to keep the record.
- Because Kimm was acting against Wilcox's instructions in keeping a ***private record***, it is a close case under the statutory exception and should be resolved using the principled approach.

RELIABILITY:

- Kimm created the records in a ***routine*** manner and had ***no motive to fabricate***.
- Kimm ***relied*** on the records and his testimony about the lack of disputes by the fishermen suggests reliability.
- Finally, he is available for ***cross-examination***, thereby offering the TOF ample opportunity to assess the ***weight***, if any, that should be accorded to the Crab Book.
- Overall, there are strong circumstantial guarantees of trustworthiness.

NECESSITY:

- Necessity must be ***flexible*** AND necessity ***cannot be considered in isolation*** from reliability: ***B(KG) [R v]***.
- Because ∃ very high circumstantial indicia of reliability in this case, the necessity threshold is lowered.
- Also recall from *B(KG)* that necessity may arise where we cannot get evidence of the ***same value***.
- It is necessary to bring in the hearsay:
    - because the detailed nature of such an accounting record does not lend itself to a witness having an ***independent recollection*** of the entries in the record (Kimm could not give meaningful material evidence without the record); and
    - because any testimony on the record is based on the writing contained within it.

Held The Crab Book fails the common law business records exception and is a very close case under the statutory exception. It is admissible under the principled approach.

Ratio Where an employee keeps a private record against the employer's instructions, its admissibility should be considered under the principled approach, not under *CEA* s 30.

Note

- NH: **It would have made more sense to start by looking at the statutory exception first, rather than the common law exception**.
- A document admitted under the BRE must of course be otherwise admissible. Moreover, it is real evidence and thus must be authenticated before it can be admitted (see Documents at p 12).

See Also ***Canada Evidence Act*** s 30 (p 143), Business Records Exception (Common Law) (p 47), Business Records Exception (Statutory) (p 49), Principled Approach to Hearsay (p 49), ***Lowe v Jenkinson***

12. Statute Chart

Canada Evidence Act

RSC 1985

WITNESSES

Accused and spouse

4 (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a ***competent*** witness for the ***defence***, whether the person so charged is charged solely or jointly with any other person.

Accused and spouse

(2) The wife or husband of a person charged with an offence under subsection 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*, or an attempt to commit any such offence, is a ***competent*** and ***compellable*** witness for the ***prosecution*** without the consent of the person charged.

Communications during marriage

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

Offences against young persons

(4) The wife or husband of a person charged with an offence against any of sections 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269 of the *Criminal Code* where the complainant or victim is under the age of fourteen years is a ***competent*** and ***compellable*** witness for the ***prosecution*** without the consent of the person charged.

Saving

(5) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

Failure to testify

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

[…]

Expert witnesses

7 Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other ***experts*** entitled according to the law or practice to give ***opinion evidence***, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.
*[Note this is a distinct issue from the admissibility of the expert opinion based on the **Abbey-Mohan** criteria]*

[…]

Adverse witnesses

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. *[See also: **Wawanesa Mutual Insurance v Hanes** (p 137), **Cassibo [R v]** (p 88), **Maves v Grand Trunk Pacific Rwy Co** (p 114)]*

Previous statements by witness not proved adverse

(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. *[See also: **Milgaard [R v]** (p 116), **McInroy and Rouse [R v]** (p 115), **Moore [R v]** (p 118), **B(KG) [R v]** (p 84)]*

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.

Cross-examination as to previous oral statements

11 Where ***a witness***, on ***cross-examination*** as to a former statement made by him relative to the subject-matter of the case and ***inconsistent*** with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement. *[See also **Krause [R v]** (p 110)]*

Examination as to previous convictions

12 (1) A witness may be questioned as to whether the witness has been ***convicted*** of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment. *[See also: **Corbett [R v]**, **Cullen [R v]**, **Titus v R**, Bad Character of the Witness (p 18)]*

Proof of previous convictions

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

How conviction proved

(2) A conviction may be proved by producing

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and

(b) proof of identity.

OATHS AND SOLEMN AFFIRMATIONS

Who may administer oaths

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.

Solemn affirmation by witness instead of oath

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.

Effect

(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.

Solemn affirmation by deponent

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, whether on the taking of office or otherwise, does not wish to take an oath, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit the person to make a solemn affirmation in the words following, namely, "I, ..., do solemnly affirm, etc.", and that solemn affirmation has the same force and effect as if that person had taken an oath.

Effect

(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.

Witness whose capacity is in question

16 (1) If a proposed witness is a person of ***fourteen years of age or older*** whose mental capacity is challenged *[i.e. by counsel]*, the court ***shall***, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person ***understands*** the nature of an oath or a solemn affirmation; and

(b) whether the person is ***able to communicate the evidence*** *[This threshold is higher than that in s 16.1(3): see **JZS [R v]** (p 106)]*

Testimony under oath or solemn affirmation

(2) A person referred to in subsection (1) who ***understands*** the nature of an oath or a solemn affirmation and is ***able to communicate the evidence*** shall testify under oath or solemn affirmation.

Testimony on promise to tell truth

(3) A person referred to in subsection (1) who ***does not understand*** the nature of an oath or a solemn affirmation but is ***able to communicate the evidence*** may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth. *[See also **DAI [R v]** (p 91)]*

Inability to testify

(4) A person referred to in subsection (1) who neither ***understands*** the nature of an oath or a solemn affirmation nor is ***able to communicate the evidence*** shall not testify. *[See also **Parrott [R v]** (p 123) . . . Note also that per **Khelawon [R v]** (p 108), while mental capacity is relevant to admissibility of hearsay—and in this context more extensive probing of declarant's capacity at time of making statement may be required—CEA section 16 has no application to hearsay]*

Burden as to capacity of witness

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

Person under fourteen years of age

16.1 (1) A person ***under fourteen*** years of age is ***presumed*** to have the capacity to testify.

No oath or solemn affirmation

(2) A proposed witness ***under fourteen*** years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

Evidence shall be received

(3) The evidence of a proposed witness ***under fourteen*** years of age shall be received if they are ***able to understand and respond to questions***. *[This is a very low threshold, lower than "able to communicate" in s 16(1–4): **JZS [R v]** (p 106)]*

Burden as to capacity of witness

(4) A party who challenges the capacity of a proposed witness ***under fourteen*** years of age has the burden of ***satisfying*** the court that there is an ***issue*** as to the capacity of the proposed witness to ***understand and respond to questions***.

Court inquiry

(5) If the court is ***satisfied*** that there is an ***issue*** as to the capacity of a proposed witness ***under fourteen*** years of age to ***understand and respond to questions***, it ***shall***, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

Promise to tell truth

(6) The court shall, before permitting a proposed witness ***under fourteen*** years of age to give evidence, require them to ***promise to tell the truth***.

Understanding of promise

(7) ***No*** proposed witness ***under fourteen*** years of age shall be asked any questions regarding their ***understanding*** of the nature of the promise to tell the truth ***for the purpose*** of determining whether their evidence shall be received by the court. *[This does not rule out such a line of questioning on cross-examination: **JZS [R v]** (p 106)]*

Effect

(8) For greater certainty, if the evidence of a witness ***under fourteen*** years of age is received by the court, it shall have the same effect as if it were taken under oath.

[…]

DOCUMENTARY EVIDENCE

[…]

Business records to be admitted in evidence

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. *[The fact that the Crab Book was kept against the employer's instructions made for a very close case ultimately leading Cromwell JA to apply the principled approach: **Wilcox [R v]** (p 138)]*

Inference where information not in business 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.

Copy of records

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

(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or

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

Where record kept in form requiring explanation

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

(a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or

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

Court may order other part of record to be produced

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

Court may examine record and hear evidence

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the ***probative value***, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the ***circumstances*** in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record. *[Mentioned in **Wilcox [R v]** (p 138) at casebook p 7-105]*

Notice of intention to produce record or affidavit

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given ***notice*** of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

Not necessary to prove signature and official character

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

Examination on record with leave of court

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

Evidence inadmissible under this section

(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.

Construction of this section

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

(a) any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or

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

Definitions

(12) In this section,

"business"

"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;

"copy" and **"photographic film"**

"copy", in relation to any record, includes a print, whether enlarged or not, from a photographic film of the record, and "photographic film" includes a photographic plate, microphotographic film or photostatic negative;

"court"

"court" means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

"legal proceeding"

"legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

"record"

"record" includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4).

Charter

1982 UK

LEGAL RIGHTS

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. *[See: **Hebert [R v]**, **Singh [R v]**, **Grant [R v]**, **Re Application under s 83.28 of the Criminal Code**, Compelled Testimony (p 73), **Brown [R v]**]*

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure. *[See: **Fliss [R v]** (p 94)]*

Detention or imprisonment

9 Everyone has the right not to be arbitrarily detained or imprisoned. *[A detention may be psychological: **Grant [R v]**; a brief investigative detention is arbitrary if not based on reasonable suspicion: **Grant [R v]** (p 97)]*

Arrest or detention

10 Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right *[This right arises **immediately** upon detention, and detention can be psychological: **Grant [R v]**; there is no general right to have counsel present during the interrogation itself: **Sinclair [R v]**; the purpose of the right in the context of a **custodial interrogation** is to support detainee's right to choose whether to co-operate with the police investigation or not: **Sinclair**]*; and

(c) *[…]*

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right

(a) *[…]*;

(b) to be tried within a reasonable time;

(c) not to be ***compelled*** to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a ***fair*** and public hearing by an independent and impartial tribunal;

(e) *[…]*

[…]

Self-crimination

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. *[The **purpose** of section 13, when viewed in the context of ss 11(c) and (d), is to protect individuals from being indirectly **compelled** to incriminate themselves: **Henry [R v]**. See also Section 13 of the Charter (p 71)]*

[…]

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

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

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the **evidence** shall be **excluded if** it is established that, having

regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute *[A balancing must be conducted according to **Grant [R v]**—see* Modern Grant Balancing Test under Section 24(2) *(p 65). The violation in **Hebert [R v]** required exclusion. See also **Fliss [R v]** (p 94)]*

Criminal Code

RSC 1985

INVESTIGATIVE HEARING

Definition of "judge"

83.28 (1) *[…]*

[…]

Obligation to answer questions and produce things

(8) A person named in an order made under subsection (4) ***shall*** answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to ***privilege***.

Judge to rule

(9) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.

No person excused from complying with subsection (8)

(10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to ***incriminate*** the person or subject the person to any proceeding or penalty, ***but***

(a) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136; and

(b) no evidence ***derived*** from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136.

*[In addition to the use (a) and derivative use (b) absolute protections, there is the constitutional exemption provided at common law. All three protections also extend to extradition and deportation hearings: **Re Application under s 83.28 of the Criminal Code** (p 127). See also* Compelled Testimony *(p 73)]*

Right to counsel

(11) A person has the right to retain and instruct ***counsel*** at any stage of the proceedings.

[…]

EVIDENCE ON TRIAL

Admissions at trial

655 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. *[See: **Castellani v The Queen** (p 89); also relevant: **Kinkead [R v]** (p 109); Formal (or Judicial) Admissions (p 57)]*

[…]

Expert testimony

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

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

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

Attendance for examination

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

Notice for expert testimony

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

(a) a ***party*** who intends to ***call*** a person as ***an expert witness*** shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice or judge, give ***notice*** to the other party or parties of his or her intention to do so, accompanied by

(i) the name of the proposed witness,

(ii) a description of the area of expertise of the proposed witness that is sufficient to permit the other parties to inform themselves about that area of expertise, and

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

(b) in addition to complying with paragraph (a), a ***prosecutor*** who intends to call a person as an expert witness shall, within a reasonable period before trial, provide to the other party or parties

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

(ii) if ***no report*** is prepared, a summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based; and

(c) in addition to complying with paragraph (a), an ***accused***, or his or her counsel, who intends to call a person as an expert witness shall, not later than the close of the case for the prosecution, provide to the other party or parties the material referred to in paragraph (b).

If notices not given

(4) If a party calls a person as an expert witness without complying with subsection (3), the court shall, at the request of any other party,

(a) grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness;

(b) order the party who called the expert witness to provide that other party and any other party with the material referred to in paragraph (3)(b); and

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

Additional court orders

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

(a) adjourn the proceedings;

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

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

Use of material by prosecution

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

No further disclosure

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

13. Index of Cases

14. Index