|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Relevance ->** | **Exclusionary Rule ->** | **PV v. PE ->** | **=** | **Admissible ->** | **Weight?** |
| Must be both:  1) Factually Relevant  2) Legally Relevant | 1) Hearsay  -Presumptively Inadmissible unless under Traditional Exception  -If not under Traditional Exception, be challenged under Principled Approach (*Khelawon*-Necessity/Reliability)  -Even if established, still under scrutiny to all other Exclusionary Rules | a) Probative: How likely does evidence prove fact and further truth seeking  -Look to whether or not fact is proven  -No minimum PV  b) Prejudice: Extent to which evidence causes trier of fact to engage in improper reasoning  -Would fact be proved in a bad way? Impermissible use?  -Ex: convicted on bad character |  |  | -Question for Trier of Fact  -Circumstantial evidence given less weight  -Judge may issue jury caution on type of evidence (Expert, circumstantial, *Vetrovec* warning) |
|  | 2) Lay Opinion/Expert Opinion  -Opinion Evidence presumptively inadmissible  -UNLESS  ->Simply Lay Opinion  ->Expert Opinion  -Must satisfy *Mohan* test for Expert Opinion Admissibility | Common Forms of PE: |  |  |  |
|  | 3) Statements of Accused/Confessions Rule  -Accused statement to person of authority is Presumptively Inadmissible (*Oickle*)  -UNLESS Crown can prove BARD it was voluntary  -Voluntariness:  ->Operating Mind  ->Inducements  ->Pressure | 1) Hostility/Sympathy Inducing |  |  |  |
|  | 4) Mr. Big (*Hart* analysis)  -Presumptively inadmissible, burden on Crown BOP  -Hearsay (Traditional Exception Applies) | 2) Side Issue Distracting Jury |  |  |  |
|  | 5) Character Evidence  -Accused=Inadmissible  ->UNLESS accused brings in good character evidence  ->a) Reputation  ->b) Psychiatric  ->c) Similar Facts  -Other Parties: Presumptively Admissible (unless other Exclusionary Rule) | 3) Consuming Time |  |  |  |
|  | 6) Similar Fact Evidence (*Handy*)  -Presumptively Inadmissible (Crown must prove BOP that PV>PE) | 4) Usurp role of jury (expert) |  |  |  |
|  | 7) Privilege  -Class Privilege: Presumptively Inadmissible  ->Solicitor-Client  ->Litigation  ->Dispute Settlement  ->Informer  -Case by Case: Must show under *Wigmore* to be privileged/inadmissible  -Check is also HEARSAY | 5) Bad Character |  |  |  |
|  | 8) Improperly Obtained Evidence  -Modified *Grant* test to determine if inadmissible under s.24(2)  -Crown must prove on BOP that reasonable, dispassionate person informed of circumstances would find that admin of justice into disrepute  -Evidence still subject to all other exclusionary rules prior |  |  |  |  |

**FRAMEWORK**

**Fundamental Rule of Law of Evidence**

* “Everything that is relevant to a fact in issue is admissible unless there is a legal reason for excluding it”
* Evidence is NOT admissible unless it is:
* -1) Relevant
* -2) Not subject to exclusion under any other rule of law or policy

**Types of Evidence**

* 1) Witness Testimony
* 2) Real Evidence & Documents

**Direct vs. Circumstantial Evidence**

* **Direct** **Evidence**: Evidence as it stands proves fact it sets out to (drugs on a person is direct evidence for possession of drugs)
  + Direct Evidence->If Believed->Ultimate Proposition
* **Circumstantial Evidence**: Evidence that requires an inference to be made to prove fact (gun on person infers that they were the person that shot deceased)
  + Circumstantial Evidence->If Believed->Inference->Ultimate Proposition
  + Inferences must be REASONABLE
  + Usually comes with a jury caution/limit of weight by judge

**Goals of Evidence**

* 1) **Truth Seeking**
  + Dominant objective for Relevance
  + Balancing of truth against other interests (takes back seat against solicitor-client privilege)
  + Rights of others: cannot undermine values/rights to seek truth (s.24(2))
* 2) **Fairness** 
  + Right to fair trial and to not self-incriminate
  + Not convicting accused on bad character evidence but on the particular set of facts of crime alleged
* 3) **Efficiency**
  + Offers of settlement (guilty plea is efficient)
  + Not wasting time going through irrelevant evidence
  + Presumption of Innocence (saves defence from having to prove innocence)

**Relevance**

**Relevance**

* “Relevance is established at law if the evidence tends to prove the proposition for which it is advanced” (*Collins*)
* 1) Factually AND Legally Relevant?
* 2) Evidence inadmissible on any ground of law or policy
* 3) Prejudicial effect of evidence outweighs probative value?

**Types of Relevance**:

* Evidence must be BOTH:
  + -1) **Factually Relevance**: Whether evidence makes a fact in issue more/less likely to be true
  + -2) **Legally Relevance**: Only those facts that are legally significant and relevant to an issue at trial

**Reasons for Excluding Relevant Evidence**

* 1) Because it would **distort** the fact finding function of the court
* -Cause irrationality
* 2) Because it would unnecessarily **prolong** a trial or confuse issues
* -Open ended inquiry would create trials within trials
* 3) Because it would **undermine** some important value
* -Would violate the Charter
* -Would violate privilege (LSUC *Rules of Professional Conduct,* Rule 4.01(1))
* 4) Because manner in which evidence is acquired/presented is **inconsistent with nature** of trial process
* -Trier of fact not supposed to conduct own investigation
* 5) Because its probative value would be **outweighed** by its prejudicial effect
* -Prejudicial effect: possibility that evidence may distort fact-finding process resulting in unfairness

***-RELEVANCE: EXISTENCE OF FACT A MAKES EXISTENCE OF FACT B MORE PROBABLE***

***-FACT A IS RELEVANT->FACT B IS RELEVANT***

***-NO MINIMUM PROBATIVE VALUE***

*R v Watson*

* **Facts**:
* -Accused charged with manslaughter for crime taking place inside home
* -Accused claimed had no knowledge, evidence for this that deceased always carried a gun was thrown out
* -Crown theory that accused was outside guarding
* **Issue**:
* -Was there a plan to kill the deceased and was the appellant privy to it?
* -Should judge have included evidence that deceased always carried a gun?
* **Ratio**:
* -Relevance: existence of Fact A makes existence or non-existence of Fact B more probable than without existence of Fact A
* -If yes, Fact A is Relevant
* -As long as Fact A is a material fact in issue or is relevant to a material fact then Fact A is relevant
* -Absence of a direct connection does not determine relevance
* -Chain of inferences allowed for including relevant admissible circumstantial evidence
* -No minimum probative value
* -Person’s conduct in given circumstances is in issue, evidence that person repeatedly acted in a certain way when circumstances arose in past counts as circumstantial evidence
* -Evidence of Disposition: inference of existence of a state of mind from a person’s conduct on one or more previous occasions and a further inference of conduct on specific occasion based on existence of state of mind
* -Evidence of Habit: repeated conduct in a given situation is a reliable predictor of conduct in that situation
* -Relevant evidence is not always admissible
* -Evidence of habit/disposition should be used to justify crime against victim
* **Analysis**:
* -Evidence that deceased always carried a gun helped to build accused’s defence and there it was relevant
* -Deceased always carried a gun, if believed chain of inferences, carrying a gun meant that it could have been a spontaneous dispute and not a pre-planned attack
* **Conclusion**:
* -Evidence that deceased always carried a weapon is relevant to question of appellant’s guilt

*R v Terry*

* Poem and dream were admitted as evidence that may have killed man
* Relevance can be established w/ change of inferences, no min PV
* Can limit what evidence will be used for with jury instruction->gets rid of potential prejudice

**Probative Value and Prejudicial Effect**

**Intro**

* Judge has ability to exclude admissible evidence if its PE>PV
* How much does evidence prove/disprove ultimate issue?
* More inferences=lower PV
* Prejudicial: NOT evidence that hurts a person’s case, but would lead to improper reasoning

***-RELEVANT EVIDENCE FURTHERS INQUIRY***

***-RIGHT TO FAIR TRIAL PARAMOUNT->RELEVANT EVIDENCE NOT ADMITTED VIOLATES S.7***

*R v Seaboyer (1991)*

* **Facts**:
* -Concerning the “rape-shield” provision (s.276/277) and the right to lead evidence of the sexual history of the complainant
* -Defence wanted to include victim’s prior history, said violated accused’s right to fair trial
* -s.276: Blanket prohibition w/ exceptions
* -s.277: Only excluding sexual history evidence for certain purpose of credibility
* **Issue**:
* -Do the rape shield provisions violate s.7 and 11(d) of the Charter?
* **Ratio**:
* -Relevant Evidence: in some degree advances inquiry, probative value outweighs prejudicial effect
* -If a law excludes evidence where pv>pe then it is violation of s.7 of Charter
* -Factors that may outweigh Probative Value:
* ->1) Unduly arouse jury’s emotions
* ->2) Distract jury/create side issue
* ->3) Consume an undue amount of time
* ->4) Unfair surprise to opponent
* -Constitutional right to fair trial must take precedence in case of conflict
* -Evidence that complainant has engaged in consensual activity on other occasions is not admissible for proving:
  + –Credibility: less worthy of belief
  + -More likely to have consented this time
* -Right to fair trial is paramount->if there is no policy reason to exclude evidence and helps trier of fact get at truth, it must be entered
* -Constitutionalization of evidence principles of truth-seeking, fairness, efficiency
* **Analysis**:
* -s.276 prohibits evidence of other sexual activity, regardless of purpose it was tendered and overreaches and impedes defence
* -s.276 has potential to exclude otherwise admissible evidence which may be relevant to a defence
* -s.276 not saved by s.1
* -s.277 provides for exceptions under which sexual activity of complainant can be used therefore does not violate s.7
* **Conclusion**:
* -s.276 is inconsistent with Charter, s.277 is not inconsistent with charter
* **Dissent:**
* -L’Heureux-Dube
* ->All evidence excluded by s.276 is either irrelevant or its PE>PV
* ->Should never use similar fact evidence, presumes that under specific circumstances women will always be found to consent
* ->Should not use evidence of habit
* ->Most evidence is irrelevant unless you buy into stereotypes
* **Policy:**
* -Want to encourage reporting->vastly underreported
* -Will not encourage reporting if entire sexual past is dredged up and they are shamed
* -Protect complainant’s privacy
* -Want to exclude irrelevant evidence
* -Relevance is constitutionalized->without a justifiable reason of excluding relevant evidence, it violates s.7
* **Goals:**
* ->Fairness: fairness to accused to make full answer and defence
* ->Efficiency: do not want to go through every sexual encounter of the complainant
* ->Truth seeking: do not want to unnecessarily impede ability to get to evidence that will get to truth without policy grounds justifying exclusion

**Sources of Evidence Law**

* 1) Common Law
* 2) Statutes
* 3) Aboriginal Law
* 4) Constitution
* -Provincial: Contract, tort evidence law
* -Federal: Criminal evidence law
* -Charter: s.11(d), s.11(c), s.13, s.7, s.8, s.24(1), s.24(2)

**Trial Process**

**Witnesses**

* Most facts have to be proved/disproved through testimony of witnesses
* Testimony: questions put by counsel
* Examination in Chief: questions asked by party calling a witness
* -May re-examine after cross-examination
* Cross-Examination: questions asked by other parties
* -Leading questions allowed

**Criminal Proceedings**

* Crown has a constitutional duty to disclose all relevant and non-privileged information to Defence
* Voir Dire: to determine facts that are a condition precedent to admissibility of evidence
* Usually can only appeal errors in law unless factual error resulted in a substantial wrong or miscarriage of justice

**Burden of Proof in Criminal Proceedings**

**Persuasive Burden**

* Persuasive Burden: Proof is on the party who is required to establish relevant facts to succeed
* -In civil actions: P usually bears persuasive burden
* -In criminal action: Crown usually bears persuasive burden

**Evidentiary Burden**

* Evidentiary Burden: Party whose duty it is to raise an issue
  + How much evidence is required to prove fact (AR/MR=BARD, Defence=Air of reality)
* Must adduce relevant evidence capable of supporting a decision in party’s favour on an issue before it can go to trier of fact

**Criminal-BARD**

* Persuasive Buren: Crown
* Evidentiary Burden: BARD
* Must prove BARD at every issue

**Burden and Degree of Proof in Civil Proceedings**

* P bears both evidentiary and persuasive burdens on all elements
* D may have evidentiary burden (ex: defamation and justification)

**Motion for a Non-Suit**

* D may argue that P has not met evidentiary burden
* D argues P has not led evidence capable of supporting an element of the cause of action
* If fail then D bring forth evidence after
* No risk approach

**Proof on a Balance of Probabilities**

* Less demanding than BARD
* “More probable than not” (*Miller v Minister of Pensions*)
* Suggested that standard should be applied in more exacting manner where allegations are especially grave
* -“context is all important and a judge should not be unmindful of inherent probabilities or seriousness of allegations or consequences” (*FH v McDougall*)

**Summary Judgment**

* Summary Judgment: Judgement w/o trial
* S.20.01(1)-(3) *Rules of Civil Procedure*
* Moving party asserts that responding party’s case is so weak that it is not worth bringing to trial (still disagreeing about facts)
* “ought not to go to trial because they cannot survive a “good hard look”” (*Pizza Pizza ltd. v Gillespie*)
* Matters of credibility requiring resolution ought to go to trial (*Pizza Pizza ltd. v Gillespie*)- requires ISSUE to go to trial
* Just look at facts, expedite process (favours efficiency)

*Irving Ungerman Ltd. v Galanis*

* Where court is satisfied no genuine issue for trial with respect to claim, court shall grant summary judgment(S.20.04(2) *Rules of Civil Procedure*)
* Secure most just, expeditious and least expensive determination of every civil proceeding on its merits
* Issue of credibility goes to trial (ex: contradictions of evidence)

Civil Proceedings: Insufficient Evidence Application

* D may apply to have actions dismissed on ground that evidence is insufficient to make out ‘s case but D loses if judge decides P does

**Burden and Degree of Proof in Penal Proceedings**

Directed Verdict

* Test for Verdict of Acquittal:
* -“Where there is before court any admissible evidence (direct/circumstantial) which charged properly to jury would justify in a conviction, cannot direct a verdict of acquittal”

Putting a Defence in Issue

* “Air of Reality” Test: Trial judge required to exercise judgment as to whether evidence supports a defence that a jury should consider it
* Crown is required to disprove defence BARD

*Pappajohn v R*

* Trial judge must put to jury all defences that arise on facts whether or not accused raises it
* Trial judge must put all defences to jury that have an air of reality
* -Question of Law

**BARD**

Defining BARD

*R v Lifchus*

* Reasonable Doubt: a doubt for which one can give a reason logically connected to the evidence
* Not absolute certainty but more than probable
* Cannot give ordinary definition
* Should include presumption of innocence
* BARD never shifts to accused
* Reasonable prejudice cannot be based on sympathy or prejudice

**Appellate Review of Factual Findings**

*Stein v Kathy K*

* Court of appeal to test findings made at trial on basis of whether or not they were clearly wrong rather than whether they occurred with view of balance of probability
* Findings at trial are not to be reversed unless it can be established that trial judge made some “palpable” and “overriding” error which affected assessment of the facts
* “Palpable” is one that is plainly seen (*Housen v Nikolaisen*)
* Reasons for deference:
  + -Judicial resources
  + -Promotes autonomy and integrity of trial proceedings
  + –Expertise of trial judges

Criminal Proceedings

* Accused may appeal a conviction on any ground that involves Question of Fact or mixed fact/law (s.675 (1)(a)(ii) *Criminal Code*)
* Crown’s right to appeal is Question of Law only (s.676(1) *Criminal Code*)
* Whether jury verdict is reasonable: properly instructed jury acting judicially could have reasonably get to outcome

*R v Binaris*

* Question of reasonableness is a Question of Law
* -Crown/Accused can appeal
* Reasonable Verdict Test: “whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered”
* -Equally applicable to judge

**Witness Testimony**

**Witnesses**

* Parties must prove or disprove all facts in issue through oral (*viva voce*) evidence of witnesses
* Any object or document that is offered in evidence must be identified by a witness before it can be admissible (*viva voice*)
* In order to testify:
* -Witness must be competent
* -Witness must swear an oath to tell the truth/satisfy a statutory substitute for an oath
* Witness Testimony can be entered by:
* ->Oath (Religion-based)- *s.13*
* ->Solemn Affirmation (Non-religion based but still just as valid as oath)- *s.14*
* ->Unsworn Evidence (Person who cannot swear but can give evidence)- *s.16*

**Oaths and Solemn Affirmation**

**Intro**

* Do not have to be Christian, as long as you believe in supreme being that has punishment for lying
* Statutory: solemn affirmation as a substitute for an oath

***-COMPENTENCY FOR OATH: APPRECIATION MORAL OBLIGATION TO TELL TRUTH***

*R v Bannerman*

* **Facts**:
* -Accused charged with unlawful sexual intercourse with minor
* -Minor testified and knew it was “bad to lie”
* **Issue**:
* -Did judge err in permitting child to testify?
* -Did child show enough appreciation of oath and consequences for lying?
* **Ratio**:
* -All that is required for understanding of consequences of an oath is that child appreciates it is assuming a “moral obligation”
* -Oath objective: find truth by getting a hold of conscience of witness
* **Analysis**:
* -Child had sufficient understanding that moral obligation came with telling the truth
* **Conclusion**:
* -Testimony allowed

*Fletcher*

* Sufficient appreciation of solemnity of situation

***-SOLEMN AFFIRMATION: MUST BE AWARE OF DUTY TO TELL TRUTH, NEED NOT BE SOCIAL DUTY***

*R v Walsh*

* **Facts**:
* -Satanist wanted to testify but would not swear on bible
* **Issue**:
* -Is someone who is a Satanist allowed to testify?
* -Do they have ability to swear affirmation when do not recognize social duty to tell truth but knows consequences in testifying?
* **Ratio**:
* -Necessary to ensure witness appreciates duty of speaking the truth before witness may be affirmed
* -Aware of sanctions therefore aware of duty
* -No need for witness to believe there is a social duty
* -Oath simply requires recognition of moral obligation and willingness to tell truth

**Unsworn Evidence**

* Children and incompetent people are able to provide substitutes for oath in some cases

***-SUFFICIENT INTELLIGENCE ON DUTY TO TELL TRUTH TEST FOR CHILDREN OATH-REPLACED BY s.16.1(1)***

*R v Khan (1990)*

* -Daughter excused from testifying under CEA
* -Mom is a competent witness (under hearsay rules)
* -Before a person can give evidence under oath, it must be established that oath in some way gets on hold on one’s conscience
* ->Must have intelligence and understanding of duty to tell truth
* -Not about oath confusing, oath and solemn affirmation and sworn testimony

***-TESTIMONIAL COMPETENCE: CAPACITY TO OBSERVE, RECOLLECT AND COMMUNICATE-ONLY IF AT ISSUE-NOW PRESUMED TO HAVE CAPACITY***

*R v Marquard (1993)*

* Judge must look at child’s ability to perceive and interpret events as well as recollect them and communicate them at trial when assessing ability to give evidence
* Testimonial Competence:
* -1) Capacity to Observe
* -2) Capacity to Recollect
* -3) Capacity to Communicate
* -If satisfied, judge may receive child’s evidence provided child promises to tell truth under s.16(3)
* -NOW: Underage now presumed to have capacity
* Dissent:
* -Evidence can still have some value if not, these people are more likely to be abused and should not create more barriers

NOTE: *Marquard* and *Khan* now do NOT apply to children

***-WITNESSES W/ MENTAL DISABILITIES MUST BE ABLE TO: 1) COMMUNICATE EVIDENCE 2) PROMISE TO TELL TRUTH-NOW s.16.1(3)***

*R v DAI*

* **Facts**:
* -Woman with low mental age testifying about sexual abuse
* **Issue**:
* -What is test for competence under *s.16.3*? Does witness have to show understanding of truth?
* **Ratio**:
* -Witnesses must able to:
  + -1) Communicate Evidence
  + -2) Promise to Tell Truth
* -Witness is not to be questioned on their ability to understand truth in abstract terms
* -Competence is just a threshold
* -Judge determines capacity (unless excluded by admissibility factors) and then trier of fact determines weight
* Analysis:
* Conclusion:
* **Policy**:
* -Don’t want vulnerable people to fall prey to sexual predators
* -Don’t want to devalue people with mental disabilities as less valued or worthy of being believed
* -Fairness of trial is still protected because witness can still be cross-examined, judge can determine credibility and give weight to testimony

***s.16 Canada Evidence Act* :*Testimony of Disabled***

* **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.

###### -Testimony under oath or solemn affirmation

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

###### -Testimony on promise to tell truth-(DAI)

(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.

###### -Inability to testify

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

###### -Burden as to capacity of witness

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

###### **s.16.1-Canada Evidence Act: Testimony of Underage**

* **16.1** (1) A person under fourteen years of age is presumed to have the capacity to testify.

###### -(2) No oath or solemn affirmation

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) Evidence shall be received

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) Burden as to capacity of witness

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) Court inquiry-(Marquard)

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) Promise to tell truth

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) Understanding of promise

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) Effect

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**

* Examination in Chief: Party offering witness
* -Open-Ended Questions Only
* -Cannot ask leading questions
* Cross Examination: Opposing party counsel
* -Can ask leading questions
* Open-Ended Question: Reasonably able to get evidence out (ex: What city were you born in?)
* Leading Question: A question structured to drive the witness to a very narrow range of answers (ex: Were you born in Vancouver?)
* Witness entitled to refresh their memory (*Rappy*)

Obligation to Cross-Examine a Witness Who One Intends to Contradict

* Witness to be recalled up to judge, aggrieved party can choose to accept it (if not, no charge will be made) (*R v McNeill*)
* Cross-examination be used to illustrate a witness is not telling the truth but must give witness chance to address evidence that contradicts their statement (*Browne v Dunn*)

Limitations of Cross-Examining a Witness

* 1) Bad Faith
* 2) Accused as witness (ex: Character evidence)
* 3) Constitutionally protected rights (cannot ask someone about using s.10 right to not self-incriminate)

*R v Lyttle*

* Cross-Examiner has wide latitude so need good faith to put matters that are disputed/unproved
* Honest advance of theory w/o evidence: cannot put forth assertions you know to be false (cannot mislead trier of fact)
* Need not be proved independently provided that counsel has a “good-faith” basis for putting the question
* Allowed to use unproven assumptions to crack untruthful witnesses
* **Goals**: balancing fairness of accused to advance defence and preventing unethical cross-exam

**Credibility**

Testimonial Factors

* Factors in determining whether to accept a witness’ evidence
* -1) Witness’ use of Language
  + - -Evasive? Avoiding Questions?
* -2) Witness’ Sincerity
  + - -Believe what you are saying?
* -3) Witness’ Memory
* -May change in what they saw (*R v Macdonald*)
* -4) Witness’ Perception
  + - -Credibility should be assessed on child’s level (*R v WR*)
    - -Adult remembering as a child should still be held to child’s perception (*R v WR*)

**Refreshing and Recording Memory**

* Device used to refresh a witness’ memory could be a “song, scent, a photograph an allusion or even a past statement known to be false” (*United States v Rappy*)
* Admissibility of past recollection recorded:
* -1) Past recollection must have been recorded in some reliable way
* -2) Must have been sufficiently fresh and vivid to be probably accurate
* -3) Witness must be able to show record accurately represented knowledge at time
* -4) Original record must be used if procurable

**Incriminating questions**

* **5.** (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to incriminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

**Means of Assessing Credibility**

1) Demeanour of the Witness (*R v White*)

* Credibility: witness’s general conduct and demeanour in determining the questions of credibility
* When witness is on stand, trier can observe witness’s reaction to questions, hesitation, degree of commitment to statement being made etc.
* Not good enough to determine credibility on demeanour alone must look at all evidence (*R v Norman*)

2) Assessing Credibility in Context of All Evidence (*Faryna v Chorny*)

* Real test of truth of story:
* -Its harmony with preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions

Assessing Credibility of Child Witnesses (*R v W(R))*

* Approach evidence of children not that of a “reasonable adult” in assessing credibility
* Assessed a “common sense” basis
* Every person testifying must be assessed by reference to appropriate criteria to their mental development, understanding and ability to communicate

Deference of Appellate Courts to Findings of Credibility at Trial

* Deference owed to trial judges as they hear witnesses directly (*R v Buhay*)
* Appellate court can overturn a verdict based on findings of credibility where they conclude following a review of evidence with deference that findings were unreasonable (*R v W(R))*

Credibility Boosting

* Cannot bring in people to testify about how truth you are, assuming credibility until in question
* **Goals**: Efficiency (would take forever establishing everyone’s credibility)
* EXCEPT:
  + –Helping to show expert is credible
  + –When evidence has brought into question credibility

Character of Trier of Fact- Use of Charter Rights

* Trier of fact cannot use the accused’s Charter right to silence as evidence in determining their guilt
* Judge is prevented from instructing jury on impermissibility of using silence to take case as one that proves guilt BARD

*s.4*: “Failure to testify” (*Canada Evidence Act*)

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

**Prior Inconsistent Statements: Own Witness**

*s.9:* “Adverse witnesses” (*Canada Evidence Act*)

* **-**(1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony
* Does not require that a party’s own witness “prove adverse” before party can contradict witness with other evidence
* Adverse more inclusive than “hostile” (*Wawanesa Mutual Insurance Co. v Hanes*)
* -(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness’ present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

*s.10(1):* **Cross-examination as to previous statements-Whether have to provide statement beforehand**

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

*KGB:* ***Out-of-court statements can be Used to: 1) Impeach Credibility 2) Truth of Contents***

* Accused refused to adopt earlier statements
* Prior inconsistent Statement by Witness (not Accused)
* Out-of-court statements are not only allowed for impeaching credibility but also for the truth of their contents now
* If both reliable and necessary, statements could be admitted under principled approach to hearsay rule
* Statement deemed reliable if:
* -1) Statement made under oath, solemn affirmation or sworn statement (reliability)
* -2) Statement is videotaped in its entirety (reliability)
* -3) Opposing has opportunity to cross-examine witness during current testimony (allows for cross-examine)

**Prior Convictions**

*s.12*: “Examination as to previous convictions” (*Canada Evidence Act*)

* **-**(1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the [*Contraventions Act*](http://www.canlii.org/en/ca/laws/stat/sc-1992-c-47/latest/sc-1992-c-47.html), but including such an offence where the conviction was entered after a trial on an indictment.
* *s.12:* “Proof of previous convictions”
* -(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

**Purpose**:

* ALLOWED: Undermine their credibility (anyone who has committed a criminal offence is more likely to be less truthful) (*R v St. Pierre*)
* NOT ALLOWED: Because you once committed a crime you are more likely to have now (pv>pe)

Young Offenders:

* Can be cross-examined on their record as a juvenile (*Morris v Queen*)
* Includes delinquency that consists of a violation of Criminal Code

Difference B/W Cross-Exam and Prior Convictions

* Cross-examine is to weaken witness’s evidence
* Prior convictions is to weaken witness’s credibility

*R v Laurier*

* Crown can ask for name of crime, substance, effect of indictment and place of conviction

***-CAN ONLY GIVE PRIOR CONVICTION IF ACCUSED TESTIFIES (USED FOR CREDIBILITY)***

***-ACCUSED AS A WITNESS MAY BE CROSS-EXAMINED ON PRIOR CONVICTIONS (NOT CONDUCT) FOR CREDIBILITY***

*R v Corbett (1988)*

* **Facts**:
* -Accused convicted of first degree murder
* -Accused claimed including prior conviction led to him being convicted not just his credibility
* **Issue**:
* -Does s.12 of the Canada Evidence Act violate s.11(d) of Charter?
* **Ratio**:
* -Concealing prior criminal record will present jury with a misleading picture of accused
* -Give jury all information but give clear direction as to the limited used of prior convictions (credibility)
* -Can only lead evidence of criminal record if accused testifies (credibility)
* -Limited to fact of prior conviction, not conduct that led to conviction
* -Cannot discuss previous testimony about other charge and trial
* -Judge has discretion to disregard s.12 because of constitutional principles
* -Probative factors: number of charges, how recent
* -Conviction does not include conditional discharge
* **Analysis**:
* -That a jury MIGHT use the evidence for improper purpose is not good enough to ban it
* -Should not be questioning capabilities of juries
* -s.12 does not violate Charter
* **Conclusion**:
* -Prior conviction allowed to be included
* **Dissent**:
* -Introduction of such evidence can prejudice accused by relaxing standard of proof of guilt
* -Principles of fundamental justice also implies fairness that also the interests of the state be fairly represented
* -Should take into account similarities of previous charge to one currently stand charged (greater prejudice)
* -Prejudicial effect of using previous murder charge for credibility on current murder charge was higher than probative and should have been excluded
* **Goals:**
* -Fairness
* ->Concerned with fair outcome of trial that may be convicted on prior conviction->cautioned for credibility
* ->Would be unfair to have his prior conviction not admitted so an improper picture of them would be presented

*Post-Corbett: R v Underwood*

* A *Corbett* application should be made by accused decided by trial judge after Crown’s closing of case (BEFORE accused testifies)
* Procedure: About fairness of trial

**Corroboration of Credibility**

***-SUPPORTING OR CONFIRMING EVIDENCE FOR UNSAVOURY WITNESSES***

*Vetrovec v The Queen (1982)*

* **Facts**:
* -Accused charged with trafficking heroin
* -Accomplice testified for Crown
* **Issue**:
* -Was there enough corroborative evidence to support accomplice’s testimony?
* **Ratio**:
* -Trial judge must warn jury it is dangerous to convict on evidence of an accomplice unless evidence is confirmed in some other way
* -Should not always trust accomplice who is getting immunity
* -Nothing inherent in evidence of an accomplice that automatically renders them untrustworthy
* -Trial judge must state which parts of evidence needs corroborating
* -No special category for accomplices
* -Inherent frailties of these witnesses may not be known to jury obviously warranting this warning
* -UPDATE: Vetrovec Warning now applies to an “unsavoury” or “disreputable” witness, not just accomplices
* -Vetrovec Warning:
* ->1) Evidence of certain witnesses is identified as requiring special scrutiny;
* ->2) Characteristics of witness that bring their evidence into serious question are identified;
* ->3) Jury is cautioned that although it is entitled to act on the unconfirmed evidence of such a witness, it is dangerous to do so; and
* ->4) Jury is cautioned to look for other independent evidence which tends to confirm material parts of the evidence of the witness with respect to whom the warning has been given
* -Supporting or confirming evidence that unsavory witness telling truth, not corroborating needed
* **Analysis**:
* -Evidence was capable of inducing rational belief that accomplice was telling truth
* **Conclusion**:
* -Did not prejudice the accused
* **Goals:**
* -Fairness: Witnesses may have reason to give false testimony and jury should know that

*Post-Vetrovec*

* Usually for witness central to Crown’s case and there is a MAJOR credibility issues (ex: jailhouse informer, accomplice) (*R v Chandra-2009*)
* Used to warn jury of unsavory witness and to point to evidence that may help confirm (*Khela*)
* NEW warning as per *Khela*
* ->(1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny;
* ->(2) explaining why this evidence is subject to special scrutiny;
* ->(3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and
* ->(4) that the jury, in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused.

**Spousal Competency**

**Accused and spouse**

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

(2) The wife or husband of a person charged with an offence under subsection 136(1) of the [*Youth Criminal Justice Act*](http://laws-lois.justice.gc.ca/eng/acts/Y-1.5) or with an offence under any of sections 151, 152, 153, 155 or 159, subsection 160(2) or (3), or sections 170 to 173, 179, 212, 215, 218, 271 to 273, 280 to 283, 291 to 294 or 329 of the [*Criminal Code*](http://laws-lois.justice.gc.ca/eng/acts/C-46), or an attempt to commit any such offence, is a competent and compellable witness for the prosecution without the consent of the person charged.

* **Marginal note: Communications during marriage**

(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

* **Marginal note: Offences against young persons**

(4) The wife or husband of a person charged with an offence against any of sections 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269 of the [*Criminal Code*](http://laws-lois.justice.gc.ca/eng/acts/C-46) where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged.

* **Marginal note: Saving**

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

* **Marginal note: Failure to testify**

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

*R v Salituro*

* **Facts**:
* -Wife who was separated from accused wanted to testify
* **Issue**:
* -Is a spouse who is separated without hopes of reconciliation allowed to testify as a competent witness?
* **Ratio**:
* -Where spouses are irreconcilably separated, there is no marriage bond to protect
* -Therefore only left with rules limiting capacity of individual to testify
* -Irreconcilability is tantamount to divorce
* **Analysis**:
* -No hope of getting back together, should be able to testify
* **Conclusion**:
* -Appeal dismissed

*R v Hawkins*

* **Facts**:
* -Witness who could implicate the accused was lured into a marriage
* -Witness recanted everything
* **Issue**:
* -Should the common law rule of spousal incompetency still apply?
* **Ratio**:
* -Spouse is an incompetent witness in criminal proceedings in which other spouse is accused, except where charge involves person, liberty or health of witness
* -Relation to events which occurred before and during the marriage
* -Absent evidence that marriage was a sham, cannot inquire into marriage
* **Analysis**:
* -Making witness compellable would threaten couple’s marital harmony and undermine purpose of spousal incompetency rule
* **Conclusion**:
* -Witness not compellable

*R v McGinty*

* **Facts**:
* -Spouse was decided to be a compellable witness
* -Accused charged with assaulting spouse
* **Issue**:
* -Was the trial judge correct in ordering witness to testify?
* **Ratio**:
* -Spouses are compellable in crimes of violence by one spouse against the other
* -Should be protecting safety of its citizens, married or unmarried
* **Analysis**:
* -Witness could be compellable as it was a domestic violence case
* **Conclusion**:
* -Trial judge did not err

Accused’s Failure to Testify

*McConnell and Beer v R*

**Real Evidence**

*R v Schwartz-* **Document Admissibility**

* Before documents can be admitted into evidence they MUST be:
* ->1) Authenticated by the party (ex: testimony of witness)
* ->2) Fall within one of exceptions to hearsay rule

*Business records to be admitted in evidence*

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

*Books and documents*

* **25.** Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other Act exists that renders its contents provable by means of a copy, a copy thereof or extract therefrom is admissible in evidence in any court of justice or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, if it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

*Notice of production of book or document*

* **28.** (1) No copy of any book or other document shall be admitted in evidence, under the authority of [section 23](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-5/latest/rsc-1985-c-c-5.html#sec23_smooth), [24](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-5/latest/rsc-1985-c-c-5.html#sec24_smooth), [25](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-5/latest/rsc-1985-c-c-5.html#sec25_smooth), [26](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-5/latest/rsc-1985-c-c-5.html#sec26_smooth) or [27](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-5/latest/rsc-1985-c-c-5.html#sec27_smooth), on any trial, unless the party intending to produce the copy has before the trial given to the party against whom it is intended to be produced reasonable notice of that intention

EXCLUSIONARY RULES

**Hearsay**

“An out-of-court statement offered for the truth of its contents”

Hearsay Words

* 1) Made **out of court** (not a statement being made in the trial you are in)
* 2) Offered for **truth of its contents** (wants trier of fact to believe it is true to prove a material fact)
* Witness can be different than Declarant (heard these statements)
* Witness can be same as Declarant (prior inconsistent statements)

Non-Hearsay Words

* An out-of-court statement that is offered for some other purpose than the truth is not hearsay
* -Where a witness testifies that declarant said something, but declarant’s statement is relevant for some reason apart from its truth
* -TEST: Would you still wish to admit this evidence even if could be false?

***-NOT HEARSAY WHEN OBJECT WAS NOT TRUTH BUT THAT STATEMENT WAS MADE***

*Subramaniam v R (1956)*

* **Facts**:
* -Accused was charged with smuggling drugs
* -Accused stated that he did so under duress
* -Accused led statements said to him by kidnappers that they were communists and that he could not go home
* -Crown argued this was hearsay and inadmissible
* **Issue**:
* -Are the kidnappers’ statements inadmissible as hearsay?
* **Ratio**:
* -Hearsay: when object of evidence is to establish truth of what is contained in statement
* -Not hearsay: when proposing not truth of statements but fact that it was made
* **Analysis**:
* -Whether true or not that they were communists/couldn’t go home, if threats made to accused would induce him to subjective belief of threats, constituting duress
* -Statement not being entered for truth of its content because does not matter if not true, even if false, still relevant for the accused’s duress claim
* **Conclusion**:
* -Excluding statements had prevented defense of duress and should have been allowed

Rationale for Rule Against Hearsay

* Difficulty in assessing what weight can be given to statement by a person whom jury have no seen or heard and has not been subject to reliability of cross-exam (*R v Blastland*)
* Declarant cannot be observed while giving the evidence
* Trier of fact has fewer tools in assessing declarant’s sincerity, use of language, memory and perceptual ability

**Traditional Exceptions to the Rule against Hearsay**

* 1) **Admissions of a Party/Statements Against Penal Interest** (*R v Terry*)
* -Confessions made to other person party to litigation (ex: accused to member of police/Crown)
* -More likely to be true because it is against your interest
* -Exception to exception: if you make confession to authority must go through other process (Confessions Rule)
* -Relevant to action
* -May not be constitute if made to a random person-usually once you have been charged
* 2) **Business Records** (*R v Monkhouse*)
* -Original record, made contemporaneously in the routine of business, by a recorded individual who is functioning in the usual and ordinary course of their business
* -Have to have a duty to make the record and must not have a motive to misrepresent
* 3) **Declaration Against Interest** (*R v Demester*, *R v O’Brien*, *R v Lucier*)
* -Someone not a party, not an admission
* -Why would person say something if not true
* -Usually for property interest
* -Can also be for criminal context
* -Against your interest but you are not party
* 4) **Dying Declarations** (*R v Schwartzenhauer*)
* -Must be:
* ->1) Declaration while dying
* ->2) By a person who is subject to trial (i.e. deceased in a murder trial)
* ->3) Declaration must be about the circumstances of death (ex: “She did it!”)
* 5) **Prior Identification** (*R v Starr*)
* -Witness is the complainant and gives series of statements
* -Bolstering credibility by saying previous statements (contemporaneous-at the time), her statements at the time when the crime happened would not be usually admissible because it was not made in trial, but it is not hearsay because she speaking about what she said, if admitting for truth of contents then hearsay but allowed for this exception
* -Initial identification can be very helpful
* -If trying to identify someone, better at time
* -In-dock identification: Admissible when witness can identify accused at trial and be cross-examined
* -Can’t identify right now, but are confident that what was said right after crime was accurate, other witnesses can be brought in to testify as to what witness said
* 6) **Prior Testimony** (*R v Hawkins*)
* -If under oath, is admissible
* -Usually if declarant is unable to attend trial
* -Even though cannot observe demeanour of witness
* -Ex: testimony at preliminary inquiry
* 7) **Prior Inconsistent Statements** (*R v B(KG)*)
* -Used when declarant likely to recant
* -Needs to be under oath/solemn affirmation/declaration and witness able to be cross-examined
* -Is it necessary and reliable
* 8) **Public Documents** (*R v Finestone*)
* -Public officials in discharge of public duties (ex: StatsCan)
* -Goals: Efficiency (don’t want to have to bring in every governmental official who worked on document to have to testify about document that they helped drafted)
* 9) **Ancient Documents** (*Halfway River First Nation v BC (Ministry of Forests)*)
* -More than 30 years old, truth has been established
* -Has to be in proper custody, not suspicion
* 10) **Res Gestae** (*R v Ratten*)
* -Physical shock and nervous excitement
* -Spontaneous utterances
* -Self interest is out the window and things uttered are sincere
* 11) **State of Mind** (*R v Starr)*
* *-*Giving statement of intention, more likely to have followed through on it, not just intending to go, allows inference that you did act on that intention without further evidence
* 12) **Oral History-A Special Case** (*Delgamuukw, R v Bernard*)
* -Oral history, aboriginal perspective,
* -Reasonable reliability (must be credible source of people’s history)

**Principled Approach to Hearsay**

“When hearsay statement does not fall under Traditional Exceptions”

If question whether or not counts under Traditional Exception, then go to Principled Approach.

***-HEARSAY: NOT JUST TRADITIONAL RULES, ACCEPETED WHEN NECESSARY AND RELIABLE (PRINCIPLED APPROACH)***

*R v Khan (1990)*

* **Facts**:
* -Dr. sexually abused child
* -Child told mother shortly after unprompted
* -Child could not testify
* -Mother testified what child had told her
* **Issue**:
* -Is mother’s statement of what child told her admissible? Do any exceptions apply?
* **Ratio**:
* -Start of moving away from just Traditional Exceptions
* -EXCEPTION: Principled Approach
* -1) Necessity
* -“Reasonably necessary”
  + - -No other evidence to support statement
    - -Unavailability of testimony (Trauma of witness reliving experience)
* -2) Reliability
* -Can rely on statement as being true
  + - * ->Spontaneous
      * ->No motive to lie
      * ->Timing
      * ->Demeanor
* **Analysis**:
* -Necessity because child could not testify for fear of re-trauma and was not a competent witness
* -Reliable because child had no reason to lie, statement was made unprompted, did not know of sexual stories or know of potential litigation
* -Child’s statement corroborated by real evidence (semen stain)
* **Conclusion**:
* -Statements should be received if necessary and reliable
* -Mother’s statement should be received

***-NECESSARY: PROVE FACT IN ISSUE, RELIABILITY: NEGATIVE POSSIBILITY OF LYING/MISTAKEN***

*R v Smith (1992)*

* **Facts**:
* -Accused convicted of murder
* -Crown relied upon evidence of mother’s 3 phone calls with deceased
* -Crown theory that third phone call proves that accused murdered deceased
* **Issue**:
* -Are the mother’s statements to daughter admissible?
* **Ratio**:
* -Reliable evidence ought not to be excluded simply because it does not fall under traditional exception
* -NEW: Hearsay evidence ought generally to be admissible where circumstances satisfy criteria of necessity and reliability
* -Trial judge then can weight probative versus prejudice
* -Trial judge can also give a jury caution
* -“Principled Approach”-applies not just to children but to all people who cannot give statements
* -1) Necessity
* ->Necessity of hearsay evidence to prove a fact in issue, alternative of not admitting is worse
* -2) Reliability
* ->”Circumstantial Guarantee of Trustworthiness”: Statement sought to be adduced is made under circumstances which substantially negate possibility that declarant was untruthful or mistaken
  + - ->Motive to lie/fabricate key issue
* **Analysis**:
* -First 2 phone calls satisfy criteria of necessity and reliability
* ->Necessity: prove fact in issue as other declarant is dead
* ->Reliability: deceased had no reason to lie
* -Would not be sensible nor just to deprive highly relevant evidence simply because declarant is unavailable for cross-examination
* -Third phone call not admitted
* ->Necessity: prove fact in issue as other declarant is dead
* ->Reliability: NOT established, untrustworthiness as declarant (deceased) has reason to lie to mom as she did not want the mother to arrange a ride for her
* -Did not justify admission without test of cross-examination
* **Conclusion**:
* -First 2 phone calls admitted, 3rd phone call not admitted

***-TRADITIONAL APPROACH: OVERTURNED IN KHELAWON***

*R v Starr (2000)-OVERTURNED IN KHELAWON*

* **Facts**:
* -Accused convicted of murder
* -G testified that C told G that C was going with accused for an auto-scam
* -G wants to use this statement and it links deceased (declarant) to accused and shows plan to isolate and murder deceased
* **Issue**:
* -Should C’s out of court statement be admitted?
* **Ratio**:
* -If traditional exception conflicts with principle approach, principle approach prevails
* -Traditional exceptions must still be determined to be reliable and necessary
* -Statements of intention referring to intentions of person other than declarant may be admissible if trial judge clearly restricts to proving declarant’s intention and is more probative than prejudicial
* -Threshold Reliability: only consider the statements of the statement
* -Ultimate Reliability: whether or not circumstances surrounding statement provide circumstantial guarantees of trustworthiness
* ->Ex: no motive to lie, safeguards to detect lie
* -1) Necessity: necessary for issue at point
  + ->Unavailability of declarant
  + ->Look at quality of evidence from other source (if none, then statement is necessary)
* -2) Reliability:
  + ->Whether circumstances surrounding statement provide circumstantial guarantees of trustworthiness->Threshold Reliability
    - -Did declarant have motive to lie?
    - -Safeguards so that lie could be discovered?
    - -Not to consider declarant general reputation for truthfulness
    - -Not to consider corroborating/refuting evidence
* -Admissibility of statements of intended were to be limited to declarant’s state of mind and could not be used to prove act/intention of any other person
* ->Even in cases where act was a joint act
* -Statements of declaration of intention of third party lend themselves to be another level of hearsay
* **Analysis**:
* -Statement was offered for truth of statements that C intended to go with accused
* -Statement had not established reliability as C had reason to lie to G (about being with another woman)
* -Statements made under circumstances of suspicion
* -Statements could not be used as intentions of accused that accused would be the type of person to commit a crime or that he wanted to lead deceased away
* -G wanted to go home with deceased, deceased unreliable as he had reason to lie (he was going out with another woman)
* **Conclusion**:
* -Statements not permissible
* **Now:**
* -Overturned by *Khelawon*
* -No longer look to threshold/ultimate reliability
* -Consider more than circumstances of statement made

*R v Mapara*

* 1) Presumptively Inadmissible: Hearsay is presumptively inadmissible unless it falls under an exception to hearsay rule
* 2) Principled Approach: Hearsay exception can be challenged to determine whether it is supported by Necessity and Reliability

***-LEADING CASE- HEARSAY TEST***

*R v Khelawon (2006)*

* **Facts**:
* -Accused charged with assaulting retirement home patients
* -All of patients had died of natural causes
* -Crown wanted to admit 3 videotaped statements by one of victims to doctor, employee and police
* -Victim now dead
* **Issue**:
* -Should statements be allowed?
* **Ratio**:
* -1) Hearsay:
* ->1) Out of court statement is adduced to prove truth of its contents
* ->2) Absence of a contemporaneous opportunity to cross-examine declarant (concerned with reliability and s.7 of right to fair trial)
* -Goal: Fairness
* -2) Once evidence identified as hearsay it is presumptively inadmissible
* -3) Traditional Exceptions: if found to be under one of the exceptions, finding is conclusive (see list above)
  + ->UNLESS Traditional Exception as a rule is challenged
* -4) If not under Traditional Exceptions, move to Principled Approach
* -1) Necessity?
* -Declarant cannot testify (ex: declarant is dead, declarant is accused and is non-compellable, trauma of witness)
* -Society’s interest in getting at truth, don’t want to lose valuable evidence
* -2) Reliability?
* -Reliability: able to overcome dangers arising from difficulty in testing evidence
* -Got rid of *Starr* test of threshold and ultimate reliability, instead taking a more functional approach

->Can admit corroborating evidence to prove reliability and look beyond circumstances statement made

2 ways establish Reliability

->a) Substantive Reliability: No real concern about truthfulness of statement because of circumstances in which it came about (ex: no motive to lie, statements against interest, dying declaration, competency of declarant)

->b) Procedural Reliability: No real concern about statement being in hearsay form because truth and accuracy can be sufficiently tested (ex: previous videotaped recording, caution given in order statement, other evidence)

* **Analysis**:
* -Victim’s statements were hearsay
* -Necessity: victim died
* -Reliability: circumstances did not provide reasonable assurances of inherent reliability (ex: presence of employee may have been coaching victim, mental competency)
* -Most reliable statement is one to police that is videotaped, under caution
* -Corroborating evidence: capacity to communicate evidence under s.16 of CEA
* -Cook had potential to influence testimony as he was known to have a grudge, potentially tainted evidence
* **Conclusion**:
* -Statements ruled inadmissible
* **Goals:**
* -Fairness of trial: accused’s inability to test evidence goes to fairness of trial
* -Truth-seeking: sometimes evidence must be admitted even if not possible to test it to get to get the truth (not admitting it could impede fact-finding)

***-HEARSAY TEST FOR PRIOR INCONSISTENT STATEMENTS (TRADITIONAL EXCEPTION +PRINCIPLED)***

*R v Youvarajagh (2013)*

* **Facts**:
* -Accomplice says accused planned killing in their own trial
* -Accomplice drafted stated and acknowledged accuracy of it for plea deal
* -Crown wanted draft to be entered into accused trial because it implicated him
* -DS wants to recant statements and denies statements written in it during accused’s trial
* -No opportunity for contemporaneous cross-exam due to solicitor-client privilege with accomplice (was same prosecutor involved in deal)
* **Issue**:
* -Are these previous statements admissible even though hearsay?
* **Ratio**:
* -Traditional rule excluding prior inconsistent statements was altered in *K.G.B.* to conform with the evolving principled approach to hearsay
* -On an exceptional basis, a prior inconsistent statement is admissible for the truth of its contents, provided the threshold criteria of necessity and reliability are established
* -Prior inconsistent statement of a non-accused witness may be admitted for the truth of its contents under
* *K.G.B.* reliability indicia are met:
* ->(1) the statement was made under oath or solemn affirmation after a warning as to possible sanctions if the person is untruthful (reliability)
* ->(2) the statement is videotaped or recorded in its entirety (reliability)
* ->(3) the opposing party has a full opportunity to cross-examine the witness on the statement (credibility)
* -If *KGB* does not apply/test is NOT met for prior inconsistent statements, look to Principled Approach to Hearsay
  + -Principled Approach to Hearsay
    - ->1) Necessity:
* -A recanting witness can establish necessity
  + - ->2) Reliability:
      * –a) Procedural Reliability: Presence of adequate substitutes for testing truth and accuracy
      * –b) Substantive Reliability: Sufficient circumstances guarantees of reliability or an inherent trustworthiness
* **Analysis**:
* -Was note videotaped therefore, statement does not satisfy KGB
* -DS shown to be untrustworthy-had clear motive to lie (plea-ing down)
* -No ability to observe demeanor/no oath or affirmation of statement (no procedural reliability)
* -Circumstantial guarantees of trustworthiness asserted by the Crown — the thorough process in creating the Agreed Statement of Fact, the involvement of counsel, and the solemnity of the guilty plea proceeding — do not establish threshold reliability for the statements from which D.S. recanted, which served to minimize his involvement in the murder and shift responsibility to Y
* -Would need a full and complete opportunity to cross-examine to establish reliability, however DS invoked solicitor-client privilege
* **Conclusion**:
* -Statements not admitted
* **Dissent:**
* -Wagner
* ->Previous statement that was found to be reliable in another proceeding and used to convict an accused is not allowed here
* ->Brings admin of justice into disrepute by not saying that at other proceeding statement was not reliable enough to include another trial for evidence of recantation

**Opinion & Expert Evidence**

**Opinion Evidence**

* Generally inadmissible
* Witnesses testify to facts of personal knowledge
* Old Rule: Expert could not testify to ultimate issue
* Concerns:
* -Pitting experts against each other
* -Biases-conflict of interest
* -May distort the process

**Exceptions to Opinion Evidence Inadmissibility**

* 1) Ordinary witnesses may be permitted to communicate their perceptions in form of an opinion that is:  
   ->within common knowledge
* ->based on multiple perceptions that can best be communicated in a compendious format
* 2) Expert Opinion may be permitted to provide assistance to understand significance of evidence

***-LAY OPINION ADMISSIBLE WHEN WITHIN COMMON UNDERSTANDING***

*R v Graat*

* **Facts**:
* -Accused pulled over
* -Police officers thought that he was drunk and charged him
* -Police testified at trial they thought he was drunk
* **Issue**:
* -Can opinion evidence on whether accused was drunk be admitted?
* **Ratio**:
* -Lay opinion admissible within common understanding of average person
* -Expert should not be given undue weight to quasi-expert when testifying on simple things because of their status
* -Lay opinion should be admitted when helps them more accurately to state the facts
* -Intoxication and other simple observations is not such an exceptional condition that would require special knowledge
* -Up to trial judge to determine whether or not opinion is admissible
* -Non-expert Witnesses can give opinion on:
  + ->Identifying handwriting
  + ->Identifying persons/things
  + ->Age/weight
  + ->Bodily plight/condition
  + ->Emotional state
  + ->Conditions
  + ->Quality/value
  + ->Speed
* **Analysis**:
* -Compendious statement not expert
* -Police treated same as similar person on simple observation
* **Conclusion**:
* -Testimony admitted as lay opinion evidence

***-LEADING TEST FOR EXPERT EVIDENCE ADMISSIBILITY***

*R v Mohan (1996)*

* -Admission of expert evidence depends on application of following criteria:
* -**a)** Relevance
* ->Question of law
* ->Prima facie admissible if so related to a fact in issue
* ->May be not admitted if prejudicial outweighs probative
* ->Is evidence likely to assist jury in fact-finding or to confuse?
* ->Is jury likely to be over-whelmed by mystic infallibility?
* -**b)** Necessity in assisting trier of fact
* ->If on facts jury can form own conclusions without opinion of expert they are unnecessary
* ->Outside experience and knowledge of trier of fact
* ->Closer to ultimate issue, more strictly it will be applied
* -**c)** Absence of exclusionary rule
* ->Compliance of a, b, d does not guarantee admissibility, must not violate any exclusionary rules
* -**d)** Properly qualified expert
* ->Special/peculiar knowledge or experience
* No criteria of reliability
* **Goals:**
* -Efficiency: do not want to be bogged down with constant experts talking about side issues
* -Truth-Seeking: should not be admitted when it could distort fact-finding process or confuse jury, but can be helpful to jury in understanding an issue they may not anything about/have wrong impression

*R v McIntosh*

* Lecturing and writing does not constitute an expert
* Credentials must be assessed by trial judge

*R v Abbey (2004)*

* 1) **Preconditions for admissibility expert evidence**
  + –Proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence
  + –Witness must be qualified to give opinion
  + –Proposed opinion must not run afoul of any exclusionary rule apart entirely from expert opinion rule
  + –Proposed opinion must be logically relevant to a material issue (narrower than *Mohan*)
* 2) **Benefits-Cost Analysis-gatekeeper function discretion**
  + –Benefits/PV: significance, methodology used by expert, expert’s expertise, impartiality and objectivity of expert, reliability, necessity
  + –Costs/PE: Risks inherent in expert testimony and PE, consumption of time, prejudice and confusion, usurping role of jury, undue influence

**Expert witnesses**

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

**Junk Science-***JLJ*

* Many forms of evidence now proven not to be completely reliable
* Danger of putting too much weight on what expert says/expert not being qualified
* Judge must act as gatekeeper
* Very little statutory reforms

**Dr. Smith**

* Forensic pediatric pathologist who testified on numerous cases resulting in wrongful convictions
* Testified despite not being qualified
* Goudge Inquiry

**Statements Made by Accused**

Presumptively Inadmissible

* Any statement made any an accused to a “person in authority” is inadmissible unless the prosecution proves that it was made “voluntarily” BARD

Voluntariness

* Operating mind of accused must be voluntary
* Conflicts:
  + –Inducements
  + –Pressure
  + –Operating Mind

Hearsay and Exceptions

* Confession outside of court= Hearsay (Presumptively Inadmissible)
* Tradition Exception to Hearsay: Statements by Accused against their Penal Interest (Presumptively Admissible)
* Exception to Traditional Exception: Confessions Rule: statements by accused to person in authority (Presumptively Inadmissible

Charter

* *S.24(2)*
* -Permits judges to exclude evidence obtained in a manner that violated the Charter if admitting would bring the administration of justice intro disrepute
* Confessions Rule concerned with:
* -Security of the person
* -Right to remain silence
* -Right to counsel
* -Right to not self-incriminate

Persons in Authority

* Someone engaged in arrest, detention, interrogation or prosecution of accused (*R v Grandinetti*)
  + Other Persons of Authority:
  + -Prison Guard (*R v Hodgson*)
  + –Complainant (*R v Downey*)- could have control over proceedings
  + –Social Worker (*R v Sweryde*)- power over family situations linked to criminal act
  + –Family of Complainant (*R v Wells*)-If agent of police
  + –Parents (*R v AB*)- child may have subjective belief parents have ability to send child to jail, must have connection w/ criminal justice system

***-CONFESSION TO AUTHORITY IS SUBJECTIVE- DID YOU BELIEVE THEY WERE IN AUTHORITY***

*R v Rothman (1981)*

* **Facts**:
* -Police put accused in cell with undercover cop
* -Undercover cop obtained confession from accused
* -Accused claimed confession was not voluntarily made to person in authority
* **Issue**:
* -Was undercover cop a person of authority?
* -Did accused believe statement was a person in authority when statement was made?
* **Ratio**:
* -Subjective Test: whether accused believed they were talking to someone in authority
* -Only in reference to who you THINK you’re confessing to
* -Claim for protection against self-incrimination can only arise when authority is seeking to compel an individual to disclose something they do not wish to
* -Once accepted that confession was NOT made to person in authority, it is admissible without Crown having to prove it was made voluntarily
* **Analysis**:
* -Undercover was not a person of authority because he was not regarded as such
* -No evidence accused believed undercover officer to be a cop and dismissed him as a narc
* -No attempt by anyone to compel accused
* -Persons of authority have power over accused
* -Concerned about threats and promises (reliability concerns)
* **Conclusion**:
* -Confession was admissible
* **NOW:**
* -Confession would be inadmissible under *Singh* and s.24(2)
* **Goals:**
* -Truth-Seeking: sometimes police must resort to trickery and other methods in order to solve crime and get to truth
* **Dissent**:
* -Estey
  + ->Refused to give statement have to respect this
  + ->Police employed tricks and lies so it cannot be voluntary
  + ->Need a broader employment of voluntariness analysis
  + ->Circumvented right to remain silent by going undercover
  + ->Have to know who you’re confessing to
* -Lamer
  + ->Must sometimes resort to tricks out of necessity
  + ->If not for undercover, many crimes would not be prosecuted
  + ->About if would bring system of justice into disrepute
  + ->Determining whether conduct is “shocking”
  + -Circumstances of proceeding
  + -Manner in which statement was obtained
  + -Degree to which was a breach of social values
  + -Seriousness of charge
  + -Effect of exclusion on result of proceedings

Voir Dire

* When Crown offers in evidence statements of an accused given to a person in authority, Crown must establish voluntariness of statement BARD before using it for any purpose (*Monette v The Queen*)
* If voluntariness is not conceded, there must be a voir dire (*Erven v the Queen*)

*Ibrahim v The King*

* Statements by an accused must be shown by prosecution to be voluntary before it can be admissible
* Policy: Reliability and Prejudice, Fairness of Accused

**Voluntariness: Operating Mind**

***-NEED OPERATING MIND FOR RELIABILITY AND TO VOLUNTARILY MAKE STATEMENT***

*Ward v The Queen (1979)*

* Accused made statement to police shortly after traumatic crash
* Voluntariness: Not just whether statements were made with inducements or fear, but also the mental condition and operating mind of the accused must be analyzed

***-COGNITIVE TO UNDERSTAND WHAT YOU ARE STAYING***

*R v Whittle (1994)*

* Operating Mind: accused posses a limited degree of cognitive ability to understand what they are saying and to comprehend that evidence may be used against them in proceedings
* Appellant was aware what was saying, fit to instruct counsel but because of the voices in his head, he did not care about the consequences
* Ex: NCRMD, narcotics, medical distress/shock
* Admissible

**Voluntariness: Oppression and Inducements**

Examples of Involuntariness

* Accused charged with theft testified he was told by police-until get some answers cannot get bail (*R v Leblanc*)- Involuntary
* Threat of Violence: “Well I’m getting mad”, accused got scared and said he stole it (*R v Letendre)*-Involuntary
* Only way you can get better is by telling the truth, you’re not on the right track (*R v S(SL)*)- Involuntary
* It wouldn’t be good if you telling a story that if you’re lying (*R v Hayes*)-Voluntary

*R v Prager*

* Oppression elements:
* -Length of time of questioning
* -Length of time intervening between periods of questions
* -Accused be given refreshment
* -Characteristics of accused

*Hobbins v The Queen (1982)*

* Atmosphere of oppression may be created although no inducement or threats/actual violence
* Accused own timidity or subjective fear of police will not avail admissibility of a statement unless there are external circumstances brought about by conduct of police that can be said to cast doubt on voluntariness of statement

***-POWER IMBALANCE AND OBJECTIVE OPPRESSIVE ENVIRO=INADMISSIBLE STATEMENT***

*R v Serack (1974)*

* **Facts**:
* -Accused arrested
* -Clothes were seized and they sat naked for hours before being questioned
* **Ratio**:
* -Clothes are essential to dignity and composure in making statements
* -Subjective component and Objective reasonableness
* -Intention does not matter in oppression
* -Power imbalance important
* -“Nature, duration and other circumstances excites hopes or fears or so affects mind of suspect that his will crumbles, speaks when otherwise would have remained silent”
* **Conclusion**:
* -Statement was not voluntarily made

***-LEADING CASE: PRINCIPLED APPROACH CONFESSION RULE***

*R v Oickle (2000)*

* **Facts**:
* -Accused detained along with gf over arson
* -Accused took polygraph and police lied about results
* -Accused was emotionally distraught but police asked proper questions
* -Accused ask if could see gf if confessed, police said yes
* -Accused confessed but later said it was duress
* **Issue**:
* -Did police improperly induce accused’s confession through threats/promises, atmosphere of oppression of any other tactics that could raise a reasonable doubt?
* **Ratio**:
* -No longer distinct branches of inducement oppression, operating mind for voluntariness, can be alone or in combination to find statement involuntary
* -Voluntariness if touchstone of confessions rue
* -PRINCIPLED TEST-Considered with VOLUNTARINESS:
* ->a) Was statement made to person in authority?
* ->b) If Yes: Presumptively Inadmissible. Can Crown prove BARD statement was Voluntary?
* -Look to Factors vitiating Voluntariness:
* ->1) Threats/Promises (veiled threat? quid pro quo?)
* ->2) Oppression (Deprived of food/water/sleep/medical attention?)
* ->3) Operating Mind (Accused knows what they are saying)
* ->4) Police Trickery (Must shock the community)
* -If Yes-Statement admissible
* -Tactic of inflating reliability of incriminating evidence is unobjectionable
* -Doctrine of oppression and inducements are concerned with reliability
* -Analysis under confessions rule must be a contextual one
* -Downplaying moral culpability of offence is not problematic
* -Police can say the potential benefits of confession but cannot make offers that are conditional upon a confession or a legal benefit
* -Confronting a suspect with adverse evidence, -even exaggerating its accuracy and reliability-will not render a confession involuntary
* -Voluntariness particular to suspect->matters who they, ability to withstand the environment
* -Factors likely to elicit False Confession:
* -Prolonged Questioning
* -Intense Pressure
* -Strong Incentives
* -5 types of False Confessions
* -1) Voluntary: not a product of police interrogation
* -2) Stress-compliant: aversive interpersonal pressure of interrogation become so intolerable that suspects comply in order to terminate questioning
* -3) Coerced-compliant: Coercive influence techniques
* -4) Non-coerced-persuaded: police tactics cause innocent person to become confused, doubt memory and be persuaded of guilt
* -5) Coerced-persuaded: interrogation involves coercive aspects
* **Analysis**:
* -Police conducted a proper interrogation
* -Accused was fully apprised of rights at all times
* -Never subjected to harsh, aggressive, overbearing interrogation, not deprived of anything
* -No inducements
* -Officers simply told accused he would feel better if he confessed
* -Never threatened girlfriend to encourage confession
* **Conclusion**:
* -Confession considered voluntary
* **Goals:**
* -Fairness of trial: concerned with statements that were truly voluntary being used against accused
* **Dissent:**
* -Police gave improper inducements (psychiatric) and were cumulative in an oppressive environment
* -Statements were obtained as a result of fear/prejudice/hope (interrogate wife)

***-DEATINED PERSON ESPECIALLY VULNERABLE, MUST HAVE MEANINGFUL CHOICE NOT TO SPEAK***

***-RIGHT TO SILENCE, NOT TO BE NOT ASKED QUESTIONS***

*R v Singh (2007)*

* **Facts**:
* -Accused was arrested for second degree murder
* -Accused stated on numerous occasions that he did not want to talk about the incident
* -Interviewing officer persisted in trying to get him to make a statement
* -While the accused never confessed to the crime, he made a number of admissions which, when taken together with other evidence, later became probative of the issue of identification at trial
* **Issue**:
* -Should statements be admissible? Do they violate confessions rule and violate s.7?
* **Ratio**:
* -“Under CL and s.7, police persistence in continuing an interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that the subsequently obtained statement was not the product of a free will to speak to authorities”
* -Right of the detained person to make a meaningful choice whether or not to speak to state authorities which trumps confessions(s.7)
* -Objective Test: Focus is on the conduct of the police and its effect on the accused’s ability to exercise his or her free will
* -After detention, the state authorities are in control and the detainee, who cannot simply walk away, is in a more vulnerable position
* -A finding of voluntariness will be determinative of the [s. 7](https://zoupio.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en" \l "!fragment/sec7" \t "_blank) issue since voluntariness, as it is understood today, requires that the court scrutinize whether the detainee was denied his or her right to silence
* -If find voluntariness BARD, then s.7 has been respected
* -But if accused can show on a BOP that the statement was obtained in violation of his or her constitutional right to remain silent, the Crown will be unable to prove voluntariness beyond a reasonable doubt
* -It is not appropriate to impose a rigid requirement that police refrain from questioning a detainee who states that he or she does not wish to speak to police.
* ->Such an approach would overshoot the protection afforded to the individual’s freedom of choice both at common law and under the *[Charter](https://zoupio.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en" \t "_blank)*
* -What the common law recognizes is the individual’s right to *remain* silent.  This does not mean, however, that a person has the right *not to be spoken to* by state authorities
* ->The importance of police questioning in the fulfilment of their investigative role cannot be doubted
* -More common circumstances that vitiate the voluntariness of a confession using the well-known headings:
* -(a) threats or promises,
* -(b) oppression, and
* -(c) operating mind
* -Number of times the accused asserts his or her right to silence is part of the assessment of all of the circumstances, but is not in itself determinative
* -Confessions rule does not exclude derivative evidence (only for statements)
* **Analysis**:
* -Mr. Singh’s proposition ignores the state interest in the effective investigation of crime
* -CL same as s.7, if admissible under CL, then s.7 has not been infringed
* **Conclusion**:
* -Confession admissible
* **Dissent:**
* -Fish
* ->s.7 has no meaning if can be overridden by officers, makes accused feel like their right does not exist
* ->Insidious strategy to undermine right, accused is powerless to stop interrogation
* ->Resistance is then futile

**Mr. Big**

*R v Hart (2014)*

* **Facts**:
* -Accused charged with murdering two daughters
* -Recruited into gang operation for Mr. Big sting
* -Accused was unemployed and socially isolated
* -Made confession to undercover police about killing daughters
* **Issue**:
* -Should the confession be admitted
* **Ratio**:
* -Mr. Big confessions shows that accused willingly participated in simulated crime and sullies their character, carrying risk of prejudice
* -Cultivate an aura of violence even if no threats
* -New Mr. Big Test/Common Law rule of Evidence:
* -1) Where Mr. Big sting took place, it should be treated as presumptively inadmissible unless Crown can prove on BOP PV>PE
* -PV
* ->Reliability of circumstances under confession made:
* -length of operation
* -number of interactions
* -nature of relationship w/ officers
* -nature and extent of inducements
* -presence of threats
* -interrogation
* -personality of accused (age, sophistication and mental health)
* ->Reliability of confession itself:
* -detail of confession
* -leads to additional evidence
* -identifies element of crime not made public
* -details only known to perpetrator
* -PE: risk of
* ->A) Moral Prejudice
* ->Accused wanted to join criminal organization and committed simulated crimes
* ->B) Reasoning Prejudice
* ->Distracted from other crimes/actions not charged for
* -2) Doctrine of Abuse of Process
* ->a) Violence: Guard against state misconduct threatening integrity of justice system and fairness of trials
* ->b) Vulnerabilities: Cannot overcome will of accused and coerce confession with violence of threats, prey on accused’s vulnerabilities (mental health, substance addictions, youth)
* **Analysis**:
* -Accused was unemployed and socially isolated
* -Described officers as best friends and brought him out of poverty
* -Incentive to confess to retain friends and get money
* -Confession does not contain any markers of reliability, contradictions, lack of confirmatory evidence
* -Moral prejudice hearing accused involvement in gang for months
* **Conclusion**:
* -Confession not accepted
* **Goals:**
* -Fairness Because of the unfairness inherent in Mr. Big, do not want accused to be convicted on improper reasoning (prejudice)
* -Efficiency: Hart analysis of going through examination to determine if entire operation is valid could be a very long process on courts
* -Truth-Seeking: Sometimes the only way to get confession/evidence is through police trickery

*R v Mack (2014)*

* Mack factors:
  + No aura of violence
  + Inducements were low
  + Operation not running very long
  + Statement was very reliable (lead to new evidence)
  + Had good limiting instructions
  + Mack not vulnerable
* PV of M’s confessions was high because there was an abundance of evidence that was potentially confirmatory:
* -Reliability: M’s purported confessions to his acquaintances A and L describe the same motive for killing the victim as M’s confessions to the undercover officers. They also made reference to burning the victim’s body.
* -Immediately after confessing to one of the undercover officers, M led him to the firepit in

which the victim’s remains lay undiscovered. And third, shell casings fired from a gun found

in M’s apartment were found in the same firepit.

* On the other hand, the confessions’ prejudicial effect was limited
* Operation did not reveal unsavoury facts about M’s history, nor did M participate in any scenarios that involved violence
* Abusive Process: Nor did the undercover officers engage in any improper conduct that could ground an application for abuse of process
* Inducements: M was not presented with overwhelming inducements. He had prospects for legitimate work that would have paid even more than the undercover officers were offering.
* Threats: Nor did the officers threaten M with violence if he would not confess. The most that can be said is that the officers created an air of intimidation by referring to violent acts committed by members of the organization. M, however, was not coerced into confessing
* He specifically instructed the jury that it had to “assess the environment, the themes of easy money, violence, the importance of honesty and integrity, any offers of exit points, and any threats or intimidation”.
* Ultimately, the trial judge left the final assessment of the reliability of M’s confessions to the jury. With respect to the bad character evidence, although the trial judge did not address it specifically, he provided the jury with a standard limiting instruction on the use that could be made of any evidence that bore on M’s character

**Character**

“propensity or disposition to behave in a certain way”

**Character Evidence**

* Character evidence is circumstantial:
* -Interference that a person behaved in a certain way at a certain time because that behaviour would be consistent with person’s character
* Character can be proven with:
* -1) Evidence of specific acts
* -2) Evidence of reputation
* -3) Psychiatric evidence

**Putting Character in Issue-Witnesses**

* Bad character evidence for purpose of undermining credibility may be allowed for witnesses

**Putting Character in Issue-Accused**

* Crown cannot lead evidence to put accused’s character at issue UNLESS:
  + -Accused leads evidence as a witness supporting inference that they were unlikely to have committed offence by virtue of a character trait
  + -Accused bringing in evidence that they have a good character
  + -Crown can only neutralize evidence/undermine credibility (cannot lead evidence that accused would be type of person to commit offence)

*R v Morris*

* Trying to show law abiding citizen is enough to put character at issue

***-ACCUSED PUTS CHARACTER AT ISSUE BY DENYING ALLEGATIONS ON BASIS OF GOOD CHARAC***

*R v McNamara (1981)*

* **Facts**:
* -Accused charged with fraud
* -Accused argues judge erred in permitting evidence of previous transaction showing bad character
* **Issue**:
* -Should this previous transaction be admissible?
* **Ratio**:
* -“If accused denies allegations on basis of good character, if so, character is put at issue”
* ->Can be Implicitly or Expressly
* -Introductory questions put to accused do not put character in issue
* -Accused does not put character in issue by denying guilt/advancing defense/repudiating allegations
* **Analysis**:
* -Accused intended to project image of law-abiding citizen and project image of integrity
* -Accused put character issue allowing for the previous shady character to be admitted
* **Conclusion**:
* -Evidence admissible, judge did not err
* **Goals:**
* -Fairness: Would not be fair for jury to have improper image of accused presenting themselves as good character without Crown ability to rebut that

**Methods of Proving Character-Accused**

**1)** **Reputation**

Reputation

* Must come from someone other than accused
* Not an opinion, but what community thinks of you
* If accused brings in evidence of good reputation, Crown can bring in evidence for bad reputation

*R v Rowton*

* If accused raised issue of character, would be unjust to have advantages of character reputation the accused does not deserve

***-WITNESS CAN TESTIFY ON CHARACTER IF CONSANT AND INTIMATE PERSONAL OBSERV***

*R v Levasseur (1987)*

* **Facts**:
* -Accused charged with breaking and entering
* -Defense included good character with one individual about their experiences from working with individual
* -Testimony was found to be inadmissible for not being reflective of the community
* **Issue**:
* -Is evidence of general reputation as to character confined to reputation in residential community of party whose credibility is under attack
* **Ratio**:
* -Reputation can be from people not just in the residential community
* -Can different reputations with different groups-must come from a circle (ex: work, neighbourhood etc.)
* -Anyone who is part of a group of people who can speak to reputation based on “constant and intimate personal observation”
* **Analysis**:
* -Business people just as accepted
* **Conclusion**:
* -Testimony admitted

***-SHOULD BE SCEPTICAL OF CHARACTER EVIDENCE/REPUTATION WHEN CRIME IS SHROUDED IN SECRECY***

*R v Profit (1992)*

* **Facts**:
* -Accused principal for sexual assault
* -Over 20 witnesses testified as to their character
* **Issue**:
* -Should evidence of good character have been used for trustworthiness and likelihood of having committed the offence?
* **Ratio**:
* -Character evidence has same degree of relevance and weight to likelihood of committing crime as well as general reputation with respect to honesty
* **Analysis**:
* -Trial judge fell short not considering not just credibility but also likelihood of crime
* **Conclusion**:
* **Dissent**:
* -Judge erred in referencing use of character evidence for likelihood of having committed crime
* -These sexual crimes usually shrouded in secrecy and hard for witnesses to know any better about character
* -Evidence of good character does not have bearing on propensity of an individual to abuse people sexually as abusers often build good character to camouflage abuse and gain access
* -Character evidence should be given little weight when considering propensity of persons in positions of trust/control to sexually abuse
* **UPDATE:**
* -Dissent adopted
* -SCC: Trial judge may take into account sexual assaults usually take place in private and will not be reflected in reputation in community of accused

**2) Specific Acts**

Specific Acts

* Crown may not lead evidence of specific bad acts of accused that are not subject of charges
* If accused chooses to testify, put evidence of specific instances of good character

***-BAD CONDUCT MUST ONLY NEUTRALIZE BY 1) REBUT GOOD CHARAC 2) CREDIBILITY***

*R v McNamara (1981)*

* **Facts**:
* -Accused charged with fraud
* -Accused talks about how he’s a good guy which he is then cross-examined on
* -Accused shady transaction is brought up
* -Accused appeals that should not have brought up he was discussing general character not specific instance
* **Issue**:
* -Should this cross-examine be admitted?
* **Ratio**:
* -Unless accused puts character at issue, past specific acts may not be used as to purpose of showing oath should not be relied upon
  + –May only be used to NEUTRALIZE good claims, cannot use bad acts that accused is more likely to have committed offence
* -Cannot use specific acts for evidence of guilty unless under similar fact evidence
* -Where character is put at issue by accused, proof of Bad Conduct can:
  + ->1) Rebut claim of good character
  + ->2) Show accused lied/Credibility
* -Jury Caution: May only use evidence for accused’s credibility not for purpose that more likely to commit crime
* -Limitations on extrinsic evidence does not apply to specific acts relation to current issue

*s.12- Accused Criminal Record*

* (1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the [*Contraventions Act*](http://laws-lois.justice.gc.ca/eng/acts/C-38.7), but including such an offence where the conviction was entered after a trial on an indictment

*s.666- Evidence of Character*

* Where, at a trial, the accused adduces evidence of his good character, the prosecutor may, in answer thereto, before a verdict is returned, 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
* -Neutralization purpose

**3) Psychiatric Evidence of Disposition**

Psychiatric Evidence

* Not the type of person who would commit offence
* Disposition: feature of an abnormal group
  + –Only member of abnormal would be able to commit crimte->Accused is/isn’t part of that group

***-MUST HAVE DISTINCTIVE IDENTIFYING FEATURES, GEENRAL DISPOSITION NOT ENOUGH***

*R v Robertson*

* **Facts**:
* -Accused charged with murdering girl
* -Accused wanted to adduce evidence from psychiatrist that he was not the type of person who would do this
* **Issue**:
* -Should the evidence be admissible?
* **Ratio**:
* -Evidence that offence had distinctive features identifying perpetrator as an unusual personality constitution member of unusual and limited class of person is admissible evidence that accused di not possess these characteristics of the perpetrator of this crime
* -In case of ordinary crimes of violence, psychiatric evidence is inadmissible to proved accused’s psychological makeup does not include tendency/disposition for violence
* -A mere disposition for violence is not so uncommon as to constitute a feature characteristic of an abnormal group falling within special field of study
* **Analysis**:
* -Evidence shows no more than deceased was killed by brutality, no recognizable personality traits of an identifiable group of people
* **Conclusion**:
* -Evidence not admitted
* **Policy:**
* -Don’t just want a rounding up of the “usual suspects”
* -Character Evidence: People can change

***-PERPETRATOR MUST HAVE DISTINCTIVE BEHAVIOUR SO COMPARING TO ACCUSED WILL HELP***

*R v Mohan*

* **Facts**:
* -Dr. charged with sexual assaults
* -Called a psychiatrist to testify that perpetrator would be a part of limited and unusual class
* **Issue**:
* -Should this evidence be allowed?
* **Ratio**:
* -Accused is permitted to adduce evidence as to disposition both in their own evidence or by calling witnesses
* -Evidence as to character is limited to evidence of accused’s reputation in community with respect to relevant trait
* -Trial judge must be satisfied that perpetrator of crime or accused has distinctive behaviour characteristics such that a comparison of one with other will be of assistance in determining guilt
* -Must scrutinize expert’s opinion as merely personal or based on reliable indicators of membership to certain groups
* -Narrow category class of persons, cannot be for simple/ordinary crime
  + ->Must have a distinctive feature/“Specialized and extra-ordinary” class
* **Analysis**:
* -Person who committed sexual assaults does not belong to a group possessing behavioral characteristics sufficiently distinct
* -Paedophillia has not been standardized to be able to construct profile
* **Conclusion**:
* -Evidence inadmissible

**Character Evidence of Other People**

***-DISPOSITION OF THIRD PERSON MAY BE PROVEN BY 1)REPUTATION 2)SPECIFIC ACTS 3)PSYCH***

*R v Scopelliti (1981)*

* **Facts**:
* -Store owner charged with murder, claimed self-defence
* -Store owner adduced evidence of previous vandalism at store and other interactions with members of the community of which he did not know of at time of shooting
* -Defence wanted to show that deceased had violent disposition and was more likely to be aggressor in this particular situation
* **Issue**:
* -Can this evidence of specific acts not known to accused be used to help put forth defence of self-defence?
* **Ratio**:
* -Self-Defence must be objectively reasonably but also subjectively held by accused
* -Deceased’s bad character can be put forth for self-defence under limited purposes to illustrate evidence of deceased’s aggression but not for a excuse for killing the deceased
* -Evidence accords with principle view that disposition of a person to do a certain thing is relevant to indicate probability of having done that act
* -Evidence of witness pre-disposition is presumptively admissible unless under exclusionary rule
* -Disposition of third person, if relevant and otherwise admissible may be proved:
* -a)evidence of reputation
* -b)specific acts
* -c)psychiatric evidence of disposition
* -Not prejudicial when dealing with third parties because they are not being convicted on fact to have more likely committed crime
* **Analysis**:
* -Evidence showed bad conduct of an accused likely to have committed offence
* -Known of previous encounters may go to subjective belief
* -Unprovoked acts of which accused did not know may not go to subjective element of fear in self-defence because accused did not know at time
* -Purpose behind unknown bad acts is support for objective reasonableness of deceased more likely being aggressor
* **Conclusion**:
* -Evidence allowed under limited circumstance->more likely to be aggressor
* **Policy**:
* -Don’t want deceased thought of as more deserving to die because of bad character evidence presented about them
* -Can use propensity evidence on 3rd parties, because they are not convicted on for being more likely to have done something

**Similar Facts Evidence: Accused’s Prior Bad Acts**

“Factual evidence of past misconduct of accused can be admitted at trial for purpose of inferring that accused committed misconduct at issue”

-Extremely probative and highly relevant

***-PRINCIPLED APPROACH: SIMILAR FACT EVIDENCE INADMISSIBLE UNLESS PV>PE***

*R v Handy*

* **Facts**:
* -Accused of sexual assault
* -Wife was called to testify of sexual assaults he had done on her as similar facts
* -Evidence that wife and complainant had met before and that there was the possibility of collusion for money
* -Accused these prior acts should not have been considered as “similar acts”
* **Issue**:
* -Should wife’s statement be admitted as similar facts for the crime at trial? What is test for similar fact evidence?
* **Ratio**:
* -Similar Fact Evidence: Presumptively Inadmissible
  + ->Look for distinctiveness, uniqueness, objective improbability of uniqueness
* -Onus on Crown to show on BOP **PV>PE**
  + ->Evidence of propensity on issue of ID is inadmissible unless propensity is so highly distinctive or unique as to constitute a signature
* -**Probative Value** considerations:
  + ->1) Strength of evidence that past events actually occurred (credibility of witness and motive to lie)
  + ->2) Potential for collusion b/w witness and claimant
  + ->3) Scope of issue (broad issue higher threshold PV, specific/material issue looked upon more favorably)
  + ->4) Evidence of similarities/supports inferences
    - -Proximity in time b/w events (may mature out of disposition)
    - -Extent to which other events are factually similar (is it sufficiently related or just blacken character?)
    - -Number of occurrences of similar events
    - -Circumstances surrounding events
    - -Distinctiveness of events
    - -Existence of any intervening events
* -**Prejudicial Effects** considerations:
* ->1) Reasoning Prejudice:
  + - ->Put more weight/time on events than is logically justified
    - ->Distract from actual charge
    - ->Confuse jury
* ->2) Moral Prejudice: convict on bad personhood or general disposition (especially when more reprehensible that accused charged)
* -Similar fact evidence must be such as to outweigh “reasoning prejudice” and “moral prejudice”
* -Similar fact may be admissible if goes beyond general propensity and is more PV>PE for crime now charged
  + ->Must be so high PV that previous misconduct is so highly relevant and cogent that it outweighs PE
* -Lapse of time opens up time to greater possibility of character reform of maturing/personality change
* -Affront to common sense to relegate two events as mere coincidences if SO unique
* -Matter that does not more than blacken accused’s character is inadmissible
* -Similar fact evidence must help to identity material issue in question
* -One prior incident is not a pattern, must look at connecting factors
* -Do not want to simply round up “usual suspects”
* -Similar fact evidence need not be conclusive
* **Analysis**:
* -There is the potential issue of collusion undermining PV
* -The prior acts of wife and the current complainant are too different to make any inferences (significant dissimilarities)
* -Non-consent of wife on different occasions not relevant as to whether complainant here consented or not
* -Incidents are too remote and dissimilar (married, started out consensual, some did not involve sexual assaults)
* -Evidence has clear ability to create moral prejudice of bad character
* **Conclusion**:
* -Evidence not allowed
* **Policy/Goals:**
* -Fairness: Moral prejudice of the accused being convicted on similarities, not actual proof of committing this crime
* -Efficiency: Distracting from the crime accused actually stands for, time consumption on accused’s entire life
* -Rounding up of usual suspects, don’t want to doubt rehabilitation of criminal justice system

**Character and Similar Facts in Civil Cases**

*Mood Music Publishing Co. v De Wolfe (1976)*

* **Facts**:
* -D had been accused of copying P’s music
* -P set up sting and D fell for it
* -P wish to adduce this evidence by showing this was type of thing D did
* **Issue**:
* -Should this evidence be allowed a similar fact?
* **Ratio**:
* -In civil cases, courts will admit evidence of similar facts if logically probative, relevant to determining matter at issue, provided it is not oppressive and unfair to other side
* -One time is not enough for a pattern
* **Analysis**:
* -Reproduction without owner’s consent is enough
* -Subconscious copying is still an infringement
* -Relevant to proving fraud
* -Unlikely to be a coincidence in 4 different times
* **Conclusion**:
* -Admitted

**Prior Convictions**

*s.12(1) CEA*

* Witness may be questioned as to whether they have been for any offences

*R v Corbett*

* Allowed to adduce evidence of prior convictions as they relate to credibility

*R v Rojas*

* When faced with statements of accused containing inculpatory statements, judge should not instruct that they are likely to be true

**Privilege**

**Privilege**

* Protects information from disclosure in court
* Enables people to speak and write with candor secure that recipient of communication cannot be compelled to disclose it in legal proceedings
* Freedom of communication is necessary for relationship
* Would do violence to relationship to bring it to court
* Not a Charter right, but has Charter values

**Privilege and Hearsay**

* If evidence is not found to be privileged, still need to complete a hearsay analysis or at least make mention of it
* Ex: Therapist telling statements were made to them by accused, those statements, while privileged constitute hearsay
* Look to Traditional Exception then Principled Approach

**Class Privilege vs. Case by Case**

* Class Privilege has automatic privilege and is presumptively inadmissible
* Case by Case will have to be proven under *Wigmore* factors to be inadmissible

**Class Privilege Examples**

* Solicitor-Client Privilege
* Dispute Settlement
* Litigation
* Informer

***-TWO TYPES OF PRIVILEGE***

*R v McClure*

* Two Types of Privilege
* -1) **Class Privilege**
* ->Ex: solicitor-client, spouse, informer
* ->Presumption of inadmissibility unless party urging admission can show why communications should not be privileged
* -2) **Case-by-case**
* ->Ex: doctor-patient, journalist-informer, religious communications
* ->Determined by *Wigmore* criteria
* -1) Communications must originate in a confidence that they will not be disclosed
* -2) Element of confidentiality must be essential to full and satisfactory maintenance

of relation b/w parties

* -3) Relation must be one which in opinion of community ought to be sedulously
* fostered
* -4) Injury would injure relation by disclosure of communications greater than

benefit gained for correct disposal of litigation

**Solicitor-Client Privilege**

*R v McClure*

* Essential for lawyer to know all facts of client’s position to properly defend them
* Encourages disclosure within relationship
* Potential to stifle communication between lawyer and client
* Must be legal advice made in confidence

***-REQUIREMENTS FOR SOLICITOR-CLIENT PRIVILEGE***

*Canada v Solosky*

* Requirements for Solicitor-Client Class privilege:
* -1) Be b/w solicitor and client (including agents)
* -2) Entail seeking of legal advice
* -3) Be intended to be confidential
* Bills are prima facie privileged unless proven would not violate relationship

*R v Cunningham*

* Solicitor-client privilege is integral to admin of justice
* Privilege encourages free and full disclosure by client require to ensure effective legal representation
* It would not be possible to infer from bare fact of non-payment of fees any particular activities of accused or the charge
* In other contexts such as family law, payment of fees may be relevant to issue of case
* Payment of fees will be determined based on facts of case and privilege of disclosure may attach

**Exceptions to Solicitor-Client Privilege**

Three Main Exceptions to Privilege

* -1) Criminal Purpose
* -2) Public Safety
* -3) Innocence at Stake

1) **Criminal Purpose**

*Descoteaux v Mierzwinski*

* Legal advice must be lawful to attract protection
* If client seeks legal advice to commit crime or fraud, same advice can be used against client
* Confidential communications lose character to extent they were made for purpose of obtaining legal advice to facilitate commission of crime
* Either criminal advice in themselves or intended to further criminal purpose

2) **Public Safety**

“Preventing a serious crime form happening by allowing a lawyer to warn an identifiable person about specific threat posed by client”

***-CONSIDER: 1) CLARITY, 2) SERIOUSNESS, 3) IMMINENCE***

*Smith v Jones (1999)*

* **Facts**:
* -Counsel referred J to S for counseling
* -J told S about plans to murder women and S told counsel
* -S then notified police and commenced action to admit statements admitted under public safety exception
* -Between lawyer and client third party (psychiatrist under umbrella of lawyer because he was referred)
* **Issue**:
* -Was J right to contact police?
* **Ratio**:
* -Public safety exceptions to all classifications of privileges and duties of confidentiality
* -S.12 Professional Conduct Handbook: Disclosure to prevent a crime: A lawyer may disclose information from relationship if lawyer has reasonable grounds to believe necessary to prevent a crime
* -Considerations:
* ->1) Clarity: Is there a clear risk to an identifiable person/group of persons?
* -Long planning? Method? Prior history of violence? Identifiable group (may be a large group if identifiable people)
* ->2) Seriousness: Is there a risk of serious bodily harm or death?
* -Must be serious bodily harm or death (includes psychological harm)
* ->3) Imminent: Is danger imminent?
* -Urgency, can still be a time in the future (do not need to know minutes)
* -Should be limited to only includes information necessary to protect public safety
* **Analysis**:
* -S had identifiable victim, had murderous tendencies, had done planning no evidence of imminence but S had already breached parole
* -Affidavit was properly limited to the risk of identifiable group of people
* **Conclusion**:
* -Appropriate to notify police
* **Dissent:**
* -While privilege may need to yield to public safety, the breach must be as narrow as possible
* -Should only disclose opinion of harm based on consultation, no circumstances to other offence or reveal any personal information
* -If confidence in psychiatrists is undermined by revealing too much communication, dangerous individuals will be less likely to seek help
* **Policy:**
* -Preserve nature of relationship for proper functioning of justice system unless harm at stake

3) **Innocence at Stake**

Innocence at Stake

* Has to be so likely that innocent person would be convicted
* Not available from any other source
* Other accused would not otherwise be able to raise a reasonable doubt without information
* Evidentiary Burden:
* -Communication Exists
* -Judge looks at communication whether it likely raises a reasonable doubt
* -Communication disclosed only in limited way to raise a reasonable doubt

*R v McClure*

* Danger that innocent person may be wrongfully convicted

**Litigation Privilege**

*Blank v Canada*

* Litigation privilege protects work done by counsel from disclosure to other parties
* Protects counsel in litigation process
* Unlike solicitor-client privilege, it ends when litigations is over
* Includes third parties not just client

**Dispute Settlement**

* Communications made during attempts to settle litigious matter through negotiation are not admissible if negotiation or mediation fails and matter is litigation
* Encourage settlement by encouraging parties to negotiate freely

**Informer Privilege**

“Intended to guard identity of police informers to protect them from retribution from criminals and to encourage informers to come forward”

Informer Privilege

* Don’t want to discourage people from coming forward if reasonable chance identity could be disclosed
* Promise of anonymity

***-INFORMER PRIVILEGE ESSENTIAL AND IS SUBJECT ONLY TO INNOCENCE TO STAKE***

*R v Leipert (1997)*

* **Facts**:
* -Police received tip from Crime Stoppers about accused growing grow up
* -Crown refused to disclose information about crime stoppers
* -Judge produced edited tip sheet document for defence
* **Issue**:
* -Is defence entitled to receive details of an informer tip?
* **Ratio**:
* -“If it is impossible to determine which details of information provided by an informer will or will not result in that person’s identity, no details should be disclosed subject to innocence at stake exception”
* -Informer privilege: protection of those who provide information to police and encourage others to do the same
* -Informer privilege is of such importance that it cannot be balanced against other interests
* -Informer is only person who knows potential danger of releasing facts to accused, Crown is not in a position to determine whether any portion of information could reveal identity
* -Exceptions: Informer privilege is subject only to “innocence at stake” exception and Charter “presumption of innocence” (“Absolutely essential”)
* -1) Without disclosure, innocence is at stake AND
* -2) Whether information is necessary to prove accused’s innocence
* -Right to disclosure of Crown documents is subject to two conditions:
* -1) Relevance
* -2) Privilege
* -Privilege belongs to Crown but also to informer
* **Analysis**:
* -Judge’s editing of the privileged document and disclosing to the defense was improper
* -Possibility of depriving informer of privilege that belongs to them
* -It is impossible for court to know what details will reveal identity of informer
* -No inconsistency between Charter/disclosure and informer privilege
* **Conclusion**:
* -Judge erred in producing informer document
* **Policy:**
* -Want to encourage reporting to police and do not want them getting harm
* -Privilege ensures reporting

**Case-By-Case Privilege**

***Wigmore* Test**

* Burden on person who wants Privilege declared

1) Communication Must Originate in Confidence

* Expectation of discussion kept secret (specifically discussed it)
* Sanctions for disclosing (medical reprimands)

2) Element of Confidentiality Must be Essential to Full and Satisfactory Maintenance of Relations b/w Parties

* Essential part of relationship
* Confidence required for necessary for relationships to work
* Required for entire group of people (not just individual relationship), relationship would cease to function
* Importance examples: institution of family, administration of justice

3) Relation must be one that in Opinion of Community ought to be Sedulously (dedicated and diligently) Fostered

* Charter values are used to demonstrate that communication should be fostered

4) Injury to Relation by Disclosure Must be Greater than Benefit Gained by Direct Disposal/Proceeding of Litigation

* Balancing relationship and seriousness of crime
* Is confidence so important that we are willing to protect it at the expense of the conclusion of a trial (and possibly get it wrong)?
* Look at ripple effect and chilling-would other people less willing to engage in relationship as a result?

***-RELIGION NOW COMMON LAW RULE PRIVILEGE, MUST APPLY NEW CASE UNDER WIGMORE***

*R v Gruenke (1991)*

* **Facts**:
* -Testimonies supported Crown’s theory
* -Lay counselor went to visit accused at home and accused told her what happened
* -Accused then went back to the church and continued discussion
* -Accused made admission to lay counselor/pastor
* -Testimonies were included and accused argues communication was privileged and therefore inadmissible
* **Issue**:
* -Are the statements that accused made to the lay counselor/pastor privileged as religious communications?
* **Ratio**:
* -Religious communications not are inextricably linked with the justice like solicitor-client privilege
* -To qualify as new form of class privilege that is excluded, reasons have to be as compelling as those for solicitor-client privilege
* -Religious communication not a common law rule of privilege, must apply *Wigmore* criteria
* -Principled Approach under *Wigmore*, consider:
  + –Nature of Communication
  + –Purpose-why was it made?
  + –Manner in which is was made
  + –Parties to communication
* **Analysis**:
* -Communications did not originate under confidence that they would not be disclosed
* -No expectation that went accused talked to lay counselor it was in confidence
* -Was for purpose of “relieving stress” not spiritually based
* **Conclusion**:
* -Communications were properly admitted at trial
* **Policy:**
* -Want litigant to have right to evidence to present best case
* -Privilege reasons have to be as high as those as solicitor-client relationship

***-JOURNALIST PRIVILEGE NOT ABSOLUTE, MUST BALANCE AGAINST SOLVING CRIME***

*R v National Post (2010)*

* **Facts**:
* -M was a journalist and received envelope that contained document from anonymous source X
* -X wanted documents destroyed because it could identify him
* -RCMP got search warrant for envelopes arguing that the evidence would advance a criminal investigation
* -M argued that this communication should be privileged as it could lead to identity of X and violate freedom of expression
* **Issue**:
* -Should the envelopes have to be disclosed? Is there a journalist-informer privilege?
* **Ratio**:
* -Public’s interest in being informed about matters that might only be revealed by secret sources is not absolute
* -Cannot use privilege to hide away evidence that may be important
* -More serious the crime, more likely privilege will not apply
* -Must be balanced against other interests such as solving a crime
* -Order compelling disclosure will not always violate s.2(b)
* -Should use the *Wigmore* criteria and accused has onus of proving all four criteria-ONUS on them
* -Privilege should not be blanket constitutionally protected because group of journalists is so diverse
  + ->Would “blow a giant hole” in law enforcement investigation
  + ->Disclosure will not in general violate s.2(b)
* **Analysis**:
* -First 3 criteria met
* -1) Originated in confidence
* -2) Would not have originated without confidentiality
* -3) Journalist-source relationship ought to be sedulously fostered (helps to expose matters of public interest)
* -4th criteria not met: sufficient seriousness of offence justifies investigation and disclosure
* -Public interest in protecting the secret source was not outweighed by public interest in a criminal investigation
* -Physical evidence essential to investigation, police had reasonable grounds to believe that envelope was forged and therefore needed to investigate to authenticate it
* -Because X may have been the perpetrator and forgery was an issue, their denial of involvement is not sufficient to end criminal investigation and accept at face value
* -Cannot blindly accept anonymous, uncorroborated statement as reason enough to terminate investigation
* -Offence is serious enough to justify decision of police to investigation criminal allegations
* **Conclusion**:
* -M required to produce envelopes
* **Dissent:**
* -Abella
* ->Should be a case-by-case basis for journalist-informer
* ->Harm to informer privilege outweighs benefit to investigation of crime
* ->Should trust journalist to determine authenticity and reliability before trespassing confidentiality of source of relationship
* ->Benefits of disclosure are negligible/speculative (did not know what find on envelope) whereas the harm to journalism is known
* **Policy**:
* -Media and sources important to public interest
* -Potential chilling effect on profession and on reporting and transparency and accountability of public institutions will be lessened

***-CSIS DIFF FROM POLICE, ONLY INFO RAISING SERIOUS RISK TO NATIONAL SECURITY IS PRIVILEGED***

*R v Harkat (2014)*

* **Facts**:
* -Accused charged with committing terrorism
* -Accused sought to obtain disclosure of information from informers to CSIS agents
* -Judge rejected request using police informer privilege
* **Issue**:
* -Are CSIS human sources protected by class privilege?
* **Ratio**:
* -Only information and evidence that raises a serious risk to national security or danger to safety of a person can be withheld from named person
* -Differences b/w police and intelligence gathering preclude applying informer privilege automatically
* -Intelligence gathered by CSIS has relaxed evidence rules and different from police sources
* -Parliament job to legislate CSIS privilege and protection is found in *IRPA*
* -Disclosing informer sources is up to trial judge discretion
* **Analysis**:
* -Accused getting access to this information was not proven to be important to his charge
* **Conclusion**:
* -CSIS human sources are not protected by class privilege
* -Judge did not err in refusing informer evidence
* **Dissent:**
* -CSIS protected by class privilege
* -CSIS used to be under RCMP- similar enough to informer

Bill C-44

* Human source: after a promise of confidentiality, person provided information to CSIS
* Affords same level of protection CSIS sources as police sources
* An offence to divulge any information that would lead to disclosure of identity of CSIS employee
* Grounds of disclosing informant’s identity of human source:
  + -1) Source and director consent to disclosure
  + -2) Not a human source (CSIS gets information without promise of confidence)
  + -3) Innocence at stake (procedure around seeking disclosure of human’s source’s identity, innocence of client would be affected)

Research-Participant Privilege?

* Criminology Professors did research in sex workers with research assistants
* Luka Magnotta one of people interviewed
* Research assistance called police, police got warrant for prof’s office
* Should there be privilege?

**Improperly Obtained Evidence**

Pre-Charter

* “No existing authority at common law to exclude otherwise admissible evidence on basis it would bring admin into disrepute” (*R v Wray*)

*R v Oickle*

* May be situations with police trickery even w/ voluntariness that is so appalling as to shock the community

*s.24(2)*: *Inadmissible under the Charter*

* (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances
* (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute

*s.8: Search and Seizure*

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

*s.9: Detention and Imprisonment*

* Everyone has the right not to be arbitrarily detained or imprisoned.

*s.10: Arrest and Detention*

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

Goals of Evidence

* Truth-seeking: want to get to truth no matter what?
* Fairness: accused has right to fair trial and have no have evidence obtained illegally used against them

**Entitlement to s.24(2)?**

***-MUST BE YOUR CHARTER RIGHTS VIOLATED TO EXCLUDE EVIDENCE IN YOUR CASE***

*R v Edwards (1996)*

* **Facts**:
* -Police arrested accused for driving with suspended license
* -Went to accused’s gf’s apartment and gained access to apartment using lies
* -Gf was never informed of her right to refuse entry or right to counsel
* -Found drugs and charged the accused
* **Issue**:
* -Does a violation of the gf’s Charter rights entitle accused to have the evidence in his case be inadmissible under s.24(2)?
* **Ratio**:
* -Expectation of privacy determined on circumstances if person satisfies they had a reasonable expectation of privacy
  + ->Presence at time of search
  + ->Possession/control of property
  + ->Historical use of property
  + ->Subjective expectation of privacy
  + ->Objective reasonableness of expectation
* -Must be your right that has been violated to have the evidence be excluded under s.24(2)
* -Third part infringements only relevant if can show that you were also infringed to show many people getting infringed
* **Analysis**:
* -Accused’s rights were not violated only gf’s
* -Accused did not have a reasonable expectation of privacy at gf’s place (did not pay rent, stayed over occasionally, denied drugs were his)
* **Conclusion**:
* -Evidence admissible

**Excluding Evidence Under s.24(2)**

***-BRING JUSTICE SYSTEM INTO FURTHER DISREPUTE->REPLACED BY GRANT***

***-REASONABLE PERSON EYES LOWERED OF JUSTICE SYSTEM***

*R v Collins (1987)*

* **Facts**:
* -Police targeted accused and had her under surveillance, arrested man she was with
* -Police grabbed accused by throat in order to prevent her from swallowing drugs
* -Police found drugs in her hand and arrested her
* -Accused argued that police lacked reasonable and probable grounds and therefore this breached s.8 (agreed)
* -Accused appealed to have evidence not admitted
* **Issue**:
* -Are the drugs found in accused in hand admissible evidence?
* **Ratio**:
* -Misconduct by police has effect on repute of administration of justice
  + -Rejected *Rothman* standard of “Shocking” community, should be much lower=disrepute
* -Further disrepute by admitting evidence into justice system:
  + -1) Factors affecting fairness of trial (serious or technical?)
  + -2) Factors relevant to seriousness of violation (deliberate vs. inadvertent, urgency)
  + -3) Factors relevant to effect of excluding evidence (essential to charge?)
* -Long-term consequences must be considered (community views)
* -Reasonable Person Test:
  + -> “Would admission of evidence bring administration of justice into disrepute in eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?”
* -Nature of Evidence matters:
  + ->Real Evidence: violation of Charter will rarely alone warrant not admitting evidence because it already existed in some manner
  + ->Conscripted Evidence (confession): violation of Charter would render trial unfair as evidence did not exist but for Charter violation
* -Availability of other investigatory techniques and ability to obtain evidence w/o violation will render violation more serious (shows blatant disregard for Charter)
* -Trivial Breach:
  + ->Administration of justice would be brought into disrepute by exclusion of evidence essential to substantiate charge and acquittal of accused when breach is TRIVIAL
* -More serious offence, more damaging to system’s repute would be an unfair trial
* -Depends on Charter right that was infringed
  + –Principle against self-incrimination most important (*Grant*)
* **Analysis**:
* -Evidence obtained was real evidence
* -Nothing to suggest that its use would render trial unfair
* -Cost of excluding would be high: someone found guilty of a serious crime would evade conviction
* -HOWEVER, cannot accept police officers harming individuals especially when no reasonable and probable grounds
* **Conclusion**:
* -Evidence excluded
* **Now:**
* -Factors outlined informed later *d* test
* -Test replaced by modified *Grant* test

***-MODIFIED GRANT TEST FOR EXCLUSION OF EVIDENCE UNDER S.24(2)***

*R v Grant (2009)*

* **Facts**:
* -Accused was walking down street looking sketchy
* -Police stopped accused and questioned him
* -Accused was told to put hands in the air/obstructed ability to walk and questioned if he had anything illegal on him
* -Accused was not told of his right to counsel or aware that he was under detention
* -Accused admitted to having gun on him and was arrested
* **Issue**:
* -Should the confession and drugs be excluded under s.24(2)?
* **Ratio**:
* -Fair Trial: “One which satisfies public interest in getting at the truth, while preserving basic procedural fairness to accused”
* -Administration of Justice: “Process by which those who break the law are investigated, charged and tried”
  + –Maintaining integrity of and public confidence in justice system
* - GENERAL: Modified *Grant*  Test for Exclusion of Evidence Under s.24(2)
  + -1) **Seriousness of Charter-infringing State Conduct**

|  |  |
| --- | --- |
| Favouring Admissibility | Favouring Exclusion |
| * + - -Minor violations     - -Good faith (but ignorance shouldn’t be rewarded)     - -One time     - -Legal uncertainty     - -Discoverability: Legit reason for not seeking warrant- *Cote* | * + - -Deliberate/reckless disregard of Charter rights     - -Part of pattern of abuse     - -Discoverability (could have obtained search warrant but chose not to)-*Cote*     - -Legal certainty     - -Misleading police testimony- *Cote* |

-2) **Impact of Breach on Charter-protected Interests of Accused**

|  |  |
| --- | --- |
| Favouring Admissibility | Favouring Exclusion |
| * + - -Fleeting     - -Technical impact     - -Discoverability (if could get judicial authorization/reasonable grounds of finding evidence, less violation of dignity/privacy)-*Cote* | * + - -Profound intrusive to right to silence, privacy, human dignity     - -Non-discoverable (Search could not have happened legally, more intrusive to accused’s reasonable expectations of privacy)-*Cote* |

-3) **Society’s Interest in Adjudication of Case on Merits**

|  |  |
| --- | --- |
| Favouring Admissibility | Favouring Exclusion |
| * + - -Evidence is highly reliable     - -Central to Crown’s case | * + - -Evidence of questionable reliability     - -Not central to Crown’s case |
|  |  |

* -**Statements Made by Accused**: Test for Exclusion of Evidence under s.24(2)
  + –Must first survive Confessions rule
  + -1) Seriousness of Charter-infringing State Conduct
    - -Police conduct in obtaining statements has long been strongly constrained
    - -Condoning serious police misconduct is more harmful to repute of justice system that acceptance of minor slips
  + -2) Impact of Breach on Charter-protected Interests of Accused
    - -Undermines detainees to make a meaningful and informed choice to speak, remain silence and self-incriminate
  + -3) Society’s Interest in Adjudication of Case on Merits
    - Examine reliability of statement
  + –Decision: Will usually favour exclusion of statements
* -**Bodily Evidence**: Test for Exclusion of Evidence under s.24(2)
  + -1) Seriousness of Charter-infringing State Conduct
    - Fact-specific
    - Admission of evidence obtained by deliberate and egregious conduct vs. good faith
  + -2) Impact of Breach on Charter-protected Interests of Accused
    - -Degree to which search and seizure intruded upon privacy, bodily integrity and human dignity of accused
    - -Plucking a hair versus blood samples
  + -3) Society’s Interest in Adjudication of Case on Merits
    - -Usually favours admissibility
    - -Reliability of bodily evidence is high
* -**Non-Bodily Physical Evidence**: Test for Exclusion of Evidence under s.24(2)
  + -1) Seriousness of Charter-infringing State Conduct
    - Fact-specific
  + -2) Impact of Breach on Charter-protected Interests of Accused
    - -Privacy under s.8 unreasonable search and seizure
    - -Intruding house in the middle of night has a higher expectation than a gym locker at a public facility
  + -3) Society’s Interest in Adjudication of Case on Merits
    - -Fact-specific
    - -Reliability usually not an issue, tending to favour admission
* -**Derivative Evidence**: Test for Exclusion of Evidence under s.24(2)
  + –“Physical evidence discovered as a result of unlawfully obtained statements”
  + –Mostly concerned with DISCOVERABILITY of derivative evidence
  + -1) Seriousness of Charter-infringing State Conduct
    - Fact-specific
    - Was behavior deliberate?
  + -2) Impact of Breach on Charter-protected Interests of Accused
    - -Making an informed choice of whether to speak to authorities
    - -If derivative evidence was independently discoverable, impact of breach on interests of accused is lessened and admission is more likely
  + -3) Society’s Interest in Adjudication of Case on Merits
    - -Since evidence is real/physical, less concerned with reliability of evidence
    - -Judge should refuse to admit evidence where there is reason to believe police deliberately abused power to obtain a statement that would lead them to evidence
    - -Don’t want to encourage to get inadmissible statements knowing that it would lead admissible real evidence
* **Analysis**:
* -Gun discovered was derivative evidence
* -1) Seriousness of Charter-infringing State Conduct
  + -Police under impression that they had detained accused and therefore there was no bad faith
  + -Breach was not deliberate/egregious and would not undermine public confidence in rule of law by admitting
  + –Police do not always know the line
* -2) Impact of Breach on Charter-protected Interests of Accused
  + –Violation of right to counsel
  + –No physical coercion or abuse
  + –Impact of infringement was significant (needed immediate legal advice from police’s pointed questioning)
* -3) Society’s Interest in Adjudication of Case on Merits
  + –Gun is main evidence of offence
  + –Highly reliable evidence in proving possession
* **Conclusion**:
* -Admission of gun into evidence would not bring administration of justice into disrepute
* -Evidence admitted

*R v Spencer*

* Child porn on Limewire, ip address given willingly, not a breach
* No expectations of infringement

***-POLICE FLAGRANT AND BRAZEN DISREGARD FOR RIGHTS FAVOURS EXCLUSION***

*R v Harrison (2009)*

* **Facts**:
* -Police pulled over car where had no grounds to believe offence was being committed
* -Searched car as incidental to driving w/o license offence (wanted to find license but that was irrelevant to charge)
* -Found boxes in the back where after asked if contained drugs accused admitted they contained drugs
* -Police officers misled and lied during testimony at trial
* **Issue**:
* -Is the cocaine discovered by police admissible under s.24(2)
* **Ratio**:
* -Should not compare police conduct with acsued’s crime
* -1) Seriousness
  + –If breach is merely technical or understandable, dissociation not a problem
  + –Police were reckless and disregarded Charter rights coupled with misleading testimony at trial
  + –Had NO reasonable grounds->even more serious
  + –No uncertainty, settled standards
* -2) Accused’s Interest
  + –Must look if breach compromised interests underlying rights infringed
  + –Accused had liberty and privacy infringed
  + –Motorists being stopped impacts rightful expectation of liberty and privacy more than trivial
  + –Not egregrious impact
* -3) Society’s Interest
  + –Drugs were critical evidence, conclusive of guilt
  + –Highly reliable
  + –While public has heightened interest in seeing determination on merits where offence is serious, public also has vital interest in justice system that is beyond reproach
* **Analysis**:
* -Police conduct was serious and was brazen and flagrant disregard for Charter
* -Undermines admin of justice
* **Conclusion**:
* -Acquittal, price paid by society for acquittal outweighed by importance of maintaining Charter standards

***-DISCOVERABILITY RELEVANT TO FIRST TWO PARTS, SERIOUSNESS GOES TO THIRD***

*R v Cote*

* **Facts**:
* -Police went to house of victim who was shot in the middle of the night
* -Police inspected house without informing accused about right to counsel or search warrants or why they were searching
* -Police asked accused about guns in the house
* -Police found gun matching bullets victim was shot with and accused was arrested
* -Was not given Charter warnings until after rbought to police stattion
* **Issue**:
* -Should evidence found during search be admissible under s.24(2)?
* **Ratio**:
* -Discoverability: unconstitutionally obtained evidence of any nature could have been obtained by lawful means
* -Discoverability is a relevant factor under s.24(2) however it is determinative under first two parts of Grant test but is not determinative
* -Seriousness of offence goes under #3 of Grant test
* -Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength of the causal connection between the *[Charter](https://zoupio.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en" \t "_blank)*-infringing self-incrimination and the resultant evidence. The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused’s underlying interest against self-incrimination. The converse, of course, is also true.
* On the other hand, in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the [s. 24(2)](https://zoupio.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en" \l "!fragment/sec24subsec2" \t "_blank)
* **Analysis**:
* -1)Seriousness
  + –Police misconduct was serious
  + –Had reasonable and probably grounds to obtain search warrant but chose not to follow proper protocol and to go to house without them
* -2) Accused’s Interest
  + –Significant infringement on privacy, liberty and dignity
  + –Unauthorized search occurred in home in middle of night and was long
* -3) Society’s Interest
  + –Evidence of gun is reliable
* **Conclusion**:
* -Evidence thrown out acquittal restored

**Shifting Use of Unconstitutionally Obtained Evidence**

***-SHIFTING PURPOSE DOES NOT WARRANT INCLUSION***

*R v Calder (1996)*

* **Facts**:
* -Accused charged with attempting to purchase sex with a minor
* -Investigating officer did not give accused caution for counsel
* -During interview accused gave statement that was proven to later be untrue
* -Evidence of prior inconsistent statement was excluded under s.24(2)
* -Crown now wanted to admit untrue statement in order to impeach accused’s credibility not for incrimination
* **Issue**:
* -Does purpose for which Crown wishes to admit evidence matter in determining its admissibility under s.24(2)?
* **Ratio**:
* -Tender of an admission as constitutes tender of it all for purposes unless tendered for limited purpose
* -Effect of destroying credibility of an accused who takes stand by way of a Charter breach will have the same effect as use of same of evidence for purpose of incrimination
* -Effect on repute of justice system is reasonable person, not carefully instructed jury properly instructed of limited purpose
* -In determining admissibility under s.24(2), it is not carefully instructed juror who is arbiter but rather member of community
* -Only in very limited circumstances that a change in proposed use will qualify a material change of circumstances warranting reopening issue once evidence has been excluded
* **Analysis**:
* -Jury considered evidence of accused was sufficiently credible enough to raise reasonable doubt
* **Conclusion**:
* -Appeal dismissed, proposed changed use of statement was not a material change warranting reconsideration
* **Dissent:**
* -McLachlin
* ->Should have admitted evidence for credibility purposes
* ->Where accused chooses to take stand and put credibility at issue, unfair to not allow Crown to cross-examine on prior inconsistent statement
* ->Crown reasonably proven that verdict may not have been same had error in law not been made
* ->**Goals**
  + -Fairness: if accused puts forth good character, Crown should be able to adduce evidence
  + -Truth-seeking: would not get to the truth

**Guest: Justice Bruce- Credibility of Witnesses**

* Credibility: about **reliability** and **veracity**
* First, there is the independent witness who has **no interest** in the dispute.
* ->One presumes that this witness is being truthful in the sense that they are not knowingly attempting to mislead the court
* ->Concern: reliability of statement
* Second, there is the witness who has an **interest in the outcome** of the dispute
* ->Both veracity and reliability is in question.
  + Because the witness has an interest in the outcome of the dispute, the court is unable to presume that they are not knowingly attempting to mislead the judge or the jury
* Third, there is the **expert witness**. This type of witness raises questions of reliability and veracity, but with regard to the latter, to a lesser extent. An expert witness is presumptively independent and there are procedural rules that attempt to ensure that the expert gives neutral evidence based on their expertise
  + An expert can overemphasize the acceptance of a particular scientific opinion and fail to refer to opposing scientific opinions. An expert could conceivably mislead the court with scientific experimental data that has not been rigorously tested and analysed. An expert may be paid by one of the parties and as such he or she may feel the need to overstate the case for that party.
* R v. WD.
* -First, the judge must ask whether she believes the evidence of the accused and if so he must be acquitted.
* -Second, if the judge does not believe the evidence of the accused, but is left with a reasonable doubt as to his guilt, the accused must be acquitted.
* -Third, if the judge is not left with a reasonable doubt concerning the accused’s evidence, she must still consider the evidence that is believed to determine whether the crown has proven the charge beyond a reasonable doubt.
* Inconsistencies:
* -First, the court generally looks for any **internal inconsistencies** in the witnesses’ evidence. Have they said one thing in direct and then contradicted themselves in cross examination. Not every inconsistency is material and sometimes a witness who has virtually memorized her evidence to avoid inconsistencies sounds too rehearsed to be credible.
* -Second, the court looks at whether there are any **external inconsistencies** in the witness’ testimony. This can occur in a number of different ways. A witness may testify to a version of the events that differs from admissions that have been made by the parties.
* -Third, the court considers whether the witness’ evidence as a whole or with regard to certain parts accords **with common sense and logic**. The authorities refer to whether the evidence is consistent with the preponderance of the probabilities. A witness may testify to something that does not ring true.
* -Fourth, the court considers whether the witness had **a good recollection** of the events in general and whether he had a selective recollection of events. A witness who cannot clearly recall the events is not a reliable witness. A witness who recalls matters that tend to favour his case but has a distinct lack of recollection for matters that weaken his case is far less credible than a person who readily admits that they cannot recall an event with perfect clarity.
* -Fifth, the court asks whether the witness has **a motive to fabricate** their evidence. Does the witness have an interest in the outcome of the dispute?
* -Lastly, the court must assess the witness’ **demeanour** on the stand. There are many references in the authorities and in academic research about the risks associated with making credibility assessments based on demeanour. Clearly the manner in which a witness testifies may be dictated by their age, social status, education, culture, intellectual capacity, and mental and physical health

**Truth About Liars-CBC Video/Ronald Cotton and Witness Identification**

**Guest: Peter LaPrairie- Preparing/Examining Witnesses from Human Trafficking**

* Once the police have obtained the full story from the victim – a means of preserving that evidence is by having the victim provide a KGB statement
* A statement taken under oath and video taped where the victim sets out the details of the offence
* The questions are non leading and similar to a direct examination
* KGB statement assures the testimony is available in future if the victim is unable to remember or unwilling to testify at trial – **preserves the evidence for trial**
* It is essential to prepare your victim for trial
* The victim will need to review all of the statements provided to the police – if videotaped watch them
* Review the elements of the offence with the victim so she understands why you are asking certain questions
* Finding evidence to corroborate the victim’s testimony is essential
* As **credibility of the victim is the main focus** of the case it is important to corroborate as much of the victim’s story as possible
* Documentary evidence seized from the accused may support victim’s story
* Control of passports by trafficker
* The credibility of the victim will be the main focus in the case
* The goal of the defence will be to discredit the victim
* It is important that your victim is well prepared to testify and ready to respond to any inconsistencies in the evidence

Victim recants her statements given to the police

* Two ways to proceed:
* Hard way – proceed with a KGB application with the witness  present in court listening to the taped statement
* Easy way – the witness suddenly remembers the contents of the statement and testifies
* **Re-examination is a good way to remedy any allegations** that the victim has provided inconsistent statements.
* This is where a KGB statement can be utilized
* Victim may be scared to testify against the accused
* Showing that the victim has been consistent in her statements to the police and in her evidence in court is a good way to buffer any allegations of inconsistent statements raised in cross.

**Guest Lecture: Matthew Nathanson- Cross Examination**

* Cross examination is a means to gather the evidence that you want for your closing argument
* You want to be able to get facts that logically lead to your stmt.
* 3 key ways to cross examine a W:
* -**Internal consistency** – did the W say something different before? If you put it to the W, the W can either adopt it (then becomes part of the evidence) or reject it (then it is an inconsistency which goes to their reliability)
* -**Consistency with other evidence** – compare a piece of undisputed evidence with the W’s evidence.
* -**Establishing external inconsistency** (eg. friend talking about other friend’s alcohol consumption. If W will lie about this under oath, what else might W lie about?)
* When cross examining non-accused W on a prior criminal record, can attack credibility & character and can bring details of the offence into the cross-examination
* Eg. *R v Rojas* – impaired driving conviction wouldn’t normally say much, but in this case, the W had tried to blame a car crash on his gf (said she was the driver) who ended up injured.
* Collateral issue rule - if a witness denies something on a collateral issue (something that only goes to credibility, not anything else) during cross examination, can't do anything. Can't call other witnesses to contradict the witness

**Guest Lecture: SE-A Investigator- Brian McConaghy**

* Gathering evidence in developing world (child witnesses, crime scenes very dirty, suspects all over the world, transient populations)
* In some panels - could see a calendar (Cambodia - 2003), architecture, language of children
* Viewed NBC Dateline video -- it was the same building!
* Got to Cambodia. Negotiate with Cambodian police. -- but many of them are part owners of the brothels. Had to learn who to trust and who to avoid - got a search warrant.
* Had to show that the house they were in was the house in the video - needed 2 things –
* **Class characteristics**: to show the house was like the house in the video AND
* **Accidental characteristics** (features unique to that house): to show that the house WAS the house in the video
* Used pictures on the wall, structure, marks on the wall, wood rotting, marks on the ceiling
* Witness testimony - may be tainted with counseling
* Confrontation clause in the US (must face your accuser) very different law around witnesses
* Commissioner for oaths - ambassador taking stmts in the Cdn embassy
* Age of the victims - very young - presumption in CEA of competence to testify
* Information/evidence sharing btwn jurisdictions (see section in Maher Arar report about info sharing)
* Translator needed btwn the child and jury - hard enough assessing non-verbal cues

**Tunnel Vision-FPT Report**

* How it could occur in **Evidence Law**:
  + - s.24(2) and improperly obtaining evidence
  + -“shopping” for expert’s to fit with theory
* “the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one’s conduct in response to the information.”
* AKA “Noble Cause Corruption”
* Unreasonably coloured/skewed
* Insidious
* Compromises presumptive of evidence

Crown Tunnel Vision

1. close identification with police and/or victim;
2. pressure by the media and/or special interest groups; and
3. isolation from other perspectives

How Does Tunnel Vision Occur?

* Accused is marginalized or “weird”
* Biases and Stereotypes
* Public pressure
* Unreliable evidence

How to Prevent Tunnel Vision

* Procedural rules on police investigation
* Training and investigation
* Instructing jury on tunnel vision

**Identification and Testimony-FPT Report**

* Eyewitness misidentification is “**the single most important factor leading to wrongful convictions.”**
* When the prosecution's case depends upon the accuracy of eyewitness identification, a trial judge is required instruct the jury on the need for **caution when dealing with such evidence**
* The charge must not only deal with issues of credibility, but also with the inherent frailties of identification evidence because of the unreliability of human observation and recollection.[**[131]**](http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/p5.html#foot131) **Don’t Tase Me Bro Video**
* Trial judge should also instruct the jury about the various factors that can affect the reliability of eyewitness identification evidence
* Regardless of the number of similar characteristics an eyewitness testifies about a particular accused, if there is one dissimilar feature, there is ***no*** identification without other sources of confirming evidence.[**[139]**](http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/p5.html#foot139)
  + -A minor error about one feature of the accused’s appearance, however, may not rob the identification evidence of all weight.[**[140]**](http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/p5.html#foot140) Weak identification evidence may be enhanced by other circumstantial evidence so as to render a verdict reasonable.
* Assume the identity of the accused is always at issue unless the defence specifically admits it on the record. Timely preparation and a critical review of all of the available identification evidence, including the manner in which it was obtained, is required as it will affect the conduct and quality of the trial.
* Allow the witness a reasonable opportunity to review all previously given statements and confirm that the statements were accurate and a true reflection of their observations at the time.
* Carefully canvass the full range of the indicia of the identification, including any distinguishing features that augment this evidence. Remember that it is the collective impact of all of the evidence that will be considered in support of a conviction. Defects in one witness’s identification can be overcome by the consideration of other evidence.
* Never interview witnesses collectively. Never prompt or coach a witness by offering clues or hints about the identity of the accused in court. **Do not condone or participate in a “show-up” line-up**. Never show a witness an isolated photograph or image of an accused during the interview.
* Consideration should also be given to the use of a *K.G.B.* application in the appropriate circumstances if a witness is refusing or unable to cooperate in accordance with a previous statement.
* Never tell a witness that they are right or wrong in their identification.
* Remember that disclosure is a continuing obligation.
* All inculpatory and exculpatory evidence must be disclosed to the defence in a timely fashion. In the event that a witness materially changes their original statement, by offering more or recanting previously given information during an interview, the defence must be told. In these circumstances, it would be prudent to enlist the services of a police officer to record a further statement in writing setting out these material changes.
* Always lead evidence of the history of the identification. It is vitally important that the trier of fact not only be told of the identification but all the circumstances involved in obtaining it, i.e. the composition of photo spread.
* Be wary of prosecutions based on weak single-witness identification. While **not required by law to secure a conviction**, ascertain whether there is **any corroboration of an eyewitness’s identification** in order to overcome any deficiencies in the quality of that evidence.-**THIS SHOULD CHANGE**

**Exam Tips**

* Use headings

**Fact Pattern**

* 1.45 Mins.
* 1) Identify Issue
* 2) Legal Test-state leading authority and set out test
* 3) Analysis- apply to facts, cases to reason by analysis, distinguish or analogize
* 4) Conclusion- come to conclusion
* Memo: impartial outcome, look at both sides and come to conclusion
* Factum/Advice: look to burdens
* Talk about principles in principled approach: reliability, PV, charter values
* Address counterarguments and policy considerations

**Development of Law**

* 30 Mins.
* Did X change law
* Would X be decided differently
* Old facts vs. new
* Intro, body (authorities), conclusion
* What was the law, why did the law change, how did balance shift
* Identify counterarguments

**Policy Question**

* 30 Mins.
* Focus on principles: efficiency, truth-seeking, fairness
* Guest speakers
* Take a position
* Address counterpoints
* Broader trends
* Wrongful convictions