

Morgan Blakley's Evidence Outline *Evidence: A Canadian Casebook* by Stewart et al.

NB: It is fairly thorough and completely based on text readings. I did not go to class. The late sections are not done as well as the early sections.

If you want this outline in openoffice format so you can edit it, email me at: plato@uvic.ca

Some Terms:

PIS = Prior inconsistent statement

CrossE = cross examination

CL = Common law

LHD = L'H-Dube

CE = Character evidence

OA = Oath Affirming

LW = Lay witness

EW = Expert witness

SCP: Solicitor-Client Privilege

AJD = Administration of justice into disrepute

### **Impeaching Credibility**

Cases: Toohey v. Metropolitan Police Commissioner, R. v. Clarke, Corbett v. The Queen

Legislation: CEA 12

### **Introduction to Evidence: Sources, Objectives, and Trial Context**

Cases: R. v. Lifchus, F.H. v. McDougall

Legislation:

### **II) the Fundamental rule of evidence law:**

- **Evidence** consists of all the means by which any alleged matter of fact is established or disproved.
- **The fundamental rule of evidence law: Everything that is relevant to a fact in issue is admissible unless there is a legal reason for excluding it.**
  - Alternative formulation: Evidence is not admissible unless it is: 1) relevant; and 2) not subject to exclusion under any rule of law or policy

### **III) Relevance**

- Relevance is determined by factual relevance and materiality (aka legal relevance)
  - **Factual Relevance:** is established at law if, as a matter of logic and experience, the evidence tends to prove the proposition for which it is advanced. (R. v. Collins 2001 OAC)
  - **Materiality:** Only legally relevant facts are admissible. The facts must be directed at a matter in issue in the case. (Collins)

### **IV) Reasons for Excluding Relevant Evidence**

Reasons for exclusion can be tentatively grouped into five categories

- 1) The evidence would distort the fact-finding function of the court
  1. The concern is about trial fairness

2. EG: Crown leading evidence in chief of accused's bad character
- 2) Admission would cause unnecessary prolongation of the trial or confuse the issues
- 3) Undermine an important value other than fact finding
  1. EG: Evidence that unfairly surprises the other party may be excluded
- 4) The manner of acquisition of evidence is inconsistent with nature of trial process
  1. EG: Trier of fact is not supposed to investigate in adversarial system
- 5) Where probative value outweighed by prejudicial effect
  1. Two options: Admit the evidence and provide trier of fact with clear limiting instructions as to proper uses, or exclude all or part of the evidence

### Admissibility test:

#### To be admissible, the evidence must:

- 1) **Be factually relevant. Does it tend to prove or disprove the fact for which it is tendered?**
- 2) **Be material: Is the fact that the evidence is tendered to prove or disprove legally significant in establishing an element of the cause of action, offence, or defense at issue?**
- 3) **Is the evidence inadmissible on any other ground of law or policy?**
- 4) **Does the prejudicial effect of the evidence outweigh its probative value?**

### V) Admissibility and Weight

- Trier of law determines admissibility, trier of fact determines weight
  - Exception: When as a matter of law, proof of one fact is presumed to constitute proof of another fact
    - EG: CC s. 258(1)(a) or 212 (3)

### VI) The Sources of the Law of Evidence

- In Canada: common law, statute, aboriginal law, and the Constitution
  - The Common Law:
    - **The rules of evidence are a means of securing the dual ends of truth and fairness; they are not an end in themselves.**
    - SCC now moving away from categorical approach and using more principled approaches
    - ...a principle of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown that the observance of the rule does not serve justice, it must be dismissed. (Lord Delvin: Official Solicitor v. K. 1965 HL)
  - Statutes:
    - Canada does not have comprehensive evidence codes like USA. The CEA and provincial acts only make sense in reference to the common law
    - Not only Evidence Acts. Statutes can have specific evidence rules
    - Although legislature is supreme, the SCC (without finding a charter infringement) has read statutory requirements as being subject to the court's common law discretion to exclude evidence whose prejudicial impact on fairness of trial outweighs its probative value (R. v. Corbett 1988)
  - Aboriginal Law:
    - In determining the scope of unextinguished aboriginal rights, aboriginal sources of evidence must be respected and given equal weight with sources traditionally admissible at common law
  - Constitution:
    - s. 52(1) any law inconsistent with the constitution is of no force or effect

- Only parliament can modify rules of evidence for issues pertaining to federal jurisdictions and the same holds with provincial jurisdiction.
- The CEA has some referential incorporation of provincial laws by virtue of s. 40
- The Charter:
  - Provides constitutional protections to some evidentiary rules
    - s. 11(d) Presumption of innocence, fair and public trial, independent tribunal
    - s. 11(c) Right not to be compelled as a witness against oneself
    - s. 23 Right against self-incrimination in subsequent proceedings
    - s. 7 LLSP requires all criminal proceedings to proceed in accordance with PoFJs
      - Common law statute rules not consistent with PoFJs either s.1 justified or no force or effect
    - s. 8 Secure against unreasonable search and seizure
    - s. 9 Right to counsel on detention and be informed of that right
    - s. 24 remedies where evidence is obtained contrary to charter

## **VII) The Trial Process**

- Witnesses:
  - With very few exceptions all facts must be proved or disproved through witnesses
  - Party calling witness does examination in chief, other parties cross-examine
    - Leading questions generally limited to the cross
- Criminal Proceedings:
  - Begin with charging document called the indictment or the information
  - Crown has constitutional duty to disclose all relevant and non-privileged info to defense (Stinchcombe 1991 SCC)
  - Voir Dire
    - For determining the facts that are a condition precedent to the admissibility of evidence.
      - EG: Determining admissibility of confession. If jury heard the debate, it would likely be highly prejudicial even if not truly admitted.
    - Sometimes jury can be present: Where debate is to competence of a child to testify.
- Civil Proceedings:
  - The pleadings frame the issues in the action and provide the basis for determining whether the evidence is relevant to a material issue.
  - Evidence in Interlocutory Proceedings in Civil matters
    - In these cases evidence is usually presented in sworn statements or affidavits. Where necessary the witness (deponent) may be required to appear for a cross examination
- The Competing Goals of the Trial Process
  - Our system is adversarial
  - Determine truth, efficiency, fairness, other social values.

### **F.H. v. McDougall 2008 SCC**

- Sexual assault of boy at Seschelt Indian Rez School
- Only standard in civil proceedings is BOP. No higher standard where criminal or moral conduct is alleged.

### **R. v. Lifchus 1997 SCC**

- Leading BARD case

- BARD inextricably linked to presumption of innocence
- \*\*\*\*\*find my notes on this case still\*\*\*\*\*

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### **Overheads**

- Evidence doctrines fall in two kinds:
  - Intrinsic rules are directed at facilitating the pursuit of truth
    - Rationality of proof
  - Extrinsic rules are aimed at advancing other policies
    - Conflicts of values

## Witnesses, Competency and Compellability

Cases: R. v. Salituro, R. v. Couture, R. v. Marquard

Legislation: CEA 4; 13-16.1

- Generally, parties must prove or disprove all facts in issue through the oral (viva voce) evidence of witnesses. Any object or document must be identified by a witness before it is admissible.
- To testify, a witness must be competent and must either swear an oath to tell the truth or satisfy a statutory substitute for the oath.

### **Spousal Competency**

- At CL, spouse and accused were incompetent for either party
- CEA s. 4(1): Everyone charged with an offense and their spouse is competent for the defense
  - There are exceptions for certain crimes making spouse competent and compellable for prosecution. ss. (2), (4), (5)
- **R. v. Salituro 1991 SCC**
  - An irreconcilably separated spouse is competent for the Crown. Compellability not raised.
  - Signed his wife's name on a cheque which wife alleges he did not have permission to do
  - Rule making an irreconcilably separated spouse incompetent for Crown is inconsistent with Charter.
  - Also, *natural repugnance* to everyone to compelling a spouse to be the means of the others' condemnation
  - The CL rule making a spouse incompetent witness involves a conflict between the freedom of the individual to choose whether or not to testify and the interests of society in preserving the marital bond.
- **R. v. Couture 2007 SCC**
  - Christian counselor case. Hubby convicted of murdering two ex-girlfriends. Conviction partly rested on two out of court statements by his spouse. Neither statement under oath and given while estranged from husband.
  - Spousal testimony raises issues of competence, compellability and privilege. Gov'd by CL and statute
  - *Everyone charged with an offense and their wife or husband is competent for the defense s.4(1), but s. 4(3) makes communications TO the spouse except from being compelled.*
  - *Wife/Hub of charged is competent and compellable for prosecution in listed offences s.4(2)*
  - *Section 4 seems to say that the spouse is competent for the defence and competent and compellable for the prosecution under the listed offence exceptions. However, communications made TO a spouse during marriage cannot be compelled.*
  - Spouses out-of-court statements inadmissible because admission under principled exception to hearsay would undermine spousal incompetency rule and its justification.
  - Where spouse's life, liberty, or health at issue, spouse is competent and compellable by Crown. This CL rule preserved by s. 4(5) of CEA. *But still remember s. 4(3)*
  - s. 4(1) does not address compellability. R. v. Amway 1989 SCC. Held that 4(1) left intact CL rule that spouse is not compellable for Crown. Court in *Couture* assumes that CL rule still available for case: Competent spouse is compellable for defense, but not for Crown. At CL a competent witness is compellable.
  - s. 4(3) creates privilege for marital communications. The privilege is for the spouse receiving

the communication and can be waived by that spouse. This privilege must be kept in mind when considering modification to law of spousal testimony.

- Should spousal incompetency rules be changed?
  - Yes:
    - Charter respect for individual freedom. Right to choose whether to testify. (*Salituro*)
  - No:
    - Giving spouse choice will produce family discord
    - Leaves victim-spouse in fear of testifying and threatened
    - Promotes conjugal confidence and protects marital harmony (natural repugnance)
  - Not completely
    - EG in US spouse is competent but privilege protects spouse from testifying against accused

### **The Oath and its Substitutes**

- In order to testify, witness must give formal indication of intention to tell the truth.
- Under the evidence acts, evidence may be received under oath or solemn affirmation.

### **R. v. Maquard 1993 SCC**

- Crown alleged Mrs. Maquard put kid's head against hot stove door to discipline her
- Child's appreciation of duty to tell truth
- Majority
  - testimonial competence comprehends (not just for children):
    - 1) The capacity to observe (including interpretation)
    - 2) The capacity to recollect; and
    - 3) The capacity to communicate
  - The goal is not to ensure that the evidence is credible, but only to ensure that it meets the minimum threshold of being receivable
  - Best gauge of capacity is generally witness' behavior at trial
  - Low threshold: basic ability to perceive, remember, and communicate
    - Deficiencies of perception and recollection are issues going to weight, not admissibility
- LHD dissent with LaForest supporting LHD re s.16 of CEA (now s., 18)
  - The general inquiry into capacity to observe and recollect (as opposed to mere communication), runs counter to clear intent of s.16 and the trend to do away with presumption of inadmissibility of childrens' evidence. It may also subvert legislative reform in this area
  - Juries are competent to assess the evidence and credibility of all witnesses incl. Children
  - The courts now accept that even where a child cannot recount precise details, they have not necessarily misconceived what happened to them. *R. v. B. (G) 1990 SCC*.
  - Reform of rules governing reception of childrens' evidence came from specific concerns:
    - Prevalence of child sexual abuse and the law of evidence as it stood presented a significant barrier to obtaining convictions in these cases
    - Thus main aim of reform was to simplify requirements to facilitate admissibility
  - CL rule based on presumption of certain classes of people being inherently unreliable. The majority holding implicitly brings this presumption of unreliability back
  - Handicapped people suffer high incidents of abuse. Exclusion of evidence bc of low capacity to observe and recollect does not acknowledge that they may have useful things to offer re events at issue. Exclusion of such evidence can render prosecution nearly impossible, with consequence that abusers can continue to abuse with impunity

## Relevance, Materiality, and probative value

### R. v. Watson 1996 OCA

- Accused charged with first degree murder. Question is admissibility of evidence of Clive Mair. He said the deceased always had a gun with him.
  - Trial judge accepted that this evidence was irrelevant and therefore inadmissible, "no viable issue of self-defence"
  - Trial judge also assumed that Mair would give evidence consistent with his statement.
    - This is acceptable
- Next is question of relevance. Relevance is not limited to self-defence; the evidence was not tendered for proof of self-defence
  - Relevance must be assessed in the context of the entire case and positions taken by Crown and defence.
- Adopting LaForest' dissent in R. v. Corbett 1988 SCC (Now the law)
  - **Relevance:** No minimum probative value is required for it to be deemed relevant. A cardinal principle of our law of evidence is that any matter that has any tendency, as a matter of logic and human experience, to prove a fact in issue, is admissible, subject to the overriding judicial discretion to exclude for practical and policy reasons.
- **Relevance requires** a determination of whether as a matter of human experience and logic, the existence of Fact A makes the existence of Fact B more probable than it would be without Fact A. If it does, then Fact A is relevant. As long as Fact B is a material fact in issue, or relevant to a material fact in issue, then Fact A is prima facie admissible.
  - Absence of direct connection does not determine relevance
- **Evidence of habit** is circumstantial evidence that a person acted in a certain way on the occasion question
- **Evidence of disposition** involves inference of the existence of a state of mind (Disposition) from a person's conduct on one or more occasions and a further inference of conduct on the specific occasion based on the existence of that state of mind.
- In this case, Mair's evidence would not add prejudice to the deceased and the existence of gun was not adduced for purposes of self-defence; it was offered to extricate the accused from any involvement in the shooting.

### The Character of the Accused in Issue

- Character means a person's propensity or disposition to behave in a certain way
  - Concerned with behavioral traits. (When a person goes to bed is habit not character)
- Character can be proved in several ways:
  - With evidence of specific acts
  - With evidence of reputation
  - With psychiatric evidence
- Character evidence (CE) is usually circumstantial
- CL has placed strict limits on admissibility and use of character evidence for a variety of policy concerns:
  - Reliability and probative value of CE
  - Efficiency concerns due to time and resources necessary to explore CE
  - Potential unfairness, especially to accused
- Character directly in issue

- Sometimes party may or must prove character as element of cause of action
  - EG: dangerous offender s.753 CC; or in a defamation case where D made attack on P's C
- When C is directly in issue, there are no special rules governing admissibility of character evidence
- Character as Circumstantial Evidence
  - When trier of fact is asked to infer that bc person has a certain character trait, he/she is more likely to have acted in the manner alleged
- Putting Character in Issue
  - The Crown cannot lead evidence of an accused's bad character unless the accused puts his/her character in issue
    - Rationale: Person would be convicted on his/her past instead of on affirmative evidence in the case. CE relevant but excluded bc the prejudicial effect will almost always outweigh the probative value
- **R. v. McNamara et al (No. 1) 1981 OCA**
  - 13 people and corporations appealed conspiracy to defraud. Accused said judge erred in admitting his past guilty plea to income tax evasion.
  - Trial judge admitted evidence because: Accused had led evidence of good character and evidence was directly relevant to prove falsity of accused's evidence. "Simard's evidence was much more than a denial of Crown's evidence"
  - "A good company should be run legally", "etiquette of businessmen", etc
  - Accused is not entitled under the guise of repudiating allegations against him to assert expressly or by implication that he would not have done the things alleged because he/she is a person of good character. If he/she does, he/she has put his/her character in issue
  - Introductory questions do not put character in issue. These include questions of: place of residence, marital status and his employment.
  - *Morris* 1978 SCC: "never convicted or arrested" = putting character in issue
  - *Baker* 1912: "earning honest living" = putting character in issue
  - *Samuel* 1956: "turned money over to police" = putting character in issue
  - Appellant intended to project an image of a man of integrity and ethics
  - Even taking into account emotional stress, Simard's comments went way beyond repudiation and explanation
- Three ways that an accused can put his/her character in issue:
  - 1) By adducing evidence of good reputation (*Rowton*)
  - 2) By testifying to his/her own good character (*McNamara*)
  - 3) By calling expert evidence of propensity or disposition
  - Crown cannot on its own put character of accused in issue by compelling accused to lead good character evidence. EG asking about past criminal conduct
- Methods of proving character
  - A: Reputation
    - **R v. Rowton 1865:**
      - Schoolmaster charged with indecent assault. Called several witnesses who attested to his excellent character.
      - If accused raises character, Crown entitled to reply
      - **Good Reputation:** Must be limited to general reputation and cannot extend to the individual opinion of witness
    - **R. v. Levasseur 1987 ACA:**



- Charged with BE and theft. Accused defence was that she removed vehicles at employer's request (Colour of right)
- Issue is whether evidence of general reputation as to character is confined to reputation in the residential community of the party whose credibility is under attack
  - Such a restriction makes no sense in the modern era
  - The law now requires a trustworthy reputation and the law seeks the best qualified witnesses
- B: Specific Acts
  - Crown cannot lead evidence of specific bad acts of the accused that are not the subject matter of the charges (subject to similar fact rule), nor may accused call witnesses as to prior good acts. What about McNamara where accused gave evidence of own good conduct?
  - **R. v. McNamara 1981 OCA**
    - When the wishes to adduce extrinsic evidence of good character by calling witnesses, such evidence is confined to general reputation, but that has no application where the accused gives the evidence
    - If the accused had not put his character in issue by testifying to his good character, then the cross examination as to his past conviction that proved he lied in the examination in chief, would not have been admissible.
    - Morris 1978 SCC pointed out the distinction between 1) Cross examination on previous convictions to permit an inference that bc the accused is of bad disposition, he is testimonially untrustworthy, which permits a further inference thta his testimony on the stand is suspect, and 2) cross-examination to prove directly that the accused lied in the witness-box
    - AN ordinary witness may be examined as to past misconduct and discreditable associations for the purpose of showing that his moral disposition is such that his oath should not be relied on.
    - An accused who testifies in his own defence, unlike the ordinary witness and provided he does not put his character in issues, is protected against that type of cross-examination; unless the previous conduct has resulted in a conviction, or unless the cross-examination can be justified under some other exception to the rule. EG similar fact evidence
    - Evidence of bad character cannot be used to show that the person was likely from his character to have committed the offense. The evidence does however, have a bearing on the general credibility of the accused.
  - Section 666 CC
    - If accuse dleads good CE, Crown may adduce evidence of previous convictions
    - Goes further than s.12 of CEA allows
    - Under 666, Crown can cross examine accused about specifics underlying the convictions
- C: Psychiatric Evidence of Disposition
  - **R. v. Mohan 1994 SCC**
    - Issue: When is expert evidence admissible to show character traits of an accused do not fit the psychological profile of putative perpetrators of offence charged
    - Pediatrician charged with four counts of sexual assault
    - Dr was going to testify that Mohan did not have traits attributable to any of the three groups in which most sex offenders fall

- In argument admissibility was analyzed under two exclusionary rules: expert evidence and character evidence. This evidence must be excluded
- Accused may adduce evidence as to disposition both in his own evidence or by calling witnesses. The general rule is that evidence as to character is limited to evidence of the accused's reputation in the community with respect to the relevant traits. The accused can in his own testimony rely on specific acts of good conduct
- Three requirements that must be met before such psychiatric evidence can be considered as potentially admissible:
  - 1) It must be relevant to an issue
  - 2) It must be of appreciable assistance to the trier of fact
  - 3) It must be evidence that would otherwise be unavailable to the ordinary layman without specialized training
- Normal behavior is within the realm of the trier of fact and special assistance is not required
- "Distinctive" (court went at length to say the word abnormal is not a good word) behavioral characteristics are a pre-condition to admissibility of this kind of evidence
- Before admitting such evidence, the trial judge must be satisfied that as a matter of law, 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
- Trial judge should consider whether the scientific community has developed a standard profile for the offender who commits this type of crime? An affirmative answer will satisfy criteria of relevance and necessity
  - Such evidence qualifies as an exception to CE rule provided that trial judge is satisfied that the opinion is within the expert's field of expertise

### **Character of the Accused: Similar Fact Evidence**

- Concerned with the conditions under which the Crown may call evidence of discreditable conduct by the accused that is not charged in the indictment
- **Makin v. AG of New South Wales 1894 PC**
  - Babies' bodies in the backyard. Adopt and kill scheme. Question was the admissibility of the evidence relating to the finding of other bodies, and to the fact that other children had been entrusted to the appellant
  - The Crown cannot adduce evidence tending to show the accused was convicted of other criminal acts for the purpose of inferring that the accused is likely to have committed the offence in the indictment. But, evidence tending to show the commission of other crimes is not inadmissible if relevant, and they are relevant if the past crimes bear upon the question of whether the indicted acts were designed or accidental.
- **R. v. Smith 1915**
  - Married three women. Each found dead in bathtub.
  - If as a matter of law, there was prima facie evidence that the appellant committed the act charged, evidence of similar acts becomes admissible
- **R. v. Straffen 1952**
  - Accused convicted of murdering young. Escaped from prison at large for four hours. Girl with bike found strangled next morning.
  - Crown sought to adduce evidence of the death of two other girls and evidence that amounted to a confession by the accused.
  - General rule: Evidence should be excluded that tends to show that the accused was guilty of

criminal acts not in the indictment.

- Indisputable rule that evidence of criminal convictions is not admissible to show criminal disposition of the accused, or even a propensity to commit the type of crime for which he is charged.
- Apart from statute there are certain exceptions to this general rule. The reason for admission being that it tends to prove, not that he is a man who has a criminal disposition, but that he was the man who committed the offence charged. (*The difference between propensity and exception allowance is that the evidence is offered as proof of specific criminal act, not as evidence of committing type of crime. Basically, the past convictions must be more specific than just "murder". EG: Strangulation of small girls.*)
- The evidence of the past two strangulations is admissible because it goes to show that he strangled Linda Bowyer; it would not be admissible to show that he was a serial strangler. The evidence showed that the same person murdered all three girls. Abnormal propensity is a means of identification.
  - NOT PROVING A PROPENSITY, PROVING A SPECIFIC CRIME.
- Before Broadman 1975 HL, similar fact evidence was admissible under 7ish categories:
  - To prove intent, to prove a system, to prove a plan, to show malice, to rebut defence of accident or mistake, to prove identity, to rebut defence of innocent association”
- **R. v. Arp 1998 SCC**
  - Rule for the admissibility of SFE is an exception to an exception to the basic rule that all evidence that is relevant is admissible
  - Evidence of propensity or disposition (i.e. prior bad acts) is relevant to the ultimate issue of guilt
    - Such evidence usually has some probative value, but is inadmissible because it is highly prejudicial.
  - Jury is not asked to infer from the accused's habits that he is the type of person to commit the crime, it is asked to infer that he is the person who committed the crime.
    - **This inference is made possible only if the high degree of similarity renders the likelihood of coincidence objectively improbable.**
  - Membership in an abnormal group is insufficient, there must be some further distinguishing features
  - **SFE is admitted on the basis of a principled approach based on the finding of an objective improbability of coincidence**
    - *This is resonant with the court's fear of wrongful convictions*
- **R. v. Handy 2002 SCC**
  - Issues: 1) the test for the admissibility of discreditable SFE where the credibility of the complainant (as opposed to the identity of the accused) is the issue, and 2) the impact of potential collusion on admissibility
  - Allegation that consensual vaginal sex turned into non-consensual vaginal and anal sex. Crown sought to adduce evidence of ex-wife about seven allegedly similar facts: forced sex with wife at her sister's trailer, etc. Ex-wife told complainant that you could get 16,000 from gov if you complained about being abused
  - Prospect of collusion cannot simply be left to the jury without giving it due consideration in the assessment of probative value
  - In discussing the probative value, the court must consider the degree of relevance to the facts in issue and the strength of the inference that can be drawn
  - The exclusion of past misconduct prohibits CE from being used as circumstantial proof of

conduct.

- The danger is that the jury can be confused by the multiplicity of incidents and put more weight than is logically justified on other evidence (**reasoning prejudice**), or by convicting based on bad personhood (**moral prejudice**)
- The exclusion of evidence of general propensity is well entrenched. People are not robots, and they can change their ways. *Fear of wrongful convictions again*
- Policy reasons for exclusion:
  - Potential for prejudice
  - Distraction and time consumption are great and will almost always outweigh probative value
- Evidence of propensity ought in general form no part of the case which the accused is called on to answer.
- An objective of criminal justice system is rehabilitate offenders. Propensity evidence could undermine this objective
- **The narrow exception:** 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 its probative value in the search for truth outweighs any potential for misuse
  - **The strength of the SFE must be such to outweigh reasoning and moral prejudices. The inferences sought to be drawn must accord with common sense, intuitive notions of probability, and the unlikelihood of coincidence.**
  - Policy reasons for the exception:
    - Probative value outweighs prejudicial effect because the force of similar circumstances defies coincidence or other innocent explanation
- **The test of admissibility of SFE:**
  - **Similar fact evidence is presumptively inadmissible. The onus is on the prosecution to satisfy on the balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudicial effect and thereby justifies its reception, [The B. (C.R.) test]**
- Disposition evidence can unusually and exceptionally be admitted if it survives the rigours of balancing probative value against prejudice
- An important control is **identifying the issue in question**
  - The general disposition of the accused does not qualify as the issue in question
  - Proof of general disposition is prohibited. *Bad character as moral prejudice not allowed*
  - Issue in question derives from the facts alleged in the charge and the defences advanced or reasonably anticipated. It is incumbent on the Crown to identify the live issue in the trial to which the evidence of disposition is said to relate. If the issue is no longer live, then the evidence must be excluded
  - Relative importance of the issue in the trial also bears of the weighing of factors for and against admission. SFE that is virtually conclusive of a minor issue may be excluded for reasons of overall prejudice
- **The required degree of similarity**
  - The principle driver of probative value is the connectedness that is established between the SFE and the offences alleged. **The judge must assess the degree of similarity and decide whether the objective improbability of coincidence has been established.** If not, not admission.
  - Similarity requires the judge to pay close attention to similarities in character, proximity in time and frequency of occurrence.

- Similarity does not require a distinctive trait, although this would bare strongly on the issue
- Similarity factors: (non exhaustive)
  - Proximity in time of the similar acts
  - Extent of similarity of other acts in detail to the charged conduct
  - Number of occurrences of the similar acts
  - Circumstances surrounding the similar acts
  - Distinctive feature unifying the incidents
  - Intervening events
  - Any other factors tending to support or rebut the underlying unity of similar acts
- Countervailing factors: (non exhaustive)
  - Inflammatory nature of similar facts and whether the Crown can prove its point with less prejudicial evidence.
  - Distraction of trier of fact from its proper focus on the facts charged
    - *moral and reasoning prejudice*
  - Undue time consumption
- Court's application of test:
  - 1) Probative value
    - 1.1) Determine precise issue in question for which the Crown seeks to adduce the SFE
    - 1.2) Assess cogency of the SFE in relation to the particular question
      - Consider the similarity and countervailing factors
  - 2) Assessment of prejudice
    - Evaluate moral and reasoning prejudice
      - Moral: Conviction because person is a bad person
      - Reasoning: Potential confusion and distraction from actual charges against accused
  - 3) Probative value v. prejudice
    - Starting point is presumption of inadmissibility. Crown must prove on BOP that the likely probative value will outweigh the potential prejudice
  - a) Potential for collusion
    - If collusion is present, it destroys the foundation on which admission is sought: namely, that events described by ex-wife and complainant, testifying independently are too similar to be credibly explained by coincidence
    - Where there is an “air of reality” to the allegations of collusion, the Crown must prove on the BOP that the evidence of similar facts is not tainted by collusion
      - It is not incumbent on the defence to prove collusion. It is a condition precedent to admissibility that the probative value of the proffered evidence outweigh its prejudicial effect. The onus is on the Crown to satisfy that condition.
  - b) Identification of the issue in question
    - Must be careful to frame the issue narrowly. An overbroad issue would create a broad gateway for the admission of propensity evidence.
  - c) Similarity and dissimilarity factors
    - As listed above
    - c.1) Proximity in time
      - Lapse in time creates greater possibility of character reform
      - Repetition over long time goes against reform
    - c.2) Similarity in detail of past acts and alleged act
      - Must consider similarities and dissimilarities

- Substantial dissimilarities can dilute probative value and compound confusion and distraction, and aggravate prejudice
  - c.3 Number of Occurrences of similar acts
    - Alleged pattern may gain strength in numbers: remember brides in bathtubs
  - c.4 Circumstances surrounding similar acts
  - c.5 Distinctive features
    - In this case, cogency derived from repetition rather than from distinctiveness
  - c.6 Intervening events
- d) Strength of evidence that the similar facts actually occurred
  - Respondent did not admit the prior misconduct and vigorous attack on ex-wife's credibility was made
  - Where admissibility is bound up with, and dependent on probative value, the credibility of the similar fact evidence is a factor that the trial judge is entitled to consider.
- **A criminal justice system that has suffered some serious wrongful convictions in part because of misconceived notions of character and propensity should not (and does not) take lightly the dangers of misapplied propensity evidence**
  - Court orders a new trial
- **R. v. Mahaligan 2008 SCC**
  - Gang car stabbing case: Backseat passenger (A) said M was not initial attacker. Front seat passenger (B) said M was. M called B in jail and said “sorry beef was with A”.
  - Phonecall clearly relevant. Identity was a central issue (who stabbed A); the apology and admission, if believed by the jury, would be highly probative.
  - Old exclusionary rule: Prosecution cannot adduce evidence of prior misconduct beyond what is alleged in the indictment, which does no more than blacken the accused' character. Goes way back to *Harrison's* trial 1692, and most famously stated in *Makin* 1894: “It is undoubtedly not competent for the Crown to...”
  - Rule extends beyond just criminal acts and embraces any discreditable past conduct. Most common is when Crown seeks to adduce SFE. Of course, rule also extends to non-SFE
  - Rule “SFE rule” is a misnomer, it extends beyond SFE and is actually a character rule. EG: If A is accused of murder, and the murder weapon was stolen in a BE the day before by A; the BE has no similarity with murder, but is admissible under the exception.
  - The similar fact evidence rule therefore precludes the Crown from adducing evidence that the accused engaged in criminal or discreditable conduct beyond what is alleged in the indictment, unless it is established on a balance of probabilities that the probative value of the evidence in relation to an issue in the case outweighs its potential prejudicial effect. The factors need not be repeated here
  - Policy rationale for excluding SFE:
    - Although it may be relevant it can unduly distract trier of fact. Potential prejudice, distraction and time consumption will almost always outweigh its probative value.
  - Prejudice does just mean increased chance of conviction. Most admitted evidence will do this. Prejudice means moral or reasoning prejudice.
  - The phone calls, although showing obstruction of justice and bad character are clearly admissible.

### **Character of Third Parties: Victims and Complainants**

- **R. v. McMillan 1975 OCA**
  - Charged with murdering infant daughter. Psych testified that Mrs. M suffered from a

psychopathic personality disorder and dangerous to child. Trial judge ruled that Crown could not cross-examine Dr. re Mr. M's psychopathic diagnosis or call evidence in reply as to mental state of Mr. M.

- Crown argued: 1) Evidence of mental disposition of MrsM not admissible bc it was not relevant to an issue between the Crown and the accused
- When A charged with murder, then A can as a defence adduce evidence showing B murdered X
  - A can show B murdered X through direct or circumstantial evidence
  - Evidence that a third person had motive or made threats against the deceased is frequently admitted under this principle
  - Such evidence must meet test of relevancy and must have sufficient probative value to justify its reception
- Exclusion of CE is done because of policy, not because of relevance. Policy reasons are: PE>PV, unfair surprise, undue distraction from the issues, unduly time consuming in relation to PV
- Prosecution cannot intro CE to prove accused is likely by reason of propensity to have committed the crime.
- Accused can adduce evidence of good character as basis of inference that he is unlikely to have committed the crime
- **Where the character is that of a THIRD PARTY, the policy reasons for exclusion are either absent or inconsiderable. If there is any relevance in the fact of character, ie if some act is involved upon the probability of which a moral trait can show light, the character may well be received.**
- Obviously, if third person is unconnected with crime by other circumstances, disposition of third person to commit such offences is inadmissible for want of probative value
  - That Hitler is a bad person, does not make his CE admissible at any murder trial
- Once accepted that 3<sup>rd</sup> person disposition is relevant and admissible, the only question is the means by which such disposition or tendency may be proved.
- **In general, but subject to exceptions, the disposition of an ACCUSED to commit a type of act, when relevant and admissible, can only be proved by evidence of general reputation**
  - One exception relates to the admissibility of psychiatric evidence where the particular disposition in issue is characteristic of an abnormal group, the characteristics of which fall within the expertise of the psychiatrist
- There is no logical reason why the same reasoning should not apply to the manner in which disposition of a third person may be proved when disposition is relevant to an issue in the case
- **Psychiatric evidence with respect to the personality traits or disposition of an accused, or another, is admissible provided:**
  - a) The evidence is relevant to an issue in the case
  - b) The evidence is not excluded by a policy rule
  - c) the evidence falls within the proper sphere of expert evidence\
- "Psychiatric evidence with respect to disposition of the accused or a third person, if it meets the three criteria, is admissible insofar as it bears on the probability of the accused, or the third person, having committed the offence
  - *I take this to mean that psychiatric evidence in such a case is only admissible as bearing on probability of guilt. Thus it is not admissible for attacking credibility etc.*
- MrsM's disposition clearly relevant and admissible.
- Second Q: If admissible, was the Crown entitled to cross examine Dr re MrM's disposition or call evidence in reply.

- The entire nature of the defence involved the assertion that the respondent was a person of normal mental makeup. In those circumstances, Crown was entitled to show, if it could, that there were two psychopaths in the house, not one.
  - In this case, MrM lost his protection
- The trial judge erred and it could have resulted in a miscarriage of justice. New trial ordered
- **R. v. Scopelliti 1981 OCA**
  - Accused had variety store, killed two bullies. Argued self defence. Issue: The admissibility of prior acts of violence by the deceased, not known to the accused, towards other persons, where the defence advanced is self-defence.
  - Respondent had previous minor difficulties with the deceased. Respondent said he was nervous and frightened. Said deceased threatened to kill him.
  - It is for the jury to assess credibility of the respondent (accused)
  - Deceased prior violence...plenty of it.
  - Well established that evidence of previous assaults and reputation for violence known to the accused is admissible under self-defence.
  - Evidence of unknown previous violence by deceased irrelevant to showing reasonableness of the accused' apprehension of an impending attack. However, there is impressive support for the proposition that, where self-defence is raised, evidence of the deceased's character for violence is admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked by the deceased.
  - A condition for the admissibility of evidence with respect to the uncommunicated (unknown to the accused) character of the deceased for violence, where self-defence is an issue: the existence of some other appreciable evidence of the deceased's aggression on the occasion in question is necessary. This evidence may emanate from the accused. This is meant to stop people from using the deceased's bad character as an excuse for killing them.
  - **The disposition of a person to do a certain act is relevant to indicate the probability of his having done or not done the act.** The law prohibits the prosecution from adducing bad CE regarding the accused for the purpose of inferring guilt on policy grounds. There are no such policy justifications for the bad character of third parties.
  - **The disposition of a third party, if relevant and otherwise admissible, may be proved:**
    - a) by evidence of reputation
    - b) By proof of specific acts, and
    - c) by psychiatric evidence if the disposition in question falls within the proper sphere of expert evidence.
  - No policy rule operates to exclude evidence of propensity with respect to a person other than the accused where that person's propensity to act in a particular way is relevant to an issue in the case.
- **R. v. Darrach 2000 SCC**
  - Accused of sexual assault. The excerpt questions constitutionality of 276.1
  - s.276 categorically prohibits evidence of a complainant's sexual history when used to support an inference of either:
    - 1) The individual is more likely to have consented; or
    - 2) The individual is less credible because of her past sexual experience
  - Evidence of past sexual history may be admissible to support other inferences
  - 276 is in essence a codification of the Seaboyer guidelines
  - s.7 PFJs incorporate more than the accused's rights. Right to full answer and defence, and right against self-incrimination are core principles of fundamental justice. These can be respected



- without the accused being entitled to the most favourable procedures imaginable
- PFJs include the three purposes of 276: Protecting the integrity of the trial by excluding misleading evidence; protecting the rights of the accused; and encouraging the reporting of sexual violence and protecting the security and privacy of the witnesses
- Therapeutic records are similar to past sexual history and cannot be used to circumvent 276
- **Admissibility test under 276(2):** Evidence must be more probative than prejudicial.
- Per *Mills* and *White*, the impact on the accused's PFJ rights must be balanced with the PFJ rights that 276 is meant to protect.
- Section 276(1): The Exclusionary Rule
  - 276(1) only excludes evidence used for inferring the twin myths: More likely to have consented and less credible
    - These myths have no probative value and can severely distort the trial process
  - “The phrase "by reason of the sexual nature of that activity" in s. 276 is a clarification by Parliament that it is inferences from the *sexual nature* of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted.”
  - Accused never has the right to adduce irrelevant or misleading evidence.
  - If evidence is not barred by 276(1) judge must still make a PV>PE assessment to determine admissibility
  - The word “significant” in “significant probative value” does not infringe the accused's right. “Significant” is balanced with “substantially” in “substantially outweighed by prejudicial effect. The two words heighten both sides of the equation and serve to direct judges to the serious effects of the use of prior sexual activity for both sides.
- By excluding misleading evidence while allowing the accused to adduce evidence that meets the 276(2) criteria, 276 enhances fairness of trials of sexual offences
- S.11(d) right to a fair trial is not necessarily breached by the exclusion of relevant information or the right to adduce relevant information that is not sufficiently probative.
- The threshold criteria of significant probative value does not prevent the accused from making full answer and defence. S.7 and 11(d) are not infringed by 276(2)c
- **Criminal Code section 276 and 277**
  - # 276. Evidence of complainant's sexual history / Idem / Factors that judge must consider.
  - # 276.1 Form and content of application / Jury and public excluded / Judge may decide to hold hearing.
  - # 276.2 Complainant not compellable / Judge's determination and reasons / Record of reasons.
  - ...
  - # 277.Reputation evidence

### Credibility

Unlike character, the credibility of the accused and witnesses is always at issue

**Rashomon:** Four stories about the murder of the husband

### **Introduction to Credibility and Supporting Credibility**

- It is important to remember that credibility has two aspects: 1) Is the witness telling the truth, and 2) is the witness a truthful person
  - Evidence concerning 1 is what is at issue in the trial. Evidence concerning 2 is collateral because it is not concerned with the substantive issues in the case and presents the risk of

distracting the jury and consuming too much time

## 1) Assessing Credibility

### 1A) Demeanor

#### – **R. v. White 1947 SCC**

- The factors to be considered in assessing credibility, and the importance of the opportunity to observe the demeanor of the witness
- General integrity, intelligence, powers to observe and remember, accuracy in statement are important
- Also, whether s/he is endeavoring to tell the truth, sincerity, bias, reticence, evasiveness etc
- All these can be answered through observation of demeanor in determining credibility
- A reason why hearsay is prima facie inadmissible is because it deprives trier of fact the opportunity to observe the declarant making the statement
  - All the subtle cues cannot be seen through a transcript
- Demeanor will not always be reliable: Cultural assumptions and stereotypes, perceived conviction in truth, etc
- Demeanor is alone insufficient to assess credibility (*Norman 1993 OCA*)

“The real test if the truth of the story (of an interested witness) is a case involving the conflict of evidence must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances” (*Faryna 1951 BCCA*, adopted in *Norman*)

### 1B) Credibility of Child Witnesses

#### – **R. v. W.(R.) 1992 SCC**

- General approach to evidence of a young child
- Children see world differently, so different details will matter. EG, time and place may be missing from their recollection
- A child's failure to recount precise details does not mean that they have misconceived what happened to them and who did it.
- Less strict standards on oath taking and corroboration of children's evidence in recent years
- Children's evidence still subject to same standard of proof as adult witnesses. **Protecting the liberty of the accused and guarding against the injustice of wrongful conviction requires a solid foundation for a verdict of guilt, whether complainant is adult or child.**
- No hard/fast rules about when a witness' evidence should be assessed by reference to adult or child standard.
- In general an adult witness testifying to events when a child, credibility should be assessed according to criteria applicable to adult standard. Presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at time of events which took place

### 1C) Deference of Appellate Courts to Findings of Credibility at Trial

- **R. v. Buhay 2003 SCC** adopts partial dissent of Iacobucci in *R.v. Belnavis 1997 SCC*
  - Reasons for appellate deference are apparent and compelling. Trial judges hear witnesses directly and observe their demeanor. They acquire a great deal of information not available on a transcript
- However, in **R. v. W.(R.) 1992 SCC**
  - An appellate court can overturn a verdict based on a finding of credibility where a review of evidence and with appropriate deference, the appellate court finds the trial court's ruling unreasonable.
  - Test: Could a jury or judge properly instructed and acting reasonably have convicted? Must

show great deference to findings of credibility made at trial

## 2) Limits on Supporting Credibility

- Accrediting questions are admissible. These include for example: witness' employment, length of residence in the community, credentials, etc
- Generally, a party may not lead evidence as part of its case where the relevance of the evidence is limited to showing that another of its witnesses is a truthful person.
  - Cannot lead oath-helping evidence: (evidence of prior consistent statements)
- Until a witness' credibility is challenged, they are assumed to be telling the truth
- **Four main exceptions to rule against oath-helping:**
  - 1) Expert evidence may be admissible to help trier of fact assess credibility of a witness **where the assessment is beyond common experience**
  - 2) Defence in a criminal case may lead evidence of the accused's reputation for veracity along with other **evidence of accused's good character**
  - 3) Witness' prior consistent statement admissible to support his/her identification at trial of the accused or another, or to rebut an implicit or express allegation of recent fabrication. The fact that the statement was made may be admissible where it forms part of the witness' narrative and is significant to understanding the witness' account of the events
  - 4) Where the credibility of the witness has been attacked, the party may adduce evidence in rebuttal to support credibility, including evidence of veracity and prior consistent statements to rebut an allegation of recent fabrication

### 2.A) Expert Evidence

- Admissibility of expert evidence is covered elsewhere. Here, the trier of fact may require expert assistance to understand the significance of the behavior of a witness to whom common standards of credibility may not apply. In these circumstances, an expert should not express an opinion on the credibility of the witness, but only to explain the special phenomena that the trier of fact should take into account in making the assessment of credibility
- **R. v. Kyselka et al. 1962 ?CA**
  - 3 people charged with raping a 16yr old mentally retarded girl. She testified that she had not consented.
  - In this case, the Crown adduced evidence that her mental capacity was that of an 11yr old and consequently she lacked capacity to lie (therefore a truthful person). Court states that the credit of a witness may be impeached by the opposite party, but oath-helping as occurred here is unacceptable
    - Court raised efficiency policy: If admitted, no limit to number of witnesses who could be called to testify to credibility of witnesses as to facts.
- **R. v. Marquard 1993 SCC**
  - Little girl suffered severe facial burn by granny. Stove or cigarette.
  - Defence called Dr, Crown elicited in cross-examination that in her opinion, the child lied when she told her that she was burned by a cigarette.
  - **Fundamental axiom of our trial process that the ultimate conclusion as to the credibility of a witness or truthfulness of a particular witness is for the trier of fact, and is NOT the proper subject of expert opinion**
    - A judge or jury who simply accepts an expert's opinion as to truth is abandoning his/her duty. Credibility and truth must be the product of trier of facts view of the diverse ingredients perceived at trial, combined with experience, logic, and an intuitive sense of the matter.
  - An expert's opinion may be founded on facts not in the admitted evidence

- Expert evidence on the ultimate credibility of a witness is not admissible
- Expert evidence on human conduct and the psychological and physical factors which may lead to certain behavior relevant to credibility, is admissible, provided that the testimony goes beyond the ordinary experience of the trier of fact
- Court must require that the witness be an expert in the particular area, the evidence must be necessary for the jury because the problem is beyond their ordinary capacity, and the jury must be carefully instructed as to their duty in making final determination of credibility without being unduly influenced by the expert testimony

## 2.B) Accused's Reputation for Veracity

## 2.C) Prior Consistent Statements

- Generally, prior consistent statements are not admissible to enhance a witness' credibility. Traditional rationale for limit is threefold:
  - 1) Prior consistent statement is not probative of its truth, witness could be a consistent liar
  - 2) Even if prior statement has some probative value, it will be minimal and cannot justify the time required for the statement to be admitted and tested
  - 3) If the trier of fact is expected to accept the statement for its truth, it is hearsay and not admissible under any exception to the rule against hearsay
- Three exceptions to exclusion of prior consistent statements:
  - 1) To support witness' identification at trial of the accused or another
  - 2) Where recent fabrication is suggested, the defence can lead evidence of a prior consistent statement to rebut the suggestion.
  - 3) Even where the contents of a prior statement are not admissible, the fact that the statement was made may be admissible where it forms part of the witness' narrative and is significant in understanding the witness' account of the events.
- 1) Prior identification: Where witness identifies accused at trial, prior identification by witness is admissible to permit both parties to explore the reliability of the identification
- 2) Recent Fabrication
  - This is the principle exception to the rule excluding prior consistent statements
  - Where one party suggests implicitly or expressly recent fabrication, the other party may adduce evidence to rebut that suggestion. Prior consistent statements show witness' consistency of statement over time.
    - *???This exception accords with the rule against hearsay. The prior consistent statement is in essence cross-examinable at this point???*
    - **R. v. Giraldi 1975 BCCA**
      - Van theft. Accused, said he was picked up and drunk guy asked him if he would drive. He said sure. Crown objected to accused being allowed to testify to prior consistent statement (told police same story earlier).
      - Prior consistent statements are admissible to rebut suggestion (express or implied) of recent fabrication.
      - If judge thinks jury might consider, or the Crown might suggest, recent fabrication, the defence can adduce the prior consistent statement. (Even before a cross examination etc).
- 3) Narrative:
  - Prior consistent statements are admissible where they form part of the witness's narrative
    - It must be part of the narrative in the sense that it advances the story from offence to prosecution

- **R. v. F.(J.E.) 1993 OCA**
  - First, the complaints (or statement) are not admissible for the truth of their contents, but only for the fact of their existence
    - Since these out-of-court statements are not admissible to prove the truth of their contents, they are not considered hearsay and the first aspect of the rationale for the inadmissibility of out-of-court statements does not apply
  - The second rationale for inadmissibility of prior consistent statements is their low probative value. Narrative is justified as providing background to the story – it provides chronological cohesion and eliminates gaps that would divert the mind of the listener from the main issue.
  - It may be supportive of the central allegation in the sense of creating a logical framework for its presentation, but it cannot be used, and the jury must be warned of this, as confirmation of the truthfulness of the sworn allegation
  - **Summary:**
    - Recent complaint evidence is not admissible at the instance of the Crown as an exception to the rule against prior consistent statements unless and until the accused raises the issue of recent fabrication. Only then is evidence of the fact of prior consistent statements admissible to rebut the attack. The Crown, can however, lead evidence of prior consistent statements as part of the *res gestae* or as part of the narrative. **To qualify as narrative, the witness must recount relevant and essential facts which describe and explain his/her evidence as a victim of the crime alleged so that the trier of fact will be able to understand what happened and how it came to the attention of the proper authorities.**
      - The jury must be instructed that they cannot look to the content of the statement as proof that a crime had been committed
- **R. v. Dinardo 2008 SCC**
  - PCS generally inadmissible because they 1) lack PV and 2) if tendered for truth, are hearsay
  - **Exception: Using PCS as part of narrative allowing the trier of fact to understand how the complainant's story was initially disclosed**
    - The challenge is to distinguish between:
      - 1) Impermissible: Using narrative evidence to confirm the truthfulness of the sworn allegation; and
      - 2) Permissible: Showing the fact and timing of a complaint, which may then *assist the trier of fact in the assessment* of truthfulness or credibility
    - This is just refuting right to use PCS for truth of contents. It can be used to help assess the general truthfulness of the witness

#### 2.D) Rebutting Attacks on Credibility

- Where witness's credibility is attacked, the party can adduce evidence in rebuttal, including evidence of the witness's reputation for veracity
- **R. v. Stirling 2008 SCC**
  - Single car accident, two dead, witness and accused seriously injured. Who was driving?
  - Cross examine witness on motive to fabricate (civil claim against accused).
  - **Prior consistent statements generally inadmissible**
    - Reason: Low PV and self-serving
    - There are exceptions. One **exception: Rebut allegation of recent fabrication**
      - Recent fabrication need not be made expressly. Nor need the fabrication be recent
        - This is rather, whether the witness made up the story after the event

- Probative value to show that witness's story was consistent before motivation to fabricate arose
- Can only be used to rebut recent fabrication. IT cannot be used to infer that because of the PCS, she is more likely to be telling the truth
- Not assessed for truth of contents
- Permissible to use PCS used to rebut recent fabrication in larger assessment of credibility

### 3 Impeaching Credibility

- Four techniques addressed:
  - 1) Lead expert evidence as to an abnormality creating unreliability (Rare)
  - 2) Lead evidence of witness's bad reputation for veracity
  - 3) Cross-examination on prior inconsistent statement
    - With judge's permission counsel can do this against own witness if they make an adverse statement. If witness because hostile, then counsel can get permission to cross examine
  - 4) Cross examine witness on his/her past record of convictions pursuant to 2.12 of the CEA
- 3.A) Expert Evidence of the Witness's Abnormality and Unreliability
  - **Toohy v. Metropolitan Police Commissioner 1965 HL**
    - Assault on retarded boy behind cinema. He claimed robbery, three men claimed they were going to help him home.
    - It is allowable to call expert evidence of mental illness that makes a witness unreliable
    - Medical evidence is admissible to show that a witness suffers from a disease or abnormality that affects reliability of the evidence. Such evidence is not confined to the general opinion of unreliability, but may give all the matters necessary to show the foundation and reasons for the diagnosis and the extent to which the credibility is affected.
      - But remember, expert evidence is not admissible unless the trier of fact would be unable to assess the witness's credibility
- 3.B) Witness's Bad Reputation for Veracity
  - **R. v. Clarke 1998 OCA**
    - Judge can exclude relevant evidence tendered by the Crown on the basis that its prejudicial effect outweighs its probative value.
    - To exclude evidence tendered by the defence, the prejudicial effect must clearly outweigh the probative value. This is a higher standard for exclusion and reflects the constitutional entrenched right to full answer and defence.
    - **The general principles determining the admissibility of defence evidence of reputation and opinion as to veracity:** (Is the probative evidence sufficiently relevant?)
      - 1) Danger that evidence will arouse jury's emotions of prejudice, hostility, or sympathy
      - 2) Danger that evidence or evidence in response will create a side issue that will unduly distract the jury from the main issues in the case
      - 3) Likelihood evidence will consume an undue amount of time
      - 4) Danger of unfair surprise; no reasonable grounds to anticipate it and prepare to meet it
      - 5) Danger that the evidence will be presented in such a form as to usurp the function of the jury
    - Per Seaboyer, the test for excluding relevant defence evidence is strict, but it exists.
    - SCC strongly disapproves of oath-helping evidence (per Beland)
    - The question "from their reputation for veracity, would you believe the witness on oath?"

usurps jury function

- **Where the outcome of the case depends on the evidence of a single witness, an expression of opinion as to that veracity is a comment on the ultimate issue**
  - Risk jury will defer to expert opinion instead of examining issue on BARD
  - Accused cannot ask the third question either, except where justice demands it
  - The first two questions can be excluded where prejudicial effect would substantially outweigh probative value. Normally, these two Qs do not usurp jury's function
    - Q1: Do you know witness's reputation for truth and veracity in the community?
    - Q2: Is that reputation good or bad?
    - Q3: Considering that reputation, would you believe witness under oath?
  - Reputation evidence is simply another form of circumstantial evidence that will assist jury in assessing credibility of Crown witness's story
  - Discretion to exclude relevant evidence must be exercised with extreme caution and in most cases it is better to permit the defence to call all the witnesses necessary to fully argue reputation.
  - **Jury Charge:**
    - Whatever witness's reputation for veracity in the community, testifying under oath in court is a very different situation
    - Character witnesses have not heard all of the evidence and are not sworn to the heavy duty of the jury to render a true verdict
    - \*\*\*Note: the concern that expert reputation evidence addresses the ultimate issue is no longer a bar to admissibility\*\*\*
- 3.C) Prior Inconsistent Statements: Other Party's Witness
  - Procedure to be followed in cross-examining other party's witnesses on a prior inconsistent statement covered by evidence acts.
- 3.D) Prior Inconsistent Statements: Own Witness
  - At CL a hostile witness can be cross-examined with a view of discrediting his testimony, although it is doubtful that their character can be attacked
  - s.9(1) of CEA:
    - A party producing a witness cannot impeach credibility by general evidence of bad character. If the witness proves adverse in opinion of the court, the party may contradict him by other evidence, or by leave of the court, prove a prior inconsistent statement.
      - Before statement can be given, sufficient warning must be given to witness
  - **Wawanesa Mutual Insurance Co. v. Hanes: s.9(1) has a drafting error and the requirement that a witness “prove adverse” is not required before a party can contradict a witness with other evidence.**
    - Also, hostile and adverse are not the same thing. Adverse means unfavourable, hostile is more restricted.
- 3 Notes and Questions
  - CEA s.9(2) and the procedure for cross-examining a party's own witness on a prior inconsistent statement.
  - **McInroy and Rouse v. The Queen 1979 SCC**
    - Witness gave detailed written statement to police implicating accused in murder. At trial she said she could not remember conversation with the accused.
    - S.9(2) provides a right of cross examination independent of s.9(1)
    - s.9(2) Is not concerned with cross-examination of an adverse witness. **The discretion is to**

**permit, without proof that the witness is adverse, cross-examination as to the statement.**

- Where counsel establishes that a witness made a prior inconsistent statement, the evidence may be sufficient to neutralize the testimony given at trial. Unless the witness adopts as true the prior statement, the statement is hearsay and is not generally admissible as proof of its contents. But note *R. v. K. (G.B.) 1993 SCC*
- Prior inconsistent statement made under oath or affirmation are effective to impugn the credibility of a witness by establishing that the witness told two different stories. If not under oath, witness can say that she is now under oath and telling the truth.
- 3.E) Prior Convictions
  - CEA s.12: 12(1) Witness can be questioned as to past convictions. 12(1.1) If witness denies the fact or refuses to answer, party may prove the conviction. 12(2) Can be proved by a) a certificate containing the substance and effect of conviction and b) proof of identity
  - A witness's prior convictions are admissible **ONLY** for the purpose of undermining his/her credibility, on the theory that a person with a criminal offence is less likely to be truthful than a person without a record
  - s.12 applicable to the accused if the accused chooses to testify
  - **R. v. St. Pierre 1974 OCA**: Accused's counsel can examine accused about past convictions without putting his character in issue. This is for trial fairness. If accused cannot put past record out in examination in chief, and it comes up in cross-examination, jury might think accused was trying to hide it and draw negative inference.
  - Trier of fact entitled to infer that an accused (like other witnesses) with a criminal record is less credible than witnesses without records
  - Cross-examination pursuant to s.12 is limited. **R. v. Laurier 1983 OCA**
    - In Cross, Crown can ask for name of crime, substance of indictment, place of conviction and the penalty. Not entitled to cross examine about details of the offences.
      - *Crown might use this to get around , or not use, SFE rule*
  - **Morris v. The Queen 1979 SCC**
    - 5/4 held accused could be cross examined as to juvenile record
    - Dissent: Court has no power to convict under Juvenile Delinquent act; JD not a criminal but a misguided child
    - Majority: JDA upheld as valid as criminal law power. "Offence" in s.12 of CEA includes delinquency that consists of violation of CC
    - There is an important distinction between cross examination as to prior convictions which is gov'd by 12(1), and cross examination which is aimed at weakening the evidence given in chief by exposing errors etc. Cross-examination under 12(1) is aimed at undermining credibility, not at directly falsifying witness's testimony
      - Cross examination at directly proving contradictions in witness's testimony is essential to the search for truth
    - **Save for under s.12, an accused cannot be cross examined with respect to past misconduct or discreditable associations unrelated to the charge...for the purpose of leading to the conclusion that by reason of his bad character, he is a person whose evidence ought not be believed. Cross examination which directly proves the falsity of the accused's evidence does not fall within the prohibition, notwithstanding that it may incidentally reflect upon the accused's character.**
  - **R. v. Corbett 1988 SCC**
    - Challenged s.12 under charter right to fair hearing



- Majority:
  - Putting blinders on jury should only be done as a last resort. Giving clear instruction as to permitted use of prior convictions can mitigate potential prejudice
  - Unless the accused takes the stand, the Crown is not permitted to adduce evidence of prior convictions, even if the accused has launched an attack on the character of Crown witnesses.
  - The jurisprudence as a whole protects the accused's right not to be convicted except on evidence directly relevant to the charge in question
  - If error is to be made, it should be made on the side of inclusion rather than exclusion
    - Basic laws of evidence embody principles of inclusion: everything relevant is admissible unless there are exceptions or policy reasons. Thereafter it is a question of weight
- LaForest **DISSENT**
  - s.12 invidiously circumvents the complex rules that preclude, in general, the introduction of by the Crown of evidence an accused's bad character, or disposition for criminal activity, or discreditable acts not related to the charge
  - The trier of fact is entitled to infer that because of a past record, the accused is more likely to lie, but cannot infer that the accused was more likely to have committed the offence. Ironically, as a matter of experience and logic (touchstones of the present inquiry), the probative value of such evidence as to guilt is far more prepossessing.
  - Ironic that carefully considered judicial criteria that requires SFE to be rejected unless it reaches a very high probative value, should by virtue of s.12 cease to obtain.
  - The jury system is not a legitimate way to assert away the problem. Juries are problematic, and do make banned inferences.
  - The word "may" is s.12 preserves judge's CL discretion to exclude evidence where PE>PV
  - Factors to consider in assessing PE v. PV
    - Most important are the nature of the previous conviction and the temporal proximity to the present charge
      - Nature of the pat convictions
        - EG: Acts of violence do not reflect poorly on honesty, while fraud does.
        - The more similar the offence, the greater the prejudices harboured by its admission
        - Court should be very chary of admitting past similar crimes, especially when the rationale for the stringent SFE test is kept in mind
      - Fairness
        - *??????Fairness to accused and prosecution: s.1 of CEA specifically provides that an accused's shield from cross examination is lost when he casts aspersions on the character of Crown witness's see page 382????????*
        - LaForest says cross examination in this case should only be permitted where it would render the trial more fair: EG only where otherwise a distorted picture would be presented
      - Evidence of convictions advances a fact in issue: the credibility of the witness. This is relevant and should be prima facie admitted under the overarching rule of evidence. Subject of course to exceptions and policy

#### 4) Some Aspects of Cross Examination

- Counsel can conduct cross-examination through leading questions.
- Cross-examination of non-accused witness may include questions about witness's discreditable conduct unrelated to case.
- 4.A) Obligation to Cross-Examine a Witness Whom One Intends to Contradict
  - There appears to be a duty to cross-examine a witness that you intend to suggest is lying on a point as to that point. You cannot simply pass by the matter unchallenged and then, once impossible for him to explain it, bring it up.
- 4.B) Foundation for Cross-Examination
  - **R. v. Lyttle 2004 SCC**
    - Accused severely beaten by five men, identified only unmasked attacker. Crown argued beaten because of theft of gold chain. Defence argued beating related to drug debt and victim had identified the accused as the attacked in order to protect real assailants
    - Questions can be put to a witness in cross-examination regarding matters that need not to be proved independently, provided that counsel has good faith belief for putting the question.
      - Not uncommon for counsel to believe what is true and not be able to prove it otherwise than by cross-examination.
    - Info falling short of admissible evidence may be put to the witness. Purpose of question must be consistent with lawyer's role as officer of the court.
    - In most cases (except sexual assault and ???) court allows wide latitude to cross-examiners to resort to unproven assumptions and innuendo in an effort to crack the untruthful witness
      - Wide latitude does not equal license
      - Counsel must have good faith belief
    - Importance of cross examination is even more critical where credibility is the central issue at trial
      - Cross-examination is the most powerful weapon of the defence
- 4.C) Leading Evidence to Contradict a Witness: The Collateral Facts Bar
  - **R. v. Rafael 1972 OCA**
    - Admissibility of evidence tendered to contradict answers given by the accused on cross-examination. Accused said he had filed income tax most years, Crown showed he had not done so for 10 years
    - The accused had been cross-examined on a collateral matter relating only to his credibility and the Crown was bound by the answer given and was not entitled to call evidence to contradict it
  - **AG v. Hitchcock 1847**
    - Hitchcock charged with illegally using a cistern to produce malt. Spooner, Crown witness, said he saw H use cistern. Cook, defence witness, said he heard Spooner say he had been offered a bribe to testify against H.
    - If the answer of a witness is a matter which you would be allowed to prove in evidence, then it is a matter on which you may contradict him.
    - Alderson said:
      - You can ask as to any fact material to the issue
      - You can ask as to state of equal mind, or bias, as between the parties: questions to show that the whole of his statement is to be taken with qualification, and that such a statement ought to be laid out of the case for want of impartiality
    - **Rationale:** The party must accept the answer of a witness, otherwise there would be an endless process of collateral issues

- See s.11 of the CEA, would Cook's evidence be admissible in Canada now?
- There have been many statements of the collateral evidence rule. Wigmore's:
  - Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction? There are two groups of facts of which evidence would have been admissible independently of the contradiction:
    - 1) Facts relevant to some issue in the case; and
    - 2) Facts relevant to the discrediting of a witness
      - Includes facts which could otherwise be receivable for the purpose of impeaching some specific testimonial quality such as witness's criminal record, bias, corruption, skill, intoxication, and illness, opportunity to observe, circumstances forming the alleged grounds of recollection, and circumstances affecting the witness's capacity to narrate the story intelligibly and correctly.
  - McCormick adds one more category of permissible contradictions:
    - 3) The contradiction of any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true
  - It seems that Wigmore's second criteria merely holds that evidence tendered solely to contradict a witness on an collateral issue is not permitted.

### **Aboriginal Law and the Challenge of Oral History**

- Campo Article
- Mitchell v. Canada Minister of National Revenue
  - Can Mohawks bring goods into Canada from USA without paying duties? No.
  - What is the nature of aboriginal rights? s.35 entrenched CL aboriginal rights
  - Para 12 "Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (Van der Peet, supra, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question."
  - What is the right claimed? Right to bring goods across st. Lawrence for trade
  - Has the claim been established? No
    - Evidentiary concerns – Proving aboriginal rights
      - Admissibility of evidence: Rules of evidence still apply, but flexibly and commensurate with the difficulties posed by oral history and sensitive to the promise of reconciliation
      - Interpretation of evidence
        - Delgamuukw cautions against facily rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.
        - It would be hollow to admit evidence then reject it or give it no weight.
- Tsilhqot'n Nation executive summary

- Court cannot declare title. But title would appear to exist along “description”
- Aboriginal title land is not Crown land, Province cannot extinguish rights
- 339 day trial, have rights to hunt, trap, fish. Rights have been infringed, case dismissed without prejudice

### Unsavoury Witnesses

- **Vetrovec v. The Queen; Gaja v. The Queen 1982 SCC**
  - Conspiracy to traffic heroin. Was testimony of L too remote to have corroborative effect?
  - Law of corroboration of accomplices is one of the most technical and complicated areas of evidence law
  - The CL recognized something unsavoury about a self-confessed knave who, often for reward, accused his companions
  - Rationales for rule for accomplices: All sorts offered through the ages
    - Ac. to Wigmore, main reason: an accomplice may try to save himself from punishment by procuring the conviction of others – purchasing impunity by falsely accusing others.
      - However, clemency not always offered.
      - Just because clemency is offered, does not mean witness cannot be trusted
    - Also, accomplice might try to minimize his role
      - Not always the case
      - Credibility varies with the facts of each case
    - Accomplice might falsely accuse others to protect his friends
      - Maybe occasionally a danger, it will hardly be common, friendship is not what unites criminals
    - None of the arguments justify a fixed and invariable rule regarding all accomplices
      - **Move towards principled approach**
      - Nothing inherent in accomplice evidence that automatically renders it untrustworthy
  - Rather than pigeonhole a witness into a category then recite a ritualistic incantation, judges should put their minds to the facts of the case and thoroughly examine all the factors that which might impair the worth of a particular witness. If the credit of the witness requires a jury instruction, then give one. If judge believes witness is trustworthy, then regardless of whether is technically an accomplice, no instruction is necessary
  - Three main problems with the *Bakersville* definition: “...” (unnecessary): Basically, “corroborating evidence” is independent evidence that materially implicates the prisoner in the crime.
    - 1) It obscures the reasons for the accomplice warning. The warning is to note the potential untrustworthiness of an accomplice, and we therefore desire other evidence which will accredit his testimony
    - 2) One “corroboration” becomes a legal term it becomes increasingly complex and technical
      - Since what is “corroborating evidence” is a question of law, large amounts of appeals are taken on the issue of whether X constitutes corroborating evidence.
    - 3) Most serious difficulty: The definition is unsound in principle. It simply holds that we believe the witness has good reason to lie, so we want evidence which tends to show he is telling the truth.
- **There is no special category for “accomplices”. An accomplice is to be treated like any other witness and the judge's conduct, if he chooses to give his opinion, is governed by the**

### **general rules.**

- Sometimes a sharp and clear warning is necessary to attract the attention of the jury to the risks of adopting, without more, a witness's evidence.
- **These comments apply to corroboration as a matter of common law. The CC specifies instances where corroboration is required and defines what constitutes sufficient corroboration. See EG s. 139 and 195.**
- Since *Vetrovec*, judges usually give a clear and sharp warning to jurors that it is unsafe to rely on the unsavory witness without some other evidence that confirms it.
- **R. v. Khela 2009 SCC**
  - K and S convicted of murder: K paid and S organized. Crown case rested primarily on testimony of two unsavoury witnesses: Long records and part of jail gang.
  - **The four main elements of a proper *Vetrovec* caution are:**
    - 1) Drawing the attention of the jury to the testimonial evidence requiring special scrutiny;
    - 2) explaining why this evidence is subject to special scrutiny;
    - 3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and
    - 4) that the jury, in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused.
      - To be confirmatory, evidence needs to be independent from the unsavoury witness.
      - Materiality is harder to define: Basically, the evidence need not implicate the accused, but in the context of the case as a whole, it should give comfort that the witness was truthful in the relevant parts of his testimony.
  - This summary need not be applied in a rigid and formulaic fashion.
  - Failure to include any of these four elements may not prove fatal if the charge read as a whole otherwise serves **the dual purposes of a *Vetrovec* warning: first**, to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony; and **second**, in appropriate cases, to give the jury the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses. In evaluating a caution, appellate courts should focus on the content of a caution and not on its form.
- Dissent: The “material” and “independent” instructions to jury are cumbersome and unnecessary. Detracts from jury weighing evidence rationally and flexibly.
  - Trier of fact is entitled to believe unsavoury witness without corroborating evidence if he/she believes the testimony to be truthful

## **Hearsay Introduction**

### 1.A) Defining Hearsay

- An Out of court statement offered for the truth of its contents
- **R. v. Teper 1952 HL**
  - Accused's house set on fire. Police said he heard woman say “your house is on fire and you are going away from it.” Judge convicted. PC overturned it. Clearly hearsay and not admissible under *res gestae*
- **Bond v. Matinos 1969 OCA**
  - Bond rear-ended sought damages for back injury. Witness said Bond's family told him Bond never did work because of back trouble. Clearly hearsay, inadmissible.

- **R. v. Williams 1985 OCA**
  - Accused charged with arson, defence argued Miller set fire. Accused and two others said Miller admitted to setting the fire. Inadmissible

### 1.B) Non-Hearsay Words

- **Subramaniam v. Public Prosecutor 1956 PC**
  - Accused convicted of having 20 rounds of ammo in Malaya. Defence put forward that he had been captured by terrorists and was acting under duress.
  - Evidence of a statement made to a witness by a person who is not a witness is not necessarily hearsay. It is hearsay if it is offered for the truth of its contents. It is not hearsay where it is proposed to establish the fact that the statement was made, not that what the statement contains is true.
    - That a statement was made, regardless of the truth of its contents, is often important. It can go to the mental state of the witness and their conduct.
- **R. v. Wildman 1981 OCA**
  - Convicted of murder 1. Hatchet murder of little girl. The statement was that Mrs. Wildman called on Feb. 16<sup>th</sup> and accused McIsaac and the appellant of putting an axe in Tricia's head. Defence wanted this to show how accused might know of the hatchet before the 28<sup>th</sup> when to police mentioned it. (Another witness said accused mentioned the hatchet on Feb 20. OCA held that statement was not hearsay.)
    - Not offered for truth of statement (that Tricia was killed with hatchet) but for the fact that it was made and explain the conduct of accused.

### 1.C) Implied Assertions and Hearsay by Conduct

- **Wright v. Tatham 1837**
  - Butler in the will, Tatham would otherwise have inherited it. Question was whether Marsden was sufficiently intelligent to make his will. Letters tendered by defence imply mental capacity: His friends talk as though he were plenty smart. All letters inadmissible.
  - An out of court statement, though irrelevant or expressly asserting no facts, might implicitly assert facts relevant to a matter in dispute. If so, it is hearsay.
- **R. v. Wysochan 1930 SCA**
  - Appellant convicted of willful murder of AK. Issue: admissibility of evidence of words spoken by AK around time she was shot. “Tony where is my husband...” Stanley, help me, I've been shot”.
    - Comes within category of “utterances indicating circumstantially the speaker's state of mind”.
      - Such utterances can either be used either: 1) testimonially as assertions to be believed, or 2) used circumstantially as affording indirect inferences
        - Utterances under 1 are admitted as the Exception for Statements of a mental condition
        - Utterances under 2 draw no issue with the hearsay rule because they are not offered for the truth of their contents.
    - The utterances in question contained no statement of facts necessary to be proved. They are only evidence more or less strong of a certain feeling or attitude of mind, and it was for the jury to decide what inferences might be drawn from them.
    - Appeal dismissed

### 1.F) The Rationale for the Rule Against Hearsay

- The rationale for exclusion is the recognition of the difficulty in assessing what, if any, weight ought to be given to a statement by a person who has not been seen, heard, or subject to any test of reliability by cross examination.
- In assessing credibility, trier of fact should consider: **Sincerity, language, memory, and perception**
  - Morgan's hearsay dangers, can't test these when its hearsay
- Evidence given in court is **under oath** or an equivalent, is subject to **cross examination**, and trier of fact can **observe witness**: these help assess credibility
  - Lamer's hearsay dangers: absence of oath, absence of opportunity to observe, lack of cross-examination

### **The Principled Approach to the Hearsay Exception**

- **R. v. Khan 1990 SCC**
  - Girl said “doctor put his birdie in my mouth and didn't give me any candy”
  - Issue is whether mother's statement of what she was told by daughter was admissible
  - Traditionally hearsay rule was regarded as absolute subject to a various **exceptions** such as: **admission, dying declaration, declaration against interest, and spontaneous declaration**
  - Because of difficulty in obtaining other evidence and because lack of reason to doubt children's statements about sexual assault, courts have moved to relax admissibility for such statements
    - IE: Necessity and reliability
  - Necessity: requires a reasonable interpretation
  - Reliability: Many factors affect reliability: Child's demeanor, intelligence, timing, lack of reasons for fabrication etc.
  - **In determining admissibility of the evidence judge must have regard to the need to safeguard the interests of the accused.**
  - Concerns of credibility will be addressed by submissions and quality of corroborating evidence
  - Children's hearsay statements on crimes committed against them are admissible subject to: Necessity, reliability, and any safeguards the judge deems necessary. Also, weight is a different issue.
- **R. v. Smith 1992 SCC**
  - Admissibility of hearsay when declarant is dead. Larry convicted of killing King, both normally residents of USA. Four telephone calls used by Crown to strengthen murder theory.
  - The categorical approach can undermine the policy of avoiding the frailties of certain types of evidence which the hearsay rule was fashioned to avoid.
  - The principle behind the hearsay rule is that any sources of inaccuracy and untrustworthiness which may lie under the untested assertions of a witness can be brought to light under cross examination. Sometimes this testing will be superfluous or impossible to deploy.
  - **Necessity**: Where the test of cross-examination is impossible for application. Where we are faced with the alternatives of receiving statements untested or not receiving the evidence at all
    - **Would the interests of truth suffer more by adopting the evidence or excluding it**
  - **Reliability**: If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy, in a high degree of probability, it would be pedantic to insist on a test whose chief objective is already secured.
  - The move towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by crossE

- **Hearsay is admissible under the principled approach, governed by necessity and reliability**
  - **Criteria of reliability:** circumstantial guarantee of trustworthiness. If circumstances substantially negate the possibility that the declarant was untruthful or mistaken, then it is admissible. *Child sexual assault, declarations against interest, etc.*
  - **Criteria of Necessity:** Refers to the necessity of the hearsay evidence to prove a fact in issue. EG, in Khan, the child was not competent to testify, thus what she said to her mother was not admissible any other way. **This is not to suggest necessary for the prosecution's case.**
    - Criteria for necessity must be given a flexible definition
    - Categories of necessity are not closed but seem to include:
      - Unavailability of witness for the purpose of testing
      - Necessary for expediency or convenience (not a strong category)
      - Too emotionally traumatic for a child
  - Court admits mother's testimony about what King said in first two telephone calls, but not the last two. Necessity is clearly made out, reliability is not. In first two calls, no reason to lie etc. In last calls (“Larry has come to get me, no need for another ride”), declarant could have had motive to lie, and might have been mistaken about whether Larry had actually returned. Reason to lie: King did not want mom's friend Phillip to come get her.
  - Judge still has residual discretion to exclude where PE>PV
  - Smith acquitted at retrial
- **R. v. B. (K.G.) 1993 SCC (KGB)**
  - Four young men jumped two guys killed one of them. Three youths interviews with police were videotaped. They said respondent said he though he had, or had, killed the deceased. When called at trial, the three youths refused to adopt their earlier statements respecting the admissions of the respondent. Trial judge held that only use that could be made of the prior inconsistent statements was with respect to credibility; they could not be tendered as proof that the respondent made the statements.
  - The dangers of admitting prior inconsistent statements for their truth are the same as the traditional hearsay dangers: Absence of oath or affirmation, inability to observe demeanor and therefore credibility of declarant, lack of contemporaneous crossE
  - Orthodox rule: a witness's prior inconsistent statement is not admissible for the truth of its content.
  - Khan and Smith clearly undermine this rule
  - Cross examination of a witness as to prior inconsistent statements is an adequate safeguard of the accused's ss. 7 and 11(d) rights
  - Videotaping changes the field. Prior statements can be placed before the trier of fact in their entirety and in a form which ensures their integrity. This undermines the traditional “presence” rationale (Capacity to observe demeanor)
  - To enable the Crown to secure more convictions with a new evidentiary rule expanding the scope of admissibility is not to expand the scope of criminal liability (in the sense intended by Dickson in *Bernard*), it is rather, to find more criminals liable.
  - Admitting the prior inconsistent statement does not mean the trier of fact will believe it over the new statement.
  - **Evidence of prior inconsistent statements of a witness other than the accused are substantively admissible on the principled basis.**
    - There must be a *voir dire* before such evidence is put before the jury in which the judge



- satisfies himself that the statement was made in circumstances which do not negate its reliability.
- As a threshold matter: if witness could not make the statement in their *viva voce* testimony, then the PIS is not admissible in the current trial.
    - EG: If PIS was hearsay, then not admissible - "X said he saw Y fire a gun"
      - Could be used as proof that statement was made, but not proof that Y fired gun
    - EG2: "Y told me he fired the gun"
      - Relates hearsay that is admissible under an established hearsay exception (it is an admission),
      - Thus here, X could in *viva voce* testimony state that "Y told me he fired the Gun" because Y's statement is an admission and therefore falls under an exception to the hearsay rule.
    - **It is crucial that the matters in the prior statement would have been admissible if offered as the witness's sole testimony.**
  - **Reliability:**
    - Reliability of PIS is a key concern. Concern is centered on the hearsay dangers: Absence of oath, presence, contemporaneous CrossE. Reliability concern is sharpened in PIS because trier of fact is being asked to choose between two statements from the same witness
    - **Focus of inquiry of reliability for PISs is the comparative reliability of the PIS and the testimony offered at trial. As such additional indicia of reliability to those outlined in Khan and Smith are necessary to bring the PIS to a comparable standard of reliability before they are admitted as substantive evidence.**
      - If the first two hearsay dangers are met, then sufficient reliability is established to allow the trier of fact to weigh the statement against the evidence tendered at trial by the same witness.
        - Ultimate reliability and weight to be given to a statement are for trier of fact
        - Reliability under principled approach is a threshold requirement
    - There must be a **substitute indicia of trustworthiness** which compensates for the oath, presence, and crossE
    - **Reliability will be satisfied when the circumstances in which the PIS was made provide sufficient guarantees of its trustworthiness with respect to the two hearsay dangers a reformed rule can realistically address: If**
      - **1) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and significance of the oath,;**
      - **2) the statement is videotaped in its entirety; and**
      - **3) the opposing party (Crown or defence) has full opportunity to cross examine witness about the statement,**
      - **Satisfaction of these criteria provide sufficient circumstantial guarantee of reliability to allow jury to make substantive use of the statement.**
      - **Other circumstantial guarantees may suffice, if the judge is satisfied that they assure reliability to the extent the traditional hearsay rule requires**
  - **Necessity:**
    - PISs provide a vexing problem for necessity. The witness is available for crossE. But it is patent that we cannot expect to get the value from the recanting witness or other sources.
  - The admissibility of prior statements for the truth of their contents:
    - 1) Invoke s.9 CEA and fulfill its requirements
    - 2) State intention in tendering statement.

- If only being tendered to impeach credibility, then that is the end of the matter
- If party wants to make substantive use of the statement, then the judge on voir dire must satisfy himself on the appropriate measures that these indicia of reliability are present: oath or affirmation will be proved; person who administered oath will testify that she also administered the warning; videotape tendered into evidence with its authenticity sworn to, and if trial judge wishes, screened to ensure veracity and integrity
  - Judge must be satisfied on BOP tht the indicia of reliability are established. Burden is on party seeking to admit the evidence.
- \*\*A different situation might arise where the prior statement reports a statement (??? court says admission.....but then says admission would not be an issue???) made by the accused.
- Even where all criteria appear to be met, judge still has discretion to refuse to allow jury to substantively use the statement.
  - Prior statements share many features with confessions, especially where police are involved.
  - The test for admission of confessions is well suited to determine if the circumstances under which the statement was made undermine the veracity of the indicia of reliability.
    - First part of confession rule:
      - No statement by an accused is admissible against him unless it is shown by the prosecution to have been a voluntary statement: Must be free of fear of prejudice or hope of advantage held out by person in authority
      - This test is applicable for prior statements. Judge must be satisfied on BOP that the statement was not the product of coercion of any form; whether it involves threats, promises, excessively leading questions by a person in authority, or other forms of investigatory misconduct.
        - Even if test admissible, it can be excluded if it woul dbring admin of justice into disrep.
- **Summary of admission of prior statements:**
  - 1) Judge must be satisfied that the indicia of reliability necessary to address the two hearsay dangers are present and genuine: Warning, oath, videotaped record, or sufficient substitutes
  - 2) If indicia are present, then: Examine circumstances under which statements were made
    - Statements supported by the indicia must have been made voluntarily if to a person in authority
    - And there are no other factors which would tend to bring the administration of justice into disrepute if the statements were admitted as substantive evidence.
  - In most cases, party seeking to admit evidence will have to establish the requirements on BOP.
  - Trial judge is not to decide on truth of statements or reliability as against the present testimony.
  - If the criteria are met, then judge need not give standard limiting instruction to jury and evidence can be treated as substantial evidence.
    - Judge must direct trier of fact to consider carefully these circumstances in assessing credibility of the PIS relative to the witness's testimony at trial.
      - EG of circumstances to take note of: Demeanor of witness at all relevant times; reasons offered for recantation; motivation and/or opportunity to fabricate; events leading to first statement; nature of the interview: use of leading questions, existence of pre-statement interviews, coaching; corroboration by other evidence.
  - Where a statement does not meet circumstantial guarantees of reliability, it may still be admissible under CEA s.9(1) and (2); but the judge will have to instruct in terms of the orthodox rule.

- **R. v. Khelawon 2006 SCC**
  - K managed retirement home. Allegedly abused S and other seniors. S gave videotaped statement to police; not under oath, but said yes to need to tell truth. S' death made statement necessary, the videotape was not sufficiently reliable. Circumstances did not provide reasonable assurances of reliability. C had motive to make S help her.
  - **Central reason to exclude hearsay is inability of TF to assess perception, memory, narration, and sincerity**
  - Distinction between threshold and ultimate reliability reflects the important difference between admission and reliance.
  - In determining threshold reliability, TJ must be mindful that **hearsay evidence is presumptively inadmissible**
  - **Factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in past decisions of this court must be dismissed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting and contradictory answers.**
  - The videotaped admission is inadmissible:
    - Mental competence of S; influence by disgruntled employee; general dissatisfaction; whether injuries caused by a fall.
  - **s. 709 CC** provides procedure for taking of evidence before a commissioner in the presence of the accused or his counsel thereby preserving both the evidence and the rights of the accused
  - **Hearsay: 1) Out of court statement adduced for truth of its contents, and 2) absence of a contemporaneous opportunity to cross-examine declarant**
  - **The Mapara framework for assessing necessity and reliability:**
    - 1) Hearsay is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions remain presumptively in place
    - 2) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability. 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.
    - If hearsay evidence does not fall within an exception, it may still be admitted if indicia of necessity and reliability are established on voir dire.
  - Necessity and reliability can influence each other
  - **Constitutional Issues**
    - Introducing hearsay under the principled approach: **Onus on party seeking to adduce the evidence to establish on BOP necessity and reliability**
    - Difficulty in testing evidence or adducing reliable evidence can impact right to FAD Charter s.7 and right to a fair trial
    - **Concern over trial fairness is a paramount reason for rationalizing the hearsay exceptions in accordance with the principled approach**
    - The right to cross-examine is a means to an end: trial fairness
      - trial fairness embraces more than accused's rights. Includes right to FAD and public's interest in arriving at the truth.
      - **Necessity founded on society's interest in the truth**
      - **Reliability founded on ensuring integrity of trial process**
    - Even where N and R are met, TJ can exclude where PE > PV
  - **Admissibility factors**

- Hearsay: Out of court statement tendered for truth of its contents AND no opportunity for contemporaneous crossE
- Hearsay is inadmissible because its reliability cannot be tested.
- Hearsay is presumptively inadmissible
- **Hearsay rules are modified to facilitate truth seeking, judicial efficiency, and fairness in the adversarial process**
- **Reliability can usually be met in one of two ways:**
  - 1) It is sufficiently trustworthy: Even a skeptical caution would see that in the circumstances, it is trustworthy, in a high degree of probability
    - Testimony in former proceedings
    - Dying declaration
    - Spontaneous utterances
    - Statements against pecuniary (or penal) interest
    - *Khan and Smith*
  - 2) Where truth and accuracy can be sufficiently tested.
    - Party admissions
    - Co-Conspirators' statements
    - *KGB and Hawkins*
  - *U. (F. J.)* used both circumstances and adequate substitutes. Highlights concern about PIS where TF is asked to accept out of court statement over sworn in court testimony
- **Must focus on the dangers raised by admitting hearsay and what is offered to counter them. Remain aware of role of TJ and TF.**
  - The factors will vary in each case
- **Both the circumstances existing at the time the statement is made, and the existence of corroborating evidence indicate whether the statement is reliable.**
- Crown attempts to preserve evidence: See CC s.709 to 714
- Hearsay evidence will not be admissible unless it is either sufficiently trustworthy, or there is a sufficient substitute basis for testing its truth

### **Hearsay Exceptions 1:**

#### Statements against penal interest

- **R. v. Pelletier 1978 OCA**
  - Roommates fought, accused pushed drunk deceased onto floor and then went to bed. David gave police statement about drinking and fighting and was charged with manslaughter. Later, charge was withdrawn and charges against Pelletier issued. David could not be found.
  - **Declaration against penal interest.**
    - Trial judge refused to allow accused to call David's statement.
  - The five tests are a valuable guide when the court decides that a declaration against penal interest should be admitted despite the rule against admission of hearsay evidence.
  - In the whole, David's declaration is against his interest, as per test #3
  - Test five is not exhaustive. Whenever the declarant cannot be brought in at the trial, their statement should be admitted. This includes physical incapacity, outside of jurisdiction, et cetera.
  - New trial ordered
- **Lucier v. The Queen 1982 SCC**

- Accused's house burned down while he was absent and shortly after he increased his fire insurance policy. Dumont admitted to a constable that he set the house on fire and did so at the bequest of Lucier.
- Statements tendered on behalf of the accused and made by an unavailable person may be admitted at trial if they can be shown to have been made against the penal interest of the person making them
- Statements implicating the accused in the crime with which he is charged emanating from the lips of one who is no longer available to give evidence robs the accused the invaluable right to crossE
- Dumont's statements not admissible.
- **Notes:**
  - The Demeter factors determine whether a declaration is against penal interest **The five Demeter Factors:**
    - 1) The declaration must be made to such a person and in such circumstances that the declarant would **apprehend a vulnerability to penal consequences** as a result.
    - 2) The vulnerability to penal consequences **cannot be too remote**
    - 3) The **declaration must be considered in its totality**. If upon the whole, the weight is in favour of the declarant, it is not against his interest
    - 4) **In doubtful cases**, the court should consider whether there are **other circumstances** connecting the declarant with the crime and whether there is any connection between the declarant and the accused
    - 5) The **declarant must be unavailable** by reason of death, insanity, jurisdiction, etc.

#### Party admissions

- A statement by a party offered by an opposing party is admissible for its truth.
- A party admission is a statement made or an act done by a party that is, or that amounts to, a prior acknowledgment that some fact is not as he now claims it to be.
  - “the trial lawyer's rule of thumb...*Anything the other side ever said or did will be admissible so long as it has something to do with the case.*”
- This exception is motivated by the adversarial system: (R. v. Evans 1993 SCC): A party can hardly object that he had no opportunity to crossE himself or that he is unworthy of evidence save when speaking under oath.

#### Prior Judicial Proceedings: Testimony from Prior Criminal Proceedings

- CC s.715 makes testimony from prior proceedings admissible in some circumstances:
  - (1) If a person gives evidence (at a previous trial on the same charge, or in the investigation of the charge, or in the preliminary inquiry into the trial), but refuses to be sworn or is dead, insane, out of jurisdiction etc, THEN the evidence can be read in the proceedings without further proof; IF it purports to be signed by the judge who before whom it was taken AND the accused cannot prove either: it was not signed by the judge OR accused did not have full opportunity to crossE
  - (2) Evidence taken on a preliminary inquiry or other investigation of a charge against the accused, can be read in a prosecution of any other offence in the same manner as it could be read in the initial charge
  - (3) Where the evidence was taken at a trial where the accused was absent by reason of absconding, he SHALL be deemed to have been present and had full opportunity to crossE
- **R. v. Potvin 1989 SCC**
  - Went to acquaintance's home to steal her jewellery. Acquaintance severely beaten and died from injuries. Three charged with murder 2. Witness testified at prelim but refused to testify at trial.

- Does CC s.643(1) (NOW SECTION 715) violate s.7 and 11(d), and if so is it justified under s1
- Did court err in holding that s.643(1) does not give judge discretion to exclude where criteria are met, and if so, did judge err in not excluding
- Did judge err in not warning jury that admission pursuant to s.643 is an unusual procedure and caution should be exercised before evidence of an accomplice is accepted against evidence of another accomplice
- **S.7 analysis**
  - Traditionally, evidence given under oath at a previous proceeding was admissible at a criminal proceeding if the witness was unavailable for reasons such as death, provided accused had opportunity to crossE when evidence was originally given.
  - Admission is not unfair to an accused who had full opportunity to crossE
  - **Full** opportunity to crossE is basic to our system and is req'd before a transcript can be read in for the purpose of convicting an accused.
- **It is a PFJ that accused has full opportunity to crossE an adverse witness**
- If judge presiding over prelim curtails crossE designed to test credibility of witness, and subsequently, the transcript is read in under 643, then likely to constitute s.7 infringement
- Failure of counsel to crossE different at prelim than at trial for tactical reasons, does not constitute deprivation of full crossE, provided it was chosen by accused and not enforced by court.
- Wilson: held that trial judge had a statutory discretion to prevent any unfairness that would otherwise result from a mechanical application of the section
  - Unfair in manner evidence was obtained, or affecting the fairness of the trial itself
- LaForest and Dickson: Concurred in result but held that 643 allowed opposition or normal evidence rules and right to exclude where PE>PV
- **R. v. Hawkins 1996 SCC**
  - Hawkins's girlfriend testified at prelim. After prelim, they were married. SCC said the transcript could not be read in under s.715. The marriage does not present a refusal to give evidence; the CL rule of spousal incompetence disqualifies a spouse from giving evidence, regardless of the spouse's choice.

#### Business Records

- In most Canadian jurisdictions, the common law business records exception has been overtaken by statute. CEA ss. 29,30,31
- Admissibility of statements made in the course of duty and in the ordinary routine of business. To be admissible, the statement must:
  - 1) relate to some act or transaction performed by the person making it in the ordinary course of his business and duty;
  - 2) be made in the ordinary course of his business under a duty to make it; and
  - 3) be made near or at the time at which the act or transaction to which it relates was performed.
- In Alberta, where a statute is still lacking, Ares v. Venner summarizes the CL rule requires:
  - 1) an original entry; 2) made contemporaneously; 3) in the routine; 4) of business; 5) by a recorded with personal knowledge of thing recorded as a result of having done or observed or formulated it; 6) who had a duty to make the record; and 7) who had no motive to misrepresent.

#### **Hearsay Exceptions 2: Spontaneous Declarations; Physical and Mental State, Dying Declarations**

HEARSAY DONE...NEED TO COPY PASTE FROM DESKTOP

## Opinion Evidence

- Opinion evidence (OE) is generally inadmissible. Witnesses are supposed to testify to the facts, their opinion on the facts are generally irrelevant.
- Two exceptions to inadmissibility:
  - 1) Lay witnesses can give an opinion in two situations:
    - 1) On matters within common knowledge
    - 2) based on multiple perceptions that can best be communicated in a compendious form
  - 2) Expert's can give an opinion where the trier of fact requires assistance to understand the significance of the evidence, or to determine what *inferences* can properly be drawn from the evidence

## Lay Opinion Exception

### - **R. v. Graat 1982 SCC**

- Police saw car weaving (drunk driver case).
- *Sherrad* list where laypersons can give opinion: (Not exhaustive)
  - 1) Identification of handwriting, persons, and things; 2) apparent age; 3) bodily plight or condition of a person including death and illness; 4) person's emotional state (anger etc); 5) condition of things (worn, shabby, new etc); 6) certain questions of value; and 7) estimates of speed and distance
- The distinction between fact and opinion is bullshit
- Broad principles: Relevant evidence is admissible. Relevance: apply human logic and experience to the case. Then should it be excluded for policy or legal reasons.
- Police opinion of driving while impaired by alcohol has probative value, will not mislead the jury, no unfair surprise, no undue consumption of time.
- **When the facts from which a witness received an impression were to evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated, a witness may state his opinion or impression.**
- Driving of motor vehicles is now **so common** that a lay witness can both give evidence as to whether someone was intoxicated (and to what degree), and whether unfit to drive
- Lay witness (LW) cannot give opinion evidence on a legal issue because this would not be an abbreviation of witness's factual observations
- Whether ability to drive is impaired by alcohol is factual determination.
  - That a witness's opinion is expressed in the exact words of the criminal code does not make it a legal opinion
- **Two caveats:**
  - 1) In determining whether an opinion is admissible, judge must exercise a large measure of **discretion**
  - 2) Since non-expert opinions are not ranked and must be weighed on the case. Thus police opinion should not necessarily be accepted over another witness's opinion

## Expert Opinion: Basic Principles

### - **R. v. Mohan 1994 SCC**

- Admission of expert evidence depends on: Relevance, necessity of assistance, absence of exclusionary rules, qualified expert
- Relevance
  - Threshold requirement for admissibility determined by judge as question of law
  - Prima facie admissible if relevant to a fact in issue. If costs outweigh benefits to the trial process, then it can be excluded

- Evidence that is otherwise logically relevant can be excluded if cost > benefit, if PE > PV, if it involves an inordinate amount of time, if it will mislead trier of fact (moral or logical prejudice)
- PE v. PV has special significance regarding admissibility of expert evidence
  - Tendency to place too much weight on expert evidence
  - This is why polygraph testing excluded
  - **Test:**
    - **(First threshold test then):**
    - **Is the evidence likely to assist or confuse the jury**
    - **Is the jury likely to put too much weight on the evidence (infallibility of science prejudice)**
- Necessity in Assisting Trier of Fact
  - **If on the proven facts, the judge or jury can form their own conclusions without help of the expert opinion, then the opinion is unnecessary**
    - “helpful to the jury” would be too low a threshold
    - What is required is that the opinion provide information outside the experience and ken of a judge or jury
    - It must be necessary to enable the trier of fact to appreciate the matters in issue
  - Must also consider PE > PV here
  - Criteria of relevance and necessity have been applied strictly in some cases to exclude expert evidence as to an ultimate issue, credibility, and oath-helping.
- Absence of any Exclusionary Rule
  - Even if the other three criteria are met, it can be excluded under other rules of exclusion
- Properly Qualified Expert
  - Must be properly qualified
  - **Novel scientific theory of technique:**
    - Subject to special scrutiny to determine if it meets basic threshold of reliability and whether it is essential to trier of fact in the sense that the trier of fact would otherwise be incapable of coming to a satisfactory conclusion. The closer the evidence approaches an opinion the stricter the application of the principle
- Whether lay or expert, a witness can testify concerning actual perceptions that are relevant to the issue in trial. **It is only when a witness purports to give an opinion on certain facts that the opinion rule is engaged.**
  - EG: If a treating physician says it is usual or unusual to observe this kind of injury in sexual assault, they are giving an opinion.
- **Expert evidence is not admissible unless the trial judge determines that it meets the Mohan criteria. The party calling the evidence must establish:**
  - **1) That the trier of fact needs assistance in order to understand the significance of the evidence or to draw proper inferences;**
  - **2) That the expertise is relevant and reliable;**
  - **3) That the witness is properly qualified in the relevant field; and**
  - **4) PV not outweighed by PE or delays in trial process (or other 'costs')**

#### Trier of Fact's Need for Assistance

- As common knowledge expands, the capacity of trier of facts to understand some type of evidence also expands.
- **R. v. Lavallee 1990 SCC**



- Appellant shot Rust through back of head. Party at their house, battered wife feared for her life.
- Admissibility of expert psychiatric evidence
- In matters calling for special knowledge, an expert may draw inferences and state his opinion. Experts function is to: provide the jury with a ready made inference which the jury could not formulate due to the technical nature of the issue.
- Juries are not experts on all matters of human nature
  - Battering relationship is **subject to many stereotypes and myths as such it is beyond the ken of the jury and is suitable for expert testimony**
- Relevance:
  - s.34(2) CC requires temporal connection between apprehension of death/serious harm and self-defence measures taken, Also, magnitude of force used by the accused.
  - The test of reasonable force is foreign to the world of a battered woman
  - Walker theory of violence....
  - Expert evidence in battering relationship can assist jury in determining whether accused has a reasonable apprehension of death when she acted. Without such testimony, it is unlikely that the jury could appreciate why her subjective fear would be reasonable in the relationship
- Principles of admission of expert evidence in this case:
  - Where expert has relevant ken beyond that of lay person
  - Difficulty of lay person to understand battered wife syndrome.
    - Helps dispel myths and stereotypes to ensure fair trial
  - Relevant in assessing nature and extent of alleged abuse
  - Assist jury in assessing reasonableness of her beliefs.
- Expert evidence cannot usurp jury duty to decide whether in fact, the accused's perceptions and actions were reasonable. But **fairness and integrity of the trial process demand that the jury have the opportunity to hear them**

### **R. v. Trochym 2007 SCC**

- T convicted murder 2. Key witness changed date she saw T after hypnosis
- Even if the science has received judicial recognition in the past, a technique or science whose underlying assumptions are challenged should not be admitted without first confirming the validity of those assumptions
- Science on hypnosis is mixed at best
- **Reliability of a science or technique can be assessed on four factors:**
  - 1) Whether the technique can be or has been tested;
  - 2) Whether the technique has been subject to peer-review and publication;
  - 3) The known or potential for error; and
  - 4) Whether the theory or technique used has been generally accepted
- Important to remember that a technique sufficiently reliable for therapy etc, may not be sufficiently reliable for use as evidence in court
- **Also must consider the impact of admitting novel science to the trial process:**
  - **Costs in terms of time, potential prejudice, and confusion caused to TF**
- When evidence on topics NOT covered by the questions asked during hypnosis, the judge must carefully consider the risks inherent in the use of hypnosis against the search for truth. Although post-hypnosis memories may be tainted, the judge must weight the PE and PV
- Evidence covered in a hypnosis session are inadmissible

- **Special jury instruction about weight must always be given where a witness has undergone hypnosis**

**Privileges:**

- The exclusion of privileged information is a recognition that truth is not an absolute principle

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**Class Privileges** 751–785; 832–833

- If you fall in a class, then there is a prima facie presumption of inadmissibility
  - Excluded because, although relevant, there are overriding policy issues
- Solicitor-client privilege is central to our legal system
- Spousal privilege codified s.4(3) CEA

**Solicitor-Client Privilege**

- SCP is the highest privilege and is nearly an absolute privilege
- **Descoteaux v. Mierzwinski 1982 SCC**
  - 1) Confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent
  - 2) Except as provided otherwise, where the exercise of a right would interfere with another person's SCP, the resulting conflict should be resolved in favour of the SCP
  - 3) Where the law gives authority to interfere with SCP, the decision to do so and means of doing so, should be determined with a view to interfere only to the extent absolutely necessary in order to achieve the ends
  - 4) Acts permitting interference with SCP must be interpreted restrictively
- **Foster Wheeler Power Co. v. SIGED 2004 SCC**
  - SCP is a civil right of supreme importance and a PFJ that serves both to protect the essential interests of clients and ensure the smooth operation of Canada's legal system
  - **There is a rebuttable presumption that SC communication is covered by the privilege. However, it is important to remember that not every fact within a SC relationship has to do with legal advice.**
    - Opposing party must specify nature of information sought, and then show that it is not subject to confidentiality or immunity from disclosure, or that legislation specifically authorizes the disclosure
- **McClure:**
  - SCP is integral to the legal system and is not merely instrumental like other privileges (doc-patient, etc)
  - The SCP is based on the fact that the SC relationship is essential to the effective operation of the legal system
  - SCP also encourages full frank communication between solicitor and client
- **Lavallee, Rackel & Heintz v. Canada 2002 SCC**
  - SCP exists independently of its assertion
- **Requirements for SCP set out in Canada v. Solosky 1980 SCC**
  - Communication must be between the solicitor and the client (this includes secretaries etc), must entail the seeking of legal advice, and must be intended to be confidential.
- Client has right to waive SCP; waiver can be express or implied
- **Pritchard v. Ontario (HRC) 2004 SCC**

- The HRC decided not to deal with Pritchard complaint of sexual harassment and gender discrimination. P sought disclosure of all documents HRC had before it. HRC decided she acted in bad faith bc she signed a release with Sears when she left that she would not complain under the Code. Among other things, P sought the legal opinion the commission had used
- SCP covers in house counsel
- SCP does not cover non-legal advice given by in house counsel: EG policy advice etc
- Whether privilege arises must be determined case-by-case
  - Depends on: the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered
- SCP does not interfere with procedural fairness
- Legislation that purport to interfere with SCP will be interpreted strictly.
  - EG: "Right to the whole record" does not include right to SCP information. It must be more explicit "Right to X, including all SCP information"
- **R. v. Campbell 1999 SCC**
  - The assertion of good faith reliance on the opinion of a lawyer (by the police in a reverse sting operation) in defence to a claim of entrapment constitutes a waiver of SCP

Exceptions to SCP: criminal purpose, public safety, and innocence at stake

Facilitating a Criminal Purpose

- Not a true exception because facilitating a criminal purpose is not legal advice and therefore does not fall within privilege.
- **Descoteaux**
  - Where individual lies about financial status to get legal aid, she is committing a crime therefore privilege does not attach to such statements
  - The privilege is meant to support the effective administration of justice. It would be nonsensical to protect communications that undermine the administration of justice (adopted from *R. v. Cox and Railton* 1884)
- **Campbell**
  - had privilege not been waived by police, he would likely have compelled documents on the basis that it may have counselled a criminal act
  - Destruction of privilege takes more than the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime, or that the lawyer became a dupe or conspirator in the crime.
  - If the lawyer had merely advised about the legality of the reverse sting, SCP would attach. If the lawyer advocated for doing the sting, the exception would apply

Public Safety

- **Smith v. Jones 1999 SCC**
  - Jones charged with aggravated sexual assault of prostitute. Defence had psychiatric report drafted. Report included information that the assault was a test run and Jones wanted to rape and kill prostitutes. Jones pled guilty, lawyer refused to release report. Smith (the shrink) started proceedings to have the info released.
  - In certain situations, SCP must yield to the public good.
  - **Determining when public safety outweighs SCP:**
    - 1) Is there a clear risk to an identifiable person or group?
    - 2) Is there a risk of serious bodily harm or death?
    - 3) Is the danger imminent?
  - 1) Clarity of risk:

- As a general rule person or group must be identifiable. Requisite specificity will vary depending on the other two factors.
- The exactitude of the details of the harm to be imposed and the targeted group
- 2) Seriousness of harm
  - Requires that intended victim be at risk of serious harm or death. Disclosure of intent to commit crimes in the future is insufficient. For public safety interest, the harm must be serious bodily harm or death. (Serious psychological harm may be sufficient as well)
- 3) Imminence:
  - Depending on seriousness and clarity of threat, the requisite time limit will change.
  - A vow to kill someone in three, once out of jail, if supported by clarity and seriousness, could be sufficiently urgent
- Extent of disclosure:
  - Generally, it should be limited as much as possible
  - The emphasis on minimizing disclosure must be stated and acted upon. EG where multiple crimes are in the document, only the details necessary for the public safety (the three criteria) can be disclosed.
  - Usually, full disclosure will not be necessary and disclosure only to necessary people should occur. EG Police, Crown, potential victim, etc
- The dissent to a more limited view of the exception. They focused on the erosion of SCP as erosion of the justice system

#### Innocence at Stake

- Applies where material that might raise a reasonable doubt is protected by SCP.
- A last resort.
- **R. v. Brown**
  - Baksh stabbed in heart. Benson admitted to his GF and lawyers that he did it. Charges dropped. Cops charged Brown.
  - Setting aside SCP is rare and tested stringently
  - Without desire to create hierarchies, innocence at stake is more important than SCP
  - SCP “should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of wrongful conviction.”
- **The McClure Test:** (each element must be proved on BOP by accused)
  - **Threshold test:** The accused must establish that:
    - 1) The information he seeks from the SC communications is not available from any other source; and
    - 2) he is otherwise unable to raise a reasonable doubt
  - **Innocence at stake test:**
    - 1) The accused seeking production of the SC communications must demonstrate an evidentiary basis to conclude that a communication exists that could raise a reasonable doubt
    - 2) If such an evidentiary basis is found, the trial judge should examine the communication to determine whether, in fact, it is likely to raise a reasonable doubt as to the guilt of the accused
    - The burden at the second stage of the innocence test (likely to raise a reasonable doubt) is stricter than that in the first stage (could raise a reasonable doubt).
    - If the innocence test is satisfied, the judge should order the disclosure of the communications, in accordance with the following principles: **Scope of disclosure:**

- Only disclose those communications that are necessary for the accused, whose innocence is otherwise at stake, to raise a reasonable doubt. Cut out everything that is tangential.
- Any information disclosed to the accused are still covered by the accused's SCP and will only be available to the Crown if they are raised at trial.
- You will likely never succeed on a McClure test. You will not get by the threshold. You have to show that you have no other defence and the communication would make a positive difference.
- In cases based purely on circumstantial evidence, defence can likely raise a reasonable doubt (IE the Crown can't make a good case)
- The use of SC communications as cumulative effect to support reasonable doubt, can only occur where the other evidence would not raise reasonable doubt.
  - **A court cannot allow privileged communications to breath credibility into other evidence, it can only be used to breath meaning into otherwise sterile evidence.**
  - Cannot allow the essence of privilege to be its undoing

### Litigation Privilege

- **Blank v. Canada (Minister of Justice) 2006 SCC**
  - Must distinguish SCP and LP
  - Unlike SCP, LP is temporally constrained. It ends with the end of the litigation
  - Blank harassed by government under Fisheries Act, seeking documents from government
  - s. 23 of the Access Act “The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to SCP”
  - Issue: Whether documents once subject to LP remain privileged when the litigation ends
  - LP is not directed at or restricted to SC communications
    - Also contemplates communications between a solicitor and third parties, or a self-represented litigant and third parties
    - Purpose is to ensure efficacy of adversarial system
      - This requires that litigants be able to prepare their contending positions in private, without adversarial interference, and without fear of premature disclosure
  - Main differences between SCP and LP
    - 1) SCP applies to confidential communications between S and C. LP applies to non-confidential communications between solicitor and third parties and includes non-communicative material.
    - 2) SCP exists whenever C seeks legal advice. LP only applies in the context of the litigation itself.
    - 3) Most important, different underlying rationales
      - SCP: Interest of all citizens in having full and ready access to legal advice (**Protect a relationship**)
        - Without the privilege, hard to get full and candid communications
      - LP: Need for a protected area to facilitate the investigation and preparation of a case for trial, by the adversarial advocate. (**Facilitate a process**)
  - LP and SCP common cause: The secure and effective administration of justice. They are complementary, not competing in their operation.
  - LP applies indiscriminately to all litigants
  - Confidentiality is not an essential element of LP

- LP is meant to create a zone of privacy for pending or apprehended litigation
- CL LP comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege
- **"Litigation"** includes separate proceedings that involve the same or related parties from the same or a related cause of action. Also includes proceedings that raise issues common to the initial action, or that share its essential purpose.
  - **Boundaries are limited by the purpose of LP: The need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.**
  - EG: Government sued by many parties with different specifics about urea formaldehyde insulation program. Despite difference, same underlying liability issues were common
- In the case at bar, Blank seeks disclosure of documents related to criminal investigation of his company. Purpose is to sue Crown for abuse of process etc.
  - Very different litigation
- Even where materials sought would otherwise be protected by LP, the seeking party can get access upon a prima facie showing of actionable misconduct by other party.
- SCP can overlap with LP and protect documents that would otherwise be released
- The word "may" s. 23 suggests government wants to promote more disclosure, not less
  - Also, point of the act is to promote access to information in the government's hands
- The test for materials is the dominant purpose test, not the substantial purpose test. More narrow, but consistent with view that LP is a limited exception to full disclosure

#### Matrimonial Privilege

- s.4(3) holds that receiver of communication cannot be compelled to disclose the communication
- **R. v. Zylstra 1995 OCA**
  - s.4(3) allows privilege and it can be invoked at anytime, even when a spouse is otherwise competent and compellable
  - The privilege, if asserted, should be done in the presence of the jury. Might otherwise confuse jury as to why Crown did not pursue issue.
  - Whether jury is allowed to draw an adverse inference is not decided here.

#### **Case by case privilege**

- **Case-by-case privilege (The Wigmore Test)**
  - 1) The communications must originate in a confidence that they will not be disclosed
  - 2) Confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties
  - 3) The relation must be one that in the opinion of the community ought to be sedulously fostered
  - 4) The injury that would inure to the relation by the disclosure must be greater than the benefit gained for the correct disposal of litigation
- **Slavutich v. Baker 1976 SCC**
  - Case cited because it adopts the wigmore test
  - Wrote honestly his opinion on a tenure form sheet. The sheet was supposed to be confidential and be burned after the tenure meeting. The sheet was released. Was dismissed for the comments among other things.
  - Goes through wigmore test and says document should have been inadmissible.
    - It was meant to be confidential. It was essential to procedure that it be confidential, the

university community clearly desires the relations in community be fostered and tenure procedures be furthered, and it is clear the the injury from disclosure would outweigh the benefit.

- Ratio: Equitable principle of breach of confidence; a confidential document submitted in good faith cannot be used against him in dismissal procedures. The board should not have accepted the tenure form sheet into evidence.

– **R. v. Gruenke 1991 SCC**

- Murder 1. Testimony of a pastor and lay counsellor. Nail puller murder.
- In case by case, there is a prima facie assumption that communication is NOT privileged.
- Religious communications are not essential to operation of justice system like SCP
- s.2(a) can be significant in some cases, it does not warrant the recognition of a class privilege
- Case by case privilege lets court determine if individual's freedom of religion would be imperiled by admission of evidence.
- “Priest and penitent” = religious communications. Must be assessed on case by case basis
- Wigmore criteria informed by Charter criteria
- Applies Wigmore test
  - Properly admitted at trial
  - No expectation of confidence
- Dissent: Wants class privilege
  - Case by case danger: focus on individual case instead of societal interests in long run
  - Religious communications test:
    - 1) Does the communication involve some aspect of religious belief or practice
    - 2) Is the religious aspect the dominant purpose or feature of the communication
    - 3) If not dominant, would the communication have been called into being without the religious aspect
    - 4) Is the religious aspect sincere or colourable
- s.27 of Charter mandates that Charter be interpreted with Canada's multicultural heritage in mind.

– **M.(A.) v. Ryan 1997 SCC**

- 17 yr old girl sexually assaulted by her shrink. Goes to other shrink for help. Shrink 2 says everything done to keep documents confidential. Issue: Are shrink2's notes protected by privilege. Or, should a defendant's right to relevant material outweigh the plaintiff's right to expectations of privacy?
- Privilege can be absolute or partial. Privilege reflects that truth is not absolute
- Communications made in confidence
- Confidentiality essential to maintain relationship
- Community wants doctor-patient relationship sedulously foster.
- Whether interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation:
  - Assess interests served. Includes specific interest of the patient and broader interests of public in doctor-patient relationships. Also consider privacy interests and perpetuation of inequalities
    - Charter s.8 privacy right.
    - s.15 equality under the law
- Where disclosure is necessary to get at the truth and prevent an unjust verdict, and where privacy interest is compelling (like here) partial privilege will be likely.

- Court refuses all or nothing privilege, favours justice over expediency and security in knowledge of protection of confidence.
- In criminal cases where liberty is at stake, the balance will be more in favour of disclosure than in civil cases, where only reputation and money are at stake.
- **R. v. O'Connor 1995 SCC 46 // R. v. Mills 1999 With the legislative changes in the middle**
  - The question of production of records of third parties is a question balancing the accused's s.7 right to full answer and defense against the third party's s.7 right to privacy and s.15 right to equal benefit of the law.
  - Defence wanted third party records (medical, counselling etc) from sexual assault complainant; records NOT in the possession of the Crown.
- CONCURRING
  - Right to a fair trial
    - PFJs vary by context. Not absolute or abstract.
    - Right to fair hearing does not give right to most favourable hearing
    - Right to a fair trial (and in this, the right to FAD) must be primarily viewed from accused's point of view, but the views of the community and complainant also play a role
    - Must remember, third party records are not in possession of Crown and therefore do not form part of case to meet.
    - Medical records from counselling are both hearsay and problematic from a reliability standpoint
  - Right to Privacy
    - Privacy has been highlighted as very important by the court; in s.7 and 8 of the Charter, and in the CL itself
    - Human dignity underlies much of the charter, especially s.7. The right to security includes security of psychological integrity of the individual
    - Privacy not absolute, thus it is a *reasonable expectation of privacy*
    - Must balance reasonable expectation of privacy against necessary interferences
    - Similar to need of state to get a warrant or have reasonable grounds for search, reasonable pre-authorization should be required for access to third party files
  - Right to Equality without Discrimination
    - Sexual assault primarily against women. Most get some kind of counselling or therapy
    - Presumption against ordering production of private records.
    - Ample and meaningful consideration must be given to complainants equality rights s.15
  - Balancing Competing Values
    - Must avoid hierarchical approach to rights
    - Applicant must show that state power to compel production of records is justified in a free and democratic society. **Justification test:**
      - 1) Production should only be granted when it is shown that the accused cannot obtain the information sought by any other reasonably available and effective means.
      - 2) Production which infringes on privacy must be as limited as reasonably possible to fulfill right to full answer and defense
      - 3) Arguments for production must be permissible chains of reasoning, and not based on discriminatory stereotypes, etc
      - 4) There must be proportionality between the salutary effects on the accused's right to FAD, and the deleterious effects on the third party's privacy rights.



- Must reflect the extent to which a reasonable expectation of privacy vests in the record, and the importance of the issue to which the evidence relates
  - Deleterious effects includes effects on victim's course of therapy and psychological integrity which is security of person
- Dissenting in result BUT MAJORITY HERE
  - Remember the information is not part of state's case, nor does Crown have access to the information. Also, third party's have no obligation to assist the defense
  -
- **O'Connor production of records test:**
  - 1) **Likely Relevant test:** (Threshold test)
    - When defence seeks information from a third party (not the state), the onus shifts and a higher threshold applies.
    - 1.1) Not an evidentiary burden, low threshold requirement to avoid fishing trips
      - Difficult for accused to call evidence given that he has never seen records
    - **The question is whether the right to make full answer and defence is implicated in the records.**
    - “Likely” relevance means: (Page 870)
      - Relevance in disclosure means “may be useful for the defense”
      - Relevance in production is a higher threshold
        - **The trial judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of the witness to testify**
          - The issue at trial includes material issues in the case and evidence relating to credibility and reliability of witnesses
        - Higher threshold allowed because third party records will come to court in one of two ways
          - 1) **s. 698(1) CC** Subpeona a person who is likely to give material evidence.
            - **s. 700(1)** the subpoena is only available for records relating to the subject matter of the proceedings
          - 2) Apply for a search warrant pursuant to **s. 487(1)**
    - Considerations of privacy should not enter the analysis at this stage.
    - Nor are we concerned with whether the evidence would be admissible: EG policy issues
    - Just stopping the defence from going on a fishing trip
    - The evidence might be relevant for EG in sexual assault cases:
      - 1) They may contain information concerning the unfolding of the events
      - They could reveal the use of therapy that influenced the complainant's memory of the alleged act
      - 3) They may contain information as to complainant's credibility, including testimonial factors such as quality of perception of events.
  - 2) Balancing FAD and Privacy
    - Agree with LHD judge must determine what will be produced tot he accused
      - Must examine and weigh salutary and deleterious effects of production order and whether non-production would constitute a reasonable limit on the right to FAD
      - Factors to be considered (5 of 7 of LHD's)
        - 1) Extent of necessity of record for FAD
        - 2) Probative value of records

- 3) Nature and extent of reasonable expectation of privacy vested in the record
- 4) Whether production is premised on any discriminatory beliefs or biases
- 5) Potential prejudice to complainant's dignity, privacy, or security of the person
- LHD's factors NOT to be included:
  - \*1) Extent to which production would frustrate society's interest in reporting of sexual assault acquisition of treatment
    - Better avenues to protect these interests: Publication bans, spectator bar, Relevance test.
  - \*2) Effect on integrity of trial process
    - This is better dealt with at admissibility stage

**Then Parliament enacts s. 278.1 through to 278.9**

**Find notes where I highlighted the important sections**

- **R. v. Mills 1999 SCC (876)**
  - The amendments are constitutional
  - **s. 278.3(4)** purpose is to prevent fishing trips under production of records
    - Also prevents stereotypes, biases, etc from forming basis of otherwise meritless production
    - It does not prohibit the accused from relying on the listed factors, it merely ensures that the accused has some other evidence to show the record is likely relevant
    - Conversely, where accused adduces such evidence, this does not mean the relevance is made out. In both situations discretion as to whether relevance as set out in s.278.5 and 278.7, rests with the trial judge
    - Does not violate s.7 or 11(d)
  - **s.278.5(1) and (2)**
    - Requires that production be “necessary in the interests of justice”
      - Permits judge to look at factors other than relevancy; such as privacy rights in deciding whether to order production to himself.
      - But (2) requires the judge to consider FAD
    - Different from O'Connor because in O'Connor, court said privacy should not be considered at this stage.
    - Judge required to “take [the factors] into account”
      - This means the judge may take the factors into account. Need not do in depth analysis of each factor
    - The judge can consider the factors without first seeing the documents. Evidence during the trial, the type of documents, etc. all provide the trial judge with an important informational foundation
    - Probative value affected by reliability: Did subject check record's veracity, when and how was record made, etc.
    - Finally, the judge has ultimate discretion to order whatever is “necessary in the interests of justice”
    - **Where the record sought can be established as likely relevant, the judge must consider the rights and interests of all those affected by production and decide whether it is necessary in the interests of justice that he take the next step and view the records. If in doubt, the interests of justice require the judge to take that step**
- Second Stage:
  - Once likely relevant threshold passed and records produced to the judge, the judge must determine whether it is in the interests of justice that they be produced to the defence

- Here the judge must again consider the 278.5(2) factors
- That factors (f) and (g) seem to inappropriately alter the constitutional balance in O'Connor is mediated by the fact that the judge need not rule conclusively on each factor and they are not required to determine whether privacy rights outweigh FAD
  - *This is the court telling parliament to go fuck itself, and telling judges they had better apply the O'Connor test*
- The discretion conferred by parliament to judges at both stages of analysis through the "necessary for the interest of justice" clause, maintains the constitutionality of the provisions and in essence affirms the O'Connor test, although nobody will likely say it expressly in court
- **From class notes:**
  - *In Mills, the court says dialogue and upholds the law. Court seems very deferential to parliament. Are they really doing what they are saying?*
    - *278.3(4) the insufficient grounds. The court seems to read down the importance of parliament including these factors. They point to a couple of the words. "Assertions" "on their own." The court in Mills renders the provision superfluous: Evidence must not rest on "assertions"*
    - *278.5: Court says: Judge must consider accused's right to full answer and defense. Production is necessary in the interests of justice if you have met (a)... if that's the case, the rest of the subs do not matter....a trumping effect over other considerations.*
    - *At 878, in borderline cases, the judge should err on side of justice (full answer and defence).*
    - *Full answer and defense seems to override other rights. If FA&D is at issue, it is necessary.*
    - *At 880: Trial judges are not required to rule conclusively rule on each of the factors....take into account the factors." (para 141)*
    - *Seshagiri suggesting that court is just paying lip service to parliamentary approach. They say there is dialogue, but in reality, they are still the boss. Subtly reqorking/watering down test. But a little to chicken.*
  - The SCC reads the legislation down because it is VERY WARY of sending innocent people to prison and only decide on the facts. FULL ANSWER AND DEFENSE is very close to a trumping right in Canada, The fear of wrongful convictions.

### Public Interest Immunity (PII)

- AKA Crown Privilege
- *Duncan*: Court accepted admiralty objection to disclosure of submarine blueprints (1942)
- PII governed by ss. 37 through 38.16
  - **s.37(1)** minister can object to disclosure. Superior courts can review whether to disclose
  - **s. 38.16** Protects a wide range of information: "potentially injurious information". Information that if disclosed could injure international relations or national security"
    - Also covers "sensitive information"
- **Cabinet Secrecy**
  - CL rule is that objection must come from proper official and court will determine if disclosure is warranted
  - CEA **s.39(1)** Where minister of the Crown or Clerk of the Privy Council objects to the disclosure order, by certifying the information is a confidence of the Queen's Privy Council, disclosure shall be refused without examination or hearing of the information by the court

- **Babcock v. Canada (AG) 2002 SCC**
  - Vancouver prosecutors wanted equal pay to TO prosecutors
  - Government produced a s. 39 certificate of the Clerk and refused to disclose certain documents
  - Cabinet confidence is essential to good government, the right to pursue justice in the courts and the rule of law is equally important
  - Function of s. 39
    - s.37, 38,39 all objections to disclosure of protected information held by government
    - **s. 37** Crown privilege except Cabinet confidences or confidences of Queen's PC
    - **s. 38** Objections related to international relations or national security
    - **s. 39** Cabinet confidences
      - CL once viewed Cabinet confidences as absolute. No more. Public interest in confidence v. public interest in disclosure
      - s. 39(1) Permits clerk to certify information as confidential
        - Two questions need to be asked before certifying confidence:
          - 1) Is it a cabinet confidence within meaning of s. 39(1)
          - 2) Is it information that the government should protect taking into account the competing interests of disclosure and confidence
        - The prohibition from disclose "Without examination or hearing" is only triggered when there is a valid certification
        - Stronger protection than CL. The language "must" "shall be refused" are in absolute terms
      - **Validity Test:**
        - 1) Must be done by the Clerk of the PC or a minister of the Crown; and
        - 2) The information must fall within the s. 39(2) categories
        - 3) The power exercised must flow from the statute and be issued for bona fide purposes of protecting cabinet confidences and the public interest
        - 4) Where a document has already been disclosed, s. 39 no longer applies
        - Clerk must provide sufficient description of information to show that the information is a Cabinet confidence and fits under the s, 39(2) categories
      - **s. 39(4)** time limits
  - Waiver: s. 39(1) does not apply retroactively to documents released by the Crown
  - Refusal to disclose for tactical prosecution reasons would be improper exercise of Clerk's power. Also, **refusal to disclose permit the court to draw adverse inference**
  - Judicial Review:
    - Even language as draconian as s.39(1) cannot oust the principle that official actions must flow from statutory authority clearly granted and properly exercised.
      - **Challenge:** Information on its face does not fall under s.39(1) or where it can be shown that the Clerk improperly exercised power.
      - Court can draw inferences based on surrounding information and the list provided by the Clerk
    - Application:
      - The already disclosed documents must be produced.
    - Constitutionality of s. 39:
      - Unwritten principles, rule of law, and independence of the judiciary must be balanced against parliamentary sovereignty
      - It is constitutional

### The AG's New Power: (830)

- CEA s. 38.13 gives AG sweeping power to prohibit disclosure of information relating to national security, or information relating to or received from a foreign entity. An applicant may apply to a single judge to vary or cancel the permit, but no appeals are possible.

### Privilege Against Self-Incrimination:

- Meant to prevent the state from being able to conscript the accused against himself. Before the Charter, there was s. 5 of the CEA
- **Charter s. 13**
  - “A witness who testifies in any proceeding has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence”
- **Dubois v. The Queen 1985 SCC**
  - Murder 2. At first trial accused admitted to killing but alleged justified killing. Convicted, but retrial ordered at appeal. Prosecution read in his testimony from first trial at second trial over objections by defence counsel.
  - Nature and Purpose of s. 13
    - Must be viewed in light of the right of **non-compellability** and the **presumption of innocence** set forth in s. 11(c) and (d) of the Charter
    - **s. 11(d)** Imposes burden of proving doubt BARD on Crown, and make case against the accused before the accused has to respond or give evidence.
    - Burden of proof and right to silence also underlie non-compellability right.
      - The principle of the **case to meet** is the basis of the non-compellability rule. The accused is not even expected to respond unless the Crown proves its case first.
    - The concept of the case to meet is thus common to ss. 11(c), (d), and 13 of the Charter
    - In the context of 11(c) and 13, the “Case to meet” principle means specifically that the accused enjoys “the initial benefit of a right to silence” and its corollary, the protection against self-incrimination
    - **s. 13** is a recognition of the principle that “...the individual is sovereign and that proper rules of battle between the government and the individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat him
    - **The purpose of s. 13 in the context of s. 11(c) and (d) is to protect the individual from being indirectly compelled to incriminate themselves.**
    - s. 13 touches on three issues:
      - 1) Who is meant to benefit from the right
      - 2) The interpretation of the terms “incriminating evidence” and “used to incriminate”
      - 3) The interpretation of the term “any other proceeding”
  - The evidence need not be incriminating in both proceedings. That would defeat the purpose of the section.
    - Cannot determine incrimination until it is tendered. Must be determined at second trial
  - Any other proceeding:
    - s. 13 is a form of protection against self-incrimination
    - Evidence given by the accused in the first case cannot be part of the evidence given in the second trial without violating 11(d) and to a lesser extent 11(c)
      - Allowing such a use would allow the Crown to do indirectly what it cannot do directly

- Compel the accused to testify

#### Statements by the Accused Persons: Common Law

- Hearsay statements by parties are admissible when offered by the opposing party. This exception (the party admissions exception) applies to hearsay statements by the accused offered by the Crown. When the statement is not made to a person in authority, there are no special rules governing admission. When the statement is made to a person in authority, it is a confession and special rules apply; the court is primarily concerned with the voluntariness of the statement.

#### **R. v. Hodgeson 1998 SCC (Page 556)**

- Appellant was confronted by dad, step-dad, mom, and girl about sexually abusing girl. Knife pulled at some point. He denied confessing.
- **Clearly established in Canadian law that confessions to a person in authority must be voluntary.**
- Confessions accorded great weight by triers of fact. Unfairness of admitting confessions traditionally dealt with through two factors:
  - 1) Voluntariness
    - Met when confession made **without fear of prejudice or hope of advantage**
      - Rule against induced or coerced confessions
    - Must be product of operating mind.
    - Consideration of both objective and subjective factors
    - **Ensures reliability and fundamental fairness, in particular right against self-incrimination**
    - Concerned with putative reliability, not actual reliability. The confession rule excludes coerced statements because they are inherently unreliable. If actual reliability was at issue, then court could look for objective corroborating evidence. But it does not do so.
      - **Only asking if it was voluntary, not if it was true**
    - Automatic exclusion necessary to stop state from coercing confessions and then finding corroborating evidence. (Reprehensible investigation technique)
      - Thus rule is not solely concerned with reliability and fairness
    - Weight and actual reliability are for the jury. TJ concerned with putative reliability. Hence fairness and administration of justice in repute
    - **Two main effects of voluntariness requirement:**
      - **1) Avoids unfairness of conviction based on confession that might be unreliable**
      - **2) Deterrent effect on use of coercion by the state**
        - Deters state actors, not private authority figures
        - “It is the nature of the authority of the state that might prompt an invol. Confession”
        - The authority, by promise or threat, express or implied, might produce the statement.
  - 2) The status of the receiver of the confession (person in authority or not)
    - Anyone formally engaged in “the arrest, detention, examination, or prosecution of the accused.” Can be enlarged to fit the circumstances
    - Cannot get rid of this rule. IT would make communications interceptions impossible: IE How could Crown prove that a communication made by underling to senior in mafia, be made without fear of prejudice or hope of advantage.
      - Even statements to undercover cops would be subject to confessions rule
      - **Practical considerations alone warrant keeping the authority requirement. Yet**

***there can be no doubt that there may well be great unfairness suffered by the accused when an involuntary confession obtained through violence by a private individual are admitted into evidence***

- Parliament should consider changes to ensure that confessions coerced by third parties are dealt with properly.
- **For now, where the confession is coerced by violence etc of a third party, the judge must give clear instruction to the jury about the dangers of relying on it**
  - “If obtained by such oppression give it very little weight”
- Limits on the Person in Authority Requirement
  - Anyone formally engaged in “the arrest, detention, examination, or prosecution of the accused.” Can be enlarged to fit the circumstances. But broader.
    - Depends on the extent to which the accused believes the person can influence control of the proceedings before him
      - **Subjective approach**
  - **Person in Authority is:** A person concerned with the prosecution, who, in the *reasonable* opinion of the accused, can influence the course of the prosecution. This is a subjective-objective test
- **The accused has evidentiary burden to raise the issue of whether the receiver of a statement was a person in authority. If met, the onus shifts to the Crown to establish BARD either that the receiver is not a person in authority or that the statement was made voluntarily**
  - **Why does the court care if the receiver was or was not actually a person in authority?**
- Summary
  - Rule requires voluntary confession to person in authority by operating mind. Based on principles of ensuring reliability and protecting fairness by guarding against state coercion. Usually person in authority means person formally engaged in the investigation, detention, arrest, or prosecution.
    - Persons who the accused believes to be acting for the state might also be considered persons in authority. Must be a reasonable basis for this belief. Defence must raise the issue. Defence has evidentiary burden of demonstrating valid issue. Then Crown has persuasive burden to prove BARD that receiver was not person in authority, or that statement was voluntary. Only rarely will judge have to direct voir dire on own accord. Little weight ought to be attached to statements obtained through coercion.
- **R. v. Wells 1998 SCC**
  - Dad contacted police to try to trick accused into confessing to sex assault his kids. Didn't work, so dad held bread knife to throat to get the statement.
  - Trial judge should have held voir dire to determine if attacker was person in authority
  - Sent back for retrial. Accused convicted again. BCCA said it was open to trial judge to exclude such evidence where PE>PV.
- **R. v. Grandinetti 2005 SCC**
  - Sting. Tried to get confession by posing as elaborate international crime outfit. Said they could influence prosecution etc.
  - Person in authority means legitimate authority. Undercover cops posing as criminals with access to corrupt police not sufficient. Accused convicted of murder 1.
- **R. v. Spencer 2007 SCC**
  - Respondent and GF arrested for robberies. Respondent supposedly insisted on making statement

- Defence argues not voluntary: Induced by hope of leniency for GF and promise of visit.
- The test is *Oickle*, and voluntariness ought to be broadly understood.
- In considering whether a reasonable doubt exists as to the voluntariness of a confession, several factors need to be considered:
  - **Threats or promises, oppression, operating mind, and police trickery**
  - All but police trickery can be considered together and are not divorced from the rest of the confession rule
  - Police trickery has different objective: Maintaining the integrity of the criminal justice system. *Oickle* says the trickery must be such to shock the community
    - **Promises:** Need not be aimed directly at the suspect to have coercive effect
      - **Existence of a quid pro quo** is an important consideration, but not determinative of voluntariness
      - Must be sensitive to the particularities of the individual
  - Inducements are necessary to get confessions. Inducement only becomes improper when **whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne**
- DISSENT:
  - Basically they think almost any inducement or threat etc. should result in inadmissibility.
  - Thinks judge mischaracterized the rule, making it an error of law, not of fact
  - Also has strong evidence that the confession was compelled by threats and promises
- **R. v. Singh 2007 SCC**
  - S convicted murder 2. Trial: satisfied BARD voluntary; S not prove breach of s.7 BOP; PE < PV.
  - Detainee's pre-trial right to silence under s.7. Particularly the intersection between the voluntariness rule under *Oickle* and the s.7 right as articulated in *Hebert*.
  - Only contests s.7 at SCC and BCCA. S said wanted to remain silent 18 times
  - Self-Incrimination
    - Confession rule and right to silence are manifestations of right against self-incrimination
    - Overarching principle within criminal justice system from which CL and Charter rules emanate. Such rules:
      - CL Rules:
        - The confession rule
        - The right to silence
      - Charter:
        - s.10(b) Right to counsel
        - s. 11(c) Right to non-compellability
        - s.13 Right to use immunity
        - s.7 Residual Protection
    - Much overlap between s.7 silence test and confessions rule. The CL confessions rule provides greater protection: Crown must prove voluntariness BARD. Therefore no need to do s.7 silence test.
  - Confessions Rule:
    - Right to silence predates Charter, longstanding CL rule
      - Basically: Absent statutory or other legal compulsion, no is obligated to provide information to the police or respond to questioning
    - Right to remain silent is not a right to not be spoken to
      - It would be difficult for police to investigate without positive right to speak to people



- But information gained through investigation is only useful if it can be relied on for its truth.
  - Hence primary reason for CL confessions rule, concern about reliability of confessions
- **Confessions are very strong evidence and can alone ground convictions. Since involuntary confessions are presumptively unreliable, and great weight attached to confessions, Crown must prove voluntariness BARD before it is admitted into evidence**
- A police caution (informs suspect of right to silence) is an important factor in determining voluntariness.
- After detention, there is greater risk of abuse of state power
  - Hence importance of reaffirming right to silence after detention
- Exercise of right to counsel (s.10 charter) creates presumption of being informed of right to silence. This diminishes the significance of the police caution.
- Cl rule on confessions has two persistent themes:
  - 1) Free will in choosing whether to speak to police or remain silent
  - 2) Ensure reception of statement would not create unfair trial or bring Admin of justice into disrepute
- Voluntariness requires the court to scrutinize whether the accused was denied right to silence. The right to silence is defined in accordance with constitutional principles. **A finding of voluntariness therefore is determinative of the s.7 issue.**
- If Crown proves voluntariness BARD, then no s.7 violation. Converse true as well: IF accused proves breach of s.7 on BOP, then Crown cannot meet voluntariness test
- Charter s.7 less than Confession rule right (Page S-117)
  - 1) s.10 only applies on arrest/detention. CL Confession applies whenever person in authority questions a suspect
  - 2) Charter s.7 requires accused prove on BOP. CL confession requires Crown prove BARD
  - 3) s.24(2) remedy is discretionary and requires bringing administration of justice into disrepute. CL confession, involuntary determinative of inadmissibility
  - \*Confession rule only subsumes s.7 right when statement is made to person in authority
  - Voluntariness is a PFJ
  - s.7 exceeds CL in certain circumstances. EG **Detained statements**
    - The right to silence is contravened where an undercover officer (or another plant) actively elicits a statement from the accused.
- s.7 Right to Silence
  - S says right should be absolute once stated and require a waiver for pursued questioning etc.
  - Court rejects this, Ignores the state's interest and overshoots individual's freedom of choice.
    - Under charter, right to counsel is express, right to silence is not
  - Accused, silence is within his control and he chooses whether to exercise it. Right to counsel requires police to facilitate the detainee's right. (OF course this is subject to the voluntariness stuff.)
  - State has legitimate interest in effective crime investigation
  - **Balance between rights of individual against unfair use of state power/resources must always be properly balanced against the state's right to deprive person of LLSP if consistent with PFJ.**
  - **Police persuasion, short of denying suspect right to choose or operating mind, will not breach right to silence.**

- The right to silence also only applies after detention. Undercover officers can and do get statements from people. It is only after detention that such tactics become unfair
- Nor is there a right to counsel pre-detention
- Police persistence in continuing an interview after repeated invocations of a right, may well raise a strong argument against any subsequent statement being the product of a free will
- Review here requires palpable and overriding error, which S does not point out.
- DISSENT: Fish +3
  - Very persuasively argues that right to silence clearly breached here. Says no new law etc.

### **Exclusion of Evidence Under the Charter**

- Collins/Stillman Note
  - Old test three parts
    - 1. Would admitting the evidence adversely affect the fairness of the trial?
    - 2. How serious was the Charter violation?
    - 3. What would be the effect of excluding the evidence on the administration of justice, or otherwise put, would the exclusion of the evidence bring the administration of justice into disrepute?
  - Conscriptive Evidence: Evidence that could not be obtained without Charter breach/ self-incrimination
  - Derivative: Only discovered because of self-incrimination
  - Discoverable: Would have been found in absence of unlawful conscription of accused
- **R. v. Grant 2009 SCC**
  - Three cops detained black kid and got him to say he had gun.
  - Issues:
    - 1) Definition of detention under ss. 9 and 10 of the Charter
    - 2) Test for exclusion under 24(2)
  - Analysis
    - A) Breach of Charter
      - G argues police breached s.9 by arbitrary detention and s.10(d) by failing to inform him of his right to counsel
        - Alternatively, if no detention, then s.8 violation for unreasonable search and seizure
      - Threshold issue: If detained, the detention arbitrary (all parties agreed police lacked legal grounds to detain G)
        - G detained when cop said keeps hands in front and the other cop moved behind him
        - Therefore breach of s.9
    - 10(b) Right to Counsel
      - Since police did not believe they had detained G they clearly breached s.10(b)
  - B) Exclusion of Evidence
    - s.24(2) “...”
    - Collins/Stillman grouped factors to be considered in a 24(2) into three categories. This shed light on factors relevant to determining admissibility, but “trial fairness” and “conscription” caused problems.
      - Moreover, what work left at 2 and 3, once conscription found. And how to measure seriousness of breach and what weight on seriousness of offence
    - Stillman made conscriptive evidence generally inadmissible

- **Heart of the Issue: Revised Approach to 24(2)**
  - Purpose of 24(2)” To maintain the good repute of the administration of justice.
    - Admin of justice: The processes by which those who break the law are investigated, charged, and tried; also includes maintaining the rule of law and upholding Charter rights in the justice system as a whole
  - “bring the admin of justice into disrepute” looks at the long term effect on maintaining integrity of, and confidence in, the justice system.
    - Asks: Would objective person, informed of all relevant circumstances and the values underlying the Charter, conclude that the admission of the evidence would bring the Admin of justice into disrepute (ADJ)
  - s.24(2) starts from the fact that a Charter breach has occurred, and thus, injury to the admin of justice already occurred. Trying to stop further damage
  - Focus of 24(2) is societal, not aimed at punishing police or compensating accused, but rather at systemic concerns.
    - Focus is on broad impact of admission of the evidence on the long term-repute
  - **When faced with 24(2) application, court must assess and balance the effect of admitting evidence on society's confidence in the justice system, having regard to:**
    - **1) The seriousness of the Charter infringing state conduct;**
      - Admission could send message courts condone serious state misconduct
    - **2) The impact of the breach on the Charter protected rights of the accused; and**
      - Admission could send message individual rights mean little
    - **3) Society's interest in the adjudication of the case on its merits.**
  - Must balance assessment of each line of inquiry and, considering all the circumstances, determine if admission would bring the AJD
- **(a) Seriousness of Charter-Infringing State Conduct**
  - Is the court effectively condoning state deviation from the rule of law
  - The more severe the deviation, the more the court must dissociate from the conduct by excluding the evidence linked to the conduct
  - Not punishing police or deterring Charter breaches.
  - Main concern is preserving public confidence in the rule of law and its processes
  - *Fucking frightening. The court cares more about its image than about the Charter*
  - **Spectrum analysis of seriousness of breach**
    - “Inadvertent but minor” through to “willful or reckless disregard”
    - Ignorance/willful blindness no excuse
- **(b) Impact on the Charter Protected Interests of the Accused**
  - Evaluate extent to which the breach actually undermined the interests protected by the right infringed
    - The more serious the impact, the more AJD
    - Think privacy, human dignity, right against-self-incrimination, etc
- **(c) Society's Interest in an Adjudication on the Merits**
  - Society expects that a criminal allegation will be adjudicated on its merits. Must ask whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion.
  - But, the view that reliable evidence is admissible regardless of how it was obtained is inconsistent with the Charter's affirmation of rights.
    - This said, public interest in adjudication on the merits is a relevant consideration

- under 24(2)
  - EG: Compelled confession unreliable.
  - The court must ask "whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial"
  - Importance of evidence to prosecutor's case can be considered
    - Excluding highly reliable evidence that guts the prosecutor's case is not a good idea
    - Including unreliable evidence that guts the prosecutor's case is a bad idea
    - In both case the question is whether AJD is greater by inclusion or exclusion
  - *Seems like the whole test boils down to the court's public image. Is the inclusion or exclusion going to make the court look best?*
  - Seriousness of offence is a dangerous consideration. *Although court does not say so, it seems like an illegitimate factor because the charter should protect the rights of everyone equally.*
  - **After examining all three lines of reasoning, judge must decide whether, on the BOP, admission or exclusion would bring the AJD to a greater extent.**
- Application to Different Kinds of Evidence
  - (a) Statements by the Accused
    - Overarching principle in criminal law. Informs confession rule, right to silence, right to counsel, right to non-compellability, and right to immunity. Residual from s.7.
    - Tending of exclusion for statements obtained by breach of Charter
      - a) Police conduct heavily constrained in getting statements. Police must adhere to Charter to preserve admin of justice's reputation. Seriousness of breach important
      - b) Usually violation will occur under 10(b) failure to inform of right to counsel. Undermines accused's right to meaningful choice as to silence, and protection from self-incrimination. Seriousness of breach important
      - c) Just as compelled statements are unreliable, so to are Charter breached statements. Detainee might be making statement based on misconceived notion of how to get out of predicament
  - (b) Bodily Evidence
    - One size fits all test of excluding conscriptive evidence is no good.
    - Seriousness of police conduct and impact on accused's rights in taking samples varies
    - Privacy, bodily integrity, and human dignity; as opposed to self-incrimination under statements made by accused
    - Does not trench on accused's autonomy
    - Must use flexible approach considering all the circumstances
    - a) depends on facts. Spectrum of seriousness.
    - b) depends on facts. Spectrum of seriousness.
    - c) Generally reliable
    - **privacy, bodily integrity and dignity**
  - (c) Non-bodily Physical Evidence
    - *GUNS!!!! The court wants guns admitted. Always, forever, in every case. Toronto is a cesspool of guns and violence and it must be controlled. Let the guns in as evidence!*
    - Same three steps. Same seriousness/spectrum analysis.
    - Usually stage 2 will be breach of s.8 search and seizure rights
      - Some places higher expectation of privacy than other places

- Human dignity etc. Strip search in subway is still a bad idea
- (d) Derivative Evidence
  - CL confession rules drew line at the statement and did not exclude evidence found as a result of statement.
    - Public interest in truth generally seen to outweigh concerns of self-incrimination regarding derivative evidence. 24(2) overruled this.
  - Discoverability is not determinative of admissibility.
    - Still a useful tool to examine impact of breach on the protected interests of the accused.
      - Assesses strength of causal connection between Charter infringing self-incrimination and the resultant evidence
  - **“courts must pursue the usual three lines of inquiry..., taking into account the self-incriminatory origin of the evidence in an improperly obtained statement as well as its status as real evidence.”**
  - If the derivative evidence was independently discoverable, the impact of the breach on the accused is lessened and admission is more likely.
  - Evidence should be excluded where there is reason to believe police deliberately abused their power to obtain a statement which might lead them to such evidence.
- Application to the Case
  - a) Seriousness of improper police conduct:
    - Police were not abusive. No suggestion of racism, profiling, etc. Not deliberate
    - Not serious breach
  - b) Impact of breach on protected rights
    - Gun obtained because of statement in breach of Charter. Therefore it is derivative.
    - First violation was s.9 curtailment of G's liberty interest. Subtlety coercive situation
      - Impact was not minimal, but not severe.
    - Second violation 10(b) right to counsel
      - Gun would not be found if not for statement. Non-discoverability aggravates impact of breach on G's rights
        - Impact on G's rights was significant
    - All things considered, impact on 9 and 10b was significant
  - c) Interest in case being adjudicated on its merits
    - Gun is highly reliable evidence. *Ohhhmy!!!! a gun!!!! let it in!!! Toronto will fall!!!*
      - Essential to a determination on the merits
      - seriousness of offence not helpful (Bullshit!)
  - Conclusion: Its a close case, but on balance admission would not bring the AJD
  -
- **R. v. Harrison 2009 SCC**
  - 35 kg coke. Discovered from Charter infringing detention and search
  - On *Grant* factors, balance favours exclusion
  - Very reliable evidence, impact on accused's rights significant, but not egregious. But the cops' conduct involved “brazen and flagrant” disregard of the appellant's Charter rights against arbitrary detention and search and seizure
  - Decided to pull Durango over because abandoning the detention may have affected integrity of police in eyes of observes
  - Arrested appellant because his license was suspended. Search of SUV incident to arrest

- Officer also gave misleading testimony at trial
- New catch-phrase: The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision.
- Cannot allow seriousness of offence and reliability of evidence overwhelm the analysis
- DISSENT: My dissenting test in *Grant* is better and easier.