EVIDENCE CAN

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CH 1: PROOF IN JUDICIAL DECISION MAKING

# A. INTRODUCTORY PRINCIPLES

Sources of evidentiary rules:

* Common law
* *Canada Evidence Act*
* *Criminal Code*
* *Charter* – for understanding the common law protections

The rules are **principled**.

* Fairness
* Reliability
* Efficiency
* …

**Types of evidence that have led to wrongful convictions:**

* Vetrovec
* Bad Character
* POC
* Mistaken eyewitness
* Experts

## 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 (s 686(1)(b)(iii)) where defence appeals (higher threshold for appeals of acquittal)

* 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
* 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*)

## 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**?

## A QUALIFIED SEARCH FOR THE TRUTH

1. **Search for the Truth** is not the only guiding value
2. **Justice** may sometimes trump truth. So other values are not diminished by search for the truth:
   1. Efficiency, Privacy, Privilege, Limits on police powers

***Noel, [2002] SCC*** *(Dube’s dissent) – para 86*

* The search for the truth is clearly one of the pre-eminent features of our system of evidence, and often the guiding principle
* Other goals such as a fair trial, deterring certain police conduct, and preserving the integrity of the administration of justice are all laudable goals to which this court must strive, sometimes at the cost of the search for the truth. Where these goals are met, however, the search for the truth must be the preponderant consideration.

## THE ADVERSARIAL SYSTEM OF TRIAL

***Swain [1991] SCC***

* The PFJs (s 7) contemplate an accusatorial and adversarial system of criminal justice.
* **An accused person has the right to control his or her own defense**.

## DISCLOSURE IN CRIMINAL PROCEEDINGS

* A has a right under s 7 to make full answer and defence 🡪 common law duty to disclose
* ***R v Stinchcombe [1991] SCC***
  + **Crown has broad and ongoing disclosure duties**
    - Broad: Crown must disclose all relevant information to A (subject to Crown’s discretion not to disclose privileged or plainly irrelevant information)
      * whether inculpatory or exculpatory
      * whether or not Crown intends to use it
      * whether or not admissible
    - Ongoing: Any new evidence must be disclosed
* ***R v Taillefer; R v Duguay [2003] SCC***
  + **Low threshold test:** Is there a reasonable possibility it would assist the accused in making full answer and defence? *Limits:*
    - Evidence must be in Crown possession – can’t require them to investigate further
    - Don’t have to disclose something that is *clearly* irrelevant
      * Problem: since Defence doesn’t have to disclose to the Crown may think something is clearly irrelevant when it is not
    - Certain privileged evidence can’t be turned over
  + This is a low standard – if unsure, err on the side of disclosing

**POLICY**

* Protection from wrongful conviction
* With such a low threshold for turning over documents, the duty is becoming increasingly onerous – cost and delay

## Disclosure in Civil proceedings

The rules are similar but it is a reciprocal duty. Both parties need to exchange relevant documents, but not to quite the same extent as in ***criminal*** trials.

**POLICY**

* Efficiency
* Could lead to settlement

# B. PROBATIVE VALUE, PREJUDICIAL EFFECT, AND ADMISSIBILITY

***R v Penney (2002) NL CA***

* **We must be careful in PV/PE analysis because the link between bad character evidence and wrongful convictions is very strong.**

**PB V PE TEST**: (initial CL test all evidence must meet):

* 1. Does the evidence have **probative value** in this trial?
     1. **Must be both relevant and material (*Re Palma (2000) Ont SCJ* )**
        + **Relevant**: tends to increase or decrease the probability of the existence of a fact in issue (***Arp [1998] SCC***)
          - no minimum PV is required for ev to be relevant (***Arp***)
        + **Material**: The evidence is concerned with an issue/element before the court
        + ID, actus reus, mens rea, motive
  2. Does it have **prejudicial effect** on
     1. Search for the truth / TOF’s view of the accused
        + Arouse emotions of prejudice, sympathy, hostility, stereotypes; Distraction; Danger of punishing A for other misconduct; Time-wasting; Unfair surprise
        + E.g. Extrinsic misconduct evidence (general bad character ev) Can lead to:
          - General Propensity Reasoning (bad people do bad things).
          - Conviction of crime outside the one charged.
          - High volumes of evidence 🡪 distracting from the core issues.
          - Jury subconsciously lowers SoP 🡪 wrongful convictions
     2. Administration of Justice (repute, integrity)
     3. Justice Values (Limit on police powers, Efficiency, Privacy, Privilege)
  3. **Balancing**: If there is a prejudicial aspect, weigh each (**BoP, onus on Crown**)
     1. 1. Identify Probative v Prejudicial
     2. 2. Look at the **degree** of each
        + Degree of Probative Value:
          - Proximity of evidence to timing of offence
          - Clarity / specificity of the evidence
          - General nexus between the evidence and the fact in issue
          - How much does the evidence help us?
        + Degree of Prejudice to this Case / Other Justice Values / Admin of Justice
     3. *Note the balance may change over the course of the trial. By opening the door to an issue, an inadmissible fact may become relevant* **(*B(FF)*)**
     4. **Crown leading evidence:** If prejudicial over probative, not admitted. ***(Seaboyer)***
     5. **Defence leading evidence:** **Probative value must be *substantially* outweighed by the prejudice for the search for the truth to be inadmiss** ***(Seaboyer ]1991] SCC)***
        + NH: Practical effect: If getting to be a very close balance, air on side of inclusion for defence evidence and on side of exclusion for Crown evidence.
        + More reluctant to exclude defence evidence because of fear of wrongful convictions ***(Seaboyer)***
     6. **Judge must consider whether judicial direction can remove the prejudice.**
  4. If admitted and there is a prejudicial aspect, make sure there is a **limiting instruction!**
     1. Absence does not *automatically* lead to overturning, but general rule:
     2. Limiting instructions are more critical where there is a jury
     3. 2 parts
        + 1. Tell them the **proper purpose** (limit, weight)for the evidence ***R v B(FF)***
        + 2. Follow up with how they can **NOT** use the evidence

***R v B(FF) [1993] SCC –*** *By opening door to an issue, inadmiss fact may become relevant changing the balance*

* **F:** Accused charge with a number of sexual offences against young persons. Evidence that he was physically intimidating and violent towards them in periods outside of when offences alleged. Trial proceeded on assumption that it was EME with a strong prejudicial component and would not be admitted. However, defence raised the issue: If sexual offences happening, why didn’t you complain earlier?
* **R:** Defence can open the door, changing the probative value of the EME. Need to do balancing again.
* **C:** New balancing 🡪 Now had more probative value = probative over prejudicial 🡪 Admissible.
* Obligation on the TJ to instruct the jury how they can use the evidence.

**Alternative Theory**

There is a theory that juries should be allowed to hear all the evidence and the problems can be dealt with by limiting instructions. Basis is idea that juries are now more educated. 2 fundamental problems:

1. Potentially leads to huge volumes of evidence being called, would increase problem of massive length of trials. Expanding the trial record to include more evidence naturally creates prejudice.
2. Could lead to wrongful convictions
   1. J in concurring opinion *(Penney? Or a random one?)* says that **the link b/t this bad character evidence and judges/juries coming to the wrong result is a very strong one**. ***Penney***

# C. TYPES OF EVIDENCE

## Direct / Circumstantial Evidence

***Dhillon (2001) BCCA***

|  |  |
| --- | --- |
| **DIRECT EVIDENCE** | **CIRCUMSTANTIAL EVIDENCE** |
| Goes directly to the proof of a fact in issue | Evidence you need to draw an inference from in order to make use of it |
| Two sources of error:  1. **Credibility** of witness  2. Witness is **mistaken** | Three sources of error:  1. **Credibility** of witness  2. Witness is **mistaken** about circumstances  3. Drawing the **wrong inference** |
|  | Not necessarily weaker evidence. May be stronger. |

🡪 Be careful when dealing with circumstantial evidence because of the possibilities of error.

🡪 Before basing a verdict of guilty on circumstantial evidence, you must be satisfied BRD that the guilt of the accused is the only reasonable inference to be drawn from the proven facts.

***R v Robert (2000) Ont CA - burden of proof; looking at the evidence as a whole***

**F:** Arson in garage; TJ required A to provide a reasonable explanation for the fire based upon “proven facts”. Convicted him because it was not proven there was gas on the ground.

* **“Miller error”** = Limiting jury’s assessment of RD to ev found to be both credible and reliable.
* A can be acquitted based on evidence you don’t believe
* A does not have burden of proving other potential inferences – merely has to show reasonable possibility of other inferences
  + **If there is a reasonable possibility another inference could be drawn = RD = acquittal**
  + **A finding of guilt can only be made** where Crown shows BRD that there is no other reasonable inference that the guilt of the accused
* Should look at the evidence as a whole rather than just the pieces you believe / accept. Despite non-belief, those pieces may still have limited value.
* The essential element is to impress upon the jury the need to find guilt BRD and to make plain to them the manner in which such a doubt can a rise in the context of circumstantial ev.

***R v Baltrusaitis (2002) Ont CA***

* TJ committed “Miller error” by limiting jury’s assessment of RD to ev found to be cred & reliable.
* **A verdict of “Guilty” can only be based on evidence found to be both credible & reliable**
* **But for a verdict of “Not Guilty”, the evidence does not have to be found both cred & reliable**
* While it is perfectly proper to instruct the jury that in order to find an accused guilty of a particular offence, they must be satisfied on the basis of evidence found to be credible and reliable, that each and every essential element of the offence has been proven beyond a reasonable doubt, the same rule does not apply to a finding of “Not Guilty” *(*see *Miller 1991 Ont CA)*
* JURY NOT TO PRE-SCREEN THE EVIDENCE
* Must look at jury charge as a whole –not just isolated passages

## REAL/DEMONSTRATIVE EVIDENCE

* Physical / Photographs / Videotapes

**MAIN STEPS**

1. **Authenticate the evidence:** 
   1. Verification on oath by person capable to do so
      1. *Person who made video: how evidence came into existence*
      2. *Witness: confirm it is an accurate description*
      3. *Technician: set up camera, process of camera, extraction from hard drive, time stamps*
   2. Person authenticating must be **credible**. ***Penney***
2. **Is it misleading?**
   1. Fairness, absence of intention to mislead
      1. For what purpose is it being led? Affects probative value (ie if gaps / not continuous – not critical if used for ID but critical if used to depict events) ***Penney***
   2. Represent the facts accurately?
      1. *Intermittent gaps (****Penney****)*
      2. *Selective editing (Penney)*
      3. *Format changing (Penney) –* need expert to testify depiction not changed
      4. *Angle misleading?*
      5. *Show only limited events?*
3. **Even if above 2 met, Prejudicial aspect?**
   1. *Inflammatory evidence can cause people to convict irrationally*. ***Kinkead***
   2. *Length of video may create prejudice*. ***Kinkead***
4. **If there is prejudice, do balancing**
   1. Do balancing taking into account purpose – J can admit some and not all. ***Kinkead***
   2. Defence admission may lower probative value of the evidence. ***Kinkead***
   3. If close, air on the side of inclusion – can help with limiting instrxns / giving less weight

***R v Penney (2002) NL CA – Authenticated? Misleading?***

**F:** People protesting seal killing took video to show A killing seal in a prohibited manner. Selective recording - gaps in video. Also video *format* changed. No expert called by Crown wrt effect of changes.

**C:** Because not fair rep, low probative value. Also prejudicial b/c TOF would assume that was what happened. Determination based largely on lack of credibility of the two primary witnesses.

* **Prior to admission it must be established that a (or picture) has not been altered or changed.**
* Selective Filming: Failure to depict an entire event, without gaps, may not be critical depending on the use to be made of the video at trial.
  + Where used for identification, continuous video may not be necessary
  + Where used to depict the event itself: A video consisting of short clips, interrupted by gaps in filming, particularly where it is impossible to determine the length of the gaps, and filming only portions of what occurred cannot be relied upon as an accurate depiction of the event.
  + **Prejudicial b/c presented a misleading / potentially misleading image.**
* Change of Format: Problems:
  + No expert brought by Crown to say the format would not have changed depiction of events
  + Original was not kept secure / restricted access for months.
  + Those who brought forward the evidence were not **credible.** (problems for authentication)

***R v Kinkead [1999] Ont SCJ – Inflammatory?***

**F:** Police take photos and videos of murder scene. No authentication or misleading problem. Want to use to show crime scene altered. Gruesome images though.

**C:** Images so gruesome that there is a risk of prejudice. J did balancing. Found some photos/video admissible as specifically attached to Crown theories.

* **Inflammatory evidence can cause people to convict irrationally.** Even though reliable and not misleading, may prejudice search for the truth if jury so impacted by images that they will find anybody guilty who might possible be (affects the SoP).
* **Balancing is not an all-or-nothing approach** – J may allow parts of evidence but not all.
* Defence can make admissions about certain evidence that lowers the probative value of admitting that evidence, making it more likely to fail the probative/prejudicial balancing.

## DOCUMENTS

To use a doc it must be AUTHENTICATED – source of existence. ***Lowe v Jenkinson (1995) BCSC***

* *Person who authored it testifies*
* *Someone who was present vouches for accuracy*
* *Found in possession of A or witness (helpful depending on purpose)*

# JUDICIAL NOTICE

***Olson v Olson (2003) Alta CA***

**F/C:** The TJ erred in law in concluding that no ev was req’d to show that the 19-year-old’s sports training would advance his career and in relying on JN to conclude that athletes often have career advantages.

* Presumption: This is an adversarial process so counsel should bring evidence for all elements
* Judicial notice is acceptance of the truth of a particular fact without proof
* Threshold for judicial notice is **strict**
* **Test:** 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**
* Cannot take judicial notice that athletes have career advantages

CH 2: EXTRINSIC MISCONDUCT EVIDENCE

* EME – misconduct of accused/party/witness that is outside subject matter of proceeding.
* CIVIL cases: *more flexible, not as concerned about prejudice, but still use criminal standards*

**Policy:**

* Rehabilitation objective of criminal justice system – undermined if past crimes allowed to haunt you
* Tendency to judge a person’s actions on the basis of character
* Can lead to serious miscarriages of justice:

**EME can prejudice the accused / lead the jury astray:** ***BFF, Arp***

* + General Propensity reasoning / evidence – should be excluded!
  + Punish for past misconduct
  + Distracts TOF / confuse jury by having attention deflected from main issues
  + May lower SoP
  + Time consumption
  + If routinely admitted, police may simply round up usual suspects for the case.

# A. BAD CHARACTER OF THE ACCUSED

## GENERAL ADMISSIBILITY OF BAD CHARACTER EVIDENCE

When dealing with bad character evidence of the accused, the test is as described in ***Cuadra***

* **STARTING PRESUMPTION**: EME / general bad conduct evidence is **inadmissible**
  + Can’t introduce prior criminal conduct to show A is more likely to have committed offence
* **TEST: Evidence which shows bad character or criminal disposition is admissible if:** (***B(FF)***)
  + **1.** Relevant to some other issue beyond disposition or character, **and**
    - ***If A testifies,*** *prior convictions**relevant to credibility so can be brought in (CEA s 12 applies to A – Corbett)*
    - *Credibility of the Witness* ***Cuadra***
      * Here defence attempted to impeach W’s credibility by showing prior inconsistent stmts. W’s explanation for these prior inconsistencies was the crim conduct of A. This was allowed as relevant to another issue (cred of W)
    - *A opens up door to EME by claiming they are a “good person” or not the “type of person” to commit the offence*
    - *Explain an issue defence has opened up* (ie why are victims not coming fwd sooner?)
    - *Narrative benefit*
    - *Motive*
  + **2.** Balance: The PV outweighs the prejudicial effect (**onus** on **Crown** to show on **BoP**)
    - A TJ’s limiting instruction can sometimes reduce prejudice & make it admissible
  + TJ can edit and limit prior criminal conduct evidence to limit its prejudicial effect
  + If admissible, TJ must give clear and specific limiting instruction on permitted and non-permitted uses for this evidence. (***B(FF)*)**

### R v Cuadra (1998) BCCA

**F/C:** Accused of stabbing victim. Witness said in initial statement he had not seen knife in A’s hands. At trial, said he saw knife in A’s hands. EME initially not allowed. Defence suggests the witness is not **credible** because his statements are inconsistent. Issue becomes credibility: Witness’ explanation relates to EME of the accused (Didn’t say anything because I was scared). 🡪 opens up door to the EME b/c purpose more than just general bad character.

## SIMILAR FACT EVIDENCE

In exceptional circumstances, propensity reasoning is allowed.

* **General propensity evidence – inadmissible**
* **Specific propensity evidence – admissible**

**TEST:** The test for admitting similar fact evidence is found in ***R v Handy [2000] SCC***

**STARTING POINT: Similar fact evidence is presumptively inadmissible**

* Cannot allow an inference from the “similar facts” that A has the propensity or disposition to do the types of acts charged and is therefore guilty of the offence
* Onus is on Crown to prove on BoP that the probative value in relation to a particular issue outweighs potential prejudice – probative value is driven by similarity

**Policy Rationale**: This is incredibly powerful evidence because:

1. Gets in similar incidents that have been done before the TOF
2. The instructions on it are favourable to the Crown – you *can* use *propensity reasoning –* due to past behavior, more likely to have committed the conduct at issue here.
3. Similar fact evidence can boost credibility of witness/victim

**EXCEPTION** to general inadmissibility:

* **Onus** is on the **Crown** to show PV outweighs the PE on BoP.
* **1. Probative: To be admissible, the similarities have** such a high level of similarity that it reflects a very specific level of propensity (cannot be due to coincidence)
* PV based on level of similarity 🡪 objective improbability of coincidence
* FACTORS

1. proximity in time of the similar acts

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

3. number of occurrences of similar acts

4. circumstances surrounding or relating to the similar acts

5. The QUALITY of the evidence

* Where 2 people have no connection and tell an incredibly similar story, almost impossible to overcome. If the witnesses are known to each other or have some common source that they’re both aware of (i.e. it was in the newspaper) 🡪 can impact the probative value.
  + **Collusion TEST:** (normally a matter of weight, but can be an admiss issue)
    - ***Chance*** that similar accusations against A could be produce of Collusion 🡪 **weight**
    - ***Air of Reality***to the accusation of collusion 🡪 **admissibility** 
      * Crown must show on **BOP** “NO Collusion”
      * J will often leave this issue to the jury (diffic to make call of collusion on BoP)
* **2. Prejudice**
  + Reasoning Prejudice
    - # witnesses, amount of evidence, complexity
    - How complex is the evidence?
    - Potential to distract the jury
    - Potential for undue time consumption
  + Moral Prejudice
    - Inflammatory nature of the acts
    - Can Crown prove point with less prejudicial evidence?
* **3. Balancing** – very tough call to make.
* **MUST** be accompanied by **Limiting Instructions – *if Admissible, still Weight issues***
  + How to use evidence, which issue it bears on
  + \*\*Cannot use SFE to make inference that Accused is of a character to do this crime

## When the Similar Fact Evidence goes to the IDENTITY of the person

**Identity TEST:**

* **1)** Such high **degree of similarity**, **objectively improbable** that crimes committed by more than one person. Take into account:
  + Similarities in the crime – have to be compelling
  + Length of time within which the crimes happened
  + Geographical area & size of community
* **2)** Is there some **evidence linking** **Accused** to the similar acts?

**Policy:**

* Allows sharing of evidence between multiple offences
* Isolated pieces of evidence are meaningless (fingerprint in one store, video with shotgun under jacket, eyewitness report of someone looking similar to accused walking into store) – but if they can all be included, can add up to a conviction.
* Similarities must be compelling to avoid wrongful convictions.

## POST-OFFENCE CONDUCT

- circumstantial evidence that arises post-offence

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

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

The test for admissibility of POC can be found in ***R v White.***

**THRESHOLD FOR ADMISSIBILITY: Can at least one reasonable inference of guilt be drawn?**

* **Can** give evidence of **identity**, put the accused **on the scene**, or evidence of **knowledge**
* **Can** be used to show **inconsistency with a defence** but forth ***Peavoy***
* **Can** show either consciousness of **innocence** or consciousness of **guilt** ***R v B(SC)***
* If need to draw a *speculative* inference (emotional rxn, not helping in search), should not admit
* **For jury to decide** if POC of A is related to the crime or some other explanation
  + Multiple probable inferences does not rob it of its probative value. Should be put before jury
* **No RD req** (*Morin*: Ev tending to show consciousness of guilt can properly be treated as supportive of other evidence of guilt and should not be excluded from consideration because, on its own, it may not satisfy the standard of proof BRD) – but instruct juries to be careful w it

INADMISSIBLE:

* **If issue is** **level of culpability!** (i.e. cannot be probative of murder v manslaughter)
  + Exception: Accused is admitting to some culpability, but their POC is so disproportionate that the evidence points to the option of greater culpability (large diff btw two alt levels of culp).
* Silence can rarely be admitted as evidence of POC (*Turcotte*) – no duty to speak.
* **Limiting instruction for POC**
  + Remind them that RD standard applies to evidence as a whole (not individual pieces)
  + Instruction on what elements can be proved by the evidence
  + Remind them that there may be other explanations – not to be a fast track to conviction

**Policy:**

* Danger that juries will fail to take account of alternative explanations of behavior and jump to conclusion of guilt – linked to wrongful convictions

### R v White [1998] SCC

**F:** After a murder, As skip town. Return after 10 days and try to avoid police, use police scanner, efforts to dispose of weapon. They say it has to do with armed robberies they committed, not murder.

**A/C:** Has probative value because one reasonable inference relates to the charged offence. Put before jury.

**USING POC TO FIND INTENT**

* Cannot be used to determine degree of culpability but can be used to rebut **DEFENCES** put fwd ***Peavoy***
  + ***To rebut Self-Defence*** – Jury can infer he was aware he had committed a culpable act
    - Self-defence goes to culpability, not level of culpability
    - But still balance: Did s/he mistrust the legal system / the police?
  + ***To rebut Intoxication*** – From purposeful acts post-offence, jury can infer A had the awareness required to form the requisite intent for murder
  + Use limiting instructions to clarify can be used to rebut defence but not go to level of culpability

### R v Peavoy (1997) \_\_CA

**F:** Altercation in apt and victim dead after in alley. A admitted to involvement in altercation (identity not in issue). Put forward defences of *self-defence* and *intoxication*. POC: Fixing furniture, not opening door, avoiding police. Improper Crown closing instruction:suggested jury use POC to determine intent wrt murder over manslaughter.

**A/C:** Jury could infer from his POC that he was aware he had committed a culpable act (rebut self-defence). Jury could infer from his POC that he wasn’t all that intoxicated (rebut intoxication defence).

--Crown’s improper suggestion needs to be fixed by the Judge.

**USING POC TO DRAW INFERENCES OF INNOCENCE *R v B(SC)***

POC may support either guilt or innocence. Doesn’t have to conclusively prove (*White*).

**TEST: If there is a reasonable inference of innocence, evidence left to the jury.** Limits:

* **Cannot produce self-serving evidence**
  + Decrying own evidence not admissible
  + Offering to take polygraph test alone is not admissible (must have other stuff to add in) because the results of the test are not admissible anyways, so it has little probative value
  + Except where evidence is tangible (ie giving up rights and assisting police etc)
* **Balancing:** PV must not be substantially outweighed by PE
  + More probative if
    - Don’t know what other physical ev police have and voluntarily providing samples
    - Offer samples etc prior to seeking consultation with counsel
    - Believes the evidence can be used against him.
  + Prejudice
    - E.g**. If yelled and screamed innocence as being led away, prejudicial because jury will think he is innocent or have sympathy.**
  + Crown not objecting to admissibility must be taken as concession that PV not substantially outweighed by former. **Where Crown objects, TJ must decide whether PE substantially outweighs the PV. *R v B(SC)***
* Evidence must not be excluded under some other exclusionary rule.

**Cannot make negative inference from silence/ failure to assist alone** bc ppl are free to do so *(Turcotte)*

**Policy:**

* Allowing this type of evidence could prejudice an accused who doesn’t have this kind of ev to offer b/c they did want a lawyer or exercised their right to silence etc 🡪 Charter right to lawyer/silence so negative inferences on this basis not allowed
* **Risk** of reading too much into the behavior / overemphasized by TOF
* **Risk** that people with legal knowledge can create this evidence after the offence

### R v B(SC) (1997) Ont CA

**F:** Complainant sexually assaulted while riding her bike. A offered to help cops, provided bodily evidence, offered to undergo polygraph.

**A/C:** TJ made no error in law by admitting the evidence of POC going to innocence

Probative Value

* Did more than offer to take a test. Provided numerous samples and turned over clothing
* Position at time of samples was that he had nothing to do with it. Defence was not consent.
* Offered samples knowing they would be tested with view to identifying him as perpetrator
* Offence previous day and no reason to believe they could not be used to assist police in IDing him
* Material was capable of scientific comparison and those comparisons would be admissible at trial
* Offered the samples shortly after arrest and *prior to exercising his right to counsel*

Prejudice / Balancing - Crown did not object to admissibility – must be taken as concession that the ev had some PV and that the PV was not significantly outweighed by any PE. In another case the Crown may object to the admissibility of this kind of ev. The TJ will then have to consider the potential PV and the PE and decide whether the latter substantially outweighs the former.

# B. BAD CHARACTER OF THE WITNESS

## PRIOR CONVICTIONS

Prior convictions are one way to assess the credibility of the witness.

#### Canada Evidence Act s 12 – When a person testifies, they can have their criminal record put to them

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

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

* **For Crown witnesses**
  + Liberty not at issue so can get into details but don’t go too far
* **For accused – if accused testifies**
* S 12 applies to an accused who testifies **Holding in *R v Corbett***
  + Relevant because prior convictions are a tool for assessing CREDIBILITY of a witness
  + Court deals with concerns about fairness to the accused in the following ways:
    - 1. Ct expresses **confidence in juries** to follow limiting instructions
    - 2. If other witnesses shown to be hardened criminals but A assumed to be innocent, would provide a **distorted picture** to the jury
    - 3. Read s 12 in such a way that **J has discretion** to limit/eliminate the record where prejudice would outweigh probative value.
    - Also note the W/A must have been convicted in order to have it put to them
    - S 12 only applies where A testifies (if not, consider entering as similar fact ev)
    - Only the fact of the convictions come in, no details (unless in as similar fact ev)
* **Court read into s 12 J’s power to edit/eliminate admission of A’s prior convictions on basis of these FACTORS: *R v Corbett***
  + **1. Temporal proximity**
    - Not determinative, but the older the record, less likely relevant to credibility
  + **2. Is it an offence involving dishonesty?**
    - Much more likely to reflect credibility (theft, fraud, deception, impersonation…)
  + **3. The level of similarity btw the label of the conviction and what A is charged with**
    - More similar in label, less likely admitted (likelihood of propensity reasoning)
  + **4. Has the accused gone after the records of Crown witnesses?**
    - This would create greater risk of a distorted pic if A’s record not introduced, esp where delib attack made on a Crown W & case comes down to cred of A v W
* Difficult balancing, but not unusual for A’s crim record to be put to them in full, and then LIs
  + So l
* **Limiting instructions:**
  + Prior convictions to be used for **credibility**, not to infer guilt.
  + Consider evidence as a whole

## OTHER DISCREDITABLE CONDUCT

### R v Cullen (1989) Ont CA

* Conduct leading to a charge of which A has been **acquitted** should not be admitted into evidence.
* For the **purpose of challenging a W’s credibility**, cross-examination is permissible to demonstrate W has been involved in discreditable conduct (counsel can broadly cross but cannot go too far)
* **Can bring up uncharged offences of W, but only prior convictions of A.**

### R v Titus [1983] SCC

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

## THE *VETROVEC* WITNESS

VW - **Crown W** that has inherent, profound or serious reliability / reliability concerns beyond reg probs

--Not for Defence Witnesses

**In the overwhelming majority of cases, it is not an admissibility issue (*Murrin*). But in some cases, the cred is so awful that there is a special doctrine that can be used to exclude.**

JUDGE’S TASK WHERE THERE IS ALLEGEDLY A VETROVEC WITNESS: ***Khela***

1. **Decide whether the witness is in the *Vetrovec* category or not**
   1. Factors going beyond general credibility problems
   2. Categories to look at:
      1. Criminal history
      2. Prior inconsistent statements
      3. Crimes of dishonesty
      4. Bias / receiving something for testimony
   3. May be one of the above areas if very severe, or a combination of them to not such a high degree.
2. **If in the category, give the *Vetrovec* instruction:**
   1. 1st part: **Separate the witness** from the other witnesses / the rest of the evidence
   2. 2nd part: Instruct/Remind the jury **what put the witness into that category**
      1. The highlights. Don’t need to be too detailed or too summary.
   3. 3rd part: You are ***entitled* to convict** on this evidence alone or to use this evidence however you see fit, but it would be ***dangerous***to do so.
   4. 4th part: Instruct the jury to look for other **confirmatory evidence** which restores their faith in the testimony of the witness. If they find such evidence, it would be safe to use that evidence to convict the accused.
      1. **Instruction must make clear to jury what type of ev is capable of offering support**
         1. Must be **independent** of the VW and **not tainted** by them
            1. **Jury should be told if reas possibility of tainting, don’t use VW’s ev**
         2. Must go to a **material** part of the VW’s evidence and give jury **confidence in the disputed part**
            1. Back up important parts of story (not peripheral issue)
            2. But doesn’t have to show A was the perpetrator
            3. b. Jury does not need direct evidence of the disputed part (ie that A was perpetrator). Can use their confidence in other material parts to gain confidence in the disputed part.
      2. In deciding **whether ev is capable of being confirmatory, does it strengthen our belief that the VW is telling the truth**? ***Dhillon***
         1. Mere fact that part of informant’s story is plausible does not amount to confirmatory evidence
      3. The following ev **cannot be confirmatory:**  ***Dhillon***
         1. Background facts common to the accused and witness
         2. Ev that A more likely to speak to W (ie same language)
         3. Possibility of a jailhouse informant’s story being generally plausible
         4. Absence of any benefit to W should be scrutinized with skepticism
      4. Critical piece that gives the jury the tools to rely on the evidence (ie make it no longer dangerous for them to do so)
      5. Although the concept has been accepted, this 4th part of the instruction has been subject to a judicial war since *Vetrovec*. Debates:
         1. What is the definition of confirmatory evidence, and how does it interact with the witness? Should we be defining it at all, or just telling the jury to look for confirmatory ev?
         2. How detailed should we get with the jury here?
            1. Court says in *Khela*: We don’t want to get too detailed with the jury. We have already warned them about the ev. Shouldn’t we favour simplicity rather than giving further detailed instruction on confirmatory evidence.
            2. Other view is that simplicity is wonderful, but is a value that should give way so as to avoid wrongful conviction.

**Confirmatory evidence:**

* **Broader approach:** Evidence that corroborates aspects of the witness’ story (antecedents, not necessarily just the main event)
* **Narrower approach:** British cases said the confirmatory evidence had to be of a very narrow nature, directly confirming that the accused was the perpetrator
  + Note the British cases that developed this only applied the Vetrovec rule to accomplices. In that context, the narrow definition of confirmatory evidence makes sense. B/c the accomplice is at the scene and so the story of most of the details will be backed up, and the concern is that they simply added the accused to their story, it is necessary to have confirmatory evidence that directly implicates the accused (as a necessary safety net).
* We have chosen the **Middle Option:**
  + **Requires** confirmatory evidence to have a more limited def than everything in the Crown case, but not so limited that it has to directly implicate the accused in the crime.

### R v Murrin (1999) BCSC – Vetrovec evidence presumptively ADMISSIBLE

**F/C:** Jailhouse informant evidence of confession called. Application to exclude evidence denied – credibility left to jury. (Found DNA later to show he was wrongfully convicted)

* Jailhouse informants – some of the most dangerous ev; strong link to wrongful convictions
* **J will not exclude evidence pre-trial due to witness credibility**
* **For the jury to decide whether witness is credible –** an issue of **weight**, not admissibility
* Regular rules apply:
  + PRESUMPTIVELY ADMISSIBLE: firsthand witness testimony
  + PRESUMPTIVELY INADMISSIBLE: Expert evidence; Hearsay Evidence; Similar Fact Evidence

### R v Khela [2009] SCC

**F:** Case against Khela rested primarily on testimony of two unsavoury witnesses: lengthy criminal records and members of a prison-based gang. Testified that Khela hired people to kill someone. Several women gave evidence against him. One was girlfriend of VW at the time of the shooting.

**TJ gave Vetrovec warning.** [principled framework for Vetrovec warning at para 37]

-Girlfriends of VWs gave testimony. Potential bias, and ev there may have been opps for VWs to influence them. Possible tainting of the confirmatory ev 🡪 not independent.

### R v Dhillon (2002) Ont CA – what constitutes confirmatory evidence

**F:** A allegedly went to house of victim and shot at front door. Jailhouse informant with 43 convictions, 34 for offences of dishonesty, and who had access to the disclosure materials, claimed A confessed to him. TJ told jury that ev that they spoke to each other could be confirmatory evidence. (Side issue: Defence questioned police to show inadequacy of investigation against other leads; TJ agreed that this opened up door to general bad character evidence of A)

* Peripheral stuff is not confirmatory evidence (backing up that A and VW talked is not confirmatory!)
* **Improper direction on what is confirmatory. Since this ev was central to Crown’s case, improper instruction on what constitutes confirmatory evidence is a serious error – new trial**
* Side issue: General bad character ev should not have been admitted because had no PV: no link btw their case against appellant and their abandonment of other leads. Questioning adequacy of their investigation should not have exposed him to having otherwise inadmissible hearsay ev of his bad character led against him. Though note questioning adequacy of investigation can be dangerous.

## EYE-WITNESSES EVIDENCE (ie Description / Photo line-ups)

**Direct evidence.** Often from a witness who appears to be credible (no vested interest) – powerful.

Eye-witness evid is one of the greatest causes of wrongful convictions – due to **reliability** (honest mistake)

* Courtroom identification is of limited or no value
* But you can bring in prior identification statements (description) or a positive identification while the events are still in the witness’ mind (ie photo line-up)
* **Reliability** goes to **weight** rather than admissibility.

**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?

**Photo line-up principles *Gonsalves***

* 1. Have at least 10 subjects
* 2. Photos should resemble W’s description, or at least resemble each other
* 3. Everything should be recorded
* 4. Before line-up, officer conducting the line-up should clarify that he does not know which person it is (double-blind identification), and that it is not necessarily anyone in the line-up
* 5. Do not tell the subject how many photos there are, and do them sequentially
  + dangerous to show all pics at once, as a person naturally wants to choose one and will do a relative assessment
* 6. Officer should not speak to W after lineup regarding identification or inability to identify

**J should give a general caution about eye witness testimony:** (particularly for stranger ID) ***Gonsalves***

* To be cautious with identification evidence – it has been responsible for wrongful convictions
* Alert jury to factors that may affect reliability (goes to **weight**)
  + How long was there an opp to see?
  + Was the sighting made in stressful circs?
  + Was there issues with lighting or obstruction of the material?
  + Questionable identification procedures
    - Delay
    - Description taken after Ws have seen pics on news or from police *(Dhillon)*
    - Non-compliance with photo line-up procedures *(Gonsalves)*
* While courtroom ev is allowed, better ev is description close to time of original event.
  + Jury should look at the description or identified picture to see how similar (taking into account ev of how A has changed)
  + Photo line-up
* Good idea to give general instruction to look for corroborative evidence
* Look at how strongly the person felt that was the person

### R v Gonsalves (2008) Ont SCJ

**F:** Two victims of armed robbery of speakers in their van independently identified G as the offender.

**A/C:** Reliable ID in this case given…

* Ample opp to observe
* Provided descriptors consistent with G’s appearance
* Compliance with photo line-up requirements
* No evidence of collusion
* Etc – see p 2-166

Accused found guilty.

CH 3: OPINION EVIDENCE

## ORDINARY WITNESS OPINION

***R v Graat [1982] SCC***

Opinion = matters within the expertise of ordinary people *(Graat)*

(As distinguished from expert evidence, which is presumptively non-admissible)

* **The general rule is that opinion evidence is ADMISSIBLE:**
* *E.g. identification of handwriting, persons and things*
* *Apparent age*
* *The bodily plight or condition of a person, incl death and illness*
* *The emotional state of a person (distressed, angry, aggressive, affectionate, or depressed)*
* *Condition of things (worn, shabby, used, new)*
* *Certain questions of value*
* *Estimates of speed and distance*
* **Principle**: No reason why a lay witness should not be permitted to provide evidence in the form of an opinion whereby doing so he is able more accurately to express the facts he perceived
* **The judge has discretion whether to admit opinion evidence**
  + Consider whether TOF in as good a position as W to form the relevant conclusion
  + Consider whether nec for W to resort to stmt in order to report observation effectively
* **Limits**
  + Witness is not allowed to *speculate*
  + Shouldn’t nec be seen as reliable - may have jumped to assumption / made wrong inference – **weight** is a matter for the TOF
  + Non-expert W cannot give opinion ev on a legal issue (ie was it negligence / automatism) - W should not be phrasing in terms of a legal standard
* Opinions of police – should be treated like opinions of lay witnesses, no special treatmen

## EXPERT EVIDENCE

**Policy:**

* Play integral role in many trials by assisting TOF to evaluate the ev and decide what to do with it
* **Dangers of expert evidence *(R v DD [2000] SCC)***
  + Jury may not realize they do not need to accept the opinion of the expert
  + Usurping TOF’s role
  + Misuse
  + Expert may not be impartial – act as advocate for one side
  + Difficult to cross-examine
  + Introduction of otherwise inadmissible material (see ***Palma***)
  + Time consuming and expensive

### R v DD [2000] SCC

**F/C:** Wanted Expert W to address delay in child making complaint of sexual abuse. This is not scientifically puzzling. Was the proper subject for a *simple jury instruction*. Thus, its admission was not necessary.

* **Keep the # of experts down.**
  + Frequently move from being impartial to being avocates
  + Not easy to detect where they are not reliable
  + Time-consuming and expensive
* **Keep down the number of experts by STRICT NECESSITY REQUIREMENT**
  + Helpfulness is not sufficient – must be necessary
  + Clearly beyond knowledge of TOF, and keep costs involved in mind
  + Easier to exclude behavioural than scientific
* May be possible for the issue to be deal with in a simple jury instruction

### R v Abbey (2009) Ont CA

**F:** 1st degree murder in context of gang dispute. R is member of gang opposing victim’s gang. Shortly after death, A gets teardrop tattoo. Crown wants Expert to testify the 3 things tattoo associated with and then talk about the ev ruling out first 2 options. Alternative Crown position: Let expert testify about the 3 reasons and allow TOF to rule out first 2 options on their own. TJ excluded Crown expert ev. Acquitted.

**PROCESS FOR DETERMINING ADMISSIBILITY:**

**Expert ev is presumptively inadmissible.**

**Before deciding admissibility**, a TJ must determine **the nature and scope of the proposed Expert Ev**.

* TJ should at the outset define clearly the proposed subject area so that at conclusion of *voir dire*, TJ well situated to rule with precision on what the witness can-not say.

**Determining admissibility is a 2-step process:**

**1: All preconditions must exist *Mohan Criteria***(must meet all 4 on a **BoP**)

1. **Relevance – the proposed opinion must be logically relevant to a material issue** (note below if the ev is as to disposition of perpetrator / accused)
   1. Expert must be testifying to a relevant issue
   2. [remember the live issues may depend on the positions of the parties]
   3. Normally relevance not an issue, but degree of relevance may affect overall balance
2. **\*\*Necessity\*\*- must relate to a subject matter that is properly the subject of expert opinion evidence** (note below if the ev is as to disposition of perpetrator / accused)
   1. Probably the most important factor
   2. Must be beyond knowledge of TOF, such that they need assistance in drawing correct inference. Helps the court fulfill gatekeeper function, avoid usurpation of TOF’s role, and keep # of expert witnesses down *(R v DD [2000] SCC)*
3. **The witness must be qualified to give the opinion**
   1. Must have significant expertise in the area and have more knowledge than the TOF
   2. Knowledge can arise from training, practical experience, or both
   3. Do not have to be the top person in their area – but level of expertise goes to weight (cross)
4. **The proposed opinion must not run afoul of any other exclusionary rule**
5. [also] **Sufficient foundation** (added by Harris – see ***Palma***)
   1. Expert Ev must have some admissible foundation or may be too prejudicial

If opinion goes to the ULTIMATE ISSUE, admissibility requirements are heightened.

**2. “Gatekeeper” component of inquiry: Case specific balancing of advantageous v deleterious effects:**

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

* Benefits of admitting the evidence
  + **Probative value** of evidence
    - how relevant
    - how necessary
  + **Reliability** of the evidence
    - Subject matter
    - Methodology used by expert
    - Expert’s expertise
    - Extent to which the expert is shown to be impartial and objective
* Costs/Risks in admitting the evidence
  + Credibility
    - Bias issues?
  + **Presentation / Risk of usurping jury’s role / jury unable to make effective and critical assessment of the evidence\*** (this factor can greatly affect admissibility!!!)
    - Complexity of the material underlying the opinion
    - Expert’s impressive credentials
    - Impenetrable jargon
    - Cross-examiner’s inability to expose the opinion’s shortcomings
    - Does expert stay within his bounds?
    - Presented in a manner in which jury can make an effective and critical assessment of the evidence? 🡪 expert give jury criteria to consider and let them apply the facts themselves; or expert apply as a hypothetical
  + Amount of court time to be used by expert
  + Opinion accessible, or pre-packaged
  + Degree to which each of the preconditions are met:
    - Does it go to a highly relevant or not so relevant issue?
    - How necessary is it?
    - How qualified is the expert?
  + Potential for prejudice
  + Reliability concerns

### R v Mohan [1994] SCC – GENERAL TEST FOR ADMITTING EXPERT EVIDENCE

The court should take seriously their role as “gatekeeper”. Should not admit ev too easily on the grounds that frailties could go to weight. This evidence can “distort the fact-finding process”

**1 Expert evidence is presumptively INADMISSIBLE** (unless Mohan factors satisfied and PPB)**.**

**2 THRESHOLD CRITERIA FOR ADMISSIBILITY**: (must meet all 4 on a **BoP**)

1. **Relevance** (note below if the ev is as to disposition of perpetrator / accused)
   1. Expert must be testifying to a relevant issue
   2. [remember the live issues may depend on the positions of the parties]
   3. Normally relevance not an issue, but degree of relevance may affect overall balance
2. **\*\*Necessity (probably the most important factor)** (note below if the ev is as to disposition of perpetrator / accused)
   1. Must be beyond knowledge of TOF, such that they need assistance in drawing correct inference. Helps the court fulfill gatekeeper function, avoid usurpation of TOF’s role, and keep # of expert witnesses down *(R v DD [2000] SCC)*
3. **A qualified expert**
   1. Must have significant expertise in the area and have more knowledge than the TOF
   2. Knowledge can arise from training, practical experience, or both
   3. Do not have to be the top person in their area – but level of expertise goes to weight (cross)
4. **The absence of some other exclusionary rule**
5. Sufficient foundation (added by Harris – see *Palma*)
   1. Must somehow attach the Expert Ev to the case
   2. Expert Ev must have some admissible foundation or may be too prejudicial

If opinion goes to the ULTIMATE ISSUE, admissibility requirements are heightened.

**3 🡪 PROBATIVE/PREJUDICIAL BALANCING:** Even if criteria satisfied, TJ has ongoing discretion to exclude if its PE outweighs its PV due to its *manner of presentation:*

1. Expert sets out critical factors weighing in favour of particular findings
2. Hypothetical question
3. Based on actual facts – growing trend not to admit expert ev in this form unless you have to. Court’s concern that expert ev not edge too close to the actual issue/facts.

#### Expert evidence as to disposition: (exception to exclusionary rule relating to character evidence)

* TJ must be satisfied that either the perpetrator or the accused has **distinctive behavioural characteristics** such that a comparison of one with the other will be of material assistance in determining innocence / guilt.
  + TJ should consider whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forwards is in common use as a reliable indicator of membership in a distinctive group (scientific comm has dvlped a std profile).
  + An affirmative finding on this basis will satisfy the *relevance* and *necessity* criteria. If J satisfied expert is a qualified expert, will be exclusion to exclusionary rule of character ev.

#### CEA s 7 – note more than 5 experts on either side without leave of the court

*“Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any part, 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”*

#### Criminal Code s 657.3 – Procedure for Expert Testimony (notice to other side is important)

**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

## Hypothetical Question

**Policy:**

* Need to present a foundational basis for the opinion or expert ev could easily be used to mislead. Some connxn req’d btw expert testimony & facts of case. Exp opinion w/o foundation highly prej.
* We are **worried about expert usurping the TOF’s role**. We want the TOF to make the decision! Can be danger that way ev presented makes it more likely TOF will delegate responsibility to expert.
  + Separation from the actual issue/facts with the hypothetical question

**Benefits of hypothetical question:**

* Reminds jury that the facts on which jury is basing their opinion are *not yet proved*.
* Might help jury to separate the expert’s opinion on this *type* of scenario from what I believe happened in this *particular* case.

### Bleta v The Queen [1964] SCC

* Failure of counsel to put questions in hypothetical form is **okay where** phrased to make clear what the evidence is on which the expert is being asked to found his conclusion.
* TJ retains final discretion to admit expert testimony or not

## The Basis and Weight of Expert Opinion

### R v Palma (2000) Ont SCJ – factual basis for expert opinion

* Take expert opinion and compare it to the evidence led
* **Value of expert testimony may be affected by reliance on second-hand source material,** but thisgoes to **weight** not admissibility
  + An expert opinion is admissible if relevant, even if based on secondhand evidence
  + This hearsay is admissible to show the information on which the opinion is based, not as evidence of the truth of the facts on which the opinion is based
  + Where expert evidence is comprised of hearsay evidence this goes to **weight**
  + **Before any weight can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist**
* Where expert opinion is based only on A’s testimony, that evidence should not be led without evidence supporting the A’s testimony. Where expert opinion is based on A’s testimony and other admitted or proven facts, that evidence should be led and any problems go to weight
* Where there is ev of some foundation but **not full foundation for the opinion** (ie not each fact on which it is based is founded on admissible ev), that is an issue that goes to **weight. *Lavalee [1990] SCC***

## PARTICULAR MATTERS

## Credibility of a Victim

* Concern about usurping the **role of the jury in finding credibility.**

### R v Llorenz (2000) Ont CA

**F:** Complainant discloses sexual abuse to her psychiatrist. He performs 24 point test to get insight into level of abuse suffered, and becomes Expert W at trial, testifying about disclosure of abuse, tests and results. Defence position is that the Expert Ev went directly to credibility.

**A:** Testimony relevant to a number of issues. So the issue was not whether there were other purposes but the manner in which the psychiatrist testified. Problems with the manner: (1) the expert had treated the complainant – suggest he believes her; (2) title of doc re test of level of abuse suggests he’d already determined she was telling the truth about sexual abuse 🡪 getting into area of usurping TOF’s role

**C:** J was wrong to admit. No limiting instruction to save so new trial.

* **Experts are not allowed to direct evidence on the issue of credibility (“oath-helping”)**
  + prohibits admission of evidence “that would tend to prove the truthfulness of the W rather that the truth of the W’s statements”
  + can provide expert ev that may assist jury in determining credibility, but can’t go directly to W’s belief or disbelief of the victim
  + credibility assessments are a matter for the TOF
* **Ev in this category may still be admitted if in addition to oath-helping, it has some other legit purpose, provided TJ provides very specific limiting instructions to prevent improper use.**
  + *E.g. Reasons for delayed disclosure that may have reasons other than untruth of claim*
  + *E.g. That symptoms are consistent with a person that has suffered sexual abuse*
  + *E.g. As part of the narrative of events of how the disclosure of the abuse came to light*
* Should call an expert that has not treated the victim to avoid usurpation of jury’s role

## Novel Scientific Evidence

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

**F:** R charged with a series of sexual assaults on his young sons. Defence tendered expert psychiatrist to testify that R’s personality was incompatible with the type of person of a particular personality disorder to commit such an offence. Ev excluded and R convicted. CA overturned.

**A/C:** No standard profile of a “distinctive group” of offenders had been developed so did not come within the “distinctive group” exception recognized in *Mohan*. Also expert would not provide raw data. J has discretion to exclude. Conviction restored.

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

1. Go through ***Mohan*** criteria (remember special reqs if ev goes to disposition)

2. Evaluate the reliability of the novel science:

a) Has the theory/technique been generally accepted in the scientific community?

b) Has it been subject to peer review and publication?

c) The known or potential rate of error or the existence of standards; and

d) Whether the theory/technique can be and has been tested.

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

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

CH 4: DIFFERENT EVIDENTIARY CONTEXT

# CIVIL PROCEEDINGS

* Governed by different statutory rules (not *CEA*)
* Still concerned about prejudice but not as in criminal settings, where *liberty* interests at stake

### Tsoukas v Seguara (2001) BCCA

**F:** Motor vehicle accident. P testifies. Cross-examined on alleged shop-lifting incident. She says she forgot to pay. W says he saw her purposely hide it.

**A/C:** Her cred was at issue so was probative over prejudicial to question her on the alleged shop-lifting. Can challenge her on that on cross but cannot call evidence to rebut her on that point.

* More flexible standard than criminal. (to avoid length/ complexity of trials, limit length/scope of ev)
* **COLLATERAL EVIDENCE RULE:** Cannot call evidence to contradict witness’ statements that go to a collateral issue or a pure credibility issue (but can challenge on cross). Can only call evidence to rebut stmts of witness that go to substance of litigation.
* Test for a new trial: “The appropriate test is whether a properly instructed jury acting reasonably would necessarily have reached the same conclusion if the evidentiary error had not occurred.”

### Johnson v Bugera (1999) BCCA

No significant different btw admiss of ev in crim and civil cases. But in criminal cases, particularly in trials before a jury, there may be a heightened concern that potentially prejudicial evidence not be placed before the trier of fact unless it has significant probative value.

# JUDGE ALONE

* PPB still applicable
  + Still needs PV to be worth court time or risk of prejudice
  + Js still care about time consumption
  + Js may be prejudiced by material
* More flexibility on the prejudice side *(Malik)*
  + Easier for witness to testify without editing
  + JJ trained in compartmentalizing evidence
  + J will have seen evidence already in deciding whether/not to admit.

### R v Malik (2003) BCSC

**F:** 2 co-accused. Originally, J ordered that Crown W refrain from identifying the other co-accused in story. Changed from jury trial to J-alone trial. Crown asking J to revisit this order and say editing no longer nec.

**C:** Order vacated. Now that J-alone, no reason to expect editing b/c (1) easier for witness to testify; (2) J better able to ignore prejudicial parts, and (3) J already heard that info so makes no difference.

* **The test for determining admissibility of prejudicial ev is the same, whether by jury/ J alone**
* Even though J better equipped than jury to compartmentalize, ev remains inadmissible when its PE outweighs its PV
* However, **less concern of jury prejudice in context of probative/prejudicial balancing**

# COMPETENCE, OATHS AND COMPELLABILITY OF WITNESSES

**General Rule: Witnesses are both Competent and Compellable**

**Policy: Don’t want to create barriers to search for the truth.**

First address competence and then compellability

* **1. Are they Competent to Testify?**
  + **1. Does the W recognize they are under a strong moral obligation to tell the truth?**
    - Basic CL rule that Ws required to be put under oath ***(CEA s 13)***
      * Raises issue of competence: Does W understand the oath?
    - CEA provides flexibility – **can be solemn affirmation instead of oath (*CEA 14-15)***
  + **2. Are they able to communicate their evidence?**
  + ***Children under 14*** *–* ***CEA s 16.1 (low std 16.1 constitutional JZS)***
    - (1) Presumed to have capacity to testify
    - (2) Shall not take an oath / make a solemn affirmation
    - (3) Ev shall be received if they are **able to understand & respond to questions**
    - (4) Party challenging capacity has burden of satisfying court as to capacity of W to understand and respond to questions
    - (5) If ct satisfied of capacity issue, shall conduct an inquiry to determine whether they are able to understand and respond to questions.
    - (6) Required to promise to tell the truth
    - (7) Shall not be asked qs at admissibility inquiry regarding understanding of nature of promise to tell the truth – at cross ok, goes to weight
  + ***People 14+ with Mental capacity issues*** *–* ***CEA s 16***
    - (1) If capacity challenged, court shall conduct inquiry to determine if they **under-stand nature of oath/solemn affirmation and are able to communicate the evid**
      * *R v DAI [2012] SCC*: There can be no Qs about understanding of oath in terms of admission. But can cross on that at trial to go to weight.
    - (2) If understands nature of oath/solemn affirmation and can communicate ev, shall testify under oath/solemn confirmation
    - (3) If does not understand nature but can communicate the evidence, may testify on promise to tell the truth
    - (4) If neither understands nature nor able to communicate, shall not testify
    - (5) Party who challenges mental capacity has burden wrt capacity issue
* Usually conducted in front of the jury so they can weigh the evidence, but trial judge has discretion if it causes prejudice
* Person who cannot communicate cannot testify
  + ***Spouse*** *(does not apply to CL relationships)* ***- CEA s 4***
    - **CL** made spouses incompetent to testify against each other
      * **Exception**: Spouse’s health or liberty as in issue
    - **Statute** significantly narrowed the rule
      * (1) spouse is competent and can be compelled for the defence
      * (2) competent and compellable in certain cases
        + (2) offence/attempt [*Youth Criminal Justice Act*](http://laws.justice.gc.ca/eng/acts/Y-1.5) 136(1) or *CC* 152, 153, 155 or 159, 160(2) or (3), 170 to 173, 179, 212, 215, 218, 271 to 273, 280 to 283, 291 to 294 or 329
      * (3) **Cannot be compelled** to disclose any communic made during marriage
      * (4) Offences against persons under 14 in the following offences:
        + *CC* 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269
      * (5) Does not affect a case where a wife or husband of a person charged with an offence may at CL be called as a witness.
      * (6) J/counsel for prosecution cannot comment on spouse’s failure to testify
* **2. Are they Compellable?**
  + An accused person has a *Charter* right not to be compelled to testify
  + **If witness is competent, automatically compellable**
    - **Unless** spouse or accused or some sort of privilege issue

### R v JZS (2008) BCCA – CEA 16.1 is constitutional

**F:** Counsel argued violation of *Ch ss 7 & 11(d)* to (1) *CEA s 16.1* presume child witnesses are competent and (2) *CC 486.2* allow W to testify behind screen, compromising cross & ability to make full answer & defence

* **Both CEA 16.1 & CC 486.2 are constitutional**
* Goal is to find the truth
* Presumption of competence and use of screens legitimate tools where goal is to find the truth
* They are reasonable limits.
  + Despite 16.1, can still cross child on whether they understand nature of promise to tell the truth (simply not at inquiry) 🡪 goes to weight rather than admissibility
  + Screens: J still has discretion to refuse if would interfere with proper admin of justice
* **Policy:**
* Have to consider (1) societal interests (2) fairness to A (3) **search for the truth**
* A entitled to fair trial but not most favorable trial possible.
* Parliament concerned children unnecessarily being put through an extra process (checking if they understood promise to tell the truth). Research said being able to express promise was not necessarily correlated with likelihood of telling the truth.
* CC 486.2 simply next step in evolution of rules of evidence – facilitate admissibility of relevant and probative evidence from children and vulnerable Ws while maintaining safeguards of challenging reliability.

CH 5: EXAMINATION OF WITNESSES

# A. ORDER OF CALLING WITNESSES / Duty to call

### R v Smuk (1971) BCCA – Order of witnesses up to counsel

**F:** TJ said A should testify first so do not have benefit of hearing other Ws. Said if A does not testify first, will not consider his evidence “too strongly”. Appeal of A allowed.

* **Order of witnesses is within the discretion of counsel**
* A free to decide if & when he will testify - Court has no jurisdiction to order A to testify first
* Improper to pre-judge credibility of W
* Improper to judge weight of evidence before all evidence is produced

### R v Jolivet [2000] SCC – No duty to call a witness

**F:** Crown opening case says they will be hearing from X who will be backing up what Y says. Crown leads Y and then closes case w/o calling X. Defence seeking remedy. TJ refuses and R convicted.

**C:** Crown’s decision no to call was not an abuse of process to not exceptional enough to trigger one of the bigger remedies. However, Crown created a prejudice to defence by asserting existence of corroborating evidence. There was no reason to limit defence’s right to address jury on what Crown chooses to put before them, but no reasonable probability the verdict would have been different. No retrial.

* **Possible remedies if Crown does not call a witness they said they would**
  + 1. Force Crown to call a witness
    - have to show abuse of process / show ev the Crown was devious
  + 2. Adverse inference instruction (that X testimony would likely have hurt Crown / that X testimony would not have provided ‘helpful’ testimony to the Crown)
    - must have no other possible explanation for failing to call witness
    - must be very careful of inferences drawn)
  + 3. Allow defence to comment on failure of Crown to call the witness
    - Unless Crown has done something to raise issue (ie mention to jury), *very difficult* to get this remedy. (each party can choose own Ws)
    - usually not a reversible error
* **First 2 remedies have a very high threshold. Only #3 available.**
  + TJ only needs to provide (1) or (2) where abuse of process – high std to meet
* **The right of the defence to address the jury on what the Crown chooses to put before the jury is fundamental to a fair trial and should only be limited for good and sufficient reason.**

[Note: Defence does not have to provide any evidence, so it would be even more rare for one of these remedies to be taken against defence]

# B. DIRECT EXAMINATION

## 1. LEADING QUESTIONS

### Identifying leading questions:

* Does the question suggest the response to be given?
* Factor may be whether it is a yes/no question
* Does the question presuppose a fact that the W did not present in evidence?

### Maves v Grand Pacific R Co (1913) Alta SC

* **General Rule:** **on material points a party must not lead his own witnesses**
  + Leading questions are allowed in cross-examination but not in examination-in-chief
  + **Reasons for not allowing leading questions:**
    - We presume W has a bias in favour of the party calling him
    - The party calling a W has an advantage by knowing what the W will prove
    - W may not understand precise meaning of question posed to him
* **Exceptions – It is okay to ask more leading questions where:** (all remain in TJ’s discretion):
  + On introductory non-controversial matters (to save court time)
    - Introducing person
    - Leading them to a certain event (w/o being too narrow)
  + By agmt of counsel and usually pre-screened with TJ, a W may be led further than normal because matter at issue is fairly narrow (to speed along process to get to key part)
  + Where W shows hostility or unwillingness to give evidence TJ can allow more leading
  + Where W needs general assistance (children, disabilities, difficulties with the evidence)
    - May affect the weight
    - J may still tell counsel not to lead on the critical part
  + Where W seems to have forgotten some key aspect of their testimony
    - May affect weight (cross-ex on how good the memory was and closing submissions)

## 2. REFRESHING A WITNESS’ MEMORY

**Rules trying to balance 2 interests:**

* **Capture memory**
* **But not tainting current evidence or allowing what they said at some point –** out of court and not under oath or subject to cross-examination – **to float in as evidence.**

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

**2 tools for referring a witness’ memory:**

* Present memory revived: tries to spark the memory (ie police use of notes) *(R v Shergill)*
  + the testimony is the admitted evidence, not the document
  + subject to exclusionary rule if it is too suggestive
  + no need to follow Wigmore rules strictly
* Past Recollection Recorded: put a prior stmt they made in as evidence *(R v Fliss)*
  + Usually after “present memory revived” fails
  + Court can grant leave for witness to review doc or electronic record
  + **Doc not admitted as ev unless W incorporates info into her testimony**
  + Some people say this is a hearsay exception because W really has “no memory”

### R v Shergill (1997) \_\_ - PRESENT MEMORY REVIVED

**No strict contemporaneity requirement** (more flexible that PRR because witness can actually be cross-examined) **but document must still be reliable** (W involved in creating? Secure? Original available?)**.**

**Present memory revived (PMR) Application/Procedure:**

1. Counsel should seek permission from TJ in absence of jury (so they do not learn of prev stmt)

2. W should be excluded

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

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

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

5. TJ should determine if this is PMR or PRR – counsel should be clear about which

* When doc created – **No strict contemporaneity requirement** for PMR, but the less contemporaneous the doc, the less likely J will allow it to be put to the W. Also goes to weight
* **Reliability** / likelihood of tainting memory
  + Created by whom (someone else’s notes?)
  + Accuracy verified by A?
  + Too suggestive?
* Ie Memo prepared by police summarizing what witness said can be put to witness *(Shergill)*

7. TJ should determine whether there is improper motive or other circumstances which makes the request unacceptable (ie doc created under pressure or investigator was leading witness)

8. In the end TJ should exercise his discretion according to the circumstances

9. If permission granted – recall jury

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

11. Counsel should then take the document away from W and ask non-leading questions

-If memory sparks document should be taken away and W testifies to what they remember

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

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

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

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

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

**Stricter rules for admitting past-recollection recorded (PRR) because it is very difficult to make full answer and defence by simply submitting a statement:**

1. Not under oath
2. Very difficult to cross-examine

### R v Fliss [2002] SCC – PAST RECOLLECTION RECORDED

**F:** Police extract undercover confession and turns out authorization for recording was not granted. Instead, officer takes stand and basically reads corrected transcript he edited next day from typed up recording.

**A:** Flaws: (1) The transcript was not a record of his memory, but of editing based on tape next day. (2) Didn’t provide any verification under oath that he was trying to be accurate at the time. This is a strict test. Testimony should have been provided in court – cannot infer.

**C:** Does not meet test. PRR is inadmissible. (but ev should have been admissible under *Charter* s 24)

* Use of docs for PRR is an **exceptional procedure -** counsel has to show the thresholds are **clearly established.** This is a STRICT TEST – cannot simply make inferences.
* **CRITERIA FOR ADMISSION OF PRR** (strict!!) (#3 added by R v JR)**:**
  + 1. Recollection must have been recorded in a **reliable** way.
    - Continuum from original record to current record
    - Witness needs to be involved in some substantial way in the recording
    - The original must be used if available
  + 2. Must have been recorded in close **proximity** to the events
    - when the events were fresh and vivid in the mind of the speaker
    - consider *nature* of event to know what is close in time
  + 3. ***R v JR (2003) Ont CA*** At time W testifies, must have **no memory of the recorded events**
    - Doesn’t require complete absence of memory – PRR may still be used where W has no recollection of a portion of statement/event
  + 4. Witness must provide **verification** that the record accurately represented his knowledge and recollection at the time / he remembers attempting to be truthful at time record made
  + *5. If available, the* ***original record*** *should be used. (this criteria not listed in JR – just look at as part of reliability of record)*

### R v JR (2003) Ont CA

**F:** After assault, reported to police conversation she had with A in stairwell. Now she does not remember that statement and Crown wants to admit PRR. Defence says absence of memory requirement not met b/c W had some recollection of the events surrounding the challenged evidence.

**A/C:** Other criteria met. Absence of memory requirement is met even though she had recollection of surrounding events. PRR admitted.

# C. CROSS-EXAMINATION

* Often goes to test the **reliability** or **credibility** of their evidence.
* Counsel cross-examining has much less access to the witness, so can put leading questions to W.
* Cross-ex is constitutionally protected as part of right to make full answer and defence, but is not an unlimited right *(Lyttle)*
  + Counsel should avoid Qs that give more than one proposition (avoid compound Qs) *(case?)*
  + Be careful not to mislead the witness
  + **Crown must be careful of asking questions that reverse the burden of proof**
    - can sometimes result in reversible error
  + Even if accused opens the door with good character evidence, Crown cannot use this to destroy the accused, only meet/negate it *(case?)*
  + Collateral issues can be cross-examined upon, but cannot call evidence to contradict it (collateral evidence rule) – collateral when it is a pure credibility issue *(Tsoukas)*
  + Still subject to **probative/prejudicial analysis**
* 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 ***CEA ss 10 & 11***)
  + Challenging W’s capacity to observe, recall and communicate accurately (reliability of ev)
  + Putting contrary evidence to the witness *(****Carter****)*
  + Showing that the W evidence is contrary to common experience

### R v Lyttle [2004] SCC

**F:** Defence theory was that victim covering up people who actually did the crime by blaming someone else. Original notes of police to same effect. Defence wanted to ask the questions without having to call the officer. Court said no – to ask the question, would have to call evidence to support it.

* **Question or scenario can be put to a witness without evidence to back it up if counsel has a good faith basis for putting the question**
  + Do not have to have an admissible basis in order to put a specific scenario before a witness, as this would prejudice the search for the truth
  + Nor can you ask any scenario because you cannot mislead the court
  + Can be incomplete or uncertain, but can’t put statements you know to be false and can’t mislead the court
  + **Good faith:** The cross-examiner may pursue any hypothesis that is *honestly advanced* on the strength of reasonable inference, experience or intuition.

#### 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**
* Section 10 covers written statements, excluding a police officer’s notes (Handy 1978 BCCA),
* Section 11 covers oral statements

### R v Carter (2005) \_\_\_

* **If counsel is going to challenge the cred of the W by calling contradictory ev, the W must be given the chance to address the contradictory evidence in CE** (aka the rule in *Browne v Dunn)*
  + Reason for rule: It is not fair to adduce evidence casting doubt on veracity of witness when he has not been given an opportunity to deal with the evidence.
  + **This rule must be applied flexibly and carefully:**
    - 1. Applies to significant matters
    - 2. Need to look at cross-examination as a whole and ask if witness was given a fair opp to respond to the allegation
    - 3. J should only apply a remedy for failure in the clearest of cases

# RE-EXAMINATION

GENERAL RULE: CROWN CANNOT SPLIT ITS CASE

* Prevents unfair surprise, prejudice and confusion
* To create orderly process of litigation, present case fully and properly the first time
* Having re-examinations and rebuttal evidence can lead to an inefficient process
* We trust juries to remember what they heard as a whole – not just last – can’t redo case
* Splitting case denies defence opportunity to cross on those aspects
* Allows Crown to wait and see what defence says on a point and then strategically deciding to add something else

### R v Moore (1984) Ont CA

**Right to re-examine exists only where there has been cross-examination and is confined to issues that are brought up for the first time in cross**

* **Purpose** is to allow party leading evidence to question about new facts or matters raised in cross – to make sure we have all the facts, NOT to split the case.
* May not ask leading questions
* Cannot re-cover a topic already covered to try make the evidence look better for you
* J has discretion to grant leave to introduce new matters in re-examination and the opposite party can cross on the new matters

# REBUTTAL EVIDENCE

Very rare and requires unusual circumstances because it can be viewed as very inconsistent with right to make full answer and defence to allow Crown to introduce new evidence at that point.

### R v Krause [1986] SCC

* General rule that the Crown cannot split its case
* **TEST: Crown may be allowed to call evidence in rebuttal after the defence case where**
  + **1. The defence has raised some new matter that couldn’t be reasonably anticipated &**
  + **2. It does not go to a collateral or pure credibility issue**
    - collateral: not determinative of an issue arising in the pleadings or indictment or not relevant to what must be proved
    - i.e. is it reasonably necessary?

CH 6: STATEMENT EVIDENCE

# A. PRIOR CONSISTENT STATEMENTS

### R. v. Ay (1994) BCCA

* **Starting presumption – prior consistent statements are inadmissible**
* We don’t view them as probative or as increasing credibility
* **Exceptions** to presumption of inadmissibility:
  + Rebutting allegations of recent fabrication (other side opens door) (***Stirling****)*
  + PV only to extent that it shows W’s story was the same even before motivation to fabricate arose (returns but does not bolster credibility of witness)
  + cannot be admitted for the truth of its contents
  + Where prior consistent statement is admitted as part of the narrative (not go into details)
  + Recent complaints in sexual cases
  + Statements on arrest
  + Statements made on recovery of incriminating articles
  + Statements made with respect to previous identification of A
* Where prior consistent statements are admissible under an exception the TJ must provide limiting instructions that **jury cannot use these statements as truth of their contents or as**

**increasing credibility**

* + The fact that a person tells the story the same way again and again does not make it credible
  + Implications for efficiency of litigation: would put onus on both sides to call lots of witnesses saying they heard it that way from the witness

**Except admissible for truth of its contents in case of prior identification** (***Swanston (1982) BCCA****)*

* Witness who cannot ID A in court can state that whoever s/he identifies earlier was the culprit
* Then, another person may give evidence that the person identified earlier was A
* Extrajudicial identification is admissible because the earlier identification has greater probative value than an in court identification

# B. ATTACKING THE CREDIBILITY OF PARTY’S OWN WITNESS

**GENERAL RULE: A party may not generally cross-examine their own witness.**

* But in some circumstances we allow counsel to destroy credibility of their W (***CEA s 9)***

#### Start with CEA s. 9(2) – court may allow counsel to ask questions on the inconsistency

Where the party producing a witness alleges … **statement in writing, reduced to writing, or recorded** on audio tape or video tape or otherwise, **inconsistent** … court may, w/out proof that the witness is adverse, **grant leave to that party to X the witness as to the statement** & … may consider X in determining whether… the witness is adverse.

* **Prove: *Milgaard***
  1. **Prior statement was in writing, reduced to writing, or recorded on audio or video tape**
     + Police partial notes aren’t good enough *(****Cassibo****)*
  2. **That statement is *inconsistent* with the testimony at trial**
     + Based on importance of statement and whether it is substantially inconsistent based on all surrounding circumstances (***Wawanesa***)
     + If the witness is believed to be lying about not remembering something, that can be ruled inconsistent (***McInroy and Rouse***)
       - Not remembering previous statement 6 months later seen as lying
  3. Part of policy is that you were **taken by surprise** of the change in testimony, so if there is evidence you knew of the witness’s change, TJ may exercise final discretion and not admit. (***McInroy* *and******Rouse*)**
     + DO NOT HAVE TO PROVE IT WAS BY SURPRISE
     + **More likely to be used on 9(1), but possible here**
  4. Any other probative/prejudice arguments. **TJ still has discretion** to grant application or not – **should provide limiting instructions** (statement can only be used to assess credibility)
  + NH: TJ should keep in mind wrongful conviction (***Milgaard*** convicted & later found innocent) when exercising discretion to grant application – even with instructions there is potential for jury to use prior statement for truth rather than credibility
* **Procedure:**
* J has discretion. Look at specific criteria and broader interests of justice *(****Milgaard* [1971] SKCA***)*
  1. Advise Crown of desire to make this application.
  2. Jury leaves
  3. Counsel gives TJ the details. TJ considers it and decides if there is a clear inconsistency.
  4. If yes, counsel has to prove it (first try putting it to the witness)
  5. If proven, right to X about circumstances under which it was made.
     + Only crossing on the difference in the statement
  6. TJ decides if there is limited right to X. If so, it is in the presence of jury
     + Confined to inconsistencies as disclosed in the statement *(****Cassibo, Milgaard****)*
     + TJ still has discretion to grant limited cross or not.
       - * Weighs prob/prej
     + If counsel were on notice that witness wouldn’t be favourable, may not be granted limited X
       - Part of policy is that counsel were taken by surprise by witness’s change from prior statement

*- 9(2) cross should happen in front of jury so they can assess credibility* (R v Milgaard)

*- 9(2) cross can be used to assess whether witness is adverse.*

#### If statement not written or if need to reduce person’s credibility to zero, move on to CEA s. 9(1) - if witness is adverse, court may allow much broader cross-examination of witness

… 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… shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

* **Prove:**
  1. **Adversity**
     + - Before a witness can be declared adverse (9(1)), must follow procedure in ***Milgaard*** first 🡪 Results of 9(2) can be used for 9(1) application
       - **Adverse witness** = unfavourable in the sense of assuming by his testimony a position opposite to that of the party calling him (***Cassibo***)
     + **Reasonable explanation for changing evidence??**
     + Did the witness make the prior statement?
     + What is its relative importance?
     + Is it substantially inconsistent?
     + Surrounding circumstances
     + Means being unfavourable. Includes but doesn’t require hostility. *(****Cassibo****)*
  2. Consider that part of policy is that you were *taken by surprise* of the change in testimony, so if there is evidence you knew of the witness’s change, TJ may exercise final discretion and not admit. (***McInroy* *and Rouse***)
     + Do not have to prove this
  3. **Consider if the testimony *damages* your case** (***McInroy and Rouse***)
     + From the BCCA decision that isn’t really addressed by SCC, but may be good law

**The Process** *(****Wawanesa Mutual Insurance* [1963] ONCA***)*:

1. Judge will determine **adversity** in absence of jury by considering *(****Cassibo****)*
   * Whether witness seems hostile
   * Whether witness has a motive to change their story
   * Whether witness is totally contradicted by all other evidence / witnesses
   * Whether there is a reasonable explanation for the change
   * Consider the relative importance of the statement (***Wawanesa***)
   * Consider whether the statement was substantially inconcistent (***Wawanesa***)
2. If witness is adverse, unrestricted right to X *(****Cassibo****),*
3. If the witness is adverse, are the interests of justice best attained by admitting the statement?
   * Consider the danger of admitting it
4. If admitted, bring jury in. Direct that the circumstances of the making of the statement be put to the witness and the witness is asked if she made them.
5. If witness denies, it can be proven.
   * + If witness admits it, no need to invoke 9(1) *(****Cassibo****)*
6. Instruct jury that the prior statement is not evidence of the facts but for purpose of showing that sworn testimony at trial is of no importance
7. Jury decides if the statement was made and if it affects the credibility of the witness

*- allows for general / much broader cross-examination of adverse witness*

**Other Party Rebutting s.9(1) cross application:**

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

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

**Limiting instructions:** The prior statement does not come in for its truth but for credibility.

### McInroy and Rouse v. R [1978] BCCA/SCC.

**F:** W made written statement to police that A had confessed to crime. At trial she said she doesn’t remember the confession and was cross-examined on her statement.

* SCC: If a witness says I don`t remember, then likely there is no inconsistency. But, **for purpose of 9(2), judge can rule that not remembering is inconsistent because the witness appears to be lying** about not remembering (in this case b/c it was only 6 months ago). Thus, prior inconsistent statement 🡪 limited X based on s.9(2)
* BCCA: **you need to *damage* the Crown’s case for broad X** until 9(1) *(SCC didn’t consider)*
  + *Could argue it was no surprise to the party that called them.*

**Transition to Hearsay:**

Even if you succeed in a 9(2)/(1) analysis, **unless the W adopts their prior stmt, it does not come in for truth**.

Even if Crown has undermined cred of W, would want to get in the prior statement 🡪 so go onto hearsay.

CH 7: HEARSAY

# RULE

**RULE: Hearsay evidence is presumptively inadmissible** (only in to test credibility).

**Benefit of out-of court statements**: the events were fresher in memory

**Cons**: Jury doesn’t get to see the demeanour or benefit from contemporaneous cross-examination.

# Hearsay Procedure

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 BoP.**

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

**Definition: Out of court statement submitted for its truth** (***Subramanian*)**

* Basic elements: *(****Khelawon* [2006] SCC***)*
  + (1) The statement is adduced to prove the truth of its contents
    - not hearsay when being used for the fact that it was said *(****Ratten, Subramaniam****)*
    - or as evidence of circumstances rather than truth of what said (***Baltzer***)
  + (2) Absence of a *contemporaneous* opportunity to cross-examine the declarant
    - Doesn’t mean you can’t use hearsay when a witness is on the stand 🡪 see necessity
* If not hearsay, accept without hearsay application
* **State of Mind** Exception / Present Intentions Exception (***Griffin***) – technically not hearsay
  1. Technically not hearsay to just get in that *declarant* had a particular state of mind (ie afraid of the accused), so doesn’t need to go through hearsay application, unless trying also to get in the reason for their state of mind.
  2. **To fit this exception, must be:**
     1. **made in a natural manner and**
     2. **not under circumstances of suspicion**
  3. **J must give limiting instructions** that stmt can only be used to prove the declarant’s state of mind and NOT a third party’s state of mind or intention.

1. **Pre-checks (*R v B(KG)*)**
   1. The contents of the hearsay statement must be **otherwise admissible**

* *bad character evidence?*
* *expert testimony?*
  1. The hearsay statement is **not the product of coercion** (threats, promises, excessive leading, or other investigatory misconduct)
* If product of coercion, fails hearsay application immediately
* If standard isn’t met, some degree of coercion will weigh against reliability

1. **Hearsay is *presumably inadmissible*** (strong presumption) **unless** it falls into (Analyze in order)(structure from ***Mapara* [2005] SCC**):

* + 1. **Statutory exceptions**
* Business Records (CEA S.30)
* Criminal Code (s715 and 715.1) – Prev stmt of W at a prev trial can be used if the person is unavailable or it is proved the testimony was given in the presence of A. Video ev of W/victim under 18 taken within a reasonable time of offence is admissible if the W/V adopts in their testimony.
* In *civil* trials before a J, evidence can be entered as affidavits
* If **statute is unclear** or definition needs to be “stretched”, better to apply the CL
  + Generally no probative/prejudicial balancing with statutory exceptions
    1. Unless statute provides discretion to J to exclude (e.g. statutory factors making it flexible, like public policy)
  + Stat exceptions (if you fit them) are not rebuttable like CL exceptions
    1. could attack under s 7 that it would be putting terrible ev in but would be very diff
    2. If you come close to meeting stat exception but not quite (as in Wilcox), that may assist you to some degree in necessity/reliability analysis
    3. Do any **traditional CL exceptions** apply? (traditional exceptions still in place – ***Mapara***)
* **Dying Declarations**
* ***Res Gestae***– spontaneous declaration with close contemporaneity to an unexpected event, not made in circumstances of suspicion. 3 qualifications:
* Past Recollection Recorded
  1. W has no memory and adopts their past statement as true - see last section
* Declarations against Interest
* Aboriginal History – Oral History in Aboriginal Title Cases
* **\*\*If hearsay fits under the CL exception, look to the *Mapara framework #3-4***
  + - **Hearsay exception can be challenged to determine whether it is supported by necessity and reliability, required by the principled approach. Modify/eliminate the exception as necessary.**
    - Burden on challenging party (on **BoP**), 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
* **\*\*If hearsay does not fit under the CL exception, look to the *Mapara framework #5***
  + - **Evidence that doesn’t fit exception may still be admissible if reliability and necessity are established in a voir dire.**
    - Not easy, but not as high a threshold as in #4. Presumptive inadmissibility is not as strong as presumptive admissibility.
    1. **Necessity and reliability** are established on **BOP by the party that wishes to lead** the evidence (onus on them) *(****KGB [1993] SCC* inherent trustworthiness framework**)
       1. **Is it necessary to present the evidence in this unusual form?** (bringing in prior stmt for its truth?)
          1. W unavailable (dead/sick/forgotten) or radical change in evidence?
          2. Must make reasonable efforts to ensure the ev has to come in in this way

SCC: it will be difficult to meet the threshold by saying the person is unable to communicate their evidence in court (ie due to mental disability) if at all possible to have the person in court. ***Parrott***

BCCA: Does not meet the necessity test to stay it is likely a W will be uncooperative or that the W is reluctant. Need to subpoena the W and have him testify 🡪 if then does not give info, necessity established. ***Pelletier***

* + - * 1. A radical change in the position of the witness can be sufficient.

*On a practical level, cannot get the evidence*

*Witness has switched their evidence*

* + - 1. **Is it reliable enough to admit?**
         1. J determines if it meets *threshold* reliability to admit (not actual)
         2. Focus is the circs in which the statement was made. (not what was said)

**KGB factors** (things missing out of court):

Oath

Whether put under oath

Whether warned about legal conseqs of lying under oath

Whether simply casual conversation or private / *formal* conversation

TOF present (evaluate demeanour etc)

Video of the statement is best substitute

Audio tape is next best

Statement written by witness

Someone writing down what they said

Scattered recollection of what person said to them, tone of voice etc from memory (may also have vested interest)

Sketchy notes and no memory of demeanour

Contemporaneous cross-examination

Available for cross now? Weighs in favour of admission

**Don’t automatically fail because you cannot meet all 3.**

Maybe 2 great and one absent…. Balancing of circumstances

**Prob with this formula:** Premised on idea that at some point there

was some kind of state interaction with the witness – didn’t assist

where state not involved.

**Degree of inherent trustworthiness**: whether the statement *appears* to be true: ***R v Khelawon [2005] SCC factors:***

Does the content of the statement itself appear to **flow**?

Logic

Flow of the story

**Contemporaneity** btw events and when described

*Kong: young girl after docs office – allowed bc stmt made directly after, among other factors*

**Motive to lie**? (motive of the person who made the initial stmt)

*Smith: victim girl phoning mom from time to time – hearsay from mom allowed bc no motive to lie*

*Kong: young girl after doc’s office – allowed bc no motive to lie and kid had no sexual knowledge prior*

Whether there is **corroborating evidence**

Shouldn’t be overemphasized bc focus is circs in which stmt made *(Starr)*.

Striking similarities between two statements can lead to a finding of reliability *(U(FJ))*

TJ must be satisfied on BoP that there are striking similarities and there was no reason or opp for collusion or influence.

If W can’t be crossed this lowers reliability

**Jury instructions if statement is admitted:**

Must be satisfied that other stmt was in fact made

If similarities btw 2 are sufficiently striking then you may draw conclusions from comparison about the truth of the 2 stmts

If reliability threshold isn’t met then prior stmt can be used to impeach cred or for the fact that it was made – not for its truth

**Leading questions or pressure** when giving statement?

1. Judge holds a *voir dire* 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)
2. 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
       - *Seaboyer* std applies: for accused, PE must *substantially* outweigh PV to exclude
       - 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
3. 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)
4. Is 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
5. Even if appeal court finds an error, can the decision be upheld by the **curative provisions** of the CC?

# Statutory Exceptions

## Business Records and Statements in the Course of Business

### R v Wilcox (2001) NSCA

**F/C:** Crab book not admissible under statute but was admissible under CL test of necessity/reliability.

* ***CEA s 30(1):* Where oral evidence would be admissible, a record made “in the usual and ordinary course of business” is admissible.**
* Where admiss under s.30 highly debatable, turn to the principled approach to determine admiss.
  + Not separate tests. In making principled argument, you should show how close you were to meeting other exceptions and why document is reliable by those underlying rationales.

#### CEA s 30

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

(10) Nothing in this section renders admissible in evidence in any legal proceeding

* (*a*) such part of any record as is proved to be
  + (i) a record made in the course of an investigation or inquiry,
  + (ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,
  + (iii) a record in respect of the production of which any privilege exists and is claimed, or
  + (iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;
* (*b*) any record the production of which would be contrary to public policy; or

(*c*) any transcript or recording of evidence taken in the course of another legal proceeding.

(12) “business” means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

# Common Law Exceptions

## DYING DECLARATIONS

* Admissible when (applied strictly)
  1. Offence involved is homicide of dead declarant
  2. Deceased had settled and hopeless expectation of almost immediate death
  3. Statement was about circumstances of death
  4. Statement would have been admissible if dead could testify
* More likely to be true – reliability established because we assume dying person would be motivated to speak truthfully. If doesn’t meet requirements, how close it is could be useful in nec/reliability test.

## RES GESTAE

* *Res Gestae* – spontaneous declaration with close contemporaneity to an unexpected event, not made in circumstances of suspicion.
* 3 qualifications:
  1. must not be made at such an interval as to allow fabrication or to reduce them to the mere narrative of a past event
  2. must relate to and can only be used toe explain the act they accompany
  3. though admissible to explain, or corroborate, they are not, in general, to be taken as proof of the truth of the matters stated

## DECLARATIONS AGAINST INTEREST

### R v O’Brien [1978] SCC

**F:** 2 people charged with possession and trafficking. Accused, O’Brien, arrested and convicted. Jensen fled country. When Jensen returns, charges against him stayed. Jensen gets legal advice - then visits O’Briens lawyer and says he did the crime himself and O’Brien wasn’t involved. Jensen then dies.

**A/C:** The manner in which Jensen provided his evidence would not have been to his immediate prejudice. His declaration was in privacy of lawyer’s office and any testimony in court couldn’t have been used against him. Doesn’t meet test. Hearsay cannot be admitted.

* **TEST:** 
  + **1. The statement must be to the witness’s immediate prejudice (goes to reliability)**
    - i. Declaration would have to be made to such a person and in such a circumstance that the declarant should have apprehended a vulnerability to conseqs as a result
    - ii. Deceased must know the fact can be used against his interest (financial, liberty)
  + **2. The vulnerability to consequences would have to be not remote –** immediate
* NH: Such reliability problems it probably wouldn’t have met the principled test either.

## ORAL HISTORY IN ABORIGINAL TITLE CASES

### Mitchell v Canada [2001] SCC

To establish ancestral right under 35(1), claimant must prove existence of ancestral practice, custom or tradition etc… *(Van der Peet)* – inevitably hearsay for historical ev, special context here cos not written

**ADMISSIBILITY: Oral histories are admiss where both useful and reliable, subject to TJ’s discretion.**

* **1. Usefulness** (we NEED this evidence – court strongly in favour of its admission)
  + May offer ev of ancestral practices and their significance that wouldn’t otherwise be available
  + May provide aboriginal perspective on the right claimed
* **2. Reliability**
  + Not required to find a special guarantee of reliability
  + Inquiries into witness’ ability to know and testify to orally transmitted history may be appropriate – for admissibility and weight
  + Resist assumptions based on Eurocentric traditions – notions of reliability shouldn’t become biased about different cultural views of evidence
* **3. TJ still has discretion to exclude if PE > PV**

**INTERPRETATION of and weighing evidence once passed admissibility:**

* generally at TJ’s discretion
* courts must interpret and weight ev with a consciousness of the special nature of aboriginal claims – but this does not negate the use of general evidentiary principles
* equal and due weight
* 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)

# COMMON LAW EXCEPTIONS AND THE PRINCIPLED APPROACH

**See *Mapara* framework** above at end of step 4(ii).

**Admission of hearsay used to be governed by the CL exceptions alone.**

* **Benefit:** 
  + **Clarity** (limited # of exceptions)
* **Disadvantages:**
* Ev not admitted simply because it doesn’t meet one of the requirements of an exception.
* Ev that met the requirements that really *shouldn’t* be brought in

**NEW METHOD**

* **Benefit:** 
  + More principled: in if necessary and reliable; out if not.
* **Disadvantages:**
  + Lack of predictability – may be becoming very J-specific b/c of the broad discretion
  + Judicial processs is elongated - Efficiency and cost at *voir dire* (ev re motive to lie etc etc

CH 8: ADMISSIONS AND CONFESSIONS

## FORMAL ADMISSIONS

* Def: Conceding a point so the other side doesn’t have to prove it I(CC s 655 wrt indictable offences)
* Efficiency & cost!
* Can be a much less inflammatory weigh of proving facts that will inevitably be proved anyway
* Admissions can affect the probative/prejudicial balancing so that some evidence that would be harmful for other reasons can’t get in (link back to the ***Kinkead***case)
* Can’t force the other side to make admissions, even if completely innocuous in your opinion (***Castellani [1969] SCC***)

## INFORMAL ADMISSIONS ARE PRESUMPTIVELY ADMISSIBLE BUT NEED PROBATIVE VALUE 🡪 PPB

* Def: An out of court statement by a party to the proceeding
  + e.g. full confession – note false confessions are very high on scale of wrongful convictions!
  + e.g. comment from which an inference can be drawn)

\*\*When you are presenting evidence of what **a party to the litigation** said out of court, it is **PRESUMPTIVELY ADMISSIBLE** for its truth if its content is otherwise admiss. (***R v Palma (2000) Ont SC***)

* + Admissions if relevant are generally **probative**
    - There is still a probative/prejudicial balancing – so admissions must have probative value – i.e. relevant and material
    - **Not considered hearsay**
      * A can take the stand, A can cross-examine the witness importing the out-of-court stmt based on accused’s knowledge of what he did or did not do. ***Palma***
  + Reliability judgments are for the TOF

## EXCEPTION: “PARTIAL OVERHEAR”

There is one exception to the general reliability rule, which is an exception to the *Murrin*-type rule: the “**out of context statement**” or the “**partial overhear**”. This is the issue in the *Hunter* case.

### R v Hunter (2001) Ont CA – partial overhears – no probative value without context

**F:** In context of having possession of a weapon and an attempted murder on a police officer, accused overheard saying: “I had a gun, but I didn’t point it”, but the full context is not heard. Crown wanted in.

**C:** Statement is *inadmissible*.

* Still probative/prejudicial analysis.
* Stricter test for admission because partial overhears are dangerous. Could be other, non-confession context to the statement *(****Hunter****).*
  + Ie. “…I killed David…” = inadmissible (***Ferris***) 🡪 highly prejudicial to interpret as confession. **No probative value w/o context**
    - Could be “They think I killed David, but I didn’t” 🡪 would make statement innocuous
  + Ie. Telling lawyer in loud voice: “I had a gun, but I didn’t point it” = inadmissible (but very close) (***Hunter***)

## PARTIALLY INCULPATORY STATEMENTS

### R v Allison

**F:** A arrested for being on premises and accused of having broken in to commit an offence. Crown led testimony of officer of accused admitting to being on the premises. Defence on cross: “Did he say **why** he was on the premises?” TJ barred defence from getting an answer on the grounds that the answer was a prior consistent statement of the accused. Later A testified and gave his version, including why.

**C:** TJ erred because. Crown argued that there was no prejudice to A because he was able to testify and give his version BUT this is unacceptable since it essentially forced A to testify & put his cred in issue. New trial.

* **Crown can lead prior statement of A, but once they do this, the whole stmt is admissible** 
  + Can be an exception to the general rule that D cannot use prior statements toward innocence.
  + **Why:** Dangerous for accused to have to take the stand to answer for the alleged confession
    - Will be strongly cross-examined by Crown. Could hurt case
    - Prior criminal record of accused can be brought to stand 🡪 as a witness (see witnesses)

## VOLUNTARINESS RULE – Statement made to a person in authority

**RULE: Where the statement was made to a person in authority, the Crown *always* has to prove BRD that A’s statement was voluntary** unless the defence gives a clear admission of voluntariness.

* Person in authority: police, prosecutor, people acting as agent of state (ie boss saying cops came in and wanted to know what happened)
* Look at whole of evidence
* There will be significant deference to the findings of the TJ (***Oickle***)
* Engages both types of prejudice
  + - 1. Reliability prejudice – very dangerous to search for the truth
         * Strong link between harsh tactics / pressure and false confessions
         * Hard for jury to understand a false confession when they don’t understand the pressure on the accused
         * False confessions are one of the top causes of wrongful convictions
      2. Prejudice to society caused if we start accepting coerced confessions
         * Public confidence in the values of our justice system could be undermined by overly harsh police tactics
* People have a right to a choice of whether to speak or not, and this right cannot be ***unreasonably*** taken away. The corollary is that the police can use reasonable methods to convince A to speak.
* *Strongest way for defence to exclude a confession*
* **Test is essentially subjective**, but must be an objective basis for what A thought (***Grandinetti***)
* **Focus** is the circumstances in which the statement was given and whether it was *inappropriately induced*, NOT whether or not the confession appears to be true.
* **No Discretion –** Under the CL voluntariness rule, if admission is found to be involuntary, it is OUT. J has no discretion to let it in! (but there is discretion under the *Charter* – see chapter 9)

**Types of conduct that may lead to involuntariness** (***R v Oickle [2000] SCC***)

* + **Threat of Harm** 
    - Both direct and indirect (e.g. withholding of protection)
  + **Oppression**
    - A has to have an operational mind/be functional when they decide to talk to auths
    - Ie. Leaving someone in a cell for days/hours can lead to false confession
    - Ie. Extreme sleep/food deprivation
    - Ie. Atmosphere of aggression in exaggerating polygraph accuracy and not saying it is inadmissible to the accused is an area of concern, but not sufficient for involuntariness on its own (***Oickle***)
    - See undercover confessions below
  + **Coercion**
    - Ie. Presenting accused with made up evidence that makes case look overwhelming could weigh strongly against admission
  + **Police trickery that would shock the conscience of the community**
    - Sometimes evidence is collected in such a way as to engage the integrity of our justice system
    - **Standard:** Would the police conduct *shock the conscience* of the community?
      * If yes 🡪 involuntary
      * Very hard to meet. Many defence counsel have tried this against Mr. Big operations and failed
  + **Improper inducements** (***Oickle***)
    - People may be inclined to give false confessions if promised a legal advantage
    - **Elements:**
      * Hope of advantage
      * Given by someone who seems tied to legal process (person in authority, cop)
        + *Undercover confessions:* Where accused does not at least reasonably believe person they confess to is an authority, statement is not involuntary (***Grandinetti***)

Underlying reasoning is concern over state *using* its coercive power – has to at least suspect state is doing it to them

Really about *legitimate state representatives*

There could be a situation where conditions are so coercive that a statement isn’t reliable

**Excep:** When accused is in custody, undercover cell plants cannot *elicit* a statement (***Hebert***), but they can listen if accused brings it up

* + - * In order to get accused to talk
        + Needs to be *exchange* element
      * *And* it then causes them to talk
        + Causation is necessary
    - Moral/spiritual inducements are acceptable, but they can skirt the line with legal ones
      * Ie. Offering psychiatric help OK when not in exchange for confession
    - Anything could be an inducement
      * Ie. Medical help *in exchange for* a confession
      * Ie. Threat regarding third party that is sufficiently close to accused
        + Threat of putting fiancée through polygraph test was not sufficient to engage voluntariness (***Oickle***)

## UNDERCOVER CONFESSIONS

Mr Big Undercover Confessions

* Voluntariness – implicit/explicit threats, inducements offered etc
* Concerns about integrity of the justice system
* Concerns about danger to the public
* Concerns about the reliability of what’s being said

**If admissible, voluntariness of the statement becomes a matter of weight** (i.e. I only said that because I thought that was what they wanted to hear) – **J might warn jury that if they think the evidence was obtained by threats or violence, can give little weight.**

**At certain extremes, undercover confessions can engage section 7 issues** (fairness of trial can be undermined if fundamentally unreliable evidence is presented or the tactics used are so contrary to our notions of society & integrity that we exclude it to avoid the court being tainted by those abusive practices)

### R v Grandinetti [2005] SCC

**F:** Undercover confession to cop who said they worked with rogue cops who could destroy evidence for nephew who was believed to have killed his aunt.

**A/C:** Voluntariness doesn’t apply because not to person in authority (as seen by A)

* **Voluntariness doesn’t apply to undercover confessions because not to person in authority** (as seen by A)
  + Position of authority – using power of the state as it was intended to be used (not rogue cops)
* **In very exceptional circumstances, you could exclude undercover confessions under the *Charter* where section 7 issues would be engaged. Fairness of the trial can be undermined if such coercive tactics are used that:**
  + 1. The evidence is fundamentally **unreliable**
  + 2. Evidence is reliable but the **tactics are so contrary to our notions of society and fundamental fairness** that it is excluded to prevent the state from beinefiting from their abusive tactics & to preserve the court’s integrity.
* *Normally, however, reliability is left for TOF as an issue of weight*
* **Undercover prison plants** cannot elicit a stmt from A (***Hebert***) but can listen if they bring it up.
  + Engages state misusing its power cuz its in a state facility
* **For the defence to make an allegation against a 3rd party,** have to show a ***sufficient connection* of that person to the crime**
  + Ie. Tried to argue aunt was dealing drugs for 3rd party that was let out of jail a week before, and that person killed her 🡪 vague and speculative
    - D can only lead bad character of proposed party if they already made that sufficient connection
  + Unless certain preconditions are met, can only serve to prejudice the jury and have them speculate that this horrible person did it (can cause them to irrationally acquit)
* Example of defence being unable to do whatever they want despite the *Seaboyer* standard

## ADMISSIONS OF CO-ACCUSED

**Where co-accused are tried in the same trial, the admission of one party is only admissible against that party. *R v Grewall (2000) BCSC***

* Ways to deal with this
  + Sever the trial (A & B tried separately) – courts don’t normally like to do this
  + Exclude the evidence – courts also reluctant to do this (search for the truth)
  + **Editing** ***Grewall*** 
    - **Limitations**; Stmt may now be missing important details. Court has concern about losing the context and integrity of the statement.
    - **Where it gets to the point of undermining the fundamental nature of the statement, editing will not be an option**
    - Easier to do if written; harder if spoken.
  + **Limiting instructions**: Tell jury that A’s references to B cannot be used against B. (even if jury tols specifically, there is still a risk of prejudice to B)

CH 9: EXCLUSION OF EVIDENCE UNDER THE CHARTER

#### Prior to Charter,

* Conscriptive evidence through a Charter breach was seen as very serious and was almost always out
  + (ev emanated from A participating in Charter breach – bodily fluids, blood, breathalyzer)
* Non-conscriptive seen as less serious – presumption that it was admissible
  + (physical ev, existed regardless of the breach)

Concerns that it didn’t focus on **reliability.** But if it’s all about reliability, may as well get rid of the ***Charter.***

#### Charter 24(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**.

* Step 1: Violation of Charter right (BoP)?
* Step 2: Balance PV (reliability) v PE (repute to the justice system) 🡪 ***Grant***

#### S. 8 – Right against unreasonable search and seizure

* Where state has *reasonable grounds*, they can generally arrest and search
* Must **balance** against state interest in investigating crime

#### s.10(b) Everyone has the right on detention or arrest to be informed of the right to contact counsel w/o delay, and should they wish to do so, police have to facilitate that without delay

* 10(b) is triggered by putting an accused in “**detention**” (***Grant***)
  + Not every interaction with a police officer is “detention” (***Grant***)
  + Includes both *physical* and *psychological* restraint (***Grant***)
  + **Psychological detention** - where the person has a legal obligation to comply **or** a reasonable person would conclude that b/c of the state conduct he had no choice but to comply (***Grant***)
    - **Factors to consider** (***Grant***)
      * Circs 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 others, and duration
      * Particular characteristics or circumstances of the individual where relevant including age, physical state, minority status, and level of sophistication
* Right to counsel arises immediately upon detention. Thus, ***Grant***was a violation of 10(b)
* If person has been told about right to counsel, and are in process of getting to phone, there can be no questioning in that period
* People should have a meaningful and informed choice whether to participate in police investigation (***Grant***)
* No right for counsel to be present during interrogation.
  + **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

### R v Grant [2009] SCC – CURRENT SYSTEM for excluding under the Charter 24(2)

**F:** Police see someone walking down street and ask to talk to him: direction to keep his hands in front, intimidation, accused was young. Police had no grounds to search him, but he said he had a gun in his pocket. He felt detained. Police didn’t think he was. **I:** Gun admissible?

**A/C:** Violation of 10(b), but not serious enough to exclude evidence. Found good faith, unintentional breach, reasonable mistake, not flagrant breach of *Charter*. High impact on accused (self-incrimination) weighed in favour of exclusion and Reasonableness and honesty of mistake weighed in favour of admission. Court admitted the gun on the test. **Surprising outcome**: Heavy on reliability over impact.

**TEST: Would in “all the circumstances”, admission of evidence obtained by a *Charter* breach “bring the administration of justice into disrepute”?**

* + **Standard:** Whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would answer yes
    - The old test was too rigid. Take into account all of the circumstances.
    - **Focus** is on the **long-term integrity** of our justice system – not this particular case
  + **FACTORS:**
    1. **Seriousness of the Charter-infringing conduct:**
       - The more serious the conduct, the more it will weigh in favour of exclusion (judiciary needs to distance itself from serious *Ch* breaches)
       - Did they knowingly breach the Charter? Technical/substantial breach?
         * Technical good faith breach🡪 Technical but the officer could have been more careful / Was substantial but reasonable mistake 🡪 Honest but somewhat unreasonable mistake 🡪 Negligence where there seems to be a pattern of unreasonable decisions/breaches even if not willfully violating charter 🡪 deliberate infringement
       - Were there extenuating circs (ie. fear about safety or loss of evidence)
    2. **The impact on the Charter-protected rights of the accused:**
       - Limited (fleeting) 🡪 Severe (profoundly intrusive / place where you had a high expectation of privacy / degrading aspect to the breach)
       - Violation that leads to self-incrimination is inherently serious (para 77)
       - Finger print or breath sample isn’t so intrusive (versus serious bodily intergrity)
       - Privacy interest engaged by s.8 may be of low interest
    3. **Societal interest in a trial on the merits** 
       - Whether the **truth‑seeking** function of the criminal trial process would be better served by admission of the evidence or by its exclusion.
         * 1. **Reliability** of the evidence

If reliable, much more likely to be admissible on factor #3

Versus if it looks like the evidence may have been rendered unreliable through the *Charter* breach

* + - * + 2. **Importance** to the Crown’s case

i.e. Does the Crown have no case without it?

* + - * + Keep in mind focus is the **long term integrity** of the justice system
      * The **seriousness of the offence** can be a factor but can cut both ways (par 84). But it is the *long-term* integrity of the justice system that is 24(2)’s focus. We want to be sure we don’t make it ok to breach *Ch* rights simply bc it is a serious offence.
        + If looks to be reliable and is a serious offence, could way in favour of not excluding. If serious state misconduct though, the fact that it is a serious offence cannot weigh that heavily in favour of getting it in.
        + If looks to be unreliable, could say the likelihood of wrongful conviction for a serious offence is even more critical, so exclude.
  + **CATEGORIES OF EVIDENCE**
    1. **Statements of the accused**
       - Using the 3 factors, most cases will strongly favour exclusion
         * 1. Very serious Charter-infringing state conduct**:** You cannot be forced to provide evidence against yourself

Technical violations won’t engage the strong presumption of exclusion (Ie. *Grant* – police didn’t think person was in detention, so didn’t give 10(b) rights)

* + - * + 2. Impact

Often it is a 10(b) violation

Right against self-incrim is fundamental to our legal system

Violation of such fundamental rights tend to favour exclusion

* + - * + 3. Society’s interest in adjudication on the merits

Great reliability concerns when police are detaining A without a lawyer

Confession may be *so* reliable (ie. 10 corroborating pieces) that it rebuts this strong presumption and is admissible (NH)

* + 1. **Bodily Evidence**
       - Pre-Grant = if emanated from body, automatically out.
       - Post-Grant = easier to get in. No presumption – flexible test:
         * 1. Seriousness of state’s infringing conduct
         * 2. Impact on Charter-infringing rights = level of intrusion

often a section 8 violation

The greater the intrusion on accused’s bodily integrity, privacy and dignity, the more imp it is for court to exclude

*Breath sample is relatively non-intrusive*

* + - * + 3. Society’s interest in adjudication on the merits

Such evidence is generally reliable and tips the balance towards admission

* + 1. **Non-bodily physical evidence (Real evidence)**
       - Balance of factors, but evidence is usually highly reliable so will often be determined on how serious the misconduct was
         * highly reliable so would have to be more serious
    2. **Derivative evidence:** 
       - Still look to the other factors, but discoverability is an important factor
         * If the physical item found because of A’s stmt, more likely excluded
         * If *otherwise discoverable*, then the impact on Accused is less 🡪 weighs toward admission

Has to be proved by Crown

* + - * Weighing (as for all others)
        + 1. Seriousness of the Charter-infringing state conduct
        + 2. Impact on Charter-protected rights of accused

Most cases will be a 10(b) violation

Where Charter rights significantly compromised by breach will favour exclusion (i.e. *Grant* led to self-incrimination finding of gun – but ct balanced with reliability and admitted)

**Discoverability** (see above)

* + - * + 3. Society’s interest in adjudication on the merits

Evidence in this category usually reliable and favours admission

CH 10: PRIVILEGE

# PRIVILEGE AGINST SELF-INCRIMINATION

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

Protection against self-incrimination

* Voluntariness rule + CL right to silence
  + Crown must prove BRD
* Right to counsel (10(b))
  + Person must prove Charter violation and balance under s 24(2)
* Immunity (13)
* Residual protection of right to silence under s 7 of the *Charter*
  + Supplements CL right to silence – usually involves serious state conduct akin to abuse of process, or where undercover cop so accused not aware speaking to authority
  + 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) *(Grant)*
2. CL right to silence, subject to statutory limitations

## PRIVILEGE OF THE ACCUSED AND THE RIGHT TO SILENCE

#### Right to Silence under Section 7 versus Voluntariness (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**
  + **Right to silence balanced with right of state to investigate.**
  + Consider the following factors:
    - 1. Vulnerability of the person (court noted how well Singh held up under pressure)
    - 2. # times asked to end interview can be indicative
    - 3. How clearly their right not to speak was set out to them and occasionally repeated
    - 4. The length of time
      * How long is too long? Key: Focus on the effect of police conduct on accused’s ability to exercise free will. (objective test but indiv characteristics relevant)
    - Has A exercised right to counsel? Yes weighs in favour of voluntariness
    - Did the police use threats / inducements
    - Whether language used gives impression that they have to talk
* 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 undercover officers in the jail – go through section 7 because 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
  + S 7 is violated if accused is cross-examined about why he did not give a stmt 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)

* **CL right to silence applies in and out of custody (no detention necessary), unless statute otherwise dictates**
  + A willingness to impart some information is not a waiver of the right to silence
* RULE: ev of silence is **inadmissible** and has no probative value, CANNOT BE USED TO INFER GUILT
  1. Evidence of silence can, in limited circs, 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
     + i.e. joint trial – silence of co-A can be admissible to assess cred but not ot 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 failed to disclose his alibi in a timely manner
  3. **narrative** and cannot easily be extricated
  + Right to silence means right not to have your silence used against you
  + Must tell the jury in clearest of terms that even if evidence of silence is admitted, it must not be used to infer guilt

### R v Singh [2007] SCC – right to silence in custody

**F/C:** Singh arrested and provided with right to counsel. Asserts his right to silence 18x, but they continue interview. Reminded of right to silence and means of persuasion were legitimate. Eventually identifies himself in pictures taken at pub, putting himself at the crime scene.

**A/C:** Court notes how well he holds up under questioning. Not vulnerable. Even though requested 18 times, right to silence under CL voluntary rules not breached.

***Sinclair [2010] SCC***

**Police do not have to stop the interview if you say you with to re-contact counsel.**

Regular voluntariness rule – have to make sure person knows they have a right to silence

### R v Turcotte [2005] SCC – Right to silence without detention

**F:** Crown wanted to use silence as consciousness of guilt evidence when accused went to police station and told them to send squad cars to an area w/o saying why

## PROTECTION OF A WITNESS / 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 s 7 with use immunity, derivative immunity, and const 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
* **Balance** the right against self-incrimination with compelling people to speak to get information.
* **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

#### Charter s 13 – constitutional protection from use of prior testimony

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

* + Protects against both use and derivative use
  + Doesn’t protect from perjury charge if you give contradictory evidence later
* **Previously (pre-Henry)**, the statement made as a witness can be brought into later trial to test accused’s credibility (not to get in for truth/to incriminate). Jury limiting instructions are required but it is controversial whether the instructions are sufficient. (*Kuldip*)
* **Noel limited the scope of the rule above**
  + *Kuldip* distinction kept alive but could only bring in innocuous statements.
  + Critiques: When could a court ever predict that something is completely innocuous? Also, having Crown pick over tiny details of difference makes Crown look pathetic and A look consistent.
* ***Henry [2005] SCC*** **(current interpretation of s 13)** further modified the Noel rules
  + Bringing in for credibility / incrimination is not really a workable distinction
    - Not easy for jurors not to use for truth. S 13 was to provide strong protection
  + **If you testify as a W and later are an accused, no use of your prior testimony**
  + **However, no s 13 protection where you testify as accused** at trial 1 and on the **same indictment**, given a retrial, **testify again as the accused**.
    - Crown can not use prior testimony in their case – this would take away choice of A whether or not to testify in trial 2
    - But if accused decides to testify at trial 2, can be heavily cross-examined on it… and the prior stmts can even be used for their truth because there is no s 13 protection

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

* A scheme to deal with compelled statements in non-proceedings
* **Section 13 is always supplemented by the broad principles of section 7**
  + **S 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 by showing otherwise discoverable
      * *A: Section 7 requires no derivative use unless otherwise discoverable. S 83.28 provides broader protection – no derivative use at all.*
    - **Constitutional exemption**
      * This will happen where the accused can show the non-proceedings (ie. CRA hearing, etc) were used to further a criminal investigation
      * Rarely engaged because the state will usually have a valid purpose
* Stat compulsion to testify (in proceedings or non-proceedings) engages liberty interest under s 7
  + The statute ss10 provides statutory immunity from use and derivative use.
* **83.28 does not offend Section 7 as long as the immunity from use in criminal proceedings applies to extradition and deportation hearings as well. Not a violation of section 7 to force them to speak as long as there is a valid purpose, but section 7 requires that the evidence not be used against them in a criminal sense or in proceedings that could have them removed from the country (liberty interest).**
  + We need to be able to compel witnesses or we could not effectively run a securities market / national security otherwise.

# PRIVILEGE ATTACHING TO CONFIDENTIAL RELATIONSHIPS

## CLASS PRIVILEGE

Presumes privilege for matters within the scope of the relationship (ie. solicitor-client, police-informant)

* + Subject only to limited exceptions such as “innocence at stake”
  + Solicitor-client privilege is also protected by section 7 aspects
  + Police-informant privilege has same power as solicitor-client privilege.
* Class privileges should now only be created by legislative action (*Brown*)
  + Spousal privilege

## Solicitor-Client Privilege

### Step 1: Does the relationship fit into class privilege? (Shirose)

* + 1. The communication is with a lawyer
  + 2. Intended to be confidential
  + 3. Be for legal advice
    - communication for purposes of doing a crime or for future crime not within advice (applies where the client is knowingly pursuing a criminal purpose)

**Step 2: Has the privilege been waived?**

* **Explicit waiver** by the client (it is the client’s privilege - *Shirose*)
* **Implicit waiver:** Attempting to use some legal communication to your benefit at trial (*Shirose*)

**If falls into SCP and no waiver, privilege in place** 🡪 strong presumption it cannot be breached

### Essential to the effective operation of the legal system. (no balancing!)

**Exceptions:**

* Innocence at stake exception – rare exception to be used as a last resort where there is a genuine risk of wrongful conviction *(****Brown [2002] SCC****)*
  + **McClure test –** 
    - Threshold Question:
      * 1. Info accused seeks from solicitor-client relationship is not available from any other source; and
      * 2. He is otherwise unable to raise a reasonable doubt (must really be the only way to get the info)
    - Two-stage innocence-at-stake test
      * #1 – 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
      * #2 – If such an evidentiary basis exists, the TJ should examine the communication to determine whether, in fact, it is likely to raise a reasonable doubt as to the guilt of the accused (stricter than stage #1)
  + **If satisfied, J should order disclosure of the communications that are likely to raise a reasonable doubt**
  + Use immunity and Derivative Use Immunity so the communications can’t be used against the privilege holder. (no transactional immunity from any future crim prosecution on that)
  + In addition to deeply held value of **SCP** **as essential to the operation of our justice system, t**here is a deeply held value of **protection against wrongful convictions.**
  + But court is willing to take some risk of wrongful convictions to protect the S-C relationship

### R v Shirose [1999] SCC – solicitor client privilege and implicit waiver

**F:** Defence in brought s 7 abuse of process application because it might "shock the conscience" of Canadians to have cops breaking the law when they were gathering evidence. In factum, RCMP legal advisers argued that regard must be had to the RCMP’s consultation with the DOJ with regard to any problems of illegality.

**A/C:** Waived privilege by claiming other side must have regard to the legl advice and claiming the contents were to their benefit.

* By saying the content of legal advice support your argument, you open the door to the other party using that legal advice to rebut your argument
  + Merely mentioning you had spoken to a lawyer is not enough – must be some attempt to use it to make your argument
  + Merely answering questions was not a waiver

### R v Brown [2002] SCC – innocence at stake exception

**F:** Brown on trial for murder. Another individual had allegedly told his girlfriend that he did it and also that he told his lawyer he did it. Statements to gf made in tumultuous relationship and context of drinking.

**A/C:** Does not meet the test. Girlfriend could have given testimony to raise a doubt so the lawyer wasn’t the only way to get the evidence. (Court willing to risk wrongful convictions to uphold solicitor-client privilege)

## OTHER CONFIDENTIAL RELATIONSHIPS / CASE BY CASE PRIVILEGE

### R v National Post [2010] SCC

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

* **Provides greater flexibility but less certainty**
* **Journalist-sources do not constitute a class privilege** – so do case-by-case
* **To establish case-by-case privilege,** the person wanting to seek protection of privilege **must satisfy these 4 Wigmore factors**:
* **Must satisfy first 3 factors** before balancing in the 4th factor (Is this a privileged type of relationship we want to encourage? If yes, balance public interest in protection of privilege v value of info to this case)
  1. The communication must originate in confidence
  2. The confidence must be essential to the relationship in which the communication arises
     + Source must insist on confidentiality as a condition for disclosure
  3. The relationship must be one which should be “sedulously fostered” in the public good
     + Relationship between a blogger vs professional journalist may differ
  4. If the first 3 conditions are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in truth seeking
     + This factor does most of the work
     + Always do this balancing even if particular relationship has been reviewed before
     + Public interest in supporting confidentiality measured against circs of the case
       - Public interest
         * Public interest in free expression will *always* weigh heavily in the balance
         * First 3 factors speak to the detriment to the public interest of disclosure (e.g. importance of openness with doctor / priest / journalist)
       - Circumstances of the case
         * 1. nature and seriousness of the offence in question
         * 2. probative value of the evidence sought
     + JJs may order full or partial disclosure
     + J can order 2 step process: Information given to him; he then reviews the information and determines whether the privilege is met.
     + J may set up protective measures (only seen by counsel / public ban, etc)
     + Crown could disclose to Defence on certain undertakings to find out what they even want before wasting time asking J to deal with it.