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# Basic Framework of Evidence Law

## Goals of Evidence Law

* **Truth seeking** is the dominant objective of evidence law. This objective is balanced against others, including:
  + **Fairness**
    - E.g., solicitor-client privilege promotes fairness and public confidence in the justice system, though it may impair efficiency and truth seeking.
  + **Efficiency** 
    - Guilty pleas often rewarded with reduced sentences

## Sources of Evidence Law

* Most of the law of evidence exists as common law. Evidence statutes contain basic provisions that in some cases modify or supplement the common law.
* Federalism shapes evidence law: Provincial matters are governed by the ***BC Evidence Act* (“BCEA”)**while federal matters are governed by the ***Canada Evidence Act* (“CEA”)**
  + **CEA:** criminal matters, federal regulatory matters and disputes involving the federal Crown.
    - Section 40 of the CEA: if the CEA fails to deal with an issue then the relevant provincial statute will apply.
  + **BCEA:** provincial regulatory matters, most civil disputes
* There are several ***Charter***provisions that are relevant to evidence law:
  + S. 11(d): presumption of innocence; fair and impartial hearing
  + S. 24(2): evidence obtained contrary to charter rights will be excluded if admission would bring administration of justice into disrepute
  + S. 7: right to life, liberty and security of person; not to be deprived except in accordance with the principles of fundamental justice
  + S. 8: unreasonable search and seizure
  + S. 11(c): not to be compelled as a witness against oneself
  + S. 13: right against self-incrimination is subsequent proceedings
* **Aboriginal law** also plays a role in the law of evidence:
  + - When assessing aboriginal rights and title, the common law rules of evidence must be balanced with Aboriginal conceptions of history and evidence

## The Fundamental Rule of the Law of Evidence

* **All relevant evidence is admissible, unless its exclusion is required by a rule of law or policy.**

## The Path to Admissibility

* The party seeking to submit the evidence has the burden of proving its relevance. There are three hurdles to admissibility: **relevance, exclusionary rules, probative value vs. prejudicial effect**
* Each of these hurdles is a *question of law* to be decided by the trial judge.

1. Evidence must be both factually and legally relevant.
2. Even if a piece of evidence is relevant, there may be a variety of reasons for excluding it:
   1. The evidence may encourage improper reasoning
   2. The evidence may unnecessarily prolong the trial or confuse the issues
   3. The evidence may undermine other values, objectives, or rights
   4. The evidence may have been improperly collected
3. If no rules of exclusion apply, the court will then consider whether the probative value of the evidence is outweighed by its prejudicial effect.

* **Only once all three of these hurdles are cleared will the evidence be admissible, which means that the trier of fact must consider it, subject to any limiting instructions issued by the judge. However, the trier of fact is not required to accept or believe any piece of evidence or draw the inferences and conclusions that have been suggested by the parties. In other words, *weight* is left to the trier of fact.**

## Relevance

As a pre-condition to admissibility, evidence must be both factually and legally relevant

* + **1) Factual relevance**
    - As a matter of logic and human experience, the evidence tends to prove the proposition for which it is advanced.
    - **Test**: does the evidence tend to make the existence or non-existence of “Fact A” more probable?
  + **2) Legal relevance/materiality** 
    - The evidence is directed at a live issue.
    - **Test:** is “Fact A” relevant to a material fact in issue?

R v Watson (1996) ONCA *Relevance requires no minimum probative value; evidence of habit makes it more likely that the person acted according to habit; inferences made relating to circumstantial evidence must be reasonable.*

F: D accused of guarding the scene of a planned assassination; defence argues D had no knowledge of any such plan and that a spontaneous conflict broke out. Friend of deceased said that deceased “always carried a gun . . . like a credit card.”

I: Is the friend’s evidence relevant?

A: No minimum probative value is required to deem evidence relevant (*Morris*); Evidence of habit is circumstantial evidence that a person acted in a certain way on the occasion. Inferences:

* Accused often carried a gun, therefore it is more likely that he had a gun that day.
* If the accused had a gun that day, it is more likely that the accused used it
* If the accused used a gun, it is less likely that the killing was planned

D: evidence of habit of gun carrying is admissible.

Other relevance examples:

R v Morris (1983): accused charged with conspiracy to import heroin from Hong Kong. Newspaper clippings re: heroin trade in Pakistan were relevant.

R v Terry (1996): accused charged with murder. Described a dream in which he had killed someone; unsigned poem found that seem to admit to killing. Both poem and dream relevant.

## Direct vs. Circumstantial Evidence

* **Direct evidence:** supports the ultimate proposition. The only real issue is whether the witness is credible and telling the truth.
  + Eyewitness: “It was raining outside.”
  + Proposition: It was raining (requires no inference)
* **Circumstantial evidence**: subsequent inferences are required to support the final proposition. In addition to credibility, a court must consider whether the inferences are supportable and justifiable.
  + Witness: “I heard a sound like rain on the roof, and when I went outside it was wet.”
  + Proposition: It was raining (requires inference)

## Probative Value and Prejudicial Effect

* Once evidence is determined relevant and not subject to an exclusionary rule, the court must consider whether the probative value of the evidence outweighs the prejudicial effect.
  + **Prejudice**: likelihood that the evidence will encourage the jury to engage in improper reasoning (“bad person”, propensity, etc.)
    - Types of prejudice:
      * Evidence arouses prejudice, sympathy or hostility in the jury
      * Evidence will create a side-issue that will distract the jury
      * Evidence will consume an undue amount of time
      * Evidence will be an unfair surprise to the other party
  + **Probative Value**: extent to which the evidence tends to prove or disprove a legally relevant fact (How useful is the evidence for the jury?)
* When the prejudicial effect outweighs the probative value the evidence will not be admissible.

R v Seaboyer (1991) SCC *Evidence will only be admitted if its probative value outweighs its prejudicial effect; if defence evidence is to be excluded, the probative value must be substantially outweighed by its prejudicial effect.* *Excluding evidence for any reason other than a clear ground of law or policy will violate section 7 of the Charter.*

F: D charged with sexual assault, wants to cross-examine complainant about prior sexual conduct, which he thinks would explain physical condition of accused. Prohibited under sections 276 and 277 of Code.

I: Do 276 and 277 infringe s. 7? Consistent with principles of fundamental justice?

A: Right to full answer and defence depends on the ability to call necessary evidence; s. 276 prevents the calling of evidence that may be highly relevant to the defence, and violates the charter by excluding evidence the probative value of which is not substantially outweighed by its prejudicial effect.

## Evidentiary and Persuasive Burdens and Procedural Considerations

* ***Persuasive burden*:** the party required to established the facts relevant to succeed
* ***Evidentiary burden*:** duty to enter enough evidence to raise an issue

In civil proceedings, the plaintiff typically has both the persuasive and the evidentiary burden.

* ***Summary Judgment***: *Cases* must pass the “good hard look” test before they will proceed to trial. The judge must ask whether there is a genuine issue for trial (e.g., credibility). Motioning party asserts that other side’s case is so weak that it is not worth going to trial
  + Irving Ungerman (1991) OCA
    - F: D argued that he had exercised right of first refusal (real estate). Unclear when $10,000 cheque was drawn on account.
    - A: genuine credibility issues and unsettled facts require trial
* ***Motion for Non-Suit*:** At the close of the plaintiff’s case, the defendant can argue that P has failed to introduce sufficient evidence on the elements of the action.
  + Hall v Pemberton (1974): assuming the evidence to be true (including direct proof and reasonable inferences), is there sufficient grounds to support the issue?
  + SC Civil Rules 12-5(4): no evidence motion by defendant does not require an election whether to call evidence
  + SC Civil Rules 12-5(6): insufficient evidence motion can only be brought if the defence elects not to call evidence.
* ***Balance of Probabilities*:** 
  + McDougall (2008) SCC
    - There is only one civil standard, and that is proof on a balance of probabilities.
    - However, context is important, and a judge should not be unmindful of the seriousness of the allegations or consequences
      * \*This leaves the door open to call the standard of proof into question in serious cases\*
* ***Directed Verdict of Acquittal*:** 
  + Criminal version of the civil motion for non-suit: D argues that Crown has not led evidence capable of establishing the elements of the offence.
    - Monteleone (1987) SCC: if a properly instructed jury acting reasonably could convict, then a DVA must not be ordered. If there is no direct evidence, a judge must engage in a limited weighing of the evidence to determine whether conviction is possible.
* ***Raising Criminal Defences*:** 
  + The trial judge must put all defences that arise on the facts, whether or not they have been specifically raised by the accused.
  + All defences lacking an evidentiary foundation/air of reality must be kept from the jury.
    - Air of reality: sufficient evidence on each element of the defence that, if believed, could establish the defence (*Cinous*).
      * Asserted conclusions (“I was drunk”) are not sufficient facts.
* ***Beyond a Reasonable Doubt*** 
  + Lifchus (1997) SCC: “reasonable doubt” is a doubt based on reason and common sense, logically connected to the evidence.
* ***Appellate Review – Civil*** 
  + Stein v Kathy K (1976) SCC: findings of fact made at trial are only to be reversed if the judge made some palpable and overriding error.
    - “Palpable error” is plainly seen or obvious
    - Court of Appeal cannot re-interpret factual events unless threshold met.
* ***Appellate Review – Criminal*** 
  + Yebes: when reviewing a jury verdict, the question is whether a properly instructed jury acting judiciously could reasonably have rendered the verdict. If so, the verdict must not be disturbed.
    - Biniaris (2000) SCC: test should be applied from a judicial perspective to ensure that jury decisions are consistent with “judicial experience”.

## FTP Report: Tunnel Vision

* Tunnel vision is characterized by a narrow focus on a particular theory or interpretation of the evidence that results in missing or suppressing other evidence that tends to disprove the dominant hypotheses or theories.

# Types of Evidence: Witness Testimony

* In common law trials, the general rule is that parties must prove or disprove all facts in issue through the oral (*viva voce*) evidence of witnesses. This includes **real evidence**, which must be identified by a witness.
* In order to testify, a witness must swear an **oath** or satisfy one of the **statutory substitutes** for the oath.

## Oath and Its Substitutes

* Traditionally, only an oath to some supreme being would suffice. Evidence acts now permit a solemn affirmation to be substituted for an oath.

***Oath***

R v Bannerman (1966) MBCA *When considering whether a witness understands the “consequences” of the oath, it is sufficient if they appreciate that they are assuming a moral obligation to tell the truth.*

F: Sexual assault conviction at trial, young witnesses testified under oath.

I: Did the judge err in permitting the child to give evidence under oath?

A: Counsel argues that boy didn’t understand consequences of the oath, but the court thinks boy understood the moral obligation.

***Affirmation***

R v Walsh (1978) ONCA *Witnesses may give evidence under a solemn affirmation so long as they display a willingness to tell the truth.*

F: Witness is a Satanist who objects to swearing an oath, willing to make solemn affirmation.

I: Can a witness who does not recognize a social duty to tell the truth, but who understands the potential for perjury charges, give evidence in court?

A: There is no requirement that a witness believe in a social obligation to tell the truth. Witness said he “could not live with himself” if he lied

**\***This case sets a low bar for the admissibility of solemn affirmations.

## Unsworn Evidence

R v Khan (1990) SCC *(Old) section 16 of CEA only requires sufficient intelligence and an understanding of the duty to tell the truth* [Rev’d 16(3) *CEA*].

F: 3-year old sexual assault complainant excluded from giving evidence.

I: Did the judge err in disallowing the child’s testimony?

A: trial judge erred in applying *Bannerman* test to unsworn testimony under s. 16; all that is required under the old s. 16 is sufficient intelligence and an understanding of the duty to tell the truth.

* Following Khan, section 16 of the *CEA* was amended as follows:

**16.**

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

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

(*b*) whether the person is able to communicate the evidence.

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

**(3)**A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

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

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

R v Marquard (1993) SCC *The ability to “communicate the evidence” under (old) section 16 requires 3 capacities: observe, recollect, and communicate. Arguably applies to new section as well.*

F: D charged with aggravated assault of granddaughter; 5-year old claimant gave unsworn testimony, saying: “my nanna put me on the stove.”

I: Was the child able to “communicate the evidence” under (old) section 16?

A: Under section 16, the ability to “communicate the evidence” requires 3 capacities: (1) capacity to observe; (2) capacity to recollect; (3) capacity to communicate. The threshold is low; once met, deficiencies of perception or recollection will go to weight.

R v DAI (2012) SCC *Under 16(3), an adult with mental disabilities can testify so long as they have the capacity to communicate the evidence and promise to tell the truth; explicitly rejects requirements set out in Khan.*

F: D accused of sexually assaulting 19-year old who has “mental age” of 3-6 year old.

I: What is the capacity threshold under 16(3) for a person with mental disability?

A: All that is required under section 16 is that the witness is able to communicate the evidence and promise to tell the truth; understanding the nature of a promise to tell the truth is not required; **however**, witness may be questioned on ability to tell the truth in factual scenarios in order to determine if she can communicate the evidence.

**\***Court makes important distinction between competence, admissibility, and weight. Competency only requires a basic ability to provide truthful evidence. Competing policy considerations: getting at the truth vs. ensuring a fair trial.

* The *CEA* was subsequently amended and a new provision was inserted to deal with witnesses who are **under 14**. Such witnesses are presumed to have the capacity to testify, but if challenged they are required only to demonstrate that they are able to understand and respond to questions and promise to tell the truth. Such witnesses may **not** be asked questions regarding their understanding of the nature of the promise to tell the truth:

**16.1**

* **(1)**A person under fourteen years of age is presumed to have the capacity to testify.
* **(2)**A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
* **(3)**The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
* **(4)**A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
* **(5)**If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
* **(6)**The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.
* **(7)**No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

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

## Examination of Witnesses

* Direct examination: open-ended questions only, leading questions not permitted.
  + “Leading” questions suggest the answer
  + Leading questions are prohibited because of a concern that the witness’ evidence will be tainted or skewed.
* Cross examination: leading questions are normal
  + Leading questions allow cross-examiners to directly address relevant evidence/details.
* Cross-examination of a non-accused witness may include questions about the witness’ discreditable conduct unrelated to the case.
* In Brown v Dunn (1893), the court said that where a party intends to contradict the evidence given by a witness, the party must put the alternative version of the events to the witness to give him or her a chance to respond.
* Witnesses are permitted to refresh their memory as they may need, either before or during the examination. ***Meddoui*** (1990) set out a four-part test for when pre-recorded evidence can be admitted:

1. Reliably recorded
2. Sufficiently fresh and vivid when recorded
3. Witness asserts that the record accurately represented his knowledge and recollection at the time
4. Original record must be used, if procurable.

\*Exception to the general rule that all evidence must be admitted *viva voce*. Distinct disadvantages include the inability to observe demeanour and manner of response.

R v Lyttle (2004) SCC *So long as they have a good faith basis for doing so, counsel may put any question to a witness during cross-examination.*

F: Trial judge held that evidentiary basis required for questions on cross-examination

A: Trial judge erred; any question can be put to the witness in cross-examination so long as counsel has a good faith basis for doing so. Often, counsel will uncover suspected (but independently unproven) facts during cross-examination. No distinction between expert and lay witnesses.

## Credibility of Witnesses

* When deciding whether to accept or reject a witness’ testimony, a judge must consider four “testimonial factors”, in addition to demeanour:
  + **Language**
    - Is a witness evasive or trying to avoid answering questions?
    - Is the use of language appropriate to the witness (e.g., engineer and non-engineer should describe problem with bridge differently)
  + **Sincerity**
    - Does the witness appear to believe what they are saying?
    - High-levels of sincerity do not necessarily indicate high-levels of reliability
  + **Memory**
    - How long ago were the events? Has anything affected or interfered with the witness’ ability to recall?
  + **Perception** 
    - Did anything interfere with or enhance the witness’ ability to perceive the events?
* \*See notes from guest speaker
* The ability to observe witnesses on the stand is a key part of the adversarial system and promotes the truth-seeking ability of courts. Important communicative tendencies cannot be observed in a written transcript. However, demeanour alone will not suffice:
  + In Norman (1993), the court said that a witness’ reliability must be based on a full assessment of all of the evidence, not just on their testimony. Witness credibility cannot be assessed in isolation.
  + Because of their ability to observe witness testimony, appeal courts grant a large degree of deference to the trier of fact.
    - However, a verdict based on credibility findings can be overturned on appeal if the verdict was unreasonable (i.e., no properly instructed jury could have reached that conclusion).
* Child witnesses cannot be expected to perceive the world the same way that adults do, and for this reason cannot be held to the same standard: R v W(R). A flaw or contradiction in a child’s testimony (or in the testimony of an adult testifying about events in their childhood) will not have the same effect as a similar flaw in an adult’s testimony. **However**, burden of proof remains the same.

***Limits on Supporting Credibility/Oath Helping***

* Counsel can ask “accrediting” questions of witnesses (e.g., length of employment, credentials, etc.). These questions may portray the witness as worthy of belief.
* However, a party may **not** lead evidence the only purpose of which is to demonstrate the truthfulness of a witness, or to demonstrate the witness’ consistency. This type of evidence is called **oath helping**. There are three exceptions:
  + Expert evidence may help the trier of fact assess the credibility of a witness where the assessment is beyond common experience.
  + The defence in a criminal case may lead evidence of the accused’s good character.
  + Where the credibility of a witness has been attacked, the party can adduce evidence to rebut the accusations, including evidence of prior consistent statements and veracity

***Prior Inconsistent Statements***

* In some cases, the evidence that a witness gives will be unfavourable to the party who called the witness and the party will have in its possession a prior statement that is more favourable.
* If this is the case, parties may ask the judge to exercise discretion under s. 9(1) to allow evidence of prior inconsistent statements that will **speak to the credibility** of the witness (not to the truth of the contents of the statement, as that would be hearsay; but see prior inconsistent statements exception). If both are under oath, different stories by the same witness are very harmful to a witness’ credibility.
* Section 9(1) of the *CEA* says the following [paraphrase]:

A party producing a witness will not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence or, by leave of the court, prove that the witness made prior statements inconsistent with present testimony, so long as the content of the prior statement is first put to the witness.

***Prior Convictions***

* Section 12 of the CEA allows witnesses (including accused persons) to be questioned about prior convictions.
* The only legitimate use of a prior conviction for evidentiary purposes is to undermine credibility, on the basis that a person who has committed a criminal offence is less likely to be a truthful person than a person who has not.
  + While perjury and fraud convictions may be relevant, is a single possession charge that happened decades ago really relevant?
  + There are concerns that evidence of prior convictions will lead juries to reason prejudicially; cautions are required.
* In R v Laurier (1983) the court said that the Crown is entitled to ask the accused for the name of the crime, the substance of the indictment, the place of the conviction and the penalty, but not entitled to cross-examine about the details of the offence.
  + However, if the accused puts his character in issue, he may be questioned on the details of the offence (pursuant to Criminal Code 666). See below, “Character evidence – criminal record”

R v Corbett (1988) SCC *Questioning accused persons about prior convictions under s. 12 does not violate their charter rights; trial judge has discretion to exclude evidence of prior convictions if prejudicial effect outweighs probative value.*

F: Accused convicted of first-degree murder, sought ruling at trial that s. 12 should not apply to him.

I: Does s. 12 *CEA* violate 11(d) of the Charter?

A: Dickson concerned about *not* putting the prior conviction evidence to the jury, especially when records of all other witnesses have been aired in court; Dickson thinks we must maintain faith in juries and their ability to use evidence as instructed. There are certain limitations: A) questions only permitted as to **convictions** (i.e., not conditional discharges, etc.); B) cannot be asked about prior testimony; C) evidence of prior convictions may be excluded if **prejudicial effect outweighs probative value**. Factors include:

* + Nature of prior offence/whether it speaks to honesty and integrity (fraud, perjury, cheating, etc.). Acts of violence don’t really speak to veracity.
  + Similarity of offence (more similar, more prejudice; conviction for same offence should usually not be admitted)
  + Remoteness in time

***Corroboration***

Vetrovec v The Queen (1982) SCC *Any disreputable or unsavoury witness may prompt a “clear and sharp” warning to the jury to make them aware of the risk of adopting, without support, the evidence of the witness.*

F: D charged with conspiracy to traffic heroin, accomplice testified for the Crown, trial judge highlighted corroborating evidence for jury.

I: What steps must trial judges take when faced with testimony from accomplices or unsavoury witnesses?

A: There is no special category for accomplices; Court rejects common law instruction that “corroborating” evidence is required. Rather, in some cases a “clear and sharp warning” will be required to highlight the risk of adopting an unsavoury witness’ testimony without more. Rather than highlighting specific pieces of corroborating evidence, it is sufficient for a trial judge to highlight the *types* of evidence that would be supporting.

* In Chandra (2005) ABCA the court said that Vetrovec warnings will be required when: (1) the evidence of the witness is **central** to the Crown’s case and (2) the credibility issues are **major**.
  + Warnings are particularly necessary where juries may not be aware of the frailties of evidence (e.g., accomplice, jailhouse informant, etc.)
* In Khela (2009) SCC the court elaborated on the purposes of the Vetrovec warning: to alert the jury to the *danger* of relying on unsupported evidence of unsavoury witnesses and to give the jury the tools necessary to identify supporting evidence. Four parts to the warning:
  + **(1)** Draw the juries attention to the testimony that requires special scrutiny
  + **(2)** Explain why it requires special scrutiny
  + **(3)** Explain that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so
  + **(4)** Explain that the jury should look for supporting evidence from other sources
    - **\*Leading authority on Vetrovec warnings**

## Eyewitness Identification and Testimony

* Over ¾ of wrongful convictions in US are a result of eyewitness misidentification
* Eyewitness evidence is often unreliable, but juries are typically strongly persuaded by such evidence, especially when the witness is confident.
* When the prosecution’s case depends substantially on the accuracy of eyewitness identification evidence, a trial judge must instruct jurors about the need to be cautious in dealing with such testimony and explain some of the factors that can affect the reliability of a perfectly honest and confident witness.
  + In some cases, more specific warnings will be required, including:
    - In-dock identifications
    - Voice identification
    - Photospread line-ups
      * Audio/video recording of the process is preferred
    - Post-hypnosis evidence of ID
* **Real and Documentary Evidence**, before it is admitted, must pass two obstacles:
  + 1) it must be authenticated by the party who wishes to rely on it (i.e., it must be identified by witness testimony)
  + 2) It must fall within one of the exceptions to the hearsay rule

# Exclusionary Rules

* Exclusionary rules are designed to protect criminal suspects and defendants against overreaching by the state. Exclusionary rules may vindicate individual rights at the expense of truth-seeking, or they may further the search for truth by preventing reliance on unreliable evidence.

## Hearsay

* Definition of Hearsay: ***Out of court statement offered for the truth of its contents***
  + Where the witness testifies **that another person, “the declarant”,** said something, the witness’ statement is hearsay if, but only if, the trier of fact is asked to accept the declarant’s statement as true.
    - If the out-of-court statement is offered for some reason apart from its truth then the witness’ evidence is not hearsay.
      * Key question: **does the legal significance depend on the truth of the statement?**
        + E.g., if mental state is at issue, does the statement (even if false) speak to that state?
    - If there is no declarant, there is no hearsay. Witnesses can give testimony about things that they said out of court, because the hearsay dangers are not present.
  + Sometimes, non-verbal gestures or cues can be hearsay (e.g., someone asks “who did it?”, person responds by pointing finger).
* Given that hearsay may be highly relevant and probative, why exclude it?
  + Witnesses who give evidence in court are subject to an oath or affirmation; they are subject to cross-examination; and the trier of fact has the ability to assess their credibility. In contrast, hearsay evidence is not given under oath, the declarant cannot be observed while giving the evidence, and the opposite party cannot cross-examine. These are the **three hearsay dangers.**
* The hearsay analysis has four parts:
  + 1) Is the statement relevant?
    - Does it tend to prove or disprove a legal issue?
  + 2) Who is the witness?
  + 3) Who is the declarant?
  + 4) What is the purpose of the statement?
    - Was it offered for the truth of its contents?
    - Or for some other purpose?

Teper v The Queen (1952)

F: Police officer testified that, shortly after a fire, he heard someone say to a man who resembled the accused “your place is burning and you going away from the fire.”

A: This evidence was hearsay and not admissible. Purpose of the statement: to convince the court was walking away from the fire and that this somehow speaks to his guilt.

* **The relevant inference is available *only if* the statement is taken as true.**

Bond v Martinos (1969)

F: P injured in motor vehicle accident, pre-existing condition; neighbour testified that someone in the family told him that the reason why P doesn’t do yard work is because of the condition.

A: Neighbour’s statement is hearsay, inadmissible.

R v Williams (1985)

F: D charged with Arson, argued that Miller set the fire; Accused and two other witnesses said that Miller told them that he, Miller, set the fire.

A: Statements by Miller are inadmissible hearsay.

Subramaniam v Public Prosecutor (1956) *If a statement made by a declarant is submitted for the truth of its contents, it is hearsay and inadmissible; if it is submitted for some other purpose, e.g. to speak to the accused’s mental state/perception, then it is not hearsay.*

F: Accused convicted of being in possession of ammunition, argued that he was captured by terrorists and acting under duress. D testified about conversation with captor who told D “I am a communist”.

I: Is conversation with captor hearsay?

A: **“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.”**

* In this case, *the fact that the captor said he was a communist,* by itself, is enough to speak to the defendant’s mental state (i.e., fear or duress). The legal significance *does not depend* on the truth of the statement.
* If the statement were offered to prove the fact that the people were rebels, then it would be hearsay.
* \*\*In this way, the same statement can be hearsay and not hearsay, depending upon the purpose for which it is offered.

**Case study** (not covered in class)

R v Evans [1993] 3 SCR 653 *Statements that are hearsay for one purpose (e.g., proving identity through the truth of the statement) may not be hearsay for another, related purpose (e.g., identifying the speaker as a member of a small group of people who would be privy to such information, which does not depend on truth of statement).*

F: D charged with robbery but was not identified at the scene. Someone matching D’s description had purchased getaway car from Mr. B. Purchaser told Mr. B that he had big dogs, that one was about to have pups, and that he worked as chain-link fencer. Subsequently shown that D had big dogs, pups, and worked as chain-link fencer.

I: Is the statement made by the purchaser admissible or is it hearsay?

A: The statement is both hearsay and not hearsay:

* Hearsay: the statement, if true, supports the inference that D was the individual who bought the getaway car. There is no proof that purchaser owned dogs or worked as fencer unless statements are assumed true. The statements **cannot be used for the truth of their contents to support this link.**
* Non-hearsay: the statement has probative value because it tells us something relevant about the purchaser, namely that he knew something specific about the accused that a relatively small group of people would know. The more unique or unusual the representations, the more probative the statement will be. In this sense, it does not matter whether the statement was true, but that it was said.

Diss. (McLaughlin): The probative value of unique identifying statements is non-existent if, as in this case, a large number of people could have been privy to such information. Only when a very small number of people could have known the piece of information will such identifying statements be relevant.

### Traditional Exceptions to Hearsay

* Traditionally, hearsay was a strict rule subject only to a limited number of clearly defined exceptions. If hearsay did not fit within one of the exceptions, it could not be admitted.
* The traditional exceptions are narrow and rigid:
* **Admissions of a Party**
  + Admission against one’s interest made by the accused, (e.g., telling your friend that you committed an offence).
    - ***R v Terry*:** evidence of a poem and a dream about a stabbing was admitted. Probative value must outweigh prejudicial effect.
  + However, admissions to police officers are presumptively inadmissible (see common law confessions rule and related s. 7 jurisprudence).
  + Allows for the entry of XFD evidence.
* **Business Records** (*Monkhouse*)
  + There are several elements of this exception, each of which must be satisfied:
    - (i) original entry; (ii) made contemporaneously and in the routine of business; (iii) by a recorder with personal knowledge of the thing recorded as a result of having observed it; (iv) who had a duty to make the record; (v) and who had no motive to misrepresent.
  + There are statutory provisions in the CEA that may also allow business records to be admitted
  + Not just any organizational record qualifies as a *business* record
* **Declarations Against Interest** (*O’Brien*)
  + Statements made by 3rd party declarants against their own penal and property interests. Declarant is now dead or unavailable due to insanity, grave illness, or absence.
  + Several requirements for 3rd party admissions of criminal conduct
* **Dying Declarations** (*Schwarzenhauer)*
  + Only apply to a deceased person who made a statement believing that death was impending. Only applies where death of the deceased is the subject of the charge and where the statement relates to their death.
* **Prior Identification** (*Starr*)
  + Two situations in which out-of-court statements of identification may be admitted for the truth of its contents:
    - If the witness identifies the accused in court, they can also enter prior identifying statements.
    - Witness is unable to identify the accused at trial, but testifies that testifies that he or she previously gave an accurate identification
* **Prior Testimony** (*Hawkins*)
  + The testimony of a declarant in a prior proceeding may be admitted if the declarant was generally unavailable to testify at trial.
* **Prior Inconsistent Statements** (KGB)
  + Witnesses may sometimes give evidence that is not consistent with a prior written statement. The prior statements are hearsay, but the SCC has said that such statements are admissible under the principled exception.
* **Public Documents** (*Finestone*)
  + Acts done by public officials in the course of their duties are admissible
    - Applies to “whatever acts they do in discharge of their public duties”
  + Considerably broader than business records exception
* **Ancient Documents** (*Ministry of Forests*)
  + 30 years, proper custody, no suspicious circumstances
  + Best just to apply the principled approach
* ***Res Gestae*** (*Ratten*)
  + Statements made by persons in highly stressful or shocking situations, typically within a very short period after the event.
  + Judges must be satisfied that the statement was so clearly made in spontaneity that there is no possibility of concoction.
* **State of Mind** (*Starr*)
  + In certain cases, statements of intention or mindset will be admissible to support an inference that the declarant followed through on that intent.
* **Aboriginal Oral Histories** (*Delgamuukw*)
  + Two requirements:
    - 1) usefulness: lower threshold than necessity; provides some insight from the aboriginal perspective that would otherwise not be available.
    - 2) reasonable reliability: source must be credible
  + Rules of evidence must be applied, but in a manner sensitive to the aboriginal histories and traditions.

### Principled Approach to Hearsay Exceptions

* In ***Khan****,* the court decided that the child’s statement to her mother about the sexual assault were hearsay statements that did not fit within any of the traditional exceptions.
  + Court says that, when children make statements about sexual assault, the hearsay rules should be relaxed. The statements will be admissible if they meet the test for **necessity and reliability.** 
    - Necessary: “reasonably necessary”. In this case, forcing the child to testify could be traumatic; further, the child was ruled incompetent.
    - Reliable: depends on the circumstances. In this case, several factors are relevant, including: timing, demeanour, personality, intelligence, and reason/ability to fabricate.
  + *Khan* limits the necessary/reliable approach to statements of children pertaining to crimes committed against the child.
* In ***Smith***, the court says that the principled approach should not be seen as a narrow exception. Rather, it is a broadly applicable, new approach to hearsay.
  + In ***Smith***, the accused made several telephone calls to her mother on the night of her murder.
  + The court said that statements which meet the necessary and reliable threshold are admitted because they do not pose the traditional hearsay dangers:
    - Necessary: necessary to prove a fact in issue because the original evidence is not available, either because the declarant is dead, missing, insane, or incompetent, **or** because evidence of the same value could not be expected to be repeated in court.
    - Reliable: “circumstantial guarantee of trustworthiness”. Circumstances must substantially negate the possibility that the declarant was untruthful or mistaken
  + In this case, the third telephone call was unreliable: the deceased was seen exiting a cab and proceeding directly to a payphone. She told her mother that “Larry has come back to give me a ride”, but it is questionable whether this was true as she hadn’t yet talked to the respondent.
    - Court engages in speculation to determine whether circumstantial guarantee of trustworthiness is present.
* In ***Mapara***, the court considers the relationship between the traditional exceptions and the principled approach:
  + Hearsay is presumptively inadmissible, unless it falls under an exception.
  + In the majority of cases, the presence or absence of a traditional exception will be determinative of admissibility.
  + However, hearsay evidence should **only be admitted if it is necessary and reliable**.
    - Traditional exceptions may need to be modified (as in Starr)
    - If it is not necessary and reliable, evidence that would otherwise fit within a traditional exception must be excluded.
    - If it is necessary and reliable, evidence that would otherwise fall outside of the traditional exceptions must be included.
  + In ***Khelawon***, the court said that if evidence falls within a traditional exception, this finding is conclusive, unless the exception itself is challenged as described in *Mapara*.
    - KH: Argue that this does not change the fact that only hearsay that is necessary and reliable will be admitted.
    - Perrin: go with Khelawon: traditional exceptions are in unless the exception itself is challenged.
      * Some are here to stay:
        + Declarations against interest
        + Party admissions

R v Starr (2000) SCC *Hearsay statements must only be admitted if they are necessary and reliable. This may require the modification of a traditional exception, the exclusion of otherwise admissible evidence, or the admission of otherwise excluded evidence. Modification of traditional exception: present intentions will only be admissible if they are not made under circumstances of suspicion.*

F: In a conversation between G and Cook, G became angry because Cook was out with another girl and Starr. Cook told G that he was going to do an autopac scam with Starr. Cook killed by Starr later that night.

I: Is the statement about the autopac scam admissible under a hearsay exception?

A: Statement of intention can’t be admitted to prove the intentions of someone *other* than the declarant. The traditional hearsay rules continue to play an important role, but they must be modified to comply with the principled approach.

* + Reliability: Was there a motive to lie? Were there safeguards in place that would allow a lie to be discovered? When assessing reliability, the court should not consider the declarant’s general reputation for truthfulness, or any prior or subsequent statements, or corroborating or conflicting evidence.
    - \*\*In ***Khelawon***, the court overruled ***Starr***: corroborating or conflicting evidence can speak to reliability, in addition to the independent circumstances in which the statement was made.

D: Statement was potentially an excuse for why Cook was out with another girl, therefore circumstantially unreliable.

R v Khelawon (2006) SCC

F: D charged with numerous counts of assault of residents of retirement home. Complainant not available to testify, three hearsay statements in question: one made to employee of home, one made to doctor who treated him, and one made to the police.

I: Are any of the hearsay statements admissible?

A: Hearsay statements have two features: (1) out-of-court statement that is adduced to prove the truth of its contents (2) there is no contemporaneous opportunity for cross-examination. Under the principled approach, there are two ways to establish reliability:

* **Substantive reliability:** There is no real concern about whether the statement is true or not, because of the circumstances in which it came about.
  + Key factor is the presence or absence of the motive to lie.
  + E.g. ***Khan***: unlikely that the child would lie/be able to describe oral sex
  + For this same reason, dying declarations, spontaneous utterances, and statements against interest are traditionally admissible.
* **Procedural Reliability:** There is no real concern about the statement being hearsay because its truth and accuracy can be sufficiently tested.
  + E.g. ***KGB***: oath, videotaped, cross-examined in court about statement.
  + For this same reason, prior testimony is traditionally admissible.

D: Statement exhibits neither substantive nor procedural reliability, not admissible. Number of issues with the evidence, including the claimant’s mental capacity, other possible causes of injury, Ms. Stangrat’s motive to discredit Khelawon, etc.

\*Use this definition for hearsay.

\*Think about the reasons for

R v Youvaraja (2013) SCC *Prior inconsistent statements are admissible if the KGB criteria are met* ***or*** *if the necessity and reliability threshold is met.*

F: DS pleaded guilty to 2nd degree murder and signed Agreed Statement of Facts (ASF) that inculpated Youvaraja. At Y’s trial, DS denied the facts in the statement.

I: Can ASF be admitted as hearsay exception?

A: Necessity is established when witness recants. Prior inconsistent statements are admissible if the KGB criteria are met (oath or affirmation, videotaped, opportunity to cross-examine in court) **or** if there is sufficient procedural or substantive reliability.

* No procedural reliability: statement wasn’t videotaped or taken under oath. Full cross-examination would be proscribed by solicitor-client privilege. **Presence of adequate substitutes** **for KGB** (e.g., availability for cross examination, accurate recording)
* Very low substantive reliability: evidence of one accomplice against another may well be motivated by self-interest. Only a full and complete opportunity to cross-examine would have allowed reliability to be assessed fully.

Diss. (Wagner): If ASF is sufficient to convict, then it should be sufficiently reliable to be admitted as evidence. Cross-examination could have been sufficiently rigorous to test reliability.

\*Create hearsay flowchart / issue tree

\*Review Youvaraja for procedural substitutes. Perrin: This is a good case when trying to analyze procedural/substantive reliability.

## Opinion and Expert Evidence

* Opinion evidence is generally inadmissible, because the role of the witness is to testify to the facts of which they have personal knowledge.
* There are two exceptions to the rule against opinions:
  + Ordinary persons can communicate perceptions in the form of an opinion on matters that are (1) within common knowledge and (2) based on multiple perceptions that are best communicated together.
    - In ***Graat***, the court gives a non-exhaustive list of when non-experts can give their opinions: identification of handwriting, persons and things; apparent age; bodily condition of a person; emotional state of a person; condition of things; questions of value; esitmates of speed and distance.
  + An expert may provide opinion where the trier of fact requires assistance to interpret or understand the significance of the evidence.

R v Graat (1982) SCC *Non-expert witnesses can give opinion evidence under the “compendious statement of facts exception,” so long as the topic is one that is within the common knowledge and understanding of any jury member.*

F: Police officer stated that, in his opinion, defendant was impaired while driving.

I: When can non-expert witnesses give opinion evidence?

A: Non-experts may give opinion evidence in situations when it would be too complicated to separately and distinctly narrate a series of facts. Ordinary witnesses can give opinion evidence about matters that are within the common knowledge and understanding of any jury member.

D: Police can testify to intoxication evidence, but their testimony should not necessarily be preferred over other witnesses as no expertise is required.

R v Mohan (1994) SCC *Four-stage test for admitting expert evidence. Relevance and reliability, necessity and the qualifications of the expert are the real hurdles.*

I: When is expert evidence admissible?

A: Four requirements for the admission of expert evidence:

* **Relevance**:
  + Logical relevance ***plus***probative value outweighs prejudicial effect
    - In this sense, prejudicial effect is the danger that the expert evidence will mislead or ‘mystify’ the jury.
* **Necessity in assisting the trier of fact:** 
  + Opinion provides information which is likely outside the experience and knowledge of a Judge or Jury
  + As with relevance, this branch takes into consideration the potential of the evidence to distort the fact-finding process, including the concern that the expert will usurp the function of the trier of fact; trials are not to become contests of experts.
* **Absence of exclusionary rule:**
* **Properly qualified expert**
  + Witness must be shown to have acquired **special or peculiar knowledge** through study or experience in respect of the matters on which he is testifying.
    - Just publishing is not enough (*McIntosh?*)
    - Practice exam: is it really possible to be a ‘bullying expert’?

\*Perrin thinks *Mohan* is a sloppy decision that overlaps with the existing jurisprudence in unclear ways. Mohan remains the **leading authority**, and should be relied upon over *Abbey*. The real questions are whether the evidence is **necessary**, whether the expert is **properly qualified** and **reliable**.

In *Mohan*, the court also said that expert evidence that advances a novel scientific technique or theory is subject to special scrutiny when assessing reliability.

R v Abbey (2009) ONCA *Reformulation of the analytical approach in Mohan.*

A: Suggests reforming *Mohan* into a two-step process:

1) Preconditions to admissibility

* Opinion must relate to a subject matter that is properly the subject of expert opinion evidence
* Witness must be qualified
* No violation of exclusionary rules
* Opinion logically relevant to a material issue

2) “Gatekeeper” function/discretion of judge

* Cost-benefit analysis
  + Benefits: probative potential and significance of issue; methodology used by the expert; expert’s qualifications; impartiality and objectivity of expert; reliability; necessity (is it required?).
  + Costs: risks inherent in expert testimony; including consumption of time, prejudice and confusion; usurping the role of the jury.

***Examining and Cross-Examining Expert Witnesses and Impartiality***

* If a witness is giving opinion on the basis of his own observations, he may be questioned on those observations and asked for his opinion. Similarly, if undisputed facts have been established through the testimony of other witnesses, the expert may be asked for his opinion.
* However, if the facts or in dispute, the expert’s opinion must be elicited on the basis of hypothetical facts.
* Experts can be posed questions about contradictory opinions from other experts, but only if they first acknowledge that he is familiar with the work.
* In the UK, concerns about the partisanship of expert witnesses led to legislation which requires experts to act independently to assist the court.
* *CEA* s. 7: no more than 5 witnesses per side

## Statements of Accused Persons

* According to the **common law confessions rule**, an accused person’s statement made to a person in authority is not admissible in the Crown’s case unless the Crown proves beyond a reasonable doubt that the statement was made voluntarily.
  + This rule covers all **statements** made by accused persons to persons in authority, not just confessions or admissions of guilt.
* Historically, there were three different ways in which “involuntariness” could be found:
  + 1) **Inducements**: if inducements are held out, the statement may be involuntary (*Ibrahim*)
  + 2) **Operating Mind:** if the person is in a state of mental distress, statements may be involuntary (*Ward*)
  + 3) **Oppression:** if the police create an environment of oppression, the statement may be involuntary
* These three branches developed independently in the common law and are brought together in *Oikle.*
* Confessions are almost always hearsay statements that are admissible under the traditional exception for statements by accused against penal interest.
  + However, they are *inadmissible* if involuntary.

R v Rothman (1981) SCC *Test for “person in authority” is a subjective one: did the accused believe that the person he was speaking with was a person in authority.*

F: D charged with possession for trafficking. When in holding cell, undercover cop elicited confession from D regarding involvement in drug trafficking operation.

I: Was the confession voluntary? Was the undercover officer a person in authority?

L: ***Ibrahim*:** no statement by an accused is admissible unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority.

A: The test for whether a person is “in authority” is a **subjective test:** did the appellant, when he made the statement, believe that the constable was a person in authority? Accused did not believe that constable was a person in authority

Diss (Laskin): accused previously declined to give a statement. This intention was subverted by the masquerading police officer. This kind of subversion of the accused’s rights brings the administration of justice into disrepute.

Concurr (Lamer): authorities sometimes need to resort to trickery; should only be the basis of exclusion if the conduct “shocks the community” (e.g., pretending to be a chaplain or duty counsel).

\*Perrin: would these kind of egregious tricks be permitted under the Charter? According to the majority approach, all that matters is the accused’s subjective belief.

### Person in Authority

* Can only police officers or agents of the state be persons in authority?
  + ***Grandinetti*:** A “person in authority” is generally someone engaged in the arrest, detention, interrogation or prosecution of an accused. Absent unusual circumstances, an undercover officer is not usually viewed, from an accused’s perspective, as a person in authority.
  + This definition suggests that a “person in authority” is related to the criminal justice process up to the point of prosecution. What about prison guards? The complainant? A Social worker? Psychiatrist? Parent?
    - The test is subjective, but in ***Hodgson*** the court said that the belief must also be objectively reasonable. The accused must perceive some connection between the person and the criminal process.
    - Complainant: in certain circumstances, the accused could think that the complainant has some control over the pleadings (e.g., influence over whether charges are withdrawn)
    - Social worker: only if their role is dierectly linked to a criminal matter. The accused has to believe that the social worker has some connection to the criminal process (e.g., arrest, detention, etc.)

### Inducements

* ***Ibrahim*** is the leading authority on inducements. In that case, a private confessed to a commanding officer. The court said:
  + “No statement of an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that **it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.**
    - The key is that there must be fear or prejudice or hope of advantage;
    - And it must be exercised or held out by a person in authority.
* Examples of statements induced by police:
  + “Until we get some statements … we just cant get no bail” (*LeBlanc*)
  + “Well, I’m getting mad” … “you don’t want to see my partner get mad” (*Letendre*)
  + “The only way you can get better is by telling me the truth” and “you’re not on the right track” (*R v S*)
  + You’ll be held in custody over the weekend
* Examples of voluntary statements:
  + “It wouldn’t be very good if it turns out your lying”

### Operating Mind

* In some cases, statements will be involuntary due to factors internal to the accused

***Ward v The Queen*** [1979] SCC *Two-part test for whether statements should be considered involuntary under the operating mind doctrine.*

F: single vehicle accident, both the accused and deceased found on ground outside vehicle. D made statement to police after he was revived.

I: Was the statement voluntary?

A: Two-part analysis: 1) whether a person in his condition would be subject to hope of advancement or fear of prejudice in making the statements when perhaps a normal person would not 2) whether, due to the mental and physical condition, the words can really be considered the utterances of an operating mind. A reasonable doubt on both of these parts of the test will be sufficient to exclude the statement.

D: Trial judge right to exclude

***R v Whittle*** (1994) SCC *Operating mind test requires that the accused possess a limited degree of cognitive ability to understand what he is saying and to comprehend that evidence may be used in proceedings against the accused.*

F: Schizophrenic accused charged with murder. Victim died in suspicious circumstances, but not charged for several weeks. Later questioned on another matter and confessed to killing. When confessing, talked about “someone being in his brain” or having “fog in his head”.

I: Was the admission voluntary?

A: The accused must be able to understand what he or she is saying and what is said. In this case, the accused could do so; the presence of “inner compulsions” cannot displace an operating mind.

\*This is a broad analysis and a very low threshold.

### Oppression

***R v Serak*** (1974) BCSC *Accused persons who find themselves in an atmosphere of compulsion / significant power imbalance may not be able to give voluntary statements.*

F: D charged with rape. Police took clothes for analysis, leaving D with only a blanket. Questioned in blanket, 8 hours later, seen by several people in detachment, still without clothes.

I: Oppression?

A: Clothes are essential to dignity; loss of dignity may have “disarmed” accused and made answering questions more difficult. Significant power imbalance.

D: Court not satisfied that statements were voluntary.

* In ***Hobbins***, the SCC said that an atmosphere of oppression may be created in the circumstances surrounding the taking of a statement. An accused’s own subjective fear will not result in inadmissibility; some degree of inappropriate police conduct will be required.

### Voluntariness: Consolidate Approach

* ***Oickle***is the case you apply for the common law confessions rule going forward. *Khelawon* is the key hearsay case; *Oickle* is the key voluntariness case.
* Key policy rationales:
  + Ensuring only reliable evidence is used
    - Tactics that commonly produce false confessions should not be used.
    - Such tactics typically involve strong incentives, intense pressure and prolonged questioning
  + Trial fairness and the rights of the accused are also important
  + Oppression and inducement rules are focused on reliability; operating mind focuses on trial fairness and accused’s rights.

***R v Oickle*** (2000) SCC  *Courts should look at all of the circumstances surrounding a confession and ask if it gives rise to a reasonable doubt as to the confession’s voluntariness.*

F: Series of fires, accused fails polygraph, questioned by police. Eventually confesses to setting 7 of 8 fires, and then re-enacted the crimes on video. Polgraph ended at 5pm, confessed to fires by 11pm.

I: Were the confessions voluntary?

A: If a confession is involuntary—whether due to threats or promises, lack of an operating mind, or police trickery—it is inadmissible. Courts must look at all of the circumstances: in some cases, a minor inducement may be impermissible if the circumstances are also oppressive (e.g., sleep deprivation); in others, it will take a stronger inducement if the suspect is treated properly.

D: In this case, the respondent was informed of his rights, was never subject to harsh or aggressive interrogation, and was never offered inducements strong enough to raise a reasonable doubt as to voluntariness.

Perrin:

* There are no longer three distinct branches to the voluntariness test. They are considered together in a contextual analysis.
* Further, the absence of oppression can be relevant in assessing voluntariness.
* There may be factors that weigh on involuntariness that do not fit into the tree tradition factors: they should be addressed (e.g., the ‘strength’ of the victim; seasoned criminal vs. first time being questioned)
* Inducements can’t be minor.
  + E.g., “on the right track” would probably be decided differently
* Exaggerating the usefulness of evidence (i.e., the polygraph) doesn’t necessarily render a confession inadmissible.
* *Oikle* has been considered an expansion of the admissibility of confessions at common law

### Confessions Rule and the Charter

* In *Oickle,* Iaccobucci cautioned against constitutionalizing the confessions rule as a principle of fundamental justice under section 7.
* However, in ***Singh***, the SCC said that the confessions rule was closely related to the Charter right to silence on detention.
  + *In the context of police interrogation of a person in detention, the two are* ***functionally equivalent***:
    - Where a statement has survived a thorough inquiry into voluntariness, the accused’s Charter application alleging that the statement was obtained in violation of the pre-trial right to silence under s. 7 cannot succeed.
    - Conversely, if the accused proves a breach of that right under s. 7, the Crown will not be able to prove voluntariness.
  + The right to silence under section 7 “supplements” the common law rule
    - For example, in ***Herbert*** the court found that the right to silence of a detained person is protected under s. 7. This right is contravened where an undercover state agent (police officer or informant) actively elicits a statement from the accused. In this case, s. 7 offers protection beyond the confessions rule.
      * The key principle in this case is that under s. 7 detained persons have the right to make a **free and meaningful choice to speak to authorities.**
        + Under section 7, the focus is on the conduct of the police an its effect on the suspect’s ability to exercise his or her free will.
      * In other words, if ***Rothman*** were to arise today, it would be decided differently.
    - Under section 7, the key policy balance is between protecting individual rights and allowing the state to deprive life, liberty or security if it is consistent with the principles of fundamental justice.
  + There are important differences between the confessions rule and s. 7
    - The confessions rule is broader. S. 7 only applies “on arrest or detention”.
    - Under the Charter, the burden is on the accused to show, on a balance of probabilities, a violation of constitutional rights. Under the confessions rule, the Crown has the burden to prove BARD that the confession was voluntary.
    - The Charter excludes evidence only if 24(2) is violated, while a violation of the confessions rule with always exclude evidence.

***R v Singh*** (2007) SCC *Common law confessions rule and right to silence under Charter 7 are different, but when a detained person is questioned by police they are functionally equivalent. There are “residual protections” offered by section 7 (detained persons have the right to make a free and meaningful choice to speak to authorities).*

F: Innocent bystander shot outside pub. Doorman ID Singh as shooter. After arrest, accused stated on 18 occasions that he did not want to talk. Concedes voluntariness but argues that right to silence under s. 7 was breached.

I: How do the common law confessions rule and Charter 7 interact?

A: Both rules are manifestations of the principle against self-incrimination. The right to be silent is not a right not to be spoken to; police must be able to question suspects of crime. However, “**police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence**.”

D: The trial judge considered the correct factors and made no error in deciding that Singh’s statements were voluntary and his s. 7 rights were not violated.

Dissent (Fish): Argues that the right to silence has no meaning if it can be ignored/overridden in this manner. Effectively, Singh was given the impression that the assertion of his right had no weight.

## A New Common Law Rule of Evidence: Mr. Big Scenarios

* Mr. Big statements are hearsay statements that are admitted under the party admissions exception.
* Traditionally, defence counsel had few ways to challenge Mr. Big admissions: confessions rule offered no protection, because not made to person in authority; right to silence not engaged because the accused is not detained.
* The SCC has three central concerns with the Mr. Big scenario:
  + (i) it is potentially unreliable, because the accused is in a situation where they have a motive to lie;
  + (ii) the evidence is inherently prejudicial, because the accused is shown to be a person who willingly participated in criminal activity, leading to both moral and reasoning prejudice;
  + (iii) there is potential for police misconduct.
* In ***Hart,*** the police suspect that the defendant had drowned his own daughters in a lake. Hart is brought into a criminal organization and compensated for various criminal tasks. The SCC develops a **new common law rule of evidence**:
  + **1) Mr. Big statements are presumptively inadmissible, unless the Crown can prove on the balance of probabilities (in voir dire) that the probative value of the evidence outweighs its prejudicial effect**
    - *Probative Value: function of the reliability of the evidence* 
      * **Circumstances**: variety of factors must be considered, including the length of the operation, number of interactions between police and accused, nature of relationship, nature and extent of the inducements offered, presence of threats, personality of accused, and the mental health and age of the accused.
      * **Statement itself**: the court must consider any “markers of reliability” that the statement demonstrates. Did the statement lead to the discovery of other evidence? How detailed was the confession? Are mundane details mentioned? Confirmatory evidence is arguably the most important factor, and can swing the balance in favour of the probative value.
    - *Prejudicial effect: stems from the harmful character evidence* 
      * **Moral prejudice**: concern that the jury will be more likely to convict on the basis that the accused took part in criminal activities and is therefore a bad person.
      * **Reasoning prejudice**: concern that the jury’s focus will be distracted away from the charges before the court, especially given the amount of time that will be spent on it.
    - In practice, the prejudice in Mr. Big operations is fairly constant, so the court will mostly focus on the reliability of the confessions.
  + **2)** If the Crown can show that the probative value outweighs the prejudicial effect, the evidence can still be excluded (or some remedy granted) if the defence can prove that there has been an **abuse of process.** 
    - The police cannot overpower the will of the accused and coerce a confession
    - If there has been violence or threats of violence against the accused, that will be an unacceptable abuse of process
    - Preying on an accused’s vulnerabilities—mental health problems, substance abuse, youthfulness, etc., is problematic
  + Finally, trial judges always retain a discretion to exclude evidence where its admission would **compromise trial fairness** (*Hart*, para 88).
  + In ***Hart***, the prejudicial effects outweigh the probative value: the scenario had become the accused’s entire life, giving him more money and opportunity than he had ever seen before. The “overwhelming inducements” called into question the reliability of the statements, and there was no confirmatory evidence. The stories coming out of the confessions were inconsistent.
    - Hart told he would be paid between $20-25k if he participated in a “big deal”
    - Paid $15k, plus dinners, trips to casino, transportation, etc.
    - Told UC cop that he was like a “brother”
    - Inconsistent statements – ‘shouldered’ the girls into the water, later used knee to demonstrate.
  + In ***Mack***, the defendant was suspected of killing a man who had disappeared, brought into Mr. Big operation. The probative value was high: the inducements were modest, he was told that he could decline to speak and stay in the organization, confirmatory evidence (remains and shell casings).
    - Taken part in 30 ‘jobs’, including picking up money, and given about $5k
    - Told that refusing to speak about killing would mean he would stay on the ‘third line’ of the organization
    - Confessed to shooting him 5 times and then burning his body. Led boss to firepit where he burned the body.
    - Mack had prospects for legitimate work that would have paid more than the crime scenarios.
    - “Air of intimidation” by referring to violent acts, but no abuse of process
  + ***Hart*** and ***Mack*** are bookend cases that give us examples of when Mr. Big statements will / will not be admitted.
  + Perrin: If Mr. Big evidence is excluded, is **derivative evidence** admissible?

## Character Evidence

* **“Character”** refers to a person’s propensity or disposition to behave in a certain way.
  + Character is different (and more deeply ingrained) than habit. Habit is something done on a regular basis, while character is the “type of person”.
  + For example, if a student has a *habit* of showing up to class on time, this may lead to an inference that they are a good student, which is a character trait.
* Character evidence is usually circumstantial: the trier of fact is asked to infer that a person behaved in a certain way because that behaviour would be consistent with their character.
  + A party that wants to show that a person is dishonest might bring evidence that the person acted dishonestly in the past, for example.
* In a criminal prosecution, evidence of an accused’s character cannot be led, unless the accused first leads character evidence.
  + However, at no point can the Crown lead evidence that the accused is the ‘type of person’ that would commit the crime. The Crown can only rebut the good character evidence.
* After ***McNamara*** it is generally accepted that there are three ways that the character of the accused can be proved:
  + Evidence of **general reputation**
  + Evidence of **specific acts**
  + Psychiatric evidence of disposition

***R v McNamara*** (1981) ONCA *An accused puts his character at issues if he asserts expressly or impliedly that he would not have done the things alleged against him because he is a person of good character. An accused does not put his character in issue by denying guilt and repudiating allegations.*

F: D argues that trial judge erred in letting Crown cross-examine on previous transaction to which the accused had pleaded guilty.

I: When can the Crown introduce evidence of bad character?

A: An accused does not put his character at issue by denying guilt and repudiating the allegations made against him. By projecting himself as a law-abiding and upright citizen, D put his character at issue (*Morris*). The Crown was permitted to cross-examine the accused on the previous transaction to challenge the truth of the statement and to rebut the claim of good character.

### General Reputation Evidence

* In ***Rowton****,* the traditional common law position was set out: the accused may only lead evidence of general good reputation and, in rebutting that evidence, the Crown is similarly confined to evidence of general reputation.
  + This is overturned by ***McNamara*** and ***Brown***.
* Further, witnesses are not to submit their opinion as to the reputation or character of the accused; they may only speak to their knowledge of his general reputation in the community.
* Historically, general character evidence could only come from ‘neighbours’. However, in ***Levasseur*** the court said that this restriction cannot be sustained and that individuals may have a variety of reputations in different ‘circles’ in which they live and work.
* In ***Profit*** (1992, ONCA), the accused was facing charges for sexual assault. A number of witnesses spoke to the good character of the accused. The court of appeal overturned the decision at trial because, though the judge used the character evidence when assessing the credibility of the accused, he did not consider whether the character evidence made it less likely that the accused committed the crime.
  + The dissenting judge reminds us that character evidence is limited to witness’ knowledge of the accused’s reputation in the community. Further, **general reputation is of low probative vale when the crime is of the type that is committed in secrecy**, like sexual assault.
    - The **SCC** agreed with the dissenting judge

### Evidence of Specific Acts

* The Crown may not lead evidence of specific bad acts of the accused that are not the subject of the charges before the court, nor may the accused call witnesses to testify to his prior good acts.
* However, the accused may testify as to instances of his own good conduct, and thereby put his character in issue.
  + In ***McNamara***, the court says that, where proof of good character is put at issue by the accused, the Crown can lead proof of previous bad conduct for two purposes:
    - 1) to rebut the claim of good character
    - 2) to show that the accused lied in the witness box (credibility)
  + **For example**, if the accused says “I have been honestly employed all my life”, the Crown can lead evidence to show that this is not the case. This rebuttal evidence proves that he lied and rebuts the good character evidence.
    - The trial judge has discretion to prohibit the admission of this kind of evidence, as always, if the probative value is outweighed by the prejudicial effect (e.g., no conviction, remote in time or irrelevant).
  + The Crown can never use character evidence to speak to propensity
* In ***Brown***, the ONCA confirmed ***McNamara***: Both in cross-examination and by reply evidence, the Crown can respond with evidence of general bad reputation or evidence of specific bad acts.

### Criminal Record of Accused

* **Section 12** of the ***CEA*** says that, if an accused testifies, he may be cross-examined on his or her criminal record. However, evidence on the details of the conduct underlying the convictions is not permitted.
* However, if the accused adduces evidence of good character, the Crown may invoke **section 666** of the Criminal Code:
  + If the accused adduces evidence of good character, the prosecution may, in answer thereto, adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed.
    - In ***P(NA)***, the court said that, if 666 is activated, the accused may be questioned about the specifics underling previous convictions.

### Psychiatric Evidence of Disposition

* Only the accused may lead psychiatric evidence of disposition, but the Crown can offer psychiatric evidence in rebuttal. Psychiatrists will be giving two types of evidence:
  + 1) that there is a small/abnormal group of people that would commit certain acts
  + 2) that the accused does or does not fit within that group
* The Courts have made it clear that this type of evidence will be admitted only on **rare occasions.**
* As with all expert evidence, evidence given by psychiatrists must first satisfy the ***Mohan***test. Then, an additional two hurdles must be cleared:
  + 1) The crime must be a distinctive crime involving a distinctive feature (i.e., cannot be ordinary crime, such as theft)
  + 2) The offenders that would commit this type of crime must be of a specialized and extraordinary class.

***R v Robertson*** (1975) ONCA *Psychiatric evidence is admissible with respect to disposition (or its absence) where the disposition in question constitutes a feature of an abnormal group and the crime was marked by features which identify its perpetrator as a member of a special class.*

F: Charged with murder of young girl. Defence wanted to call psychiatric evidence to demonstrate that the accused lacked any aggressive or violent tendencies.

I: Can defence call psychiatric evidence?

A: A mere disposition for violence is not uncommon enough to constitute a characteristic of an abnormal group. The fact that the killing was ‘brutal’ does not make the crime distinctive crime that can be connected to a special class of people.

***R v Mohan*** (1994) SCC *When assessing psychiatric evidence of disposition, the key question is: has the scientific community developed a standard profile of the offender who commits this type of crime? If yes, then the evidence will qualify as an exception to the exclusionary rule relating to character evidence.*

F: Paediatrician charged with four counts of sexual assault against teenage girls. D wants to call psychiatrist to testify that perpetrator of such offences would be part of a limited and unusual group of individuals and that the respondent did not belong to that class of people.

I: Is the evidence admissible?

A: Psychiatric evidence of disposition faces a number of hurdles, the first of which is that the crime must be “distinctive” or “extraordinary”. The judge must be satisfied that either the perpetrator of the crime, or the accused, has distinct behavioural characteristics such that a comparison of one with the other will be of material assistance.

D: It is not clear that only a psychopath could have committed the act. “Psychopath” has not been standardized to the extent that it could be said to match the profile of the offender.

### Proving Character of Victims

* In ***Scopelliti***, the defendant sought to lead bad character evidence of the deceased. D argued that he acted in self-defence when he shot the two deceased in his gas station. He had had prior interactions with them: they had stolen from him and vandalized his store. There were also instances in which the deceased had lashed out violently at members of the community, but of which D was not aware at the time of the shooting. D wanted to adduce this evidence to support the proposition that the deceased were the aggressors and that he acted in self-defence.
* Disposition evidence of a third party (including a victim) is **presumptively admissible**, so long as it is relevant. This includes all three forms of disposition evidence—general reputation, specific bad acts, and psychiatric evidence of disposition.
  + Unlike with accused persons, there is no rule of policy that prohibits juries from engaging in propensity reasoning with non-accused persons (i.e., prior aggressive acts make it more likely that they acted aggressively in this instance).
    - Potential prejudice: because they behaved badly in the past, they deserved to be shot.
* In this case, the jury would have to be **warned** not to use the evidence to assess the reasonableness of D’s apprehension of an impending attack.

## Similar Fact Evidence

* If admitted, similar fact evidence can be used for factual findings, but not for disposition. Whenever similar fact evidence is admitted, there must be a **jury warning** to this extent.
  + If similar fact evidence is admissible on a multi-count indictment, the facts from one case can be used to increase or decrease the probability that something happened. However, when the previous facts have not been proven in court, there is an additional issue as to whether the court even believes that they happened (considered under probative value).
* In ***Handy*** the Crown wanted to admit evidence of 7 allegations of non-consensual sex between the accused and his wife. The Crown argues that the previous events establish a pattern that the accused is a violent person who, when engaged in sexual conduct, does not take “no” for an answer.
  + 1) As a **general rule**, character evidence, including evidence of prior bad acts, is inadmissible.
    - The danger is that the jury might put more weight than is logically justified on the past acts (“**reasoning prejudice**”) or they might convict based on bad personhood (“**moral prejudice**”).
      * Propensity evidence has a real potential for prejudice, distraction and time consumption.
  + 2) There is a **narrow exception** for highly relevant and probative evidence of previous misconduct. Only if the Crown proves that the probative value of the evidence outweighs the prejudicial effect will the evidence be admitted.
    - The threshold will be reached if it would be an “**affront to common sense**” to suggest that the similarities are a coincidence.
      * The **first step** is to determine the material issue that the SFE disposition evidence seeks to support. The rest of the analysis depends on this, because probative value cannot be assessed in the abstract.
      * Evidence that shows general disposition, and nothing more, will never meet the test.
      * **Probative value: is there an “objective improbability of coincidence”**.
        + Connection between SFE and allegations must be highly distinctive or unique
        + Proximity in time, number of occurrences, distinctive features, circumstances, etc. are all relevant
      * Admissible SFE will demonstrate “repeated conduct in a particular and highly specific type of situation” (“calling card”).
  + If collusion is present, it destroys the foundation upon which admissibility is sought: namely, the events are too similar to be credibly explained by coincidence. Here, there was “more than opportunity”; not admissible.

***Similar Fact Evidence in Civil Cases***

* ***Handy*** should be applied in both civil and criminal cases. However, the prejudicial effects are probably lower in a civil case.
* In ***Mood Music***, the plaintiffs claimed that a musical record to which they owned the copyright was copied by the defendant. The plaintiffs and an agent provocateur conspired to catch the defendants red handed—copying and re-naming music in just the manner alleged in the suit. Denning suggests a lower standard in civil cases: “so long as the evidence is logically relevant and not oppressive or unfair to the other side”. (Probably overruled by *Handy*).

## Privilege

* Privilege is a rule of evidence that protects information from disclosure in court, even where that information is relevant and probative. From a policy perspective, the law of privilege asserts that the pursuit of truth in a specific case is less important than other interests (namely, the importance of the relationship).
  + Evidence that meets the requirements of privilege is **inadmissible** unless the holder of the privilege (i.e., the client) waives his or her right to non-disclosure.
  + Neither the professional nor the client can be compelled to divulge privileged information.
* While the SCC has concluded that “the public has the right to every person’s evidence” (***National Post***), privilege is an exception that operates to enable people to speak and write with complete candour and openness in certain relationships.
* **Solicitor client privilege** is the privilege between a lawyer and client, and is different than **litigation privilege**. The latter protects communications with third parties during litigation, but dies with the litigation.
* **Confidentiality** is a distinct ethical obligation to keep all information about his client confidential; however, only communications between lawyer and client will attract privilege.
* Privilege can be asserted on a **class basis** or on a **case-by-case basis**. If a communication falls within class privilege, the communication is presumptively inadmissible. There are very few forms of class privilege:
  + Solicitor-client privilege
  + Litigation privilege
  + Dispute settlement
  + Informer privilege
* The class privileges are justified because the relationships are *part* of the legal system, rather than ancillary to it.

***Solicitor-Client Privilege***

* Clients—especially criminal clients—must be fully confident that they can tell their lawyer the whole story. Protecting the integrity of the relationship is seen as indispensible to the continued existence and effective operation of Canada’s legal system.
* While it began as a rule of evidence, solicitor client privilege has evolved into a substantive principle of law, recognized as a principle of fundamental justice, that trumps any lesser interest. This principle must be taken into account when interpreting legislation that might have an impact on the privilege.
* **Requirements of Solicitor-Client Privilege (*Solosky*):**
  + The communication must:
    - 1) be between a solicitor and client (including agents of the solicitor)
    - 2) entail the seeking of legal advice
    - 3) be intended to be confidential

### Exceptions to Solicitor Client Privilege

* Solicitor client privilege is nearly absolute, subject to only the rarest of exceptions. There are three recognized exceptions: (1) criminal purpose; (2) public safety; (3) innocence at stake. Exceptions that apply to solicitor-client privilege will apply to all privileges.
* ***Facilitating a Criminal Purpose***
  + Privilege does not attach to communications that were made for the purpose of obtaining legal advice to facilitate the commission of a crime (***Descoteaux***)
    - However, must be evidence that the advice facilitated the crime or that the lawyer otherwise became a “dupe or conspirator” (***Campbell***)
* ***Public Safety*** 
  + This exception allows a lawyer to warn an identifiable person about a specific threat posed by a client.
  + In ***Smith v Jones***, a lawyer referred his client to a psychiatrist and explained that the communications would be protected by solicitor-client privilege. The client explained to the psychiatrist his plan to murder a prostitute, in graphic terms. Test for public safety exception:
    - 1) Clear risk to an identifiable group or person
    - 2) Risk of serious bodily harm or death
      * Must be an element of violence
      * Serious psychological harm will suffice
    - 3) Danger must be imminent
      * Must create a sense of urgency, but no time period
      * In ***Jones***, some time had passed between the threats and the proceedings, but there was some evidence of imminence (visiting downtown east side) and the other factors weighed heavily in favour of disclosure.
  + If the criteria are satisfied, the disclosure must be limited to only what is necessary.
* ***Innocence at Stake*** 
  + Evidence that is so significant that it could prevent a conviction. Threshold questions plus two-stage test, set out in ***McClure***:
  + 1) **Threshold questions**:
    - The information must not be available from another source
    - The accused would otherwise be unable to raise a reasonable doubt
  + 2) **Innocence at stake test:**
    - 1) The accused must first establish an evidentiary basis to demonstrate that a communication exists that *could* raise a reasonable doubt.
    - 2) The judge will review the communication and consider whether it is *likely to raise a reasonable doubt*.
    - 3) If this likelihood threshold is met, the communication is disclosed to the extent necessary.

### Other Forms of Class Privilege

***Litigation Privilege***

* Litigation privilege protects the work done by counsel from disclosure to other parties (e.g., briefs, memos, etc.). Unlike communications protected by solicitor-client privilege, these communications an be subject to disclosure orders once the litigation is over.

***Dispute Settlement Privilege***

* Communications made during attempts to settle a litigious matter through negotiation or mediation are not admissible if negotiation fails and the matter is litigated.
* Such communications are often labelled “without prejudice”, though the label is not strictly necessary if it is clear that the communication was made with the intent that it not be disclosed in litigation.
* To establish an exception, the party seeking production must show that a competing public interest outweighs the policy goals behind the rule (encouraging settlement).

***Informer Privilege***

* Informer privilege protects communications between members of the public and the police. It is intended to guard the identity of police informers to protect them from criminals and to encourage informers to come forward.
* In *Liepert,* the Court says that **innocence at stake is the only exception to informer privilege**.
* Speculation that the information might assist the defence is insufficient: there must be an evidentiary basis that suggests that disclosure of the informer’s identity is necessary to demonstrate the innocence of the accused.
* Policy reason for the exception: privilege must not stand in the way of an innocent person establishing their innocence.
* ***Scott*** gives us three examples of where the innocence at stake test may be met (though the test must always be applied):
  + 1) The informer is a material witness (i.e., saw the crime first hand)
  + 2 )The informer is an *agent provocateur* (e.g., may have played a part in entrapment or some other illegitimate scheme)
  + 3) The accused seeks to establish that a search is in violation of s. 8 of the Charter and the disclosure is absolutely essential to establish the accused’s factual innocence.
* In ***Liepert,*** the defence sought disclosure of a Crime Stoppers top sheet. Trial judge ordered disclosure of redacted tip sheet. Crown withdrew.
  + Without the informer’s consent, or unless an exception applies, the Crown cannot waive privilege. When the informer is confidential, the court cannot try to conceal identity because even innocuous details might give the informer away.
  + While the threshold is not met in *Liepert*, the court gives us an example of when the test might be met:
    - Evidence suggests that goods seized pursuant to a search warrant were planted, and that the informer planted the goods or knew about the planting.

### Case-by-Case Privilege and the Wigmore Criteria (\*expect on exam)

* The four-part ***Wigmore*** test is applied when determining whether privilege is granted on a case-by-case basis:

**1) Communication must originate in confidence that it will not be disclosed.**

* + - In *National Post*, the journalist promised source Y that the communications would be in confidence. If the source does not insist on confidentiality, then privilege cannot arise.
    - This is not always an easy hurdle: in some cases, there can be no expectation of confidence, given the nature of the relationship (e.g., communications between friends are not truly made in confidence, even if one promises as much)

**2) Element of confidentiality must be essential to full and satisfactory maintenance of relations between parties.**

* + - The relationship requires frank discussion, or some broader system/institution requires full disclosure between the parties
    - At this stage, you consider the scope of the relationship. This scope is relevant at stage 4, where you consider the prospective harm to this relationship.

**3) The relation must be one that in the opinion of the community ought to be sedulously fostered.**

* + - The relationship has broad import in the functioning of society
      * E.g., importance of investigative journalism in civil society depends on confidential relationship (*National Post*)
    - \*Charter values can be important at this stage\*

**4) Whether the injury to the relationship by disclosure is greater than the benefit gained by correct disposal of the litigation.**

* + - This part looks at the prospective harm that will follow if the confidence is breached and the material is disclosed. What kind of ‘ripple’ effects will this order have on the relationship in society? Does this harm outweigh the harm caused by not ordering disclosure?
* The Wigmore criteria are arguably applied from two perspectives, each of which must be satisfied to grant privilege: 1) Are the criteria satisfied generally? 2) Are they satisfied in this case?

**R v Gruenke** (1991) SCC *No class privilege for religious communications. Whether an individual’s freedom of religion will be infringed upon by the admission will depend on the particular facts of each case.*

F: D (and boyfriend) charged with conspiring to murder 82-year old man that she had an ongoing, platonic relationship with. Confessed to pastor and counsellor, whose evidence the defence now seeks to exclude, either under common law privilege or on the basis of 2(a) protections.

I: Should a class-based or case-by-case privilege be recognized for religious communications? How does the freedom of religion analysis affect this question?

A: Class privilege will only be recognized if the communications are “inextricably linked” to the justice system, as solicitor-client communications are. The communications in this case do not satisfy the first requirement, as they did not originate in an expectation of confidentiality (counsellor approached D, and D said that she was planning on telling the police).

Dissent: L’Heureux-Dube would have recognized a general religious communications privilege on the basis of the social value of religious communications and the Charter guarantee of freedom of religion. Thinks that the development of spiritual relationships requires privilege.

\*In some cases, the admission of evidence may infringe on an individual’s freedom of religion rights. At the second and third stage of the Wigmore analysis, several factors are important when assessing religious communications. Depending on the faith at issue, this test could have different results (e.g., some religions have a history of compelling confessions):

* + Nature of the communications
  + Purpose for which they were made
  + Manner in which it was made
  + Parties to the communication

**R v National Post** (2010) SCC *Journalistic privilege is recognized in Canada and exists on a case-by-case basis. When considering journalistic privilege, the real work is done at the fourth stage of the Wigmore analysis.*

F: RCMP want NP to turn over forged bank documents that they received from a confidential source. NP received document on promise of confidentiality.

I: Are the communications protected by privilege?

A: The key policy balance: public interest in the suppression of crime and public interest in the free flow of accurate information. Majority recognizes the importance of journalistic privilege and says that it could well satisfy the Wigmore test; however, in this case the public interest in the production of the physical evidence outweighs the public interest in the protection of the secret sources, specifically because the document is the *actus reus* of an alleged crime. **Wigmore analysis:**

* First two criteria easily satisfied
* At the third criterion, the ‘type’ of journalist will be a consideration (e.g., blogger-source different than investigative journalist-source). Satisfied in this case, institutional importance.
* The fourth criterion does a lot of work: the court must weigh other public interests against the potential harm to the relationship.
  + Nature and seriousness of offence
  + Probative value of the evidence
  + Purpose of the investigation
  + Key question: public interest in disclosure vs. public interest in confidentiality

Dissent (Abella): thinks that the fourth branch is tipped in favour of recognizing privilege. She is concerned that there will be a “profound impact” to the journalistic profession. She says that, regardless of the results of testing the envelope, there is a “fatal disconnect” between the envelope, the identity of X and the alleged forgery (para 139). The envelope could identify X, but not the alleged forger.

**R v Harkat** (2014) SCC *CSIS informers are neither protected by unique class privilege nor by police-informer privilege. Court does not apply Wigmore criteria, deferring instead to IRPA scheme.*

F: Minister of Immigration issued security certificate that declared Harkat inadmissible to Canada on national security grounds. When challenged, disclosure issues arose regarding human sources who provided information regarding Harkat to CSIS.

I: Are CSIS human sources protected by a class privilege?

A: CSIS human sources are not protected by a class privilege, and police-informer privilege does not apply to them. New classes will likely only be created by legislation (*NP*). IRPAscheme prohibits the disclosure of information that would endanger public safety or a person; therefore, identity of sources will generally be protected from disclosure (except to special advocates). In rare cases, special advocates can be given permission to cross-examine sources.

D: No class privilege, disclosure and cross-examination allowed.

Diss (Abella): informers’ lives may be placed at risk if anonymity cannot be guaranteed. Thinks that there should be a class privilege for CSIS informers. Informer privilege has two policy reasons: “protection of a channel of information and of the people supplying it.” These policy reasons are frustrated by a case-by-case approach.

* In response to Harkat, Parliament passed **Bill C-44**, which effectively creates a class-based privilege for human sources.
  + **Human source**: “An individual who, after having received a promise of confidentiality, has provided, provides or is likely to provide information to the Service.”
  + **18.1(2):** no person shall disclose identity of human source
  + **18.1(3)**: may disclose if consent of source and Director
  + **18.1(4)**: judge may order disclosure if: (a) determined that an individual is not a human source or (b) essential to establish innocence.

## Improperly Obtained Evidence

* At common law, there was no authority to exclude otherwise admissible evidence on the basis that it would bring the administration of justice into disrepute. Judges were not concerned with the *manner* in which evidence was obtained, so long as the evidence was relevant and otherwise admissible (***Wray***).
  + This common law approach focused almost exclusively on the truth-seeking function of evidence law, sometimes at the cost of fairness and other values.
  + One exception to the common law position was the confessions rule.
  + In ***Oickle***, the SCC said that “there may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness, is so appalling as to shock the community.”
    - This suggests that, even without the Charter, the SCC might have moved away from the strict common law approach.
* The Canadian approach is located between the sometimes harsh common law position and the blanket American approach (whereby unconstitutionally obtained evidence is automatically excluded):
  + **Charter 24(2):** “a court concludes that the evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the 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**.”
* The accused has the burden of proof under 24(2) in the following manner:

1. Prove that one or more charter rights violated
   1. Common violations:
      1. **Section 7:** right to life, liberty, and security of person, not to be deprived except in accordance with principles of FJ. [Right to silence included here
      2. **Section 8**: unreasonable search or seizure
      3. **Section 9**: arbitrary detention or imprisonment
      4. **Section 10(b)**: rights on arrest or detention **(a)** to be promptly informed for the reasons thereof; **(b)** to retain and instruct counsel and to be informed of that right
2. Was the evidence obtained in a manner that infringed a Charter right
   1. There must be a ***temporal and causal connection***between the evidence and the infringements
      1. Causal: there must be a relationship between the infringement and the obtainment of the evidence. The fact that there was a breach at the same time as the obtainment of evidence only matters if the breach is connected to the gathering of the evidence. (e.g., search warrant results in discovery of drugs and arrest, but police forget to advise re: counsel. Breach is not causally related to the discovery of the evidence).
3. Having regard to all the circumstances, would the ***admission of the evidence bring the administration of justice into disrepute***?
   1. *Grant* has provided a three-part balancing exercise that is the controlling test. However, the provision says to take ***all***of the circumstances into consideration. So, if there is a fact that doesn’t fit into one of the three categories, it should still be considered (exam).

**R v Edwards** (1996) SCC *Defendants cannot rely on the infringement of third party’s Charter rights when seeking to exclude evidence under 24(2). If no personal right of the defendant was affected by the police, then the appellant has no grounds to exclude under 24(2).*

F: Police arrest man, subsequently breach his girlfriend’s charter rights by conducting an unauthorized search of her apartment where they discover his drugs.

I: Can D apply under 24(2) pursuant to the unreasonable search?

A: 24(2) provides remedies only to applicants whose own Charter rights have been infringed.

\*BP: Charter violations of third party rights are not irrelevant, but they must somehow speak to how the accused’s rights have been infringed.

**R v Collins** (1987) SCC *The focus must be on whether the admission of the evidence would bring the administration of justice into disrepute, either by depriving the accused of a fair hearing or through judicial condonation of investigatory or prosecutorial misconduct.*

F: Officer grabbed D’s throat to prevent her from swallowing drugs, violated section 8 rights.

I: What is the test for “bringing the administration of justice into disrepute” under 24(2)?

A: The court says that, when considering whether the administration of justice would be brought into disrepute, a number of factors must be considered, which can be grouped into three categories: 1) trial fairness; 2) seriousness of the Charter violation; 3) disrepute caused by excluding vs. admitting the evidence. Rules that French version is authoritative: “the admission of it in the proceedings ***could***bring the administration of justice into disrepute.”

D: Court must dissociate itself from the conduct of the police officer, which was completely unacceptable and flagrantly in breach of the accused’s right. Evidence excluded.

* ***Stillman*** tried to clarify *Collins* by stating that all “conscriptive” and “non-discoverable” evidence is generally inadmissible. Conscriptive evidence includes statements, compelled bodily samples, and any evidence derived from the foregoing (accused “compelled” to incriminate himself).

**R v Grant** (2009) SCC

F: Officers on patrol near school thought Grant looked suspicious, detained him, questioned him, and found that he had drugs and a gun. Detention was found unlawful, breach of section 9 and 10(b).

I: Should the evidence be excluded under 24(2)?

A: Overarching test under **24(2): whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute?**

* Objective test focused on the long-term effect of the admission of this kind of evidence (i.e., not on short-term public reaction)
* Rejects the approach in *Stillman* that all non-discoverable, conscriptive evidence is automatically excluded.

**Three-part balancing exercise:**

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

* *The more severe or deliberate the state conduct that led to the Charter violation the greater the need for the courts to dissociate themselves from that conduct.* 
  + Weighs in favour of admissibility: Inadvertent or minor violations, made in good faith or legal uncertainty. Urgency or necessity may attenuate (e.g., need to prevent disappearance of evidence).
    - Breaches that are in good faith in one case will not be in similar, subsequent cases (e.g., if the *Grant* facts occurred again, the breach would be considered reckless or deliberate).
  + Weighs against admissibility: Deliberate or reckless disregard of Charter rights, part of a pattern of abuse

1. **Impact on the Charter-protected interests of the accused**

* *To what degree did the violation actually undermine the interests protected by the right infringed?* 
  + Weighs in favour: Fleeting, technical impact; discoverable derivative evidence
  + Weighs against: Profoundly intrusive; non-discoverable derivative evidence.
    - The court makes it clear that discoverability, while a factor, is not the test.

1. **Society’s interest in an Adjudication on the Merits**

* *Would the truth-seeking function of the criminal trial process be better serviced by the admission of the evidence, or by its exclusion?*
* *Weighs in favour*: evidence is highly reliable and relevant; reliable evidence that, if excluded, guts the Crown’s case; serious case (adjudication on merits).
* *Weighs against*: evidence of questionable reliability; unreliable evidence that is a major part of the prosecution’s case; serious case (justice system beyond reproach).
* *\*seriousness “cuts both ways”, as does role that evidence plays in prosecution’s case*

\*The way to work through the test is to consider each of the three factors in detail and then to weigh them against one another. In practice, when two factors weigh in favour of admission, the evidence tends to be admitted. Similarly, when two factors weigh against admission, the evidence tends to be excluded.

The court analyzes the factors as follows, and concludes that the evidence is **admissible**:

1. The police conduct was not ideal but it was not egregious or reckless. No suggestion of racial profiling. Weighs in favour of admissibility.
2. The fact that there were multiple breaches is important (9 and 10(b)). Non-discoverability of evidence aggravates impact. The impact of the breach was significant, but not at the high-end of the scale. Weighs against admissibility.
3. Gun is highly probative and reliable. Weighs in favour of admissibility.

**Charter-protected interests (*Grant*):**

* Arbitrary detention (s. 9): liberty interest
* Statement obtained in breach: section 7 right to silence and the principle against self-incrimination (one of the most important interests, appears to have more weight than others). Courts have tended to exclude statements obtained in breach of the Charter.
* Often, 10(b) violations will result in an unlawfully obtained statement. 10(b) interests include liberty and autonomy, right to be free from self-incrimination, right to make informed choice as whether or not to speak to authorities.
* \*Appears that the court
* Unreasonable search (s. 8): privacy interests and human dignity. A search that intrudes on an areas in which an individual enjoys a high degree of privacy is more serious than one that does not.
* **Bodily evidence**: key interests are privacy, bodily integrity, and human dignity. Right to silence, right against self-incrimination, which apply to statements, do not apply to bodily samples.
  + Forced blood samples would be treated differently than fingerprinting, for example.
* **Non-bodily physical evidence**: privacy is the main interest, and degree of expectation of privacy is important consideration.
  + Dwelling house attracts higher expectation of privacy than business place.
  + Strip-search or cavity search would be serious privacy invasion
* **Derivative evidence:** physical evidence obtained as a result of unlawfully obtained statement [at issue in Grant]. Discoverability is not determinative, but it is a useful factor (at stage 2) because it allows the court to asses the causal connection between the Charter infringement and the evidence. The more likely that the evidence would have been obtained without the statement, the lesser the impact on the accused’s interest against self-incrimination.

**R v Harrison** (2009) SCC

F: Officer pulls over vehicle without grounds and finds that driver’s license is suspended. Officer conducted illegal search, discovered 35kg. Clear violation of sections 8 and 9.

A: Grant test under 24(2):

* **Seriousness of Charter-infringing state conduct**: the officer’s conduct was reckless and the breaches were at the serious end of the spectrum, aggravated by officer’s misleading in-court testimony.
* **Impact on the Charter-Protected Interests of Accused:** Liberty and privacy interests at stake. Motorists have lower expectation of privacy, but the absence of *any* reasonable grounds at all make the impact serious.
* **Society’s interest on adjudication on the merits:** Highly reliable evidence that was virtually conclusive of guilt, weighs in favour of admissibility.

D: Evidence must be excluded; seriousness of the offence and reliability of the evidence must not overwhelm the 24(2) analysis.

**R v Cote** (2011) SCC

F: police violated a number of the accused’s rights, including unreasonable search, unlawful detainment, 10(b), and right to silence as protected by 7.

I: Was trial judge correct in excluding evidence?

A: Standard of review is one of reasonableness.

* **Discoverability:** refers to situations where unconstitutionally obtained evidence of *any nature* could have been obtained by lawful means had the police chosen to adopt them [i.e., discoverability isn’t just about derivative evidence]. Relevant at first two stages:
  + **First stage**: if the police officers could have conducted the search legally but didn’t think about it, or proceeded because they thought they couldn’t get a warrant, then the seriousness of the state conduct is heightened. On the other hand, if the police had a legitimate reason for not seeking prior judicial authorization, but they could have, then this will lessen the impact.
    - What does “legitimate reasons” mean? Can there ever be “legitimate reasons” for not seeking prior judicial authorization?
  + **Second stage**: if the search could not have occurred lawfully and the evidence was non-discoverable, then the impact on the accused’s Charter protected interests will be greater. If the police could have demonstrated R&P grounds, then the impact will be lessened because the evidence was discoverable, though not completely negated.

D: The state conduct was very serious. While the evidence was discoverable, there was a very high right to privacy. Court upholds trial judge’s decision to exclude.

**R v Calder** (1996) *When considering admissibility under 24(2), there may be some situations in which evidence can be admitted for a limited purpose*.

F: D charged with soliciting sex of a person under 18. Police breached 10(b) rights; during interview that followed, Calder told police he wasn’t at the scene, which was untrue. Trial judge excluded statement pursuant to 24(2).

I: Can the statement be used for the limited purpose of attacking Calder’s credibility?

A: In a **rare case**, evidence that would otherwise be inadmissible may be admitted under 24(2) for a *limited purpose*.

\*The purpose of the evidence would fit under the third stage of the *Grant* test, when the court considers the centrality of the evidence to the Crown’s case.

# Evidence Without Proof: Formal Admissions and Judicial Notice

*Formal Admissions*

* Formal admissions are permitted on the grounds that they can dramatically increase efficiency.
* Formal admissions are admitted and agreed-upon facts that do not require evidence. In criminal cases, guilty pleas involve a plea to the essential elements of the offence and the particulars of the offence. The Crown must still prove any aggravating factors in sentencing, beyond a reasonable doubt.
* In *Tunner* and *Novak*, the court said that, in civil cases, counsel on appeal are bound by the admissions made at trial.

*Judicial Notice*

* With judicial notice, the judge is able to rely of facts that are neither proven nor admitted. For example, a judge can take notice that the term ‘gypsy’ is a derogatory term for the Roma people. In another case, the court took judicial notice that the Holocaust occurred.
* There are some risks with the power of judicial notice, including the possibility that the judge could take notice of facts that the parties would prefer to contest. The SCC gives us a test for when judicial notice can be exercised in ***Find***:
  + **1)** the fact is so notorious or generally accepted as to not be subject to debate amongst reasonable people **2)** the fact is capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.
* In some cases, taking judicial notice can be quite controversial: can the court take notice that domestic abuse overwhelmingly involves women, for example?