**Evidence – Fall 2011 – Perrin**

**I. BASIC FRAMEWORK**

* **Statutory Provisions: CEA, ss. 2, 40; BCEA, s. 2**

Source and Goals of the Law of Evidence

* Fundamental rule of evidence: everything relevant to fact in issue admissible unless there is legal reason to exclude
* **Relevance**: evidence tends to prove the proposition for which it is advanced 🡪 factual relevance.
* **Legal relevance**: If it is directed at a matter in issue in the case 🡪 material relevance.
* **Reasons to exclude evidence**:
  1. It would distort the fact-finding function of the court (e.g. prejudicial impact)
  2. It would unnecessarily prolong a trial or confuse the issues
  3. It would undermine some important value other than fact-finding
  4. The manner in which it is acquired or presented is inconsistent with the nature of the trial process
  5. Its probative value is outweighed by its prejudicial value

Relevancy

***R v Watson* (1996), 108 CCC (3d) 310 (ONCA)**

**Determination of relevancy – context of case, policy reasons for exclusion, probative value, connection to issue.**

**Facts:** Df charged w/2nd degree murder, convicted of manslaughter. Df, C and H go to warehouse. Vic and C shot. There was a defence theory that Vic and H were both armed and Vic shot first. Evidence of M saying that Vic was always armed deemed irrelevant and inadmissible by trial judge because there was no air of reality to a self-defence theory.

**Issue:** Was there an error in excluding one expert witness’s evidence as not being relevant?

**Analysis:** Doherty JA:

* Relevance must be assessed in the context of the entire case and the positions taken by Crown and defence.
* All relevant evidence is admissible, subject to discretion to exclude matters that may unduly prejudice, mislead or confuse trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of policy (*Corbett)*
* Relevance does not involve considerations of sufficiency of probative value (*Morris*)
* The absence of a direction connection does not determine relevance.
* A finding of relevance does not determine admissibility 🡪 excluded if against an exclusionary rule or too prejudicial.

**Ruling:** The evidence about Vic’s habit was relevant and admissible. New trial ordered.

* ***R v Morris*, [1983] 2 SCR 190**
  + Df charged w/heroin importing from Hong Kong, cops find undated news article about events in the heroin trade of Pakistan 🡪 is this article relevant?
  + Admissible – probative value (i.e. inference that he was interested in heroin trade) was low but prejudicial effect wasn’t considered high enough by trial judge for exclusion (deference given)
* ***R v Terry*, [1996] 2 SCR 207**
  + Df charged w/murder. In days after killing, he told friends about dream in which he killed the deceased in specific circumstances. Cops found handwritten, undated, unsigned poem in his room that seemed to be an apology/regret for killing someone. Are either of these relevant?
  + Poem admissible – low probative value because connection to events was tenuous and was considerable prejudicial effect, but admissible as a link in the chain of inferences tending to establish guilt
  + Dream admissible – narrative of accused’s conduct after the crime, not suggested to jury that they should treat it as an admission of accused’s guilt 🡪 concerns alleviated by jury instruction.

Probative Value and Prejudicial Effect

* Trial judge has **power to exclude evidence** from either party in a civil case or for Crown evidence in criminal cases on the ground that its **prejudicial effect exceeds its probative value**

***R. v. Seaboyer*, [1991] 2 SCR 577**

**Analysis of probative value versus prejudicial effects.**

**Facts:**  Df charged w/sexual assault, not allowed to cross-examine woman on her sexual conduct because of “rape shield” laws. He argues the law infringes his right to present evidence relevant to his defence, violating his right to a fair trial.

**Issue:** Do rape shield provisions infringe ss. 7, 11 of the *Charter*?

**Analysis:** McLachlin J:

* Purpose of the legislation: (1) preservation of the integrity of the trial by eliminating evidence which has little or no probative force but which unduly prejudices, (2) encourages reporting of crimes, (3) protection of witness’s privacy.
* Denial of right to call evidence tantamount to denial of right to rely on a defence to which the law says one is entitled 🡪 Procedural limitations may lead to conviction of the innocent 🡪 fund princ of justice of right to fair trial violated!
* The rules of evidence should permit the judge and jury to get at the truth and properly determine the issues.
* **"Law which prevents trier of fact from getting at truth by excluding relevant evidence w/o clear ground of policy or law justifying exclusion runs afoul of fundamental conceptions of justice & what constitutes fair trial"**
* Evidence should be received if legally relevant unless judge decides to exclude it because of prejudicial effects
* **Types of prejudice**: (1) danger it may unduly arouse jury’s emotions of prejudice, hostility or sympathy, (2) probability that the proof and answering evidence it provokes may create a side issue that will unduly distract jury from main issues, (3) likelihood it will consume undue amount of time, (4) danger of unfair surprise to opponent.
* Prejudice must substantially outweigh value of evidence before judge can exclude evidence relevant to a defence
* **Exclusion of relevant evidence can be justified if potential prejudice to trial process clearly outweighs its value**
* Here, s. 277 is ok – sexual rep evidence used to challenge credibility – this evidence has no legitimate purpose.
* 276 is a blanket exclusion with few exceptions, may exclude highly probative evidence (e.g. honest/mistaken belief)
* To deny a df the building blocks of his defence is often to deny him the defence itself
* **Judge can always warn against** using a piece of evidence for an issue for which that evidence has no probative force
* Judges must first sensitively assess if the evidence relating to sexual conduct meets the test of relevance and that the admission of the evidence would outweigh the damages and disadvantages of admitting it. The judge must then ensure that evidence is tendered for a legitimate purpose and that it logically supports a defence.
* Second, the judge must make sure that the jury is fully and properly instructed as to that evidence’s use.
* **Dissent** (L’Heureux-Dube):
* The hypothetical situations put forth by defence for s. 277 are already covered, irrelevant, or of low probative value
* Consent is to a person, not to a circumstance as admission of this evidence would suggest

**Ruling:** Section 277 does not violate the *Charter*, s. 276 is overly broad and violates the right to a fair trial.

Evidentiary and Persuasive Burdens

* **Persuasive burden** of proof is on party who is required to establish the relevant facts to succeed – BoP, BARD
* **Evidentiary burden** is on the party whose duty it is to raise an issue – must point to or adduce some relevant evidence capable of supporting a decision in party’s favour on an issue before that issue can go to trier of fact

Burden and Degree of Proof in Civil Proceedings

* Plaintiff typically bears both the evidentiary and persuasive burdens on all the elements of the action
* **Motion for a Non-Suit**: df argues pf hasn’t led evidence capable of supporting 1+ elements of cause of action
* Df must decide whether to call evidence or not when he/she makes a motion for non-suit
* The **motion is determined by the trial judge**. Test: whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient evidence to support the issue (*Parfitt v Lawless* in *Hall v Pemberton*)
* **Balance of probabilities** is the standard for pf to proof his or her allegations 🡪 more probable than not.
* **Summary judgment**: judgment without trial where facts are in question (vs application to determine a question of law, where facts are agreed upon) 🡪 to be used sparingly
  + **Rule 9-6 in BCSC** for summary judgment, 9-7 is summary trial
  + Standard: no fixed criterion, just evaluate overall credibility of pf’s action (*Pizza Pizza Ltd v Gillespie*)
* There is only 1 civil standard of proof, no matter how serious of allegations 🡪 BoP (*FH v McDougall*, 2008 SCC)

***Irving Ungerman Ltd v Galanis* (1991), 4 OR (3d) 545 (ONCA)**

**Test for Summary Judgment – No genuine issue as to any material fact and trial clearly unnecessary**

**Facts:**  2 corporations enter agreement w/LH to buy a property that had been leased to G, who had right of first refusal. G said he’d exercised the right by giving a deposit. G moved for summary judgment and got it.

**Issue:** Was the ruling on summary judgment correct?

**Analysis:** Morden ACJO:

* Judgment can only be given where pleadings, depositions, etc, show there is **no genuine issue as to any material fact**
* A litigant’s “day in court” has been traditionally regarded as the essence of procedural justice, but if there is no real issue and a trial would be unnecessary, having a trial would be against procedural justice
* **Must be clear trial is unnecessary**. **Burden is on moving party to *satisfy* court** requirements of rule have been met.
* Court’s function here is to determine when a genuine issue of fact exists, not to resolve any issues of fact
* As a general proposition, **if there is an issue of credibility, a trial is required**

**Ruling:** Here, there was dispute as to facts and credibility was at issue, so there should have been a trial.

Burden and Degree of Proof in Criminal Proceedings

* **Directed Verdict of Acquittal**: At end of Crown’s case, accused may ask trial judge to rule that Crown has not discharged its evidentiary burden (i.e. hasn’t led evidence capable of establishing the elements of the offence)
* Accused is not required to elect whether to call evidence before the motion is decided
* **Test**: Is there any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction? (*R v Monteleone*, [1987] 2 SCR 154)
* A mere assertion by accused that a defence should be left to the jury does not, by itself, put a defence into play
* Standard for confirming charges at prelim inquiry – same as directed verdict of acquittal test (*Arcuri*, SCC 2001)
  + Direct evidence on all elements 🡪 case must proceed to trial, regardless of existence of df evidence
  + But if any of Crown’s evidence is circumstantial, judge can engage in a limited weighing of whole of evidence (of Crown and df evidence)
* **“Air of reality” test**: trial judge must put before the jury any defences which may be open to the accused upon the evidence, whether raised by the accused’s counsel or not (*Pappajohn v the Queen*, [1980] 2 SCR 120)
  + There must be some evidential basis upon which the defence can rest for judge to put forward the defence
  + Trial judge also has duty to keep defences with no evidential foundation from the jury (*R v Cinous*)
  + Burden of proof on accused is evidential, not persuasive
  + In applying the test, judge must consider totality of the evidence and assumed df’s evidence to be true
  + There is no requirement that the evidence be adduced by the accused
  + Trial judge **must not make determinations about witness credibility or weight, make findings of fact, make factual inferences** in doing this
  + If a defence survives the test, the burden is on the Crown to disprove it BARD
* Requirement of proof BARD of guilty is enshrined as part of presumption of innocence in s. 11(d) of *Charter*

***R v Lifchus*, [1997] 3 SCR 320**

**Description of proof beyond a reasonable doubt**

**Facts:**  Df convicted of fraud. Appealed on ground that judge had not properly explained BARD to the jury.

**Issue:** Was BARD properly explained to the jury?

**Analysis:** Cory J

* Onus on Crown to prove guilty of accused BARD is linked to the presumption of innocence
* Jury must be aware that standard of proof is higher than standard in civil cases of BoP, but less than absolute certainty
* **Reasonable doubt should not be described as an “ordinary” concept**
* You can’t describe BARD as proof to a “moral certainty”
* Should avoid qualifying the word “doubt” with any word other than “reasonable” (e.g. haunting, substantial, etc)
* Jurors must be reminded that burden is always on Crown to prove accused is guilty BARD, never shifts to df
* Sufficient to tell jury that reasonable doubt is **doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence** – can’t be based on sympathy or prejudice or be imaginary or frivolous

**Ruling:** Trial judge erred by saying it was an ordinary, everyday sense of the words.

Appellate Review of Factual Findings

***Stein v. The “Kathy K.”*, [1976] 2 SCR 802**

**Appellate review of factual findings in civil proceedings**

**Facts:**  Stein’s sailboat collided with a barge, Stein died. Challenge to trial judge’s portioning of liability.

**Issue:** What is the standard of appellate review for factual findings at trial?

**Analysis:** Ritchie J:

* Accepted approach of a court of appeal is to test the findings made at trial on the basis of whether or not they were **clearly wrong** rather than whether they accorded with that court’s view of the balance of probability
* Appeal judges don’t see witnesses in person so deference must be paid to trial judge’s findings, unless plainly wrong

**Ruling:** Court of Appeal should not have changed trial judge’s findings.

* ***Housen v Nikolaisen***, **[2002] 2 SCR 235**, Iacobucci and Major
  + A palpable error is one that is “plainly seen” and significant
  + Must have a significant impact on the outcome of case and overcome the other good findings of fact
  + Reasons for deference: judicial resources ($$$), promotes autonomy and integrity of trial proceedings, expertise of trial judges, advantageous position and benefit of *viva voce* evidence
  + Documentary evidence: possible lower threshold for review because no advantageous position as the evidence wasn’t *viva voce* in the first place, but still concerns of judicial resources and autonomy

***R. v. Biniaris*, [2000] 1 SCR 381**

**Test for review of the reasonableness of a conviction at trial**

**Facts:**  Df convicted of murder at trial. BCCA held conviction was unreasonable and changed it to manslaughter on ground that his participation in the assault was very brief and evidence of his intention was unclear. BCCA said that the question of the reasonableness of a conviction was a question of law, thus giving right of appeal to higher courts.

**Issue:** What is the test for an appellate court to determine if a jury or trial judge verdict is unreasonable?

**Analysis:** Arbour J:

* Test: whether verdict is one that a properly instructed jury acting judicially could reasonably have rendered (*Yebes*)
* Test involves an objective assessment to determine what verdict a reasonable jury could have arrived at and, to some extent, a subjective one where weight of evidence is examined rather than its bare sufficiency 🡪 **mixed test**
* If it was **trial by judge, try to identify defects in analysis** that led the trier of fact to an unreasonable conviction (e.g. not being aware of an applicable legal principle or entering verdict inconsistent with the factual conclusions reached)
* You must be able to articulate the basis as explicitly and precisely as possible upon which you find a jury’s conclusion to be unreasonable 🡪 it is insufficient for court of appeal to refer to a vague unease, or a lingering or lurking doubt
* You **must show that the jury was not acting judicially** when they reached their unreasonable conclusion (e.g. analytical flaw) 🡪 scrutinize the charge to the jury
* Consider that evidence would have passed the no-evidence motion 🡪 judging the jury for believing the evidence?
* Assessment requires not merely asking whether properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction
* Subjective component of the test is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence 🡪 requires reviewing judge to import his or her knowledge of the law and expertise of the courts, gained through the judicial process over the years, not simply his or her own personal experience and insight
* **\*\*\*NOTE\*\*\*** Perrin disagrees! Thinks this “judicial experience” stuff is cracked out and that these problems can be dealt with through jury instructions. Shouldn’t be messing with standard of appellate review.
* ***R v Trochym*, [2007] 1 SCR 239**, Deschamps J
  + There must be explicit reasons why an appeal court has to interfere with a trial decision, especially with juries

**II. TYPES OF EVIDENCE**

**A. Witness Testimony**

Oath and Substitutes

* **Statutory Provisions: CEA, ss. 16 (mental capacity), 16.1 (children)**

***R v. Bannerman* (1966), 48 CR 110 (Man CA) \*\*\*OLD LAW\*\*\***

**Understanding an oath just means that a child appreciates he/she is assuming a moral obligation**

**Facts:**  Df charged with sex with children. 2 underaged kids testified at trial. 1 kid said it was bad/wrong to lie.

**Issue:** Did trial judge err in letting a kid testify without an inquiry into whether he was capable of understanding an oath?

**Analysis:** Dickson J:

* Where trial judge w/advantage of observing & talking to child examines it as to its understanding of nature of an oath and determines child is competent to testify, his discretion, unless manifestly abused, should not be interfered with.
* Each case will depend on its own facts and the impression the child makes upon the judge will be of great importance
* All that is required for understanding of the consequences of an oath is that the child appreciates it is assuming a moral obligation beyond a simple, every day obligation 🡪 **getting a hold on the conscience of the witness**

**Ruling:** Trial judge’s inquiry was sufficient.

* ***R v Fletcher* (1982)** (ONCA): For kid to take oath, all that has to be determined is “whether child has sufficient appreciation of solemnity of occasion, and added responsibility to tell truth involved in taking the oath.”
* ***R v Leonard* (1990)** (ONCA): Agrees with *Fletcher* and adds that the responsibility to tell the truth is over and above duty to do so as part of ordinary duty of normal social conduct.

***R. v. Walsh* (1978), 45 CCC (2d) 199 (ONCA) \*\*\*OLD LAW\*\*\***

**Solemn Affirmations**

**Facts:**  Satanist ruled incompetent to testify at trial because he didn’t recognize social duty to tell the truth in court.

**Issue:** What is the competency required for adults to take oaths?

**Analysis:** Martin JA:

* If you have no religious belief you can’t take an oath because it won’t bind your moral conscience, but you can affirm
* To affirm, you must establish that the witness **appreciates the duty of speaking the truth** in the relevant sense (i.e. liable to penal sanctions if false evidence is given) and that he says he will speak the truth in court

**Ruling:** The Satanist was competent, knew consequences of false evidence, and said he would tell the truth.

Unsworn Evidence

***R v Khan*, [1990] 2 SCR 521 \*\*\*OLD LAW\*\*\***

**Admissibility of unsworn evidence of children**

**Facts:**  Creepy doc sticks it in a toddler’s mouth and toddler tells her mom in baby language what he did.

**Issue:** What is the admissibility law for a child’s unsworn evidence?

**Analysis:** McLachlin J:

* *Bannerman* test does not apply for unsworn evidence because it only relates to oaths
* Unsworn evidence: all that’s required is simple line of questioning directed to whether child understands difference between truth and lie, knows that it’s wrong to lie, understands necessity to tell truth, and promises to do so.
* A child’s unsworn evidence must be corroborated by some other material evidence
* Frailties in the child’s testimony go to the weight to given to the evidence, not its admissibility
* For oaths: oath gets hold of conscience in some way and there is appreciation of significance of testifying in court.
* **Unsworn testimony: sufficient intelligence and an understanding of the duty to tell the truth**.
* The Act makes no distinction between children of different ages 🡪 irrelevant to admissibility.
* Arguments for admission: prosecution of offences against kids and adults who are mentally incapable of testifying
* Arguments against: kids have bad memories, differences in ability to perceive, difficulty in separating make-believe

**Ruling:** Trial judge failed because he confused the oath and unsworn evidence tests and put weight on child’s age.

***R. v. Marquard*, [1993] 4 SCR 223\*\*\*OLD LAW\*\*\***

**Ability to communicate evidence**

**Facts:**  Crown says grandma shoved kid’s face against oven door. Defence says the child burnt self on a cigarette.

**Issue:** Admissibility of a child’s unsworn evidence regarding communication of evidence.

**Analysis:** McLachlin J:

* **Testimonial competence**: capacity to (1) observe (including interpretation), (2) recollect, (3) communicate.
* The inquiry is into *capacity* to perceive, recollect and communicate, not whether the witness *actually* perceived, recollects, and can communicate about the events in question 🡪 low threshold.
* Best gauge of capacity is the witness’s performance at the time of trial 🡪 large deference to trial judge’s assessment
* Defects in ability to perceive or recollect are to be explored in course of giving evidence (cross-examination)

**Ruling:** Trial judge’s inquiry was fine, kid’s evidence good.

Examination of Witnesses

* General rule for common law trials is that all evidence must be given or identified by oral testimony of a witness
* To protect accused from irrelevant/prejudicial allegations, cross-examining accused on discreditable conduct is typically not permitted (with a few strict exceptions) 🡪 general rule against bad character evidence for accused
* To protect right to silence, can’t cross-exam on failure to answer cop Q’s or failure to advance a defence pre-trial
* To protect presumption of innocence, you can’t cross-examine accused on motive to give exculpatory evidence
* Trier of fact must make inferences about witnesses (1) use of language, (2) sincerity, (3) memory, (4) perception
* Witness testimony should be examined w/reference to all of the evidence – don’t assess each piece (*Norman*)
* Where a witness can’t remember events in question, he may testify from a record of his past recollections
  + Record is usually, but doesn’t have to be, made by the witness himself
* 4 **requirements for admissibility of past recollection recorded** (*R v Meddoui* (1960), Kerans JA):
  1. 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 the time 🡪 usually 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
* General rule: **obligation to cross-examine a witness whom you intend to contradict so that he can have an opportunity to explain** 🡪 essential to fair play and fair dealing with witnesses (*Browne v Dunn*, 1893 HL)
* **If you don’t cross-examine, no special instruction to jury is** required beyond normal instruction that the jury is entitled to believe all, part, or none of a witness’s evidence, regardless of whether the evidence is uncontradicted
* If recall of witness impossible, impracticable, or inappropriate **trial judge has discretion to give special warning**

***R. v. Lyttle*, [2004] 1 SCR 193**

**Ethical and legal constraints on cross-examination**

**Issue:** What constraints on cross-examination arise from the ethical and legal duties of counsel when they allude in their questions to disputed and unproven facts? Is good faith sufficient or must you provide an evidentiary foundation?

**Analysis:** Major and Fish JJ:

* **Questions can be put to a witness in cross-examination regarding matters that need not be proven independently, provided that counsel has a good faith basis for putting the question**
* “**Good faith basis” is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used**
* Information falling short of admissible evidence may be put to the witness, including incomplete or uncertain evidence, provided the cross-examiner does not put suggestions to the witness recklessly or that he knows to be false
* Purpose of the question must be consistent with the lawyer’s role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible
* To assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited
* A trial judge must balance rights of an accused to receive a fair trial with need to prevent unethical cross-examination
* If a question implies the existence of a disputed factual predicate that is manifestly tenuous or suspect, a trial judge may properly take steps, by conducting a *voir dire* or otherwise, to seek and obtain counsel’s assurance of good faith
* **Ruling**: Trial judge improperly placed conditions on a legitimate line of questioning.

Credibility of Witnesses

*Assessing Credibility*

* **Means of assessing credibility**:
  + Factors to consider when assessing demeanor (*R v White*, SCC 1947, Estey J, in *Norman*): general integrity and intelligence, powers to observe, capacity to remember, his accuracy in statement, whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or biased, reticent and evasive.
  + Demeanor not the only important factor, witnesses may be credible but not reliable (*Norman*)
  + Must assess credibility in the context of all the evidence (*R v Norman* (1993) ONCA, Finlayson JA)
* **Assessing the Credibility of Child Witnesses**
  + Court should take common sense approach and not impose same standard as for adults, though this does not mean the standard of proof is lowered (*R v W(R)*, [1992] 2 SCR 122, McLachlin J)
  + Every person giving testimony should be assessed by reference to criteria appropriate to their mental development, understanding and ability to communicate (*R v W(R)*)
  + When an adult testifies to things that happened when he was a kid, adult standard should be used (*W(R)*)
* **Deference of Appellate Courts to Findings of Credibility at Trial**
  + Trial judges hear witnesses directly, observe demeanor, hear tone of responses, so they acquire a great deal of information which is not necessarily evident in a transcript (*R v Buhay*, 2003 SCC, Arbour J)
  + Appellate courts can overturn verdicts 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, McLachlin J)

*Limits on Supporting Credibility*

* Generally a party may not lead evidence as part of its case where the relevance of the evidence is limited to showing that another of its witnesses is a truthful person, nor can they generally lead evidence that the witness has made prior consistent statements 🡪 “**oath helping**”
* Four main exceptions to the rule against oath helping:
  1. Expert evidence
  2. Defence can lead evidence of the accused’s reputation and good character
  3. Prior consistent statements can be admissible to support testimony or rebut allegation of recent fabrication
  4. Where credibility of a witness has been attacked, the party can adduce evidence in rebuttal

*Prior Inconsistent Statements*: pp. 353-358

* Prior statements are hearsay and not admissible for truth of their contents (unless through hearsay exception)
* Other party’s witness –not admissible for truth unless adopted by witness: **see *CEA ss.* 10-11, *BCEA* ss. 13-14**
* Own witnesses: **see *CEA*, s. 9(1) (adverse witnesses), s. 9(2) (cross-examination of prior recorded statement)**
  + A witness who is found to be “hostile” to the party calling that witness may be cross-examined with a view to discrediting his or her testimony (although the witness’s character can’t be attacked)
  + ***CEA*, s. 9(1):** You can contradict the witness who proves adverse with other evidence, or with leave of the court, prove that the witness made at other times a statement inconsistent with his present testimony
    - You first must give the circumstances of the statement to the witness so they can know when it was made, and then you have to ask him if he made the statement
    - Suggests the witness must first be declared adverse – *BCEA* has similar wording
    - “Adverse” is a more comprehensive expression than “hostile” – includes hostility of mind but also includes what may be merely opposed in interest or unfavourable (*Wawanesa v Hanes*)
  + Application to introduce prior inconsistent statement: Judge must first determine if witness is adverse, consider testimony of witness, and the statement, and satisfy himself upon any relevant material given to him that witness made the statement. Consider relative importance of the statement and whether it is substantially inconstant. Consider all surrounding circumstances in determining adversity (*Wawanesa*).
  + Judge should then consider possible dangers and if justice would best be met by admitting it.
  + Judge should instruct jury that the prior statement is not evidence of the facts contained therein but is just to show that the testimony given at trial could not be regarded as of importance (*Wawanesa*)
  + It is for jury to decide whether witness made the prior statement and if it affects their credibility
  + ***CEA*, 9(2)**: Can cross-exam on inconsistent prior recorded statement, w/o proving adverse (see p.356)

*Prior Convictions*

* ***CEA*, s. 12**: Can question witnesses on prior convictions. If they deny it, you can prove it. (see ***BCEA*, s. 15**)
* Prior conviction evidence is admissible only for the purpose of undermining credibility.
* *CEA*, s. 12 is applicable to the accused if he chooses to testify. Accused’s own counsel can question him on it.
  + However, you can’t cross-examine on the details of the offence (*R v Laurier*, 1983 ONCA)
    - Entitled to ask for name of the crime, substance and effect of the indictment, place of the conviction and penalty, but not the details of the offences
  + You can cross-examine on juvenile offences (*Morris v The Queen*, 1979 SCR)
* **NOTE: Section 666 of Criminal Code** – permits Crown to cross-examine on the specific of a previous conviction if the accused has put his character in issue

***R. v. Corbett*, [1988] 1 SCR 670**

**Cross-examination and exclusion of accused’s criminal record**

**Facts:**  Df convicted of murdering associate in coke trade. Appealed on ground he’d been deprived of right to fair hearing. At trial, he’d applied to get s. 12 of *CEA* not applied to him. He’d had a string of theft convictions and non-capital murder.

**Issue:** How can s. 12 of the *CEA* be applied?

**Analysis:** Dickson CJC:

* Purpose of s. 12: says that prior convictions do bear upon the credibility of a witness.
* Accused’s record must be examinable so jury isn’t left with incorrect impression that all Crown witnesses are hardened criminals while the accused has an unblemished past 🡪 would deprive jury of info relevant to credibility.
* Jury must be trusted with their job and given clear instruction regarding extent of its probative value (i.e. credibility)
* Evidence of accused’s prior convictions can only be adduced by Crown if accused takes the stand.
* Error should be made on side of inclusion unless a very clear ground of policy or law dictates exclusion
* Can only cross-examine on the fact of the conviction, not of the conduct leading to the conviction.
* No cross-examination if accused was given a conditional discharge and fulfilled all the conditions.
* Accused can’t be cross-examined to whether he testified on the prior occasion to show he wasn’t believed before.
* **Trial judge has discretion to exclude prejudicial evidence of previous convictions in an appropriate case**.
* Judge should consider whether the jury would be seriously misled by the exclusion (e.g. accused extensively attacks witnesses’ records) and if it would be unfairly prejudicial to the accused if it were admitted.
* **Concurring** (Beetz J): In order to conform with ss. 7 and 12 of the *Charter*, s. 12 of *CEA* must leave room for trial judge’sdiscretion to disallow cross-examination on accused’s prior convictions **if the convictions are of tenuous probative value in assessing credibility and their disclosure would be highly prejudicial** to the accused.
* **Concurring in result** (McIntyre and Le Dain JJ): There is no judicial discretion in s. 12, it doesn’t offend *Charter*.
* **Dissenting** (La Forest J):
* Prejudice arises between s. 12 circumvents the rules against Crown adducing bad character evidence
* This prejudice doesn’t just disappear because the accused has chosen to testify
* We deceive ourselves if we expect jury to reason in ways that are unrealistic, if not impossible
* “**Vicious circle**”: person is suspected and investigated because of his record and existence of the record increases the likelihood of his conviction 🡪 particularly true when previous convictions are for similar crimes.
* Section 12 therefore results in unequal ability of accused persons to conduct their defence
* **Factors**: nature and similarity of the conviction, when it happened, whether it will render trial more/less fair, whether accused has launched an attack on credibility of Crown witnesses (i.e. credibility-centered cases)
* Evidence going to credibility is prima facie admissible in the absence of a clear reason to exclude it
* Needs of the accused and public would be met by recognition of a discretion to exclude evidence when its probative value is overshadowed by prejudicial effects

**Ruling:** There is discretion to overrule s. 12 and exclude a prior conviction, but here, it was admissible.

* ***R v Underwood*, [1998] 1 SCR 77**: *Corbett* application- when do you seek it?
  + The application should be made by the defence and decided by the trial judge immediately after the close of the Crown’s case (same time you make application for directed acquittal)
  + If necessary, a *voir dire* should be held where defence discloses evidence it intends to call
  + It is an error to wait until after the accused has testified to rule on whether their record can be used
    - Unfair to accused because he can’t know what’s coming down the line

*Corroboration*

***Vetrovec v The Queen; Gaja v The Queen*, [1982] 1 SCR 811**

**Warnings for Unsavoury Witnesses**

**Facts:**  V+G charged with conspiracy to traffic. Accomplice, L, testified. Trial judge instructed jury that it was dangerous to convict on L’s testimony unless it was corroborated, then pointed out pieces of evidence that could corroborate it.

**Issue:** What is the law for sketchy witnesses and accomplices?

**Analysis:** Dickson J:

* Traditionally, judges warn juries that it is dangerous to convict on accomplice evidence unless corroborated – first, judge decides as matter of law if the witness was an accomplice, then explains what corroboration means, then points to evidence capable of corroboration, then tells jury it’s up to them to decide if the evidence corroborates.
* Listing corroborating evidence: risk with long, complex trials that if judge misses a piece or two, there’ll be new trial
* Requirement of listing corroborating evidence also draws attention to prejudicial evidence
* Former method was long, technical, confusing for juries – tell them person is shifty, then point out things that support
* Legal meaning of corroboration: independent testimony which affects the accused by connecting or tending to connect him with the crime – evidence which confirms the crime was committed and that the accused did it
* **Justifications for warning for accomplices and why Dickson shuts them down**: accomplice may try to save self or buy immunity by getting others convicted (deals not always made, credibility depends on facts), suggest his innocence or minimize his involvement by blaming others (not always the case – if he’s an accomplice, he’s already admitted his involvement), try to protect his friends (doesn’t happen that often), and they are not credible because they are criminals and morally guilty (law doesn’t distinguish between type of accomplish, nothing inherently untrustworthy)
* Basically, those are all sweeping generalizations and things should be based on facts/circumstances instead
* Corroboration can be useful because witness may have reason to lie but this isn’t the only way to accredit the witness
* Law on corroboration was unduly, unnecessarily complex and technical 🡪 movement towards principled approach
* There should be no special category for accomplices 🡪 juries can use common sense in deciding weight
* **What may be appropriate in some circumstances is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness**
* Generally mention that it would be unsafe to rely on the unsavoury witness without other agreeing evidence
* This applies equally to accomplices and disreputable witnesses of demonstrated moral lack (e.g. record of perjury)
* Trial judge’s decision to give a warning or not should be given high degree of deference
* **NOTE**: be clear on test – who it applies to, issues of discretion & deference, what can be given as examples to jury

**Ruling:** Trial judge’s warning on L was fine.

* ***R v Chandra*, 2005 ABCA 186**: “Warning will be required where evidence of witness is central to Crown's case and credibility issues are major… Object of warning is to ensure jury is aware of dangers inherent in evidence of certain witnesses, dangers of which jurors may not otherwise be aware. Importance of the warning is substantial where credibility issues may not be readily ascertainable by a juror unfamiliar…"
* ***R v Khela*, 2009 SCC 4**, Fish J: Purpose of a Vetrovec warning - "First, to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony; and second, in appropriate cases, to give the jury the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses."
* **Statutory Provisions: CEA, ss. 4, 5, 10, 12-16.1; BCEA, ss. 4-9, 13-17, 20-23, 72-73**

**B. Real Evidence & Documents**

* **Statutory Provisions: CEA, ss. 19-36, BCEA, ss. 25-52, 54-70**
* ***R v Wise***: evidence is real when referred to tangible items
* Real evidence: see *CEA* s. 30(1) (biz records made in usual course), 31.1 (electronic docs), 52 (marriage)
* Exceptions to rule of authentication through witness: bank record, birth certificate, Cdn law (must prove foreign)
* ***R v Bakker***: news article where crazy rapist pedo torturer loser gets caught and police examine videos of him getting head from Cambodian children, then go to Cambodia and compare the video to brothels until they figure out exactly where he was, then they use that to charge and convict him.

**III. EXCLUSIONARY RULES**

**A. Hearsay**

Identifying Hearsay

***Subramaniam v. Public Prosecutor*, [1956] PC**

**Definition of Hearsay**

**Facts:**  Df convicted of having illegal ammo. He was found wounded. He said he’d been captured by terrorists and had been acting under duress. He tried to give evidence of statements of terrorists.

**Issue:** What is hearsay?

**Analysis:** MR LMD De Silva:

* It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made (**ASK**: would you still want to admit it if it were false?)

**Ruling:** Statements here were to show accused’s state of mind and were improperly excluded.

Rationale for Rule Against Hearsay:

* Difficulty for jury to assess what weight can properly be given to statement by person whom jury have not seen or heard & which has not been subject to any test of reliability by cross-examination (*R v Blastland*, 1986, Eng)
* Hearsay evidence not delivered on oath. Truthfulness, accuracy, & demeanor of person can’t be tested (*Blastland*)
* Trier of fact can’t assess sincerity, use of language, memory & perceptual ability (“**hearsay dangers**”, *R v B(KG)*)

Exceptions to Rule Against Hearsay

* **Res Gestae or Spontaneous Utterances** (*R v Ratten*, p1971] 3 All ER 801)
  + Under certain circumstances an utterance becomes so spontaneous/sincere due to being immediate & not controlled, that there is brief period of time where considerations of self-interest wouldn’t have been in play, so the utterance will be trustworthy and express real tenor of belief and can be taken to be truth
  + *R v Khan*: contemporaneous, under pressure or emotional intensity
* **Dying Declarations** (*R v Schwartzenhauer*, [1935] SCR 367)
  + Dying words of person who death is subject of the litigation about the circumstances of the death
  + Evidence that would have been admissible by the victim had she lived
* **Statements Concerning Bodily and Mental Condition**
* **Statements of Intention/of Mind** (*R v Starr*, 2000 SCC)
  + Evidence is not admissible to show state of mind of persons other than the deceased or to show that person other than the deceased acted in accordance with deceased’s stated intentions
  + It is not admissible to establish the past acts referred to in the utterance
  + Essentially about what someone had going on in their mind at the time but they are now dead
* **Statements Against Interest** (*R v Demeter,* [1978] SCC)
* **Statements by Parties (***R v Terry*, [1996] 2 SCR 207)
  + An admission against interest, provided that its probative value outweighs its prejudicial effect
  + Admissions by parties in litigation or admissions by accused
* **Co-conspirator exception**: (*P(R)* in *Starr*) cases where act was joint one involving deceased and another person
* **Business Records** (*R v Monkhouse,* [1988] 1 WWR 725)
  1. It must be an original entry – no copies allowed
  2. Contemporaneous recording – gives added value of reliability, less likely to be forged
  3. Has to be made in the routine course of business – reliability because it’s done same way always
  4. Must be a record of business – commercial transaction of some kind
  5. Must be by a person who is since deceased – otherwise, call them up to stand – necessity
  6. Made by a person who is under a duty to do the act and to record it
  7. Made by person with no motive to misrepresent it
* **Public Documents** (*R v Finestone*, [1953] 2 SCR 107)
  + Confidence in public officers, statistics admissible without expert evidence
* **Ancient Documents** (*Halfway River First Nations v BC*, 1999 BCCA)
  + Documents more than 30 years old that are produced from proper custody with suspicious circumstances
  + In modern days, a principled approach instead of this rigid exception may be more appropriate
* **Oral History** (*Delgamuukw v BC*)
  + A special exception to allow First Nations oral histories, as they don’t have rich written histories
* **Prior Judicial Proceedings** (*R v Hawkins*, [1996] 2 SCR 1043)
  + Questionable because while person was under oath, you still can’t assess demeanor/hearsay dangers
* **Prior Identification** (*R v Starr*, [2000] 2 SCR 144)
  + Prior statements from trial identifying the accused (e.g. dock) or when witness is unable to ID the accused at trial but can testify that they previously made an accurate identification

Necessity & Reliability: The “Principled Approach” – pp. 231-244, 245-258

***R. v. Khan*, [1990] 2 SCR 531**

**Necessary and reliable approach to admitting hearsay evidence**

**Facts:**  Creepy doc sticks it in a kid’s mouth. She tells her mom about it afterwards.

**Issue:** Is the mother’s testimony about what her daughter told her admissible?

**Analysis:** McLachlin J:

* The hearsay rules have often proved unduly flexible in dealing with new situations
* **Two general requirements: necessity and reliability**
* Necessity means “reasonably necessary” 🡪 includes if testifying would traumatize or harm a child (high standard)
* Other weaknesses can be dealt with through weight
* Reliability: timing, demeanour, personality of the child, intelligence and understanding of child, absence of any reason to expect fabrication in the statement 🡪 not an exhaustive list, varies with the circumstances and child
* Factors: if statement wasn’t made in declarant’s interest or when litigation was a known possibility, if it emerged naturally and without prompting, included knowledge declarant otherwise wouldn’t have (e.g. here, the child shouldn’t have had any ideas about sexual acts), and if there is corroborating evidence.
* Corroborating evidence should be considered (rejected in *Starr*, then *K* rejects *Starr*)

**Ruling:** Hearsay statement was necessary and reliable, should have been admitted.

***R. v. Smith*, [1992] 2 SCR 915**

**Further development of principled approach to hearsay**

**Facts:**  Df convicted of murdering gf. She had called her mom several times before being murdered.

**Issue:** Is the mother’s evidence about the phone calls admissible or inadmissible hearsay?

**Analysis:** Lamer CJC:

* **Necessity**: death or some other cause renders the declarant unavailable as a witness on the stand or you cannot expect to get evidence of the same value from the same or other sources
* **Reliability**: a circumstantial guarantee of trustworthiness 🡪 no hearsay problem if it’s going to be truthful
* Reliability does not have to be established with absolute certainty 🡪 just that typical dangers aren’t there
* Reasons underlying the exceptions: (a) where the circumstances are such that a sincere and accurate statement would naturally be uttered and plan of falsification be formed, (b) where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force, (c) where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.
* *Khan* should be understood as the triumph of a principled analysis over a set of ossified, judicially-created categories
* Lamer thinks that *Khan* signaled the end of the categorical approach
* Movement towards an approach governed by the principles which underlie the rule and its exceptions alike
* Preliminary determination of reliability is to be made exclusively by the trial judge before the evidence is admitted
* If necessity and reliability are satisfied, lack of testing by cross-examination will go to weight, not admissibility
* A properly cautioned jury should be able to evaluate on the above basis and attach weight and draw inferences
* There is still residual discretion to disallow the hearsay evidence due to overwhelming prejudicial effects

**Ruling:** First 2 calls allowed (no known reason to lie), last call disallowed (reasonable possibility she was lying)

***R. v. Starr*, [2000] 2 SCR 144**

**Hearsay that fits within a traditional exception may be inadmissible if it is not sufficiently reliable and necessary**

**Facts:**  Witness testified df told C “if we are going to get this done, we better get this done now.” Df and C then left. C saw his old gf, who testified C told her he had to go do a scam with [df].” Later, C and DW was shot and killed.

**Issue:** Was C’s statement of intention admissible?

**Analysis:** Iacobucci J:

* “State of mind” exception: declarant’s statement adduced to show his intentions or state of mind at time statement made – must be present existing state of mind, made in natural manner, not under circumstances of suspicion
* Evidence is not admissible to show the state of mind of persons other than the deceased
* Why? Increased dangers – how did declarant know third party’s intentions? From that person? 4th party? Speculation?
* To enter a statement of intention of 3rd party, there must be a hearsay exception for each level of hearsay
* Co-conspirator exception: cases where the act was a joint one involving deceased and another person
* Statements aren’t automatically inadmissible if referring to joint acts – jury must be instructed on use (declarant only)
* Concern for reliability and necessity should be no less present when hearsay is introduced under an exception
* Introducing unreliable hearsay would compromise trial fairness and raise the spectre of wrongful convictions
* Traditional exceptions may need to be reexamined in light of principled approach but total abolition isn’t the answer
* Exceptions add predictability and certainty, foster greater efficiency, and aid overburdened judges to rule quickly
* Exceptions serve an explanatory or educative function, instructing about relevant factors to consider in determining whether to admit a particular type of hearsay or whether to admit hearsay in a particular factual context
* **Corroborating evidence should not be considered when determining admissibility** (rejected in *Khelawon*)
* If modified to fit principled approach, exceptions are practical manifestations of it in concrete and meaningful form
* Exceptions teach us about the historical and contemporary rationale for admitting certain forms of hearsay
* In the clear majority of cases, presence or absence of a traditional exception will be determinative of admissibility
* **Evidence falling within a traditional exception is presumptively admissible but can be challenged**
* Party challenging admissibility will bear burden of showing that the evidence should nevertheless be inadmissible
* Absence of a motive to lie is a relevant factor in admitting evidence under the principled approach

**Ruling:** Trial judge erred in admitting C’s statement because it was unreliable.

* ***R v Mapara*, 2005 SCC** (McLachlin CJC): Hearsay presumptively inadmissible unless w/in an exception. The exceptions remain in place but can be challenged on necessity/reliability (overturned in *Khelawon*). The exception can be modified to bring it within compliance. In rare cases, evidence within an exception will be excluded for not meeting the principled approach. Hearsay outside of an exception can be admitted through that approach.

***R. v. Khelawon,* 2006 SCC 57**

**Current state of hearsay – categories must be challenged as a whole, look at corroborating evidence**

**Facts:** S claims retirement home owner beat him. S and others give recorded statements to police then all die of old age.

**Issue:** Are the recorded statements admissible?

**Analysis:** Charron J:

* **Defining features of hearsay**: (1) statement adduced to prove truth of its contents, (2) absence of a contemporaneous opportunity to cross-examine the declarant 🡪 if so, it is presumptively inadmissible
* So if there was a cross-examination done (e.g. transcript), you can use the statement
* For principled exception, have voir dire to see if necessity/reliability have been established (onus on opposing party)
* May have constitutional dimension by impacting df’s ability to make full answer and defence, right to fair trial
* Trial fairness includes accused’s rights and broader societal concerns of having trial process arrive at the truth
* Reliability is about ensuring integrity of the trial process
* **If trial judge determines it falls into an exception, this finding is conclusive and the evidence is ruled inadmissible, unless, in a rare case, the exception itself is challenged as described in both those decisions**
* Reliability requirement met in 2 ways: (1) show there is no real concern about truth because of circumstances it was made in (e.g. no reason to lie, spontaneous), (2) show that the truth and accuracy can be sufficiently tested
* Availability of the declarant goes a long way to satisfying the requirement for adequate substitutes
* Doesn’t seem to find anything wrong with using **corroborating evidence to boost reliability**
* It is possible that presence of a striking similarity between statements from different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case

**Ruling:** Evidence here did not meet the reliability requirement – mental capacity issues, motive to lie, etc

**B. Opinion & Expert Evidence**

* **Statutory Provisions: CEA, s. 7; BCEA, ss. 10-12**

Lay Opinion

***R. v. Graat*, [1982] 2 SCR 819**

**“Compendious statement of facts” exception for lay opinion evidence**

**Facts:**  G stopped by cops for crappy driving. G complains about chest pain, goes to hospital. By the time he’s out, it’s too late to administer a breathalyzer. Cops testified at trial to say that he was drunk.

**Issue:** Is the cops’ evidence on G’s drunkenness admissible?

**Analysis:** Dickson J:

* Non-expert witnesses can give opinions on (i) identification of handwriting, persons, and things, (ii) apparent age, (iii) bodily plight or condition of a person, including death and illness, (iv) emotional state of a person, (v) condition of things (e.g. worn, new, etc), (vi) certain questions of value, and (vii) estimates of speed and distance.
* Lay witness should be permitted to testify w/an opinion if he is able more accurately to express the facts he perceived
* Non-expert witnesses can give evidence that someone was intoxicated because it may be difficult to narrate factual observations individually and a medical expert is not needed to diagnose intoxication
* Intoxication is a matter a jury can intelligently resolve on the basis of common ordinary knowledge and experience
* Non-expert witnesses cannot give opinion evidence on legal issues – doesn’t qualify as abbreviated version of facts
* 2 caveats: (1) Judge must exercise large measure of discretion, (2) no special reason for preferring police evidence.
* **Note**: Perrin thinks judge gave more weight to senior cops 🡪 so experience may give lay opinion more weight.

**Ruling:** Cops evidence on drunkenness of G was admissible.

Expert Opinion

***R. v. Mohan*, [1994] 2 SCR 9**

**Rules for admission of expert evidence**

**Issue:** When is expert evidence admissible?

**Analysis:** Sopinka J:

* Admission of expert evidence depends on (a) relevance, (b) necessity in assisting the trier of fact, (c) the absence of any exclusionary rule, and (d) a properly qualified expert
* Relevance is a threshold requirement to be decided by a judge as a question of law 🡪 **cost-benefit analysis**
* Relevance factors: impact on trial process, time needed, prejudicial effects, potential to mislead, possible misuse
* Expert evidence with scientific jargon may be accepted by as being infallible and given more weight than deserved
* Will it assist or confuse jury? Will jury be overwhelmed by “mystic infallibility” or objectively asses it w/open mind?
* Necessity: should give scientific information which is likely to be outside the experience and knowledge of judge/jury
* Opinion must be necessary to enable trier of fact to appreciate the matters in issue due to their technical nature
* Possibility evidence will overwhelm jury and distract them from their task can be offset by proper instructions
* Experts cannot be permitted to usurp the functions of the trier of fact
* Properly qualified: expert must be shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify
* The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of the principle
* ***R v K(A)*, 1999 ONCA**, Charron JA: Only expert evidence if about opinion, not facts, does it have to qualify (doctor can testify about wounds but not give opinions on things like how hard the victim was hit, if it was unusual, etc)
* ***R v Abbey*, 2009 ONCA 624**, Doherty JA: (consistent w/*Mohan*)
  + Judge must decide whether expert evidence meeting preconditions to admissibility is sufficiently beneficial to the trial process to warrant admission despite the potential harm to the trial process **🡪 gatekeeper function**
  + Preconditions: opinion relates to a matter that is properly the subject of expert evidence, witness must be qualified, must not violate an exclusionary rule, must be logically relevant to a material issue
  + Relevance can refer not only to relevance to an issue but also to whether it’s sufficiently probative
  + Costs: consumption of time, prejudice and confusion, inability of jury to make effective/critical assessment, unduly protracting and complicating proceedings, advantage to party with best ability to pay experts
* **Reliability of novel areas of expertise**:
  + *R v Frye* (US): Has it gained general acceptance in the particular field which it belongs?
* **Qualification of an expert**:
  + Can be qualified through study and/or experience which equips him with specialized knowledge (*Mohan*)
  + Credentials must be established in evidence and assessed by the trial judge
  + Lecturing and writing extensively does not constitute an expert (*R v McIntosh*, 1997 ONCA)
* **Ultimate Issue**:
  + Closer evidence is to ultimate issue, more strictly the tests of necessity and reliability are applied (*Mohan*)
  + Experts cannot give an opinion on issues of mixed fact and law (guilt, negligence, etc)

Examining and Cross-Examining Expert Witnesses:

* For weight, trier of fact must determine extent to which facts on which it is based have been proved in evidence
* If facts in dispute or expert used facts not proven, expert’s opinion must be on basis of hypothetical facts
* If you want to cross-examine an expert on a contradictory opinion in authoritative works, to avoid unfairness to the expert, he must acknowledge familiarity with the work and confirm that it is authoritative (*R v Marquard*)

Restrictions on Expert Evidence and Disclosure

* Trial judge has gatekeeper role in scrutinizing expert evidence in light of ongoing debates about suitable controls on their participation, exclude junk science, protect role of trier of fact (*R v J-LJ*, [2000] 2 SCR 600, Binnie J)
* In England, there are rules that no matter who retains the expert, the expert’s duty is to help the court
* Expert witnesses have an obligation to tell the truth but it is unclear if they have an express obligation to the court
* Section 657.3 of the *Criminal Code* requires that both Crown and defence provide notice if calling an expert
* Crown must disclose copy of expert’s report within reasonable time prior to trial, while defence have an obligation to disclose info about expert evidence on which it relies (exception to *R v Stinchcombe*)

**C. Statements by Accused Persons**

Introduction

* **NOTE:** These can still be knocked out by an excl. rule! E.g. privilege, additional *Charter* violations, etc
* Three sources of exclusionary rules: common law, s. 24(2) of *Charter*, and ss. 7 and 13 of *Charter*
* **Common law confessions rule: accused’s statement made to person in authority not admissible in Crown’s case unless the Crown proves beyond a reasonable doubt that the statement was made voluntarily**

Persons in Authority

***R. v. Rothman,* [1981] 1 SCR 640**

**Person of authority is a subjective concept**

**Facts:** Cops search df’s apt, find hash. Put him in cell, send in cop pretending to be a trucker. Df says he deals hash.

**Issue:** Are the df’s statements cell admissible or do they violate the confessions rule? What is a “person of authority”?

**Analysis:** Martland J:

* Confessions ruled applies to statements given before trial by an accused to persons in authority
* Rationale: concern for integrity of criminal justice system 🡪 balance b/w need to convict guilty and not innocent
* **Test to determine if a person of authority is subjective** 🡪 did he believe he was a person of authority?
* If the confession was not made to a person in authority, it is admissible without any requirement of voluntariness
* **Dissent** (Estey/Laskin): If df already refused to give a statement, test of voluntariness must include appreciation of circumstances in which statement is made, incl. awareness statement is being “volunteered” to person in authority
* Here, calculated lies/tricks brought admin of justice into disrepute, subverted df’s right to remain silent.
* **Dissent** (Lamer, concurring in result): Statements, even admissible on face, should be excluded if use in proceedings would, because of what was said/done by person in authority eliciting statement, bring admin of justice into disrepute
* There must be clear connection b/w conduct and obtaining of statement, & conduct must be shocking
* Factors: judge should consider all circumstances of the proceedings, manner statement was obtained, degree of breach of social values, seriousness of charge, effect exclusion would have on proceedings
* **Ruling:** Appeal dismissed because accused did not believe undercover cop to be a person of authority.
* **Mr. Bigs**: Accuseds don’t know they’re cops so voluntariness not an issue nor inducement (no SCC cases)
* Reliability in non-authority confessions – suggestion voluntariness should apply to all confessions
* Prejudicial arguments 🡪 legal prejudice is the tendency to engage in improper reasoning
  + Mr Big: prejudicial because you infer he’s a bad person for associating with gang members? Weak.
* ***R v Grandinetti*, [2005] 1 SCR 27**, Abella J: "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."
* Persons of authority: prison guard, complainant, social worker, family of complainant if they speak to the police before they talk to the accused (*Wells*, 1998 SCC), psychiatrist 🡪 case/fact specific, *voir dire* needed

Voluntariness – Inducements

* ***Ibrahim v. The King* (PC 1914):** No statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a **voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority**
* Determination will be very fact-specific and will depend on trial judge’s assessment of credibility of accused/cops
* ***R v Leblanc* (1972 BCCA)**: “Can’t get no bail until we get answers” 🡪 involuntary
* ***R v Letendre* (1979 BCCA)**: Cop: “I’m getting mad”. Cop 2: “I don’t like to see him get mad.” 🡪 involuntary
* ***R v S(SL)* (1999 Alta CA)**: Cop: “Only way you can get better is by telling me the truth”, “You’re not on right track” 🡪 involuntary because it planted in accused’s mind notion that rehab for sexual offences must start w/confession
* ***R v Hayes* (1982 Alta CA)**: “It wouldn’t be very good if you’re telling us a story now, and it turns out that you’re lying” 🡪 Voluntary – you need context – tone, length of interrogation, body language, etc. Moral inducements ok.
* ***R v Reyat* (1993 BCCA)**: Comments about accused’s family ok, though somewhat oblique promises/threats.

Voluntariness – Operating Mind

***Ward v. The Queen*, [1079] 2 SCR 30**

**Test for Operating Mind for voluntariness**

**Facts:** Df in car crash. Unconscious at first, then makes a statement in a daze.

**Issue:** Is the statement admissible?

**Analysis:** Spence J:

* Look at mental condition of df at time statement made to determine if it represented operating mind 🡪 reliable?
* Must determine if a person in his condition would be subject to inducements when a normal person would not be
* Must determine if, due to mental/physical condition, words can’t be found to be utterances of an operating mind

**Ruling:** Dude was barely conscious/not really conscious at the time, so it was involuntary.

* ***R v Whittle*, [1994] 2 SCR 914**: accused w/schizo charged with murder. Operating mind test requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused.
  + No inquiry necessary as to if accused capable of making a good/wise choice or one that is in his interest.

Voluntariness – Oppression

* **Factors**: length of time of questioning period, length of time between periods of questioning, whether accused has been given proper refreshment, time of day, number of cops and how imposing they were, weird noises, lighting, temperature, recautioning about counsel/silence, and characteristics of person who makes the statement (e.g. child, old man vs hardened criminal) (*R v Prager*, [1972] 1 All ER 1114)
* **Oppressive questioning**: nature, duration or other circumstances (including fact of custody) excites hopes or fears, or so affects mind of suspect that his will crumbles and he speaks when he usually wouldn’t (*Prager*)
* An atmosphere of oppression may be created in the circumstances surrounding taking of statement, even without inducements, threats of violence or actual violence (*Hobbins v The Queen*, [1982] 1 SCR 552, Laskin CJC)
* Accused’s own timidity or subjective fear of cops does not matter 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*)

***R. v. Serack,* [1974] 2 WWR 377 (BCSC)**

**Oppressive questioning**

**Facts:**  Accused arrested, put in cell at 7:30. Cops took clothes, gave him blanket. At 3:30, cop took him for questioning where statement obtained. He had no clothes, just blanket, had to walk in front of employees on way to questioning.

**Issue:** Was an oppressive environment created that made the statement inadmissible?

**Analysis:** Berger J:

* Nothing immediately sinister about this – cops had good reason to take clothes and give him a blanket at first
* Leaving him like that until 3:30pm unreasonable – should have gotten clothes in meantime but no effort made to do so
* It was wrong to carry out the interview in this way 🡪 A man’s trousers are… essential to his dignity and composure
* Man in blanket vs cop in uniform – cop has advantage that may disarm accused of a separate will, power imbalance
* **Policy**: make police behave better if they think improper behaviour will get statements tossed out
* **It didn’t matter that police didn’t intentionally create an oppressive or humiliating environment**

**Ruling:** Statement was involuntary.

Voluntariness – Consolidated Approach

***R. v. Oickle*, [2000] 2 SCR 3**

**Modern approach - The rule is concerned with voluntariness, broadly understood, not rigid, fixed rules**

**Facts:**  Accused takes polygraph on arsons at 3, told he failed at 5. Questioned at 5, given rights, told can leave whenever. At 7pm, admitted to 1 fire, then to 6 more at 11pm. Reminder of rights given several times during that period. Written statement taken w/warnings repeated. Put in cell at 2:45am. Accused found awake at 6am and asked to do re-enactment, agrees. More warnings given, advised he could stop at any time. Accused went to multiple locations and described how he set the fires. Accused asked for deal but cop said no. Cops said they’d have to question his gf if they didn’t settle things.

**Issue:** What are the common law limits on police interrogation?

**Analysis:** Iacobucci J:

* Rule needs to be restated because of inconsistent use in lower courts and growing understanding of false confessions
* Confessions rule should recognize which interrogation techniques commonly produce false confessions.
* Goals of confessions rule: protecting rights of accused without unduly limiting society’s need to investigate crimes.
* Research with mock juries indicates that people find it hard to believe that someone would confess falsely.
* Five basic kinds of false confessions: voluntary, stress-compliant (to escape interrogation), coerced-compliant (threats and promises – most common type), non-coerced-persuaded (confused, doubt self, temporarily persuaded of own guilt), and coerced-persuaded (threats/promises plus confusion and self-doubt).
* Danger of using fabricated evidence –could persuade susceptible suspect or convince him protesting is futile.
* Should record interrogations – capture tone/body language – (1) allow courts to monitor practices and enforce safeguards, (2) deters police from using techniques likely to lead to untrustworthy confessions, (3) enables courts to make informed judgments, (4) accords with sound public policy.
* Rigid categories can’t be used because oppressive conditions, inducements can operate together 🡪 branches combined but high standard for involuntariness 🡪 *strong* incentives, *intense* pressure
* Confessions rule protects **broader conception of voluntariness**: focus on protecting accused’s rights, trial fairness
* Analysis should be contextual 🡪 circumstances surrounding confessions – reasonable doubt to voluntariness?
* Findings on voluntariness are factual, can only be overturned for some palpable and overriding error
* Cops can minimize moral but not legal significance of crimes, can’t offer deals, can suggest potential benefits of confession but can’t make offers conditional on confession, moral inducements are ok, threats/promises towards 3rd party are improper if relationship strong enough, can’t deny access to food/sleep/water/bathroom, shouldn’t fabricate evidence, it’s ok to confront accused w/adverse evidence (e.g. polygraph) or exaggerate its reliability/accuracy
* Sign of involuntariness is emotional disintegration (doesn’t include crying upon confessing)
* You can confront w/inadmissible evidence (e.g. polygraph), even though it’s hard for defence because they either have to explain away a confession without reference to the polygraph or admit that accused failed the test
* Tactical disadvantage to defence is not relevant to voluntariness of the accused’s confession 🡪 just prejudicial effect that is outweighed by immense probative value of a voluntary confession
* **Dissent** (Arbour J): Interrogation used improper inducements and use of polygraph put accsed in unfair position of having to lead prejudicial, unreliable and inadmissible evidence against himself to impeach veracity of statements

**Ruling:** Confession was voluntary. Cops took care to give warnings, not deprive him of anything, etc.

The “Confessions Rule” and the *Charter*

* ***R v Oickle*:** Confessions rule has broader scope than *Charter*. S. 10 only for arrest/detention but confessions rule applies even for questioning. *Charter* also has different burden and standard of proof. *Charter* requires df to show violation on BoP but confessions gives Crown burden of showing voluntariness BARD. Remedies also different. *Charter* excludes only if it would bring admin of justice into disrepute. Confessions rule always causes exclusion.

***R. v. Spencer*, [2007] 1 SCR 500**

**Clarification and adoption of *Oickle***

**Facts:**  S arrested for multiple robberies and his gf H arrested for 1. S expressed concern for H, asked for her to be left out. Cops told him H would be charged. S offered to confess in exchange for slack treatment of H. Cop said he couldn’t make a deal. S requested visit with H. S confessed to some robberies and was allowed to visit. He then confessed to more.

**Issue:** Were S’s confessions voluntary or involuntary due to inducement?

**Analysis:** Deschamps J:

* Agrees *Oickle* is the test 🡪 rule is concerned with voluntariness, broadly understood
* It doesn’t matter if it is the cop or the accused who makes the offer 🡪 inducement either way if accepted by cops.
* Promises don’t need to be aimed at the suspect, i.e. can be in regards to a 3rd party
* It is **strength of inducement, having regard to particular individual and his circumstances, that is considered**
* Police trickery and lies separate category of analysis based on administration of justice being brought into disrepute
* Previous categories (operating mind, inducements, oppression) are together and are analyzed on basis on reliability
* **NOTE**: Perrin disagrees, thinks that they’re both about reliability+admin and they aren’t separate.
* Look **for reasonable doubt about will being overborn versus being able to make a free and informed choice**
* Deference to trial judge if he considered all the relevant circumstances and properly applied the law
* It is relevant factor accused has/hasn’t lost control of interview to point where he is not on level playing fields w/ cops
* Also relevant that accused was aggressive, mature, savvy participant and tried many times to get deals w/cops
* **Dissent** (Fish J):
* “Will overborn” means detainee wouldn’t have given statement but was persuaded to, to achieve an expected result

**Ruling:** The confessions were fine because the inducement wasn’t strong enough.

***R. v. Singh*, [2007] 3 SCR 405**

**Relation of common law confessions rule to the *Charter* right to silence on detention**

**Facts:**  Accused arrested for murdering bystander shot at pub. He spoke to counsel after being advised of rights. During interview, kept saying he didn’t want to talk. He didn’t confess but made admissions which were later used for ID at trial.

**Issue:** Did his repeated refusals to speak mean that his eventual admissions were involuntary?

**Analysis:** McLachlin CJ:

* Modern view of confessions rule includes right of detained person to make meaningful choice whether to speak.
* Focus is on the conduct of cops and its effect on accused’s ability to exercise his or her free will (objective test)
* Objective test but individual characteristics of accused are relevant considerations in applying the test
* In the context of a police interrogation of a person in detention, where the detainee knows he or she is speaking to a person in authority, the **two tests are functionally equivalent**. It follows that, where a statement has survived a thorough inquiry into voluntariness, the accused’s *Charter* application alleging that the statement was obtained in violation of the pre-trial right to silence under s. 7 cannot succeed. If s. 7 fails, voluntariness will fail as well.
* Residual protection afforded to right to silence under s. 7 of *Charter* can supplement common law in other contexts
* Completely disallowing questioning after accused asks it to stop would ignore interest in investigation of crime and would overshoot the protection afforded to the individual’s freedom of choice both under common law and *Charter*
* Judgment on whether statement was product of free will to speak to authority is to be given high deference
* **Dissent** (Fish J):
* Relentless pursuit of confession urged accused, subtly but unmistakably, to forsake his counsel’s advice, so accused was deprived not only of his right to silence but also, collaterally, of the intended benefit of his right to counsel
* It gives the accused the feeling that their constitutional right to silence has no practical effect and they must answer
* Continued refusal to stop asking questions makes accused feel futile so that ultimate submission isn’t true consent
* Police can’t press detainees to waive *Charters* rights they’ve asserted or deliberately frustrate their effective exercise
* Confessions rule is distinct from s.7, though there is overlap. Different purposes should mean different doctrines.

**Ruling:** There was no problem, rights are all good, admissions good to go.

**D. Character & Similar Fact Evidence**

Overview – Character

* Person’s “character” is their propensity or disposition to behave in a certain way 🡪 character traits
* If character is directly in issue, there are no special rules governing admissibility of character evidence
* **Circumstantial use**: the trier of fact asked to infer that, because a person has a certain character trait, he is more or less likely to have behaved in the manner alleged
* **ASK:** Is character at issue in the case? If yes, exclusionary rules don’t apply (e.g. dangerous offensive app)
* General principle: if accused opens door, Crown only entitled to respond with evidence of similar nature/kind
* Rationale: accused already has to fight charges, shouldn’t have to respond to other allegations (distracting)

Putting Character in Issue

* Crown may not lead character evidence unless the accused himself has led evidence supporting the inference that he was unlikely to have committed the offence by virtue of a character trait
* **3 ways to put character in issue**: adducing evidence of good reputation, testifying to your own good character, or by calling expert evidence of propensity or disposition

***R. v. McNamara* (1981), 56 CCC (2d) 193 (ONCA)**

**How to put character into issue**

**Facts:**  Accused charged with fraud for rigging bids. He argued trial judge erred in letting Crown cross-examine him on a previous transaction that led to accused pleading guilty of income tax evasion. Crown said he led good character evidence because he had implied that he would never do illegal/unethical things. He said it was just denial of the allegations.

**Issue:** Did accused put his character into issue?

**Analysis:**

* Accused does not put character in issue by denying guilt or explain matters essential to his defence.
* Accused is not entitled, however, under guise of repudiating allegations to **assert expressly or impliedly that he would not have done the things alleged against him because he is a person of good character (test)**
* Accused gives evidence of good character when he states that he has never been convicted or arrested, that he has been earning an honest living, or that he has in the past turned over found property to the police (honest person)

**Ruling:** Accused put character in issue when he said he only runs companies legally 🡪 integrity, ethical businessman

Proving Character of Accused – Reputation

* ***R v Rowton* (1865)**, 169 ER 1497: Crown can rebut character evidence w/evidence of general reputation of tendency and disposition of his mind towards committing or abstaining from the crime for which he is being tried.
  + Must be restricted to general reputation and must not extend to the individual opinion of the witness

***R. v. Levasseur* (1987), 35 CCC (3d) 136 (Alta CA)**

**Who can give evidence of general reputation?**

**Facts:**  Woman charged with stealing car that her employer leased to someone says she took it at request of her employer and therefore had colour of right. Defence included evidence of good character, including that of a subsequent employer.

**Issue:** Is general reputation evidence confined to reputation in the residential community?

**Analysis:** Harradence JA:

* Restriction to the residential community has no place in modern society
* 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** (e.g. one in res community, one at work)
* The rule should seek to provide for the best qualified witnesses
* Issue is not about the weight to be given but rather whether it is admissible
* It is not about what YOU think, it’s about what the COMMUNITY thinks
* **Dissent**: Subsequent employer shouldn’t have been allowed 🡪 can’t testify to her past reputation at time of offence

**Ruling:** Evidence should have been admitted. New trial ordered.

***R. v. Profit* (1992), 11 OR (3d) 98 (ONCA) \*\*\* OVERTURNED BY SCC\*\*\***

**Use of general reputation evidence (particularly in cases with sexual misconduct and children)**

**Facts:**  Principal accused of being a perv. He used many character witnesses.

**Issue:** Was the evidence used for the proper purposes by the judge?

**Analysis:** Goodman JA:

* **Character evidence is admissible on a two-fold basis**: (1) in support of the credibility of the accused, and (2) as the basis of an inference that he is unlikely to have committed the crime
* Where character witnesses have given evidence as to the moral behaviour of an accused with respect to children in cases alleging sexual offences against children… it is to be given same weight as it would for other offences
* **Dissent** (Griffiths JA): Good character evidence not admissible when it’s just that witness’s own opinion nor can the witness testify about observations he made of certain conduct of the accused
* Good character evidence may be useful for cases like commercial dishonesty, but it has little probative value in cases of sexual misconduct against children by persons in positions of trust or control
* Abusers often build good character profiles to camouflage their abuse so it has diminished probative value
* Those testifying to good character would unlikely to be aware of flaws in character, propensity for sexual misconduct

**Ruling:** Judge didn’t explicitly acknowledge that it could be used for saying he isn’t the type to do it, so conviction cut.

**SCC JUDGMENT [1993] 2 SCR 637 (SOPINKA J):**

* We agree with the dissent of Griffiths JA
* Trial judge may take into account that in sexual assaults cases with children, it mostly occurs in private and will therefore not be reflected in the reputation of the accused in the community for morality
* Propensity value of character evidence as to morality is diminished in such cases

Proving Character of Accused – Specific Acts

* Crown can’t lead evidence of specific bad acts of accused that are not the subject matter of the charges in question nor can the accused call witnesses to testify as to his prior good acts
* If accused testifies, he can give evidence of specific instances of his own good conduct and put character in issue
* **Section 666 of Criminal Code** – permits Crown to cross-examine on specifics of previous conviction if accused has put his character in issue (*R v P(NA)*) 🡪 maybe be able to limit it *Corbett-*style but Perrin doesn’t know
  + Goes beyond s. 12 of the *CEA*, which doesn’t allow Crown to cross-examine on details of offence

***R. v. McNamara* (1981), 56 CCC (2d) 193 (ONCA)**

**When can the accused and the Crown testify about specific acts?**

**Facts:**  Same as above – dude going down for fraud relating to bids

**Issue:** Was the Crown allowed to bring up specific acts?

**Analysis:**

* “Character” means not only reputation but actual moral disposition
* The confinement to general reputation evidence only applies to witnesses, not the accused himself
* **Crown may adduce similar fact evidence in rebuttal of evidence of good character**
* When accused puts character in issue, he opens the door to cross-examination and the proof of previous bad conduct may have a double effect: it not only rebuts his claim to a good character, but it directly proves that he lied in the witness box if he has impliedly asserted that he is a law-abiding citizen
* Opens it up for Crown to ask about details of past convictions, past misconduct and discredible associations (**s. 666 of *CC***versus s. 12 of *CEA* which only allows Crown to cross on criminal records if accused takes the stand)
* However, trial judge still has discretion to disallow cross-examination on previous conduct, not resulting in a conviction, that was remote in time, or of little probative value on issue of credibility and that was gravely prejudicial
* Where the only avenue of admissibility of evidence of bad character is to rebut the accused’s evidence of good character, the evidence has limited use 🡪 can’t be used to show the person was likely from his character to have committed the offence, but it does have bearing on the general credibility of the accused
* What the jury is asked to do is to reject the accused’s evidence as unreliable

**Ruling:** Appeal was allowed on other grounds but the stuff done by Crown for character evidence was fine.

Proving Character of Accused – Psychiatric Evidence of Disposition

***R. v. Robertson* (1975), 21 CCC (2d) 385 (ONCA)**

**What kind of expert evidence on disposition is admissible?**

**Facts:**  Accused charged with murder of nine year old girl.

**Issue:** Did the trial judge err in rejecting the evidence of expert witnesses tendered by the defence that the appellant did not show any violent or aggressive tendencies as character traits or in his psychiatric make-up?

**Analysis:** Martin JA:

* Evidence the offence had distinctive features which identified the perp as a person possessing unusual personality traits constituting him a member of an unusual and limited class of persons would render admissible evidence that the accused did not possess the personality characteristics of the class of persons to which the perp of the crime belonged
* Accused can call evidence tending to show that, by reason of the nature of the offence or its distinctive features, its perp was a person who was a member of “a specialized and extraordinary class” and accused didn’t have the features
* Crown is entitled to call psychiatric evidence to rebut the defence’s evidence
* For ordinary crimes of violence, accused cannot call evidence saying he has no tendency/disposition to violence
* **Must show disposition constitutes a characteristic feature of an abnormal group 🡪 high standard**
* Mere disposition for violence is not so uncommon as to constitute a feature characteristic of an abnormal group

**Ruling:** The evidence was inadmissible because it did not specify an abnormal class of people.

***R. v. Mohan*, [1994] 2 SCR 9**

**How can expert evidence be admitted?**

**Facts:**  Doctor charged with molesting 4 patients. He tried to call expert evidence saying person who would do that would fit into a limited and unusual group of individuals that he would not fall into but trial judge disallowed it.

**Issue:** Should the expert evidence have been admitted?

**Analysis:** Sopinka J:

* Categorization of “ordinary” and “extraordinary” crimes is a legal question, so is normal/abnormality of accused
* Before an expert’s opinion is admitted, trial judge must be satisfied that either the perp of the crime or the accused has distinctive behavioral characteristics such that a comparison will be of material assistance in determining guilt
* Judge should consider opinion of expert and whether expert is expressing a personal opinion or whether the behavioral profile is in common use as a reliable indicator of membership in a distinctive group
* **Has the scientific community developed a standard profile for the offender**? 🡪 satisfies relevance and necessity
* Expert evidence is an exception to the usual rules relating to what can be brought in as character evidence

**Ruling:** There was no distinction category of pervs who would do this and no standard profile of a pedo or psychopath.

* ***R v Morin*, [1988] 2 SCR 345** (Sopinka J): accused charged with murder/sexual assault of 9 year old girl, said he didn’t do it but if he did, he was not guilty by reason of insanity as he was schizophrenic. In cross-examination, the psychiatrist called by defence to say he was schizo conceded that aspects of the crime revealed the sort of disorganized and disturbed thinking consistent with schizophrenia. Was this admissible to establish guilt?
  + Same principles that govern admission of similar fact evidence apply equally where the Crown seeks to introduce psychiatric evidence relating to accused’s character. No difference between showing accused’s propensity to commit the crime by similar fact and psychiatric evidence.
  + If the evidence’s sole or primary relevance is to show disposition, it must be excluded 🡪 trial judge must first determine if it is relevant to another issue in the case (e.g. identity)
  + To be relevant on the issue of identity, the evidence must tend to show that the accused shared a distinctive, unusual behavioral trait with the perp 🡪 sufficiently distinctive it acts as a badge/mark of ID
  + Fact that accused is a member of an abnormal group, some of the members of which have the unusual behavioral characteristics shown to have been possessed by the perp, is not sufficient.
  + In some cases it may be shown that all members of the group have the distinctive characteristics, and if a reasonable inference can be drawn that the accused has them, then the evidence is relevant
  + Greater number of people having those tendencies, the less relevant the evidence on ID will be and more likely it will be that its prejudicial effect will predominate over its probative value

Proving Character of Victims – Bad Character

***R. v. Scopelliti* (1981), 63 CCC (2d) 481 (ONCA)**

**Admissibility of evidence of disposition of third parties**

**Facts:**  Accused charged with shooting 2 people who were harassing him in his store. He claimed self-defence. At trial, he tried to admit specific act evidence of bad character of the victims that had been unknown to him before the shootings.

**Issue:** Should the evidence about the victims have been admitted?

**Analysis:** Martin JA:

* When self-defence is raised, evidence not only of previous assaults by the deceased, known to the accused, towards third persons, is admissible to show the accused’s reasonable apprehension of violence from the deceased. Evidence of the deceased’s reputation for violence, known to the accused, is admissible on the same principle.
* Evidence of violence by the deceased not known to the accused are not admissible to show the reasonableness of the accused’s apprehension of an impending attack – but there is support for position that evidence of the deceased’s character for violence is admissible to show the probability of the deceased have been the aggressor
* There must also be evidence of aggression at the incident in question (though it may come from the accused)
* Disposition of a person to do a certain act is relevant to indicate the probability of his having done or not done the act
* **Disposition of 3rd person, if relevant & otherwise admissible, may be proved by: (a) evidence of reputation; (b) proof of specific acts, (c) psychiatric evidence if disposition in question is w/in proper sphere of expert evidence**
* Evidence of prior acts of bad conduct of accused which has no probative value other than to permit an inference that the accused is a person who by reason of his criminal conduct or character is likely to have committed the offence charged is excluded by a rule of policy 🡪 but no such policy reason exists for people other than accused if relevant

**Ruling:** Evidence on deceased’s acts was relevant to show they may have been the aggressors.

Criminal Cases – Similar Fact Evidence

* **Similar fact evidence**: evidence of discreditable conduct for which the accused is not charged with
* Label is misleading: (1) it need not be similar to be admissible, and (2) may not be admissible even if similar

***R v Handy*, [2002] 2 SCR 908**

**What is the test for admitting similar fact evidence in criminal law?**

**Facts:** Woman claims accused raped her. Crown tried to have accused’s wife give evidence of accused’s propensity for painful sex and that he won’t take no as an answer. Wife and complainant had met and discussed this days before the rape.

**Issue:** What is the test for admissibility of similar fact evidence where credibility is the issue? Impact of collusion?s

**Analysis:** Binnie J:

* Nobody is charged with a general disposition to do something 🡪 reason for general exclusion
* Danger of reasoning prejudice (give testimony more weight than justified) or moral prejudice (convict b/c he’s bad)
* Policy: may occupy trier of fact’s attention too much, has potential for prejudice, distraction, and time consumption, may encourage police to round up the usual suspects, and goes against the idea of rehabilitation of offenders
* **Exception: so highly relevant and cogent that its probative value in search for truth outweighs misuse potential**
* It can be admitted when it would be an affront to common sense to suggest the similarities were due to coincidence
* Strength of the similar fact evidence must be such as to outweigh reasoning and moral prejudice
* Inferences to be drawn must accord w/common sense, intuitive notions of probability, & unlikelihood of coincidence
* Probative value exceeds prejudice b/c force of similar circumstances defies coincidence or innocent explanation
* If the “similar facts” are more focused and specific to the charge, probative value of propensity becomes more cogent
* The similar fact evidence is only admissible if it goes beyond showing general propensity 🡪 **must ID material issue**
* Relative importance of issue may also have bearing on weighing of factors for/against admissibility
* Principal driver of probative value is the connectedness that is established between the similar facts and alleged offences, particularly where the connections reveal a “degree of distinctiveness or uniqueness”
* The propensity must be so highly distinctive or unique as to constitute a signature (for identification use)
* Where animus of the accused towards the deceased is the issue, a prior incident of violence against that person may be admissible, even if the form of violence (shot vs stabbed) is different 🡪 acts are dissimilar but inference is compelling
* **Factors: similarities in character, proximity in time, circumstances surrounding the acts, distinctive features, intervening events, frequency of occurrence, and any other factor supporting or rebutting the unity of the acts**
* **Counter factors for prejudice: inflammatory nature, if Crown can prove point with less prejudicial evidence**
* Similarity does not necessarily require a strong peculiarity or unusual distinctiveness underlying the events being compared, although similar facts manifesting a singular trait (e.g. necrophilia) would be a powerful tool
* **Probative value**: first determine the precise issue in question for which Crown seeks to adduce the evidence, then address the cogency of the similar fact evidence in relation to that question 🡪 **consideration of connecting factors**
* **Prejudice**: evaluate both moral and reasoning prejudice and the inflammatory nature of it
* **Weighing**: presumptively inadmissible, then Crown must establish on BoP that probative outweighs prejudice
* Collusion: Crown required to satisfy judge that on BoP the evidence of similar facts isn’t tainted with collusion
* Lapse of time opens up greater possibility of character reform, tends to undermine premise of character continuity
* Remoteness in time also may affect relevance and reliability
* Not every dissimilarity is fatal but substantial ones may dilute probative strength and aggravate prejudice by compounding confusion and distraction
* Circumstances: look at broader context 🡪 here, it was a marital relationship vs a one-night stand
* Judge must consider credibility of the similar fact evidence when exercising gatekeeper function 🡪 threshold is whether it is reasonably capable of belief
* Prejudice may be limited with a *Corbett­-*like process of selective exclusion and strong jury instruction
* Reasoning prejudice: can’t distract jury from actual charges 🡪 consumption of time with other allegations
* Trial judge’s decision to admit similar fact evidence is entitled to substantial deference
* The use of probative/prejudice to INCLUDE evidence (versus usually use it to exclude evidence)

**Ruling:** Trial judge should have considered collusion before admitting the evidence. New trial ordered.

Civil Cases – Similar Fact Evidence

***Mood Music Publishing Co Ltd v De Wolfe Ltd*, [1976] 1 All ER 763 (CA)**

**What is the test for similar fact evidence in civil law?**

**Facts:**  Pf had a song. Df had a song that sounded very similar. Pfs wrote to df, who responded that the song was written for his company but recognized they were similar. The pfs made further recordings and baited the df into stealing them, then tried to adduce those instances of theft as similar fact evidence. They thought he also stole past songs.

**Issue:** Should the instances of baited theft have been allowed as similar fact evidence?

**Analysis:** Lord Denning MR:

* In civil cases the **courts will admit evidence of similar facts if it is logically probative and logically relevant in determining the matter which is in issue**
* Admissible provided that it was not oppressive or unfair to the other side, and also that the other side has fair notice of it and is able to deal with it

**Ruling:** It may have been coincidence once but is unlikely to be coincidence four times. Probative enough to be admitted.

**E. Privilege**

* **Statutory Provisions: CEA, ss. 4, 37-39; BCEA, s. 8**

Overview

* Privilege protects info from disclosure, even when relevant/probative, to enable people to be candour/open
* Privilege evidence is inadmissible unless holder of privilege waives his right to non-disclosure
* Privilege is distinct from confidentiality 🡪 not all confidential information is protected from disclosure
* First step in analysis: is the type recognized as a class privilege or a case-by-case privilege?
  + **Class**: blanket privilege, presumptive inadmissibility because of overriding policy reasons
    - E.g. spousal (codified in **s. 4(3)** of *CEA*) and informer privilege
  + **Case-by-case**: governed by the **Wigmore test**:
    1. Communication must originate in confidence that it won’t be disclosed
    2. Element of confidentiality must be essential to full and satisfactory maintenance of relationship
    3. Relation must be one which in opinion of the community ought to be sedulously fostered
    4. Injury that would result to the relationship by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation
  + Case-by-case examples: doctor-patient, psychology-patient, journalist-informant, religious communication

Solicitor-Client Privilege

* Solicitor-client privilege has nearly absolute protection
* *Descoteaux v Mierzwinski*, [1982] 1 SCR 860: courts must take privilege into account in interpreting legislation
* *Descoteaux* formulated the rule as substantive law:
  1. Confidentiality of communications may be raised in any circumstances where such communications are likely to be disclosed without the client’s consent
  2. Unless the law provides otherwise, when the legitimate exercise of a right would interfere with another people’s privilege, the resulting conflict should be resolved in favour of protecting confidentiality
  3. When the law gives someone authority to do something that might interfere with confidentiality, you should not interfere with it except to the extent absolutely necessary to achieve the legislation’s ends
  4. Acts providing otherwise must be interpreted restrictively
* It is necessary to preserve the fundamental relationship of trust between lawyers and clients. Protecting the integrity of this relationship is itself recognized as indispensable to the continued existence and effective operation of Canada’s legal system. It ensures that clients are represented effectively and that the legal information required for that purpose can be communicated in a full and frank manner (*R v Gruenke*, [1991] 3 SCR 263)
* It is essential for the lawyer to know all facts of the client’s position. **Privilege encourages disclosure** (*Gruenke*)
* It must be as close to absolute as possible, will only yield in certain clearly defined circumstances, and it does not involve a balancing of interests on a case-by-case basis (*R v McClure*, [2001] 1 SCR 445)
* There is an outer limit to the protection 🡪 courts have gone against conferring constitutional status
* Anton Piller order: allows 1 party to litigation (moving party) to search opposing party’s business or home, without notice, where court is satisfied by moving party the search is required to prevent destruction of material evidence
  + Must ensure protection of solicitor-client privilege 🡪 if not, court can remove moving party’s lawyer
* **Requirements for solicitor-client privilege** (*Canada v Solosky*, [1980] 1 SCR 821]). Communication must:
  1. Be between a solicitor and client (including agents of a solicitor)
  2. Entail the seeking of legal advice, and
  3. Be intended to be confidential
* You do not have to claim the privilege to get it, as long as you meet the three requirements
* Presumption that lawyer’s bills are *prima facie* privileged, onus lies on party seeking disclosure to prove that productive would not violate the confidentiality of the relationship (*Maranda v Richer*, p2003] 3 SCR 193)

Exceptions to Solicitor-Client Privilege

* **Three exceptions**: (1) criminal purpose, (2) public safety, (3) innocence at stake
* **Facilitating a criminal purpose**: legal advice must be “lawful” to attract protection (*McClure*)
  + Protecting of this info would be injurious to the interests of justice (*R v Cox and Railton*)
  + 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” (*R v Campbell*, [1999] 1 SCR 565, Binnie J)
  + If lawyer merely advises on legality of an operation, that isn’t enough (*Campbell*)
* **Innocence at stake:** all privileges must give way in a case where there is a danger that an innocent person may be wrongfully conviction (*McClure*)
  + There must be evidence that the information sought could raise a reasonable doubt towards guilt
  + Sequence of events (e.g. going to lawyer🡪cops🡪therapist🡪file a suit, after learning about charges against someone and then you also file a complaint against that person) isn’t enough

***Smith v. Jones* (1999), 169 DLR (4th) 385 (SCC)**

**Public Safety exception to solicitor-client privilege**

**Facts:**  Guy tells therapist, who was hired by his lawyer to give a psych report after guy was charged with assaulting a prostitute, about detailed plans to kill prostitutes, so therapist tries to tell authorities about him because he’s a danger.

**Issue:** What are the rules for the public safety exception to solicitor-client privilege?

**Analysis:** Major J:

* Goals: foster climate where dangerous people more likely to disclose disorder, get treatment, be less danger to public
* Public safety exception applies to all classes of privilege
* Clients must be able to speak freely to lawyers to get proper advice and the privilege is the client’s to give away
* **Three factors**: (1) is there a clear risk to an identifiable person or group of persons? (2) Is there risk of serious bodily harm or death? (3) Is the danger imminent? 🡪 weight attached varies with circumstances
* **Clarity**: evidence of long range planning? Specific method suggested? Prior history of violence or threats? Prior assaults or threats of violence similar to those planned? If there is a prior history of violence, has it been increasing in severity? Directed to an identifiable person or group of persons (general rule that the group must be ascertainable)?
* **Seriousness**: Intended victim in danger of death or serious harm (must be violent) – includes serious psychological harm that substantially interferes with health or well-being (*R v McCraw*, [1991] 3 SCR 72)?
* **Imminence**: Risk itself must be serious and creates a sense of urgency. If the threat is serious, clear, or targeted at an identifiable group, no specific time limit is needed to be imminent. Statements made in fleeting anger are insufficient.
* Extent of the disclosure should be limited as much as possible 🡪 aspects indicating the risk only.

**Ruling:** The threat here was detailed, to prostitutes, super violent, and imminent, so it could be disclosed.

Litigation Privilege

* Litigation privilege protects the work done by counsel from disclosure to other parties (*Blank v Canada*)
* It protects the counsel’s role in the litigation process
* Litigation privilege ends when the litigation ends (versus solicitor-client privilege, which is permanent)

Dispute Settlement:

* Communications made during attempts to settle litigious manners through negotiation or mediation are not admissible if the negotiations failed and the matter is litigated 🡪 “without prejudice”
* Encourages settlement by encouraging parties to speak and negotiate freely without fear of future damage
* This is a class privilege (*Middlecamp v Fraser Valley Real Estate Board* (1992), 96 DLR (4th) 227, BCCA)
* Exceptions can be established if party seeking production can show there is a competing public interest that outweighs the policy goals behind the rule

Informer Privilege

* Intended to guard ID of police informers to protect them from retribution and encourage them to come forward
* **3 exceptions** where: (1) information is a material witness to the crime, (2) informer has acted as agent provocateur, and (3) if accused seeks to establish that a search is in violation of s. 8 of *Charter* and the disclosure is absolutely essential to establish the accused’s factual innocence (e.g. claim that cops planted evidence)

***R. v. Leipert*, [1997] 1 SCR 281**

**Scope of informer privilege and how to challenge it**

**Facts:**  Guys get caught with grow-op, says he has right to disclosure of the Crimestoppers tip.

**Issue:** When can an informant’s identity be disclosed to the defence?

**Analysis:** McLachlin J:

* You can’t edit the document to remove references 🡪 who knows what could give away the informant’s ID
* Fundamental importance to justice system: encourages people to help the police, depends on relationship of trust
* Promise of anonymity allays fear of retaliation and helps cops get info they might otherwise never have
* So important that court can’t balance the benefit of the privilege against countervailing considerations
* Privilege belongs to the Crown but can’t be waived without consent 🡪 judge has no discretion for this privilege
* Scope: crim and civ, witnesses on stand don’t have to admit to being informers, subject only to innocence at stake
* It prevents not only the name of the informant, but also any info which might implicitly reveal his identity
* Innocence at stake: mere speculation not enough, must have evidential basis (material witness, agent provocateur)
* Search warrant challenges: only ok to reveal ID when absolutely essential 🡪 basically innocence at stake
* **Procedure for when accused seeks disclosure of privileged informer information**: (1) accused must show some basis to conclude that without disclosure his innocence is at stake. If so, (2) court may then review the information to determine whether, in fact, the information is necessary to prove innocence. If yes, (3) court should only reveal as much information as essential to allow proof of innocence 🡪 but first Crown can have option of staying proceedings

**Ruling:** Accused didn’t establish that ID disclosure was necessary to establish innocence, so no luck.

Other Relationships (Wigmore Test)

***R. v. Gruenke*, [1991] 3 SCR 263**

**How to determine a case-by-case basis privilege**

**Facts:**  Girl tells lay counselor then pastor about involvement in a murder before turning self in.

**Issue:** Are her communications with the pastor or counselor protected under privilege?

**Analysis:** Lamer CJC:

* Prima facie privilege for religious communications would constitute an exception to general principle that all relevant evidence is admissible 🡪 need policy reasons to overcome this
* Policy reasons giving solicitor-client privilege are different because religious communications not essential to justice
* Freedom of religion in s. 2(a) will be significant in some cases but it doesn’t need to be recognized as class privilege
* Freedom of religion will depend on particular circumstances (**nature of communication, purpose, manner, parties**)
* In applying the Wigmore criteria, both s. 2(a) and 27 must be kept in mind, most importantly for 2nd/3rd criteria
* Here, communications were made for emotional stress relief, not for religious or spiritual purposes
* Doesn’t necessarily matter if communication was not to an ordained priest or minister or wasn’t formal confession
* Formal confession may indicate expectation of confidentiality but it isn’t necessary or determinative
* Must be careful in applying Wigmore as to recognize importance of spirituality and not cause a chilling effect

**Ruling:** No expectation of confidentiality here and it wasn’t for a spiritual purpose, so no privilege attached.

**F. Improperly Obtained Evidence**

Common Law

* Old law: Doesn’t matter how evidence was obtained, even if judge doesn’t like it (*R v Sang*, [1980] AC 402)
  + Only prejudice vs probative matters, not how it was obtained (*R v Wray*, 1971 SCC)

Section 24(2) of the *Charter*

**24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may

apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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

* Prerequisites to s. 24(2): applicant must prove that one or more Charter rights were violated

***R. v. Edwards*, [1996] 1 SCR 128**

**Can you use 3rd party’s Charter violation to get evidence excluded under 24(2) in your own case?**

**Facts:**  Cops survey E and see him go to gf’s house. He later leaves and is stopped by cops, who arrest him for driving with a suspended (but admit it was for drug investigation). Cops go to gf’s house and engage in “lies and half-truths” to get her to cooperate (cooperate or we’ll sit here until we get a warrant). She points to a couch and they find drugs in it. Gf is arrested and at no time prior to being taken into custody was she advised of her right to counsel or refuse entry to cops.

**Issue:** Can Edwards use the *Charter* violations against his gf in his own trial?

**Analysis:** Cory J:

* In the case at bar, there is no need to consider the reasonableness of the search since the appellant has not established the requisite expectation of privacy
* Searches can be unreasonable due to 3rd party rights violations 🡪 **potentially massive invasions of privacy or flagrant abuses of rights in unreasonable manner** of persons not involved in the activity being investigated
* Doesn’t matter if the violation wasn’t brought to the attention of the court 🡪 would ignore the purpose of s. 8
* Some invasions will be justified, e.g. home wiretaps that invade privacy of other household members
* ***24(2) only provides remedies to applicants whose own Charter rights were infringed*** 🡪 no automatic standing
* **LaForest** (concurring in result): S. 8’s purpose: afford protection to all of us to be secure against intrusion by the state by unreasonable searches 🡪 *everyone* has the right to be secure 🡪 important not to break into places w/o warrants

**Ruling:** E can’t use 24(2) to kick out evidence based on someone else’s rights violation b/c no expectation of privacy

Excluding Evidence Under the Charter – Bringing Administration of Justice into Disrepute

**CORRECT APPROACH**: Use the 3 criteria laid out in *Grant* and analyze them using factors from *Collins*.

***R. v. Collins*, [1987] 1 SCR 265**

**How to determine if 24(2) should be used – Factors are still useful but analysis frame is now from *Grant***

**Facts:**  Cops grab drug dealer by throat to stop her from swallowing heroin. Section 8 violation found at trial.

**Issue:** How should the Charter violation be dealt with?

**Analysis:** Lamer J:

* “If it is established that… brings into disrepute” 🡪 places burden on applicant, BoP
* The question is whether the admission or exclusion of the evidence would bring the admin of justice into disrepute
* **Purpose of 24(2)**: prevent having admin of justice brought into *further* disrepute by admission of evidence by depriving accused of a fair hearing or judicial condonation of unacceptable conduct in investigation
* You must look at the long-term consequences of admission or exclusion
* Concept of disrepute necessarily involves element of community views 🡪 requires judge to refer to what he conceives to be the views of the community large (but this doesn’t mean public perception is determinative)
* Ultimate determination is with the courts 🡪 only effective shelter for individuals and unpopular minorities
* **Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?**
* Judge’s discretion should be grounded in community values and, in particular, long-term community values
* **Factors for 24(2):** what kind of evidence is it? What Charter right was infringed? Was violation serious or of a merely technical nature? Was it deliberate, willful or flagrant, or inadvertent or committed in good faith? Did it occur in circumstances of urgency or necessity? Were other investigatory techniques available? Would evidence have been obtained in any event? Is offence serious? Is evidence essential to substantiate charge? Are other remedies available?
* Three categories of factors (not used now): (1) whether evidence will undermine fairness of trial by conscripting accused against himself, (2) seriousness of breach, and (3) effect of exclusion of long-term repute of admin of justice.
* Factors: nature of evidence obtained, nature of right violated, not so much manner in which right was violated
* Real evidence: existed irrespective of the violation 🡪 its use does not render the trial unfair
* Evidence emanating from accused: unfair to trial because it didn’t exist prior to the violation and strikes at one of the fundamental tenets of the right against self-incrimination
* Relevant if evidence could have been obtained without violation 🡪 lessens blow but also makes violation offensive
* The more serious the offence, the more damaging to the system’s repute would be an unfair trial

**Ruling:** The violation was flagrant and a serious violation so evidence can be excluded.

* ***R v Stillman*, [1997] 1 SCR 607**: “Conscriptive” evidence = statements, bodily samples, uses of body as evidence, and any evidence coming from that. “Non-discoverable” if it could not have been obtained by legal, non-conscriptive means. Majority held that both of these must be present to affect trial fairness.

***R. v. Grant*, [2009] 2 SCR 353**

**New approach to determining if 24(2) should be used**

**Facts:**  Kid gets hassled by cops, told to hold hands in front of him, admits to have weed and a gun. Held that his s. 10(b) right to counsel was violated because he was detained unlawfully and arbitrarily and not advised to right to counsel.

**Issue:**

**Analysis:** McLachlin CJ and Charron J:

* *Collins*’ 3 categories of factors created confusion as did real evidence/evidence emanating from accused distinction
* *Collins* suggested breaches can be ‘insignificant’ (not true) and that **seriousness of offence matters (it doesn’t**)
* *Stillman* was read as creating an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence
* *Stillman* goes against 24(2) requirement that court consider “all the circumstances”
* Trial fairness is better conceived as an overarching systemic goal than as a distinct stage of the 24(2) analysis
* **24(2)’s focus**: (1) long-term and prospective, (2) societal, systematic concerns, (3) integrity, confidence in system
* **Court must assess and balance effect of admission on society’s confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (must not give message justice system condones serious state misconduct), (2) impact of the breach on the Charter-protected interests of the accused (message that individual rights count for little), and (3) society’s interest in adjudication of the case on its merits**.
* Seriousness: the more serious or deliberate (including willful and reckless disregard) conduct, greater the need for courts to dissociate themselves in order to preserve public confidence in and ensure state adherence to the rule of law
* Concern is not to punish police (deterrence is a side consequence) – it is to preserve confidence in rule of law
* Extenuating circumstances (e.g. need to prevent disappearance of evidence) may attenuate conduct, as does good faith
* Ignorance of Charter standards must not be rewarded/encouraged, negligence/willful blindness not equal to good faith
* Impact on accused’s interests: evaluation of the extent to which the breach actually undermined accused’s interests
* Society’s interest: general expectation criminal cases will be adjudicated on merits, so you must balance if truth-seeking function of trial would be better served by admission or exclusion
* If a breach suggests that evidence may be unreliable, this points in the direction of exclusion
* Importance of evidence to Crown’s case: tied to reliability
* Statements by accused: protection by confessions rule, violates principle against self-incrimination, tend to exclude
* If it can be said that the statement wouldn’t have been made but-for the breach, this leans towards exclusion
* Bodily evidence: broad contextual approach, *Collins* factors relevant, interests of privacy, bodily integrity, human dignity, flexible test on all the circumstances 🡪 seriousness of conduct, impact of breach, value of trial on merits
* Evidence obtained from the body is generally reliable, so value of trial on merits is boosted
* Non-bodily physical evidence: same 3 concerns as bodily evidence
* Derivative evidence (physical evidence recovered because of statements): conscriptive and discoverable, court must assess strength between statement and discovery of the evidence, use same 3 criteria as the other categories
* Considerable deference will be given to trial judge’s decision on balancing and weighing
* Analysis not just above accused’s rights – also must care about long-term cost, systemic costs, etc (**objective** analysis)
* **When doing analysis for *Grant*, try to analogize to other cases!**

**Ruling:** Admin of justice wouldn’t be brought into disrepute. Area of legal uncertainty, understandable error.

***R. v. Harrison*, [2009] 2 SCR 494**

**Example of application of *Grant***

**Facts:**  Guys driving car pulled over for no good reason and 35kg of coke found inside.

**Issue:** Should 24(2) apply?

**Analysis:** McLachlin J:

* An officer’s hunch is no substitute for proper Charter standards
* *Grant* gives 3 lines of inquiry: (1) seriousness of conduct, (2) impact of breach, (3) society’s interest in prosecution
* Seriousness: spectrum of conduct ranging from blameless to negligent to blatant disregard for Charter rights
* Recklessness can be quite serious, especially if there was no reasonable grounds for engaging in the conduct
* Officer’s in-court testimony was misleading which is an aggravating factor
* Impact: detention and search impacted liberty and privacy but detention was brief and privacy expectation was low
* Mitigating factor: nothing in the encounter was demeaning to the applicant
* Relatively non-intrusive nature of search should be weighed against the lack of reasonable grounds to search
* Seriousness of offence cannot take on disproportionate significance, even if evidence conclusive of guilt as this would deprive those charged with serious crimes of the protection of Charter rights and declare that ends justify the means
* Fact that an offence is more serious than the breach doesn’t matter 🡪 police must adhere to higher standards

**Ruling:** It should have been excluded.

Shifting Use of Unconstitutionally Obtained Evidence

***R. v. Calder*, [1996] 1 SCR 660**

**Whether previously excluded evidence can be used for another purpose**

**Facts:**  Cop caught w/hooker. Says he wasn’t there, later proven to be untrue. Charter right violated when statement made.

**Issue:** Can evidence excluded from Crown’s case in chief be used to impeach the accused’s credibility?

**Analysis:** Sopinka J:

* *Kuldip*: accused can be cross-examined on statement made by him at previous trial (but statement never inadmissible)
* When a statement is admitted, generally it is available as positive evidence of innocence or guilt
* Mere fact that a false exculpatory statement as made may be evidence of consciousness of guilty
* Statement whose use is limited to credibility challenge can only impeach accused’s testimony and nullify it at best
* It is wrong to think that evidence can be made admissible which his otherwise inadmissible just because it’s for cross
* Voluntariness is determined by reference to the circumstances surrounding the taking of the statement. These circumstances are static and determinable at the outset of trial. Nothing done in the context of trial can alter them.
* Voluntariness of the statement isn’t affected by the purpose for which the Crown proposes to use that statement
* Effect of evidence taken in breach will have same effect whether used in cross-exam or chief
* Just because jury can be instructed to apply a distinction does not mean use for impeachment will be less detrimental
* In determining admissibility under 24(2), it is not the carefully instructed juror who is the arbiter of the effect on the administration of justice but rather the well-informed member of the community, who does not have the benefit of a careful instruction from the trial judge on the distinction. Not only will that person not tend to understand the distinction in theory, but will regard it as immaterial in assessing the effect on the repute of the admin of justice.
* If use of a statement is seen to be unfair by reason of having been obtained in breach of a Charter right, it is not likely to be seen to be less unfair because it was only used to destroy credibility
* **Only in very limited circumstances will change in use qualify as a material change in circumstances that would warrant reopening the issue once evidence is excluded** (**Note**: Laforest says he can’t see when this would happen)
* **Dissent** (McLachlin J):
* It is important for jury to be able to fairly judge the truthfulness of a witness, and for the trial process, it is equally important not to permit witnesses to take the stand and fabricate lies without fear of cross-examination
* It may seem fair to use a statement against the accused that was obtained against his Charter rights, but if he chooses to take the stand and place his credibility in issue and to swear he’ll only tell the truth, it is harder to say it’s unfair to permit Crown to cross-examine on a prior inconsistent statement

**Ruling:** You cannot use excluded evidence for the purpose of impeaching credibility.

* ***R v Cook*, [1998] 2 SCR 597**: Circumstances allowing for reassessment of the *Collins* factors as the trial progresses, as suggested in *Calder*, will be very rare and doesn’t include impeachment of accused’s credibility

**IV. EVIDENCE WITHOUT PROOF**

* **Statutory Provisions: CEA, ss. 17-18, BCEA, s. 24**

Formal Admissions

* Parties may admit facts, dispending with the need for the other party to prove them
* **Criminal Cases**: a guilty plea is an admission of facts necessary to establish elements of the offence but not of any further facts alleged by Crown 🡪 these extra facts must be agreed to or proved BARD at sentencing (*R v Gardiner,* [1982] 2 SCR 368, *Criminal Code*, s. 724(3))
* **Civil Cases**: Parties may formally request that another party admit facts (BC Supreme Court Civil Rules 7-7)
  + Facts may also be admitted by counsel in the court of trial
  + Formal admissions made for purpose of dispensing with proof at trial are conclusive for matters admitted
  + Evidence adduced relating to them is irrelevant, even if contradictory (*Tunner v Novak* (1993 BCCA)

Judicial Notice

* Judicial notice: under certain circumstances a judge may take notice of a fact despite a lack of relevant and admissible evidence 🡪 a rule, not an exception
* **Purpose**: efficiency in the trial process
* Adjudicative facts: who/what/where/when/why 🡪 In dispute between the parties, only strict judicial notice
* Non-adjudicative facts: legislative and social facts 🡪 relate to law and policy but not to specific individuals
* A court may take judicial notice of facts that are either **(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons, or (2) be capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy** (*R v Find*, [2001] 1 SCR 863)
* Non-adjudicative facts have a less stringent test (*Danson v Ontario (AG)*, [1990] 2 SCR 1086)