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# Introduction

* **Sources of evidentiary rules**: common law, Canada Evidence Act, Charter (influences the interpretation of the common law
* Rather than have hard and fast rules, courts adopt a principled-approach
  + Not formalistic
  + Think about principles behind the rule
  + Consider if those principles are still valid in the society
  + **Does the rule properly reflect the principles?**
  + **The more rigid the rule, the less often it reflects the principles**
* Admissibility? (*Noel*)
  + Overarching goal is fair trial and qualified search for the truth – see Noel for more goals
    - Truth Seeking
      * Truth is not the only guiding value
    - Doing Justice – so justice can be seen to be done
      * Justice may sometimes trump truth
  + **All comes down to weighing the good vs the bad**
    - * Probative value = value of the evidence for the search of the truth
      * Prejudicial effect:

1. Impede the search for truth.

2. Prejudicial effect on the accused.

3. Prejudice on the administration of justice or integrity of the court system.

4. Prejudice to someone’s privacy

## Appealing an Evidentiary Issue

* Appeal courts are usually defer to the trial judge in the application of the laws as long as it is reasonable
* Appeal courts more likely to overturn errors of law
* Steps in Appeal
  1. Convince the Appeal Court that there is an error at trial (ie. admitting or not admitting)
  2. Error must be a reversible error
     + Trivial/technical matters will likely not result in reversible error
  3. If defense appeals a conviction, court will consider application of the curative provisions of the CC
  4. If curative provisions does not apply
     1. Stay the proceedings under section 7/24(1) if person is facing a retrial for the 4th time (Hunter)
     2. Retrial
     3. Enter an acquittal (rare)
  5. If Crown appealing
     1. Most likely retrial
     2. Never enter a conviction

### Curative Provisions (s686(1)(b)(iii))

* Section 686(1)(b)(iii) of CC can be used to leave guilty verdicts intact **in exceptional cases only**
  + Evidence must be so overwhelming that a trier of fact would inevitably convict
  + Very onerous
  + Whether there is any possibility that the trier of fact would have had a reasonable doubt as to the guilt of the accused had the impugned evidence been removed from their consideration
  + Likely inappropriate to use this section to cure if there are multiple charges and also with included offences
* S.686(1)(b)iii- curative provision (Jolivet)
  1. Onus is on Crown to satisfy that there is no reasonable possibility that the verdict would have been different. Not enough to show that there is an evidentiary error.
  2. Consider seriousness of the error, effect it likely had on inference drawing process, and the probable guilt of the accused on the basis of the legally admissible evidence
* **judge screwing up an accused’s right to cross-examine cannot be cured by the curative provisions (Lyttle)**

## Judge vs Jury trials

* Judge alone trials are **more difficult to overturn** as the appeal courts will read the decision as a whole and have their reasons reviewed based on what they say and not on speculation. Trial judges are entitled to be taken at their word (O’Brien SCC 2011)
* Judge alone trials can be more **expedited** than jury trials because testimony at voir dire can be used instead
* Judge alone trials lower the prejudice as we trust the trial judge to be able to

## Critical evidentiary Concerns

* 1. Is the evidence **admissible?**
     + Judge always have a residual discretion to not admit evidence if probative < prejudicial
     + **Judge always acts as a gatekeeper** to decide what the trier of facts should hear, but err on the side of admissible and let the trier of fact weigh in
  2. What **purpose** can the evidence be used for?
     + Judge has the authority to edit the evidence to reduce prejudice
  3. Minimizing prejudice via various methods
     + Jury instruction
     + editing
  4. **Weight** (what strengths or weaknesses does it have?) anything to be particularly cautious about which will require **jury instructions**?

## Timing of evidentiary issues

* Pre-trial evidentiary rulings increases efficiency and allows counsel to prepare properly
  + **Critical for judges to remind juries how to use the evidence**
* During the trial (ie. witnesses bring up something that was unexpected or unforeseeable)
* Raised on appeal

## Qualified search for the truth (Noel)

* Law of criminal evidence often excludes relevant evidence **to preserve the integrity of the judicial process**, it is difficult to accept that courts should ever willingly proceed on the basis of untrue facts
* The court takes a flexible approach to the rules of evidence reflecting a keen sensibility to the need to receive evidence which has real probative force in the absence of overriding countervailing considerations
* Movement towards a flexible approach motivated by the realization, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination
* Motivation in reforming rules of evidence has been a genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for the truth
* Preventing jury from hearing evidence going to the heart of the accused’s credibility on the grounds that the jury are incapable of properly using it for this just purpose would add a barrier to the truth-seeking process which is both unjustified and unjust
* Ensuring that an accused receives a **fair trial**, **deterring police misconduct**, and **preserving the integrity of the administration of justice** are all laudable goals to which this Court must strive in its rule of evidence, sometimes to the detriment of full access to the truth
  + Where these goals are met, search for truth MUST be the preponderant consideration
* Section 5 of CEA and s 13 of Charter takes away fear of future incrimination and allows witness to assist the trier of fact

## Adversarial system of trial (Swain)

* Section 7- principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings
* **Pfj requires that an accused have right to control his defense, has control over decision whether to have counsel, whether to testify, and whether to call witnesses**

## Discovery in criminal cases (Taillefer; Duguay)

* Subtantial cause of wrongful convictions
* Investigation material is not property of the Crown but are key parts of the case for full answer and defense
* Crown has duty to disclose under common law and enshrined in the Charter s.7 and helps to guarantee the accused’s ability to exercise the right to make full answer and defense
  + Where accused demonstrates a *reasonable possibility* that the undisclosed information could have been used in meeting the case for the Crown, advancing a defense or otherwise, he has also established the impairment of his Charter right to disclosure
  + **Materials turned over does not have to be admissible**

### Crown’s duty to disclose

* Must disclose all “relevant” information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown’s discretion to refuse to disclose information that is privileged or plainly irrelevant.
  + One way around disclosures arguments is by **limited disclosure through undertakings**
    - But SCC says you can only do this for some materials but not for privileged materials owned by someone else (not the Crown)
* Crown can sometimes delay disclosure for security interests or if the evidence may jeopardize another ongoing investigation
* “**Relevance**” must be assessed in relation to the charge itself and to the reasonably possible defenses
  + One measure of “relevance” is its usefulness to the defense
  + **If it is of some use, it is relevant and should be disclosed**
  + Requires determination by the reviewing judge that production of the information can **reasonably be used by the accused either in meeting the case for the Crown, advancing a defense or otherwise in making a decision which may affect the conduct of the defense**
* Relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea
* All statements obtained from person who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses
* Concept of “relevance” favours the disclosure
* Threshold for disclosure is quite low
* Crown’s duty arises naturally from the Crown attorney’s role as an officer of the court in our criminal justice system
* Crown cannot rely on uncertainties in the law relating to the disclosure of evidence to justify the failure to disclose

### Infringement of right to full answer and defense

* + **Right to disclosure only one of the components of the right to make full answer and defence**
  + Infringement of right to disclosure not always an infringement of right to make full answer and defence
  + **Test**: to determine whether there is an infringement of the right to make full answer and defense, **the accused** will have to show that there was a **reasonable possibility** that the failure to disclose affect the outcome at trial or the overall fairness of the trial process
  + **Principles that apply in determining whether right to full answer/defense has been infringed**
    1. Undisclosed information must be examined to determine the impact it might have had on the decision to convict (easier for judge alone trials)
       - If at this stage the courts find reasonable possibility the reliability of the conviction is affected 🡪 new trial
    2. Then consider whether it affected the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence
       - Must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed due to non-disclosure
    - Onus is on accused to demonstrate there is a *reasonable possibility* that the verdict might have been different
      * Not a heavy burden like “certainty” or “probably”
      * Balance interest of a fair trial and public’s interest in the efficient administration of justice
    - Requires appeal court to determines whether there was a reasonable possibility that the jury might have had a reasonable doubt as to the accused’s guilt
      * **Not to examine evidence item by item, weigh in its entirety**
      * **Must make effort to reconstruct overall picture of the evidence that would have been presented if the information was disclosed**

### Quashing Guilty Pleas

* Accused must demonstrate that there is a **reasonable possibility** that the fresh evidence would have influenced his decision to plead guilty, **objective test**
  + Whether a reasonable and properly informed person in the same situation would have run the risk of standing trial

### Remedies for Lack of Disclosure

1. **Adjournment** so proper disclosure can be made (subject to Charter challenges for right to speedy trials)
2. **Inadmissibility** of evidence because prejudice to great
3. **Mistrial** – must show bad faith for the Crown and rare

# Probative Value, Prejudicial Effect and Admissibility

## Textbook (Paciocco)

* **Information can be admitted as evidence only where it is relevant to a material issue in the case**
  + Subject to an exclusionary rule or operation of an exclusionary discretion
* Receivability of evidence in a criminal case (test for probative value – **first 2 elements below, degree of probative value is important**)
  + Relevant (Arp)
    - a **tendency** to make the existence of any fact in proof of which it is offered more or less probable than it would be without the evidence
    - Concerned with the relationship between the item of evidence tendered and the fact that it is offered to prove (not a legal concept)
    - To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. **Evidence must simply tend to “increase of diminish the probability of the existence of a fact in issue**”
    - **No minimum probative value required for evidence to be relevant**
  + Material
    - A legal concept
    - Signifies that an item of evidence is concerned with an issue (or element) that is before the court
    - Defines the status of the proposition that the evidence is offered to establish to the case at large
* Degree of probative value:
  + Proximity of the evidence to the timing of the offence
  + Clarify of the evidence
  + General nexus between the evidence and the fact in issue
  + Avoid myths
* **Primary materiality**: whether the thing sought to be proved can matter given the facts in issue, substantive law, or the procedural rule
* **Secondary materiality**: used to describe evidence that is about other evidence in the case. Usually relate to the credibility or reliability of other evidence
* Courts do not formally distinguish between primary and secondary but there are strict limits on secondary material evidence because of concerns of time and complications
* Relevance of evidence may depend on context
* Circumstantial evidence may be too equivocal to be of any probative value
* Exclusionary discretion (exercised in an extremely guarded fashion)
  + Judges have discretion to exclude relevant and material evidence where its probative value is outweighed by its prejudice
    - But sometimes limiting instruction can be a cure and issue would be one of weight
  + Judge should consider value of the evidence (based on reliability and the strength of the inferences) and the possible prejudice
  + **Defense evidence excluded must have prejudice substantially outweigh its probative value (Seaboyer)**
  + Judges cannot exclude evidence based on how it was obtained but only based on its impact on the fact-finding process (may be different for Charter claims)
  + Judges can exclude evidence (even if it appears admissible under statute) to be in accordance with Charter
  + **No rule to allow inclusionary discretion BUT**
    - A court has residual discretion to relax in favour of the accused a strict rule of evidence to prevent miscarriage of justice (Seaboyer, ie. favour the defense)
    - Inadmissible evidence *may* be admitted by way of a Charter remedy
  + **Credibility and reliability** are to be considered in assessing probative value
    - Judges should exercise restraint by asking whether a reasonable trier of fact could find the evidence credible and reliable. BUT NOT SUBSTITUTE THE JUDGE’S VIEW
  + Discretion can also be used to sever parts of the evidence
* **Narrations** could be a “back-door” for including otherwise inadmissible evidence only where significant testimony cannot be recounted meaningfully and fairly without its disclosure
  + There should be clear judicial direction
* Judges are to consider probative value and prejudice and balance them. **Judges must consider whether judicial direction can remove prejudice**.

## Seaboyer Standard for Crown/Defense Evidence

* Principles governing the right to call defense evidence
  + In general, nothing is to be received which is not logically probative of some matter requiring to be proved. Everything which is probative should be received, **unless** its exclusion can be justified on some other grounds
    - A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial
  + **Admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission**
  + To exclude **defense**  evidence, the prejudice must **substantially** outweigh the value of the evidence
    - When it comes to expert evidence, the rules are somewhat the same between Crown and defense
  + **Circumstances where truly relevant and reliable evidence are excluded are RARE, especially when it is evidence going to the defense.**

# Types of Evidence

## Direct/Circumstantial Evidence(Dhillon)

* direct evidence goes directly to the proof of a fact in issue
  + ready-to-use evidence
  + evidence that does not require further inference
  + ie. eye witness, videotape, photos (depends on circumstances)
* circumstantial evidence is indirect evidence, it is evidence of a chain of circumstances from which you are asked to draw inferences which may lead to the proof of the fact in issue
  + inference must be drawn in order to use it
* direct evidence **has 2 possible errors**
  1. witness may be lying
  2. witness might be mistaken
* circumstantial evidence has **3 possible errors**
  1. witness may be lying
  2. witness may have mistaken
  3. **drawing the wrong inference**
* **an inference is a much stronger kind of belief than conjecture or speculation**
* **if there are no proven facts from which an inference can be logically drawn, it is impossible to draw an inference – at best this would be speculation**
  + need to prove the foundational facts in order to draw the inferences
  + *better* to have some direct evidence to support the circumstantial evidence
* to convict, the inference must be the only reasonable inference to be drawn from the proven facts

## Use of Evidence

### Robert

* case was **entirely circumstantial** – the fire started by the motor engine
* **standard of proof**: court cannot convict unless it is convinced beyond a reasonable doubt that the proven facts leads the court to no other reasonable conclusion than the guilt of the accused
  + **inexorable rule of law in Canada**
* charging jury on reasonable doubt (lots of deference)
  + charge the jury in accordance with the traditional language of proof beyond a reasonable doubt (Cooper)
  + charge the jury in accordance with that language and pointing out to the jury the other inferences that the defenses says should be drawn from the evidence and the necessity to acquit if any raised a reasonable doubt
  + charging the jury that it must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts
* **always for the Crown to show beyond a reasonable doubt that there was no other inference than the guilt of the accused**
* accused does not have to provide an explanation or prove anything
* using “proven facts” as a term is problematic from the accused pov because he does not have to prove anything
* concluding an explanation “might reasonably be true” raises the reasonable doubt
* should the evidence be subject to a reliability test before used for fact finding?
  1. **“Miller error”**
     + Evidence you “believe”, evidence that you “accept”
       - No prescreening of evidence
     + But given the high onus (beyond a reasonable doubt), there is a possibility of acquitting on evidence you do not believe
     + Defense has no burden to prove anything, but just needs to raise a reasonable doubt
  2. Each piece of evidence does not have to be proven beyond a reasonable doubt, evidence should not be looked at in isolation
  + Jury should not be booting out evidence before the fact finding
  + However, it does not stop jury from excluding evidence that is clearly unhelpful
* **even Crown need not prove specific facts, just overall verdict**
* finding of guilt can only be made where there was no other rational explanation for the circumstantial evidence but that the defendant committed the crime

### Baltrusaitis

* must look at jury charge as a whole, not just isolated passages
* credible + reliable = fact. Use facts to find guilt. SAME DOES NOT HOLD TRUE FOR acquittal
* should not prescreen evidence before using it to find facts

## Real/Demonstrative Evidence

* tangible evidence (such as the physical article) that gives first hand impression of the events
* counsel must always think through the **proper admitting process** for real evidence
  + authenticate a piece of evidence (must **confirm** its origin and **testify** to it)
* Crowns can bring in “example” physical evidence through an expert but very risky (if the original was destroyed) because it CAN BE HIGHLY PREJUDICIAL
* Crown can also use computer simulation to illustrate the case, with expert testimony BUT CAN BE HIGHLY PREJUDICIAL
* Demonstrative evidence involves use of visual aids to illustrate or explain (used to assist the witness)
  + Testimonial aid and not original evidence
  + Can be a backdoor for otherwise inadmissible evidence
  + Have to consider prejudice

## Primary concerns with Video/Photo Evidence (Penney)

* steps taken to ensuring security of, or restricting access to video
* calling expert what would/could result from these changes in formats (VHS->DVD, etc)
* continuous or edited?
* Human operated or automatic?
  + Where camera is operated by person who can selectively choose to file portions then
    - Does it still depict scenes of the crime?
    - Still silent, trustworthy, unemotional?
* Time-codes?
* Overly graphic that may raise the emotions of the jury and be prejudicial

## Test for Video/Photo Evidence

* **core threshold is whether the evidence is relevant and probative**
* should err on the side of inclusion rather than exclusion
* flaws in the evidence does not mean it is inadmissible
* similar to testimonial evidence by a silent, trustworthy, unemotional, unbiased and accurate witness

**TEST (Kinkead)**

1. Witness to **authenticate** the video/audio (on a balance of probabilities according to minority in Penney)
   * According to minority view in Penney
     + **Illustrative theory**: use video/photo to illustrate or clarify the evidence of a witness 🡪 have the witness confirm it is consistent with their recollection
     + **Silent witness:** the video/photo speaking for itself 🡪 have a witness talk about how the video was recorded and where
   * Determination of fact and credibility of the witness (Penney)
   * Also considered whether the video was altered/changed
2. Judge determine probative value of evidence assessing its tendency to prove a fact in issue in the case (relevant) including the credibility of the witnesses
   * **Accurately represent the facts or depicts the scene** (fundamentally misleading?)
     + Ie. selective filming vs continuous filming.
     + What it is intending to prove may change probative value (ie. ID = ok, the AR = maybe not)
   * What is the purpose of leading the evidence?
3. Judge determines the prejudicial effect of the evidence because of its tendency to prove matters which are not in issue (irrelevant) or because of the risk the jury may improperly use the evidence to prove a fact in issue
   * Will it inflame the jury with all the graphical content?
   * **Fairness and absence of any intention to mislead**
     + **key question for judge is: whether the video/photo distorts the facts (minority in Penner)**
       - distortion alters physical facts which are relevant to an essential issue 🡪inadmissible
       - distortion affecting non-relevant representations 🡪 only affects weight
   * prejudice must be based on common sense and have air of reality
   * length of video may create prejudice (Kinkead)
4. Judge must balance probative value against prejudicial effect having regard to the importance of the issues for which the evidence is legitimately offered against the risk that the jury will use it for other improper purposes, taking into account limiting instructions
   * Judge could exercise discretion to edit
   * Counsel can also consider making admissions and avoid this to be brought forth
   * Today we are more exposed to violence and there should be fewer cases for excluding video/photos because of its inflammatory nature (Kinkead)
   * Courts *may* not have jurisdiction to restrict jury from seeing evidence in private (Kinkead)

## Documents (Lowe v Jenkinson)

* Documents **must be authenticated in order to be admissible**
* Must let the other party see the entire thing – for fairness
* Call witnesses to authenticate
* Not objecting to the use of a document previously does not mean the person cannot raise the issue later on

# Judicial Notice

* Dangerous to ask judge to take judicial notice
* Usually applicable to uncontroversial topics
* **Counsel should call evidence even to establish very obvious issues**
* Adjudicate facts, legislative facts, social framework facts (Danson)
  + **Social framework facts**: will only have relevance if linked to the evidence in the particular case
    - General explanations about society and human behavior, aka social condition
    - Usually judges rely on this without saying a word
    - Courts can take judicial notice of recent unlawful conduct in community (Calderwood)
  + **Adjudicative facts**: facts that concern the immediate parties
  + **Legislative facts**: facts that establish purpose and background of legislation including social economic and cultural context. Facts of a general nature and subject to less stringent admissibility requirements
  + **Must have some evidence for adjudicative facts**
* More strict for adjudicative facts
* The more important the fact, the more stringent the proof required
* **Test (Olson)**
  + Threshold for judicial notice is **strict**
  + Court may properly take judicial notice of facts that are **so notorious** or **generally accepted** as not to be the subject of debate among reasonable persons OR capable of immediate and accurate demonstration by resort to readily accessible sources of **indisputable accuracy**
  + Judicial notice is acceptance of the truth of a particular fact without proof
  + Cannot take judicial notice that athletes have career advantages

# Extrinsic Misconduct Evidence

* Admissibility may depend on whether it is primarily material issue (ie. what happened) or a secondarily material issue (ie. credibility of witness)
* Proof of habit may be seen as part of character and must consider whether it will prejudice
* **Bad character evidence usually a root of wrongful convictions**
* **Dangers of using evidence of prior bad acts (Arp, Handy)**
  1. Distracts trier of fact
  2. Prejudice to the accused
  3. Time consumption
  4. If routinely admitted then police may simply round up the usual suspects for cases. We must assume usual suspects can start a new life.
  5. Jury may find that the accused is a bad person who is likely to be guilty
  6. May punish the accused for past misconduct
  7. May confuse jury by having their attention deflected from the main issues
  8. Jury made decide to change the onus of proof (ie. balance of probabilities instead)
* **General Rule (Arp, Cuadra):** Extrinsic misconduct evidence/bad character evidence that only shows the accused is the type of person that will likely commit offense is usually inadmissible because the prejudicial effect will outweigh the **slight** probative value, but admissible if (probative > prejudicial, for example):
  1. Relevant to some other issue beyond disposition or character (ie. narrative)
  2. Defense opens the door by questioning the inconsistency of a witness (ie. why they didn’t come forward earlier)
     + Witness can claim they were threatened by the accused’s bad character (Cuadra)
  3. Defense opens the door by pointing finger at other suspects or alleges crappy police investigation (Dhillon)
     + Officers can testify a link between the case against the accused vs abandonment of other leads (investigative hearsay)
     + Trial judge should give instructions on investigative hearsay and hold voir dire prior to defense opening the door
     + Probative > prejudicial
  4. Defense calls “good character” evidence which opens the door for Crown to attack using misconduct evidence
  5. Similar Fact test (Handy)
     + Must outweigh moral and reasoning prejudice
     + Inferences sought to be drawn must accord with common sense, intuitive notions of probability and the unlikelihood of coincidence
     + Coincidence has its limitations. More than once is likely not coincidence
  + Even if admissible, judge must give clear and specific limiting instruction on permitted and non-permitted uses for this evidence (BFF)
  + Cannot use it as a fast-track to guilt
  + A judge’s limiting instruction can sometimes reduce prejudice and make it admissible
  + Seriousness of the crime can be considered
* Jury Instructions (BFF)
  + must SPECIFICALLY instruct juries not to infer guilt from bad character
    - must tell jury how to use that evidence and what NOT to do
  + must minimize as far as possible the dangers of using this evidence
  + absence of comment or objection from counsel does not vitiate this duty
  + **simply cautioning jury not to use a conviction on one count before them as evidence of propensity to commit the other offence** is NOT ENOUGH to satisfy this duty. Must address this SPECIFICALLY
  + regardless of the relevant of the evidence, the limiting instructions must be given

## Similar Fact Evidence (Handy)

* Very powerful evidence if there were previous similar acts and more likely to have engaged in the conduct (unless they were acquitted of those acts)
* Similar fact evidence can boost credibility of witness/victim
  + Care must be taken that similar fact evidence is not used to boost witness credibility by blackening the accused
* High level of similarity will drive up the probative value
* **Narrow exception of admissibility**
* Similar fact evidence need not be conclusive (ie. need not prove guilt)
* Misconduct towards the victim not as inflammatory as misconduct towards others (aka not as prejudicial)
* If using similar fact to prove identity, must have a “**unique trademark**”
* **Complex instructions if there is more than 1 charge on the case**
  + Not to use evidence in 1 count to convict on the other
  + Must consider evidence to every count separately
* Similar fact evidence may be easier to introduce through co-accused but still need to weigh prejudice

**Test for admitting similar fact evidence**

1. **Probative value of the evidence**
   1. Potential for collusion (judge consider on a balance of probabilities)
      * assess the **relevance** and the **weight** of the disputed evidence to arrive at a probative value
      * Cannot draw sharp line between weight and admissibility, admissibility depends on weight in this case
      * Where there is an air of reality to the prospect of collusion it is not incumbent on the defense to prove collusion. The Crown is required to prove on balance that evidence is not tainted by collusion
        + Air of reality = more than proof of opportunity (ie. simple contact)
   2. Identification of “the issue in Question”
      * Valued of the evidence in relation to an issue in question
      * Trial judge must instruct that the evidence only be used for the issue in question
      * Crown must identify the live issue and if no longer an issue then exclude the evidence
      * Minor issues are more likely to be given less weight and excluded
      * Should not see “issue in question” as categories for admission
      * Should be more specific in identifying the issue instead of just “credibility”
   3. Similarities and dissimilarities between the facts charged and the similar fact evidence
      * Degree of similarity depend upon the issues in the particular case, the purpose for which the evidence is sought to be introduced and the other evidence
      * Cannot use similar facts that have been acquitted or stayed because it is a policy that prevents collateral attacks on accuracy of prior dispositions
        + NZ and UK does not adopt the Canadian position
        + There should be weighing the probative value and prejudice, no hard and fast rule
      * List below is helpful but not exhaustive
      1. Proximity in time of the similar acts
         * Remoteness in time may affect relevance and reliability
      2. Extent to which the other acts are **similar in detail** to the charged conduct
         * Substantial dissimilarities may dilute probative strength
         * Does not need to be a technical similarity
         * Generic similarities that are present in most instances of the same crime are not considered
      3. Number of occurrences of the similar acts
         * One occurrence is sufficient
         * But higher number of occurrences 🡪 lesser degree of similarity required
      4. Circumstances surrounding or relating to the similar acts
         * What was said before, what was said after, etc
         * Where it occured
      5. Any distinctive features unifying the incidents
      6. Intervening events
   4. Strength of the evidence that the similar acts actually occurred
      * Analysis need not go further if the similar fact evidence cannot support the inferences sought by Crown
      * **Credibility of the similar fact evidence is a factor the trial judge must consider**. Ultimate assessment of credibility is for jury (goes to weight)
      * Evidence could potentially be too prejudicial unless judge finds it reasonably capable of belief
      * General tendency not as strong as specific tendency and may be determinative of whether it is admissible or inadmissible
2. **Assessment of the prejudice**
   1. **Moral prejudice** (potential stigma of bad personhood)
      * Beware not to undermine s7 and 11d of the Charter
   2. **Reasoning prejudice** (confusion, distraction, etc)
   * Countervailing factors (helpful but not exhaustive)
     + Inflammatory nature of the similar acts
     + Whether the Crown can prove its point with less prejudicial evidence
     + **Possibility of collusion or taint**
       - **Reason to tell the same story when it didn’t happen to them?**
       - **Defense can show the victim and similar fact witness talked to each other**
     + Potential distraction of the trier of fact from the proper focus
     + Undue time consumption
   * Reducing prejudice can be done by editing evidence
   * Must consider whether the evidence will come in through another form anyways (ie. Section 12 of the Canada Evidence Act – examination as to previous convictions)
3. **Weighing up probative value and prejudice (balance of probabilities, onus on Crown)**
   * Justice includes society’s interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process

# Evidence about Other Possible Suspects (Grandinetti)

* Accused can adduce defense evidence to show a third party committed the offense **but** there must be other evidence tending to **sufficiently connect** the third person
  + This connection is required because it may prejudice the trial and confuse the jury if there is no sufficient connection
  + Counsel can cross-examine crown witnesses or produce other evidence to create the sufficient connection

# Post Offense Conduct

* Conduct after an offense that helps **infer** the person is guilty of the offense
* Circumstantial evidence, **subject to competing interpretations weighed by the jury (White)**
* **Likely cannot convict on this alone but powerful**
* Dangerous piece of evidence linked to wrongful convictions
* Shouldn’t draw inferences from how emotional people seems
* law does not impose any duty to speak and so any refusal to do so cannot imply guilt. Consequently, silence can rarely be admitted as evidence of post-offence conduct (Turcotte)
* **must have one rational inference that the person has committed the crime**, it cannot be speculative, in order to have probative value (threshold for admissibility)

## Danger of using Post Offense Conduct (White)

* **Jury’s failure to take account of alternative explanations for the accused’s behavior and mistakenly leap from such evidence to conclusion of guilt**

## Rule for admitting post-offense conduct (White)

* Cannot admit conduct of refusing to cooperate with the police, but if defense makes it an issue then…**they opened the door**
  1. Jury should not be permitted to consider evidence of post-offense conduct when the accused has admitted culpability for another offence and the evidence cannot logically support an inference of guilt with respect to one crime or another (usually narrow circumstances) – it is an issue of relevance
     + Trial judge should instruct jury when the evidence has no probative value (in narrow circumstances)
     + Key: What is the Crown trying to prove?
     + Admissions by the defense may narrow the issue in dispute
     + Examples (not a formula):
       - Accused admits the AR but denies the level of culpability 🡪 no probative value, instruction required
       - Accused’s identity in question (or unsure if they are involved) 🡪 some probative value of an unlawful act, instruction NOT required
       - SLIGHT possibility for post-offense conduct to support distinctions between levels of culpability
         * Ie. the post-offense conduct indicates an overall plan
  2. Jury should be properly instructed that the evidence not be misused and look at evidence as a whole
     + Remind juries that post-offense conduct may have multiple inferences
  3. Generally, post-offense conduct inferences and weight are questions for the jury. No probative value instructions are required in limited circumstances
  4. Trial judge still has discretion to not admit if probative < prejudicial.

## Standard of proof for post-offense conduct (White)

1. Even if “no probative value” instruction not required, judge should still instruct on the proper use and remind jury not to leap to conclusion. People can flee for innocent reasons
2. Same evidentiary burden as other evidence – must evaluate as a whole and not separately
3. Proper remedy for dangers of post-offense conduct is proper jury instruction

## Post-offense conduct inferences (Peavoy)

1. **Cannot** be used to determine the level of culpability with respect to included offenses (ie. manslaughter vs murder)
   * In rare circumstances could be used to determine culpability if there is a drastic divide between the offenses (White)
2. **Cannot** be used as self-serving/no-risk evidence (ie. offering to take a polygraph when there is clearly no repercussion)
3. **May be** of assistance in determining whether the accused has committed an unlawful act (ie. whether there was culpable homicide)
   * Prove identity
4. **Crown can also use this to show inconsistency with a defense that is put forth**

* May have some evidentiary value in rebutting defenses put forward which are based on an alleged absence of the required culpable mental state
* Cleaning up the scene is not consistent with self-defense or intoxication defenses
  + But there might be some cases where the accused is not knowledgeable and cleaning up is not inconsistent
  + Self-defense: use evidence to show consciousness of guilt
  + Intoxication: not to use evidence for consciousness of guilt (showing guilt) but just to show the person had the proper cognitive function (rebutting intoxication)
  + Judges must instruct how to use the evidence for the 2 defenses

1. Support an inference of innocence (BSC)

## Prejudicial Remarks in relation to PoC (Peavoy)

* Crown comments can be inappropriate, for example:
  1. Suggesting the defense tailored story to the disclosure material
  2. Making statements without support from evidence and invited jury to draw improper inferences for some of the defenses
* **Dealing with prejudicial remarks (from appeal court pov)**
  1. Whether the trial judge erred in not commenting on the prejudicial remarks of Crown in his charge to the jury
  2. If there is an error, whether the appeal can be dismissed under s.686(1)(b)(iii) of the CC
  + **No general rule that improper Crown address to the jury is an unfair trial**
* Judges have duty to put forward defenses that have an air of reality but judge should (highly preferred) instruct jury that a particular defense is not the position put forth by the accused (not a reversible error)

### R v B.(S.C.) (consciousness of innocence)

* **General principle**: cannot produce self-serving evidence
  + Except where the evidence is tangible (ie. person giving up their rights and assisting the police, etc)
  + But under the Seaboyer standard, should be easier for accused to introduce
* Possible to get some “innocent evidence” in as part of the narrative while cross-examining the investigating officer
* A risk that people with legal knowledge can “make-up” this evidence
* **Accused’s offer to cooperate and provide samples and tests**
  1. Offering to take a polygraph test, **alone**, cannot be used as evidence (must have other stuff to add in)
     + Reason is that this is basically evidence that the accused made a consistent statement, little probative value
     + **Results from polygraph tests are inadmissible anyways…**
     + Favourable inference can be drawn only if accused **knows** that the polygraph test can be used against him in trial
  2. **Factors making it admissible:**
     + Not knowing what other physical evidence the police had and voluntarily providing various samples
     + Prior to seeking consultation with counsel
     + Position was that the accused was not involved at all (not an issue of consent or similar)
     + Knowledge of the accused (whether they have an idea that the evidence can be used against them)
     + The materials turned over would be admissible in trial
  3. Must evaluate this evidence on a **principled-basis**
     1. Inadmissible (for accused) if prejudicial substantially outweigh probative
     2. In admissible (for Crown) if prejudicial outweigh probative
  4. **Risks/Dangers**
     1. Reading too much into the behavior
     2. May be overemphasized by trier of fact
     + Risk is best avoided by using discretion to exclude
  + **Crown may object to admitting this evidence and judges should weigh case-by-case**

## Limiting Instructions for Post-Offense Conduct

1. Sometimes a no probative value instruction is required
2. Instruction on what elements can be proved by this evidence
3. Warn about the dangers of using post-offense conduct (ie. people run for different reasons) and not to be a fast track to conviction
4. Must remind jury that the reasonable doubt standard applies to the evidence as a whole

# Bad Character of the Witness

* Counsel’s reaction at trial is very important in appellate reviews – one of the factors
* Can also attack credibility through bad character of the witness
* **Crown cannot lead good character evidence for the witnesses**

## Section 12 of CEA – Examination to previous convictions

**Examination as to previous convictions**

12. (1) A witness [*including the accused, but have to hold Corbett hearing first*] may be questioned as to whether the witness has been convicted of any offence [*may include pardons but no case law*], 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.

**Proof of previous convictions**

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

**How conviction proved**

(2) A conviction may be proved by producing

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and

(b) proof of identity.

## Prior Convictions of the Accused (Corbett)

* Section 12 of the Canada Evidence Act allows examining a witness’ past criminal record
* **Prior convictions must not be used to infer guilt and should be limited to issues of credibility**
* **Section 12 purports to make prior convictions admissible on the issue of credibility only**
* Trial judge is duty bound to instruct on the limited permissible use it can make of such evidence
* Best way to balance and avoid the risks is to give jury all the info and give clear direction. This is better than excluding evidence from them
* So long as clear instructions are given it can be argued that the risk is outweighed by the serious risk of error should the jury not see the info
* **Does Section 12 leave trial judges discretion to exclude prior convictions? YES, because it may undermine the right to a fair trial**
  + **Only applicable when accused decides to testify**
    - **If not then have to consider introducing through similar fact**
  + The accused is a special witness who would have liberty at stake
  + Court is reading in a special exception for the accused and special hearing (**Corbett hearing**) before introducing accused’s criminal record
  + **Only the fact** of the convictions come in, no details (unless it comes in as similar fact evidence)
    - More flexibility for witnesses other than the accused
  + **Balancing factors:**
    - Nature of the previous conviction
      * Whether it indicates a crime of dishonesty
    - remoteness or nearness to the present charge
      * greater similarity 🡪 greater prejudice
        + because there is a much higher risk of improper use
      * keep in mind the rules of similar fact evidence
    - interest of **not distorting** the view presented to the jury
      * accused should not be shielded when he opens the door or starts challenging other witnesses based on prior convictions
  + **admitting this evidence for credibility ONLY and consider evidence as a whole🡪 must have instruction**

## Other Discreditable Conduct of Witnesses

* Crown witnesses are more likely to be questioned about discreditable conduct (other than convictions) and with more freedom, because of the flexibility for defense (Cullen, Titus)
* Counsel can broadly cross-examine, even issues not in front of the courts, but cannot go too far (Cullen)
* Purposes of cross examination: (Titus)
  + test credibility
  + Explore frailty of the Crown case
  + Accused is deemed innocent until proven guilty
  + Right to explore all circumstances capable of indicating that any of the prosecution witnessed has a motive for favouring the Crown

# Vetrovec Witness

* Witnesses with a **serious history** (or a **big motive**) can cause a **severe** credibility issue that may raise the question of whether to hear their evidence
* Options to deal with this on a policy level:
  1. Exclude the evidence with severe problems
  2. Allow the evidence and let cross-examination handle this and jury can weight it
  + **Solution: evidence are allowed but subject to special rules**
* **Defense witnesses should not be classified as vetrovec and judges can “alert” the jury (but not with the vetrovec framework)**

## British law

* Very narrow and applied to the accomplice only
* If accomplice testifying, only rely on it if there is very strict corroboration on the key issues (ie. involvement of the other party)
* Canadian law is not limited to only accomplices
* **Canadian law does not require such strict corroboration and look at the story as a whole**

## Dealing with Vetrovec witnesses (Khela)

* 1. Judge should **objectively** determine whether there is a reason to suspect the credibility of the witness according to the traditional means by which such determinations are made.
     + Consider the factors below.
       - Involvement in criminal activity
       - A motive to lie by reason of a connection to the crime
       - Previously given inconsistent statements
       - Unexplained delay in coming forward with the story
       - Providing different accounts on other occasions
       - Lies under oath
     + **Not about whether the trial judge personally finds the witness trustworthy but whether the factors signals that caution is required**
     + **Jailhouse informants are always vetrovecs**
     + Receiving a huge benefit might be an overwhelming factor that puts someone as a vetrovec witness
     + Labeling someone as vetrovec is at discretion of judge, appeal courts may reverse
  2. Judge assess the importance of the witness to the Crown case
     + Minor role = unnecessary to burden the jury
     + More important = greater duty to warn
  3. Framework of “clear and sharp warning” to jury
* No particular category of witness requires this warning
* Warning need not be framed technically or formulaic
* Up to the trial judge to craft the caution.
* **Focus on content, not form**
* **Defense counsel should identify for the jury’s benefit evidence that cannot be considered confirmatory at all**
  + - **Draw attention of jury to the testimonial evidence requiring special scrutiny**
      * Akin to applying the reasonable doubt standard only to this evidence
    - **Explain why this evidence is subject to special scrutiny**
      * Highlight to the jury the reasons why the witness is put in this category
      * review the key points of the witness testimony
    - **Cautioning the jury that it is very dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true**
      * must be clear not to invite the jury to substitute the view of the judge for their views
      * should be **clear** to the jury that even if they believe this evidence, it is not a fast-track to conviction. Must still consider as a whole whether the Crown has proved its case beyond a reasonable doubt
    - **The jury should look for evidence from another source tending to show that the untrustworthy witness is telling the truth**
      * **[Harris, Vetrovec Cautions and Confirmatory Evidence: A Necessarily Complex Relationship]**
    - **Independent confirmatory evidence that confirms a material part of the vetrovec testimony**
      * + **Independent**
      * Vetrovecs corroborating each other should not be considered independent
        + **Relate to material aspect**
        + **Support a rational inference that the witness is more likely to be telling the truth**
    - judge should warn the jury again even if there is confirmatory evidence
      * [Khela]
    - Confirmatory evidence need not implicate the accused or prove the key issues, but must restore faith in *relevant* aspects of the case. Just need evidence to convince court the witness is telling the truth
      * Does the evidence strengthen our belief that the suspect witness is telling the truth?
    - Confirmatory evidence need not confirm the issue in dispute (ie. identify), as long as the confirmatory evidence “boosts” credibility
      * [Khela - **minority**]
      * Thinks it has detrimental effect and is unworkable/unnecessary
      * Just instruct the jury to look at the rest of the Crown evidence to see if they are more confident in the vetrovec story
    - Should tell the jurors to focus on credibility. Don’t require independence and materiality
      * [Dhillon – **confirmatory evidence case**]
    - **Must have proper instruction on evidence capable of confirming the testimony of informant**
      * Errors – evidence that cannot be confirmatory
        + Background facts common to the accused and witness is not confirmatory
        + Accused more likely to speak to witness is not confirmatory
        + Possibility of a jailhouse informant’s story being generally plausible is not confirmatory evidence
        + Absence of any benefit to witness should be scrutinized with skepticism. Informants sometimes come forward for real or perceived benefits not know to the court

No benefit does not strengthen credibility but negatives a reason for disbelieving him

* + - * + Witness pleading guilty to previous charges is not relevant for credibility
      * **Confirmatory evidence should be about the case and not peripheral** 
        + But note that the vetrovec could have had access to info about the case
    - **Defense counsel should object to such confirmatory evidence and could be fatal**

## Excluding Vetrovec Testimony (Murrin)

* **Accused is not entitled to have evidence excluded** even when the vetrovec are manifestly unreliable or even if the judge does not believe it
  + **An issue of weight, not of admissibility**
* **vetrovec are presumptively admissible**
* Judges are obligated to exclude evidence which will be unfair to the accused. BUT unfair does not mean unreliable.
* Trial judge is never to direct an acquittal on the ground that in his opinion the evidence is manifestly unreliable

# Eye-Witness Testimony

* Eye witness is direct evidence
* Strongest coming from a person that is independent of the proceeding
* **Number one source of wrongful convictions**
  + **Identification evidence cases create a real danger of wrongful conviction**
* Witnesses can make honest mistakes and attaching unreliable images to the case

## Judicial List of Considerations for Eye Witness Testimony (Gonsalves)

* Was the suspect a complete stranger or known to the witness?
  + More likely to identify someone you know
* Was the opportunity to see the suspect a fleeting glimpse or more substantial?
* Dark or well-illuminated?
* Was the sighting by the witness in circumstances of stress?
* Did the witness commit the description to writing or report description to police in a timely way?
  + Eye witness out-of-court ID of a suspect, a prior consistent statement, is admissible as exception to hearsay
    - Pointing out the accused in court has little probative value because it is so obvious
    - Out-of-court ID right after the incident is much more probative
* Is the witness description general, generic or vague or is there a description of **detail** including distinctive feature of the suspect?
* Were there intervening circumstances, capable of tainting the independence of the identification? (ie. **collusion**)
* Has the witness described a distinguishing feature of the suspect not shared by the accused (or vice-versa)?
* Is the eye-witness identification unconfirmed?

## Duty of Police Officers (Gonsalves)

* Desirable for police to document and detail statements made by identifying witnesses
* Must consider:
  + Conditions under which an observation is made, the care with which it is made, and the ability of the observer
  + Method used to recall or refresh recollections of a witness who is to be relied upon to identify a person
    - If witness does not know accused, greatest care must be used to ensure absolute independence and freedom of judgment
  + Means employed to gain the evidence
* **Police officer must exercise utmost care to ensure identification is made unassisted**

### Photo Line-up Recommendations (Gonsalves)

* Court of appeal not very deferential with taints

1. Contain at least 10 suspects
2. Photos should resemble closely as possible to description by witness
3. Should be recorded on video or audio. Essential to have an officer who does not know who the suspect is do this line-up
4. Before the line-up officer should confirm he does not know who it is.
5. Advise witness to be thorough and present photos sequentially (not all together)
6. Note all comments by witness and obtain signature
7. Police officer should not speak to witness after line-up. This casts suspicion that the ID was reinforced.
8. Should have an officer not involved in the investigation do the line-up. Perhaps even 2 officers.

## Duty of Courts (Gonsalves)

* **Deficiencies in police procedure does not render it inadmissible, it is a matter of weight**
  + Appeal courts look to compelling confirmatory evidence to assess the safety of conviction
* Evidence is not excluded under S24 of Charter when identification is tainted by inappropriate procedures
* Judge should give a general caution about eye witness testimony, particularly in case of stranger IDs
* **Must consider the totality of the identification evidence**

# Common Knowledge

* **Opinion = inference from observed fact**
* **General rule is opinion evidence is inadmissible**

## General Rule (Graat)

* Failure of counsel to object to the admission of inadmissible evidence in this circumstance is not fatal
* **Need to distinguish between expert and non-expert opinions: just giving an opinion does not make someone an expert**
* **Subjects upon which non-expert witnesses are allowed to give opinion include**
  + Identification of handwriting, persons and things
  + Apparent age
  + Bodily plight or condition of a person, including death and illness
  + Emotional state of a person (distressed, angry, aggressive, affectionate or depressed)
  + Condition of things (worn, shabby, used new)
  + Certain question of value
  + Estimate of speed and distance
* **Determining whether an opinion is admissible is discretion of trial judge, unless in one of the categories commonly allowed**
  + **Consider whether the trier of fact is in as good a position as witness to form the relevant conclusion**
  + **Whether it is necessary for the witness to resort to compendious statement in order to communicate effectively what was observed**
* **Opinions of police should be treated like opinions of lay witnesses, no special treatment**
  + **Fact that police has more experience does not mean it should be preferred**
  + **May even lower the weight if the officer is closely associated to the case**
* **No reason in principle why a lay witness should not be permitted to testify in the form of an opinion if it more accurately expresses the facts he perceived**
  + There is a high risk of a distorted picture by just getting the facts and not the opinion
* Usually not a matter where scientific, technical, or specialized testimony is **necessary** in order to for the court to understand the relevant facts
* Non-expert witnesses cannot give opinion on legal issues

# Expert Evidence

* Presumptively **inadmissible** unless Mohan factors are satisfied
  + Rules apply when a witness purports to offer an opinion that requires special training/education to arrive at (beyond common sense)
  + Rule does **not** apply when specially trained witnesses simply describe factual observations
* Assist the trier of fact to draw inferences that they may not otherwise be able to draw
* Encyclopedia and research reports likely not admissible because it cannot be cross-examined
* Psychiatric evidence that the accused (because of his mental state) is unlikely to have committed the crime is generally inadmissible (BSC)
* Defense may, however, lead expert evidence of an acccused’s disposition where the crime alleged is one that was committed by a person who is part of a group possessing distinct and identifiable behavioural characteristics. Defense may lead evidence to show that the accused’s characteristics excluded him from that group (BSC)

## Dangers of expert evidence (DD)

* Misuse
* Expert may not be impartial and acting as advocate for one side
* Difficult to cross-examine by counsel
* Introduction of otherwise inadmissible material
* Time consuming and expensive

## Section 7 of CEA – limiting number of experts

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.

## Section 657.3 of CC - Procedure for Expert Testimony

**Expert testimony (ss1)**

* **an expert may be given by means of a report accompanied by the affidavit or solemn declaration of the person** as long as before the proceeding, the other party is given a copy of the affidavit or solemn declaration and the report and reasonable notice of the intention to produce it in evidence.

**Attendance for examination (ss2)**

* court may still require expert to attend for cross-examination

**Notice for expert testimony (ss3)**

* 30 days notice to other party (or time otherwise set by the courts)
* Must give other side notice of the qualifications of the expert and description of the expertise
* **Crown** has additional burden to give a description of the intended testimony of the expert
* **Defense** must give Crown notice no later than the close of the Crown case

**If notices not given (ss4)**

* courts may adjourn and order party to disclose pursuant to ss3

**Additional court orders (ss5)**

* court can do the same as ss4 if a party did not have adequate time to prepare

**Use of material by prosecution (ss6)**

* **an expert’s material cannot be used by the prosecution unless the expert testifies or accused consents**

**No further disclosure**

* expert information on this proceeding can only be used for current proceeding

## General Rule (Mohan – on a balance of probabilities)

* Even if criteria is satisfied, trial judge has an ongoing discretion to exclude if its manner of presentation causes prejudicial effect to outweigh its probative value
  1. Relevance to a material issue
     1. Logically relevant to the case
     2. Cost-benefit analysis (keep in mind Seaboyer)
        + Questions to consider
          - Is the evidence likely to assist the jury? Or likely confuse them?
          - Is the jury likely to be overwhelmed? Or can they keep an open mind?
        + Finding benefit
          - Extent the opinion is founded on proven facts
          - Extent which the proposed expert opinion supports the inference sough to be made from it
          - Extent to which the matter tends to prove an important issue in the proceedings
        + **Question reliability when novel theories proposed, burden on party to disprove**
        + **Costs**
          - Prejudicial effect of the evidence
          - Practical costs
          - Prospect it will confuse the trier of fact
        + **Consider procedural safeguards**
          - Jury direction
          - Cross examination
          - Editing of the opinion
  2. Necessity in assisting the trier of fact (absolutely necessary? DD)
     + Prevents experts in matters that triers of fact can figure out themselves
* Necessity should be a controlling factor for admitting experts
  + A finding that some aspects of the evidence might reasonable have assisted the jury is not enough
  + Must be necessary in order to allow the fact finder to appreciate the facts due to their technical nature OR to form a correct judgment on a matter if ordinary persons are unlikely to do so without the assistance of persons with special knowledge
* **Jury instruction could be used in place of expert evidence when**
  + No benefit derived from the added flexibility of the expert evidence
  + Nothing to be gained from cross-examination
* Limitations on use of jury instructions in place of expert evidence
  + Controversy in the particular field
* When defense raises an issue, it may be more appropriate to meet it with defense evidence. Crown shouldn’t present expert evidence out of the blue

1. Absence of any other exclusionary rule
   * + Any other problems that may arise even if you meet the other 3 criteria?
     + Risk of usurping the trier of fact?
     + Risk of having too much technical language
     + Expert evidence can be an exception to the exclusionary rule relating to character evidence if coming from a qualified expert
2. Properly qualified expert
   * + **The closer an opinion on an ultimate issue, the greater scrutiny**
     + Deficiencies in expertise affect weight, not admissibility
     + Special knowledge and experience going beyond that of the trier of fact
     + Determined at a voir dire
     + Witnesses should not be permitted to offer opinion beyond their expertise
       - Counsel must object if opinion beyond expertise is offered otherwise appeal court will not reverse
     + Judge must consider whether it is a personal opinion or generally accepted in the scientific community
     + May be harmful if there are others that are much more qualified
3. Sufficient foundation (added by Harris)

* Must somehow attach the expert evidence to the case (ie. counsel can do it in their address to the jury
* Expert evidence must have some admissible foundation or may be too prejudicial
* Essential for party to indicate the scope and nature of the witness testimony and what facts it is intended to prove
* Appeal court may intervene if there is clearly no foundation to admit this expert evidence

## Extent of the Expert Opinion

* Way of presenting evidence is critical…how direct is it to the answer?
  + **Direct**: information that directly answer the question and legal conclusion tied together for the trier of fact
    - **NOT APPROPRIATE WHEN THERE ARE CONTESTED FACTS**
  + **Indirect**: generic information being presented and allow the trier of fact to tie them together
  + **The middle ground could be using a hypothetical scenario (Bleta)**
    - **MOST APPROPRIATE WHEN THERE ARE CONTESTED FACTS**
* Usually better to describe the similarities of various things instead of saying “match”

## Basis and Weight of Expert Opinion (Palma)

* Expert opinions are the product of the application of the expert’s knowledge, skill and expertise to certain facts. Sources of information include:
  1. Expert’s first hand knowledge or observation
  2. Evidence given at trial, usually put as a hypothetical question and
  3. Information gathered by the expert out of court, otherwise than by first-hand observation. Possibly hear-say
* **Value of expert opinion may be affected by the source of its information but not inadmissible**
* Generally
  + Experts may give opinion on basis of hearsay
  + Expert may give opinion repeating the out-of-court information
  + Opinion is admissible
  + Weight of the opinion may be affected by the extent to which It rests on second-hand info, but not its admissibility
  + Before weight can be given, the facts upon which the opinion is base must be found to exist
* as long as there is some admissible evidence to establish the foundation (no need for evidence for every single element of the foundation) of the expert’s opinion the trial judge cannot instruct jury to ignore the expert testimony, but trial judge must warn the jury about the weight to apply
* **when information based on mouth of party** to the litigation or suspect source, court ought to require independent proof
  + lack of proof may lead to 0 weight of opinion

## Expert Evidence Going to Ultimate Issue (Bryan)

* no general rule precluding expert evidence on the ultimate issue, but expert should not make the legal conclusion
  + sometimes it may be necessary for the opinion to go to the ultimate issue
* **there is a danger that the experts may usurp the functions of the trier of fact**
* **criteria of relevance and necessity are sometimes applied strictly to exclude expert evidence to an ultimate issue**
* counsel objection is critical. If counsel thinks the evidence is admissible and it ends up going to the ultimate issue…too bad

## Boosting Credibility of a Victim using Expert Evidence (Llorenz)

* **oath-helping** prohibits admission of evidence adduced solely for the purpose of proving that a witness is truthful
* **no expert evidence directly going to the issue of credibility (even if that is the ultimate issue)!**
* evidence potentially oath-helping may be admissible if it has some other legitimate purpose and does not go directly to the credibility issue
  + judge must give clear instructions on permitted use
  + evidence should be led in a way that reduces potential for misuse, such as
    - **in a more indirect way rather than a direct opinion**
    - **if it is part of a narrative for the jury to understand how the case came to court**
    - **providing expert evidence why victims come forward with a delay (if defense counsel challenges the delay)**
    - **providing opinions about behavior associated with victims**
* expert’s disclaimers may not be enough to neutralize prejudice
* experts who treated the victim that testify directly/indirectly that hints at the victim being credible is not allowed, better to call a separate expert that did not treat the victim
* critical issues to watch for if calling expert
  + language that leads the jury to infer directly about credibility
  + jury must be given proper limiting instructions on what use the expert’s testimony can be used
* limits of oath-helping rule
  1. not violated where the opinion happens to lend support to another witness
  2. if there is utility apart from simple oath helping the probative value outweighs the prejudicial
  3. experts are permitted to offer opinion that is relevant to the credibility or reliability of other witnesses (ie. offering background info)

## Novel Scientific Evidence (J.-L.J.)

* novel science=
  + no established practice among courts of admitting evidence of that kind OR
  + expert using an established scientific theory or technique for a new purpose OR
  + if there is a realistic basis for challenging the theory
* **Mohan factors of necessity and reliability are strictly applied**
* Seaboyer test for lower defense standard may not be effective when faced with novel sciences
* Stronger case to admit novel sciences if it can be tied to a **specific propensity** to commit a very unique offense
  + Specific propensity to commit an unique offense is *potentially* admissible (just some general correlation is not sufficient)
* Subject the reliability of this novel science to “special scrutiny”, in addition to Mohan
  1. Whether the theory or technique can be and has been tested
  2. Whether the theory or technique has been subjected to peer review and publication
  3. The known or potential rate of error or the existence of standards
     + At least know the error rate to assess its value
  4. Whether the theory or technique used has been generally accepted in the scientific community

## Abbey (New Framework for Mohan factors)

* Justice Doherty’s analysis will likely be the framework going forward
* Always a good idea for counsel to present alternatives or narrower versions of expert testimony for judge to choose from
* **Before determining admissibility a trial judge must determine the nature and scope of the proposed evidence, this reduces the risk of experts giving opinions beyond their expertise**
  + Set the boundaries and language
  + Set exactly the scope of the proposed opinion that may be admissible
  + Judge can modify or edit accordingly
  + Precision required
* Two-step process for determining admissibility – using Mohan as a basis
  1. Four preconditions to admissibility (yes/no answers to each, must have yes to all before moving to next stage)
     1. Proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence
        + Necessary to help the trier of fact draw the inference (necessity considered again in 2nd balancing stage)
     2. Witness must be qualified to give the opinion
     3. Proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule
     4. Proposed opinion must be logically relevant to a material issue
        + Legal relevant has a higher threshold than logical relevance
          - Legal relevance requires considering the probative value – a task better for the 2nd step
  2. Gatekeeper function (case-specific cost-benefits analysis)
     + DEGREE OF necessity should be part of the cost-benefits analysis
       - Necessary 🡪 high probative value
     + **Degree** of the preconditions (above) are considered at this stage and could depend on the **manner the evidence** is presented in this balancing stage
     + **Benefits**: probative potential and the significance to which the evidence is directed
       - When considering probative value must also consider the reliability including subject matter, methodology used, expertise of the expert and the extent to which the expert is shown to be impartial and objective
         * must not intrude into territory customarily the exclusive domain of the jury. Judge decided whether evidence is worthy of being heard. Jury decides whether evidence should be accepted and acted upon
     + **Cost**:
       - Consumption of time, prejudice and confusion
       - Effective and critical assessment
       - Complicating proceedings
     + **Judges should consider whether jury instruction is good enough so that expert evidence is not needed**
     + **Manner of presentation (direct/indirect) may change the prejudicial effect**

# Competence/Compellability of the Usual Witness

* **Presumptively admissible if the witness were part of the events**
* most witnesses are competent and compellable, **first address competence and then compellability**
  + Schell (Alberta CA) – compellability flows from competence
* **Compellability**: ability to get the witness to court
* **Competence**: capable and competent to testify
  + J.Z.S case and CEA s13-16.1
* **All potential witnesses are allowed to testify** and leave it to the trier of fact to assess for credibility, but common law rules with spouse/children remains in CEA
* Common law rule requires witnesses to go under oath when testifying, but modified by statute
  + CEA allows oath or solemn affirmation
* The oath reminds the witness the obligation to tell the truth, but this raises an issue of competence (does the witness understand the oath?)
  + Competency involves 2 aspects
    - **Capacity**: capacity to observe, recollect, and communicate
    - **Responsibility**: aware of the responsibility to testify in a truthful manner
* Preference for evidence from witness, but there are exceptions for previous statements/hearsay

## Section 13-16.1 of CEA – Oaths/Solemn Affirmation & Competence of Adult/Children

* Sections 13-15, allows solemn affirmations be taken in place of an oath
* **Interesting that the statute does not address children with mental capacity issues, seems that there is a stronger presumption that they are more competent than adults with mental capacity issues**

### People 14+ with mental capacity issues (s 16)

* Inquiry into competency will be undertaken when challenged by counsel
  + Burden rests with challenger on a balance of probabilities
  + Can challenge **capacity and responsibility**
* Usually conducted in front of the jury so they can weigh the evidence, but trial judge has discretion if it causes prejudice
* Determining competency of witness is not a matter outside the experience and knowledge of a judge so experts are rarely needed
* Can use a promise to tell a truth in place of an oath or solemn affirmation (uncertain if the judge has discretion to refuse)
* Deference to trial judge to decide
* Person can use a promise to tell the truth if they do not understand oath/solemn affirmation
* Person who cannot communicate cannot testify

### Children (s 16.1)

* Presumed to have capacity to testify
* Burden on challenger to satisfy the court there is an issue with capacity
  + Cannot challenge **responsibility** in the preliminary inquiry, but ok during cross-examination
  + Challenge can only be to capacity: ability to understand and respond to questions (seems even lower than capacity)
* Court may also raise the issue on its own volition or counsel satisfies the court that there is an issue BEFORE conducting an inquiry (16.1(5))
* No need to inquire into the children’s understanding of what it means to swear an oath
  + Evidence shall be received it they **understand and respond** to questions (16.1(3)) (even lower threshold than “communicate”)
* Children not be asked any questions regarding their understanding of the nature of the promise to tell the truth (16.1(7))
  + But can be challenged during cross-examination
* **When competency is an issue the focus is on the child’s capacity to understand and respond to questions**
* Weighs heavily in favour of admitting and almost impossible to challenge a young person’s capacity to testify
* No need for oath/solemn affirmation, only promise to tell the truth

### Spousal Competency (section 4 of CEA)

* Preserves the common law rule that a spouse cannot testify against their spouse
* 4(5) preserves common law situations where spouses can testify against their spouse
* Spouse is a competent witness for the **defense**
* **Subsection 2** (offenses against spouse) and **4** (offenses against young persons) creates exceptions where the spouse is competent to testify
* Subsection 3 removes the ability to compel a person to testify, but does not mean they are incompetent
  + Disclosing part of the privileged communication requires disclosing the rest
* Does not include common law and similar relationships because policy should be to include more evidence, not exclude it. Various courts have taken different stances on this issue
* Spousal competency should be an issue for Parliament to fix only
* Spousal incompetency does not apply when the marriage is valid in law, but they are separated (Salituro)
  + The purpose behind section 4 is to protect marital harmony. But the need is no longer there if they are separated
* Incompetency will not operate if the purpose of the marriage was to avoid criminal responsibility and no intention of fulfilling marital obligations (Hawkins)

## Constitutionality of CEA 16.1 (JZS)

* Analysis of Charter violations must be done from the point of view of **accused** and **society’s interest** to seek the truth
  + Courts balance truth seeking (admitting more witnesses) against the right of the accused, and err on the side of admission
* Evidentiary rules have to be **fundamentally unfair** to be struck down. Just losing some advantage is not enough
* 16.1 presume the child has the capacity to testify and burden to establish otherwise is on the person raising the issue. Child cannot be examined on their ability to understanding of the nature of a promise to tell the truth during voir dire. **During trial a child can be examined on credibility and reliability and also on their understanding.**
  + Shifts the issue of admissibility to an issue of weight
  + Does not offend the Charter

# Order of Calling Witnesses

* Issues that arise include the order of presenting witness and whether a witness must be called

## R v Smuk

* No rule of law as to the order of calling witnesses
* **Order of calling witnesses are at discretion of counsel, but jury can draw inferences and affect the weight of the testimony**
* All witnesses are usually excluded in the proceedings until they have finished testifying
  + Exceptions can be made for experts (if it is part of their role) or relatives
  + Accused cannot be excluded from the court
* **Credibility**: general integrity and intelligence of the witness, his power to observe, his capacity to remember and his accuracy in statement

## Crown Not Calling Its Witness (Jolivet)

* Crown is not obliged to call a witness it considers unnecessary for the case
* **Adverse inference should not be drawn if the Crown can provide an explanation for the change**
* **Rarely appropriate for judge to comment on Crown’s failure to call a witness, even more rare for defense witnesses**
* Trial judge is left with a lot of discretion on how to react
* Defense can choose to call the witness but procedurally disadvantaged (ie. charging jury, cross-examine)
* **Very rare to force the Crown to call a witness**
* 3 positions can be taken
  1. Force crown to call witness
     + Have to show Crown’s conduct amounts to an abuse of process for this remedy
     + Not putting up a witness that can be challenged is part of trial tactics, not abuse of process
  2. Give jury instructions as to adverse inference
     + Must have no other possible explanation for this remedy
     + Must be very careful what inference to be drawing from this
  3. Allow defense to make a comment to the jury as to the missing witness
     + Only if jury has heard about the witness
     + Usually not a reversible error
  + Only 3rd remedy available. First 2 remedies has a very high threshold
* **Defense can still ask the court for a mistrial if there was prejudice to the defense strategy due to the missing crown witness**

# Direct Examination

## Leading Questions (Maves)

* **Counsel cannot ask leading questions of their own witnesses but can guide through sign-posts to take witnesses into different areas**
* Answer provided through a leading question is not inadmissible, but just affects the weight given

### Identifying Leading Questions

* **Leading questions**: questions which directly or indirectly suggest to the witness the answer he is to give. Two different kinds
  1. Questions that suggests the answer to the witness
     + Rules below would apply
  2. Presupposes the existence of a fact not presented by that witness in evidence
     + Never permissible unless the presupposed matter is not contested
  + Key identifying leading questions is **whether in their context they suggest the response**. Whether a question invites a yes/no answer is a factor to consider

### Exceptions for Leading Questions

No leading questions for your own witness on **material points** and proximate circumstances but on **merely introductory points and form no part of the issue** then it is ok to lead

* Exceptions
  + For the purpose of identifying persons or things, the attention of the witness may be directly pointed to them (**preliminary/non-controversial matters**)
  + Can also get the **permission** of the judge to ask leading questions in non-controversial matters
  + Courts have discretion to allow leading questions **to children or people with mental disabilities**
  + **Where one witness is called to contradict another as to expressions** used by the latter, but which he denies having used, he may be asked directly
  + When circumstances show that he is **hostile** to the party who called him, judge has discretion to relax this rule
  + Rule will be relaxed where the inability of a witness to answer questions obviously arises from **defective memory** (the most common issue)
  + From the **complicated nature of the matter** as to which he is interrogated

### Reasons for no leading questions:

* Witness may have a bias in favour of one party
* Party calling the witness has advantage of knowing what witness will say
* Witness may not understand the precise meaning of the questions posed to them

### Steps to Seeking Permission for a Leading Question

* 1. Ask to repeat
  2. Pass on to some other subject and come back after
  3. Permit a question containing a reference to the subject matter
  4. Permit a question containing the supposedly omitted matter

# Refreshing a Witness’s Memory

* Prior to this it may be appropriate to try leading questions first

## Prior to trial

* Witnesses are free to use whatever means they choose but the means can affect the weight of the evidence
* **The opposing counsel is entitled to explore what means the witness has used**
* Only exception is when the witness uses other “scientific” memory enhancing technique. The party presenting the witness must demonstrate the reliability required of novel science

## During trial

* Can range from letting witness refer to notes to assist all the way to reading out a record
* Two different types and have different rules!
  + **Past Recollection Recorded** (need to follow Wigmore rules)
    - Usually after the “present recollection revived” fails
    - Court can grant leave for witness to review document or electronic record
    - **The document is not admitted as evidence unless the witness incorporates the information into her testimony**
    - The record is merely an aid and some courts allow to make the record an exhibit
    - Some people say this is a hearsay exception because the witness really has “no memory” and are being “refreshed”
  + **Present Recollection Revived** (no need to follow Wigmore rules strictly)
    - Actually sparking the memory of the witness. The admitted evidence is the testimony, not the document
    - Subject to exclusionary rule if it is too suggestive

### Procedure for Present Recollection Revived (Shergill)

* **No strict contemporaneity requirement for present recollection revived, but document must still be reliable**
* Police use of notes is like a present recollection revived
  1. Counsel should seek permission in absence of the jury and witness.
  2. Counsel identify the passages to use and explain what subject matter counsel seeks to elicit
  3. Trial judge should consider whether or not the memory of the witness appears to be exhausted
  4. Trial judge determine whether the situation appears to be one of refreshing memory OR adducing evidence of past recollection recorded
     + **Counsel should be clear which one it is**
  5. Judge determine if document is appropriate one to use
     + **Contemporaneous** is not required for present recollection revived, but contemporaneous could should more weight
     + **Reliability** is a concern for both present recollection revived and past recollection recorded
     + Document should give a reasonable basis for believing the witness had this memory
  6. Judge determine whether there is any improper motive or other circumstance making this inappropriate
     + **Ie. the document was created under pressure or the investigator was leading the witness**
  7. Judge exercise discretion based on circumstances
  8. If permission granted, recall jury and judge should explain what counsel would be doing
  9. Counsel place document in front of the witness without comment and ask the witness to read it
     + Jury should not be told what the document says
  10. Counsel should then take document away and ask non-leading questions
  11. Opposing counsel entitled to examine the document and to cross-examine the witness
  12. instruct the jury about the use they can make of the document. **the prior statements were not proof of their contents and the sole purpose of it was memory refreshing.**

### Using Inadmissible Evidence for Present Memory Revived (Fliss)

* Section 8 of the Charter protects against recording a conversation by one of the participants who is a police officer
* **Evidence excluded under the Charter can be used for present memory revived but not past recollection recorded**
* **Can use the inadmissible document to refresh memory but not read it out verbatim**
* **Wigmore factors must be clearly satisfied**

### Wigmore factors for Past Recollection Recorded (J.R.)

1. Reliable record
   * Must be recorded in a reliable way
   * Created by witness or witness reviewed it for accuracy
   * Most reliable would be video, audio or when witness writes out their own statement
   * Least reliable when a third party wrote the notes and then confirmed by the witness
2. Timeliness
   * Within a reasonable time of the event
   * Events were fresh in the mind of the person
3. Absence of memory
   * Does not require **total loss of memory**
   * Witness is either devoid of a present recollection or an imperfect present recollection
   * Cannot be used to “boost” the reliability of a witness testimony
4. Present voucher as to accuracy
   * Must **vouch for the accuracy of the assertions** in the record
   * Indirectly attach the oath to the statement
5. Original records must be used if possible

* **Statement is admissible for memory recollection as long as Wigmore factors CLEARLY satisfied**

# Cross Examination

* **Goals of cross-examination**
  + Eliciting favourable testimony from the witness
  + Discrediting the testimony of the witness or attacking the reliability
* **Counsel should avoid questions that gives more than one proposition**
* **Even if accused opens the door with good character evidence, Crown cannot use this to destroy the accused, only meet/negate it**
* Cross-examination can be to attack a small inconsistency of a prior statement
* **Collateral issues can be cross-examined upon, but cannot call evidence to contradict it (collateral fact rule)**
  + Collateral when it is a pure credibility issue
* All witnesses put their credibility in issue and can be impeached on:
  + Bias, prejudice, interest, corruption
  + Attacking character of witness through bad character
  + Contradicting witness through previous inconsistent statements (subject to S10 and S11 of CEA)
  + Challenging the witness’ capacity to observe, recall and communicate accurately
  + Putting contrary evidence to the witness (*Carter*)
  + Showing that the witness evidence is contrary to common experience

## Section 10 of CEA – Cross-Examination on Previous Statement (Written)

* **Witness may be cross-examined on previous statements without opportunity to review it**
* If counsel intends to contradict the witness then must draw the witness’ attention to the parts used to contradict
* Cannot use this as a backdoor to obtain the statement of a defense witness since defense has no duty to disclose (Peruta 1992 Quebec CA)
* Section 10 covers written statements, excluding a police officer’s notes (Handy 1978 BCCA),
* Section 11 covers oral statements
* **The prior inconsistent statements can ONLY be used for credibility and not evidence of their truth unless adopted by the witness or otherwise admissible under a hearsay exception**
  + **But can be used as an exhibit to assist the jury if it was heavily used (Campbell 1990 Alberta CA)**
  + **Trial judge has discretion to edit before using as an exhibit**
* The statement used for cross-examination need not have been proved voluntary (Logan 1988 Ontario CA)
* **No need for trial judge’s permission to conduct section 10 cross (Keegstra 1994 Alberta CA)**
* Steps:
  1. Confirm the present testimony with witness
  2. Confront witness with making of the prior statement
  3. Put inconsistent statement to the witness
  4. Witness either adopts the prior inconsistent statement or not

### Limits to Cross-Examination (Lyttle)

* An essential right to make full answer and defense protected under Section 7 and 11(d) of the Charter
* **Counsel are bounded by the rules of relevancy and are barred from resorting to harassment, misrepresentation, repetition or putting questions whose prejudicial effect outweighs their probative value**
* **Counsel are not to ask questions that case aspersions on a witness or suggest contrary facts unless there is a good-faith basis**
  + good-faith basis is based on information available to cross-examiner and need not be proven, but cannot be reckless
  + counsel can cross-examine on areas falling short of admissible evidence, without proof, as long as there is a good-faith basis
* trial judges have broad discretion to ensure fairness and see justice being done
* **expert evidence cross-examination**
  + experts must not be asked to take into account facts that are not subject to his professional expert assessment

### Contradicting a Witness (Carter)

* **counsel challenging the credibility of a witness by calling contradictory evidence (on key matters), the witness must be given the chance to address the contradictory evidence in cross-examination**
  + **not an absolute rule and must be tailored to the circumstances**
* failure to cross-examine on peripheral matters or details will not engage it, but will go to weight
* **counsel should not invite juries to draw inferences against the credibility of witness because of non-confrontation except in the clearest of cases**
* **counsel should err on side of caution and put the question regardless how u think witness will answer it**

# Re-examination

* **reexamination is not highly unusual but rebuttal is**
* judges sometimes automatically ask counsel if they wish to reexamine
* **not meant to reaffirm helpful things the witness said**
* re-examination is to ask non-leading questions about new matters that were raised in cross-examination and not dealt with
* the new matter does not necessarily have to be unforeseeable
* **right to re-examine exists only where there has been cross-examination and confined to matters arising in cross-examination** (Moore)
  + new facts cannot be introduced
  + judge has discretion to grant leave to introduce new matters in re-examination and the opposite party can cross-examine on the new matters

# Rebuttal Evidence

* risk sandwiching the defense but is sometimes necessary to meet the defense case so the jury gets a clear picture

## Krause

* general rule that the Crown cannot split its case
* Crown must produce and enter its own case all the clearly relevant evidence
* **Crown may be allowed to call evidence in rebuttal after the defense case where the defense has raised some new matter or defense which the Crown could not reasonable have anticipated + does not go to a collateral or pure credibility issue**
  + But cannot bring rebuttal evidence on matters that merely confirm or reinforce earlier evidence
  + Issue must be new and concerns the merits of the case, cannot be a collateral issue or credibility issue
* Collateral matters can be dealt with through cross-examination and not rebuttal

# Prior CONSISTENT Statements

* Presumptively inadmissible because it is self-serving and little probative value.
  + Even if admitted, it cannot be used as proof of the truth except for: past recollection recorded or ID evidence
  + **Usually admitted for the fact that a statement was made, not for content**
* The prior statements are usually there for you to cross-examine to test credibility and not admissible for its truth unless witness adopts it

## Jury Instructions for Admitting Prior Consistent Statements

* Judge must give clear instruction or it may result in reversible error (Ay)

1. Explain that the prior consistent evidence cannot be used to enhance the credibility of the person making the statement since evidence does not become more credible because it has been repeated
2. Direct the jury not to use the evidence for its hearsay purpose
3. Describe any legitimate purpose for which it was admitted

## Exceptions for Prior Consistent Statements (Ay)

* Prior consistent statements may be admissible under the following exceptions:
  1. Recent Fabrication (Stirling)
     + does not require an allegation of recent fabrication be expressly made
       - sufficient that the circumstances of the case reveal that the apparent position of the opposing party is that there has been a prior contrivance
     + have probative value to the extent that it shows the witness’ story was the same even before motivation to fabricate arose
     + removes a potential motive to lie and useful in assessing credibility and reliability
     + Getting into details is permissible as long as it is not prejudicial
  2. Where the previous consistent statement is admitted as part of the res gestae or part of the narrative
     + **Narrative**
       - The usage must be made clear to the jury.
         * limited to using the statement to understand whether the conduct of the witness was consistent with the evidence
         * Cannot use it to boost credibility
         * cannot be taken as proof of the underlying facts
       - The narrative should not go into details or the prejudicial effect > probative value
  3. Recent complaints in sexual cases
     + Superseded by statutory provisions
  4. Statements on arrest
  5. Statements made on recovery of incriminatory articles
  6. Previous Identification (Swanston)
     + **Evidence of extra-judicial identification is admissible not only to corroborate ID but as independent evidence going to identity, regardless if witness testimony is impeached**
     + Probative value of extra-judicial ID is higher than in court ID

# Inconsistent Witness Testimony

## Party’s Own Witness

* Options available (dependent on circumstances and testimony given):
  + present memory revived
    - appropriate when clearly the witness is losing memory and not intending to screw up the party’s case
  + past recollection recorded
    - appropriate after trying present memory revived and the person really cannot remember
  + 9(1)/9(2) followed by hearsay application to admit
    - Appropriate when the party shows signs they are not being helpful to the case/hurting the case
    - NOTE: WRITING REQUIREMENT FOR 9(2)

## Opposing Party’s Witness

* Cross-examination
* Section 10 – prior written statements
* Section 11 – prior oral statements

# Attacking the Credibility of Party’s Own Witness

## Relationship between Section 9(1) and 9(2)

* Before a witness can be declared adverse (9(1)), must follow procedure in *Milgaard* first (Booth 1982 BCCA)
  + Result of 9(2) can be used for 9(1) application
  + 9(2) requires statement in writing and 9(1) applies to statements in writing and **not** in writing
* **Hostile witness** = a witness that does not give his evidence fairly and with a desire to tell the truth because of a hostile animus toward the party that called him (*Coffin*)
* **Adverse witness** = unfavourable in the sense of assuming by his testimony a position opposite to that of the party calling him (*Cassibo*)
* Adversity under 9(1) is broad and subsumed the declaration of hostility under common law

## Section 9(2)

* Allows counsel to cross-examine witness without a finding that the witness is adverse, loss of memory can be grounds for 9(2) (*McInroy)*
  + Not remembering arguably is an inconsistency. The surrounding circumstances can also help trial judge make the decision
* judge has discretion to grant leave to counsel to cross-examine his own witness on a prior inconsistent statement even at the stage of re-examination where the witness in cross-examination has given evidence on a matter which is contrary to a prior statement (Moore)

### Requirements

* Statement must be in **writing**, reduced to writing, or otherwise recorded (audio/video)
  + Excludes notes written out by the police officer
  + Transcript of interview should be sufficient
* Judge **has discretion to refuse**
* Cross-examination **limited** to the inconsistent statement only
  + Inconsistency should be significant

### Procedure for 9(2) Application (*Milgaard*)

1. Counsel advises court that he is bringing a 9(2) application
2. If there is a jury, jury leaves room and voir dire begins
3. Counsel shows the judge the statement, pointing out the inconsistencies
4. If judge agrees there are inconsistencies, he invites counsel to prove the statement
   * Even a witness claiming loss memory can be treated as inconsistent statement (*McInroy*)
   * Proof in this context is limited to proof in relation to that statement, unlike in 9(1)
5. Witness is asked if he made the statements that are recorded

* If admit 🡪 statement is proved
  + Party given leave to cross-examine under 9(2) is entitled to prove the previous inconsistent statement without having to move to 9(1) (*Cassibo*)
  + Easy shortcut without 9(1)
* Denies 🡪 evidence can be called to prove it

1. Opposing counsel has right to cross-examine. Opposing counsel can also argue that circumstances would make it improper to allow counsel to present it to the jury during cross-examination
2. Judge decides whether the statement was made and whether the ends of justice would be best attained by allowing the cross-examination

### Outcome of 9(2) Cross-Examination

* Witness accepts the prior statement as true 🡪 becomes his evidence (*Deacon*)
* Witness denies statement 🡪 only be used for credibility and judge **must clearly warn jury** not to use the statement for proof of its content. (subject to hearsay exceptions)

## Section 9(1)

### General Rule

**General rule** against calling party to impeach credibility of witness through bad character, except if the court finds the witness **adverse (further adverse details below):**

1. calling party can contradict witness using other evidence (no leave of court required)
2. **by leave of the court,** prove that the witness made the prior inconsistent statement (including broadly cross-examine the witness) but must draw the witness’ attention first pursuant to Section 11
   * **Statement need not be in writing (can be oral)**

### Adverse Definition (*Wawanesa*)

* Adverse is superset of hostile
* Adverse includes **hostility of mind, opposed in interest or unfavourable and opposite in position to that of the party calling the witness**
* Adverse is more than just changing the testimony, it is a sense that the witness has switched sides
* Some courts require that the witness hurt the case before declaring adverse, some courts are ok as long as witness does not “help” the case (McInroy

### Procedure to Determine Adversity (*Cassibo, Wawanesa*)

* Procedure for 9(1) similar to 9(2) but **nature of evidence called will be broader because issue is adversity**, not just inconsistent statement

1. Voir dire without the jury present
2. Judge must satisfy himself whether the witness made the statement
   * Calling the witness who heard the oral statement (ie. police officer)
   * Proof using 9(2) cross-examination outcomes (if it was in writing)
3. Consider importance of the statement and whether it is *substantially* inconsistent
   * **Factors** (Cassibo):
     + the **demeanour** and attitude of the witness
       - hard to reverse for appeal courts
     + how credible the witness is (but judge must be careful not to usurp jury’s role)
     + how material any inconsistencies are
     + reason for switching positions
       - if logical reason is provided, then harder to claim adversity
       - absent a reason can lead to inference of adversity
     + the circumstances in which they were made
   * Lack of a reasonable explanation also a significant factor to find adversity
   * there are circumstances where prior **inconsistent statements are sole reasons** for declaring adversity (*Cassibo*)
4. If judge feels witness is adverse, still need to consider whether permitting cross-examination would meet the ends of justice and bear in mind the dangers of admitting such a statement
5. If grant leave, then recall jury and direct attention of the witness and ask if he made the statement
6. Must instruct jury the prior statement is not evidence of the facts contained herein
   * Up to the jury to decide on credibility
   * Even if trial judge declares witness adverse and allows counsel to prove it, whether it is proved is a question of fact for the jury to decide whether the statement was actually made (*Cassibo*)

# Hearsay

* Common law area of evidence
* Presumptively inadmissible unless it fits into a well-defined exception (rule-based approach)
  + This has been reformed and we now follow a principled-approach
  + The exceptions are very narrow and the use of the hearsay may be limited

## Definition of hearsay (Subramaniam)

* Evidence of a statement made to a witness by a person who is not himself called as a witness **may or may not be** hearsay.
* Hearsay and inadmissible when the out of court statement is used to establish the truth of what is contained in the statement
* Not hearsay and admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made
* The fact that the statement was made, quite apart from its truth, is relevant in considering the mental state and conduct of the witness or some other person

## Permissible Non-Hearsay Uses (Ratten)

* **Evidence of a witness which includes words spoken by another is not automatically hearsay**
* If the speaking of the words, is a relevant fact, a witness may give evidence that they were spoken.
* A question of hearsay only arises when the words are relied upon for their truth

## Common Law Hearsay Exceptions

### State of Mind Exception or Present Intentions Exception (Griffin)

* **Used to show intentions or emotions (such as fear) of the declarant**
* **A limited hearsay exception that only goes to the state of mind of declarant**
* Admissible as long as:
  1. State of mind of the person is **relevant**, and
     + Usually relevant because the deceased’s state of mind can show motive of the killer (which in turn is relevant to ID) and also show a relationship between deceased and the killer
     + If the deceased and accused are unknown to each other, then of course irrelevant
     + Deceased’s state of mind alone *may not* be sufficient to prove motive but can be one consideration
  2. Statement is made in a **natural manner**, not under circumstances of suspicion
* **Judge must give limiting instruction that statement can only be used to prove the declarant’s state of mind and NOT a third party’s state of mind or intention**
  + Not a fast-track to conviction
  + Courts are more likely to admit evidence + clear instruction rather than make it inadmissible

### Dying Declarations

* Statement made by someone that has a high immediate expectation of death and names the accused
* From a policy pov, this seems more likely to be true

### Res Gestae

* Spontaneous declarations with some sudden unexpected event, not made in circumstances of suspicion
* Close contemporaneity required
* Have indicia of reliability

### Past Recollection Recorded

* See previous section
* Used when person has no memory and adopts their past statements as true

### Business records

* **Supplemented by statute, CEA s30 (see that section for more)**
* Declarations, oral or written, are admissible for their truth where made reasonably contemporaneously in the ordinary course of duty by persons having personal knowledge of the matters who are under a duty to make the record/report and there is no motive to represent the matters recorded
  + - * Original entry no longer need to be made personally by a recorder with knowledge of the thing recorded. If is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records, such as a machine(*Monkhouse*)

### Declarations against Interest (Underwood)

* Justification is that making a declaration against our own interest is likely to be true
* Requires the following to justify admission of out-of-court statements relying on the penal interest exception:
  1. At the time that the declarant made the declaration it was **against his or her penal interest**
  2. That the statement was made in circumstances where the declarant should have known it is against penal interest, and
     + Only necessary to show declarant should have been aware of his vulnerability to penal consequences does NOT require immediate prejudice
     + [Simon’s editorial comment] what about the person’s age? Should it be taken into consideration? The court did not seem to have addressed that. We can consider J.D.B. v North Carolina from the Supreme Court of USA for some insight. A young person’s age affects whether they know if they are “in custody”. So would that affect also their perception of penal interest?
  3. The potential for **penal consequences was not too remote**

### Aboriginal History (Mitchell)

* Evidentiary concerns:
  + **Admissibility of evidence**
    - Oral evidence are admissible when useful and reasonably reliable, subject to exclusionary discretion
      * Necessary: no other means of obtaining
      * Provides aboriginal perspective
    - In determining usefulness and reliability the judge must resists Eurocentric assumptions
    1. Usefulness: evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case
    2. Reasonably reliable
       - No need for special guarantee of reliability
       - Inquire into witness’ ability to know and testify to orally transmitted traditions are issues of admissibility and weight
    3. Trial judge still has discretion to exclude if probative value is overshadowed by its potential for prejudice
  + **Interpretation of evidence**
    - Court usually has no precise rules for other cases because it is in the domain of the trial judge
    - Court must interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims and is critical to the meaningful protection of s35(1) rights
    - Must give due weight to the evidence. Not undervalue or overvalue the evidence. Place on equal footing
    - There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence
* Court should approach the rules of evidence and interpret it 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
* Must apply flexibly in a manner commensurate with the inherent difficulties posted by such claims and the promise of reconciliation embodied in s35(1)

# Hearsay Procedure (Underwood – supplemented by Prof Harris)

CAVEATS:

* + Admitting evidence under hearsay exception does not trump other rules of evidence
  + If admitting prior statement of the accused to the police, DO NOT APPLY HEARSAY 🡪 follow rules for confession/admissions
  + **Where hearsay evidence is tendered by an accused a trial judge can relax the strict rules of admissibility where it is necessary to prevent a miscarriage of justice (*Williams*)**
    - Does not mean necessity/reliability is swept aside, just not as “strict”

**PARTY MAKING THE HEARSAY APPLICATION HAS ONUS TO SATISFY COURT ON A BALANCE OF PROBABILITIES**

1. Are any of the statements relevant and probative?
   * + Evidence of other possible perpetrators usually relevant and probative
2. If relevant, is it hearsay?

* Simple test:
  1. An out of court statement is adduced to prove the truth of its contents and absent the opportunity to cross-examine person making statement
  2. Hearsay is not identified by the nature of the evidence but by the use to which the evidence is put
  3. Proving the fact that a statement was made is not hearsay unless proving the contents for its truth
* If not hearsay, accept without hearsay application

1. If hearsay, the contents must be otherwise admissible

* **hearsay is not a backdoor for otherwise inadmissible evidence**
* ie. bad character evidence, expert testimony

1. The hearsay statement is not the product of coercion (threats, promises, excessive leading, or other investigatory misconduct)

* includes cases where admitting would bring administration of justice into disrepute
* **Usually considered as a factor as part of the reliability analysis rather than eliminating the evidence now**

1. Judge hold a voir dire before putting it to the jury.

* Judge needs to be satisfied that the statement was made in circumstances which do not negate its reliability, does not mean the judge believes it is reliable yet

1. Does a statutory exception apply?

* Business Records (CEA S.30)
* Criminal Code (s715 and 715.1)
* If **statute is unclear** or definition needs to be “stretched”, better to apply the common law
  + Common law hearsay exceptions are not extinguished by statute unless it is clear and specific
* Does statute **otherwise provide discretion** to judge to exclude?

1. Do any traditional common law exceptions apply (traditional exceptions still in place according to Mapara)?

* State of Mind Exception or Present Intentions Exception
* Dying Declarations
* Res Gestae
* Past Recollection Recorded
* Business records
* Declarations against Interest
* Aboriginal History

1. If hearsay fits under the common law exception, look to the *Mapara framework #2-3 – reproduced below*
   * + **Hearsay exception can be challenged to determine whether it is supported by necessity and reliability, required by the principled approach. Modify the exception as necessary.**
     + Burden on challenging party (on balance of probabilities), but unlikely to succeed
     + **In rare cases, evidence falling within an existing exception can be excluded because it lacks necessity/reliability in the particular circumstances of the case**
     + Usually will pass this step if falling under a common law exception
     + Challenger must satisfy on balance of probabilities
2. If common law exception does not apply, does it fit into the KGB/inherent trustworthiness framework of necessity/reliability? (discussed below)
3. Even if admissible under common law (exceptions or KGB/ITF), should trial judge exercise their residual discretion (Seaboyer/Mohan) to exclude because prejudicial > probative?
   * + Defense has more leeway to introduce evidence to protect against wrongful conviction
       - But if it is against a co-accused then judge has to instruct the jury not to use the evidence to convict co-accused, but only to acquit the accused
4. If admissible, judge should direct the jury to the circumstances in assessing the credibility of the witness and also remind them of possible hearsay dangers (if using principled approach exception)
5. If the appeal court entitled to intervene?
   * + Usually hearsay applications are fact-dependant and not legal errors
     + Highly differential to trial courts as long as judge considered the correct exceptions/principles and trial judge’s decision not patently unreasonable
6. Even if appeal court finds an error, can the decision be upheld by the curative provisions of the CC?

## Principled Approach to Hearsay (Necessity and Reliability)

* + **Necessity and reliability should not be considered in isolation, one may impact the other (*Khelawon*)**
    - **Context giving rise to need for hearsay may impact the degree of reliability to justify its admission**

### Necessity (balance of probabilities)

* + - Necessity must be given a flexible definition, “**reasonable necessity**”
    - **The fact that there is other evidence on the same point does not render the hearsay unnecessary (*Smith*)**
    - Key is unavailability of the witness’ courtroom testimony
    - Generally 2 classes according to Wigmore:
      1. The person is dead, out of the jurisdiction, insane or otherwise unavailable for purpose of testing.
         * **Reasonable efforts must be undertaken to obtain the direct evidence of the witness (Khelawon)**
         * Witness with prior inconsistent statement (including radical changes in witness’ position) satisfies the criteria
      * People that are likely adverse or disinclined to testify does NOT satisfy necessity (Pelletier)
        + Better to call the person and have the judge see for himself..makes the application easier
        + If witness is physically available, better to put them on the stand and try to give testimony before resorting to hearsay unless there is clear evidence they are unable to (Parrott)
      * not satisfying CEA s16/16.1 may be a sign of necessity
        + if child is incompetent to testify, unavailable to testify or may face trauma based on psychological assessments (*Khan*)
      1. We cannot expect to get evidence of the same value from the same source.
         * Necessity in this case is not so great and matter of expediency or convenience. Examples include admissions, and business records

### Threshold reliability (balance of probabilities)

* Whether it is **sufficiently reliable** to leave the evidence with the trier of fact
  + Is not a substitute for the trier of fact’s assessment (actual reliability), and not whether the judge actually believes it himself
  + **Central concern of hearsay is inability to test it and the principled approach of reliability is aimed at identifying cases where this is overcome (*Khelawon*). Overcome by:**
    1. Show that there is no real concern about whether the statement is true or not because of the circumstances it came about (ie. KGB)
    2. Show that there is no real concern from the fact that the statement is presented in hearsay form because it can be tested
       - **Availability of the declarant for cross-examination goes a long way to satisfying requirement for adequate substitutes**
* Steps:
  1. Apply KGB criteria
     + If satisfied, very likely to admit
  2. Try UFJ (out of court statements that are “similar” to each other)
  3. Try Inherent Trustworthiness Framework (Khelawon)
  + **KGB and Inherent Trustworthiness Framework compliment each other and should be looked at holistically**
* **KGB**
  + - **3 criteria are flexible but should, reasonably be all present to admit the hearsay**
    - Objective of the KGB test is to put the hearsay into a setting substantially similar to the courtroom experience and ability to examine, adequate substitutes?
    - Focuses on the circumstance when the hearsay statement was made, not focused on the content of the statements
      1. Made under **oath or solemn declaration** and following the administration of an explicit warning about the risk of prosecution for lying
         * There *may* be cases where a trial judge can conclude that an appropriate substitute for an oath is established such as circumstances that impress the witness to tell the truth
      2. **Complete video record** to allow observation of the person making the statement
      3. **Contemporaneous cross-examination**
         * Not a question of whether it is preferable to have cross-examination but whether the lack of cross-examination is a reason to keep the statement from the jury
* **U(FJ) (Prior inconsistent statements)**
* **Focuses on analyzing the content of the statements rather than the circumstances**
  1. Similar statements can be compared and satisfy the criteria of reliability
     + Must be so striking that two independent people is unlikely to fabricate
     + Must not have possibility of taint by outside influence or collusion
     + Must not have prior knowledge of each other’s statements
       - Suggestion by interrogator could be a factor to consider
  2. Direct the trier of fact to follow this 2-step process in evaluating the evidence
     1. Certain that the statement used as a reliability reference was made, without taking into account the prior inconsistent statement under consideration
     2. Once satisfied reference statement was made, compare the two statements for similarities and if they are strikingly similar
* **Khelawon (inherent trustworthiness framework)**
* **Framework that focused on the contents of the hearsay**
* An expansion of KGB so even if KGB was not satisfied, the hearsay may still come in
* Relevant factors to consider cannot be categorized as relating to threshold or ultimate reliability, it depends on the particular dangers arising from the nature of the statement AND any means available to overcome it
* Steps in applying:
  1. Judge must identify any specific hearsay dangers (not exhausitive)
     + Motives to lie
       - Not a major concern because person presenting the hearsay can be cross-examined
       - Focus on whether declarant had motive to lie to witness
     + Lack of indications of reliability
     + Lack of corroborative evidence
     + Inability for cross-examination
       - Should not overuse this factor or risk going back to the KGB framework
       - Lack of cross examination should go to weight (Smith)
     + Coercion or behavior of the questioning party
     + Competence
       - Perhaps not satisfying s16 of CEA may be a factor
     + Contemporaneous
       - No time to make up a story
     + Statement not making logical sense
     + Worried about providing the information
  2. Determine whether the circumstances guarantees the trustworthiness to compensate for the dangers above
     + Keep in mind it is a threshold, ultimate reliability is for jury
     + Balance all factors and ask if there is inherent trustworthiness OVERALL

## General Framework for admissibility of hearsay evidence (*Mapara*):

* 1. Hearsay is presumptively inadmissible. Traditional exceptions remain presumptively in place.
  2. Hearsay exception can be challenged to determine whether it is supported by necessity and reliability, required by the principled approach. Modify the exception as necessary.
     + Opposing party can challenge the existence of the exceptions but unlikely to succeed
  3. In rare cases, evidence falling within an existing exception can be excluded because it lacks necessity/reliability in the particular circumstances of the case
     + Opposing party can trigger this by satisfying on balance of probabilities
  4. Hearsay evidence *may* be admitted if reliability and necessity can be established on a voir dire (principled approach, below)

# Statutory Hearsay Exceptions

* Better to start with a statutory exception before going to the common law

## Section 715 of Criminal Code

* Previous statement of witnesses at a previous trial, preliminary hearing, etc can be used if:
  + the person is unavailable (dead, insane, away from Canada, sick)
  + proved that the testimony was given in the presence of the accused
* can also be used to prosecute accused’s trial on a different charge
* accuse can argue he did not have full opportunity to cross-examine

## Section 715.1 of Criminal Code

* video evidence of witness/victim under 18 taken within a reasonable time of offense is admissible if witness/victim adopts it in their testimony

## Business Records

* + Originally a common law exception but now extended by statute
  + **Common law applies to written and oral statements and statutes are confined to writing or records**
  + CEA section 30
    - **Requires that the evidence be otherwise admissible in oral form**
  + Business records are real evidence and **authenticity must be proved** before it is admissible
  + Subsection 10 excludes various records (countering party has burden to “prove” these exceptions)
    - Record made in the course of an investigation/inquiry
    - Record in the course of giving legal advice
    - Privileges
    - Record contrary to public policy
    - Transcript/recording of evidence taken in the course of another legal proceeding
    - Record must be made “**in the usual and ordinary course of business**”, not enough that the record was made by a business
  + Uncertain if “usual and ordinary course of business” includes cases where employees do the record keeping contrary to instructions (Wilcox)
    - Courts have decided that the CEA and common law require that the person have personal knowledge (Paciocco)
      * Other provincial evidence acts say that lack of personal knowledge only goes to weight

# Formal or Judicial Admissions

* Parties can make a formal admission to the court in lieu of conclusive proof at the beginning of the case
  + **Requires agreement by the parties, not up to defense to frame an admission that suits them (Castellani)**
* Admissions can greatly change probative/prejudicial balancing in evidence applications
* Admissions are almost impossible to undo when made
  + Judge can exercise discretion to undo the admission but very high threshold
  + Mistrial can also be declared

### Section 655 of Criminal Code

* 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.

# Probative Value of Informal Admissions/Confessions

* **Confessions**: party conclusively admitting guilt
* **Admissions**: statements that are of assistance in proving guilt
* Same rules apply for confession or admission
* **Statements, that have probative value, made by the accused come in through admissions and not hearsay, regardless if it was before or after a crime**
  + Admissions are not considered hearsay because accused can rebut and cross-examine (Palma)
* Very difficult to argue an admission is unreliable, but easier to argue voluntariness

## General Rule

* General rule is that **admissions are admissible** and frailties are assessed by the trier of facts
  + **Exception** is partially overheard statements (*Hunter*)
    - **speculative and the probative value tenuous because maybe it was part of the conversation only and lack context 🡪 lack reliability**
    - **but if substantial parts are overheard, then arguably accurate**
  + Lead by the opposing party (Palma)
  + Crown must take the good with the bad but can convince jury to disbelieve the bad parts (Palma)
    - Part of statement can be given if parties agree (Allison)
  + Multiple statements do not have to be led, Crown can choose to lead as many (Allison)

## Confessions/Voluntariness Rule to Authorities (Oickle/Grandinetti)

* Common law rule that a statement made to the authorities must be **proved beyond a reasonable doub**t that it is voluntary
  + Gaps in the foundation of the case or gaps in the video could create a reasonable doubt of voluntariness
* **Hold-back evidence** can be very powerful to corroborate with a detailed confession, this leads to a logical circumstantial inference that the confession was truthful
* **Infringement of s 10(b) will likely lead to confessions and statements being involuntary**
  + However, compliance with 10(b) does not necessarily mean the statement is automatically voluntary and admissible. Must look at circumstances as a whole
* Steps
  1. Accused has an evidentiary burden to show that there is a valid issue for consideration on whether when the accused made the confession, he or she believe that the person to whom it was made was a person in authority (**air of reality**)
     + Person in authority is generally someone engaged in the arrest, detention, interrogation or prosecution of the accused
  2. Burden shifts to the Crown to prove beyond a reasonable doubt that:
     1. **Accused reasonably believe that the person was a person in authority**
        + Largely subjective test focusing on the accused’s perception of the person
          - Also an objective element of the reasonableness of the accused’s belief that he is speaking to a person in legitimate authority
          - Does NOT include someone who seeks to sabotage the investigation or steer investigation away (illegitimate authority)
        + Whether the accused, based on his perception of the recipient’s ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice or making one results in favourable treatment
        + Undercover officers are not persons of authority absent unusual circumstances
        + Parent, doctor, teacher, employer may all be persons of authority if circumstances warrant but merely exerting personal authority will not trigger confessions rule
        + **Key: is the state’s coercive power engaged?**
     2. **The statement was voluntary** (*Oickle*).
        + Focus on the **causal connection** between the confession and the police action
          - Did the factors below cause a confession?
        + Most are looked at from the accused’s **subjective and reasonable perspective**
        + Categories of consideration (consider as a whole contextually):
          1. Threats

Threats made anytime during the interview will attract scrutiny

* + - * 1. Promises for Legal Benefit

Biggest area of concern because it can be seen as abuse of state power

Moral/spiritual reasons to talk are acceptable

Offering psychiatric help is not acceptable

Savvyness of the accused may be a factor to consider, also look at whether they exercised their right to counsel

* + - * 1. Coercion

Knowing the person has some addiction and holding them back

Sleep deprivation, no food, stress, isolation, medicine

Usually not enough, must have other factors as well

* + - * 1. Action which affects the integrity of the justice system

Tactics which shock reasonable members of the Canadian community although not engaging other factors

* + - * 1. Accused not of operating mind

Usually courts allow 6 hours of interview

The accused may be so pressured that they don’t know what they are doing (ie. automaton)

Shock, intoxication, hypnosis

* + - * 1. Whether the accused was warned about their right to silence (Singh)

## Confessions to Undercover Officers (Grandinetti)

* **State’s coercive power is not engaged**
* Common tactic is the undercover confession (without detention) where the accused voluntarily engages with the police officers
  + Usually involves giving the accused some incentive to talk (ie. offering to destroy the evidence for the accused, finding a scapegoat, etc)
  + **There *may be* circumstances that statements can be made in such coercive circumstances that their reliability is jeopardized even if not made to a person in authority or the circumstances greatly affect the integrity of the court system**
    - **Best to address this through abuse of process (under section 7/24(1)) or other *Charter* values rather than voluntariness rule**
    - **If the Charter does not apply to the undercover operations because it was out of country, then the Charter applies when the case comes to court (ie. abuse of process under Section 7/24(1))**
    - Key is whether the way the evidence was collected “shock the conscience of the community”
      * The police giving incentive to talk during undercover operations is usually not enough to “shock the community”
* Confessions to **undercover officers posing as cell mate**, requires that the officer not actively solicit confession. Only passively get information

## Admissions of a Co-Accused (Grewall)

* More leeway for accused introducing evidence (*Seaboyer*), but have to be careful that it does not prejudice the trial or prejudice the co-accused
* Presumption that persons accused of the joint commission of crime be tried together
  + Economic efficiencies
  + Consistent verdicts
* **Mere fact of a cut-throat defense is not sufficient to warrant separate trials**
* Joint trials enjoy still **constitutional protections** (right to full answer/defense, right to be shielded from evidence which unfairly prejudices)
  + **A right to fair trial does not entitle accused to exactly the same trial as if tried alone**
  + Respective rights of each accused must be balanced by the trial judge to preserve overall fairness
  + Balancing of the Charter values must take into account interests of society
* When deciding a severance application trial judge must take into account practical consequences for separate trials and potential prejudice to the co-accused
* General rule: **admissions of a co-accused are admissible against himself but not against co-accused.** Trial judge **must** give the clearest instruction to the jury on the allowable and prohibited uses of that admission.
  + Reason behind the rule:
    - It is impossible to cross-examine the co-accused because they are not compellable and thus the reliability of the confession may be suspect against the co-accused
  + If a limiting instruction is indeed not enough the judge can try the following (in order):
    - Editing the statements (or ask Crown to properly prep the witness so they won’t talk about prejudicial information)
    - throw out the confession statement to protect the fair trial interests of the co-accused
    - severance of the trials (very high burden)
* Editing Statements
  1. Editing of a statement may at times be necessary because of the inclusion of irrelevant or unnecessarily prejudicial evidence but such editing must not affect the tenor of a relevant statement
  2. Edited statements must be free from unnecessary prejudice, but the remaining portions must retain their proper meaning
  3. Jury should have as much as possible of a statement said to constitute an admission to place it in proper context
  4. Even though substantively irrelevant, contextual evidentiary relevance may allow admission
  5. Extent of the admissibility of that contextual evidence and probative value must exists and be weighed against prejudicial effect
* **Crown also has a duty** to ensure only the relevant portions are presented as evidence to assist the court

# Charter Issues (Grant)

## Section 7 – Finding a Principle of Fundamental Justice

1. It must be a legal principle
2. Must be sufficient consensus that the alleged principle is vital or fundamental to our societal notion of justice
3. Alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results

## Section 8 – Unreasonable Search and Seizure

* **Must balance against state interest in investigating crime**
* Does the state have **reasonable grounds** to step into your privacy and liberty?
* **Key is reasonable expectation of privacy** which involves:
  + Existence of a subjective expectation
  + Objective reasonableness of the expectation
* Personal privacy (strongest protection since it involves bodily integrity), territorial privacy, informational privacy
* Not all information is protected under Section 8. Info on intimate details of lifestyle and personal choice are protected
* **Totality of the Circumstances Test (Tessling)**
  1. Did person have a reasonable expectation of privacy?
     1. What was the subject matter in question?
     2. Did person have a direct interest in the subject matter?
     3. Did the person have a subjective expectation of privacy in the subject matter?
        + Low expectation does not lead to low protection of privacy
        + Absence of subjective expectation does not automatically mean section 8 protection is gone
        + No expectation when exposed to the public or abandoned
     4. Was the expectation objectively reasonable?
        + Major battleground for Section 8 arguments
        1. Place where search occurred
           + Consider nature/quality of information obtained
        2. Public view of the subject matter?
        3. Subject matter abandoned?
        4. Information already in possession of 3rd party?
        5. Was police technique intrusive compared to the privacy interests?
           + Lack of intrusiveness a factor to consider
           + Technology evaluated to its PRESENT capability, not some hypothetical
        6. Use of surveillance technology reasonable?
           + Nature and quality of information?
        7. Exposure of intimate details of the lifestyle? Or biographical data?
           + Exposure of details inside a home?
  2. If there was a reasonable expectation of privacy, did police violate it?
  3. Balancing under Section 24(2): Seriousness of the offence vs reasonableness of the search

## Section 9 – Unreasonable Detention/Arrest

* Section 9 – reasonable **grounds** for arrest? Cannot be complete speculation. A search for weapons/evidence can be done as part of an arrest.
  + Detention can be based on reasonable **suspicion**, lower standard than reasonable grounds

## Section 10 – Right to Counsel

* **No right for counsel to be present during interrogation (no Miranda rights like in the USA)**
* This Charter right ensures the accused is aware of their rights and giving a statement voluntarily
* Section 10(b) supplements s7 (right to silence) by:
  + **Informational component**: advise accused of right to seek counsel
  + **Implementational component**: given an opportunity to exercise right to consult
* **10(b) engaged upon arrest or detention, remedied under s 24(2)**
* **Not absolute and must be reasonable and balanced against various interests (interest in solving crimes and voluntary statements)**
  + No right to continuously consult counsel
  + **Right to consult AGAIN in the following circumstances:**
    1. New procedures involving the detainee
       - Non-routine procedures like polygraph, line-up, etc
    2. Change in jeopardy
    3. Reason to believe accused did not understand their 10(b) rights
       - If police undermine legal advice that was given

## Framework for 24(2) – Pre-Grant (No longer applicable)

* Provided a high degree of certainty
* Evidence was categorized conscriptive vs non-conscriptive, once it fits into a category it will be obvious whether it will be excluded or included
  + **Conscriptive evidence**: evidence that flowed from the accused (ie. statements and bodily substance) which are almost certainly out and no 24(2) balancing
  + **Non-conscriptive** (real evidence that otherwise existed without a Charter breach but was obtained as a result of a Charter breach) = balancing occurs under 24(2)
    - Factors to consider:
      * Severity of the Charter breach
      * Reliability of the evidence
      * General conduct of the police officers
      * Seriousness of the offense and importance to the Crown case
  + this test was too rigid and did not consider “all the circumstances” for conscriptive evidence
  + Ontario Court of Appeal says the test should all be about reliability (reliable = admit, unreliable = not admit), but this effectively eliminates the Charter rights and ignores the broader interest of the justice system
  + 24(2) balancing focuses on probative value (reliability of the evidence) and prejudicial effect (repute of the justice system)

## Steps to apply Charter

1. Violation of a Charter right on balance of probabilities (burden on accused to satisfy)?
2. Balance probative value (reliability of evidence) vs prejudicial effect (repute to the justice system) under 24(2) – state action, therefore do not apply section 1. (see below)
   * Charter rights are not absolute and must be balanced under section 24(2) (not section 1), unlike in USA where evidence against a constitution right is automatically excluded
   * *the evidence shall be excluded if it is established that, having regard to* ***all the circumstances****, the admission of it in the proceedings would bring the* ***administration of justice into disrepute****.*
   * **What would a reasonable member of the public think about the inclusion or exclusion of this evidence?**
   * 24(2) gives trial judge a broad discretion

### Balancing under Section 24(2), Post-Grant

* Focus is long-term and prospective protection for the integrity of the justice system in the eyes of a reasonable member of the public
  + ensure breach does not do further damage to the repute of the justice system
* Focus is not on the short-term effect or the case at hand (although a factor to look into)
  + **Not aimed at punishing the police or compensating the accused**
* Must look at all 3 (or 2 according to Nikos) lines of inquiry and balance:
  1. Seriousness of the Charter Breach
     1. Seriousness of the Charter-Infringing state conduct
        + **Good faith** and honest mistakes on the part of the police will reduce need for court to disassociate itself (legitimate confusion?)
        + Ignorance of Charter standards must not be rewarded or encouraged
        + Negligence and unreasonable mistakes cannot be equated with good faith
        + Deliberate police violation will support exclusion
        + A pattern of infringing conduct also support exclusion
        + Also consider how close was the police to compliance with the Charter
        + Courts excusing serious police misconduct is more harmful than acceptance of minor police misconduct
     2. Impact on the Charter-Protected Rights of the Accused
        + Which rights were violated?
          - Some Charter rights (is. 8 and 10(b)) have more impact on accused
          - Rights relating to self-incrimination are very serious
        + Intrusive or minor/technical?
        + The more serious the impact on the accused’s protected interest, the greater risk that admission will bring administration of justice into disrepute
  2. Society’s interest in an adjudication on the merits
     + Competing Interests to balance:
       - **Truth-seeking**: consider consequence of excluding the evidence and including the evidence
       - **Reliability of the evidence**
         * Admission of evidence of questionable reliability more likely to bring administration of justice into disrepute where it forms the entire prosecution case
         * Exclusion of highly reliable evidence may effectively kill the case
       - Seriousness of the case can sometimes be considered
       - **Keep in mind long-term and not short-term**

## Applying S24 to Statements by the Accused

* slightly different than pre-Grant but still very difficult to admit
  + No absolute rule of exclusion like in voluntariness rule but as a matter of practice have tended to exclude on the ground that admission on balance would bring administration of justice into disrepute
  + **Most cases will strongly favour exclusion**

1. Seriousness of the Charter-Infringing state conduct
2. Impact on the Charter-Protected Interests of the Accused
   * + Often it is a 10(b) rights violation
     + Right against self-incrimination is fundamental to our legal system and this is enabled through 10(b)
     + Violation of such fundamental rights tends to favour exclusion
3. Society’s Interest in an Adjudication on the merits
   * + Reliability of the evidence might be at stake when the police are detaining the accused without a lawyer

## Applying S24 test to Bodily Evidence

* pre-Grant excludes almost all bodily evidence, **post-Grant it is easier to get in**

1. Seriousness of the Charter-Infringing state conduct
2. Impact on the Charter-Protected Interests of the Accused
   * Often a s 8 violation
   * **The greater intrusion on the accused’s bodily integrity, privacy and dignity the more important it is for a court to exclude**
3. Society’s Interest in an Adjudication on the merits
   * **Such evidence is generally reliable and tips the favour towards admission**

## Applying S24 test to Real Evidence

* Most cases would be a simple balance between reliability and seriousness of the Charter breach

1. Seriousness of the Charter-Infringing state conduct
2. Impact on the Charter-Protected Interests of the Accused
   * + Often a s 8 violation
3. Society’s Interest in an Adjudication on the merits
   * + **Usually will not have reliability issues and tends to favour admission**

## Applying S24 test to Derivative Evidence

* physical evidence discovered as a result of unlawfully obtained statement
* Common law rule is to admit but is overruled by the Charter
* Judge should exercise discretion to refuse admitting if there is reason to believe the police **deliberately abuse**d their power to obtain a statement that will lead to derivative evidence
* **Strongly favours exclusion because it would encourage Charter violations otherwise**
  + Exception is if evidence is otherwise discoverable

1. Seriousness of the Charter-Infringing state conduct
2. Impact on the Charter-Protected Interests of the Accused

* Most cases will be a 10(b) right violation
* Where Charter rights were significantly compromised by breach it will favour exclusion
* Discoverability of evidence is an important factor
  + If the evidence was otherwise discoverable, it is heavily in favour of admission
  + Investigators would have to go on the stand to show how they will arrive at the evidence eventually anyway without the Charter breach

1. Society’s Interest in an Adjudication on the merits
   * **Evidence in this category usually reliable and favours admission**

## Definition of “Detention” and “Arbitrary” under s 9 and 10

1. Detention under 9/10 refers to a suspension of the individual’s liberty interest by a significant physical or psychological restraint. Psychological detention is established where:
   * the individual has a legal obligation to comply with the request
   * a reasonable person would conclude by reason of the state conduct that he had no choice but to comply (test in step 2)
2. Courts can consider whether a reasonable person in the circumstance would conclude he was detained.   
   Factors to consider:
   * Circumstances giving rise to the encounter as would reasonably be perceived by the individual
   * Nature of the police conduct including the language used, physical contact, place it occurred, presence of other, and duration
   * Particular characteristics or circumstances of the individual where relevant including age, physical statute, minority status, and level of sophistication

* A detention is arbitrary under s 9 if not **authorized by law or lacked reasonable suspicion**

# Self-Incrimination

* Protection against self-incrimination
  + Voluntariness rule and common law right to silence (subject to statute)
    - Crown must prove beyond a reasonable doubt
    - Automatic exclusion
  + Right to counsel (10(b))
    - Person must prove Charter violation and balance under s24(2)
  + Immunity (13)
  + Residual protection of right to silence under Section 7 of the Charter
    - Supplements the common law rights to silence
      * Usually involves serious state conduct akin to an abuse of process
    - Court can judicially stay the proceedings pursuant to 24(1)

## In-custody interview

* 1. voluntariness rule
  2. section 7 (right to silence) residual protection

## Out-of-custody interview

* 1. Detained? May still have right to counsel under 10(b)
  2. Common law right to silence, subject to statutory limitations

## Right to Silence

### Section 7 of the Charter (Singh)

* **Usually applies in custody or when liberty is engaged**
* **Police persuasion (legitimate means of persuasion), short of denying the suspect the right to choose (free will to choose) or depriving him of an operating mind, does not breach the right to silence**
  + Consider the following factors:
    - Number of times the person asserted their right to silence
    - Sophistication of the individual
    - Length of the interview
    - Impact of the interview on the accused and the vulnerability of the accused
    - Language used by the police, whether it infers that the person has an obligation to speak
    - Continued questioning even when accused repeatedly asserts their right to silence
* When **in detention** the test for voluntariness and section 7 right to silence is functionally equivalent
  + The courts **believe the right to silence should sit in the voluntariness rule but Nikos says it should be within section 7 instead**
    - One reason is that undercover officers in the jail would not engage the voluntariness rule
    - Undercover officer can passively seek information but cannot actively solicit information
* Cases where Section 7 supplements the common law
  + Section 7 is violated if accused is cross-examined about why he did not give a statement to the police
  + Statutorily compelled statements may also violate section 7
  + Where an undercover officer actively elicits an admission from a detained suspect
    - Depends on the test “the relationship between the state agent and the accused to determine whether there was a causal link between the conduct of the state agent and the making of the statement by the accused”

### Common law right to silence (Turcotte)

* **Applies in and out of custody, unless statute otherwise dictates**
  + A willingness to impart some information is not a waiver of the right to silence
* RULE: evidence of silence is **inadmissible** and has no probative value, CANNOT BE USED TO INFER GUILT
  1. Evidence of silence can, in limited circumstances, be adduced by the Crown if they can establish a **real relevance and a proper basis**. But must give appropriate warning to the jury
     + Can only be used to assess credibility and not to infer guilt
  2. defense raises an issue (**opens the door**) that renders the accused’s silence relevant, ie
     + Where defense emphasize the accused’s cooperation with authorities
     + Where accused testified that he had denied the charges against him when arrested
     + Where silence is relevant to the defense theory of mistaken identity and a flawed police investigation
     + Where the accused fairly to disclose his alibi in a timely manner
  3. **narrative** and cannot easily be extricated
  + Must tell the jury in clearest of terms that even if evidence of silence is admitted, it must not be used to infer guilt

## Witness Immunity

* **Supplements the right to silence** so people compelled to speak would not need to worry about self-incrimination
* Person can be compelled to speak in the following ways:
  + Statutory regime (ie. 83.28)
    - But protected by section 7 with use immunity, derivative immunity, and constitutional exemption
      * The section 7 requirements set a minimum, thus if the statute is broader, the statute applies
  + Subpoena as a witness
    - Protected by section 13 of the Charter
* **Use immunity**: compelled incriminating statements cannot be used directly against the witness
* **Derivative use immunity**: evidence undiscoverable but for the compelled incriminating statement cannot be used against the witness, section 7
* **Constitutional exemption**: Section 13
  + **Previously (pre-Henry)**, the court allowed incriminating evidence in a previous proceeding to be used for credibility, but not use the statement for its truth. Jury limiting instructions are required but it is controversial whether the instructions are sufficient.
  + **Noel limited the scope of the rule above**
    - Crown cannot continue invite the accused to adopt the incriminating statement for its truth
    - **The court limited the cross-examination of incriminating statements to innocuous areas of differences only**
      * Only parts of the statement that cannot be used to draw an inference of guilt
  + **Henry** further modified the Noel rules

### Section 13 of the Charter (Henry – current interpretation)

* Section 5 of CEA and Section 13 of the Charter both protect against self-incrimination
* Section 5 has been subsumed by the Charter
* At common law witnesses had the right to refuse to answer questions that would tend to incriminate them, but this has been removed by CEA s5 (Summa v Meier BCCA 1981)
* **Section 13 protection should logically apply if the person was an accused on 2 proceedings on separate indictments (or maybe even claim CEA s5\*\*)**
* CEA s 5 requires:
  + Person to invoke it expressly by **objecting**
  + Would have had the common law right against self-incrimination but for 5(1)
* Section 13 based on a principled approach
  + Objective of 13 is not to protect everybody, but to protect witnesses who were compelled to speak and then protected by the Charter
    - Focus is on protecting a witness who then became an accused at another proceeding
    - Section 13 is **not meant** to protect accused as retrials from the testimony of his previous trial, because they were never compelled
  + **Same indictment**
  1. If the accused does not testify at his trial, his testimony from an earlier proceeding cannot be used against him at that trial, regardless of whether he was the accused or a mere witness at the earlier proceeding
     + This rule prevents the Crown from having their case proved by the accused and the accused’s constitutional right under s11(c) would not be violated
  2. Even if the accused does testify at his trial, his testimony from an earlier proceeding cannot be used against him at that trial if he was compellable as a witness at the earlier proceeding
     + Prior to *Henry*, the courts allowed cross-examination of prior testimony to attack credibility
     + *Noel* stated the accused could only be confronted with earlier testimony about innocuous issues
     + *Henry* completely changed the rule and now depends on whether the accused was a compellable witness at the previous proceeding
     + **it is now permissible to cross-examine any accused who is being retried with evidence they gave at their earlier trial**
     + **there is now a complete bar on using earlier compellable testimony**
  3. If the accused doest testify at his trial, his testimony from an earlier proceeding can be used to cross-examine him at that trial provided he was not compellable as a witness at the earlier proceeding
     + The cross-examination can allow the Crown to solicit the accused to adopt the prior statement for its truth
  + “**other proceedings**” include bail hearings, voir dires, new trials, etc
  + “**compellable**” should treat witnesses as compelled even if their attendance was not enforced by subpoena
  + The goal of s 13 is to **protect individuals from indirectly being compelled to incriminate themselves**
* **Criticisms**
  + The absolute immunity for all non-testifying accused, even those who testified earlier, makes little sense. The **immunity is too strong** that the person at the previous proceeding could be making up lies knowing they will be protected anyways
    - The court should leave residual discretion to the trial judge to allow witness to be cross-examined on the prior testimony for credibility
  + There should not be much worry about protecting accused in retrials because most of the time their prior statement will not be incriminating

### Immunity under s83.28 of the Criminal Code

* A scheme to deal with compelled statements in non-proceedings
* **Section 13 is always supplemented by the broad principles of section 7**
  + Section 7 provides protection/immunity for those who are compelled to speak by statute
    - **Use immunity**
    - **Derivative use immunity**: evidence discovered through the statement
      * Must have an air of reality to apply and then onus flips to the state to disprove on a balance of probabilities
      * Derivative use protection under the statute is broader than the judicial interpretation
        + **Discoverability doctrine is inapplicable unless the statute mentions**
    - **Constitutional exemption**
      * **Rare** occasion where the court may determine this applies
      * This will happen where the accused can show the non-proceedings (ie. CRA hearing, etc) were used to further a criminal investigation
* Statutory compulsion to testify (in proceedings or non-proceedings) engages liberty interest under s 7
  + The statute ss10 provides statutory immunity
* **83.28 does not offend Section 7 as long as the immunity applies to extradition and deportation hearings as well**

# Privilege

* An evidentiary rule that is not aimed at truth finding
  + 24(2) is another such exception
  + Section 7/13 is also an exception
  + This can also promote truth seeking for the long term
* Meant to protect some other value that society has interest in
* Confidentiality is the key to some of the privileges
* Privilege prevents having to disclose information in the truth seeking process
  + Very broad protection
  + Judge has a duty to stop the proceeding when there is potential for disclosing privileged materials

## Case-by-Case Privilege (National Post)

* Class privilege is difficult to apply to non-standardized professions and also no flexibility to the balancing interests 🡪 **courts more likely to try case-by-case than class**
* Journalistic-confidential source privileges not recognized by Canadian court as a class privilege
  + UK does not attach class privilege
  + US rejected class privilege and allows case-by-case only
* To establish case-by-case privilege, the person wanting to seek protection of privilege **must satisfy these 4 Wigmore factors** (general framework to balance the competing interests):
  + Must satisfy first 3 factors before balancing in the fourth factor
  1. Communication must originate in a confidence that the identity of the informant will not be disclosed
     + Can only be claimed where the communication is made explicitly in exchange for a promise of confidentiality
     + Wigmore was concerned with the confidentially of the *contents* of the communication but should equally apply to the *identity* of the informant
     + Source must insist on confidentiality as a pre-condition
  2. The confidence must be essential to the relationship in which the communication arises
  3. The relationship must be one which should be “sedulously fostered” in the public good
     + Relationship between a blogger vs professional journalist may differ
     + Where the person concludes that in a particular case the relationship should no longer be fostered then this factor fails and public interest is no longer served by the privilege
  4. The courts must consider whether in the instant case the public interest is served by protecting the identity of the informant from disclosure outweighs the public interest in truth seeking
     + This factor does most of the work
     + Courts weigh against any countervailing public interest
     + Consider the nature and seriousness of the offence in question, probative value of the evidence sought
     + Public interest in free expression will *always* weigh heavily in the balance
     + **Some judges would exercise discretion to collect all the privileged information when considering this factor**

## Class Privilege

* Class privilege presumes privilege for matters within the scope of the relationship (ie. solicitor-client, informer privilege)
  + Subject only to limited exceptions such as “innocence at stake”
  + Solicitor-client privilege is also protected by section 7 aspects
* Class privileges should be created by legislative action
  + Spousal privilege

### Solicitor-Client Privilege

* Solicitor-client privilege is based on the functional needs of the administration of justice
  + One of the highest forms of privilege in the law and also constitutionally protected under section 7
* Solicitor-client privilege belongs to the client and is for the client and not the solicitor to waive
* Privilege is not absolute but should be overridden only as a last resort where absolutely necessary
* Where legal advice of any kind is sought from a professional legal advisor 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 can be waived.
  + Talking to a lawyer on purely business matters does not bring about solicitor-client privilege and must be assessed case-by-case
* To establish solicitor-client privilege
  1. Communication must be intended to be confidential
  2. Communication in relation to legal advice
* Privilege does not apply to documents that existed PRIOR TO the relationship nor to physical objects in the lawyer’s custody
* Exceptions
  + **Before looking into exceptions, we need to be sure a privilege exists and is not waived**
  + **Communications in furtherance of crime or fraud** (arguably not an exception but a negation of privilege) (*Shirose*)
    - Only applies to **future crimes and not crimes already committed**
      * Must be clear that exception won’t apply when the person is seeking legal advice to something he plans to do
    - No privilege will attach where the client either conspires with his solicitor or deceives him
    - Key is the intent and purpose of the client and whether the client knew or “should have known”
    - Clients seeking legal advice on good faith on transactions that turn out to be illegal does not trigger exception
    - Steps
      1. Party raising the allegation of future crime must provide an evidentiary foundation, mere allegation is insufficient
      2. Once the evidentiary foundation is met, the trial judge should vet the materials and disclose only if the materials can fairly support an inference of criminal intent
  + **Full answer and defense** (*Brown*)
    - Both tests require the accused to have some knowledge of the communications in question, mere speculation is not enough
    - Usually preferable to delay the application until end of Crown’s case so trial judge can “guess” whether a reasonable doubt exists
      * But Nikos said it’s better to make the application before the trial
    - The evidence sought from the privileged communication **must go directly to one of the elements of the offense**, it cannot be some corroborative evidence or someone that attacks credibility of a Crown witness
    - Courts will not explicitly consider the seriousness of the offense but counsel should emphasize that to the court in appropriate circumstances
    - Threshold test (necessity test) – to show there is a foundation for the innocence at stake exception
      * Once this threshold is met, the judge will get the information and then balance in the innocence at stake test
      * Very problematic as it is inviting the judge to pre-judge the outcome of the case
      1. The information he seeks from the solicitor-client communication is not available from any other source, and
         * Trial judge should consider admissibility of other potential sources of information before overriding the privilege
         * Must have some circumstantial evidence that the privileged information is critical
      2. He is otherwise unable to raise a reasonable doubt (ie. raising other defenses)
         * Not enough that it would “help” or “significantly help” the defense
      3. If the threshold test is not met the privilege stands, otherwise go to innocence at stake test
    - Innocence at stake test
      * Problematic to argue because the defense doesn’t have the information that needs to be argued upon
      1. Accused seeking production of solicitor client communication has to demonstrate an evidentiary basis to conclude that a communication exists that **could raise** a reasonable doubt as to his guilt
      2. If such an evidentiary basis exists, the trial judge should examine the communication to determine whether, in fact, it is **likely to** raise a reasonable doubt as to the guilt of the accused
      * **Burden on 2nd stage is higher than burden on 1st stage, so akin to substituting the judge’s view**
    - What to release?
      * Judge should order production of only the communication necessary to allow accused to raise a reasonable doubt
      * Communication are not to be turned over to the Crown
      * If the communications are used by the accused, the privilege holder is protected under the Charter by use immunity and derivative use immunity. But there is NO TRANSACTIONAL IMMUNITY
  + **Waiver** (*Shirose*)
    - If advice intentionally disclosed by the client then it might be waived
    - Party waives the protection of the privilege when he voluntarily injects into the suit the question of his state of mind or when he brings suit or raises defense that makes his intent and knowledge of the law relevant
      * Just mentioning that you spoke with a lawyer is not enough to constitute waiver
      * More likely to find a waiver if using the lawyer consultation to support the case/arguments (ie. when the party is using a “good-faith” defense)
    - Only disclose the parts which are related to a live issue
    - Explicit waivers and implicit waivers (opening the door)