Evidence Law Outline

BASIC FRAMEWORK

SOURCES AND GOALS OF EVIDENCE LAW

Modern approach: human logic, reason, and experience within an impartial judicial environment

Goals of Evidence Law:
The law of evidence is concerned primarily with the means of proof that can be put before the trier of fact at trial, the permissible uses that the trier of fact can make of the proof, and how the means of proof may be presented and tested.

How does our system of evidence cope with the sometimes competing values of truth, efficiency and fairness? – We attempt to maximize each of these 3. Note: If there is a rule that totally throws one of the three values into the dumpster, that's an issue to raise

Sources of Evidence Law:
(1) Common law: In recent years, SCC has been actively modifying and developing common law of evidence; has replaced some categorical requirements with more functional approach; addressed stereotypical thinking
(2) Statutes: Common law rules are tailored by statute to address special circumstances of particular types of subject matter and processes. Cannot be understood without reference to the common law background.
(3) Aboriginal law: SCC: Aboriginal sources of evidence must be respected and balanced with other sources admissible at common law (***Delgamuukw*** *oral histories valid source of evidence for determination of Ab rights*)
(4) The Constitution: Law of evidence is constrained by constitutional requirements (***CA s. 52(1)***). Criminal case: common law rule of evidence inconsistent with Charter is of no force/effect // Civil case: common law rules will be developed in accordance with Charter values

Division of Legislative Authority: Limitations on legislative powers created by ***ss. 91*** and ***92*** apply to the rules of evidence – only Parliament can create rules of evidence for matters falling under federal jurisdiction, and only provincial legislatures can create rules of evidence for matters falling under provincial jurisdiction.

- Federal – ***CEA***: Criminal; federal regulatory; disputes involving federal Crown (***CEA s. 2***)
- Provincial – ***BC Evidence Act***: Property; civil matters (***BCEA s. 2***)
- Residual Clause – ***CEA s. 40***: In some instances, the applicable evidence law in a matter within federal jurisdiction will be determined in accordance with provincial evidence provisions. *Provincial evidence law applies in the province where proceedings are taken subject to the CEA and other Acts of Parliament*.

The Canadian Charter of Rights and Freedoms:
1. *Charter* provides express constitutional protection for some evidentiary principles in criminal proceedings: ***s. 11(c)*** right not to be compelled as a witness against oneself // ***s. 11(d)*** accused is innocent until proven guilty // ***s. 13*** right against self-incrimination in subsequent proceedings
2. ***s. 7*** of the *Charter* has proved to be an important vehicle for the constitutionalization of evidentiary principles (right to life, liberty and security of the person)
3. *Charter* protects important rights in investigation of offences: ***s. 8*** right to be secure against unreasonable search or seizure // ***s. 9*** right not to be arbitrarily imprisoned // ***s. 10(b)*** right to retain counsel
4. Where evidence is obtained in manner that infringes *Charter* right, *Charter* provides for remedy (***s. 24(1)***)

Direct Evidence vs. Circumstantial Evidence:
Direct evidence does not require any inferences to be made. It is evidence that, **if believed, resolves a matter at issu**e (only question = credibility). *Evidence –> if believed –> ultimate proposition.*

Circumstantial evidence requires inferences/generalizations of human logic and experience. It is evidence that **tends to prove a factual matter by proving other events or circumstances** from which (alone or in combination with other evidence) the occurrence of the matter in issue can be reasonably inferred.
Evidence –> chain of inferences –> ultimate proposition.

BURDEN AND DEGREE OF PROOF

EVIDENTIARY AND PERSUASIVE BURDENS

Persuasive Burden: On the party who, in law, is required to establish the relevant facts to succeed.
Evidentiary Burden: On the party whose duty it is to raise an issue. A party under an evidentiary burden must adduce or point to some relevant evidence capable of supporting a decision in the party's favour on an issue before that issue can go to the trier of fact.

CIVIL PROCEEDINGS

In civil proceedings, the plaintiff bears the EB and PB on all elements of the action.

Motion for Non-Suit: "Half-time" at civil case; P has laid out all evidence and rests their case. ***BC Supreme Court Rules Rule 40(8)-40(11)***. D may argue P has not met his evidentiary burden.

- ***40(8):*** *No evidence motion*: D may apply for dismissal on ground that there is no evidence to support P's case. If motion fails, judge will ask D for his case (to lead evidence).
- ***40(10):*** *Insufficient evidence*: D may apply for dismissal on ground that evidence is insufficient to make out Ps case. If motion fails, more of a gamble, ***40(11)*** says you cannot lead case in chief as defense. Unless court otherwise orders, D must have elected not to call evidence // "extent to which evidence supports proposition for what it is put forward to."

Balance of Probabilities:
P must prove his allegations on a BOP: "find the fact more probable than not" (***Miller***) and/or "on the basis of a preponderance of probability…be reasonably satisfied of the fact alleged" (***Smith***).

Disposition:
Apply BOP test by trier of fact. "Standard applied on whole of the evidence and at the end of the case." // "More probable than not" and **if it is 50-50, the moving party loses**. // A probability that is "reasonably satisfied."

Summary Judgment:
Moving party asserts the responding party's case is so weak that it is not worth bringing to trial –> judgment without a trial (***BC Supreme Court Rule 18(1)(b)***). In a motion of summary judgment the moving party is NOT claiming the responding party has led no evidence capable of establishing elements of a cause of action. Objective: Screen out claims that ought not to proceed to trail because they **cannot survive "the good hard look"** (***Pizza Pizza***).

CRIMINAL PROCEEDINGS

Directed Verdict of Acquittal:
Criminal version of non-suit – arises after the Crown rests case – accused asks TJ to rule the Crown has not discharged evidentiary burden –> has not led evidence capable of establishing the elements of the offense.

Test is whether direct or circumstantial evidence, if believed by a jury acting reasonably, would justify a conviction (***R v. Monteleone***)

Test for burden at preliminary inquiry stage: When Crown adduces direct evidence on all elements of the offense, the case must proceed to trial (***R v. Acuri***). // In circumstantial cases (at least one element): Judge must engage in limited weighing of the whole of the evidence, including any defense evidence to determine whether a "reasonable jury" properly instructed could return a verdict of guilt.

Putting Defense in Issue:
The trial judge is required to exercise some judgment as to whether the evidence supports a defense to the extents the jury should consider it.

- **Test: "air of reality"** – defense should be put to a jury if and only if there is an evidential foundation for it. *When there is any evidence of a matter of fact the proof of which may be relevant to the guilt or innocence of an accused, the TJ must leave that evidence to the jury so that they may reach their own conclusion upon it* (***Pappajohn v. The Queen***).

- In applying the "air of reality" test, the TJ considers the totality of the evidence, and assumes the evidence relied upon by accused is true. The TJ does NOT make determinations of credibility of witnesses, weigh evidence, make findings of fact, or draw determinate factual references. The test is NOT to determine whether defense is (un)likely to succeed – the only question is whether the evidence discloses a real issue to be decided by the jury (***R v. Cinous***).
- Once defense has been put to jury, Crown then has burden to disprove all elements of the defense BRD (exception of mental disorder: BOP).
- Two principles: (1) TJ must put to jury all defenses that arise on the facts, whether or not they have been specifically raised by an accused; (2) TJ has positive duty to keep from jury evidences lacking an evidential foundation.

Proof Beyond a Reasonable Doubt:
Crown must prove all elements of offence BRD (entrenched in ***s. 11(d) of Charter***)

Jury Instruction re: BRD (***R v Lifchus 1997 SCC,*** outlines what BRD means and how jury is to be instructed)
Charge should **avoid:** "ordinary" (RD ≠ ordinary) // "moral certainty" (moral certainty ≠ evidentiary certainty) // Do not qualify "doubt" except with "reasonable"

1. That BRD is ordinary expression with no special meaning
2. Inviting jurors to apply same standard of proof they apply to important decisions of own lives
3. Equating BRD to "moral certainty"
4. Qualifying "doubt" with "serious", "substantial", etc
5. Instructing jurors they may convict if they are "sure" the accused is guilty

Charge should **include:** RD = doubt based on reason and common sense, which must be logically based upon evidence or lack of evidence // ***Model charge re BRD*** (Note: a charge which is consistent with the principles set out here will suffice regardless of particular words used by the trial judge.):

1. BRD intertwined with the presumption of innocence
2. Burden rests with prosecution throughout the trial and never shifts
3. BRD is **not based on sympathy or prejudice**
4. It is based upon reason and common sense
5. It is logically connected to evidence or absence of evidence
6. Does not involve proof to an absolute certainty; it is **not proof beyond any doubt** nor is it an imaginary or frivolous doubt
7. More is required than proof that the accused is probably guilty – a jury which **concludes only that the accused is probably guilty must acquit**

"The verdict ought not to be disturbed if the charge, when read as a whole, makes it clear the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply." (***R v. W(D)***).

APPELLATE REVIEW OF FACTUAL FINDINGS

Test for Successful Appeal: (1) Was there an error in law? **(2)** Is there a reasonable possibility that error affected outcome of the case? (i.e. would/could the error reasonably affect the outcome at trial?)

New trial or substitute different verdict (*if verdict necessarily would have followed based on application of law*)

Error in Law: Evidentiary ruling // Error in explanation of law to jury // Misstatement of law in reasons for judgement –> New trial or substitute verdict

Unreasonable Verdict: [Defence only] Used when MR or element of AR lacking – No reasonable jury, properly instructed, could have convicted A on evidence presented –> usually conviction overturned and acquittal entered

Miscarriage of Justice: [Defence only] Was there a failure in the justice process which gave rise to an unsafe verdict? **Crown engaged in misconduct // Jury not impartial –> New trial or acquittal**

Note: Appeal courts are deferential to TJ in findings of fact unless overriding or palpable error on the part of TJ.

TYPES OF EVIDENCE

WITNESS TESTIMONY

General rule is that the parties must dis/prove all facts in issue through oral (*viva voce*) evidence of witnesses. In order to testify, a witness must be (1) competent (refers to permission take an oath/testify in court) and must (2) either swear an oath to tell the truth or satisfy one of the statutory substitutes for the oath.

There is a test for an oath, one for solemn affirmation, one for unsworn evidence and <u>never shall the three meet</u>! – Judges have been overturned for mixing these up, students have been downgraded for it!

OATH

Before a witness can give evidence under oath, they must demonstrate **<u>knowledge that there is a moral obligation to tell the truth</u>**. It must be established that the oath in some way *gets a hold on his conscience* and that there is *an appreciation of the significance of testifying* in court under oath. We no longer inquire into eternal damnation consequences of lying because "no human being can say what are the spiritual consequences of telling a lie under oath (***R v Bannerman* 1996 MANCA**)

SOLEMN AFFIRMATION

The witness must solemnly affirm that the evidence to be given by him shall be **"<u>the truth, the whole truth and nothing but the truth</u>"** (***CEA s. 14(1)***). There is *no requirement that a witness recognize a moral obligation/duty to society* to make a solemn affirmation (this is a low threshold). Note: Knowledge of the law of perjury is not part of the test (although it was a factor in this case)` (***R v Walsh* 1978 ONCA**)

UNSWORN EVIDENCE

Requirements for unsworn evidence as per ***CEA s. 16*** are (1) sufficient intelligence (2) an understanding of duty to tell the truth (***R v Khan* 1990 SCC**). But ***CEA s. 16*** was amended after ***Khan***. Anyone under 14 we presume to have capacity to testify. Evidence of a proposed witness under 14 shall be received if they are **<u>able to understand and respond to questions</u>**. They must promise to tell the truth.

CEA s. 16 Deals with proposed witness over age 14 whose mental capacity is challenged

s. 16(1): If a proposed witness is a person over 14 but whose mental capacity is challenged, the court must conduct inquiry to determine:
- (a) whether person understands the **nature** of an oath or a solemn affirmation; and
- (b) whether the person is **able to communicate** the evidence (interpreted in ***Marquard***)

s. 16(2): A person who understand nature of oath **and** is able to communicate the evidence **shall** testify
s. 16(3): A person who does *not* understand nature of oath **but** is capable of communicating the evidence **may** testify on <u>promising to tell the truth</u>
s. 16(4): A person who does *not* understand nature of oath **and** is *not* able to communicate the evidence **shall not** testify
s. 16(5): Party challenging competency has the burden of satisfying court that there is issue as to capacity

CEA s. 16.1 (Post ***Marquard***) Deals with proposed witness under age 14 (at time of trial)

s. 16.1(1): A person under 14 is presumed to have the capacity to testify
s. 16.1(2): A proposed witness under 14 **shall not** take an oath or solemn affirmation
s. 16.1(3): Evidence of proposed witness under 14 **shall be received if they are <u>able to understand and respond to questions</u>**
s. 16.1(6): Required to <u>promise to tell the truth</u>
s. 16.1(7): There **shall be no questions** regarding their understanding of nature of promise to tell the truth
s. 16.1(8): If testimony is heard, it has same effect as if it were under oath

Test for "ability to communicate" in ***CEA s. 16***:
What is required to determine testimonial competence is a basic ability to (1) perceive/observe, (2) remember/recollect and (3) communicate. The inquiry is into *capacity*, not whether witness *actually* perceived or recollects the events in question (that is for the jury to decide upon hearing the evidence) (***R. v. Marquard* 1993 SCC**)

EXAMINATION OF WITNESSES

Examination-in-chief: Questions asked by party offering witness//leading questions not generally permitted

Cross-examination: Questions asked by opposing party // leading questions permitted and almost always used (*leading question: one which suggests its own answer*)

- X-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition but there must be a **good faith basis**: a function of (1) information available to the x-examiner (2) his belief in its likely accuracy (3) purpose for which it is used (***R. v. Lyttle* 2004 SCC**)
- Non-accused witnesses can be x-examined not only as to facts relevant to the case but as to matters that might cast doubt on their credibility // x-exam of accused on **discreditable conduct** typically not permitted (to protect accused from irrelevant and prejudicial allegations)

Testimonial factors: considered by trier of fact in evaluating a witness's testimony:

1. The witness's use of language – "tall", word choice (implied)
2. The witness's sincerity – do they believe what they're saying?
3. The witness's memory – injury, age, exposure to media reports/other witnesses
4. The witness's perception – anything that inhibited your ability to see, intoxication
(5) The witness's demeanor – calmness, eye contact, tone of voice, etc.

Refreshing Memory:
Witness is entitled to refresh his memory before testifying or while testifying "whether or not the stimulus itself constitutes admissible evidence" (***R v Fliss* 2002 SCC**)

Conditions for the admissibility of past recollection recorded: (***R v Meddoui* 1990 SCC?**)

1. The past recollection must have been recorded in some reliable way
2. At the time, it must have been sufficiently fresh and vivid to be probably accurate
3. Witness must be able now to assert that the record accurately represented his knowledge and recollection at time. Usual phrase requires witness to affirm that he "knew it to be true at the time"
4. The original record itself must be used, if it is procurable

KGB Statements: *initial statement that a V makes to police which is later used in court in lieu of her direct testimony provided certain strict conditions are met (see **R v B(KG)**)*

The Obligation to Cross-Examine a Witness Whom One Intends to Contradict:
"If you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him" (***Browne v Dunn* 1893 HL**). Moldaver JA assumed the existence of this duty and addressed the consequences of non-compliance: (***R v McNiell* 2000 ONCA**)

CREDIBILITY

A ***reliable*** witness is one that is telling the truth // A ***credible*** witness is one that is a truthful person

Means of Assessing Credibility:
(1) Demeanor of the Witness: Certain questions in determining credibility may be answered from observation of witness's general conduct and demeanor (***White v R* 1947 SCC**). When witness is on the stand, the trier can observe the witness's reaction to questions, hesitation, degree of commitment to statement, etc. The trier can also assess the relationship between the interviewer and the witness (***R v B(KG)* 1993 SCC**). (2) Assessing Credibility in the Context of All the Evidence: The real test of the truth of the story of an interested witness in a case involving conflict of evidence must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (***Faryna v. Chorny* 1951 BCCA**).

Assessing Credibility of Child Witnesses:
Standard of "reasonable adult" is not necessarily appropriate in assessing credibility of young children. A flaw, such as a contradiction, in a child's testimony should not be given same effect as a similar flaw in the testimony of an adult (***R v B(G)* 1990 SCC** as cited in ***R v W(R)* 1992 SCC**) – not suggesting that the standard of proof must be lowered when dealing with children. It simply means we must not approach evidence of children from the perspective of rigid stereotypes // Note: where an adult is testifying s to events which occurred when she was a child, her credibility should be assessed according to adult witness criteria **but** her evidence pertaining to events which occurred in her childhood (inconsistencies, time/location, etc.) should be considered in context of the age of the witness at the time of the event.

Deference of Appellate Courts to Findings of Credibility at Trial:
(1) TJs hear witnesses directly. They observe their demeanour and hear the tone of their responses. They therefore acquire a great deal of information which is not necessarily evident from a written transcript // (2) The sifting and weighing of this kind of evidence is the particular expertise of the trial court (**R v Belnavis, 1997 SCC** adopted in **R v Buhay, 2003 SCC**) // However, an appellate court can overturn a verdict based on findings of credibility where it concludes, following a review of the evidence and with appropriate deference to the trier of fact, that the findings are unreasonable (**R v W(R), 1992 SCC**)

Limits on Supporting Credibility:
Generally, a party may not lead evidence as part of its case where the relevance of evidence is limited to showing that **another** of its witnesses is a truthful person –"**oath helping**". Until a witness's credibility is challenged, it is assumed that the witness is telling the truth // However accrediting questions, put to the witness (employment, credentials, etc.) are admissible (***R v Clarke,* 1998 ONCA**).

Four main exceptions to the rule against oath helping: (1) Expert evidence, where the assessment is beyond common experience // (2) Defence may lead evidence of accused's veracity and good character // (3) Prior consistent statements, to rebut an explicit or implicit allegation of recent fabrication // (4) Where the credibility of the witness has been attacked

Prior Inconsistent Statements:
Generally inadmissible for the truth of its contents because it is hearsay // *Exception: KGB Statements: initial statement that a V makes to police which is later used in court in lieu of her direct testimony provided certain strict conditions are met (**R v B(KG)**)*

Other Party's Witness: Procedure to be followed in x-examining other party's witness on a prior inconsistent statement, written or oral, is laid out in evidence acts (***Canada Evidence Act, ss. 10–11***). Traditionally, the prior inconsistent statement of a witness was not admissible for its truth, unless the witness adopted it.

Own Witness: You may want to have your witness declared hostile so you can x-examine witness on prior inconsistent statements – you need leave of court to do this // **NB** common law: "hostile" // statute: "adverse"– seen as a broader concept // (Note: you could use ***CEA s. 9(2)*** to prove that witness is adverse; this *can* lead to ***CEA 9(1)*** but there may be other ways to argue that witness is adverse)

***CEA* s. 9(1)** – implies that a party is not allowed to contradict a witness by other evidence unless that witness has been declared adverse – courts have not read it as requiring that a party prove its own witness to be "adverse" before the party can contradict the witness with other evidence

Prior Convictions:
A witness's prior convictions admissible only for purpose of undermining credibility (***CEA s. 12; BCEA s. 15***)

CEA s. 12 **applicable to accused** if he chooses to testify – trier of fact entitled to infer that an A with a criminal record is, for that reason, less credible than a witness without a criminal record (**PE:** "if you are a criminal, you are more likely to have committed this crime"

Limits on prior convictions of A being admitted: (1) only if A decides to testify can prior convictions be brought in (2) Limited to fact of conviction, cannot x-exam on details of the offence/conduct that led to conviction (***R v Laurier* 1983 ONCA**) (3) Cannot extend to discreditable conduct/associations (4) Cannot examine A about other times he testified and was convicted (5) (Fulfilled) conditional discharge ≠ conviction

TJ has discretion to exclude all/part of prior record in appropriate cases where the PE would outweigh the PV (***R v Corbett* 1989 SCC**, *but this wasn't appropriate case for this – A made deliberate attack on credibility of C witnesses, largely based on prior records. Issue for jury: solely credibility*)

Corbett Application should be made by D and decided by TJ immediately after close of C's case. If necessary, *voir dire* will be held where D discloses evidence it intends to call (note: TJ ruling may be modified if defence evidence "departs *significantly* from what was disclosed"). It is an error to wait until after A has testified to rule on whether criminal record could be used in x-exam (***R v Underwood* 1998 SCC**)

An A can be x-examined on his **record as a juvenile**; jury can take juvenile record into account when assessing credibility (***Morris v the Queen,* 1979 SCC** 5:4 majority ➔ *majority: the word "offence" as used in **CEA s. 12(1)** includes a delinquency that consists of a violation of the CC // dissent: court has no power to convict a child under the Juvenile Delinquents Act; it was express policy of Parliament that a child found to be a juvenile delinquent should not be stigmatized as one who has been convicted*)

Corroboration:
Baskerville formula for corroboration was embodied in common law and in CC // *Ex. Corroboration of accomplices*: Common law requirement that the evidence of an accomplice be corroborated (TJ must instruct jury that it is dangerous to convict on accomplice's testimony unless it is corroborated. TJ must then outline the evidence that is capable of corroborating accomplice's testimony) (***R v Baskerville* 1916**).

Vetrovec*: SCC establishes new, more functional approach for caution in assessing evidence of some witnesses*

Problems with the common law rule on accomplice testimony: (1) Listing of corroborative evidence by TJ gives too much authoritative weight to that evidence (2) Unintelligible instruction to jury: told on one hand that the person shouldn't be believed, but here is a bunch of evidence that supports the evidence (3) TJ is not required to warn jury with respect to testimony of other witnesses with disreputable and untrustworthy backgrounds. Why should we automatically require a warning for an accomplice? (***R v Vetrovec* 1982 SCC**).

"The law of corroboration is unduly and unnecessarily complex and technical. There is no special category for accomplice. Sufficient for TJ simply to instruct jury that they should view the testimony of the witness with great caution and that it would be wise to look for other supporting evidence before convicting the accused."

Vetrovec adopts language from ***DPP v. Hester*** –"**confirmation** from some other source that W is telling truth"

Since *Vetrovec*, where Crown's case depends upon the credibility of witnesses whose veracity might be in doubt, TJs have frequently delivered a "clear and sharp warning" as recommended in *Vetrovec*,.

Bottom Line: TJ has discretion. If in TJ's discretion, the credibility of a witness is to be cautioned, the TJ may give a *Vetrovec* warning. TJ also has discretion on whether or not to draw attention to corroborating evidence.

The Vetrovec Warning will typically include an instruction that it is unsafe to rely on the unsavoury witness's evidence without some other evidence that confirms or agrees with it.

Corroborative evidence must be independent and material to their story (***R v Khela* 2002 SCC**)

REAL EVIDENCE & DOCUMENT

Evidence has been found to be real when it refers to tangible things (***R v Wise* 1992 SCC**); blood stain, gun, etc. General rule: real evidence and documents must be authenticated through a witness. Rationale: to ensure that chain of custody has remained intact (issue of contamination) // to allow x-examination because item cannot speak for itself // to allow us to test the item // allows relevant information that could in/decrease weight given to that item.

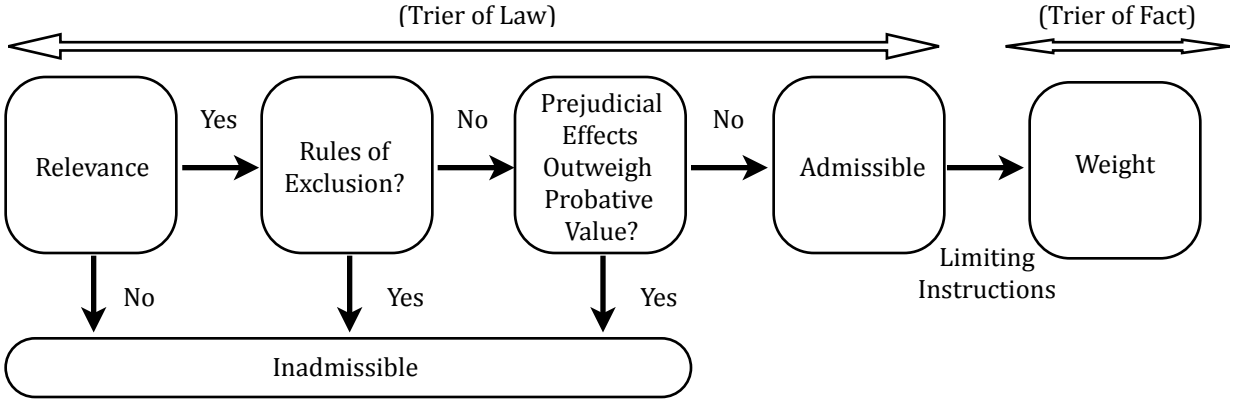
Statutory Exceptions to General Rule of Authentication:* *CEA ss. 19–36* // *BCEA ss. 25–52, 54–70

CEA s. 19 Act of Parliament published by Queen's Printer (note: foreign laws do need to be proven – must call a witness/expert in the foreign law)

CEA s. 30(1) Business records made in usual and ordinary course of business

CEA s. 31.1 Electronic documents, e-mails (note: party seeking to introduce has burden of proving authenticity – problems with electronic documents: identification of author // easier to alter // can make copies)

FUNDAMENTAL RULE OF EVIDENCE LAW



Evidence is only admissible if it is:

(1) Relevant
(2) Not subject to exclusion under any other rule of law or policy

RELEVANCE

Factual relevance ("*relevance*") is established at law if, as a matter of logic and human experience, the evidence tends to prove the proposition for which it is advanced // ***Legal relevance*** ("*materiality*") is established if evidence is directed at a matter in issue in the case (***R v Collins* 2001 ONCA**)

Relevance Test

Relevance requires a determination of whether, as a matter of human experience and logic, the existence of Fact A makes the existence or non-existence of Fact B more probable than it would be without the existence of Fact A. If it does, then Fact A is relevant to Fact B (***R v Watson* 1996 ONCA**)

When looking at relevance, there is **no minimum probative value** … any matter that has any tendency, as a matter of logic and human experience, to prove a fact in issue, is *prima facie* admissible (***R v Watson* 1996 ONCA** citing ***R v Morris***). *Even if the PV is low and the PE is high, evidence can still be admitted as long as the limiting instructions to the jury can bring down the PE to a level where the PV is higher.*

Re Habits: *Surely any sensible person in investigating whether a given individual did a particular act would be greatly helped in his inquiry by evidence as to whether that individual was in the habit of doing it."*

All relevant evidence is admissible subject to a **discretion to exclude matters** that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy (***R v Watson* 1996 ONCA** citing ***R v Corbett***)

Reasons for excluding relevant evidence:

1. Admission would distort fact-finding function of the court (hearsay – relevant but insufficiently reliable)
2. Admission would unnecessarily prolong trial or confuse the issues (evidence that witness is not credible)
3. Admission would undermine some important value other than fact-finding (evidence obtained in violation of Charter **s. 24(2)**)
4. Manner in which it is acquired or presented is inconsistent with the nature of the trial process (trier of fact cannot perform own investigation)
5. Its ***probative value*** is outweighed by its ***prejudicial effect*** (possibility that the evidence may distort the fact-finding process, resulting in unfairness to accused – criminal cases)

Note: It is much harder to exclude evidence led by the defence – designed to balance

PROBATIVE VALUE AND PREJUDICIAL EFFECT

At common law, a trial judge has the discretion to exclude otherwise relevant evidence on the ground that its prejudicial effect exceeds its probative value.

Probative value refers to the proper use of the evidence. ***Prejudicial effect*** refers to the improper use of the evidence. The main idea behind prejudicial effect is that it might interfere with fact-finding process by causing trier of fact to engage in improper reasoning and draw inferences which it is not meant/permitted to do.

This discretionary power of court is applicable to both parties in civil cases and the Crown in criminal cases. For Defence in criminal cases: **Seaboyer Standard** – Evidence led by Defence in criminal cases can only be excluded if the prejudicial effects **substantially outweigh** the probative value (***R v Seaboyer* 1991 SCC**).

Seaboyer **makes it tougher for the TJ to exclude evidence that the A wants to lead. To exclude Defence evidence, there better be a lot of PE. You have a problem if you exclude evidence for which PV is not substantially outweighed by PE.**

EXCLUSIONARY RULES

(1) Before you consider exclusionary rules, do a relevance analysis. If it is relevant: (2) "Is an ER engaged?" (3) How does ER operate? (4) The rationale behind the rule – because SCC has shown increasing willingness to radically alter or reject old rules if they no longer serve their purpose.

HEARSAY

Common law approach (i.e. specific, narrow, rigid exceptions) + Principled approach (i.e. we are going to think for ourselves instead of categorizing) = Awkward hybrid used in Canada

"Hearsay" is an <u>out of court statement</u> that is <u>offered for the truth of its contents</u>, where there is no **opportunity for contemporaneous cross-examination** (***Khelawon***)

Hearsay Test (Principled Approach)

(1) Is it relevant? If yes, admissible.
(2) Is it hearsay? If statement is led for non-hearsay purpose ➔ No ➔ admissible (***Subramaniam***)
If statement is led for truth of contents ➔ Yes ➔ presumptively inadmissible (***Mapara***)
(3) Does it fall within a traditional exception?
If yes ➔ presumptively admissible and <u>conclusive</u> (***Khelawon***)
<u>Unless</u> exception itself is challenged based on necessity and reliability (***Khelawon***, overturning ***Mapara***) ➔ inadmissible
If no ➔ may still be admitted if necessity & reliability established in *voir dire* (***Mapara***)

IDENTIFYING HEARSAY

[First, identify the issue at trial] // **(1) Relevance analysis**: It matters how you define relevance of the hearsay statement; the way you define its relevance actually *tells you* whether or not it is hearsay // **(2) Identify witness** // **(3) Identify declarant** (note: witness and declarant could be the same person) // **(4) Purpose of statement** (note: often the statement will serve dual purpose: a hearsay purpose and a non-hearsay purpose. You can have a *voir dire* to try to get statement in for the hearsay purpose. If this fails, you can still lead it for the non-hearsay purpose and TJ will give a caution as to the correct use of the evidence).

Easy test for identifying hearsay: "Would you still lead the evidence if the statement was false?" If the answer is yes, then it is not hearsay.

When an out-of-court statement is offered simply as proof that the statement was made, it is not hearsay, and it is admissible as long as it has some probative value (***Subramaniam***)

If someone testifies as to what they said at a previous time but they are *not* adopting it as their own at trial, it is still hearsay (because you can't be cross-examined contemporaneously)—but hearsay is allowed if the witness was contemporaneously cross-examined (even if necessity requirement not met) (***Khelawon***)

Hearsay Dangers: *(rationale for excluding hearsay, an otherwise relevant piece of evidence)*
1. It is risky because statement was not under made under oath
2. It is not subject to punishment – perjury doesn't apply to that statement
3. It is not subject to cross-examination and we can't assess testimonial factors (when witness ≠ declarant)
4. Hearsay statements are potentially unreliable
5. Hearsay evidence is not the "best" evidence

TRADITIONAL APPROACH

Traditionally, hearsay evidence would be presumptively inadmissible unless it fit within a traditional exception. *SCC (under old model): courts could continue to identify new exceptions at common law, therefore category of common law exceptions to the hearsay rule was open* (***Ares v Venner* 1970 SCC**).

Traditional Exceptions to the Rule Against Hearsay [very narrow and rigid interpretation]

1. **Admissions of a Party (accused or party in litigation):** An admission against interest made by accused is admissible provided its probative value outweighs its prejudicial effect (this last part is redundant because even if it is admissible based on an exception, you still have to do a PV/PE analysis) (***R v Terry* 1996 SCC**)
2. **Business Records:** Employment record/contract/receipt. Requirements for admitting the record (***R v Monkhouse* 1988 WWR**): (1) Must be original entry (no copies) // (2) Must be a contemporaneous recording (Reliability issue: less likely to have been forged) // (3) Must be in routine course of business (routine record keeping; rationale: if they do it the same way every single time, its more likely to be correct) // (4) Must be a record of business // (5) Must be by a person who is since deceased (because if they're alive, you can just get them on the stand) // (6) Must be by a person who was under a duty to do the act and to record it // (7) Person must have had no motive to misrepresent the record // Note: there are also statutory provisions that allow business documents in *but* they don't deal with the hearsay issue, so you have to think about both
3. **Declarations Against (Pecuniary, Proprietary, Penal) Interest:** Without this exception, you couldn't allow confessions (***R v Demeter* 1978 SCC; *R v O'Brien* 1978 SCC**)
4. **Dying Declarations:** Refers to a case from 1824: Only admissible where (1) death of deceased is the subject of the litigation (i.e. murder); (2) the evidence is be about the circumstances of the death; and (3) it is evidence that could have been given if the deceased had lived (***R v Schwartzenhauer* 1935 SCC**) // Note: if it is double hearsay, you couldn't have put the deceased on the stand because it would have been hearsay
5. **Prior Identification:** Refers to a case called ***Tat***: 2 situations where evidence is admissible: (1) Prior statement identifying the accused is admissible where identifying witness also identifies the accused at trial (**docket ID**) // (2) Where identifying witness is unable to identify the accused at trial *but* can testify that he/she gave an accurate description or gave an accurate ID—and in that case, those who heard that ID can be a witness (***R v Starr* 2000 SCC**)
6. **Prior Testimony:** Testimony of declarant in a prior proceeding, raises hearsay dangers because the trier of fact can't examine demeanor, can't cross-examine (they were examined, but by someone else) (***R v Hawkins* 1996 SCC**)
7. **Prior Inconsistent Statements:** Witness has given sworn videotaped statement, but there is a possibility that witness may recant due to intimidation or fear. If testimony in court varies from videotaped testimony, *evidence of prior inconsistent statement may be admissible on a principled basis, the governing principles being the reliability and necessity of the evidence* (necessity may exist where you have the witness but the evidence itself is unavailable). **Requirements of KGB Statements:** (1) Threat of perjury // (2) Contemporaneous recording done by video (***R v B(KG)* 1993 SCC**)
8. **Public Documents:** ***R v Finestone* 1953 SCC**
9. **Ancient Documents:** ***Halfway River First Nation v British Columbia (Ministry of Forests)* 1999 BCCA**
10. ***Res Gestae*:** In times of shock, spontaneous declarations may be admissible (***R v Ratten* 1971 All ER**) (without consciousness/opportunity to lie)
11. **State of Mind:** Statements related to intention or mental state—to support the inference that declarant followed through on stated course of action (***R v Starr* 2000 SCC**) (cannot be made under circumstances of suspicion)
12. **Oral History:** In cases related to aboriginal rights, oral evidence admissible when reliable (***Delgamuukw v British Columbia* 1997 SCC**)

PRINCIPLED APPROACH

The SCC has come to recognize that the traditional hearsay exceptions were driven by two fundamental principles: necessity and reliability (originally set out in ***Khan*** and ***Smith***)—Significance of ***Khan***: it is an expression of the principles that underlie the principled approach (Lamer J in ***Smith***).

The SCC has held that the traditional exceptions should not be abolished, but that these exceptions must be updated and assessed in terms of necessity and reliability (***Starr***). In ***Mapara***, McLachlin CJC presents a framework for balancing the traditional exceptions with the principled approach.

(1) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain in place and are conclusive (***Khelawon***).
(2) A hearsay exception can be challenged to determine whether it is supported by *indicia* of necessity and reliability, required by the principled approach (***Mapara***), however, the exception must be challenged generally, not on a case-by-case basis (***Khelawon***, *overturning* ***Mapara***). The exception can be modified to bring it into compliance (***Mapara***).
(3) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if *indicia* of necessity and reliability are established on a *voir dire* (***Mapara***).

Necessity: Must be reasonably necessary (***Khan***). ***Khan*** set a high standard for necessity, but this has relaxed in subsequent cases. Necessity goes beyond unavailability of the declarant, the quality of the evidence is also relvant—can we adduce evidence of the same value from another source? (***Starr***). It must also be an issue of central concern to the case (***Starr***). // Factors to consider: can we adduce evidence of the same value from another source? (***Starr***)// incompetence of child to testify (***Khan***) // psychological harm or trauma (***Khan***).

Reliability: Must be significantly reliable; what matters will vary according to circumstances (***Khan***). There are 2 common scenarios where reliability will be established: (1) circumstances in which it came about suggest strong reliability (***Smith***/***Khan***/no motive to lie) // (2) circumstances allow for sufficient testing of reliability other than through cross-examination (***KGB*** statement) — There is a tension in the reliability analysis between TJ and TF (***Starr***). Threshold reliability is considered by TJ, while ultimate reliability is considered by TF (***Starr***), *but* TJ must be mindful of their limited role when assessing reliability; TJ cannot exclude evidence at threshold stage without consideration of corroborating evidence (***Khelawon***). // Factors to consider: lack of motive to lie (***Khan***) // corroborating evidence (***Khelawon***) // timing (***Khan***) // intelligence, understanding, language used (***Khan***)

STATEMENTS BY ACCUSED PERSONS

If an out-of-court statement (hearsay) falls within a traditional exception, it is "presumptively admissible and conclusive" unless the general exception is challenged (***Khelawon***). Statements by accused against penal interest are a traditional exception to the hearsay rule. An exception to this traditional exception is the common law "**confessions rule**"**:** statements by accused to persons in authority are inadmissible unless they are proven beyond a reasonable doubt to be voluntary**.**

Hearsay rule: out-of-court statement = inadmissible
➔ **Traditional exception to hearsay rule:** statement by A against penal interest = admissible
➔ **Exception to exception (confessions rule):** statements by A to persons in authority = inadmissible
➔ **Exception to confessions rule:** statement proven BRD to be voluntary = admissible

Issue: *these cases aren't going to be about necessity, they're going to be about* ***reliability****.*

If the confession was made to a person who is **not a person in authority**, then it is presumptively admissible. If the confession was made to a **person in authority**, then the Crown must prove BRD that the confession was *voluntary* for it to be admissible. Whether/not a person is a person in authority will be determined in *voir dire*

PERSONS IN AUTHORITY

A "person in authority" is generally someone engaged in the arrest, detention, interrogation, or prosecution of an accused. Absent unusual circumstances, an undercover officer is not usually viewed, from an accused's perspective, as a person in authority (Abella J in ***Grandinetti***).

Rationale: The person in authority has actual **or** perceived power over the accused's liberty or the criminal prosecution process against the accused in some way. **Dual purpose:** reliability of confession + protection of/ fairness to the accused.

The person to whom the statement is made must be perceived by the accused as being a person in authority—this is a **subjective test**. Even if, objectively speaking, the person is actually a person in authority, if the accused did not perceive them as such, then they are deemed not to be a person in authority. It is not sufficient that the accused simply *suspected* that the person is a person in authority; the accused must have knowledge that the person they are making the confession to is, in fact, a person in authority (***Rothman***).

Policy: Police must sometimes, of necessity, use undercover tactics but there are limits on what they can do in terms of admissibility of evidence (***Rothman*** sets a low threshold for appropriate police conduct).

"Persons in authority": *de jure* (legally) vs. *de facto* (in fact—i.e. they appear to have influence)

- Police officers or other agents of the state
- Prison guards and peace officers – *automatically considered persons in authority by virtue of their status* (***Hodgon* 1998 SCC**)
- Complainant – *if the accused believed they had control over the initiation of proceedings* (***Downey***)
- Social worker – *if the accused believed the social worker investigating child abuse allegations would report the abuse (statutory obligation to report)*(***Sweryda* 1987 ABCA**)
- Family of complainant – *if family members have contact with police, they could be perceived as acting as agents of police* (***Wells* 1998 SCC***, there should have at least been a voir dire*)

"Persons *not* in authority":

- Psychiatrist (***Wilband* 1967 SCC**)
- Parent – *parent is not, as a matter of law, a person in authority if there is no close connection between the decision to call authorities and inducement on a child to make a statement* (***AB***)

These are case-specific, fact-specific, and *voir-dire*-determined // Standard for review: highly deferential (CA judges give high level of deference on whether person was "person in authority", even higher level of deference on voluntariness) // NB: remember—you can't argue that "in this case, the parents were egregious, therefore the confession is not reliable", you have the challenge the *whole rule* (***Khelawon***)

VOLUNTARINESS

(1) Inducements

Confessions rule: A statement by an accused against penal interest is inadmissible in evidence against him unless it is shown by Crown to have been a ***voluntary statement***—in the sense that it had not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority (i.e. good cop, bad cop) (Lord Summer in ***Ibrahim v The King* 1914 AC,** *classic articulation of the inducement aspect of the confessions rule*) // So the fact that the statement was made to a person in authority is not enough; there must have been an inducement held out by the person in authority. Inducement can be proposed by the accused (***Spencer***) // But: we're going to ask, how strong was the inducement? (***Oickle***)

Cases finding a lack of voluntariness:

- ***R v Leblanc* 1972 BCCA:** Accused charged with theft, testified he was told by police "until we get some sort of answers where the stuff come from… we just can't get no bail"
- ***R v Letendre* 1979 BCCA:** Charged with stolen stereo equipment, denied it; one officer said "Well, I'm getting mad". Other officers says he doesn't like to see his partner get mad. Accused "got scared" and said: "I stole the stuff myself, okay". *Quid pro quo*: threat of harm. But we want to know the details: how big was the officer, did he actually say it in an angry tone of voice, was the accused handcuffed, etc.—this is why there is a high standard of deference in appellate review.
- ***R v S(SL)* 1999 ABCA:** Police officer: "the only way you can get better is by telling me the truth"… "you're not on the right track"—induced by planting in the accused's mind that the path to rehabilitation begins with a confession (note: just because a statement may be or is true, doesn't mean its not an inducement)

Cases finding voluntariness:

- ***R v Hayes* 1982 ABCA: "**It wouldn't be very good if you're telling us a story and it turns out you're lying"
- ***R v Reyat* 1993 BCCA:** Accused charged with terrorist bombing. Implication from police that harm may come to his "beautiful" family—implied that if accused didn't co-operate, family may be investigated.

(2) Operating Mind Doctrine

Voluntariness analysis extends beyond inducements; further investigation is required even if there is no hope or fear of prejudice. Statements made by persons without an operating mind cannot be admitted as evidence (***Ward v The Queen* 1979 SCC**).

Standard is pretty low: Operating mind doctrine requires that the accused possess a limited degree of cognitive ability to understand what s/he is saying and to comprehend that the evidence may be used in proceedings against the accused. No inquiry is necessary as to whether the accused is capable of making a good or wise choice or one that is in his/her best interest (***R v Whittle* 1994 SCC**).

Underlying concerns: (1) reliability—how much weight can we give a statement that was made without full consciousness) (2) voluntariness broadly understood—did the accused make a choice to make that statement? Couple that with the right to silence and you'd have a very strong case post-*Charter* (asking someone to incriminate themselves while not fully conscious: ooh, you're in trouble!)

(3) Oppression Doctrine

State of mind of the accused is relevant—an atmosphere of oppression may be created in the circumstances surrounding the taking of a statement.

Oppression is not about deliberate and attempts of police to create an oppressive environment. A lack of malicious intent/to humiliate does not matter; what does matter is that the will of the accused is overborne in order to establish oppression (***R v Serack* 1974 BCSC**).

However, the accused's own timidity or subjective fear of the police is not included in this analysis, unless there are external circumstances brought about by the conduct of the police that can be said to cast doubt on the voluntariness of the statement (***Hobbins v The Queen* 1982 SCC**). So fears that are in the mind of the accused will not factor into the voluntariness analysis.

Factors to consider: food breaks, how often reminded of rights, smoke breaks, offered food that complies with religious beliefs, religious observances. You have to argue that circumstances raise a reasonable doubt about voluntariness of the statements. NB: lack of oppression will support a finding of voluntariness (***Oickle***)

Consolidated Approach:

A statement can be involuntary based on circumstances, an oppressive environment or conduct, a lack of operating mind, or a **combination of these things** (***Oickle***).

Oickle is an objective analysis, but we are to consider subjective characteristics (Deschamps J in ***Spencer* 2007 SCC**). ***Oickle*** prevails over ***Ibrahim***. ***Oickle*** broadly recast the law relating to voluntariness. Voluntariness involves multiple factors—we will consider the 3 categories *but* police trickery/lies are still a distinct category because of the fundamental purpose (this is more about the repute of the administration of justice). Search for inducements (if you're going to make an argument for it) is now the starting point, not the end point for the voluntariness analysis. Circumstances to consider in assessing inducements: is the participant savvy/mature?

Consequence of ***Oickle***: An argument of involuntariness may fail on each branch of the voluntariness doctrine separately, but when you put all the factors together, it may satisfy the involuntariness criteria. ***Oickle*** allows Defence to make arguments that consolidate all the different parts of voluntariness, but it takes back what voluntariness actually means (have to show strong incentive, intense pressure, et.). Its a contextual test.

High level of deference given because it is fact-specific but even when you are being deferential, the law still has to be correct, also have to consider palpable and overriding error of fact

Confessions Test (Consolidated Approach)

(1) Is it relevant? If yes, admissible.
(2) Is it hearsay? If statement is led for truth of contents ➔ Yes ➔ presumptively inadmissible (***Mapara***)
(3) Does it fall within a traditional exception?
If statement by accused against penal interest ➔
Yes ➔ presumptively admissible and conclusive (***Khelawon***)
Unless exception itself is challenged based on necessity and reliability (***Khelawon***, overturning ***Mapara***) ➔ inadmissible
If no ➔ may still be admitted if necessity & reliability established in *voir dire* (***Mapara***)
(4) Was the statement made to a person in authority?
If yes ➔ Confessions Rule ➔ presumptively inadmissible
Unless Crown can prove voluntariness BRD
If no ➔ admissible

THE CONFESSION RULE AND THE CHARTER

Confessions rule and *Charter s. 7* tests are functionally equivalent: If Crown proves BRD that the statement was voluntary, Defence cannot make an argument that right to silence was violated (***s. 7*** functionally = confessions rule). If circumstances are such that the accused can show (on BoP) that the statement was obtained in violation of his right to silence, then the Crown will not be able to prove voluntariness BRD (***Singh***).

The constitutional right to silence has not changed the voluntariness rule. The ultimate question is whether the accused exercised free will by choosing to make a statement. ***Right to silence ≠ right not to be questioned*** (***Singh***) *however police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities* (Charron J in ***Singh***)

Residual protection offered by *s. 7* is only triggered upon detention (rationale: after detention, more vulnerable position). Example where ***s. 7*** goes beyond confessions rule: statements made to undercover cop—confessions rule not triggered because undercover cop is not a person in authority (***Rothman***, ***Grandinetti***).

Factors to consider: (1) failure to warn suspect that police have reasonable grounds to believe accused committed the crime (2) efforts made by accused to invoke his right to silence (***Singh***).

Note: if the suspect is detained by police, the test for voluntariness is more strict (***Singh***).
Note: Non-confession statements made to person in authority subject to same voluntariness analysis (***Singh***).

OPINION & EXPERT EVIDENCE

General rule: opinion evidence is presumptively inadmissible. **Rationale:** We want witnesses to testify as to facts to help TF form an opinion on guilt/innocence, we don't want to usurp the role of the TF which would cause the TF to simply defer to the expert; we also don't want to confuse or mislead the TF

Dangers of expert evidence: distorts fact-finding process // too much weight given // TF will defer to expert opinion (apt to accept without review) // may be misused by jury // competition of experts // independence of experts

Exception to exclusionary rule: (1)"lay opinion" or (2) "qualified expert opinion"

[Note: the closer the expert's opinion is to the ultimate issue, the stricter the test for admission]

LAY OPINION

Lay Opinion Test

A witness to crime can provide an opinion regarding something that is within common knowledge and experience of people and doesn't require expert qualifications (i.e. must be on an issue for which expert is unnecessary and TF can reasonably confront opinions) (***Graat***).

Can give opinion on: identification of handwriting/persons/things, apparent age, apparent weight, bodily condition of the person (such as ill/dead), emotional state, condition of things (worn, shabby, used/new), questions of value, estimates of speed and distance [*rationale: efficiency*] (***Graat***) // **Cannot give evidence to legal issues** (ex. can give opinion on factual impairment but not negligence) (***Graat***) // Can only give basic credentials (must avoid credibility/reliability-helping) "beware of expert in lay person's clothing" (***Graat***)

Factors to consider: (a) is witness drawing a logical inference from the facts? // (b) are the facts upon which the opinion is based too speculative? // (c) is witness providing opinion that is phrased as a legal conclusion? (legally conclusive statements are prejudicial) // (d) does evidence go beyond common knowledge (can't say *X* fell down and *was having a heart attack*)

Weight: even if a witness can give an opinion, there may be significant issues to weigh: Is the lay witness qualified to draw this inference even if it is common knowledge (ex. maybe they personally have less experience in this area) // Does the lay witness have a certain background that would lead them to a certain conclusion? // Some opinions are too dangerous to allow (ex. laypersons cannot give opinion that someone is mentally ill) // Weight is also addressed at **probative value/prejudicial effect stage**—increased experience with drunk people may make their evidence more probative but may also lead to more prejudice in that the jury will simply defer to the police officer's opinion

EXPERT OPINION

Requirements for Admission of Expert Evidence (***Mohan***)

(1) Relevance: Requires finding of *both* logical relevance and a determination that the benefits of the evidence (weight, materiality, reliability) outweigh the costs (confusion, "mystic infallibility". The opinion must be so related to the fact at issue that it has some tendency to help solve it. (***Mohan***)
(2) Necessity in assisting TF: Evidence is necessary because it is not expected to be within the common knowledge and experience of TF (***Mohan***). Must be necessary to enable the TF to appreciate matters in issue due to their technical nature (***Abbey***). If the jury can form an opinion without the expert, then the expert is not necessary.
(3) Absence of exclusionary rule: Evidence cannot run afoul of exclusionary rules of evidence separate and apart from the opinion rule itself (***Mohan***).
(4) Properly qualified expert: There is a concern that the evidence will be misused, given more weight than it should, treated as "virtually infallible". This could distort the fact-finding process. ***Test:*** a properly qualified expert has "acquired special or peculiar knowledge through study or experience." Expert status is achieved when the expert possess special knowledge and experience going beyond that of TF (***RWD***).

The analysis boils down to necessity (#2) and reliability (#4).

The closer the expert's opinion is to the **ultimate issue**, the stricter the test for admission including: the more qualified the expert should be, through study or experience (based essentially on CV).

TJ as gatekeeper: must scrutinize evidence to exclude junk science and protect the role of the TF (***JLJ***)

Jury instructions can be helpful to address the dangers of expert opinions // Preventing too many experts and surprise experts is addressed through **legislation**.

Examining and Cross-Examining Expert Witnesses: It is preferable to elicit expert opinion based on hypothetical facts, because if a fact is shown to be disproven, it could be fatal to opinion/case.

Scope of cross-examining an expert witness: Can be cross-examined on contradictory opinions in authoritative work but witness must acknowledge that he is familiar with the work cited and agree that work is authoritative (***Marguard* 1993 SCC**)—seems a bit absurd because expert can just deny authoritativeness)

Ask the TF: (1) Do you believe the facts which the expert based their opinion on? (2) Do you believe the opinion of the expert (based on qualifications).

STATUTORY PROVISIONS

Statutory reforms in England: Restricting more severe; expert evidence is most helpful when it is independent and not tied to adversaries. England does not rely on our system.

Canada: Expert witnesses have obligation to tell the truth, but do not have express obligation to report to the court in an independent and non-partisan manner.

- ***CEA s. 7***: Restricts number of experts that each side can call to five in any proceeding. Interpreted as 5 per issue (***Fagan v. Urie* 1958 SCC**).
- ***BCEA s. 10***: Requirements for written report (copy given to all parties 30 days prior assertion of qualifications required; etc).
- ***BCEA s.11***: Expert must not give opinion unless a written statement of that opinion and the facts on which that opinion is formed has been given to all parties 30 days prior to testimony. Note: Person presiding may still permit the statement, pursuant to ***s. 11(2)***.
  - Section 12: Section 11 does not apply to criminal proceedings.
- ***BCSC Rule 32(a)***: Ability of court to appoint independent expert (inspecting property; assessing mental state of person). In these circumstances, the report of expert is tendered as evidence—does not need to be called. This is form of documentary evidence.
- ***BCSC Rule 40***: Procedures of expert opinion.
- ***Criminal Code s. 657.3***: Experts on both sides must disclose they will be providing opinions. Crown must disclose a copy of its expert report within a reasonable time prior to trial.

CHARACTER & SIMILAR FACT EVIDENCE

CHARACTER EVIDENCE OF ACCUSED

When we introduce character evidence, the inference we are asking the TF to draw is that A is the type of person who would commit this crime (propensity, disposition, character – not habits, tendencies (allowed))

There is a concern about the **probative value** of character evidence (how much does it help us to know how I behaved at a certain time in a specific context) and the **prejudicial effects** (improper reasoning: we're going to punish someone because of who they are, not because of what they did)

It is generally impermissible to engage in disposition reasoning (you are a certain type of person therefore you are more likely to have committed this crime) except when it is led by the accused.

Accused can lead evidence of good character for two purposes: (1) I am an honest person, therefore I am credible and you can believe me when I say I did not commit this crime. (2) I am a good person, therefore I am less likely to have committed this crime (disposition reasoning) (***Profit***). Good character evidence led by the accused is admissible and is an exception to the oath-helping rule.

Crown can only lead evidence of bad character of accused when character is put at issue by accused. This is a door that the *accused* opens (doesn't have to be by Defence counsel, can be unintentional). If accused does not put character at issue, Crown can still introduce prior bad acts if they fall within the similar fact rule.

Threshold Test: "Putting Character at Issue"

The accused will be found to have put character at issue if he "asserts expressly or impliedly that he would not have done the things alleged against him because he is a person of good character"—i.e. if the accused leads the TF to disposition-style reasoning (***R v McNamara* 1981 ONCA**). *Ex: My company is run "as a company should be run, legally"—implicit character trait: law-abiding, honest.*

Accused is **not** found to have put character at issue if he denies his guilt, repudiates the allegations against him, gives an explanation of matters essential for the defence—they are all directly relevant to, and squarely defined within the four corners of, the charges against the accused (***McNamara***).

Even when accused puts character at issue, Crown can only lead this bad character evidence for two purposes: (1) The accused is lying, therefore he is not credible and you shouldn't believe him. (2) To rebut the evidence of good character – all this does is neutralize the good character evidence (but it can go further—if the bad character evidence shows that the accused has lied under oath, it can taint the accused's entire testimony and undermine his entire credibility). **The Crown *cannot* lead bad character evidence for the purpose of disposition reasoning:** (3) The accused is lying/bad person, therefore he is more likely to have committed this offence (TJ must instruct the jury on the proper use of bad character evidence: jury *cannot* draw the inference that the accused is more likely to have committed the crime).

General principle: Crown is only entitled to respond with evidence of similar nature to what accused presents. Scope of Crown's ability to respond is limited to evidence of similar nature.

[Note: If character is a live issue in the case (i.e. character evidence is direct evidence) then evidence on character is admissible by both parties and these rules do not apply. *Ex. lawsuit about liable/slander re dishonesty, dangerous offender application.*]

[Note: all it takes to get the accused's criminal record into trial is for the accused to take the stand (***CEA s. 12*** trumps common law)]

There are three methods of proving character of the accused:

(1) General Reputation of the Accused

Reputation is based on general knowledge *not* someone's personal opinion—this is inadmissible (***Graat***). To prove character of the accused, you have to show reputation based on what the *community* thinks of that person. Traditional concept of community: where you live, but we have moved away from this common law reputation based evidence because *no one* knows anyone in their community anymore! TJ was using an outdated definition of community. Per Harradence JA: **"There may be distinct circles of persons, each circle having no relation to the other, and yet each having a reputation based on constant and intimate personal observation of the man."** (***R v Levasseur* 1987 ABCA**)

Community Test

(1) You have to identify a distinct circle of people that the witness is a part of, each circle having no relation to the other. (2) the reputation must not be based on gossip only, but rather based on constant and intimate personal observation of the man (***Levasseur***).

For some offences (*behind-closed-doors, crime-of-secrecy*)**,** character evidence will be of such low probative value that it is really not very helpful at all and the prejudicial effects would likely outweigh the probative value. Sexual assaults are shrouded in secrecy and flawless of character may not come to light until accused is charged. (*dissent in* ***R v Profit* 1992 ONCA**, *gets endorsed by SCC*).

However, this does not mean that good character evidence of general reputation should be excluded in cases of sexual assault. It simply means that, in a jury trial, if the TJ does not exercise their discretion to exclude the evidence on the basis of PE *substantially* outweighing PV (***Seaboyer Standard*** since it is Defence evidence), then the evidence should be put to they jury but with a strong warning that the jury should question how much weight to give to it, given the nature of the offence (*sexual, behind-closed-doors, crime-of-secrecy*) and the potential disconnect between the crime and the reputation of the accused.

Ontario College of Physicians and Surgeons, cited by dissent: "there is data to show that evidence of good character does not have any bearing in the propensity of an individual to abuse patients sexually… abusers often build good character profiles to camouflage their abuse."

(2) Specific Acts of the Accused

Difference between general reputation and specific act: specific act is based on one incident. General reputation evidence must be given through people other than the accused but evidence of good acts can only be led by the accused (*practically: individual good acts have low probative value*) (***McNamara***).

In responding to evidence of good character, Crown has a broad ***scope*** but is limited in ***purpose*** (***McNamara***).

When character is put at issue by accused, the Crown is not limited, in leading rebuttal evidence, to the same type of evidence that the accused led to establish good character (***McNamara***, *accused implied he is a good, honest businessman*). So if the accused leads evidence of good general reputation, the Crown can use proof of prior bad act to rebut the claim of good character and to show that the accused lied (undermining credibility).

However, this is going to require a jury instruction: The evidence of prior bad act cannot be used to show that the accused is more likely to have committed this offence, it can only be used to undermine the accused's credibility.

Interplay Between Character Evidence & Prior Convictions:
If the accused chooses to testify, his criminal record will be admissible, but only to undermine credibility (***CEA s. 12***). Evidence on the details of the prior convictions is not permitted; only the fact that the accused was convicted (***Laurier***). (note: the TJ has discretion to exclude all/part of prior record in appropriate cases where the PE would outweigh the PV (***Corbett***)).

But further, if the accused puts character at issue, the evidence of previous convictions may be adduced (***CC s. 666***), which has been interpreted by the case law to mean that the accused can then be questioned on the details of the prior convictions (***PNA***).

(3) Psychiatric Evidence About the Accused

Because evidence of psychiatric disposition is expert opinion evidence (of a psychiatrist) about the type of person that would commit a certain crime, it engages both issues of character and expert evidence.

Psychiatric Evidence Test

Evidence of psychiatric disposition will only be admissible if:

(1) It is relevant
(2) It meets the requirements for expert opinion evidence set out ***Mohan****:*
    (a) **Relevance:** Requires finding of *both* logical relevance and a determination that the benefits of the evidence (weight, materiality, reliability) outweigh the costs (confusion, "mystic infallibility". The opinion must be so related to the fact at issue that it has some tendency to help solve it. (***Mohan***)
    (b) **Necessity in assisting TF:** Evidence is necessary because it is not expected to be within the common knowledge and experience of TF (***Mohan***). Must be necessary to enable the TF to appreciate matters in issue due to their technical nature (***Abbey***). If the jury can form an opinion without the expert, then the expert is not necessary.
    (c) **Absence of exclusionary rule:** Evidence cannot run afoul of exclusionary rules of evidence separate and apart from the opinion rule itself (***Mohan***).
    (d) **Properly qualified expert:** There is a concern that the evidence will be misused, given more weight than it should, treated as "virtually infallible". This could distort the fact-finding process. ***Test:*** a properly qualified expert has "acquired special or peculiar knowledge through study or experience." Expert status is achieved when the expert possess special knowledge and experience going beyond that of TF (***RWD***).
(3) It has an appropriately high probative value.

Psychiatric evidence is assessed mostly through concepts of probative value and prejudicial effects as opposed to a principled approach.

Necessity Requirement in *Mohan*
An assessment of whether or not this is something that is properly the subject of an expert opinion will help us determine whether psychiatric evidence can be used for good character. Expert testimony cannot be on a matters within common knowledge and experience (***Mohan***).

In the case of psychiatric disposition evidence, the expert is going to testify that:
    (a) This is a **peculiar crime** (as opposed to an **ordinary crime**) (***Robertson***)
    (b) It is committed by a **particular class of people** (***Robertson***)
        - The standard suggested by the language of the case law suggests that it would be very rare for this evidence to be admitted: have to demonstrate that this is a specialized and extraordinary class of offender or that they have a recognizable personality, characteristics, or traits to which the disposition evidence would provide a window (***Robertson***).
        - *Sniper example: If Crown has not shown that A has sniper skills, then it makes it highly unlikely that he would have been able to do those murder – this is highly probative*
    (c) The accused does not fall within that class of people
        - You can't lead psychiatric evidence to tell us things you could find out through general reputation evidence (*i.e. you can't testify that this accused is honest*).
        - Evidence that could get in through "general reputation" or "specific acts", the jury can make up their own mind about what that evidence means, how probative it is, whether they believe it, and how much weight they would give to it (***Mohan***).

Ways to attack an attempt to lead evidence of psychiatric disposition:
(1) **Attack the science (reliability):** your science is not actually as good as you say it is. The idea that there is only certain pools of people that commit certain crimes is actually a very difficult threshold to satisfy.
(2) **Attack the class :** How big is the class? Is it over or under-inclusive?

Evidence of psychiatric disposition is not likely to be admitted because the standard to meet is very high and the evidence is generally not very probative.

CHARACTER EVIDENCE OF VICTIMS

There is no exclusionary rule for evidence of bad character of third parties; it is admissible if it is (a) relevant and (b) has probative value. Character of third parties can be proven through general reputation, specific bad acts, or psychiatric evidence (***R v Scopelliti* 1981 ONCA**, *bullying victims*)

Character Evidence of Third Parties Test (***Scopelliti***)
(1) It is relevant
(2) Its probative value outweighs its prejudicial effects

Bad acts of the victim that accused was aware of are admissible to demonstrate that there was reasonable apprehension of harm (self-defence argument): (*Ex. road rage; stole gasoline; broke lights in front of the store using snowballs; spat Coca Cola on the floor*) (***Scopelliti***).

Bad acts unknown to accused are not relevant to the question of reasonable apprehension of harm ***but*** where self-defence is raised, evidence of the victim's character for violence is admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked (but not that there was a reasonable apprehension of harm). (*Ex. vandalism, threats to others*) (***Scopelliti***).

PRIOR INCONSISTENT STATEMENTS

Generally inadmissible for the truth of its contents because it is hearsay // *Exception: KGB Statements: initial statement that a V makes to police which is later used in court in lieu of her direct testimony provided certain strict conditions are met (see **R v B(KG)** below)*

Other Party's Witness: Procedure to be followed in x-examining other party's witness on a prior inconsistent statement, written or oral, is laid out in evidence acts (***Canada Evidence Act, ss. 10–11***). Traditionally, the prior inconsistent statement of a witness was not admissible for its truth, unless the witness adopted it.

Own Witness: You may want to have your witness declared hostile so you can x-examine witness on prior inconsistent statements – you need leave of court to do this // **NB** common law: "hostile" // statute: "adverse"– seen as a broader concept // (Note: you could use ***CEA s. 9(2)*** to prove that witness is adverse; this *can* lead to ***CEA 9(1)*** but there may be other ways to argue that witness is adverse)

***CEA* s. 9(1)** – implies that a party is not allowed to contradict a witness by other evidence unless that witness has been declared adverse – courts have not read it as requiring that a party prove its own witness to be "adverse" before the party can contradict the witness with other evidence

PRIOR CONVICTIONS

A witness's prior convictions admissible only for purpose of undermining credibility (***CEA s. 12; BCEA s. 15***)

CEA s. 12 **applicable to accused** if he chooses to testify – trier of fact entitled to infer that an A with a criminal record is, for that reason, less credible than a witness without a criminal record (**PE:** "if you are a criminal, you are more likely to have committed this crime"

Limits on prior convictions of A being admitted: (1) only if A decides to testify can prior convictions be brought in (2) Limited to fact of conviction, cannot x-exam on details of the offence/conduct that led to conviction (***R v Laurier* 1983 ONCA**) (3) Cannot extend to discreditable conduct/associations (4) Cannot examine A about other times he testified and was convicted (5) (Fulfilled) conditional discharge ≠ conviction

TJ has discretion to exclude all/part of prior record in appropriate cases where the PE would outweigh the PV (***R v Corbett* 1989 SCC**, *but this wasn't appropriate case for this – A made deliberate attack on credibility of C witnesses, largely based on prior records. Issue for jury: solely credibility*)

Corbett Application should be made by D and decided by TJ immediately after close of C's case. If necessary, *voir dire* will be held where D discloses evidence it intends to call (note: TJ ruling may be modified if defence evidence "departs *significantly* from what was disclosed"). It is an error to wait until after A has testified to rule on whether criminal record could be used in x-exam (***R v Underwood* 1998 SCC**)

An A can be x-examined on his **record as a juvenile**; jury can take juvenile record into account when assessing credibility (***Morris v the Queen,* 1979 SCC** 5:4 majority ➔ *majority: the word "offence" as used in **CEA s. 12(1)** includes a delinquency that consists of a violation of the CC // dissent: court has no power to convict a child under the Juvenile Delinquents Act; it was express policy of Parliament that a child found to be a juvenile delinquent should not be stigmatized as one who has been convicted*)

Corroboration:
Baskerville formula for corroboration was embodied in common law and in CC // *Ex. Corroboration of accomplices*: Common law requirement that the evidence of an accomplice be corroborated (TJ must instruct jury that it is dangerous to convict on accomplice's testimony unless it is corroborated. TJ must then outline the evidence that is capable of corroborating accomplice's testimony) (***R v Baskerville* 1916**).

Vetrovec*: SCC establishes new, more functional approach for caution in assessing evidence of some witnesses*

Problems with the common law rule on accomplice testimony: (1) Listing of corroborative evidence by TJ gives too much authoritative weight to that evidence (2) Unintelligible instruction to jury: told on one hand that the person shouldn't be believed, but here is a bunch of evidence that supports the evidence (3) TJ is not required to warn jury with respect to testimony of other witnesses with disreputable and untrustworthy backgrounds. Why should we automatically require a warning for an accomplice? (***R v Vetrovec* 1982 SCC**).

"The law of corroboration is unduly and unnecessarily complex and technical. There is no special category for accomplice. Sufficient for TJ simply to instruct jury that they should view the testimony of the witness with great caution and that it would be wise to look for other supporting evidence before convicting the accused."

Vetrovec adopts language from ***DPP v. Hester*** –"**confirmation** from some other source that W is telling truth"

Since *Vetrovec*, where Crown's case depends upon the credibility of witnesses whose veracity might be in doubt, TJs have frequently delivered a "clear and sharp warning" as recommended in *Vetrovec*,.

Bottom Line: TJ has discretion. If in TJ's discretion, the credibility of a witness is to be cautioned, the TJ may give a *Vetrovec* warning. TJ also has discretion on whether or not to draw attention to corroborating evidence.

The Vetrovec Warning will typically include an instruction that it is unsafe to rely on the unsavoury witness's evidence without some other evidence that confirms or agrees with it.

Corroborative evidence must be independent and material to their story (***R v Khela* 2002 SCC**)

SIMILAR FACT EVIDENCE

Similar Fact Evidence in Criminal Cases

The only way Crown can lead disposition/propensity evidence is if the evidence falls within the exception of **similar fact evidence.** The proper use of similar fact evidence is that because of these prior incidents, the accused is more likely to have committed this crime (disposition reasoning is allowed). Furthermore, the Crown can lead this evidence without the accused having put his character at issue.

There is a general exclusionary rule against misconduct beyond the scope of the indictment.
This is to avoid (a) reasoning prejudice**:** confusing the jury, diverting trial attention, taking up too much time; and (b) moral prejudice**:** the reasoning that "the accused is a *bad person* and is therefore the *kind of person* who would commit this crime (rationale: we want to believe that the rehabilitation purpose of the criminal justice system is effective, also, we don't want to round up the usual suspects).

Similar fact evidence within the scope of indictment is admissible because it can be extremely relevant and has extremely high probative value. The argument is that its probative value outweighs the potential misuses. Furthermore, we reject the idea that there is actually a moral prejudice left when we admit similar fact evidence. This disposition purpose of this evidence is permissible.

Similar fact evidence is assessed mostly through concepts of probative value and prejudicial effects as opposed to a principled approach. We must question whether the probative value outweighs the prejudicial effects (NB: this test uses PV/PE analysis to admit evidence that would otherwise be excluded whereas the residual discretion PV/PE analysis is to *exclude evidence that would otherwise be included*)

Similar Fact Evidence Test (Criminal Cases)

Similar fact evidence is presumptively inadmissible. The onus is on the Crown to satisfy the TJ (on a BOP) that **in the context of the particular case**, the probative value of the evidence *in relation to a particular issue* outweighs its potential prejudicial effects and thereby justifies its reception (***R v Handy* 2002 SCC**).

Factors to Consider in Assessing Probative Value of Similar Fact Evidence
(1) Quality and strength of the evidence; (2) Potential for collusion; (3) Scope of the issue in question – the more well-defined the issue you are arguing for, the better; (4) Degree of similarities in facts of the current charge and prior incidents (implied: the prior incidents also have to be similar to each other);
(5) Distinctiveness/uniqueness; (6) Objective improbability of coincidence; (7) Distinctive pattern of behaviour shown; (8) Proximity in time/frequency of occurrence

Factors to Consider in Assessing Prejudicial Effects of Similar Fact Evidence
Note: disposition reasoning is *not* prejudicial in this case
(1) Inflammatory (i.e. jury will convict because accused is a *bad person*); (2) Necessity: is there another way the Crown can prove its case through less prejudicial means (this is about necessity *to the Crown's case*);
(3) Is it going to distract TF or take up to much time; (4) If the prior incident was an offence but the accused was not charged, the offences were never proven. You don't want to have a trial within a trial.

Similar Fact Evidence in Civil Cases

Similar Fact Evidence Test (Civil Cases)

The Courts will admit similar fact evidence if it is **logically probative**, provided it was not oppressive or unfair to the other side. There also needs to be opportunity for the other side to respond to this evidence (***Mood Music Publishing Co Ltd v De Wolfe Ltd* 1976 All ER**)

Similar method of reasoning as ***Handy:*** We want to zero in on the issue and determine the relevance, then assess the probative value of the evidence. But note: there is a greater potential for prejudicial effects in a criminal setting.

PRIVILEGE

Generally, evidence (documents or information) that meets the requirements for privilege is presumptively inadmissible unless it falls within a recognized exception. **Rationale:** There is value in open communication, candour, and frankness in certain relationships. Cost of privilege: hinders the truth-seeking function.

There are two major categories for privilege:

(1) **Class based privilege** applies automatically to all individuals who have a certain relationship, which has already been recognized by the courts. These are relationships that evidence law recognizes as being particularly special. However, there are exceptions to class-based privilege. Four categories of class-baed privilege: (a) solicitor-client privilege (b) litigation privilege (c) dispute settlement (4) informer privilege.

(2) **Case-by-case privilege** applies only to some individuals in certain relationships – has to be argued (*Ex. priest, psychiatrist*)

Confidential ≠ Privilege

Confidentiality is a necessary, but not sufficient, condition for establishing privilege. Just because something is recognized as confidential, even in law (duty of confidentiality), it does not mean it is privileged. But if something is subject to privilege, then we would inevitably expect that it would be confidential. A duty of confidentiality has to do with the relationship—a solicitor owes has duty of confidentiality towards their client. Privilege has to do with the rules of evidence in court—when a judge will compel disclosure.

Note: only the person who *holds the privilege* can waive it, and the privilege is held *by the client*. Also: "privileged" stamp on documents helps, but is not necessary.

Privilege Test

(1) **Is the communication covered by a class privilege or a case-by-case privilege?** (***McClure* 2001 SCC**)

If the relationship has already been recognized by the courts ➔ Class-based privilege
(a) solicitor-client (b) litigation (c) dispute settlement (4) informer
If the relationship has not been recognized by the courts ➔ Case-by-case privilege

If evidence meets requirements ➔ **presumptively inadmissible**
Unless the evidence falls within a recognized exception

(2) **Does an exception apply?**

If yes ➔ **admissible**

Class-based privilege

(1) ***Solicitor-client privilege test:*** (***Canada v Solosky* 1980 SCC**)
(a) Communication between solicitor (or his agent) and the client
(b) Must entail legal advice
(c) Must be intended to be confidential
Exceptions: Facilitating a criminal purpose // Public safety // "Innocence-at-stake"

(2) Litigation privilege
Exceptions: Post-litigation

(3) Dispute settlement privilege
Exceptions: Public interest outweighs policy goals of encouraging settlement

(4) Informer privilege
Exceptions: Material witness // Agent provocateur // Grounds for search warrants

Case-by-case privilege: Apply the ***Wigmore Test***
(a) Confidentiality
(b) Centrality of confidence to the relationship
(c) Nature of the relationship
(d) Degree of harm to the relationship

SOLICITOR-CLIENT PRIVILEGE

Rationale for this particular highly regarded form of privilege: it is integral to the administration of justice. Without solicitor-client privilege, the client does not enjoy the full benefit of retaining counsel. In criminal context: being able to make full answer/defence relies on being able to communicate openly with counsel.

Solicitor-Client Privilege Test: (***Canada v Solosky* 1980 SCC**)

1. Communication between solicitor (or his agent) and the client
2. Must entail legal advice
3. Must be intended to be confidential

Privilege comes into existence independently; it does not need to be asserted. i.e. as soon as the test in ***Solosky*** is satisfied, privilege exists (***Lavallee, Rackel and Heintz v. Canada* 2002 SCC**)

Statutory provisions that undermine solicitor-client privilege must do so "only to the extent that it is absolutely necessary in order to achieve the end sought by the enabling legislation". Exceptions to solicitor-client privilege are to be interpreted restrictively and narrowly (***Canada v Solosky* 1980 SCC**).

Note: Third parties typically don't fall under solicitor-client privilege, but a psychiatrist who is retained through counsel for the purposes of the legal advice to be given is covered under the umbrella of solicitor-client privilege (***Smith v Jones* 1999 SCC**).

Exceptions to Solicitor-Client Privilege

(1) Facilitating a Criminal Purpose:

The advice itself must have been sought for the purpose of obtaining legal advice to facilitate the commission of a crime (***Campbell***). i.e. facilitating criminal activity through your advice (*Ex: accessory after the fact*).

The destruction of the privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice *facilitated* the crime (Binnie J *obiter in* ***Campbell****, but highly persuasive and likely good law*)

(2) Public Safety:

Solicitor-client privilege should *only* be set aside in situations where the facts raise "real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm" (***Smith v Jones***)

Criteria: (1) Clarity: how clear is the threat? a generalized threat won't cut it (2) Seriousness: how serious is the threat? (3) Imminence: danger doesn't need to be *immediate* to meet the imminence requirement.

These are very narrow criteria and should be interpreted in a narrow way. Even if they are satisfied, the disclosure should only be to the extent that is absolutely necessary.

In rare cases where accused poses an **"instant" risk**, such that an *ex parte* order is not possible, only then should you make a timely warning to police (*dissent in* ***Smith v Jones*** *but likely to be good law*)

(3) Innocence-at-Stake:

There is no other way the information would be obtainable and there is otherwise no other way that accused could raise a reasonable doubt (***McClure***). This can be interpreted as saying, this is the last and only change to avoid a wrongful conviction.

LITIGATION PRIVILEGE

Litigation privilege protects work done by counsel from disclosure to other parties – it protects counsel's role in the litigation process, including any communications with third parties. Litigation privilege and solicitor-client privilege are "distinct conceptual animals" (***Blank v Canada***).

Differences between solicitor-client privilege and litigator-client privilege:
(a) Communication under SCP is permanent, whereas communications subject to LP can be disclosed when the litigation is over
(b) SCP applies **only to confidential communications**, whereas LP can apply to communications of a **non-confidential** nature between solicitor and third parties, and even includes material of non-communicative nature
(c) SCP exists any time a client seeks legal advice from his solicitor, whether or not litigation is involved, whereas LP applies **only in the context of litigation**
(d) LP is based on the need facilitate investigation and allow for adequate preparation in the adversarial process. It aims to **facilitate a process**, whereas SCP aims to **protect a relationship**.

DISPUTE SETTLEMENT

Communications made (between counsel or between parties themselves) during attempts to settle a litigious matter through negotiation or mediation are not admissible (at common law) if the negotiation or mediation fails and the matter is litigated (***Middlecamp***).

Rationale: we want to encourage settlements. Sometimes it comes down to an economic question: Will it cost us more to go to court or to settle? It doesn't mean you are admitting guilt.

To establish an exception to dispute settlement privilege, the party seeking production must show that a competing public interest outweighs the policy goals of encouraging settlement through open communications without fear of it being used in the litigation (*Ex. pattern of child abuse comes up during divorce settlement—we want this information to get into the child custody hearing*)

Note: the heading "*without prejudice*" is helpful but not necessary.

INFORMER PRIVILEGE

The purpose of informer privilege is to protect the *identity* of police informers and citizens whose help is enlisted for the law's benefit. It protects not only the name but also any information that could identify or reveal the informant's identity (***Leipert***). **Rationale:** To protect that individual against retribution and to encourage people to come forward and report crime or provide evidence.

Informer privilege belongs to the Crown *but* they can only waive it if the informer consents (***Leipert***).

Informer privilege applies both civilly and criminally (***Leipert***) but the exceptions to informer privilege are used to establish the accused's innocence or a defence, therefore, there is NO exception in civil cases (***Scott***).

Exceptions to Informer Privilege
There were originally three exceptions to the informer privilege (***Scott* 1990 SCC**).
(1) When the informer is a **material witness** to a crime (particularly if they are the *only* witness)
(2) When the informer was an **agent provocateur** – i.e. someone who instigates. Exception could be extended to cases of entrapment where the accused provides evidentiary basis.
(3) Where accused seeks to establish that a **search was not on reasonable grounds** – designed to deal with informants *not* being called as to guilt (***s. 8***). Competing values: protecting identity of police informers vs. the need for accused to know the case against him and that it was collected in a constitutional manner

"Innocence-at-stake" is the only exception to informer privilege (***Leipert* 1997 SCC**). There must be a basis to conclude that the identity of the informant is necessary to demonstrate innocence of an accused; speculation is not enough. This may arise when (a) the informer is a **material witness** to a crime or (b) the informer was an **agent provocateur** (*so, two exceptions identified in **Scott** are simply examples of "innocence-at-stake". Third exception re search warrants is not addressed*).

CASE-BY-CASE PRIVILEGE

The standard for recognizing class-based privilege is this: **"Is the communication inextricably linked to the justice system?"**(***Gruenke***). (*So the threshold for judging any claim for class-based privilege is whether it is as compelling as the argument for solicitor-client privilege. Ex. law clerks*). The Court wants to move away from the class-based approach towards case-by-case analysis because it allows for more relevant evidence to be admitted unless there are compelling arguments against it. We lose some certainty at the benefit of flexibility.

If you are dealing with a relationship that is not within the four corners of the class-based privilege, you're going to have to make an argument that, while the relationship as a whole may not be subject to a class-based privilege, this particular situation would require that privilege apply.

Case-by-Case Privilege Test: (***Wigmore Test***)

1. **Confidentiality:** Communication must originate in *confidence* that it will not be disclosed
2. **Centrality of confidence to the relationship:** That element of *confidentiality must be essential* to full and satisfactory maintenance of the relationship between parties
3. **Nature of the relationship:** *Relation* must be one that, in the opinion of community, ought to be *sedulously fostered*
4. **Degree of harm to the relationship:** *Injury* to the relation caused by disclosure must be *greater than the benefit* gained by correct disposal of litigation (how bad would the harm to the relationship be vs. how bad would it be if we got the wrong answer in this litigation)

[Note: #3 and #4 is where most of the work is done and where most cases fail]

Religious Communications **EXAM!!!**

The policy for having other forms of class-based privilege do not extend to religious communications (***Gruenke***). While there is an important social purpose for confidentiality in religious communications, it does not meet the standard for recognizing class-based privilege because it cannot be said to be "inextricably linked to the justice system. However, an argument for privilege can be made on a case-by-case basis.

"Religious Communication" Test: (***Gruenke***)

There are four qualifications for when communication will be considered to be "religious communication"

1. **The nature of the communication**
2. **The purpose for which it was made** (***Gruenke***: communication was for an *emotional/psychological purpose*, not for a *spiritual* purpose – its about an individual seeking emotional support through a church)
3. **The manner in which it was made** (Was it made in the context of confession for example?)
4. **Who were the parties to the communication** (A statement made during mass will probably not meet this requirement. Just because the statement is made in a church doesn't make it religious communication

Gruenke fails at the first stage of the ***Wigmore Test.*** Neither the conversation with the priest nor the counsel could be expected to be confidential. The accused had already made her mind up to turn herself in and she wanted to unburden herself. Therefore, there was no confidential relationship established.

IMPROPERLY OBTAINED EVIDENCE

COMMON LAW APPROACH

At common law, there is a general rule that we will not exclude evidence simply because of how it was obtained. We don't care how it got to court as long as it is relevant and has probative value (although confessions rule exception would still apply).

We do not have an automatic exclusionary rule for improperly obtained evidence (***R v Wray* 1971 SCC**). The approach the framers of the *Charter* took was that we would not have a general exclusionary rule. i.e. Just because your rights were infringed (*s. 7–10*) doesn't meant that evidence won't be used against you.

Step 1: *Charter s. 24(1)*

"Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to obtain such remedy as the court considers appropriate and just in the circumstances."

General rule: ***s. 24(1)*** operates to generally limit claims for exclusion of evidence to the individual whose rights have been infringed, so it must be the accused's *Charter* that is violated. However the intrusion of the privacy rights of third parties *may be relevant* in determining whether a search was conducted in a reasonable manner (***R v Edwards* 1996 SCC**).

Ways Around ***Edwards*:** (1) Cory J: Infringements of other party's *Charter* rights may inform your own *Charter* rights, so you may be able to argue that *your* right was violated (even if it was a minimal infringement). That way the reasonableness of the police conduct will be assessed in the context of the intentional and deliberate violation of the rights of the other party. (2) You *may* be able to make an argument under ***s. 7*** that it would be against the principles of fundamental justice to convict an accused person using evidence that is unconstitutionally obtained (untested)

There is no automatic standing; just because the evidence is unconstitutionally obtained is not enough to pass the ***s. 24(1)*** test; it has to be *the accused's Charter* rights that were infringed. Only then can the accused proceed with a ***s. 24(2)*** test to see whether or not the evidence so obtained should, in fact, be excluded.

Step 2: *Charter s. 24(2)*

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

The test for "bringing the administration of justice into disrepute", based on a bilingual interpretation of ***s. 24 (2)***, is: Whether, on a balance of probabilities, admitting the evidence *could* (*gives with one hand*) bring the administration of justice into *further* (*takes with the other hand*) disrepute (Lamer J in ***R v Collins* 1987 SCC**, *the throat-grab-to-prevent-swallowing-case*).

COLLINS/STILLMAN APPROACH

Purpose of *Charter s. 24(2)*

It's not about providing a remedy for police misconduct (i.e, fairness to the accused), or incentivizing the police to conduct investigation in line with *Charter* rights (although that may be a side-benefit), or the disrepute that came from the infringement of the *Charter* right. Rather it's about whether the administration of justice would be brought into *further* disrepute if you were to admit the evidence (burden of proof is a balance of probabilities (Lamer J) (***Collins***).

Note: Lamer J interprets ***s. 24(2)*** based on a bilingual interpretation. English version of the Constitution says "would" but the French version says "could". So, you can cross out "would" and write "could".

"Bringing the administration of justice into disrepute" Test: (Lamer J in ***R v Collins* 1987 SCC**)

The test, based on a bilingual interpretation of ***s. 24(2)***, is whether, on a balance of probabilities, admitting the evidence *could* (*gives with one hand*) bring the administration of justice into *further* (*takes with the other hand*) disrepute.

This is based on the reasonable dispassionate individual who is informed of the principles of the administration of justice, the circumstances of the case, and has a general knowledge of *Charter* rights and *Charter* values (*How many people would this include in Canada? Idea of a reasonable person doesn't help us*)

Factors to consider (***Collins***): (This is a contextual test; you have to have regard to all of the circumstances)
(a) What kind of evidence was obtained?
(b) What *Charter* right was infringed?
(c) Was violation serious or merely technical in nature? *There is a spectrum/continuum of infringement*
(d) Was it deliberate/willful/flagrant or was it inadvertent/committed in good faith?
(e) Did it occur in circumstances of urgency or necessity?
(f) Were there other investigatory techniques available? *Echoes s. 1 values*
(g) Would the evidence have been obtained in any event? *Discoverability (not a strong argument)*
(h) Is the offence serious? *(eliminated post-Collins) If offence is serious, the more jeopardy the accused is in, so the standards should be higher for a fair trial. Flip side: public doesn't want to see someone acquitted of a serious offence because of a "technicality"*
(i) Is the evidence essential to substantiate the charge? *The importance of the evidence for the Crown*
(j) Are other remedies available? *Are there other ways that the accused could have obtained satisfaction for the infringement of their Charter rights (if so, evidence more likely to be admitted)*

Post-Collins

Post-*Collins*: The factors get grouped: (1) Trial fairness (2) Seriousness of the Charter violation (3) Balancing of repute between admissibility and exclusion of unconstitutionally obtained evidence.

The SCC makes a distinction between **real evidence** (unlikely to render trial unfair because of the nature of the evidence, more likely to be admitted) and **conscriptive evidence** (evidence that comes from accused in response to *Charter* violation, will typically result in unfairness, less likely to be admitted). While the distinction between conscriptive and non-conscriptive evidence has been rejected, there is still a distinction between *statements* and *evidence obtained from your body* (***R v Stillman* 1997 SCC**).

Since ***Stillman,*** conscriptive evidence is generally inadmissible. There is an automatic exclusionary rule for undiscoverable conscriptive evidence. The Court doesn't like this because it doesn't like automatic rules. Because its supposed to be a contextual analysis. The Court is concerned that we are no longer doing a contextual analysis. All we're doing is trying to pluck evidence into a category and that tells us what the outcome is. That is not what was intended by the language in s. 24(2).

Problems with ***Collins*** approach: Trial fairness is where all the work was being done, there isn't much left for the other two parts of the test. How do you measure the seriousness of a *Charter* breach? Seriousness of the offence: *Grant* says that cuts both ways, it is an irrelevant factor, and should not be considered in the analysis.

The ultimate purpose that informs ***Collins*** and ***Stillman*** test is trial fairness. In ***Collins***, trial fairness was considered to be a factor in s. 24(2) analysis. ***Grant*** says this is not just a factor, it *is* the overarching goal in having the administration of justice being reputable). **Fair trial:** "one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused"(***R v Harrer* 1995 SCC**)

REVISED APPROACH

The administration of justice embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole – this is the purpose of s. 24(2). It is not about incentivizing proper police conduct (that is a happy side benefit) (***Grant***).

"Bringing the administration of justice into disrepute" ***Grant Test:*** (***R v Grant* 2009 SCC**)

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

(1) The **seriousness** of the *Charter*-infringing state conduct (*this is about the state conduct*)
(2) The **impact of the breach** on the *Charter*-protected interests of the accused (*this is about the accused*)
(3) **Society's interest** in the adjudication of the case on its merits

It is a long-term and prospective, forward-looking test. It is an objective, dispassionate inquiry (language of reasonable person from ***Collins*** is gone). The focus is societal. It is not aimed at punishing the police, or providing a remedy/compensation to the accused, but rather at systemic concerns [*sets the bar quite high*].

1. **The seriousness of the *Charter*-infringing state conduct**
   - Spectrum: inadvertent or minor violations <—> recklessness or willful disregard to *Charter* rights [*language: good faith, morally blameless <–> negligence is in the middle* (***Kitaitchik***, adopted by SCC in ***Harrison***) *<–> bad faith, deliberate, egregious, blatant disregard*][***area of legal uncertainty*** (***Grant***, *main difference from* ***Harrison***)][*insufficient grounds* (***Grant***) *vs. no grounds* (***Harrison***)]
   - The courts must dissociate themselves from the conduct of the police, especially if it is systematic.
   - The more serious the *Charter*-infringing state conduct, the more likely it is the evidence will be excluded, but the court recognizes certain extenuating circumstances: Mitigating factors include the need to prevent the loss of the evidence or good faith (not the same as willful blindness). Aggravating factors include systemic problems, such as racial profiling [*officer's misleading testimony* (***Harrison***)] [*absence of systemic problem ≠ mitigating factor, it is neutral, irrelevant* (***Harrison***)]

2. **The impact of the breach on the *Charter*-protected interests of the accused**
   - Spectrum: a fleeting or technical violation (*car*) <—> profoundly intrusive violation (*strip search*)
   - Must first identify the interest involved (*understand the purpose behind the right that is violated: human dignity interest, self-incrimination interest, privacy interest (reasonable expectation of privacy)*)
   - Requires "actual" impact – must show *how* the individual accused was affected in this particular case, *Ex*. what parts of your body were searched (extra hurdle for the accused)
   - [*more than minimal, subtly coercive* (***Grant***), *more than trivial* (***Harrison***, *similar level of intrusiveness as* ***Grant***) *<–> significant <–> severe, egregious*][*Discoverability: reduced role – only "impact"* (***Grant***)]

3. **Society's interest in the adjudication of the case on its merits**
   - There is a shift here from the focus in ***Collins*** on trial fairness to society's interests in the adjudication of the case on its merits. It is not about trial fairness, but the repute of the administration of justice.
   - This is all about the **truth seeking function** of the court: (a) How is the public going to view the admission *or exclusion* of the evidence? (this one can cut both ways) (b) Would the truth seeking function of the court be better served by admission or exclusion?
   - This is about the **reliability** of the evidence obtained: If it is reliable, it furthers the truth seeking function. If it is unreliable, it doesn't further the truth seeking function.
     [*real evidence is highly reliable* (***Grant***, ***Harrison***), *statements, circumstantial evidence are less reliable*]
   - Also look at the **importance and necessity of the evidence to the Crown's case**. This allows the ends to justify the means – what is found *can* influence the weight of this factor.
     [*critical to the Crown's case and virtually conclusive of guilt* (***Harrison***)]
   - The seriousness of the offence doesn't get completely disregarded but it cuts both ways – not helpful

Make a conclusion at each stage (tends to favour admissibility or inadmissibility) but also use qualitative language as to how strongly the factors favour one outcome or the other. You have to assess the intensity of each factor and the relationship between the 3 factors. Is one factor strong enough to outweigh the other 2?

How different types of evidence would be assessed under the new ***Grant Test***:

1. **Statement by Accused**
   - Generally, statements by accused will be presumptively excluded but this is not automatic

2. **Bodily evidence**
   (1) **Seriousness:** Very fact-specific
   (2) **Intrusiveness:** There is a range of intrusiveness in obtaining bodily samples: When it's forced (forced blood, forced dental impressions, forced surgery), this makes it much worse, as opposed to taking hairs from a brush (privacy interest is violated, but there is really no issue of bodily integrity)
   (3) **Society's interests:** Bodily evidence is generally very reliable, but there is lots of room for advocacy: chain of custody, contamination of samples, how reliable is the sampling technique (PCR DQ-Alpha testing). Just because it is real evidence does not make it inherently more reliable. But the court is willing to say that real evidence is *generally* more reliable.

3. **Non-bodily physical evidence**
   Ex. Strip search obtaining drugs (highly intrusive, but not obtaining a bodily sample)
   (1) **Seriousness:** Very fact-specific
   (2) **Intrusiveness:** There is a range of intrusiveness depending on what is being searched: home, body – very high expectation of privacy; place of work, car – lower expectation of privacy
   (3) **Society's interests:** Generally reliable because it is real evidence.

4. **Derivative evidence** **EXAM!!!**
   - Usually physical evidence obtained as a result of an unlawfully obtained statement (coerced confession, classic ***Ibrahim***)
   - **The common law confessions rule does not exclude derivative evidence (the evidence obtained as a result of the confession)** – if you have a coerced confession which leads to real evidence (like cocaine), the confession is inadmissible, but the real evidence, at common law, would not be (***Grant***).
   - ***Section 24(2)*** provides a residual protection: You can only use the common law confessions rule to exclude the statement (automatic exclusionary rule) but to exclude the derivative evidence, you have to make an argument that your ***s. 7*** right to remain silent was infringed (***Singh***), which is inconsistent with the principles of fundamental justice. Under ***s. 7***, there would be a similar, if not identical, outcome to the voluntariness analysis of the confessions rule. So, the common law confessions rule would render the statement automatically inadmissible, and because of the ***s. 7*** infringement, we can make an argument under ***s. 24(2)*** to exclude the derivative evidence as well.
   - ***Re Discoverability*****:** SCC criticizes discoverability as a principle *but* it retains a useful, though reduced, role in assessing the actual impact of the breach on the protected interests, i.e. if you can establish discoverability to a certain degree of certainty, that will act to limit the impact of the infringement on a *Charter*-protected interest because the evidence would have been obtained anyway (***Grant***).

Note: deference to TJ: As long as TJ gets the test correct (as a matter of law), and considers the correct factors, and doesn't make any legal errors, courts will defer to the TJ's findings (this makes sense because the test includes factors like reliability, which include assessing testimonial factors and credibility to an extent.

SHIFTING PURPOSE

***R v Kuldip* 1990 SCC** makes a distinction between the two purposes of (a) incrimination and (b) credibility. If you admit evidence as to consciousness of guilt, the strongest use of that evidence is the inference that the accused is more likely to have committed the crime. If you admit evidence only to undermine the credibility of the accused, the strongest use of that evidence is that it neutralizes the accused's evidence – basically renders the accused's evidence as useless (this was in context of *Charter s. 13* and *CEA s. 5,* so not directly applicable).

***R v Calder* 1996 SCC**

Generally speaking, when evidence is unconstitutionally obtained, the courts will not allow for arguments about the purpose for which the evidence is led to affect the ***s. 24(2)*** analysis.

s. 24(2) **has a unique nature**. You may determine that allowing the evidence for the purpose of undermining credibility would *not* bring the administration into disrepute, and that allowing it for the purpose of showing consciousness of guilt *would* bring the administration of justice into disrepute, but in the ***s. 24(2)*** analysis, we are concerned about the *effects* of admissibility.

Even though we could caution the jury not to use the unconstitutionally obtained evidence for the purpose of establishing consciousness of guilt, the effect of admitting it would still be to undermine the accused testifying in his defence, and violate his self-incrimination interest, and we're concerned more about the ultimate outcome and effect of admitting this evidence. Jury instructions are believed to work, but you can't separate the *taint* of unconstitutionally obtained evidence through jury instructions. If the jury is aware that the evidence was obtained unconstitutionally, the *taint* of the administration of justice would still be there. The attack on credibility is just a **back door way** of getting unconstitutionally obtained evidence admitted (Sopinka J in ***R v Calder* 1996 SCC**).

The idea that would feature heavily here in a ***Grant*** analysis is the **self-incrimination interest** of the accused – this would still be undermined even if the evidence was only admitted for the purpose of undermining credibility. This is the key: the link between self-incrimination and allowing the evidence, even for the purpose of undermining credibility.

Counter Argument

Note: the Court says if the Crown wanted to lead the evidence only to undermine credibility, then they should have only made that argument in the first place and brought it up in cross-examination. You could argue that this opens the door for a "very limited set of circumstances" where unconstitutionally obtained evidence could be used for a limited purpose of undermining credibility. The best chance Crown would have at this is to give up on the incriminating purpose, don't even try to argue it, but explicitly state that if the accused takes the stand, they will try to lead this evidence, even if it was unconstitutionally obtained, for the purposes of undermining the accused's credibility. *How would this argument makes its way in the* ***Grant*** *test? See dissent.*

McLachlin J Dissenting: **The evidence should have been admitted for the limited purpose of undermining credibility.** When the accused chooses to take the stand and places credibility at issue (by vouching to the jury that what is saying is the whole truth and nothing but the truth), it is more difficult to say that it is unfair to permit the Crown to cross-examine him on his prior inconsistent statement and to put the vital question to him of which version of his statement is true (echoes of ***Seaboyer*** reasoning re arguments about the admissibility of the accused's criminal record: once the accused starts to launch an attack on the other witnesses in the case, the jury is left with a false impression about the accused. This seems to be unfair and would mislead the trier of fact, possibly leading to a false outcome if we can't produce evidence that the accused has lied in the past just because the evidence was unconstitutionally obtained). Merger of two principles of criminal justice system: truth-seeking function and fairness. This seems to be in line with the definition of a "fair trial" as "one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused"(***Harrer* 1995 SCC**). **But**: at the time ***Calder*** was decided, trial fairness was the main touchstone for a ***s. 24(2)*** analysis – it's pre-***Grant***. Since ***Calder*** there has been a shift away from the focus in ***Collins*** on trial fairness to society's interests in the adjudication of the case on its merits (***Grant***). SCC has said that the s. 24(2) analysis is not about trial fairness, rather it is about the repute of the administration of justice. *Does this make McLachlin J's argument less convincing?*

EVIDENCE WITHOUT PROOF

JUDICIAL NOTICE

Judicial notice is reliance on a fact by a trial judge that is neither proven by evidence in the proceedings nor formally admitted by the parties. **Rationale:** efficiency, but also truth-seeking function. TJ decides whether/ not they can recognize facts without evidence. *Ex. standard speed limit, when not posted, is 50 km/h. This is way more common than any of us realize and often do not appear in decisions (Binnie J). His view: without it, we wouldn't even be able to have trials.* **Risks of JN:** When judges go on their own fact-finding missions // Parties not given opportunity to make submissions on contested facts // The issue becomes controversial with respect to the question of fairness

The purpose for judicial notice is not only to dispense with unnecessary proof but to avoid a situation where the court, on the evidence, reaches a factual conclusion that contradicts readily accessible sources of indisputable accuracy and which would therefore bring into question the accuracy of the court's fact-finding process (***Newfoundland Treasury v NAPE* 2004 SCC**).

Judicial Notice Test: (***R v Find* 2001 SCC**)

Fact must either be (a) so notorious or generally accepted that it is not the subject of debate among reasonable people ***or*** (b) capable of immediate and accurate demonstrate by resort to readily accessible sources of indisputable accuracy [Threshold for this is strict]

CEA s. 18 and ***BCEA, s. 24***: Judicial notice of statutes – you don't have to bring in the Governor General to testify that he did, in fact, sign the statute.

What qualifies as a "source of indisputable accuracy": Aboriginal offenders overrepresented in criminal justice system // Commissions of Inquiry // *But not* Parliamentary Committee Reports (***Find***)

There is a difference between legislative facts and adjudicative facts and their respective standards of admissibility (***Danson v Ontario* 1990 SCC**). **Adjudicative facts** concern the immediate parties (who did what, when, where, and how) and are usually those that are in dispute– these must be proven by admissible evidence. **Legislative facts** are those that establish the purpose and background of legislation, including its social, economic, and cultural context. These facts are general in nature, and are subject to less stringent rules for judicial notice. Judicial notice is more likely to occur when you're dealing with legislative facts.

Courts reluctant to decide *Charter* cases absent adjudicative facts –can't bring *Charter* case in factual vacuum

FORMAL ADMISSIONS

Formal admissions occur when a party admits to a set of facts without any form of compulsion. Formal admissions dispense the need to prove the facts that are admitted. The primary purpose of recognizing formal admissions by parties is to build efficiency and also promote the truth-seeking function.

Central difference between formal admissions and party admissions as an exception to the hearsay rule: formal admissions are made in a particular context in litigation. They are either made in court or through documents that are directly part of the litigation (like pleadings) or an exchange of correspondence between counsel in a civil case.

Criminal context: guilty is a classic formal admission – an admission of the essential facts necessary to establish the elements of the offence as particularized in the indictment or the information (does not include facts related to the details of the offence, i.e. aggravating factors). Therefore, at sentencing, the Crown will need to lead evidence on any facts which are not admitted even when the accused admits guilt (***R v Gardiner* 1982 SCC**, *additional facts need to be proven by Crown at sentencing stage even when the accused admits guilt*).

Civil context: Formal admissions more common; usually made through pleadings. Formal Admissions = Statements in pleadings or a failure to respond to pleadings // Oral statements of counsel at trial // Exchange of letters before trial (exception: if it is part of a dispute settlement) // Failure to reply to a request to admit facts (taken to agree to those facts)

The legal effect of a formal admission in a civil case is that they are taken as conclusive as to the matters to which they speak, and the court is bound to act on those admissions even if the evidence led at trial contradicts the admission. Client, and therefore new counsel, are bound by formal admissions made by previous counsel in the same proceeding (***Tunner v Novak* 1992 BCLR**).

APPENDIX A: REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE

CHAPTER 4: TUNNEL VISION

Tunnel vision is 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. Typically, any piece of evidence that contradicts the prevailing theory is excluded. This can result from **noble cause corruption**, wherein the police are willing to cut corners because they believe that they are pursuing the truth.

Specific factors that may contribute to Crown tunnel vision:

1. Close identification with police and/or the victim
2. Pressure by the media and/or special interest groups
3. Isolation from other perspectives

The following practices should be considered to assist in deterring tunnel vision:

1. Crown policies on the role of the Crown should emphasize the quasi-judicial role of the prosecution and the danger of adopting the views and/or enthusiasm of others. Policies should also stress that Crowns should remain open to alternate theories put forward by defence counsel and other parties.
2. All jurisdictions should consider adopting a "best practice," where feasible given geographic realities, of having a different Crown Attorney prosecute the case than the Crown Attorney who advised that there were grounds to lay the charge. Different considerations might apply with mega-cases.
3. In jurisdictions without pre-charge screening, charges should be scrutinized by Crowns as soon as practicable.
4. Second opinions and case review should be available in all areas.
5. There should be internal checks and balances through supervision by senior staff in all areas with roles and accountabilities clearly defined and a lead Crown on a particular case clearly identified.
6. Crown offices should encourage a workplace culture that does not discourage questions, consultations, and consideration of a defence perspective by Crown Attorneys.
7. Crowns and police should respect their mutual independence, while fostering cooperation and early consultation to ensure their common goal of achieving justice.
8. Regular training for Crowns and police on the dangers and prevention of tunnel vision should be implemented. Training for Crown Attorneys should include a component dealing with the role of the police, and training for police should include a component dealing with the role of the Crown.

CHAPTER 5: EYEWITNESS IDENTIFICATION AND TESTIMONY

- 78% of total pool of convictions of IPNYC involved eyewitness misidentification
- There is research in the US to show that cross-racial identification can be particularly inaccurate
- When an eyewitness has an honest but mistaken belief in their statement, testimonial factors do not help us determine whether they are right or wrong because they *believe* they are telling the truth
- *Ex. Ronald Cotton and Jennifer Thompson*

Factors that contribute to eyewitness misidentification

1. The belief that our memory is a perfect recording is wrong, it can actually change over time
2. Confirmation bias/solidification of memory
3. Tainting of memory

The following practices should be considered to respond to the honest but mistaken witness:

1. As you come across problems, change the procedures
2. Best practices should be binding in some way
3. Full disclosure of procedures used
4. Can ask judge to give a caution re: eyewitnesses sometimes believe they are correct but they are wrong, can explain the procedures used and compare them against best practices – in cases where the accused is known to the witness, this may not be as big of a problem

Standards and practices that should be implemented and integrated by all police agencies:

1. If possible, an officer who is independent of the investigation should be in charge of the lineup or photo spread. This officer should not know who the suspect is, avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness's degree of confidence afterward.

2. The witness should be advised that the actual perpetrator may not be in the lineup or photospread, and therefore the witness should not feel that they must make an identification.

3. The suspect should not stand out in the lineup or photospread as being different from the others, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.

4. All of the witness's comments and statements made during the lineup or photospread viewing should be recorded verbatim, either in writing or if feasible and practical, by audio or videotaping.

5. If the identification process occurs on police premises, reasonable steps should be taken to remove the witness on completion of the lineup to prevent any potential feedback by other officers involved in the investigation and cross contamination by contact with other witnesses.

6. Show-ups should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.

7. A photospread should be provided sequentially, and not as a package, thus preventing 'relative judgments.'

Standards and practices that should be implemented and integrated by prosecutors:

1. 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.

2. 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.

3. 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" lineup. Never show a witness an isolated photograph or image of an accused during the interview.

4. When meeting with witnesses in serious cases, it is wise, if it is feasible and practical, to have a third party present to ensure there is no later disagreement about what took place at the meeting.

5. Never tell a witness that they are right or wrong in their identification.

6. 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.

7. 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 photospread.

8. 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.

9. The use of expert evidence on the frailties of eyewitness identification is redundant and unnecessary in the fact-finding process. A proper charge and caution by the trial judge can best deal with the inherent dangers of identification evidence.

10. Workshops on proper interviewing techniques should be incorporated in regular and ongoing training sessions for police and prosecutors.

11. Presentations on the perils of eyewitness misidentifications should be incorporated in regular and ongoing training sessions for police and prosecutors.

CHAPTER 6: FALSE CONFESSIONS

False confessions are rarely the product of proper police technique. It takes strong incentives, intense pressure and prolonged questioning" (***Oickle***).

Standards and practices to address false confessions:

1. Custodial interviews of a suspect at a police facility in investigations involving offences of significant personal violence (eg. murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be video recorded. The video recording should not be confined to a final statement made by the suspect, but should include the entire interview.

2. Investigation standards should be reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.

3. Police investigators and Crown prosecutors should receive training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.

Is the voluntariness test developed in *Oickle* and applied in *Spencer* and *Singh* sufficient to prevent wrongful convictions?

CHAPTER 7: IN-CUSTODY INFORMANTS

Admissibility of in-custody informers:

1. It is relevant ➔ presumptively admissible
2. Hearsay rule ➔ presumptively inadmissible
3. Traditional exception to hearsay rule (statements against interest) ➔ presumptively admissible
   Unless you challenge the exception altogether for a defined class of persons: *in-custody informants are inherently and completely unreliable*
4. Exception: (confessions rule) – statement not made to a "person in authority" ➔ still admissible
5. Voluntariness – the analysis doesn't get this far

*Solution: could have a rule about corroborating evidence combined with a **Vetrovec** warning – a sharp, clear warning about reliability concerns (people who have an incentive to lie)* (***Brooks*** case)

Standards and practices to address in-custody informants:

1. Cross-sectoral educational programming should be provided to ensure that justice professionals are aware of:
   1. the dangers associated with in-custody informer information and evidence;
   2. The factors affecting in-custody informer reliability;
   3. policies and procedures that must be employed to avoid the risk of wrongful convictions precipitated by in-custody informer information or evidence.

2. Policy guidelines should be developed to assist, support and limit the use of in- custody informer information and evidence by police and prosecutors.

3. Each province should establish an in-custody informer registry so that police, prosecutors and defence counsel have access to information concerning prior testimonial involvement of in-custody informers. The creation of a national in-custody informer registry should be considered as a long-term objective.

4. A committee of senior prosecutors unconnected with the case should review every proposed use of an in-custody informer. The in-custody informer should not be relied upon except where there is a compelling public interest in doing so. The In-Custody Informer Committee's assessment should take into account, among other things, factors affecting the reliability of the information or evidence proffered by the informer. That reliability assessment should, moreover, begin from the premise that informers are, by definition, unreliable. Any relevant material change in circumstances should be brought to the In-Custody Informer Committee's attention to determine whether the initial decision as to whether there was a compelling public interest in relying on the in-custody informer should be revisited.

5. Any agreements made with in-custody informers relating to consideration in exchange for information or evidence should, absent exceptional circumstances, be reduced to writing and signed by a prosecutor (in consultation with the relevant police service/investigative agency), the informer, and his or her counsel (if represented). A fully recorded oral agreement may substitute for a written agreement.
6. In-custody informers who give false evidence should be vigorously and diligently prosecuted in order to, among other things, deter like-minded members of the prison population.

APPENDIX B: STATUTORY PROVISIONS

CANADA EVIDENCE ACT

Section 2: Sets out jurisdiction – CEA Applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

Section 4: No **husband/wife** is compellable to disclose any communication made by him/her to other during marriage.

Section 5: No witness shall be excused from answering any question on the ground that the answer may tend to criminate him.

Section 7: Restricts experts that each side can call to five in any proceeding. Interpreted as **5 per issue** (***Fagan v Urie* 1958 SCC**).

Section 9: If the witness proves **adverse**, the party may contradict him by other evidence…or…may prove that the witness made at other times a statement inconsistent with his present testimony (see also *BCEA*, s.14).

Section 12: Prior conviction of accused

A witness's prior convictions admissible only for purpose of undermining credibility (***CEA s. 12; BCEA s. 15***)

If the accused chooses to testify, his criminal record will be admissible, but only to undermine credibility (***CEA s. 12***). Evidence on the details of the prior convictions is not permitted; only the fact that the accused was convicted (***Laurier***). (note: the TJ has discretion to exclude all/part of prior record in appropriate cases where the PE would outweigh the PV (***Corbett***)).

But further, if the accused puts character at issue, the evidence of previous convictions may be adduced (***CC s. 666***), which has been interpreted by the case law to mean that the accused can then be questioned on the details of the prior convictions (***PNA***).

Section 14: "…may make the following affirmation: 'I solemnly affirm the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth."

Section 16: Unsworn evidence: witness, 14 or older, whose mental capacity is challenged

Allows for unsworn evidence – don't go through "moral right and wrong", etc.

Dealing with proposed witness, 14 or older. When mental capacity is challenged, an inquiry must be conducted to determine: (a) whether the person understands the **nature** of an oath or a solemn affirmation; (b) whether the person is **able to communicate** the evidence (interpreted in ***Marquard***).

- ***Sub 2***: If they satisfy both, they can testify.
- ***Sub 3***: Person who does not understand oath/affirmation, but are capable of communicating evidence, they shall be permitted to give testimony on promise to tell truth.
- ***Sub 4***: Where they fail both branches of inquiry, they cannot testify.
- ***Sub 5***: Party challenging competency has the burden of satisfying court there is issue as to capacity.

"ability to communicate" = Basic ability to (1) perceive/observe, (2) remember/recollect and (3) communicate. The inquiry is into *capacity*, not whether witness *actually* perceived or recollects the events in question (that is for the jury to decide upon hearing the evidence) (***Marquard***).

Section 16.1: Unsworn evidence: witness under 14

[Post ***Marquard***]. Dealing with proposed witness, under age 14 (at time of **trial**). Person under 14 is presumed to have capacity to testify.

- ***Sub 2:*** Shall be received if they are able to understand and respond to questions.
- ***Sub 6:*** Person is required to promise to tell the truth.
- ***Sub 7:*** There **shall be no questions** regarding their understanding of the nature of the promise to tell the truth.
- ***Sub 8:*** If testimony is heard, it has same effect as if it were under oath.

Section 17–18: JN shall be taken of all acts of Parliament, public or private, without being pleaded.

Section 28: No book/document can be admitted unless the party has **before trial** given to the other party notice of that intention.

Section 30: Business records made in usual and ordinary course of business

A record made in the **usual and ordinary course of business** that contains info in respect of a matter where oral evidence is made is admissible.

Exception to hearsay rule: **Business Records:** Employment record/contract/receipt. Requirements for admitting the record (***R v Monkhouse* 1988 WWR**): (1) Must be original entry (no copies) // (2) Must be a contemporaneous recording (Reliability issue: less likely to have been forged) // (3) Must be in routine course of business (routine record keeping; rationale: if they do it the same way every single time, its more likely to be correct) // (4) Must be a record of business // (5) Must be by a person who is since deceased (because if they're alive, you can just get them on the stand) // (6) Must be by a person who was under a duty to do the act and to record it // (7) Person must have had no motive to misrepresent the record // Note: there are also statutory provisions that allow business documents in *but* they don't deal with the hearsay issue, so you have to think about both

Section 31.1 Electronic documents, e-mails (note: party seeking to introduce has burden of proving authenticity – problems with electronic documents: identification of author // easier to alter // can make copies)

Section 37: Objection to disclosure of info on grounds of *specified* public interest.

Section 38: Objection to disclosure on basis of **national security**.

Section 39: Objection to disclosure on basis of confidence of Queen's Privy Council.

Section 40: "In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken…subject to this Act and other Acts of Parliament, apply to those proceedings."

BRITISH COLUMBIA EVIDENCE ACT

Section 2: Sets out jurisdiction

Section 8: No **husband/wife** is compellable to disclose any communication made by him/her to other during marriage.

Section 10: Requirements for written report (copy given to all parties 30 days prior assertion of qualifications required; etc).

Section 11: Expert must not give opinion unless a written statement o that opinion and the facts on which that opinion is formed has been given to all parties 30 days prior to testimony. NOTE: Person presiding may still permit the statement, pursuant to subsection 2.

Section 12: Section 11 does not apply to criminal proceedings.

Section 13: Witness may be X-examined as to previous statements made by that witness in writing, or reduced into writing…without the writing being shown to him. If it is intended to contradict the witness, the writing **must be first called** to those parts of the writing that are to be used for contradicting the witness.

Section 24: JN shall be taken of all acts of Parliament, public or private, without being pleaded.

Section 34, 52: Banking records are admissible when made in ordinary course of business.

Sections 72, 73: Rules relating to sexual victims' autonomy and testifying via TV.

APPENDIX C: CHARTER PROVISIONS

Section 7: Right to life, liberty, and security of the person

s. 7 of the *Charter* has proved to be an important vehicle for the constitutionalization of evidentiary principles

Interest involved: right to silence, self-incrimination

Confessions Rule & Charter s. 7
Confessions rule and *Charter s. 7* tests are functionally equivalent: If Crown proves BRD that the statement was voluntary, Defence cannot make an argument that right to silence was violated (*s. 7* functionally = confessions rule). If circumstances are such that the accused can show (on BoP) that the statement was obtained in violation of his right to silence, then the Crown will not be able to prove voluntariness BRD (***Singh***).

The constitutional right to silence has not changed the voluntariness rule. The ultimate question is whether the accused exercised free will by choosing to make a statement. ***Right to silence ≠ right not to be questioned*** (***Singh***) *however police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities* (Charron J in ***Singh***)

Residual protection offered by *s. 7* is only triggered upon detention (rationale: after detention, more vulnerable position). Example where *s. 7* goes beyond confessions rule: statements made to undercover cop—confessions rule not triggered because undercover cop is not a person in authority (***Rothman***, ***Grandinetti***).

Factors to consider: (1) failure to warn suspect that police have reasonable grounds to believe accused committed the crime (2) efforts made by accused to invoke his right to silence (***Singh***).

Note: if the suspect is detained by police, the test for voluntariness is more strict (***Singh***).
Note: Non-confession statements made to person in authority subject to same voluntariness analysis (***Singh***).

Derivative Evidence & Charter s. 7
The common law confessions rule does not exclude derivative evidence (the evidence obtained as a result of the confession) – if you have a coerced confession which leads to real evidence (like cocaine), the confession is inadmissible, but the real evidence, at common law, would not be (***Grant***).

Section 24(2) provides a residual protection: You can only use the common law confessions rule to exclude the statement (automatic exclusionary rule) but to exclude the derivative evidence, you have to make an argument that your *s. 7* right to remain silent was infringed (***Singh***), which is inconsistent with the principles of fundamental justice. Under *s. 7*, there would be a similar, if not identical, outcome to the voluntariness analysis of the confessions rule. So, the common law confessions rule would render the statement automatically inadmissible, and because of the *s. 7* infringement, we can make an argument under *s. 24(2)* to exclude the derivative evidence as well.

Section 8: Right to be secure against unreasonable search or seizure

Test for s. 8 infringement: Whether or not you had a reasonable expectation of privacy in the thing that was searched. Body/Home: High level of reasonable expectation of privacy.

Interest involved: privacy and/or human dignity interests

Exception to informer privilege argument: Where accused seeks to establish that a **search was not on reasonable grounds** – designed to deal with informants *not* being called as to guilt (s. 8). Competing values: protecting identity of police informers vs. the need for accused to know the case against him and that it was collected in a constitutional manner (***Scott***).

Section 9: Right to be secure against arbitrary detention

Test for s. 9 infringement: Lack of reasonable grounds to believe that A has committed a criminal offence

Investigative Detention – test for infringement: Lack of reasonable grounds to suspect that A has committed a criminal offence (test in ***Mann* 2004**).

Note: you never get to use the fruits of the search to justify the search – this is *ex-post-facto* reasoning

Interests involved: liberty interests

***R v Mann* 2004 SCC** sets out for the first time that there is something called an **investigative detention** and articulated what grounds you needed for it. **Test for investigative detention:** reasonable grounds to *suspect* (not believe) that the accused is involved in a criminal offence.

A search incident to an investigative detention (which is different from a search incident to an arrest) is limited to a pat-down search to find weapons, and only when there are reasonable grounds to suspect that the officer is at risk of harm. (*In **Mann**, the search becomes unreasonable when the police proceed to pat down a soft bulge in accused's pocket – that was a search for evidence not for weapons*)

Section 10(b): Right to retain counsel

Interests involved: self-incrimination interests [Interest behind the right to counsel is **self-incrimination** (i.e. making an informed choice based on legal advice about whether or not to speak or cooperate with police, legal counsel would have told accused to shut up)]

Section 11(c): *right not to be compelled as a witness against oneself*
Section 11(d): *accused is innocent until proven guilty*
Section 13: *right against self-incrimination in subsequent proceedings*

Charter s. 24: Provides for remedy where evidence obtained in unconstitutional manner

Charter s. 24(1) "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to obtain such remedy as the court considers appropriate and just in the circumstances."

General rule: ***s. 24(1)*** operates to generally limit claims for exclusion of evidence to the individual whose rights have been infringed, so it must be the accused's *Charter* that is violated. However the intrusion of the privacy rights of third parties *may be relevant* in determining whether a search was conducted in a reasonable manner (***R v Edwards* 1996 SCC**).

Ways Around ***Edwards*:** (1) Cory J: Infringements of other party's *Charter* rights may inform your own *Charter* rights, so you may be able to argue that *your* right was violated (even if it was a minimal infringement). That way the reasonableness of the police conduct will be assessed in the context of the intentional and deliberate violation of the rights of the other party. (2) You *may* be able to make an argument under ***s. 7*** that it would be against the principles of fundamental justice to convict an accused person using evidence that is unconstitutionally obtained (untested)

There is no automatic standing; just because the evidence is unconstitutionally obtained is not enough to pass the ***s. 24(1)*** test; it has to be *the accused's Charter* rights that were infringed. Only then can the accused proceed with a ***s. 24(2)*** test to see whether or not the evidence so obtained should, in fact, be excluded.

Charter s. 24(2) "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would **bring the administration of justice into disrepute**."

The test for "bringing the administration of justice into disrepute", based on a bilingual interpretation of ***s. 24 (2)***, is: Whether, on a balance of probabilities, admitting the evidence *could* (*gives with one hand*) bring the administration of justice into *further* (*takes with the other hand*) disrepute (Lamer J in ***R v Collins* 1987 SCC**, *the throat-grab-to-prevent-swallowing-case*).

APPENDIX D: IMPORTANT CASES

HEARSAY

***Subramaniam v. Public Prosecutor* 1956 PC**

Only issue at trial: whether he was under duress. Statement by communist soldier to Subramaniam: "I am a communist" // (1) Relevance: it makes it more likely that Subramaniam had a subjective belief that his life was in danger and that he was afraid for his life // (2) Witness: Subramaniam // (3) Declarant: the communist soldier // (4) Purpose of the statement: ***statement was not led for the truth of its content.***

Held: Statement is not hearsay and is admissible when it is proposed to establish the fact that the statement was made, not the truth of the statement

***R v Khan* 1990 SCC**

(McLachlin J)

Sexual assault of 3-year-old in doctor's office. Declaration to mother without prompting. Corroborating evidence: semen on girl's clothing. Daughter found incompetent to testify.

Held: Mother could testify about what child told her. Evidence admissible for truth of its content.

Traditional Approach: Child's statement is hearsay. Statement does not fall within a traditional exception (res gestae fails because it was not a spontaneous declaration—not contemporaneous: it would have had to be during the abuse, even 2 minutes later doesn't count since there was no emotional intensity)

Principled Approach: Has to be significantly reliable and reasonably necessary. Matters relevant to reliability will vary with the child and the circumstances and are best left to the TJ // (traditional approach had certainty but lacked flexibility)

Significance of *Khan*: it overcomes common law approach to rule-based exceptions. Must be seen as an expression of principles that underlie the principled approach (Lamer CJC in ***Smith***).

***R v Smith* 1992 SCC** (Lamer CJC)

Deceased's phone calls to her mother: (1) 10.21 pm: "Larry abandoned me." // (2) 11.21 pm: "Larry has not returned." // (3) 11.54 pm: "Larry is back." // (4) 12.41 am: "…on my way…". 1.30 am: body is found.

Held: Statement 1 and 2 are admissible under ***Khan*** principles because they are necessary and reliable (no motive to lie) // Statement 3 is not reliable (declarant had a motive to lie to prevent mother from worrying—problem: we're making reliability assessments and only given jury part of the story) // (4th wasn't at issue)

***R v Starr* 2000 SCC** (Iacobucci J)

Starr convicted of murder 1 for killing Cook, other deceased is D. Allegation that Starr lured them to side of road, claiming they were going to an AutoPac scam. Cook was police informer coming out of jail. Crown theory: D was unfortunate witness. Jodi G (Cook's gf) is witness (provides motive and links Cook with Starr).

Held: Factors to be considered on admissibility inquiry should be categorized in terms of threshold and ultimate reliability and corroborating evidence should not be considered (note: overruled in ***Khelawon***).

Relationship between traditional hearsay exceptions at common law and the principled approach: Should not abolish traditional exceptions, but these exceptions must be updated and assessed in terms of necessity and reliability. So: Evidence falling within a traditional exception is presumptively admissible unless other party can undermine it by arguing that it is not sufficiently necessary or reliable (based on ***Smith***).

Necessity: Goes beyond unavailability of declarant, quality of evidence is also relevant—can we adduce evidence of the same value from another source? It must also be an issue of central concern to the case. // **Reliability** [tension between TJ and trier-of-fact]**:** Threshold reliability – considered by TJ: TJ should not consider declarant's general reputation for truthfulness, nor any prior or subsequent statements, nor presence of corroborating or conflicting evidence (overturned in ***Khelawon***: shouldn't be allowed to exclude evidence at threshold stage without consideration of corroborating evidence). Ultimate reliability – considered by TF

***R v Mapara* 2005 SCC** (McLachlin CJC) [part of the evolution]

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

*Note: in rare cases will something not be admitted if it falls under a traditional exception based on necessity and reliability (**Khelawon** supports this and states you have to challenge the exception generally, not on a case-by-case basis).*

R v Khelawon 2006 SCC

Current Law (Charron J)

*K was charged with assault and uttering threats, cook's motive was questioned (she was fired with notice), contamination of witness (which also tainted the declarant), doctor's testimony was also tainted by presence of cook, videotaped testimony to police was not tainted (as much) but was not given under oath (no **KGB**), still reliability concerns of declarant based on his history of paranoia/delusions <u>but</u> supported by psychology expert who watched videotape and stated no signs of dementia (able to understand question/appreciate consequences)*

New definition of hearsay: out-of-court statement, offered for the truth of its content where there is no **opportunity for contemporaneous (at the same time they are made) cross-examination** (hence no way to establish reliability) // **Allows for admission of evidence that is hearsay if it has been contemporaneously cross-examined** (even if it's not necessary), ex: a transcript from a previous trial where witness was cross-examination, even if witness is available, this would not count as hearsay based on ***Khelawon*** (essentially taking out necessity by altering definition of hearsay <u>but</u> would still have to pass **probative and prejudice analysis**)

Before (in ***Starr***) you couldn't bring in corroborating evidence in the reliability analysis under principled approach, **but now you can include corroborating evidence**—evidence from doctor that injuries were consistent with assault but possibly caused from a fall

STATEMENTS BY ACCUSED PERSONS

R v Rothman 1981 SCC

(Martland J for majority, Lamer J concurring, Estey J dissenting)

A arrested carrying hash, brought into police station. Advised of right to counsel and right to keep silent, declined to give statement. Undercover cop came into cell with him. A said he looked like a narc but changed his mind after officer said he was not a narc. A eventually confessed.

Held: The statement is admissible. The police officer was <u>not</u> a person in authority because he was <u>not perceived</u> as being a police officer by the accused at the time the statement was made. **The test is subjective.** Police must sometimes, of necessity, resort to tricks. Tricks that are okay: pretending to be a hard drug addict or truck driver. Tricks that are not ok: Member of legal aid.

Lamer J concurring: Police trickery could result in inadmissibility if it would bring the administration of justice into disrepute and shock the community (foreshadows what will be coming in subsequent cases).
Estey J dissenting: We should not be tricking people into waiving their right to remain silent. Period.

***R v Grandinetti* 2005 SCC** (Abella J)
Police conducted undercover operation, posed as member of criminal organization trying to win accused's confidence, said "we can use our corrupt police contacts to steer investigation away from you". A told them he committed murder of aunt. **Held:** A did not perceive them as police officers. Authority in a legal sense means someone who the accused's opinion can influence the investigation or prosecution.

Ibrahim v The King 1914 AC

In custody in shackles, was asked by officer, "Why have you done such a senseless act?" – accused replied, "Some three or four days he has been abusing me; without doubt I killed him."

Held: No statement by an accused is admissible in evidence against him unless is it shown by the prosecution to have been a **voluntary statement**, in the sense that it was NOT been obtained by him from fear of prejudice or hope of advantage exercised or held out by a person in authority (*quid pro quo*). BUT there must be **inducement** – the simple question it was confessed to person in authority is NOT enough. That an accused made a statement under circumstances of hope, fear, interest or otherwise goes only to its weight.

R v Serack 1974 BCSC

A arrested at 7.30 am. By 3.30 pm, he still only has a blanket (clothes were taken for lab testing). ***Held:*** *"A man's trousers are essential to his dignity". The police were right to take his trousers, but they should not have conducted the interview. They should have given the man some pants! It does not matter if there was no deliberate breach by police.*

Held: A lack of intention to humiliate/malicious does not matter. What does matter is that the will of accused is overborne in order to establish oppression.

R v Oickle 2000 SCC

(Leading Case on Common Law Confessions Rule)

Oickle was a volunteer firefighter who started fires. Accused for convicted multiple arsons – he is volunteer fireman – several incidents of father's car and girlfriend's car and ones in his neighborhood – police administer polygraph at hotel at 3pm – tell accused he failed the test and "machines don't lie" – now ask for confession (inducement) – confesses to g/f car fire – he then goes to police station – re-cautioned at 8:15pm – at 11pm he confesses to 7 fires – by 1:10am he signs statement – he is in cell by 2:45 – at 6 am he is awake, so they say you are up already, "can you re-enact what you did" – they videotaped the re-enactment.

Held: Inducements, operating mind doctrine, and oppression doctrine are no longer separate branches, they can be combined.

Majority: The statements were voluntary. Questioning was persistent and accusatorial, but never hostile, aggressive, or intimidating. Police can appeal to moral inducements. They are entitled to downplay moral culpability of offences but there is a concern if they downplay legal consequences. Threat of inducement can operate against a third party (we'll bring in your girlfriend and put her on a polygraph) but the strength of the inducement will play a role in the analysis. Police could exaggerate reliability of polygraph.

Dissent: The interrogation contained improper inducements.

R v Singh 2007 SCC

Right to silence is asserted 18 times but police continue questioning. Defence conceded that statement is voluntary at common law but argued violation of Charter s. 7 right to silence—interpretation: right to silence requires the police to stop asking questions once the right is asserted.

Held: Wrong. Right to silence ≠ right not to be questioned. Statement is admissible.

Charron J: "Under both common law and Charter rules, police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities."

Fish J dissenting: "The question on this appeal is whether "no" means "yes" where a police interrogator refuses to take "no" for an answer from a detainee under his total control."

CHARACTER EVIDENCE

***R v Levasseur* 1987 ABCA**
Accused leading evidence of good character – charged with B&E to warehouse where she allegedly stole truck – she said employer said she could – good character brought by subsequent employer.

Held: Majority would admit evidence of the subsequent employer. Reputation based on constant and intimate personal observation – not limited to residential community. If you are going to call witness for general reputation, it cannot be based on their opinion, must be based on constant observation, person must be trustworthy, the law wants the best person.

***R v Profit* 1992 ONCA**
High school principal – appealing conviction of 2 counts of indecently assaulting boy – called 22 witnesses to support his character – they were from summer camp counselors, church leaders, business people, colleagues, friends – they all testified he was of good reputation – they said he was honest, moral, and had great integrity – said he never made inappropriate comments.

Issue: Did TJ err in not explicitly considering the possibility that the good character evidence could go to both the credibility of the accused who denied the offence and for the disposition purpose (because he is such a good person, he is less likely to have committed these acts of sexual impropriety).

Held – overturned by SCC: When accused leads evidence of good character, it may be admissible for credibility and for disposition purposes. The TJ did not give maximum use as going to good character, and the failure to mention even the possibility of good character evidence going to disposition suggests that TJ was not even aware that that was possible. This is an error of law. **SCC:** Conviction restored.

Dissent (Griffiths J) – adopted by SCC: Raises serious concerns about reputation evidence and its potential for being unhelpful. Reputation evidence is limited in scope and should not include witnesses' own opinions.

Reasoning: First thing he does, he carves out what was reputation evidence and what was evidence of good acts. Second thing he does, TJ rejected the accused's testimony and accepted evidence of complainant (finding of fact). How could this far removed evidence about his reputation upset that finding of fact? It should not ever do that. This is the legal error. The extrinsic, generalized evidence of the reputation of the accused was allowed to disrupt the findings of fact as to credibility – this is a powerful argument.

For some offences, character evidence will be of such low probative value that it is really not very helpful at all and the prejudicial effects would likely outweigh the probative value. Sexual assaults are shrouded in secrecy and flawless of character may not come to light until accused is charged. [*Ontario College of Physicians and Surgeons, cited by dissent:* "there is data to show that evidence of good character does not have any bearing in the propensity of an individual to abuse patients sexually… abusers often build good character profiles to camouflage their abuse."]

However, this does not mean that good character evidence of general reputation should be excluded in cases of sexual assault. It simply means that, in a jury trial, if the TJ does not exercise their discretion to exclude the evidence on the basis of PE *substantially* outweighing PV (***Seaboyer Standard*** since it is Defence evidence), then the evidence should be put to they jury but with a strong warning that the jury should question how much weight to give to it, given the sexual nature of the offence and the potential disconnect between the crime (*behind-closed-doors*) and the reputation of the accused.

R v McNamara 1981 ONCA

Character put at issue when accused adduced evidence that he ran the company "Like any company should be done – legally".

Issue: Whether or not Crown can introduce prior bad act since A put his character at issue (accused implied: he is a good, honest, businessman). When the accused leads evidence of good general reputation, is the Crown limited to using evidence of bad general reputation or can they use a prior bad act to rebut the good general reputation?

Held: When character is put at issue by accused, proof of prior bad act can be used to rebut the claim of good character and show that the accused lied (goes to credibility). Crown is not limited, in leading rebuttal evidence, to using the same type of evidence that the accused led to establish good character. But this is going to require a jury instruction: this evidence (the prior bad act) cannot be used to show that the accused committed the offence, it can only be used to undermine the accused's credibility. So: Crown has a broad *scope* in responding to evidence of good character (can respond by using reputation, or bad acts) but is limited in *purpose*.

General reputation evidence must be given through people other than accused but if the accused is going to lead evidence of good acts, it is only the evidence who can do that. Note: TJ still has discretion re probative value / prejudicial effect.

R v Robertson (1975 OCA)

A wanted to lead psych evidence that showed that he didn't exhibit any violent tendencies and the type of person who would have committed the offence was one who would exhibit these tendencies. Class of person put forward in this case: psychopaths. TJ rejects the idea that only this class of people would commit a brutal murder such as this (upheld on appeal).

Held: You'e going to have quite an extraordinary and peculiar crime in order to be able to lead this kind of evidence. The standard is very high.

Is the concept of "ordinary crime" versus offences having "distinctive features" persuasive? Expert dangers. Accused has to be willing to be assessed. What if Crown wants to bring in their own psychiatrist to have the accused assessed? Issues of privilege (what if assessment shows that he *does* fit within the class?). The reasoning may not be entirely sound, the idea that only a specific class of people can commit a certain type of offence. Counterpoint: in some cases, if you don't have a person with a good reputation, character evidence based on psychiatric assessment may be all they have, so if you're going to exclude that evidence, you may be taking away a reasonable doubt. So maybe we should be more cautious about excluding this evidence.

R v Scopelliti 1981 ONCA

Store owner shoots guys at night and claims self defense – deceased admits he shot them – accused offered testimony of what happened (said two victims antagonized him) – he said he was fearful they would hurt/rob him – there was significant evidence of bad acts of deceased victims. A seeking to admit prior bad acts of victim.

Held: If the accused is claiming self-defence, he cannot be the aggressor. If we have evidence of bad acts of third parties, there is no exclusionary rule – it is admissible if there is PV to it. Can prove through general reputation, psychiatric evidence, and specific bad acts. ***But*** there must be some link between the bad acts (disposition) and the event in question (the self-defence). It is not enough to say that the victims had general propensity for violence – you need more.

Bad acts of the victim that the accused was aware of are admissible to demonstrate that there was reasonable apprehension of harm (self-defence argument): (*Ex. road rage; stole gasoline; broke lights in front of the store using snowballs; spat Coca Cola on the floor*)

Bad acts unknown to the accused are not relevant to the question of reasonable apprehension of harm ***but*** where self-defence is raised, evidence of the victim's character for violence is admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked (but not that there was a reasonable apprehension of harm). (*Ex. vandalism, threats to others*)

SIMILAR FACT EVIDENCE

***R v Handy* 2002 SCC**
Charge: sexual assault causing bodily harm. Complainant consented to have sex, but had not consented to certain acts or the type of sex (aggressive). Crown wanted to lead evidence from former wife that A was aggressive during sex to show that there was a propensity for violence during sexual relations.

Held: There is a pattern of conduct, but the behaviour is not uniquely similar enough. There is insufficient probative value. Similar fact evidence should have been inadmissible.

Application of test to the facts: Issue in question broadly was credibility, but specifically whether consent was given. There was a pattern of conduct, but setting was different, context was different (marriage vs. casual encounter), behaviour wasn't uniquely similar enough. Prejudicial effects: he got away last time, we're not going to let him get away this time. Court recognizes that domestic abuse allegations are inflammatory.

***Mood Music Publishing Co Ltd v De Wolfe Ltd* 1976 All ER**
Plaintiffs has library of music works – provide them to producers – D has similar business – similar songs submitted – P song created prior to D – P tried to bring similar fact evidence to show D acted similar in past – engaged in two attempts to introduce SFE: (1) Trap order: recorded another hit.

Held: We may be willing to accept that it was a coincidence in one case, but it is very unlikely that there would be coincidences in four cases.

PRIVILEGE

***Smith v Jones* 1999 SCC**
Lawyer sends client to shrink for evaluation hoping to get info that could be use in defense – client describes his crime to the shrink and how he took woman as sex slave – said it was trial run and he was going to do it again – shrink was concerned he would do it again – told lawyer the info should be disclosed – shrink went to court to disclose.

Held: TJ – the psychiatrist must disclose, CA – privilege *does* attach. There is a public safety exception that this falls within, but BCCA says they won't compel the psychiatrist to disclose, but they can choose to do so, SCC – exception to privilege in this case is satisfied.

The application of the test in ***Smith v Jones*** shows us how rigorously this test will be applied – the criteria were met pretty easily.

***R v Leipert* 1997 SCC**
Police received tip from CrimeStoppers he was growing pot in house – police show up with dogs four times – officer noticed smell – on basis of that evidence obtained search warrant – TJ orders disclosure – Crown says they will not.

Issue: does the crime stoppers tip sheet need to be disclosed? To what extent can you protect the identity of an informer in the disclosure of information the informer gave, even if you don't use their name – can we just give the tip sheet without the name?

Held: Don't even go there! You have no idea how the information you disclose may in/directly lead to the identity of the informer, putting them at risk of retribution and raise other concerns. In this case, informer privilege is held to be more important than disclosure obligation (not surprising since ***Stinchcombe*** foresaw this exception of privilege).

Defence Argument: ***Charter s. 7*** as recognized in ***Stinchcombe*** places an obligation on the Crown to disclose all relevant information to the Defence and therefore, informer privilege results in constitutional principles being overwritten by common-law exclusionary rules. This argument fails because ***Stinchcombe*** foresaw this and states that the Crown disclosure obligation is *subject to privilege*.

Crown Argument: The entire tip sheet (not just the identity of the tipper) should be privileged subject to an "innocence-at-stake" exception – so we can probably add this onto a list of exceptions for informer privilege

***R v Gruenke* 1991 SCC**
22-year-old A had a platonic father-figure relationship with 82-year-old B. She lived with him, he gave her money, put her in his will, etc. Then she alleged that he began making sexual advances to her, at which point she moved out. His advances became more aggressive until A and her boyfriend plotted to kill him. One night, after a fight, she and her boyfriend beat B to death. Two days after the murder, Frovich, a counselor who had been talking to A prior to the murder went to speak to A about her involvement in the murder. They then go to see the church pastor, Thiessen, together.

Held: TJ: Testimony of statements to counselor and pastor are hearsay, but because they included incriminating statements, they fall within the traditional exception to hearsay. The pastor and counselor are not persons in authority so the confessions rule does not apply. The statements are thus admissible. They are not subject to privilege because they are not considered to be religious communication. SCC agrees.

Reasoning: A went to church for *emotional and psychological healing* (note: the word *spiritual* is not in there). The issue became: was this simply a counselor relationship (emotional capacity) or does it relate to a freedom-of-religion-type argument (spiritual capacity)? This is a case of a pastor and a lay counselor helping the accused to work through some of her issues on an emotional level.

Applying the Wigmore Test
1. **Confidentiality:** ***Gruenke***: Neither the conversation with the priest nor the counsel could be expected to be confidential. The accused had already made her mind up to turn herself in and she wanted to unburden herself. Therefore, there was no confidential relationship established.
2. **Centrality of confidence to the relationship:** The element of confidentiality would be essential to full and satisfactory maintenance of a relationship with a pastor but not a lay counselor.
3. **Nature of the relationship:** Relationship with a pastor, in the opinion of community, would be one ought to be sedulously fostered. The ability to confess your sins and ask for forgiveness is a central element of many religions (I assume). Therefore, a church member's confidential communications with a pastor for religious purposes is important to one's freedom of religion and ought to be preserved.
4. **Degree of harm to the relationship:** If pastors could be compelled to disclose information shared during confession, it would greatly undermine the role of pastors and confession in religion.

IMPROPERLY OBTAINED EVIDENCE

***R v Edwards* 1996 SCC**

A was a suspected drug dealer. Police got a tip that he has drugs either on him or at his girlfriend's house. Arrested for driving while suspended and taken into custody. The vehicle is impounded. The police go to the girlfriend's house, where they engage in lies and half-truths to get her to cooperate with them. They say they could get a warrant, described it as just paperwork. They find crack cocaine under a couch cushion. Girlfriend is not informed that she has the right to refuse entry to the police or that she has right to counsel, she is charged but the charges are dropped. Accused is in her apartment, it is not his apartment, and he doesn't live with her.

Charter s. 8: Right to be secure against unreasonable search or seizure. **Test for infringement:** Whether or not you had a reasonable expectation of privacy in the thing that was searched.

Issue: When, if ever, should a *Charter* violation against a third party be considered under s. 24(2)? When should evidence obtained in violation of s. 24(2) of a third party be excluded in proceedings against an accused who is not related to the person whose rights were actually infringed (a.k.a. When does an accused have standing to argue the Charter rights of a third party?

Held: he does not have standing, evidence is admissible

Reasoning: Edwards was not a live-in boyfriend, but he was there a few nights a week, so he may have had some expectation of privacy in her home (not a lot, but some), so he could still argue that even that low privacy interest was violated because of the manner in which the search was conducted (through lies, half-truths, etc.), the state conduct was so egregious with respect to her, that Edwards could point to that to establish a violation of his own right. But he does not get to argue for exclusion unless he can establish that he himself has suffered a *Charter* violation

***R v Collins* 1987 SCC** (Lamer J, *the throat-grab-to-prevent-swallowing-case*)

Undercover cops got tip from someone saying lady had drugs – police grabbed her by the throat – she had heroin in hand – police didn't want her to swallow the drugs.

First attempt to articulate a test for what it means to bring the administration of justice into disrepute under s. 24(2) – note: keep track of how the court describes the purpose of s. 24(2), and how the test has changed

Issue: whether the drugs, found in the hand of the accused, should be excluded under s. 24(2)

Held: Eventually they excluded the evidence, based on the facts at the time.

Reasoning: There is a clear violation of s. 8. There is a temporal and causal link between the infringement and the evidence (language from ***Grant***). The infringement is physically grabbing her by the throat, restraining her and obtaining the drugs from her hand – unlawful search and seizure. There is a clear temporal and causal link. Temporal link: the moment they search and seize the evidence is the moment they find it. Causal link: they obtained the item only because they engaged in that behaviour.

Factors to consider:
(a) What kind of evidence was obtained?
(b) What *Charter* right was infringed?
(c) Was violation serious or merely technical in nature? *There is a spectrum/continuum of infringement*
(d) Was it deliberate/willful/flagrant or was it inadvertent/committed in good faith?
(e) Did it occur in circumstances of urgency or necessity?
(f) Were there other investigatory techniques available? *Echoes s. 1 values*
(g) Would the evidence have been obtained in any event? *Discoverability (not a strong argument)*
(h) Is the offence serious? *(eliminated post-Collins) If offence is serious, the more jeopardy the accused is in, so the standards should be higher for a fair trial. Flip side: public doesn't want to see someone acquitted of a serious offence because of a "technicality"*
(i) Is the evidence essential to substantiate the charge? *The importance of the evidence for the Crown*
(j) Are other remedies available? *Are there other ways that the accused could have obtained satisfaction for the infringement of their Charter rights (if so, evidence more likely to be admitted)*

Application of test to the facts in this case: there was real evidence in this case, meaning trial fairness less of an issue, the cost of excluding the evidence would be high, it was a serious crime, there was merely suspicions, it was a serious violation of the right. Even though it involved real evidence, it still resulted in an exclusion.

R v Stillman **1997 SCC**

Accused is young offender – deceased found with semen and bite mark – witnesses put accused at time and place – police need to link him to crime – his two lawyers write letter saying there is no consent for bodily samples and cannot be interviewed in their absence – lawyers leave – police take samples and interview him – he blows nose in Kleenex and they take it for evidence.

Held: New summary "unfair trial box" test for determining admissibility of s.24(2) breached evidence. Hair, Dental, Saliva are conscriptive and excluded – not otherwise discoverable. NO discussion of trial fairness because failure to show discoverable by alternate means. Tissue is admissible (no force), they could have got warrant for garbage can after sealing it.

R v Grant 2009 SCC

Accused walking down street – two plain clothed officers drove by and thought he looked suspicious as he stared and was fidgeting – school nearby and there had been bad things going on – uniformed officer approached accused and subsequently other two officers approached accused – officers asked if he had anything on him – accused said he had firearm and marijuana – officers took these two items – officers had no legal grounds or reasonable suspicion to detain accused – he was "psychologically" detained.

Issue: whether the loaded revolver, a piece of real evidence, should be excluded under s. 24(2)

Charter* rights violated:** ***s. 9 (arbitrary detention because there wasn't reasonable grounds to suspect that A had committed a criminal offence, test for investigative detention set out in ***R v Mann* 2004 SCC**); ***s. 10(b)*** (didn't advise him of his right to counsel)

Note: the facts in ***Grant*** arose November 2003 – *Mann* hadn't been decided, so you have to judge the police conduct based on the law at the time. That is why ultimately the evidence is dealt with differently than it would have post-***Mann***.

Deschamps J (dissenting): Tried to argue that if the evidence is extremely reliable *and* the offence is extremely serious, that should suggest that the evidence should be admitted. Majority thinks this shouldn't be done because we must look at the long-term impact, not just the individual case. *In favour of Deschamps: If the evidence is found to be reliable and there is more at stake, I think it is more likely that the exclusion of the evidence would bring the administration of justice into disrepute. Society's interest would be better served by allowing this evidence. In favour of Majority: the standards we're going to hold the state to in proving a serious crime must be higher because of the consequences of the crime and because of the long-term nature of this inquiry.* So seriousness of the offence doesn't get completely disregarded but it does cut both ways. Be very cautious about putting all your arguments into "seriousness of the offence". It still does get talked about in ***Grant*** and ***Harrison***.

Application of *Grant Test* to the facts: ***s. 9*** *and* ***10(b)*** *infringement*

1. **Seriousness:** No bad faith, not deliberate or egregious. **It's an area of considerable legal uncertainty** – it was a mistake, but an understandable one and it cannot be characterized as bad faith. Thus, admitting this evidence would not bring administration of justice into further disrepute – suggests admissibility, *but moving forward: the conduct would be less justifiable if it happened again – police are expected to know the law (Mann – investigative detention), they are not expected to know the nuances of jurisprudential debate, but they are expected to know where the law stands.*
2. **Intrusiveness:** s. 8 detention infringement was more than minimal because it escalated so quickly (not severe, but more than minimal; subtly coercive); s. 10(b) right to counsel infringement was also significant, answers were not spontaneous, they were in response to specific questions, they were non-discoverable – this is an aggravating factor. The police in their questions were probing for search grounds, they were fishing. Its not just that he was detained, it was that he was detained for the purpose of trying to get him to make incriminating statements so that they could get to arrest him and search him. Overall, the impact was significant – suggests inadmissibility
3. **Society's interest** – re: the gun – the evidence was highly reliable, and it is essential to assessing the case on its merits – suggests admissibility

Overall: This is a "close case". They admit the evidence because the police are operating in an area of considerable legal uncertainty. First factor suggests it would not bring the administration of justice into disrepute. The gun has significant value to the merits of the case even though the violation was significant. 2 factors suggest admissibility (disrepute if you exclude the evidence), one factor suggests inadmissibility (disrepute if you include the evidence). But you have to assess the intensity of each factor and the relationship between the 3. In this case, the factor suggesting inadmissibility is not strong enough to outweigh the other 2 suggesting admissibility.

***R v Harrison* 2009 SCC**
Driving-while-Albertan, drug-courier case. Car driving with no plate on front – pulled over by cops – driving suspension – detention continued and found drugs – Alberta did not require plate on front after all!

Charter* rights violated:** ***s. 9 – police did not have grounds to stop the accused, police don't get to randomly stop vehicles when they want to, he was arbitrarily detained; ***s. 8*** – there was no grounds for the search (didn't have the right to stop him in the first place and there was no valid arrest made)

Issue: whether the cocaine discovered *as a result* of the Charter-violation should be excluded

Held: Court decides to exclude the evidence – note: it is real evidence that is very reliable, but it's excluded (two pieces of real evidence: handgun in ***Grant***, cocaine in ***Harrison***; but different outcomes). TJ put too much emphasis on the seriousness of the offence – SCC says is not very relevant. TJ put too much emphasis on the truth-seeking function

Application of *Grant Test* to the facts: ***s. 8*** *and* ***s. 9*** *infringement*
1. **Seriousness:** officer showed blatant disregard; non-existent grounds (zero) – this is different from insufficient grounds; it's aggravated by the officer's misleading testimony (the officer not only violated right against arbitrary detention, he then comes to court to try to use the trial process and his testimony under oath to mislead the court to admit the evidence that was unconstitutionally obtained (this is a great example of "further disrepute"); this isn't a systemic problem, but that is hardly a mitigating factor, it's just neutral; unlike ***Grant***, this is not an area of considerable legal uncertainty, there are clear standards and they were breached. Spectrum: negligence falls in the middle: morally blameless –> negligence –> conduct showing blatant disregard (***Kitaitchik***, adopted by SCC in ***Harrison***) – **suggests inadmissibility**
2. **Intrusiveness:** liberty interest, privacy interest – but not human integrity/dignity – lower expectation of privacy in vehicle than in home, but there was still no grounds for detention or the search. The impact was more than trivial and significant but it was not egregious (similar level of intrusiveness as ***Grant***) – **suggests inadmissibility**
3. **Society's Interest:** cocaine is real evidence, it is highly relevant and reliable. It's critical to the Crown's case and virtually conclusive of guilt. Seriousness of the offence is not very helpful – **suggests admissibility**

Overall: the first two factors favour excluding the evidence, the first one more so than the second. But the third factor favours including. Note that just because two factors go one way, and only one goes the other way doesn't automatically mean that the evidence should be inadmissible. We must still assess the intensity of each factor and consider the relationship between the three factors. In this case, the last factor (truth-seeking function: that it is real evidence, it is reliable and necessary to the Crown's case) is not strong enough to overpower the other two factors.

This tells us: if all you have to argue for admissibility is the truth-seeking function (it is reliable and critical evidence), the evidence is probably going to be excluded, bearing in mind that the factor in #1 was very strong in favouring exclusion.

***R v Calder* 1996 SCC**
Attempted purchase of sex acts with a minor
Side issue but interesting question: what is the purpose for which the evidence is admitted?

Infringed Charter right: ***s. 10(b)*** right to counsel

It helps Crown to lead evidence that Calder denied he was present at Queen and Bathurst, because (1) it undermines his **credibility** – they had evidence that he *was* there; (2) if you can prove that someone set up a false alibi, it demonstrates **consciousness of guilt** – the inference is that only someone who is guilty would seek to create a false alibi (it is more likely that he committed this offence because he deliberately set up a false alibi)

Issue for SCC: whether the purpose for which the unconstitutionally obtained evidence is going to be led has any bearing on the s. 24(2) admissibility

- ***R v Kuldip* 1990 SCC**: Makes a distinction between these two purposes: incrimination vs. credibility – the most effective articulation of the practical impact of the admissibility of evidence for these two purposes: if you're going to admit evidence as to consciousness of guilt, it is evidence from which you could infer that the accused committed the crime – this is the strongest use of the evidence of consciousness of guilt, it demonstrates, through a form of circumstantial evidence, that the accused is more likely to have committed the crime for which he is charged. What is the highest value/strongest use of evidence that only goes to undermining the credibility of the accused: it neutralizes the evidence – all we're saying is this evidence is useless, it can't be used. It can't prove what the accused is saying (because now his credibility is undermined so you can't believe him), but it can't be used as evidence that the accused is more likely to have committed the crime either. This is a case where the jury instruction has to be very clear on how the evidence can and can't be used. // Note: *Kuldip* arose in context of *Charter s. 13* and *CEA s. 5* which prohibits cross-examination of accused on prior inconsistent statements in another trial for the purposes of incrimination, but not for the purposes of challenging credibility – so this distinction has some relevance, but it't not directly applicable to this case

McLachlin J Dissenting: **The evidence should have been admitted for the limited purpose of undermining credibility.** When the accused chooses to take the stand and places credibility at issue (by vouching to the jury that what is saying is the whole truth and nothing but the truth), it is more difficult to say that it is unfair to permit the Crown to cross-examine him on his prior inconsistent statement and to put the vital question to him of which version of his statement is true (echoes of ***Seaboyer*** reasoning re arguments about the admissibility of the accused's criminal record: once the accused starts to launch an attack on the other witnesses in the case, the jury is left with a false impression about the accused. This seems to be unfair and would mislead the trier of fact, possibly leading to a false outcome if we can't produce evidence that the accused has lied in the past just because the evidence was unconstitutionally obtained). Merger of two principles of criminal justice system: truth-seeking function and fairness. This seems to be in line with the definition of a "fair trial" as "one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused"(***Harrer* 1995 SCC**). **But**: at the time ***Calder*** was decided, trial fairness was the main touchstone for a ***s. 24(2)*** analysis – it's pre-***Grant***. Since ***Calder*** there has been a shift away from the focus in ***Collins*** on trial fairness to society's interests in the adjudication of the case on its merits (***Grant***). SCC has said that the s. 24(2) analysis is not about trial fairness, rather it is about the repute of the administration of justice. This would make McLachlin J's argument less convincing.