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# Principles & Sources of Evidence

Principles to be balanced:

* Truth/truth seeking function of the courts
* Efficiency
* Fairness (often something like privacy/personal interests)

-how these are ranked for each rule or in general will effect the form of the evidence law we have

-How well is each evidentiary rule maximizing/meeting these?

Sources:

1. Statutes (small) – CEA and BCEA

* CEA applies to: crim, matters of litigation arising from matters in the Parl/Federal JD
* BCEA applies:
  + to matters over which prov leg has JD (s. 2)
  + when in the provice
  + and SUBJECT to the CEA and other Acts of Parl
  + re: procedural matters – applies unless inconsistent with CEA/other acts (thus could apply when there are fed matters but only in the procedural realm)

1. Constitution

* S.8 search and seizure, s.13, 10b right to cousel, 11d presumption of innocence, s.7 PFJs (fairness reqs), s. 24(2) excluding improperly obtained ev.

# Fundamental Rule & Framework of Ev Law

**Evidence is not admissible unless it is relevant and not subject to exclusion under any other rule of law or policy.**

**All relevant evidence is admissible subject to a discretion to exclude matters that may unduly prejudice, mislead or confused the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy. – *Corbett cited in Watson***

## The Framework

Determined on *voir dire*.

1. **Precondition: RELEVANCE**

**-TEST: As a matter of logic and human experience does the evidence, if believed, tend to prove or disprove a material fact needed in the case (issue). – *Watson***

-Burden **=** party seeking admission est rel on BoP

* factual and legal aspects – both established
  + factual: if believed, makes something more or less likely to be true, empirically
  + legal: does it have a bearing on an issue at trial? (this reqs knowledge of the substantive law in the area, elements of the crime/tort etc.) 🡪 relevant in relation to *what?*
* No min probative value, ANY tendency to prove… – ***R v Morris cited in Watson***
  + E.g. ***R v Morris*** *–* newspaper clipping re: trade of heroin = SCC said it was an unexplained presence that possibly showed interest and informed him of sources of supply. \*\*\* (dissent = disposition = prej = ev therefore impermiss?)
* No assessment of truth
* Other evidence can be used to support the relevancy of a certain piece of evidence.
* Onus to est relevance on party seeking to admit (tie-breaking rule!)

Relevance of Direct evidence: Ev 🡪 if believed 🡪 guilt/innocence (e.g. is the wit lying? If believed…)

Relevance of Circ ev = more problematic:

***Watson*** example: Ev (deceased always carries a gun) 🡪 if believed 🡪 Inference A: he must have had a gun at this time 🡪 inference B: situation could have been started by deceased w gun 🡪 Inference C: acc’d less likely to know about it as unplanned 🡪 ultimate issue of guilt or innocence

* Ask: if the ev believed, are the chain of inferences leading to the ultimate issue/proposition rational?

***Seaboyer***

-constitutionalization of relevance in s.7: full A&D

-CL exclusionary rules must be brought into compliance with the Charter

* + ***If it keeps relevant ev out, attack the rule.* Must be a clear ground of policy (CL will be here, but always need updating) or law (statute).**
* **E.g. s.277 remained const because** it was constructed in a limited way **and only *excluded use in a specific purpose*** amounting to a rejection of anachronistic ideas.
  + Vs. blanket exclusion w exceptions (Parl has to think up possible uses before hand);
  + “ a law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.” – McLachlin J
  + a potential big gun in the arsenal for getting ev in.
  + Ensure exclusion is for a specific purpose and to the minimal extent possible to do its job (Like the *Oakes*  language, it is also a balancing provision.

-while striking down s. 276 of the CCC re: blocking certain evidence of past sexual history to too far a degree.

-If relevant ‘presumptively admissible’

1. **Rules of Exclusion? – see pgs. \_\_\_\_\_\_\_**

**-Burden:** party opposing at admission must establish rule (depending on the rule); party seeking to admit = prove it falls w/in exception to exclusionary rule.

* Hearsay
* Opinion Evidence (unless expert)
* Involuntary Statements of Acc’d to Persons in Authority
* Some character evidence (unless SFE)
* Privileged
* Unconstitutionally Obtained Evidence after 24(2) analysis

1. **Residual Discretion: Do Prejudicial Effects Outweigh Probative Value?**

**-no burden here. Discretion.**

“All relevant ev is admissible subject to a discretion to exclude matters that may unduly prejudice, mislead or confused the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy.”

* Prob value:
  + “How relevant is it?”
  + usefulness of the evidence to prove an issue/the inferences you need to draw
  + How close/how far the evidence is to the actual crime/facts/the issue at hand?
* Prejudicial Effect: How much could it mislead the finder of fact or risk improper use by them?
  + Lead to improper reasoning, confusion or extreme time it would consume
  + Assess risks of improper use vs. benefits of proper use.
  + Is the value worth the costs?
  + NOT just prej to the D’s case.
* Even if prejudice is high, if it can be dealt w by limiting instructions and can be brought ‘below’ prob (even if low), it will be admitted. – ***R v Terry*** 
  + 🡪 dream and poem about killing someone. Poem let in w lting instruction as to allowable *circumstantial* inferences
* It is a discretion of the trial judge – ***Gray v ICBC***

***Seaboyer*** (1991 SCC)

**-** Is its value worth what it costs?

**-If law is going to exclude relevant evidence, must establish that the rule will only exclude D evidence whose probative value is substantially outweighed by its prej effect.**

**\*\*\*\*Prob vs. prej also reaches a constitutional necessity level.**

* Another constitutional argument opening.
* Equal prob and prej

1. **If Admitted: Limiting instructions/uses?**

* The judge may be required in certain circs under case law (e.g. Vertovec) AND/OR
* If there are any prejudicial effects/improper reasonings that could arise, MUST instruct against them.

# Burdens of Proof

## Civil – Summary Judgment

Purpose: avoid failures of procedural justice, screen out claims that can’t survive a good hard look.

-Made ‘sparingly and judiciously’.

-insufficient for opposing party to claim more and better evidence will be available at trial. (high level of preparedness by counsel needed).

-credibility issues requiring resolution should go to trial. ***Pizza Pizza***

-Even if chance of success of one side is

## Civil – Motion for Non-Suit

-after P’s case

-**Rule 12-5 Supreme Crt Civil Rules**

* **No evidence motion** (need not state whether you will lead D ev) vs. 12-5(6) **insufficient ev motion** (only allowed after you will not call D ev)
  + Creates risks re: latter bcz a lower bar and would otherwise become a matter of course. No ev = clearer, less time. \*\*\*efficiency as value here.
  + Also: want it to happen less often because want to avoid sits where J has to prejudge the evidence

**-Test:** Assuming the ev to be true, and adding all nec and reasonable inferences, is there sufficient evidence to support the issue/element? – ***Hall v Pemberton***

## Civil – Balance of Probabilities

-more likely than not

-NOT 50% + 1

-***McDougall*** – rejects the arguments for a “more exacting” standard when the civil allegations are more grave.

* Uncertainty about what the standard really is going to be in each case 🡪 possible arbitrariness
* How would you explain it to a jury?
* Would there be different standards for diff torts/causes of action? Would there need to be ranges of severity and thus standard w/in causes of action?
* There are critiques of McDougall as well!
  + “there is only one civil standard of proof at common law and that is a proof on BoP. Of course context is all important and a J should not be unmindful where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these consideration do not change the SoP.”
  + Is this just an embedded high standard in the guise of ‘context’?

## Criminal – No Evidence Motion

(aka Directed Verdict of Acquittal)

Test: **If there is, before the court, any admissible evidence (direct or circ, without weighing it) which, if believed by a properly charged and reasonable jury, would justify conviction, J cannot direct a verdict of acquittal.** – ***Monteleone***

* Application to circumstantial evidence involves **“limited weighing”**: not just believe ev but also choosing certain inferences as reasonable/rational to lead to a finding of evidence existing.
* 1) Classify ev (dir or circ), then 2) engage in ltd weighing if nec

-same test applied for the confirmation of charges at a prelim hearing – ***Arcuri***

* Crown ev direct on all elements = trial, regardless of D ev; Ev consisting of or including circ ev (even on *a single* element) = limited weighing of all evidence including circumstantial ev and that of D

Reasons for existing:

-constitutional presumption of innocence (11d), n/a for civil

-remand is aweful, want to end the *jeopardy and prejudice* of being charged (on life as well as on other, more substantiated charges).

-Like air of reality: you don’t put stuff to a jury when such an outcome is illogical

## Criminal – Air of Reality of D

(aka Putting a D in Issue)

-evidentiary burden to allow a D to be put to a jury

-Purpose: again, avoid illogical verdicts. J has duty to keep D’s from jury if lacking in ev foundation-- ***Cinous***

-**Test: Assuming the D evidence is true, for each element of the D there should be:**

* **A basis in evidence**
* **“Reasonably capable of supporting the inferences needed to acquit”  
  “Upon which a properly instructed jury could reasonably draw the inferences necessary to acquit”**
  + Again, for circ ev a limiting weighing will occur:
  + The potential of the evidence is for the TJ to judge in this sort of ruling, but ***by its broadest potential***. What are the *field* of reasonable inferences that could be drawn from this ev?

-again, no substantive weighing or cred findings

-later Crown has a *persuasive burden* to disprove the D (at least one element of it) BARD

## Criminal Standard: BARD

-burden rests with Crown and never shifts to the accused (unless on certain elements there is a RO, but that would need a constitutionality check)

-standard applied at *end* of the case and considering all the evidence (not to each piece)

Defining reasonable doubt – ***Lifchus***

* Not BoP, ‘probably or likely guilty’ = must acquit
* Not a frivolous/far fetched/imaginary doubt
* Not absolute certainty of guilty, just below. Not proof beyond ANY doubt.
* Not a doubt based on sympathy or prejudice
* Based on reason and common sense
* Requires a logical connection to evidence or absence of evidence (i.e. a lack of motive)
* If you are ‘sure’ that the accused has cttd the offence = convict

-There may be error if this is not quoted verbatim.

-Additional errors re: BARD:

* Not correcting prosecution characterizations of the standard in closing
* Not providing limiting instructions
* If a piece of evidence invites the jury to reason outside of Lifchus, basis for exclusion.
* Boiler plate reasons: test/standard stated correctly without a real/proper app to the facts

## Appellate Review Standards

ERROR OF FACT

- ***The “Kathy K”*** (1976 SCC) – “Findings of fact at trial … are **not to be reversed unless it can be established that the learned TJ made some *palpable and overriding error* which affected his assessment of the facts**… it is not, in my view part of [the CA’s] function to substitute its assessment of the BoP for the findings of the judge who presided at trial.”

-can’t just ‘disagree’ with the findings of the TJ.

-a palpable error = “one that is plainly seen”, and RP would not disagree about the presence of an error. – ***Housen v Nikolaisen* (2002 SCC)**

-overriding = overcomes the other good findings of the TJ. Has real effect on the outcome.

-reasons to defer – ***Housen v Nikolaisen***

* Judicial resources: no retrials
* Promoting autonomy and integrity of the trial level: confidence that the decisions will be respected and matter
* Expertise/advantaged position of the TJ + benefit of viva voce evidence.

UNREASONABLE JURY VERDICT

TEST: ***Biniaris* (2000 SCC, Arbour J)**

* Asking **through the lens of judicial experience:** Could a properly instructed jury, **acting judicially**, have reasonably come to that same result?

-‘judicial experience’/judicially = free of prejudicial effects that a judge would have been able to ignore

-why are we allowing an error-free trial to be questioned?:

* Juries unfamiliar w certain types of probs that arise in ev; JJ are trained, read the inquiries, aware of systematic issues in the criminal system they address everyday; black box of jury does not offer assurances of no errors like TJ reasons; JJ able to take judicial review
* Isn’t there a more creative way to deal with this *before* the verdict?? (submissions, jury instructions to instill the juries with ‘judicial experience’ to a degree…?)

# Oath and its Substitutes

-determination of competence of witness

## Oath

-TEST:

* **Must show a spiritual/moral obligation to tell the truth,** (***Bannerman*** – child witness –1966 MBCA)
* **over and above the duty in ordinary social conduct** (***Leonard*** – 1990 ONCA). It is meant to “take hold of the conscience” of the witness

-need not know/be able to indicate the ‘consequences’ of their religious obligation

-high level of deference to the TJ on this matter. A lot comes from the demeanor.

## Solemn Affirmation

-TEST: Witness **indicates a commitment to tell the truth on that occasion – *Walsh*** – Satanist

-knowledge of consequences of perjury not part of the test, but may buttress their commitment

-A LOW TEST

-**CEA s. 14** establishes the affirmation**.** Does not mandate an inquiry into ‘nature/consequences’

## Unsworn Testimony – Persons under 14 at trial

**CURRENT LAW: CEA s.16.1**

* (1) presumed capacity to testify
* (2) NO oath or affirmation
* (3) must be able to **understand and respond to Qs** to receive their ev
* (4) challenger to capacity has burden to prove there is an issue as to understanding/responding in sub 3
* (5) **If satisfied, crt conduct an inquiry** to determine whether able to understand/respond
* (6) must **promise to tell the truth**
* (7) NO inquiry/Qs into understanding nature of the promise
* (8) same effect as under oath

Law at time of ***Khan***

-suff intelligence to justify hearing the evidence

-understand the importance/consequences of telling the truth 🡪 in this case, he was able to testify after appeal as she gave a clear example of a lie + of consequences to her, in her own way

-corroboration req

Errors: focusing too much on the young age rather than applying the test, applied the Bannerman test which was unnec because unsworn, too much important on ‘beyond every day’ truth-telling

-Differences in Law: explicit difference in starting point (presumption); ‘intelligence’ level much lower now, no need to understand the duty

## Persons whose mental capacity is challenged

**CURRENT LAW: CEA s.16**

* (1) Before evidence INQUIRY INTO:
  + (a) understand nature of oath/affirmation? i.e. **check if they could oath or affirm first**; AND
  + (b) able to communicate the ev?
    - ***Marquard Test***: McL J - existence of capacity to observe, recollect and communicate.
    - NOT inquiry into whether they actually did perceive etc…
    - **Best gauge of capacity is their performance giving evidence itself (voire dire)**
    - A low threshold.
    - LHD dissent= thinks this should be an even lower threshold for allowing the unsworn. Only capacity to communicate. Any issues re: recollection etc. goes to weight/cred/reliability. Should come out in cross. Forbids prosecution of crimes against young victims
* (2) Satisfy both inquiries? Testify under oath/affirmation
* (3) Not nature, but communicate: Testify ‘unsworn’ 🡪 promise to tell the truth
* (4) Neither: shall not testify.
* (5) burden of satisfying court there is an issue re: mental capacity is with the challenger

- Both 16 and 16.1 = demonstration of the faith in the ability to test the evidence and the HARM from keeping relevant evidence out, which is the sway of the law these days.

# Witnesses – Examination, Assessment, Instruction

**DIRECT**

- Witness may **refresh memory by any means that would rekindle** his recollection **whether or not the stimulus constitutes admissible evidence**. – ***R v Fliss***. Can be statement later proven untrue, song, scent, ILLUSION - ***Rapey***

- **Recorded Memory:** Where a witness cannot remember the events, he can testify to authenticate a recorded memory and have it admitted **under certain conditions**– ***Meddoui***

* Reliably recorded
* Must have been sufficiently fresh and vivid to make it accurate at time of recording;
* Witness must assert the record accurately represented his knowledge and recollection at the time;
* Original record must be used if procurable.

-**Rule against oath-helping/prior consistent statements**: may not lead e.gs of times they told the truth, char ev of them being an ‘honest person’ or many other times that they have kept their story straight. OATH SHOUD BE ENOUGH.

* Exceptions: expert wits re: qualifications; accused may open door to character ev (tho not consistent stmts); rebuttal evidence to challenging the wit’s cred

-Post-hypnosis evidence is prima facie inadmissible – ***R v Trochym***

**PIS for direct wit: CEA s. 9(1) & 9(2)**

9(2): PIS leading to adverse finding

* Allege a PIS
* Crt MAY without proof of adversity, grant leave to start XX by the leading party on that PIS
* May consider that CC in determining whether wit is adverse (can be used for finding adversity under 9(2))

-9(1): PIS after adverse finding

* Must prove adverse
* May contradict by other ev OR
* W LEAVE OF CRT, May prove a PIS (after giving circs to wit and asking if he did or didn’t make that stmt)

**XX**

- XX Questions may only be put to the witness if there is a good faith, reasonable basis for that question. May use experience/intuition in this basis. Wide but not unlimited latitude.– ***Lyttle***

-May not XX accused re: character ev , which would violate their right to self-incrim, about confessions to PiA unless ruled admissible.

-**Duty to XX:** If you intend to call evidence to contradict a wit’s evidence, you must confront them with this evidence in XX of them to allow response/explanation – ***Brown v Dunn***

**-Prior Inconsistent Stmts** on XX: CEA s.10-11 & BCEA s.13-14

**KGB Stmts**

-verbatim transcript

-video recorded

-under oath

-*Meddoui* factors should be met.

-entered into evidence for the truth of its contents (often to avoid ‘changing’ of stmts, e.g. recanting sexual assault vics)

## Assessing Wit Cred (weight)

**Testimonial Factors**:

* Language
* Sincerity: seems to believe what they are saying
* Memory: age or injury, time elapse, intervening events, intox, anything that could taint testimony,
* Perceptions: anything that could enhance or inhibit ability to know what they are testifying to (intox, conditions)
* Demeanor: calm? Evasive? Tone of voice? Reaction to Qs?

-may not be able to find the witness who honestly believes but is mistaken.

-evaluate the witness’ evidence (cred) at the **end of the case** with **the rest of the evidence – *R v Norman*.** (Avoids tunnel vision, in line with *Lifchus*, will have instruction on law, will have ‘whole picture’)

Assessing Cred of Child Witnesses – ***R v W(R)***

-assess by standard of how a child would see the world

-flaw/contradictions should not be given the same effect as if

-criteria to be ‘met’ should be “appropriate to their metal development, their understanding and their ability to communicate”

-applies to adults who were children when they witnessed the events

## Prior Convictions: *Corbett* w *Underwood*

-**CEA s. 12:** A witness may be questioned as to whether the witness has been convicted of any offence… including such an offence where the conviction was entered after a trial on an indictment.

***Corbett***

-applies to all witnesses including the accused should they decide to testify (doesn’t violate presumption of innocence – 11d)

* Would otherwise be unbalanced with the Crown witnesses’ cred being seriously challenged
* Another demonstration of the court’s trust in juries/limiting instructions, the importance of XX, and their distaste for excluding relevant, and even minimally probative evidence

-goes only to cred (not like SFE or character)

-Ltd to **name of the crime, the substance and effect of the indictment, the place of the conviction and the penalty**, but he is not entitled to cross-examine the accused about the details of the offences – ***Laurier***

-May not extend to discreditable conduct/assoc’ns

-no Qs about whether they testified in those trials or not/whether they plead guilty – ***Geddes***

-convictions do not include cond’l discharges when conditions were fulfilled.

-Juv record is included in previous convictions -- ***Morris***

-Qing of acc’d **subject to a TJ discretion** to maintain its constitutionality: **may prohibit questioning on some or all of the criminal record if its probative value is outweighed by the prej effects**

* Crime of dishonesty?
* How recent to present offence
* Similarity to present offence could = more prej. Also if highly gory/serious.
* Would it unfairly shield the accused to disallow XX on record because cred of Crown wits have been attacked?

-BUT in CAB they let in the non-capital murder conviction in the face of a capital murder charge.

***Seaboyer*** did a similar test using the Charter to GET EV IN.

**PROCEDURE** -- ***Underwood***

-D makes app at end of Crown’s case.

-*Voire dire* if nec. D here discloses the kind foe v it wishes to call.

-J has discretion to revisit/modify their ruling if D ev “departs sig from what was disclosed”

## Unsavoury Witnesses – *Vetrovec*

- ***Vetrovec*** = discussion and rejection of the auto warning for corroboration re: accomplice witnesses (***Baskerville*** rule)

-after revision, will extend to wits other than accomplices, and will not apply to all accomplices.

**PROBS w Baskerville:**

* draws attn to unfavourable, corroborating ev of Crown wits via authority of the J, right before deliberation;
* contradictory warning (unbelievable BUT here is all the corrob)
* corroboration legal definition began to mean ev that D did it, not ev that confirmed the testimony/their truthtelling
* Reasons to disbelieve may not apply to every accomplice:
  + immunity from punishment; suggest their own innocence/reduce their involvement/pass blame; cover for friends by falsely accusing; morally guilty in general thus shouldn’t be believed.
* Shouldn’t categorize. Overly formal and overly broad as well as too narrow. Assess individually.
* Shouldn’t help make the jury’s decision for them
* Expose through cross!: no right to silence, expose immunity deals etc
* Efficiency issues: J having to go through/find all corrob ev 🡪 APPEALS

**POSSIBLE POLICY Q HERE: what are the/some various approaches that can be used to deal with unsavoury wits?**

***Vetrovec* Test and Warning:**

-TEST:

**If, in the TJ’s judgment, the credit of the witness is such that the jury should be cautioned, then he may** instruct accordingly. If on the other hand, he believes the witness to be trustworthy, then, **regardless** of whether the witness is technically **an accomplice no warning is nec**.”

-How **central to Crown’s case?** (***Chandra***). More central = more need and strength of warning.

-Concern re cred because of relationship the situation \*\*\*\**benefit from lying, a particular incredible person*

* Starting with a presumption of unsavoury, though may be fleshed out in voire dire?: accomplices, jailhouse informants (***Chandra***), jilted lovers, convictions for perjury

-Discretion, not matter of law.

-Are they intruding into jury’s area?

-----> WARNING CONTENT on next pg.

WARNING CONTENT: -- ***Khela*** and ***Smith*** (Fish J for maj)

1. clear and sharp warning to alert/**drawn attention of the jury** to the testimonial evidence requiring special scrutiny
2. explaining **why** this ev is **subject to special scrutiny**
3. **cautioning the jury that it is dangerous** to convict on unconfirmed evidence of this sort, **though they are entitled to do so** if they are satisfied that the ev is true
4. explain that in determining the veracity of the suspect ev **should look to other evidence tending to show the untrustworthy wit is telling the truth** as to the guilt of the accused.

* “This **may entail** some **illustration from the evidence** of the particular case **of the type of evidence,** doc or testimonial, **which might be drawn upon by the juror in confirmation** of the wit’s testimony or some important part thereof.” 🡪 not a mandatory part of the instruction.

(Deschamps for min: It is quite irreconcilable from ***Lifchus*** to focus on one witness and decide on their believability at the time. Avoid rigidity/technicalization of ev law, most of our est principles are able to test Crown’s case enough)

-spectrum of warning for spectrum of types of unsavoury wits?: more for *really* problematic wits re: how much you will instruct on the need to confirm or will refer to examples.

# Real/Doc Evidence

-general rule = authorization through a witness

-statutory exceptions exist via reliable mechanisms to produce certain categories of real/doc ev to increase efficiency. No truthseeking lost by going through more efficient and/or reliable means.

HIGHLIGHTS:

-CEA s.31.1 - 31.8= burnden + ways of proving authenticity of electronic documents (system that recorded it/it was stored on was in working order etc.)

-BCEA s.52: ways of proving marriage = certificate, registration, witnesses to the ceremony

-areas such as financial institution/corporate records, birth certificates, statutes (foreign and domestic) all have stat exceptions to usual evidence admission/auth rules

# Exclusionary Rules

## Hearsay

Hearsay Dangers: reasons for excluding otherwise relevant ev

* not under oath, no perjury pressures to create truthfulness
* not subject to XX – particularly high problem when declarant is not the witness
* testimonial factors are not able to be assessed – “ “ “

-in Civilian system, Qs of hearsay go to weigh rather than admiss.

CURRENT LAW: ***Khelawon***

\*\*\***Always check relevance first\***

1. **Is it hearsay?**

* Is it adduced for the truth of its contents?
  + Statement made out of court
  + **Helpful guiding Q: Would the party til seek to admit the statement if it was known it was false/untrue?** i.e. valid purpose besides for truth e.g. to prove the fact that it was made-- ***Subramaniam***
* Is there no opportunity for contemporaneous XX of the declarant at the time the statement was made?
  + There are some procedures to allow for this and not preserve evidence of someone near to death etc.
* No direct necessity element here?
* Declarant and witness may be the same person.

1. **Does it fall within one of the Traditional Exceptions to Hearsay? IF YES**, will generally be conclusive for admissibility.

**-**The consideration here is TF, as truth is part of that

1. Admissions of a Party– ***Terry***

* Against interests
* provided prob >prej

1. Business Records – ***Monkhouse***

* An original entry (not a copy)
* A contemporaneous recording (i.e. printed when it happened)
* The record keeping must be routine/systematic (doing it the same every time = more reliable)
* Records a commercial transaction of some kind
* Record was taken by a person since deceased (nec)
* By a person with a duty to make that recording
* With no motive to misrepresent it.

1. Declarations Against Pecuniary, Proprietary or Penal Interests – ***Demeter*** and ***O’Brien***
2. Dying Declarations – ***Schwartzenhauer***

* By a person whose death is the subject of the litigation
* The subject of the declaration must be about the circs of the death

1. Prior Identification – ***Starr***

* Where identifying witness is IDing the accused at trial OR
* OR where unable to ID accused at trial BUT may testify that he/she previously gave an accurate ID of who is now the acc’d

1. Prior Testimony – ***Hawkins***

* Prior proceeding
* Generally unavailable

1. Prior Inconsistent Statements –***KGB***

* Certain reliability standard apply: video, under oath,
* Nec not because of the absence of the wit but OF THE EVIDENCE in that same form, which is now recanted.
* Able to be XX, since now on the stand

1. Res Gestae – ***Ratten***

* From physical shock, creating stress/nervous excitement which removes from one’s faculties from their control so that the utterance = so spontaneous and sincere that it should be admitted
* So Immediate that not controlled by the senses, self-interest could’t have been brought to bear

1. State of Mind/Present Intentions – ***Starr***

* Admissible only to show SOM of deceased, what was in their mind at that moment
* NOT for SOM of someone other than deceased
* NOT to prove that someone other than the deceased acted in accordance with the stated intentions of the deceased
* NOT to prove that past acts in the utterances occurred.
* Declarant must be completely unavailable.

1. Public Documents – ***Finestone***
2. Ancient Documents – ***Halfway River FN v BC***

* In historical claims, aboriginal title
* +30 years old
* Absence of circs of suspicion
* Presumed to be signed, certified etc, as it purports
* Proof of execution needed if there is circs of suspicion

1. Oral History – ***Delgamuukw***

* Skips hearsay analysis
* Would frustrate the effective and fair litigation of aboriginal land title claims if it were blocked by hearsay.
* Very special case

1. **Can you challenge the entire, general exception itself?** (sort of first seen in ***Starr*)**

**May NOT challenge just its application to this partic case** – rejection from ***Mapara***

* Challenge is to whether it is supported by indicia of necessity and reliability, required by the principled approach.
* The exception can be modified as necessary to bring it into compliance (para 42)
* This is a “RARE CASE”

1. **Is the statement necessary and reliable enough to be excepted anyways?**

**\*\*residual category (first seen in *Smith*)**

* Establish existing indicia of nec and reliability surrounding the statement
* **Necessity:** to prove the fact in issue
  + Unavailability of THE TESTIMONY, not just of the wit. Of a similar kind.
  + Did the side leading hearsay make all reasonable effeorts to preserve the evidence? -- ***Khelawon***
  + Declarant incompetent, dead, senile, out of jurisdiction, otherwise unavailable, psych impact of testifying
  + Does NOT mean nec for prosecution’s case
* **Reliability:**
  + **Show a substitute for testing the evidence other than contemp. XX**
    - Functional approach: Consider the particular hearsay dangers of the hearsay statement in this case, and then whether they can be dealt w accordingly/adequately
      * ability to cross the declarant anyways (he’s there)
      * under oath statements
      * contemporaneous recording: demeanor aspects, hearing tone etc.
      * in a past proceedings: demeanor, already XX
  + **circumstances surrounding statement raise no real concern about its truth**
    - Functional approach prevails: all relevant factors speaking to the reliability of the stmt may be considered by the TJ
      * Timing of stmt to its subject matter
      * Made without the suggestion of litigation
      * Child of tender years = own reliability, esp re: usual absence of knowledge of sexual acts
      * motive to lie? 🡪 relationship to declarant? Other extraneous reasons
      * knew he could perjure himself?
      * confirmatory evidence to the truth telling 🡪 substantial 180 from the ruling in ***Starr***, returning to the approach in ***Smith***
  + Reliability concerns may exist in the circs of *either* the witness or the declarant.

1. **Subject to prob > prej discretion!**

Diff from nec & rel in ***Khan***!

-nec = “reasonably necessary”

-reliability = includes corrob now

-Use of Trad Exceptions: nearly exorcized by Smith,but make return in *Starr* and *Mapara/Khelawon*

-reliability analysis may now include corrob/confirmatory ev (contra Starr)

## Opinion Evidence – Lay and Expert

1. **Is it opinion evidence?** – presumptively inadmissible UNLESS in either of these 2 categories.

* draws a conclusion from their observations, makes inferences

### Expert Opinion?

1. **Has it been properly qualified as expert testimony? – *Abbey*** / ***Mohan***

-party seeking admission = est. admiss on BoP

- ***Abbey*** 2 Stage Test for Qualifying Experts (blue print for applying Mohan)

**i) HOW STRICTLY WILL TEST BE APPLIED?: the closer the expert testimony is to the ultimate issue, the more strictly the Mohan test will be applied when analyzing the expert**.

* MORE nec – WAY outside common experience, some closer than others: black matter vs fingerprint analysis),
* REALLY well qualified (most work likely done here).
* Another reason for disclosure of reports, we will know this upon voire dire

-AND **warning must be given** that the ultimate decision is still the jury’s.

**ii) PRECONDITIONS:** (the ‘easy Qs’)

* Does the testimony relate to subject matter properly the subject of expert testimony
  + outside common knowledge/experience, likely to come to a wrong conclusion without expert
  + (Superficial level of necessity).
* Sufficiently qualified to give opinion on this partic topic: 🡪 a reliability check here too
  + Have special/peculiar knowledge via **study and/or experience that would give specialized knowledge**
  + Edu/training creds, time on the job, # of cases
  + Previously having been qual as an expert IS NOT part of the analysis.
* No exclusionary rules otherwise operating (hearsay? Priv?)
* Logical relevance to a material issue at trial
  + Classic relevance: has a tendency to prove or disprove a fact at issue as a matter of human experience and logic

**iii) GATEKEEPER STAGE - cost/benefit analysis**

* **Benefits first:**
  + Probative potential/value i.e. **reliability** (***Trochym***)
    - *In order to properly ascribe the prob value, you must understand how reliable the ev is.*
      * How well can the technique do what it purports to do? 🡪 **reliability of the method**
      * Capacity of the individually expert in to apply that tecnique (can they actually give ev on this) 🡪 **reliability of their qualifications**
      * Have they properly applied that technique? How well have they done it this time? (contamination e.g.) 🡪 **reliability of its application**
    - “broadly construed to include the subject matter of the evidence, the methodology used by the expert, the scope of the expert’s own expertise and the impartiality and objectivity of the expert”
    - The reliability of the evidence will be gauged by the standards of the discipline of the evidence itself. Doherty gives a Big list of ways to judge reliability of soc sci.
  + Significance of the issue it goes towards. Not for trivial issues bcz of costs of trial times.
    - **Re: reliability. Emma Cunliffe –** Evidence that presents with any of the following factors should be approached w great caution:
      * cannot offer published literature in support of his/her methodology and techniques;
      * does not or cannot convey the limits of knowledge within his or her field;
      * uses a technique that has not been tested in a manner appropriate to the expert’s discipline to ensure its reliability and validity;
      * offers an opinion that is more certain in its conclusions than the published work seems to support;
      * seems unwilling to consider alternative explanations or interpretations of the evidence or unable to articulate why his or her preferred explanation is superior;
      * changes his or her opinion over the course of a case without providing a good explanation for this change, particularly where the opinion becomes more favourable to the side that has retained the expert;
      * has only received the job training, or has developed a new method for the particular case; or
      * did not follow institutional or industry procedures in this case or has not documented those procedures,
* **Costs: Look at the expert dangers which exist in this case.**
  + How complex is the material underlying the opinion/its presentation? Will it confuse the jury and cause them to simply defer?
    - Can the judge even understand it/how they got to their conclusions and what they mean?
  + How much time will be consumed by this evidence? (added by ***JLJ*** and ***Mohan***)
  + Are the credentials/jargon blinding?
* **Necessity:** 
  + Is it nec in one of the senses laid out in Mohan?
  + Do we need to hear about this expert testimony at all? In relation to how expensive, how reliable, how probative.
  + In partic: Could it be given to the jury in a different way? i.e. instructions?

**iv) When qualified as an expert, TJ duty to delineate scope of their testimony (what issues they can comment on) and expertise.**

* what is going to be/can be said and HOW it is said.
* what they have proper expertise on; what manner of presentation will be least prejudicial to the accused

-expert report MUST be disclosed by BOTH SIDES (including acc’d) before tiral: BCEA s.10-12

-XX on hypothetical facts, which will later need to be proved (BARD by Crown) for the expert’s opinion can be BELIEVED and therefore applied, strong jury instruction is clearly not est’d.

-can XX on contradictory opinions BUT ltd to authoritative works that the witness confirms they are familiar with + agree are authoritative – ***Marquard***

* May suggest unreliable if don’t know authoritative, contradictory stuff vs them; avoids ambush style XX. Doesn’t get the best/real evidence for them to explain.

### Lay Opinion?

1. **If not an expert, is the opinion properly within the categories permitting lay opinion evidence?** – ***Graat***

-Allowed on areas of common knowledge and experience (note that this the same lang in ***Mohan***, i.e. must be *outside* this common knowledge to be allowed as expert op)

-Some categories of permissible lay opinion *🡪 non exhaustive.*

* + Apparent age and weight
  + ID of persons, things, handwriting
  + Emotional state of another
  + Condition of things (worn, shabby etc.)
  + Certain Qs of monetary value
  + Estimates of speed/distance/time.
  + Level of intoxication/ability to drive

-allowable as it is often difficult to separate out and narrate the everyday/slight factual observations one by one on these matters. They are technically a ‘compendious stmt of facts.’

-TJ = high degree of deference re: allowing lay opinion

-certain people (e.g. police officers’) lay opinions should not be given more weight than others. The basis for the admissibility is *everyone’s* ability to comment on these things.

- Beware the expert in lay clothes: if not being qualified as an expert, watch for any indications of expertise in their testimony that would lead to such a belief in the jury’s eyes.

Safeguards?:

-stat provisions re: #s of experts: s. 7 CEA: 5 per side, but this has come down in CL = 5 per issue – ***Fagan***.

-disclosure/notice of reports – BCEA s 10-12

-XX

-limiting instructions in certain sits

## Statements of Accused to PiA – CL “Confessions Rule”

Purposes of the Rule:

-**reliability** issues of confessions that are extracted/pressured in certain circumstances (inherent authority makes people feel they don’t have a choice but agree)

-**repute of the administration of justice** – don’t want to be related to certain acts that can draw out confessions

HEARSAY AND CONFESSIONS RULE LOCK TOGETHER.

1. **Relevance?** Quite obvious,admiss unless excl rule
2. **Hearsay**? Likely lead through the PO which heard/took the stmt = inadmiss
3. **Trad exception to hearsay**? Admissions by a party/stmts against penal interests= presumptively admiss (Could try and challenge the trad except.
4. **Stmt to Person in Authority?** = inadmiss
5. **Crown proves voluntariness of stmt BARD?** = admiss
6. **Other exclusionary rules that may continue to operate?** Admin of justice into disrepute? Charter violations during the interrogation/leading frm the stmt? - 24(2)

**4. Was it to a Person in Authority?**

**TEST:**

* **Did the accused perceive them as such?** -- ***Rothman***
  + Subjective test
  + Suspicion of PiA does not meet this test. (e.g. “you look like a narc”)
* **Who did they perceive them as?**
* **Did the accused subjectively believe they had control e over the criminal justice process/proceedings** (and do they have some objective level of influence)**? – *Grandinetti***

- someone engaged in the arrest, detention, interrogation or prosecution of the accused

-i.e. can’t just be auth re: senior gang member

-general categories:

*De Jure* – auto by virtue of their status

* Police/Crown
* Prison guard – ***Hodgson***
* Probation/Parole officer

*De Facto* – If accused believed them to have control/influence over the process

* \*\*\*\*They may also need to have a certain degree of influence on it: **(Probably subject to an obj/reasonableness std**, though low, but the court hasn’t said this clearly. Could be improved. If no objective standard: eviscerating the rule, and the admin of justice purpose doesn’t come into play if here is no connection w it through the person.)
* The complainant or (possibly) their family – ***Downey*** & ***Wells***
  + Social working investigating child abuse allegations – ***Sweryda***
  + Principals (belief that they are agents of the police, could set them on you)

**NOT** PiAs:

* Psychiatrist assessing the accused UNLESS there is belief some control/influence in the proceedings.
  + Will need A LOT to get to that level. E.g. “if you come clean, I can the crown to reduce your charge.” – ***Wilband*** didn’t go this far
* Parents, even if they hold out non-penal sanctions.

**5. Was it voluntary BARD?**

Leading Cases = ***Oickle*** + later developed in ***Spencer***

-“consolidated” approach, bringing together the previously separated 3 heads of involuntariness: inducements, operating mind, oppression

Rationales: Iacobucci J in ***Oickle***

-lack of reliability (i.e. risk of false confessions) + fairness to the accused

-Concern re: commonly used techniques that create false confessions. 🡪 Soc sci on this: **strong incentives, intense pressure prolonged Qing.**

### *Oickle’s* CONSOLITATED APPROACH

Involuntariness can be based on any of the 3 original heads of involuntariness (inducements, lack of operating mind or oppressive conduct or environment) OR any combination of the three.

-can mix together light oppression with less severe inducements, and now together, could amount together to involuntariness (gives to D)

-takes back: Seems to set a high standard for voluntariness. Even if a temporal link, *the STRENGTH of the inducement is was really counts….*

* Weighing them together. Particularly strong aspects can carry others. Absence of oppression can reduce the impact of other factors.
* Note that a clear lack of operating mind will likely stand alone
* Read the entire transcript, contextual approach. Certain slip ups, if later corrected and strongly rejected
* One of the most highly deferential evidentiary rules
* **Standard: voluntariness or not, broadly understood.**

Inducements- ***Ibrahim***

-Fear of prejudice or hope of advantage

**-LOOK BEYOND THE INDUCEMENT, even if you find one. The startin point but not the end point of the voluntariness analysis.**

-*nexus requirements:*

**-held out by a PiA**: nexus between PiA and the inducement. Can’t just be in the mind of the acc’d. May need a certain level of reality/control of the officer over what they are offering (not just ‘you’ll go to hell’). (see ***Spencer***)

- note a certain level of **time nexus,** which the **strength of the inducement will effect** – a stronger inducement may ring stronger to the acc’d and effect him throughout his stmt, while a slight one, where the confession comes much later may no longer be counted.

-**STRENGTH** of the inducement needs to be gauged.

-framed as a **quid pro quo** (e.g. NOT ‘you’ll feel better’, again need to be able to give them something.)

-can operate against 3P 🡪 may **gauge relationship**. Does it create a *strong enough* inducement? 🡪 ***Spencer***

-Moral/spiritual inducements will generally be okay. We *want* them confessing from their conscience/personal responsibility and accountability. – ***Oickle***

Egs of sufficient inducements that created involuntariness:

* No bail unless you confess (remind of their power over it) – ***Leblanc***
* “I don’t like to see my partner getting mad.” Threatens violence, though Perrin would say, might be more oppressive than a quid pro quo—***Letendre***
* “You’re not on the right track” 🡪 Hope of advantage quid pro quo re: **withholding benefits**. Would not get therapy he needed to be rehabilitated from his sexual offending. – ***S(SL)***

### Atmosphere of Oppression

-Determined by the circumstances of the questioning.

-Need not be deliberate or intended by the police. Indeed may be police policy. (***Serack***, significant difference from 24(2) of the Charter)

* A finding of deliberate creation of oppressive environment could definitely be helpful, though, Perrin would suggest.

-Additionally, “it does not matter that the police did not commit any illegality.” (***Hobbins***)

-Focuses on the conduct of police

-An **ABSENCE of oppression**, under ***Oickle*** matters/has an impact on the rest of the analysis. E.g. small inducements may not weigh heavily at all without it.

-“**Timidity or subjective fear of the police** in [the accused’s] own mind will not avail to avoid admissibility UNLESS there were external circumstances brought about by the conduct of the police that can be said to cast doubt on the voluntariness of the statement.” – ***Hobbins*** 🡪 a narrowly applied principle:

* Court maintains reluctance to accept an unreasonable subjective fear of the police that emanates only from the accused, and is not externally triggered/brought out.
* Although this has a
* i.e. fears that are not influenced at all by police conduct will not reach a level of involuntariness, even if they are real to the accused! E.g. refugees generally terrified by the police because of past experiences

-***Oickle*** = **objective analysis with subjective characteristics**: types of people, categories e.g. a religious person, keeps kosher, a hardened/calculating criminal

-Look to **policy reasons** too: would you want this to become a regular practice? Would we want the court to distance themselves from this? “We don’t want to countenance it.”—***Serack***

-**Possible factors** influencing an atmosphere of oppression: (weigh the number and severity!)

* + Length of interrogation
  + sleep? Time of day
  + how many officers
  + temperature of the room
  + presence of repetitive or annoying sounds
  + physical imposition over the acc'd
  + breaks? Their length?
  + food (dietary/religious restriction)? Washroom?
  + Did police re-caution at all?
  + nicotine withdrawal?
  + allowed religious observances/prayer?
  + Were they clothed while Q’d? How long are they left like this? – ***Serack***
  + How comfortable of is the chair (this especially re: medical conditions)
  + State of the room they are in
  + Given medical attention/prescriptions if needed?
  + Was Qing hostile? Aggressive? Intimidating? (***Oickle*** wording)
  + You can probably take into account age and size of the accused in here, since it is objective + may inform their

### Operating Mind

-Purposes/reasoning: ***Ward***

* F: car crash, man and gf, she died, He was knocked unconscious, not fully conscious still when gives a statement to police. Still in a state of medical shock.
* Concerns:
  + the reliability of what is someone saying when they are not fully conscious. Who knows where it is coming from.
  + Not being able to choose whether to give the statement or not because doesn’t have those faculties = not voluntary!
  + Worry about admin of justice when police are asking people Qs when they are not fully conscious. Inablity to caution them about their rights.

**-**TEST: ***Whittle***

* **Did they have the ltd degree of cognitive ability to understand what he or she is saying?**
  + Might become assumed?
* **AND can they comprehend that the evidence may be used in proceedings against them?** Do they expect the *BASIC* consequences
  + Very low threshold. Don’t need to know e.g. the jeopardy you’re in/the sentence etc.
* Does NOT include a inquiry into whether they are capable of making a good or wise choice. No inquiry re: reasoning behind their decision to confess, wondering if it is rational or not. This could cause bootstrapping (IMO).

### Police Trickery

* Whether it shocks the community to use a certain circumstance of lies/tricks to get the confession.
* Did police downplay legal consequences? Not allowed! (allowed to downplay moral culpability of the crime)
* Are allowed to lie about existence or reliability/strength of evidence against them 🡪 *generally* unobjectionable.
  + Pertending to be a confessiong priest, D counsel,

Fish J’s dissent in ***Spencer***: “will being overborne/tool” standard is too high a test for involuntariness, allows too many confessions in. Applies in narrow operating mind standard, to the *entire* voluntariness standard.

-majority response = mentions that test at one point, but as a whole the *Oickle* test is applied.

Failure to consider relevant factors = appeal?

-when you look at the factors: characterize them 🡪 support or against finding of voluntariness (either on their own or together)

-does a repeated assertion of the right to silence = voluntary (well edyucated about his rights, when he confesses he is deliberately choosing to waive it – maj in *Singh*) or involuntariness (resistance is futile, suggests that the Qing will never end until you confess)?

Rothman allows **Mr. Big** scenarios

Reliability issues!

* lying because if they don’t meet the violence level of the Mr Bigs, they could be on the receiving end. Can’t get out.
* Ignoring the inducements at the level of voluntariness, don’t get to analyze.

Challenges:

* Widely used (not just in this case) + it is letting in UNRELIABLE confessions! Bring this trad exception into compliance: change what PiAs mean.
* Could you lead expert ev that generally Mr. Big confession are of very low prob value. (Should they? MOHAN)
  + Need to show improper reasoning, taint, NOT just prej to the D. i.e. consorting w criminals.
* Another: No operating mind analysis WITHOUT a PiA, and yet the RELIABILITY of such confessions when not operating mind is at issue no matter WHO

## The Confessions Rule and S.7 R2S– *Singh*

-F: ***Singh—***18 assertions of the right to silence, interrogation continues, they deflect him and then resume Qing. D admit voluntariness at CL, but claim violation of right to silence under s.7 therefore exclusion under 24(2).

-Is there any residual room in s.7 for excluding once the CL confessions rule has run its course?

Charron J (maj) in this case: they are **functionally equivalent** though not identical.

* Functionally equivalent when:
  + **Detained:** falls into liberty category of s.7
    - Undercover investigation PRE-detention = no charter violation.
  + **Acc’d KNOWS that they are a person in authority:** if you can prove it was voluntary under CL, there is no violation of the s.7 R2S. Oickle w charter in mind. Enough voluntariness to = a choice?
* Note **CL is easier for acc’d** to exlude: raise a reasonable doubt as to voluntariness + Charter is not auto exclusion, go through 24(2) analysis framework

**RESIDUAL S.7 PROTECTION** - where CL doesn’t cut it.

* **Undercover PiA WHILE detained**: will not offend CL because no PiA, BUT could violate s.7 by violating your free and informed choice to remain silent.
* **Amounts to deliberate circumvention to R2S. Cannot/are not freely waiving your Charter right** since you don’t know that they are exactly the person you have the right to remain silent from. Violates your free and informed choice to be silent.
* There are probably more areas of s.7 resid protection.
* ***Rothman*** *would likely be decided different today.*

Fish J (dissent): test at CL is voluntariness (*Oickle*, see also his view of it in *Spencer* dissent); different test for R2S, free and meaningful choice as to whether to speak to authorities. Clearly voluntariness broadly understood DOES NOT assure/EQUAL a free and meaningful choice. Not equivalent tests cannot assure each other in most circs.

## Crown Character Evidence

-exclusion only applies when character is circumstantial evidence. There are offences where they can be direct: libel/slander case, dangerous offender ss.

-refers to propensity evidence (type of person) rather than evidence of habit, which is admissible.

-operates for the benefit of the accused. A sword in their hands only.

-Don’t forget: Crown can bring in as much good character as they want, esp in rebuttal.

**-The accused is entitled to raise propensity evidence towards the uses of:**

* the ultimate issue (“Since I am thins sort of person, I did not commit this crime.”)
* and to enhance their own credibility (an exception to rule against oath helping).

-**How is the D able to prove good character?**

### 1. Reputation

***Levasseur* –**

* **TEST** to admit a proper reputation wit: may come from:
  + distinct circles of persons
  + each circle forming a reputation of the accused
  + based on constant and intimate personal observation
* Not about personal opinion on their character. (would run afoul of lay opinion rule); rather, general knowledge, what the community thinks.
* General rep may ONLY come through 3Ps, though the accused *may open the door* via statements going to general rep.
* need not be from the community in which you reside. Times have changed.
* Dissent: would have excluded because it was a subsequent employer. Her character at the time of the offence may be different than with this employer. Prob value substantially reduced because of lack of temporal connection, possibility of shifting character.
* Contradictory to the situation of hearsay. We aren’t scared about dangers

***Profit*** – character ev in sexual assault/private crimes situatons

F: principal sexually assaulting students. No error in not giving weight to ev towards the ultimate issue.

* such trials usually = sole issue is credibility. A finding of fact on preferring the complainant’s story (e.g.) should not be upset by far removed, extrinsic and generalized evidence of character.
* general application: for some offences, character ev will be of such low prob value that J is entitled to find the character evidence to be of very low weight. Shrouded in secrecy, behind closed doors, usually just the offender and the victim.
  + NOT standing for exclusion

Potential difference if jury trial:

* Likely no exclusion via discretion: low prob value needs to be substantially outweighed by prej (note that the inference is permissible, but you could argue the compiling of the evidence bcz of numbers = improper weight, BUT still v low prej, thus likely admitted).

Perrin’s opinion Re: jury instructions

* Be strict w the test: seek to consolidate and limit the number of witnesses: who best represents the different spheres. How close the personal connection? (avoid improper reasoning from the numbers)
* explain that there is an allowable inference from it
* Caution about the weight it provides, though re-caution on presumption of innocence and entitled use of the evidence
* could attempt a form of rebuttal evidence re: oath helping/character for a complainant (which would usually not be allowed) should be allowed in this partic situation as a balance considering the type of issue this case turns on.
* **+ always an express warning re not using crown bad char ev to ultimate issue.** 🡪 error if not included - ***McNamara***

### 2. Specific Acts

-Crown NOT limited in the rebuttal/cred ev to the same type that the accused opened the door with. May be via bad rep or bad acts -- ***McNamara***

-ONLY the accused may lead evidence of good *acts/conduct*. Must take the stand for this type (will let in record).

### 3. Psych Evidence of Disposition

-very rarely admitted

-**TEST**: crime itself must be:

* very peculiar/unique, have distinctive features, be in an **specialized and extraordinary class or have recognizable personality characteristics/traits** that the psych ev on disposition would offer insight into.
  + Needs to meet the *Mohan* criteria, help make inferences that the jury would otherwise be unable to, ill-equipped to. The psych ev cannot just give us general reputation or good acts, they can make their own minds up about this.
* **AND need to show that there is a definitive class/group** of people that do the crime, no others (to then show they are not part of that class) – ***Robertson***

-How to challenge this psych evidence:

-attack the science: not as good as you say it is, a difficult threshold to satisfy.

-args: how BIG is the class? (over/under inclusive?) Is the specific accused actually in this class after all?

**-Crown may only bring propensity evidence if accused ‘puts character in issue’.**

* **TEST:** asserts expressly or impliedly that he would not have done the things alleged against him because he is a person of good character. If accused leads the trier of fact to disposition-style reasoning to ultimate issue. – ***McNamara***
* **NOT char in issue:** denying guilt, repudiating the allegations against you, giving an explanation re: matters necessary to the defence (elements), habit evidence.
  + Anything directly relevant to the scope of the charge against them at this time is fine. Going outside the courtroom = likely put in issue.
* CAB: Implicit e.g. “We run the company as it *should* be run” – honest, law-abiding
* Crown may not XX to get an answer that would get accused put character at issue. WILL NOT HAVE OPENED THE DOOR. If the XX Q doesn’t seek to/directly do so and it is otherwise volunteered, it DOES open the door.
* Criminal Records get in via s.12 despite this CL exclusionary rule
* May invoke s.666 CCC: once character is put in issue, accused may be XX on criminal record AND the details of the offence.
  + How connected does the crime have to be to the allegation of good character?
  + Good case for making an arg for a CL whittle down of this stat provision a la Corbett. 🡪 give prob/prej discretion here too.
  + MY OPINION: if the only purpose is rebuttal and cred then it seems like it has t be SOMEWHAT logically connected, or else it is clearly for another purpose, that being the impermissible one.

-**Scope of Crown’s ability to respond:** NOT limited to the same type that the accused opened the door with. May be rebut via bad rep or bad acts – ***McNamara***

-Allowable Uses of crown evidence:

* **Rebut the evidence of good character.** May neutralize the inference to ultimate issue.
* Towards impeaching **credibility**: evidence of dishonest character OR to show that the good character evidence he is leading is a lie. May a
* **But may NOT go towards the ultimate issue**. One form of reasoning is allowed by one party but not the other (it is contradictory!)

**Reasoning to exclude Crown char**:

-overwhelmingly prejudicial : convict on THIS situation, not past. Four corners of the offence.

-we don’t want them going through every bad act you’ d ever done

* Efficiency
* Don’t want to burden the accused with having to disprove those allegations as well as this the actual legal jeopardy they’re in.

-reliability and prob value concerns

## Exception to the Rule Against Crown Char Ev: Similar Fact

***R v Handy***

-F: Sexual assault causing bodily harm, consent to sex but not in the form which she agreed to, started and then wouldn’t start. SFE attempted to be brought in from ex-wife.

-Allowed w/o putting char in issue.

-Reasoning: objective improbability of coincidence. Admitted because is ***so highly relevant and cogent that its probative value in search for the truth is so high that it outweighs all our concerns for misuse.***By the time we enter SFE, there should be no more moral prejudice left because it is **strictly enforced, not common, high bar.** High bar also because it is a very worrisome danger in reasoning (see prejudices below).

-situation specific propensity evidence that may establish the D’s propensity to do a certain act in certain context circumstances. -“Spectrum of propensity” – MO v general propensity evidence that would just prove a general propensity for wrongness: too prejudicial to be probative (+ in crim would definitely start to engage 11d right to presume innocence)

### *Handy* Test:

-must go to a well-defined, **precise issue in the trial** (likely not the ultimate issue; e.g. in CAB: that he goes beyond original consent)

***-*balance probative value of the evidence with the it’s potential to cause prejudice**

-burden of proof lies with plaintiff or Crown to satisfy trial judge on BoP that in this case the prob outweighs potential predj

**-probative value =** how helpful it is to the actual case, which will come down to **how similar the evidence actually is,** and how sure we can be about ruling out collusion risk.

### Prejudices:

**-**rationales behind the general rule against bad acts from Crown:

**-moral prej:**

* Drawing in past bad actions can cause a jury to assume bad past = bad present. May cause both actions to be put on trial, especially if the SFE case is more detailed/stronger than the present.
  + Done it in the past, must have done it today.
* May be punishing for past act or for general ‘badness’ that is implied by the evidence

**-reasoning prej:**

* Possibility to confuse the jury, diverting attention from the proper issues *in this* case, how much time ouwld it take up?

**-Inflammatory nature of the prior acts:** brings back worries about moral prej. Need to punish *someone* for a brutal crime

**-Necessity to Crown’s case**: can you do it through less prej means? (diff from the nec in hearsay)

### Factors affecting similarity:

i.e. probative value of SFE. \*\* a contextual analysis of similarity. “Uniquely similar enough,” so many matching factors.

* Proximity in **time**
* Similarity of **surrounding circumstances as well as the acts**
  + eg: nature of the relationship between the two party in either situation, ‘trigger’. Even if conduct is clearly different, having extremely similar ‘triggering’ circumstances is weighty.
* Distinctive unifying features: weird trademark
* Number of occurrences of similar acts
* Intervening events
* Quality of evidence: credibility check 🡪
  + A collusion check should occur here. If possibility is not past ‘opportunity’, should leave to jury to judge the relative merits of the evidence/the possibility of collusion. This happens often, as evidence of collusion is hardly ever that clear.
  + If the evidence seems clear enough to make SFE inadmissible burden goes to P in pretrial to establish no collusion on BoP.
  + Factors:
    - nexus between P and SFE witness will undermine the SFE.
    - Changing of stories though time, towards higher similarity, especially after coming to know each other. Changing stories may be conscious or unconscious but either way, might lead to inadmissibility.
    - “opportunities for info sharing” is not damning: this may be the reasonwe know of the SFE in the first place.

APP to CAB:

-enough frequency/temporal connection

-NOT uniquely similar enough. 🡪 not suff prob value

* Diff type of relationship
* Setting/context
* Acts were not distinct enough

-prej:

* Punishing for past crimes + domestic abuse = possibly inflammatory.

SFE in Civil cases = ***Mood Music***

-test basically the same

-so long as not oppressive to the other side (prej) and as long as notice was given.

## D Character Evidence of 3Ps – *Scopelliti*

***Scopelliti***

-D is always allowed to adduce situations that he is aware of: go to his subjective belief in imminent bodily harm and the reasonableness of that belief

-accused seeks to adduce past bad acts of the victims *which he himself is not aware of at the time of the offence*. SD in M2 case.

-**may adduce such evidence, but may *not* be used to judge the reasonableness of his perceptions of harm** (has no bearing because he doesn’t know it). **May only go to confirm/support the inference that the victims were the aggressors in this instance** (they are the type of people who target and attack innocent strangers).

-To include such evidence, D must adduce **some other appreciable evidence of the 3P’s aggression on the occasion in Q**, though this evidence may emanate from the accused’s testimony.

-Reasoning:

* The D should be given the benefit of any evidence relevant to the accused to cast a doubt.
* Exclusion of D evidence needs prej effects to *substantially* outweigh prob value.

-Crown able to adduce rebuttal evidence of good acts/disposition of the victims.

Critiques:

-Argument to be made to involve the *centrality* of the issue of aggression to the trial. Could protect more against its impermissible if not admitted when (e.g.) aggression is admitted but reasonableness or use of force are the main issues.

-The application of this rule in other offences may lead to problematic reasoning/unfairness to the complainant. In particular, it did so in the case of sexual assault which lead to statutory exceptions.

## Privileged Communications

-RATIONALE: value openness/candour in communications of this nature; do not want its possible exposure in court to effect the decision to go to that person or speak openly to them.

-Adding priv is hard too because creating more situations conpromises the truth-seeking function of the court. Present approach balances both truthseeking and other relationships/interests, then.

-only the person who holds the privilege can waive it.

1. Is the communication covered by class or case-by-case privilege?

**CLASS PRIVILEGE**

-Falling w/in one automatically leads to exclusion of your evidence, subject to strict exceptions.

-to create a class privilege: must be analogous to the importance of s-c priv, i.e. inextricably linked w the justice system working

### Solicitor-Client:

-Integral to the admin of justice.

-Interference here will be *extremely rare* and only to the extent necessary to enable the litigation – ***Descoteaux***

-Similarly, allowing the exceptions to operate will also be policed strictly

-privilege belongs to the client. Exists w/o independent assertion of claim, at all time as long as meets all the test – ***Lavalee***

**-TEST:**

* Communication between lawyer (or his agent/the firm) and client (not their family etc.)
* Entails seeking legal advice (as opposed to financial etc.)
* It was confidential communication.

-**Exceptions to Solicitor Client Priv:**

* Facilitating a Criminal Purpose -- ***Descoteaux***
  + Counseling offences (knowing the law to get around the law), providing advice that is illegal
  + “…takes more than evidence of 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** OR that **the lawyer otherwise became a ‘dupe or conspirator’**. – ***Campbell***
    - Should be some level of subjective fault on part of the lawyer 🡪 might not apply because the
    - OR if the client is *using you*
  + Evidence ON the legality of a practice/operation is not facilitating. – ***Campbell***
* Public Safety – ***Smith v Jones***
  + F: forensic psych applies to have his findings heard on sentencing i.e. that the accused was *high risk* for re-offence re: wanting to kill prostitutes/how specifically he planned it etc.
  + Psych report covered under solicitor-client priv because psych was retained to advise the legal advice to the client by the D lawyer (re: pleaing etc). (Predates *Blanc* re: lit priv)
  + CA rules that the psych’s priv is a permissive one: they can decide to disclose and then goes through this process.

**TEST:** clear risk that an identifiable individual or group is in imminent danger of death or SBH.

*Clear risk:* Factors to consider:

* Does it suggest long-range planning? A method of ctting the crime?
* Prior history of violence or threats of violence? Are those similar to what is suggested/planned this time?
* Does the history of violence increase in severity?
* **Is the risk to an ascertainable group or individual?** (large groups count).

*Seriousness of threat*

* Death or SBH
* *Violence* is necessary to unseat privilege. This includes serious psychological harm rising to a level that would interfere w victim’s health/well being

*Imminence*

* Doesn’t need to be ‘immediate’ to fulfill this part of the test, depending on the seriousness and clarity of the threat
* “such chilling intensity and graphic detail that a reasonable person would be convinced it would be carried out” = imminent.
* CAB: more difficult than other steps: didn’t offend while on bail, no finding of psych on imminence, THOUGH did follow up because it was so severe. Main findings = D admitted to the psych that breached bail to go lok at prostitutes in DTES, right after arrest = knew he was under the radar of the authorities, what the consequences would be (waiting til proceedings were over). IN COMBO WITH the obviousness of the other 2 factors.
  + In RARE cases where the risk is such that a hearing is *impossible* timely warning should be given to police (by lawyer?) . May have to justify that it fell into this exception afterwards.
* Innocence at Stake – ***McClure*** developed in ***Brown***
  + High threshold! Super difficult to establish. D = est each step on BoP
  + **Threshold stages:** 
    - Contents of the s-c communication is not available from any other source/not otherwise *admissible* at trial
      * *voir dire* to ensure potentially inadmissible evidence re: this info *is actually* inadmissible before making a ruling on priv exception
    - otherwise unable to raise a reasonable doubt (last and only chance to avoid a wrongful conviction)
      * Crown cases which are entirely based on circ evidence = likely not going to meet this test.
      * Judged by assessing the strength of the Crown’s case
  + **Test stages:**
    - D must show some evidence that the information sought from the priv material *could* raise a reasonable doubt to guilt
      * This is where the info of the existence of the communication comes in.
    - IF YES: TJ examines aff of lawyer re: all contents to determine whether any part is *likely* to raise a RD
      * May not order disclosure because they are confirmatory/would have a ’cumulative effect’/strengthen/corrob the D: ONLY when the communications *make sense* of the other ev and raise the reasonable doubt.

**Litigation – *Blank v Canada***

Rationale: allows for effective preparation of material in adversarial process; some amount of lawyer’s ability to produce work products without too much worry about disclosure

-Protect’s counsel’s role, and applied to communications w third parties/general contents of the file.

-may be disclosed *after* the litigation in Q/closely related proceedings/appeals have completed

**Dispute Settlement**

-applies to communications in attempts to settle matters though negotiations/mediation

-establishing an exception: Party seeking production must

* Show a competing public interest outweighs the goals of encouraging settlement out of court
  + something so egregious that = injustice if court was not to hear about it. E.g. admitting to physical abuse of child during negotiations
* Able to show the need for an exception *just in this case*

### Informant:

***Leipert***

-Rationale: protecting informant from retribution, encouraging them to come forward and reporting/providing evidence.

-used mainly in the investigative stage to create grounds, do undercover work, then leading to non-anonymous evidence. Often compensated.

-priv belongs to Crown whom can only disclose with consent of informant

-Both ID and contents of tip are subject to priv: we have no way of knowing what amongst the details will ID the informant, *especially* with anon tips like Crimestoppers. This anon tip was thus completely privileged in the CAB.

-may edit and disclose some info of the informant in other cases when we can ask them about what is safe to say.

**Exception: INNOCENCE AT STAKE**

-prior exceptions (material witness to the crime; agent provocateur/entrapment; est’ing search w/o grounds) are now examples of when innocence could be at stake.

-**TEST**:

* must show basis on the evidence for concluding disclosure of ID of informant is necessary to demonstrate innocence of accused.
  + A mere conflict between informant info and acc’d testimony is not a basis, nor does speculation.
* If basis shown, court reviews the info to determine whether IN FACT that info is nec to the D
* IF YES: court should only disclose as much as essential to prove innocence.

### Case-by-case Privilege

-duty of confidentiality ≠ privilege. Confidentiality to all others, not nec when compelled by the court. Though priv = confidentiality.

**WIGMORE TEST: all must be met**

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

* societal norms? Understanding of the parties?

1. Element of confidentiality must be essential to the full and satisfactory maintenance of relations between the parties:

* irrecoverable. No longer able to uphold its purpose: if privacy breached, can’t eep doing what it’s supposed to do. No longer able to speak freely which is essential to that relationship.

1. Relationship must be one that, in the opinion of the community, ought to be sedulously fostered.

* we want people to keep having these relationships that free/candid expression is important to.

1. Injury to the relationship caused by disclosure must be greater than the benefit gained by correct disposal of litigation.

* Balancing harm to relationship to harm of getting the answer wrong at trial
* E.g. jail sentences/ criminal wrongful conviction are always outweighing.
* Necessity/other available evidence may weigh here.

***Gruenke*** –test for religious communications

* Nature of the communication:
* Purpose for which it is made 🡪 Spiritual basis more so essential than to vs emotional/psychological support
* Manner in which it was made
  + Closed group? W leader of church? W a lay counselor?
* Who are the parties to the communication?
  + Just because in a church, doesn’t make it relig communication

## Unconstitutionally Obtained Evidence – 24(2)

24(2): Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any right or freedoms guaranteed by this Charter, the evidence shall be excluded **if it is established** that, having regard **to all the circs** the **admission of it in the proceedings (*Collins*: COULD) bring the admin of justice into (*Collins:* FURTHER) disrepute**.”

-BOP = on the applicant (D) on a balance of probabilities

-rights impaired must be those of the applicant for the exclusion – ***Edwards***: bf’s drugs via search of gf’s apt.

* Based on the language of the section “anyone whose rights”.
* The violation of 3P rights may be used to ID impairment, if there is also a privacy interest of his in her home. Then her violations get folded into his, and a high violation of her rights would infringe his low privacy one.
* Perrin suggests that this has a breaking point: could get even more intrusive from the CAB

***Collins:*** 1987 SCC

-purpose: not about punishment for polic misconduct

-disrepute in the eyes of “reasonable man, dispassionate, and fully apprised of the facts of this case” 🡪 more like a charter jurist? Objective*, not* re: public outcry.

* Would it deprive acc’d of fair hearing?: kind of ev (real: less so)
* Seriousness of the Ch violation: condonation of unacceptable state conduct?: serious v technical; deliberate v inadvertent/good faith; circs of urgency/nec to maintain ev; obtained w/o violation?
* Balancing disrep: could it happen by excluding the ev?: nec to substantiate charge/centrality to the case; srsnss of offence?

FRAMEWORK REPLACED BY: ….

### *R v Grant*

Threshold Q: what the obtained evidence temporally and causally linked to the breaches?

**TEST:**

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

1. **The seriousness of the charter-infringing state conduct,**

* POLICE CONDUCT & its purpose
* Purpose = disassociation from that type of conduct.
* Spectrum:
  + deliberate/flagrant/systematic or institutional VS good faith
  + inadvertent and minor -----🡪 willful or reckless disregard
* Includes mitigating and aggravating factors:
  + Mit: a real need to prevent the disappearance of evidence
  + Mit: in good faith. Negligence or lack of knowledge IS NOT good faith. Was there **uncertainty of the law in the area and thus** understandable mistake?
  + Agg: part of a pattern/routine/police policy? Is it an example of profiling?
  + Agg: misleading testimony to try and get admission of the evidence. \*\*\* clear eg of *further disrepute*
  + Agg: complete lack of grounds vs. some but insufficient grounds

1. **The actual impact of the breach on the Charter protected interests of the accused AND**

* Purpose: your rights count in a real way, not just on paper. Spectrum: fleeting/technical/transient violation vs profoundly intrusive
* What *rights and related interests* were breached, and how seriously?
* Relatively non-intrusive breach can be made worse (“significant, though not egregious” (***Harrison***)) because of a complete lack of grounds/justification being found in stage 1.

S.9 engaged – liberty, sometimes bodily integrity

* phys restraint?,
* was is abusive, going beyond the need?
* Duration?
* phys conditions of confinement
* “subtle coercion” (seen as ‘not sever, but more than minimal’) vs actually locked up
* were they detaining to get a statement (i.e. breaches now overlapping)?

-s.10b – right to remain silent/right against self incrim:

* spontaneous utterances vs. in response to probing Qs
* discoverability?
* Did an improper detainment happen to get a statement, leading to a breach? 🡪 one breach leading to and agg the other?

-s.8 – privacy, dignity, sometimes bodily integrity

* how high is the reasonable expectation of privacy?
* How intrusive/personal is the search

1. **Society’s interests in the adjudication of the trial on its merits**

* Purpose: truth seeking function of the judiciary + society’s view of justice system based on exclusion or admission.
* Content: would the truthseeking function be better served by admission or exclusion?
  + Reliability of the evidence
  + Necessity/centrality to the crown’s case
  + NOT as much about seriousness of the offence: could cut either way
* If this is the only factor which indicates admission, likely not enough.

### SCC guide on different evidence

*Statements of the accused*

* Generally excludable but not automatically
* 1: police conduct concerns
* 2: high centrality to the protected interest 🡪 self-incrimination super high.
* 3: not generally reliable

*Bodily Evidence*

* 1: mainly on facts
* 2: spectrum of types of intrusion: high = forced blood tests/dental impressions 🡪 fingerprints 🡪 hairbrush hair samples, breathalyzer.
  + S.8 engaged: privacy and dignity, bodily integrity
* 3: generally reliable BUT make args re: chain of custody, how certain the sampling or testing techniques are, whether there was room for contamination.

*Non-bodily physical evidence*

* 1: mainly on facts
* 2: big spectrum. High = cavity/strip search 🡪 home search 🡪 car/office/garbage etc searches
  + s.8 engaged: privacy (level of expectation of privacy can help you judge the interest impacted)
* 3: high reliability usually, and often things like drugs/firearms central to charges on possession etc.

*Derivative Evidence: from Statements excluded by CL confessions rule or 10b violations*

* 1: on facts
* 2: discoverability alive here: if it was discoverable without the statement = less impact on interest of self-incrimination
  + sometimes 10b, sometimes CL rule/s.7:
  + right against self-incrim, right to silence: how much did the conduct of police impinge that free choice?
* 3: real evidence = again, often reliable.

**-Generally speaking we will not allow for argument about purpose/use of evidence to effect the admissibility analysis of 24(2).**

**-Rationale in Calder for the rejection:** unique nature of 24(2) exclusion i.e. Admin of justice into disrepute.

* **Can’t instruct away.**  Taint to AoJ is still there, because it is being used at all. Not sufficiently respecting a *significantly* impaired right.
* *Would still enlist the D in his own prosecution*, despite this already being ruled on.
* The “less significant” use it would hold in credibility would amount to no remedy at all!
* Unconstitutionally obtained = treated differently from all other types.
* Prej is *not* part of the analysis unlike in usual jury instruction necessity.
* Would amount to a back door entry of seriously rights-breaching evidence.

-McL J dissent: more of an unfairness focus like ***Corbett* 🡪** Crown is blocked from making use of clear credibility impeachment, while D can go to town on their witnesses. Seems like it would lead to a false outcome.

-**However if , *Calder* arose today, leaves open some room for a completely ltd purpose to be argued**

– ***Calder*** (offended 10b, sex from a minor prostitute, false alibi, inadmissible under 24(2) to consciousness of guilt, Crown wanted to use in XX to impeach cred, neutralize his testimony)

-The Grant test is much more open to advocacy/fact driven than the old Collins/Stillman test. Most about the impact on the interests underlying the right! S.2 can open the door for a limited purpose and might be bale to tip balance?

* #1: Not much room for change in the state conduct area: purpose is not in the mix at this point.
* 🡪 this could be a deciding feature (good faith or legal uncertainty = could make a diff w shifting purpose idea.)
* #2: A limited use may have a lessened impact on the interest and might tip the balance!

**🡪 will always favour exclusion, but TO WHAT DEGREE!**

* + Here was 10b: right against self incrim and informed decision to speak to police or not.
  + If using for consciousness of guilt (to ultimate issue) = BIG impact on that right! Incrimination in the essence.
  + If using for purely credibility: significant impact, still may taint/discredit his testimony, make ToF prefer otherwise. Still an implication for leading to incrimination, but to be fair, on a less blatantly significant as use for direct ev of guilt!
* #3: reliability?
  + In use for direct evidence🡪 not real evidence. We know from Grant that stmts of accused are usually less reliable to than real ev. ALSO quite a few possibly problematic inferences to get to guilt. Additional lowering of reliability.
    - LOW
  + In use for impeaching cred 🡪 much more reliable for cred. Not the content of the statemet, but that the story changed. Fewer inferences to get to impeachment.
    - MODERATE (still circumstantial, still not real ev)
* #3: centralist to Crown case?
  + Cred: definitely have other evidence (usually do!)

\*\*likely not to have been decided differently, but we still have this framework as a possibility for the Crown

# 

# Evidence w/o Proof

## Formal Admissions

Purpose: efficiency, promoting truth, aids in narrowing the issues to only those most hotly contested.

Crim:

-Guilty plea = admission with certain nec elements and must admit to the indictment

-aggravating facts at issue at sentencing must be proven BARD by Crown, nonetheless. – ***Gardiner***

Civil:

-there are many more incentives and penalties for making admissions in this context.

-conclusive: court bound to agree to these admissions, even if other evidence contradicts it.

-counsel on appeal bound by admissions of counsel at trial *absent exceptional circumstances* (nec for proper Admin of justice, e.g. duress to plead guilty etc.) – ***Tunner***

## Judicial Notice

***NAPE***

TEST: = adopted from ***Find***

* Fact is so notorious/generally accepted, *not subject of debate amongst reasonable people* OR
* Capable of immediate and accurate demonstration by *resort to readily accessible sources of indisputable accuracy.*

-reliance on a fact by the judge that is neither proven by or adduced in evidence, nor admitted by counsel. Allows notorious facts.

-Promotes efficiency and truth-seeking (no point or logic to argue them when they are so clearly true). Avoids

**There is a difference between legislative and adjudicative facts and their respective standards of admissibility. Charter decisions must not be made in a factual vacuum. Charter applications without adjudicative facts can only be made in rare or exceptional circumstances – where there is simple question of law, it is clear and incontrovertible. – *Danson v Ontario*** (1990 SCC):

F: Law passed that made solicitors liable in some circumstances – wanted to challenge constitutionality of law – question of standing as there were no facts – no affidavits or sworn statements – no witnesses – AG wanted to quash application because facts are disputable.

* Distinction between Legislative and Adjudicative Facts:
  + Adjudicative: Facts that concern the immediate parties – “who, what, when, motive, intent…” 🡪 specific 🡪 must be proven by admissible evidence.
  + Legislative: Those that establish purpose and background of legislation, including its social, economic, and cultural context. These facts are more general in nature, and are subject to less stringent admissibility requirements 🡪 more susceptible to judicial notice.
* “The concept of legislative fact does not provide an excuse to put before the court controversial evidence to the prejudice of the opposing party without providing a proper opportunity for its truth to be tested”.
* SCC Held: Factual vacuum can result in bad law, and there is something at issue in this case that requires facts – such as proof of the negative impact on lawyers.