LAW 453 – EVIDENCE

HATCH

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# Unit 1 – Introduction to the law of evidence

## the role of evidence

There are three kinds of evidentiary rules that serve the substantive law:

1. Rules of Process
   * Outline how evidence is presented to the trier of fact
   * Provide procedures designed to enhance the prospects that witnesses will tell the truth (i.e. the oath)
   * The law of evidence controls the manner in which questions are posed, the way exhibits are presented and the conduct of in-court demonstrations
2. Rules of Admissibility
   * Identifying what information the triers of fact are allowed to consider
   * *R v Jarvis* 🡪 it is a principle of fundamental justice that relevant evidence should be available to the trier of fact in the search for the truth
   * There can be restricted admissibility:
     + Rules of practical exclusion – can’t have thousands of witnesses
     + Rules of subordinated evidence – evidence excluded under policy or principle (*Charter* rights, solicitor/client privilege)
     + Rules of non-evidence – irrelevant information that distorts the truth
       - Hearsay rule 🡪 ordinarily, courts must not treat what has been said out of court as though it is the equivalent of in-court testimony
3. Rules of Reasoning
   * The deliberation stage, where the trier of fact makes the ultimate decision in the case by “weighing” the evidence and applying its funding to the relevant rules of substantive law
   * Smallest category of evidentiary rules

## the objectives of the law of evidence

##### 5 Goals in the Law of Evidence

1. Truth seeking and fact finding (*Noel*)
   * What you say in a trial cannot later be used against you to incriminate you
2. Procedural fairness
3. Protection of the parties and justice system participants
4. Trial efficiency
5. Public confidence

## sources of the law of evidence

* The law of evidence comes from both statue and common law
  + *Canada Evidence Act, Alberta Evidence Act, Criminal Code*
* *Canada Evidence Act*
  + Competency and compellability (section 4)
  + Rules for examination in chief (s 9(1))
  + Cross-examination
  + Cross examination of a witness with respect to their prior criminal record (s 12)
  + Competency of witnesses (s 16 and 16.1)
  + Bank records (s 29)
  + Business Records (s 30)
* *Alberta Evidence Act*
  + Competency of witnesses (ss 3 – 9)
  + Corrobative evidence (s 10-12)
  + Examination of witnesses (s 22 -25)
  + Admissibility of previous court proceedings (s 26)
  + Statutes, public documents, banking records, and electronic records (ss 27 – 41)

## trends in the law of evidence

Four trends have marked the progress of evidence law in Canada over the last 25 years:

1. **The move to a purposive approach**
   * A move to more flexible evidence rules
   * *R v Khan* 🡪the hearsay rule would have resulted in exclusion of an overwhelmingly reliable out-of-court complaint made by a young victim being sexually assaulted by her doctor
     + Without the reliable hearsay her version of events would not be available
     + The hearsay rule was not created to prevent these reliable statements from being admitted
     + The SCC rectified the over inclusive nature of the hearsay rule by adopting a general “purposive exception” that now permits courts to examine admissibility by assessing whether exclusion will advance the goals the hearsay rule intends to achieve
   * SCC affirmed: “The continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the difficulties posed by such claims
2. **The development of the overarching exclusionary discretion**

* Judges have the discretion to exclude evidence, even if it is technically admissible, based on a cost-benefit analysis
* If the “probative value” of the evidence outweighs the “prejudice” its admission will cause, it can be excluded

1. **The move to increased admissibility**

* The development of purposive rules of admissibility has resulted in increased admissibility
* Legislated movement away from reliance on strict rules of proof

1. **The rise of technology**

* Technology can now be used to present evidence

## The evolving reform of the common law rules of evidence by the scc

* These cases establish a pattern of admitting more hearsay evidence than previous years
* An unadopted statement before *KGB* could only be used to impeach a witness
  + The SCC rejected this traditional rule and allowed statements to be tendered for their original truth
  + Where threshold reliability is met (video recorded in which witness looks truthful), the Court will feel more comfortable admitting the statement
    - Even if the witness later recants
* ***KGB* statement 🡪** causation given by police, to a person giving a statement that may be used later in court. It creates a possible exception to the hearsay rule

## features of the adversary system

* Counsel determines what evidence is to be presented and is bound by a code of ethics
* The Judge is an independent arbiter who has no prior knowledge of the case; they are a passive party in the case
  + The Judge is not ignorant, but they really have no specific knowledge
  + They will have the indictment, but that has very little information on it
* Unless there is a jury, the Judge is both the trier of fact and the trier of law
  + Jury trials are rare
* Evidence is provided largely by way of *viva voce* (oral) evidence in public and under oath
* Examination in chief 🡪 direct examination by the party that called the witness
* Cross examination 🡪the questioning of a witness or party during a trial, hearing, or deposition by the party opposing the one who asked the person to testify in order to evaluate the truth of that person's testimony, to develop the testimony further, or to accomplish any other objective the interrogation of a witness or party by the party opposed to the one who called the witness or party, upon a subject raised during direct examination—the initial questioning of a witness or party—on the merits of that testimony.

##### The *Voir Dire*

* *Voire Dire* – a trial within a trial, used in both a civil and criminal trial
* Typically used in the event of legal disputes such as whether particular evidence is admissible
* *Voire dire* is a separate hearing and evidence heard during it is not part of the general trial record and cannot be relied on when making a final decision
* For example, if the *voir dire* hearing fails, the trial would continue as if that evidence had never been presented
* In the event of a jury trial, the jury is not present during *voir dire*

### snapshot of a criminal proceeding

1. Investigation
2. Arrest and charge

* Police swear the investigation
  + The pleadings (the information) are sparse

1. Interim release 🡪 bail

* Accused is released on least restrictive terms possible
* If detained, the accused has a right to a bail hearing

1. Disclosure

* Defense does general not have to provide disclosure except for the exceptions below:
* *Taylor* 🡪 Defense needs to disclose when:
  + Accused intends to use the defense of alibi
  + Expert evidence is going to be called (s 675.3(3))
    - Crown 🡪 CV and name 30 days before trial; report in reasonable time before trial
    - Defense 🡪 CV and name 30 days before trial; report before the close of the Crown’s case
  + When Charter relief will be sought (*Dwernychuk*)
  + *Corbitt* application – if the accused’s prior convictions are so prejudicial and will taint the jury, they will be excluded from the trial (ss 276 and 278)
* *Stinchcombe* 🡪 Crown has the burden to disclose all of its documents to the defense
  + Large change to law of disclosure, which is still evolving to date

1. Election & plea
   * Accused must stated whether they want to plead guilty or not-guilty
   * Crown has to decide whether to try the matter in QB or provincial court
   * Order of accused on indictment is important for multiple party offenses – it’s the order in which you put forward your evidence
2. Preliminary inquiry – s 548
   * Only happens if your matter is in QB
   * Needs to be sufficient evidence on which a properly instructed jury may convict
   * Defense is under no obligation to disclosure or call evidence
   * The Crown can skip the PI and go right to a direct indictment
     + Hatch this PI is a very important step and could save a lot of time for both parties
   * Defense gets the opportunity to see the case before them, preserve any evidence (s 715)
3. Trial

* Incompetency/non-compellability of the accused
* *Voir dire* – trial within a trial
* Directed verdicts
* Charge to jury
* Duty to give reasons
  + If the trial is by Judge alone, the judge must give reasons
    - The change came from the original notion that judges are assumed to know the law and therefore, their decisions should be taken as is( *R v Sheppard*)
  + Trial by jury 🡪 jury under NO obligation to provide reasons for judgments

### snapshot of a civil proceeding

* The exchange of pleadings (extensive) and joinder of issues
  + Once pleadings are filed – move into an important stage of the proceedings = affidavit of documents – complete disclosure is mandatory in civil – all documents that touch upon matter in dispute must be disclosed (subject to one thing)
* Parties are both mutually competent and compellable
* Examination for discovery (pre-trial) and mutual obligation to make full disclosure
  + Plaintiff gets to examine the defendant and vice versa
  + Number of important features:
    - Opportunity to assess your opponent’s case – what kind of witness is this person under oath?
    - Chance to seek admissions from the other side
    - If P elects to testify at if she/he changes their evidence (even subtly) you can as the D put that prior testimony to the plaintiff and seek an explanation for the change in testimony – court can accept all or none or part of what the witness said
    - Can be used as a settlement tool – once discovery is complete you can reassess the case
* Vast majority of civil matters settle without going to trial
* Trial – mini-trials, judicial dispute resolution and formal trial itself
* Trial is to be held before an independent adjudicator (e.g. judge sitting alone or a jury) with no prior knowledge of the dispute. Permitted in limited circumstances to “challenges for cause” = deciding which juror is independent enough to sit on the jury
* Leave it up to the parties themselves to gather evidence

## enforcing the law of evidence

### enforcement at the hearing

* Enforcement of the rules of evidence begins with the party who wishes to present the evidence
* It is unethical for lawyers to blurt out inadmissible information before juries, or to present evidence to judges with no air of reality
* It is important for the party in which evidence is being present against object to it
  + Objections can be taken to the improper form of questions, to the admission of inadmissible evidence, to improper submissions of opposing counsel, or in a jury trial, to errors in the judge’s charge to the jury
* If an objection is made in a jury trial, other than to the form of a question, the jury will be removed
* Objections are an imperfect way of enforcing the rules of evidence
  + The comment has already been made

### enforcement on appeal

* If a party objected and a judge or adjudicator makes an incorrect decision in applying the evidentiary rule, a legal error will have occurred
* An appeal won’t arise from an error that would not have changed the ultimate outcome
* The failure to object cannot make inadmissible evidence admissible; nor does the failure to object relieve the judge of the obligation of getting evidentiary rules right
  + A trial judge who does not follow the rules of evidence commits an error
* An appeal will be barred only if the accused party expressly waives the right to *voir dire* and admits the statement to be voluntary
  + Beyond this rule, there are no fixed rules about the impact that the failure to object will have

# unit 2 – the basic admissibility and evaluation of evidence

At its core, the rules of evidence first assist us in determining whether or not a particular piece of information should be considered by the trier of fact, that is, is it admissible?

## the basic rule of admissibility

* Information can be admitted as evidence only where it is **relevant to a material issue in the case**
  + This is the *basic rule*
* Admissibility questions are for the Trial Judge and the trier of **law** to resolve (NOT the jury)
* Even if evidence meets this rule, it may not be admitted
  + Can still be caught in the exclusionary rules
* *R v Truscott* 🡪 subsumed materiality in its definition of relevance, noting “evidence will be irrelevant either if it does not make the fact to which it is directed more or less likely, or if the fact to which the evidence is directed is not material to the proceedings”
* 5 general factors that govern admissibility:
  1. Is the evidence relevant and material?
     + Does the evidence tend to prove or disprove a particular matter which is in issue between the parties?
  2. Is the evidence barred by the operation of an exclusionary rule?
  3. Is the evidence to be excluded on the basis that it was obtain in violation of a specified *Charter* right?
     + Can turn to a *Grant* analysis – will the administration of justice be in disrepute?
  4. Is the evidence legally relevant?
     + Legal relevance is examining whether the value of the evidence is worth the cost to the trial process (*R v Mohan*)
  5. Do the same rules apply to a defence evidence in a criminal case?

### materiality

* Evidence that is not directed at a matter in issue in the case is “immaterial”
* To identify immaterial evidence, ask “what is being sought to be proved with this evidence?” and then determine whether that thing is a matter in issue
* Evidence is material if it relates to a primary issue that arises for decision
* The primary issue that a court or tribunal has to determine are defined by the pleadings in the case, the substantive laws that pleaded allegations or claims turn on, and those procedural rules that arise during the case that require facts to be determined
* A judge must assess the quality of material evidence
  + It is indirect or secondary material that assists the trier of fact in resolving the issue of identity
* Courts do not formally distinguish between primary and secondary materiality
  + But, there are strict limits on secondary information
    - Limits are posed due to time consumption and unnecessarily complicating matters
* Immaterial evidence can be admitted
  + Not always easy to identify in advance what the use of some evidence may be

### relevance

* Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely that that proposition would appear to be in absence of that evidence
* Relevance is about the relationship between evidence and the fact it is offered to prove
  + No legal test for this; it is a matter of logic

##### Direct Evidence, Circumstantial Evidence and Relevance

* **Direct evidence** is evidence which, if believed, resolves a matter in issue
  + Establishes a material fact without the need for inferences to be drawn
    - We examine here the so-called testimonial factors of a witness, that is, their observational skills (did they really perceive the event; how capable of perceiving it were they at the time?) their memory, their appropriate use of language, their experiential capacity and their honesty.
* **Circumstantial evidence** is evidence that tends to prove a factual matter by proving other events or circumstances from which [either alone or in combination with other evidence] the occurrence of the matter in issue can be reasonably inferred
  + Requires inferences to be drawn before it is of use in resolving material issues
  + To convict on circumstantial evidence in a criminal case, the circumstantial evidence must not only be consistent with the conclusion that the act was committed by the accused, but must be inconsistent with any other rational or reasonable conclusion
* Relevance is important only for circumstantial evidence
* Information that is direct evidence of a material issue does not need a bridging inference before it is useful

##### Logical Relevance

* Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence
  + It does not need to be highly probative
  + It does not need to establish a fact on its own
  + Just has to have a logical relevance to a proposition
* SCC 🡪 to be logically relevant, the evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to “increase or diminish the probability of the existence of a fact in issue”
  + As a result, there is little probative value required for evidence to be relevant
* *R v Ferris* (Mona case, pg 33) – Accused was heard saying “I killed David”, but the officer who heard it did not hear what was said before and after it
  + In isolation, this is obviously a telling statement
  + In reality, the court determined that its meaning was so speculative and its probing value was so minor, the TJ should have excluded it
* Relevance is contextual in that it depends on the facts in issue, the position taken by the parties in respect of those facts, and the other evidence adduced in relation to those facts
* Judges may exclude evidence as irrelevant after relying on the accumulated knowledge from courts and studies to the effect that certain types of evidence can appear probative when they are not
* *R v Seaboyer* 🡪 Court rejects the ‘twin myths’
  + The belief that the past consensual sexual experiences of a complainant are relevant (1) to her credibility because they show her to be of discernible behaviour, or (2) to her readiness to consent to sex because she has shown herself to by the type to consent

## evaluating or weighing the probative value of evidence

* Do not confuse relevance and weight of evidence, also distinct from admissibility
* Weight relates to how probative or influential the evidence is
* The basic rule of admissibility requires materiality and relevance, but not weight
  + The trier of fact can decide how much weight to give the evidence after it is accepted
* The concept of weight is not legally challenging as the weight of evidence is simply a function of how believable and how informative the trier of fact considers it to be, as a matter of human experience
* Evidence is not just about the logical connection between a fact and issue, but it does have to be logically probative despite its potentially prejudicial effect
* Believability affects weight
* Credibility goes to the honesty of the witness; reliability goes to the accuracy of the evidence
* The ability of evidence to inform depends upon:
  + How live the issue it addresses is
  + How cogent the evidence is in proving the thing it is offered to prove
* Direct evidence is completely informative
  + The only thing affecting the weight of material direct evidence is believability
* For circumstantial evidence the strength of the logical inference yielded by the evidence is critical in determining weight.
  + E.g. a finger print found at the scene of a crime will be given a lot of weight. The fact that a person was said to be wearing a certain colour of sweater does not likely hold as much weight
* **Believability and informativeness of evidence =** **probative value**
* Judges can effect weight and reliability, but the ultimate determination as to probative value of evidence is left to the trier of fact
* *R v Morin* 🡪 SCC made it clear that the ultimate standard of proof, “beyond a reasonable doubt” in a criminal case does not attach to individual pieces of evidence, but rather it is the evidence as a whole at the end of the case which must be examined collectively to determine whether or not the case has been proven to the requisite standard

## the exclusionary discretion

* Judges have the discretion to exclude relevant and material evidence where its probative value is outweighed *substantially* by its prejudice
  + This comes from the view that it is better to wrongfully acquit someone than it is to wrongfully convict them
* A judge must determine the value of the evidence, based on both its believability and the strength of the inferences it leads to, against the costs presented by such evidence
* We are in an era of strong discretion in which the judge is often given a vital role to play in evaluating evidence as a prelude to admissibility
* Two kinds of exclusionary discretion:
  + One gives judges the discretion in criminal cases to exclude evidence obtained in circumstances such that it would result in **unfairness** if the evidence was to be admitted at trial
  + The second form permits judges to exclude otherwise technically admissible evidence in criminal, civil and administrative law cases, **where the benefits of its admission cannot justify the negative effects** its admission will cause (cost/benefit analysis)
* At common law, there has been no recognized discretion to exclude technically admissible *defence* evidence
  + It can only be excluded solely where its probative value is *substantially* outweighed by the prejudice it would cause
* *R v Clarke* 🡪 the protection of the innocent and the right to present full answer and defence depend on the ability to call evidence
* *R v Williams* 🡪 a court has a residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard does not exist
* Probative value has become a key element in the operation of the general exclusionary discretion as well as the operation of a number of rules of evidence
  + So long as the trial judge is confined to threshold question of whether the evidence is worthy of being heard by the trier of fact, probative value can properly be considered at the admissibility stage while still leaving the trier of fact to determine the ultimate question of whether the evidence is going to be accepted or acted one
* In evaluating probative value for admissibility purposes, including when applying the exclusionary discretion, judges can therefore undertake the limited weighing process of considering whether the evidence is informative enough to warrant being heard in all of the circumstances
* Where a rule of evidence calls for an assessment of probative value when deciding whether to admit the evidence, judges should engage in a threshold evaluation of how believable the evidence is, including how credible the witness offering the evidence is
* *R v Hart* 🡪 it would be artificial and self-defeating for judges to ignore defects in the evidence when applying rules dedicated to determining whether evidence has sufficient value to receive
  + This decision determined that the Mr. Big evidence comes at a price
    - Raises the question of unreliable confessions and wrongful convictions
    - This technique runs the risk of being abusive
    - The reason that these are typically admitted is due to the fact that the admissions are found to be exceptions to the hearsay rule
    - These should be treated as presumably inadmissible in which the Crown has to establish on a balance of probabilities that the probative value of the confession outweighs the prejudicial effect
      * Then the court will look to the confession itself for markers of reliability (is what the accused saying adding up to what is being found?)
* **Note on inclusionary discretion**: evidence that does not satisfy the rules of evidence cannot still be admitted by the trier of fact
* Exclusionary rules have been seen to undermine the discretion of the trier of fact. Judge should therefore exercise discretion when applying exclusionary rules

##### The Concept of Prejudice

* Evidence is prejudicial only where it operates improperly or where it produces problematic collateral costs
* Emotion rather than logic ends up driving the results
  + Explicit photos, bad character evidence, etc
* Prejudice can describe both the distorting impact that evidence can have on the finding of fact, and broader considerations of fairness in allowing the evidence to be presented
  + It embraces adverse practical consequences of receiving evidence
* Any potential that evidence has to undermine an accurate result; to complicate, frustrate, or degrade the process; or to assault the dignity of witnesses or parties can agitate in favor of the exclusions of technically admissible evidence
* Evidence can be prejudicial to the accused, witnesses and the Crown
  + Used to be only prejudicial to the accused
* Balancing exercise of the judge – once evidence is determined to be admissible, we look at the probative value against the prejudicial effect and consider whether (in a jury trial) the direction by a judge could remove the prejudice in that evidence
  + From there it is a judgment call

## relevance, materiality, and narration

* Narrative – when a witness is testifying and goes through details that are not really relevant to the case, but does assist with the flow of the story
  + May not be a problem
* Narrative information can be extremely prejudicial
* The Crown will try to get potentially prejudicial information in by saying that it is “relevant to the narrative”
* Care must be taken with the narrative doctrine
  + Prejudicial information should gain this type of “back door” entry only where the significant testimony cannot be recounted meaningfully and fairly without its disclosure
* If prejudicial narrative does get it, it is up to the judge to ensure that it is not considered

## conditional admissibility – From unit notes

* Sometimes, something may be admissible, but not conclusively
  + It depends on certain things
  + You may not be able to explain why it is relevant early on in the trial, but you can undertake to show the relevancy of the evidence later on
* Essentially, a piece of evidence may be deemed admissible conditionally and if the conditions are not met, the trier of fact will be told to disregard it
* Just because evidence has been ruled admissible does not necessarily mean that it will be tendered by counsel
  + Once a ruling as to admissibility has been obtained, the Crown may well not tender it and make it part of their case, but rather have it ruled admissible during the course of their case and if and when the accused then elects tot testify, use it for the purposes of cross-examination

##### Limited or Restricted Admissibility

* Evidence that is admitted for one purpose, but not for another
  + i.e. *Goldfinch* – cannot use the evidence to infer that the complainant is less credible than she is
* *Corbett motion* – exclude the accused’s criminal record or parts of it
  + In *Corbett*, the accused’s record was edited out and the jury has to be told that the convictions are only admissible on the limited subject of credibility
* Revisiting of Evidentiary Rulings:
  + An evidentiary ruling as to admissibility made by a Judge during the course of the trial may be revisited depending on the course of the trial
    - A perfect example arose in *R. v. Underwood*, where the Court decided that a granting of a Corbett motion withholding from a jury an accused witness' prior criminal record, was in a sense provisional only and if Defence counsel thereafter overplayed their hand, the Trial Judge could revisit the ruling later in the trial and then permit the Crown to cross-examine the accused on his record. In other words, evidentiary rulings need not be static and they could change during the course of the proceedings as Other evidence unfolds.

##### Revisiting of Evidentiary Rulings

* An evidentiary ruling as to admissibility made by a judge during the course of the trial may be revisited depending on the course of the trial
* *R v Underwood* 🡪 the SCC determined that a granting of a *Corbett* motion withholding from a jury an accused witness’ prior criminal record, was in a sense provisional only and if defense counsel thereafter overplay their hand, the TH could revisit the ruling later in the trial and then permit the Crown to cross-examine the accused on record

##### The Hearing of Inadmissible Evidence by the Trier of Fact – The Remedy

* On occasion, the Court will hear evidence that it ought not to have had before it
* If the trial is being held before a judge sitting without a jury there usually is no lasting damage occasioned because the Judge will simply disabuse her mind of the inadmissible evidence
* There are two remedies available if it is a jury trial:
  + The Judge would need to give a close limiting instruction to the jury directing them also to disabuse their minds of the inadmissible evidence they have heard
  + In more serious cases of inadmissible evidence, the ultimate remedy is to declare a mistrial
    - This is also available in judge alone trials if the judge does not believe they can disabuse their minds

### Summary

In summary, evidence that is irrelevant is inadmissible. Evidence that is relevant to a matter that is not in issue is inadmissible because it lacks materiality as that notion is discussed in the text. Evidence that is relevant to a matter in issue may be admissible unless excluded by a specific exclusionary rule, or by the discretionary balancing of interests found in the cost benefit analysis discussed in Mohan, and if it is defence evidence we are concerned with, the more stringent test for exclusion as discussed above. Overlying all of this is the Court’s obligation to exclude evidence that has been obtained as a result of a Charter breach where the admission of the evidence would/could bring the administration of justice into disrepute. Such evidence will be excluded notwithstanding the fact that it is highly probative and indeed may be conclusive with respect to the ultimate result of the case. (See 3. 24(2) of the Charter)

## standards of admissibility of evidence

* There is a difference between the ultimate standards of proof that the law requires before facts are found in a case and the standards that have to be met before individual items of evidence are admissible
  + Individual pieces of evidence do not have to be proved beyond a reasonable doubt to be admitted
    - Unless the evidence is the only proof of an essential part of the case
* *R v Morin* 🡪 it is an error of law for the judge to direct a jury to apply the ultimate burden of proof to individual items of evidence h
* There are still standards that apply as preconditions to the admissibility of evidence:
  + Testimony Where No Exclusionary Rule is in Issue
    - Most often, there will be no exclusionary rules to consider, the only standard is the basic rule of evidence
  + Exhibits or “Real Evidence”
    - “real evidence” (physical evidence) is generally admissible where it is both relevant on the standard just described, and authentic; where it is in fact what it is purported to be
  + Rules Having “Factual Triggers”
    - Proving Factual Triggers on a Balance of Probabilities
      * “factual triggers” – these rules outline one or more factual preconditions that must exist before the rule applies
      * The general rule that the party seeking to have such a rule of evidence applied must establish each of the factual prerequisites on the balance of probabilities
      * The “similar fact evidence” rule applies where the Crown wants to rely on discreditable uncharged conduct of the accused to support a prosecution
    - Proving Factual Triggers Beyond a Reasonable Doubt
      * Most often, the beyond a reasonable doubt standard will not apply, even when evidence is terminal to the case for the accused
        + E.g. of when beyond a reasonable doubt must be used: if the statement of a young person is offered by the Crown in a criminal case, the Crown will also have to prove beyond a reasonable doubt that the statutory requirements in the *Youth Criminal Justice Act* have been complied with
      * There are other rules of evidence, known as presumptions, where preliminary facts will sometimes have to be proved beyond a reasonable doubt
        + If a party proves that a basic fact exists, the trier of fact is then to presume that another fact also exists

Where a finding that the presumed fact exists will be conclusive of guilt, however, the Crown must establish that basic fact beyond a reasonable doubt

* + Basic Common Law Rules of Exclusion Pertaining to the Nature or Effect of the Evidence
    - Other rules of evidence, including some of the most basic common law rules of exclusion (hearsay, opinion, character evidence) do not have factual triggers
      * Their operation depends on the nature of the evidence; there is no sense in discussing standards of proof relating to admissibility for such rules
    - E.g. a question will be leading or not. Evidence is either hearsay or it is not. It either raises an issue of character or it does not.
  + Statutory Modifications
    - Statute can alter the standards of proof that would otherwise apply in determining admissibility
      * E.g. computer records cannot be authenticated using the generous standards applied above. They will only be admissible under the *Canada Evidence Act* where the designated prerequisites are met
    - It is necessary for the individual rules to be examined to determine the appropriate standard of proof for admissibility, always bearing in mind that it is not necessary to speak in terms of standards of proof when a rule of evidence turns on the legal characterization of the evidence or the effect of its admission

##### The Legal Burden – Criminal

* Also, the primary burden, the persuasive burden, or the ultimate burden
  + The burden for the Crown in a criminal case and the plaintiff in a civil case
* *R v Lifchus* 🡪 pointed out that reasonable doubt can be connected to the evidence, but it can also be logically connected to the **absence** of evidence
  + - i.e. Defence can argue that a DNA sample that was not then tendered by the Crown creates an absence of evidence and should therefore create reasonable doubt
  + it is also important because it spoke to the standard of proof and what does not meet that standard
    - likelihood does NOT meet the standard of proof in a criminal case
      * “probably” or “likely” committed the offence is not enough to convict

##### The Legal Burden – Civil

* Until fairly recently, there was thought to be a sliding standard of proof
  + This is NOT correct
* There is only one standard of proof 🡪 proof on a balance of probabilities

##### The Evidentiary Burden

* Referred to as the secondary burden of adducing evidence, the duty of passing the judge or sometimes the tactical burden
* **Question:** Is there enough evidence to leave a particular issue with the trier of fact to consider?
  + This is a question of law and must be decided by the judge
* This is assessed at two separate points in the trial:
  1. At the close of the Crown’s case
     + Once the Crown/Plaintiff has closed their case, counsel for the defendant will have to decide whether or not there is sufficient evidence on each essential ingredient of the offence or cause of action has been called to warrant or justify the case going any further
  2. At the close of the entire case (see more in course notes)
     + There must be an air of reality to the defense presented
* The evidentiary burden is a low bar to meet

## the charter revolution

* Once the court finds that evidence was gathered in a way that breaches the accused’s Charter rights, the Court has to determine whether it is admissible
* Usually, the court will grant a remedy
  + Typically an exclusion of evidence

# unit 3 – character evidence: primary materiality

## character evidence introduced

* Character evidence – any proof that is presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in particular behavior
* This kind of evidence can lead to primarily material inferences about how likely it is that someone behaved in the fashion alleged, or to secondarily material inferences about how trustworthy the evidence of a witness might be
* Character Evidence can take a number of forms:
  + Directly through statements of opinion
  + By proof of reputation
  + In a broader sense, character can be proved through expert opinion
  + Circumstantially, by proving the particular acts of a person on other occasions
    - Through witness testimony, admissions by the person who’s character is being explored, through certificates proving criminal convictions and more
* Character evidence which shows only that the accused is the type of person likely to have committed the offence in question is inadmissible

### character and concerns about relevance and prejudice

* Where the character of a person is not a matter directly in issue in a proceeding, there is often insecurity about its relevance and true probative value
* Character evidence is general information about a person that is being presented for the purposes of leading to specific conclusions about behavior on a particular occasion
* The probative value of character evidence is often uncertain and the generalizations involved in character typing tent to be pejorative and judgmental
  + When character is proved, it presents the risk of prejudice
    - The prejudicial effect arises because it may lead to the possibility that an accused might be convicted by the trier of fact because of his apparent propensity to commit a particular type of crime
* **Moral prejudice** – simply describes the human tendency to be influenced by an emotional reaction to the subject’s character rather than by the rational strength of the evidence
* **Reasoning prejudice** – refers to the practical challenges that admitting character evidence can present, including distractions from the real issues, complicating the case and increasing the risk of confusion, and adding to the expense of litigation

### character and mere habit

* Character evidence rules are concerned with drawing inferences based on the kind of person the individual in question is
* Evidence that does not judgmentally ‘typecast’ another is not character evidence
  + Must distinguish between character and habit
* Habit is admissible (most times)
* A habit, being the tendency of a person to engage repeatedly in a particular kind of conduct, may or may not reflect on one’s character
  + When it doesn’t, the rationales underlying the character evidence rules do not apply and the admission of evidence about that habit should turn solely on its relevance and on the application of general exclusionary considerations
* Where a habit can colour the impression held by others of the kind of person the subject is, the character evidence rules should determine admissibility

### character rules vary with context

* Because the intensity of the risk of prejudice varies depending on whether the evidence is being presented in a criminal or civil case, or whether it relates to a party or a non-party, different character evidence rules govern
* If character evidence is admitted as proof of what happened, and the person who’s character has been proved also testifies, the trier of fact will be free to use that already-admitted character evidence in assessing that person’s credibility
  + The converse is not true
  + If character evidence is admitted to assess the credibility of a witness, the trier of fact cannot use it draw inferences about what happened
* The law tends to be more restrictive with primarily material character evidence
  + Primarily material issue – what happened
  + Secondarily material issue – to challenge the credibility of a witness
* If evidence can pass the more restrictive primary materiality standards, it should be available for credibility evaluation

## discreditable conduct evidence called by the prosecution in a criminal case

### The Exclusion of general bad character about the accused

* The Crown cannot call general bad character evidence
  + Evidence that shows only that the accused is the sort of person likely to commit the offence charged
* **Prohibited inference** – even where evidence is admissible for other purposes, if it incidentally exposes the general bad character of the accused, the trier of fact is prohibited by law from inferring that the accused may be guilty because he is the sort of person likely to commit the offence charged
* The Crown can prove the conduct being prosecuted no matter how badly this may reflect on the character of the accused
* It is trite law that character evidence which shows *only* bad character is inadmissible
* Where the Crown seeks to lead evidence, including by cross-examining the accused, about his extrinsic conduct or his character traits or practices, it is therefore essential to ask the threshold question: is the proposed evidence discreditable to the accused?
  + If it is, the rule applies
* Bad character evidence is determined by asking whether the ordinary person would disapprove of the conduct or character revealed
  + Doesn’t need to be criminal to engage this rule
* If extrinsic character evidence does more than simply show the general bad character of the accused, it may be admissible by the Crown

#### *R v Handy*

*Facts:* - Accused was charged with sexual assault causing bodily harm

* The complainant, who was a casual acquaintance of the accused, said that she had consensual sex with the accused but that it turned into non-consensual sex together with physical abuse
* The accused’s defence was that it was always consensual
* At trial, the Crown sought to introduce similar fact evidence from the accused’s ex-wife about seven alleged similar incidents that occurred during their abusive relationship
  + The evidence was to the effect that the accused had a propensity to inflict painful sex and when aroused would not take no for an answer
  + This was argued to explain why the complainant should be believed when she testified that the assault proceeded despite her protest
* At trial, the ex-wife testified that she and the complainant had met a few months before the sexual assault
  + she told the complainant she could get money from the Criminal Injuries Compensation Board if she told them she was abused
* The TJ convicted the accused of sexual assault; the CA said that the similar fact evidence was wrongly admitted

**Note**: similar fact evidence – establishes the conditions under which factual evidence of past misconduct can be admitted at trial for the purpose of inferring that the accused committed the misconduct at issue

*Issues:* The test for admissibility of discreditable similar fact evidence where the credibility of the complainant is the issue

* The impact of potential collusion on the admissibility of evidence

*Held:* The similar fact evidence was not to be admitted and a new trial was ordered

*Reasons:* - The ex-wife’s testimony relates to incidents removed in time, place and circumstance from the charge

* + It is only circumstantial evidence of the matters the jury was called on to decide and, as with any circumstantial evidence, its usefulness rests entirely on the validity of the inferences it is said to support with respect to the matters in issue
* The contest over the admissibility of similar fact evidence is all about inferences
  + When do they arise? What are they intended to prove? By what process of reasoning do they prove it? How strong is the proof they provide?

*The General Exclusionary Rule*

* The responded is correct in saying that evidence of misconduct beyond what is alleged in the indictment which does no more than blacken is character is inadmissible
  + Nobody is charged with having a general disposition for theft or violence
* The exclusion generally prohibits character evidence to be used as circumstantial proof of conduct
* The danger is that the jury might be confused by the multiplicity of incidents and put more weight than is logically justified on the ex-wife’s testimony (reasoning prejudice) or by convicting based on bad personhood (moral prejudice)

*Policy Basis for the Exclusion*

* While in some cases propensity inferred from similar facts may be relevant, it may also capture the attention of the trier of fact to an unwarranted degree
* Its potential for prejudice will always outweigh its probative value

*The Narrow Exception of Admissibility*

* While emphasizing the general rule of exclusion, courts have recognized that an issue may arise in the trial of the offence charged to which evidence of previous misconduct may be so highly relevant and cogent that it’s probative value outweighs any potential for misuse
* The strength of similar fact evidence must be such as to outweigh ‘reasoning prejudice’ and ‘moral prejudice’
  + The inferences to be drawn must accord with common sense, intuitive notions of probability and the unlikelihood of coincidence
* The mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused

*Policy Basis for the Exception*

* The policy basis for the exception is that the deficit of probative value weighed against prejudice on which the original exclusionary rule is predicated is reversed
* Probative value exceeds prejudice, because the force of similar circumstances defies coincidence or other innocent explanation
* As the similar facts become more focused and specific to circumstances similar to the charge, the probative value of propensity becomes more cogent

*The Test of Admissibility*

* Similar fact’s admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission whatever the purpose of its admission.
  + Probative value must outweigh prejudicial effects
    - Evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.
* The court identified 7 non-exhaustive factors that would assist in assessing whether similarity is sufficient to make it probable that the act occurred:
  1. Proximity in time of the similar acts
  2. The extent to which the other acts are similar in detail
  3. Number of occurrences of the similar acts
  4. Circumstances surrounding or relating to the similar acts
  5. Any distinctive features unifying the incidents
  6. Intervening events
  7. Any other factors which would tend to support or rebut the underlying unity of similar acts

*Difficulties in the Application of the Test*

* Very hard to apply probative v prejudice
* It is important to identify the issue in question
* It must be determined in light of the purpose for which the evidence is offered
* **Similar fact evidence may be admissible if, *but only if*, it goes beyond showing general propensity (moral prejudice) and is more probative than prejudicial in relation to an issue in the crime now charged**
  + Evidence should not be excluded because it shows the bad in someone, but it should be excluded if that is ALL it shows
    - Bad character is not an offence of the law
* There must be an identification of the required degree of similarity
  + The principle driver of probative value in a case such as this is the connectedness that is established between the similarity fact evidence and the offences alleged
* Must also identify the connecting factors
  + Is the similar fact evidence appropriately connected to the facts alleged in the charge?
* The deciding cases suggest the need to pay close attention to similarities in character, proximity in time and frequency of occurrence
* Cogency increases as the fact situation moves further to the specific end of the spectrum
* Similar fact evidence need not be conclusive

Headnote Reasoning/Analysis:

* The issue of potential collusion between the complainant and the ex-wife was an important element of the probative weight analysis
* The evidence of potential collusion went beyond mere opportunity and involved the “whiff of profit”
* It was part of the judge’s role as ‘gatekeeper’ to consider the issue
* If collusion were established to the satisfaction of the TJ on a BOP that would be destructive to the very basis upon which the similar fact evidence sought to be admitted, which was the improbability that two women would independently concoct stories with so many allegedly similar features
* The TJ erred in law by deferring the whole issue of collusion to the jury
* The TJ also didn’t pay sufficient attention to the dissimilarities between the evidence of the ex-wife and the complainant
  + None of the incidents of the ex-wife began consensual and then turned non-consensual
* Further, the charges related to a one-night stand rather than the long-term dysfunctional relationship
* The similar fact evidence was prima face inadmissible and the Crown did not discharge the onus on it of establishing on a BOP that the probative value of the evidence outweighed its undoubted prejudice
* The probative value of evidence, especially in light of potential collusion, was not properly evaluated and the potential of such evidence for distraction and prejudice was understated
* Consent and the complainants credibility in relation to whether there was consent was a *crucial* issue at trial
* A serious potential for moral and reasoning prejudice existed
  + After hearing the ex-wife’s evidence, the jury would form a very low opinion of the accused and be more likely to believe the worst of him
* This sort of reasoning a to the accused’s general disposition was precisely what the similar fact evidence exclusion rule was designed to prevent

### the similar fact evidence rule

* The similar fact exception arises from the difference between general propensity evidence which is forbidden and specific fact evidence which *may* be admissible
  + E.g. evidence that an accused is a loot who has previously robbed homes 14 times in the last 2 years would be inadmissible. **But** evidence that he has a propensity to flood the houses after he loots them could be admissible as establishing the identity of the offender
* Evidence that the accused has engaged in discreditable or criminal acts, or is otherwise of a discreditable character is presumptively inadmissible
* The onus is on the prosecution to satisfy the trial judge on a BOP that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception
* In assessing the probative value of evidence, consideration should be given to such things as:
  + The strength of the evidence that the discreditable or criminal act occurred
  + The connection between the accused and the similar act event, and the extent to which the discreditable or criminal act supports the inferences sought to be made, relating to a specific issue in the case
  + The extent to which the matters it tends to prove are at issue in the proceedings
* Consideration needs to be given to both moral and reasoning prejudice when determining the risk of prejudice
* If this rule is applied properly, evidence that does no more than invite the general inference that the accused is the kind of person to commit the offence will not be admitted

## the similar fact evidence rule described

##### The Scope of the Similar Fact Evidence Rule

* Name comes from cases where the Crown was attempting to prove that the accused person committed similar acts before
  + Can also extend to evidence that bears no similarity to the offence with which the accused is charged

##### The Similar Fact Evidence Rule and the Exclusion of General Bad Character Evidence

* *Handy* rearticulated the similar fact evidence rule
  + The test was adopted to solve problems in past case law
  + Similar fact evidence is presumptively inadmissible, but may be admitted upon application by the Crown if it can be shown on a balance of probabilities that the probative value outweighs the prejudicial effect.
* The test can produce controversial outcomes
* If it is applied how intended, however, it can operate to protect against the admission of general bad character evidence, and against specific bad character evidence that is not worth hearing
* Similar fact evidence is inadmissible unless the prosecution shows on a BOP that its probative value outweighs its potential prejudice
  + This is a strict application
* The evidence needs to be evaluated in relation to a particular issue
  + General disposition of the accused does not qualify as an issue in question
* It is incumbent on the Crown to identify live issues in the trial to which the evidence relates

## step 1 in the analysis: Weighing probative Value

### the strength of the evidence that the similar acts occurred

* The more believable it is that the similar fact event occurred, the more probative value the evidence has
* In the event the similar act resulted in a conviction, the court can be confident that this act occurred
  + This enhances probative value
* *R v Jesse* 🡪 criminal verdicts are presumptively reliable and a judge, conducing a *voire dire* into the admission of similar fact evidence is not only entitled to rely on that verdict to conclude that that the accused committed the similar act, but absent rare circumstances, should refuse to permit the accused to challenge the accuracy of that verdict during the *voire dire*
  + The underlying facts can be proved by formal admission, by reading in facts admitted after a guilty plea, by calling witnesses to the event, or through transcripts of evidence given at the earlier trial
* When evidence is given through testimony of those who suffered, the TJ must consider whether the testimony is reasonably capable of belief
* Where the accused has been prosecuted for and acquitted of a prior act of misconduct, it will ordinarily be impermissible to use that prior act as similar fact evidence
  + Acquittal is a finding of innocence
* The Crown may also be prevented from relying on a similar event relating to charges that have been stayed
  + Only if the stay is particularly due to the Crown’s lack of evidence
* ***Ollis* exception** 🡪 The Crown can lead evidence underlying a previous acquittal to establish that the accused’s state of mind in relation to a subsequent charge
  + If the *fact* of the prior charge is relevant, the Crown can lead evidence about it
* ***Arp* anomaly** 🡪 In the case of multi-count indictments, and where the similar fact evidence rule is satisfied, the Crown can rely on evidence about one charge as similar fact evidence helping to prove another charge
  + The trier of fact will not err in using an allegation as similar fact evidence even where the accused is ultimately acquitted of that allegation at the end of the case

##### Intentional and Inadvertent Collusion

* The probative value of similar fact evidence sometimes turns on the unlikelihood that two or more persons would be making similar false allegations
  + Occurs when the two stories are just too alike
* Collusion can arise both from a deliberate agreement to concoct evidence as well as from communication among witnesses that can have the effect, whether consciously or unconsciously of colours and tailoring their description of the impugned events
* It is on the Crown to prove there was no collusion
  + This is part of the TJ’s gatekeeping function
* If the Crown succeeds in showing there probably was nothing more than the opportunity for collusion or collaboration, as opposed to actual tainting, concern about tainting should not affect the admissibility decision
* Juries can still be instructed to consider the possibility of tainting when weighing evidence

### the extent to which the proposed evidence supports the desired inferences

* The extent to which the similar fact evidence supports the desired inferences has two components:
  + Connection to the accused
  + Connectedness to a properly defined issue

##### Connection to the Accused

* The relevance of similar fact evidence is predicated on the proposition that the accused did the discreditable acts sought to be proved
* If there is insufficient evidence to rationally connect the accused to the similar fact evidence, it can yield no inferences
* It is enough if the evidence linking the accused to the similar act establishes more than a ‘mere possibility’ that he committed it

##### Connectedness to a Properly Defined Issue

* Even if a similar fact event did happen and the accused can be linked to the event, the probative value of proving that event will depend on the extent to which, as a matter of human experience, proof of that event supports the desired inference about the matter in issue
  + *Handy* 🡪 connectedness or nexus that is established between the similar fact evidence and the offence alleged
    - Called it the principle driver for probative value
* The key to undertaking this evaluation is to identify properly the issue the similar fact evidence informs, to identify the inferences the Crown is seeking to use to inform that issue, and to assess the cogency or persuasiveness of those inferences
* Where the probative value of similar fact evidence depends on similarities, care has to be taken not to act on ‘generic similarities’, or the kinds of features likely to be present in many or most instances of the same crime
  + Generic similarities do not yield appropriate inferences

## illustrations of connectedness (or relevenance and materiality)

* Admissibility is about use, probative value and prejudice in the particular circumstances
* Discreditable conduct that is directly relevant does not require a close evaluation of relevance
* All other uses of similar fact evidence require careful assessment of whether, logically, in context, the discreditable evidence truly informs the target issue identified

##### Discreditable Conduct that is Directly Relevant

* Can sometimes be so directly relevant that the Crown cannot prove the offence charged without revealing similar fact evidence
* *R v G(SG)* 🡪 Evidence which is directly relevant to the Crown’s theory of the case is admissible even though it may also demonstrate the bad character of the accused, as long as its probative value outweighs its prejudicial effect

##### Discreditable Conduct Establishing *Actus Rea*

* *Shearing* 🡪 similar fact evidence can be used to prove that a crime occurred; the *actus reus*

##### Discreditable Conduct and the Credibility of Complainants

* Similarities in the particular features of *independent* allegations by two or more persons can reach the point where it would defy common sense to think that such similarities are merely coincidental
* Independent allegations can yield probative value on credibility in this way even where there is nothing strikingly similar or unique in the allegations, provided a network of features is shared between the allegations that is significant enough to undermine the suggestion of chance
* The strength of multiple similar stories depends on being able to discount any collaboration or contamination between those witnesses

##### Discreditable Conduct Relating to the Alleged Victim

* Courts often permit the Crown to prove the violent or abusive nature of the prior relationship between the accused and an alleged victim
* Evidence of the nature of a relationship that provides context is essential to an accurate interpretation of the events
* Where such evidence demonstrates a strong disposition to act violently or sexually towards the victim, it is not being used to prove the bad personhood of the accused, but to support the specific inferences that the accused is disposed to act violently towards the victim and that he had that disposition on the incident in question

### materiality of the evidence

* The issue that similar fact evidence is tendered to establish must be live or material
* If the issue has ceased to be in dispute, the evidence is inadmissible
* If the thing that the prejudicial evidence proves is unimportant, exclusion is more likely to occur
* The relevant inquiry is into the probative value of the inference yielded by the similar fact evidence, not the probative value of the Crown’s case
* The probative value of the similar fact evidence is not enhanced because other evidence supports the same inference the similar fact evidence is presented to promote

## Step 2 in the analysis: assessing prejudice for the purpose of admissibility

* Potential prejudice to the accused may be assessed in the following manner:
  + By considering the potential for ‘moral prejudice’ against the accused
    - Moral prejudice – the risk of convicting the accused because he is a *bad person* rather than based on proof that he committed the offence
  + By considering the potential for reasoning prejudice against the accused
    - Reasoning prejudice – the risk of distracting or confusing the jury, or of undue consumption of time, and the danger that the jury may have difficult disentangling the subject matter of the charges from the similar fact evidence

### moral prejudice

* Moral prejudice refers to the risk that the evidence will be used to infer guilt based on the forbidden chain of reasoning, from general position or propensity
* *R v Last* 🡪 Deschamps J cautioned that jury directions do not remove but only reduce the risk of moral prejudice
* The limits on what restricted admissibility doctrines can achieve reinforce the need to maintain high awareness of the potential prejudice effect of admitting similar fact evidence
* *Shearing* 🡪 where the similar fact evidence reveals a ‘morally repugnant act’ its potentially poisonous nature will require a correspondingly high probative value to overcome its impact
* Where the offence charges is significantly more troubling than the similar fact evidence, the risk of moral prejudice is diminished
* The risk of moral prejudice is considered to be modest where the similar fact evidence involves prior acts of aggression against the victim of the crime charged
  + Theory – prior threats or abuse of the victim is so closely connected to the specific charge that is it unlikely a jury would resort to the prohibited offence

### reasoning prejudice

* Has to do with the distraction of the trier of fact from its proper focus on the charge itself
* The first kind of distraction is much like moral prejudice in that it describes how the trier of fact can be deflected from engaging in a rational assessment of the case by sentiments of revulsion and condemnation
* The second form of distraction – the risk that the court will be caught up in a conflict about the accuracy of the similar fact evidence
* There is danger where many separate, but similar, incidents are being proved that the trier of fact might mix up the matters of consideration with the matters of decision

### factors reducing the impact of prejudice

* Similar fact evidence is more likely to be admitted in a judge trial
* The theory that risk lessens in a judge alone trial arises because judges are trained in the misuse of discreditable conduct evidence
* Also, the judge will have heard the evidence in *voir dire*
* The principle driver in a judge trial is probative value

## the balancing

* Once both prejudice and probative value have been determined, the next step is to balance the two
  + Always bearing in mind that similar fact evidence is prima facie inadmissible
* *Handy* 🡪 a challenge in balancing the two is that there is no necessary inverse relationship between probative value and prejudice
  + When one increases, the other doesn’t necessarily decrease
* **Question to ask**: whether the similar fact evidence has been demonstrated to be sufficiently probative to justify running the risks of prejudice presented by the evidence

## The mandatory direction

* When similar fact evidence is admitted, its use is limited
* A proper jury direction should:
  + Direct the jury to avoid relying on the prohibited inference **(the most critical aspect)**
  + Direct the jury that they are not to punish the accused for past misconduct by finding the accused guilty of the offence or the offence charged
  + Provide direction on the appropriate, non-prohibited use to which the discreditable conduct evidence may be put in the case at hand
  + Advise the jury not to use the evidence unless they are satisfied that the similar fact incident occurred
  + Direct the jury on the frailties of the similar fact evidence
  + Direct the jury to consider whether that apparent coincidence can be explained away by collaboration or contamination between witnesses
* Limiting instructions are not usually required where the evidence tends to show animus or motive on the part of the accused against the complainant

## the special case of proving identity through similar fact evidence

* *Alp* 🡪 two inquires must be undertaken before similar fact evidence discussing two or more crimes can be admitted
  + The judge is to assess the degree of similarity demonstrated by the manner in which the acts in question were committed to determine whether it is *likely* the same person committed the alleged similar acts
    - The focus must be on the acts themselves and not on other evidence of the accused’s involvement in those acts
    - The probative value of similar fact inference turns on similarity between the events, and not on other evidence
  + Where the judge has determined that the crime charged and the similar act offence was likely committed by the same person, the judge is then to ask a second question: whether there is some evidence linking the accused to the similar act
* *R v Alp* 🡪 3.5 years apart, two lone intoxicated girls went missing in the early hours of the morning. Each was transported to a remote location near Prince George. Each was killed and left naked . In both cases, the clothing was scattered. The SCC did not change the TJ’s finding that these were sufficiently similar such that they were likely committed by the same person
* If the two tests (above) are met, the probative value of the similar act will outweigh the prejudice of the evidence
  + It can then go to the jury who can decide if they want to use the evidence
* Where it can be shown that a gang used a unique or distinctive *modus operandi* in committing other offences, this can serve as similar fact evidence to establish that a gang was responsible for a specific crime where the same *modus operandi* was used
  + ***modus operandi* –** MO, is someone's habits of working, particularly in the context of business or criminal investigations, but also more generally. It is a Latin phrase, approximately translated as mode of operating.
* Similar fact proof that the gang committed the offences is not proof without more that a particular member of the gang participated

## the problem of multi-count indictments

* Often, accused will face several criminal allegations during the same trial
* It is permissible to use evidence presented at one of the counts when disposing of the other accounts in the event the counts arise out of the same event
* Multi-count information or indictments that allege *separate incidents* immediately raise the risk of prejudice, given that the trier of fact will be learning during the same trial about separate allegations of misconduct by the accused
* The similar fact evidence rule influences how this is dealt with in 3 ways:

1. The accused may apply for an order ‘severing’ the counts so that they will be tried in separate proceedings
   1. If the similar fact evidence is found to be useful, this will likely fail
      1. If the scenarios are decided to be tried together, similar fact evidence is more welcomed
2. The second scenario applies where the evidence relating to one or more charged events is not admissible as similar fact evidence relating to one or more of the other charged events but where the counts are not severed
   1. It is not possible to exclude proof of misconduct on other occasions so we take a restricted admissibility approach and rely on jury directions to ameliorate the risk of prejudice
3. The third scenario involves cases where the evidence on one or more counts is admissible as similar fact evidence on the other counts
   1. The TJ must ensure in such cases that the evidence is used properly

## good or exculpatory character evidence called by the accused: introduced

* Notwithstanding the prohibition against the Crown being able to lead such evidence, the accused may always play the character card and inject the issue of character into his case
  + This is risky
* The accused may prove that she is not the kind of person who would commit the offence with which she is charged. This proof can be done through:
  + Reputation witnesses
  + Admissible expert testimony
  + The accused’s own testimony
  + Similar fact evidence
  + According to some authorities, the opinion evidence of lay witnesses who are familiar with the accused
* Where an accused presents this kind of evidence, she will be taken to have placed her own character in issue, enabling the Crown to present evidence about her character for the purpose of neutralizing the character evidence of the defence
* This can be done through:
  + The cross-examination of the character witnesses and of the accused
  + Rebuttal reputation witnesses
  + Proof of the previous convictions of the accused
  + Admissible expert testimony
  + Otherwise admissible similar fact evidence
* Good or exculpatory character evidence is proof presented by the accused to suggest that she is not the type to have committed the offence
  + This is generally considered to be relevant
* Good character should be understood as including any character trait that may exculpate the accused
  + Anything that makes the commission of the offence less likely
* Where the accused calls such evidence, he also puts his character into issue and the Crown becomes entitled to use various techniques to rebut the evidence

## good character evidence and modes of presentation

### reputation evidence

* The accused cannot call witnesses to show that he has engaged in acts showing good character
  + This is to avoid minitrials into those specific claims
* The common law allows the compendious and concise technique of calling reputation witnesses
* The testimony must be relevant

### opinion evidence

* A character witness cannot express his/her opinion about the accused’s character
  + Courts sometimes ignore this
* In some cases, expert witnesses may be allowed to testify that the accused has some distinctive characteristic that would make it less likely that the accused committed the offence
  + *Reliable* expert evidence of this type would be admissible if the trial judge is satisfied that either the perpetrator of the crime or the accused has distinctive behavioral characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt

### the testimony of the accused

* The accused can assert his good character when testifying
* The prerogative of asserting one’s good character can operate as a trap for accused persons, opening the door to proof of bad character

### similar fact evidence indicitive of innocence

* The accused can rely on exculpatory similar fact evidence, so long as it is sufficiently situation specific
  + Cannot be a general demonstration of honesty (eg)
* Where the defence calls similar fact evidence, the rule differ from the ordinary similar fact evidence rule
  + This is because concerns about moral prejudice tend to not apply where the accused wants similar fact evidence adduced
* Where the accused wants similar fact evidence, the only issue is whether the evidence is relevant in supporting the specific disposition claimed

## good character evidence and crown rebuttal evidence

* The Crown’s rebuttal may be used to refute the assertion of good character but may not be used as a basis for determining guilt or innocence

### The Cross Examination

* The Crown can cross-examine the accused, or the witness who has provided the good character evidence, in a fashion that suggests the accused does not possess the particular good character that is claimed
* This is dangerous for the accused
  + It is hearsay evidence that can be rebutted with hearsay
* The Crown can call witnesses to suggest that the reputation of the accused for the relevant character is in fact bad
* Section 666 of the CC 🡪 allows the previous convictions of the accused to be proved whenever he puts his good character in issue

### similar fact evidence

* Where the accused puts their good character in issue, rules change
* Admissible similar fact evidence can be used both for the specific purpose for which it was admitted and to neutralize the general suggestion by the accused of good character
  + The trier of fact still cannot convict on bad character

## character evidence called by the accused about others

* Those restrictions that apply to the Crown when presenting bad character evidence relating to the accused to not apply when the accused wishes to lead bad character evidence about another
* The accused is the only one at risk of moral prejudice since the accused is the only one being judged

### character evidence called by the accused against a co-accused

* Subject to the discretion of the trial judge to exclude evidence where its prejudicial effect is greater than its probative value, an accused person may establish that, by reason of his character, a co-accused is the more likely perpetrator of the crime with which they are charged
  + In doing so, the accused will be taken to have put his own character in issue
* The sole fixed limitation is that an accused cannot try to establish the propensity of a co-accused by relying on acts for which the co-accused has been acquitted
* Propensity evidence may be led by a co-accused so long as the prejudicial effect of that evidence does not clearly outweigh its probative value

### character evidence about third parties in non-sexual offence prosecutions

* Other than in sexual offence cases where special rules apply, where the character of persons other than the accused or a co-accused is relevant to a primarily material issue, it can be proved provided the probative value of the evidence is not substantially outweighed by the prejudice it could cause

##### The General Rule

* This body of law developed primarily in self-defence cases
* It is obvious that in self defense cases, where there is a foundation for suggesting that the deceased was the aggressor, it is relevant to the reasonableness of the accused’s action that he was aware that the deceased had a reputation for violence
  + More likely to apprehend harm and use self defence
* Evidence about the reputation of the victim for violence has therefore been long admissible
* Proof that the victim has a violent disposition as demonstrated through the specific acts of violence unknown to the accused is also relevant according to the theory that violent people are more likely to react violently than those who do not have a violent disposition
* These principles can be applied even in non-self-defence cases
* *R v Khan* 🡪 in an appropriate case, the past racial profiling by police officers would be admissible
* As always, judges hold discretion as to what character evidence can be admitted
  + The normal balancing formula doesn’t apply, there must be *substantial* prejudice
* Unlike similar fact evidence called by the Crown, relevant third-party character evidence is *prima facie* admissible when called by the accused

##### Rebuttal Evidence and the Character of the Accused

* The accused person who defend themselves by pointing a finger at a third-party and suggesting that that person has a propensity to commit the crime will call their own character into issue
* BUT the accused person will not be taken to have put their character in issue by simply pointing their finger at another
  + The accused will only lose their shield if they attempt to cast blame on another by pointing out that other’s propensity to commit crimes
* The reasoning is that when it comes to determinations of who the responsible actor is, it would be misleading for the trier of fact to learn only about the character of the third party and not about the character of the accused

### similar fact evidence about unkown suspects

* Accused persons can present relevant similar fact evidence about other unknown suspects in an effort to cast doubt on their own guilt, so long as there is an air of reality to that defence and the probative value of the evidence is not substantially outweighed by prejudice

### Complaints in Sexual offence cases

* In a sexual offence prosecution, the accused is absolutely prohibited from leading evidence about the sexual experiences of complainants on other occasions for the purpose of showing that the complainant is the type of person to consent, or to show that the complainant is of such discreditable character that she should be believed
* Where evidence revealing the sexual experiences of complainants on other occasions invites other specifically relevant inferences, it will be admissible provided it has significant probative value that substantially outweighs the prejudice to the proper administration of justice that it could cause
  + Including the dignity and privacy interest of the complainant
* Twin myths 🡪
  + A sexually experience women was considered to have demonstrated a propensity to consent, increasing the likelihood that she consented on the occasion in question (**the kind of person to consent**)
  + The “sexual permissiveness” of the woman was said to say something about the complainants character, and discreditable character was seen to be relevant to credibility (**the kind of person not to believe**)
* Sexual reputation evidence is no longer admissible
  + S 277 of the CC
* S 276(2)(a) makes sexual reputation evidence inadmissible on the issue of consent
* S 276 imposes strict limits on the admissibility of proof about specific instances of a complainant’s sexual activity other than the sexual activity that forms the subject matter of the charge
  + Cannot prove the details of prior acts of sexual victimization on other occasions
* S 276 imposes a two-part hurdle to the admission of such evidence:
  + S 276(1) prohibits absolutely the use of sexual experience evidence for certain enumerated purposes
  + S 276(2) provides that even if proof of the sexual activity of the complainant is not being used for a prohibited purpose, it will still be inadmissible unless the judge determines that the evidence has “significant probative value” that is not outweighed by competing considerations

##### The Probative Purposes

* S 276 does not prevent all sexual activity evidence from being used to inform the issues of consent or credibility
* It prohibits only certain kinds of *inferences* about consent and credibility from being drawn
  + Only the twin myth inferences relating to consent or credit which draw on the sexual nature of the activity for their relevance are prohibited
* If the sexual experience evidence is being used for some other purpose, even on the issues of consent or credibility, it may or may not be admissible
* E.g. Hatch’s fill in called evidence about a women accusing her client of sexual assault when she bragged about giving the accused a blow job
  + It is not really about the sex act itself – if it is admissible in an assault, it will be admissible in a sexual assault
    - Must be relevant to the matter at issue, doesn’t necessarily matter that it is sexual in nature

##### Probative Value and Prejudice

* Even if specific, relevant evidence passes this first hurdle it may still be excluded by s 276(2)(c)
* It will be excluded if it doesn’t have significant probative value
  + Also if it is substantially outweighed by prejudice
* “significant” and “substantially” provide no precision, but cause that to be admissible, the evidence must have real importance in the case
* The prevalent practice in cases involving proof of a prior sexual history *between the accused and the complainant* is to admit the evidence where the nature of the complainant’s claim of non-consent would appear more likely than it should as a result of the misleading impression that would otherwise be left that the two were sexual strangers at the time

## third-party evidence called by the crown in criminal cases

* The Crown is free to lead evidence about the character of personality of third parties, provided that the probative value is not outweighed by the prejudice
* This can be done to rebut any character submissions made by the defence
* The Crown can even initiate this evidence in some cases
  + *R v Jack* 🡪 the accused was prosecuted for murder without the body of the victim being found. The Crown called evidence to show that the victim was a good mother who would not abandon her children and was therefore a victim of foul play

## character evidence in civil cases

* Unless the character of a party to a civil proceeding is directly in issue, or unless the civil case raises allegations of a criminal nature, good character evidence cannot be called
* Evidence demonstrating the bad character of a party that is presented as circumstantial proof of what happened must satisfy the similar fact evidence rule to be admissible, although that rule tends to operate generously and subject to different considerations than in a criminal case

### generally

* Character evidence tends not to play as large a role in civil litigation as it does in criminal
* Where the character of the litigant is directly in issue, as in a defamation action, character evidence is admissible
* Where character evidence is not directly an issue, some of the civil evidence rules are more restrictive than those that apply in criminal cases

### the good character of parties: primary materiality

* Proof that a party is of good character is not generally admissible
  + Due to irrelevance
* In civil cases, priority is given to keeping litigation manageable, avoiding confusing the issues, and preventing unfair surprise to the litigants

### the bad character of parties: primary materiality

* The admission of evidence demonstrating the bad character of parties in a civil case is governed by the similar fact evidence rule, where that evidence is circumstantial
* There is a tendency to overuse this rule
* The similar fact evidence rule should be consulted solely where the evidence in question demonstrates or implies that one of the parties has a discreditable character
* The civil similar fact evidence rule should not be treated as the same as the criminal
  + The nature of prejudice differs significantly
  + In criminal cases, the similar fact evidence rule applies solely to the Crown
    - Not skewed like this in civil cases
      * The parties have equal rights
  + There is no presumption of inadmissibility in civil cases like there is in criminal cases
    - Admission turns on relevance subject to the ordinary exclusionary discretion
* The consideration of prejudice should emphasize matters of importance in civil litigation
  + Typically: reasoning prejudice (unfair surprise, undue consumption of time, etc)

### the character of third parties

* Can be proved in civil cases by establishing specific conduct that shows how that person may have acted on the occasion in question

# unit 4 – hearsay

* Hearsay is an out of court statement that is offered to prove the truth of its contents
* The essential defining features of hearsay are:
  + The fact that an out-of-court statement is adduced to prove the truth of its contents
  + The absence of a contemporaneous opportunity to cross-examine the declarant
* Colloquially 🡪 a rumor, not being backed up in some way

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## recongnizing hearsay

* The rule is **simple**: hearsay evidence is presumptively inadmissible
* The starting point is to determine whether evidence is hearsay
* The SCC defined the features of hearsay as:
  + The fact that an out-of-court statement is adduced to prove the truth of its contents
  + The absence of a contemporaneous opportunity to cross-examine the declarant
    - When determining whether a statement should be subject to a hearsay exception, one must ask: **“what is the substitute for the oath and what is the substitute for the right to cross-examine?”**
* *Alternate definition:* hearsay is an out of court statement that is admitted for the truth of its contents
* The fundamental concern lies in the inherent difficulties in testing the reliability of out-of-court hearsay statements
* Four concerns that relate to making hearsay statements:
  + Perception
    - Declarant may have misperceived the facts
  + Memory
    - Could be wrongly remembered
  + Narration
    - Could be misleading
      * Could the person hearing the statement perceive it in a manner that was unintended
  + Sincerity
    - Could be a knowingly false assertion
* The rule against hearsay is intended to enhance the accuracy of the court’s finding of fact, not impeded its truth-seeking function
* Does not just have to be a verbal statement
  + Can be an affidavit sworn by a witness
  + Videotaped questioning under oath
  + Medical charts
* **Principled approach** 🡪 is it being shown in a manner that is necessary and reliable?

## statements offered for their truth

* Only those statements offered for their truth offend the rule against hearsay
  + Just because and out of court statement is made does not make it hearsay
* Hearsay evidence is not identified by the nature of the evidence, but by the use to which the evidence is put – its purpose
* When an out-of-court statement is offered simply as proof that the statement was made, it is not hearsay and it is admissible as long as it has some probative value
* **Question to be asked:** what relevant purpose does the statement have aside from its truth?
  + if the statement has some probative value, it may be admissible for that limited purpose

## prior statements of witnesses: abscene of contemporaneous cross-examination

* What about out-of-court statements made by witnesses who testify?
  + The witness is present and can be cross-examined
* *R v Khelawon* 🡪 the SCC has made it clear that the traditional law of hearsay extends to out-of-court statements made by the witness who does testify in court when that out-of-court statement is tendered to prove the truth of its contents
  + ***Rationale***: lies in the difficulty in testing the reliability of the out-of-court statement
* Can still be admitted under hearsay exceptions, but the starting point it to recognize that it is hearsay
* When a witness repeats or adopts his/her earlier out-of-court statement, no hearsay issue arises
  + An out-of-court statement can be used to trigger a witnesses memory and is then part of the in-court testimony
* Hearsay concerns arise when a witness either recants their earlier out-of-court statement or testifies that she has no memory of making the statement
* Worse: witness claiming no memory of the incident
  + No cross is possible on asking why he is now giving inconsistent testimony
  + The Crown would attempt to refresh the claimants memory as to what was stated (show them a letter they wrote, remind them what they said)
* **What if claimant still recants after reminder?** You can’t use the statement

## implied statements

* An out-of-court statement may be verbal, written, or implied
* An implied statement is any assertion that it is not expressed by language, but rather revealed through action
  + Nodding, pointing, etc
* These are assertions by conduct and are treated the same as a spoken or written statement
* Sometimes, a person’s body language can communicate their belief in a state of facts even if they don’t intend it to
* The more common battleground is where implied assertions are contained in verbal or written statements
* Implied assertions are difficult to identify and often overlooked by courts
  + i.e. asking to buy drugs is implying that the person does drugs
* *R v Baldree* 🡪 the SCC ruled that implied and express statements were essentially the same
  + in both cases, hearsay concerns are engaged
  + The court decided that a single drug purchase call overheard by a police officer on a seized cell phone was not admissible for the truth of its content as it clearly was hearsay that was being submitted for its truth
    - The Crown argued that it was admissible for its truth as an implied assertion
      * The Supreme Court rejected this submission, holding that the drug purchase call here did not withstand scrutiny under the principled approach, however this need not always be the case they said, with drug purchase calls, the Court distinguishing their earlier decision in Ly, supra.

# unit 5 – hearsay exceptions

## principles underlying the exceptions

* Hearsay evidence may be admissible under an existing hearsay exception or may be admitted on a case-by-case basis according to the principles of “necessity and reliability”
* **Necessity and reliability** are the guiding principles for the admissibility of all hearsay
  + Existing hearsay exceptions must comply with these principles
* Necessity is satisfied where it is reasonable necessary to present the hearsay evidence in order to obtain the declarants version of events
* Reliability refers to the threshold reliability, which is for the TJ
  + The function of the TJ is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement
* Ultimate reliability is the weight/value that the trier of fact, whether judge or jury, gives to the admitted evidence
* Hearsay exceptions are governed by the same principles that underlie the hearsay rule
  + The hearsay rule is in place to improve accurate fact-finding by excluding hearsay statements that may well be unreliable or that cannot be adequately tested
* Hearsay exceptions are in place to facilitate the search for truth by *admitting* into evidence hearsay statement that are reliably made

##### History of the Principled Approach

* **Timeline:** *Khan* 🡪 *KGB* 🡪 *Hawkins & Morin* 🡪 *Starr* 🡪 *Khelawon*

#### *R v Khan*

*Facts:* - Khan was examining a 3 and ½ year old and her mother

* He told the child to wait in his office while he examined her mother
* Khan and the child were alone in his office when he sexually assaulted her
* Upon leaving, the child told her mother that Kahn put his “birdie” in his mouth and there was a wet spot on her sleeve
* At trial, the conversation between mother and daughter was excluded on the basis of hearsay
* The TJ also held that the child was not competent to give unsworn evidence or to testify
* The TJ acquitted Khan; the CA set aside the acquittal and ordered a new trial

*Issues:* - Did the CA err in concluding that the TJ misdirected himself in ruling that the child was incompetent to give unsworn testimony

* Did the CA err in holding, contrary to the TJ, that a “spontaneous declaration” allegedly made by the child to her mother was admissible?

*Held:* Yes

* Hearsay evidence of the child’s statement on crimes committed against the child should be received, provided the guarantees of necessity and reliability are met; therefore, the mother’s statement should have been received

*Reasons:*

*Did the TJ err in law holding that the child was incompetent to give unsworn evidence?*

* The child did not understand what the bible was or what it meant to testify in court
  + The Crown did not content that she was competent to give evidence under oath
* The Crown submitted that her unsworn evidence should be received under s 16 of the Canada Evidence Act
* The TJ made two errors:
  + He errored in applying the *Bannerman* test to s 16 of the Evidence Act
    - The only two requirements for the reception of evidence are sufficient intelligent and the duty to tell the truth
  + Erred in placing critical weight on the child’s age
    - The Act makes no distinction between children of different ages
    - The child fulfilled the two requirements for the reception of evidence, but the TJ still let himself be swayed by her age

*Did the TJ err in rejecting the mother’s statement of what the child told her after the incidents?*

* Applying the traditional tests for spontaneous declarations, the TJ correctly rejected the mother’s statement
* The statement was not contemporaneous, being made 15 minutes after leaving the office
* It was not made under pressure or emotional intensity, which would give the guarantee of reliability upon which the spontaneous declaration rule has traditionally been rested
* The question becomes: the extent to which, if at all, the strictures of hearsay can be relaxed in regard to the child’s testimony
* The traditional hearsay rule has proved unduly inflexible in dealing with new situations and new needs in the law
* The child’s statement to the mother needs to be both necessary and reliable
  + It was
* Necessity was present
* The statement bore a strong indicia of reliability – the child made the statement in a disinterested manner, in the sense that it was not made in favor of her interest
* Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.

**Test**:

* Is the hearsay statement necessary? Need only be “reasonably necessary”
* Is the evidence reliable?
* In determining admissibility, the judge must have a regard to the need to safeguard the interest of the accused
* Within two years of the *Khan* case, the SCC made it clear that the principles within it were of general application (*R v Smith*)
* *Khan* and *Smith* expanded the admissibility of otherwise inadmissible hearsay evidence

#### *R v KGB*

*Facts:* - Two men leaving a bus are attacked by 4 youths, including KGB

* At some time during the dispute, one of the attackers stabs a victim in the heart and kills him
* All of the attackers are interview on camera, without preparation
  + They all state that KBG said something along the lines of “I didn’t see it, but the guy got stabbed and KGB said that he may have killed the guy with his knife”
* KGB is arrested and goes to trial
* At trial, all three youths recant their statement and say they lied to exculpate themselves
* The TJ applied the orthodox rule for prior inconsistent statements and only permitted the jury to use the statements to impeach the credibility of the witnesses rather than to prove a fact
  + Obviously the Crown doesn’t want this approach
* KGB was acquitted, upheld on appeal

*Issues:* - Are the video tapes hearsay?

* Should prior inconsistent statements be considered hearsay?

*Held:* Yes, hearsay, but admissible if meets the *Khan* test of necessity and reliability (**principled approach**)

*Reasons:*

* The videotapes are hearsay because they are being admitted to prove the truth of a statement
* The youths can’t be cross-examined because they are now claiming they lied
  + **Orthodox rule**: prior inconsistent statements can only be used to impeach the witnesses for credibility
* Also, there was no oath at the time the prior inconsistent statement was made, the trier of fact could not assess their demeanour when it was made
  + There was no opportunity contemporaneous cross-examination
* The SCC departs quite radically from the past law on prior inconsistent statements
  + Decides that the statements can be admitted into court as proof of the truth of their contents in the event they meet the *Khan* test
* Created a principle exception to the hearsay rule
* Hearsay evidence in any form, while still *prima facie* inadmissible, can be admitted into evidence if the party seeking to enter it can show that it meets the test of necessity and reliability
  + **Necessity** – not a high hurdle, just reasonable necessity. Evidence would be helpful and is an effective means of getting it
  + **Reliability** – to find this, look to testimonial factors (oath, threat of prejudice, ability to assess demeanour, etc)
* New trial ordered, TJ could hold *voir dire* to determine these facts
* *KGB* presented a clear case for the court
* The prior inconsistent statements were needed to be introduced for their truth or the Crown had no case
* The necessity requirement is met when a witness recants
  + The question of reliability is more troubling
    - The problem is that the trier of fact is being asked to choose between two statements – one made out of court and the other made at trial, with all the safeguards
* The requirement of reliability will be satisfied where:
  + The statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation
  + The statement is videotaped in its entirety
  + The opposing party has a full opportunity to cross-examine the witness respecting the statement
* These represent the *optimal* conditions
* *KGB* is not intended to create a new categorical exception
  + The admissibility of prior inconsistent statements for their truth was to be determined using the principled case-by-case approach
  + The criteria is not fixed, just provides guidelines
* Flexibility has become the rule
* Subsequent case law shows that rarely are all the *KGB* criteria met
* Prior inconsistent statements lead to tough cross-examinations
  + Only really works if the witness explains the recanting
* Videotaping is desirable and should be encouraged
  + It is not a precondition to admissibility but it does provide meaningful proof
* When admitting prior inconsistent statements for their truth on the basis of “striking similarity” it is contemplated that the comparison statements are both admissible
  + One cant be admissible while the other is inadmissible

#### *R v Hawkins & Morin*, [1996] 3 SCR 1043

*Facts:* - The accused was a police officer who was responsible for gathering intelligence of the activities of motorcycle clubs operating within the area

* In response to threats from the accused, CG, the accused’s girlfriend, contacted the police and disclosed details of the accused’s involvement with the president of one of the motorcycle clubs
* She stated that the accused received money in exchange for information about the ongoing investigation
* The accused and president were charged with conspiracy to obstruct justice
* At the prelim inquiry, CG testified that the accused and president were friends, and frequently met
  + Also stated that the accused brought home files of the investigation which he gave the president
  + She also testified about the money the accused came home with
* CG was cross-examined by 4 defense counsel
* CG subsequently retained her own counsel and recanted her testimony
* The accused and CG were married prior to trail
* TJ held that CG’s testimony was inadmissible, Crown appealed

*Issues:* Whether CG’s preliminary testimony is admissible at trial

*Held:* Admissible under the principled approach for necessity and reliability

*Reasons*

* The common law rule of spousal incompetency is that the spouse is an incompetent witness in criminal proceedings in which the spouse is the accused, except where the charge involves the person, liberty or health of the witness spouse
* While alternative approaches to the rule of spousal incompetency may serve to promote the autonomy and dignity of an individual spouse, it is the SCC’s opinion that any significant change to the rule should not be made by the courts, but by Parliament
* A marriage which is motivated by a desire to take advantage of the spousal incompetency is still a true marriage, deserving of the law’s protection
* What the Crown is asking for would be a drastic departure from the common law rule

*Principled Approach*

* The prevailing view in the common law is that evidence at trial of statements made by a witness in a prior adjudicative proceeding represents a form of hearsay
* Applies the *Khan* and *Smith* approach – necessary and reliable
* Necessity and reliability must always be applied in a flexible manner
  + If a hearsay statement satisfies these two requirements, the TJ may put the statement to the trier of fact, subject to safeguards and with a caution of weight
* Must still keep *KGB* in mind
  + The principle approach should not permit the admission of a statement which the declarant, if she or he had been available and competent to testify, would not have been able to offer into evidence through direct testimony because of the operation of an evidentiary rule of admissibility
* **Necessity** 🡪 the hearsay evidence will be necessary in circumstances where the declarant is unavailable to testify at trial and where the party is unable to obtain evidence of a similar quality from another source
  + The preliminary inquiry testimony of a witness will satisfy the criterion of necessity where the witness is generally unavailable to testify at trial
  + CG was unavailable to testify on behalf of the Crown for the purposes of the necessity criterion
    - She could not be called due to spousal incompetency
* **Reliability** 🡪 will be satisfied where the hearsay statement was made in circumstances which provide sufficient guarantees of trustworthiness
  + Concerned with threshold reliability, not ultimate reliability
  + A witness’s testimony before a preliminary inquiry will generally satisfy this threshold test of reliability since there are sufficient guarantees of trustworthiness
    - The same issues and parties are typically present at trial
  + CG’s recorded testimony before a preliminary inquiry bears sufficient hallmarks of trustworthiness to permit the trier of fact to make substantive use of such statements at trial
    - She was also cross-examined
* In the balance of considerations, and notwithstanding considerations of "unfairness" to the accused in his marital relationship, the risk of prejudice arising from the admission of Graham's preliminary inquiry testimony did not significantly exceed the potential probative value of such evidence at trial
* he trial judge should not have exercised his residual discretion to exclude her testimony, and the transcripts ought to have been put to the trier of fact, subject to appropriate safeguards and instructions

#### *R v Starr*

*Facts:* - Cook (deceased) and Weselowski were drinking wit Starr in a hotel room

* Starr left late at nigt and parted ways with the party
* Cook’s girlfriend approached Cook and Weselowski and at that point Cook told his girlfriend that he could not go out with her that night because he had to meet Starr to commit a crime
* Some hours later, both Weslowski and Cook were dead on the side of a highway and Starr was arrested
* At trial, the Crown advanced the theory that the murders were gang-related, where Starr used the insurance fraud money to lure the two people to the highway
* The case hinged on the testimony of the girlfriend
* The TJ admitted her statement on the “present intentions” or “state of mind” exception to the hearsay rule
* Starr convicted

*Issues:* Whether the statement of the girlfriend is admissible

*Held:* No

*Reasons:*

* It was clear that the Cook’s alleged out-of-court statement to his girlfriend was that he was intending to "go and do an Autopac scam with Robert" was adduced to prove the truth of its contents
  + As such, normal **inadmissible**
* Hearsay evidence ay be admitted as falling within the “present intentions” or “state of mind” exceptions to support an inference that the declarant did in fact do that the declarant state he or she was about to do
* “present intentions” are only admissible, if at all, to prove the intentions of the declarant
* Cook’s intended course of action on the night of his murder was relevant because the jury could infer from this evidence of intention that Cook followed through on his intention and travelled into the country with the accused
  + But the use to which the Crown proposed to put Cook's statement impliedly included attempting to prove that the accused likewise intended to travel into the country with Cook
    - This was a non-permitted, illegal use of Cook's statement.
* By admitting the statement and declining to expressly caution the jury that it could not be used to prove the state of mind and present intentions of the accused, the TJ failed to protect the accused from its illegal use, and may have well been seen to be endorsing it
* Cook’s statement should **not** have been admitted under the “present intentions” exceptions because the statement lacked the necessary circumstantial guarantees of trustworthiness
  + The statement contained no indicia of reliability since it was under circumstances of suspicion (the girlfriend didn’t necessarily believe Cook, she was angry he was with another woman)
* Cook had a motive to lie and the statement should therefore have been excluded for this reason as well
* The statement was also grossly prejudicial
  + By admitting the statement for the truth of its content and failing to caution the jury as to its legal uses, the TH may have unintentionally invited the jury to infer that the accused was in a case that followed Cook, and that the accused was alone in the car since Cook only referred to the accused, and that the accused went with Cook as part of a plan to lure Cook to a secluded area and kill him
* These are illegal and dangerous inferences, substantially prejudicing the accused and outweighing any probative value that the statement had
* The statement was inadmissible under the **principled approach** in *Khan* and *Smith*
* Generally, the principled approach had been relied upon to expand the common law exceptions to the hearsay rule and allow for the admission of otherwise inadmissible hearsay statements where necessary and made in circumstances of reliability
  + Should also be applied where a party wishes to introduce hearsay evidence as coming within one of the common law exceptions to the hearsay rule, especially in the criminal context where such admission could result in wrongful convitions
* Applying the principled analysis to hearsay exceptions will also improve the intellectual coherence of the law of hearsay
* **To the extent that the result of an analysis pursuant to common law exceptions conflicts with the result of the principled analysis, the principled analysis should prevail** 
  + It would be rare that hearsay would be admissible under a common law exception but not the principled approach
* Cook’s statement is inadmissible both at common law and under the principled approach
  + Fails the principled analysis because it was made under circumstances of suspicion, where the declarant has some motive to lie
  + Fails reliability

**NOTE:** This cases says that we can have these traditional exceptions but they need to comply with the modern, principled approach of necessity and reliability (in summary, all hearsay evidence must adhere to the principled approach)

* The party that wants to tender the evidence must prove that it falls under an exception and/or satisfies the principled approach
* If it falls under an exception, it is presumptively admissible
  + It is then up to the opposing party to show that it is *inadmissible* under the principled approach
* If the hearsay statement doesn’t fall under an exception, it is presumptively *inadmissible*
  + You must show that is admissible under the principled approach
* The TJ still **always** maintains the discretion to exclude statements that satisfy the principled approach

**6 Step Framework:**

1. Is the statement being introduced to prove the truth of its contents?
   1. If yes, it is hearsay and is prima facie inadmissible so party attempting to use it must show either that:
      1. it falls under a traditional exception OR
      2. is admissible under principle approach
2. Hearsay evidence is presumptively admissible (no need for voir dire) if it falls under a traditional exception
3. Hearsay exception can be challenged (in voir dire) to determine if hearsay exception adheres to the principled approach
4. If it cannot adhere to the principled approach, evidence must be excluded – the onus to prove it is on the party challenging it (this is rare)
5. If it does not fall under a recognized exception it can still be admitted (in voir dire) using the principled approach
6. Even if the evidence is admissible under a recognized exception or principled approach then the judge still may refuse to admit the evidence if its prejudicial effect outweighs its probative value
   1. ***R v Nicholas***: TJ refused to admit videotape of complaint who was to traumatized to testify on stand. CA reversed, said it should have been admitted because no prejudice to the accused
   2. ***R v Smith***: where principled approach satisfied, the lack of cross examination goes to weight, not admissibility and a properly cautioned jury should evaluate the evidence on that basis
7. Admitting evidence under hearsay does not trump other rules of evidence

#### *R v Khelawon*

*Facts:* Five elderly residents of a retirement home told various people (worker in the retirement home, the doctor, police) that they were assaulted by the defendant, the manager of the home

* By the time of trial, four had died of old age and the last was no longer competent to testify
* Four had made videotaped statements to the police, which were all pretty similar

*Issues:* Are the videotaped hearsay statements admissible?

*Held:* No

*Reasons:* - Court applied the principled approach; necessity and reliability

* The evidence tendered is undoubtedly hearsay; it does not fall within traditional exceptions; can it be admitted under the principled approach?
  + The hearsay evidence is undoubtedly necessary, the declarant is dead
* **Is it reliable?**
* There are no adequate substitutes to cross-examination to test reliability of evidence – only the police video
* Is the hearsay inherently trustworthy?
  + No. Declarant’s mental capacity at issue, may have been influenced, corroborating evidence was inadmissible
  + The things one of the witnesses says in the video are contestable by expert evidence (i.e. his injuries could have occurred through a fall as well as a beating)
* Hearsay in this case is inadmissible – does not meet the threshold reliability
* Note that necessity is conceived very broadly
* Traditional exceptions still matter but are not determinative – i.e. hearsay falling within a traditional exception but not meeting necessity/reliability requirements will be excluded
* **Threshold reliability allows the judge to look at ALL factors, including corroborative evidence**

##### Framework for Considering the Admissibility of Hearsay Evidence

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

* There are two additional considerations:
  + First, even where the evidence is admissible under an exception to the hearsay rule or under the principled approach, the judge may still refuse to admit the evidence if its prejudicial effect outweighs its probative value
    - **Reminder**: hearsay evidence often presupposed that the declarant is unavailable or cannot be effectively cross-examined
    - *R v Smith* 🡪 where the criteria of necessity and reliability are satisfied, the lack of testing by cross-examination goes to weight, not admissibility and a properly cautioned jury should be able to evaluate the evidence on that basis
  + Second, it must be remembered that admitting evidence under a hearsay exception does not trump other rules of evidence
    - Iacobucci 🡪 it is a principle of fundamental justice, protected by the *Charter*, that the innocent must not be convicted and to allow the Crown to introduce unreliable hearsay against an accused would compromise trial fairness and raise the spectre of wrongful convictions
* Where hearsay evidence is tendered by an accused, a TJ can relax the strict rules of admissibility where it is necessary to prevent a miscarriage of justice
  + This acknowledges the liberty of the accused
  + Does not eliminate the necessary and reliability concerns

### reasonable necessity

* Necessity is founded on the need to get at the truth; in substance it is a form of the “best evidence” rule
* Hearsay may be necessary to enable all relevant and reliable information to be placed before the court, so justice may be done
  + Doesn’t have to be necessary to the prosecution’s case
  + Also not equated to the availability of a witness
* Wigmore 🡪 the assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources. The necessity is not so great; perhaps hardly a necessity, only an expediency or convivence
* “reasonable necessity” requires that “reasonable efforts” be undertaken to obtain the direct evidence of a witness
  + Without necessity, the introduction of out-of-court statements could replace the calling of witnesses, which would deprive the opposing party of opportunity for cross-examination
* **General proposition**: where a witness is physically available, and there is no evidence that he or she would suffer trauma in testifying, then the witness should be called
  + There is a spectrum of trauma, proof of severe trauma is not required
  + Unwillingness to testify is not enough
* There is no presumption of necessity
  + The TJ must determine why it is necessary to receive a statement untested by cross-examination
* Expert witness can work to prove necessity
  + E.g. psychiatrist stating that the witness would likely commit suicide if forced to testify
* There is no absolute rule that a particular kind of evidence need to be called in all cases
* Necessity relates to the particular witness’s evidence
* Necessity is concerned with obtaining the relevant direct evidence from a particular witness
* **What about multiple statements?** If a witness testifies, the law generally does not allow for the admission of prior consistent statements
  + This form of repetition violates the rule against oath-helping
  + Therefore, repetitious statements made by unavailable witnesses should not each be admitted or the rule against prior consistent statements will be subverted
* The only reason for multiple hearsay statements would be to provide additional information or context that supports the necessity in admitting these statements

### threshold reliability

* The criterion of reliability is about ensuring the integrity of the trial process
* The evidence is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it
* In considering reliability, a distinction is made between threshold and ultimate reliability
* Threshold reliability 🡪 for the TJ and concerns the admissibility of the statement
  + TJ is a gatekeeper whose function is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement
* TJ must use a functional approach
* All relevant factors going to the reliability of the statement can be looked to – including corroborating or conflicting evidence
* A concern is that *voir dire* on the admissibility of hearsay could overtake the trial; difficult to draw the line
* **Impt**: TJs need to be mindful of the fact that the question of ultimate reliability not be predetermined on the admissibility *voir dire*
* Reliability should be given a flexible meaning
  + “some degree of trustworthiness more than ordinary” is sufficient
* *Khelawon*: the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other:
  + The statement is made in circumstances that speak to its truth and accuracy
  + Show that the truth and accuracy can be adequately tested
    - The TJ must be in a position to test the evidence and assess its true worth

##### Inherent Trustworthiness

* Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form
* Factors that go to inherent trustworthiness; consider whether the statement was made:
  + Spontaneously
  + Naturally
  + Without suggestion
  + Reasonably contemporaneously with the events
  + By a person who had no motive to fabricate
  + By a person with a sound mental state
  + Against the person’s interest in whole or in part
  + By a young person who would likely have knowledge of the acts alleged
  + Whether there is corroborating evidence
* Must also consider possible safeguard that would go to expose any inaccuracies or fabrications:
  + Was the person under a duty to record the statements
  + Was the statement made to public officials
  + Was the statement recorded
  + Did the person know the statement would be publicized
* Motive is an important factor in determining reliability
* Proved evidence of motive to fabricate goes to the heart of reliability
* If there is no proved motive or proved absence of motive, then motive is a neutral factor
  + “lack of evidence of motive to fabricate is not equivalent to proved absence of motive to fabricate”
* Relationship evidence is another factor as it may concern the topic of the statement
* The SCC has made it clear that threshold reliability is concerned with the reliability of the declarant and not with the receiver
* **How satisfied must the TJ be of the trustworthiness of a hearsay statement?** Sceptical caution
  + What must be shown is a certain cogency about the statement that removes any real concern about their truth and accuracy
  + **High** threshold test

##### Can the Evidence Be Tested?

* Common sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence
* Optimal testing method 🡪 have the declarant state the evidence in court, under oath and subject to contemporaneous cross-examination
* The second aspect of reliability considers whether there are any substitutes that address the hearsay dangers arising from lack of oath, presence and cross-examination. They include:
  + Was the person under oath when making the statement
  + Was the making of the statement audio or video taped
  + At the time of making the statement, was the person cross-examined
  + Is the person now available to be cross-examined in court on making the out of court statement
* The primary concern here is whether the trier of fact will be in a position to rationally evaluate the evidence
* When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement’s truth and accuracy, there is no need to inquire further into the likely truth of the statement
* Cross-examination is a **critical** factor in testing evidence
* **Note**: necessity and threshold reliability are interrelated
  + They are not fixed standards; they are fluid and work together
* If an item of evidence exhibits high reliability then necessity can be relaxed and vice versa
  + Necessity + reliability = 1

## 1. prior inconsistent statements

* Prior inconsistent statements of non-party witnesses may be admitted for their truth on a case-by-case basis using the principled approach
* Necessity is accepted whenever a witness recants his/her earlier out-of-court statement
* Reliability is found either when:
  + The process in taking the prior inconsistent statement is sufficient to allow the trier of fact to assess its value against the witness’s in court testimony; OR
  + The statement is inherently trustworthy
* **Orthodox rule:** At common law, prior inconsistent statements made by a non-party witness, if offered for their truth, were not admissible unless adopted as truth by the witness
  + They were admissible only as to the creditability to show that on a prior occasion the witness said something inconsistent with the testimony now given
* ***KGB* did away with this rule**

##### *KGB* Application As Part of Invoking s 9 of the *Canada Evidence Act*

1. The calling party must state its intention in tendering the statement. If the party gives notice that it will seek to have the statement admitted for its truth, the *voir dire* will continue on that issue
2. The calling party bears the burden of proof to establish on a balance of probability that the admissibility of the prior inconsistent statement for its truth
3. The calling party must establish threshold reliability on a case-by-case basis
4. The calling party must also establish that the statement was made voluntarily, if to a person in authority, and that there are no other factors that would tend to bring the administration of justice into disrepute if the statement is admitted for its truth

* At the end of this *voir dire* the TJ makes a ruling
* Not all prior inconsistent statements can be admitted for their truth – even if they comply with the *KGB* criteria

## 2. prior identifications

* Out-of-court identifications made by a witness may be admitted for their truth and for credibility where the witness makes an in-court identification
* Out-of-court identifications may also be admitted for their truth where the witness makes no in-court identification, but can testify that he/she previously gave an accurate description or made an accurate identification
* Where the identifying witness makes no in-court identification and does not testify as to the accuracy of any prior identification, then the situation is the same as if he/she had not testified
  + The out-of-court identification is hearsay and is not admissible under the hearsay exception for prior identification
* **General rule**: witness is not permitted to testify as to his own previous consistent statements because they add nothing to the in-court testimony
* Prior statements of identification are an **exception**
* In-court identifications are inherently suspect
* The courts have long recognized that the witness should be asked to identify an accused at the earliest opportunity and under the fairest circumstances
  + As a matter of common sense, courts readily admit prior identifications to give credence to the in-court identifications
* It should not be accepted that every statement of prior identification is admissible for its truth
  + There may be inconsistencies between the in-court testimony of the witness and the out-of-court statement
    - The witness will have to adopt and accept the statement in her evidence if it is inconsistent with her in-court statement
* The situation is also different when the eyewitness makes no identification in court
  + The evidence of the prior identification is not going in for consistency
  + **BUT** such evidence is regularly admitted when the identifying witness can testify that he/she previously made an accurate identification
* Some believe that hearsay is being admitted when a prior identification is provided
  + May or may not be true; prior identifications are acts, their relevance does not always require reliance on words spoken out of court
  + So long as the identification witness testifies that the person she identified was the assailant, there is no hearsay problem
* Where there is a recantation of the prior identification, it can be dealt with under *KGB*
* An identification is a form of statement and *KGB* should be the guiding authority
* Where there is no recantation, but merely a failure to recall, *Khan* should be applied

## 3. prior testimony

* Testimony given at a prior proceeding, if offered for its truth, is hearsay
* Wigamore disagrees 🡪 prior testimony was not hearsay and no exception needed to be created because the evidence had already been subjected to cross-examination
* The existing hearsay exception for prior testimony is shaped by the general principles of necessity and reliability
* Necessity 🡪 grounded in the unavailability of the witness
* Reliability 🡪 rests on the fact that at the prior hearing the witness was under oath, and was available for cross-examination, and there is an accurate transcript of the testimony to be tendered

### the common law exception

* At common law, evidence given in prior proceedings by a witness is admissible for its truth in a later proceeding provided:
  + The witness is unavailable
  + The parties, or those claiming under them, are substantially the same
  + The material issue to which the evidence is relevant are substantially the same; and
  + The person against whom the evidence is to be used had an opportunity to cross examine the witness at the earlier proceeding
* The exception is confided to testimony from prior proceedings where the issue and parties are substantially the same as in the present hearing
* The requirements of identity of issue and identify of parties go to ensure that the party against whom the evidence is offered had an adequate opportunity to cross-examine the witness at an earlier proceeding
  + An actual cross is not needed – the opportunity is enough
  + It is not necessary that all the issues in the two actions correspond and the cause of action doesn’t have to be the same
    - Required 🡪 that the evidence relates to any material issues that are substantially the same in both actions
* In principle, the requirement that all parties be the same is unnecessary
  + The fundamental concerns is with the party against whom the evidence is being offered as this is the party being denied the opportunity to cross

### admissibility under the rules of court

* In civil cases the various rules of court provide an alternative basis for admitting prior testimony
  + Usually more narrow and applicable only it its respective province

### admissibility under the criminal code

**715** **(1)** Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person

**(a)** is dead,

**(b)** has since become and is insane,

**(c)** is so ill that he is unable to travel or testify, or

**(d)** is absent from Canada,

and where it is proved that the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.

* This is the codification of the common law rule
* The witness must be unavailable and the prior testimony sought to be admitted into evidence must relate to the same charge and must have been taken in the presence of the accused
* When these above conditions are met, the prior testimony may be admitted without further proof
* *R v Potin* 🡪 The operation of the exception is not determined by the use actually made of the opportunity to cross-examine, but rather by the unavailability of a full opportunity to do so
* The accused is not deprived of “full opportunity” to cross-examine a witness resulting from a failure to disclose information that could have been used in cross-examination
  + Full opportunity applies to situations where counsel has an intention to pursue certain questions and is frustrated in doing so
* The TJ can still exclude prior testimony under this section. This discretion can be exercised:
  + Where there was unfairness in the manner in which the evidence was obtained
  + Where the admission would not be fair to the accused
* Wilson J gave two examples of unfairness in obtaining evidence:
  + The witness is temporarily absent from Canada; though it would not be hard for the Crown to ensure attendance at the trial
  + The Crown is aware at the time the evidence was initially taken that the witness would not be available to testify at the trial, but did not inform the accused of this so that he could make the best opportunity of his cross
* Wilson J also identified that the exercise of this residual discretion also brings into play two conflicting concerns:
  + Fair treatment of the accused
  + Society’s interest in the admission of probative evidence in order to get at the truth of the matter
* When prior testimony does not fit within s 715, recourse can be had to the principled approach
  + S 715 does not occupy the field with respect to admitting prior testimony in criminal cases

## 4. prior convictions

* A party to a civil proceeding may prove that the other party or the third party has been convicted of a criminal offence for the purpose of establishing *prima facie* that such person committed the offence charged
* Criminal trial evidence has high assurance of reliability
  + The Crown must prove its case beyond a reasonable doubt
* A number of provinces in their Evidence Act expressly provide for the admissibility of prior convictions
* Evidence of prior convictions may be used “offensively” by a plaintiff to prove the basis of claim
  + It can also be used defensively by a defendant to resist a claim
* The evidence can be admitted as *prima facie* proof, subject to rebuttal
* The *prima facie* standard affords a convicted party the opportunity to explain why the conviction should not be taken as proof of the underlying facts
  + If there is a good explanation, the matter can proceed at trial
  + If there is no explanation, and the convicted party simply wants to put forth the same evidence that was rejected and seeks to relitigate the same issue then this should not be permitted
* The fundamental concern is that baseless relitigation undermines the integrity of the judicial system and amounts to an abuse of process
* Unlike criminal convictions, it is accepted law that an acquittal is not admissible in a subsequent civil trial to prove that the party did not commit the offence
  + The high burden of proof in a criminal case can lead to an acquittal, but that does not mean that there is *no* evidence that the accused did not commit the offence on a civil standard
* **When is rebuttal allowed?** Rarely
  + General rule 🡪 a party will be barred from relitigating a prior criminal conviction
  + It may be permitted when it enhances rather than impeaches the integrity of the judicial system:
    - When the first proceeding is tainted by fraud or dishonesty
    - When fresh, new evidence, previously unavailable, conclusively impeaches the original results
    - When fairness dictates that the original result should not be binding in the new context

## 5. admissions of a party

* When we speak of admissions, we are referring to anything said or done by a party to the action pre-trial or even pre-verdict
* A party may introduce into evidence against an opposing party any relevant:
  + Statement made by the opposing party
  + Act of the opposing party
  + Statement made by a third person which is expressly adopted by the opposing party or where it may be reasonably inferred that the opposing party has adopted it
  + Statement by a person the opposing party authorized to make the statement, or where the statement was made by the opposing party’s agent or employee concerning a matter within the scope of agency or employment, during the existence of the relationship
  + Statement made by a co-conspirator in furtherance of a conspiracy
* Admissions are acts or words of a party offered as evidence against that party
  + “anything the other side said or did will be admissible so long as it has something to do with the case”
* “admission against interest” 🡪 the opposing side has decided to introduce an admission at trial against the party
* Admissions can be classified as hearsay (although up to debate)
* Wigmore Opinion 🡪 admissions are not hearsay, in that they passed the gauntlet of the hearsay rule because the party against whom the evidence is being admitted has no need to cross-examine himself
* *R v Evans* 🡪 SCC stated that an admission is an exception to the hearsay rule
* Most admissions take the form of statements
  + These statements may be used to impeach the party by way of showing a prior inconsistent statement, and they are inadmissible for their truth
  + They don’t need to comply with *KGB*

**Admissions Subject to Special Rules**

* Confessions of an accused in a criminal prosecution are a type of admission governed by special rules
  + Must be entered under the “confessions rule” and must be voluntary
* An admission is when an accused makes a statement to **ordinary persons**
  + No *voir dire* is required
* Mr. Big confessions are also subject to special rules
  + Quasi-confessions made unwittingly to the police as part of undercover police operations
* Mr. Big confessions are presumptively inadmissible, and the Crown needs to prove on balance that the probative value outweighs the prejudicial

### formal and informal admissions

* Formal admissions 🡪 dispense with the need to prove a fact in issue
  + Once made, is binding on the party and not easily withdrawn
  + E.g. agreed statement of facts, pleadings, guilty plea
* Informal admissions 🡪 not conclusive proof of an issue, nor does it in any way bind the parties, it is open to be contradicted or explained

### admissions need not be based on personal knowledge

* An admission need not be passed on personal knowledge
* A party may accept what others say, and if so, the party is deemed to have adopted those statements
* The party must in some way indicated an acceptance or belief in the truth of the hearsay statement
* The value to be attached to the belief is a matter of weight for the trier of fact

### admissions by conduct

* Admission may be implied from a party’s conduct
  + Anything the other side ever said or *did*
* The issue is one of relevancy
* The court must be satisfied as to the validity of the inference from the conduct to the alleged admission

### admissions by silence

* Admissions can be implied from a party’s silence
* Certain conditions must exists:
  + A statement, usually an accusation, is made in the presence of the party
  + In circumstances such that the party would be expected to respond
  + That the party’s failure to respond could reasonably lead to the inference that, by his silence, the party adopted the statement
  + The probative value of the evidence outweighs its prejudicial effect
* A party’s silence can be ambiguous – BE CAREFUL
* *R v Scott* 🡪 the authorities make it clear that great caution should be exercised when considering a question of adopted or implied admission by silence as there may be other reasons for an accused’s silence. A statement made in the accused’s presence is not evidence of the facts contained therein, even if it is reasonable to expect an explanation or denial, unless the accused accepts or adopts the statement, either expressly or by inference, as his/her own
* The principle of adoption by silence does not apply where an accused is confronted with the allegations by a person in authority
  + In these circumstances, the accused has a right to remain silent and invoking that right cannot be used against him
  + You can assert the right to select questions and it still holds

### vicarious admissions

* When a party authorizes another person to speak on her behalf, the party is bound by the admission made
  + This is rare
* The more common situation is where an agent or employee makes an unauthorized statement that the opposing side now seeks to have admitted as an admission against the party
* **Test:** 
  + Proof of agency/employment (requires agent to testify)
  + Admissions of agent tendered against principal must have been made to a 3rd party within the scope of authority during subsistence of agency
    - Unlikely an agent would make a statement against principal during employment unless it was true
    - Needs to be within scope of duty (delivery boy cannot makes admissions on treasury stock)
    - But, you do not need authority granted by employer to make such statements
* Admission made vicariously by authorized agent may be admissible against principle

### admissions by parties in furtherance of a common design

* **General rule:** an admission is evidence only against its maker
  + The confession of one co-accused is not admissible against the other co-accused
  + E.g 🡪 A testifying that he stabbed a guy and that B hit him with a baseball bat is *only* evidence against A
    - The jury would have to be instructed to only use this evidence against A. If it was so prejudicial, B may need a separate trial
* If participants are tried separately, the rule does not apply
  + A can be a witness in B’s trial and vice versa
* Should A attempt to refuse to testify at B’s trial or recants on the stand his prior statement may be admitted for its truth under the principled approach
* Accomplice statements do carry a concern of reliability
  + Does not mean it can’t come in under the principled approach
* Once a partnership is proven by independent evidence to exists, the admission of one partner acting in the scope of the partnership is evidence against all the partners
  + *R v Samuels* 🡪 the relationship of a seller and buyer of drugs was capable of giving rise to finding a common design
* Not every statement of a co-conspirator is admissible
  + Only those made during the course of the conspiracy and in the furtherance of the conspiracy fall within the exception
  + Co-conspirator’s guilty plea or confession is not admissible
* The difficulty with the co-conspirator exception is that it applies only if there is evidence that the accused was a member of the conspiracy, and this issue is the very one before the court
  + The trier of fact is left to decide what to do with the co-conspirator declarations
* In charges involving common design all evidence, including the hearsay statements of co-conspirators, is conditionally admissible
  + It is then to the trier of fact to review the evidence and to determine whether to invoke the co-conspirator exception
  + Requires a 4 part jury instruction
    - Part 1 relates to what is required to prove the existence of a conspiracy
    - Part 2 relates to the proof of the membership of the accused in the conspiracy
    - Parts 3 and 4 explain how to use those co-conspirators statements that do meet the exceptions
* Statements made in the formation of the conspiracy are not hearsay
  + They are circumstantial evidence of the existence of the conspiracy because their relevance lies in the fact that they were said
  + They are direct evidence of a formation of an agreement to commit an offence and their admission does not depend on the truth of their contents
* The co-conspirator exception to the hearsay rule is not engaged when a co-conspirator testifies at trial and describes the acts and statements of others involved in the conspiracy
  + The co-conspirator’s “testimony” is admissible against the others as described
  + The Jury is not to consider the evidence against the accused in isolation; context is needed
* Necessity is found based on three factors:
  + Co-accused declarants are not compellable by the Crown
  + The undesirability of trying alleged co-conspirators separately
  + The evidentiary value of contemporaneous declarations made in furtherance of an alleged conspiracy
* Reliability is found in that:
  + The trier of fact must be satisfied beyond a reasonable doubt that the conspiracy in fact existed
  + The state must establish on a BOP through evidence directly admissible against the accused that the accused was a member of the conspiracy
  + The trier of fact must also consider out-of-court declarations made in furtherance of the conspiracy
  + Statements made in furtherance of the conspiracy generally will be made spontaneously and contemporaneously with the events at a time where the would be little reason to lie
* The *Carter* rule meets the requirements of the principled approach and stands

## 6. declarations against interest by non-parties

* The common law recognizes a hearsay exception for statements made against the declarant’s interest
  + Essentially the exception applies to non-parties
* Declarations against interest made by parties are admission and fall under their own exception
* The assumption underlying the exception is that people do not readily make statements that admit facts contrary to their interests unless those statements are true

### declarations against pecuniary and proprietary interests

* A declaration against pecuniary or proprietary interest may be admitted where:
  + The declarant is unable to testify
  + The statement when made was against the declarant’s interest
  + The declarant had personal knowledge of the facts stated
* Necessity flows from the unavailability of the declarant
* Reliability is founded on the fact that the declarant, who is aware of the adverse facts, admits them
* In principle, the declarant need not realize that the statement may be used against him
* Not all declarations against interest are clear-cut
  + They can contain statements that are favorable to the maker’s interest
* The more favored approach is to admit the entire statement
  + It is premised on the theory that the statement as a whole was made within a frame of mind as the declaration against interest and therefore carries with it a measure of trustworthiness
  + The value to be attached is a question of weight for the trier of fact
* Courts have admitted “all matters involved in or knit up with the statement”

### declarations against penal interest

* **Penal interest** 🡪 a statement that puts the statement maker at the risk of prosecution
* A declaration against penal interest may be admitted where:
  1. The declaration is made in such circumstances that the declarant should have apprehended a vulnerability to penal consequences as a result
  2. The vulnerability to penal consequences cannot be remote
  3. The declaration sought to be given in evidence must be considered in its totality. If upon the whole tenor the weight is in favour of the declarant, it is not against his interest
  4. In a doubtful case a court might properly consider whether or not there are other circumstances connecting the declarant with the crime and whether or not there is any connection between the declarant and the accused
  5. The declarant is unavailable by reasons of death, insanity, or grave illness which prevents the giving of testimony even from a bed, or absence in a jurisdiction to which none of the processes of the Court extend. A declarant would not be unavailable [where he or she refuses to testify]
* The common law has long excluded statements against penal interest
  + Concerned with false confessions
* The suspicion regarding the trustworthiness of such declarations permeates the penal interest exception
* The SCC has created a far more stringent exception for declarations against penal interests than for pecuniary or proprietary statements against interest
  + Applied the five principles (above)
* Principle one means that the declarant must know that the statement will be held against him
  + There must be vulnerability flowing from the statement
* Principle 3 adopts an approach where the TJ must weigh all the evidence to determine whether, on a balance, the declaration is or is not against interest
* Principle 4 is a further caution – before admitting such declarations in doubtful cases, the court wants additional guarantees of trustworthiness
  + The fear is collusion and fabrication
* The SCC creates a high bar to admit this evidence

## 7. dying declarations

* In a criminal case, a dying declaration of a deceased person is admissible for the prosecution or defence when:
  + The deceased had a settled, hopeless expectation of almost immediate death
  + The statement was about the circumstances of the death
  + The statement would have been admissible if the deceased had been able to testify
  + The offence involved is the homicide of the deceased
* With respect to this exception, there is necessity: the witness is dead
* Reliability is said to derive from the believe that a person who knows that he/she is about to die will be motivated to speak truthfully
* Death must be near and certain, and the deceased must be aware of this fact
  + The test is subjective
* This exception is (now) confined to cases of homicide
  + E.g. the dying declaration of a passenger involved in a car accident is admissible against the driver **only** if the driver is charged with criminal negligence causing death of the passenger
    - This same statement would not be admissible in a civil suit for wrongful death
* The exception requires that the declarant’s death be the subject matter of the charge
  + As such, they are **NOT** subject to the principle approach (though they arguably should be)

## 8. declartions in the course of duty

* The admissibility of declarations made in the course of duty is based on the presumed reliability with their making
* 1st – Most records are of a “mechanical natures:
  + They are prepared as a matter of routine, where there is little reason or motive to fabricate
  + Under the common law, where a declarant had a motive or an interest to misrepresent, the records would NOT be admitted
* 2nd – Businesses rely on these records, and it is the job of the maker to be accurate
* 3rd – Entries are prepared reasonably contemporaneously with the events or transactions recorded
* A declaration in the course of duty is different from an admission
* Declarations that fall under this exception may be admitted by the party responsible for the record in order to support his/her case, unlike an admission that is tendered by the opposing party *against* the party who made the statement

### at common law

* Declarations, oral or written, are admissible for their truth where
  + Made reasonably contemporaneously
  + In the ordinary course of duty
  + By persons having personal knowledge of the matters
  + Who are under a duty to make the record or report
  + There is no motive to misrepresent the matters recorded
* At CL, the maker of the statement had to be dead
  + This is no longer the case
* *Ares v Venner* 🡪 expanded the common law exception for declarations in the course of duty
  + Nurses notes were allowed to be admitted as evidence of medical malpractice

### busines records

* *Myers v DPP* 🡪 legislation reform flowed from this decision
  + An exception for “business records” was created in the *Canada Evidence Act* and most of the provincial evidence acts
* These provisions eclipse, but don’t replace, the common law
* The common law exception remains and important adjunct to the statutes
  + It applies to both oral and written statements, whereas the statute only applies to writings or records
  + The common law does not require that notice be given, where some statutes do
* There is some conflicting decisions in terms of whether opinion can be admitted
  + The court in *Ares v Venner* admitted it, but some courts read the statute to apply to only facts
* There is no uniformity among statutes
* Under the *CEA*, records are not admitted when made in the course of an investigation or inquiry, obtaining or giving legal advice, or in contemplation of legal proceeding
  + **BUT** some provincial statues state that the circumstances of the makings of the record will go to the weight of the evidence but not its admissibility
* All the statutes in fairly similar terms speak of the need for the record or writing to be made in the usual and ordinary course of business
* It is not enough that the record simply be made by a business
  + The record must be made in the “usual and ordinary course of business”
* Half of the provinces also require that it was in the usually and ordinary course of business to make the writing or record
  + This is also true in the common law
* A duty to make the record reinforces the guarantees of reliability since without it there would be less impetus on the employee to be careful and accurate in the making of the record
* Most of the provincial provisions provide that the writing or records be made of any act, transaction occurrence or event
  + This phrase has been interpreted to mean that only statements of fact are admissible
  + Statements of **opinion** are inadmissible
* It is hard to determine whether something is a fact or opinion
* There is also a potential **double hearsay** problem
  + The record itself is hearsay and it may be constructed of hearsay statements of others
* Most provincial statutes say that the lack of personal knowledge of the maker will go to weight not admissibility
* American court established a rule that both the giver and the taker of the information need to act in the regular course of business
  + This is followed in Canada
    - i.e. a police officer’s report from a witness at the scene of a crime is not admissible under this rule
* The section was not indented to make hearsay evidence of any third party admissible
* Hearsay statements should only be admitted where the maker of the writing and the informant or informants are both acting in the usual and ordinary course of business
* The reliability is premised on the notion that they are prepared by persons under a business duty; where a person provides information gratuitously, the record loses its stamp of trustworthiness
* The trend appears toward increased reliance on the principled approach when difficulties arise in admitting business records

### electronic records

* Most jurisdictions have enacted specific legislation to deal with electronic documents
  + Does not create new hearsay exceptions
* The concern with electronic records is the authenticity and maintain confidence in the integrity of the stored information
* The admissibility will depend on how it was created and its purpose
* Where humans create the information to record their observations, the hearsay concerns are triggered

## 9. spontaneous statements (*Res Gestae*)

* ***Res gestae***🡪 the facts surrounding or accompanying a transaction (“part of the thing”)
* This term is harmful because it invites tying admissibility to a transaction, which creates an unprincipled limitation
* It is useless because there is no *res gestae* exception; rather, the term embraces a number of distinct hearsay exceptions:
  + Statements of present physical condition
  + Statements of present mental state
  + Excited utterances
  + Statements of present sense impression
* The best phrase to encompass these exceptions is: **spontaneous statements**
* The common principle underlying each of these exceptions is that reliability is founded on the spontaneous making of the statement before there is time for concoction
* Necessity is based on expediency
* Unavailability of the declarant is not a prerequisite; the declarant may testify and the spontaneous statement may also be admitted into evidence

### statements of Present physical condition

* Where a person claims to be experiencing a particular physical condition, the statement containing that claim is admissible but only to prove that the person was experiencing the condition at the time and to establish its duration
* This exception is confined to natural expressions that usually accompany and provide evidence of an existing illness or injury
* The statement of past pain is not admissible
* The hallmark of the statements are their spontaneity
  + This provides reliability that can be presumed from the spontaneous utterance as to the declarant’s bodily sensation

### statements of present mental state

* Where a person describes his/her present state of mind (emotion, intent, motive, plan), the person’s statement to that effect is admissible where the state of mind is relevant and the statement is made in a natural manner and not under circumstances of suspicion
* Only where the statement as to the state of mind are going in for their truth is there need to resort to the hearsay rule
* If the statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule
* If those statements permit an inference as to the speakers state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred
* Statements of intent are about the present not the past
  + *R v Starr* is the leading case on statements of intention

### excited utterances

* A statement relating to a startling event or condition may be admitted to prove the truth of its contents if it is made while the declarant is under the stress of excitement caused by the event or condition
* The key principle is that the statement is being made in response to an event where the possibility of concoction can be disregarded
* **Test from *Andrews***:

1. Can the possibility of concoction or distortion by disregarded?
2. Are the circumstances in which the statement was made so unusual or startling to dominate the thoughts of the victim?
3. In order to be spontaneous it must be so closely associated with the event which excited the statement that the mind of the declarant can be said to be dominated by it (event which triggered the mechanism is still operative)
4. Consider other factors going to concoction or distortion
5. Fallibility of human recollection goes to weight not admissibility

### statements of present sense impression

* A statement that describes or explains an event or condition made while the person was perceiving the event or condition, or immediately thereafter, may be admitted for its truth
* The key principle is that a person is so dominated by the stress and excitement of an event that a concoction or fabrication is unlikely

**Important Cases on *Res Gestate***

* *Ratten*, Privy Council m 1971
  + Phone call made by deceased wife to police was admissible to rebut the accused defence of accident
  + There was a close connection between the statement and the shooting
  + There were pressured circumstances
* *Risby*, 1978
  + The accused made an exculpatory statement when drugs were found by police
    - “I have no idea”
  + The statement was elicited by defence when cross examining the police officer
  + The court found that the admissibility was not restricted to the case of recent statements
  + The court says it goes beyond the most immediate event

#### *R v Couture (CDR)*,2007 SCC 28

*Facts:* - Couture was charged with 2nd degree murder of an ex-girlfriend and her friend

* While in prison on other charges, Couture was visited be a woman name Darlene, who was a Christian Volunteer Counsellor
  + She was married to someone else at the time
* During the visits, David had confided to her that he had killed his ex-girlfriend and one of her friends
* He said he killed his ex out of jealousy and the friend because she saw
* He also told her that he had anal sex with both of them after he killed them
* Couture was released on parole and as part of his parole, had to live with Darlene and her husband
* While in the home, Couture assaulted Darlene and the husband demanded he leave
* Darlene stayed in contact with Couture – they ended up getting married
* Couture was continuously abusive and when visited by police in relation to the murder charges, Darlene told them what Couture told her in prison
* The couple reconciled and Darlene attempted to downplay her testimony to the police, but did not fully recant
* The TJ admitted Darlene’s statements under the principled approach to the hearsay rule
* CA said the statements shouldn’t have been admitted based on spousal incompetency

*Issues:* Whether Darlene’s statements were admissible under the principled approach (or in general)

*Held:* Inadmissible as hearsay

*Reasons*

*The Law Respecting Spousal Testimony*

* Spousal testimony raises issues of competence, compellability and privilege that are governed by a combination of common law principles and statutory provisions
* S 4 of the *Canada Evidence Act* governs spousal testimony
  + Preserves the common law rule, subject to the exceptions it creates
  + Essentially, spouses are incompetent to testify against each other except in the event that the individual’s person, liberty or health is at risk
* As such, Darlene was neither competent nor compellable to testify for the Crown
* The Court recognized the need for maintain the spousal incompetency rule as any form of substantial reform is to be left to Parliament
* It is a traditional rule of evidence that should not be undermined by the application of the principled exception to hearsay

*Application to Facts*

* 1st question: is the evidence hearsay?
  + Absolutely. The crown is seeking to adduce the statements to prove the truth of their contents and there was no contemporaneous opportunity to cross-examine Darlene at the time of her statement
* The principled exception applies **only** to hearsay evidence that would otherwise be admissible through the direct testimony of the declarant, had the declarant been available and competent to testify at trial
* The evidence is presumptively inadmissible, unless it falls within an exception
  + It does not fall under any traditional exceptions
  + Must turn to the principled approach and determine necessity and reliability
* Darlene’s statement is necessary because she is neither competent nor compellable to testify for the prosecution
* The reliability requirement is aimed at identifying those cases where the hearsay concern (the inability to test the truth) is sufficiently overcome to justify receiving the evidence regardless of this difficulty
  + *Khelawon* – the criteria of reliability is usually met either because of the way the statement came about, its contents are trustworthy, or where circumstances permit the ultimate trier of fact to sufficiently assess its worth
* There is less reliability here as Darlene was not videotape nor was she cross examined
* There is also an issue in calling her as a witness
* Because of the spousal incompetency rule, it is not open to the Crown to rely on the *accused’s* ability to cross-examine his spouse as his own witness in order to meet its burden on the admissibility inquiry
* The accused, in order to properly test the evidence put against him would be forced to call his spouse as a witness, confront her in cross-examination, and ultimately also risk being convicted on her evidence
* This approach **clearly** undermines the rationales of the spousal incompetency rule and therefore cannot be accepted
* This approach would be a broad application and would virtually abolish the rule *KGB* statements (under oath and videotaped) could be routinely taken by the police and, in any case where the spouse is physically available, the Crown would be able to invoke the accused’s ability to call the spouse at his/her trial to meet its onus on the admissibility inquiry
  + The police would essentially always call spouses in and take statements knowing that it could be admitted under the hearsay rule
  + Since the opportunity to cross is the most powerful factor favoring admissibility, the evidence would likely become the rule rather than the exception
* **The principle approach to hearsay would undermine the spousal incompetency rule**
  + It undermines marital harmony

### Hearsay SUMMARY

* If you are looking to have a hearsay statement admitted, you bear the onus of showing that it falls under a recognized exception to the hearsay rule or satisfies the principle approach
* If the statement falls within a traditional exception, then it is presumptively admissible and your opponent has the onus of proving it is not admissible under the principle approach
  + This creates a rebuttable presumption
* If a statement does not fall within a traditional exception, it is presumptively inadmissible and you bear the onus of demonstrating that it fits in the principled approach
  + This is a more flexible approach as statements now do not have to be squeezed into one of the 9 traditional approaches
* There can be a case in which a statement falls within a traditional exception, but does not meet the principle approach
  + The TJ maintains discretion to exclude these statements

# unit 6 – opinion and expert evidence

## opinion and fact

### the general exclusionary rule introduced

* **Opinion** – inference from observed fact
* An inference from an observed fact is different from the observed fact itself
* It is the neutral, impartial trier of fact who is to determine what inferences or conclusions to draw from facts
* The role of the witness is ordinarily to describe observed facts that the impartial trier of fact will use to draw on his own inferences or conclusions
* **Basic tenet** 🡪 the usual witness may not give opinion evidence, but testify only to facts within his knowledge, observation and experience
* **The opinion rule is an exclusionary rule**

### exceptions to the general exclusionary rules

* Contrary to the general rule, opinion evidence is often allowed, but only if there is no other meaningful way for them to communicate ordinary knowledge that they possess
* Expert evidence is the most used exception to the opinion evidence rule
* Experts can offer opinions where trier of facts do not have the special training or experience required to make the relevant and worthwhile inferences that the expert witnesses are offering
* When a clear opinion is being given by a witness, it must be determined whether to apply the “lay opinion evidence” rule or the “expert evidence” rule
* Use lay opinion if all that is required to form the opinion is normal experiences
  + A lay witness cannot provide evidence outside the common stock of knowledge – things we all know
    - This encroaches on expert evidence
* Use the expert evidence rule if special training or experience is needed to form the opinion
* Whether expert evidence rules can be triggered is a tough call
* **Remember**: it is whether the witness, expert or not, is offering information that requires special training or experience to observe
* *R v Collins* 🡪 expert evidence rules did not apply to police officers conducting an experiment to determine whether the bullets would ricochet off the water, striking a target
  + The experiment did not require expertise to conduct, and no scientific principles were applied
* It is the substance of the evidence that matters, not the status of the witness

## the “lay Opinion Evidence” Rule

* Lay evidence may present their relevant observations in the form of opinions where:
  + They are in a better position than the trier of fact to form the conclusions
  + The conclusion is one that persons of ordinary experience are able to make
  + The witness, although not expert, has the experiential capacity to make conclusions
  + The opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusion
* Usually admitted because the line between fact and opinion is indistinguishable
* *R v Graat* 🡪 SCC allowed lay opinion evidence on the general basis that lay witnesses can present their observations as opinions where they are merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly
* Except in the common areas where this kind of opinion evidence is routinely admitted, the admissibility of lay opinion evidence is a matter of judicial discretion
* Must determine whether it is **necessary** to have the lay witness express an opinion
* TJ must assess whether the trier of fact is in as good a position as the witness to form the relevant conclusions
  + If yes, it cannot be admitted
    - Unless the lay opinion evidence can, without prejudicing the case, assist in the orderly presentation of information
* In determining whether lay opinion evidence is needed, the TJ should consider, whether, given the nature of the observation or the deficiencies of language, it is necessary for the witness to resort to compendious statements in order to communicate effectively what has been observed
* The TJ will consider whether the conclusion is one that people with ordinary experience are able to make
* TJ will also consider whether the particular witness has the requisite “experiential capacity” to form the relevant opinion
  + This is different than expertise

## the ultimate issue rule (A general rule applicable both to lay and expert opinion evidence

### general

* A witness cannot usurp the role of trier of fact because the trier is free to accept all, or part, or none of their testimony
* It is the trier of fact who renders the verdict, not the witness
  + There is no longer a concern that a witnesses opinion could lead to the ultimate verdict
  + *R v Gaat* got rid of the ultimate issue rule (an opinion can never be received when it touches the very issue before the court)
* The fear of undue influence is slightly more compelling where the opinion witness is an “expert”
  + The “ultimate issue” rule is also gone in this case
* There is no rule of general application preventing expert witnesses from offering opinions on the ultimate issue in a case
* The fact that an expert is about to testify on one of the ultimate issues in the case will sometimes be a *factor* to consider in determining whether the testimony will be admitted
* Two cousins of this rule survive (below)

### opinions on pure questions of domestic law

* No witness, expert or otherwise, can provide an opinion on a pure question of domestic law
* Evidence must be about questions of fact, not law
* Law is for lawyers to argue, not witnesses to offer
* Occasionally, a legal standard does not have its own technical definition and requires nothing more than a conclusion of fact to resolve
* It is appropriate to hear expert evidence on foreign law
  + This is treated as a question of fact

### the rule against oath-helping

* A properly qualified witness can provide general information relevant in judging the credibility of a witness, but is prevented by the rule against oath-helping from expressing an opinion about whether a particular witness is telling the truth
* The rule prohibits the admission of evidence adduced solely for the purpose of proving that a witness is truthful
* **Rationale**: it is a basic tenant of our legal system that judges and juries are capable of assessing credibility and reliability of evidence
* There is a fear that if experts, or even laypersons familiar with witnesses are permitted to express their opinions as to whether witnesses are telling the truth or furnishing accurate information, triers of fact might simply defer to those opinions rather than assessing credibility and reliability themselves
* The rule is not confined to opinions offered in support of credibility or reliability of witnesses
  + It is also offended when witnesses offer an opinion that another witness is incredible or unreliable, or manipulative or deceitful
* Also catches cases where, as a matter of substance, the relevance of the evidence lies only or primarily in the implication that the witness is, or probably is, giving an accurate testimony
* Rule is offended where a witness offers an opinion on how to interpret apparent reliability problems with the testimony of another witness
* Rules is breached when a witness bolsters their own testimony by invoking hearsay support
* Evidence cannot be offered for the purpose of sharing an opinion about how believable the testimony is
* Limits on the rule against oath helping:
  + The rule is not violated where the testimony of a witness expressing their own observations or admissible opinion happens to lend support to the testimony of another witness
  + If there is utility apart from simple oath-helping in having a witness express an opinion on the credibility or reliability of another witness, and the probative value outweighs the prejudicial effects, an opinion on the credibility or reliability of another witness can be received
  + Experts offering opinion evidence that is *relevant to the credibility* or reliability of other witnesses is permitted
    - The expert does not comment on the truthfulness or reliability of a witness, but offers the trier of fact background information outside the competence of the trier of fact that the trier of fact can then use in making its own conclusions about whether to credit the witness
      * E.g. witness possessing psychological characteristics that could diminish their credibility and these characteristics may not be apparent to the trier of fact
* In order to permit trier of facts to become educated about the possible implications of such matters, the law draws a distinction between opinion evidence *about credibility* (goes to oath helping) and opinion evidence *relevant to credibility*
  + The latter is likely admissible where the *Mohan* requirements are satisfied
* TJ’s have two obligations in this sense:
  1. Where a witness embarks on evidence relevant to credibility, the TJ must ensure that the evidence presented is confined to its proper purposes and that the expert does not stray into offering opinions about credibility and reliability
  2. Must direct the jury in a jury trial on the limited use that is to be made of the evidence

## expert witness

### the scope of the expert evidence rules

##### “Expert Opinion” or “Expert Evidence”

* Traditionally, courts have applied expert evidence rules whenever a witness purported to offer testimony that could not be offered without special training and experience
* There is a growing body of authority that the rule does not apply to witnesses who provide “factual evidence”
  + Only where the expert is offering opinion
* Line between fact and opinion is unclear
* The concerns that inspired the creation of the *Mohan* rule apply whether or not the witness is offering opinion or fact
* If the evidence requires special training or experience to observe or understand, triers of fact are vulnerable to accepting unreliable testimony
* Given the difficulty in distinguishing between fact and opinion, and that the established *Mohan* rule provides a flexible measure of admissibility that explores credentials, probative value, and prejudice, there are strong reasons why courts should steer away from a rule that turns on the characterization of the proof that experts offer, as opposed to the quality of their evidence

##### The Difference between Expertise and Ordinary Knowledge

* The rules governing expert factual testimony, whatever they prove to be, have to be applied sensibly
* Knowledge that is easily acquired and generally understood by persons engaging in common undertakings is not “special knowledge” that is beyond the understanding of the average juror
* Police officers:
  + Expert qualification is not a precondition to police officers testifying to matters properly within the realm of officer training and experience
  + *Mohan* standards apply to specialized police training such as fingerprint examination, or drug experts who offer evidence about the drug trade

### the *mohan* test for admissibility

* Expert opinion evidence is presumptively inadmissible
* It can be admitted only if the party calling it satisfies the following 4 preconditions to admissibility, on the balance of probabilities:
  1. The evidence must be necessary in the sense that the expert deals with a subject-matter that ordinary people are unlikely to form a correct judgment without assistance (more than helpful)
  2. The evidence must be logically and legally relevant to a material issue
  3. The witness must be qualified to offer the opinion in the sense that the expert possesses special knowledge and experience going beyond that of the trier of fact in the matters testified to
  4. The proposed opinion must not run afoul of nay exclusionary rule apart entirely from the expert opinion rule (it must be admissible evidence)
* TJ is still the gatekeeper
* Even if these conditions are met, the TJ must decide whether the evidence is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence

##### The *Mohan* Standards of Admission

* ***R v Mohan* factors:** necessity in assisting the trier of fact, relevance, a properly qualified expert the absence of an exclusionary rule that would be offended the admission of evidence
* The burden is on the party calling the evidence to establish that these components have been satisfied on a BOP
* **Note 🡪** these components are not to be applied as rigid, technical rules, but rather as content specific criteria for admissibility
* TJ must evaluate whether the cost of admitting the evidence would outweigh the benefits
  + If yes, inadmissible.
* Benefits 🡪 probative value
* Costs 🡪 the distracting and time consuming thing expert testimony can become
  + It takes a long time to evaluate and understand expert evidence
  + Can sometimes lead to TJs simply adopting the testimony without scrutiny
* *R v Abbey* 🡪 called for a two stage analysis of the test
  + (1) use the 4 rules based pre-conditions to admissibility first
  + (2) gatekeeping balancing
* *Mohan* applies in civil litigation as well as criminal and administrative
* Whether evidence will satisfy *Mohan* is not a matter of strict precedent
  + Past cases can provide illustrations
  + Still must be assessed on a case by case basis
* *Mohan* requires a highly contextual approach to the admission of expert evidence

##### Applying the Expert Witness Test

* Admissibility is determined during *voir dire*
* There are no rigid rules about how detailed or formal the inquiry must be
* To enable the TJ to decide properly whether the proposed expert evidence will be admissible, it is essential for the party proposing the expert to indicate with precision what the scope and nature of the expert testimony will be and what facts it is intended to prove
* If admissibility is contested, information relating to each of the *Mohan* preconditions shall be presented
  + As well as any information required for the TJ to act as gatekeeper

### Precondition 1 – necessity in assisting the trier of fact

* The same understanding of necessity applies in both civil and criminal cases
* *Mohan* holds that if on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary
* Expert evidence is necessary where:
  + The expert deals with a subject matter that ordinary people unlikely to form a correct judgment about without assistance
    - E.g. cause of a fire
  + The expert provides information likely outside the experience and knowledge of the judge or jury
    - E.g. parliamentary procedure
  + The technical nature of information requires an explanation so that a lay trier of fact can understand it
    - E.g. analysis of DNA
* Necessity is not to be applied to strictly, but *Mohan* stressed that expert evidence will not be admissible simply because it may be helpful
* Necessity includes examining whether substitutes for the expert testimony are available to address a trier of fact’s knowledge gap
* The fact that other experts are available to testify on a matter cannot undermine the necessity of an expert opinion offered by a witness on the same matter
  + E.g. an engineer can testify as to the cause of an accident *as well as* a police officer
* Necessity is to be judged according to whether the particular kind of evidence being offered meets the necessity requirement, not according to whether other experts have already filled the need for expert testimony

### precondition 2 – relevance

* *Mohan* treated the relevance component of admissibility as requiring a “legal relevance” inquiry involving a gatekeeping evaluation
  + TJs were to look for more than logical relevance
    - Still had to evaluate costs and benefits
* *Abbey* sensibly separates the preconditions for admission from this gatekeeping function
  + This approach calls for only logical relevance
  + The gatekeeping function, that comes second, will evaluate the costs and benefits
* Logical relevance 🡪 expert evidence that has no tendency as a matter of human experience and logic to make the existence of a fact in issue more or less likely than it would be without the evidence, will be strictly inadmissible
  + Embraces the concepts of relevance and materiality that comprise the basic rules of admissibility

### precondition 3 – a properly qualified expert

##### The Qualification Requirement

* Again, special knowledge and experience going beyond that of the trier of fact is required
* The special training or experience needed to acquire, comprehend, or use special information need not be acquired through formal training or education
  + But there must be systematic learning that goes beyond mere anecdotal observation, transient personal experience, or modest study
* Provided special training has occurred, the standard of expertise is not high
* Deficiencies in expertise can affect the weight but not admissibility
* *R v C(M)* 🡪 the question is not simply whether the witness is an expert. It is whether the witness has the expertise to offer an opinion in the relevant area

##### Enforcing the Qualification Requirement

* It is trite law that expert witnesses should not give opinion evidence on matters for which they possess no special skill, knowledge, or training
* The TJ has an ongoing duty to ensure that the expert remains in scope of the matter
* The precise area of expertise of the witness should be determined in the *voir dire*
* **BUT**: it is not an appealable error for experts to offer opinions outside their established qualifications where their expertise is nonetheless clear

### precondition 4 – the absence of an exclusionary rule

* Just because expert testimony passes the *Mohan* test does not permit the expert to offer testimony that breaches other rules of admissibility
* To be admissible, there must be an absence of other exclusionary rules prohibiting the testimony being offered
* Example:
  + Evidence in *Mohan* was excluded in part because its admissibility would offend the exclusionary rule that applies where an expert purports to testify that an accused person is not capable of committing the offence charged
    - This exclusionary rule is avoided only if the personality profile of the perpetrator group is sufficiently complete to identify distinctive psychological elements that were in all probability present and operating in the perpetrator at the time of the offence

### the gatekeeping function

* If all 4 preconditions are satisfied, the expert evidence will be admitted permitted it survives the gatekeeping function
* The TJ must determine whether the benefits of the admissibility outweighs its costs
* Admissibility is not an all or nothing proposition
  + TJ can admit part of the preferred testimony, modify the nature or scope of the testimony, or edit the language used

##### Determining the Benefits

* Examination of probative value
* The more probative the evidence, the greater the benefit of admitting it will be
* *R v K(A)* 🡪 the potential influence that expert evidence can have on the case depends on how cogent the evidence is in prove the thing it is offered to prove and how live the issue it addresses is in the proceedings
* Influence of the expert evidence also turns on the extent to which the opinion is founded on proven facts
  + The opinion must relate to the evidence in the case to have utility
* Courts can look at the credibility of the expert, but unless these issues are severe, they are not apt to exclusion
* To be admissible, expert evidence must always achieve a threshold level of reliability sufficient to warrant placing it before the trier of fact
  + It is a gatekeeping function to ensure that this threshold is met
* Once that threshold is met, the more reliable the evidence is and the greater the benefits of admissibility will be
* Courts tend to only look into reliability when experts are offering novel theories or employ non-established techniques, or where familiar forms of expertise are being challenged
* *Daubert v Merrell Dow Pharmaceutical* 🡪 when the opinion that is presented purports to be based in science, the factors in this American case will be considered
  + Focused intently on the scientific method as the key inquiry relating to the reliability of expert propositions
  + The method includes not only testing the underlying hypothesis relied on by the expert to see if the theory has been falsified, and the establishment of known rates of error, but also peer review and publication as well as general acceptance in the relevant academic community
* Scientific validity is not a condition precedent to that admissibility of expert opinion evidence
  + Not all experts purports to rest in science
* The question to ask when opinion doesn’t relate to science is whether experience and research permit the expert to develop a specialized knowledge that is sufficiently reliable to justify placing before the trier of fact
* The law is now settled
* The benefit of the admission of expert evidence is to be evaluated is an amalgam of:
  + The cogency of the evidence
  + The importance of the issues the evidence addresses
  + The believability of the evidence based on such things at the expertise of the witness, the quality of the performance in the case, and the experts impartiality
* Where the evidence is novel or the reliability of the theories and techniques is being realistically challenged, the benefit analysis will also include an assessment of the integrity of those theories or techniques
  + If the expert purports scientific theories, compliance with the scientific method will be central
  + If it doesn’t, the evaluation will be based on factors such as:
    - The degree of compliance with the principles and standards of the relevant discipline
    - The demonstrated accuracy of the information used
    - The ability of the proposed expert to explain the foundation for the opinion

##### Identifying the Costs

* The costs are simply the negative consequences that admitting the expert evidence are apt to produce
* The negative consequences include:
  + Undue consumption of time
  + Diversion of attention from real issues in the case
  + The inability of the opposing party to cope with expert evidence offered by a party having a distinct resource advantage
* If the evidence is prejudicial, this creates another issue in admissibility
* The most important danger is that the trier of fact will be unable to make an effective and critical assessment of the evidence
  + More prevalent in jury trials
* Court must consider what procedural safeguards are in place
  + Jury directions
  + Cross-examination
  + Editing the expert opinion
  + Provision of notice and discovery

##### Independence and Impartiality

* Experts primary duty is to the court and not the party that called them
* They are expected to provide evidence fairly and without bias
* **Independence –** relates to the connection between the expert and the case
* **Impartiality** – relates to the state of mind of the expert and whether the witness is biased in favour of the party calling them as an expert
  + Is the expert argumentative? Engaging in advocacy? Exceeding expertise?
* Courts prefer to use dependence and partiality concerns in weight not admissibility
  + It is believed that the effects of dependence and partiality can best be measured after hearing the evidence in its entirety

### Course Material Notes on Expert Evidence

* In 2015, the SCC revisited the topic of expert evidence and confirmed the principles surrounding admissibility of the expert evidence
  + Admissibility of expert opinion evidence is government by the test in *Mohan*
    - Relevance
    - Necessity in assisting the trier of fact
    - Absence of an exclusionary rule
    - A properly qualified expert
  + An expert has a duty to the Court to be impartial, independent and unbiased
  + A lack of objectivity can go to the admissibility of the expert evidence, but more commonly it will merely go to weight
  + The objective of the expert should be examined under the final part of the *Mohan* test: a properly qualified expert
  + The threshold test for admissibility is “not particularly onerous, and it will be quite rare that the expert evidence will be completely inadmissible
* Once the threshold test for admissibility has been met, the TJ may still take into account consideration the expert’s independence and impartiality in weighing the evidence

## novel and challeneged science

* Expert evidence will be treated as ‘novel science’ where there is no established practice among courts of admitting evidence of that kind, or where the expert is using an established scientific theory or technique for a new purpose
* In order to be admissible, novel science must:
  1. Be essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert;
  2. Be subjected to a special scrutiny with respect to its reliability; and
  3. Satisfy an even stricter application of the necessity and reliability inquiries where the expert opinion approaches an ultimate issue in the case
* Even when there is an established practice of admitting a kind of expert evidence, if the underlying scientific theory is challenged and that challenge is realistic either because that theory has not previously been closely scrutinized, or because of changes in the base of knowledge, the expert evidence should not be admitted without confirming the validity of the underlying assumptions
* The increase in expert witnesses led the court to create safeguards that apply where scientific theories may realistically be unreliable
  + Where areas of expert testimony are well established and familiar, there is generally little need to be concerned about this
* Exactly when the intense examination will be called for is not entirely settled
  + Novel science hasn’t been defined
* A theory or technique that has long been offered within the scientific community may be new or novel to courts, and some courts have used this as the standard of novelty
* Since what is being tested by the novel science doctrine is forensic reliability , the relevant question should naturally focus on the novelty of admission
* Using familiarity as the trigger for novel science must be made with a caveat: hypothetically induced evidence is too unrealistic to admit
* A special scrutiny will be called for when expert evidence is predicated upon a theory or technique that is novel in the sense that:
  + Courts have not developed an established practice of admitting it
  + Where an established practice is being put to a novel use
  + Where there is a realistic basis for challenging the underlying theory

## the presentation and evaluation of expert evidence

### expert training

* At times, expert witnesses simply provide general, background information to the trier of fact that is useful in assessing evidence
  + Can be done without the expert commenting on the particular case
* This information enables the trier of fact to generate its own conclusions based on the facts it finds
* It could be that one side concedes to an expert opinion in the case of a highly recognized expert
  + Could have your own expert evaluate the other side’s expert or examine it yourself and find that it is a good expert

### expert opinions based wholly on personal observations

* Most often experts often their interpretation of a given set of facts
* At times, the expert may be a witness to the facts forming the foundation for their opinion
* These witnesses will testify as an eyewitness to the underlying facts, and then offer an expert opinion as to what those facts signify
* Expert opinion rules apply solely to the opinions offered
  + They do **not** apply to the testimony about the facts the expert has personally observed unless the observation in question could have been made without the expertise

### expert opinions based in whole or in part on hearsay or inadmissible information

* At other times, the expert will conduct an investigation prior to trial that includes interviewing witnesses or reading documents, and then offer an opinion based on the facts they have “found”; these expert witnesses rely in whole or in part on ‘hearsay’ to form their opinions
* The expert could offer an opinion based on other experts not called as witnesses
* Since it is essential for the trier of fact to know the basis for an expert opinion so that the opinion can be evaluated, it is permissible for an expert witnesses to relate any inadmissible information that they have relied on, including hearsay
  + Enables the trier of fact to evaluate the evidence, does not provide proof of facts
* *Abbey* 🡪 although an opinion based on inadmissible information may be received, before any weight can be given to the expert’s opinion, the facts upon which the opinion is based must be found to exist on the basis of admissible evidence
* The rule in *Abbey* means that although it is necessary for the facts supporting the opinion to be found to exist based on admissible evidence, it is not necessary to establish each and every fact the expert relied on
  + As long as there is *some* admissible evidence, the opinion can be accepted
* Where an opinion is based *mainly* on information not proved by admissible evidence, it is appropriate for the judge to direct a jury that the opinion is not entitled to any weight and where the essential foundations of the expert opinion are undercut, it is an error to rely on it
* If the hearsay foundation offered by the expert witness satisfies hearsay exceptions, the necessary foundation can be established by the expert directly and it will be up to the trier of fact to decide whether it considers that admissible hearsay foundation to reliable and the opinion worthy
* If an expert obtains and acts on information of a kind that is within the scope of his expertise and which does not come from a party to the litigation, the trier of fact is free to weigh the opinion even if that information does not meet the established hearsay exceptions

### expert opinions secured by hypothetical questions

* Unless facts are uncontested, it is inappropriate to have the expert listen to the evidence to form a question as to the facts upon which their opinion will be based
* The party calling the witness should present the expert with a **hypothetical factual scenario** that reflects the facts that party hopes that the trier of fact will find
  + Always bearing in mind that before any weight at all can be given to an expert’s opinion, the facts upon which the opinion is based must be found to exist
* If the facts are materially inconsistent with the facts, the opinion is useless
* Expert opinion heightens the risk that the trier of fact may simply adopt their opinion without critical analysis
* It is important before the risk is taken to ensure that the expertise is capable of supporting the conclusion offered

### presenting the expert evidence and explaining the evidence to juries

* If the testimony of an expert is highly technical, counsel, who has called the witness, should ask the witness to explain himself in a language that laymen can understand
* The SCC has discouraged TJ’s from attempting to translate expert evidence into simpler language to assist jurors
  + This is potentially hazardous
* If the evidence is relayed in a misleading way, it can create a reversible error

## the use of written authorities to examine and cross-examine the expert

* Technically, books and articles are hearsay when they are being relied upon as proving accurate information
* Books and articles are inherent in study
  + The hearsay foundation for expertise is not treated as problematic
* **But**: the rules of evidence do not permit reliance on books and articles in the examination and cross-examination of experts unless certain criteria are met
* The expert can refer to other authorities so long as he adopts the opinions contained in those authorities by expressing his agreement with them
  + Essentially becomes the experts opinion
* The expert can be crossed using texts/articles only where she acknowledges that they works are authoritative
  + Again, adopts the opinion of the author
* Where the expert acknowledges the authority of the work, but rejects its conclusions, she can be asked to explain why and her answer will go to relevance and credibility

## special statutory provisions

* Two kinds of provisions are of particular importance of the provisions contained in various provincial evidence acts:
  + The first imposes limits on the number of experts who can be called without leave of the court
    - Varies between 3 and 5 for those with this provision
    - Intended to keep trials from degenerating into a battle of the experts
  + The second permits reports by certain experts to be filed with the court without calling the expert at trial
    - Some provisions apply to any expert while others are confined to medical practitioners
* S 657.3 of the CC permits expert reports, supported by affidavit, to be admitted on any issue in lieu of calling the witness
  + The court retains the discretion to call the witness

# unit 7 – privilege

## general principles

* Privilege, as a general rule of evidence, arises at trial and belongs to a witness
* The witness, although required to take the stand, by virtue of privilege can refuse to answer certain questions or refuse to produce certain documents
* *Descoteaux v Mierzwinski* 🡪 SCC recognized that a privilege or a right to confidentiality was a substantive rule giving a person protection from disclosure of communications outside of the trial setting (making it come within the Charter, s 7)
  + This case concerned solicitor-client privilege, but it still applies to all privileges, providing protection for confidential communications inside and outside the courtroom
* Privilege is not designed to facilitate the truth-finding process
* Privilege is inimical to the search for truth in that it leads to the loss of otherwise relevant and reliable evidence
* Wigmore 🡪 the investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion of these privileges
* Compelling reasons must exists before a privilege is recognized
  + There must be some overriding social concern or value that warrants the loss of probative evidence
    - This is a matter of policy more than proof
* Assumption 🡪 privilege goes to protect some societal interest
  + This is an assumption not open to proof
* *R v Gruenke* 🡪 SCC rejected the creation of a blanket privilege for religious communications
* Wigmore fashioned 4 conditions to serve as the foundation for determining all such privileges whether claimed or established:
  1. The communications must originate in a *confidence* that they will not be disclosed
  2. This element of *confidentiality* *must be essential* to the full and satisfactory maintenance of the relation between the parties
  3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*
  4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal litigation
     + This test represents the “utilitarian” approach to privilege in that privilege is created to serve the greater public good
* In recent years, confidentiality or “protection of privacy” has been advanced as a sufficient justification to found a privilege
  + The privacy models widens the scope from Wigmore

### “class” privileges and “case-by-case” Privileges

* *R v Gruenke* 🡪 SCC made a distinction between “class” and “case-by-case” privileges
* **Class privilege** 🡪 there is a *prima facie* presumption that the communications are privileged and inadmissible
  + The party urging admission must show why the communications should *not* be privileged
  + Two of the most significant class-privileges:
    - Common law – solicitor client privileges
    - Under statute – spousal communications
  + A third, less defined privilege applies to settlement discussions between actual or contemplated litigants
* **Case-by-case privilege** 🡪 there is a *prima facie* assumption that the communications are *not* privileged and are admissible
  + In order to determine whether privilege applies in a particular case, the Court accepted the Wigmore test
* The Wigmore criteria are as follows:
  + The communication must originate in confidence that it will not be disclosed
  + The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between parties
  + The relationship must be one which in the opinion of the community ought to be sedulously fostered
  + The injury that would inure to the relationship by the disclosure must be greater than the benefit thereby gained for the correct disposal of litigation
* The general rule is that the public has the right to every person’s evidence
  + A recognition of a new class of privileges will be very rare
* SCC has commented that any new classes of privileges will likely have to be created by legislature

### waiver of privilege

* The right to claim or waive privilege belongs to the holder – for whose benefit the privilege was created – and it is essential to identify who actually holds the privilege
* Issues arise when the government is the holder
  + In a narrow sense, the holder is the executive counsel for the government
    - This interpretation would insulate government from any claim of waiver by its civil servants
  + A more palatable interpretation is to apply the principle of distributed governmental authority
    - A privileged communication may be waived by a civil servant acting within that person’s proper authority and responsibilities
* The holder can be a party to the litigation or an ordinary witness
* Witness holder 🡪 none of the parties have the right to assert the privilege, and none of the parties are harmed if a TJ erroneously overrides a witness’ claim for privilege
  + Only the witness has been harmed
  + Neither party can appeal the error as no harm was done to the parties
  + **On the other hand** – if a TJ erroneously upholds privilege and evidence is lost, this loss may give the party deprived of the evidence grounds for appeal
* The holder may waive privilege and disclose the information
* The waiver may be made expressly or may be found by implication
* An express waiver of privilege will occur when the holder:
  + Knows of the existence of privilege
  + Voluntarily evinces an intention to waive it
* An implied waiver is not based solely on finding an implied intention on the part of the holder to waive the privileged communications, but is also based on considerations of fairness and consistency
* Parties cannot use privilege as a sword and a shield
  + I.e. only invoking it for conversations that are unfavorable and waiving it for favorable conversations
* Waiver as to part of communication will constitute waiver as to the entire conversation
* Mere reference to obtaining legal advice is not sufficient to constitute waiver; waiver involves more
* In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent
* Implied waiver often arises when parties put their state of mind into issue
  + i.e. they allege they acted in good faith upon the advice of legal counsel
    - In this situation, that party cannot at once make the assertion of good faith without disclosing the legal advice
* Waiver of privilege will not necessarily result in a general waiver for all purposes
  + The waiver may be of limited application
    - i.e. suggesting a party acted on advice in a letter from their lawyer will only waive privilege to that letter, not to all communications between the parties

### inadvertent disclosure of privileged information

* Inadvertent disclosures are unintentional and do not constitute valid waiver of privilege
* Nevertheless, the traditional common law position has been that the privilege is lost and the communication is admissible
* This result is based on 3 different rationales:
  1. There is the principle that privilege protects the source of the information and not the information *per se*
  2. Privileges are narrowly construed by the common law courts in order to minimize the loss of evidence
  3. Those involved in the privileged relationship are obliged to safeguard their communications, and if they do not, then so be it, privilege is lost
* Since *Descouteaux*, courts are affording greater protection to inadvertently disclosed privileged information
  + There have been a number of decisions where counsel are removed as solicitors of record when they become aware of and decide to make use of privileged documents sent to them by mistake
    - As such, courts are willing to protect privilege and chastise counsel for taking advantage of inadvertent mistakes
* Civil cases 🡪 disclosure does not automatically result in the loss of privilege; nor will it be automatically protected
  + Matter of case-by-case judgment
* *Metcalfe v Metcalfe* 🡪 MBCA stated that the starting point is that a court should protect the confidentiality of privileged communications as must as possible
* **But** inadvertently disclosed information can be used where the communications are important to the outcome of the case and there is no reasonable alternative form of evidence that can serve the same purpose
* Different principles apply in criminal cases
  + Full answer and defence considerations in a criminal case discourage courts from using privacy interests to supress information that may assist the accused; even though they might suppress similar information in a civil case

## solicitor-client privilege

* A communication between a solicitor and a client, of a confidential and related to the seeking, forming or giving of legal advice, is privileged information
  + The privilege survives death of either party
  + It is the strongest privilege recognized in law, as close as it gets to absolute
* There is no privilege for communications that are themselves criminal or that are made with a view to obtaining legal advice to facilitate to commission of a crime or fraud
* The privilege may also be overridden where it would result in the withholding of evidence that might enable an accused to establish his innocence, or where public safety is at risk
* Solicitor-client privilege arises because lawyers have made themselves indispensable to the administration of justice
  + Clients seeking advice **must** be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent
  + Privilege is essential to providing sound legal advice
    - Clients need to be candid and furnish all relevant information that must be provided to lawyers if they are to properly advise their clients
* Privilege belongs to the **client** and is not for the lawyer to waive
  + Client can authorize the lawyer to disclose
* Wigmore – Scope of solicitor-client privilege:
  1. Where legal advice of any kind is sought
  2. From a professional legal adviser in his capacity as such
  3. The communications relating to that purpose
  4. Made in confidence
  5. By the client
  6. Are at his instance permanently protected
  7. From disclosure by himself or by the legal advisor
  8. Except the protection be waived
* Privilege protects confidential communications that arise on contact
  + No need for a formal retainer
* Clients contact with the lawyers secretary or clerks is also privileged
* Casual communications are not privileged
* Privilege will protect communications where legal advice is sought; it will not protect advice given by lawyers outside of the law
  + E.g. no privilege attaches to general business matters
* Each situation must be assessed on a case-by-case basis
  + Courts must examine the substance of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered
* The communications must be intended to be confidential
  + The presence of an unnecessary third party undermines such intent
* A lawyer can have more than one client so long as the information is shared among those with a “common interest”
  + This will create privilege
    - **But** should a dispute arise among the parties, the privilege is inapplicable and the respective parties may demand disclosure
* The common interest exception has been expanded to cover those situations in which a fiduciary or like duty has been found to exist between parties, such as a trustee-beneficiary
  + Key 🡪 parties have the “self-same interest” or share a common goal
* The privilege protects “communications” – involves the intentional imparting of information
* Privilege does not attach to pure facts, but this is not always clear or definite
* If there is an issue, the courts will look at the connection between the fact and the communication
  + If the fact is integral to the solicitor-client exchange then it should be presumed to be privileged
* What about the identity of the client?
  + *Fink* 🡪 SCC stated that the name of client can be protected by privilege, but not always
    - In normal circumstances, they are not privileged
      * The client must go to the lawyer with the intention of his identity remaining confidential
* Privilege cannot be use to shield the client from disclosing otherwise non-privileged material
  + E.g. a client cannot send tax documents to a lawyer for protection while undergoing a tax audit
    - Privilege does not apply to documents that existed prior to the relationship
* Privilege does not apply to physical objects (they are not communications)
  + Smoking gun
  + Stolen property
* Privilege outlasts the relationship
  + Once privileged, always privileged
  + **Exception** 🡪 will cases, where the execution, contents or validly of the will is in dispute and in trust cases where the settlor is dead
    - The rationale is that the client’s interests are furthered through disclosure of their confidences
* *R v Jack* 🡪 MBCA allowed a family lawyer to testify about conversations with the accused’s wife prior to her murder. The court found that it was in the interest of both the client and the administration of justice that the communications be admitted into evidence

### communications in furtherance of crime or fraud

* Privilege does not attach to communications that are in themselves criminal or else are made with a view to obtaining legal advice to facilitate the commission of a crime
* Only communications made for the purpose of *lawful* advice are privileged
* Privilege is not intended to assist in the aiding and abetting of crimes
* The clients intentions are important:
  + The law will not discourage client’s from seeking legal advice in good faith even regarding transactions that ultimately turn out to be illegal
* **Future crimes** 🡪 privilege will not attach
* **Past crimes** 🡪 privilege will protect communications involving the litigation of past crimes
  + Will also protect the seeking of advice to *avoid* committing future crimes
* The party suggesting that there has been a fraudulent wrongdoing must provide an evidentiary foundation
  + If the foundation is met, the TJ must vet the material and can only disclose the evidence if it can fairly support an inference of crime
* Privilege wont’ extent to **any** unlawful conduct
  + Torts
  + Regulator offences
  + Abuse of process applications

### innocence at stake

* No privilege is absolute
  + But it is rigorously protected and only overridden as a last resort
* **Absolute Necessity Test** 🡪 as restrictive a test as may be formulated short of an absolute prohibition in every case
* Two exceptions to solicitor-client privilege:
  1. The “innocent at stake” exception
  2. The “public safety” exception
* Privileges will yield to the accused’s right under section 7 of the *Charter* to make a full answer and defence

##### *McLure* Threshold Test

The accused must establish that:

1. The information he seeks from the solicitor-client communications is not available from any other source
2. He is otherwise unable to raise a reasonable doubt

If the threshold test is not met, analysis ends. If the threshold is met, the judge proceeds to the innocence at stake test.

##### Innocence at Stake Test

**Stage 1:** The accused seeking production of the solicitor-client communication has to demonstrate an evidentiary basis to conclude that a communication exists that *could* raise a reasonable doubt as to guilt

**Stage 2:** If such an evidentiary basis exists, the TJ should examine the communications to determine whether, in fact, it is *likely* to raise a reasonable doubt as to the guilt of the accused

* Striker burden than stage one

If the innocence at stake test is satisfied, the judge should order disclosure.

Onus is on the accused to establish each element of the test on a balance of probabilities

* *Brown* 🡪 SCC expanded on the *McLure* test
  + First – must be determined that privilege even applies before moving to a *McLure* hearing
  + Second – in both the threshold test and the innocence at stake test, there is a requirement that the accused have some knowledge of the information or communication
    - Mere speculation as to what the file may contain is not enough

**Threshold Test**

* The first component of the threshold test is necessity
  + The information cannot be available from any other admissible source
* The second component is whether the accused can raise a reasonable doubt in any other way (also goes to necessity)
  + If the accused can be acquitted in some other way, do not need to negate privilege
* The SCC has suggested that it is preferable to delay the *McLure* application to the end of the Crown’s case as it allows the TJ to better determine if the accused’s innocence is at stake
* If there is some evidence upon which a reasonable jury, properly instructed, could acquit, the *McLure* application should be denied
* In the event that a TJ does not allow the application and the accused is convicted, the Appeal court may be able to conduct the *McLure* hearing

**Innocence at Stake Test**

* Stage one is the precursor to getting the TJ to examine the communication
* Stage two – judge examines the communications
* Both stages of the test speak to raising a reasonable doubt about the accused’s guilt which has been interpreted narrowly by the SCC
  + E.g. *Brown* held that the quality of the evidence is not a factor
    - Arguably, it should be
* The tests developed in *McLure* and *Brown* are unduly restrictive
* A misapplication of the *McLure* test could lead to a wrongful conviction, which it was designed to avoid
* The response would be to loosen the restrictions in the test
* *Brown* 🡪 SCC set out a number of safeguards pertaining to the third party who’s privilege is violated:
  + The judge should order production of only those communications that are necessary to allow the accused to raise a reasonable doubt
  + The communications are not to be turned over to the Crown; if the accused doesn’t present the communications, they will never come to the attention of the Crown
  + If the communications are use, the privilege holder is protected under the *Charter* by “use immunity and derivative use immunity”. The privilege holder’s communications cannot be used in a subsequent case against the privileged

### public safety

* *Smith v Jones* 🡪 SCC recognized a public safety exception to solicitor-client privilege (planned to kill prostitutes, told psychiatrist, who was acting as an agent of the lawyer)
* When public safety is involved and death or serious bodily harm is imminent, solicitor-client privilege should be set aside
* In determining when public safety outweighs privilege, there are three factors to consider:
  + **Clarity** – is there a clear risk to an identifiable person or group of persons?
  + **Seriousness** – is there a risk of serious death or bodily harm?
  + **Imminence** – is the danger imminent?
* It is implicit that the public interest exceptions recognized for solicitor-client privilege are available for all other privileges
* Privilege must yield to the public interest in seeing that the innocent are not convicted or that the public are kept safe, then all other privileges must so yield as well

### law society proceedings

* The *Legal Profession Act* provides that no claim of solicitor/client privilege can be advanced by a lawyer who is facing disciplinary proceedings
* The Hearing Committee may go in camera to protect the client’s privilege, however the lawyer cannot “hide behind” the privilege
* The Law Society Rules, in addition to adopting the rules in *Smith v Jones* and extending it, also provide that the lawyer must disclose confidential information to the Law Society when required to do so by them and that the lawyer must disclose confidential information when required to do so by the law
* When acting for more than one party in the same matter, the lawyer must disclose to all such parties for whom he is acting any material confidential information acquired by the lawyer in the course of the representation and relating to the matter in question
  + This speaks to the notion of shared privilege
    - What you learn from one client must be shared with the co-client as there cannot be confidences by the lawyer between the co-clients
* The Rules of the Law Society permit the lawyer to disclose privileged information when it is reasonably necessary for the lawyer to propery prosecute an action or defence a clime or allegation in a dispute with a client

## litigation privilege

* Communications between a lawyer and third persons are privileged if, at the time of the making of the communication, litigation was commenced or anticipated and the dominant purpose for the communication was for use in, or advice on, the litigation
* There is likely no solicitor-client confidentiality at stake
* Witnesses, information gathered for litigation, research 🡪 all likely protected under litigation privilege (work product, solicitor-third party, or anticipation of litigation privilege)

### the rationale for the privilege

* Separate and distinct from solicitor-client privilege in the following ways:
  + Rationales underlying the two privileges are different
    - Solicitor-client privilege protects the relationship
    - Litigation privilege is based on the adversarial system, which encourages the opposing party to prepare their respective cases as best they can
      * It would impede preparation if parties had to turn over their preparation to the other side
  + Solicitor client privilege exists any time a client seeks legal advice, whether or not ligation is involved, whereas litigation privileges applies only in the context of litigation
  + Solicitor privilege is permanent whereas litigation privilege is temporary and ends with the litigation (no need to maintain adversarial protection after litigation ends)
  + Solicitor privilege is meant to protect client confidences whereas litigation privilege does not require that communications be made in confidence (will likely share those communications at trial)
  + Solicitor privilege is the *highest* privilege, not lightly override whereas litigation privilege is far more likely to be truncated
* **Parameters of litigation** 🡪 the enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action. Proceedings that raise issues common to the initial action and share its essential purpose would also qualify
* Litigation privilege arising from a civil case is not protected in a criminal proceeding arising from the same incident
* Expert witnesses will usually be considered agents of the lawyer and will therefore be protected under solicitor-client privilege
  + The function of the relationship must essential to the existence/operation of the solicitor-client relationship
    - E.g. a private investigator engaged to investigate and interview witnesses is a gatherer of information and his findings are not protected by solicitor client privilege
* Litigation privilege is intended to establish a “zone of privacy” for the preparation of litigation and nothing more

### the dominant purpose test

* Litigation party privilege attaches to information obtained by the solicitor or the agent for the solicitor from third persons, if made for the purpose of litigation either commenced or anticipated
* *Waugh v British Railways Board* 🡪 leading case, developed sole purpose test (narrow test)
* Dominant purpose test 🡪 a document may be prepared with more than one purpose in mind, but the “dominant purpose” must be that of litigation before privilege will attach
  + This is the accepted test in Canada

### the status of copies

* An unresolved issue concerns the status of copies of otherwise public or non-privileged documents
  + If the originals are not privileged, should the copies with the lawyer be privileged?
* *Hodgkinson v Simms* 🡪 the majority found the copies to be privileged, largely on the premise that counsel need to be able to prepare the case in confidence that the information they collect will be protected
  + The dissent, claiming the move to greater disclosure, would not uphold privilege of copies
* Should not be an all or nothing approach
* As a matter of principle, copies of documents, merely collected or gathered by the lawyer for potential use in the litigation should not be privileged
  + Lawyer is just acting as a collector of information
* *Blank* 🡪 SCC, extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does not appear to be more consistent with the rationale and purpose of the litigation privilege

### the implied undertaking rule

* Documents disclosed on discovery are not free to be used by the receiving party for purposes other than the present litigation
* Documents supplied in discovery are subject to an “implied undertaking” that they are for use only in the present action
* **Rationale is two-fold**:
  + The discovery process in civil cases amounts to a state-sanctioned invasion of privacy
    - Litigants are compelled by the rules of civil procedure to reveal documents and to answer questions in discovery
  + By assuring litigants that the information they provide will not be used in collateral matters encourages more complete and candid discovery
    - Whatever occurs in the discovery room stays in the discovery room unless presented at trial
* If a party wants to use the information outside of court, they must seek leave and probative value must outweigh prejudice
* *Juman v Doucette* 🡪 SCC, created guidelines for dealing with the competing interests:
  + The implied undertaking rule is not absolutely protected but should not be too readily set aside
  + It is important to identify the competing values at stake in the particular case
  + Prejudice to the parties should be considered
  + The implied undertaking rule ought not to shield contradictory testimony
* An open issue is whether there is a similar implied undertaking rule to cover information disclosed by the Crown to the defence in criminal proceedings
  + *Wagg* ONCA:
    - The civil implied undertaking rule does not apply to criminal disclosure because the rule is concerned with compulsion through the civil discovery process
    - The guiding principle is that because a party is given access to and use of documents for a particular purpose, there is necessarily an implication that they will not be used for any other purpose
    - That there are important policy reasons for recognizing an implied undertaking rule with respect to disclosure of materials to the defence in a criminal case
      * There is concern that the highly personal information about third parties is made available to defence
    - That, whilst this is true, third parties must accept intrusion in the interest of achieving a proper result in a criminal case, the law should provide them with some reasonable protection against use of the information for entirely different purposes
    - That the disclosing bodies, namely the Crown and police, be given notice so that they may resist any production if necessary
    - That where one party is in possession of the Crown brief material, fairness generally dictates that it be produced to the other side
    - That any information that was used in courts should generally be produced, subject to special concerns

## spousal privilege

* Bill C-32, which is now law promulgated by the Senate in July 2015, maintains spousal privilege but with respect to spousal incompetency, vis-a-vis the Crown, Parliament has essentially reversed the law here
* At common law, spouses are not competent to testify because of their interest in the case
* S 4(3) of the *Canada Evidence Act* was enacted to codify the rule
  + No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made by her husband during their marriage
* The AB Evidence Act states “adult interdependent partners” which likely covers common law relationships
* Must separate competency from privilege
  + Competency may prevent a person from testifying at all
  + Privilege may allow a spouse to testify but invoke privilege for certain questions
* ONCA held that a competent spousal witness can assert privilege but it must be done in from to the jury to allow the jury to understand by the Crown was not pursuing a certain line of questioning
* Spousal privilege characteristics include:
  + Spouses are legally married (Canada Evidence Act)
  + Applies to communications and not observations
  + Made during the marriage (Canada Evidence Act)
  + Privilege belongs to the witness for the witness to assert in the presence of the trier of fact
  + Privilege ends with the marriage
* Justifications for spousal privilege:
  + It encourages the sharing of confidences between spouses
  + It preserves harmony between spouses
  + It is suggested that the invasion of private marital communications is an indelicate undertaking not to be sanctioned
* These justifications are not strong – spousal privilege was abolished in England
* In Canada, communications during the marriage are protected
  + Those before and after marriage are not
    - It does not apply to widowers
* Unlike other privileges, the communications do not necessarily have to be made in confidence
  + There is authority that “any communication” means exactly that and protects all spousal communication whether intended to be confidential or not
* *Gosselin v R* 🡪 the SCC refused to allow observations to be part of spousal privilege
* Privilege is held by the spouse receiving the communication and not by the spouse who made it
  + E.g. an accused who told his wife he killed someone cannot attempt to you use spousal privilege to stop her from testifying

## settlement negotiation privilege

* There exists a “class” privilege to protect settlement discussions
* The discussions must be made during the course of settlement negotiations for the purpose of the settlement and are not intended to be disclosed or used against the parties should the negotiations fail
* **Fundamental purpose**: encourage settlements
* Applies in both civil and criminal cases
* The privilege applies to the parties involved in the negotiations and protects communications from being disclosed to third parties
* There are exceptions
  + Where the existence of an agreement or the terms of a settlement are at issue, or the negotiations give rise to a cause of action, the privilege may be overridden
  + Can be overridden if there is a compelling public interest to do so

### the nature and scope of the privilege

* This privilege is in place mostly as a matter of public policy to encourage honest and frank discussions between parties
* A second rationale is the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence
* As a class privilege, settlement privilege presumptively applies when parties enter settlement discussions and does not need to be expressly invoked by the parties
* Preconditions to the privilege:
  + A litigious dispute must be in existence within contemplation
  + The communication must be made with the express or implied intention that it would not be disclosed to the Court in the event that negotiations fail
  + The purpose of the communication must be to attempt to effect a settlement
* The use of “without prejudice” is not required nor conclusive of the privilege
* The substance and context of the communication has to be considered
* Privilege protects communications between parties and prevents communications with third parties
  + i.e. cannot seek disclosure of a settlement between A and B in a dispute between A and C

### overriding the privilege

* The onus lies on the party seeking disclosure of communications otherwise caught under settlement privilege to prove an exception
* Settlement privilege is not as highly protected as solicitor-client privilege and is not considered a substantive rule of law or fundamental civil right
* **The party seeking to override it must show that a competing public interest outweighs the public interest in encouraging settlement**
* Key factor – the relevancy of and use to be put for the communications sought
* The public policy basis is to prevent anything said in settlement negotiations being relied upon as an admission against their maker
  + The privilege protects admissions
* Where the communication is sought to be used against its maker and there is little or no prejudice, then the compelling public policy purpose underlying the rule is not triggered and courts are more inclined to override the privilege
  + E.g. *R v Bernardo* 🡪 negotiations between the Crown and the key crown witness, Holmoka, were admitted. Holmolka was already tried and sentenced so the communications would not bring any risk of prejudice against her
* ***Meyers v Dunphy* Established Exceptions:**
  + Whether without prejudice communications have resulted in a concluded compromise agreement
  + To show that an agreement apparently concluded between the parties during negotiations should be set aside on the grounds of misrepresentation, undue influence or fraud
  + Where a clear statement made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel
  + If the exclusion of the evidence would act as a cloak for perjury, blackmail, or other unambiguous impropriety, but such an exception should only be applies in the clearest case of privileged occasion
  + In order to explain delay or apparent acquiescence in responding to an application to strike out a proceeding for want of prosecution by use of the letters is to be limited to the fact that such letters have been written and the dates at which they were written
  + Whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him
  + Where an offer is expressly made without prejudice except as to costs
* This list should not be applied in a mechanistic way
  + It should be analyzed in light of the purpose and principles underlying the rule
* Well recognized exception – prove the existence or scope of a settlement
  + Once the parties have agreed to a settlement, it is necessary to give those parties the means to prove the terms of their agreement
* Guiding factors in finding an exception:
  + First, if the settlement or discussions surrounding a settlement are at issue, then presumably the privilege does not apply
    - This is recognized in the first three exceptions above
  + Second, relevancy and privilege need to be considered
  + Third, there needs to be a compelling public interest to override the protection; the privilege is founded in the public interest and may have to give way to the public interest
* Settlement privilege is a common law rule and parties can contract out of common law rules

## case-by-case privilege

* Certain communications will be privileged on a case-by-case basis using the Wigmore Four criteria:
  1. The communications must originate in a confidence that they will not be disclosed
  2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties
  3. The relation must be one which in the opinion of the community ought to be sedulously fostered
  4. The injury would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation
* Claims for privilege are made by professionals of all kinds and non-professional relationship to seek protection of certain confidences
* Courts have resisted for the most part
  + Expanding privilege too far will result in the loss of the value of evidence
* SCC has held that new “class” privileges will be rare
  + It can only be created through legislation
* Criteria 1 – does not matter if the conversations will ultimately be privileged, but they have to be made in confidence
  + Absolute protection is not required to fulfill this criteria
* Criteria 4 – the interest served by non-disclosure must extent to any effect on society of the failure of individuals to obtain treatment restoring them to healthy and contributing members of society
  + The interest served by protection from disclosure must include the privacy interest of the person claiming privilege and inequalities which may be perpetuated by the absence of protection
  + Also seeks to protect ss 8 and 15 Charter rights
* If it is found that in a claim for privilege, a certain document or class of documents is required for the truth, the court must limit the production to the extent required to avoid an unjust verdict
* The interest in disclosure in a civil case is less compelling than in a criminal case
  + Lose money and reputation in civil, lose liberty in criminal
* Should a balancing of competing interests favor disclosure, then they should consider whether or not full disclosure is necessary
* **Problem** 🡪 case by case approach compromises certainty
  + Individuals in confidential relationships are not able to predict whether their communications will or will not be protected
* Procedure: conducted in *voir dire* and the burden rests on the person seeking to exclude the evidence on the basis of privilege

### journalist-source case-by-case privilege

* *R v National Post* 🡪 SCC recognized that journalist-source privilege is available on a case-by-case basis
* There is some flexibility in the analysis for the third criteria – fostering the relationship in the public good
* As with most case-by-case privileges, the primary area of contention will be under the fourth criterion which does “most of the work”
* The court must weigh the value to the public of the relationship in question against any countervailing public interest, such as the investigation of a particular crime or litigation of a particular matter
* Suggested areas to consider in the weighting process:
  + The nature and seriousness of the offence under investigation
  + The centrality to the dispute of the evidence sought
  + The potential probative value of the information
  + The type of information sought
  + The purpose of the investigation
  + Whether the facts, information or testimony are available from another source
  + The degree of public importance of the store and whether the story is already in the public domain
* The onus is on the media to establish all four criteria

## protection of third-person records in criminal cases

* In criminal cases, the Crown has a duty to turn over to the defence all relevant information in its possession
  + Third parties are under no such duty
* The accused must apply to the court for the production of third party records
* Sexual offence cases 🡪 special legislated procedure the accused must comply with before the TJ orders a complainant or witness to produce specified records to the accused
* If the records have already been turned over to the Crown, they are not to be disclosed to the accused unless the complainant or witness waives their production or the TJ orders production
* The Crown’s investigative work is not for them to use in securing a conviction; it is the property of the public to be used to ensure justice is done
* The threshold of relevancy for the Crown is low; if the information is of some use to the defence, it should be disclosed
  + Duty to disclose is a simple request, does not require court application
* The broad duty of disclosure is premised on two assumptions:
  + That the material in possession of the prosecuting Crown is relevant to the accused’s case
  + That this material will likely compromise the case against the accused
* The accused has an interest in disclosure for the purpose of making a full answer and defence
* Not *all* Crown information must be turned over, they do have some discretion
  + If the information is irrelevant or disclosure is governed by law
    - Crown bears the burden of proving that disclosure should not occur
* **Information in the possession of the Crown that is clearly relevant and important to the ability of the accused to raise a defence *must* be disclosed to the accused regardless of any potential claim of privilege**
* The disclosure regime attaches to the prosecuting Crown, not the “Crown” as a whole and other non-involved state agencies or departments
  + But, the police, despite being separate, do have a duty to disclose to the Crown
    - In this way, for disclosure purposes, the police and the Crown are regarded as one
* *R v McNeil* 🡪 where the Crown or police are aware that relevant information exists, they should secure it as part of the investigation
  + Where police misconduct records of officers playing a material role in an investigation are either related to or could reasonably impact on the case against the accused, then they should be retrieved and treated as “first party” information and disclosed in accordance with the obligations under *Stinchcombe*
* When put on notice of potentially relevant information, Crown counsel are under a “duty to inquire” and obtain the information if it is reasonably feasible to do so
* The scope of the duty to inquire has some parameters:
  + An accused does not have a free standing constitutional right to an adequate investigation of the charges against him/her
  + An accused does not have a constitutional right to direct the conduct of the criminal investigation of which he/she is the target
  + The disclosure right, as broad as that right is, does not extend so far as to require the police to investigate potential defences
* Third party production, unlike Crown disclosure, requires a weighing of competing rights
  + The accused’s right to make a full answer and defence must be weighed against the third party’s right to privacy
    - There are two approaches: common law and s 278 of the CC

### the common law: *R v o’connor*

#### *R v O’Connor*

*Facts:* - Roman Catholic Bishop was charged with sexual offences against complainants 25 years earlier

* Defence counsel obtained a pre-trial order requiring disclosure of the complainant’s entire medical, counselling and school records and that the complainants authorize production of the records
* The records later came into the Crown’s possession
* The TJ was given all the therapy records of the complainants
* Over the several court appearances on various issues, the defence would raise the issue of non-disclosure and the TJ would order disclosure and the Crown would supply a few more records
* It ultimately got to a point where the Crown turned over what they said were all the records to defence
* At trial, it was apparent that there were copies of drawings that had not been provided when the Crown attempted to introduce them into evidence
* The TJ stayed the proceedings and the BCCA allowed the Crown’s appeal and ordered a new trial

*Issues:* The manner in which the accused can obtain production of therapeutic records from the third party custodian of the documents in question.

*Held:*

*Reasons:* - The Crown has an ethical and constitutional duty when requested by the accused to disclose all information in its possession or control, unless it can satisfy the trial judge that the information is clearly irrelevant or privileged.

* The therapeutic records of sexual assault complainants should not be subject to a different disclosure regime than other information in the Crown's possession.
* ­*R v O’Connor* 🡪 SCC’s first attempt to strike a balance between the accused’s right and the third party’s rights
  + O’Connor was a former Catholic priest charged with sexual offences committed against former student
* The defence sought disclosure of the complainants’ entire medical, counselling and school records
  + At the time, the prosecution did not have this
* Two step procedure for production of third-party records:

##### *O’Connor* Application Procedure

1. Accused obtains *subpoena duces tecum* and serves it on 3rd party record holder requiring them to attend court with the relevant records (**THIS DOES NOT MEAN THEY ARE PRODUCED TO THE JUDGE** 🡪 **Production decided per 1st stage of O’Connor**)
2. Accused brings an application showing that the records sought are likely relevant. Notice of application is given to Crown, 3rd party and all other interested parties
   1. Not an onerous standard to meet and once met, then the records must be handed up to the Judge for his inspection.
   2. If the judge is satisfied that the information contained within the records is likely relevant to an issue in the case, then he will examine them to determine whether or not an order of production ought to be made and to whom the documents ought to be disclosed and on what terms.
   3. The judge is not concerned yet with admissibility - this test only asks whether there is a reasonable possibility that the information contained within the records will be logically probative to an issue in the trial.
   4. LHD: The correct place for the application is trial, not at the prelim √≠ But lay the foundation in prelim
3. O’Connor application is brought before the judge
4. If record holder advances a well-founded claim that the targeted document is privileged then privilege will bar production unless accused can show their innocence is at stake
5. If privilege is not an issue then the judge determines if production should be compelled under the following test:
   1. Step 1 – the accused must convince the TJ that the information sought is “likely relevant”
      1. The threshold of proof is significant but not onerous
         1. The relevance threshold is set to prevent the defence from going on a fishing expedition
      2. Likely relevant 🡪 there is a reasonable possibility that the information is logically probative to an issue at trial of the competence of a witness to testify
   2. Step 2 – the TJ must examine the records to determine whether, and to what extent, they should be produced to the accused
      1. This is the stage in which the TJ balances the competing interest

**Summary**

**Issue:** What is proper text for production of 3rd party records?

**Ratio:** 3rd Party records already in the possession of the Crown:

* Not protected by quasi-privilege: Crown must disclose all potentially relevant information, including these 3rd party records, as per Stinchcombe
* Relevance of such records will be presumed
* If Crown seeks 3rd party records they are obligated to advise the complainant that it will probably be disclosed to the accused and obtain consent of complainant
* If complainant refuses then ethical Crown may advise complainant that they may not be able to go forward with prosecution

3rd Party records **not in possession** of Crown

* Are protected by quasi-privilege (2 competing policy factors)
* Accused’s right to make full answer and defence s.650(3) Criminal Code and enshrined as a principle of fundamental justice under s.7 Charter
* Complainant’s right to reasonable expectation of privacy

### legislation: third-party records in sexual offences

* Legislation followed in response to *O’Connor*
* On its face, this legislation, ss 781.1 to 278.91 of the CC rejects the *O’Connor* test, notwithstanding that the test was developed in reliance on constitutional principles
  + Legislation was upheld by SCC in *R v Mills*
    - They read down the legislation so that it could pass constitutional muster and not infringe the accused’s right to make a full answer and defence
* Broad impact; applies to both complainants and witnesses
* Records 🡪 any form of record that contains personal information for which there is a reasonable expectation of privacy
  + Use s 8 to determine this
* Virtually all government records are caught because the s 278.1 list includes records whose privacy is protected by statute
* Unlike privilege, a reasonable expectation of privacy may still be found in the presence of third parties
  + E.g. group therapy
* The legislation applies even though the witness or complainant may have turned over the records to the prosecution, *contra O’Connor*
  + In these situations, the Crown is under a duty to notify the accused that it has such a record in its possession, but it does not disclose the record’s content unless the witness waives the production or the court so orders
* Does not apply to records already in the possession of the accused
* S 278.2 provides an exemption 🡪 does not include records made by persons responsible for the investigation or prosecution of the offence
* Adopts the two step approach in *O’Connor* but changes it significantly:
  + First step is the same in that the accused must convince the TJ for the record, but the threshold is stricter
    - Relevance inquiry and interest of justice inquiry
  + Second step involves judicial inspection, but with a stricter standard

#### *R v Mills*

*Facts:* - Accused was charged with sexual assault and unlawful sexual touchin

* The offences allegedly occurred when the complainant was 13 years old
* At the start of trial, defence counsel sought full disclosure of all the complainants therapeutic records that were in the possession of a counselling organization
* The TJ ordere portions of various records to be produced
* Defence counsel then sought production of similar records held by a psychiatrist and another organization
* The TJ advised the parties that Bill C-46 had just been proclaimed in force, amending the CC to include s 278.1 to 278.91
* Defence challenged the constitutional validity of the amendments on the grounds that they violated the accused’s rights under s 7 and 11(d) of the *Charter*
* The trial judge permitted the defence to proceed with its constitutional challenge without first applying for the third party records under the new provisions.
* He found that Bill C-46 was unconstitutional to the extent that it altered the balance between privacy rights and the rights of an accused to a fair trial achieved in

*Issues:* Whether the new provisions are constitutional

*Held:* Yes

*Reasons:* - Parliament drafted Bill C-46 to govern the production of private records of complainants and witnesses in sexual assault proceedings in place of the common law regime established in *O'Connor*.

* Bill C-46 outlines a two-stage process for the production of records
  + At the first stage, the accused is required to establish that the records sought are "likely relevant to an issue at trial or to the competence of a witness to testify" and that production is necessary "in the interests of justice."
  + At the second stage, the trial judge must view the records in order to determine whether they should be produced to the accused.
* Although the procedure in Bill C-46 differs significantly from the O'Connor regime by directing trial judges to consider the salutary and deleterious effects of disclosure on the accused's right to full answer and defence and on the complainant or witness's right to privacy and equality, it does not follow that the legislation is unconstitutional.
* The ability of the accused to make full answer and defence is a core principle of fundamental justice and is crucial to ensuring that innocent persons are not convicted.
  + Non-disclosure of relevant information by the Crown can seriously erode this right, which must be defined in light of other principles of fundamental justice which may embrace interests beyond those of the accused.
* The right to make full answer and defence does not automatically entitle the accused to admit all evidence that may tend to prove his or her innocence, irrespective of the ordinary rules of evidence
  + its scope must be determined in light of the privacy and equality rights of complainants and witnesses
    - This means that the accused's right to make full answer and defence is not automatically breached when he or she is deprived of relevant evidence
* Where the records to which the accused seeks access are part of the case to meet or their probative value is high, the accused's ability to raise a reasonable doubt about his or her innocence is directly implicated
  + In such cases, the complainant's right to privacy must yield to the accused's right to make full answer and defence, in order to avoid convicting the innocent
  + Where the records in question are not part of the case to meet and will serve only to distort the truth, privacy and equality considerations will take precedence
* Bill C-46 applies to all records of complainants and witnesses in sexual offence proceedings which contain personal information in which there is a reasonable expectation of privacy.
* By limiting its coverage to records in which there is a "reasonable" expectation of privacy, Bill C-46 is consistent with s. 8 privacy rights
  + Applied in this way, ss. 278.1 and 278.2(1) of the Criminal Code catch no more records than they should and are not overly broad.
* While the Crown can obtain the complainant's private records through a search warrant or subpoena, the accused can get them only by making an application under Bill C-46, unless legislative protection is expressly waived.

##### Step 1: Getting Inspection – The Relevance Inquiry

* Requires that the record is likely relevant to an issue at trial or to the competence of a witness to testify
* Requires that there is a reasonable possibility that the information is logically probative
  + Either to the material issue in the case or evidence relating to the credibility of witnesses and to the reliability of other evidence in the case
* S 278.3(4) must not be read literally, it must be read constitutionally
  + This section requires that the accused be able to point to “case-specific evidence or information” that show that the record is likely relevant to an issue at trial
  + It does not require that the accused show the precise manner in which the targeted document would be used at trial
* Questions that touch the private or personal domain of the witness’s life contained in the record are not permitted

##### Step 1: Getting Inspection – The “Interest of Justice” Inquiry

* Accused must convince the TJ that the production of the record is necessary in the interest of justice
* This is where the TJ must balance the accused’s right to make a full answer and defence and the third party’s right to privacy
* S 278.5(2) list eight factors to consider (5 are from *O’Connor*)

1. The extent to which the record is necessary for the accused to make full answer and defense
2. Nature and extent of the reasonable expectation of privacy with the record
3. Probative value of the record
4. Whether production of the record is based on discriminatory beliefs of bias
5. Potential prejudice to the personal dignity and right of privacy to whom the record relates
6. Societies interest in encouraging the reporting of sexual offenses\*
7. Societies interest in encouraging the obtaining of treatment by complainants of sexual abuse\*
8. Effect of determination on the integrity of the trial process\*

* The TJ is directed to merely consider these factors, they are not conclusive
* As a final protection for the accused, the TJ is always free to make whatever order is necessary in the interest of justice
* The Court’s advice is, when in doubt – inspect

##### Step 2: Inspection

* TJ reviews the record and then determines whether or not the record should be produced to the accused
* In deciding whether or not to order production, the same balancing factors are taken into account
* Three of the factors listed were expressly rejected in *O’Connor* for consideration at the production stage (starred above)
  + It was argued that these factors unfairly altered the balance against the accused
  + *Mills* held that these factors hold no controlling weight, they are just to be considered
* The legislation provides far more protection for witnesses and complainants in sexual cases than any other case-by-case privilege

## public interest immunity

* Government documents and information may be protected from disclosure when a judge determines that the public interest in preserving the confidentiality of the information prevails over the public interest in seeing that litigants have access to all relevant information
* Public interest immunity differs from privilege in 3 respects:
  + The protection is not “owned” by the Crown. Should the Crown fail to object, others, including the presiding judge, may do so in order to safeguard the public interest
  + The Crown cannot waive the protection
  + Its primary purpose, unlike privilege, is to protect information and not a relationship. Therefore, once the protection is given, no secondary sources may reveal the information
* Recognized at common law and in statute

### the common law

* Under the common law, public interest immunity gives protection to a broad array of government and public body interest, security concerns, cabinet decision making and police matters
* The court must balance two competing public interest:
  + On one hand, it is in the public interest that the administration of justice should not be frustrated by the withholding of relevant information
  + On the other hand, there are certain government secrets that should not be disclosed in the public interest
* This immunity is available in both civil and criminal actions
  + Civil – if protection is rejected, Crown discloses
  + Criminal – if protection is rejected, Crown discloses or stays the charges
* Generally, objection is based on either the class or content of the documents
* Class objections 🡪 concerned with protecting certain types of documents
  + Usually rely on concerns about candour
    - Candor argument – that confidentiality is essential to ensure full, free and frank discussions of matters of public importance
  + These objections rarely succeed
* Content objection 🡪 seeks to protect specific information contained in the documents
  + Specific concerns are raised and the courts have a far better understanding as to why the particular information ought not to be disclosed
* *Carey v Ontario* 🡪 leading case on common law approach to public interest immunity; provides a list of considerations when balancing competing interests:
  + The level of decision making
  + The nature of the policy decision
  + The particular contents of the documents
  + The time when the document or information is to be revealed
  + The importance of the case
  + The need or desirability of producing the documents to ensure that the case can be adequately and fairly presented
  + Whether or not the allegations involve government misconduct; and
  + The ability to ensure that only the particular facts relating to the case are revealed
* This is a move away from government secrecy
* Common law rule applies to matters within provincial jurisdictions and to claims of privileges brought by the provincial governments

### section 37: issue of a specified public interest

* Deals with protection of information relating to specified public interest
* Can only be taken by government official and cannot be heard in a provincial court
* S 37 is concerned with the disclosure of information
* If the Court concludes that the disclosure of the information would encroach upon a specified public interest that information can be released
  + But only if the public interest in disclosure outweighs the importance of the specified public interest
* Must balance the public interest in disclosure against the importance of the specified public interest
* Provincial courts can hear a claim for immunity under the common law
  + Encouraged; will save the inconvenience of adjourning the matter for a s 37 application in QB

### section 38: national security issues

* More aggressive provision, dealing with national security questions
* Imposes obligations on the Crown, defence, plaintiff, defendant or on any government official from whom disclosure is sought, to notify the AG in writing of any possibility that sensitive information or potentially injurious information is expected to be disclosed during a hearing
* The judge at the proceeding where the disclosure is anticipated is to be informed and prevent the disclosure
* Depending on the information, the AG of Canada or the Minister of National Defence is empowered to authorise the disclosure
* The person seeking the information can apply to the Federal Court, Trial Division for disclosure
* The judge must determine 3 issues:
  + Is the information sought to be disclosed relevant or not in the usual sense of the *Stinchcombe* rule, that is to say it may be reasonably useful to the defence
  + If the information is relevant that the judge must determine whether the disclosure of the information would be injurious to international relations, national defence, or national security
  + Upon a finding that disclosure would result in injury, the judge must determine whether the public interest in disclosure outweighs an importance in the public interest in non-disclosure

### section 39: cabinet and committee information

* Provides for cabinet security
  + Matters of cabinet secrecy, national security
  + Certain privileges that attach to federal government that are to be withheld on basis of state privilege
* Historically, there are items of national importance/security
* Provisions in the Evidence Act s. 37-38 which involve withholding of government information.
* Other than in anti-terrorism legislation, expanding state privilege somewhat

## protection of informant’s identity

* The common law protects the identity of an informant from disclosure in a criminal or civil proceeding
* This is recognized as a fixed rule
* It is subject to only one exception, imposed by the need to demonstrate the innocence of an accused person
* Whether to disclose the informant’s identity is not a matter of judicial discretion
* There is no balancing of interests to determine whether privilege applies
* **The decision has been made: the public interest is best served by protecting the identity of informants**
* Rationale:
  + Informants play an important role in solving crimes
  + Informants need to conceal their identities for their own protection and to encourage others to come forward with information
* If the informant goes beyond simply providing information, their privilege may be lost
  + They begin to play an active role in a criminal investigation
* Informant 🡪 simply furnishes information to the police
* Agent 🡪 acts on the direction of the police and goes into the field to participate in the illegal transactions in some way
* The information provided is not protected
* The **only** exception to this privilege is where the evidence is needed to demonstrate the innocence of an accused person
  + No exceptions in civil cases
* In determining whether or not the accused’s innocence is at stake, the courts must utilize the *McClure* Innocence at Stake Test

##### Innocence at Stake Test

* The test is applied in two stages in order to reflect the dual nature of the judges inquiry:
  + Stage 1 – the accused is seeking production of the privileged information and must provide some evidentiary basis upon which to conclude that there exists a communication that could raise a reasonable doubt as to his guilt
    - The judge will decide whether to review the evidence
  + Stage 2 – the TJ must examine the solicitor-client file to determine whether, in fact, there is a communication that is likely to raise a reasonable doubt as to the guilt of the accused

# unit 8 – self incrimination

## introduction

* The common law has long treated it unfair to force an accused person to be his own betrayer in a criminal case
* It is a matter of principle that a person should not be required to answer an allegation made against him unless and until the Crown has charged him and established a case to meet during trial by presenting evidence to support the allegation
* The idea that self-incrimination is offence rests on ideas about privacy and inherent dignity of individuals
* The principle against self-incrimination supports limits on the extent to which an accused person can be used as a source of information about his/her own criminal conduct
* The self-incrimination concept is unstable
  + It has a limited scope and requires different things at different times
* There are two categories of clear rules that vindicate the principle against self-incrimination
  + Rules that apply during formal proceedings
  + Rules that relate to conscriptions occurring outside of formal proceedings
* There are 3 governing principles that limit the reach and influence the self-incrimination principle:
  + It furnishes more aggressive protection
  + With the exception of bodily samples intimately linked to the accused, the self-incrimination concept simply does not apply to pre-existing items of real evidence that are capable of being gathered without the participation of the accused
  + The self-incrimination concept provides protection only against incrimination, not against other uses of compelled information

## the privilege against self-incrimination (Formal Proceedings)

* At common law, the principle against self-incrimination supported only two self-incrimination rules:
  + Privilege against self-incrimination
    - Enables witnesses to refuse to answer questions in formal proceedings if their answer would tend to incriminate them
  + The Crown was prevented from calling the accused as a witness during his own trial
* The *Charter* now provides witnesses with an aggressive form of the use immunity and derivative use immunity

## the self-incrimination protection of witnesses

### statutory use immunity

* S 5 of the *Canada Evidence Act* removed the right of witnesses to refuse to answer questions that may incriminate them
* It now provides protection to those who are forced to reveal information tending to show that they have committed offences
  + They can be prosecuted for what they reveal, but their testimony cannot be used against them
    - Effectively given use immunity
* The use immunity protection relates only to those answers that amount to self-incriminating admissions at the time the previous testimony is being given
  + Does not extent to other testimony witnesses may give
* AB Evidence Act mimics Canada
* Use immunity does not need to be invoked under the Canada Evidence act
  + Presumably so under Alberta as well
* S 13 of the *Charter* makes s 5 redundant
  + Has the same theoretical foundation as the statutory provisions
  + It is intended to extent s 5 of the *CEA* to give further and better effect to its common purpose
  + The primary motivation for recent developments in the interpretation of s 13 was to prevent s 13 from being used to enable an accused person to give a version of events to a trier of fact while hiding from the trier of fact that she previously offered a different account of those same events under oath

### constitutional use immunity – section 13 of the *Charter*

##### The Rules of Constitutional Use Immunity

**Rule 1:** If the accused does not testify at his trial, his testimony from an earlier proceeding cannot be used against him at that trial, regardless of whether he was the accused or a mere witness

* A person who does not testify at his trial has absolute use immunity at that trial

**Rule 2**: If the accused does testify at his trial, testimony he previously provided during an earlier proceeding where he was not a compellable witness can be used to cross-examine him at his trial, and depending on its relevance, can be used either as proof of his guilt or to challenge his testimony (*R v Henry*)

* Crown can use prior testimony to incriminate and impeach the accused

**Rule 3:** If the accused does testify at his trial, his earlier testimony from a prior proceeding where he was a compellable witness cannot be used at his trial if that earlier testimony has the potential to be used by the Crown as affirmative evidence of the accused’s guilt

**Rule 4:** If the accused does testify at his trial, his testimony from an earlier proceeding where he was a compellable witness can be used at his trial to challenge his testimony if that earlier testimony does not have the potential to be used by the Crown as affirmative evidence of the accused’s guilt

**Exception to these rules**: if the accused is being prosecuted because it is alleged that it was an offence for him to testify as he did at an earlier proceeding, then the Crown is free to prove his earlier, allegedly criminal testimony

#### *R v Henry*

*Facts:* - Henry was previously convicted of first degree murder, but his conviction was overturned by the BCCA and sent for retrial

* Henry had testified in his own defence and again at the retrial, but told a different story in the second trial
* Henry was convicted again after the Crown cross-examined him on the inconsistent statements from the first trial

*Issues:* Whether s 13 is avalible to an accused who chose to testify at his/her own retrial

*Held:* S 13 does not protect an accused who chooses to testify at a retrial from having his/her previously volunteered testimony used against him

*Reasons:* - the purpose of s 13 is to protect individuals from being directly compelled to incriminate themselves

* In tandem with s 5 of the *CAE*, it accomplishes this by establishing a *quid pro quo* system, in which witnesses can be compelled to testify on potentially incriminate matters in return for the State’s promise that such compelled evidence cannot be used against hem
* By preventing the subsequent use of testimony, such a system encourages the witness to provide full and frank testimony
* S 13 is only available to an accused who had testified compulsorily in the earlier proceeding, whether a retrial of the same matter or a different trial
* Draws a distinction between retrials where the accused had previously testified voluntarily (**not** entitled to full immunity) and instances where the accused had been compelled to testify as a non-accused witness in a different trial (entitled to full immunity)
* It is unworkable to attempt to draw a distinction between the use of previously given testimony to impach the accused’s credibility or to incriminate him/her
  + On that basis, s 13 applies to *any* use of evidence given under compulsion

##### The Field Operation of the Constitutional Use Immunity Rules

* S 13 offers protection only at criminal cases or other proceedings where the accused is being prosecuted
  + No application in civil cases
* S 13’s base function is to prevent the use of earlier testimony to incriminate an accused
* The protection at criminal trials and other proceedings extends only to testimony given by the accused person in an earlier formal proceeding
  + Does not protect against “informal statements” made by the accused outside of earlier formal proceedings, such as an answer given during police questioning
* *Dubois* 🡪 SCC held that “other proceedings” includes the initial mistrial
  + Term must be defined broadly to fulfil the section’s underlying mission of preventing compelled self-incrimination
* Other proceedings also includes bail hearing, preliminary inquiry, *voir dire*, earlier independent civil trials, and administrative hearings in which evidence is taken under formal process

### exceptions: perjury and similar cases

* S 13 specifically excludes prosecutions for “perjury and for giving of contradictory evidence” from its reach
* Rationale: the earlier testimony is the *actus reus* of the offence and if the Crown cannot used the perjured statement, it would be impossible to prosecute these cases

### derivative use immunity

* The testimony of a compellable witness can lead to the discovery of other evidence, sometimes known as “derivative evidence”
  + E.g. a witness testifies that he and an accomplice robbed a store and threw the gun in a bush
    - The witnesses testimony cannot be used against him at his own trial, but the gun can because it is not testimony
* In some cases, s 7 of the *Charter* can be used at the subsequent proceeding to fill the breach left by s 13 to exclude evidence derived from the earlier testimony of a compellable witness
  + Occurs where the authorities are attempting to use evidence against the accused that they would not have found but for his earlier compelled testimony
  + The burden is initially on the accused to prove that the evidence would not have been discovered without the testimony
    - The burden effectively shifts to the Crown to prove on a BOP that they would have found the evidence without the testimony

#### *R v S(RJ)* \* re-read

*Facts:* - Accused was charged with break and enter, and theft

* M was separately charged with the same offence
* The charges were laid separately because of a procedure at youth court which directed that the younger accused be tried in Phase One Youth Court and the older in Phase Two
* The Crown subpoenaed M as its main witness at the accused’s trial
* Pursuant to an application by M’s counsel, the TJ quashed the subpoena on the ground that to compel M to testify would violate s 7 of the Charter
* Crown proceeded with trial but was unsuccessful against the accused; charges against M were stayed
* Crown appeal the subpoena quash; CA allowed the appeal and said the subpoena was fine

*Issues:* Whether M can be compelled to testify

*Held:* Yes – appeal dismissed

*Reasons:* - A statutory compulsion to testify engages the liberty interest of s. 7

* The liberty interest is affected, however, in accordance with the principles of fundamental justice
* No principle of fundamental justice demands that M should have a right to silence or a privilege against self-incrimination; M was properly compelled
  + Fundamental justice was satisfied because neither M’s testimony, nor a limited class of evidence derived from his testimony, could be later used to incriminate him in other proceedings
* S 5 of the *CAE* does **not** violate the Charter

4 Different Judgments Rendered

* Iacobucci + 3
  + M was properly compelled
  + The liberty interest at stake was in accordance with PFJs.
    - The PFJs are satisfied here because M’s testimony would not be used against him in his own trial
  + The onus is on the defendant to show that the evidence adduced is derivative evidence
* Lamer (alone)
  + Agrees with Iacobucci
  + Says the court should be able to exempt or quash a subpoena in some cases
    - Could show defence’s strategy in adducing other crimes done
* Sopinka and McLachlin
  + Rejects immunity concept, but says derivative use immunity should not be adopted
  + The issue is not whether the witness can refuse, but rather, can the Crown get them in the witness box?
  + Ask: Was evidence obtained as a result of immunity? Could the Crown have otherwise obtained it in any other event?
    - This is quite speculative
* In balancing these interests, the following factors, not intended to be exhaustive, should be considered:
  + (1) the relative importance of the evidence to the prosecution in respect of which the accused is compelled;
  + (2) whether the evidence can be obtained in some other manner;
  + (3) whether the trial or other disposition of the charge against the accused whose evidence is sought to be compelled could reasonably be held before he or she is called to testify;
  + (4) the relationship between the proposed questions to the accused witness and the issues in his or her trial;
  + (5) whether the evidence of the accused witness is likely to disclose defences or other matters which will assist the Crown notwithstanding the application of s. 5(2) of the *Canada Evidence Act*; and
  + (6) any other prejudice to the accused/witness, including the effect of publication of his or her evidence.
* Failure to raise the matter at the appropriate time, or an adverse ruling in that regard, will in some circumstances not preclude the matter being renewed in subsequent proceedings.

### use immunity under section 7

* There are cases where use immunity is conferred even though the evidence is not being used to incriminate the accused at the proceedings
* *R v Bagri* 🡪 it will occur if the Crown tries, at a deportation or extradition hearing of an individual, to use testimony or derivative evidence obtained from that individual through an investigative hearing
  + Investigative hearings, created by the government’s anti-terrorism initiative, enable the state to compel witnesses to testify before a judge in order to furnish information useful in the investigation of a past or apprehended terrorist offence
* Self-incriminating information secured from the witness in Canada could then be used in a foreign trial to incriminate the witness, without Canadian protection being available
* Even though a person is not being incriminated at a deportation hearing, s 7 steps in to provide indirect protection against that happening

### cross-examination about immunity

* The protection granted by s 13 raises the spectre that other persons can falsely admit at the trial of an accused that they, and not the accused, committed the offence yet avoid having their admission used against them or used to cross-examine them if they themselves are later tried
* Even if a witness knows of s 13 and attempts to “take the rap” for the accused knowing it cannot be used against him, the Crown cannot cross-examine the witness on his knowledge of s 13
* The witness can still be charged and tried on other evidence, or charged with perjury if the admission is false
* The incomplete protection furnished by s 13 reduces the risk that a witness, even knowing about s 13, would falsely implicate himself because of that section
* The low probative value of this kind of question will tend to be outweighed by the prejudice of the line of questioning
* The SCC has not foreclosed on this line of questioning in cross-examinations in all cases
  + In rare circumstances, such as where the Crown can prove a plot to lie, the decision might shift and this line of questioning can become permissible
* *R v Noel* 🡪 SCC held that similar prohibitions apply with respect to s 5 of the *CAE*

## the non-compatibility of accused persons at their own trial

* Accused persons, other than corporations, cannot be compelled to testify against themselves at their own trials
  + Can be compelled to testify at other proceedings even where those proceedings deal with the same subject matter as their charges
* If the sole purpose of calling suspects as witnesses in proceedings is to obtain self-incriminatory information to assist in an investigation against them, the witnesses may be protected from testifying
* **Generally,** if there is a legitimate public interest in having the evidence of a witnesss at a proceeding, the witness will be required to testify
* In non-penal proceedings, the parties can be forced to tesify by the opposing party

### competence and compellability outside of the *Charter*

* S 4(1) *CEA* – accused can testify in their own trial, but cannot be called by the Crown
  + Under provincial evidence acts, all parties to a proceeding are competent to testify
  + Most are compellable as well
    - Cannot be forced to testify against themselves in provincial prosecutions

### subsection 11(c) of the *charter*

* Overtaken the law relating to non-compellability of accused persons charged with offences
  + Even if a provincial evidence act makes an accused compellable, s 11(c) overrides it
* 11(c) 🡪 any person charged with an offence has the right not to be compelled to be a witness in proceedings against the person in respect of the offence
  + Doesn’t apply to corporations
* Only available to natural persons, charged with an offence
  + Real question: whether the relevant proceedings have penal consequences
* Three conditions must be met to benefit from the protection against self-incrimination under s 11(c):
  + The person must be compelled as a witness
  + In proceedings against that person
  + In respect of an offence
* Note: interrogation at a police station doesn’t make you a witness (at that time)
* 11(c) does not catch informal admissions or confessions, even if they are compelled
  + Does catch a pre-trial discovery
* A proceeding can be against more than one person and s 11(c) protects co-accused from forcing the other to testify
* “in respect of the offence” – interpreted broadly
  + Some link between the offence and proceedings
* This protection is not confined to the proceeding at which the accused is being tried for the offence
  + There must be a substantive connection between the two proceedings

### section 7 and “constitutional exemptions” from testifying

* S 7 can buttress s 11(c) and enable a witness who is a suspect to avoid testifying
  + Rare
* **Rationale:** it is a principle of fundamental justice to compel a person to testify at a proceeding, even where he is not the accused, if this is being done in order to obtain incriminating information from him
  + State power to compel cannot replace a criminal investigation
* Use the predominate purpose test to determine if the testimony is sought for investigation reasons
* While it is somewhat disputed, case law suggests that no prejudice requirement attaches to the constitutional exemption in cases where the predominate purpose is investigation
* Justice Cory – even where the Crown has a legitimate purpose in calling a witness, a subject can resist where her testimony would undermine her right to a subsequent fair trial, taking into account that she will be provided with use and derivative use immunity
  + There is some uncertainty as to whether this reflects the law

### adverse inferences from the failure to testify

##### Adverse Inferences by Trial Courts

* The failure of the accused to testify cannot be used as evidence of his guilt
  + Although, where the evidence in the case already shows the accused to be guilty BRD, the trier of fact may use the failure of the accused to testify to conclude that the accused has no explanation that could raise a reasonable doubt (*R v Noble*)
    - It would severely undermine the right not to testify if triers of fact were allowed to draw adverse inferences from the lack of testimony
* Exception 🡪 adverse inferences are permitted to be drawn against the credibility of an alibi if the accused does not provide reasonable notice of the alibi to the Crown in advance of the trial, or if the accused does not testify in support of his alibi

##### Inferences by Appeal Courts

* It is common for appeal courts, when deciding whether an error of law has caused a miscarriage of justice or whether a verdict is unreasonable, to support their conclusions with reference to an accused’s failure to testify
* *Noble* suggests that appeal judges *can* use the failure to testify as additional proof of guilt because the presumption of innocence, which supports the bar on adverse inferences at trial, operates with much less vigour on appeal after the accused has already been convicted

### commenting on the failure to testify

* S 4(6) *CEA* 🡪 Crown and judge are prohibited from commenting on the failure of the accused to testify
  + Doesn’t prevent defence counsel from testifying
    - Where the accused has not testified, it is routine for defence to tell juries about the constitutional right of accused not to testify
      * Without evidence, counsel should not explain why the accused didn’t take the stand
* Defense can also comment on the failure of a co-accused to testify in order to point out that the accused’s testimony is not contradicted by the co-accused
  + **But**, an accused person must not suggest that the failure of the co-accused to testify is evidence of the co-accused’s guilt
* This section is interpreted narrowly, applies mostly to juries (judges shouldn’t make this mistake)
* Even in jury trials, the prohibition is narrow, breached only by suggesting there is evidence the accused could give which he has failed to give
  + Neutral comments, simply noting the accused didn’t testify, are not prohibited
    - A judge can comment that the Crown evidence has not been contradicted by the defence where this is so

### tactical compulsion

* Tactical compulsion 🡪 where the accused feels they have no choice but to testify because of the strength of the evidence against them
  + This is a choice made by the accused
* Does **not** attract s 7 and 11 *Charter* protection
  + This only attaches to legal compulsions to testify

## pre-trial rights to silence

* Right to silence principle 🡪 the accused is entitled to choose whether to speak to persons in authority
* Adverse inferences cannot be drawn against an accused person because of his pre-trial silence
  + If they were allowed, this would deprive the accused of any meaningful choice to refrain from speaking
* Where an accused does speak 🡪 there are a series of rules for determining whether those statements, or the evidence those statements lead to, can be admitted
  + Function of the rules – to protect the principle of choice by distinguishing those cases where the accused makes an integral choice to speak from those cases where the choice is not integral or truly voluntary

### general

* *Singh* 🡪 the common law right to silence simply reflects the general principle that absent statutory or legal compulsion, no one is obliged to provide information to the police or respond to questioning
* Now, we exclude involuntary confessions, and at times even other evidence that such confessions lead to, in large measure because of self-incrimination concerns

### where the accused does remain silent

* S 7 right to silence exists at all time against the state and applies any time the accused interacts with authority, whether detained or not
* The right to silence is robust enough that the accused does not waive it by providing information selectively
  + The accused is free to provide some, non, or all of the information he has
* Silence by an accused may be admitted as a necessary part of the narrative surrounding the admissible evidence
* The tactics an accused uses may open the door to proof of the accused’s silence and permit it to be used for limited purposes
  + E.g. that accused says he complied with police, his silence can be used in rebuttal
* If the accused provides an alibi, but doesn’t provide reasonable notice of the alibi sufficient to enable the police an opportunity to investigate, this failure can affect the weight of the alibi
  + Reasonable notice 🡪 information about the whereabouts of the accused at the time and the names of the witness to the alibi
  + Where police already have this information, no adverse inference can be drawn
  + Silence at the time of arrest is not sufficient to ground this inference
* If the crown can use an accused’s pre-trial silence, the TJ must instruct the jury on its limited use
* The right to silence is not as strongly protected where it is a co-accused rather than the Crown who wants to prove the failure by the accused to speak to authorities
  + Accused have the right to make a full answer and defence
  + SCC has held that the pre-trial silence of the co-accused can be used solely to challenge her credibility but not as evidence of her guilt

### admissions and confessions by the accused

* Statements made by an accused are admissions by an opposing party litigant, and thus fall into an exception to the hearsay rule
* Where those statements have been made to ordinary persons, they are admissible at the behest of the Crown to prove the truth of their contents
* Statements made by accused to persons in authority are not as easily admitted
  + These are **confessions** and to be admitted, they must satisfy the confessions rule

### the confession rule

##### The General Significance of *R v Oickle*

* The “confessions rule” is meant to ensure that statements made by the accused persons in authority are admitted into evidence only where the accused has made a meaningful choice to speak
* Police questioning is seen to be a legitimate and effective tool of a criminal investigation, but going too far can damage proof
* *R v Oickle* 🡪 the SCC recast the law surrounding the voluntariness of confessions
  + **Rule**: a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness on the part of the person making the admission
    - **Derived confessions rule:** Any subsequent statements made to a person in authority where the factors that tainted the involuntary statement are still operating at the time of the subsequent statement will also be inadmissible
* The confessions rule is simply an admissibility rule and does not operate to control the weight that a confession is to be given, if admitted
* The confessional rule inquiry is to be contextual and specific, turning on the factors particular to the case
  + Will involve consideration of the making of threats or promises, oppression, the operating mind doctrine and police trickery
* “In order for more statements made to a person in authority to be admissible, the Crown must establish BRD in light of all circumstances that the will of the accused to choose whether to speak or not has not been overborne by inducements, oppressive circumstances, or the lack of an operating mind. In addition, there must not be police trickery that unfairly denies the accused’s right to silence.”

##### “In Order for Most Statements… to be Admissible…”

* If the statement is the *actus reus* of the offence (e.g. words of refusal when refusing a breathalyzer test), the Crown need not show voluntariness
* Voluntariness *voir dires* are also not generally conducted with respect to statements made under statutory compulsion, where different considerations apply
* Apart from exceptional cases, the voluntariness rule applies to statements made to persons in authority where they are being offered as evidence against the person who made the statement
  + Applies to full confession and less complete admissions
  + Applies to both inculpatory and exculpatory statements

##### Statements Made to a Person in Authority

* General rule 🡪 the voluntariness rule applies only to statements made to persons in authority
* A person in authority is someone the accused believes to have coercive power
  + Persons formally engaged in the arrest, detention, examination or prosecution of the accused
* The concern is whether the person said to be in authority has the ability to influence or control the prosecution and is allied with the police or prosecuting authority
* *Police Trickery Cases*
  + Should operate only if the person whose conduct in question is in fact a state agent
  + Causes exclusion where the conduct in question would shock the community
* *Inducement and Oppression Cases*
  + Where the concern is with the impact that inducements or oppressive conduct may have had on the choice of the accused to speak, a purely objective standard is inappropriate
  + Settled law that the question in these cases is: **whether the accused, based on his reasonable perception of the recipient’s ability to influence the prosecution believed either that refusing to make a statement to the person would result in prejudice or that making one would result in favorable treatment.** 
    - Subjective
  + People who have no authority may even satisfy the requirement
* *Operating Mind Cases*
  + Two distinct situations:
    - Those where the functioning mind affects the influence that inducements or oppression have
      * “inhibiting operating mind” cases – rule should require that the accused subjectively knows he is dealing with a person in authority since the concern is the impact of that authority
    - Those cases where the concern is that the mind of the accused is simply not operating because of its own internal or subjective state
      * “pure inoperative mind” cases – no requirements should apply, the state of the mind causes the concern as to whether the statement was voluntary
* *Procedure and Persons in Authority*
  + Other than in pure inoperative mind cases, a *voir dire* is not to be held for voluntariness unless the person receiving the statement is a person in authority according to the relevant standard
  + **Settled law** 🡪 if the statement was made to someone the accused knew to be a police officer or prison official or guard, a *voir dire* should be held unless it is waived by the accused through an express admission of voluntariness
    - If it was an undercover cop, the accused must prove they had some inclination to believe it was a person in authority to receive the protection of a *voir dire*

##### The Crown Must Establish BRD, In Light of All of the Circumstances

* Two standards of proof:
  + The Crown must meet the modest burden of presenting evidence capable of satisfying a reasonable trier of fact that the statement was made
  + The Crown must prove beyond a reasonable doubt that if such a statement was in fact made, it was made voluntarily
    - The circumstances must be considered (police trickery, coercion, misconduct), any indication that the statement may not have been voluntary
* Best option is to videotape the interrogation

##### The Crown Must Establish that the Will of the Accused has not been Overborne

* *Oikle* 🡪 causation is a central consideration
  + An effort by the police to convince suspects to make admissions becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject was overborne

##### The Will of the Accused has not been Overborne by Inducements

* *Oikle* 🡪 the most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or promise
  + *Quid pro quos* can serve to undermine voluntariness, whether the threats or promises related to the accused or to someone closely connected to the accused
* An inducement can render a confession involuntary even though the inducement arises only implicitly from the actions of a person in authority who does not intend to offer hope or raise fear
* The ultimate question is whether the inducements are strong enough, either alone or in combination with other factors, to raise a reasonable doubt about whether the will of the subject has been overborne
* *Oikle* inducement factors:
  + Any confession that is the product of outright violence is involuntary
  + Suggestions such as “it would be better to confess” may or may not result in a finding of involuntariness (look at context)
  + Spiritual or moral inducements will generally not produce an involuntary confession because the inducement offered is not within the control of the police
* Hope of advantage inducements (as per *Oikle*)
  + An explicit offer by the police to procure lenient treatment in return for a confession (very strong inducement)
  + Where an accused person has been subjected to such intense and prolonged questioning that he would become convinced that no one will believe his protestations of innocence, *holding out the possibility* of a reduced charge would raise a reasonable doubt
  + An offer of psychiatric help or counselling in exchange for a confession is not generally a strong inducement

##### The Will of the Accused has not been Overborne by Oppressive Circumstances

* A confession may be excluded as involuntary where it is the product of an atmosphere of oppression created by authorities even though there has been no improper inducements
* *Oikle*, 2 psychological mechanisms that can produce this result:
  + The stress-compliant confession made to escape the oppressive conditions
  + The phenomenon by which the oppressed accused comes to doubt his own memory to believe the relentless allegations made by the police
* Atmosphere of oppression: deprivation of food, clothing, water, sleep, medical attention, denying access to counsel, intimidating questioning for prolonged periods of time
* It is not *per se* improper for police to lie, but using these tactics can contribute to an oppressive interrogation

##### The Will of the Accused has not been Overborne by the Lack of an Operating Mind

* Admissible statements must be the product of an operating mind
* The mere fact of intoxication or mental illness is not enough to require exclusion
* The operating mind consideration is not a discrete inquiry separate from the confessions rule
  + It is a factor in determining whether a statement was made voluntarily

##### The Dirty Tricks Doctrine

* *Oikle* 🡪 a confession may be considered involuntary and inadmissible if its obtained by dirty police trickery that while neither violating the right to silence no undermining voluntariness, is so appalling as to shock the community
* High abuse of process standard in which confessions are to be excluded to maintain the integrity of the administration of justice
  + Examples: posing as a priest or legal aid to inject truth serium into a diabetic saying its insulin
* Two kinds of tricks that would require exclusion (old, not really focused on anymore):
  + Those that produce unreliable confessions
  + Those that are so unpalatable that they shock the conscience, whether or not the trick put reliability at risk
* Now the focus is on how abusive the conduct is, and to consider the risk of unreliability as a factor in the consideration

### ficticious criminal organization rule: Mr. Big Scams

* Statements secured by recruiting suspects into fictitious criminal organizations are presumptively inadmissible
* To overcome this presumption, the Crown must establish on the balance of probabilities that the threshold reliability of that statement outweighs the prejudicial effect of admitting it into evidence
  + Reliability factors: manner and circumstances in which it was obtained, the personal circumstances of the suspect, the nature of the statement, the existence of confirmation
  + Prejudicial factors: the proof of bad character that would be revealed when narrating the suspect’s participation in the fictitious criminal organization if the statements were admitted, the tactical inevitability that to answer the statements, the accused would have to testify and admit to lying to gain an advantage, thereby exposing themselves to cross-examination
* Even if the Crown discharges the burden, the TJ are required to consider whether, on a BOP, the conduct of the police threatens the integrity of the administration of justice, thereby constituting an “abuse of process”
  + If this is so, the TJ will have a broad discretion to fashion a remedy
    - Exclude the evidence, OR
    - Stay of proceedings

### statements under the *youth criminal justice act*

* Children are particularly vulnerable
* Special rules apply to persons under the age of 18
* Subject to narrow statutory exceptions, the Crown has to prove both voluntariness and material compliance with s 146 of the *Youth Criminal Justice Act* BRD before statements by youth can be admitted
* Consultation and attendance rights 🡪 children have the right to a lawyer and their parents, relatives or other appropriate adults present during questioning
* Informational rights 🡪 required that young person be made aware of those rights, that they need not speak and any statement they make can be used as evidence against them

### the general discretion to exclude

* Judges have the residual discretion to exclude confessions or admissions
  + Can exclude voluntary confessions
    - Prejudice v probative value consideration
* Need some clarification on the standards for applying this discretion

### section 7 of the *charter*

* S 7 supplements the common law protections
* This has resulted in several discrete rules that can cause the exclusion of evidence that would be admissible at common law under the voluntariness rule

##### Undercover/Detained Statements

* S 7 can cause the exclusion, for example, of statements surreptitiously and actively elicited from detained suspects by state agents
* The *Charter* rejects such statements because active elicitation by undercover state agents will deprive detained suspects of the ability to make an effective choice whether or not to speak to authorities

##### Statutorily Compelled Statements

* S 7 requires the exclusion, in proceedings that incriminate the accused, of some statements that the accused has been obliged by law to make
* Not all statutorily compelled statements are excluded
  + Courts make a context based decision
* They will look for:
  + The existence of real coercion in making the statement
  + The existence of an adversarial relationship at the time the statement is made
  + Any risk that the statement will be unreliable
  + The risk that the statutory authority to comple statements may lead to an abuse of power
* The presecence or abscene of thse factors will be evaluated together to decide whether admission of the statement would compromise the purpose underlying the principle against self-incrimination
* Those purposes include the protection of persons against making unreliable confessions and the protection of personal autonomy and dignity

##### Derivative Evidence

* The *Charter* causes the exclusion of the entire involuntary statement as well as all otherwise undiscoverable evidence found as a result of the confession
* S 7 can produce this effect whether or not the common law does as well

##### Section 7 and the Right to Silence

* S 7 has not caused wholesale modification to the common law
* The general constitutional right to silence will be satisfied in any case where the accused makes the choice to speak to authorities (makes a voluntary statement)
* In cases other than detained/undercover statements and statutorily compelled statements, the *Charter* right to silence is redundant to the common law voluntariness rule
* Voluntariness is a burden the Crown has to satisfy
  + The accused would have to satisfy a *Charter* breach, so it is better to rely on the common law rule than attempting to invoke s 7

##### Derived Confessions to Persons Not in Authority

* Applies where the subsequent statement has been made to a person in authority
* Also applies where accused persons describe an involuntary confession they made to persons in authority, when speaking to someone not in authority
  + This subsequent conversation will also be inadmissible lest it be used to disclose the involuntary confession
* It’s unclear if this protection applies in a situation where the accused doesn’t simply narrate the confession but instead makes another statement about the events

## a principled approach to self-incrimination

* Self-incrimination rules can apply in other elements of criminal law and it would be a mistake to confine the concepts to established rules
* *White Test* 🡪 involves asking whether the outcome objected to compromises the purpose underlying the principle against self-incrimination
  + Ask whether there is real coercion, whether there is an adversarial relationship at the time, whether the conscription of evidence puts its reliability at risk and whether the process increases the risk of state abuse
* The SCC has since said that *White* did not transform the principle against self-incrimination into a free-standing legal principle

## non-testimonial in-court self-incrimination

* Self-incrimination like concerns arise where the accused is called upon during his trial, not to testify but to perform some physical act, such as displaying his hands to a witness, or standing or walking
  + They aren’t being asked to be a witness, s 11(c) doesn’t apply
* Judges determine these issues simply by applying their general discretion to control the proceedings before them and admit evidence where its probative value outweighs the risk of prejudice
  + *White* criteria can help with determining prejudice

## subsection 10(b)

* S 10(b) is not a substitute for the voluntariness rule
  + Even is s 10(b) is complied with, confessions can still be involuntary
* Voluntary statements can be excluded as a result of s 10(b) violations
* S 10(b) imposes both informational and implementational duties on the police
  + When any of these duties have been violated, the evidence may be excluded under s 24(2)
* Informational 🡪 detainee must be informed of the right to retain and instruct counsel without delay and the existence of legal aid
* Implementation 🡪 imposes the obligation on the police, when the accused has indicated a desire to consult counsel, to provide a reasonable opportunity to do so, including providing privacy for the consultation

## roadside statements and conscripted conduct in impaired driving cases

* Primary rules that apply to broker the public interest in conscripting the accused to participate in her own investigation, and the principles against self-incrimination:
  + Where the statement made by the accused is the *actus reus* of the offence, voluntariness does not have to be proven
    - E.g. refusing to take the breathalyzer test
  + Relevant statements made by drivers (admitting to consuming alcohol) can be admitted without the need for a voluntariness *voir dire* but solely to show that the officer had reasonable grounds for arresting the accused
  + Roadside statements made by the detained suspect who has yet to speak to counsel are not admissible as positive evidence of guilt or to undermine the accused as a witness, even if they were voluntary
  + It is not permissible to rely on the silence of an accused for any purpose including assessing credibility
  + Where the accused makes statements as the drive that has been involved in an accident in the honest belief that she is legally compelled to, the rule against statutory compulsion prevents the Crown from relying on those statements
  + When a roadside screening device demand is made, the suspect detained is entitled to be advices of the right to counsel without delay
    - Right to counsel is suspended under s 1
  + The result of a lawfully secured roadside screening test are admissible as proof of the reasonableness of the officer’s grounds for arrest but cannot be used as proof of guilt
  + Where a driver is directed to exit a car so that the officer can observe impairment, a functional equivalent of a sobriety test is being undertaken and therefore observations that are made of the condition of the accused can be used solely to support the reasonableness of the officer’s grounds for arrest
    - Cannot be used as proof of guilt

# Unit 9 – improperly obtained evidence

## the evolution of the inadmissibility of some improperly obtained evidence

### the common law

* With the exception of involuntary statements, the probative value of evidence does not change because it was obtained illegally
  + Courts are reluctant to throw out perfectly good evidence because it was illegally obtained
* In order to avoid loss of good proof, the common law generally refused to reject evidence because of how it was obtained
* This opened the doors to police acting illegally and not being dealt with outside of the trial
* It wasn’t until the *Charter* that courts began to change their admission of evidence

### The *Charter*

* Since the *Charter* will be violated by almost any illegal investigative technique, most evidence obtained illegally by state agents is now subject to potential exclusions under s 24(2) – the exclusionary rule
* 24(2) holds that unconstitutionally obtained evidence is excluded but only in those cases where its admission would bring that administration of justice into disrepute
  + “Bringing the administration into disrepute” is a formula with little guidance
* The SCC’s decisions in *Grant* and *Harrison* now provide the factors for determining when to admit evidence

### a complex of theories for exclusion under section 24(2)

* The *Charter* is ambiguous as to its underlying exclusionary theory
* The triggering test for exclusion seems aimed at protecting the reputation of courts by empowering judges to avoid the harm that may occur if they are seen to condone unconstitutional acts by accepting the fruits of *Charter* violations
* Currently, the main concern behind exclusion is seen to be the need to preserve public confidence in the rule of law and its processes
  + The key concept that drives the present law is therefore condonation theory
    - The more serious the violation and the more significant the intrusion into the constitutionally protected interests of the accused, the greater the need for the courts to distance themselves from the violation by excluding the evidence
* The deterrence of police conduct is no longer an operative goal

## the current law introduced

### the law summarized

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

* S 24(2) is the primary basis for excluding evidence under the *Charter*
* Accused persons must apply to the trial court to have unconstitutionally obtained evidence excluded
* Before a court can even consider whether to exclude the evidence, the applicant must establish, on the BOP, that her Charter rights have been breached by a state agent
* If the accused is successful, the court will go on to consider whether each of the two exclusionary requirements has been met
  + (1) obtained in a manner that infringed or denied the individuals Charter rights
  + (2) the admission of the evidence in all of the circumstances could bring the administration of justice into disrepute
    - Seriousness of the breach
    - Impact of the charter breach on the accused
    - Societies interest in the adjudication of the breach

### the law illustrated

*R v Grant*

* Grant was unlawfully detained by police who then found a handgun in his pocket
* The statements Grant made were unconstitutionally obtained and not admitted into evidence
* The handgun, derivative evidence found as a result of the unconstitutionally obtained evidence, was admitted
  + The Court found it admissible in evidence because the breach was not serious enough to undermine public confidence in the administration of justice if the handgun was admitted into evidence
    - The police did believe they could detain him and they were not abusive or racially motivated

*R v Harrison*

* Harrison was pulled over for driving in ON without a front licence plate, however, he should not have been pulled over as he had an AB plate, which didn’t require a front plate
* The cop nevertheless pursued and found a suspended license and 35kg of cocaine in the car
* The detention was contrary to s 9 and heavily infringed on the accused’s Charter rights
* The SCC found that the stop and search of the vehicle without a semblance of reasonable grounds, and the impact of the breach was significant to require the Court to dissociate with the justice system from these flagrant *Charter* breaches, notwithstanding the public interest in the truth-seeking function of the criminal trial process
  + The evidence was therefore excluded

## the application for exclusion

### the technical components introduced

* Accused persons must apply to the trial court to have unconstitutionally obtained evidence excluded
* Before a court can even consider whether to exclude the evidence, the applicant must establish, on a BOP, that his *Charter* rights have been infringed by a state agent
* Must comply with s 24(1), which requires:
  + An application to,
  + A court of competent jurisdiction
  + Brought by anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied

### the application

* Impromptu Charter applications shouldn’t be made
  + But practices vary
* Criminal courts have traditionally been reluctant to deny relief because of procedural flaws
  + The substance is generally considered to be more important than form when it comes to the rights of accused persons
* It has been held that where uncontradicted evidence discloses a significant *Charter* violation, the TJ is obliged to enter into an inquiry to determine whether that infringement occurred, even in the absence of an application
  + Especially where an accused is unrepresented

### a court of competent jurisdiction

* A court of competent jurisdiction is a court that has jurisdiction over the person and the subject matter and has, under the criminal or penal law, jurisdiction to grant the remedy
* Exclusion of evidence remedy is within the trial court’s jurisdiction
* Significant limitation 🡪 judges conducting preliminary inquiry cannot exclude evidence as a 24(2) remedy
  + The jurisdiction of preliminary inquiry judges is derived exclusively from statute and does not include the power to grant *Charter* relief
* Judicial officers conducting bail hearings and parole board panels are not courts of competent jurisdiction that can refuse to consider unconstitutionally obtained evidence
  + Unconstitutionally obtained evidence can be used without regard to s 24(2) at these hearings
* Adjudicators are now recognized to have discretion outside of the *Charter* to exclude evidence that would undermine the fairness of the proceeding

### the applicant’s *charter* rights are violated

* First step is to establish, on a BOP, that the accused’s Charter rights have been violated
* This raises two obstacles
  + It is the accused’s own *Charter* rights that must be violated
  + The Charter right must be violated by a state agent
* In some cases, it is possible to extend access to the exclusion remedy beyond cases where a police officer violated an individual’s Charter rights
  + E.g. a doctor who takes a blood sample at the request of the police has been held to be a state agent
* Test for whether a civilian will be treated as a state agent 🡪 whether the act said to be a Charter violation would have taken place in the form and in the manner which it did but for the involvement of a state agent
* A private citizen will also be acting as a state agent if their primary purpose in acting is to discover evidence with a view of criminal charges

## where the applicant’s *charter* rights have been violated

* Where the applicant succeeds in establishing that her *charter* rights have been violated, two further preconditions must be met before the evidence is excluded
  + The applicant must establish that the evidence she wants to exclude was obtained in a manner that infringed or denied her Charter rights
  + The applicant must persuade the court that in all of the circumstances, the admission of the evidence in the proceedings would bring the administration of justice into disrepute

## requirement 1: “obtained in a manner”

* Evidence can be excluded under s 24(2) solely where it has been obtained in a manner that breached the Charter rights of the applicant
* Although a non-remote causal connection between the breach and the discovery of the evidence will satisfy the “obtained in a manner requirement”, a causal connection is not strictly required
* A generous approach is taken
* Courts should examine whether there is a sufficient connection, given temporal, contextual, and/or causal factors, for it to be said that the evidence has been tainted by the Charter breach

### “Obtained in a Manner” and the sufficiency of the connection

* Purpose 🡪 ensure that evidence will be excluded under s 24(2) only if the discovery of the evidence can be linked in a meaningful way to the *Charter* violation
* A flexible approach is taken because the key inquiry is whether admission of the evidence would bring the administration of justice into disrepute

### must the breach precede the discovery of evidence?

* Conventional view 🡪 a necessary condition of exclusion is that the breach occur before the discovery of evidence
* To insist on the breach proceeding the discovery of evidence as an absolute precondition to exclusion means that *ex hypothesi* evidence can be admitted even if it would bring the administration of justice into disrepute
  + *R v Mian* offers some support for this view, but it is still somewhat uncertain
    - Exclusion of evidence was upheld where the accused’s right to counsel was breached (22 min delay in right to counsel)
      * The evidence had been seized within two minutes of the detention, so the right was breached *after* the evidence was collected

### “tainting” is the key inquiry

* Decisive question 🡪 whether the evidence has been tainted by the *Charter* breach
* Courts have adopted a purposive and generous approach
* It is unnecessary to establish a strict causal relationship between the breach and the evidence
* The evidence will be tainted if the breach and the impugned evidence can be said to be part of the same transaction or course of conduct
* The required connection between the breach and the evidence may be
  + Temporal
  + Contextual
  + Causal
  + Any combination of the 3
* Must be determined on a case-by-case basis
* Doesn’t really focus on order of evidence to breach anymore

### cases with a causal connection

* Causal connection is established where the unconstitutional investigative technique leads to the discovery of evidence
* Derivative evidence can also meet the test
  + Unconstitutional evidence is derivative when it is discovered as a result of finding other unconstitutionally obtained evidence, or where its relevance becomes apparent only because of the *Charter* breach
* Where a charter breach is an antecedent to the discovery of evidence, but is not the material cause of its discovery, it may be too remote to consider a causal connection

### cases without a causal connection

* Even in the complete absence of a causal connection if the *Charter* violation and the discovery of the evidence can be characterized as integral parts of the same transaction, the “obtained in a manner” test can be met
  + Temporal and contextual factors can make the necessary link
* As long as the discovery of evidence is part of the chain of events during which the Charter violation occurred, and the connection is not too remote, it can be said that the evidence was obtained in a manner than infringed the Charter
* **But** even where the breach occurs before the discovery of the evidence, a mere temporal connection between the two will not suffice
  + There must also be a contextual connection

### the overall evaluation and temporal, contextual connections

* Even though contextual and temporal links can suffice, it remains true that the absence of causation can make the link between the breach and the evidence
  + E.g. temporal connections can be lessened by intervening events
* Where there is a fresh start – events after the initial breach that make the breach immaterial – the obtained in a manner requirement may not be satisfied
  + The material issue is still whether the evidence has been tainted and for some breaches, late compliance with the Charter won’t change this

## requirement 2: the effect of the admission on the repute of the administration of justice

### the mode for assessing disrepute under the current law

* Where evidence has been obtained in a manner that violates the Charter, the court will exclude it if
  1. The breach is serious enough, and
  2. The impact on the Charter protected interests of the accused is significant enough to
  3. Outweigh society’s interest in the adjudication of the case on its merits
* The court must assess these factors to determine whether a reasonable person, fully informed of all of the circumstances and the values underlying the Charter, would conclude that the admission of the evidence could bring the administration of justice into disrepute
* The focus is on the damage that condoning the Charter violation by accepting its fruits for admission could do to the long term interest in maintaining the integrity and public confidence in the justice system; look beyond the immediate case

### step 1 in assessing disrepute – gauging the seriousness of the *charter*-infringing state conduct

* Involves assessing the blameworthiness of the conduct
* Focuses most intently on the state of mind of the officer about Charter compliance, but extends to include systemic or institutional failures in Charter compliance
* The Charter infringing state conduct will be more serious where it is part of a larger pattern of Charter violations committed during the investigation of the accused
* The first line of inquiry under the *Grant* test, gauging the seriousness of the breach, is undertaken to determine how important it is for courts to dissociate themselves from the unconstitutional conduct
* Underlying theory 🡪 while, in some measure, a court will be seen to condone a *Charter* breach if it admits the fruits of the breach, the degree of harm caused will vary depending on the seriousness
  + The more severe the breach, the more of a need for the courts to dissociate and exclude the evidence
* There are three considerations that will colour the seriousness of the breach:
  + The blameworthiness of the conduct
  + The degree of departure from *Charter* standards
  + The presence of absence of extenuating circumstances

##### Blameworthiness of the Conduct

###### Officer Conduct

* The relative good faith or bad faith by the police is the most important factor in determining the seriousness of the breach
* Place the police on a fault line; not just characterize as acting in good or bad faith
* Where the police lands on the fault line relates to the officer’s belief in Charter compliance, not to ulterior motives for violating the Charter
* Good faith breach 🡪 police honestly, but mistakenly, believed she was respecting the Charter and the belief must be reasonable
  + Most often occurs in cases where an officer relies on an existing legal rule that has yet to be declared unconstitutional
* Good faith can also exist where the law that was breached was obscure or highly technical, or involved the exercise of close judgment
  + Premised on a reasonable misunderstanding of the law
* The police move off the good faith spectrum when they *should have known* about the relevant Charter limit
  + The saving grace here would be a finding of an absence of bad faith
  + Usually occurs where the law is little known or controversial
* Where the constitutional limit of the officer is ignorant of is basic and settled, the breach moves unequivocally to the bad faith zone
* Where provincial law or the SCC has settled a legal question, it is unreasonable for the police to remain ignorant and will increase the seriousness of the breach
* Carelessness also gets into the bad faith zone
* Bad faith extreme 🡪 the violation is wilful
  + E.g. cops interviewing a woman while drunk because they knew she would assert her right to counsel when sober (*R v Clarkson*)
* *R v Grant* 🡪 derivative evidence, being evidence discovered as a result of unconstitutionally obtained statements, must be excluded where there is reason to believe the police deliberately abused their power to get the statement in hope it would lead to derivative evidence
* The assessment of the blameworthiness of the relevant conduct is not confined to the time of the breach, but extends to the officer’s testimony about Charter compliance
  + Also to misleading information provided in search warrant or wiretap applications

###### Institutional and Systemic Conduct

* Bad legal advice that leads to a Charter breach does not necessarily create a finding of good faith
* *R v Harrison* 🡪 evidence of systemic or institutional abuse will aggravate the seriousness of the breach and weigh in favor of exclusion, while the absence of such a problem is hardly a mitigating factor
* The failure of law enforcement agencies as a whole to respond to Charter rules is therefore a relevant consideration

###### Patter of Violations

* A pattern of illegality will aggravate the seriousness of the breach
* The more violations there are, the more likely there will be disrepute caused by admission of the unconstitutionally obtained evidence
* A pattern of violence demonstrates a lack of respect for the rule of law

##### Degree of Departure from *Charter* Standards

* S 24(2) exists so courts, as institutions responsible for the administration of justice, do not effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of the unlawful conduct
  + The more significant the deviation is, the more compelling the case for exclusion will be
* Must determine whether the breach is substantial or merely technical
  + E.g. more serious to not advise a detainee of his right to counsel/legal aid when he has expressed financial concern than it is to not advise a person being search incidental to his arrest of their right to counsel before starting the search
* The seriousness of a breach is exacerbated when an officer departs from Charter standards to a major degree
* The overall manner in which the police conduct themselves impacts how far removed they are from respecting the Charter
* The departure from Charter standards will be more intense where the vulnerability of the accused is exploited

##### Extenuating Circumstances – Necessity and Emergency

* Extenuating circumstances may attenuate the seriousness of the police conduct that results in a Charter breach
* Necessity 🡪 necessity in breaching the Charter to preserve evidence can diminish the seriousness of the breach
  + Two important points under this concept
    - More is needed that the simple fact that after any crime is committed, the possibility that evidence might be destroyed is inevitably present
      * There must be foundation for the belief in urgency
        + E.g. word of an arrest getting out would lead co-conspirators to destroy evidence that typically required a warrant
    - The urgency in preserving evidence should not be understood as reducing the seriousness of intentional, as opposed to inadvertent, Charter violations
* Emergency 🡪 where the public or police safety is at stake, a more generous approach is taken
  + E.g. delaying the right to counsel in attempting to control a volatile situation (*R v Strachan*)

### step 2 in assesing disrepute – guaging the impact of the *charter* violation on the *charter*-protected interest of the accused

* The measure of the significance of the impact of the violation on the accused is gained by examining the nature and degree of instruction of the charter breach into the Charter protected interests of the accused
* This 2nd inquiry focuses on the seriousness of the impact of the Charter breach on the Charter protected interests of the accused
  + The more interest being harmed, the greater the case for exclusion
* Rationale 🡪 address the danger that admitting the evidence may suggest that Charter rights do not count thereby negatively impacting the repute of the administration of justice
* The way the impact is assessed varies with the kind of evidence sought to be admitted (evidence listed below)

##### Statements

* The degree of intrusion that occurs when statements are unconstitutionally obtained is high
  + Statements engage the principle against self-incrimination
  + Also engage right to liberty and autonomy
* The right of the accused to choose whether to speak to authorities is aggressively protected
* **Unconstitutionally obtained statements are presumptively inadmissible**
* The significance of impact can be reduced where there is a sound basis for concluding that the accused would have spoken in any event, or where the breach is so technical as to have no real effect on the decision to speak
  + No causal link between the breach and the statement

##### Bodily Evidence

* The degree of intrusion depends upon the extent to which privacy, bodily integrity, and human dignity are compromised given the nature of the samples and the manner in which they are secured
* Bodily evidence does not present a risk of self-incrimination
  + Statements create new information, bodily evidence exists
* At one end of the spectrum, one finds that forcible taking of bodily samples or dental impressions (*Stillman*)
  + At the other end of the spectrum lie the relatively innocuous procedures such as finger-printing
* No presumption of exclusion; better addressed on a case-by-case basis by reference to the interest of privacy, bodily integrity and human dignity

##### Non-Bodily Physical Evidence

* The significance of the impact of the violation turns primarily on the manner of discovery and the degree to which the manner of discovery undermines the Charter-protected privacy interests of the accused, although privacy interest related to the nature of non-physical evidence also fall to be considered
* Body cavity searches and strip searches represent more serious breaches than pat down or frisks
  + Pat downs are more unreasonable than searching a person’s property and searches of one’s home are more serious than their office or car
* The manner of the search can increase the intrusiveness
  + E.g. harden entry into a home by armed officers can enhance intrusiveness

##### Derivative Evidence

* Derivative evidence 🡪 typically real evidence that is discovered as a result of unconstitutionally obtained statements
* The significance of the impact of the violation will turn on the Charter breach used to obtain the statement that led, in turn, to the derivative evidence
* Since derivative evidence comes from unconstitutionally obtained statements, the degree of intrusion will generally be significant, unless:
  + The breach had no real impact on the accused to make an informed decision about whether to speak to the authorities
  + It can confidently be said that the statement in question would have been made notwithstanding the breach
  + It can confidently be concluded that there is a likelihood that the derivative evidence would have been discovered even had there been no breach
    - Where this conclusion can be made, the significance of the intrusion varies with the degree of the likelihood that discovery would have occurred in any event

### step 3 in assessing disrepute – judging society’s interest in an adjudication on the merits

* The weight to be accorded to society’s interest in the adjudication of the case on its merits varies according to
  + The reliability of the evidence
  + The importance of that evidence to the case for the Crown
* While the seriousness of the offence is also a valid consideration, it in fact contributes little to the outcome since both society’s interest in deciding a case on its merits, and its vital interest in having a justice system that is above reproach, are heightened, effectively neutralizing the importance of the seriousness of the offence as a factor material to the exclusionary decision
* The third line of inquiry asks whether the truth-seeking function of the criminal trial process would be better served by admission of evidence or by its exclusion

##### The Reliability of the Evidence

* If a breach undermines the reliability of the evidence, this points in the direction of exclusion
  + There is no public interest in the admission of unreliable evidence
* Exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, bringing the administration of justice into disrepute
* Where the breach is serious enough and the impact is significant, the reliability of the evidence will not save it

##### The Importance of the Evidence

* The exclusion of evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution
* SCC has cautioned against treating the fact that evidence is crucial to the Crown cases as automatically requiring the evidence to be included
* Even if evidence is crucial, exclusion will occur if the Charter breach is serious enough of its impact on Charter rights is significant enough

##### The Seriousness of the Offence

* This isn’t as important of a consideration anymore; must not be given a lot of weight

### excluding evidence under section 24(1) of the *charter*

* Evidence can be excluded under s 24(1) in one-two situations
  + To remedy Charter violations that do not occur at the time evidence is obtained
    - E.g. to remedy an abuse of process by the Crown that affects the ability to evaluate evidence
    - Standard is high
  + Where the receipt of the evidence by the Court would breach the Charter
    - E.g. the admission of statutorily compelled statements would compromise self-incrimination principles
* S 24(1) provides for discretionary relief, something that is inappropriate where the receipt of the evidence would, by ex hypothesi, constitute a charter breach

### excluding unfairly obtained evidence in the absence of a *charter* violation

* Recognized in *Harrer* that improperly obtained evidence in absence of Charter breach
  + *Harrer*: Statements made to US authorities that if they had been Canadian would have breached. Court said “non-24(2) unfair trial exclusion made out.
  + Rely on following factors
    - 1) whether manner of obtaining the evidence renders it unreliable
    - 2) whether the evidence, by its nature, could be misleading
    - 3) seriousness of the misconduct
    - 4) whether, as a result of the unfair conduct, the accused is compelled to incriminate himself

### improperly obtained evidence and civil cases

* In some cases even in private lawsuits state may have been involved in obtaining evidence that one of the parties wishes to use.
  + In theory, so long as court of competent jurisdiction we could invoke S.24(1) or (2) to have it excluded (very few cases on this)
* If state not involved in obtaining evidence or not party to trial trying to use evidence then can’t use Charter
  + Must rely on the common law
    - Traditionally, the common law took a rigid stance and almost never permit exclusion on grounds it was obtained improperly, unfairly, or illegally
    - However seeing signs from Courts that there is discretion in the common law that is informed by Charter values.
      * Courts willing to consider excluding improperly obtained evidence in purely civil cases.
      * Ex: one party illegally recorded information that shows wrongful courts have said may be willing to exclude on this basis

# Unit 10 – methods of presenting evidence

* The adversarial system is based upon witnesses who present their evidence orally before a trier of fact
* The mechanism that compels the attendance of a witness is the subpoena
* The subpoena can compel both personal attendance and that the witness bring relevant documents
* Where a witness does appear, a court may issue a warrant to compel their attendance and a finding of contempt may be made
  + A witness who refuses to testify or to answer relevant questions can face prosecution for disobeying a lawful Court Order or can be cited for contempt
  + There are severe penalties for witnesses who are less than cooperative

## the calling of the witness

* Our trial system is based on the calling of witnesses and, as a general rule, the court is entitled to every person’s evidence, provided the person is competent to testify
* Competency 🡪 the person is qualified or capable of giving evidence
  + Should the person not wish to testify, he **can** be forced to or compelled
    - Served with a subpoena
* *Subpoena ad testificandum* 🡪 requires that the person attend to give evidence
* *Subpoena duces tecum* 🡪 requires not only that the person attend to give evidence but that the person also bring anything in his possession or control that relates to the charge, and more particularly, those things specified in the subpoena
* Should the person fail to attend, a warrant may be issued for his arrest and the person may be found guilty of contempt of court
* S 3 *CAE* 🡪 a person is not incompetent to give evidence by reason of interest or crime
* Today, basically all potential witnesses are allowed to testify; their frailty goes to credibility
  + There are still exceptions for spouses and children

## competency generally

* In criminal cases governed by the Canada Evidence Act, there are two competency regimes
* The general rule is that every person is both competent and compellable
  + The Court is entitled to every person’s evidence
* With respect to the issue of competency, historically a number of categories of individuals were not competent to give evidence:
  + **Children**
  + Infidels (non-christians)
  + **Those with mental disability**
  + Convicts
  + **The parties themselves**
  + **Their spouses**
  + Persons interest in proceedings
    - Today, we only care about the bolded categories
* Section 16 of the Act applies to adult witnesses and s 16.1 applies to child witnesses under the age of 14

##### Adult Witnesses

* Under s 16, persons over the age of fourteen are presumed competent to testify
* An inquiry into their competency will be under taken by the court only when the proposed witnesses’ competency is challenged an the court is satisfied that there is an issue as to the person’s capacity to testify under oath or affirmation
* Capacity under s 16 requires an understanding of an oath or affirmation and whether the witness is able to communicate the evidence
* Understanding of an oath or affirmation involves an understanding of the additional moral obligation to speak the truth in court
* An ability to communicate the evidence involves the capacity to perceive, remember and communicate the evidence
* Should the witness understand the nature of the oath or solemn affirmation and be able to communicate the evidence, the witness will then be allowed to testify under oath or affirmation
* Should the witness not understand the nature of the oath or affirmation, but have the necessary capacity to give evidence, the witness may testify on promising to tell the truth

##### Children Witnesses

* Under s 16. 1 of the *CAE* all child witnesses under the age of 14 are presumed competent to testify
* An inquiry into their competency will be undertaken by the court when the proposed witness’s competency is challenged or when the court is satisfied that there is an issue as to the child’s capacity to understand and respond to questions
* No child witness will take an oath or solemn affirmation
* They will be permitted to testify on promising to tell the truth and no inquiry will be allowed as to their understanding of the nature of a promise to tell the truth
* A child’s evidence taken by way of a promise to tell the truth shall have the same effect as if it were taken under oath
* Competency involves two aspects:
  + Capacity
  + Responsibility
* The witness must have the capacity to observe, recollect and communicate
  + Is the witness capable of observing what was happening?
  + Is the witness capable of remembering what he/she observes?
  + Can the witness communicate what he/she remembers?
* The witness must also accept and be aware of the responsibility to testify in a truthful manner
* Common law regimes of competency have been done away with
  + New statutory regimes are codified in s 16 and 16.1

### competency of adult witnesses

* Witnesses over the are of 14 are presumed competent
* For proposed witnesses over the age of 14, an inquiry into their competency will be undertaken only when a challenge is made and the court is satisfied that there is an issue as to the proposed witnesses mental capacity
* **S 16(1)** **Test:**
  + Whether the person understands the nature of an oath or a solemn affirmation
  + Whether the person is able to communicate the evidence
* When the answer to both questions is “yes”, the witness can swear an oath or affirm
* Where the answer to question 1 is “no”, but the second yes, the witness will be permitted to give unsworn evidence
* If the answer to the second question is no, the witness will be declared incompetent
* S 16 inquiry begins with a challenge to the mental capacity of the proposed witness and the burden rests with the challenger to satisfy the court that there is an issue with capacity
* The inquiry is conducted in front of the jury
  + Can be in *voir dire* if there is a possibility of prejudice
* Experts can assist judges, but it is not a matter of expert decision
* *R v Parrot* 🡪 determining the competency of a would-be witness is not a matter outside the experience and knowledge of a judge
* At the conclusion of the inquiry, the judge then rules on the witnesses’ competency and a large measure of deference is to be accorded to the TJs assessment of a child’s capacity to testify
* *R v Marquad* 🡪 it is necessary to explore in a general way whether the witness is capable of perceiving events, remembering events and communicating events to the court
  + It is not necessary to determine in advance that the child perceived and recollects the very events at issue as a condition of ruling that the evidence be received.
  + Not required of adults and shouldn’t be required of children
* The oath is about responsibility – what is required is to get a hold of the witnesses conscience, that there is an appreciation for testifying under oath
* The child’s understanding of the moral obligation must include (*R v Leonard*):
  + An appreciation of the solemnity of the occasion
  + An understanding of the added responsibility to tell the truth *over and above* the duty to tell the truth as part of the ordinary duty of normal social conduct
  + An understanding of what it means to tell the truth in court
  + An appreciation of what happens in both a practical and moral sense when a lie is told in court

### competency of child witnesses

* Children, like adults, are presumed to have capacity to testify
* The focus has changed from admissibility to reliability
* An inquiry will be proceeded with if the child’s capacity is challenged, in which case the challenger has the burden of satisfying the court that there is an issue as to the child’s capacity
  + Court can raise the matter too
* Under s 16.1(2), a child witness shall not take an oath or solemn affirmation
  + Children will be permitted to testify upon promising to tell the truth
* When competency is an issue the focus is on the child’s ability to understand and respond to questions
* Again, competency is decided by the judge
* The evidence of a child witness given by way of promise is to have the same effect as if it were taken under oath
  + Removes the stereotypical thinking that a child’s evidence is inherently suspect
    - Should be approached in the same way an adult witness is

### competency of the mentally disabled

* Contained in s 16 of the *CEA*
* It is for the party alleging mental incompetency or lack of capacity to satisfy the court that there is an issue to be tried
  + The threshold is low
    - Does this witness’ condition substantially negate the trustworthiness of the evidence?
* Section 16(3) of the Canada Evidence Act properly interpreted, establishes just two requirements for an adult with mental disability to take the stand
  + The ability to communicate the evidence
  + A promise to tell the truth
* There is no additional obligation that the witness be able to demonstrate that he/she understands the nature of the obligation to tell the truth
* If the witness isn’t found to be incompetent until during/after testimony, a mistrial may be required
* We again should have reference to Bill C-32 for Section 53 amends Section 16 of the Canada Evidence Act by adding subsection 3.1 to provide that no questions can be asked to determine whether or not the prospective witness understands the nature of the promise to tell the truth. The Alberta Evidence Act is silent on how to deal with the mentally disabled witness.

## parties to the proceedings

* Civil: parties are competent and compellable at instance of themselves and opposite party
* Section 4(1) of *AEA* – parties are competent and compellable on behalf of any party, as are the spouses of the parties, subject to marital privilege (s 8 AEA)
* Crim: accused is neither competent nor compellable for the Crown but **is for the Defense**
* Co-Accused – although competent for remaining co-accused, is not compellable by any one of them to testify
  + Only remedy is to get separate trials – then they’re competent and compellable by Crown
* Significant *Charter* issues here – *R v S(RJ)* – recognizes use immunity and derivative use immunity as protection for separately indicted or severed accused called by Crown
  + Sometimes, may have available to him ability to have the subpoena served upon him set aside
    - = ruling from Court that incompetent for Crown
* Parallel civil proceedings – no immunity from testifying in those civil proceedings – no general rule that civil proceedings are to be stayed pending resolution of criminal matters (can be done, but difficult)
* Tactical considerations whether to sever:
  + Does the Crown need the evidence of one against the other(s)?
  + Is this overborne by the public interest in convicting all the accused and in one joint proceeding?
  + Is there a risk of inconsistent verdicts if we proceed separately?
  + Is the proposed witness credible; which is more credible; which accused is “wanted" more by the Crown?
  + Will there be a refusal to be sworn or a refusal to testify?
  + Is there corroboration available to the Crown?
  + How will a forced cut-throat defense work its way out?
  + Could the accused get severance in any event?
  + How ought the various accused be listed on the Indictment because that will determine the order in which they are put to their respective defences, which may be extremely significant? Remember that an accused who is listed first on the Indictment cannot revisit his decision to call no evidence once the various co-accused listed after him have elected to testify.
* Note: can’t rely on defence counsel of co-accused 🡪 tactical matters may be discussed but they’re still adverse in interest to you
* Order of proceedings NB – who goes first
* If separately indicted, may be “cast on the three horns of the triceratops”
  + He runs the risk of self-incrimination/harmful disclosure in the event he testifies truthfully
  + In the event he refuses to be sworn, he will be cited for contempt and be punished severely
  + If he lies, will be punished severely because prosecuted for **perjury** which is serious offence

## the competency and compellability of spouses

* The rule of spousal incompetency applies only where there is a valid and subsisting marriage
* The rule does not apply to common law relationships or where the couple, although legally married are irreconcilably separated
  + No risk of damaging matrimonial harmony
  + Crown must satisfy the burden
    - They need to never reconcile
    - The test is a necessarily subjective determination
* In **civil cases**, any party or the spouse of any party is a competent and compellable witness for any party of the action
* In a criminal case, the spouse of an accused is a competent witness for the defence (s 4(1) *CEA*)
* Bill C-32 has essentially set aside both Spousal incompetency and non-compellability vis-a-vis the Crown with subsection 4(2) being replaced by a new provision and subsections (4) and (5) being repealed.
  + S 4(2) now holds that no person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused.
* The common law exceptions apply when:
  + The accused is charged with an offence involving the spouse’s person, health, or liberty
  + Even though there is no charge, evidence reveals that the accused threatened the spouse’s person, liberty or health
  + Violence, cruelty or threats are made against the spouses’ child
* There is an issue as to whether a spouse is compellable under the common law
  + It is the preferred view that the spouse, on being found competent, is also compellable
* The two most cogent rationales to justify the rule are:
  + The protection of matrimonial harmony
  + The natural repugnance in compelling a wife or husband to assist in convicting the other
* Spousal incompetency applies to out of court statements
  + i.e. to police

## examination in chief

* Most evidence is presented in the form of oral evidence
* Questions posed by lawyers to elicit oral evidence are not themselves evidence
* Witnesses cannot just tell the story they see fit
  + Questions are used to structure the presentation to help ensure that only admissible evidence is given
    - Also for strategic purposes – to allow a party to be selective of the information that is sought from the witness

### examination in chief defined

* Describes the phase in the testimony where that witness is being questioned by the party who has called her
* It can also describe the method of questioning that the party calling a witness is entitled to use under normal circumstances

### the method of questioning during examination in chief

* The party calling a witness should generally use open-ended as opposed to leading questions
* Answers to leading questions are not inadmissible, but the fact that they were a result of a leading question may effect weight

##### Open-Ended Questions

* Limits are placed on the questions that can be asked by the party that called the witness
* The lawyer is to ask open-ended questions as to not elicit a favorable response
  + “who was with you?”, “when did you first notice that?”
* This enables the witness to tell his own store and reduces the lawyer’s influence
* Answers to open-ended questions are usually persuasive and credible because the response will be natural and likely to be seen as independent
* If you have a good witness, this is the best strategy to use to present evidence

##### “Leading” Questions

* Generally impermissible
* Two kinds of leading questions:
  + One that suggests an answer to the witness
  + One that presupposes the existence of a fact not presented by that witness in evidence
* The second kind of leading question is **never** permissible unless the presupposed matter is not contested
* Situations in which the first kind of question is permissible:
  + Introductory or undisputed matters
  + Identification of persons or things
  + The contradiction of statements made by others
  + Complicated or technical matters
  + Where leave has been obtained to cross-examine a witness that is hostile or adverse
  + Where the witness is having difficulty answering the question and leave has been obtained to lead the witness
  + Where the question will refresh the memory of a witness and leave has been obtained to lead the witness
  + Any other case where leave has been obtained to lead the witness, in the interest of justice
* Judges have discretion to remove the ban on questions that suggest the answer, where it is necessary to do in the interest of justice
  + They may do so where:
    - The witness, because of age, language or mental challenge, is having difficulty answering the question
    - The question will refresh the memory of a witness who is having difficulty recalling
* A leading question does not always invite a yes or no answer

## refreshing memory

### generally

* Memory can be jarred
* The law enables counsel to, subject to limits attempt to refresh the memory of a witness

### prior to trial

* Witness are generally free to use whatever means they choose to refresh their memories prior to trial
  + The means used can effect weight
    - Exception: testimony that has been generated using unproven “scientific” memory enhancing techniques (hypnosis) is *prima facie* inadmissible
      * Before this testimony can be received, the party presenting it will be obliged to demonstrate that the relevant technique possess the threshold of reliability required for “novel science” in the expert opinion evidence context
* Opposing counsel is entitled to explore what means, if any, were undertaken to refresh a witnesses memory prior to trial
  + If documents or real items were consulted, the judge can order production to the opposing side
* *R v Trochym* 🡪 post hypnosis evidence is to be excluded absent proof by the party who is seeking to rely on it of a change in the underlying scientific assumptions about its reliability
* Witness can testify on matters in which their memory was not refreshed by hypnosis provided that the probative value outweighs the prejudicial value
  + Judge must still warn the jury about the potential frailties of post-hypnosis evidence and give proper instructions to weight

### during trial

##### Past Recollection Recorded

* A witness may, with leave of the court, refresh their memory in court from a document or an electronic record that was recorded reliably
  + Shouldn’t be used if their memory is fine; can’t be used to bolster testimony through repetition or provide the witness with a script
* The SCC has described the pre-requisites that apply where a witness does require to have their memory refreshed and the doctrine of “past recollection” is relied on:
  + The witness must use the original, if it is available
    - Where it isn’t, an authenticated copy can be relied on
  + If the record is a document created by the witness, it must have been created at a time when the memory of the witness was sufficiently fresh to be vivid and probably accurate
  + If the record is a document created by another or an electronic recording, the document must have been reviewed by the witness at a time when his memory was sufficiently fresh to be vivid and probably accurate
  + The witness can rely on the document/electronic record to assist in presenting his testimony only if the witness is able to assert that the document or recording accurately represents his recollection at the time it was made
* Each requirement is important
* Once a witness has reviewed a document that contains past recollection recorded, the information contained in the record does **not** become evidence unless the witness incorporates the information into her testimony
  + Or unless the document is admitted under some other evidence rule
* The witness does not have to say he remembers the evidence after reviewing a document
  + Can just say that he knew the facts at the time the record was made and that they were accurately recorded
* Generally inappropriate to simply ask the witness to read from the document
* A witness who does not recall the details in question after reviewing the record can be allowed to read from the record those portions that she can attest were recorded accurately and verified as accurate at the time
  + To present this as the witnesses independent testimony would be misleading, that its why it is best to have the witness read directly from the record
  + This will be less likely to confuse the trier of fact

##### Present Recollection Revived

* Subject to an exclusionary discretion where doing so would be too suggestive, a witness may consult any document while testifying
* As long as the document sparks an actual recollection of the event recorded, the witness can present oral testimony about the event remembered
* This differs from past recollection recorded
  + The primary significance of the distinction is that for cases where a review of the record does not inspire an actual recall of the facts recorded, the rigid requirements just described for past recollection recorded are essential
    - The document is in substance the evidence and must therefore meet the requirements of time, verification and accuracy of the past recollection recorded rule
  + If a witness views a record and has her present memory revised, then testifies about the event, the record is not the evidence, it was just a trigger
    - The testimony is
* Even if the record does spark a memory of the witness, it should not be read from as the record is not the evidence, its merely an aid

##### Transcripts and Depositions

* A court may allow a witness who cannot recall matters they have previously testified about to be shown transcripts of their earlier testimony or their depositions
* There is no contemporaneity requirement, nor is there a need for the witness to have read over the transcript to verify its accuracy

##### Refreshing Memory with Unconstitutionally Obtained Evidence

* *R v Fliss* 🡪 police officer was allowed to refresh his memory in court using the transcript of an electronic interception that was held to be in violation of s 8 of the Charter and excluded from evidence
  + The court suggested he could have refreshed his memory outside of court with the transcripts
* This decision is troubling; the testimony should be unconstitutional as well

## cross-examination

* Vital part of adversarial process
* Cross examination has two basic goals:
  + Elicit favorable testimony from the witness
  + Discrediting the testimony of the witness
* English Rule 🡪 allows the cross-examiner to inquire into any relevant matter
  + Followed in Canada

### the method of questioning in cross-examination

* The use of leading questions in cross-examination is permitted
* The cross-examiner presumably questions a witness that is partisan to the other side
  + This would make the witness less susceptible to leading questions
* The use of leading questions becomes improper where the witness proves partisan (a supporter) to the cross-examiner’s side
  + E.g. plaintiff calls employee of defendant’s company
* **Tips for Cross Examination**:
  + Preparation
  + Don’t cross-examine without a purpose
    - It is more effective to know what you are getting at and who you have to question and leave other parts alone
  + Cross-examine for the judge or jury deciding the case, not for your client
  + End on a positive note; know when to quit
  + Get helping evidence out *before* impeaching the witness
    - First go through the things you know you are going to get from them before they get angry
    - May see you as harmless if you start out with questions they agree with

### cross-examination on credibility

* Each witness who takes the stand puts his/her credibility into issue, and counsel in cross-examination are free to discredit or to “impeach” the witness’s credibility
  + All witnesses put their credibility at issue when they take the stand
* Broadly speaking, there are four goals with respect to cross-examination:
  1. To bring out evidence which is helpful to you on the substantive issues raised by the case or that which is harmful to your opponent on such issues.
  2. To impeach the credibility of a witness/to weaken the quality of their evidence by a cross-examination focussed on their testimonial factors.
  3. To elicit evidence which adversely affects the credibility of a witness who has already testified or one who is yet to be called
  4. To focus the case, that is, a good cross-examination should focus the Court’s attention upon those areas of the matter in dispute which require close examination by the tribunal.
* Wigmore likened impeachment to explanation 🡪 the witness has made an assertion in examination in chief and in cross, counsel seeks to *explain away* the evidence
  + Discredit the witness, the testimony or both
* Cross-examination designed to **impeach a witness** may focus on a number of areas:
  + By showing bias, prejudice, interest or corruption
  + By attacking the character of the witness through raising prior convictions, prior bac acts, or poor reputation
  + By contradicting the witness through previous inconsistent statements
  + By challenging the witness through previous inconsistent statements
  + By challenging the witness’s capacity to observe, recall, and communicate accurately
    - Physical or psychological conditions
  + By putting contrary evidence to the witness
  + By showing that the witness’s evidence is contrary to common experience
  + Best one 🡪 demonstrating that the witness has made a prior inconsistent statement
* In general, when a cross-examiner asks a question relating purely to credibility, the witness’s answer is final
  + This practice is called the collateral facts rule
    - Prohibits the presenting of evidence to contradict a witness on a collateral matter

### limitations on cross-examination

##### Generally

* Cross-examining counsel are bound by the rules of relevancy and are barred from resorting to harassment, misrepresentation, repetitiousness, or more generally, from putting questions whose prejudice effect outweighs their probative value
* Counsel are not to ask questions that case aspersion on a witness or suggest contrary facts unless the cross-examiner has a “good faith” basis for the question
* TJ must ensure cross is not becoming irrelevant or insulting
* Counsel cannot abuse or harass a witness
* There are limits on the questions counsel can ask
  + Cross-examiner must have a good faith bass for suggesting evidence within a question
    - E.g. “you’ve lied for the accused before, haven’t you?”
* Good faith basis 🡪 a function of the information available to the cross-examiner, his/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
  + Information can be complete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that she knows to be false
* *R v Howard* 🡪 counsel are not allowed to cross-examine on irrelevant or inadmissible matters
* Where evidence is starting to get suspect, TJ can call *voir dire*
* Key parameters 🡪 relevancy and materiality
  + Fluid concepts, change with issues at hand

##### Limits on Crown Counsel in Cross-Examination of the Accused

* It is improper for Crown counsel to ask the accused as to the veracity of Crown witnesses and it is improper for Crown counsel to question the accused as to otherwise inadmissible bad act evidence
* *R v Logiacco* 🡪 Crown prosecutor must be a symbol of fairness
  + Restraint is required in the cross-examination of the accused and certain lines of questions are simply not permitted
* It is improper to ask the accused about the veracity of Crown witnesses
  + This line of questioning suggests an onus upon the accused to provide a motive and in doing so they undermine the presumption of innocence
* Accused persons cannot be questioned as to their discreditable conduct and associations, unrelated to matters at trial
  + Normal witnesses can
* If evidence is too unreliable to be tendered in the Crown’s case, or if the Crown doubts its veracity, it should not be used in cross-examination of an accused
  + Such evidence would be incapable of providing a good faith basis for suggestions in cross-examination
* Where the Crown’s good faith foundation is challenged on reasonable grounds, and the suggestion put to the accused may be unfairly prejudicial, the proper course is for the Crown or defence to seek a *voir dire* on the propriety and scope of the question to be asked
* Cross-examination that is directly relevant to prove the falsity of the accused’s evidence does not fall within the ban, notwithstanding that it may incidentally reflect on the accused’s character by disclosing discreditable conduct on his part

### failure to cross-examine: the rule in *browne v dunn*

* *Browne v Dunn* 🡪 A party who intends to impeach on opponent’s witness must direct the witness’s attention to that fact by appropriate questions during cross-examination
  + This is a matter of fairness to the witness
    - It is especially unfair to a witness to adduce evidence that casts doubt on his veracity when he has not been given an opportunity to deal with the evidence
  + Challenging a witness also gives the trier of fact an opportunity assess credibility
* If the cross-examiner fails to do so, there is no fixed consequence; effect depends on circumstances of each case
* The court should first see if the witness can be recalled
* If that isn’t possible or appropriate, the weight of the contradictory evidence or submission may be lessened, or such evidence may be rejected in favour of the testimony of the opponent’s witness
* Counsel does not have to go through every single detail to be contradicted
  + The necessary unfairness that triggers the rule only arises when there is a failure to cross-examine on a central matter
* Fundamental question 🡪 whether the witness was given an opprounity to respond to the cross-examiners contrary position and not necessarily all the details
* Should counsel fail to confront a witness with a prior inconsistent statement, that violates the procedure for proper impeachment on these statements
* Ss 10 and 11 *CEA* 🡪 before being allowed to contradict a witness by introducing prior inconsistent statements, counsel may lay a proper foundation, which includes confronting the witness in cross-examination with the making of the inconsistent statements

### the collateral facts rule

* Collateral Facts Rule 🡪 prevents the calling of evidence to contradict the answers of an opponent’s witness, whether given in chief or on cross-examination, on collateral matters
* What constitutes collateral fact is open to debate
* *AG v Hitchcock* Test 🡪if the answer of a witness is a matter which you would be allowed on your part to prove in evidence, if it has such a connection with the issue that you would be allowed to give it in evidence, then it is a matter which you may contradict him
* Two general approaches as a result of *Hitchcock*:
  + The Wigmore Test: Could the fact, as to which error is predicated, have been shown in evidence for any purpose independent of the contradiction? This test includes facts relevant to a material issue and facts that go to discredit a witness’s credibility
  + The Phipson Test: Proof may only be given on matters relevant directly to the substantive issues in the case. Proof of contradiction going to credibility is prohibited unless it falls within certain exceptions
    - Exceptions: (1) bias, interest or corruption, (2) previous convictions, (3) evidence of reputation for untruthfulness or (4) expert evidence on problems that could affect the reliability of a witness’s evidence
      * This approach, if applied strictly, could exclude good evidence
* The collateral facts rule forbids the calling of evidence to contradict the answers given by an opponent’s witness about “collateral” facts
* Contradiction usually arises from an answer given on cross-examination so the rule is often stated: a witnesses answer on a collateral matter to a question asked in cross is final
  + Rule is not confined to answers given in cross, can apply to examination in-chief
* Rule is mostly based on policy concerns and a rule of trial efficiency
  + Allowing proof on collateral matters may confuse the trier of fact and may take up undue time
* **Key question** 🡪 is the evidence offered of sufficient value and of sufficient importance to the issue before the court that we ought to hear it having regard to the necessary court time required, potential confusion of issues, and any unfairness and prejudice to the witness?
* Proposal:
  + The allowing of evidence to contradict a witness’s testimony is a matter best left to the TJ
  + TJ should weight the benefits of receiving the evidence against potential prejudice
  + Allow contradiction where the probative value outweighs the counterbalancing policy concerns
* Phipson approach still has a strong tradition in Canada

##### Bias, Interest Corruption

* It is accepted that partiality, bias or corruption colours a witnesses entire testimony
* Such evidence is always relevant and is not collateral

##### Previous Convictions

* Exception under statute allows for questioning on prior convictions
* Should the witness deny or refuse to answer, the cross-examining party may then prove the convictions
* To a certain extent this exception is based on ease of proof and the conclusive nature of that proof

##### Reputation as to Trustworthiness

* If counsel suggests to the witness that he has a general reputation for untruthfulness and he denies it, counsel can call evidence as to their general reputation for untruthfulness in the community

##### Expert Opinion on the Reliability of a Witness

* Expert evidence can be called to show physical or mental problems that make the witness incapable of giving reliable evidence

### cross-examination on prior convictions

* S 12 *CEA* 🡪 Any witness, including the accused, may be questioned as to prior convictions
* However, with respect to an accused, the court has a discretion to disallow such questions weighing the probabtive value of the evidence against its potential prejudice
* The factors considered in excercising this discretion include the nature of the conviction, similiarity to the charge now before the court, age of the conviction and fairness at trial
* General proposition – a prior criminal conviction may bear on credibility
* TJ is under a duty, in cases where the accused has been cross-examined as to prior convictions, to instruct the jury regarding the limited permissible use of the evidence
* Cannot be crossed on “discharge”
* Can only be examined as to the fact of the conviction and the sentence
  + Cannot be questioned on the facts that led to the conviction
* The fact that conduct has resulted in a criminal conviction will usually enhance the probative value of the cross-examination
  + Therefore, the ordinary witness may be cross-examined on the facts underlying the criminal conviction
    - Only limit is that of relevancy and propriety
* It is for the accused to show that the prejudice is such that to allow the cross-examination would undermine the accused’s right to a fair trial
  + TJ makes the ultimate decision
* 4 factors to consider in exercising the discretion (*R v Corbett*):
  + The nature of the previous conviction
    - A conviction for perjury or for fraud is far more telling about a person’s honesty and integrity than a conviction for assault
  + How similar the previous conviction is to the offence now charged
    - The concern here is of prejudice – court should be very chary of admitting evidence of a previous conviction for a similar crime
  + The remoteness or nearness of the previous convicton
    - Convictions occurring long before and followed by a blameless life should generally be excluded
  + Fairness
    - Where the accused attacks the credibility of the Crown witness and credibility is at issue, it would be unfair to insulate the accused from his own criminal past
    - Allowing this would distort the jury’s view
* Attacking the good character of a witness engages the *Corbett* concerns
  + Challenging the accuracy and reliability of the witness does not to the same degree
* Defence has a right to know, before calling evidence, whether or not the accused’s prior convictions will be raised in cross; this should be disclosed in a *voir dire*
* The purpose of the *voir dire* is not defence disclosure, just required for context
* *Corbett* applications apply in civil cases as well

### prior inconsistent statements

* Witnesses may be impeached using prior inconsistent statements
* The prior inconsistent statements go only to credibility and are not evidence of their truth unless they are adopted by the witness
* Before counsel will be allowed to contradict a witness by proving a prior inconsistent statement, fairness demands that the statement be put to the witness
* Inconsistent statements show an undefined capacity to err
* The inconsistent statement goes only to credibility or reliability and is not introduced for its truth unless the witness adopts the prior statement or it is admissible under a hearsay exception
* Ss 10 and 11 of the *CAE* require that the cross examiner give the witness notice of the statement
  + Rationales: saves time, gives the witness an opportunity to explain any contradiction or inconsistency
* S 10 pertains to statements in writing, reduced to writing or recorded
  + Statements must be made by the witness
  + The writing does not have to be shown to the witness
* S 11 pertains to inconsistent statements made orally
* 4 Steps to Impeach a Witness Using Prior Inconsistent Statements:
  1. Counsel has the witness confirm the present testimony
  2. The witness is then confronted with the making of a prior statement
  3. The prior inconsistent statement is then put to the witness showing contradiction - counsel usually reads it out loud for the record first
  4. Finally, the witness may be asked to *adopt*  the prior inconsistent statement for its truth
     + If the witness refuses to do so, then the statement goes only to credibility, unless the witness is a party or an accused, which makes the statement admissible for its truth as an admission
* Proof of the inconsistent statement need only show that it is sufficiently connected to the material issue in the case
* Where s 10 is being used, only the portion of the document that is being used needs to be put to the witness; the entire document does not have to become an exhibit

##### Prior Inconsistent Statements of Accused or Parties

* Treated differently from other witnesses
* Statements by an accused or a party may be used as evidence going to the substantive issue of guilt, and not just credibility
  + They are **admissions**
* There is no need for instructions to the jury limited the use they can make of this prior inconsistent statements
* There is no requirement that the accused or party adopt these statements before they can be considered as evidence against them
* **BUT** the Crown cannot attempt to trap the witness by holding back certain statements and hoping that the accused will testify to them
  + Therefore, prior statements first tendered by the Crown in cross will not be inculpatory
  + They must be tendered as part of the Crown’s case
* When an accused is cross-examined on a prior statement, as with any witness statement, the TJ has discretion to permit all or part of the statement
  + The whole statement need not be put into evidence
* Accused cannot be cross examined on a statement ruled inadmissible

### incomplete cross-examinations

* A cross-examination that is cut short does not necessarily result in the loss of the testimony already given
* There is no set consequences and the matter is within the discretion of the trial judge
* The right to cross-examine is not absolute or limitless
* The inability to cross-examine does not necessarily render the witness’s testimony that is given inadmissible
  + There is concern about a fair trial, but there is no definite test in determining whether an accused has been deprived of the right to make a full answer and defence
  + Discretion is with the TJ as to fairness
* In exercising this discretion, there are 3 relevant considerations to serve as a guide:
  + The reason for the incomplete cross-examination
    - Looks at fault of the witness
      * No fault attributed on death
      * Deliberate conduct of the witness to frustrate the cross speaks against receiving the witness’s testimony
    - Flexibility and common sense must be used when analyzing a child witness and the child becoming unresponsive during a cross
    - Fault can also be applied to the cross-examiner
  + The impact of the lack of cross-examination
    - What is looked for is the prejudice to the cross-examiner
    - It is sufficient to identify areas where the witness is vulnerable to attack had the cross been completed
      * TJ can consider:
        + How important the evidence is
        + Can the trier of fact evaluate the evidence without a cross?
        + How much cross-examination was complete and what was the context and effect of that cross?
        + Are the significant areas of cross left unchallenged
        + Were inconsistencies crossed?
  + Possible ameliorative action
    - Can the witness be brought back?
    - The TJ ought to consider placing less weight upon the evidence given the lack of cross and an appropriate instruction the jury to do so as well

### re-examination and rebuttal or reply evidence

* Once cross-examination is complete, then re-examination may, with leave of the Court, take place
* New matters cannot be raised at this point
  + The witness cannot simply repeat what was stated in the examination-in-chief
  + This is not the chance to have the last say
* Can only deal with issues raised in a cross-examination for the first time
* **BUT** rebuttal and reply (which differs from re-examination) evidence arises after the close of the defence’s case, where the Crown or Plaintiff would again, with leave of the Court, be permitted to call further evidence to deal with matters which have arisen for the first time in the course of the Defence’s case
  + This involves calling further evidence
    - Counsel can’t **split their case**
      * They can’t withhold evidence which should have been called in the examination-in-chief in hopes of being able to call it at this point in the case
      * All relevant evidence which you have in your possession and you intend to call ought to be led in the case in chief and none can be held back for rebuttal

## real evidence

### general principles

* **Real evidence** 🡪 the tangible items exhibited to the judge or jury
  + This evidence may be directly linked to the occurrence (murder weapon) or may be demonstrative evidence, which refers to aids used to help witnesses better illustrate or explain their evidence
* Important elements of real evidence
  + Authenticity
  + Continuity
* The evidence is admissible provided it is properly authenticated
* The TJ must be satisfied that there is a sufficient basis to support the identification of the exhibit, its continuity and it’s integrity
* Real evidence may also be excluded where its potential to arouse undue prejudice outweighs its probative value
* Demonstrative evidence is a testimonial aid and is not original evidence of what happened
* The relevance of real evidence is inextricably linked to its authenticity
* Crown must provide sufficient foundation for the reception of real evidence into evidence
  + Crown must establish the “continuity” of the exhibit in that the exhibit is accounted for from pick-up at the scene
* Threshold for proof is not high
* TJ must be satisfied that there is evidence to support the conclusion that the item of real evidence is what the party claims
* There is a concern with prejudice – visual, tangible evidence has a powerful impact
  + Must be excluded if prejudicial effects > probative value

### views

* If it is impractical to being the evidence to the court, the court may go to the evidence by way of a view
* The value in conducting a view must be weighed against the inconvenience and disruption necessitated in essentially moving the court participants to the site
* What is said during the view can be of concern; best to have the judge explain it on record or have it recorded
* Observations of the trier of fact at a view are evidence

### photographs and videotapes

* The admissibility of photographs or videotapes depends upon:
  + Their accuracy in truly representing the facts
  + Their fairness and absence of any intention to mislead
  + Their verification on oath by a person capable of doing to
* The person verifying doesn’t need to be the photographer, can be an eye witness
* The photograph can be of the scene taken well after the events as long as a witness testifies that it is a fair and accurate reproduction of the scene as it was at the time of the incident
  + *R v Maloney* 🡪 TJ rejected distorted video of the hockey game to show assault
* Photographs/videos must be excluded where they would be used to inflame the minds of the jurors against the accused
  + Today, we are exposed to more violence in graphic detail and should be less swayed than in the past
  + Less videos should be excluded for inflammatory prejudice provided they have some probative value
* *R v Maloney* 🡪 SCC held that a judge may rely on his own viewing of a videotape taken of a crime to establish identification
  + Removes the old assumption that video/photograph evidence had to be accompanied by a witnesses testimony
* Video of an accused walking the police through the way he committed the crime is generally admissible as an admission
* The police attempting to re-enact a version of the events must be very carefully considered before being admitted as evidence
  + Court should consider the video’s relevance its accuracy, its fairness, its necessity and whether what it portrays can be verified under oath
  + The video must represent accurate, undisputed facts; cannot just be one party’s side of the story
* Demonstrative evidence is intended to aid witness’s in their testimony, it is not intended to allow witnesses to repeat their testimony

### document

* Documents can be authenticated in a number of ways: calling a witness who saw the document signed, calling a witness who is familiar with the handwriting, etc
* Circumstantial evidence can point to the genuineness of the document
* The use of a document at trial is guarded by the best evidence rule
* **Best evidence rule** 🡪 requires that the original of a document be tendered when a party seeks to prove the contents of that document
* Flexibility and common sense must be used when analyzing a child witness and the child becoming unresponsive during a cross
* Fault can also be applied to the cross-examiner
  + Secondary evidence (copies, etc) is inadmissible
* The best evidence rule is confined to cases where a party has the original document and could produce it, but does not
  + The party may satisfy the court that the original is lost, destroyed or is otherwise in the possession of another and cannot be obtained
  + Flexibility is urged in the rule

### computer-generated evidence

* Admissibility generally falls to be decided within the traditional frameworks of the law of evidence, although the *CEA* now has a new provision dealing with the authentication of electric documents
* Where the records rely on human input, hearsay concerns apply and an exception needs to be found
  + Usually admissible under the business records exception
* Information generated by the computer is not hearsay for the most part; no human input, no hearsay concerns
  + This information can be treated as original with the only concern being accuracy and reliability of the information-generating process
* In the event a computer is used to create a visual aid, counsel must establish a proper foundation that:
  + The expert’s testimony is relevant and admissible and the model relates to that evidence
  + The expert who’s testimony the model illustrates is familiar with it
  + The model fairly and accurately reflects the expert’s evidence to which it relates
  + The model will aid the trier of fact in understanding or evaluating the expert’s evidence
* When computer recreation is introduced the reliability of the computer program should be assessed

## judicial notice

### judicial notice of facts

* Judicial notice is the acceptance by a court, without the requirement of proof, of any fact or matter that is so generally known and accepted in the community that it cannot be reasonably questioned, or any fact or matter that can be readily determined or verified by resort to sources whose accuracy cannot be reasonably questioned
* Must distinguish between taking judicial notice of adjudicative facts and legislative facts
  + **Adjudicative facts** 🡪 facts to be determined in the litigation between parties
  + **Legislative facts** 🡪 facts that have relevance to legal reasoning and the law-making process and involve broad considerations of policy
    - Assist in determining questions of law and are not intended to resolve questions of fact
* Judicial notice also includes “social framework facts”
  + **Social framework facts** 🡪 provide a context for the judge to consider an apply the evidence in a given case
    - Can be provided by experts or may be accepted as common knowledge
    - Will only be relevant if the linked to the evidence in the particular case
* There is no bright line that divides judicial notice from common sense
* Facts judicial noticed are not proved by evidence or under oath, nor are they tested by cross
* The threshold for judicial notice is **strict**
  + A court may properly take judicial notice of facts that are either
    - So notorious or generally accepted as to not be the subject of debate among reasonable persons
    - Capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy
* An appellate court must look to what is or is not the local communities common knowledge
* 2 rationales for judicial notice
  + It is a means to expedite the trial process – a tool of convenience designed to shorten and simplify trials
  + It is based on the need to protect the credibility of the judicial system (Morgan approach)
    - Under this model, judicial notice applies only to indisputable facts that, if not accepted, would bring the judicial system into disrepute
    - Once judicial notice is taken, the matter is indisputable
    - The Morgan approach is the accepted approach in Canada (stricter)

##### Adjudicative Facts

* Facts determined in a particular case
* It is also taken of facts that are commonly before courts and that are of common knowledge in the court community
* Can be taken of facts previously found by other courts
* It extends to facts capable of ready determination by resort to sources of indisputable accuracy
  + E.g. going to a calendar to match days and dates
* Dictionary meanings are another source of indisputable accuracy

##### Legislative Facts

* Facts that have relevance to legal reasoning and the law-making process and involve broad considerations of policy
* They are not directed at resolving a specific factual issue in the case before the court
* They are resorted to when the courts are asked to make laws
* Legislative facts are not likely to be indisputable
* Judicial notice and expert evidence are not compatible
  + Judicial notice deals with common knowledge
  + Expert evidence requires that the knowledge be beyond the ordinary person

##### Social Framework Facts

* Hybrid of adjudicative and legislative facts
* Refer to social science research that is used to construct a frame of reference or a background context for deciding factual issues crucial to the resolution of a particular case
* No facts in the true sense of the word; more like general explanations about society or human behavior
  + Usually requires experts to explain the relevant social condition
* Where such expert evidence is looked to, the issue relates to the general social framework and this information is used to develop the law in a general way and is not necessarily specific to the parties in the particular case
* *R v Ipeelee* 🡪 SCC held that courts **must** take judicial notice of systematic and background issues affecting AB peoples
* This judicial notice does not intrude into the adversarial system like judicial notice of adjudicative facts does
* For the social context information to have any relevancy, it must be linked to the evidence in the particular case

##### The Procedure

* The procedure is somewhat fluid
* It is generally contemplated that the matter will be raised at trial, when counsel formally asks the court to take judicial notice of certain facts
* Judges can take judicial notice without input from counsel
* The matter can be raised for the first time on appeal, as an appellate court can properly take judicial notice of any matter of which the trial court may properly take notice
* *R v Spence* 🡪 SCC recognized that adjudicative, legislative and social facts are not treated alike
  + The test for accepting adjudicative facts is strict – there needs to be notoriety and indisputability of facts
  + Not necessarily as high for the other two, more elastic test based on interrelated variables:
    - The level of notoriety and indisputability of the fact sought to be notice
    - The significance or centrality of the fact in disposing of the issue
      * The more important the fact, the more stringent the proof required

### judicial notice of laws

* A judge is charged with the duty of knowing the domestic statute and common law
* Judicial notice is to be take of the laws of Canada and provinces
* Laws of foreign jurisdictions must be proved
* Most subordinate legislation (i.e. bylaws) must be proven by official copies or certified copies

## special procedure for child witnesses

### the child witness

* Children face enormous stress and trauma on the stand
* Parliament assisted in developing procedures to help child witnesses
  + The police may be excluded from the court room
  + A support person may be permitted to be close to the witness while testifying
  + The child may be permitted to testify outside of the courtroom or behind a screen
  + The accused will not be permitted personally to cross-examine the child witness unless the TJ so allows
  + A publication ban may be impose to protect the child’s identity
  + A child’s videotape evidence is admissible at trial

### testifying outside the prescence of the accused

* S 486.2(1) of the CC allows child witnesses to testify outside of court
  + Applies to all witnesses who at the time of trial are under 18
* 486.2(7) stipulates that the accused, judge, and jury must be able to watch the testimony by means of cctv or otherwise and that accused must be permitted to communicate with counsel while watching the testimony
* The starting point for children is that upon application a court shall grant the order, unless the order would interfere with the proper administration of justice
* Jurys can be instructed that a screen or recording has to do with the youth and not with the guilt or innocence of the accused, but this is not a mandatory instruction

### videotaped evidence

* Extends s 715.1, 715.2 so recording of evidence is admissible in any criminal proceeding where victim or witness is under 18 and where he/she might have difficulty presenting evidence because of mental or physical disability
  + The administration of justice is still a consideration
* Section 16.1 of *CEA* deals with persons under 14 years of age
  + Presumed to have capacity to testify and clarifies that new test for receipt of child evidence is that the child is able to answer and respond to questions
  + No requirement of oath or make solemn declaration, but will be required to promise to tell the truth
  + 16(1) now only to proposed witnesses over 14 years of age and whose mental capacity challenged

# unit 11 – secondary materiality and your own witness

## the bar on bolstering the credibility of your own witness

* **General rule** 🡪 a party may not ask questions or present evidence solely to bolster the credibility of his own witness
  + Evidence must be about primarily material issues in the case and not about other evidence
* The concern is that allowing this would take an undue amount of time and create distracting side issues
* Until their creditability has been made an issue by the opposing party, witnesses are assume to be trustworthy and of good character
* It is permissible to introduce a witness to the court
  + Age, describe their family, employment status and their connection to challenge the case
  + Counsel may attempt to introduce their witness in a way that bolsters credibility
    - It’s a question of degree when the line is crossed between permissible introduction and impermissible bolstering

## good character evidence: the accused as a witness

* Exception – as an indulgence to the accused in a criminal case, the accused can prove his good character in a variety of ways
  + This evidence is considered relevant both to the primarily material issue of whether the accused committed the offence charged and to the secondary material issue of the credibility of the accused as a witness
* The accused testifying can assert their own honesty, and other witnesses can be called to testify as to the reputation of the accused for truthfulness and veracity
* If the accused chooses to put their character in issue, the Crown is entitled to rebut the claim by cross-examination or by calling other witnesses who will testify to the accused’s bad reputation

## secondarily material expert evidence

* A party may call an expert witness to testify about facts relevant to the credibility of one of their witnesses where those facts are likely to be beyond the experience of the trier of fact
* The rule against oath-helping prevents the expert from going so far as to testify that the witness is likely to be telling the truth

## prior consistent statements

### rules against proof of previous consistent statements

* **Prior consistent statements** 🡪 declarations made by witnesses before they take the stand that are consistent with the testimony they give while on the stand
* Evidence that a witness previously made a prior statement consistent with that witness’s evidence will generally be inadmissible
  + If offered as proof of the truth of what the prior consistent statement asserts, it is hearsay
    - Prior consistent statements are an amalgamation of two elements – hearsay element and a declaration element
* The fact that a prior consistent statement was made is generally (1) not probative, (2) its proof is typically self-serving and is therefore more often (3) superfluous information
  + 3 is relatively unimportant because superfluous information can be handled in the probative value rationale
* When a witness relies on her own earlier statements to support the truth of what she is testifying she is trying to corroborate her own testimony
  + Corroboration, by definition, is independent confirmatory evidence
* There are exceptions to this general rule that permit some prior consistent statements to be proved for restricted purposes
  + Tend to apply where prior consistent statements fall within exceptions to the hearsay rule
  + Or when a prior consistent statement is neither without probative value nor self-serving
    - Exceptions exist to enable prior consistent statements that serve as circumstantial evidence on a material issue
      * Such as the state of mind of the speaker
      * That rebut “recent fabrication” challenged
      * That constitute admissible hearsay
      * Such as statements contained in business records
      * Prior identifications
      * Spontaneous statements
      * That consist of statements when found in possession
      * That are exculpatory statements made on arrest
      * That are required to be disclosed in the narration of material evidence
* Regardless of the exception being used, it is never permissible to infer hat a witness’s claim is more likely to be credible because the witness has repeated the same story
* It is essential that the judges not use admitted prior consistent statements for improper purposes and that juries be directed in situations where material error in the proper use of prior consistent statements is available

### prior consistent statements as circumstantial evidence

* The fact that a statement has been made will raise relevant and permissible inferences
* The circumstantial value of prior consistent statements is not confined to proving the state of mind of the speaker, but where they are offered for that purpose, the state of mind must of course not be an issue

### recent fabrication

* A recent fabrication challenge is made where the opposing party suggest that the version being offered by the witness was created at some point in time after the event the witness is testifying about
* If this kind of challenge is made, proof that the witness had in fact made a statement consistent with his current testimony, before the point in time when that version is alleged to have been created, rebuts the allegation of recent fabrication and can be admitted
* The timing of the prior consistent statement is relevant
* To satisfy this exception the prior consistent statement
  + Must be consistent with the testimony that is offered to support
  + Must have been made after the event being testified about
  + Must predate the point in time when the opposing party claims the version of events was first adopted
* The statements admitted under this exception cannot be relied upon as accurate statements of what happened in their own right (**hearsay**) or as confirming or corroborating the in-court testimony
  + They don’t add weight to the credibility of the testimony
* Simply put, this exception exists to knock the recent fabrication challenge off the scales
* This doesn’t add any weight to the statement as it returns the statement to what it would have been without the challenge
* The alleged fabrication does not need to be “recent” relative to the trial or hearing
  + It is enough that the claim is being made after the fabrication occurred at or around some identifiable point in time after the event being attested to
* An express fabrication is not required either, it can be suggested within the testimony

### recent complaint in sexual offences

* At common law, the failure of a sexual offence complainant to tell someone about her alleged victimization at the first reasonable opportunity was considered to hurt reliability
  + S 275 of the CC has abrogated these rules
    - It is now an error to use the failure to complain as a basis for a *presumptive adverse inference* relating to credibility or consent
* **But** there may be circumstances in a particular case that make it reasonable to expect that had the sexual assault occurred, the complainant would have said so earlier
* The complainant can them be cross-examined about the failure to make a timely complaint
  + This opens to the door to proof that she did complain
* The prior complaint can be used to negate the adverse inferences the defence sought to draw from delay
  + Still can’t be treated as positive proof that the offence did occur

### prior consistent admissible hearsay

* Where a prior consistent statement is found in otherwise admissible hearsay, it can be proved
* If it falls within a hearsay exception, it is admissible for the truth of its contents and can also be relied upon to support the credibility of the witness
  + Applies to prior identification of persons and business records
  + Also applies where the statement meets the principled approach
  + *Res gestae* exceptions apply
    - Excited utterances
    - Statements of present physical condition
    - Statements of present mental sate
    - Statements of present sense impressions

### statements made when found in possession

* The *res gestae* label has also been used to allow statements made by an accused person found in possession of stolen goods or illegal drugs to be admitted, apparently to prove the truth of their contents
* The *res* is the act of possession
  + The offence is continuing at the time the accused person is found with the items
    - Therefore, statements made at the time occur during the transaction being inquired into
* This can be problematic
  + The situation doesn’t necessarily require that the speaker be overwhelmed by the pressure of the moment
  + The first instinct of someone caught with drugs is likely to lie

### exculpatory statements made on arrest

* Recognized by ONCA, not clear how widely accepted (seems to be accepted by most CDN courts)
  + Ex: “I didn’t steal the chicken officer. A friend asked me to look after it for a minute” – deny responsibility, as indulgence will allow this testimony to be admitted even though it duplicates
    - Generally exculpating statement made on arrest is admissible
* Spontaneous out-of-court statements made upon arrest when first taxed with an accusation can be exception to PCS

### Narrative

##### The Narrative Concept

* Prior consistent statements can come in as narrative
* Ordinarily, when evidence gains admission as narrative, it has no probative value
  + Comes in as background information
  + Pure narrative cannot be used as proof or to support inferences
* Sometimes, prior consistent statements admitted as narrative do yield probative evidence and are used as ground inferences that help trier of fact make decisions

##### Pure Narrative

* In cases in which statements form part of the story but fail to satisfy any hearsay exception, it may still be necessary to admit them in order to unfold the narrative properly
* The statements can’t go to credibility or as truth of their contents
* “to qualify as narrative, the witness must recount relevant and *essential* facts which describe and explain his/her experiences as a victim of the crime alleged so that the trier of fact will be in a position to understand what happened and how the matter came to the attention of proper authorities”
  + Two important things are clear:
    - When it is being done on a pure narrative basis, the doctrine of narrative should be used to reveal the existence of prior statements solely where it is necessary to do so
    - Only so much detail as is necessary to provide a comprehensible narration of events should be provided

##### Narrative as Circumstantial Evidence

* There are cases where a narrative can yield circumstantial evidence
* Where the fact that a complaint was made is helpful to the trier of fact in assessing the credibility of the complainant on some basis other than the theory that consistency supports credibility, the trier of fact is entitled to take this into account
* Narrative as circumstantial evidence is most likely to be used in assessing the testimony of child witnesses
* What can be relied upon is the timing and circumstances in which the prior consistent statement was made, rather than the simple fact that the witness has said the same thing before

### limiting instructions and prior consistnet statements

* Where prior consistent statements are admitted under any rule, it is important that the TJ give limiting instructions to the jury
  + The PCE cannot be used to enhance the credibility of the person making the statement
  + Explain that PCS are not independent and therefore do not corroborate the testimony
  + Direct the jury not to use the evidence for its hearsay purpose
  + Describe any legitimate purpose for which it was admitted

## rehabilitating the credibility of your own witness

* Where opposing counsel has attacked the general credibility of a witness, counsel may use approved techniques in an effort to rehabilitate that credibility
* Those techniques include
  + Re-examination of the witness who has been attacked
  + Calling evidence about the positive reputation of the witness for trustworthiness
  + Calling witnesses to negate or weaken expert testimony by opposing counsel relating to hidden defects said to affect the witness

### relevance and methods of rehabilitation

* The door to proof of general credibility is opened more broadly where opposing counsel makes the credibility of the witness an issue
* Rebuttal evidence must be relevant to the challenge made

### softening anticipated evidentiary blows

* When a witness has been convicted of an offence, it is appropriate for the party who has called that witness to ask about this conviction during the evidence in chief, when the question is not being raised to impeach the witness
  + This allows counsel to present the witness as though there is nothing to hide, rather than allowing opposing counsel to enjoy the dramatic revelation that the witness is a criminal
* This kind of strategy is not confined to the criminal records of one’s own witness

## challenging the credibility of your own witness

* If the witness disappoints the party who called her, the law does not allow that party to attempt to show that the witness is not a credible person
* A witness is **hostile** when he does not wish to tell the truth because of a motive to harm the party who has called him, or to assist the opposing party
* A witness is **adverse** if the evidence he gives is unfavorable, or opposed in interest, to the party who has called him
* A party is not permitted to challenge the credibility of a witness he has called, but can, in accordance with the following rules, challenge the credibility or reliability of the evidence the witness gives
* With leave of the court, a party can cross-examine his own “hostile” witness “at large” by asking questions designed either to show that any harmful evidence given by that witness is not credible or reliable, or to attempt to persuade the witness to furnish evidence helpful to the party who called him
* If the witness (not hostile) still gives statements inconsistent with his testimony, the party calling the witness can, with leave of the court, cross-examine him if that witness is *adverse* under the applicable *Evidence Act*
* Where a declaration of adversity has been obtained, the party can also seek leave to prove the previous inconsistent oral statements made by the witness
  + If a previous inconsistent oral statement is proved and witness adopts it as true, the statement becomes testimony of the witness and can be relied upon by the party as proof of the facts that statement asserts
  + If a previous consistent oral statement is proved but repudiated by the witness, it can be used solely to show that, because of the inconsistency, the witness is unreliable and his evidence not credible
* Cases falling under the *Canada Evidence Act*
  + If the witness has made a prior inconsistent statement in writing or that has been reduced to writing, or recorded on audiotape or videotape, there is a third path to cross-examining one’s own witness, this time without the need for a declaration of hostility or adversity
    - A judge can grant leave under s 9(2)to cross-examine the witness, but only about that statement or his partiality bias

### general attacks on credibility

* Counsel “vouches for” their witness – it is never appropriate for her to attempt to challenge her own witness by calling repudiation evidence about
  + His lack of trustworthiness
  + By using his criminal record to discredit him
  + By cross-examining him about his previous discreditable acts or associations
* Each Evidence Act confirms that party’s calling the witness cannot move to impeach the witness

### calling other witnesses who contradict your witness

* One way to attempt to neutralize the evidence of one of your own witnesses is to call other witnesses who provide a different and more helpful account
  + There is no limit on your ability to do so
* S 9(1) of the *CAE*  is slightly misleading (it has been carried into provincial statutes, too)
  + S 9(1) provides that if the witnesses produced by a party “in the opinion of the court, proves adverse, the party may contradict him by other evidence”
    - This drafting blunder has been ignored, witness doesn’t have to be declared adverse before bringing in contradictory evidence

### leading questions and refreshing memory

* More helpful where memory is actual a problem
* A judge can require counsel try simple methods of recollection before moving to more invasive methods of trying to prove that the witness has previously made inconsistent statements or by attempting to cross-examine the witness

### cross-examination of one’s own witness

* The judge has to provide a formal ruling that a cross-examination can occur

##### The Hostile Witness

* At common law, a court has the power to grant leave to a party to cross-examine their own witness when that witness is “hostile”
* **Hostile** 🡪 doesn’t give evidence fairly and with a desire to tell the truth because of a hostile animus towards the party who called him
* The just must simply be satisfied that some hostile animus exists
  + Demeanor general attitude
  + The substances of the evidence
* When a declaration of hostility has been obtained, cross-examination is “at large”
  + Can be employed to neutralize harmful evidence by impeaching the credibility or reliability of the testimony the hostile witness has given or to secure testimony that will assist the party’s case

##### The Adverse Witness and S 9(1) of the *Canada Evidence Act*

* The common law authority to cross-examine one’s own witness has been supplemented by an independent gateway to cross-examination under s 9(1)
  + Doesn’t’ actually mention the ability to cross one’s own witness
* It is settled that if a party obtains a declaration that a witness is “adverse” under s 9(1), a judge can grant leave to cross that witness
* In AB, the scope permitted under s 9(1) is much narrower than in the case of hostility
  + Would be better for the party to get a declaration of hostility to cross at-large
* Adversity is broader than hostility
  + Hostility requires a finding that the witness is not giving his evidence fairly and with a desire to tell the truth because of a hostile animus
  + **Adverse** 🡪 a witness is adverse when he is unfavorable in the sense of assuming by his testimony a position opposite to that of the party calling him
    - The mere existence of a material inconsistency between the earlier statement and the testimony may be enough

##### Cross-Examination and S 9(2) of the *Canada Evidence Act*

* **9(2)** Where the party producing a witness alleges that the witness made at other times a statement in **writing**, reduced to writing, or **recorded on audio tape or video tape** or otherwise, inconsistent with the witness’ present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse
* Where leave to cross is given under 9(2), the cross is confined to questioning as to the statement, including why there are inconsistencies and which versions are true

##### Adversity and Provincial Evidence Acts

* Some *Evidence* acts (provincially) explicated provide for crossing one’s own witness in the event of adversity
* Where the province doesn’t provide this, it’s likely that s 9(1) applies to allow the cross

##### Special Statutory Provisions

* In some cases, rules of practice applicable in civil cases may allow a party to cross-examine witnesses that he has called, without a declaration of adversity
  + S 53.07 ON *Rules of Civil Procedure* Leave to Cross Examine

##### Leave to Cross-Examine

* Regardless of authority (CL or statutory), judges have the ultimate discretion to allow the cross of one’s own witness
* A witness cannot be called if the party knows it will assist the other side for the sole purpose of discrediting that witness
* A court may refuse to give leave to the Crown to cross an adverse or even hostile witness if the crown’s sole purpose in doing so is to confront he witness with prejudicial information it knows the witness will deny, as an indirect way of letting the jury know that this technically inadmissible info exists
* A judge can limit the scope of an allowable cross

### previous inconsistent statements

* Counsel cannot freely confront disappointing witnesses with their earlier inconsistent statements
* Procedure:
  + Determination by the judge that the statements are indeed inconsistent
    - There must be material enough of a difference between the statements that the discrepancy is reasonably relevant to credibility or reliability
  + Determination by the judge that the inconsistencies are relevant
* Can come in through a hearsay exception and will be accepted for the truth of its contents
* If the statement doesn’t come in as hearsay, but the witness is properly confronted with his statement and accepts that its true and accurate, that becomes the evidence

### procedure and challenging one’s witness

##### Climbing the Ladder

* Start with the least intrusive method of challenging your own witness
  + Start with memory refreshing techniques
  + If that doesn’t work, move to s 9(2) if there are previous written statements and 9(1) if there aren’t
    - If cross at large isn’t allowed under s 9(1), take a hostility approach
  + If nothing works up to this point, an effort can be made to have previous inconsistent statements admitted under *KGB*
* Counsel doesn’t have to take every step in this latter
  + The order envision by *KGB* was that the *KGB* application should only be brought after the Crown has shown that the witness to be averse has exhausted the s 9 procedure
    - This is what normally happens

##### Prior Inconsistent Statements and Statutory Cross-Examination: Choosing the Relevant Provisions

* None of the provincial evidence statutes have a provision similar to 9(2), but they all have something identical to 9(1)

##### S 9(2) Procedure

1. The party seeking leave asks for *voir dire*
2. The *voir dire* begins with the witness being excused and the party who called the witness identifying the alleged inconsistencies and producing the statement for inspection
3. The judge does a preliminary review of the statement to see, if on its face, it satisfies the “inconsistency” and “recorded” statement requirements
   1. If it is evident that the statement doesn’t, application dismissed
4. If the statement is apparently inconsistent and recorded, the TJ calls upon the party to prove the statement was made. The witness can be returned to the stand and examined on that issue
   1. If the witness does not admit to making the statement and the party wants to prove it with other evidence, the witness leaves again
5. Opposing counsel may cross the witness whose testimony is being offered to prove the statement, and may call its own evidence to the contrary
   1. This cross can focus whether the statement was made, as well as on any circumstances that may show that it is not in the interest of justice to grant the application relating to the content of the statement or the manner in which it is secured
6. The party bringing the application should be permitted to re-examine on any issue raised during the cross of its witnesses and cross any evidence called by opposing counsel
7. Submissions are made in the absence of the witness as to whether leave to cross-examine should be granted under s 9(2) to cross that witness. Operates by asking whether the cross will serve the end of justice.
   1. Factors the TJ can consider: probative v prejudicial value
8. If leave is granted, the TJ should rule on the extent of cross that is to be permitted and then recommence the trial, with the witness back in court
9. If the witness admits making the statement, then that becomes his testimony
10. Judge retains all discretion to permit all or part of the written statement to be made an exhibit in the proceedings

##### The S 9(1) Procedure

1. *Voir dire* is asked for
2. Witness leaves, party must prove material inconsistency
3. Party can demonstrate adversity by presenting evidence or referring to evidence already disclosed in the case supporting a finding that the witness in unfavorable in assuming by his testimony a position opposite to that of the party calling him
   1. Hostility is not required
4. Opposing counsel can cross the witnesses who testimonies are being offered to prove that adversity of the witness and can call evidence to the contrary
5. Party bringing the application can re-examine on any issues raised during the cross of its witnesses
6. Submissions are made in the absence of the witness as to whether leave should be granted under s 9(1) to engage in permissible cross and prove the prior inconsistent testimony
7. If adversity or hostility is established, TJ claims witness is adverse and then determines whether leave is permitted to challenge the witness in the manner permitted by law
   1. Probative v prejudicial value analysis here
8. If cross is allowed, TJ rules on the scope of the cross permitted
9. Witness has to be reminded of the circumstances in which the first statement was made

##### The Declaration of Hostility and Cross-Examination at Large

* The declaration of hostility must be secured from the TJ following *voir dire*
* Can be made through a mixture of CL and statutory rules

##### The *KGB* Application

* Typically used after the other methods above have failed
* Can be independent of the other methods