Law 280 Law of Evidence
Nikos Harris
Summer 2009

By

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Note: The materials here are not in the same order as in the syllabus, but are arranged in the way that makes sense to me. I'm sure that you can work this out.

280 Law of Evidence: Nikos Harris

Similar Fact Evidence

R. v. Handy [2000] SCC

Creates the test for the admissibility of similar fact evidence

Similar Fact Evidence and Identity

Character Evidence Called by AC against a Co-AC

Post Offence Conduct

R. v. White [1997] SCC

Post Offence Conduct is just another circumstantial evidence and does not require any special rules, except for a proper charge to the jury.

R. v. Peavoy [1997] ONCA

POC is to be used for identity, and not the level of culpability. If AC admits having done actus reus, but pleads a defence, then POC can be used to infer mens rea.

R. v. S.C.B. [1997] SCC

Where one can reasonably infer from POC that AC is not guilty, then the evidence has probative value and should be admitted unless there is a substantial degree of prejudicial effect.

Bad Character of the Witness 19

Prior Convictions

R. v. Corbett [1988] SCC

S.12 applies to cases when accused is the W, but only to establish the credibility of their testimony

Other Bad Conduct

R. v. Cullen [1989] ONCA

For the purposes of challenging a W's credibility, cross examination is permissible to demonstrate that the W has been involved in discreditable conduct.

R. v. Titus [1983] SCC

Cross examination of a Crown W concerning his an outstanding indictment is admissible for the purpose of showing his possible motivation to seek favour with the Crown.

The Vetrovec Witness

R. v. Dhillon [2002] ONCA

Corroborative evidence should not merely show possibility of the W being honest, it must go beyond that.

R. v. Khela [2009] SCC

Corroboratory evidence must be independent and material to their story.

Nikos Harris, "Vetrovec Cautions and Confirmatory Evidence: A Necessarily Complex Relationship" 2005

Good Character Evidence

R. v. E.D.H. [2000] BCCA

If AC places his character in issue by arguing good character, then the Crown can lead evidence of bad character, but this evidence can only go to refute the good character evidence.

Eye Witness Identification

R. v. Hibbert [2002] SCC

Eye witness in-court identification is dangerous, and requires a stringent charge to the jury.

Opinion Evidence 25

Common Knowledge

R. v. Graat [1982] SCC

A W to crime can provide an opinion regarding something that is within common knowledge and doesn't require expert qualifications.

R. v. Mohan [1994] SCC

Expert evidence to character will be admitted if it is reliable, relevant, and necessary.

R. v. Bleta [1964] SCC

As long as the questions are phrased to make clear what the evidence that the expert is founding his conclusion on is, non-hypothetical questions are admissible.

R. v. D.D. [2000] SCC

SCC limits expert evidence to cases where it is absolutely necessary.

The Basis and Weight of Expert Opinion

R. v. Wilband [1982] SCC

Expert opinion may rely on second hand sources.

R. v. Abbey [1982] SCC

For expert evidence to be admissible, at least some of the facts upon which experts base their opinions must be proved by admissible evidence. Zero foundation will result in inadmissibility.

R. v. Jordan [1984] BCCA

An expert is allowed to use whatever data that he deems necessary. Abbey rule does not apply to scientific evidence.

R. v. Lavallee [1990] SCC

As long as there is some admissible factual foundation present for expert testimony, the shortage of such facts is an issue of weight, not admissibility.

R. v. Bryan [2003] ONCA

Expert evidence regarding the ultimate issue is admissible, but raises a stricter P/P standard.

Credibility of a Victim

R. v. Llorenz [2000] ONCA

Evidence directly aimed at proving the credibility of the victim is inadmissible, unless if that evidence has some other legitimate purpose, and proving credibility is its mere side-effect.

Novel Scientific Evidence

R. v. J.-L.J. [2000] SCC

Novel scientific methods are to be subjected to special scrutiny to be admitted as evidence.

Leading Question

Maves v. Grand Trunk Pacific Rwy. Co [1913] ALSC

On material points, leading questions are allowed in cross-examination, but not in direct examination.

Refreshing a Witness' Memory

Present Memory Revived

R. v. Shegrill [1997] CA

There is no contemporaneity requirement for present memory revived.

Past Memory (Recollection) Recorded

R. v. J.R. [2003] ONCA

Recorded past statements by the W can be admissible as evidence.

R. v. Fliss [2002] SCC

Otherwise excluded evidence can be relied on to refresh memory. W can use only those parts of the testimony that he now recalls making, or that he authenticates as accurate at the time that his memory was fresh.

Evidence of prior inconsistent statements of W other than AC should be admitted on a principled basis, the governing principles being the reliability and necessity of the evidence.

R. v. U.(F.J.) [1995] SCC

Similar out of court statements can be compared with each other to establish reliability.

R. v. Parrott [2001] SCC

If W can testify in court, then bringing in hearsay is not necessary.

R. v. Pelletier [1999] BCCA

If W is disinclined to testify, adverse, or unlikely to cooperate, this does not pass the threshold of necessity.

R. v. Khelawon [2006] SCC

When accessing reliability of the statement, the court can also consider the inherent trustworthiness of it.

Traditional Exceptions to Hearsay Rule 47

Business Records and Statements in the Course of Business

R. v. Wilcox [2001] NSCA

Choice between common law records test and the s.30 test. Statutory is always the place to start.

Declarations Against Interest

R. v. Underwood [2002] ABCA

Statements against penal interest may be admitted, if it passes specific criteria and the principled analysis.

Oral History in Aboriginal Title Cases

Mitchell v. Canada [2001] SCC

Oral histories are admissible as evidence where they are both useful and reasonably reliable

Admissions 50

R. v. Castellani [1960] SCC

AC can only make admissions on the points introduced by the Crown in their allegations.

Confessions 50

Probative Value

R. v. Hunter [2001] ONCA

Partially overheard confessions are admissible only if there can be no possible doubt to their meaning and context.

R. v. Allison [1991] BCCA

Confessions have to be led in full, or not at all.

The Voluntariness Rule

R. v. Oickle [2000] SCC

New test for voluntariness outlined.

R. v. Grandinetti [2005] SCC

A person in authority is someone who AC believes to be in a position of power to influence the prosecution or investigation.

Admissions of Co-Accused

R. v. Grewall [1999] BCCA

Confession of an AC is not admissible against a co-accused.

Exclusion of Evidence Under the Charter 54

R. v. Miller [2008] ONCJ

Disregard for Charter rights of the AC will exclude the evidence due to disrepute of justice.

R. v. Buhay [2003] SCC

Non-conscriptive evidence can be excluded under s.24(2) if the breach of Charter rights is sufficiently serious.

R. v. Burlingham [1995] SCC

Physical evidence that would not have been discovered but for an inadmissible statement is considered conscriptive and hence is inadmissible.

R. v. Grant [2009] SCC

A new test for exclusion of evidence consistent with the express purpose of s.24(2)

Privilege 58

Privilege Against Self-Incrimination

R. v. Singh [2007] SCC

The right to silence issues in custody will now be covered by the broad concept of voluntariness: a finding of voluntariness will be determinative of the s.7 right to silence issue.

R. v. Turcotte [2005] SCC

Silence in the face of police questioning is a Charter right and cannot be used as evidence of guilt.

Self-incriminating statements at previous trials

R. v. Henry [2005] SCC

AC who gave voluntary testimony at his previous trial is not covered by s.13

Re: Application under s.83.28 of the Criminal Code [2004] SCC

Investigative hearings can push the limits of s.7 rights.

Solicitor Client Privilege

R. v. Shirose [1999] SCC

Exceptions to solicitor client privilege

R. v. Brown [2002] SCC

Solicitor Client Privilege and the Right to make full answer and defense.

Slavutych v. Baker [1976] SCC

Conditions necessary to establish a privilege against the disclosure of communications.

280.1 Proof In Judicial Decision Making

Introduction

Most laws of evidence deal with admissibility of evidence. They come from::
- Common Law
- Federal *Canada Evidence Act* (R.S., 1985, c. C-5)
- *The Charter*
- Often a textbook such as *Wigmore's Rules of Evidence,* or Paccioco's *Law of Evidence in Canada* is relied on for theory.

The rules of admissibility are based on the basic principle of the value of evidence. The value is the balance between the probative value and the prejudicial effect of the evidence. That is, do the good effects of the evidence outweigh the bad effects?

The fundamental goal of evidence presentation is the search for truth, so the probative/prejudicial balance is usually applied in relation to it, making truth the ultimate value. But, often one has to consider other values:
- Integrity of the system
- Efficiency of the system
- Charter rights
- Privacy
- Lawyer/ client confidentiality, or any other privileged social relationship.

R. v. Noel [2002] SCC
The law of evidence is qualified search for the truth, seeking to maximize truth finding and to minimize injustice

Probative Value: Evidence which is sufficiently useful to prove something important in a trial, by being material and relevant. Probative value of proposed evidence must be weighed against prejudice in the minds of jurors toward the opposing party or criminal defendant.
Prejudicial Effect: Evidence that is so prejudicial to the defendant that the outcome of the trial will be improperly influenced. The meaning of "prejudicial evidence" goes to whether a jury will be so swayed that it will convict on emotion rather than proof. The judge may hear and see all the evidence, even evidence that may be prejudicial, since she is expected to ignore its prejudicial character.

R. v. Swain [1991] SCC
Evidence in the context of the adversarial system of trial

Facts: AC was charged with assault and aggravated assault. Over the AC's objections, the Crown sought to adduce evidence with respect to insanity at the time of the offence. The trial judge allowed the evidence and AC was found not guilty by reason of insanity. Based on s.542(2) of the Code, the trial judge ordered AC to be kept in strict custody pending a decision of the Lieutenant Governor. AC argued that s.542(2) violated the Charter.
Issue: This is a bullshit introductory case, but in the odd chance that anyone cares..
Discussion:
- The evidence is presented and admitted in the context of the adversarial system, and the counsel will often have large amount of sway as to what evidence is presented, in which order it is presented, and how it is presented.
- But the judge serves as the controller of the presentation of evidence and the conduct of counsel.
- So both parties have great discretion to put forth their case as they wish.
- SCC limits to the autonomy the parties as to leading evidence:
    1. Duty not to mislead the court: one cannot lead irrelevant evidence for a malicious purpose;
    2. Duty to court as well as client;
    3. Crown duty of fairness
    4. Crown duty and goal is not to get a conviction but to see that justice is done.
- Judge serves the role of a gatekeeper
    - Even though the adversaries have decided to bring in the evidence, judge can overrule this.
    - Judges have a duty to ensure that all of the evidence is relevant.
    - Judges will also get involved in questioning Ws, especially expert Ws for clarification.

Ruling: Appeal allowed.

Full Disclosure: is one of the primary evidentiary rules, whereby the police has to turn over all of their evidence to the AC, erring on the side of giving too much. This is done to prevent wrongful convictions. It is also based on the principle that AC should be able to review all of the evidence to construct their defense in whichever way they wish. Full disclosure also contributes to court efficiency, as it promotes a higher rate of guilty pleas. In civil trials, both sides have to make disclosure. In criminal trials, defense sometimes also has to make disclosure.

R. v. Taillifer; R. v. Duguay [2003] SCC

Evidence is to be disclosed if there is some reasonable possibility that it may be of some use to defense.

Facts: A 14-year-old girl was killed. ACs were charged and convicted for first degree murder. AC.T's appeal from conviction was dismissed. AC.D was allowed and a new trial was ordered for second degree murder. AC.D then pleaded guilty to manslaughter. He became aware that the police and Crown had failed to disclose evidence, including contradictory evidence by Ws and evidence supporting their alibis. AC had been in custody for eight years.
Issue: What does the Crown have to disclose?
Discussion:

- The right to disclosure was encompassed by the section 7 Charter right to make full answer and defence.
- AC seeking to establish that the right to make full answer and defence was violated must establish that there was a reasonable possibility that the failure to disclose affected the reliability of the conviction.
- Even where this was not the case, AC could establish that the failure to disclose impacted on the overall fairness of the trial.
- If something is clearly irrelevant then it does not have to be turned over
- But if there is some reasonable possibility that it may be of some use to the defense then it has to be turned over.
- This evidence does not have to be admissible - let the defence and the court sort this out. Even the material which is not admissible on its own can be of importance and become admissible in the context of the trial.
- Everything in the possession of the State (both police and Crown prosecution) have to be disclose their material.
- There are exceptions to disclosure:
  - It is clearly irrelevant
  - Crown can argue to retain privileged evidence
  - Interference with an on-going investigation
  - W safety
- Evidence also has to be disclosed in a timely manner.

Ruling: Appeal allowed

Proof in Judicial Decision Making

Probative Value, Prejudicial Effect, and Admissibility

- Ideally, issues of admissibility are dealt with pre-trial. This way the jury is not exposed to anything prejudicial.
- In many cases, presentation of prejudicial evidence to the jury will be grounds to re-trial.
- So, in pre-trial hearings, the evidence is put to the basic common law test of Probative/Prejudicial value based on the central factor of the reliable search for the truth.

R. v. Arp [1998] SCC

For something to have probative value it must be material and relevant. For something to have prejudicial effect, it must be sufficient to sway the jury to convict on emotion rather than proof.

Facts: Two women were murdered in a similar way two-and-a-half years apart in the same city. AC was arrested after the first murder. He willingly gave scalp and pubic hair samples to police and was released when none matched samples from the victim. DNA testing was not contemplated then. During the second murder investigation, AC refused to give samples for DNA testing. However, his cigarette butts, taken after a police interview, were analyzed for DNA and matched semen samples from the second victim. AC's earlier hair samples were analyzed for DNA and matched the butts and semen. AC was arrested and charged for the two first degree murders. At trial, all evidence was ruled admissible. A jury convicted AC of both counts. He appealed claiming that the admission of evidence from the hair samples violated his Charter rights.

Issue: Does the evidence have probative value?
Discussion:
- For something to have probative value it must be material and relevant
    1. Material means relating to a fact in issue at the trial
        - Evidence pertaining to identity of the AC is often material.
        - So financial status of the AC accused of robbery is material to the fact in issue, whereas financial status of AC accused of assault is immaterial
    2. To be relevant, the evidence must tend to increase or diminish the probability of an existence of a fact in issue.
        - Being broke or rich is relevant to accusation of robbery, as it increases or decreases the probability of the fact in issue.
        - Is there a specific connection between the evidence and the crime?
- Prejudicial evidence is something sufficient to sway the opinion of the jury based on emotion and prejudice
    - The jury may convict on the basis of the AC being a generally bad person
    - The jury may wish to punish based on other previous crimes or misconducts
    - The jury may be distracted from the crime in question, shifting the focus of the trial towards irrelevant
    - The jury may be tempted to apply a lower standard of proof, as opposed to BARD.
    - There are degrees of severity to the prejudicial effect:
        - The worse the behaviour, the more prejudicial the effect
        - The longer the presentation of the evidence is, the more prejudicial its effect.
- In the end, the trial judge has to weight the balance of probative and prejudice.
- Evidence presented solely for prejudicial purpose is inadmissible

Ruling: Appeal dismissed.

R. v. B. (F.F.) [1993] SCC

Probative value of evidence is increased if it is pertinent to something that one side builds their case on. Prejudicial evidence has to be presented to the jury with limiting instructions.

Facts: AC was the complainant's uncle and cared for her for several years when she was a child. The complainant alleged that the appellant physically and sexually abused her from the age of six until she was 16. She did not report the incidents sooner because of the AC's violent control over her and her family. The trial judge admitted the testimony of the complainant's siblings regarding the AC's violent control over the complainant's family. AC argued that this evidence was inadmissible because it was oath-helping evidence and its prejudicial value outweighed its probative value.
Issue: Is the evidence of AC's domineering behaviour admissible?
Discussion:
- There are some negative aspects to the evidence.
- But AC builds his defense on the issue, to which the evidence is highly pertinent.
- When the prejudicial effect of the evidence outweighs the probative value, but it is still found admissible, the evidence has to be presented to the jury with proper instructions, as to how to use it and how not to use it.
- Character evidence that shows only the bad character of AC is inadmissible
- But evidence that shows bad character and is relevant for something else, can be admissible
- Once evidence admitted, the next step is
    - The weight that the evidence should be given
    - The limit that the evidence can be used for.
- The judge must warn the jury about the prejudicial effect and tell them why the evidence is being admitted. He has to tell jury:
    - Why the evidence is presented
    - How it must not be used for prejudicial reasons

Ruling: The evidence is admissible, but the judge failed to properly charge the jury

Seaboyer Standard: Prejudicial value must substantially outweigh the probative value in order to result in the evidence being inadmissible

R. v. Seaboyer [1991] SCC

Thresholds of prejudice are different for Crown and AC

Facts: At issue on these appeals was the constitutionality of ss.276 and 277 of the Code, the "rape-shield" provisions, which restricted the right of defence counsel at a trial for a sexual offence to cross-examine and lead evidence of a complainant's sexual conduct on other occasions. The AC was charged with sexual assault of a woman with whom he had been drinking in a bar. At the preliminary inquiry AC sought to cross-examine and present evidence on prior and subsequent sexual conduct of the complainant and applied for an order declaring ss.267 and 277 unconstitutional. The judge refused his application on the ground that he lacked jurisdiction to hear it and committed the AC for trial.
Issue: When does the P/P balance tip in favour of inadmissibility?
Discussion:

- It is made tougher for the judge to exclude evidence that the AC wants to lead
- Threshold for Crown is if the prejudicial value outweighs the probative value by the smallest amount then the evidence will not be admissible
- Defence evidence can only be excluded if its probative value is substantially outweighed by prejudice.
- Something that will merely mislead has to face a lower threshold of inadmissibility for defence.
- This is not as strict a test for getting information in as Crown is subjected to because the system wants to guard against wrongful convictions.

Ruling: Appeal dismissed.

Types of Evidence

Direct and Circumstantial

Direct Evidence: Evidence, which if believed, proves the existence of the fact in issue without inference or presumption. No further inference needs to be drawn from it. The classic example is eyewitness evidence. (*Dhillon*)
Indirect or Circumstantial Evidence: Evidence that one needs to draw an inference from in order to make use of it. It is not intrinsically bad, or weak, but the fundamental difference between direct and circumstantial evidence are the possibilities of error that arise from the two.(*Dhillon*)

There are two ways that direct evidence can be faulty:

1. The eyewitness is lying
2. The eyewitness is not lying, but is mistaken due to external factors.

Circumstantial evidence can be faulty in three ways:

1. The eyewitness is lying
2. The eyewitness is not lying, but is mistaken
3. The inference is wrong:
    - There can be multiple interpretations and inferences made from any circumstance
    - Once we accept the evidence, we have to ask if there is another reasonable inference that can be drawn

Hodge's Rule: The court cannot convict unless it is convinced BARD that the proven facts lead the court to no other reasonable conclusion than the guilt of the AC. However, this rule is not inexorable.

R. v. Dhillon [2001] BCCA

Before basing a guilty verdict on circumstantial evidence, one must be satisfied BARD that the guilt of the AC is the only reasonable inference to be drawn from the facts

Facts: AC contends that the charge to the jury on circumstantial evidence was defective because (1) the judge did not tell the jury that there was no direct evidence and (2) the judge instructed the jury that in a circumstantial evidence any reasonable doubt must be based on proven fact.
Issue: Are these sufficient for a re-trial?
Discussion:

- Reiterates the standard instruction on convicting and BARD from *R. v. W.(D)* [1991] SCC
- Judge explains the difference between direct and circumstantial evidence (see above).

- Before basing a guilty verdict on circumstantial evidence, one must be satisfied BARD that the guilt of the AC is the only reasonable inference to be drawn from the facts (*Hodge's Rule*)
- Inference is a much stronger kind of belief than conjecture or speculation
- There is no need for the judge to tell the jury that there was no direct evidence - this is stating the obvious
- Nether was there any problem with the charge

Ruling: Appeal denied.

R. v. Robert [2000] ONCA

AC's evidence does not have to be believed or accepted, as long as it is sufficient to raise a RD

Facts: AC is convicted of arson based on purely circumstantial evidence. He claims that it was an accident. The judge held that to convict it was sufficient that the facts lead to no other reasonable conclusion that the guilt. AC argues that instead of applying this principle to the Crown case, the judge applied it to AC's explanation of the fire. This required him to prove a reasonable explanation for the fire on the facts, and created a reverse onus.
Issue: Did the judge create a reverse onus?
Discussion:

- Here, instead of asking if Crown has proven guilt BARD, the trial judge found guilt using the Hodge formula to test the explanation of the AC. Thus, he forced the AC to offer an explanation based on "proven facts"
- "The Miller Error": A common instruction to the jury was to consider evidence which it accepted or believed, and to reject and not consider that which it did not.
- But this is inherently problematic.
  - The problem with this is that AC is entitled to be acquitted on evidence that is not believed or accepted.
  - Evidence might not be believed or accepted, but could be sufficient to raise a RD.
  - The Miller Error gives the impression that you can only acquit on evidence you accept or believe; it is an error of law as it requires AC to prove something, creating a reverse onus, whereas AC does not have to prove anything, just raise a RD
- The circumstantial evidence from which the Crown would ask the jury to draw inferences must be proven facts;
- This proven facts instruction does not apply to the AC

Ruling: Appeal allowed

The Miller Error: A common instruction to the jury was to consider evidence which it accepted or believed, and to reject and not consider that which it did not. The Miller Error gives the impression that you can only acquit on evidence you accept or believe; it is an error of law as it requires AC to prove something, creating a reverse onus, whereas AC does not have to prove anything, just raise a RD (*R. v. Miller* [1991] ONCA

R. v. Baltrusaitis [2002] ONCA

Even if the evidence is not believable, if it raises a reasonable doubt, AC must be acquitted.

Facts: Judge made the charge that "your acceptance of evidence as truthful transforms evidence into fact, upon which you base your verdict". AC appeals that this is the Miller Error.
Issue: Is this so?
Discussion:

- Damn right it is.

Ruling: Word

Real and Demonstrative Evidence

Real (physical) Evidence: Material evidence of objects actually involved in the case that can be presented in the courtroom in original form.
Demonstrative Evidence: Evidence that is the representation of the object. This includes photos, recordings, videos, charts, diagrams, etc.

Videos and Photos

- Real or demonstrative evidence is generally helpfully and very probative (*R. v. Nikolovski* [1996] SCC)
- Can be powerful because this type of evidence seems neutral
- Danger with video or photos is that they can be highly inflammatory as it may be so graphic to make the jury act in an inappropriate way. So, there is an inherent prejudicial impact, thus one must have a legitimate reason why they are putting this information before the jury
- One needs to show that it demonstrates something that something less graphic could not show (*R. v. Kinkead*)
- After *Nikolovski* videotapes are admissible as evidence, as a natural progression from audio and photos. The factors which are considered in assessing the admissibility of videotapes are generally said to be the same as those for photographs. Per *R. v. Creemer* [1968] SCC, the admissibility of photos depends on:
  - Their accuracy in representing the fact
  - Their fairness and absence of intention to mislead
  - Their verification on oath by a person capable to do so.

R. v. Penney [2002] NFCA

Videotape evidence must be untempered, with no intention to mislead, and be an accurate representation of the facts.

Facts: AC is a seal-hunter, charged with killing a seal in a slow and brutal manner based on a video made by a animal-rights group, which was professionally edited.
Issue: Is a videotape admissible as evidence? Is selective taping (recording only partial events based on the cameraman's bias) an issue?
Discussion:

- Trial judge rejected the tape, because those who made it lacked credibility in his eyes, and the tape did not represent the facts. Because of this, the charge was dismissed.
- NFSC admitted the tape. The accuracy, continuity and integrity of the tape are relevant to its weight as evidence, and not the whether it is admissible or not.
- In deciding if the video is admissible, the judge must consider whether the video was changed or altered.
  - This decision relies on the assessment of credibility of the Ws introducing the video
- The Ws are not credible, and the video seems to be altered, as it was transferred through multiple formats.
- It is also filmed in a most biased manner, focusing on the gory detail, with large parts of the event missing.
- The video is not an accurate representation of the facts.
- The purpose of this video as evidence was not to establish that AC was on the scene of the crime, but that AC clubbed the seal in a graphic manner. In the first case it would have been admissible, but in the latter case it is prejudicial.

Ruling: Appeal allowed and acquittal restored

Admitting Video Evidence:

1. Authenticate: explain the basic process by which the evidence came into existence
   - Call the person who made the video or photo and have them testify as to how it came into existence
   - Call a W who was at the scene of events and who is willing to testify that it is an accurate description of what happened.
   - Call a technician who set up the camera and/or who can testify as to the process of the camera.
2. Establish a basic level of fairness: demonstrate that the video does not present a misleading image
   - Start with the basic P/P test again
   - For what purpose is the evidence being led? Counsel should set this out for the judge;
   - Show that it accurately represents what happened
   - Potential problems:
     - intermittent / gaps in recording;
     - selective editing to achieve a goal;
     - format changing;
   - Can weight issue if the problems are not too bad or an admissibility issue if lots of potential problems
   - Could argue compounding error (as in *Penney*) where all the factors added up in weight.

R. v. Kinkead [1999] ONCA

Whether crime scene photos are too graphic to be used without causing prejudice is best decided on individual basis

Facts: AC is charged with two counts of first degree murder. Crown wants to introduce photos from the crime scene, which AC argues to be too graphic and gory, thus leading to prejudice.
Issue: Is the prejudicial effect of the photos strong enough to merit exclusion?
Discussion:

- ONCA sets out the basic P/P test.
- The photos pass the P/P test as they are material and relevant.
- The real question is if the photos are so inflammatory and graphic to cause loathing and hatred towards AC
- Our culture is so desensitized to such images, that they are not likely to sway the jury from their sworn task
- Crown wants to bring in photo portraits of the girls when they were alive to show that they wore specific necklaces. Defence avoids showing these pictures by agreeing that the necklaces were worn by them.
- The judge rules the following:
  - Blood and blood smears are OK
  - Autopsy is excluded, except for where they show bruising to the face.
  - Bodies in situ (crime scene) is OK
  - Pictures of wounds - these are to be judged on an individual basis, but anything too grotesque is best left out

Ruling: Some pictures are admitted, some aren't.

Documents

It is possible to attach documents as admission if there is no debate among counsel, but if there is disagreement, then the documents have to be authenticated.

Authentication: the onus is on the person leading the evidence

1. Have the person who authored the document testify.
2. Have someone who was present (e.g. board meeting) but didn't author the document vouch that the document is an accurate representation
3. Show that it was found it in possession of someone, such as AC or W. This can be helpful depending on the purpose of bringing in the evidence.

Lowe v. Jenkinson [1995] BCSC

Documents must be authenticated

Facts: PL is a solicitor, presenting a transcript of an alleged phone conversation between D and his insurance agent.
Issue: Can this transcript be authenticated?
Discussion:

- This is not an original conversation, and there is not way to verify the validity of this, or even whose voices are on the tape, without proper authentication.
- Documents must be authenticated as outlined above.
- PL fails to do so.

Ruling: The transcript is not admissible

Best Evidence Rule: As per (*Garton v. Hunder* [1969] UK CA). The most original form of the real evidence is the best evidence and that is what should be put before the trier of fact (such as the original tape of the phone call; the original journal; etc). But this rule is considered largely outdated and is applied flexibly with the relative reliability of modern technologies

1. If the original is available, it is to be used, after being marked and having copies made.
2. If the copy has to be used, it has to be authenticated by a W
3. If the original is destroyed
   - If it was destroyed accidentally, then a copy can probably be used.
   - If there is an allegation of some substance that the document want purposefully destroyed there may be problems with admissibility and/or weight going back to the P/P balance

Judicial Notice

Olson v. Olson [2003] ABCA

Judge may take judicial notice of a fact that is so obvious as to make it unnecessary to call evidence on that point

Facts: The case concerns whether a 19 year old athlete falls within the definition of a "child" to a marriage under s. 2 of the Divorce Act, for the purposes of getting increased alimony payments. One side wants to rely on judicial notice that enrolling a child in athletic programs leads to improved career options.
Issue: Can the judge take judicial notice of this?
Discussion:

- Sometimes something will be so notoriously known that the judge will take it for granted without hearing evidence on it - hence, the concept of judicial notice.
- The test for judicial notice is strict: a court may properly take judicial notice of facts that are either so notorious or generally accepted as not to be the subject of debate among reasonable persons
- The rule of precedent is applicable here - previous finding of judicial notice can be relied on in subsequent cases.

Ruling: Here, the court is not willing to take judicial notice.

Extrinsic Misconduct Evidence

Character Evidence: Any proof presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in particular behaviour.

Extrinsic Misconduct Evidence: Misconduct of the AC or a party that is outside of the subject matter of the proceeding.
- Extrinsic bad character evidence is presumptively inadmissible (*Handy*).
- Onus is on the Crown to prove on BP that in the circumstances of the particular case the probative value outweighs the prejudicial effect (*Handy*).
- Evidence that does no more than to prove that AC is the kind of person to have committed the crime is inadmissible, for it will invariable have greater potential prejudicial effect than probative value (*Arp*)

Bad Character of the Accused

- Bad Character of the Accused evidence can lead to serious miscarriages of justice, especially since the ability of juries to follow limiting instructions is questionable.
- Some ways that extrinsic misconduct evidence may be prejudicial:
  - Propensity reasoning: if AC did this before, he is likely to have done it again.
  - Punishing for previous bad act: AC deserves to go to jail merely because of his past crimes.
  - Distraction: too much evidence to consider.
  - May lower standard of proof: interferes with purity of BARD.
- The risk of prejudice may be higher if the similar fact acts are morally repugnant
- In a trial with judge alone rather than a jury trial, it will be more difficult to have similar fact evidence excluded because it is assumed that judges can overcome prejudice

Bad Character of the Accused Test:
1. Is it relevant to a material issue beyond general bad character? (credibility?)
2. Does the probative value outweigh the prejudicial effect? (See *Handy* Test for similar fact evidence)

If yes to both then the evidence is admitted, but judge still needs to warn the jury of about what the evidence can and cannot be used for.

R. v. Cuadra [1998] BCCA

Courts may admit bad character evidence if it is relevant to something else besides merely bad character of the AC.

Facts: Victim claimed that he was confronted by two men, one carrying a bat. He identified the AC as the man carrying the bat. Victim was later stabbed. W testified seeing AC with a knife. The trial judge admitted evidence of a prior violent act by AC. AC testified that a friend was involved in a fight with the victim. He claimed he used the bat to scare away the victim and that it was his friend stabbed him. After conviction, AC appeals, arguing that the trial judge erred in allowing the Crown to adduce evidence of his character in an effort to rehabilitate a witness who gave a previous inconsistent statement at the preliminary inquiry.

Issue: Can bad character evidence be used in this case?

Discussion:
- As a general rule, if evidence that shows bad character is relevant to something else besides merely bad character, and has heavy probative value, then it can be admitted.
- The court allows some bad character evidence, because it is material, and is fairly probative.
- In the case at bar
  - The prejudicial effect of admitting the evidence is that this goes against the rule of not admitting bad character evidence.
  - But it has probative value. The evidence related to a prior violent act by AC. It was used to explain why a W was afraid of AC and might give a prior inconsistent statement to police as to AC's involvement in the assault.
  - So the judge did not err.

Ruling: Appeal dismissed.

280.2 Extrinsic Misconduct Evidence

Similar Fact Evidence

Similar Fact Evidence: Establishes the conditions under which factual evidence of past misconduct of AC can be admitted at trial for the purpose of inferring that the AC committed the misconduct at issue. Similar fact test is engaged in every case where the Crown is presenting evidence to establish the guilt of the AC that either directly or indirectly reveals the discreditable or stigmatizing character of AC.

R. v. Handy [2000] SCC

Creates the test for the admissibility of similar fact evidence

Facts: The victim went out drinking with her friends and met AC whom she had known for several months. They went home together and what began as consensual sex became violent. AC was charged with sexual assault causing bodily harm. The Crown tried to introduce evidence of AC's history with his ex-wife which involved seven past sexual assaults on her. The trial judge allowed it.

Issue: Is AC's history of violence with his ex-wife is admissible as evidence?

Discussion:

- Before this case, the rules for admitting this type of evidence were a shitshow.
- Extrinsic evidence of misconduct is usually inadmissible, but an exception can made because of a high level of similarity between the two or more specific acts.
- Often a ruling to admit similar fact evidence can make or break your case because once a jury sees evidence of a pattern of conduct they are much more likely to convict.
- Similar fact evidence is admissible if it shows a distinct and particular propensity to act in a specific way under specific circumstances, as opposed to a general propensity to do bad things.
- Similar fact evidence does not need to go to some other point in order to be admitted.
- At some point there is such a high degree of similarities that the evidence's probative value overcomes its prejudicial effect. Thus the probative value is based on the level of similarities.
- Strength of reliability of the similar fact evidence depends on the amount of time it would take to adduce the similar fact evidence: if it would take an inordinate amount of time, the prejudicial side goes way up
- Once similar fact evidence is admitted, must be accompanied by limiting instructions
- All of the counts do not need to be charged on, merely serving as background to the charged offence in question.
- If the charges are tried separately, and AC is acquitted on one, it cannot be brought in as similar fact for others.
- Using this test SCC found that the evidence put forward by the Crown was inadmissible.

Ruling: The evidence is inadmissible

Admissibility of Similar Fact Evidence: (*R. v. Handy*)

1. Examine the strength of the evidence in showing that the past events actually occurred. The credibility of the W must be considered and if there is any motive to lie must have an effect.
2. Consider whether there was any potential of collusion between the W and the claimant.
    a. If there was merely an opportunity to collude then this is a matter of weight
    b. If there is an air of reality to the accusation, then the onus is on the Crown to show on BP that no collusion occurred, otherwise the evidence is inadmissible.
3. Consider the scope of the issue in question. If it is a very broad issue, then the threshold for probative value will very high. If it concerns a material issue in the trial, then it should be looked upon favourably.
4. Consider whether the evidence supports the inference that the Crown is attempting to draw. This involves examining the similarities and the connectedness between the events. Factors include:
    a. Proximity in time of the similar acts
    b. The extent to which the other acts are similar in detail
    c. Number of occurrences of the similar acts
    d. Circumstances surrounding or relating to the similar acts
    e. Any distinctive features unifying the incidents
    f. Intervening events
    g. Any other factor which would tend to support or rebut the underlying unity of the similar acts.
5. Consider the extent to which the matters proven by evidence are material to the issue at proceedings.
6. Consider the prejudicial effect of the evidence, both in moral and reasoning prejudice
    - The moral prejudice includes evidence that will cause the jury to think that AC is a bad person. This is particularly where the past events were acts that were more reprehensible than the current facts.
    - The reasoning prejudice includes evidence that present a risk of distraction and will consume too much time.

A particular danger of putting in similar fact evidence:
- A criminal justice system that has suffered serious wrongful convictions should not take lightly the potential harmful effects of the evidence.
- So one has to consider if there is a strong link between wrongful convictions and similar fact evidence.

Similar Fact Evidence and Identity

- Sometimes the way that two or more crimes are committed, supports the conclusion that they were each committed by the same person.
- Where the AC can be linked to one of those crimes, the similarity between the crimes might demonstrate that he committed them all.
- Little bits of evidence, which on their own, will not be enough to connect the AC to the crime scene
- But when brought in as similar fact evidence, they draw a consistent picture.
- Although identity cases are resolved using the general similar fact evidence rule described above, the question of when similar fact evidence will be probative enough to help establish the identity of the perpetrator prompted the SCC in *R. v. Arp* to provide extremely formalized suggestions for analyzing such case

Similar Fact Evidence of Identity Test:
1. Is there such a high degree of similarity between the two acts, that it is objectively improbable that crimes where committed by more than one person?
2. Is there some evidence linking AC to the similar act?

- If the picture is such that it is objectively improbable that the crimes were committed by more than one person, then the evidence is admitted?

Character Evidence Called by AC against a Co-AC

Subject to the discretion of the trial judge to exclude evidence where its prejudicial effect is greater than its probative value, AC person may establish that, by reason of his character, a co-AC is the more likely perpetrator of the crime with which they are charged. In doing so, however, AC will be taken to have put his own character in issue.
- The sole fixed limitation is that AC cannot try to establish the propensity of a co-AC by relying on acts for which the co-accused has been acquitted.

Post Offence Conduct

Post Offence Conduct: Conduct by the AC similar to that, which would be expected of a guilty person. It can be characterized in two broad categories:
- Attempts to flee, conceal or destroy evidence, and evade arrest.
- Attempts to avoid successful prosecution: interaction with Ws, tampering with evidence.

Post Offence Conduct is most commonly used in issues of identity, not in levels of culpability, though it is applicable to considerations of defences.

R. v. White [1997] SCC

Post Offence Conduct is just another circumstantial evidence and does not require any special rules, except for a proper charge to the jury.

Facts: AC is charged with murder of his acquaintance. After his death, AC (who was on probation) robbed a bank, fled jurisdiction, tried to dispose of a weapon (which matched the murder one), and tried to flee a police chase. Defence claims that post-offence conduct has no probative value, and that it was all in relation to the robbery, and not murder.
Issue: Is post offence conduct relevant?
Discussion:
- Under certain circumstances, post offence conduct can be circumstantial evidence.
- Examples of this are flight from jurisdiction, concealment, change of name, etc. This is called "consciousness of guilt evidence"

- But when this is introduced to support an inference of guilt, it is susceptible to jury error.
- SCC changes the term "consciousness of guilt" label to the more neutral "post offence conduct" (POC), which is indicative of the fact that multiple inferences can be drawn from the evidence.
- In this case, the POC is potentially relevant to the commission of murder, thus the judge did not have to instruct the jury that there is "no probative value" to AC's actions.
- Consideration of potential alternate explanations are to be left to the jury.
- AC claims that the judge should have charged the jury that unless they are satisfied BARD that the flight and concealment were in relation to the murder, and not to another offence, then they cannot use that evidence to convict. This is wrong.
- BARD standard applies only to the jury's overall decision of guilt, and not to individual categories or pieces of evidence.(*R. v. Morin*)
- As long as the judge instructs the jury that POC can have other explanations than the guilt for the offence, it can be used.

Ruling: Appeal dismissed.

R. v. Peavoy [1997] ONCA

POC is to be used for identity, and not the level of culpability. If AC admits having done actus reus, but pleads a defence, then POC can be used to infer mens rea.

Facts: AC is charged with murder of his buddy, who he stabbed in a fight after a drunken argument over Indian land claims. AC claims self defence and intoxication. After the fight, he called his lawyer and his girlfriend. When police arrived to his apartment and made loudspeaker demands that he exit , he claims to have slept through it (because of a hearing problem), finally exiting his apartment 3 hours later. AC admits that he stabbed the victim, but claims intoxication and self-defence. Crown argues first degree murder based on his POC.

Issue: Can POC be used to show the degree of culpability?

Discussion:

- Evidence of POC is commonly admitted to show that AC has acted in a manner, which is consistent with the conduct of a guilty person, and inconsistent with that of an innocent one.
- POC should only be used for identity and not level of culpability. So that if AC admits to homicide, POC cannot be used to establish the degree (manslaughter/second/first degree murder)
- But it can be used if AC has admitted the elements of the offence and is arguing they are not culpable based on a defence. Then POC can be introduced because it is not dealing with "how culpable", but "culpable or not culpable" (as in whether there was a sufficient mens rea to show criminal culpability)
- It can be used as evidence against the defence of self defence.
- POC can also be admissible for determining mens rea, such as purposeful acts after an offence that rebut intoxication defence, as it shows a functioning state of mind.
- In the case at bar, AC admits actus reus, but denies mens rea (culpability) based on defences of intoxication and self-defence.

Ruling: New trial ordered.

R. v. S.C.B. [1997] SCC

Where one can reasonably infer from POC that AC is not guilty, then the evidence has probative value and should be admitted unless there is a substantial degree of prejudicial effect.

Facts: AC is charged with sexual assault with a weapon. The victim (AC's second cousin) while riding on an isolated trail, was knocked off her bike with a stick by a man on a motorcycle, hit with sticks and sexually assaulted. This is a question of identity: the vicim recognizes the AC as the perpetrator, and AC's friend testifies that AC was with him until just prior to the time of the offence, when he rode off alone on his motorcycle. AC denies this, and there are issues with testimony and facts, as well as expert evidence by a doctor that AC is not the kind of a man to do these things, and the fact that AC fully cooperated with the police, gave DNA, blood, and hair, evidence, and took a lie detector test. AC was acquitted.

Issue: Can POC such as DNA test and lie detector test be led to show "consciousness of innocence"?

Discussion:

- Crown submits that judge erred in admitting the evidence that AC took a lie detector test to bolster his credibility and show "consciousness of innocence". Can such evidence be led?

- Evidence that AC agreed to take a polygraph test only has probative value as it helps infer that AC was willing to do something that a guilty person would not do. (However, polygraph evidence itself is inadmissible).
- Also, AC could have hoped to fool the polygraph. So, multiple inferences can be made from such evidence.
- POC supporting an inference favourable to AC should be admitted, if the P/P balance makes it admissible.
- SCC says we have to go back to basic principles of *Seaboyer* - the lower standard of P/P balance for AC
- Like "consciousness of guilt" evidence, "consciousness of innocence" evidence with multiple reasonable inferences should be left to the trier of fact.

Ruling: Evidence is admissible, but trial reordered on a different matter.

Bad Character of the Witness

On a cross examination you can attempt to undermine Ws by challenging their:

1. Reliability
   - Associated not with honesty or trustworthiness but the accuracy of W's evidence due to certain objective circumstances. Was it dark? Was it far? Was W scared? How much did W see?
2. Credibility
   - Questioning the trustworthiness of the W: he may be lying, exaggerating, minimizing, etc.
   - Common areas which give rise to an issue of credibility:
     - Inconsistent statements;
     - Interested in the result of the proceedings (financial interest, association or relation to the AC);
     - Other motivation;
     - Questionable logic in their story;
     - Demeanor on the stand;
   - Prior bad conduct of W, such as dishonesty-related prior criminal offences (fraud, obstruction), can raise an issue of credibility.
     - May be a factor to consider how much weight or emphasis should be put on that W's evidence.

Prior Convictions

Canada Evidence Act
s.12 Examination as to previous convictions

(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.

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

(2) A conviction may be proved by producing

(a) a certificate containing 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.

R. v. Corbett [1988] SCC

S.12 applies to cases when accused is the W, but only to establish the credibility of their testimony

Facts: AC is charged with first degree murder and sentenced to life. At trial he is called as W, and under s.12, evidence is brought of his past conviction of murder. AC appeals, claiming that this violates his s.11(d) right to a fair hearing, by reason of introduction of evidence of his earlier conviction.

Issue: How does s.12 work when the AC is the W?

Discussion:

- S.12 applies to cases where AC is the W, but only insofar as it determines the trustworthiness of their testimony, and not for the finding of guilt.
- When the AC is the W, merely the fact of the conviction must be brought, and not the details of it (unless a similar fact application is made)
- So, the prior convictions are simply evidence for the jury to consider, along with everything else, in assessing the credibility of the AC

- The judge has discretion to control the amount of past convictions evidence brought in.
- The trial judge may exercise his discretion to exclude evidence of prior convictions in those unusual cases where a mechanical application of s.12 would undermine the right to a fair trial, that is when the prejudicial effect outweighs the probative value
- Because of the prohibition of general bad character evidence, s.12 has been interpreted as requiring some other permissible reason for bringing in the evidence: prior record must go to a relevant issue.
- The burden of proof remains upon the Crown and the introduction of prior convictions creates no presumption of guilt nor does it create a presumption that the AC should not be believed.

Ruling: Appeal dismissed.

Corbett Application to bring evidence of prior convictions of the AC:
Factors used to determine which convictions should be brought in:
1. Element of dishonesty: Prior offences of dishonest nature, such as fraud or obstruction have more probative value
2. Temporal proximity: More recent convictions are more likely to have probative value;
3. Nature of the crime: If previous crime and current crime are very similar then could be more prejudicial. Also, serious crimes of the past will have more prejudicial effect.

Other Bad Conduct

- Past acquittals of the AC are always inadmissible.
- But for other Ws, especially Crown Ws, there is a possibility of introducing evidence of their past general discreditable acts, even if they were not convicted on them.

R. v. Cullen [1989] ONCA

For the purposes of challenging a W's credibility, cross examination is permissible to demonstrate that the W has been involved in discreditable conduct.

Facts: AC is charged with driving his truck at the victim. The victim has been previously charged with possession of burglar's tools, found guilty, but was not given a criminal conviction, only a conditional discharge. At present trial, she was called as a W, and her credibility challenged by leading evidence of her finding of guilt as per s.12.
Issue: Is this relevant to the proceedings, as she was not convicted, merely found guilty?
Discussion:
- For the purposes of challenging a W' credibility, cross examination is permissible to demonstrate that the W has been involved in discreditable conduct that is not limited to criminal convictions.
- This case turned entirely on the credibility of the victim.

Ruling: Appeal allowed, new trial ordered.

R. v. Titus [1983] SCC

Cross examination of a Crown W concerning his an outstanding indictment is admissible for the purpose of showing his possible motivation to seek favour with the Crown.

Facts: AC is convicted of second degree murder. He appeals on the grounds that judge refused defence counsel's request to cross-examine a Crown W about an outstanding indictment of murder that the W has from the same police department.
Issue: Can an outstanding indictment of the W, that has not come to trial, be brought as evidence?
Discussion:
- The purpose of cross-examination is so that the defence may explore all factors which might expose the frailty of the evidence called by the Crown.
- It is fundamental principle of justice that the W indicted of murder is innocent until proven guilty.
- But a W with an outstanding indictment may have a motive for seeking favour with the Crown.
- In such case, defence counsel has a right to cross examine him.

Ruling: Appeal allowed, new trial ordered.

The Vetrovec Witness

Vetrovec Witness: A Crown W that has inherent, profound or serious reliability or credibility concerns that go beyond regular problems; a W that has a demonstrated a complete lack of morals, have no soul, and can barely pass for a human being.. These types of Ws have been linked to wrongful convictions. Some recognized categories are:

- jailhouse informant;
- W that has lied under oath during this or another proceeding;
- W who has given multiple inconsistent statements;
- W who is an accomplice and is now getting a deal;
- W getting a benefit for testifying (money; jailhouse privileges (soap on a rope); plea bargain)

Vetrovec Categorization Test: (*R. v. Sauve* [2002] SCC)

1. What is the degree of problems with their inherent trustworthiness? Some factors to consider are:
   a. Have they been involved in criminal activity?
   b. Do they have an unexplained delay in coming forward with evidence?
   c. Did they lie to authorities?
   d. Has W sought a benefit for testimony?
   e. Has there been evidence that W selectively disclosed his evidence?
   f. Has there been a series of inconsistent statements?
   - In some instances, the presence of only one circumstance, such as where W was provided a substantial benefit in relation to his testimony, may be sufficient. In others, the combination of a number of circumstances, such as W's criminal background and the existence of a number of prior inconsistent statements, may cumulatively require a caution.
2. The threshold will be dependent on how important the W is to the Crown's case?
   a. The more important the W is to the Crown case, the less problems it would take to invoke the caution;
   b. Where the W is less important – it would take much more credibility problems to invoke the Vetrovec caution

Vetrovec evidence has been involved in famous wrongful conviction cases such as *Morin* and *Sophonov.*

Vetrovec evidence requires mandatory special instructions from the judge (*R. v. Sauve*):

1. Judge must separate out the Ws from the other evidence and caution that testimony requires special scrutiny;
2. Judge must identify the characteristics of the W which bring the credibility into serious question;
3. Judge must caution the jury that although they are entitled to rely on the W's unconfirmed evidence alone, it is dangerous to do so;
4. Judge must caution the jury to look for other independent evidence (corroborating evidence) that tends to confirm other material testimony of the Vetrovec W

What is Corroborating Evidence?

- Main approach: look at the corroborating evidence to decide if it restores your faith in the Vetrovec's evidence – this leads back to a balance: the more serious the doubt in the Vetrovec, the more confirmatory evidence will be needed to restore faith.
- Must be independent of the Vetrovec evidence and cannot confirm mere peripheral parts of the evidence. Mere marginal support for the W's evidence is not sufficient (*Dhillon*)
- However corroborating evidence does not have to confirm all aspect of the evidence, rather it is okay if it goes only to some parts of their evidence
- Corroborating evidence does not need to implicate the AC - its purpose is only to credibility to evidence of the Vetrovec in general
- Judge sometimes will review some corroborating evidence that might be considered to give guidance on what types of evidence to look for (*Dhillon*)

R. v. Dhillon [2002] ONCA

Corroborative evidence should not merely show possibility of the W being honest, it must go beyond that.

Facts: AC is convicted of murder of someone who he had no previous knowledge of. The evidence is highly circumstantial and flawed, but the conviction rests on testimony of a jailhouse informant. The informant was very fishy, with over 40 previous convictions, and a history of being denied as an informant. The corroborative evidence is also very fishy. As in it stinks. Of fish. And fish-like substances.
Issue: What level of corroborative evidence is necessary to accept this Vetrovec evidence?
Discussion:

- Must be independent of the Vetrovec evidence and cannot confirm mere peripheral parts of the evidence. Mere marginal support for the W's evidence is not sufficient.
- The Vetrovec W is key to the Crown case.
- So, given the *Sauve* Test, there has to be a significant amount of evidence to support the W's credibility.
- Six out of seven pieces of corroborative evidence brought forth by the Crown are insufficient, and one is marginal
- The insufficient ones merely show that the W could possibly be honest, and that AC could have confided to him, without increasing the likelihood of AC actually confiding to him.
- This is not enough.
- Fish fail!

Ruling: Appeal allowed and new trial ordered.

R. v. Khela [2009] SCC

Corroboratory evidence must be independent and material to their story.

Facts: AC is charged with first degree murder. He allegedly paid two men to murder the victim. The Crown's case rested primarily on the testimony of two unsavoury Ws with lengthy criminal records, both members of a prison gang. Trial judge directed the jury to scrutinize their testimony with the greatest care and caution, and to seek extrinsic evidence of their credibility. AC was convicted. He appealed that the trial judge's Vetrovec warning failed to instruct the jury that to be confirmatory, evidence supporting the testimony of unsavoury Ws must be independent and material.
Issue: What charge to the jury should the judge give for corroborative evidence?
Discussion:

- One view is simplicity: giving the jury freedom to use any evidence to prove credibility of Vetrovec Ws
- The other view is stringency, as it is in the UK system, where every piece of their story has to be confirmed.
- SCC finds a middle ground:
    - The jury is to be instructed to consider the Vetrovec evidence and the rest of the Crown case, and to seek evidence <u>independent of the Vetrovec W</u>, which backs a <u>material and important part of their story</u>.
    - "Independent" means that the <u>corroborative evidence should not be tainted by any connection to the Vetrovec W.</u>
    - "Material" means that the less significant parts of their evidence do not have to be proven. However, it also means that the <u>most significant and important parts have to be corroborated</u>.
- In cautioning the jury, the trial judge was required to draw its attention to the testimonial evidence requiring special scrutiny, explain why the evidence was subject to special scrutiny, warn of the danger to convict on unconfirmed evidence, and instruct the jury to look for evidence from another source tending to show that the untrustworthy witness was telling the truth as to the guilt of the accused.
- The judge captured the substance of a proper Vetrovec warning.
- <u>The judge's instructions were incorrect to the extent that he failed to point to the jury that not all evidence will corroborate Vetrovec testimony.</u> However, those comments would not have reasonably been thought to affect the verdict.

Ruling: Appeal dismissed

Some courts, as well as Nikos, would like to see two more parts to the instructions:

- Even if the Vetrovec W is confirmed by corroboratory evidence, still proceed with caution
- The amount of corroboratory evidence required to establish credibility of the W should depend on the unsavouriness of the W.

Nikos Harris, "Vetrovec Cautions and Confirmatory Evidence: A Necessarily Complex Relationship" 2005

- A framework which provides a trier-of-fact with too broad a discretion to rely on the evidence of a Vetrovec W increases the risk of wrongful convictions, each one of which diminishes the reputation of our criminal justice system.
- A trial judge has a broad discretion in terms of the particular content and structure of this caution
- The rules concerning confirmatory evidence might be summarized as merely requiring that the trier-of-fact carefully examine the testimony of the Vetrovec W in the context of the evidence as a whole and determine whether or not they believe the W's evidence.
- It is submitted, however, that the rules concerning the evaluation of confirmatory evidence for Vetrovec W are much more complex than that. Not only are a number of areas of evidence not capable as serving as confirmatory evidence, but also the presence of some confirmatory evidence does not equate with making it safe to convict on the evidence of a Vetrovec W.
- The entire purpose of the Vetrovec caution, which is to protect against the risk of wrongful convictions based on unreliable evidence, is undermined if a trier-of-fact is provided with the impression that it is safe to convict an AC based on the evidence of a Vetrovec W which is supported by any other evidence in the Crown case.
- A trier-of-fact should understand that not all Crown evidence is capable of serving as confirmatory evidence, as well as that caution must be exercised even where there exists some independent evidence which supports a relevant part of the W's testimony.
- The rules concerning confirmatory evidence for Vetrovec W might be summarized as follows:
  - the confirmatory evidence must be independent of the Vetrovec W and an additional warning may be required if there is a risk that consistencies between the testimony and other evidence are the product of details of the offence the W learned from sources other than the AC. Evidence which is tainted through connection to the Vetrovec W cannot serve as confirmatory evidence.
  - the confirmatory evidence must relate to a relevant part of the W's testimony and must be able to support a rational inference that the W is more likely to be telling the truth;
  - the more profound the W's trustworthiness problems, the more cogent the confirmatory evidence must be in order to make it safe to rely on the evidence of a Vetrovec W;
  - the confirmatory evidence should generally be reliable in its own right, and particularly if the confirmatory evidence comes from only one source or the trustworthiness concerns regarding the Vetrovec W are particularly profound;
  - Even in the presence of substantial confirmatory evidence, a trier-of-fact should still exercise a degree of caution in relying on the evidence of a Vetrovec witness.

Good Character Evidence

- W who is not the AC can bring in good character evidence, but only as general characteristics.
- The AC may prove that she is not the kind of person who would commit the offence with which she is charged. This proof can be done through
  - Reputation witnesses to give character evidence on the community's perception of the AC
  - Admissible expert testimony;
  - The AC's own testimony;
  - Similar fact evidence;
  - According to some authorities, the opinion evidence of lay witnesses who are familiar with AC. (the law is iffy)
- When AC brings in good character evidence, it opens a chance for the Crown to disprove it by leading bad character evidence.
- However, this bad character evidence can only be used to discredit the AC's character and credibility as a W, not to convict him based on it.

R. v. E.D.H. [2000] BCCA

If AC places his character in issue by arguing good character, then the Crown can lead evidence of bad character, but this evidence can only go to refute the good character evidence.

Facts: AC is convicted on 7 counts of sexual misconduct and assault of his stepdaughter, ranging over the period of many years, from age 10 to 18. He denies guilt, and appeals on the basis that the trial judge improperly admitted evidence of bad character, and did not adequately instruct the jury on the use of bad character evidence. This

includes some pornographic photographs, that were deemed not relevant, but Crown was given leave to cross-examine AC on them nonetheless.
Issue: Can Crown lead bad character evidence on cross examination after AC brought evidence of good character?
Discussion:
- Usually, bad character evidence against the AC is inadmissible, and putting AC's character in issue is not allowed.
- If AC, under the guise of repudiating allegations against him, asserts that he could not have done the things alleged, because he is a person of good character, then he puts his character in issue.
- Where AC places his character in issue, Crown can cross-examine him on prior acts of discreditable conduct
- Where AC calls evidence of good character, judge must instruct the jury to assess the credibility of AC
- But where Crown shows evidence of bad character of the AC, this evidence can only refute the credibility, and not as a basis of determining guilt.
- The judge must make sure to make a proper and clear charge to the jury about this.
- He failed to do so in this case

Ruling: Appeal allowed and new trial ordered.

Eye Witness Identification

This is one of leading causes of wrong convictions in North America.

R. v. Hibbert [2002] SCC
Eye witness in-court identification is dangerous, and requires a stringent charge to the jury.

Facts: AC charged with attempted murder arising out of the brutal attack of a real estate agent during an open house. The Crown's case was based largely on circumstantial evidence among which was the in-court identification of AC by the victim and a neighbour. Victim failed to identify him in the line-up pre-court, but afterwards she saw repeated footage of his arrest on TV. After this, in court, she identified his as the assailant. AC appealed alleging weaknesses in identification evidence and errors in the instructions to the jury about the evidence of identification.
Issue: What weight should be given to eye W in-court identification?
Discussion:
- In the circumstances, the trial judge should have cautioned the jury more strongly that the identification of AC in court was highly problematic as direct reliable identification of the perpetrator of the offence.
- Eye witness in-court identification can be very powerful, but it is dangerous, being deceptively credible, because it is honest and sincere.
- The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it.
- It is problematic not because of credibility issues, but from reliability standpoint.
- But a jury might be concerned if W was not asked to identify an AC in court as the perpetrator and might draw an unjustified adverse inference against the Crown if the question was not asked.
- Moreover, the inability of W to identify AC in court as the perpetrator is entitled to some weight.
- Some factors that it may be more reliable: if W knows AC, view, proximity, time.
- The instruction to the effect that such identification should be accorded "little weight" does not go far enough to displace the danger that the jury could still give it weight that it does not deserve. Judge has to clearly set out the risk of mistake.
- It would have been prudent to emphasize for the benefit of the jury the very weak link between the confidence level of a W and the accuracy of that W.
    - It should also have been stressed that the impact of the victim having seen the AC arrested by the police as her alleged assailant could not be undone. Nor could she be expected to divorce her previous recollection of her assailant from the mental image that she formed after having seen AC on TV. All of this will melt and etch the images in her mind.

Ruling: Appeal allowed and new trial ordered.

Opinion Evidence

In the law of evidence, an opinion means an 'inference from observed fact. A basic tenet of our law is that the usual W may not give opinion evidence, but testify only to facts within his knowledge, observation and experience.

The major exception to this is the expert W.

Common Knowledge

R. v. Graat [1982] SCC

A W to crime can provide an opinion regarding something that is within common knowledge and doesn't require expert qualifications.

Facts: The trial judge accepted the opinion evidence of two police officers that the AC's ability to drive had been impaired by alcohol and convicted him under s.234 of the Code. AC appeals to determine whether a court may admit opinion evidence on the question to be decided - here, whether the appellant's ability to drive had been impaired by alcohol.
Issue: Is common knowledge opinion admissible?
Discussion:

- The question whether a person's ability to drive was impaired by alcohol is one of fact, not of law, and non-expert Ws may give evidence as to the degree of a person's impairment.
- The guidance of an expert is unnecessary.
- The value of opinion will depend on the view the court takes in all the circumstances.
- The judge, however, should not consider the opinion of police officers in a preferential way merely because they may have extensive experience with impaired drivers.
- Here, the non-expert evidence was correctly admitted.
- The Ws all had an opportunity for personal observations.
- Based on the P/P balance, there are limits on allowing first-hand non-experts to be give opinion evidence.

Ruling: Appeal dismissed.

Lay Opinion Will Be Inadmissible:

- If there is a question whether the W is drawing a logical inference from the facts
- If the facts upon which the opinion is based are too speculative.
- When having a W provide an opinion that is phrased as legal conclusion. One should be careful about having too much invasion into the role of the trier of fact. Opinions are to assist trier of fact in assessing, not to provide a conclusion and tell trier of fact what they should concluded. (e.g. W can provide opinion that "AC seemed intoxicated" but can't say "AC was too intoxicated to drive")
- If the lay W is trying to give evidence that goes beyond common knowledge into expert evidence (e.g. lay W can't say "X fell down and was having a heart attack)

Because W can give an opinion there may be very significant issues of weight involved. Is the lay W really qualified to draw this inference even if it is out of common knowledge? Does the lay W have a certain background that would lead them to certain conclusion?

Expert Evidence

Canada Evidence Act
7. Expert Witnesses
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.

- Expert evidence is one of the few areas where defence has disclosure obligations.

- There is an inherent problem with expert evidence in current Canadian Criminal system. It costs a fair amount of money to hire an expert W, and often the amount of money that the leading experts will cost, will often be more expensive than the money potentially received from the lawsuit.

Voir Dire: A "trial within a trial." It is a hearing to determine the admissibility of evidence, or the competency of a W or juror, conducted prior to to the trial.

R. v. Mohan [1994] SCC

Expert evidence to character will be admitted if it is reliable, relevant, and necessary.

Facts: AC, a practising pediatrician, was charged with four counts of sexual assault on four female patients aged 13 to 16, during medical examinations conducted in his office. A psychiatrist testified in a *voir dire* that the psychological profile of the perpetrator of the first three complaints was likely that of a pedophile, while the profile of the perpetrator of the fourth complaint that of a sexual psychopath. The psychiatrist intended to testify that AC did not fit the profiles of those unusual groups, but the evidence was ruled inadmissible. AC was found guilty by the jury and appealed. ONCA allowed his appeal and ordered a new trial.

Issue: Can expert evidence to character be admissible?

Discussion:

- Expert evidence advancing a novel scientific theory should be subjected to special scrutiny to determine whether it met a basic threshold of reliability, and whether it was necessary in the sense that the trier of fact would be unable to come to a satisfactory conclusion without the assistance of the expert.
- The closer the evidence approached an opinion on an ultimate issue, the stricter the application was of this principle.
- Evidence of an expert that AC, by reason of his or her mental make-up, would be likely/unlikely to commit the crime does not fit into the categories of reputation in the community with respect to a trait or specific acts of good conduct, both of which types of evidence could be led by an AC.
- Before the experts opinion as to disposition was admitted into evidence, the trial judge must be satisfied that either the perpetrator of the crime or AC had distinctive behavioural characteristics such that a comparison of one with the other would be of material assistance in finding guilt.
- A finding that the scientific community had developed a standard profile for the offender who committed the type of crime in issue would satisfy the criteria of relevance and necessity.
- The evidence would qualify as an exception to the exclusionary rule relating to character evidence provided the judge was satisfied that the proposed opinion was within the field of expertise of the expert W.
- In this case, nothing in the record supported a finding that the profile of a pedophile or psychopath had been standardized in the scientific community.
- The experts profiles were not sufficiently reliable to be considered helpful, and any value it might have had would be outweighed by its potential for misleading or diverting the jury.
- The evidence should be excluded.

Ruling: Appeal allowed

Expert Evidence Test: (*R. v. Mohan*) Onus is on the party calling the expert to establish on BP

1. Is the evidence that the expert would provide relevant to a material issue?
2. Is it absolutely necessary to assist the trier of fact: when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. The necessity requirement is made more stringent by *R. v. D.D.*
3. Will the evidence assist the trier of fact in drawing an inference relative to the case?
   - Is the evidence reliable? (if the scientific method used is novel, look at the *R. v. J.L.J.* Test).
   - If expert evidence that goes to a relevant area is either too conclusive or too complicated, one should question if it will really help the trier of fact.
   - Will the evidence overwhelm the jury or be too directive in telling the jury what to conclude?
4. How qualified is the expert?
   - Not usually controversial for admissibility, but will often become a weight issue when it comes to consideration of leading expert or just a run of the mill expert

- Also, the opinion of an expert must not only pass those standards applicable to expert evidence but must also comply with other rules of evidence, such as other exclusionary principles, and P/P balance.

280.3 Opinion Evidence

A major concern with expert evidence is that the expert can usurp the role of the jury
- There are some circumstances where you cannot get around the expert commenting and providing a direct opinion (such as insanity defence);
- However, the court will prefer if the evidence is presented in a way which is less directive
- There are two ways to prevent the expert from usurping the role of the jury.

1. Using hypothetical questions;
2. Avoiding having the expert go to the ultimate issue in the case
    - Asking for general factors that indicate whatever you are trying to show (such as "what factors make it more likely for an organization to be a cult" instead of "does this seem like some sort of crazy cult?");

Hypothetical Question: Factual scenario that reflects the facts that the part hopes to prove.
Ultimate Issue: The closer the opinion of the expert goes to ultimate issue at trial (verdict), the stricter the test for admissibility becomes (*Mohan*). There is no absolute rule that counsel can't ask the expert to give an opinion on the ultimate issue in the case, but this will result in the court being particularly tough in terms of admissibility of P/P test (*Bryan*)

R. v. Bleta [1964] SCC

As long as the questions are phrased to make clear what the evidence that the expert is founding his conclusion on is, non-hypothetical questions are admissible.

Facts: AC was acquitted on a charge of non-capital murder. While fighting with the victim, he was knocked down and his head struck the pavement. Some Ws observed that when AC got up he staggered and appeared to be dazed. The victim had started to walk away when AC, after getting up, stabbed him fatally with a knife.. AC used defence of automation. This was supported by a psychiatrist who had not examined AC until more than three months after the incident, but who attended his trial and listened to all the evidence as to AC's head injury and his behaviour immediately after receiving it. The expert was not asked hypothetical questions but was invited to express his opinion based on the evidence which he had heard. CA ordered a new trial on the ground that this evidence was inadmissible and should not have been accepted by the judge.
Issue: Can expressive and directive expert evidence be admissible?
Discussion:
- Judge can insist on hypotheticals if he feels that this is the best way for the jury to understand it
- But he can waive this, as long as the jury is clear on the nature and foundation of the opinions of the expert
- If expert evidence is led as facts of case, the court will be particularly tough in terms of admissibility of P/P test
- There are two situations in which counsel does not have to use a hypothetical question:
    - If the evidence is not in dispute.
    - If the expert has dealt directly with the AC (interviewed or examined him).
- In the present case it was clear that psychiatrist was proceeding on the hypothesis that the AC's blow on the head and his conduct after receiving it were as described by the Crown Ws, and that AC's condition as to amnesia, headaches and other symptoms were honest.
- During the trial, all sides were satisfied that a proper basis had been laid for the admission of the doctor's opinion.
- The trial judge was justified in assuming that the hypothesis on which the psychiatrist based his opinion had been made clear to the jury, and he was justified in admitting this evidence.

Ruling: Appeal allowed and acquittal restored.

R. v. D.D. [2000] SCC

SCC limits expert evidence to cases where it is absolutely necessary.

Facts: AC was charged with sexual assault and invitation to sexual touching. The 10-year-old victim alleged that AC sexually abused her when she was five or six years old. The victim did not tell anyone about the alleged assaults for two and a half years. The Crown sought to call a child psychologist to provide expert evidence that a child's delay in alleging sexual assault was not an indication that the allegations were false. The trial judge admitted this evidence and AC was convicted. CA held that the evidence should not have been admitted because it was neither relevant nor necessary. Crown appealed to SCC.
Issue: Is it time to shuffle up the rules for expert evidence?
Discussion:
- SCC goes on a rant against expert Ws
    - There is a whole industry of expert Ws forming around the court system

  - There is an easy slide into impartiality when it comes down to experts who are called in repeatedly to testify on similar evidence.
  - There has been more an more evidence linking expert Ws to wrongful conviction
  - Expert evidence increases the time and cost of litigation
  - The fees charged by many experts mean that money becomes a large factor in the justice system
  - Expert reputation and knowledge makes it very challenging to cross-examine or contradict them for non-experts
- Expert Ws will be tolerated only when the jury absolutely requires assistance in their decision.
- The *Mohan* test is still applicable, but more stringency and importance is put on the "necessity" element.
- The psychologist's evidence had no technical quality sufficient to meet this threshold of necessity.
- Rather, a judge should have made mention of the childhood trauma and delay of charges in their address to the jury. They are all reasonable adults who would have figured this shit out themselves.

Ruling: Appeal dismissed.

The Basis and Weight of Expert Opinion

- Expert testimony must always relate to the case and to the facts at the bar. So it is the responsibility of the counsel to ensure that there is sufficient evidence to form these facts. It is the trier of fact's role to decide if the case at bar has similar circumstances, and, thus, if the expert ideas have any foundation.
- Where there is some foundation with some evidence missing as the basis on expert opinion, then it is an issue of weight. (*Wilband*; *Lavallee*) This holds even if there are some fairly significant foundation issues. (*Lavallee*)
- If there is zero evidence brought in to to show foundation for the expert testimony, then there is an issue of admissibility and expert opinion will not be admissible (*Abbey*)

R. v. Wilband [1982] SCC

Expert opinion may rely on second hand sources.

Facts: AC is convicted of a serious sexual offence, and Crown seeks to have him confined as a "dangerously sexy offender". At the hearing, Crown calls two forensic psychiatrists who argue that AC cannot control his sexual impulses and will strike again. They based their opinion on interviews with the AC, prison files, and psychiatrists' reports. Defence claims that this is inadmissible as it is based on hearsay. BCCA rejected this. AC appealed.
Issue: Is basing expert testimony on prison files considered hearsay?
Discussion:

- To form an opinion, expert has to consider all possible sources of information, including second hand sources, as long as their reliability is within professional scope.
- The value of the opinion may be reflective of the extent that the expert relied on second hand material, but this goes to weight, and not to admissibility.

Ruling: Appeal dismissed.

R. v. Abbey [1982] SCC

For expert evidence to be admissible, at least some of the facts upon which experts base their opinions must be proved by admissible evidence. Zero foundation will result in inadmissibility.

Facts: Due to insanity, AC was found not guilty of importing blow into Canada. AC called an expert to testify that AC is hypomaniac, who knew he was doing wrong but believed that, if caught, he would not be punished, because there is a magic ghost monkey watching over him.The trial judge found that AC's incapacity to appreciate the nature and quality of his acts met the test of s.16(2), and more particularly, that he did not "appreciate" the consequences associated with the commission of the offence. Crown appeal fails at BCCA and goes to SCC.
Issue: Did the trial judge fuck up on "hearsay" evidence introduced during the testimony of expert?
Discussion:

- An expert W will often have to rely his opinion testimony on second hand evidence. It will be admissible if relevant
- But can second-hand evidence form the basis of opinion?
- An expert expressing an opinion that he forms on the basis of talking to AC. This is not hearsay.
- But this evidence of AC's statements cannot go to the truth of the statement. That would be hearsay.
- There is a danger of confusing the two.

- Experts are entitled to take into consideration all possible information in forming their opinions, but the factual basis on which such opinions are based must be established based on admissible evidence. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.
- If they cannot be, and zero evidence is brought to show foundation, then an issue of admissibility arises and expert opinion will not be admissible
- There was no admissible evidence properly before the Court with respect to the delusions experienced by the AC, and his cracked-out behaviour.
- The trial judge erred in accepting as factual much of the hearsay evidence related by an expert in the course of giving his opinion.

Ruling: Appeal allowed.

R. v. Jordan [1984] BCCA

An expert is allowed to use whatever data that he deems necessary. Abbey rule does not apply to scientific evidence.

Facts: AC is arrested smuggling envelopes of a substance that is believed to contain heroin. RCMP ran several tests using a control substance from the lab that was labelled as a sample of heroin. They also compared the spectra readings to those in US literature. Based on the similarities of the spectra graphs, they concluded AC's substance to be heroin, and convicted him.

Issue: Did the judge err in giving weight to RCMP opinion that the control substance was heroin, which was based on hearsay?

Discussion:

- AC claims that RCMP should have established that the control substance was heroin by contacting the lab in Ottawa.
- Court says that this is unnecessary. Calling him would require him to prove that the substance was heroin, going to his source, and so on, making scientific analysis too protracted and slow.
- The ruling of *Abbey* does not apply to scientific evidence.

Ruling: Appeal dismissed

R. v. Lavallee [1990] SCC

As long as there is some admissible factual foundation present for expert testimony, the shortage of such facts is an issue of weight, not admissibility.

Facts: AC was a battered woman in a violent relationship with her common law partner. At a party, he had loaded a gun and told AC that when everyone left the house she would "get it". He then gave the gun to AC and she was going to commit suicide but then aimed at the dude and shot him in the back of the head as he was exiting the room they were in. AC pleaded not guilty and raised self-defence. At trial AC did not testify but defence counsel presented expert psychiatric evidence as to the psychological make-up of women who were battered and felt trapped in the abusive relationship. The Crown sought to have the evidence excluded but the trial judge permitted the evidence to remain and dealt with the Crown's concerns in his charge to the jury. On appeal MBCA found fault with the jury charge as it related to the expert evidence and ordered a new trial. AC appealed to SCC.

Issue: Can the evidence be included?

Discussion:

- Expert evidence was properly admitted in any situation where the subject matter of the inquiry was such that ordinary people were unlikely to form a correct judgment about it if unassisted by persons with special knowledge.
- In the case at bar, expert evidence on the psychological effects of battering on wives and common law partners was both relevant and necessary for the jury to render a correct verdict.
- Without such evidence the jury would not be able to fully appreciate the mental state of the female AC.
- The fact that expert testimony was based on hearsay evidence did not render the expert's testimony inadmissible.
    - If the expert testimony was relevant it was admissible.
    - The hearsay evidence relied on was admissible for the purpose of showing that the expert opinion had some basis but was not admissible for the purpose of proving the truth of the things alleged in that hearsay evidence. (*Abbey*)
    - The proper means of addressing the issue of the admitted hearsay evidence and the expert opinion based on it was to determine what weight should be attached to the expert's opinion.
    - Before any weight could be given to the expert's opinion, the facts upon which the opinion was based must be found to exist.

- The requirement that there be admissible evidence which corroborated the evidence on which the expert based his opinion did not mean that any expert opinion not completely based on admissible evidence must be withdrawn from the jury's consideration.
- As long as there was some admissible evidence to establish the foundation of the expert's opinion the trial judge was free to leave the expert opinion for the jury's consideration.
- The judge should instruct the jury to weigh the opinion based on their assessment of the strength of the underlying evidence upon which it was based.

- In this case the trial judge did charge the jury in this manner. Furthermore, there was sufficient admissible evidence underlying the expert's opinion in this case to render the expert testimony admissible.

Ruling: Appeal allowed.

R. v. Bryan [2003] ONCA

Expert evidence regarding the ultimate issue is admissible, but raises a stricter P/P standard.

Facts: AC is convicted for possession of cocaine for the purposes of trafficking. AC possessed 2.9 grams of yay and $1,500 when he was arrested. He denied that he possessed the blow. He provided an innocent explanation for the cash. The Crown called a police officer and qualified him to give expert evidence related to the cocaine trafficking business and its proceeds. The officer testified that someone in AC's circumstances would be trafficking, and the funds were crime proceeds. AC submitted that this evidence was inadmissible and prejudicial since it went to the ultimate issue that the jury had to decide.

Issue: Is the testimony admissible?

Discussion:

- The evidence was properly admitted. But the expert did say that it is likely that the money is proceeds from being a gansta' and a balla'. This hits the ultimate issue on one of the charges.
- There is no absolute rule that counsel can't ask the expert to give an opinion on the ultimate issue in the case.
- But this will result in the court being particularly tough in terms of admissibility of P/P test.
- No basis existed to challenge this evidence. The expert was properly qualified. The evidence was relevant, necessary, assisted the trier of fact and was not excluded by any rule.

Ruling: Appeal dismissed

Particular Matters

There is general flexibility in admitting expert evidence, and most of the time the issues will be seen as those of weight, as opposed to admissibility. However, there are some areas of expert evidence, where admissibility becomes a serious issue.

Credibility of a Victim

Oath Helping: having a W give opinion evidence to the credibility of another W. This is forbidden. Straight up.

R. v. Llorenz [2000] ONCA

Evidence directly aimed at proving the credibility of the victim is inadmissible, unless if that evidence has some other legitimate purpose, and proving credibility is its mere side-effect.

Facts: AC appealed his conviction of a sentence for sexual abuse, based on admissibility of portions of a psychiatrist's evidence and the adequacy of judge's charge on this evidence. Crown's case rested on the credibility of the victim. In support of her evidence, Crown examined the psychiatrist who treated her. The psychiatrist's evidence, taken as a whole, communicated to the jury the clear message that he believed the victim's allegations of sexual abuse. AC appeals that this had the role of oath helping, and that the trial judge failed to properly instruct the jury that the evidence was not to be used for the purpose of bolstering the complainant's credibility.

Issue: Is this oath helping?

Discussion:

- It was open to the Crown to call evidence which provided the context in which the allegations were made and that the victim's condition was consistent with sexual abuse. However, it was not necessary to provide the list to the jury.
- Taken as a whole, it seemed as oath-helping, and going too close to ultimate issue.

- The prejudicial effect of the evidence outweighed its probative value.
- Credibility of the victim will not be subject to opinion evidence
  - The rule against oath-helping prohibits the admission of evidence adduced solely for the purpose of proving that a W is truthful. The rule applies to evidence that would tend to prove the truthfulness of the W or truth of the Ws' statements
  - Same as bad character evidence, evidence may come in, which effects credibility but may have another purpose
  - So, evidence may still be admitted if, in addition to being oath-helping it has some other legitimate purpose
- In this case, expert's testimony gave a clear message of bolstering victim's credibility.
- There was a serious likelihood that the jury attached substantial weight to the belief of the psychiatrist that the victim was telling the truth.
- The trial judge did not sufficiently instruct the jury on the use of the expert evidence.

Ruling: Appeal allowed

Novel Scientific Evidence

Expert evidence will be treated as "novel science" where there is no established practice among courts of admitting evidence of that kind, or where the expert is using an established scientific theory or technique for a new purpose.

R. v. J.-L.J. [2000] SCC

Novel scientific methods are to be subjected to special scrutiny to be admitted as evidence.

Facts: AC was charged with sexually assaulting two young boys. He sought to introduce a psychiatrist's testimony into evidence to establish that the offences were probably committed by a serious sexual deviant and that various tests of AC had disclosed no such personality traits. The trial judge excluded this evidence on the basis that it only showed a lack of general disposition and was not saved by the distinctive group exception. The AC was convicted, and appealed. The QCA allowed the appeal and ordered a new trial on the ground that the psychiatrist's evidence had been wrongly excluded. Crown appealed to SCC.

Issue: Is a new behavioral profiling technique admissible expert evidence?

Discussion:

- In order to rely on the distinctive group exception, it had to be shown that the crime could only have been committed by a person having distinctive personality traits that the AC did not possess.
- When considering novel scientific methods, the basic *Mohan* factors are applicable
- But there is another test to consider
- Recent years have seen an increase in expert Ws. This raises a risk of using scientific evidence, which may be discredited some time down the road, such as hair evidence or physiognomy was in the past. This means that the courts should be cautious about new scientific methods, regarding them with specific scrutiny.
- In the case at bar, the new behavioral profiling procedure fails several of the basic reliability criteria, as well as raises the basic *Mohan* issue of going to ultimate issue. There was also a very real possibility that evidence of the error rate in these tests would distort the fact-finding process. All of this made it inadmissible.
- This case sends a general message that courts need to tighten up admissibility standard for all expert evidence.
  - Critical statement from the court: trial judge should take seriously its gatekeeper role

Ruling: Appeal allowed and conviction restored.

Novel Scientific Evidence Test:

1. Can it satisfy the standard *Mohan* test,
   - Even stricter application of the "necessity" and "reliability" inquiries where the expert opinion approaches an ultimate issue.
2. Is the science in question sufficiently reliable to put before the court. Some of the other factors to consider are:
   - Has the technique been tested, or can it be?
   - Is the error rate known?
   - Has the theory or technique been subject to peer review?
   - Is this generally accepted in the scientific community?

Even if the practice is established, if the underlying scientific theory is realistically challenged because of changes in the base of knowledge, the expert evidence should not be admitted without confirming the validity of the underlying assumptions.

Examination of Witness

Direct Examination

Leading Question

Leading Question: questions that directly or indirectly suggest to the W the answer that he is to give, or contains the information that the examiner is looking for. Often, a leading question may be answered by a "Yes" or "No", though not all of these are leading.

The party calling a witness should generally use open-ended as opposed to leading questions. Although the answers to leading questions are not inadmissible, the fact that they were obtained by leading questions may affect their weight. There are two kinds of leading questions.

- The first kind suggests the answer to the W.
- The second kind presupposes the existence of a fact not presented by that W in evidence. This second kind of leading question is never permissible unless the presupposed matter is not contested.

Maves v. Grand Trunk Pacific Rwy. Co [1913] ALSC

On material points, leading questions are allowed in cross-examination, but not in direct examination.

Facts: PL's horses escape and get run over by D's train. D loses the case for damages, and appeals, alleging that the trial judge erred in preventing D's counsel from asking leading questions of a forgetful W in a direct examination. The W has forgotten an important part of a conversation that D wanted to obtain through leading the W.
Issue: What is the use of leading questions on direct examination?
Discussion:

- The rule is: On material points a party must not lead his own W but may lead those of his adversary
- This is because:
  - W has a bias in favour of a party bringing him forward
  - The party calling a W has an advantage over the adversary, in knowing what the W is expected to prove.
  - Allowing leading in this case will allow a party to extract only the beneficial parts of the story.
- On introductory and auxiliary points, it is both allowable and proper for a party to lead their own W.
- So, leading question cannot be used when it is sought to prove material or proximate circumstances

Ruling: Appeal dismissed.

There are some exceptions to the rule, where leading questions will be accepted, but may go towards the weight of the evidence:

- To bring out preliminary matters (name, occupation, and other pedigree information).
- Where the memory of the W has been exhausted and there is still information to be elicited.
- In a sensitive area, to avoid the W from testifying to incompetent or prejudicial matter.
- In cases where a W may need some extra assistance due to their youth, trauma, etc.
- Where the W is hostile to the examiner, or reluctant or unwilling to testify, in which situation the W is unlikely to accept being "coached" by the questioner.

Refreshing a Witness' Memory

- The law enables counsel, subject to limits, to attempt to refresh the memory of a W.
- This can be done either through leading them to remember the picture more truthfully, or presenting documentary evidence of their previous statements. This give rises to two concepts:
  - Present Memory Revived
  - Past Memory Recorded
- These are extraordinary procedures, so the processes must be followed in a careful manner because it is easy to taint W or process;
- Most of the time, one has to try to revive present memory, before the past memory recorder should be relied on.

Present Memory Revived

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

- The document itself is not the evidence it just assists - the document is not admissible for its truth, although it will be marked for identification

R. v. Shegrill [1997] CA

There is no contemporaneity requirement for present memory revived.

Facts: W's memory is refreshed by reference to statement that she gave to the police, and by the transcript of her testimony at the preliminary inquiry. The statement was made 6 years after the offence, and written by someone else. The W also could not read english, and had the documents translated to her in the absence of the jury.
Issue: Can the Crown use the transcript to refresh the memory of their W?
Discussion:

- W's memory can be refreshed by transcript of their testimony during the preliminary hearing (*R. v. Coffin*)
- There is a difference between a W who forgets something and needs notes to remember, and who, even after the notes has no memory, but testifies that the notes are accurate and true.
- The rule for past memory recorded is that the document must be made by the W near the time of the event, or must be verified by the W when the vents are fresh in her mind. But does this rule apply to refreshing memory?
- There is no contemporaneity requirement for simple refreshing of memory. <u>It should only apply to the past recollection recorder.</u>
- This case outlines the strict procedure used to have the present memory revived.
    1. Bring application when jury is removed
    2. Identify document and explain what counsel seeks to elicit from W
    3. Judge must consider if W's memory appears to have been exhausted
    4. Judge determines if it is a situation of reviving memory or if it is past recollection recorded
    5. Judge examines document for appropriateness and reliability
    6. Improper purpose test: judge must satisfy herself that there is not an attempt (conscious or not) just to get that document into evidence; supposed to be a bone fide attempt to revive the W' memory
    7. Judicial discretion according to the circumstances and attitude of W
    8. Recall jury and explain that counsel called W to refresh their memory and judge had granted permission
    9. put the document before the W and let them read in silence without comment
    10. Take document away; ask non-leading questions
    11. Opposing counsel can examine document and cross-examine W
    12. Judge may give a limiting instruction to the jury. (re: document not for truth or credibility)

Ruling: Yes they can.

Past Memory (Recollection) Recorded

W may refresh her memory in court from a document or an electronic record that was recorded reliably.

<u>Past Memory Recorded Admissibility Test:</u>
Per *Wigmore Law of Evidence*, and set out in *R. v. Fliss* past memory recorded is a well established exception to the hearsay rule as long as it is:

1. W has <u>no memory of the recorded events</u> at the time of testimony, and thus needs to resort to records.
    - This does not require a total loss of memory, imperfect present recollection is sufficient
2. The document was <u>reliably recorded</u>:
    a. The W must have prepared the record personally, or vouch for accuracy if someone else did
    b. The original records must be used, or an authenticated copy must be used.
3. Made <u>within a reasonable time when the W' memory was sufficiently fresh</u> to be vivid and accurate
    - If the record is a document created by another, or an electronic recording, that document or recording must have been reviewed by the witness at a time when his memory was sufficiently fresh to be vivid and probably accurate
    - There is no set standard, but it is set depending on the context of the case.
4. The <u>W vouches that the record</u> accurately represents his recollections at the time it was made.

- The primary significance of the distinction between present memory revived and past memory recorded is that in the latter, the document is in substance the evidence, and must therefore meet the requirements of time, verification, and accuracy of the past recollection recorded rule.
- Whereas in the case of present memory revived, the document is just a trigger, assisting the testimony, which is the evidence in itself.
- There are a few statutory provision in the Criminal Code which create past recollection routes:
  - Under s.715, if W provided testimony at preliminary hearing but is then not available for trial (dead, insane, really ill, absent from Canada, etc.), preliminary hearing testimony can be brought in the trial, unless AC can prove they did not have a full opportunity to cross the W at the preliminary hearing
  - Under ss.715.1 and 715.2 young complainants in sexual assault trials can have a videotape taken soon after the offence and it can be entered if adopted under oath.

R. v. J.R. [2003] ONCA

Recorded past statements by the W can be admissible as evidence.

Facts: AC and his buddies kidnap four girls, rape them and abuse them, after which one of them dies. AC is convicted of first degree murder, kidnapping, sexual assault with weapon, etc. He appeals the murder (as opposed to manslaughter) based on the admissibility of a statement under the past recollection recorded exception to the hearsay rule, made by one of the victims. Crown W testified to a brief conversation she had with the AC on the way to the apartment where she was led. After her testimony, to refresh her memory, Crown directed her to her statement to the police, where she gave a different version of the conversation. She still could not remember, but said that at the time of her statement the events were fresh in her memory, while the trial was 2.5 years after the events. Judge ruled that the part of her statement that she could not remember was admissible

Issue: Is this admissible?

Discussion:

- At trial, it was not disputed that the statement given was accurate.
- The 16 hours between the events and the statement is within the traditional bounds of reliability
- Although she had a chance to talk to other victims before, there is no evidence of collusion
- So, as long as the testimony passes the *Wigmore* criteria, then it is admissible.

Ruling: Appeal dismissed

R. v. Fliss [2002] SCC

Otherwise excluded evidence can be relied on to refresh memory. W can use only those parts of the testimony that he now recalls making, or that he authenticates as accurate at the time that his memory was fresh.

Facts: AC confesses to murder to a undercover cop wearing a wire. The police had authorization to make the recording, but at trial this was found to have been improperly granted. The judge made the tape and transcript inadmissible, but not the testimony of the W cop, who had his memory refreshed by the tape. In fact, his testimony was mostly verbatim rendition of the excluded transcript.

Issue: Can the memory be refreshed by otherwise excluded evidence?

Discussion:

- The statement of the W cop was crucial to Crown's case.
- Trial judge denied the move to suppress the testimony of the cop as tainted. He ruled that the cop could give evidence as to his present recollection of the talk. For this, he could make use of the transcripts to refresh his memory.
- The tape and transcript were found to be in violation of s.8 of the *Charter* (search or seizure) and were excluded, based on the *Duarte* ruling that secret recordings of a conversation where one person is the agent of the state are in violation of s.8.
- Any *viva voce* evidence of a W who was not a party to the conversation, but only heard it through the tape would have been excluded too.
- But the cop was a party to the tape. His corrections to the transcript were fresh in his memory.
- W must use in his testimony only those portions of the record that he now recalls, or that he authenticates as accurate at a time when his memory was fresh and vivid.
- The cop had reviewed the transcript of a taped conversation shortly after the conversation took place but could not recall everything that was said. He could not therefore authenticate the entire transcript as accurate.

- Defence moves that cop testifies until his memory is exhausted, and then use the transcript. Judge says fuck off. There is no such rule as "exhaustion of memory"
- The cop was allowed to testify, and to refresh his memory, no matter if the stimulus was admissible itself.
- It is the narrative, not the stimulus, that becomes evidence. The stimulus does not have to be admissible.
  - But this is highly unlikely to pass the *Shegrill* examination of evidence for memory refreshing.
- But here, the testimony mirrored the transcript almost word for word in some areas.
- It went beyond refreshing the memory, it created a memory based on inadmissible evidence. So, W cannot read a document *verbatim*.

Ruling: Appeal allowed.

Cross-Examination

- The opportunity to cross-examine in order to test or to challenge a witness's evidence is an absolutely vital part of the adversary process.
- As an essential component of the right to make full answer and defence, AC has a right to cross-examine witnesses for the prosecution without significant and unwarranted constraint. This is enshrined in s.7 of the *Charter* and any limitation will engage *Charter* rights
- Cross-examination has two basic goals:
  - Eliciting favourable testimony from the witness
  - Discrediting the testimony of the witness.
- The practice in Canada is to follow the "English Rule," which allows the cross-examiner to inquire into any relevant matter, as compared with the "American Rule," where cross-examination is limited to subjects or topics that were covered in examination in chief and to matters relating to the witness's credibility.
- But there are clear limits to this:
  - One cannot harass a W with questions repetitive to the point of futility,
  - One cannot go into the area of inquiry that is not relevant or helpful
  - It is improper for Crown to ask AC as to the veracity of Crown Ws and it is improper for Crown to question AC as to otherwise inadmissible bad act evidence.

Considerations during cross examination that can test or undermine the strength of W's testimony:

- Reliability: even an honest W may have misperceived a situation
- Credibility: bias, motive, prior convictions. All Ws under cross-examination have their credibility at issue.
- Inconsistent Statements: deviation from previous statements clearly goes to credibility and reliability
- Evidence of collusion between Ws: contact, relationship, etc.
- Corroboration: look for details and facts that corroborate the story
- Air of Reality: does story have air of reality?
- Accuracy of the recollection: was the W drunk, tired, distracted?
- Prior Incident: Based on prior incidents does this story seem plausible? Be cautious regarding general bad character evidence.

The Specific Scenario Issue

- Leading a specific alternative scenario goes beyond testing reliability and credibility
- It creates a risk of prejudice: in having theories without evidentiary foundation advanced; particularly to Crown;

R. v. Lyttle [2004] SCC

There is no need for evidentiary foundation to advance a theory on cross-examination, as long as counsel has a good faith basis in the scenario, they can advance a hypothesis on strength of experience and reasonable inference.

Facts: AC is charged with assault with weapon for being one of a gang who viciously beat and robbed a man. The victim told a cop that the attack was over a gold chain, but the cop suspected a drug connection, which he reported to his superior Detective. Detective included this in the report, without speaking to the victim. So the entire drug-related theory has no basis, only police notes with hearsay from an unknown informant, which are in themselves inadmissible.

Issue: Can the theory be mentioned in court during cross-examination?

Discussion:

- The theory is to the benefit of the AC, since he claims that the victim's identification of him in the line-up is to protect the real offender - his associate in the drug ring.
- So Crown seeks to prevent cross-examination along these lines in the absence of evidentiary foundation.
- The old rule under *R. v. Howard* is that it is not open to the examiner or cross-examiner to put as a fact, or even a hypothetical fact, that which is not and will not become part of the case as admissible evidence.
- This created a problem – what if you have some basic evidentiary foundation for a proposition that is not admissible?
- The right of AC to cross-examine prosecution Ws without significant constraint is an essential component of the right to make a full answer and defence. This is protected in the Charter at s.7 and s.11(d)
- *Howard* applies only to expert Ws.
- A question can be put to a W in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question
- Good faith basis is a low threshold, but it must be reasonable, thus bringing in an element of objectivity

Ruling: Appeal allowed and a new trial ordered.

Brown v. Dunn Rule: if counsel is going to challenge the credibility of a W by calling contradictory evidence, the W must be given a chance to address the contradictory evidence in cross-examination while he is in the W-box (*Brown v. Dunn* [1893] HL)

R. v. Carter [2005] SCC

Brown v. Dunn rule is not an absolute, and should be applied with deference to counsel competence.

Facts: At the trial level, defence counsel failed to cross-examine a Crown W. After the conviction, AC appeals that absence of such cross-examination is a mistake of law.
Issue: Is the failure of defense council to challenge a W on credibility sufficient for a re-trial?
Discussion:

- It is not fair to a W to adduce evidence which casts doubt on his words, without giving him an opportunity to address it.
- But the application of the *Brown v. Dunn* principle is not absolute and must be tailored to the circumstances.
- The application of the rule requires a holistic analysis, rooted in the circumstances of each case:
  - Failure to ask about significant matters upon which you will ultimately attempt to rely will engage the rule
  - Failure to put details to a W will not
- Defence may choose to be non-confrontational and to not question the W.
- Counsel should not invite the juries to draw inferences against the credibility of W because of "non-confrontation" except in the clearest of cases (???)
  - A defence counsel's decision to not question the W, whether by tactical decision, or mere oversight, should not be relied on as proof of anything.
  - But it cannot be relied on as a "mistake of law" to appeal a decision. It is assumed that counsel is competent and know what they are doing. Both he and his client have to live with his decisions.

Ruling: Appeal dismissed.

Re-Examination and Rebuttal Evidence

Re-Examination

- When a new issue is brought at at cross-examination that was not brought up in direct examination, the party that led the W can choose to re-examine them. But this is to be used sparingly.
- Standards for permitting re-examination:
  - Only where the cross-examination has raised new issues
  - If the Crown has already brought up an issue on direct examination, it will be tougher for them to re-examine

R. v. Moore [1984] ONCA

Only matters touched on cross-examination can be covered at re-examination.

Facts: AC and two friends cooperated in planning a robbery of a taxi driver and assisted in summoning a specific cab on a certain night and in locating a site to get rid of the cab. AC did not accompany the others during the actual

robbery but knew that they would be armed. The two others murdered the cab driver in the course of the robbery and were subsequently arrested. One of them confessed to the police and AC was then arrested. All three were convicted with first degree murder. AC appealed on the grounds of being a pansy.
Issue: How much of a pansy is AC?
Discussion:
- If Defence has cross-examined on part of a statement, the Crown cannot re-examine on the rest of the statement
- The re-examination has to deal only with something that was brought up at cross.
- Judge may grant leave to counsel to cross-examine his own W on a prior inconsistent statement even at the stage of re-examination where the W in cross-examination has given evidence on a material matter which is contrary to a prior statement.
- But there was no basis for this.
- The trial judge erred in permitting Crown counsel to re-examine one of their W, but that error could not form the basis for a new trial.

Ruling: Appeal dismissed.

Rebuttal Evidence

- The idea of the Crown calling testimony after the AC has put forth their case. This allows Crown to put forth new theories or scenarios once AC has successfully defended themselves after Crown's original accusations.
- It is <u>generally not permitted</u> because a limit needs to be put on litigation, and the AC has a right to know the case against her before presenting hers.
- One could apply to re-open Crown's case, but there is a strong presumption against this, with stricter rules than re-examination
- One of the possibilities is that AC puts forward some evidence or theory that Crown could not have reasonably anticipated.
- Also, in cases of alibi, AC has to disclose their case with the prior notice
- Defence will often avoid this by making disclosure, because rebuttal places Crown testimony as the last thing that the jury will hear.

<u>Rebuttal Evidence Admissibility Test:</u>
As general rule the Crown cannot split its case and bring in new evidence.: must enter own case and relevant evidence that it intends to rely upon for all issues in the pleading. However, per *R. v. Krause* [1986] SCC, rebuttal evidence can be permitted where:
1. The issue brought by Ac could not have been reasonably anticipated or expected
2. This must be an non-collateral issue: new issue raised must go to the centre of the case and cannot be purely a credibility issue.

Statement Evidence

Prior Inconsistent Statements

- If a W provides a statement in court that is inconsistent with a statement given before, this is a classic case of cross-examination, having impact on credibility and of the W.
- They may not be evidence of their truth, unless they are adopted by the witness.

Prior Consistent Statements

As a general rule, prior consistent statements are not admissible evidence, because they are prejudicial, self-serving, have low probative value, and extend litigation times. But there are some exceptions:

1. For the purposes of supplementing the narrative and showing the consistency of conduct (*R. v. Ay*)
2. Prior consistent statements can be admitted where it has been suggested that a W has recently fabricated portions of his evidence (*R. v. Stirling*)
   - This does not require that an allegation of recent fabrication be expressly made - it is sufficient that the circumstances of the case reveal that the "apparent position of the opposing party is that there has been a prior contrivance"
3. Prior identification of AC (*R. v. Swanson*)

R. v. Ay [1994] BCCA

The existence of prior consistent statements can be mentioned to supplement the narrative and show consistency of conduct, but their actual content is inadmissible.

Facts: AC is convicted for several sexual offences involving the same victim and occurred when the she was between 5 and 17 years old. She does not press charges until she is 30. AC, his wife, and his friends present a completely different story from that given by her. AC argued that inadmissible evidence of the victim's prior out of court consistent statements concerning the allegations of sexual assault made to her mother, the investigating officers and others was allowed to go before the jury without instructions. AC also argued that the trial judge misdirected the jury on the application of the reasonable doubt standard to the issue of credibility.
Issue: What legal use can be made of evidence admitted under the "narrative exception" to the common law rule that evidence of a W's prior consistent statements is generally not admissible?
Discussion:

- W be called to prove that another W has made a prior statement consistent with the evidence that such other W gives at trial, as it is self-serving and has low probative value.
- Evidence of a prior consistent statement made by a W is generally speaking not admissible as evidence of the consistency of such W
- However, a prior consistent statement can be led for its existence, not for its content, to show consistency of conduct if a limiting instruction is given
  - Only the existence of the statement can be mentioned, not the content
- So, the jury were entitled to hear of the fact of the prior complaint as this was part of the narrative:
  - The fact of the complaint was relevant and probative to the narrative and to understanding the chain of events, and if it had been limited to the narrative it would have been admissible.
  - However, it went beyond that.
- There is also a discussion of the *R. v. W.D.* formula for applying reasonable doubt in the context of a case where credibility is central. It has to be reinforced to the jury that criminal standard of proof requires BARD, and not choosing who the jury believes more.
- The judge erred in failing to instruct the jury on the allowed use of prior consistent out of court statements .

Ruling: Appeal allowed, new trial ordered.

W.D. Instruction:

1. If you believe the AC, then you must acquit;
2. If AC's evidence raises a reasonable doubt, then you must acquit;
3. If you reject the AC evidence, AND the rest of evidence proves his guilt BARD, then you must convict;

R. v. Stirling [2008] SCC

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

Facts: AC is convicted for negligence causing death. The convictions arose out of a single-vehicle accident in which two of the car's occupants were killed and two others were seriously injured, including AC. The primary issue before the trial judge was whether the Crown had established that AC, and not the other survivor of the accident, was driving the vehicle when the crash occurred. All parties agreed that a line of questioning during other survivor's corss-examination raised the possibility that the survivor had motive to fabricate his testimony. Following a *voir dire*, the judge admitted several prior consistent statements, which served to rebut that suggestion. AC argued on appeal that although the judge was correct in admitting the prior consistent statements for the purpose of refuting the suggestion of recent fabrication, he erroneously considered them for the truth of their contents
Issue: Is this true?
Discussion:

- One of the exceptions to inadmissibility of prior consistent statements is where it was suggested that a W recently fabricated portions of his or her evidence.
- A statement thus admitted has no probative value beyond showing that the W's story did not change as a result of a new motive to fabricate.
- It is impermissible to assume that because a W made the same statement in the past, he was more likely to be telling the truth, and any admitted prior consistent statements were not be assessed for the truth of their contents.
- Prior consistent statements have the impact of removing a potential motive to lie, and the trial judge is entitled to consider removal of this motive when assessing the W's credibility.
- The judge was aware of the limited use of the prior consistent statements, and no error was made.

Ruling: Appeal dismissed.

R. v. Swanston [1982] BCCA

Prior evidence of a consistent identification is admissible, as long as it is verified.

Facts: AC was acquitted at trial on a charge of robbery. The victim had identified AC at the line-up and at the preliminary hearing. However, the victim had difficulty in positively identifying AC at trial. The Crown proposed to call police Ws who could testify that the victim had identified AC on two previous occasions and that that man was in fact the AC. The judge refused to admit this evidence. Crown appeals.
Issue: Can evidence of earlier identification be given by a third party?
Discussion:

- There is an *obiter dicta* in *R. v. McGuire* (1975) NSCA that if the person does not himself give evidence, evidence of his earlier identification cannot be given.
- But this should be reviewed
- English courts allow extra-judicial identification evidence.
- Almost a year and a half had gone by since the robbery when the doctor testified at trial.
- None of the exclusionary rules of evidence is infringed by permitting the identifying W, who cannot identify AC in court, to state that whoever he identified on an earlier occasion was the culprit.
- The Crown may prove by another W that the man identified by the identifying W was the AC in the dock.
- May be more reliable; may be preferable evidence as it is closer to the offence.

Ruling: Appeal allowed, new trial ordered.

Challenging the Credibility of Your Own Witness.

Adverse Witness: A W who give evidence unfavorable or opposed to the interest of the party who called him. This is most common when the W starts to contradict his past testimony.
Hostile Witness: A W that does not wish to tell the truth because of a motive to harm the party who has called him, or to assist the opposing party. NOTE: these two are treated the same for the purpose of s.9.

- A hostile witness can be cross-examined by their party with leave of the court (According to Paciocco)
- A party can cross-examine an adverse W if he can be said to be "adverse" in accordance to s.9 of the *Canada Evidence Act.*

S.9 Adverse Witnesses

(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

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

- A s.9(1) issue arises when a W becomes adverse or hostile to the party leading them.
  - Where the W has been declared adverse under s.9(1), counsel can have a go cross-examining him.
  - If found adverse, W can be subjected to general cross-examination
- A s.9(2) issue arises when a W appears to have given a previous inconsistent statement that was recorded and documented.
  - Without being labelled adverse, W can be cross-examined on their previous inconsistent statement
  - This is different from s.9(1) which makes way for a general cross-examination.
  - Cross-examination on the inconsistency of the statement does not does not make the statement admissible: the statement is not being put for its truth
  - This is more limited than s.9(1), but may often be a stepping stone to s.9(1), which can be relied on if the limited cross-examination is no sufficient.

Wawanesa Mutual Insurance v. Hanes [1963] ONCA

In determining whether a W is adverse, judge may consider prior inconsistent statements of theirs.

- In cases where application is made to introduce a prior inconsistent statement under s.9(1), the following procedure is to be observed at a *voir dire*:
  1. Court must find that the alleged prior statement was made;
  2. Prior statement must be substantially important and substantially inconsistent with previous testimony;
  3. Court should at this point consider the demeanor and behaviour of the W;
  4. Court has to determine if a s.9(1) cross-examination would be in the interest of justice;
  5. Based on the above, the Court has to make a finding that W is adverse;
- Such admittance should not be indiscriminate
- It is in the end, up to the jury to decide whether the prior statement has in fact been made by the W.

R. v. Cassibo [1982] ONCA

How to define an adverse witness.

Facts: AC is convicted on four counts of incest with his daughters. At trial AC denied the allegations. Defence called Ws, including people living in the house, to testify to the improbability of the acts alleged. Judge found these Ws to have either low credibility, or their testimony being of low value. Victim's mother (Crown W) testified and changes her story, denying her previous corroborative statements to the police. Crown has her ruled as an adverse witness, and has her prior statements admitted. AC appeals on the grounds of this being improper.

Issue: What is an adverse witness?

Discussion:

- At a *voir dire* victims' mother corroborated their story, but at direct examination she changed her statement and denied everything. Trial judge allowed the *voir dire* evidence to be accepted as the trial evidence.
- Defence at a cross-examination elicited the contrary statement from the mother. Crown applies to re-examine her regarding the prior inconsistent statement that she's made to the police.
- If she denied making the statement, Crown asked to have her proven as a adverse W under s.9(1).
- S.9(1) does require a finding of adversity before a prior inconsistent statement is introduced at a *voir dire.*
- Factors to consider when declaring W adverse:
  - Demeanour and air of hostility towards leading counsel, and towards the other side.
  - Prior inconsistent statements: how radical is the change? How much warning did counsel have? Is there any explanation for the chance?

Ruling: Appeal dismissed.

R. v. McInroy and Rouse [1978] SCC

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

Facts: AC's appeal from convictions of murder. BCCA held that the trial judge had erred in permitting Crown to cross-examine a Crown W under s.9(2) in respect of a statement after that W had said that she was unable to remember making such a statement to the police to the effect that AC had told her he had killed the victim. The majority of the BCCA, went on to hold that W's statement to the police could properly be placed before the jury under the doctrine described as "past recollection recorded" because she had testified that her statement represented what she believed to be true at the time she gave it even though she said she did not recollect her conversation with AC at the time of the trial. The majority held that the statement was admissible as probative of the matter asserted in it. Minority dissented on this issue.
Issue: Can the statement be admitted?
Discussion:

- S.9(2) conferred a discretion on a trial judge where the party producing W alleged that W had made, at another time, a written statement inconsistent with the evidence being given at the trial.
    - The discretion was to permit, without proof that the W was adverse, cross-examination as to the statement.
- Where the judge finds there is a legitimate loss of memory, there may not be an inconsistency found and thus no s. 9(2) granted.
- However, Where the trial judge in the *voir dire* comes to the conclusion that the lack of memory is feigned or fake, there is an actual conflict in the testimony cross-examination under s.9(2) can be called.
- The task of the trial judge was to determine whether the W's testimony was inconsistent with her statement to the police. He was perfectly entitled to conclude that it was.

Ruling: Appeal dismissed

R. v. Milgaard [1971] SKCA

Procedure for a s.9(2) application.

Facts: AC, a boy of 17, is convicted of the non-capital murder of a girl and sentenced to life imprisonment. He had driven in the company of a friends from Regina to Saskatoon to pick up a friend on their way to Vancouver when he stopped a girl in the street in Saskatoon to ask his way Right after that the car got stuck and he and one friend went to look for help. He went in the direction of the girl and returned about 20 minutes later. The girl was later found dead near the place where the youths had stopped, her body covered with stabbing wounds and showing signs of sexual attack. His friends in the car later signed a statement to the effect that she had seen her companion stabbing the victim. At trial she claimed to have forgotten such making this statement. The appeal was based, among others, on allowing the cross-examination of W by the Crown counsel in the presence of the jury before any declaration was made as to her being adverse, and failure to hold a cross-examination of the same W on a previous written statement in the absence of the jury before making a ruling as to whether she was adverse.
Issue: Who dunit?
Discussion:

- Under s.9(2) judge can grant permission to cross-examine on prior inconsistent statements without declaring W adverse. This is not an absolute right, and the judge has a discretion not to allow this process.
- If after that counsel applies to call W adverse, the cross-examination can be considered as evidence of adversity
- The procedure for this is as follows:
    1. Counsel has to advise the Court that s.9(2) application is being made
    2. Dismiss the jury
    3. Explain to the circumstances to the judge and produce the written statement
    4. Judge has to determine whether there is in fact inconsistency at hand.
    5. Counsel has to prove the written evidence wither by having the W affirm it or by other evidence
    6. If the statement is proven, other side can cross-examine
    7. Judge has to decide whether or not a cross-examination before the jury will be permitted.
- After a successful s.9(2) cross-examination, if the W still adverse, counsel may choose to go to a s.9(1) application.
- The judge did err in allowing the cross-examination of a W respecting a statement in writing previously made by that W inconsistent with the evidence given in Court in the jury's presence.
- But, in the present case, there was nothing in the cross-examination of the W either by Crown or defence counsel that would not have occurred if the correct procedure had been applied.

Ruling: Appeal dismissed.

Hearsay

Hearsay: An out-of-court statement that is offered to establish the truth of the content of the statement. The essential defining features of hearsay are:
1. The fact that an out-of-court statement is adduced to prove the truth of its contents and
2. The absence of a contemporaneous opportunity to cross-examine the declarant.

An out-of-court statement includes previous statements made by a witness who testifies. An out-of-court statement also includes an "implied statement," which is any assertion revealed through actions and not words. Where the actions are intended to communicate a message, they are treated the same as a verbal or a written statement.

Hearsay evidence is presumptively inadmissible (*Khelawon*) because:
- It is not a statement provided under oath;
- It takes away the perceptive abilities that a trier of fact usually has – such as the ability to assess the demeanor of the person making the statement, their inflections, body language, tone, etc.;
- Most importantly, the evidence is not subject to cross examination

- The rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function (*Khelawon*)
- The fact that W testifies in court does not matter. The prior statement is still hearsay and for it to be admitted for its truth, a hearsay exception needs to be found. See s.9

Non-Hearsay Uses of Out of Court Statements

- When an out-of-court statement is offered simply as proof that the statement was made, it is not hearsay, and it is admissible as long as it has some probative value.
- *R. v. Edwards* [1994] ONCA concluded that the intercepted telephone calls were not hearsay and were admissible.

R. v. Subramaniam [1956] JCPC

Out of court statements that are not adduced for reasons other than the truth of their content are not necessarily hearsay.

Facts: AC was charged with possession of twenty rounds of ammunition, an act that was contrary to an emergency decree to counter terrorism then in place in Malaysia. He was found wounded by security forces, was searched, and the ammunition discovered. AC's defence was duress, and he took the stand. He described how he was captured by terrorists and was about to relate conversations with them. The trial judge interjected to rule that what the terrorists said was hearsay — unless the terrorists were called to testify. Of course, the terrorists were not called. AC was convicted and sentenced to death.
Issue: Can AC lead evidence of what the terrorists told him?
Discussion:
- Privy Council allowed his appeal on the grounds that the trial judge had erred in preventing AC from telling the court what the terrorists had said.
- AC's defence of duress would be made out if he had been compelled to do the acts by threats that gave rise to a reasonable apprehension of instant death.
- Of importance in the law of duress is the fact that threats are made.
- It is not hearsay and is admissible when it is proposed to establish by the evidence the fact that the statement was made, not the truth of the statement.
- In this case, it was of no significance whether the terrorists would have acted on their threats. The relevancy of these statements had nothing to do with their being true.

Ruling: Appeal allowed

Circumstantial Evidence of State of Mind

R. v. Wysochan [1930] SKCA

Out of court statements are not hearsay if they show the state of mind of the declarant

Facts: AC was convicted of the murder of a woman and sentenced to death. She had been shot. At the time, the only people present were her husband and AC. According to husband, AC did the shooting. According to AC, the shooting must have been done by the husband. At issue were words spoken by victim after the shooting. She said to a friend, "Tony, where is my husband?" and when he came near her she stretched out her hand to him and said, "Stanley, help me out because there is a bullet in my body."
Issue: Is this hearsay?
Discussion:

- The Court of Appeal ruled that these statements were not hearsay; they merely showed her belief and feelings towards her husband.
- That is, her general non-aversion to her husband, implying that he was not the one who just shot her.
- Yet the implied assertion is obvious — "AC shot me" — but if she had said that it would be hearsay.

Ruling: Appeal dismissed

R. v. Ratten [1971] JCPC

Out of court statements are not hearsay if they show the state of mind of the declarant and have probative value for the trial.

Facts: AC is convicted of the murder of his wife. AC alleges that he shot her accidentally while cleaning his gun. There was a phone cal made out of the house at the time of the death. According to the operator, the wife was hysterical and sobbing, trying to phone the police. She then hung up.
Issue: Is this hearsay?
Discussion:

- The mere fact that evidence of a witness contain words spoken by another person does not make it hearsay.
- Hearsay only arises when these words are relied on to establish some fact
- The fact that a call was made, and that the caller was hysterical establishes the fact that she was in a state of fear.
- This is admissible evidence of the state of mind.
- This has probative value, as it adds weight to the theory that the shot was not accidental.

Ruling: Appeal dismissed.

Exception to the Hearsay Rule: Principled Approach

The law has come to recognize that the traditional hearsay exceptions were driven by two fundamental principles: necessity and reliability. This was originally set out in *R. v. Khan* and *R. v. Smith*.

R. v. K.G.B. [1993] SCC

Evidence of prior inconsistent statements of W other than AC should be admitted on a principled basis, the governing principles being the reliability and necessity of the evidence.

Facts: In the course of a fight between four young persons (including AC) and two men, one of the youths stabbed one of the men in the chest, killing him. Two weeks later, AC's friends were interviewed separately by police. Police advised them that they were under no obligation to answer questions and that they were not charged with any offence "at this time." With the youths' consent, the interviews were videotaped. They told police that AC had acknowledged that he thought he had killed the victim with a knife. AC was subsequently charged with second degree murder and tried in Youth Court. At trial, the three youths who had given statements to police recanted their statements and, during cross-examination under s.9, they stated that they had lied to police to exculpate themselves from possible involvement. Although the trial judge had no doubt that the recantations were false, the prior inconsistent statements could not be tendered as proof that AC had actually made the admissions, but only to impeach the credibility of the witnesses. AC was acquitted because there was no other sufficient identification evidence. The ONCA upheld the acquittal.

Issue: Should the common law rules of hearsay be reconsidered?

Discussion:

- The rule should be replaced with a principled approach based on reliability and necessity.
- As a threshold matter the statements should only be admissible if they would have been admissible as the W's sole testimony.
- If a witness rejects their prior statement and radically changes their testimony at trial this may satisfy the necessity requirement to bring the prior statement in through hearsay evidence.
- Reliability would be satisfied when the circumstances in which the prior statement was made are reasonably analogous to those in court. The closer these come to the courtroom setting, the more reliable they are. This is a cumulative analysis. This requires:
    1. Courtroom Oath: If the statement was made under oath, solemn affirmation or declaration following an explicit warning to the W as to the existence of severe consequences for perjury;
    2. Physical Presence: Something that would allow the court to observe the behaviour and demeanour of the declarant. If the statement was videotaped in its entirety, this is the best case scenario;
    3. Contemporaneous Cross-Examination: The opposing party had had a full opportunity to cross-examine W at trial respecting the statement.
    - Alternatively, other requirements might suffice if the judge was satisfied that the circumstances provided adequate assurances of reliability
- If the requirements were satisfied, the trial judge would instruct the jury that they could take the statement as substantive evidence of its content.
- Where the prior inconsistent statement did not have the necessary reliability, but the party leading them otherwise satisfied the requirements of ss.9(1) or 9(2), the statement might still be tendered into evidence, but the trial judge had to instruct the jury in terms of the existing rule.
    - Some things to consider here: motive to lie, temporal proximity of the statement, form of the statement

Ruling: Appeal allowed and new trial ordered.

Principled Approach Test:

1. Hearsay is presumptively inadmissible. Start here.
2. Is the content of the statement regularly admissible?
3. Can the party leading the evidence establish on BP that the statement is not a product of coercion, threats, duress, etc. (There is a heightened caution for recanting Ws)
4. Can the party leading the evidence establish on BP that admitting the statement must be necessary
    a. It must be necessary to discovering the truth,
    b. It must be necessary insofar as enabling all relevant and reliable information to be placed before the court
        i. Inability of a W to testify in court
        ii. W radically changing their story and washing their hands of their previous testimony
5. Can the party leading the evidence establish on BP that the statement must be reliable.
    a. *K.G.B.* test asks for closest fit to the tree indicia of courtroom testimony
        i. Oath
        ii. Physical presence to allow observation of the declarant
        iii. Ability for contemporaneous cross-examination
    b. Similar out of court statements can be compared with each other to infer reliability (*R. v. U.(F.J.)*)
    c. If the *K.G.B.* requirements are not met, consider inherent trustworthiness (*R. v. Khelawan*):
        i. Does the content carry with it such strong indications of truth that we think it meets threshold reliability and can go to jury (*R. v. Khan*)
        ii. Is there a motive for the W to lie?
        iii. Is there any corroborative evidence to support the truthfulness?
    d. The two tests can be complimentary in establishing the balance to pass the threshold of reliability.
6. The P/P balance must be satisfied.

R. v. U.(F.J.) [1995] SCC

Similar out of court statements can be compared with each other to establish reliability.

Facts: AC was convicted of incest and sexual touching. In an interview by an investigating officer, the victim (AC's 13 year old daughter) stated that he had regular sexual intercourse with her, most recently the previous night, and described various sexual activities. AC was questioned and admitted to the incidents, described the same activities and also stated that the most recent incident was the previous night. AC was then charged with a number of sexual

offences. At trial, his statement to police was admitted through the testimony of the interviewing officers. When the daughter was called by Crown, she admitted that she had made the statement alleged, but asserted that the allegations of sexual assault were untrue. AC also testified at trial and denied the truth of much of the contents of his statements. The ONCA upheld the trial conviction.
Issue: Did the judge err in inviting the jury to compare the daughter's unadopted prior inconsistent statement with AC's unadopted statement?
Discussion:
- The prior statement was necessary evidence when a W recanted.
- Where W was available for cross-examination, a threshold of reliability could sometimes be established by a striking similarity between two prior statements (the one being assessed and the other clearly substantively admissible), if there were, on a BP, striking similarities and neither reason nor opportunity for collusion of the declarants, nor improper influence by third parties.
- If the statement of recanting AC met the reliability criterion and was substantively admissible, the trier of fact was directed to follow a two-step process of evaluation:
    1. Ascertain that the statement being used as a reliability reference was made, without considering the prior inconsistent statement under consideration;
    2. Compare the similarities of the statements, and if sufficiently striking and unlikely to have been fabricated, draw conclusions from that comparison about the truth of the statements.
- Here, the victim provided a comprehensive explanation for changing her story.
- Her and AC's statements contained a significant number of similar details with a strikingly similar assertion as to time of sexual contact.
- There was not evidence of collusion or pressure.
- Therefore, the complainant's statement was substantively admissible.

Ruling: Appeal dismissed

R. v. Parrott [2001] SCC
If W can testify in court, then bringing in hearsay is not necessary.

Facts: AC was convicted of kidnapping and sexual assault on a mentally challenged woman, on the basis of out-of-court statements made by the complainant to her doctor and the police, some of which had been videotaped. The complainant did not testify on the voir dire or at trial. The Court of Appeal held that the trial judge erred in admitting the hearsay evidence when the victim herself was available to testify and there was no expert suggestion that she would suffer any trauma or adverse effect by appearing in court. Crown appealed to the SCC
Issue: Can past statements be admitted in place of having the W testify?
Discussion:
- The trial judge erred in finding its admission to be "necessary".
- If W is physically available and there is no suggestion that she would suffer trauma by attempting to give evidence, as was the case here, that evidence should generally not be replaced by hearsay.
- There were no exceptional circumstances in this case to displace the general rule.

Ruling: Appeal dismissed.

R. v. Pelletier [1999] BCCA
If W is disinclined to testify, adverse, or unlikely to cooperate, this does not pass the threshold of necessity.

Facts: AC appeals from his conviction on a charge of first degree murder. The Crown's theory was that AC had been conscripted by a drug dealer, K, to murder Ward because Ward owed K money and was believed by K to be an informant. At trial, the Crown sought to adduce evidence of a conversation between C and K in which K allegedly asked C whether he thought Ward was an informant. The Crown sought to ask C about statements made by K as an exception to the rule against hearsay. The Crown claimed that this evidence was necessary because the investigating officers had determined that K was unwilling to cooperate with the authorities. The trial judge found that C's evidence was admissible because the tests of necessity and reliability had been met. AC argued that the Crown should have been required, at a minimum, to call the officers to testify under oath as to the basis for their belief that K would neither allow himself to be interviewed nor appear as a W.
Issue: Did the evidence pass the threshold of necessity?

Discussion:
- The fact that the officers believed that K would be unwilling to testify did not mean that it was necessary to lead hearsay evidence.
- It was only necessary to call this evidence because Kong was adverse to the Crown.
- The evidence of those who were simply disinclined to testify or unlikely to cooperate was not included within the ambit of necessity.
- The Crown had therefore failed to establish necessity, and the evidence was not admissible as an exception to the rule against hearsay.

Ruling: Appeal allowed, new trial ordered.

R. v. Khelawon [2006] SCC

When accessing reliability of the statement, the court can also consider the inherent trustworthiness of it.

Facts: Appeal by the Crown from ONCA decision overturning the AC's convictions for assault of all sorts. AC was the manager of a retirement home. An employee of the retirement home discovered S, a resident of the home, badly injured in his room. S told the employee that AC had beaten him and threatened to kill him if he did not leave the home. The employee eventually took S to a doctor, who testified that he found three fractured ribs and bruises that were consistent with S's allegation of assault but which also could have resulted from a fall. The employee took S to the police and S gave a videotaped statement. The statement was not under oath but S answered "yes" when asked if he understood it was important to tell the truth and that he could be charged if he did not tell the truth. The police attended at the retirement home where more residents complained that they had been assaulted by AC. AC was charged in respect of five victims but, by the time of trial, four of them, including S, had kicked the bucket and the fifth went senile. The trial judge admitted some of the hearsay evidence based in large part on the similarity between the statements. ONCA excluded all of the hearsay statements and acquitted AC on all charges.

Issue: Should the complainants' hearsay testimony should be received in evidence.

Discussion:
- S's videotaped statement to the police was inadmissible.
  - His death before the trial made this necessary, but the statement was not sufficiently reliable.
  - The circumstances in which it came about did not provide reasonable assurances of inherent reliability.
  - Serious issues as to the inherent reliability of the statement included whether S was mentally competent, whether he understood the consequences of making the statement, whether his statement was motivated by dissatisfaction about the management of the home, and whether his injuries were caused by a fall.
  - There was a striking similarity between statements, but the other statements posed even greater reliability difficulties and could not be admitted to assist in assessing the reliability of S's.
- The traditional law of hearsay extends to out of court statements made by the W who does testify in court when that out of court statement is tendered to prove the truth of its contents.
- W who testifies in court is under oath, can be observed by the trier of fact and is available for cross-examination.
- There are two frameworks for reliability that can be followed
  - The *K.G.B.* Framework
  - Inherent trustworthiness Framework
    - Does the statement flow naturally, does it make sense, was it relatively contemporaneous, spontaneous, etc?
    - Did the maker of the statement have a motive to lie?
    - Is there any corroborative evidence for the content of the statement?
- Two frameworks can be used alternatively or together, but using both will increase the reliability of the statement.

Ruling: Appeal dismissed

Traditional Exceptions to Hearsay Rule

Principled Approach and Common Law Exceptions:

R v. Mapara [2004] SCC presents a framework for balancing the traditional exceptions with the principled approach:

1. Hearsay is presumptively inadmissible unless it falls under an exception: the traditional exceptions remain presumptively in place
2. A traditional exception can be challenged to determine whether it is supported by indicia of necessity and reliability: the exception can be modified as necessary to bring it into compliance with principled approach
3. In "rare cases" evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking the particular circumstances of the case
4. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire

Unless there is good reason to modify an established common law rule, the modern approach to hearsay should be applied in a manner which preserve and reinforces the integrity of the traditional rules of evidence (*Couture*)

Traditional Exceptions are:

1. Past recollection recorder
   - Discussed above.
2. Statements contributing to the narrative
   - Discussed above.
3. Business Records and Statements in the Course of Business
   - See following.
4. *Res gestae* (A sudden statement intrinsically tied to an event)
   - A close contemporaneity is required
   - It is thought reliable as there is little time for calculated insincerity;
5. Dying declaration
   - The deceased had a settled, hopeless expectation of almost immediate death;
   - The statement was about the circumstances of the death;
   - The statement would have been admissible if the deceased had been able to testify; and
   - The offence involved is the homicide of the deceased.
6. Present statement of future intention
   - A present statement of future intent without any circumstances of suspicion
   - If someone states that they are currently expecting to do something at a certain point, you can believe the truth of that person's statement that they did indeed follow through
7. Declarations Against Interest
8. Co-conspirators' Exception
   - The confession of one co-AC is not admissible against the other co-AC.
   - If the participants are tried separately the above rule does not apply.
   - But this is different for partnerships - all offences that include a common design. Once a partnership is proven by independent evidence to exist, the admission of one partner acting in the scope of the partnership is evidence against all the partners.
   - Only those statements made during the course of the conspiracy and in furtherance of the conspiracy fall within the exception.
   - Any statements after the fact of the conspiracy: guilty pleas, full confessions, etc. are not admissible.
9. Oral Evidence in the Aboriginal Context
10. Spousal Exception

Business Records and Statements in the Course of Business

Common Law Test for Business Records:

1. Document must be an original entry (can be done through a mechanical process, not person);
2. It must be made contemporaneously;
3. It must be made in the routine of business (broadly interpreted);
4. Document must be made by recorder with personal knowledge of the thing as a result of having done or observed formulated it;
5. The recorder must have had a duty to make the record ;
6. The recorder must have had no motive to misrepresent.

Canada Evidence Act
s.30 Business Records to be Admitted into Evidence

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

(2) one can draw on document for truth of contents and to draw inferences from things that are missing from the document;

(10) (a) records made in course of investigation or inquiry or in giving legal advice and (b) documents that are against public policy, do not follow under this rule

(11) statute does not derogate from common law rules, but is in addition to them. One can use common law or the statutory rules, depending on the circumstances.

R. v. Wilcox [2001] NSCA

Choice between common law records test and the s.30 test. Statutory is always the place to start.

Facts: The AC were fishermen and a wholesaler, Glace Bay Fisheries. They were charged with hundreds of summary conviction offences under the *Fisheries Act.* The fishermen were alleged to have sold snow crab catches in excess of their quotas to GB. The Crown seized a substantial amount of financial records from GB pursuant to the *Act*, included a "crab book". The book was prepared by an employee of GB. He was not required by his employer to prepare this record. He kept it on his own initiative to properly fulfill his duties, although against his employers orders. The book contained a record of the shipments received from fishermen and the payments that were made. He had no independent recollection of these transactions apart from the book. It was for these reasons that the judge refused to admit it.

Issue: Can this be admitted?

Discussion:

- The judge erred when he excluded the book.
- The court could not evaluate the evidence that AC claimed should have been excluded since there were no findings of fact.
- The book was not admissible under the common law business records exception to the hearsay rule.
  - There was no duty to create this record.
- However, the book was admissible pursuant to s.30 of the Canada Evidence Act.
  - Kimm made it during his employment in the usual and ordinary course of business.
  - S.30 has no "duty" requirement.
  - It was immaterial that Kimm created it against GB's instructions since he used it to fulfil his duties.
  - The seizure was properly conducted under the Act.
  - Although the crab book could be said to have been made in the ordinary course of business, court was not prepared to admit it under s.30.
  - He felt that in so doing the ambit of the section would be extended too broadly and he preferred to apply the principled approach.
  - Ultimately he found that the crab book had sufficient guarantees of trustworthiness to be admitted.
  - The book should have been admitted since it satisfied the requirements of reliability and necessity.

Ruling: Trial continued.

Declarations Against Interest

Common Law Declarations Against Interest Test:

A declaration against pecuniary or proprietary interest may be admitted where

1. The declarant is unavailable to testify;
2. The statement when made was against the declarant's interest;
3. The declarant had personal knowledge of the facts stated.

- Necessity flows from the unavailability of the declarant. Reliability is founded on the fact that the declarant, who is aware of adverse facts, admits them. The clearest case of this is the acknowledgment of a debt owed.
- The theory on which the rule rests is that a person will not concede even to himself the existence of a fact which will cause him substantial harm, unless he believes that the fact does exist.

R. v. Underwood [2002] ABCA

Statements against penal interest may be admitted, if it passes specific criteria and the principled analysis.

Facts: AC was involved in the drug trade and was charged with the murder of one of his associates. At his trial he sought to lead evidence that another of his associates, P, now dead, had confessed to the killing. Another associate would testify that P had confessed to the killing. P's wife also has some testimony that points to P's involvement in the murder. The trial judge found that the statements were equivocal and did not meet the test of reliability.

Issue: Can these statements be admitted?

Discussion:

- Can the statements of P be admitted as declarations against interest?
- The courts have been reluctant in admitting statements against penal interest. But this should be reviewed.
- The court should admit statements against penal interest as not hearsay under three criteria
    1. At the time of the declaration it was against the declarant penal interests;
    2. It was made in circumstances where the declarant should have known it is against penal interest;
    3. The potential for penal consequences was not too remote.
- Meeting this common law test is good, but not determinative.
- After meeting the common law test, the evidence still has to pass the principled analysis test.
- *Seaboyer* note:
    - A number of cases have said that there is somewhat greater discretion for AC to lead hearsay evidence; this case emphasizes that Crown should not oppose hearsay in this situation because it is their job to get a truth not win. So AC is more likely to succeed in leading hearsay evidence, but must still meet some threshold of reliability.
- The statements were relevant.
- The two statements by P that were hearsay were declarations against penal interest. They also satisfied the test of necessity and reliability under the principled approach. The P/P balance was rockin'

Ruling: Appeal allowed, new trial ordered.

Oral History in Aboriginal Title Cases

Mitchell v. Canada [2001] SCC

Oral histories are admissible as evidence where they are both useful and reasonably reliable

Facts: Challenge to customs because of historic aboriginal trading relationship with American aboriginal nations

Issue: What would Jesus do?

Discussion:

- Rules of evidence are to be applied flexibly, purposively and to facilitate justice, not stand in its way: rigid application of the traditional rules of evidence may actually injure the search for the truth
- Go back to the core rationales underpinning the rules of evidence: search for truth and fairness
- Oral history will in many respects be the best evidence from aboriginal people; this requires a certain degree of flexibility in adjusting the rules of evidence
- The basic rule is: oral histories are admissible as evidence where they are both useful and reasonably reliable
    - Usefulness: (1) no other means of obtaining the same evidence (2) provide the aboriginal perspective on the right claimed
    - Reliability: the witness' particular ability to know and testify to orally transmitted traditions may go to admissibility and weight
- Even useful and reasonably reliable evidence may be excluded in the discretion of the court if its probative value is overshadowed but its potential for prejudice
- *Van der Peet* test for establishing and aboriginal right protected under the Charter s.35(1) (I hated that class)
    a. The existence of the ancestral practice, custom or tradition advanced as supporting the claimed right;
    b. The practice, custom, or tradition was integral to the claimant's pre-contact society in the sense that it marked it as distinctive; and
    c. Reasonable continuity between pre-contact practice and the contemporary claim

Ruling: Pow wow.

280.8 Admissions And Confessions

Admissions

Admissions: Acts or words of a party offered as evidence against that party. These circumvent the hearsay rule.

There are two types of admissions:
- Formal admissions:
  - Both sides can agree that matters are conclusively proven and therefore will not have to be litigated
  - Admissions save court time, and can be used strategically to pre-empt harmful evidence.
  - Once a fact is admitted, it cannot be taken back, but there is some judicial discretion to overturn this.
  - Counsel need specific client instructions to make admissions
  - Judge cannot order admissions
  - Crown can still call evidence on a point if the AC admits it
- Informal admissions: out of court statements of a party.
  - Out of court admissions of a party in the action are presumptively an exception to the hearsay rule, because of the ability of the party to deal directly with the evidence.
  - This idea is conceptually related to the statement against interest idea of hearsay exception

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

R. v. Castellani [1960] SCC
AC can only make admissions on the points introduced by the Crown in their allegations.

Facts: AC's wife is poised with arsenic, and he is convicted for murder. He appeals on the ground that he was not allowed to admit at trial certain facts under s.562 of the Code.
Issue: Are admissions admissible?
Discussion:
- Trial judge claimed that defence has no right to make admissions unless Crown is willing to accept it.
- CA disagrees. The judge erred in not admitting this, but the error was not substantial enough to cause prejudice and to warrant a new trial.
- SCC disagrees:
  - It is up for the Crown to state the allegations and facts against the AC of which it seeks admission.
  - AC is under no obligation to admit any of this.
  - But AC cannot frame the wording of the allegation by admitting it in his way to suit his own purpose
  - In the good old days, admissions were inadmissible in court.

Ruling: Appeal dismissed.

Confessions

Confessions: Detailed informal admissions by the AC that go a long way in concluding their guilt, making a breaking the case.

Probative Value

Generally, something AC is alleged to have said about themselves is considered to have high probative value
- Questionable circumstances which give rise to issues of reliability and credibility go to weight and not admissibility and will usually be dealt with via instructions to the jury.
- One major exception to the rule is statements that were partially overheard.

R. v. Hunter [2001] ONCA

Partially overheard confessions are admissible only if there can be no possible doubt to their meaning and context.

Facts: AC is alleged to have pulled out a gun during a police chase and attempted to fire it at the cops. The gun jammed and did not fire. AC was convicted of aggravated assault, use of a firearm while attempting murder, and illegal possession of a firearm. At trial, the judge admitted an utterance "I had a gun but I didn't point it" allegedly made by AC to his lawyer and overheard by a passerby. The judge told to the jury that they could determine the meaning of the overheard words. Based on this, conviction was given. AC appeals on the grounds of this error.
Issue: Is such a confession admissible?
Discussion:

- AC claims that the utterance cannot meet the threshold of relevance needed for admissibility because its meaning cannot be determined without the context
- It is also so speculative that the prejudicial effect outweighs the probative value.
- In *R. v. Farris* [1994] SCC, an officer overheard a snippet of conversation of AC phoning his father and saying "I killed X".
  - This was found inadmissible, because the context was unknown, thus making the meaning impossible to ascertain.
  - This makes the statement of a low probative value. However, the prejudicial value is extremely high.
  - Ergo, a P/P fail.
- In this case, the words uttered can be imagined in a context that would not make a confession out of them.
- So, the utterance is inadmissible. As it is a key point to the Crown case, this is a serious error.

Ruling: Full acquittal.

R. v. Allison [1991] BCCA

Confessions have to be led in full, or not at all.

Facts: AC is found with a pry bar inside a cannery closed for the holidays. He is convicted for breaking and entering. He claims that he entered through an open door, and found the pry bar inside. At trial, the officer testified about the door that AC has allegedly confessed to him as being the one through which he broke into the building. But Defence were not allowed to cross-examine on this statement. AC appeal that it is unfair for Crown to adduce only one part of the explanation of the AC, and then object to the cross-examination of the other.
Issue: Is the confession admissible?
Discussion:

- It is unfair to tender only a part of the confession, without allowing a full examination of it.
- The statement should have been ruled inadmissible, as one made in custody to a person of authority, or a *voir dire* should have been held to determine its admissibility.
- Defense should have had the chance to introduce the full explanation on cross-examination.

Ruling: Appeal allowed, new trial ordered.

The Voluntariness Rule

R. v. Oickle [2000] SCC

New test for voluntariness outlined.

Facts: Appeal by the Crown from the overturning on appeal of AC's conviction at trial of seven counts of arson. AC is a firefighter who was present at a series of fires. During investigation, AC agreed to submit to a polygraph. He was told that while the interpretation of polygraph results was inadmissible, anything he said would be admissible. The officer conducting the test exaggerated the accuracy and reliability of the polygraph, and told AC he had failed it. During questioning over the course of six hours, police minimized the moral significance of the crimes, offered AC psychiatric help, suggested that confession would make him feel better, and that his fiancee and members of the community would respect him for admitting his problem. AC confessed to setting seven of the fires, and re-enacted the crimes. At trial, he was convicted of seven counts of arson. NSCA excluded AC's confessions and entered an acquittal.
Issue: Was the interrogation convicted in a way to render the confession involuntary?

Discussion:

- Two of the biggest red flags to the involuntariness are fear and offers of favours.
- The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise.
- In the case at bar, the questioning, while persistent and often accusatorial, was never hostile, aggressive or intimidating, and did not hold out any implied threat or promise.
- There was never any insinuation of a quid pro quo, nor did police breach AC's trust or improperly offer him leniency by minimizing the serious legal consequences of his crimes.
- Although police exaggerated the accuracy of the polygraph, merely confronting a suspect with exaggerated adverse evidence did not, in itself, render a confession involuntary.
- The prejudicial effect of Oickle's voluntary confession was outweighed by its immense probative value.
- The confession was voluntary.

Ruling: Appeal allowed, conviction restored.

Voluntary Confession Test:

1. Can the AC on BP prove that the confession made to a person in authority? (*Grandinetti*)
   - Generally someone engaged in the arrest, detention, interrogation or prosecution of an AC.
   - Did the AC, based on his or her perception of the recipient's ability to influence the investigation or prosecution, believe that making a statement would result in favourable treatment.
   - There is also an objective element to this: the belief must be reasonable.
2. Can the Crown on BARD prove there the confession was voluntary and the will of the AC has not been overborne by inducements, oppressive circumstances, or the lack of an operating mind?
   - These factors are to be considered in a holistic, cumulative manner.
   a. Threat
      - Threatening violence or danger to the AC or someone else: this is rare but most powerful.
   b. Inducements
      - Look for *quid pro quo* offer by interrogators, explicit or implicit.
      - There is a difference between proper and improper inducements: dividing line is gradated
      - Any offer of legal inducement of having lighter sentence, which leads to a confession, will in most cases be enough to render the confession inadmissible.
      - Offers or psychiatric help or other counselling in exchange for a confession is a no-no.
      - Minor inducements are OK - as long as the AC is mature and savvy enough (*R. v. Spencer*)
      - Spiritual or moral inducements appealing to conscience, guilts, religion, etc, are proper.
   c. Oppression
      - Exposing the AC to oppressive circumstances: sleep deprivation, stress, isolation, denial of food, medicine, etc.
      - Lying about non-existent evidence can contribute to the oppression.
      - On its this is usually not enough to show voluntariness, but it can be an addition to other factors.
   d. Operating Mind
      - Conditions that impair one's cognitive ability to understand what they are saying and what effect it may have in proceedings against them.
      - Statements under shock, hypnosis, intoxication, delirium, *some* mental disorders are excluded.
   e. Other police trickery
      - The sort of conduct of the authorities that , while "neither violating the right to silence nor undermining voluntariness per se, is so appalling as to shock the community" and threaten the integrity of the justice system with disrepute.
      - This is a distinct inquiry from the other three, which are holistic.
   f. Did that lead to the confession?
      - The causal relationship does not need to be precise (not "but for"), but must have had a clear influence on a balance of probabilities

Polygraphs: These are inadmissible in court, but any statements of the AC made to the cops while taking them, or talking over the results of them, can be admitted. AC must be warned of the inadmissibility of the test results. To see if the polygraphs have been used improperly to deceive the AC on the admissibility of their evidence, Courts should engage in a two-step process.

1. The confession should be excluded if the police deception shocks the community.

2. Even if not rising to that level, the use of deception is a relevant factor in the overall voluntariness analysis.

R. v. Grandinetti [2005] SCC

A person in authority is someone who AC believes to be in a position of power to influence the prosecution or investigation.

Facts: Significant circumstantial evidence linked AC to the murder of his aunt. To obtain additional evidence against him, several officers, posing as members of a criminal organization, worked at winning the AC's confidence. To encourage him to talk about the murder, they suggested that they could use their corrupt police contacts to steer the murder investigation away from him. AC eventually confessed his involvement in the murder. At no time was he aware of the true identities of the undercover officers. The trial judge ruled that the AC's inculpatory statements to the undercover officers were admissible, holding that the undercover officers could not be persons in authority and that no *voir dire* on voluntariness was necessary. AC was convicted of first degree murder, and on appeal, a majority of the CA upheld the conviction.
Issue: Are confessions to an undercover police officer pretending to be a gang member admissible, without holding a voir dire to determine their voluntariness?
Discussion:

- The question of voluntariness is not relevant unless there is a threshold determination that the confession was made to a "person in authority".
- In most cases this is simple: someone engaged in the arrest, detention, interrogation or prosecution of AC.
- The full test of who is a "person in authority" is largely subjective, focusing on the AC's perception of the person to whom he or she is making the statement.
    - The operative question is whether AC, based on his perception of the recipient's ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment.
    - There is also an objective element: the reasonableness of the AC's belief that he or she is speaking to a person in authority. It is not enough, however, that an AC reasonably believe that a person can influence the course of the investigation or prosecution.
- Absent unusual circumstances, an undercover officer is not usually viewed, from an AC's perspective, as a person in authority. Where AC 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.
- In this case, the AC failed to show that when he made the confession, he believed that the person to whom he made it was a person in authority.
    - The AC believed that the undercover officers were criminals, not police officers, albeit criminals with corrupt police contacts who could potentially influence the investigation against him.
- The statements, therefore, were not made to a person in authority.

Ruling: Appeal dismissed

Admissions of Co-Accused

R. v. Grewall [1999] BCCA

Confession of an AC is not admissible against a co-accused.

Facts: An Indian style family killing. The police obtained wiretap authorizations and intercepted conversations between one of the ACs, his sister K and his girlfriend S. K said: "dad said that he was gonna to pay him so much money that if he does it and then he goes that dad planned it, you pulled the trigger and he drove the getaway car".
Issue: Is this admissible?
Discussion:

- Often co-ACs are tried together and a problem arises when one AC makes a confession which not only details her role, but the roles of her co-ACs.
- There are huge inherent reliability concerns, such as attempts to shift blame to co-AC.
- Where a statement is to be tendered by the Crown against one co-AC that has the potential to be strongly prejudicial against another co-AC, the SCC has held that the better course is to hold a separate trial of each.
- Possible solutions: splitting trial, editing (if it won't affect tenor of statement); instructions to only use for that AC.
- In this case, the court chooses to admit an edited version of the wiretap, that excludes any implications of the other AC.

Ruling: Fiat Lux.

Exclusion of Evidence Under the Charter

Charter of Rights and Freedoms
7 Life Liberty and Security of Persons
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.

8 Search and Seizure
Everyone has the right to be secure against unreasonable search or seizure
- Where a person has an expectation of privacy, the police can only access his property for investigative purposes when there is a reasonable cause

10 Arrest or Detention
Everyone has the right on arrest or detention
(a) to be informed promptly of the reasons therefore
(b) to retain and instruct counsel without delay and to be informed of that right;

13 Self Incrimination
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.

24 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.

Conscriptive Evidence: where AC, in violation of his Charter rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples. Also includes real evidence discovered as a result of an unlawfully conscripted statement. This is known as derivative evidence.
Non-conscriptive Evidence: evidence that does not emanate from the AC but exists independently of the Charter violation.
NOTE: These distinctions have been rendered pointless by *R. v. Grant* [2009] SCC.

R. v. Miller [2008] ONCJ
Disregard for Charter rights of the AC will exclude the evidence due to disrepute of justice.

Facts: AC was arrested for drunk driving. Upon arrival to the station, he has asked for his lawyer. The police officer phoned lawyer's office, but as it was 3am got no answer. He did not look up the lawyer's home address in the phone book. AC then asked to have his mother, who was a court clerk, phoned. Officer said that he did so, but phone records show otherwise. After failing to contact counsel, AC was made to take the breath test, and failed. Defence seeks to exclude the evidence of the test as being against the 10(b) of the Charter.
Issue: Can this be excluded.
Discussion:
- 10(b) guarantees a right to retain and instruct counsel without delay.
- The police have a duty to facilitate AC's ability to contacting their lawyer.
- AC expressed his clear wish to contact the counsel of his choice.
- The police were not diligent in contacting the counsel asked for. They did not look up the home number of the lawyer, and did not phone AC's mother, who would have been able to give them the home phone of the lawyer.
- The general rule in *R. v. Stillman* [1997] SCC is that conscripted evidence obtained in violation of s.10(b) right is automatically excluded. But there are exceptions.
- As far as evidence goes, breath samples are non-intrusive and are a minor breach of trail fairness.
- But the police really fucked the dog with the s.10(b) rights here, and failed to do something that would have been very simple.
- This brings into disrepute the administration of justice and the evidence is excluded.
- Note: since the *Grant* decision, this case would have gone the other way.

Ruling: Charge dismissed.

R. v. Buhay [2003] SCC

Non-conscriptive evidence can be excluded under s.24(2) if the breach of Charter rights is sufficiently serious.

Facts: AC rented a locker at a bus station. Security guards smelled pot coming from the locker, and opened it finding a bag of weed. They left the bag back in the locker and contacted police. The police, alleging that they also smelled the pot, seized the bag and its contents without a warrant. AC was arrested and charged with possession for the purpose of trafficking. The trial judge excluded the evidence on grounds that AC's s.8 right was violated. AC was acquitted. MBCA allowed the Crown's appeal.
Issue: Is the evidence to be excluded per s.24(2)?
Discussion:

- AC had a reasonable expectation of privacy in his locker.
  - AC had rented it out for 24 hours. He was not informed of the bus depot policy of access to the lockers.
  - A reasonable person would expect that paying money for a locker would guarantee the security of his items in the locker.
- Security guards are not state agents and are not covered by *Charter*.
- The search of the locker by the police was contrary to s.8 of the Charter
  - A search is reasonable if it is authorized by law, the law is reasonable, and the manner that the search is conducted is reasonable.
  - The search was warrantless. This is *prima facie* unreasonable and the onus is on Crown to prove otherwise on BP. They fail to do so.
  - The warrant could have been easily obtained.
  - This is not justified under the "plain view" exceptions to search and seizure, as it was hardly in the plain view.
  - The Crown claims "transfer of control" from security to police as outside of the s.8 scope. This is bullshit, as it would work as a way to circumvent s.8 completely.
  - So the search was unreasonable.
- Old Test for excluding evidence under s.24(2): per *R. v. Stillman* [1997] SCC
  a. Trial fairness: Is the evidence conscriptive or non-conscriptive based on the manner that it was obtained?
     - If the evidence is non-conscriptive, then the trial is fair
     - If the evidence is conscriptive, but Crown can show on BP that it would have been discovered by alternate non-conscriptive means, then the trial is fair.
     - If the evidence is conscriptive, but Crown fails to show on BP that it would have been discovered by alternate non-conscriptive means, then the trial is not fair.
  b. Seriousness of Breach: conduct of the officers, etc.
  c. Disrepute of Justice: If the trial is fair, has the breach been so serious as to have brought into disrepute the administration of justice. If yes, then the evidence can still be excluded.
- The breach of Charter rights is sufficient to exclude the evidence.
  - The evidence was non-conscriptive, so there is no problem with trial fairness
  - The admission of the evidence would not have rendered the trial unfair, but the breach was serious and indicated a blatant disregard for appellant's rights.

Ruling: Appeal allowed, charges dismissed.

R. v. Burlingham [1995] SCC

Physical evidence that would not have been discovered but for an inadmissible statement is considered conscriptive and hence is inadmissible.

Facts: AC, charged with one murder and suspected in a second, was subjected to intensive and manipulative police interrogation, although he had stated repeatedly that he would not speak unless he could consult his lawyer. He was offered a "deal" by police whereby he would be charged with second degree murder if he provided them with the location of the gun used in the murder. Police told him that this was a one-time opportunity offered only while AC's lawyer was unavailable. Police also continually denigrated the integrity and reliability of AC's lawyer. AC gave a full confession, showed police the murder site and gave them the location of the gun. He also called his girlfriend and told her about the confession. At trial on a first degree murder charge, AC' right to counsel was found to have been breached, and his confession were ruled inadmissible. The fact of finding the gun, the actual gun, testimony of a witness, testimony identifying the gun and testimony of AC's girlfriend regarding statements made to her were admitted. AC was convicted at trial of first degree murder and the decision was affirmed on appeal.
Issue: Was AC was denied his s. 10(b) Charter right to counsel and if so, what was the appropriate remedy?

Discussion:
- AC's s.10(b) right was breached by continued interrogation despite AC's stated wish to consult a lawyer, the belittling of the lawyer, and exertion of pressure to accept the deal without consulting his lawyer.
- So, the confession obtained as a result of the plea bargain is inadmissible under s.24(2)
- But what about the evidence emanating from it: The fact of finding the gun, the actual gun, testimony of a witness, testimony identifying the gun and testimony of AC's girlfriend regarding statements made to her?
- The s. 24(2) jurisprudence on derivative physical evidence has thus far been dominated by two related concepts — conscription and discoverability
- If AC can show is a logical proximate relationship between the derivative and original evidence, the derivative evidence is presumptively excluded and the onus is on the Crown to demonstrate on BP that the derivative evidence would have otherwise been discoverable.
    - The emphasis is on the proximity of the derivative evidence based on a "but for" test. Would the police have discovered the evidence on their own ("would" not "could")
    - The most proximate evidence, the gun, is inadmissible as it would not have been found but for the breach.
    - The statement to girlfriend and the statements as to the location and description of the gun are derivative and less proximate to the breach. But it would not be present but for the original breach.
- The admission of the impugned evidence would bring the administration of justice into disrepute.

Ruling: Appeal allowed, new trial ordered.

R. v. Grant [2009] SCC

A new test for exclusion of evidence consistent with the express purpose of s.24(2)

Facts: AC was stopped by undercover police for looking suspicious. Upon being questioned by them, he was fidgeting with his pants, and when asked by the police if he has something that he should not have, he confessed to possession of a bag of pot and a loaded gun. He was then searched, the items seized, and he was charged for trafficking, possession of an illegal firearm, and a whole bunch more.

Issue: Is the evidence admissible?

Discussion:
- The general rule of inadmissibility of all non-discoverable conscriptive evidence seems to go against the requirement of s. 24(2) that the court determining admissibility must consider "all the circumstances".
- Trial fairness as a multifaceted and contextual concept is hard to reconcile with a near-automatic presumption that admission of a broad class of evidence will render a trial unfair, regardless of the circumstances.
- The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice.
    - But s. 24(2) does not focus on reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence.
- The new test of the admission of evidence obtained in breach of the Charter should engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective.
    - See test below.
- The three lines of inquiry described above support the presumptive general, although not automatic, exclusion of statements obtained in breach of the Charter.
- In the case at bar:
    - AC was in detention, and he should have been provided with his rights. This is a breach of s.10(b) and the statement by AC is should have been inadmissible by the old rules. This would have made the discovery of the evidence of pot and the gun also inadmissible.
    - However, officers acted in a good faith, and they made a reasonable mistake as to whether AC was in detention.
    - The impact of the Charter breach on the AC's protected interests was significant, although not at the most serious end of the scale. he fact that the evidence was non-discoverable otherwise aggravates the impact of the breach on Mr. Grant's interest in being able to make an informed choice to talk to the police.
    - But the value of the evidence is considerable.
    - These effects must be balanced in determining whether admitting the gun would put the administration of justice into disrepute. The significant impact of the breach of Charter rights weighs strongly in favour of excluding the gun, while the public interest in the adjudication of the case on its merits weighs strongly in favour of its admission.
    - Under the new test, the evidence is admissible

Ruling: Appeal allowed in part.

280.9 Exclusion of Evidence Under the Charter

New Test for Excluding Evidence Under s.24(2): per *R. v. Grant* [2009] SCC

When faced with an application for exclusion under s. 24(2), the question is always whether the admission of evidence will bring the administrative justice into disrepute. The three lines of inquiry to pursue are:

1. The seriousness of the Charter-infringing state conduct
   - The concern here is not to punish the police or to deter breaches. The main concern is to preserve public confidence in the rule of law and its processes.
     - More serious: willful or flagrant disregard for Charter; casual approach to Charter.
     - Less serious: good faith on the part of the police, extenuating circumstance of urgency
2. The impact of the breach on the Charter-protected interests of AC
   - Certain Charter rights have more impact on the AC than others.
   - Look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. So a s.8 violation of a house is more serious than s.8 violation in a bus station locker.
   - Rights relating to self-incrimination are very serious in this section.
3. Society's interest in the adjudication of the case on its merits.
   - Will the vindication of the Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial?
     - Should consider not only the negative impact of admission but also the impact of failing to admit.
     - Mere reliability of evidence and concern for truth finding will often clash with the principles of s.24(2) which call for a consideration of all circumstances.
   - The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.

- The weighing process and balancing of these concerns is one for the trial judge. As a general rule, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the AC's protected interests, the trial judge may conclude that it should be admitted under s. 24(2).
- The judge should refuse to admit evidence where there is reason to believe the police deliberately abused their power to obtain a statement which might lead them to such evidence.

Applicability of the new test to various types of evidence:

1. Statements by the Accused
   - First consideration: a statement made to an authority is presumed inadmissible unless the Crown can establish beyond a reasonable doubt that it was made voluntarily. After this, s.24(2) can be considered.
   - Statements by the AC engage the principle against self incrimination, which is fundamental to Charter.
   - Because of this, there is a heavy presumption of inadmissibility to statements by AC, but it is rebuttable.
   - The concern with proper police conduct in obtaining statements from suspects and the centrality of the protected interests affected will in most cases favour exclusion of statements taken in breach of the Charter.
   - When it comes to society's interest. consideration of reliability of the evidence may add to weight of presumption. Corroborative evidence could potentially make it more reliable?
2. Bodily Evidence
   - There is a range of bodily evidence ranked on how invasive it is: from breath and fingerprints, to cavity searches and DNA samples.
   - The first two inquiries will be important here. What was the police conduct? What was the level of intrusion? Did it substantially violate bodily integrity?
   - The public interest inquiry will usually favour admission of bodily evidence.
3. Non-bodily Physical (Real) Evidence
   - Privacy is the right most commonly engaged in this area, so the degree of violation/expectation of privacy is key. Bodily integrity may also be a consideration.
   - Reliability issues with physical evidence will not generally be related to the Charter breach. Therefore, this consideration tends to weigh in favour of admission.
4. Derivative Evidence
   - Physical evidence discovered as a result of an unlawfully obtained statement.
   - The starting place is certain presumption of inadmissibility.
   - Discoverability retains a useful role in assessing the actual impact of the breach on the protected interests of the AC. Objects undiscoverable without the statement are likely to be inadmissible. Objects that can be discovered, opens room for analysis.
   - The public interest in having a trial adjudicated on its merits will usually favour admission of the derivative evidence, as it is usually physical and reliable.

Privilege

Evidence which is probative and reliable can still be inadmissible if it violates the principles of social relationships.

Privilege Against Self-Incrimination

- Traditionally s.7 includes that AC in state custody is not obliged to talk to the police
- Under *R. v. Hebert*, the right to silence for AC under custody was read into s.7 of the Charter.
    - This was in relation to an undercover cop who elicited a confession in jail after AC refused to talk to the police during interrogation.

R. v. Singh [2007] SCC

The right to silence issues in custody will now be covered by the broad concept of voluntariness: a finding of voluntariness will be determinative of the s.7 right to silence issue.

Facts: Appeal by AC from his conviction for second degree murder on the basis his s.7 right to silence was breached. The AC was arrested with respect to a shooting death of an innocent bystander killed by a stray bullet. AC was advised of his s.10(b) right and consulted counsel privately. During two subsequent interviews with police AC stated 18 times that he did not want to discuss the incident. Eventually, police got him to an interview. While AC did not confess to the crime, he made numerous self-incriminatory admissions on the issue of identification at trial. On a *voir dire*, the trial judge determined the admissions, in all the circumstances, were not the result of the police systematically breaking down his operating mind and the AC's right to silence was not undermined. The trial judge held the probative value of the statements outweighed their prejudicial effect and ruled them admissible. BCCA upheld the trial judge's ruling.
Issue: Are the self-incriminatory statements that the police got out of AC in the breach of his s.7 right to silence?
Discussion:

- The old common law right to silence is that no one is obliged to provide info to police during questioning.
- This has been enshrined in s.7 of the Charter as a fundamental principle of the right to remain silent.
- What is the overlap between the voluntary confession rule in common law (*Oickle*) and the s.7 right to silence?
- The two test overlap, but the common law one has more weight, as it places the onus on the Crown to prove BARD that the confession was voluntary, as opposed to the onus on AC to prove s.7 infraction, followed by a s. 24(2) exclusion.
- But s.7 may apply pre-detention, and to undercover police, where voluntariness rule has no power.
- The Charter gives the minimum rights to everyone. The confession rule expands and enhances the s.7 right.
- The right to silence issues in custody will now be covered by the broad concept of voluntariness: a finding of voluntariness will be determinative of the s.7 right to silence issue
- The exercise of the right to silence is not a straight up Charter right, as the right to counsel (s.10(b)), which is provided for expressly.
    - The right to silence is within control of the AC, whereas s.10(b) is something out of the control of AC, and is in the Charter to protect the AC from police.
    - Charter is a balance of interest between individual and society
    - Making the right to silence absolute would abolish the right of society to prosecute criminals. S.7 as it is, with a limited right to silence, is a balance of the two interests.
- Thus, the right to silence in s.7 is a limited right
    - There is nothing that stops the police from questioning the subject after s.10(b) right has been exercised
    - Police persuasion, short of denying AC the right to chose, or depriving him of an operating mind, does not breach the right to silence.
    - So, use of legitimate means of persuasion is permitted under the rule.
- It is not appropriate to require that police refrain from questioning a detainee who states that they do not wish to speak to police.
- There was no error in law. The police were right in questioning AC. The statements made by him are admissible.

Ruling: Appeal dismissed

R. v. Turcotte [2005] SCC
Silence in the face of police questioning is a Charter right and cannot be used as evidence of guilt.

Facts: Appeal by the Crown from a judgment of BCCA, setting aside AC's murder convictions and ordering a new trial. AC went to a police station and asked that a car be dispatched to his ranch, but refused to explain why. The officers dispatched to the ranch discovered three victims who had died from axe wounds to the head. AC was charged with three counts of second degree murder. The evidence against him was entirely circumstantial. The trial judge informed the jury that AC's refusal to respond to certain questions from the police was post-offence conduct from which an inference of guilt could be drawn. The jury convicted AC on all three counts, but the BCCA set aside the convictions and ordered a new trial.
Issue: Can AC's refusal to talk to the cops be seen as evidence of guilt?
Discussion:
- Everyone had the right to silence in the face of police questioning, even if he or she was not detained or arrested.
- This right existed at all times against the state, whether or not the person asserting it was within the state's power or control.
- Moreover, a voluntary interaction with the police did not constitute a waiver of this right. Hence, AC did not waive his right to silence by going to the police station and answering some of their questions.
- Post-offence conduct is only those actions of the AC that are probative of guilt.
- Silence in the face of police questioning would rarely be admissible as evidence of post-offence conduct because it was rarely probative of guilt.
- Evidence of silence (or lack of) can be admitted sometimes: when defence seeks to emphasize AC's cooperation with police, when it is relevant to a defence theory of mistaken identity, or to infer credibility when there are two co-accused blaming each other, and one has been more talkative prior to trial.
    - When evidence of silence was admitted, the jury had to be carefully instructed on the very limited use for which such evidence could be used.
- So, the evidence regarding AC's silence was not admissible as post-offence conduct.

Ruling: Appeal dismissed.

Self-incriminating statements at previous trials

Charter of Rights and Freedoms
13 Self-Incrimination
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.

Canada Evidence Act
5 Incriminating Questions
(1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

There are four kinds of immunity that can be derived from the right to silence.
1. Use immunity: compelled incriminating testimony cannot be used directly against the W.
2. Derivative use immunity: evidence undiscoverable but for the compelled incriminating evidence cannot be used against the W.
3. Constitutional exemption: a form or complete immunity from testifying where proceedings are undertaken or predominantly used to obtain evidence for the prosecution of the W.
4. Transactional immunity: W cannot be charged on the offence of the same subject matter as the compelled incriminating testimony. This is not applicable in Canada.

R. v. Henry [2005] SCC

AC who gave voluntary testimony at his previous trial is not covered by s.13

Facts: Henry and Riley were involved at a drug-jacking where they raided a grow op and killed the guard by taping shut his mouth and nose. At trial both pled intoxication, and claim that their memory is very hazy. They are convicted, but get an appeal from CA. At second trial, Riley admits lying at the first trial, recovers his memory, and admits to putting tape on the guard, however, places most of the blame on Henry. At the second trial, the Crown cross-examined ACs on testimony given by them at the first trial that was inconsistent with their testimony during the retrial. ACs were again convicted of first degree murder. On appeal AC argued that their prior incriminating testimony could not be used against them in the retrial under s.13. The CA upheld the conviction.
Issue: Can prior voluntary testimony by AC be excluded under s.13?
Discussion:

- Under *R v. Kuldip* the rule was that inconsistent testimony from prior proceedings can be used against credibility.
- Under *R. v. Noel* changed the rule so that only absolutely innocuous (not incriminating in any way) statements prior proceedings can be used against credibility.
    - This meant that Crown was impotent at relying on completely inconsistent statements, letting ACs make shit up as they go.
    - Per *Noel*, AC would have been saved under s.13 from having previous incriminating statements brought in.
- SCC decides to create a new framework for s.13
- The purpose of s.13 was to protect individuals from being indirectly compelled to incriminate themselves, as a part of a *quid pro quo* deal between state and individual to induce them to testify as a witness.
- The new rule should be that anyone compelled to give testimony should be protected by s.13 and cannot be used, even against credibility (*Kuldip* is partially overruled)
- All witness testimony is presumed to be compelled.
    - Nikos thinks we should call it a strong presumption, but shouldn't completely foreclose bringing witness' testimony into a second trial.
- But AC's at previous trial can be either compelled or voluntary. S.13 of the Charter was not available to AC, who gave voluntary testimony at their first trial on the same indictment.
- AC freely testified at both trials with no compulsion to do so.
- Their s.13 Charter rights were not violated.
- The Crown could not file previous testimony at the retrial unless if AC choses to testify again, because to do so would permit the Crown indirectly to compel the accused to testify.

Ruling: Appeal dismissed

- AC who gave testimony as a witness at a previous trial is covered by s.13
- AC who gave compelled testimony at his previous trial is strongly covered by s.13 and s.5(2)
- AC who gave voluntary testimony at his previous trial on the same indictment is not covered by s.13

Re: Application under s.83.28 of the Criminal Code [2004] SCC

Investigative hearings can push the limits of s.7 rights.

Facts: S.83.28 of the Criminal Code is one of the new provisions added to the Code as a result of the enactment of the Anti-terrorism Act in 2001. It provides for a process of an "investigative hearing" judicial tribunal, where a Named Person is brought before a judge and is obliged to give evidence to the tribunal.
Issue: Is s.83.28 in violation of the right to silence and principle against self-incrimination?
Discussion:

- If the state has reasonable grounds to believe you know about a terrorist offence that has or is about to happen you can be required to come and tell the police what you know and turn over any material you have
- This does engage the s.7 right to remain silent.
- A statutory exception to the common law rule not having to talk to police
- Because the statements are statutorily compelled testimony, they cannot be used to incriminate the testator
- W gets direct use, derivative use, and constitutional exception immunity under s.83.28
- If the witness believes they are the actual target of the investigation they can apply for a Constitutional exemption on the basis that they have a s.7 right to remain silent
- The policy is compliant with the Charter, because it cannot be used against the W.
- If Crown can prove derivative evidence to be otherwise discoverable, then it can be admitted against W.

Ruling: Not unconstitutional.

Solicitor Client Privilege

- Not all information and conversation between a lawyer and client are covered by this.
- Legal advise that is intended to be confidential is covered by the solicitor-client privilege.

- There are some situations when the solicitor client privilege is not applicable.
  - Future criminal activity exception
  - Putting witnesses upon stand - any evidence led along these lines can be cross-examined.

R. v. Shirose [1999] SCC

Exceptions to solicitor client privilege

Facts: AC is a victim of a reverse sting operation by the police, who sold a large shipment of heroin to him. The legality of this operation is unclear. Prior to the set-up, RCMP consulted with a lawyer from DoJ. When asked to reveal the nature of the advise that they received, they relied on solicitor-client privilege to evade disclosure.
Issue: Does solicitor-client privilege apply in this case? If it does, was it waived?
Discussion:

- Wigmore's definition is: where legal advise of any sort is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence of the client, are at his instance permanently protected from disclosure by himself or by his legal adviser, except where the protection is waived.
- The RCMP's consultation with the DoJ was privileged solicitor-client communication.
- But are there any applicable exceptions that would have waived the right?
- Future Crimes and Fraud Exception:
  - Where a client seeks communication to facilitate the commission of a crime, the communication is not privileged
  - The client must either conspire with the adviser or deceive him.
  - The privilege is denied only where the client knows that the activity is a crime
  - But subsequent formation of a criminal intent will breach the privilege (?)
- Full Answer and Defence Exception:
  - Another exception arises where adherence to the rule had the effect of preventing the AC from making full answer and defence.
- The RCMP waived privilege by putting its good faith belief in the legality of the reverse sting in issue and by asserting reliance upon consultation with the DoJ to support its position.
- Disclosure was to be made to the ACs prior to re-trial regarding the legal advice given respecting the legality of RCMP officers posing as drug sellers and offering drugs for sale to suspected distributors, and the possible consequences to officers engaging in these activities.

Ruling: Appeal allowed

R. v. Brown [2002] SCC

Solicitor Client Privilege and the Right to make full answer and defense.

- The two interests at stake are both fundamental to Canadian justice. But the right to make full answer is a little more important.
- *R. v. McClure* sets out the test for disclosure exception to the solicitor client privilege
- This is to be done very rarely, and only after a stringent test. It should only happen when the issues going to the guilt of AC are involved, and there is a genuine risk of wrongful conviction.
- If the judge allows an exception, there must be certain protections
  - Carefully limited use of the information
  - No disclosure beyond this case
  - The person whose privilege was broken gets direct and derivative use immunity, but does not transactional immunity.

***R. v. McClure* Test:**

1. AC must establish that the information that he seeks from the solicitor client communication cannot be found elsewhere AND that he is otherwise unable to raise a RD
2. AC has to demonstrate an evidentiary basis that a communication exists that could raise an RD
3. Judge has to examine the communication in private, see if it is likely to raise and RD

Slavutych v. Baker [1976] SCC

Conditions necessary to establish a privilege against the disclosure of communications.

1. The communication must originate in a confidence that they will not be disclosed.
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.