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# Chapter 1: Proof in Judicial Decision Making

# Introduction

Sources of rules of evidence:

Common law – most significant source

*Canada Evidence Act* – federal statute

Other statutes containing evidentiary rules (provincial and federal)

Charter – values are considered in interpreting rules

Rules of evidence applied most strictly in criminal trials with jury

## A Qualified Search for the Truth

### R. v. Noel

* Fair trial is a qualified search for the truth
* Qualified by: ensuring fair trial, deterring police misconduct, preserving integrity of justice system, privacy concerns, efficiency of court system

## The Adversarial System of Trial

### R. v. Swain

* Court system is based on adversarial context – evidentiary issues are mainly in hands of counsel
* Adversarial positions of counsel are seen as mechanism to further search for truth
* *Charter* s.7 also protects your right to choose your defence – you have a right to put forward certain defences and not others (Crown can’t force defence to put forward a defence)

## Disclosure

* **Crown has broad and ongoing disclosure duties**
* Crown must make broad and early disclosure – A has a right under s.7 of the *Charter* to make full answer and defence
  + Disclosure duty is ongoing – any new evidence must be disclosed
  + Making the disclosure early encourages efficiency in justice system – can be adjourned or kicked out of court if process is taking too long
* A does not have broad disclosure duties to the Crown (subject to some exceptions – ex. expert evidence)
* Lack of full disclosure is one of main causes of wrongful convictions

### R. v. Stinchcombe

* Common law duty to disclose is subsumed under the *Charter* (s.7 – right to make full answer and defence)
* Crown must disclose all relevant information to A – whether inculpatory or exculpatory (subject to Crown’s discretion not to disclose privileged or plainly irrelevant information)
* Relevance relates to both the charge itself and to all reasonably possible defences
* Relevant information must be disclosed whether Crown intends to introduce it as evidence or not
* All statements obtained from people who have provided relevant information to authorities must be provided even if Crown is not calling them as witnesses

### R. v. Taillefer; R. v. Duguay

* General rule is that Crown must disclose any material that is in their possession which has a reasonable possibility of being of some use to the defence (this is a low threshold)
  + Evidence must be in Crown possession – can’t require them to investigate further
  + Don’t have to disclose something that is *clearly* irrelevant
  + Certain privileged evidence can’t be turned over
* This is a low standard – if unsure err on the side of disclosing

# Probative Value, Prejudicial Effect and Admissibility

**Probative value versus prejudicial effect test** (initial CL test all evidence must meet):

1. Does the evidence have probative value in this trial

2. Does it have prejudicial effect

If yes weigh each,

3. If admitted provide limiting instructions

**Limiting Instructions:**

1. tell jury why they are receiving evidence (proper purpose)

2. warn them how they are NOT to use the evidence

**Probative Value:**

* Combines materiality and relevance
* Evidence will make a fact in issue more or less likely if it has probative value
* Have to look at the degree of probative value to balance against prejudicial effect - does the evidence have worth, and how much does it help us
* Can look at strength of evidence, clarity, specificity, in determining probative value; how strong are potential inferences

**Prejudicial Effect:**

* Keep in mind, some pieces of evidence have no prejudicial effect
* This evidence can lead jury astray in a number of ways (***BFF, Arp***):

1. conviction of crime outside the one charged

2. general propensity reasoning (bad people do bad things)

3. distract the trier of fact from the main issue in the case

* Prejudicial effect varies in degree like probative value

### R. v. Palma

* To be received, evidence must be:
  + Relevant – makes the existence of any fact (which it relates to) more or less probable [not a legal concept]
  + Material – must be concerned with an issue that is before the court [this is a legal concept]
  + Admissible – [this is a legal concept]
* Require all three for evidence to be received

### R. v. Arp

* Relevance - Evidence must tend to increase or decrease probability of existence of fact in issue
* Relevance depends on facts in issue

### R. v. Seaboyer

* More reluctant to exclude A evidence because of fear of wrongful convictions
* Balancing test is different for Crown and defence:
  + Crown evidence has an even balancing – not an easy test to be met
  + **A has greater latitude to lead evidence than Crown** – **TEST:** is the probative value of the evidence *substantially* outweighed by the prejudice

HARRIS: Crown evidence – err on the side of exclusion. For defence evidence – err on the side of inclusion.

### R. v. B.(F.F.)

* Obligation on TJ to instruct jury how they can use evidence

### R. v. Penney

* We must be careful in probative/prejudicial analysis because this is linked to wrongful convictions

# Types of Evidence

## Direct/Circumstantial

|  |  |
| --- | --- |
| DIRECT EVIDENCE | CIRCUMSTANTIAL EVIDENCE |
| Evidence that doesn’t require further inference – **“Ready made” evidence** | Evidence that requires further inferences for use – **Not “ready made” evidence** |
| Two sources of error:  1. credibility of witness  2. witness is honest but mistaken | Three sources of error:  1. credibility of witness  2. mistaken about circumstances  3. inference that the party wants drawn is not the  proper inference |
|  | Not necessarily weaker evidence (***Dhillon***) |

### R. v. Dhillon

* Circumstantial evidence is not necessarily weaker than direct evidence

## Uses of Evidence

### R. v. Robert

Facts: arson in garage; TJ didn’t believe A’s story

* A can be acquitted based on evidence you don’t believe
* Should look at evidence as a whole – not individual pieces (for both Crown and defence evidence)
* A does not have burden of proving other potential inferences – merely has to raise a RD about the Crown’s inference
  + **If there is reasonable possibility other inference could be drawn = RD**

### R. v. Baltrusaitis

* Considers prescreening Crown evidence but not defence evidence
* HARRIS: this is difficult to distinguish to jury, so there is no prescreening instruction now.

## Real/Demonstrative

## A. Video Tapes

SCC generally like things like photo and video for their unbiased idea of what happened

Admissibility requirements for video (***Creemer*** in ***Penney***):

1. Assess accuracy in truly representing the facts

2. Fairness and absence of intention to mislead

3. Verification under oath by a person capable to do so

HARRIS: this is essentially 2 steps:

1. Authentication – Tell court how evidence came to exist. Why it represents the scene

2. Is the evidence potentially highly misleading

### R. v. Penney

Facts: people protesting seal killing took video to show A killing a seal in a prohibited manner. Technical changes were made to the tape and no one testified to say those changes wouldn’t affect the content.

* Precondition to admission – party introducing evidence must establish it has not been altered or changed
* **Ratio**: the video must be probative to the issue it is being introduced to prove.

Here the issue was the manner of killing but the video was not continuous, therefore couldn’t effectively show the manner used and wasn’t probative of that issue

* Sequence and timing may not always be relevant, but here they are – dependent on issue video is proving

## B. Photographs

### R. v. Kinkead

* Inflammatory evidence can cause people to convict irrationally
* Defence can make admissions about certain evidence which then lowers its probative value (no need to introduce evidence for a proven issue) – this makes it more likely to fail the probative/prejudicial balancing
* Making admissions lessens the need to put evidence before the jury
* Defence admissions can affect the probative/prejudicial balancing

## Documents

## A. Authentication

Counsel can agree that evidence is authentic and this eliminates need for authentication at trial

### Lowe v. Jenkinson

* To use a document it must be authenticated
  + Give knowledge about source of existence
  + Must call evidence to authenticate

# Judicial Notice

* Where certain issues being relied on are so uncontroversial that there is no need to call evidence and if it is questioned the judge may take “judicial notice” – **if reasonable person would be unable to debate the issue**
* It is very dangerous to rely on this concept. Particularly for Crown who have onus of proof
* Judge maintains discretion to refuse to provide judicial notice

### Olson v. Olson

* **Threshold for judicial notice is strict**
* This is an adversarial process therefore counsel should bring evidence for any element they are attempting to prove

Again admissions can be made if both parties agree fact is not in dispute

# Chapter 2: Extrinsic Misconduct Evidence

# Bad Character of the Accused

**“Extrinsic misconduct evidence”** – evidence which is outside the charge and makes A look bad

**Starting presumption is that this evidence is inadmissible** – onus on Crown to show on BoP that probative value outweighs prejudice

A should be careful about opening the door to this evidence by claiming they are “good person” or not the “type of person” to commit the offence

This evidence can lead jury astray (***BFF, Arp***):

1. convict for outside crime

2. general propensity reasoning

3. distract trier of fact

## General Admissibility

### R. v. Cuadra

* Can’t introduce prior criminal conduct to show A is more likely to have committed offence
* **Evidence which shows bad character or criminal disposition is admissible if** (***BFF***)**:**

1. relevant to some other issue beyond disposition or character, and

2. the probative value outweighs the prejudicial effect

* Here defence attempted to impeach W’s credibility by showing prior inconsistent statements. W’s explanation for these prior inconsistencies was the criminal conduct of A. This was allowed as relevant to another issue (credibility of W)
* One of core beliefs of justice system is rehabilitation – introducing prior crimes goes against this value
* TJ can edit and limit prior criminal conduct evidence to limit its prejudicial effect
* Crown should:
  + Flag this as bad character evidence
  + Determine legitimate purpose
  + Remind TJ to give limiting instruction

## Similar Fact Evidence

* Have to make similar fact application to introduce multiple complainants or bring in outside incidents
* Effect – hurts credibility of A and increases credibility of complainants

### R. v. Handy

Facts: sexual assault case. Crown wanted to introduce similar fact evidence that A had committed similar acts against his ex-wife

* **General propensity evidence – inadmissible**
* **Specific propensity evidence - admissible**
* **Similar fact evidence is presumptively inadmissible**
  + Cannot allow an inference from the “similar facts” that A has the propensity or disposition to do the types of acts charged and is therefore guilty of the offence
  + Onus is on Crown to prove on BoP that the probative value in relation to a particular issue outweighs potential prejudice – probative value is driven by similarity
* Policy Rationales:
  + Potential for prejudice, distraction and time consumption is great and usually outweighs probative value
  + Achievement of the rehabilitation objective of the criminal justice system is undermined if your past crimes are allowed to “haunt you”
  + There is a tendency to judge a person’s action on the basis of character
* **Exception to general inadmissibility:**
  + **To be admissible, the similarities must be such that absent collaboration, they could not be due to coincidence**
  + As the “similar facts” become more similar to the charge, probative value increases – degree of similarity required depends on issues in the case, the purpose for which the evidence is introduced, and the other evidence
* **Factors** **supporting admissibility**:

1. proximity in time of the similar acts

2. extent to which the acts are similar in detail to the charged conduct

3. number of occurrences of similar acts

4. circumstances surrounding or relating to the similar acts

5. distinctive features unifying the incidents

6. intervening events

7. any other factors which support or rebut the underlying unity of the similar acts

* **Factors supporting exclusion:**

1. inflammatory nature of acts – ex. incident brought in is more serious than offence charged = more prejudicial

2. whether Crown can prove its point with less prejudicial evidence

3. potential distraction of trier of fact from the facts charged

4. potential for undue time consumption

* COLLUSION: Where there is an “air of reality” to allegations of collusion, Crown must prove on BoP that the similar fact evidence is not tainted with collusion
  + Evidence of collusion on a scale – more contact = greater likelihood of collusion, less contact = less likely collusion
  + HARRIS: defence may benefit from colluding parties testifying – this can help destroy their credibility

SIMILAR FACT RE: IDENTITY

* Where it is improbable that there are multiple offenders, can conclude it is likely one person
* Consider: time, space, modus operandi, broader context
* Allows sharing of identity evidence between multiple offences
  + Can use similar fact evidence to build strong identity case – where separate there would have been acquittal

## Post-Offence Conduct

- Circumstantial evidence that arises post-offence

- Evidence of conduct after offence can be led to infer guilt if it is consistent with “how a guilty person would act” – attempts to evade capture or prosecution

* Must be able to raise at least one reasonable inference of guilt to use this evidence
* **Doesn’t include general demeanor** – we can’t predict how people will act, feel

- Leading post-offence conduct evidence to show innocence has been resisted (even though ***Seaboyer*** says it should be easier to lead)

- see ***BSC*** for framework for leading “post-offence innocent conduct”

### White v. The Queen

Facts: V is murdered and A fleas jurisdiction.

* Post-offence conduct is just another **form of circumstantial evidence**
* There is problem that juries may jump to conclusion of guilt based on this evidence – can result in wrongful convictions

Issues:

1. Alternate Explanations for Conduct

* Post-offence conduct (POC) evidence may be admitted to show that A acted consistently with the conduct of a guilty person
* Where identity or involvement has been admitted, POC has no probative value
  + **POC cannot be used to determine level of culpability or degree of offence committed** (ex. to distinguish between murder and manslaughter) (***Arcangioli***)
* It is for the jury to decide whether the POC of A is related to the crime before them or to some other culpable act
  + Multiple probable inferences doesn’t rob evidence of its probative value – should be put before jury to determine which inference they prefer
* **TJ must give jury limiting instructions:**
  + Remind them that there may be other explanations
  + Remind them to use it as one piece of evidence (in combination with others)

2. Reasonable Doubt Standard

* BRD standard of proof only applies to final determination of guilt or innocence
  + Don’t apply this standard to each individual piece of evidence
* Evidence should be considered as a whole to come to final verdict
* [Where the Crown’s case is based on one piece of evidence, that piece of evidence must be accepted BRD in order to convict]

### R. v. Peavoy

Facts: A put forward self defence and intoxication defences (not an issue of identity)

* POC cannot be used to determine the degree of culpability of the A (***Arcangioli***)
* Post-offence conduct may have some evidentiary value in rebutting defences put forward by A which are based on an alleged absence of the required culpable mental state
  + If conduct is not consistent with actions of a person who had the state of mind being alleged at trial
* Here A put forward self-defence (self defence is equivalent to claiming moral innocence) – jury could infer from his POC that A was aware he had committed a culpable act and had not acted in self-defence
  + **POC can be used to rebut self defence – self defence goes to culpability not level of culpability**
* If jury found A committed a culpable homicide, the POC could not be used as evidence that A intended to commit murder as opposed to manslaughter
  + BUT, defence contended that Crown hadn’t proved requisite intent for murder due to intoxication – this opened the door to infer from POC that despite A’s intoxication, he had the awareness required to form the requisite intent for murder
  + **POC can rebut intoxication – purposeful acts post offence can show A wasn’t that intoxicated**

### R. v. B.(S.C.) [Innocent Post-Offence Conduct]

Facts: complainant sexually assaulted while riding her bike. A offered to help cops, provided bodily evidence and offered to perform lie detector.

* Generally evidence of a prior consistent statement is inadmissible because it has low probative value – broad statements of innocence have low probative value
  + Offering to take a polygraph was seen as similar to a prior consistent statement, and not very probative since A risks nothing due to the polygraph results being inadmissible
* **POC which supports an inference of innocence may be admissible if**:
  + Evidence must be relevant
  + Probative value must not be substantially outweighed by prejudicial effect
  + Evidence must not be excluded under some other exclusionary rule
* People are free to choose not to assist the police in their investigation – therefore, failure to assist, standing alone, cannot be used as evidence against a person at trial (see ***Turcotte***)

# Bad Character of the Witness

## Prior Convictions

### Canada Evidence Act (CEA) s.12

**Examination as to previous convictions**

**12.** (1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment.

[Witness can be questioned about whether they have been convicted of an offence – means you can put their criminal record to them. Goes to the credibility of W.]

***Seaboyer*** – Ws other than A receive more scrutiny (allow details of their crimes to emerge, can bring up uncharged offences)

### R. v. Corbett [Prior Convictions of A who testifies]

* s.12 can apply to an A who testifies
  + in order to provide the jury with an undistorted picture (rather than have a bunch of criminal Ws and a non-criminal looking A)
  + Requires that the jury be given a clear instruction about how it may and how it may not use evidence of prior convictions put to A
  + TJ maintains discretion to exclude cross-examination of A on his prior convictions if prejudice outweighs probative value
* Factors to consider in prejudice/probative balancing:
  + Nature of previous conviction (is it crime of dishonesty)
  + Similarity of offence to previous conviction - more similar = more prejudice
  + Remoteness or nearness of previous conviction
  + Whether it is fair to A and to Crown to prohibit cross-examination on previous convictions – especially when a deliberate attack has been made on a Crown W and where resolution of the case comes down to credibility of A versus that W
* For A – limited to credibility determination. Can only introduce prior convictions, not uncharged offences. Generally can’t provide details re: prior convictions

## Other Discreditable Conduct

### R. v. Cullen

* Evidence of events forming the basis of a criminal charge of which A has been acquitted should not be admitted into evidence
* For the purpose of challenging a W’s credibility, cross-examination is permissible to demonstrate that a W has been involved in discreditable conduct
* **Can bring up uncharged offences of W, but only prior convictions for A**

### Titus v. R.

* Cross-examination of a Crown W concerning an outstanding indictment against that W is proper and admissible for the purpose of showing a possible motivation to seek favour with the prosecution

## The Vetrovec Witness

### R. v. Murrin

* “Jailhouse Ws” – some of most dangerous evidence; strong link to wrongful convictions
* TJ should exclude evidence where its admission would be unfair to A – this does not equate with reliability
  + **Evidence may be flawed, but that doesn’t mean we throw it out**
* Even evidence which may be unreliable should be admitted unless there is particular prejudice to A from its admission
  + Assessment of reliability should be done by the trier of fact
* **Despite the reliability issues with Vetrovec Ws we admit their evidence and allow the trier of fact to assess its reliability**

### R. v. Khela [What is Vetrovec W, Vetrovec Caution]

What is Vetrovec W

Consider:

1. criminal record

2. crimes of dishonesty

3. inconsistency of evidence

4. receiving something for testimony

Vetrovec Caution

* There is no mandatory set of words required for the caution – appellate review will only occur if the caution should have been given and wasn’t, or if the cautionary instructions failed to serve the intended purpose

Before giving the Vetrovec Warning:

1. TJ should determine whether there is a reason to suspect the credibility of the W

2. TJ must assess the importance of the W to the Crown’s case – more important the W the greater need for the caution (where W plays a central role in the proof of guilt, the warning is mandatory)

**Framework for Vetrovec Warning:**

1. draw attention of jury to the testimonial evidence requiring special scrutiny – separate evidence out

2. explain why this evidence is subject to special scrutiny

3. caution the jury that it is dangerous to convict on unconfirmed evidence of this sort – though jury can do so if they are satisfied this evidence is true

4. the jury should look for corroborating evidence from another source which support truthfulness of this testimony (amount of confirmation needed may vary with reliability of W – VWs range in dangerousness)

The instruction to the jury must make clear what type of evidence is capable of offering support :

1. Evidence must be independent

2. Evidence must be material – backs up important part of story (not peripheral issue)

HARRIS: jury should be told if reasonable possibility of tainting, don’t use VW’s evidence

Problems with VW:

- If jury finds confirmation of VW they might automatically convict

- May convict on confirmatory evidence only

### R. v. Dhillon [What constitutes confirmatory evidence]

* In deciding whether evidence is capable of being confirmatory – does the evidence strengthen our belief that the suspect W is telling the truth?
  + Mere fact that part of an informant’s story seems generally plausible does not amount to confirmatory evidence

Where defence asserts an inadequate police investigation, Crown may be entitled to lead hearsay evidence of the police investigation to rebut that allegation – where TJ believes the probative value of that evidence outweighs its prejudicial effect and the jury is instructed on its limited use

- Risky for A to lead this type of defence

HARRIS: likes hard line this court took on what constitutes confirmatory evidence

## Other Dangerous Evidence

## a. Eye-Witness

- Area is plagued with “honest but mistaken” issues

- Where W knew the person from before there is less likelihood of mistaken identification

- We don’t exclude this evidence, but it is subject to a strong warning given to the jury:

* Tell jury: be cautious, look for confirmatory evidence, warn that wrongful convictions have occurred from this evidence

### R. v. Gonsalves

* Issues with reliability, not credibility, of eye-witness testimony which may lead to wrongful convictions
  + Conditions under which observation was made, the care with which it is made, and the ability of the observer, potential for tainting, affect the weight of the evidence
* Questionable identification procedures affect the weight of the identification (don’t exclude evidence entirely)
* In-court identification receives little weight – prior identification is considered more reliable (it occurs before potential for tainting)

Photo Pack Line-up:

* Should contain at least 10 subjects
* Photos should resemble W’s description, or at least resemble each other
* Everything should be recorded
* Officer should confirm that he doesn’t know who the suspect is, or whether his photo is in the lineup
* The photo pack must be presented sequentially and not as a package
* A form should be provided setting out in writing the comments of the officer and W
* Officer should not speak to the W after the lineup regarding their identification or inability to identify

# Chapter 3: Opinion Evidence

# Common Knowledge

Lay Ws may give opinion evidence where:

* **Court likes these Ws – traditional form of evidence**
* They are in a better position than trier of fact to form the conclusion
* The conclusion is one that an ordinary person could make
* The W has the experiential capacity to make the conclusion
* The opinions being expressed are merely an easier way of expressing facts

### Graat v. R.

* Ws can provide opinions that are within the knowledge of ordinary persons
* Ws can present opinions where they are merely giving a statement of facts that is too difficult to be narrated separately and distinctly
* Limitations:
  + Must be probative over prejudicial
  + Cannot be completely speculative
  + Opinion should not be phrased in a legalist manner (invites their legal conclusion) – cannot “usurp the function of the jury”
  + Must be within experience of ordinary person
  + Where opinion is provided this can go to weight - the value of the opinion will depend on the view the court takes in all the circumstances
* Admissibility of lay opinion evidence is in the TJ’s discretion

# Expert Evidence

**See also *Criminal Code* s.657.3**

### CEA s.7 Expert Witnesses

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

[provides limitation on number of expert Ws called – by Crown or defence]

- Justice system has grown suspicious of these types of witnesses:

- They aren’t performing the usual task we expect of a W (they weren’t there)

- They are paid (concerns about bias)

- These types of witness are linked to wrongful convictions (this evidence can be deceptively strong)

**One of the few areas where defence has disclosure duties – counsel must provide reasonable notice to the other side if they are calling an expert witness**

### R v. Mohan

To evaluate whether expert evidence is admissible

* 4 Criteria:

1. RELEVANCE – is it relevant, and how relevant

2. NECESSITY

* + - If on the proven facts the trier of fact could form their own conclusions without help, then the expert opinion is unnecessary (see ***DD***)
    - Necessary if it **provides information which is likely to be outside the experience and knowledge of the trier of fact**

3. ABSENCE OF ANY EXCLUSIONARY RULE

4. PROPERLY QUALIFIED EXPERT

* + - Basic threshold – they have more knowledge than ordinary person
    - A witness who has acquired special or peculiar knowledge through study or experience in respect of the matters on which he is to testify
    - Level of expertise goes to weight – more expert may be more convincing

HARRIS: there should be some foundation for expert’s opinion (factual basis)

Requires some connection between expert testimony and facts of case

An expert opinion without foundation is highly prejudicial

## The Hypothetical Question

### Bleta v. The Queen

* No requirement that questions be put to the expert in “hypothetical” form – as long as questions are phrased to make clear what the evidence is on which the expert is being asked to found his conclusion
* TJ retains final discretion to admit expert testimony or not

## The Basis and Weight of Expert Opinion

### R. v. Palma [Factual basis for expert opinion]

* Take expert opinion and compare it to the evidence led
* Value of expert testimony may be affected by reliance on second-hand source material, but this goes to weight not admissibility
  + An expert opinion is admissible if relevant, even if based on secondhand evidence
  + This hearsay is admissible to show the information on which the opinion is based, not as evidence of the truth of the facts on which the opinion is based
  + Where expert evidence is comprised of hearsay evidence this goes to weight
  + Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist
* Where expert opinion is based only on A’s testimony that evidence should not be led without evidence supporting the A’s testimony. Where expert opinion is based on A’s testimony and other admitted or proven facts, that evidence should be led and any problems go to weight
* Where there is some foundation evidence is admissible, where there is a lack of foundation, this goes to weight (***Lavallee***)

## Ultimate Issue [see *Bryan, Mohan, Abbey*]

### R. v. Bryan

* **There is no general rule excluding expert evidence on the ultimate issue** – no rule against commenting on facts of case, but it is dangerous
* However experts are not to usurp the function of the jury – don’t want trial to turn into contest of experts
  + The criteria of relevance and necessity are applied strictly – will sometimes result in expert evidence as to ultimate issue being excluded
    - Admissibility requirements heightened when opinion goes to ultimate issue (***Mohan***)
  + The way evidence is led can affect this issue – where expert is asked to give opinion on the specific facts of the case and A, this can lead to usurping
  + **If you can lead evidence in a less direct manner court prefer it – may make otherwise inadmissible evidence admissible too**
    - **Present evidence in non-invasive form to prevent usurping**

## Credibility of a Victim

### R. v. Llorenz

* Experts are not allowed to provide direct evidence on the issue of credibility (“oath-helping”)
  + Can provide expert evidence that may assist the jury in determining credibility, but can’t go directly to “believe” or “disbelieve” this W.
  + Credibility assessments are a matter for the trier of fact
  + Credibility is an issue at every trial – don’t want to end up in battle of experts
* Even where expert testimony is inadmissible for oath-helping ,it may be admissible for other uses – requires that TJ provide very specific limiting instructions to prevent improper use

## Novel Scientific Evidence

Expert evidence is novel science where the scientific theory or technique has not yet been generally accepted in the relevant field, or where the particular use made of a generally accepted theory or technique has not yet been generally accepted in that field.

**TEST: In order to be admissible “novel science” must**:

1. be essential (necessity) – trier of fact will be unable to come to a satisfactory conclusion without expert assistance

2. be subjected to special scrutiny regarding its reliability

3. satisfy an even stricter application of “necessity” and “reliability” inquiries where the expert opinion approaches an ultimate issue in the case

## Limiting Expert Evidence [see *JLJ, DD, Abbey*]

### R. v. J.-L.J.

* Strict approach to expert evidence – TJ should take “gatekeeper” role seriously and expert evidence should not be too easily admitted
  + Standard for allowing expert evidence is strict – even for defence
* Novel scientific evidence should receive greater scrutiny:

1. Go through ***Mohan*** criteria

2. Then go through tests for novel scientific evidence to evaluate reliability:

a) Whether the theory or technique can be and has been tested

b) whether the theory or technique has been subjected to peer review and publication

c) the known or potential rate of error or the existence of standards

d) whether the theory or technique used has been generally accepted

If basic criteria are met, then most issues go to weight

* [**Foundation requirement -** Before any weight at all can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist]

### R. v. D.D. [Court signaling they want less expert evidence]

* Dangers of expert opinion evidence:
  + Neutrality of expert witnesses is questionable – they are paid to appear
  + These witnesses are linked to wrongful convictions
  + Potential to usurp the jury
  + Expert evidence is highly resistant to effective cross-examination by counsel who aren’t experts in that field
  + Expert opinions are usually derived from academic literature and out-of-court interviews – unsworn material that is unavailable for cross-examination
  + Time-consuming and expensive
* Necessity Requirement – helpfulness is not enough, mere relevance is not enough
  + Based on stricter standard, behavioural expert evidence more often out (than scientific)
* Jury instruction where possible instead of expert evidence is preferable
  + One method of limiting need for expert evidence is to put information into jury instructions where possible

### R. v. Abbey [Rephrasing of Mohan test]

* **Expert evidence is presumptively inadmissible – party tendering the evidence must establish admissibility on BoP**
* TJ should be involved in both admissibility of expert evidence and in determining the nature and scope of the proposed expert evidence
  + TJ should set boundaries on how admissible expert evidence is introduced and led (admissibility is not “all or nothing”)
  + TJ may admit only part of the evidence, modify nature or scope of proposed opinion or edit language used to frame opinion
* Expert evidence should provide jury with criteria to use to draw inferences – but shouldn’t go so far as applying those criteria to the facts (leave that to the jury)

***Mohan* test as in *Abbey*:**

Process for Determining Admissibility:

**1. Certain preconditions must exist** – evidence must meet all these preconditions or will be excluded and second phase of test does not need to be dealt with

* Necessity – expert opinion needed to draw inference
* Qualified expert
* Opinion must not be excluded by some other exclusionary rule
* Logically relevant to material issue
* Some foundation for opinion

**2. Case specific cost-benefit analysis:**

TJ must consider benefits of evidence to trial against potential to prejudice trial and justice system

TJ’s balancing is entitled to deference by Court of Appeal

* “Benefit side”
  + Probative value of evidence – how relevant, how necessary
  + Significance of issue to which evidence relates
* “Cost side”
  + Potential for prejudice
  + Reliability concerns
  + Time-consuming
  + Potential to confuse or overwhelm jury – highly confusing expert evidence where expert is essentially saying “just believe me”
  + How evidence is being presented – how directly it relates to evidence of the case
  + Bias issues of witness

After evidence is found admissible – put careful scope on evidence; limit evidence and way it’s led

## Competence, Oaths and Compellability of Witnesses

Generally: almost everyone is competent and compellable (must meet this threshold to testify)

Competence: generally requires W be put under oath

We view oath as a tool in search for truth

### CEA s.13 – 15 Process for Administering Oath or Solemnization

**Who may administer oaths**

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

**Solemn affirmation by witness instead of oath**

**14.** (1) A person may, *instead of taking an oath*, make the following solemn affirmation:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

**Effect**

(2) Where a person makes a solemn affirmation in accordance with subsection (1), his *evidence shall be taken and have the same effect as if taken under oath*.

**Solemn affirmation by deponent**

**15.** (1) Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, does not wish to take an oath, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit the person to make a solemn affirmation in the words following, namely, “I, ......., do solemnly affirm, etc.”, and that solemn affirmation has the same force and effect as if that person had taken an oath.

**Effect**

(2) Any witness whose evidence is admitted or who makes a solemn affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn.

### CEA s.16 and s.16.1 [Mental and Youth Capacity]:

* Now much harder to get evidence past mental health capacity issue than youth issue
* Mental capacity issue requires inquiry – low threshold
* Neither threshold is too high – we want Ws to testify to help in search for truth

**Witness whose capacity is in question** [establishing competence of a W is a task for the TJ (***Parrott***)]

**16.** (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person understands the nature of an oath or a solemn affirmation; and

(b) whether the person is able to communicate the evidence. [communication requires perceiving, remembering, and talking about past events]

**Testimony under oath or solemn affirmation**

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

**Testimony on promise to tell truth**

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.  [implication that you can look into understanding of promise to tell truth]

**Inability to testify**

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

**Burden as to capacity of witness**

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

**Person under fourteen years of age** [section has moved towards admitting youth testimony with fewer restrictions than mental capacity]

**16.1** (1) A person under fourteen years of age is presumed to have the capacity to testify.  [presumption of competence – party who challenges capacity must demonstrate there is an issue]

**No oath or solemn affirmation**

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

**Evidence shall be received**

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

**Burden as to capacity of witness**

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

**Court inquiry**

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

**Promise to tell truth**

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

**Understanding of promise**

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.  [for purpose of inquiry, can’t question understanding of promise to tell truth – but can bring this up at trial]

**Effect**

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

### R. v. J. Z. S.

Issue: should young children presumptively be prevented from seeing A

A’s counsel challenged presumption and argued:

- should require party requesting screen to prove necessity

- should allow inquiry into child’s competence and understanding of promise to tell truth

* **Criminal Code s.486.2** – allows for presumptive use of screen or CCTV for Ws under 18. Eliminates requirement that an applicant establish evidentiary basis for need. Court must grant application unless it would interfere with the proper administration of justice
  + Justified:
    - Doesn’t impeded questioning in cross-examination
    - Doesn’t impede full answer and defence
    - Encourages testimony
* **CEA s.16.1** – presumes children under 14 have capacity to testify.
  + Party who wants to challenge capacity must first satisfy court that there is an issue – if an inquiry is granted the child may only be questioned on his ability to understand and respond to questions
  + Provision prohibits pre-testimony inquiries into child’s understanding of the nature of a promise to the tell truth (substituted for an oath) – this can be brought up in cross-examination at the trial stage
* s.16.1 changes focus of child’s evidence from admissibility to reliability
* Court – deference to legislature
  + Want rules which encourage/facilitate hearing from all Ws

## Spousal Competency

* To preserve marital harmony
* CL – spouses incompetent to testify against each other
  + Except – where spouse W’s liberty or health is involved (ie. they were victim)

### CEA, s.4 [maintains CL but creates a variety of exceptions]

(not applicable to common law union or irreconcilably separated – these spouses are competent and compellable)

**Accused and spouse**

**4.** (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person. [spouse is competent to testify for defence]

**Accused and spouse**

(2) The wife or husband of a person charged with an offence under subsection 136(1) of the *Youth Criminal Justice Act* or with an offence under any of sections 151, 152, 153, 155 or 159, subsection 160(2) or (3), or sections 170 to 173, 179, 212, 215, 218, 271 to 273, 280 to 283, 291 to 294 or 329 of the Criminal Code, or an attempt to commit any such offence, is a *competent and compellable* witness for the prosecution without the consent of the person charged. [Crown can force testimony for these specific listed offences]

**Communications during marriage**

(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage. [communications are not compellable – but must be made *during* marriage]

**Offences against young persons**

(4) The wife or husband of a person charged with an offence against any of sections 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269 of the *Criminal Code* where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged.  [where complainant is under 14 – spouse is competent and compellable]

**Saving**

(5) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

**Failure to testify**

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

# Chapter 5: Examination of Witnesses

# A. Order of Calling Witnesses

### R. v. Smuk [Order of calling Ws]

* A is free to decide when and if he will testify
* The Court cannot require A to testify first, or to testify at all
* If A testifies after all Ws are called, this may be a factor to consider in credibility assessment, but does not prevent A from testifying at all

### R. v. Jolivet [Obligation to call W]

Facts: Crown discussed calling a W but decided not to partway through trial

* Crown is under no obligation to call a W it considers unnecessary to its case
  + Due to our adversarial process, Crown maintains a fair deal of discretion in how it will present its case
  + Remember other side often has power to call this W instead – but this can be dangerous
* Remedies to W not being called:

1. If abuse of process (by Crown) – court can order Crown to do something

* Can force Crown to call W, or TJ can call the W **[rarely used]**

2. Judicial instruction of “adverse witness” – can comment on failure to call W and tell jury they can assume W’s evidence wouldn’t have been helpful

* Probably couldn’t apply to defence in criminal trial (because of presumption of innocence) **[rarely used]**

3. Allow other side to call W if they want – court doesn’t get involved

* **High threshold for remedies – we want to leave these tactical decisions to counsel (adversarial system)**
* Because Crown mentioned this W and later did not call them there were options to address any unfairness created by this:
  + TJ could call the W
  + A could comment in closing on the W’s absence
  + TJ could be asked to comment

**Reversible Error – must ask whether evidentiary mistake could have really made difference at trial**

# 

# B. Direct Examination

## Leading Questions

### Maves v. Grand Trunk Pacific Rwy. Co [Leading Witness]

* **General Rule:** **on material points a party must not lead his own witnesses**
  + Leading questions are allowed in cross-examination but not in examination-in-chief
  + We presume W has a bias in favour of the party calling him
  + The party calling a W has an advantage by knowing what the W will prove
* **Exceptions** (all remain in TJ’s discretion):
  + Can and should lead your W on introductory matters – to reduce court time
  + By agreement of counsel a W may be led further than normal because matter at issue is fairly narrow
    - Should inform TJ because they have final discretion
    - If there is no controversy the evidence should be introduced through admissions
  + Where W shows hostility or unwillingness to give evidence TJ can allow more leading
  + Where W seems to have forgotten some key aspect of their testimony
  + Where W has challenges in presenting evidence (ex. very young W)

## Refreshing a Witness’ Memory

Where memory has to be refreshed – this can be considered in weight given to evidence

### R. v. Shergill [PMR – Present Memory Revived]

Before PMR, counsel should first exhaust other attempts to jog memory

PMR Procedure:

1. Counsel should seek permission from TJ

2. W should be excluded

3. Counsel should identify the document and passages they want to use and explain what subject matter they want to elicit

4. TJ should consider whether W’s memory appears to be exhausted

- TJ may also consider relaxing rule against leading questions to try to elicit memory (see ***Maves***)

5. TJ should determine if this is PMR or PRR – should be clear about which process you are using

6. TJ should determine whether document is appropriate one to use

- Consider factors such as: when document was created, by whom and whether W verified its accuracy, is it reliable, too suggestive, etc.

- TJ has discretion to say some documents are too dangerous (ex. someone else’s notes)

7. TJ should determine whether there is improper motive or other circumstances which make the request unacceptable

8. In the end TJ should exercise his discretion “according to the circumstances and the attitude of the W”

9. If permission granted – recall jury

10. Counsel should place document in front of W without comment and ask W to read all or part of it. Jury should not be told the nature of the document or what it says

11. Counsel should then take the document away from W and ask a non-leading question – if memory sparks document should be taken away and W testifies to what they remember

12. Opposing counsel may examine the document and cross-examine W

13. Instructions to the jury should tell them how they can use the reference to the refreshing document:

- Prior statements were not to be considered proof of their contents

- Can’t be used to show consistency in W’s evidence and therefore enhance credibility

- Sole purpose of allowing reference to previous statement was to refresh present memory

### R. v. Fliss (SCC 2002) [PRR – Past Recollection Recorded (Hearsay Exception)]

PRR is an exceptional procedure, very invasive and hard to counter – conditions precedent to reception should be clearly satisfied (err on the side of exclusion)

These criteria are strict and it is hard to get this evidence into court

**Past Recollection Recorded 4 Criteria:**

1. Reliability

Recollection must have been recorded in a reliable way

2. Proximity

At the time it must have been sufficiently fresh and vivid to be probably accurate

3. Verification

W must be able now to say the record accurately represented his knowledge and recollection at the time

4. If available, the original record should be used

### R. v. J.R. (Ont CA 2003) [PRR]

Adds another criteria to ***Fliss*** PRR test:

1. Reliability

- W prepared or reviewed for accuracy

- Original record must be used if available

2. Timeliness

- Record was made or reviewed while event was fresh in W’s mind to be vivid and likely accurate

- Appropriate length of time will vary with circumstances

3. **Absence of memory**

**- At the time W testifies, he must have no memory of the recorded events**

- **Doesn’t require complete absence of memory -** PRR could still apply where W remembers parts of the statement but has no recollection of a portion

4. Verification

- W must be able to say he was being truthful at the time of recording

# Cross-Examination

Leading questions are allowed during cross-examination

### CEA s.10

**Cross-examination as to previous statements**

**10.** (1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, *if it is intended to contradict the witness, the witness’ attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness*, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

**Deposition of witness in criminal investigation**

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

### R. v. Lyttle [Importance of Cross Examination/What can or can’t be put to W during cross]

* Cross-examination is fundamental to providing a fair trial and full answer and defence [right to cross-examination is protected under ss.7 and 11(d)]
* Broad discretion to question W during cross examination
  + **Limits:** Counsel are bound by rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness, or from putting questions whose prejudicial effect outweighs their probative value
* **As long as counsel has a good faith basis for asking an otherwise permissible question in cross-examination the question should be allowed – (TJ has discretion to limit cross if theory is very tenuous)**
  + No requirement to have admissible evidence to back up scenarios or questions put to the W
  + Cross-examiner can pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition
  + [cannot put suggestions to W recklessly or which are known to be false – standard rules of evidence still apply and can’t be violated]
* HARRIS: at the end of the day should probably have at least some admissible evidence to put your theory to the jury
  + If your cross examination doesn’t elicit admissible evidence which supports your theory you shouldn’t put that theory to the jury in your close

### R. v. Carter [Obligation to put Questions to W]

* Fairness to W requires putting propositions to them instead of hypothesizing later
* If you are relying on some proposition about what W did or didn’t do, you should put this proposition to W

Rule in ***Browne v. Dunn***:

If counsel is going to challenge W’s credibility by calling contradictory evidence, the W must be given the chance to address the contradictory evidence in cross-examination

* Can be penalized for failing to put relevant issue to W – TJ can give instructions that jury may consider that these questions weren’t asked in their credibility assessment

Rule should be applied “flexibly” – in limited circumstances

Look at cross examination as a whole and ask whether a W had fair opportunity to provide explanation – or were they “ambushed”

# Re-Examination

HARRIS: threshold for re-examination is not high – this happens frequently

### R. v. Moore

* Right to re-examine exists only where there has been cross-examination and must be confined to matters arising in cross-examination (unless permission from court to reexamine on matter not brought up in cross examination)
* New facts can’t be introduced in re-examination – but TJ retains discretion to allow introduction of new matters in re-examination and the opposite party may cross-examine on the new facts
* **In re-examination leading questions are not allowed**

# Rebuttal Evidence

More limited application than re-examination

### R. v. Krause

**General Rule:** Crown will not be allowed to split its case – therefore entire case must be presented upfront

* Prevents unfair surprise, prejudice, confusion
* A is entitled to have the whole Crown case before him so that it is known what must be responded to

**Rebuttal Evidence:**

* Allowed where defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which could not have been reasonably anticipated
* May arise in cross-examination – where something new emerges in cross-examination which Crown had no chance to deal with in its case-in-chief and where the matter relates to an essential issue, then Crown may be allowed to call evidence in rebuttal
  + Can’t call rebuttal evidence to dispute a collateral issue
* Defence may have right to rebut Crown’s rebuttal evidence – at TJ’s discretion

# Chapter 6: Statement Evidence

# A. Admissibility Of Prior Consistent Statements

### R. v. Ay

* **Starting presumption – prior consistent statements are inadmissible**
* We don’t view them as probative or as increasing credibility
* **Exceptions** to presumption of inadmissibility:
  + Where recent fabrication is alleged (other side may open door)
  + Where prior consistent statement is admitted as part of the narrative
  + Recent complaints in sexual cases
  + Statements on arrest
  + Statements made on recovery of incriminating articles
  + Statements made with respect to previous identification of A
* Where prior consistent statements are admissible under an exception the TJ must provide limiting instructions that jury cannot use these statements as truth of their contents or as

increasing credibility

Reasonable doubt in relation to credibility (***WD*** instructions):

1. If they believe A they must acquit

2. If they do not know whether to believe A or the complainant, they must acquit

3. If they do not reject the evidence of A they will have a RD and must acquit

4. If they disbelieve A, they reject his evidence as untrue, they have to be convinced BRD of the guilt of A on the whole of the evidence before they could convict

### R. v. Stirling

Facts: negligent driving case

* Prior consistent statements are generally inadmissible
  + They are viewed as lacking probative value and being self-serving
* **Exception:** admissible where it has been suggested that a W had recently fabricated portions of his evidence
  + Sufficient if “apparent position of the opposing party is that there has been a prior contrivance”
  + Not necessary that a fabrication be particularly recent – prior consistent statement before “triggering event” can refute recent fabrication allegation
  + Prior consistent statement can be admitted to rebut fabrication allegation, but cannot be admitted for the truth of its contents
  + Admission of prior consistent statements returns credibility of W by removing a motive for fabrication

## Prior Identification

### R. v. Swanston (see also Gonsalves)

* Evidence of extrajudicial identification is admissible not only to corroborate an identification made at trial, but as independent evidence going to identity
* Extrajudicial identification is admissible because the earlier identification has greater probative value than an in court identification

# B. Attacking Credibility of Party’s Own Witness

### CEA s.9

* In some circumstances we allow counsel to destroy credibility of their W

Start with s.9(2) (see ***Milgaard***):

* Requirements:

1. statement must be recorded or reduced to writing

2. inconsistency – must be significant inconsistency

* Gives you limited cross about those inconsistencies
* TJ has discretion to grant application or not – should provide limiting instructions (statement can only be used to assess credibility)

**Previous statements by witness not proved adverse**

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

[usually the starting point]

Then s.9(1) [for broader cross or if no prior recorded statement]:

* Allows for general cross examination of adverse W
* Steps:

1. start with 9(1) – provides basis for adversity

2. find adversity

Rebutting s.9(1) cross:

1. Bring up that it was previous known that W would be adverse (***Milgaard***)

2. Bring up that W isn’t “hurting case” (***McInroy***)

**Adverse witnesses**

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

[if you can prove W has made an inconsistent statement and is adverse to party who called them – you can generally cross examine them (only limitation is no bad character evidence)]

HARRIS: TJ should keep in mind wrongful conviction (***Milgaard***) when exercising discretion to grant application – even with instructions there is potential for jury to use prior statement for truth rather than credibility

### Wawanesa Mutual Insurance v. Hanes [“Adverse” W]

* To consider **whether W is adverse**, TJ should:
  + Consider testimony of W and the statement
  + Satisfy himself upon any relevant material that the W made the statement
  + Consider the relative importance of the statement and whether it is substantially inconsistent
* If TJ decides W is adverse he should balance possible dangers of admission versus the value of admitting it
* If TJ decides to allow statement he should (in front of jury) direct that circumstances of making of the statement be put to the W and that he be asked whether he made the statement
* TJ should instruct the jury that the prior statement is not evidence of its contents, but is for the purpose of showing that the sworn testimony given at the trial could not be regarded as of importance

### R. v. Cassibo [s.9(1)]

Issues:

1. Requirement (no longer exists) of corroboration of complainants which implicates the A

- Old Criminal Code provision based in stereotypes which essentially created a presumption that the complainant was lying

- In this case the corroboration was established by the two sisters corroborating each other’s story

2. Collateral matter issue

- Counsel is allowed to cross-examine the other party’s W with respect to collateral matters on the issue of credibility – **can’t lead evidence to contradict unless on key issue**

- The cross examination here related to the truthfulness of their testimony and not to a collateral matter – the purpose was to show they had fabricated the allegations

3. Whether complaints made by daughters to mother were admissible (**Prior consistent statements**)

- Fact that the mother denied that the daughters complained does not make their evidence regarding those complaints inadmissible

- Generally prior consistent statements are not admissible to increase W credibility

- Here the prior consistent statements were admissible to **rebut the allegation of recent fabrication** put forward by the defence

- This evidence is also inadmissible as part of the **narrative** of the case – it would have been impossible for Crown to present a clear narrative to the trier of fact without including the complaints made to the mother

4. Whether Crown could cross examine their witness (mother) on prior statements made to police

- If TJ finds that W called by a party is hostile, the TJ may grant leave to the party producing the W to cross-examine him

- “**Adverse**” – includes hostile, and also unfavourable in the sense of assuming by his testimony a position opposite to that of the party calling him

- Hostility must be towards the party calling the W

- motive of a W to support the opposite side supports finding of adversity

- In deciding whether W is “adverse” the TJ may take into account prior inconsistent statements of the W

- TJ should satisfy himself that the W made the prior inconsistent statement, and should consider the importance of the statement, whether it was substantially inconsistent with W’s testimony and all the surrounding circumstances

- Both oral and written statements alleged to be inconsistent can be used to determine whether the W is adverse (for s.9(1))

- Even if W found adverse, TJ has discretion whether to grant cross examination

- s.9(2) provides an independent procedure under which the TJ may permit a party to cross-examine his own W as to a statement previously made in writing or reduced to writing without any necessity for a declaration that the W is adverse

- TJ can in certain case determine that a W is adverse based solely on their previous inconsistent statement

- Particularly where the change in testimony is not explained by confusion, duress, emotional upset or other similar circumstances

- Reasons for change can be critical – W is not adverse if he provides plausible reasons for change

- and where the variance in W’s testimony relates to a vital issue

### McInroy and Rouse v. R.

* Procedure for an application under s.9(2) (from ***Milgaard***):

1. Counsel should advise that he wishes to make an application under s.9(2)

2. The jury should leave

3. Counsel should provide the written statement

4. TJ should read the statement and determine if there is an inconsistency between it and the W’s testimony

5. If there is an inconsistency, counsel should prove the statement – by having W admit the statement or providing the necessary proof by other evidence

6. If the statement is proven, opposing counsel has the right to cross-examine regarding circumstances under which the statement was given

7. TJ should then decide whether or not he will permit cross-examination

* Court of Appeal: the W was not an adverse W because she did not testify to anything that was damaging to the Crown’s case
  + **Introduced requirement under s.9(1) that W is “hurting case” – could use this case to try to prevent cross by arguing this requirement**
* SCC: s.9(2) doesn’t require an adverse W, just that prior inconsistent statement was made and then it is in the discretion of the TJ
* **A finding that the W is lying about not remembering is equivalent to an inconsistent statement for using s.9(2)**

### R. v. Milgaard [Framework for s.9(2)]

* Under s.9(2) a TJ can allow counsel to cross-examine their own W as to a statement previously made **in writing, or reduced to writing, that is inconsistent** with the evidence which the W is giving.
  + The TJ may grant the application without declaring the W hostile
  + Final discretion whether to grant cross-examination or not is with TJ
* **The right to cross-examine under s.9(2) is limited** – confined to cross-examination in relation to the inconsistencies
  + This cross examination can be used to determine if the W is hostile, if a further application is made. If W is declared hostile then the right to cross-examine is not restricted
* **Procedure for an application under s.9(2):**

1. Counsel should advise that he wishes to make an application under s.9(2)

2. The jury and W should leave

3. Counsel should provide the written statement

4. TJ should read the statement and determine if there is an inconsistency between it and the W’s testimony

5. If there is an inconsistency, counsel should prove the statement – by having W admit the statement or providing the necessary proof by other evidence

6. If the statement is proven, opposing counsel has the right to cross-examine regarding circumstances under which the statement was given

7. TJ should then decide whether or not he will permit cross-examination – whether it would be improper to allow it even though criteria are met

* If there is highly prejudicial information in statement that jury will be tempted to use for its truth rather than just credibility
* TJ may not grant application where counsel had prior knowledge W would be adverse
* If cross-examination is granted under s.9(2) it should be performed in front of the jury so they can assess credibility

# Chapter 7: Hearsay

# What is Hearsay?

### Subramaniam v. P. P.

* Evidence of a statement made to a W by a person who is not called is hearsay (and inadmissible) when the object of the evidence is to establish the truth of what is contained in the statement.
* It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made

# Non-Hearsay Uses of Out of Court Statements

## Circumstantial Evidence of State of Mind

### R. v. Wysochan

* **Utterances which circumstantially indicate the speakers’ own state of mind:**
  + Admissible (not hearsay) where utterances are introduced as evidence of a certain feeling or attitude of mind
* [utterances introduced for the truth of their contents – are inadmissible hearsay]

### Ratten v. The Queen

* Hearsay issue only arises when words spoken are relied on “testimonially” – as establishing some fact narrated by the words

## Common Law Exceptions

How these exceptions have gained reliability can support reliability in a principled approach analysis

Also if evidence fits a CL exception this is presumption it will be admissible (***Mapara***)

### DYING DECLARATIONS:

* Admissible when:
  + Offence involved is homicide of dead declarant
  + Deceased had settled and hopeless expectation of almost immediate death
  + Statement was about circumstances of death
  + Statement would have been admissible if dead could testify
* Reliability is established because we assume dying person would be motivated to speak truthfully
* **Applied strictly**

RES GESTAE: “Spontaneous statements”

Exception to the hearsay rule if the declarations constitute a part of the thing done

Reliability is found in their spontaneity – before there is time for concoction

**Subject to three qualifications:**

1. they must not be made at such an interval as to allow fabrication, or to reduce them to the mere narrative of a past event

2. they must relate to and can only be used to explain the act they accompany and not independent facts prior or subsequent thereto

3. though admissible to explain, or corroborate, they are not, in general, to be taken as any proof of the truth of the matters stated

Declarant may testify – doesn’t negate necessity because it is based on expediency

# C. Exceptions to the Hearsay Rule

## Necessity and Reliability

### R. v. B. (K.G.)

Policy behind not allowing prior inconsistent statements for their truth:

- absence of an oath

- presence

- lack of contemporaneous cross-examination by opposition

**Prior inconsistent statements will only be admissible if they would have been admissible as W’s sole testimony** – ie. can’t be subject to some other evidentiary rule

**Reliability** threshold must be met (TJ discretion based on circumstances of case):

Met when circumstances in which prior statement was made provide sufficient guarantees of its trustworthiness:

1. the statement is made under oath or solemnization following a warning as to the existence of sanctions and the significance of the oath or affirmation

2. the statement is videotaped in its entirety

3. the opposing part has a full opportunity to cross-examine the W respecting the statement

Other circumstantial guarantees of reliability may suffice to make statements substantially admissible if the TJ is satisfied that those circumstances provide adequate assurances of reliability

**Necessity:**

**Can include when there has been a radical change in testimony – one story of events is held hostage by W**

Higher reliability decreases the level of necessity required for admission

No requirement that the W be unavailable

Flexibility in necessity criterion

TJ maintains discretion (even if all other reliability criteria are met)

* Must satisfy himself that the statement was not the product of coercion of any
* Also should not admit prior statement if the way the statement was elicited would bring the administration of justice into disrepute

### R. v. U. (F.J.) [Similarity between Statements]

Threshold of reliability can sometimes be met when the W is available for cross examination and where striking similarities exist between two statements – only where there is a basis for rejecting as unlikely all other possible explanations (other than that the two statements are true)

**Necessity requirement is seen as met whenever a W recants**

**Reliability threshold:**

- Cross examination – if W can’t be cross examined then this may impede jury’s assessment of reliability of statement (lowers reliability)

- criteria set out in ***B (KG)***

- striking similarities – TJ must be satisfied on BoP that there are striking similarities and there was no reason or opportunity for collusion or influence

**Jury instructions if statement is admitted:**

1. must be satisfied that other statement was in fact made

2. if similarities between two are sufficiently striking then you may draw conclusions from comparison about the truth of the statements

If reliability threshold isn’t met then the orthodox rule still applies – ie. prior statement can be used to impeach credibility or for the fact that it was made – not for their truth

### R. v. Parrott [Necessity]

Necessity – if W is incompetent to testify, unable to testify, unavailable to testify or if TJ is satisfied that testimony might be traumatic (***Khan***)

**Necessity must be determined on case by case basis (flexible) – reasonable efforts must be made to have W testify**

### R. v. Pelletier [Necessity]

Necessity – does not include those W who are not inclined to cooperate

***F(WJ)*** – fear or disinclination without more do not constitute necessity

### R. v. Khelawon [Principled Approach to Hearsay]

- Highly exceptional process – difficult threshold to meet

**“Hearsay” defining features**:

1. the fact that the statement is adduced to prove the truth of its contents

2. the absence of a contemporaneous opportunity to cross-examine the declarant

* Reasoning behind general exclusion of hearsay statements is difficulty in testing these statements
  + Adversary system is based on assumption that sources of untrustworthiness or inaccuracy can best be brought to light under cross-examination. **It is mainly because of the inability to put hearsay evidence to that test, that it is presumptively inadmissible**
* Onus is on party seeking to admit hearsay evidence to prove reliability and necessity on a BoP
* Even if two criteria are met (necessity and reliability) the TJ has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect

Steps in determining admissibility of hearsay evidence:

1. Determine if evidence is hearsay

Only when evidence is called for its truth will it constitute hearsay

2. Is statement otherwise admissible – no other exclusionary rule

3. Is there overwhelming evidence statement was coerced, pressured, etc.

4. Does the evidence fall within a traditional CL hearsay exception or statutory exception

If yes then the evidence is presumptively admissible

5. If the evidence does not fit within a traditional exception, the evidence must be analyzed under the principled exception to the hearsay rule (party wishing to lead must prove necessity and reliability on BoP):

6. The necessity criteria must be established – no way to lead evidence in traditional manner

May consider whether all reasonable efforts were made to secure the evidence of the declarant in a manner that also preserves the rights of the other party

7. Satisfy the reliability requirement in one of two ways:

The evidence is not admissible unless there is a **sufficient substitute basis for testing the evidence** (see ***KGB*** criteria) or the **contents of the statement are sufficiently trustworthy** (can consider: logic and flow of statement, motive to lie, how statement was received, contemporaneous, corroborative evidence, ability to cross-examine)

8. TJ still has discretion to balance probative/prejudicial – but it is rare to get through principled analysis and fail at balancing

HARRIS: once hearsay goes to jury it is likely to be used – it’s hard to undermine (lack of strong cross)

## Business Records and Statements in the Course of Business

### CEA s.30

**Business records to be admitted in evidence**

**30.** (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record. [Cannot contain something that would be inadmissible if person were on stand testifying. Have to produce record, state where it came from, etc. At that point if made in usual and ordinary course of business it is admissible for its truth]

### R. v. Wilcox

Facts: charged with over fishing. Someone has kept meticulous records in “crab book” that appear to set out the case. Crown was not able to get this evidence in at trial and appeals on that basis. W has no recollection of specific entries. W was under no duty to keep these records.

Admissibility:

First address whether the document is admissible under statutory or traditional hearsay exceptions

- if principled approach is still necessary, consideration of the traditional rules will assist with the application of the principled approach

- using traditional hearsay exceptions promotes predictability in the law (especially important for document evidence)

**1. CL Exception:**

CL business records exception to hearsay rule (***R. v. Monkhouse***) requirements:

A record containing:

1. an original entry – need not be made personally by a recorder with knowledge of the thing recorded (sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records)

2. made contemporaneously

3. in the routine

4. of business

5. by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it

6. who had a duty to make the record – seen as a circumstantial guarantee of document’s trustworthiness – enhances reliability

7. who had no motive to misrepresent

**2. Statutory Exceptions (*CEA* s.30)**

Admissibility under *CEA* s.30 requires: a record made in the usual and ordinary course of business

No requirement of “duty to record” – just has to be in “usual or ordinary course of business”

**In cases where admissibility under s.30 is highly debatable, turn to the principled approach to determine admissibility**

**3. Principled Approach**

**Threshold Reliability:** Requires considering two aspects:

1. whether the statement was made in circumstances tending to negate inaccuracy or fabrication. (Factors such as absence of motive to fabricate on part of declarant)

2. statement was made in circumstances which provide trier of fact with satisfactory basis for evaluating the truth of the statement (ex. routine nature of creation, relied on for business purposes, absence of motive to misrepresent)

* What gives document inherent reliability borrows from CL and statutory exceptions – having elements from those exceptions supports reliability in principled analysis
* These are not separate tests – **in making principled argument you should show how close you were to meeting other exceptions and why document is reliable by those underlying rationales**

**Necessity:** must be applied flexibly

“Unavailability” – impossibility of presenting the evidence in a non-hearsay form is not a strict requirement under the principled approach to hearsay

Necessity should be considered in relation to reliability – higher reliability may offset the fact that the evidence is only necessary for expediency or convenience (***KGB***)

Finding of necessity does not require that the proposed evidence is the only evidence available on the point (***Smith***)

The impossibility of a W who has kept a record giving meaningful evidence of the matters recorded will tend to support the admission of the record itself as the evidence

\*Must remember that the principled approach (threshold reliability and necessity) only deals with the hearsay aspect of the evidence

**Because it is a document, it must still meet the requirements for admissibility of documents – authenticity must be proven**.

## Statements Against Liberty Interests

Less likely to be lying if you are saying something against your interests

### R. v. Underwood

**Statements against liberty interests requirements**:

1. at the time of the declaration it was against his penal interest

2. the statement was made in circumstances where the declarant should have known it is against penal interest (ex. talking to lawyer doesn’t count)

3. that the potential for penal consequences was not too remote (doesn’t have to be immediate arrest)

This is a narrow exception – difficult test to meet

Court here finds CL exception met but goes to broader principled approach – this is useful for appellate review purposes

- Reliability analysis can be helped by the CL exception already being met

### R. v. Mapara [Framework for Hearsay Analysis]

Framework for considering admissibility of hearsay evidence:

1. Look to statutory exceptions

2. Look to CL exceptions

If 1 or 2 apply, evidence is presumptively admissible (if they don’t apply evidence is presumptively inadmissible)

3. Traditional exceptions can be challenge on basis of necessity and reliability of principled approach

Exception can be modified or even eliminated to bring it into compliance with principle approach

4. If you meet an exception still do the broad principled analysis

In rare cases evidence which falls within a traditional exception may be excluded because it fails necessity or reliability assessment (rare because of strong presumption of admissibility)

5. If evidence doesn’t fit an exception it may still be admissible if reliability and necessity are established on a voir dire

Presumptive inadmissibility is not as strong as presumptive admissibility (in #4)

Not easy, but not as high a threshold as in #4

## Oral History in Aboriginal Cases

### Mitchell v. Canada (Minister of National Revenue – M.N.R.)

Establishing an aboriginal right protected under s.35(1), claimant must prove (***Van der Peet***):

1. The existence of the ancestral practice, custom or tradition advanced as supporting the claimed right

2. that this practice, custom or tradition was “integral” to his pre-contact society in the sense it marked it as distinctive, and

3. reasonable continuity between the pre-contact practice and the contemporary claim

Because of nature of this inquiry (historical considerations required) it is inevitable that much of evidence will be in hearsay form

***Van der Peet*** – a court should approach the rule of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in.

(this guideline applies to both admissibility of evidence and weighing of aboriginal oral history)

Continued application of rules of evidence – but rules must be applied flexibly (***Van der Peet, Delgamuukw***)

Oral Histories:

Admissible where both useful and reliable, subject to TJ’s discretion

Usefulness (we NEED this evidence – court is strongly in favour of its admission):

1. may offer evidence of ancestral practices and their significance that wouldn’t be otherwise available

2. may provide aboriginal perspective on the right claimed

Reliability:

Not required to find a special guarantee of reliability

Inquiries into witness’ ability to know and testify to orally transmitted history may be appropriate – for admissibility and weight

Resist assumptions based on Eurocentric traditions – notions of reliability shouldn’t become biased about different cultural views of evidence

Interpretation of and weighing evidence once it has passed admissibility:

Generally at the TJ’s discretion

Courts must interpret and weigh evidence with a consciousness of the special nature of aboriginal claims – but this does not negate the use of general evidentiary principles

Equal and due treatment

HARRIS: this case shows sometimes you have to educate the court in reliability of new or different forms of evidence

# Admissions and Confessions

Usual hearsay rules don’t apply – these statements may be easier to lead

## Formal Admissions

Formal Admissions: parties agreeing on certain facts. Jury is told these things are proven, accept them as fact. Admission could be refused if it cannot be properly imparted to trier of fact without calling evidence

Criminal Code s.655

**Admissions at trial**

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

### Castellani v. The Queen

* **An A cannot admit a fact alleged against him until the allegation has been made**
* If attempting to use s.562 (now s.655) it is for the Crown to state the facts which it alleges and of which it seeks admission
* Admitting an allegation requires two persons, one who makes the allegation and another who admits it
* Can’t force the other party to make admissions (TJ has broad discretion to force admissions)
* Case is probably challengeable – we put high value on trial efficiency
  + Unreasonably refusing to make admissions could engage ethical issues

## Informal Admissions

### R. v. Palma

* Admissions of parties are not hearsay
* Opposing party’s admissions can be led without engaging hearsay
  + Your counsel can cross-examine
  + You have the opportunity to take the stand and refute or explain
* Doesn’t have to be a confession, just advances the other party’s case
* **If you decide to lead an admission the statement must come in as a whole**
  + Can make submissions to trier of fact to believe certain parts and not others, but the entire statement is admissible for its truth
  + Complete statement = things done in very close proximity

### R. v. Hunter [Partial Overhear – exception to presumptive admissibility of statements]

* An utterance is irrelevant and therefore inadmissible if there is no evidence as to the context in which it is made – courts are concerned with us getting the whole statement (***Palma***)
* If meaning is highly speculative then probative value is correspondingly tenuous and can be easily outweighed by potential prejudicial effect
* **Right to silence:** Following arrest an A is not obliged to make a statement – lack of questioning the arresting officers cannot be used against an A to support his guilt

### R. v. Allison

* Crown should be required to put forward the whole explanation given by an A to a Crown W, or none at all. **Can’t just put forward inculpatory content**.
* **Can be dangerous for A to testify**:
  + Subjects A to strong cross examination
  + Allows for introduction of prior criminal record

## The Voluntariness Rule

Probably the best chance to exclude statements

- Involuntary statements harm truth seeking goal

- Protecting integrity of justice system requires excluding these statements and discouraging this state conduct

**Applies where:**

1. Statement is made to person in authority

2. Statement cannot be obtained by fear of prejudice or hope of advantage

3. Don’t have to be in detention – applies any time you are talking to person in authority

### R. v. Oickle [Voluntariness]

**CL Confessions Rule** (CL confessions rule provides broader rights than the Charter)**:**

* It applies whenever a person in authority questions a suspect.
* **The onus is on the Crown to prove BRD that the confession was voluntary**.
  + Only time Crown doesn’t have to prove this is when A *explicitly* waives voluntariness
* Violation of the confessions rule always results in excluding the evidence (Charter violation only excludes where admitting the evidence would bring the administration of justice into disrepute)
* **TJ should review the entire context of each confession on a case by case basis and determine whether there is a RD that the resulting confession was involuntary.**

**Elements of Involuntariness:**

1. Legal inducement

2. Provided by someone who appears to be in legal field

3. Tied to confession – inducement must cause A to talk

**Inducements:**

* Require “quid pro quo”
* Oppression – can include exaggerating evidence against A, making up evidence
* Sometimes promises of medical/psychological help
* Can be in regard to 3rd parties – if sufficiently close relationship
* “It would be better” – sometimes dangerous phrase to use, where tied to implied threats, promises
* Spiritual or life inducements are acceptable – police aren’t perceived as in control of these things

**“Operating Mind Doctrine”** – requires that A has knowledge of what he is saying and that he is saying it to police officers who can use it to his detriment. Considered in conjunction with other factors of analysis.

**Police Trickery:** distinct inquiry. Specific objective is maintaining the integrity of the criminal justice system – look for police tactics that would “shock the community”

* + If police deception doesn’t raise to this level, it is a relevant factor in the overall voluntariness analysis
* **A confession will not be admissible if it is made under circumstances that raise a RD as to voluntariness – these include, threats, inducements and oppression and the entire context of the confession should be considered by the TJ**
* If TJ considered all relevant circumstances then a finding regarding voluntariness is essentially factual and should only be overturned for some “palpable and overriding” error

## What COnstitutes a Confession?

### R. v. Grandinetti [Person in Authority – Voluntariness analysis]

Process for assessing confession admission (***Hodgson***):

1. evidentiary burden on A to show a valid issue for consideration about whether when A made confession he believed that the person to whom it was made was a person in authority

2. burden shifts to Crown to prove BRD either that A did not reasonably believe that the person was a person in authority, or if he did that the statement was made voluntarily

* **Person in Authority TEST:** someone A reasonably believes to be a legitimate state representative. Largely subjective – A’s perception of person he is making statement to

A’s belief that he is speaking to a person in authority must also be reasonable

* + TJ must assess whether A reasonably believed the receiver of the statement was acting on behalf of the police or prosecuting authorities (***Hodgson***)
* **Undercover officer will usually not be a “person in authority”**
  + In rare circumstances where state has acted so distastefully, has “shocked the conscience of the community” or the statement is patently unreliable, it may be excluded without engaging voluntariness

Evidence of Possible Third Party Involvement

* Evidence of 3rd party involvement in offence is admissible if it is relevant and probative (***McMillan***)

**Sufficient Connection Test:** show reasonable connection between 3rd party and offence

Generally will have to show actual ability of 3rd party to be at scene or strong motive evidence

## Admissions of Co-Accused

### R. v. Grewall

Joint Trials:

* There is a strong presumption that people accused of the joint commission of a crime should be tried together
  + Policy: avoidance of inconsistent verdicts, cost, truth may not be discovered at either trial

Admissions

**CL Rule:** An out of court confession is only admissible against the A who made the statement. It is not admissible against the co-accused

Because it is a statement against interest (hearsay exception) – it remains hearsay against the co-accused (therefore inadmissible)

* Statement by A to police is only evidence against the co-A if the words are accepted by the co-A as true by words, conduct, action or demeanour
* Statements made in furtherance of a conspiracy between co-conspirators are admissible (hearsay exception)

To prevent improper inferences by jury:

1. can provide limiting instructions

2. can sever trials – rarely happens because of strong presumption against

3. can edit statement

Editing Statements

* May be necessary but must not affect the tenor of the statement
* Edited version must be free from unnecessary prejudice but must retain proper meaning
* Jury should have as much of statement as possible in order to place it into context to determine its truth
* Even though substantially irrelevant, contextual evidentiary relevance may allow admission
* Extent of admissibility of that contextual evidence and probative value must still be balanced against prejudicial effect

# Chapter 9: Exclusion of Evidence Under the *CHarter*

Limited to criminal trial

An attempt to balance individual interest in liberty against providing state with power to investigate

## Overview of Sections 10(b) and 8 of the *Charter*

*Charter*:

**s.8** – unreasonable search or seizure

* Engaged when state comes into space where individual has reasonable expectation of privacy
* We require that state have reasonable ground (rather than mere suspicion) to arrest and search someone

**s.9** – right not to be arbitrarily detained or imprisoned

**s.10** – provides rights to people who are arrested or detained

**s.10(b)** – right to retain and instruct counsel – right is triggered upon detention

**s.24(2)** – exclusion of evidence bringing administration of justice into disrepute

**Framework:**

1. Was right violated, if yes

2. Go into s.24(2) – evidence isn’t automatically excluded. Must balance values to see if including evidence serves administration of justice or puts system in disrepute

### R. v. Grant

**“Detention”** under the *Charter*:

(Also identifies point at which rights subsidiary to detention are triggered)

**1.** Detention refers to suspension of a person’s liberty interest by a significant physical or psychological restraint. Where individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would think he had no choice due to the state conduct

**2.** To determine whether the reasonable person in the individual’s circumstances would conclude that he had been deprived by the state of liberty of choice, you can consider the following (**objective test**):

a) circumstances giving rise to the encounter as would reasonably be perceived by the individual

b) nature of the police conduct

c) the particular characteristics or circumstances of the individual, where relevant

* **s.10(b) right to retain counsel arises immediately upon detention (even if just for investigative purposes)**
  + **at this point police are required to inform A of his rights and give him a reasonable opportunity to obtain legal advice if he chooses**
  + While in process of facilitating communication with counsel, no questioning allowed

s.24(2) Inquiry:

* Objective inquiry into the long term effect of admission of evidence on the overall repute of the justice system – not focused on the immediate case
  + **Whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute**
* Consider and balance:

**1. the seriousness of the *Charter*-infringing state conduct**

- More severe or deliberate (was breach knowingly or reasonable mistake) the state conduct the greater the need for courts to exclude evidence linked to that conduct

- Evidence that the Charter-infringing conduct was part of a pattern of abuse tends to support exclusion – court is trying to protect this A’s rights and the rights of everyone (even if they haven’t come before the court)

**2. the impact of the breach on the *Charter* protected interests of the A**

HARRIS: 1 and 2 = Seriousness of Charter Breach

Consider conduct of cops, and type of Charter right violated and how serious the violation was in terms of intrusion

**3. society’s interest in the adjudication of the case on its merits**

- Usefulness of evidence in search for the truth

- Reliability of the evidence should be considered – if the breach indicates that the evidence is less reliable, this favours exclusion (Reliability weighs strongly in favour of admission)

Application of Inquiry on Specific Types of Evidence:

**Statements of A:**

* Presumptive general (not automatic) exclusion of statements obtained in breach of the *Charter*
* Unlawfully obtained statements often violate the right to counsel under s.10(b). This undermines A’s right to make a meaningful and informed choice whether to speak, the related right to silence, and the protection against testimonial self-incrimination. These rights protect the individual’s interest in liberty and autonomy – creates a **strong presumption** that violation of these rights will lead to exclusion of the statement
* Statements taken in violation of the Charter are less likely to be reliable (similar to involuntary statements)

**Bodily Evidence:**

* No presumption of inadmissibility
* Requires a flexible test based on all the circumstances (eliminates the strict conscriptive = inadmissible test) – **look at particular evidence and context around it**
* Consider the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the A – the greater the intrusion on these interests the more important to exclude that evidence

**Non-bodily Physical Evidence**

* Search and seizure of areas that attract a higher degree of privacy will be considered a more serious breach
* Reliability issues with physical evidence will not generally be related to the Charter breach. This consideration tends to weigh in favour of admission – **may be presumption of admissibility due to high reliability**

**Derivative Evidence:**

* [physical evidence discovered as a result of an unlawfully obtained statement]
* No automatic exclusion
* “Otherwise Discoverable” – where the evidence would have been obtained in any event; under new s.24(2) analysis discoverability allows assessment of the causal relationship between the evidence and the Charter breach
  + **The more likely that the evidence would have been obtained even without the statement, the lesser the impact of the breach on A’s interest against self-incrimination**

# CHapter 10: Privilege

# Privilege Against Self Incrimination

Extremely broad, important right (***Grant***)

## Privilege of the Accused and the Right to Silence

***Hebert*** – when in custody s.7 includes Charter right to silence of A

### R. v. Singh [Voluntariness/Right to Silence]

Issue: A’s pre-trial right to silence under the Charter in relation to the common law voluntary confessions rule (***Oickle***) – tension between rights of A and societal interest in effective investigation of crimes

* **Voluntariness test and Charter application alleging that the statement was obtained in violation of the pre-trial right to silence are functionally equivalent**
  + Because the test for voluntariness requires objectively looking at whether A’s right to silence was denied this test is also determinative of s.7 inquiry
* Principle against self-incrimination: general organizing principle of criminal law
  + Both the confessions rule and the right to silence come out of this principle
* If right to counsel (under s.10) has been exercised this is one factor that can be considered in favour of voluntariness of A’s statement
  + Being informed of right to silence also favours voluntariness of statement
* **s.7 goes beyond the CL confessions rule in some circumstances:**
  + “detained statements” – where the right to silence of a detained person is contravened where an undercover state agent (either a police officer or an informant planted by police) actively elicits a statement from the A
  + “statutory compulsion” statements made in compliance with statutory obligations to speak
  + Exclusion of derivative evidence
* There is no outright requirement that the police stop questioning A when he exercises right to silence – this would deny state interest in investigating crime
  + In some circumstances continued questioning by the police may violate Charter right
  + Factors:
    - Number of times A asserts his right (part of the assessment but is not determinative in itself)
    - Signs of A’s resistance breaking down (frustration, emotional, etc.)
    - Language police use when ignoring A
    - Language used by A in refusing to talk
  + **The ultimate question is whether the A exercised free will by choosing to make a statement**
    - Consider the factors of the case and characteristics of A
    - Violation of right to silence by persistent questioning is possible but very difficult threshold for A to meet

### R. v. Turcotte [Decision strongly in favour of CL right to silence]

Facts: Farm murders. Crown argued silence as post-offence conduct from which to infer guilt

* **You have general right to silence in or out of custody**
* “Post-offence conduct” – circumstantial evidence which includes only A’s conduct which is probative of guilt (doesn’t include all conduct of A) (see ***White***)
* Individuals are under no obligation to assist police, in most circumstances, so their silence cannot on its own be probative of guilt (***BSC***)
* If Crown can establish a real relevance and a proper basis, evidence of silence can be admitted with an appropriate limiting instruction
  + TJ must instruct the jury about the proper purpose for which the evidence was admitted, the impermissible inferences which must not be drawn from it, the limited probative value of silence, and the dangers of relying on such evidence
* Exceptions to rule against using pre-trial silence against A:
  + Joint trial – where silence of co-A can be admissible to assess credibility but not to infer guilt
  + Where the defence opens the door and makes A’s silence relevant
  + Where A failed to disclose his alibi in a timely or adequate manner
  + If the silence is tied up in the narrative or other evidence and cannot be extricated
* Using silence as evidence of guilt creates a duty to respond to police questioning – despite a Charter protected right to the contrary
* Answering some police questions and not others does NOT waive right to silence

## Protection of a Witness

### Henry v. The Queen [Prior Testimony (s.13)]

* Purpose of s.13 is to protect individuals from being indirectly compelled to incriminate themselves – **it precludes incriminating evidence given in one proceeding from being used to incriminate that W in any other proceedings**
* s.13 is applicable and effective without invocation and even if W is unaware of his rights
* **“Proceedings” -** includes a retrial on the same indictment and **“witness”** also applies to an A testifying (voluntarily) in his own defence (***Dubois***)
  + Issue of testimony being compulsory or voluntary at first proceedings is irrelevant as the right focuses on the second proceedings – the time at which the previous testimony is intended to be used
* ***Kuldip*** – s.13 allows prior testimony to come in if inconsistent with current testimony – allows general cross examination for credibility assessment
  + Issues arise in determining between used for credibility and used for incrimination (particularly where juries are involved) – we are suspicious about juries being able to determine between these two uses
* ***Noel*** – only allowed prior “innocuous” testimony to be used for credibility – cross examination limited to innocuous testimony
  + This really prevented any prior testimony from being used – how could Crown determine in advance what would be innocuous
* Root of s.13 is *quid pro quo* (protection in exchange for compelled testimony). Root of *quid pro quo* is compulsion.
* **s.13 is not available to an A who chooses to testify at his or her retrial on the same indictment – they aren’t compelled, they volunteered testimony**
  + prior statement can come in, not for its truth, but Crown can aggressively cross examine and probably suggest it was true
* **prior compelled testimony of a W cannot be used at all in a subsequent trial against him (either for credibility or incrimination)**
  + prior testimony of W who is now A can never come in

HARRIS: these two rigid categories might be too inflexible

### Re Application under s.83.28 of the Criminal Code

Scope of s.83.28

* Purpose of Act – prosecution and prevention of terrorism offences
  + Permits compulsion of testimony on the part of the named W – confers greater investigative powers on the state in its investigation of terrorism offences
* Judge in investigative hearing viewed as protector of W
  + There to make sure evidentiary rules are followed; has discretion to tell W he doesn’t have to answer questions that break those rules
* CEA applies to judicial investigative hearings – therefore the named person is entitled to protection under the CEA (ex. spousal privilege, prior statements, etc.)
* Relevance (as CL rule) applies to judicial investigative hearings – boundaries of relevance determined by supporting materials for s.83.28 order as well as investigatory nature of the proceeding
  + CL rules of evidence must be followed
  + Judge is there to ensure the proceeding follows rules of evidence and constitutional protections

Section 7 of Charter – right against self-incrimination

* There are various times when societal interests will force you to talk (***SRJ***)
* Principles of fundamental justice must meet three criteria:

1. be a legal principle

2. sufficient consensus of vital or fundamental to societal notion of justice

3. capable of being identified with precision and applied to situations in a manner that yields predictable results

* Three procedural safeguards to self-incrimination available in investigative hearings:

1. **use immunity** – compelled testimony can’t be used directly against him in subsequent proceeding

2. **derivative use immunity** – compelled testimony can’t be used to obtain other evidence, unless discoverable through alternative means

3. **constitutional exemption** – form of complete immunity from testifying where proceeding is predominantly used to obtain evidence to prosecute the W

- Rarely engaged because state will usually have valid purpose

* The procedural protections available in relation to the judicial investigative hearings are equal to (and re: derivative evidence , greater than) the protections given to Ws compelled to testify in other proceedings
  + S.83.28(10) provides these protections only for subsequent criminal proceedings
  + SCC extends these protections to extradition and deportation hearings (para 78)

DISSENT:

BINNIE - this is an abuse of the powers conferred under the Act – the Crown is using it to obtain a mid-trial examination for discovery of the W before a different judge to determine what they will or will not say in the witness box (rather than calling the W in the normal proceedings)

* This would fall under “constitutional exemption”

LeBEL (and FISH) – the way this provision structures relations between the judiciary and the investigative arm of the police will always lead to this manner of abuse of power and eliminates the independence of the judiciary (finds Act unconstitutional)

# Privilege Attaching to Confidential Relationships

**Privilege –** some information cannot be led in court to protect the sanctity of the relationship the communication was in regards to

* Clear example of acceptance that there are some goals outside search for truth

## Solicitor-Client Privilege

Has almost received constitutional status

**Basic Requirements:**

* Relates to some form of communication
* Between client and qualified lawyer
* Communication was intended to be confidential
* Communication is about legal matters (personal or business advices is not protected)

If information fits within these criteria there is a strong presumption of protection

### R. v. Shirose

Facts: Defence in this case brought an application under s.7 of Charter to boot the case out of court because it might "shock the conscience" of Canadians to have cops breaking the law when they were gathering evidence - rare occurrence where we might say evidence is inadmissible because of the horrible way it is collected. Cop mentions that the police consulted legal advice when they considered doing this operation.

Existence of a Solicitor-Client Relationship:

* Based in policy that communications between the two are essential to the effective operation of the legal system
* Where legal advice is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived
* **Doesn’t require traditional lawyer/client relationship to engage rivilege**

“Future Crimes and Fraud” Exception:

* Where communications are made with a view to obtaining legal advice to facilitate the commission of a crime – whether lawyer knows or is duped
* Only applies where client is knowingly pursuing a criminal purpose
  + Privilege is not automatically destroyed if the transaction turns out to be illegal
  + There must be something to show that the advice facilitated the crime or that the lawyer otherwise became a “dupe or conspirator”

Full Answer and Defence:

* Exception to the privilege where following that rule would have the effect of preventing the A from making full answer and defence

Waiver of Solicitor-Client Privilege:

* **Explicit Waiver:** when party waives privilege, all communications are open, can’t just waive some privilege
* **Implicit Waiver:** A party waives the protection of solicitor-client privilege where he voluntarily injects into the suit the question of his state of mind – when the suit raises an affirmative defence that makes his intent and knowledge of the law relevant
  + **When you attempt to use some legal communication to your benefit at trial**
  + Court is reluctant to find implicit waiver

### R. v. Brown

* Issue of competing interests of solicitor-client privilege and A’s s.7 right to make full answer and defence
  + Solicitor-client privilege is not absolute and may sometimes yield to permit A to make full answer and defence
  + Policy – interest of avoiding wrongful convictions gives innocence a slightly higher value than solicitor-client privilege
* Test for yielding solicitor-client privilege (***McClure***) – very difficult to trigger
  + **Innocence at stake -** such that solicitor-client privilege should be infringed only where core issues going to the guilt of the A are involved and there is a genuine risk of wrongful conviction
  + **Stringent test, rare exception, last resort**

**First:** To satisfy the threshold test, A must establish that:

* + The information he seeks from the solicitor-client communication is not available from any other source; and
  + He is otherwise unable to raise a RD

**Then:** If the threshold is satisfied, the judge should move to the “innocence at stake test” which has two stages:

* + #1 – the A seeking production of solicitor-client communication has to demonstrate an evidentiary basis to conclude that a communication exists that could raise a RD about his guilt **[standard = could raise RD]**
    - Requires some evidence of contents of communication – mere fact of communication is not enough
  + #2 – if such an evidentiary basis exists, the TJ should examine the communication to determine whether it is likely to raise a RD as to the guilt of A

**[standard = necessary and likely to raise RD -** burden is stricter in this stage than in first stage**]**

* If innocence at stake test is satisfied, TJ should order disclosure of the communications that are likely to raise a RD
* Use and derivative use immunity is available to W who makes confidential communication and is forced to testify and break privilege
  + Testimony and derivative evidence can’t be used in subsequence trial – but can result in independent investigation
  + No transactional immunity

## Other Confidential Relationships

### R. v. National Post

**1. “Class Privilege”** – once relevant relationship is established, provides blanket confidentiality between confiding party and party in whom the confidence is placed in order to protect these types of relationships (regardless of judicial search for the truth)

* Stronger form of privilege – ex. solicitor-client, informer privilege
* **Once established as within a class privilege there is very strong presumption the information can’t be used in court**
* Law recognizes very few “class privileges” and it is likely that any future “class privileges” will be created by legislation, if at all

**2. Case-by-Case Privilege**

* More common form of privilege
* Provides greater flexibility but less certainty
* Consider – is this the type of relationship we want to encourage. If yes, then we balance protecting privilege against giving court access to information
* **Wigmore Criteria**:

1. Communication must originate in a confidence that the identity of the informant won’t be disclosed

2. The confidence must be essential to the relationship in which the communication arises

3. The relationship must be one which is in the public good to foster

4. **If all these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth**

* Most of analysis comes in here (#4)
* Always do this balancing even if particular relationship has been reviewed before