Evidence Mini Summary
Summer 2012 (Harris)
Liz Pan

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ALL EVIDENCE

General rule
All evidence that is relevant is presumptively admissible.

The evidence:
1) Must be relevant, in that it makes the existence of a material fact in issue more or less likely.
2) Must be presumptively admissible or satisfy the criteria of an exception.
3) Must not engage any other exclusionary rule that would make it inadmissible.
4) Must have greater probative value than prejudicial effect.
   Note Seaboyer standard: For the Crown, if the prejudicial effects outweigh the probative, the evidence will be excluded. For the defence, the prejudicial effect must *substantially* outweigh the probative value in order to warrant exclusion.

Basic test (Kinkead):
1) Determine the probative value of the evidence, assessing its tendency to prove a fact in issue, including the credibility of the witnesses.
2) Determine the prejudicial effect of the evidence because of its tendency to prove matters that are not in issue, or because of the risk that the jury may use the evidence improperly to prove a fact in issue.
3) Balance the probative value against the prejudicial effect having regard to the importance of the issues for which the evidence is offered against the risk that the jury will use it for improper purposes, taking into account the effectiveness of any limiting instructions.

Probative value/prejudicial effect balancing
1) Probative value refers to the *extent* that the evidence makes a material fact more or less likely. Prejudicial effect can refer to prejudice to the accused (like moral prejudice), or prejudice to the trial process (like undue consumption of time).
2) Formal admissions by the accused can significantly affect the probative value of some evidence. Ex: If the accused admits to the Crown allegation that death was caused by stabbing, would decrease probative value of gruesome autopsy photos admitted to show cause of death.
3) All evidence is subject to this final balancing.

The jury should be instructed:
1) As to the permissible and impermissible uses of the evidence.
2) As to the primacy of the reasonable doubt standard. The ultimate test is if the Crown proved the guilt of the accused beyond a reasonable doubt.
3) If the Crown's case is entirely or almost entirely circumstantial, the jury should be instructed that the accused should be found guilty only if they are satisfied that the guilt of the accused is the only reasonable conclusion to be drawn from the whole of the evidence (Robert).
4) As to the inherent risks of some types of dangerous evidence, like that of Vetrovec witnesses.
5) That it is for the judge to determine the law, and for the jury to determine the facts. If evidence is admitted, the assessment of credibility, reliability, and ultimately, weight is the province of the jury.

WD (cited in Robertson)
The TJ should instruct the members of the jury that:
1) If they believe the evidence of the accused, they must acquit.
2) If they do not believe the testimony of the accused but are left in reasonable doubt by it, they must acquit.
   Note: In other words, the jury can reject part of the evidence of the accused and still reasonably entertain a doubt as to his guilt based on other parts of the accused's evidence.
3) Even if not left in doubt by the evidence of the accused, they still must ask themselves whether they are convinced beyond a reasonable doubt of the guilt of the accused based on the balance of the evidence that they do accept.
   Note: In other words, if they reject all of the accused's evidence, they must still be convinced beyond a reasonable doubt.

This instruction should be given when the evidence of the accused witness, if believed, would warrant an acquittal.

REAL AND DEMONSTRATIVE EVIDENCE

Definition
Real evidence refers to tangible items exhibited to the trier of fact. This evidence is often directly linked to the incident, such as a murder weapon.
Demonstrative evidence refers to aids used to help witnesses better illustrate or explain their evidence to the trier of fact, like a map that shows the locations of a series of murders.

General rule
The evidence is admissible IF (Creemer, cited in Penney):
1) It is properly authenticated, AND
2) It is not fundamentally misleading.

However, like any evidence, it will be inadmissible if its prejudicial effect outweighs its probative value.

Key principles
Real evidence is inherently reliable/credible, inherently neutral/impartial, and can be highly probative.

BUT, visual, tangible evidence has powerful impact. There is a risk that it will create undue prejudice by inflaming emotional passions or mislead the trier of fact.

Penney
Authentication is necessary to give the evidence any probative value. The TJ must be satisfied that the evidence is what it is purported to be. The onus is on the party seeking to lead it.

Whether the evidence is fundamentally misleading will depend on the particular item of evidence and the purpose for which it is led. In Penney, the sporadic videotape was fundamentally misleading, as it was being led for a purpose that required it to show the event as a continuous transaction. However, it would not have been fundamentally misleading if it were being used for identification.

For videotapes to be admissible:
1) It must be established that the video has not been altered or changed.
2) The video must accurately represent the facts or depict the scene of the offence.

Kinkead
Real/demonstrative evidence may be excluded, even if authenticated and not intentionally misleading.
A probative/prejudicial balancing will be applied to each item of evidence.
The TJ has discretion to admit all the evidence, none of the evidence, or only part of the evidence, and can edit out any offending portions in order to reduce potential prejudice.
The probative value of evidence can be fundamentally affected by the willingness of the accused to make certain admissions. If the defence is willing to admit certain things that relate directly to the purpose the Crown indicates for leading the evidence, that evidence then becomes unnecessary to proving whatever facts have been admitted.

Lowe v Jenkinson
Documents may be authenticated in a number of ways, such as calling the writer, calling a witness who saw the document signed, calling a witness who is familiar with the writer's handwriting, by comparison of the writing in dispute with a writing proved to be genuine, by the calling of experts, or through admission by the opposing party.

Jury instruction
If there is a risk that the evidence will be misused, the TJ should:
1) Identify the proper purpose of the evidence, AND
2) Warn the jury against its improper use.

Ex: Gruesome autopsy photographs, when identification is the only matter at issue.

EXTRINSIC MISCONDUCT EVIDENCE

Definition
Extrinsic misconduct evidence refers to any evidence that the accused has engaged in discreditable or criminal acts outside of the indictment. AKA: general propensity/bad character/disposition evidence.

Similar fact evidence is extrinsic misconduct evidence that reflects a SPECIFIC propensity to react in a similar way to similar circumstances. Can be relevant to:
1) Credibility. If the complainant is alleging that the accused did x, and two other witnesses testify that the accused did x, the improbability of coincidence supports the inference that the complainant is telling the truth about x. Allegations must be independent. The possibility of collusion completely undermines probative value.
2) Identification. If several offences are carried out in a similar manner, like a series of arsons in close proximity to each other, all of abandoned houses, all set using a rare and unusual accelerant, and all around the same time of day, the improbability of coincidence supports the inference that the same person committed all of them.

General rule
Extrinsic misconduct evidence is presumptively inadmissible. If the evidence does no more than invite the inference that the accused is the kind of person to commit the offence in question, it will be excluded (Cuadra).

Evidence that does no more than prove the general propensity of the accused will not gain admission for it will invariably have greater potential prejudicial effect than probative value (Handy).

Similar fact evidence is presumptively inadmissible. Although it may be relevant, it risks capturing the attention of the trier of fact to an unwarranted degree; its potential for prejudice, distraction, and time consumption is very great and these disadvantages will generally outweigh its probative value, and is therefore presumptively inadmissible (Handy).

Conduct leading to a charge of which an accused has been acquitted cannot be proved against him as similar acts (Cullen).

Exceptions
1) Extrinsic misconduct evidence that is related to an issue other than disposition MAY be admissible, such as specific propensity (Handy). As the similar fact evidence becomes more focused and specific to circumstances similar to the charge in question (ie, situation specific), the probative value can increase to the extent that it outweighs the prejudicial effect (Handy). Note: NH says this due to the improbability of coincidence.
2) Evidence of prior convictions under s 12 of the CEA is presumptively admissible (Corbett). All witnesses are presumed to have their credibility at issue. Evidence of prior convictions is presumed to be relevant to credibility.

Key principles
Handy
Extrinsic misconduct evidence will be admissible IF the Crown satisfies the TJ, on a balance of probabilities, that:
1) It is relevant and probative to some other issue beyond disposition or character, AND
2) The probative value of the evidence outweighs its potential prejudice.

Bad personhood is not an offence. Evidence of general criminal disposition or bad character will have no cogency, as it does not have any specific connection with or relation to the issues for decision. General disposition of the accused does not qualify as an issue in question (Handy).

Admission carries the risk of:
1) Moral prejudice. The risk of convicting the accused because he is a "bad person" rather than based on proof that he committed the offence.
2) Reasoning prejudice. The risk of distracting or confusing the jury, or of undue consumption of time, and the danger that the jury may have trouble disentangling the subject matter of the charges from the similar fact evidence.

When the probative value of specific propensity evidence depends on the unlikelihood that two or more persons would be making similar false allegations, collusion (or collaboration) between those persons completely undermines the probative value.
Factors to consider when assessing probative value:
1) The strength of the evidence that the similar acts actually occurred.
2) The extent that the evidence supports the desired inference. Factors to assist in assessing similarity when the Crown is trying to use the similar fact evidence to prove the actus reus (rather than identity):
   i. Proximity in time of the similar acts
   ii. Extent to which the similar acts are similar in detail
   iii. Number of occurrences of the similar acts
   iv. Circumstances surrounding or relating to the similar acts
   v. Any distinctive features unifying the incidents
   vi. Intervening events
   vii. Any other factor which would tend to support or rebut the underlying unity of the similar acts (like possibility of collusion).
3) The materiality of the evidence (ie, the extent that the matters it tends to prove are live issues in the proceedings).

Jury instruction
The jury must be told (Handy):
1) They may only use the extrinsic misconduct evidence for the proper purpose for which it was admitted.
2) It must not be used to reason from general disposition to guilt by inferring that the accused is a person whose disposition or character is such that he is likely to have committed the offence in question.

Proper jury instruction is necessary to counteract three possible effects of bad character evidence (BFF):
1) The jury might convict on general propensity reasoning (ie that because accused committed past bad acts, the accused committed the bad act in question).
2) The jury might convict to punish for past acts.
3) The jury might become confused and substitute a verdict with respect to the past acts for a verdict on the charge in issue.

EVIDENCE OF POST-OFFENCE CONDUCT

Definition
Evidence of post-offence conduct refers to conduct of the accused, after the incident in question, that can support an inference of guilt.

General rule
Evidence of post-offence conduct is generally admissible. It may be relevant:
1) When identity or culpability is at issue, but not the extent of that culpability. The conduct of an accused after a crime has been committed may provide circumstantial evidence of participation in that crime. The Crown must show that there is a reasonable possibility that the post-offence conduct is linked to the offence in question (White).
2) To rebut defences put forward by an accused that are based on an alleged absence of the required culpable mental state (Peavoy).
3) To support an inference of innocence. Evidence that a person assisted the police when under no obligation to do so and provided evidence which, if he committed the offence, could be used to convict him may, depending on the circumstances, be reasonably capable of supporting the inference that the accused had nothing to fear because he did not commit the crime (BSC).

Risks:
1) There is a risk that the trier of fact will draw the wrong inference. There could be multiple explanations for the conduct in question.
2) Some evidence of misconduct is put before the trier of fact, with the risk that it could lead to general propensity reasoning.
3) There is a risk that the trier of fact will over-emphasize the evidence.

Exceptions
Evidence of post-offence conduct cannot be used when the accused has admitted to committing the offence in question, but has denied a specific level of culpability for that act, or has denied committing some related offence arising from the same operative set of facts (White).

The post-offence conduct of the accused can be “equally explained by” or “equally consistent with” two or more offences (White). Ex: When an accused has admitted that he punched the victim, the fact that he fled from the scene does not help to determine if he fled because he punched the victim, as he alleges, or stabbed the victim, as is being alleged.

When culpability for one offence is admitted but culpability for another offence is denied, evidence of post-offence conduct cannot be used to draw an inference of guilt because it does not relate to a particular offence, and therefore cannot be used to determine the degree of culpability of an accused (Peavoy).

Key principles
White
Evidence of post-offence conduct is commonly admitted to show that an accused person has acted in a manner, which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person.

Evidence of post-offence conduct may be used when the identity or culpability of the accused is at issue. In other words, when the accused has denied any involvement in the facts underlying the charge at issue, and has sought to explain his or her actions by reference to some unrelated culpable act. Ex: The accused alleges that he fled because he robbed a bank, not because he murdered someone.

A reasonable inference of guilt may be drawn from:

1) The fact that the accused fled from the scene of the crime or the jurisdiction in which it was committed, attempted to resist arrest, or failed to appear at trail, OR
2) Acts of concealment, such as when the accused has lied, bribed a witness, assumed a false name, changed his appearance, or attempted to hide or dispose of incriminating evidence.

There is no special standard of proof for evidence of post-offence conduct. Like other evidence, it should not be excluded from consideration because it fails does not satisfy the standard of proof beyond a reasonable doubt.

The trier of fact’s determination of guilt or innocence must be based on all of the evidence, and the criminal standard cannot be applied to select items or categories of evidence. UNLESS, in the rare case when evidence of flight or concealment is the only evidence or constitutes substantially all of the evidence of the Crown, then it follows that such evidence must be proven beyond a reasonable doubt in order to support a conclusion of guilt.

Peavoy
Evidence of post-offence conduct must be relevant. It must be reasonably capable of supporting an inference that tends to make a fact in issue more or less likely.

Post-offence conduct by an accused that is reasonably capable of supporting an inference adverse to the accused OR favourable to the accused is admissible as long as its probative value outweighs its prejudicial effect and there is no exclusionary rule requiring the exclusion of the evidence (Peavoy).

BSC
Evidence of post-offence conduct, proffered by the defence, should be received when:

1) It is relevant,
2) Its probative value is not substantially outweighed by its prejudicial effect, AND
3) There is no applicable exclusionary rule.

Jury instruction
The jury should be properly instructed to ensure that the evidence is not misused. The TJ should remind the jury that people sometimes flee or lie for entirely innocent reasons, and that even if the accused was motivated by a feeling of guilt, that feeling might be attributable to some culpable act other than the offence for which the accused is being tried (White).

The jury must be instructed as to how evidence of post-offence conduct can and cannot be used. If the Crown suggests the evidence should be used in a prohibited manner, the jury should be instructed that the evidence cannot be used to assess the accused’s level of culpability (Peavoy).

Notes
NH says this is likely the most frequent source of reversible error.

EVIDENCE OF PRIOR CONVICTIONS

Relevant statutory provision
Canada Evidence Act, section 12

12. (1) A witness may be questioned as to whether the witness has been convicted of any offence … including such an offence where the conviction was entered after a trial on an indictment.
(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

Definition
The s 12 meaning of *conviction* is strictly construed. The accused cannot be cross-examined on a discharge, or on findings of misconduct within a disciplinary hearing (Corbett).

General rule
Character/extrinsic misconduct evidence is presumptively inadmissible.

BUT, as an exception to this general rule, evidence of prior convictions under s 12 of the CEA is presumptively admissible (Corbett). All witnesses are presumed to have their credibility at issue. Evidence of prior convictions is presumed to be relevant to credibility, based on the theory that if a witness has committed criminal acts, he will be more likely to lie.

Exceptions
The TJ has the discretion to exclude this evidence, by precluding cross-examination of an accused on prior convictions. The defence must show that the prejudice is such that to allow the cross-examination would undermine the accused's right to a fair trial (Corbett).

Key principles
Corbett
Four central factors to consider when assessing admissibility of evidence of prior convictions:

1) Timing. The more recent, perhaps the more relevant.
2) Nature of the previous conviction. If it speaks to dishonesty (theft, perjury, fraud), will weigh in favour of admission.
3) Extent to which the named offence is similar to the offence charged with. Can weigh against admission because of risk of being used for general propensity reasoning.
4) Fairness. If the defence is attacking the credibility of the Crown witnesses, this may weigh in favour of admission, to avoid presenting the trier of fact with a distorted picture.

When the accused is a witness, the Crown can adduce evidence of prior convictions as they relate to credibility. The burden of proof remains upon the Crown and the introduction of prior convictions creates no presumption of guilt nor does it create a presumption that the accused should not be believed. The prior convictions are simply evidence for the jury to consider, along with everything else, in assessing the credibility of the accused (Corbett).

The Crown's right to cross-examine the accused on prior convictions is limited. The Crown is permitted to cross-examine the accused as to the fact of the conviction and the sentence imposed, but not the conduct or facts that led to the conviction. The accused may not be asked if she testified on the prior occasion.

These limitations on the Crown apply only to accused persons who testify. Ordinary witnesses may be cross-examined by either party with respect to discreditable conduct, including any facts underlying criminal convictions.

Jury instruction
In cases where the accused has been cross-examined on prior convictions, to instruct the jury regarding the limited permissible use it can make of such evidence (Corbett).

Should remind the jury that it may use the evidence for the assessment of credibility, and must not use it for general propensity reasoning (that is, that due to the nature of the prior conviction or convictions, that the accused is the sort of person who would commit the offence in question.

Notes
A Corbett hearing refers to the voir dire that is held to provide a context for the TJ to assess the probative value compared to the potential for prejudice raised by the prior convictions.

EVIDENCE OF VETROVEC WITNESSES

Definition
A Vetrovec jury instruction is required for any witness with such severe credibility or reliability issues that he cannot be trusted to tell the truth under oath, due to his amoral character, criminal activities, past dishonesty or inconsistency, or motives to lie. These witnesses are known as Vetrovec witnesses.

Their severe credibility or reliability problems can come from one factor, like a prior conviction for perjury, or more often, from a combination of factors, like prior inconsistent statements, criminal record, and evidence that there has been some leniency with respect to some charges.

Warnings do not need to be given for every witness falling within some designated category, such as accomplices or jailhouse informants. In any instance where there are serious reasons to be concerned about the credibility or reliability of an important witness, a warning should be given.

General rule
The evidence of Vetrovec witnesses will generally be admissible. However, this evidence is so dangerous that a Vetrovec instruction must be given to the jury, which will make the ultimate determination of credibility.

Questions of credibility and the weight that should be given to evidence are for the jury, within the legal framework given by the TJ (Murrin).

A judge has the discretion to admit evidence that he considers unreliable unless there is some particular prejudice flowing to the accused from its admission. Both the accused and the Crown have a right to expect the assessment of reliability to be performed by the jury (Murrin).

Key principles

Both defence and Crown counsel have a responsibility to raise objections if they feel the Vetrovec jury instruction is inadequate.

Dhillon
The position taken by opposing counsel can render certain evidence admissible that would otherwise be inadmissible. This is known as *opening the door*.

Jury instruction

A Vetrovec jury instruction should (Khela):

1) Identify the testimony requiring special scrutiny,
2) Explain why it requires that special scrutiny,
3) Caution the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; AND
4) Tell the jury to look for evidence from another source tending to show that the untrustworthy witness is telling the truth (ie, confirmatory evidence). This confirmatory evidence does not need to implicate the accused, BUT:
    a) Must relate to a **material** aspect of the VW's testimony, and
    b) Must be **independent** of the VW. (Note: Regrettably, includes evidence from another VW).

Confirmatory evidence is **independent** if it is not tainted by its connection to the unsavoury witness. It is **material** if it bolsters the jury's confidence in that the witness was truthful in relevant aspects of his testimony; however, such evidence does not necessarily have to implicate the accused (Khela).

Note: Harris says the jury also should be instructed:

1) To be cautious with the evidence, even if there is corroborating evidence, AND
2) That there is a relationship between the severity of reliability and credibility problems and the amount and quality of corroborating evidence needed to restore confidence. What is needed can vary, and not all evidence is even capable of providing the level of comfort or confidence required for conviction.

Notes

Although the decision to warn is discretionary, if the testimony is dangerous enough in the particular circumstances of the case, a failure to give an adequate warning to the jury will constitute an error of law.

EYEWITNESS EVIDENCE

Definition

Not all eyewitness evidence warrants the same degree of caution. It is particularly dangerous when:

1) The conditions for viewing were poor (such as a limited time, or in darkness), OR
2) The suspect is unknown to the witness.

General rule

Eyewitness evidence is presumptively admissible. Credibility/reliability issues will be left for the trier of fact to assess.

Note: Prior identification is an exception to the rule against hearsay. In-court identifications are inherently suspect. The witness expects to see the perpetrator in court. Further, a significant amount of time can pass between when an initial identification is made and the time of trial, during which memories can fade or become tainted.

Key principles

Gonsalves

Eyewitness identification prosecutions involving the identification of a stranger raise an alert as to the well-recognized dangers inherent in such evidence and the risk of a miscarriage of justice through wrongful conviction.

Eyewitness identification evidence can be notoriously unreliable, calling for considerable caution by the trier of fact.

Generally, it is the reliability, not the credibility, of the witness that must be established.

An assessment of the reliability of the identification evidence depends on a critical consideration of the basis of the witness's conclusion. Examples of factors to consider:

1) Was the subject a stranger or known to the witness?
2) Was the opportunity to see the witness a fleeting glimpse or something more substantial?
3) Was the subject seen in the darkness of night or well-illuminated conditions?
4) Were there intervening circumstances, capable of tainting or contaminating the independence of the identification?

The conditions under which an observation is made, the care with which it is made, and the ability of the observer affect the weight of the evidence. The method used to recall or refresh the recollections of eyewitnesses is also of crucial importance.

Photo lineups should:

1) Consist of photos that resemble the eyewitness's description as much as possible, or at least as close as possible to the suspect.
2) Be conducted by a person outside of the investigation who does not know who the suspect is or if his photo is contained in the lineup.
3) Be presented sequentially, rather than as a package.

Jury instruction

The TJ should (Gonsalves):

1) Instruct the jury that eyewitness testimony is often involved in wrongful convictions, AND
2) Provide a list of factors to consider when considering the weight to give the evidence.

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OPINION AND EXPERT EVIDENCE

Relevant statutory provisions
Canada Evidence Act, section 7 and *Criminal Code*, section 657.3

Definition
An *opinion* is an inference from observed facts. It is generally only for the trier of fact to determine the inferences that can be drawn from facts.

Expert evidence refers to any observations or descriptions that require special training or experience to be offered competently. The purpose of expert evidence is give the trier of fact the ability to draw inferences it would not otherwise be able to draw. It should provide information that is outside the ordinary knowledge of the trier of fact, and be relevant to a material issue.

General rule
The general exclusionary rule is that the usual witness may not give opinion evidence, but testify only to facts within her knowledge, observation, and experience. Therefore, opinion evidence, including expert evidence, is presumptively inadmissible.

The party wanting to lead the evidence has the burden of showing that it should be admissible, unless the other party concedes to its admission.

Risks
1) Overreaching by expert witnesses is likely the most common fault leading to reversals on appeal (Abbey).
2) The potential exists for the trier of fact to defer to the opinions of experts, rather than making its own determinations.
3) Expert witnesses are presumably receiving some kind of benefit from their testimony, which raises a concern about bias (DD).
4) Linked to wrongful convictions (DD).
5) The presentation of expert evidence can be very time-consuming and expensive (DD).
6) It is difficult for opposing counsel to test reliability through cross-examination (DD).

Exceptions
Two categories of admissible opinion evidence:
1) Non-expert witnesses. The opinion of lay witnesses may be admissible when there is no other meaningful way for them to communicate the ordinary knowledge they possess (Graat).
   Note: This is sometimes called the “compendious statement of facts” exception because, in expressing what may appear to be an opinion, the lay witness is really summarizing a number of independent observations such as, “his eyes were bloodshot, he smelled of alcohol, he was unsteady on his feet, etc.”
2) Expert witnesses. The opinion of experts may be admissible when the trier of fact does not have the special training or experience required to make the relevant observations that the expert can offer, provided the Mohan criteria, as developed in Abbey, are satisfied.

Key principles
Graat
Non-expert witnesses may give opinion evidence when:
1) It concerns matters that the trier of fact can resolve based on ordinary knowledge, and where the guidance of an expert is unnecessary, AND
2) When it may be difficult for them to narrate their factual observations individually, given the nature of the observation of the deficiencies of language.

Note: NH says counsel should ask witnesses the basis of their opinions. This may help the trier of fact to understand the scene and may stop them from speculating.

Mohan
The admission of expert evidence depends on the application of four criteria:
1) Necessity. Does the expert evidence deal with a subject matter that the trier of fact would be unable to draw inferences in without assistance?
2) Relevance. Is the expert evidence logically relevant to a material issue?
3) A qualified expert. Does the expert possess special knowledge and experience going beyond the trier of fact, in the matters testified to?
4) The absence of an exclusionary rule. Is there any applicable exclusionary rule that would be offended by the admission of the evidence?

Note: There are two aspects to relevance.
1) Is the expert evidence logically relevant to a material issue? AND
2) Does the expert evidence relate to the actual circumstances of the case? This can be determined by the use of a *hypothetical question* (see Bleta).
   Not enough to have expert evidence saying, “X can happen”, should have expert evidence saying, “X can happen in THESE circumstances.”

Bleta
Where an expert is giving an opinion based on facts not within his personal knowledge, it is necessary to put the question to him in a hypothetical context, even if evidence has already been led upon such facts, because the facts of the case are for the trier of fact to determine, not the expert.

If the trier of fact finds that the facts in the hypothetical exist, the opinion can be applied. If the trier of fact finds facts materially inconsistent with the hypothetical, the opinion becomes useless.

Palma
A lack of foundation will generally go to weight, rather than admissibility. As long as there is *some* admissible evidence to establish the foundation for the expert’s opinion, that opinion can be accepted, although the TJ should instruct the jury that the more the expert relies on facts not proved in evidence, the less weight the jury may attribute to the opinion.

Llorenz

The rule against oath-helping prohibits the admission of evidence adduced solely for the purpose of proving that a witness is truthful. The ultimate conclusion as to the credibility or truthfulness of a witness is for the trier of fact, and it is not the proper subject of expert opinion. Witnesses may not express an opinion about whether a particular witness is telling the truth.

BUT, expert evidence may be led with regard to information that the trier of fact would require to make its own determination of credibility. A jury instruction will be critical. Ex: The reasons why children frequently recant their allegations of sexual abuse.

DD

Expert evidence presents a number of serious risks (see above), and its use should be more limited. The admission of expert evidence should be subject to a more stringent test of necessity: Only when the trier of fact is apt to come to a wrong conclusion without expert evidence, or where access to important information will be lost unless we borrow from the learning of experts.

A jury instruction is preferred to expert opinion, where practicable. It saves time and expense and is given by an impartial judicial officer, and any risk of superfluous or prejudicial content is eliminated. Note: Harris says, will not work in all situations, like if both sides have competing evidence.

Abbey

Before deciding admissibility, the TJ must determine the nature and scope of the proposed expert evidence. In doing so, the TJ sets out both the boundaries of the proposed expert evidence but also the language in which the expert evidence may be proffered. This will help ensure that the testimony will be confined to permissible areas and it will meet the requirement of threshold reliability.

Admissibility is not an all or nothing proposition. The TJ may admit part of the proposed testimony, modify the nature or scope of the proposed opinion, or edit the language used to frame that opinion.

The ONCA restructured the admissibility test articulated in Mohan into two steps:

1) Existence of preconditions to admissibility. This inquiry will yield yes or no answers. Evidence that does not meet the preconditions to admissibility will be excluded at this stage.
    a. Is it necessary? Note: There must be a requirement for special knowledge, without which the trier of fact would be unable to draw inferences (DD).
    b. Is it logically relevant to a material issue (does it make the existence of a fact more or less likely)?
    c. As per NH: Is it relevant to the actual facts of the case, as can be determined by the use of a hypothetical question?
    d. Is the expert qualified to give the evidence?
    e. Is there an absence of any other exclusionary rule?
2) Gatekeeping/balancing. This inquiry requires the exercise of judicial discretion. The TJ must perform a cost-benefit analysis to determine if the expert evidence is sufficiently beneficial to the trial to warrant its admission despite its potential harm.
    a) Probative value.
        i. Revisit the criteria of necessity, relevance, and qualified expert and assess as if on a continuum. Ex: If borderline or very experienced expert, if peripheral or material issue, if unhelpful or essential.
        ii. Consider the overall reliability of the expert evidence. Ex: The subject matter of the evidence, the methodology used in arriving at the opinion, the expert's expertise, and the extent to which the expert is impartial and objective.
    b) Prejudicial effect.
        i. The risk that the jury will be unable to make an effective assessment of the evidence.
        ii. The risk that the jury will yield its fact-finding function.
        iii. The risk that the evidence will unduly complicate and extend the proceedings.

Jury instruction

When a witness offers evidence that is relevant to credibility, the TJ should ensure that the evidence presented is confined to its proper purpose, and to direct the jury on the limited use that is to be made of the evidence (Llorenz).

The TJ should instruct the jury that the more the expert relies on facts not proved in evidence, the less weight the jury may attribute to the opinion (Palma).

The TJ should instruct the jury members that (from CJC):

1) The opinions of experts are just like the testimony of any other witnesses. Just because an expert has given an opinion does not require them to accept it. They give the opinion as much or as little weight as you think it deserves. They should consider the expert's education, training and experience, the reasons given for the opinion, the suitability of the methods used, and the rest of the evidence in the case when they decide how much or little to rely on the opinion.
2) The expert witness was asked to assume certain facts. What an expert assumes or relies on as a fact for the purpose of offering her opinion may be the same or different from what you find as facts from the evidence introduced in this case.
3) Although how much or little they rely on the expert's opinion is up to them, the closer the facts assumed or relied on by the expert are to the facts as they find them to be, the more helpful the expert's opinions may be to them. To the extent the expert relies on facts that they do not find supported by the evidence, they may find the expert's opinion less helpful

Notes

Expert evidence is a significant factor in wrongful convictions.

NOVEL SCIENTIFIC EVIDENCE (SUBTYPE OF EXPERT EVIDENCE)

Relevant statutory provisions

Canada Evidence Act, section 7 and *Criminal Code*, section 657.3

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

Note: Canadian courts have previously established a practice of admitting kinds of expert evidence that have subsequently been shown to be unreliable. Ex: The optical comparison of hair samples was once routinely admitted, but is now known to be dangerous.

General rule
Novel scientific evidence is a type of expert evidence, and is therefore presumptively inadmissible.

Expert evidence that advances a novel scientific theory or technique is subject to special scrutiny, in addition to the Mohan criteria as developed in Abbey. Think Mohan+.

When the science is not established, in addition to the risks of expert evidence, there is an increased risk that worthless or misleading information will be presented to the trier of fact, which may be unable to identify it as such.

Key principles
JLJ
In order to be admissible, novel scientific evidence satisfy an even stricter application of the necessity and reliability inquiries than as defined in Abbey:
1) The evidence must be essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert.
2) The reliability of the evidence must be subjected to special scrutiny, considering factors such as:
    a. If the theory has been tested.
    b. If the theory has been subject to peer review and publication.
    c. If the potential error rate of the theory is known.
    d. If the theory is generally accepted by the scientific community.

The closer the opinion comes to a conclusion on the ultimate issue of guilt or innocence, the stricter the test of admissibility will be.

Novel science is subject to special scrutiny. If expert evidence were accepted that the offence was probably committed by a member of a “distinctive group” from which the accused is excluded, it would be a short step to the conclusion on the ultimate issue of guilt or innocence.

Jury instruction
See previous section on Expert Evidence, plus add some extra caution in as required by the facts.

PRIOR CONSISTENT STATEMENTS

Definition
A prior consistent statement is a statement made by a witness, before trial, that has the same content as that witness’s testimony at trial.

General rule
Evidence of prior consistent statements is presumptively inadmissible. It is excluded because it is self-serving, easily fabricated, and offends the rule against self-corroboration.

Exceptions
1) Narrative (Ay).
2) Recent fabrication (Stirling).
3) Prior identification (Swanston). Note: This is also an exception to the rule against hearsay, as the evidence will be admitted for its truth.

Key principles
Ay
Evidence of prior consistent statements may be admissible under the narrative exception. However:
1) They should be admitted only when necessary, AND
2) Only as much detail as is necessary to provide a comprehensible narration of events should be provided.
   The fact that a complaint was made, how it was made, and when it was made and why it was made at that time, may all be relevant and admissible.
   The prior complaint must be described in general terms only, omitting details of what was actually said. The content of the statement is inadmissible unless it is relevant for some other purpose, such as providing the necessary context for other probative evidence.

Jury instruction
When evidence of prior statements is admitted, a jury instruction must be given (Ay).

When evidence of prior consistent statements is admitted, the TJ should give the jury an appropriate limiting instruction as to the permissible and impermissible uses of the evidence. The limiting instruction should (Ay):
1) Explain that prior consistent statements cannot be used to enhance the credibility of the person making the statement, since evidence does not become more credible just because it has been repeated,
2) Direct the jury that the evidence cannot be used for its hearsay purpose (for the truth of its contents), AND
3) Describe any legitimate purpose for which it was admitted (which depends on the exception being invoked and the facts and circumstances of the case).

Stirling
If an opposing party claims that the testimony of a witness has been recently fabricated, prior consistent statements that rebut this allegation will be admissible, but only for this limited purpose.

Prior consistent statements are capable of rebutting an allegation of recent fabrication only if they predate the time that the opposing party claims the version of events was fabricated (before the alleged motive to lie has developed).

Prior consistent statements admitted under this exception does not confirm that the testimony is not fabricated. They only confirm that it was not fabricated as a result of the alleged motive to lie. Therefore, in a narrow sense, they strengthen the credibility of the witness by removing the challenge that has been made.

Swanston
Evidence of prior identification is admissible to corroborate an identification made at trial, and to provide independent evidence going to identity. The identifying witness must be present for cross-examination and able to testify that she previously made an accurate identification.

The evidence is then admitted for its truth, and is therefore also an exception to the rule against hearsay.

PRIOR INCONSISTENT STATEMENTS

Relevant statutory provisions
Canada Evidence Act, section 9

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

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

*In Cassibo, a police officer's notes of his interview with a witness, made during the interview and afterwards, which were neither signed nor acknowledged by the witness, did not constitute a statement in writing or reduced to writing within s 9(2). For "reduced to writing", must be verbatim transcript.

Use 9(2) when the witness has not come through for the party that has called the witness, if in writing, reduced to writing, or otherwise recorded. Perhaps the witness is giving evidence that is unexpected, but not necessarily harmful. If leave is granted to cross-examine the witness on inconsistencies, the witness may provide a reasonable explanation for them. If there is a reasonable explanation for the inconsistencies, may not need to go to 9(1). The witness may adopt the prior statement, and bring it into the in-court testimony. If there is no reasonable explanation, one explanation is that the witness is adverse. If there is some motive, that will also support a finding of adversity.

Use 9(1) when the party that called the witness would want to destroy the witness's credibility, because the witness has not only not come through for that party, but has actually provided evidence that is helpful to opposing counsel. The purpose would be to cross-examine the witness so aggressively that the party that originally called the witness can tell the jury not to rely on the evidence.

Or, use 9(1) if 9(2) is unavailable, because the statement is not in writing, reduced to writing, or otherwise recorded.

Definition
A prior inconsistent statement refers to some previous version of the witness's evidence that is different from what is given in court.

General rule
Evidence of prior inconsistent statements is presumptively inadmissible.

Exceptions
1) Past recollection recorded (Fliss). Note: This is also an exception to the rule against hearsay, as the evidence will be admitted for its truth.
2) Prior identification (Swanston). Note: This is also an exception to the rule against hearsay, as the evidence will be admitted for its truth.

Key principles
Cassibo
Section 9(2):
1) When a party producing a witness alleges that the witness has made a prior inconsistent statement, the TJ may grant that party a **limited right** of cross-examination **relative to the inconsistencies** between the prior statement and the current testimony.
2) The prior inconsistent statement must have been in **writing, reduced to writing, or otherwise recorded**.
3) A declaration of **adversity is not required**.

Section 9(1):
1) When a party producing a witness alleges that the witness has made a prior inconsistent statement, the TJ may grant that party a **broad** right of cross-examination.
2) The prior inconsistent statement may be **oral, in writing, reduced to writing, or otherwise recorded**.

3) A declaration of **adversity is required**.
4) The prior inconsistent statement may be received by the TJ on a voir dire to determine if the witness is adverse. If a limited right of cross-examination has previously been granted under s 9(2), that cross-examination may also be used in the determination.

Note: If evidence of prior inconsistent statements is permitted under s 9(2) or s 9(1) of the CEA, this evidence cannot be used for its hearsay purpose (that is, of proof of its contents). The evidence would have to be admitted under an established statutory or CL exception, or pursuant to the necessity/reliability analysis engaged under the principled approach in Khelawon.

In deciding if a witness is adverse under s 9(1), the TJ is entitled to take all the surrounding circumstances into account, including:
1) The demeanour and attitude of the witness.
2) The credibility of the witness.
3) How material the inconsistencies are.
4) The circumstances in which the statements were made.
5) If there is a reasonable explanation for the inconsistencies.
6) Any motive to lie.
7) Relative importance of the statement.

A witness is *adverse* when she is unfavourable in the sense of assuming by her testimony a position opposite to that of the party calling her.

A prior inconsistent statement may be taken into account when making a determination of adversity under s 9(1). The fact that the witness has made a prior inconsistent statement constitutes relevant, cogent, and admissible evidence on that issue. That evidence alone may be sufficient proof of adversity, irrespective of the demeanour and attitude of the witness on the stand.

Milgaard
Procedure for an application under s 9(2) of the CEA:
Note: The prior inconsistent statement must be in writing, reduced to writing, or otherwise recorded. If the statement does not meet this requirement, the party must use an application under s 9(1) of the CEA before proving it.
1) Counsel advises the court that she is bringing a 9(2) application.
2) If there is a jury, the jury leaves the room and a voir dire begins.
3) Counsel shows the TJ the prior statement, pointing out the inconsistencies with the testimony.
4) If the TJ agrees that there are inconsistencies, he will ask counsel to prove the prior statement. Note: Even a claim by the witness that he does not recall making the prior statement can be treated as a prior inconsistent statement if the TJ disbelieves the witness (McInroy).
5) The witness is asked if he made the prior statement. If he admits making it, the statement is proved. If he denies making it, other evidence can then be called to prove it.
6) Opposing counsel has the right to cross-examine the witness as well as any other witness called to prove the statement. Opposing counsel may try to show that even if the witness made the statement, there are circumstances that would make it improper to allow counsel to present it to the jury during cross-examination.
7) The TJ will then decide if the statement was made, and if the cross-examination will be allowed.

Procedure for an application under s 9(1) of the CEA:
1) Counsel advises the court that she is bringing a 9(1) application.
2) If there is a jury, the jury leaves the room and a voir dire begins.
3) Counsel can call any evidence relevant to a declaration of adversity.
4) The TJ will decide if the witness is adverse, and if leave will be granted to allow proof of the statement and/or the broad right of cross-examination.
5) The witness is asked if he made the prior statement. If he admits making it, the statement is proved. If he denies making it, other evidence can then be called to prove it.

Jury instruction
If evidence of the prior inconsistent statement is brought in, the jury should be instructed that the evidence is not admissible for its truth (Cassibo).

HEARSAY EVIDENCE

Definition
Hearsay evidence refers to out of court statements that are introduced for their truth.

Only those statements offered for their truth offend the rule against hearsay. Therefore, hearsay evidence is not identified by the nature of the evidence, but by the use to which the evidence is put. When an out of court statement is offered only as proof that the statement was made, it is not hearsay.

Evidence of an out of court statement made to a witness by a person who is not called as a witness may or may not be hearsay (Subramaniam):
1) It is hearsay, and inadmissible, when the purpose of the evidence is to establish the truth of what is contained in the statement.
2) It is not hearsay, and is admissible, when the purpose of the evidence is to establish the fact that the statement was made.

When witnesses repeat or adopt their prior statements, no hearsay issues arise. BUT, hearsay concerns do arise when witnesses recant their prior out of court statements or testify that they have no memory of making the statement.

General rule
Hearsay evidence is presumptively inadmissible. The general exclusionary rule is engaged due to the difficulty in testing the reliability of the out of court statement. A premium is placed on in court testimony, because the witness is under oath, can be observed, and is available for cross-examination.

Non-hearsay uses of out of court statements

The statement may be admitted for a purpose other than its truth, although an appropriate jury instruction will be required:

1) Circumstantial evidence of state of mind.
    a) Hearsay cannot be used as evidence of the truth of the thing that was said. However, the evidence may be admitted on some other principle, such as to provide circumstantial evidence of state of mind (Baltzer).
    b) Out of court statements can be used to provide circumstantial evidence of state of mind, such as fear, which can then be used to draw further inferences (Ratten).
2) Prior inconsistent statements put to witnesses to attack credibility (Cassibo).
3) Prior consistent statements to rebut an allegation of recent fabrication (Stirling).

Statutory exceptions

1) Business records, under s 30 of the CEA. Note CL exception as well.

CL exceptions

2) Business records. Must be (Wilcox):
    a) An original entry;
    b) Made contemporaneously;
    c) In the routine;
    d) Of business;
    e) By a person who had a duty to make the record; and
    f) By a person who had no motive to misrepresent.

    The duty requirement contributes a circumstantial guarantee of truth based on the assumption that a declarant would fear censure and dismissal should an employer discover an inaccuracy in the statement (Wilcox).

    Remember, these are documents, and would therefore qualify as real evidence and require authentication and must not be misleading.
3) Statements against interest. Must (O'Brien):
    a) Have been made to such a person and in such circumstances that the declarant should have apprehended penal consequences as a result, AND
    b) The vulnerability to consequences must not be too remote.

    The guarantee of trustworthiness of a declaration against interest flows from the fact that it is to the deceased's immediate prejudice. To be admissible, the declarant must realize that the declaration may well be used against him (O'Brien).
4) Statements of mind/statements of intent. Declarations of present state of mind are admissible if (Griffin):
    a) The declarant's state of mind is relevant.
    b) The statement was made in a natural manner.
    c) The statement was made without a motive to lie.

    These statements are not admissible to show the state of mind of persons other than the declarant, nor are they admissible to show that persons other than the declarant acted in accordance with the declarant's stated intention (Griffin).
5) Dying declarations.

    If a dying declarant says, "Jimmy shot me" while expiring, hearsay evidence of this dying declaration is admissible. The reliability of the statement is thought to flow from the fact that a dying person has lost all reason to lie.
6) Res gestae.

    The res gestae exception is based on the belief that, because certain statements are made naturally, spontaneously, and without deliberation during the course of the event, they leave little room for invention by the declarant and little room for misunderstanding by the witness hearing them, "My hand is burning" or "The house is on fire". Includes:
    a) Words or phrases that either form part of, or explain, a physical act; and
    b) Exclamations so spontaneous as to belie concoction.
7) Past recollection recorded (Fliss).
8) Prior identification (Swanston).

Key principles

Process for assessing the admissibility of hearsay evidence:

1) Does the out of court statement require admission for its truth, or as proof that the statement was made?

    If it requires admission for its truth, this engages the exclusionary rule that hearsay evidence is presumptively inadmissible.
2) Would the out of court statement be otherwise admissible, or is it subject to another exclusionary rule/presumption of inadmissibility?

    If it engages another exclusionary rule, that rule will also need to be addressed.
3) Was the out of court statement the product of obvious and severe state coercion?

    A TJ has discretion to refuse to admit a statement when there is concern that the statement is the product of investigatory misconduct (Khelawon). More likely, however, this would become a factor to consider in the reliability analysis.
4) Is there a statutory exception that would render the out of court statement admissible?

    If so, the statement is admissible, without considering necessity or reliability.
5) Is there a common law exception that would render the out of court statement admissible?

    If so, there is a strong presumption that the statement will be admissible. However, the exception must still be supported by the requirements of necessity and reliability.
6) If no statutory or common law exceptions exist, is the out of court statement rendered admissible by the application of the principled approach outlined in Khelawon? Are the tests of necessity and reliability met?

    If so, then the statement will be admissible, BUT
7) The statement will be subject to a final probative/prejudicial balancing, as always.

KGB

When the reliability and necessity criteria are met, prior inconsistent statements of witnesses other than the accused are admissible for their truth, provided they would be otherwise admissible.

Parrott

The test of necessity requires that reasonable efforts be undertaken to obtain the direct evidence of the witness.

When a witness is physically available, and there is no evidence that she would suffer trauma in testifying, then the witness should be called.

Note: The requirement of necessity is there in part to protect the integrity of the trial process. Good reason must be shown to support the necessity for the introduction of out of court statements that can deprive the opposing party of the opportunity to test the evidence through cross-examination.

Pelletier

The **necessity** requirement may be satisfied when either the witness or the testimony is unavailable:

1) The witness is generally unavailable to testify at trial, including, but not limited to, death, illness, and insanity.
2) If the witness is incompetent or if, based on psychological assessments, that testimony in court might be traumatic or harmful.
3) It is not possible to get evidence of the same value as the out of court statement, because there has been a radical change in the content of the statement, or the witness is holding the prior version of events hostage (KGB).

Necessity will not be satisfied when considering the evidence of those who are simply disinclined to testify or are unlikely to cooperate. *Necessary* does not mean *necessary to the Crown's case*.

Khelawon

The principled approach: This case endorsed a functional approach to determining the admissibility of hearsay evidence. Therefore, all relevant factors going to the reliability of the statement can be considered by the TJ.

The **reliability** requirement will generally be met based on two grounds, both of which should be considered:

1) Its truth and accuracy can be adequately tested, by considering the circumstances in which the statement was made. Consider KGB criteria:
    a) Absence of an oath. Was the prior statement given under oath, under formal/serious circumstances, or in an informal situation?
    b) Inability to observe. Was the prior statement videotaped, audiotaped, made into a transcript, or supported by police notes?
    c) Lack of contemporaneous cross-examination. Is there an opportunity for cross-examination on the prior statement, or is cross-examination impossible?
2) The statement is inherently trustworthy. Consider:
    d) Was the statement made with an absence of motive to lie? (Like coercion, state pressure, threats)
    e) Was the statement made reasonably contemporaneously with the events in question?
    f) Was the statement made naturally, spontaneously, and without suggestion?
    g) Was the statement against the interest of the person making it? (Note: If so, could engage CL exception)
    h) Does the statement make sense in terms of the logic of what is being reported?
    i) Does the statement concern knowledge that the declarant would not otherwise have?
    j) Is there any corroborative evidence?
    k) Does the statement share striking similarities with other statements (UFJ)?

Mapara

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

Jury instruction

If an out of court statement has a relevant purpose aside from its truth, it may be admissible for that limited purpose, although the TJ must instruct the jury as to its limited relevance and to the fact that it is not admissible for its truth (Baltzer).

If an out of court statement is admitted for its truth under a hearsay exception, the TJ should instruct the members of the jury that (KGB):

1) They may consider both what the witness has said in her testimony, and her prior statement, as evidence of what actually happened.
2) That it is for them to determine how much or how little of the witness's testimony or prior statement to believe or rely on.

FORMAL ADMISSIONS

Relevant statutory provisions

Criminal Code, section 655

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

Definition

A formal admission is a concession by the accused that dispenses with the need to prove a fact at issue.

Note: If the accused is willing to make an admission, there will be very little probative value in the Crown leading evidence for that purpose, as that fact will have been conceded and would not need to be proved because it would no longer be a fact at issue.Therefore, formal admissions by the accused can affect the admissibility of evidence considerably.

Key principles
Formal admissions of alleged facts cannot be made until the Crown has made allegations of those facts (Castellani).

It is for the Crown to state the facts. The accused cannot force the Crown to accept the admission of any facts, although it is open to the Crown to accept them (Castellani).

Jury instruction
The TJ should instruct the jury that the facts that the parties have agreed to must be accepted without evidence.

ADMISSIONS

Definition
An admission is made whenever the accused makes a statement to an *ordinary* person that is offered as evidence against the accused. Admissions are not considered to be proven facts, like formal admissions, and are always open to be contradicted or explained.

General rule
Admissions are presumptively admissible (Palma). They can be used to attack the credibility of the accused by way of showing a prior inconsistent statement, and they are admissible for their truth.

Admissions do not constitute hearsay because the accused (Palma):
1) Has knowledge of what was said,
2) Can have her counsel challenge the evidence through cross-examination, AND
3) Can give her own evidence, if she chooses.

Exceptions
Overheard words should be excluded when their meaning is speculative. The probative value is tenuous and the prejudicial effect can be severe. Courts have tended to exclude evidence of admissions that lack full context, such as an overheard snippet (Hunter).

As a matter of fairness, the Crown may not adduce only the part of the explanation that assisted its case and then object to the admission of the exculpatory part of that explanation, thereby forcing the accused onto the stand (Alison).

Note: Accused persons cannot lead their own exculpatory statements. This is consistent with the rule against prior consistent statements.

Key principles
When the Crown leads evidence of a statement made by an accused, it must lead all of it, both for and against the accused. The statement must come in as a whole (Alison).

Note: Consistent with Murrin, if there are reliability/credibility concerns, the evidence will generally be admissible, because it has such high probative value, and the question of weight will be left to the trier of fact.

CONFESSIONS

Definition
A confession is a type of admission governed by special rules. A confession refers to when the accused makes a statement to a *person in authority*, typically someone engaged in the arrest, detention, interrogation, or prosecution of the accused.

General rule
The *voluntariness rule* applies, whether or not the accused is in detention: When the Crown is seeking to lead evidence of statements made by an accused to a person in authority, the Crown has the onus of proving the voluntariness of the statement beyond a reasonable doubt; this applies whether or not the suspect is in detention. The rule applies to both full confessions (ex: "I killed Paul") and less complete confessions (ex: "I just bought a gun"). (Oickle)

Requiring voluntariness reduces the risk that unreliable evidence will be admitted and vindicates the right of the accused to remain silent.

Exceptions
The rule will not apply if the accused does not know and reasonably believe that the person to whom the statement was made was a person in authority (Grandinetti), and the statement will be treated as an admission, and therefore presumptively admissible.

In a joint trial, an admission by an accused is not admissible against a co-accused. A statement made by an accused to persons in authority is only evidence against the co-accused if he accepts the words as true by words, conduct, action, or demeanor. In any case, the statement remains hearsay against the co-accused and the TJ must give a limiting instruction (Grewall).

Key principles
The voluntariness rule has two aspects:

1) Threshold question: Was the confession made to a person in authority (Grandinetti)?
2) Was the confession voluntary (Oickle)?

Grandinetti
Was the confession made to a person in authority?
The test has both subjective and objective components:

1) Did the accused believe that the person could influence the prosecution? AND
2) Was that belief reasonable?

Oickle
Was the confession voluntary?
When assessing the voluntariness of a confession, the TJ should determine if the surrounding circumstances give rise to a reasonable doubt as to the confession's voluntariness. Consider:

1) **Threats or inducements. Was the confession made for a quid pro quo offer for legal leniency?**
   Any confession that is the product of outright violence is involuntary.
   Suggestions like, "it would be better to confess" may or may not result in a finding of involuntariness, depending on whether the words would be understood as a veiled threat.
   Spiritual or moral inducements, like, "if you confess, you will feel better" will generally not produce an involuntary confession.
   An explicit offer of lenient treatment in return for a confession will generally warrant exclusion.
   An offer of psychiatric help of counselling in exchange for a confession is less of an inducement than an offer of leniency.
2) **Oppressive circumstances. Was the confession made to escape the oppressive conditions?**
   Includes deprivation of food, clothing, water, sleep, or medical attention; denying access to counsel; or excessively aggressive, intimidating questioning.
3) **An operating mind. Did the accused have the capacity to make the choice to confess?**
   The operating mind test requires that the accused possessed a limited degree of cognitive ability to understand what he was saying and that the evidence could be used against him.
   The mere fact of intoxication, mental illness, or other conditions that could impair cognitive function is not enough to require exclusion.
4) **Police trickery. Was the confession obtained by police trickery that would shock the community?**
   In excluding confessions on this basis, courts are to be wary of unduly limiting police techniques. Therefore, not all lies or tricks employed by the police will require exclusion. Mr Big scams have been found not to be a trick that would shock the public.
   Examples of conduct that would shock the conscience and therefore require exclusion include posing as a priest, posing as a legal aid lawyer, or injecting truth serum into a diabetic accused under the pretense that it was insulin.

The objective of the contextual approach is to respect the goals of:

1) Protecting the rights of accused persons,
2) Without unduly limiting society's need to investigate and solve crimes.

Grandinetti
An undercover officer is not usually viewed as a person in authority.

Evidence of the possible involvement of a third party in the commission of an offence is admissible if it is relevant and probative (ie, if there is a sufficient connection between the third party and the crime).

Confessions made in coercive circumstances but not to a person in authority can be filtered through other exclusionary doctrines, such as abuse of process.

Grewall
A statement may need to be edited due to irrelevant or unnecessarily prejudicial content, but the remaining portions must retain their proper meaning in relation to the whole.

A confession may be evidence against a co-accused if he accepts the words as true by words, conduct, action, or demeanor, but the hearsay statements of co-conspirators made in furtherance of a conspiracy are applicable as evidence against each other, as they are deemed to be agents of each other.

Jury instruction
In a joint trial, the TJ must instruct the jury that the out of court statement of one accused is admissible only against the maker of the statement and cannot be considered in determining the co-accused's culpability (Grewall).

EVIDENCE EXCLUDED UNDER THE CHARTER (GRANT)

Relevant statutory provisions
Charter, sections 8-10, 24(2)

8. Everyone has the right to be secure against unreasonable search or seizure.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

***24.** (1) Anyone whose rights or freedoms … have been infringed may apply to … to obtain such remedy as the court considers appropriate and just…*

*(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, **the evidence shall be excluded if** it is established that, having regard to all the circumstances, **the admission of it in the proceedings would bring the administration of justice into disrepute.***

Charter, section 24(2)

An application can be made under s 24(2) of the Charter **to exclude evidence obtained as a result of a Charter breach**.

The court must assess and balance the effect of admitting the evidence on society's long-term confidence in the justice system having regard to:

1) The seriousness of the Charter-infringing state conduct.
   Admission may send the message that the justice system condones serious state misconduct.
   Consider: Was the breach deliberate and in bad faith, honest but negligent, honest and reasonable, or technical and in good faith?
2) The impact of the breach on the Charter-protected interests of the accused.
   Admission may send the message that individual rights count for little.
   Consider: Was the evidence obtained from a drawer that was half open, or as a result of an unreasonable cavity search?
3) Society's interest in the adjudication of the case on its merits.
   Focuses heavily on reliability of the evidence.
   Is the evidence highly reliable real evidence, or a sketchy statement derived from a gun being pointed at the accused?

Application to different kinds of evidence:

1) Statements by the accused.
   The heightened concern with proper police conduct in obtaining statements from suspects and the centrality of the protected interests affected will in most cases favour exclusion of statements taken in breach of the Charter, while the third factor, obtaining a decision on the merits, may be attenuated by lack of reliability.
2) Bodily evidence.
   In general, when an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity, and dignity is high, body evidence will be excluded, notwithstanding its relevance and reliability. On the other hand, when the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity, and dignity, reliable evidence obtained from the accused's body may be admitted.
3) Non-bodily physical evidence.
   Reliability issues with physical evidence will not generally be related to the Charter breach, which tends to weigh in favour of admission
4) Derivative evidence.
   The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination. On the other hand, in cases when it cannot be determined with any confidence if evidence would have been discovered in absence of the statement, discoverability will have no impact on the s 24(2) inquiry.
   As a general rule, when reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the TJ may conclude that it should be admitted.
   On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.

PRIVILEGE AGAINST SELF-INCRIMINATION: PRIVILEGE OF THE ACCUSED AND THE RIGHT TO SILENCE

Relevant provisions

Manifestations of the principle against self-incrimination:

1) The common law voluntariness rule (Oickle),
2) The common law right to silence (Turcotte), AND
3) Charter principles, including (Singh)
   a) The right to silence as a principle of fundamental justice under s 7. Engaged when liberty interests are at stake.
   b) The right to counsel under s 10(b). Engaged upon detention. If exercised, weighs in favour of the presumption that the accused has made an informed choice to speak.
   c) The right to non-compellability under s 11(c). Engaged when the accused is at trial. The accused cannot be forced to testify.
   d) The right to immunity under s 13. If a person is a compellable witness, and thereby forced to testify, any incriminating evidence cannot be used against that person at a later proceeding.

General rules

The right to silence as a principle of fundamental justice under s 7 is engaged when liberty interests are at stake (ie upon arrest or detention). An accused cannot be forced to speak.

The right to silence as a common law principle is engaged any time a person interacts with the state. Absent statutory or other legal compulsion, no one is obligated to provide information to the police or respond to questioning.

The state does not need to advise the accused of her right to silence UNLESS they are putting her in detention (she is not being deprived of liberty).

Remember: The voluntariness rule deals only with admissibility. An accused that does not succeed in excluding a statement can still argue that the statement should be given no weight due to its unreliability.

Exceptions

In most circumstances, silence cannot, on its own, be probative of guilt because individuals have no obligation to speak to the police. However, silence of the accused may be admissible in limited circumstances, if the Crown can establish a real relevance and a proper basis AND the jury is appropriately instructed:

1) When there is a conflict between the right to silence and the right to full answer and defence.
2) When the defence raises an issue that renders to the accused's silence relevant. Ex: If the accused claims while testifying that he cooperated with the police, his silence can be proved in rebuttal. Ex: If the accused does not provide reasonable notice of an alibi sufficient for the police to investigate it, this failure can affect the weight of the alibi evidence.
3) If the accused's silence is inextricably bound up with the narrative and cannot be easily extricated.

Key principles

Singh

The constitutional right to silence under s 7 is *the right to remain silent*. It is not the right not to be spoken to or questioned by state authorities.

While an accused cannot be forced to speak, after her right to silence has been asserted, following the exercise of her right to counsel, police are free to question the accused and to attempt to persuade her to speak, within the confines of the voluntariness rule. Broader societal interests must be balanced with the rights of the accused.

If the CL voluntariness rule is satisfied, there will be no breach of s 7's right to silence because it will have been established that the accused made a meaningful choice to speak, which is what s 7 protects.

Generally, the CL rule will exclude confessions more readily and offers better protection than the Charter rule:

1) The CL rule requires the Crown to prove voluntariness beyond a reasonable doubt. A violation will always warrant exclusion of the evidence.
2) The Charter rule requires the accused to prove involuntariness on a balance of probabilities. A violation will only warrant exclusion if admitting the evidence would bring the administration of justice into disrepute under s 24(2).

However, there will be cases when s 7 gives greater value to the accused:

1) Detained statements. The s 7 right to silence is contravened when an undercover state agent (police officer or an informant planted by the police) **actively** elicits a statement from the accused. The CL rule only applies to statements made to a person that the accused knows or reasonably believes to be a person in authority. The undercover agent would not fall into this category and the CL rule would therefore not apply. (Like in Hebert).
2) Statements made under statutory compulsion.
3) Derivative evidence.

Factors to consider when assessing voluntariness:

1) Did the accused make persistent, futile efforts to invoke her right to silence?
   Did the accused ask repeatedly and assertively, or did she say she wasn't sure if she should talk?
2) Did the continued interrogation following the accused's efforts to invoke her right to silence have an obvious negative effect on her?
   Was the accused a sophisticated criminal, or a vulnerable first time offender?

Turcotte

The common law right to silence: Absent statutory or other legal compulsion, no one is obligated to provide information to the police or respond to questioning. This right applies anytime an individual interacts with the state.

Selective disclosure will not waive an accused's right to silence. An accused is free to provide some, none, or all of the information he has. Adverse inferences cannot be drawn from an accused exercising his right to silence.

Jury instruction

Turcotte

When the Crown is permitted to lead evidence of the accused's pre-trial silence, the TJ must instruct the jury as to:

1) The purpose for which the evidence was admitted,
2) The impermissible inferences that must not be drawn from the evidence,
3) The limited probative value of silence, AND
4) The dangers of relying on such evidence.

PRIVILEGE AGAINST SELF-INCRIMINATION: PROTECTION OF A WITNESS

Relevant statutory provisions

Charter, section 13

13. A witness who testifies in any proceedings has <u>*the right not to have any incriminating evidence so given used to incriminate that witness*</u> *in any other proceedings,* <u>*except*</u> *in a prosecution for perjury or for the giving of contradictory evidence.*

Criminal Code, section 83.28

Obligation to answer questions and produce things

ss (8) A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.

No person excused from complying with subsection (8)

ss (10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

(a) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136; and
(b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136.

Right to counsel
ss (11) A person has the right to retain and instruct counsel at any stage of the proceedings

General rule
When the accused does not testify at his trial, his testimony from an earlier proceeding cannot be used against him, regardless of whether he was the accused or a mere witness at the earlier proceeding.

Key principles
Henry
Interpretation of section 13:

1) If the accused **does not** testify at his trial, **regardless** of whether he was the accused or a mere witness at the earlier proceeding, his testimony from an earlier proceeding **cannot** be used against him at that trial. He has **use immunity.**
Note: If the Crown could prove all or part of its case by using the accused's testimony from an earlier proceeding, it would be equivalent to using the accused as a Crown witness during his own trial, thereby compelling a version of events from the accused. This would subvert the accused's constitutional right under s 11(c) not to testify at that trial.
Ex: Dubois testified at his first trial and admitted that he killed the victim, but claimed he acted in self-defence. His conviction at that trial was overturned. At his retrial, a s 13 violation occurred when the TJ permitted the Crown to use admissions made by Dubois in his first trial that he struck the fatal blow.
2) If the accused **does** testify at his trial, **if** he **was** compellable as a witness at the earlier proceeding, his testimony from an earlier proceeding **cannot** be used against him at that trial. He has **use immunity**.
Ex: Noël testified as a compellable witness at his brother's murder trial. When he was testifying, he implicated himself in the killing. At Noël's subsequent trial for his part in the murder, a s 13 violation occurred when the TJ permitted the Crown to cross-examine Noël using extracts of the testimony he had given at his brother's trial.
3) If the accused **does** testify at his trial, **if** he **was not** compellable as a witness at the earlier proceeding, but testified voluntarily as an accused, his testimony from an earlier proceeding **can** be used to cross-examine him at that trial.
Ex: Henry testified as a witness at his first trial on charges of murder. His conviction at that trial was set aside. He testified again at his second trial on the same charges, giving a different account. The Crown was permitted to cross-examine Henry at his second trial, using his testimony from the earlier trial.

Note: The SCC reversed itself in this case. In Kuldip (1990), the SCC held that the Crown could not cross-examine an accused using her earlier testimony in an effort to produce positive evidence of guilt (incrimination purpose), but could use the earlier testimony to demonstrate that the accused was not a reliable witness (impeachment purpose). The approach was modified in Noël (2002), so that an accused could be confronted only with earlier testimony about issues that were innocuous with respect to guilt. Now, the operative question is if the accused was a compellable witness at the earlier proceeding.

Application under s 83.28
This section goes farther than s 24(2), and the voluntariness rule, excluding all derivative evidence, regardless of discoverability.
Statutory compulsion to testify engages liberty interests under s 7 of the Charter.
The right against self-incrimination is a principle of fundamental justice. Three procedural safeguards to protect this right:

1) Use immunity. Protects the individual from having the compelled incriminating testimony used against him in a subsequent proceeding.
2) Derivative use immunity. Protects the individual from having the compelled incriminating testimony used to obtain other evidence, unless that evidence would be otherwise discoverable.
3) Constitutional exemption. Provides complete immunity from testifying when proceedings are undertaken to obtain evidence for the prosecution of the witness.

EXCLUSION BASED ON PRIVILEGE

Definition
Privilege is a witness's right to confidentiality that arises at trial. There must be an overriding social concern or value that warrants the loss of probative evidence. The broader social interest must be balanced against the principle that courts should have all relevant evidence available. Under class privilege, communications are presumptively privileged and inadmissible; examples of recognized classes include solicitor-client communications (CL) and spousal communications (statutory). Under case-by-case privilege, communications presumptively not subject to privilege and are admissible. The party seeking exclusion must show why the communications are privileged.

Determination of privilege
Four conditions for determining privilege:

1) The communications must originate in a confidence that they will not be disclosed.
2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
3) The relationship must be one that should be sedulously fostered.
4) The damage that would occur to the relationship by disclosure must be greater than the benefit gained.

Exclusionary rule
Once there is a finding of privilege, a witness may refuse to answer questions and produce documents covered by that privilege despite having been compelled to take the stand.

When a client seeks legal advice from a solicitor, the communications relating to that purpose, made in confidence by the client, are permanently protected from disclosure, unless that protection is waived by the client (Shirose).

Exceptions
There is no privilege for communications that are of a criminal nature or that are made for the purpose of obtaining legal advice to facilitate the commission. However, the privilege will protect communications involving the litigation of past crimes and the seeking of legal advice to avoid committing future wrongs (Shirose).

The privilege does not extend to advice given by lawyers with regard to matters outside the law (Shirose).

Implied waiver arises when a party puts her intent and knowledge of the law at issue, such as when she alleges that she acted in good faith upon the advice of legal counsel, e.g. the party cannot make the assertion of good faith without disclosing the advice (Shirose).

The innocence at stake exception: privilege may yield in order to permit an accused to make full answer and defence, as a last resort, when core issues going to the guilt of the accused are involved and there is a genuine risk of wrongful conviction (Brown). The McClure test for the innocence at stake exception:

1) As a threshold determination, the accused must establish that:
    i. The information in is not available from any other source
    ii. He is otherwise unable to raise a reasonable doubt
2) If the threshold test has been satisfied, the TJ may apply the innocence at stake test:
    i. The accused seeking production of the 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.
    ii. If such an evidentiary basis exists, the TJ should examine the communication to determine if, in fact, it is likely to raise a reasonable doubt as to the guilt of the accused.

Note: The requirement that the accused has to show that he cannot otherwise a reasonable doubt without disclosure puts the defence in the position of having to argue that their case is not strong enough to avoid a conviction.

Principles
Clients seeking advice must be able to speak freely to their lawyers, secure in the knowledge that what they say will not be disclosed without their consent. The privilege belongs to the client and is for the client, not the solicitor, to waive. The client may, however, authorize her solicitor to disclose the information.

Privilege is not absolute and may be subject to greater considerations of, for example, the innocence-at-stake of an accused person, the right to rebut evidence brought in issue, and considerations of the interest and safety of the public.