Guiding principle of the law of evidence

The overarching principle of the law of evidence is that *everything that is relevant to a fact in issue is admissible unless there is a legal reason for excluding it*. In other words, evidence is not admissible unless it is relevant; and not subject to exclusion under any other rule of law or policy.

Is the evidence relevant?

1. Relevance

b. *Overview* - in order to be admissible, evidence must be both factually and legally relevant. Does the existence of fact A make the existence or non-existence of fact B more probable than it would be without the existence of fact A? If so, then fact A is relevant to fact B. If fact B is a material issue or fact, then fact A is both relevant and material, therefore *prima facie* admissible. {Watson}

c. *Application* - both factual and legal relevance must be satisfied. Determined by the judge as a question of law. Evidence which meets these requirements, is not subject to any exclusionary rule, but is otherwise considered more prejudicial than probative will be excluded, however. {Mohan}

ii. *Threshold for relevance* - not high; for instance, evidence that the accused had a certain eye colour, though this is a popular characteristic in the general population, still substantiates consistency in determining the identity of the perpetrator.

b. *Probative value can be minor* – newspaper clipping concerning heroin importation from Hong Kong used in trial of accused charged with heroin importation from Pakistan; relevance was that an inference could be drawn that the accused had informed himself concerning heroin importation. {Morris}

ii. This evidence is circumstantial, and of limited probative value; however, relevant and material, therefore admissible, with weight left to the jury. {Morris}

iii. For instance, evidence that the accused was a gang member makes it more probably that the accused had a gun on the relevant day. {Abbey}

c. *Must support conclusions it purports to advance* - while probative value can be minor, the purported relevance of the evidence must in fact be advanced by adducing it. {Bell}

ii. For instance, evidence that the accused is a cocaine/marijuana dealer does not mean that the accused would be more likely to have access to rohypnol. {Bell}

d. *Importance of context in relevance* – meaning of a statement cannot be determined without context. If jury could not determine from the utterance the meaning of the whole thought, then it is not probative of a fact; could be used to support an inference opposed to the truth. Also more probative than prejudicial. {Hunter}

ii. For instance, overhearing "I had a gun, but I didn't point it" - could have been preceded by "they thought that," etc. {Hunter}

iii.Factual relevance

2. *Overview* - whether a matter tends to make more or less likely the fact that it purports to, as a matter of logic and human experience. Facts so related that, according to the *common course of events* (logic and human experience), either one, taken on its own or in connection with other facts *proves* or *renders probable* the past, present, or future existence or nonexistence of the other.

3. *Direct evidence* - *always* relevant, though not always material; as, direct evidence, if believed, is capable of resolving the facts it purports to describe.

4. *Circumstantial evidence* - relevance of such evidence depends on the strengths of the inferences which can be drawn from the evidence. *Inferences must not be speculative or unreasonable.*

    b. eg. consider Arcangioli, in which the flight of the D. from the scene of the crime was incapable of supporting an inference that he stabbed the complainant. May merely have punched the complainant (multiple perpetrators, incapable of saying that the accused was the one who did the stabbing). {Arcangioli}

iv.Legal relevance

2. *Overview* - also called materiality. Facts relating to issues unnecessary to sustain or defend against the cause of action are legally irrelevant. For instance, in a criminal trial, this refers to the elements of the offence (eg. *mens rea / actus reus,* care and control in an over .80 offence, knowledge and control in a possession offence, identity, etc.)

3. Levels of materiality

    b. *Primary materiality* - evidence is relevant to the primary issue, eg. innocence or guilt. Law receptive to primarily material evidence.

    c. *Secondary materiality* - evidence is relevant concerning the reliability or credibility of other evidence. Law strict to secondarily material evidence.

4. *Propensity can be material* - while propensity reasoning concerning the accused is not generally acceptable, evidence concerning a party other than the accused may be relevant through propensity, and limiting instructions may be issued. {Tuck}

    b. For instance, evidence that the deceased smuggled drugs into a club could also support inference that deceased smuggled knife into club. {Tuck}

    c. For instance, evidence that both the complainant and the accused were members of gangs means that prejudice is limited, as propensity balanced between parties. {Abbey}

    d. For instance, evidence that the complainant was more likely to have consented due to sexual history is not relevant, as per s. 276(1) of the Criminal Code (see: character evidence concerning witness other than the accused, s. 276). {Darrach}

5. *Motive can be material* - evidence which shows that a party had a motive to commit the alleged crime is relevant for that purpose. {Ruddick}

    b. For instance, evidence that the accused was carrying out an affair would be relevant to motive, if

not too remote. {Rallo}

c. For instance, evidence that the accused stole funds from the deceased would be relevant if it had been discovered or would have been discovered. {Ruddick}

d. Purposes of excluding irrelevant evidence

ii. *Distortion* - evidence may be inadmissible because to admit it would distort the fact finding function of the court, particularly by causing the trier of fact to reason irrationally or inappropriately (eg. hearsay evidence not reliable, propensity evidence leads to prohibited reasoning).

iii. *Efficiency* - relevant evidence may be inadmissible because its admission would unnecessarily prolong a trial or confuse the issues (eg. collateral evidence rule preventing one party from proving that the other party is lying about facts that are not in issue - because this would lengthen trials without enhancing truth-seeking mission of court).

iv. *Policy* - relevant evidence may be inadmissible because its admission would undermine some important value other than fact finding (eg. informer privilege weighs the interest in protecting confidential informants, against trial fairness); consider also s. 24(2) of the *Charter* in this regard.

v. *Procedural* - relevant evidence may be inadmissible because its admission would undermine some important value other than fact finding. For instance, the trier of fact is not supposed to perform its own investigations into the facts of the case (consider *R. v. Hamilton* / *R. v. Mason*). There are limits on the types of questions which may be asked of testifying witnesses depending on the type of examination being conducted.

vi. *Residual* - discretionary power to exclude evidence which is more prejudicial than probative. May arise where evidence is admissible for one purpose but inadmissible for another purpose (eg. rule from *R. v. Subramaniam*, hearsay admissible for reasons other than proving truth of its contents). *Prejudicial effect* refers to the possibility that the evidence may distort the fact finding process, resulting in unfairness to the accused.

Does the evidence emanate from an allowable source?

2. Competency

a. *Overview* - all persons are presumed competent to testify at common law, subject to certain exceptions. Difference between incompetency and *privilege* – the former prevents testimony whatsoever, while the latter deals with the types of communications which are admissible as evidence at trial.

b. Exceptions to presumption of competency

i. Incompetency to take oath or communicate due to youth or mental incapacity

1. *Overview* – to testify, a witness must give some formal indication that he or she will be truthful. Further, witnesses must be capable of communicating their evidence. Those who are incapable of doing so are not competent to testify. (see also: s. 5 of the BCEA - operates similarly)

2. *Temporality* - best gauge of capacity is the witness's performance *at the time of trial*. Generally, a witness who demonstrates capacity to testify at trial will be allowed testify. {Marquard}

3. *Deference on appeal* – large measure of deference is to be accorded to the trial judge's assessment of a child's capacity to testify. Second- guessing on appeal is to be eschewed. {Marquard}

4. *Purpose* - The golden thread uniting these varying and different rules is the principle that the evidence must meet a minimal threshold or reliability as a condition of being heard by a judge or jury. {DAI}

5. *Application* – Goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable. Defects in ability to perceive or recollect the particular events at issue are left to be explored in the course of giving the evidence, notably by cross-examination. {Marquard}

    a. *Process*

        i. *Voir dire* – competence of a proposed witness is an independent inquiry: it may not be combined with a *voir dire* on other issues, such as the admissibility of the proposed witness's out-of-court statements. {DAI}

        ii. *Questioning* - requires consideration and accommodation for particular needs; questions should be phrased patiently in a clear, simple manner. {DAI}

        iii. *Evidence* – preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. A witness should not be found incompetent too hastily. {DAI}

        iv. *Experts* - may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness. {DAI}

    b. *Witness over 14-years old when testifying, mental capacity challenged* - governed by s. 16 of the *CEA*.

        i. *Inquiry* – upon challenge, inquiry must be conducted to determine whether the person (a) understands the nature of the oath or affirmation, and (b) is able to communicate the evidence. s. 16(1).

            1. *Understanding* of oath or affirmation - no longer a lack of appreciation of the spiritual consequences required of lying under oath; rather, understanding of the solemnity of the occasion, and the added responsibility to tell the truth over and above normal social conduct. {Fletcher/Leonard}

                a. *Limits* – unnecessary and indeed undesirable to conduct an abstract inquiry into whether the witness generally understands the difference between truth and falsity and the obligation to give true evidence in court. {DAI}

            2. *Communication of evidence* – requires (1) the capacity to observe, including interpretation, (2) recollect, and (3) to communicate. Capacities, and not whether witness actually observed, recollects, etc. {Marquard}

                a. *Limits* – explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if can differentiate between true and false everyday factual statements. {DAI}

ii. *Burden* – there is a presumption of capacity to testify (common law); the party challenging capacity carries the burden of proving otherwise. s.16(5)

iii. *Outcomes*

1. *Incapable of oath, but not communication* - if the witness is unable to understand the oath/ affirmation but is nevertheless capable of communicating the evidence, the witness is able to testify upon promising to tell the truth, under s. 16(3).

2. *Incapable of oath and communication* - where the witness fails to understand the oath *and* cannot communicate the evidence, the testimony will be barred, under s. 16(4).

a. *Affirmation cannot be accompanied by assertion of falsity* – to affirm while at the same time asserting that he would not tell the truth would be equivalent to a refusal to affirm. There are coercive measures available to the Court to deal with this. {Walsh}

c. *Witness under 14-years old when testifying* - governed by s. 16.1 of the *CEA.*

i. *Overview* – barred from making oaths or affirmations under s. 16.1(2). Instead, evidence is received if the witness is capable of understanding and responding to questions, s.16.1(4) upon a promise to tell the truth, s. 16.1(6).

ii. *Inquiry* – upon challenge, inquiry must be conducted to determine whether the witness is capable of understanding and responding to questions. s. 16.1(5) The inquiry does not permit questions concerning the understanding of the promise to tell the truth, s. 16.1(7).

iii. *Burden* – there is a presumption of capacity to testify, s. 16.1(1), and the party challenging capacity carries the burden of proving otherwise. s. 16.1(4)

iv. *Outcomes* – evidence is only barred if the witness is challenged, and the result of the s. 16.1(5) inquiry indicate that the witness is incapable of understanding and responding to questions. Otherwise, admissible under promise to tell the truth, s. 16.1(8).

ii. Incompetency of spousal witness

1. *Overview* – generally, spouses are incompetent to testify for or against one another, subject to common law and statutory exceptions. This originally reflected the loss of legal identity of a wife upon marriage, and more recently the need to protect marital harmony. {Salituro}

a. While s. 6 of BCEA appears to allow for spousal competence and compellability for the Crown, it is likely that the *Charter* would preclude this (competence = compellability, per *Gosselin*).

b. Under s. 7 of BCEA, competent and compellable in civil proceedings.

2. *Marital status* - where spouses are irreconcilably separated, or divorced there is no marriage bond to protect, and spousal incompetency is inapplicable. Only married persons can avail themselves of the rule. {Salituro}

3. *Temporality* – renders a spouse incapable of testifying in relation to events which occurred both *before* and *during* the marriage. {Hawkins}

4. *Genuineness of marriage* - a marriage entered into after an indictment or designed to take advantage of spousal incompetency may nonetheless be a true marriage; court can only inquire where presented with concrete evidence that the marriage is a sham, and not intended to provide mutual care and support. {Hawkins}

5. *Application*

    a. s. 4(1) holds that the husband or wife of the accused is a competent witness *for the defence*.

        i. *Compellability* - while an inference of compellability follows from competency, the omission here seems deliberate in light of s. 4(2), and, given the negative effect of reading in compellability on the sanctity of marriage, Courts hold that such a change is best left to legislature. Therefore, *likely* competent but not compellable.

    b. s. 4(2) of the *CEA* holds that the husband or wife of the accused is a competent *and* compellable witness *for the prosecution* for certain offences.

    c. s. 4(3) holds that spouses are not compellable to disclose communications between the spouses during their marriage. (see spousal privilege)

    d. s. 4(4) the husband or wife of the accused is a competent *and* compellable witness *for the prosecution* for certain offences where the complainant is aged fourteen years or less.

    e. s. 4(5) provides that the common law rule remains in effect; a spouse is competent where the offence involves the person, liberty or health of the witness spouse.

    f. s. 4(6) holds that the judge cannot comment on the failure of the accused or the accused's spouse to testify (though read below re: competency of accused).

6. *Policy* - Involves a conflict between the freedom of the individual to choose whether or not to testify and the interests of society in preserving the marriage bond. {Salituro}

    a. *Compellability follows competency*

        i. Making a separated spouse a competent witness for the prosecution may ultimately mean that an irreconcilably separated spouse is also compellable at the instance of the prosecution. As much a denial of the dignity of an irreconcilably separated spouse to exempt the spouse from the responsibility to testify because of his or her status as it is a denial of the spouse's dignity to deny his or her capacity to testify. {Salituro}

        ii. A rule prohibiting a spouse from testifying if he or she so wishes raises serious questions about whether it unreasonably infringes on a person's liberty and equality interests. {Hawkins}

iii.Incompetency of accused / accused's right to silence (testimonial)

1. *Overview* - the accused is neither competent nor compellable for the prosecution. The presumption of innocence indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty. {Noble} (see also: purpose -> right to silence, privilege against self incrimination)

    a. While s. 6 of BCEA appears to allow for accused's competence and compellability for the Crown,

it
is likely that the *Charter* would preclude this (competence = compellability, per *Gosselin*).

2. *Purpose* - it is critical to the dignity of the accused to use his or her silence to assist in grounding a belief in guilt beyond a reasonable doubt; otherwise, no matter what the accused does, communicative evidence emanating from the accused is used against him; undermines right to silence. Further, if silence can be used against the accused, then the burden of proof has shifted. {Noble}

3. *Prohibited to comment on accused's failure to testify* - s. 4(6) holds that the judge cannot comment on the failure of the accused or the accused's spouse to testify.

   a. *Exceptions*

      i. *Absence of explanation, not required to speculate* - in a judge alone trial, silence of the accused may be referred to as evidence of the absence of an explanation which could raise a reasonable doubt. In other words, it is reference to the fact that the judge need not speculate about possible explanations which are not in evidence. This does not offend right to silence / innocence presumption. {Noble}

         1. For instance, as in *Prokofiew,* the jury is entitled to take into account that the evidence stands uncontradicted. The prohibited inference is that silence is evidence of guilt. Comments to this end may prejudice a trial, but not necessarily fatally. {Prokofiew}

      ii. *Undisclosed alibi* - narrow exception for circumstances where an alibi is not disclosed in time to permit investigation. In such circumstances, the failure of the accused to testify and be cross examined on the alibi allows for a negative inference to be drawn by the TOF. The reasons for the exception relate to the ease of alibi fabrication, and the diversion of alibi inquiry from the trial. {Noble}

4. *Policy* - unfortunately, s. 4(6) of the *CEA* prevents TJ from instructing the jury on the impermissibility of using silence to take the case against the accused to one that proves guilt beyond a reasonable doubt. This is problematic, because jury could then, due to lack of instruction, draw prohibited inference unbeknownst to the Court (because reasons for conviction not given). However, counsel for the accused can make comment on this matter. {Noble}

3. <u>*Privilege*</u>

a. *Overview* - protects information from disclosure in court, even where that information is relevant and probative. Privilege information is inadmissible unless waived by the party holding the privilege. Different from "confidential communications". Can be either "class based" (presumptive) or "case by case" (non-presumptive). {McClure}

b. *Purpose* - protects certain relationships of public value which require candour and discretion. Exception to the rule that the public has the right to all relevant evidence. {National Post}

c. Forms of privilege

   i. *Solicitor-client privilege*

      1. *Overview* - attaches to communications between a client and a lawyer. Best recognized class privilege, began as evidentiary rule but has developed into a principle of law. Applies to any circumstance where

communications are likely to be disclosed without the client's consent. {Descôteaux}

2. *Purpose* - necessary to preserve the fundamental relationship of trust between lawyers and clients. Protecting the integrity of this relationship is itself recognized as indispensable to the continued existence and effective operation of Canada's legal system. {Foster Wheeler Power}

3. *Application*

    a. *Requirements* - (1) communications with (2) solicitor (including agents of the solicitor) which entail the (3) *seeking* of legal of advice and are (4) intended to be confidential. {Solosky}

    b. *No claim required for protection to apply*- privilege does not come into being by an assertion of a privilege claim; it exists independently. Therefore, the action or inaction of someone other than the client (eg. the solicitor) is not able to violate this right. {Lavallee}

    c. *Waiver* - privilege may be waived explicitly, through whole or partial disclosure of communications, or by depending in good faith on the content of the advice. {Campbell} Otherwise, absent waived, privilege of this type applies permanently.

    d. *Applies to in-house counsel and outside counsel* - while this must be assessed on a case by case basis, the fact that a legal opinion was provided by in-house counsel does not alter the nature of the communication or the privilege. {Pritchard}

    e. *Included communications* - not merely advice, counsel, or opinions are covered. While some communications are public (eg. filing pleadings), others arise out of a complex, long-term mandate. Therefore, must understand nature and context of the relationship - if long-term, rebuttable presumption. {Foster Wheeler}

    f. *Close to absolute as possible* - must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. {McClure}

    g. *Err on side of confidentiality* - where exercise of a right would interfere with this privilege, the conflict should be resolved in favour of confidentiality, unless the law provides otherwise. Even where the law does provide otherwise, interpreted narrowly, and interference should be limited to the minimal extent necessary to achieve the ends sought. {Descôteaux}

    h. *Cannot be abrogated by statutory inference* - unless expressly stated, no statutory right for administrative investigator to review documents even for the limited purpose of determining whether solicitor–client privilege is properly claimed. Applicable to all statutory administrative investigators. {Blood Tribe}

    i. *Immune to challenge under s. 2(b), freedom of expression* - the right conferred under s. 2(b) is subject to privileges and functional constraints. {CLA}

    j. *Exceptions* - where solicitor-client privilege covers a set of communications, these may nevertheless be unprotected if they meet one of the following exceptions:

        i. Criminal purpose exception

            1. *Overview* - legal advice must be "lawful" to attract protection; if seeking advice to commit

a crime, that advice can be used against the client. Protection of criminal communications would always injure the interests of justice. Scope is limited to those communications which are criminal. {McClure}

2. *Aid in crime, whether knowing or unknowing* - whether the client sets out with the intent of committing crime or fraud and uses the communication with the lawyer as an aid, assistance, or means of doing so. {Descôteaux}

3. *Actus reus* - privilege does not attach to statements that constitute the *actus reus* of the offence (for instance, in uttering a threat). {Descôteaux}

ii. Public safety exception

1. *Overview* - when the interest in the protection of privilege and the safety of members of the public are engaged, the privilege will have to be balanced against these other compelling public needs. {Smith}

2. *Application*

   a. *Risk of serious bodily harm or death* - crimes without element of violence are insufficient. Risk factors should be considered, including evidence of long-term planning, method to be employed, history of violence. {Smith}

   b. *To identifiable persons or group* - can be large group (eg. female prostitutes in BC) but if it is clearly identifiable, then this does not preclude operation of the exception. {Smith}

   c. *Which is imminent* - defined in context, not necessarily temporality, but certainty which is considered - if delivered with chilling intensity and graphic detail so as to persuade of its imminence. {Smith}

3. *Narrow scope* - disclosure of the privileged communication should generally be limited as much as possible. References to other criminal behaviour which does not meet exception requirements would be deleted. {Smith}

iii.Innocence at stake exception

1. *Overview* - all privileges must give way in a case where there is a danger that an innocent person may be wrongfully convicted. {Brown}

2. *Threshold* - accused must establish:

   a. *Unavailability* - the information sought is not available from any other source; {Brown}

      i. *Admissible* - if there is alternative information, this will only preclude the exception where it is admissible. However, available evidence is presumed admissible. {Brown}

      ii. *Contents* - if there is alternative information, this will only preclude the exception where it concerns the contents and not merely the existence of the communications. {Brown}

b. *Necessary to raise a doubt* - otherwise impossible to raise a reasonable doubt; allow access only where there is no other defence and the requested communications would make a positive difference. {Brown}

i. *Timing* - should await the close of the Crown's case, as McClure application not necessary if there is no case to meet. {Brown}

3. *Innocence at stake test* - applied if threshold met:

a. *Viability* - accused must demonstrate an evidentiary basis to show that a communication exists which could raise a reasonable doubt; {Brown}

b. *Examination* - judge must then examine communication to determine whether it is likely to raise a reasonable doubt (stricter standard); {Brown}

c. *Amplification of the record* - judge may require the solicitor to testify, or provide records with an affidavit of completeness to make determinations at this stage (records avoid fishing expeditions). {Brown}

d. *Cumulative effect* - if incapable of raising a reasonable doubt on its own, can be considered cumulatively with other evidence only where other evidence would not raise reasonable doubt in absence of the communications. {Brown}

e. *Quality of evidence* - cannot invade privilege because this will provide evidence that is more likely to be believed than the evidence already available to the accused. The quality of the evidence is not a factor. {Brown}

f. *Entitlement to disclosure* - applies only to the accused; Crown cannot use this to gain access to privileged material. Evidence subject to normal disclosure procedures, Crown can cross examine on portions relied upon by accused. {Brown}

4. *Narrow scope* - only those communications which are relevant to raising the reasonable doubt; must protect disclosure as much as possible. {Brown}

4. Examples

a. *Lawyer's bills* - presumption that lawyer's bills are *prima facie* privileged and the onus lies on the party seeking disclosure to prove that production would not violate the confidentiality of the relationship. {Maranda}

b. *Prosecutorial discretion* - charging decisions made by Crown counsel are not covered by solicitor–client privilege—that is, they are not made within any solicitor–client relationship, but "as an officer of the Crown, independently exercising prosecutorial discretion." {Frank Paul Commission}

ii. Spousal privilege

1. *Overview* - arises from s. 4(3), which holds that spouses are incompetent (see competency). Privilege belongs to the spouse receiving the communications, and so can be waived by that party. {Couture}

a. *Application*

i. *Generally* - where a wife or husband is otherwise compellable or competent to give evidence, there is no compulsion to divulge communications with a spouse. {Zylstra}

ii. *Waiver* - privilege belongs to the spouse receiving the communication and can be waived by him or her. {Couture}

iii. *Presence of jury* - if the privilege was asserted, it should be done in the presence of the jury. To proceed otherwise might have left the jury in some confusion. {St Jean}

iv. *Scope of privilege* - unlike competency, only covers communications made during the course of the marriage. {Couture}

v. *Testimonial* - privilege is testimonial in nature, giving a right to withhold evidence but the communications themselves are not privileged; therefore, if available in non-testimonial form (eg. as a statement made to police), this is not privileged. {Couture}

iii. Public interest immunity

1. *Overview* - concerned with situations in which a public official objects to disclosure of information on the ground that disclosure would be contrary to the public interest. governed by the *CEA*.

2. *Trial fairness* - however, where conflict between national interest and trial fairness is irreconcilable, an unfair trial cannot be tolerated. Right of an accused person to make full answer and defence may not be compromised, therefore remedy will be required. {Ahmad}

3. *Application* - overarching question is whether disclosure would encroach on public interest, and whether this outweighs public interest in disclosure.

a. *General* - s. 37(1) holds that the Fed may object to disclosure of information in court by specifying a specific public interest which would otherwise be compromised. A judge must examine the information to determine whether privilege is warranted.

b. *Potentially injurious information* - under s. 38, the Fed may object to disclosure of information which would injure international relations, national defence, or sensitive information which relating to these matters, if it is of a type that the Fed is taking measures to safeguard.

i. *Review* - judge able to review information under s. 38 to be provided with a sufficient basis of relevant information on which to exercise their remedial powers (varied, including dismissal of individual counts or stay of all counts) and to avoid the collapse of the prosecution. {Ahmad}

c. *Cabinet confidences* - protected from disclosure to person, body, court under s. 39; includes recommendations, proposals, explanations, deliberations, draft legislation; however, lapses after twenty years, and does not cover discussion papers relating to public decisions (or non-public decisions after four years).

i. *Review* - judge not able to review information under s. 39; where it has been *bona fide* certified as a confidence which the government should protect by a PC Clerk, this must be accepted. Only where not in good faith (eg. missing information, or used for selective disclosure as litigation tactic) is this process assailable. {Ahmad}

ii. *Partial disclosure* - disclosure of one document does not constitute a class waiver requiring disclosure of documents protected by s. 39; may be disclosed selectively. {Ahmad}

iv.Informer privilege

1. *Overview* - guard the identity of police informers to protect them from retribution from criminals and to encourage informers to come forward. {Leipert}

2. *Waiver* - informer privilege belongs to the Crown, but the Crown cannot waive the privilege without the consent of the informer. {Leipert}

3. *Breadth* - applies in criminal, civil proceedings, to a witness on the stand, whether the informer is present, etc. Applies to any details, any information which would tend to reveal identity. {Vancouver Sun}

4. Editing of disclosure - where an exception applies, may be appropriate where the identity of the informant is known, and the court can ascertain that the edited information will not tend to reveal the identity of the informant. {Leipert}

5. *Exceptions* - Supreme Court has held that informer privilege is subject only to innocence at stake (see solicitor-client exceptions for test) - the following are illustrations of where that exception may properly arise in context of informer privilege:

    a. *Material witness* {Leipert}

    b. *Agent provocateur* {Leipert}

    c. *Unreasonable search* - where the accused seeks to establish that a search warrant was not supported by reasonable grounds, the accused may be entitled to information which may reveal the identity of an informer notwithstanding informer privilege. {Leipert}

v. Litigation privilege

1. *Overview* - protects the work done by counsel from disclosure to other parties. Rather than protecting the relationship between the solicitor and the client, it protects the counsel's role in the litigation process. Ends with the litigation. {Blank}

2. *Scope of privilege* - broader than solicitor client, includes communications with third parties as well as with client, anything created, communicated, collected for the dominant purpose of litigation; does not have to be confidential or even communicative. {Blank}

3. *Purpose* - unlike solicitor-client, litigation privilege is not gained at protecting relationship, but rather directly to the process of litigation, the need for a protected area to facilitate investigation and preparation for adversarial process. Both serve admin. justice. though. {Blank}

4. *Extinguishment* - where litigation ends, so does this privilege. However, where related litigation persists - litigants or related parties locked in same combat - privilege is sustained. {Blank}

    a. For example, documents prepared for the dominant purpose of a criminal prosecution are not protected in suit for civil redress for the manner in which the government conducted that

prosecution: different juridicial source. {Blank}

5. *Bad faith conduct* - privilege does not apply to evidence of abuse of process or similar blameworthy conduct. *Prima facie* showing of bad conduct will lead to disclosure. {Blank}

vi.Dispute settlement privilege

1. *Overview* - communications made during attempts to settle a litigious matter through negotiation or mediation are not admissible if negotiation or mediation fails and the matter is litigated, eg. where labelled "without prejudice" (though this is not necessary).

2. *Application* - party seeking production must show that a competing public interest outweighs the policy goals behind the rule.

vii.Privilege against self-incrimination

1. *Overview* - at common law, witness could refuse to give self-incriminating testimony. Now, this is abrogated by s. 5 of the *CEA*, which holds that witnesses are compelled to answer all questions, but testimony cannot be used against the witness except for in perjury trial. Also invokes s. 13 and s. 7 of the *Charter*. s. 4 of the *BCEA* operates similarly.

2. *Direct evidence*

    a. *Standard exemption via CEA s. 5 and Charter s. 13*

        i. *Overview* - witness who testifies in *any* proceedings 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. {Henry}

        ii. *Purpose - quid pro quo*, designed to protect a witness who is compelled to give evidence protection from self-incrimination; *no quid pro quo* where evidence not compelled (eg. where an accused *chooses* to testify). {Henry}

        iii.*Development* - difficult to isolate adducing prior testimony for the purposes of incrimination, which was prohibited, than from adducing for the purposes of credibility impeaching, which was not prohibited. Therefore, court did away with this distinction in favour of approach focusing on compulsion. {Henry}

        iv.*Application*

            1. *Threshold question* - protects only against incriminating evidence. Evidence which is *not* incriminatory but which merely may *become* incriminatory does not trigger protection. Does not *create* evidence for Crown, but rather merely provides means for TOF to reject D.'s evidence. {Nedelcu}

                a. For instance, exculpatory evidence given under compulsion at civil trial can be used to impeach credibility at subsequent criminal trial. {Nedelcu}

            2. *Witness compelled at prior proceeding* - if a witness was compelled to testify at a prior proceeding, the prior compelled evidence is treated as inadmissible, whether for challenging credibility or incrimination. *Quid pro quo satisfied*. {Henry}

3. *Witness not compelled at prior proceeding, does not testify at new trial* – where a person does not testify on retrial, the prior testimony is inadmissible - the Crown is not permitted to compel the accused to testify through this indirect manner. {Henry}

4. *Witness not compelled at prior proceeding, testifies at new trial* - if a person testifies at one trial while not under compulsion (eg. accused) then volunteers inconsistent testimony upon retrial, the prior evidence is admissible for incrimination as well as to impeach credibility. {Henry}

b. *Constitutional exemption, s. 7*

i. *Overview* – s. 7 provides a constitutional exemption" from testifying when either (1) the predominant purpose of compulsion is to obtain self-incriminating evidence or (2) the compulsion would cause undue prejudice to the witness.

ii. *Prejudice* – arises when compulsion would threaten the fairness of any subsequent trial, or from harassment, etc, but does not always merit constitutional exemption. {Phillips}

3. *Derivative use evidence*

a. *Overview* - "use immunity" covers only the testimony itself, and not evidence derived from it, subject to certain restriction under s. 7 of the *Charter:*

i. *Not otherwise obtained or appreciated* – evidence which could *not* have been obtained, or the significance of which could not have been appreciated ought generally to be excluded under s. 7 of the *Charter* in the interests of trial fairness. {S. (R.J.)}

ii. *Discoverability* - protects where the evidence could not have been located otherwise, practically speaking. While the burden technically lies with the party claiming immunity, this party cannot do more than point to a plausible connection between the evidence and derivative evidence; Crown knows best how it was obtained. {S. (R.J.)}

viii. Case-by-case privilege

1. *Overview* - accounts for relationships based on confidentiality which do not fall into categories of class privilege. {Gruenke}

2. *Purpose* - communications outside of class privileges, notwithstanding their social importance, are not inextricably linked with the justice system in the way that solicitor–client communications surely are. However, may yet be worth protecting. {Gruenke}

3. *Application* - governed by the Wigmore criteria:

a. *Originate in confidence* - communications must originate in a confidence that they will not be disclosed.

b. *Confidence necessary to relationship* – confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

c. *Sedulous fostering* – relation must be one which in the opinion of the community ought to be

sedulously fostered.

d. *Balancing* - Injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

4. Examples

a. *Psychiatrist-patient* - confidentiality is clearly essential to the maintenance of the relation between a victim of sexual abuse and a psychiatrist providing that person with treatment. Lack of privilege would have a chilling effect on other persons in the same situation, undermining their treatment. Partial privilege appropriate, non-essential material deleted. {Ryan}

b. *Priest-penitent* - not protected by s. 2(a) of the *Charter;* privilege only exists where the parties expected the utterances to be confidential; while the formal confession process may be a strong indication of this expectation, it is not determinative. {Gruenke}

c. *Journalist-source* - as recognized in *National Post*, most of the work is done in the weighing section under the fourth branch. {National Post}

ix. Confidentiality

1. *Implied undertaking of confidentiality in litigation*

a. *Overview* - evidence compelled by pre-trial or hearing discovery from a party to civil litigation can be used by parties to the litigation solely for the purpose of the litigation in which it was obtained. {Juman} (see s. 4 of the BCEA, s. 5 of the CEA)

b. *Purpose* - rests on the idea that, if they faced repercussions relating to testimony, would be reluctant to make disclosure fully and candidly. {Juman}

c. *Scope of undertaking* - *i*ncludes the wrongdoing of persons other than the examinee and covers innocuous information that is neither confidential nor discloses any wrongdoing at all. All information provided through compelled testimony is covered. Applies during and after litigation. {Juman}

d. *Exceptions*

i. *Interest balancing* - careful weighing of public interest asserted (eg. the prosecution of a serious crime) against the public interest in protecting the right against self-incrimination as well as upholding a litigant's privacy and promoting an efficient civil justice process. Onus on the applicant. {Juman}

ii. *Public safety concerns* - where the test identified in Smith v. Jones concerning the public safety exception in matters of privilege applies. {Juman}

iii. *Impeaching inconsistent testimony* - where the deponent has given contradictory testimony about the same matters in successive or different proceeding, the undertaking rule affords no shield to use of prior testimony for use of impeachment. {Juman}

iv. *Suggested crimes* - cannot form a shield from the detection and prosecution of crimes in which the public has an over-riding interest; however, not in all cases sufficient. Further, while police

can subpoena transcript, evidence barred from admission under s. 5 of the *CEA* and s. 13 of the *Charter* - only investigative. See privilege against self-incrimination, above. {Juman}

v. *Statutory exceptions* - where a child needs protection, under the *Child, Family, and Community Service Act* of BC, issues of public safety. {Juman}

2. *Equitable breach of confidence*

a. *Overview* - certain procedures create an umbrella of confidence, protection afforded by which extends to all who have a legitimate interest in the proceedings. The effect of this is to ensure that good faith communications ought not to prejudice those who participate. {Slavutych}

b. *Different from privilege* - while similar to case-by-case privilege, this doctrine only protects the utterer from prejudice arising from the statement; privilege would preclude the use of the statement in any judicial capacity. {Slavutych}

c. *Requirements* - will be confidential where the procedure involves confidence, a document was rendered upon the firm agreement of both parties that it should remain confidential, the uttering party had a legitimate interest in the proceedings. {Slavutych}

i. For instance, the peer evaluation process of a university is one in which *Slavutych* participated in under the auspices of confidence, therefore should not be so prejudiced.

Is the evidence presented in an allowable form?

4. Refreshed or recorded memory of witness

a. Present recollection refreshed

i. *Overview* - a witness is entitled to refresh his or her memory before testifying or while testifying. In principle, a device or document of any sort can be used in order to accomplish this. The recollection, *not the stimulus*, becomes the evidence, and therefore the stimulus can be hearsay, inaccurate, etc. {Fliss}

ii. *Requirements* - where the aid genuinely revives the witness' memory, the nature of the aid and its contemporaneity, etc. are not relevant. Inadmissible evidence or non-evidence can be used to refresh memory. {Wilks}

iii. *Process* - arises where witness has a memory lapse, but there is a stimuli capable of refreshing. If the witness testifies that memory has been refreshed, proceeds testimony without further aid of the stimulus. {Wilks}

b. Past recollection recorded

i. *Overview* - where a witness cannot remember the events in question, he or she may testify from a record of his or her past recollection; usually made by the witness, but does not need to be so. (see also: hearsay, s. 715.1 exception)

ii. Reliability - reliability of the evidence is determined by its contemporaneity, accuracy, etc. Where it is a technical detail (eg. a licence plate number) there is little worry about subjective interpretation. With decreasing technicality, increasing worry. {Wilks}

iii. *Requirements*

1. *Reliable* - past recollection must have been recorded in some reliable way. {Meddoui}

2. *Contemporaneous* – at the time of recording, the memory must have been sufficiently fresh and vivid to be probably accurate. {Meddoui}

3. *Adoption* - witness must be able now to assert that the record accurately represented his knowledge and recollection at the time - to affirm that he "knew it to be true at the time." {Meddoui}

4. *Original record* – the original record itself must be used, if it is procurable. {Meddoui}

5. <u>*Real evidence*</u>

a. *Overview* - refers to tangible items exhibited to the judge or jury. May be directly linked to the evidence (eg. murder weapon), or demonstrative (eg. aids which better illustrate evidence). Evidence is received firsthand, and the senses of the jury, rather than of a witness, are used to draw conclusions. {P&S}

i. For instance, view performed by TOF of evidence means that the perceptions of the real evidence by the jury become the evidence. {Meyers}

ii. For instance, TOF may rely on videotape *alone* in order to establish identification, where the video is capable of supporting an inference of identification on a BRD standard. {Nikolovski}

b. *Process* – overriding principle is a determination of whether the probative value is outweighed by the prejudicial effect. Residual power to exclude therefore applies. {P&S}

i. For instance, particularly gruesome photos of a victim may be excluded where they are deemed to be of limited probative value. However, society increasingly desensitized, therefore few cases where images with probative value are excluded. {Teerhuis-Moar}

ii. *Views* - where impractical to bring evidence to Court, may visit evidence by way of a view at discretion of judge. Probative value must be weighed against inconvenience. Court reporter should be present to record what is occurring. Allowable under s. 652(1) of the *Criminal Code*.

1. For instance, while it has been argued that a view involves TOF finding own evidence, this is no more true than with any real evidence. {Meyers}

iii. *Best evidence/original documents rule*

1. *Overview* - applies where a party has the original document, but does not produce it.May submit copy instead where court satisfied that the original is lost or otherwise unavailable.

2. *Process* - functional approach, avoids overly stringent or strained application of the rule, as to do otherwise would impede the truth seeking function of the Court.

a. *Secondary evidence* – may be given absent better evidence, when a proper explanation is given for the absence of primary evidence. {Cotroni}

b. *Destruction in good faith* - original has been destroyed by the party offering evidence of its contents, it is not admissible unless the destruction was in good faith, without intention to prevent

its use as evidence, etc. {Cotroni}

i. For instance, partial re-recordings of communications made by the D. are admissible where there is a good faith reason for destruction of the originals.{Cotroni}

c. Types of real evidence

i. Direct evidence

1. *Overview* - tangible items related to the commission of the acts at issue in trial. Only if the item of real evidence is the very item it purports to be will it support the conclusions sought to be drawn from it. Further, certain of these inferences will also be undermined where the exhibit has been compromised. {P&S}

2. *Process* - the Crown must establish the continuity of an exhibit. In order to do so, witness that found the item and the witness that took custody of it will have to be called; judge must be satisfied that there is sufficient from which it could be inferred that the item is what it purports to be. {P&S}

   a. *Conflicting evidence* - where relevance depends on source of evidence, and evidence on this point conflicts, then TOF must decide whether item came from that source. Not a matter for voir dire on admissibility. Threshold is low. {Andrade}

      i. For instance, for the jury to decide whether a towel had been contaminated with hairs; matter for weighing of facts/credibility, outside realm of judge. {Andrade}

      ii. For instance, where complainants could only tentatively identify knife used in ABH, but were able to establish where the knives were on the person and home of D. Therefore, admissible. {Staniforth}

      iii. For instance, where exhibits officer not available to testify, this does not render evidence inadmissible. Only fatal where raises a reasonable doubt as to continuity, as per TOF. {MacPherson}

ii. Demonstrative aids

1. *Overview* – refers to aids used to better explain evidence to the jury.

2. *Process* - witness is asked whether the item in question would assist in explaining testimony to the jury. If so, and if the evidence which the item helps explain is otherwise relevant and admissible, then the consideration moves to the next stage. {P&S}

   a. Witness must be familiar with the model, must fairly and accurately reflect evidence, and must aid trier of fact in understanding evidence.

iii.Experimental evidence

1. *Overview* - relevance of experimental evidence is determined through the degree of similarity between the replication and the original event, though it is impossible to replicate the original event perfectly. Care required, as party allowed to repeat evidence in powerful manner. Must be more probative than prejudicial. {Walizadah} (see also: video evidence, below).

2. *Process* - may depend largely on which party made the re-enactment. Witness must be familiar with the model, must fairly and accurately reflect evidence, and must aid trier of fact in understanding evidence. {P&S}

    i. *Danger of extra witness* - while re-enactment evidence has been largely allowed, dangers abound, as such evidence may just be a compilation of prior consistent statements.

    ii. For instance, a taped re-enactment of killing made voluntarily by suspect has little danger of unfairness. On the other hand, different where other parties make tape. {Latimer}

    iii. For instance, taped re-enactments should rely on undisputed facts, otherwise their probative value is undermined. {MacDonald}

iv. Forms of real evidence

1. *Photographic and video evidence, intercepted communications*

    a. *Overview* - can be admitted demonstratively, or as real evidence from which a TOF may draw substantive conclusions. Videotape has testimonial quality, and once authenticated can stand on its own as a silent witness. {Nikolovski}

        i. For instance, while the complainant was unable to verify the identification on the tape, the TOF was satisfied that the person in court was the person on the tape, and this could be properly used to ground a conviction. {Nikolovski}

    b. *Process* - Should consider the (1) relevance, (2) accuracy, (3) fairness and absence of intention to mislead, (4) verification under oath of what the video purports to convey. {Walizadah} (also applies to experimental evidence on video, for instance).

        i. *Temporality* - photograph may be admitted even where taken long after the events, so long as a witness testifies that it is a fair and accurate reproduction of the scene as it looked at the relevant time. {P&S}

        ii. *Alteration* - as a precondition, it must be established that the tape has not been altered or changed. subsequent to the recording. {P&S}

            1. For instance, a film of a seal hunter edited to show the "gory stuff" - film did not have time codes, and timing was relevant to the offence charged (fail to kill quickly), inadmissible. {Penney}

            2. For instance, with intercepted communications, the Crown must prove the integrity of the recording, accuracy, continuity, voice identification, and that there has been no alteration; threshold reliability, in other words, as weight is to be assigned by the TOF. {Andrade}

        iii. *Completeness* - general practice is to give jury access to all exhibits during deliberation where feasible. Also able to view entire tape in open court, where to do otherwise would provide incomplete, inaccurate, and potentially unfair picture. {Patterson}

            1. For instance, general practice is to give jury access to all exhibits in deliberations; tape used to rebut cross-examination shown entirely in open court as well. {Patterson}

iv. *Evidence may be authenticated by*:

1. The photographer; a person present when the photograph was taken; (eyewitnesses) {Schaffner}

    a. *Eyewitnesses testify from memory* - and from present vision of the photograph, and perform a comparison of the two. {Schaffner}

2. A person qualified to state that the representation is accurate; an expert witness. (non eyewitnesses). {Schaffner}

    a. *Non-eyewitnesses authenticate photos through familiarity* - with subject matter or knowledge of equipment which created it. {Schaffner}

2. *Documents*

a. *Overview* - several means for authenticating documents. Should be noted that this merely establishes threshold reliability; eg. the documents are *authentic* in that they are admissible as what they purport to be - still subject to a finding of fact on that point, and in terms of contents. {P&S}

b. *Process*

i. *Authentication*

1. *Generally* - documents may be authenticated by calling a witness to the signatures on the document, calling a witness familiar with handwriting, satisfaction of the court through comparison of handwriting, or through an admission by a party. Need not be proved by expert witness. {*Pitre*}

    a. For instance, two post cards and two letters do not go far enough to constitute a regular correspondence within the meaning intended by the rule. {Pitre}

    b. For instance, TOF may make handwriting comparisons on their own, without the need for expert aid; however, this becomes a question for weighing by the jury. Notice required for counsel so as to allow for submissions. {Adam}

    c. *Criminal Code* s. 8 holds that writing may be shown to be genuine by comparing it with other writings proven genuine.

2. *Ancient documents* - those more than thirty years old, are admissible where circumstances raise no suspicions and the documents are produced by a source that would normally have custody. {P&S}

3. *Government documents* - by statute, certain public and judicial records are admissible without need for proof of authenticity. {P&S} (see also: judicial notice -> laws)

4. *Electronic documents*

    a. *Authenticity, under s. 31.1* - adducing party must first prove its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be. {Morgan}

b. *Best evidence rule under s. 31.2* - must prove the integrity of the electronic documents system, or fall under exceptions under s. 31.4 (dox with secure electronic signatures), or, absent evidence to the contrary, where printout has been acted upon. {Morgan}

3. *Computer-generated evidence*

a. *Overview* - generally governed by normal rules of evidence, although the *CEA* now accounts for such evidence specifically.

i. *Records* - most computer records are admissible via business records exception to the rule against hearsay. To submit a copy instead of the record, s. 30(3) of the *CEA* requires an affidavit of authenticity. (see out of court statements -> hearsay -> biz records)

1. For instance, printouts are considered representations of the record, and not *copies* within the meaning of s. 30(3); this is now codified under s. 31.2.

2. For instance, verifying witness need not be a computer expert, merely knowledge as to the workings of the record-keeping system; reliability comes from reliance.

3. For instance, self-generated records are not subject to any hearsay concerns due to lack of human input, therefore treated as real evidence without need for exception.

ii. *Recreation* - computer recreation is like a video reenactment; therefore, begs assessment of the reliability of the projection, as with all other criteria. However, where novel, must be considered under novel science criteria (see novel forms of expert evidence).

1. For instance, see *Grandell*, where visual recreation of scene was deemed too prejudicial and subjective to be admissible. {Grandell}

6. <u>Admitted facts</u>

a. *Overview* - facts may be admitted into evidence by way of admission of the parties, eg. where the litigants are willing to make concessions concerning the adjudicative facts material to the proceedings. {Castellani}

i. Under s. 655 of the *Criminal Code*, on an indictable offence the accused may admit *any* fact alleged; this appears to do away with the need for Crown agreement.

b. Process

i. *Allegation* - accused cannot admit a fact, whether adverse or otherwise, until the Crown has alleged this fact against the accused. It is for the Crown to state the facts upon which its case is formed. {Castellani}

1. For instance, accused sought to admit existence of extramarital affair, so that highly prejudicial evidence of this fact would not be admitted through witnesses; more damaging. {Castellani}

ii. *Crown discretion limited* - while the Crown must agree to D. admissions of fact, the Crown is not entitled to refuse acceptance in order to keep an issue alive artificially. In other words, cannot gain entry for prejudicial evidence by refusing admissions of fact by D. {Proctor}

1. For instance, Crown sought to accused evidence of attack on two women, highly prejudicial, accused

admitted this fact, identity not in issue therefore evidence relating to identity immaterial. {Castellani}

iii. *Determination of formality* - merely labelling an admission as formal (and therefore indisputable) or informal does not settle the matter; court must investigate nature of agreement between counsel. {Korski}

1. *Formal admissions* - agreement that the admitted fact is true, cannot be contradicted by the accused once made without leave of the court; amounts to conclusive proof of the admitted fact and prohibition of any further dispute. {Korski}

    a. For instance, an agreement as to what a witness would have said in testimony is informal, versus formal admissions concerning truth of the contents of the testimony. {Korski}

    b. Examples include guilty pleas; Under BC Civil Rules, claims must indicate whether facts are admitted, denied, or outside of knowledge, 3-3; must give notice of admission, 7-7;

2. *Informal admissions* - not conclusive, may be contradicted, explained, etc. Merely an item of evidence open to rebuttal, interpretation, weighing. {Korski}

    a. For instance, an agreement as to what a witness would have said in testimony is informal, versus formal admissions concerning truth of the contents of the testimony. {Korski}

iv. Dispute of admitted facts - for formal admissions, cannot withdraw without Court's permission, while concerning informal admissions, once there is a dispute, must call evidence on the matter. {Korski}

7. *Judicially noticed facts*

a. *Overview* - acceptance by a court of a fact without requiring proof, where fact is notorious and accepted in the community, or could be readily determined by sources of unquestionable accuracy. {P&S}

b. *Purpose* - means to expedite the trial process, by not expending judicial resources on proving facts which are notorious in the community. Avoids bringing the admin. of justice into disrepute, and once the matter is noticed, it is indisputable. {Find}

c. *Types*

i. Legislative facts

1. *Overview* - facts which have relevance to legal reasoning, lawmaking process, policy considerations. Resorted to when courts are asked to make law. Not likely indisputable in Canadian paradigm.

    a. For instance, the content of the words "free and democratic society" is determined by taking notice of judicial facts - as where the Court needs to determine whether firearm use is a pressing and substantial concern, and resort is needed to social statistics. {Clayton}

    b. *Not compatible with expert evidence* - as expert evidence definitionally requires expertise to understand, judicial notice of facts not within the purview of the common person should not take place. {Desaulniers}

2. *Not legislation* - notice taken of laws of Canada and the provinces, but subsidiary and foreign laws must be proven, including regulations, by official or certified copies. {Schaeffer}

ii. Adjudicative facts

1. *Overview* – facts which are at issue in the litigation between the parties. Indisputable in the Canadian paradigm. {Find}

    a. For instance, dictionary and other definitions relied upon to determine that the words *Gypsy* and *Roma* are interchangeable. {Krymowski}

iii. Social framework facts

1. *Overview* – facts relevant to the social context of the decision making process which allow a contextual matrix for judicial reasoning. Hybrid of legislative and adjudicative facts. Must be linked to evidence in the case at hand.

    a. For instance, use of expert evidence on racism or other social conditions in jury selection process.

    b. For instance, information on battered women in *Lavallee* not relevant absent evidentiary link establishing that this condition applied to the accused. {Lavallee}

d. *Process* – counsel must first ask the court to take notice, and make submissions concerning the propriety of this; judge can also initiate this process. strict requirements, as such facts are not tested by cross-examination, nor are they proven under oath. {P&S}

i. *Elastic, but not for adjudicative facts* –level of notoriety and the significance or centrality of the fact are considered in applying the test to legislative and social framework facts. More central or dispositive the fact, the more stringent the proof required. {Spence}

ii. *Considerations*

1. *Notoriety* – must be so generally accepted so as to not be the subject of debate among reasonable persons; or,

2. *Verifiable* – must be capable of immediate and accurate demonstration by access to readily accessible sources of indisputable accuracy.

8. <u>Opinion evidence</u>

a. *Overview* – opinion evidence is generally inadmissible, as the role of witnesses is to testify to the facts of which they have personal knowledge. Subject to exceptions, however.

b. *Differentiating between fact and opinion* – there is only a tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear. Generally identifiable where persons are testifying about something they have inferred or surmised from events directly observed. {Graat}

c. Exceptions to rule against opinion evidence

i. Expert opinions

1. *Purpose* – to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate for themselves.

2. *Statutory implications*

a. *Limitation* - PG evidence acts limit number of experts on a subject to between three and five, presumably to preserve judicial economy. *Criminal Code* s. 7 limits to five. Otherwise similar (though PG acts do not apply to BCCA, BCSC, BCPC regarding experts - see BCEA s. 10).

i. Under BCRC part 11(1), expert under duty not to advocate for any party. Parties may jointly appoint experts where agreed, or appoint own experts. Court may also appoint expert. Otherwise similar.

ii. Under BCEA, s. 11 invokes notice requirements, although these are applicable only to civil proceedings.s

b. *Non-testimonial* – allow experts (or certain types of experts) to file evidence by way of report, without need for testimony. Also set out in s. 657.3 of the *Criminal Code*, though the court may require cross-examination.

i. Under BCRC, expert may tender evidence by way of report; this is also allowed under s. 10(3) of the BCEA. However, there is a right to cross examine under both (11-7 BCRC).

c. *Defence experts* - while the *Criminal Code* requires that notice/disclosure must be given by litigants if adducing expert evidence as a report, this does not apply to the defence until the Crown's case has closed (provision does not allow for exclusion of expert evidence in any case).

3. *Manner of presentation*

a. *Overview* – there are a variety of ways in which expert evidence can be presented.

b. *Assessment only* - provides background information to the TOF for use in assessing evidence, without commenting on the particular case. {P&S}

i. For instance, evidence that abused children may well continue to associate with their abusers. {K.A.}

c. *Personal observations* – expert is a material witness concerning the facts which constitute the foundation of the evidence being given. Only the opinion portion of the evidence is subject to expert/opinion evidence rules of admissibility. {P&S}

i. For instance, a doctor testifying concerning the nature of a burn injury, who examined the injury before diagnosing it. {Marquard}

d. *Hypothetical opinions* - where the facts of the case are contested, an expert's opinion must be based on a hypothetical scenario based on what the TOF might find with regard to facts; of course, if the TOF does not find those facts, the opinion is due no weight. {P&S}

i. See 11-6(1) of BCRC, must provide list of documents, assumptions relied upon in providing expert evidence.

ii. For instance, this may avoid prejudice, ensure that the opinion is supported by the expertise, avoid usurping the TOF. {K.A.}

e. *Expert opinions based on inadmissible evidence* - opinions will often be based on information that is otherwise inadmissible - hearsay statements, etc. TOF must know basis of opinion to evaluate it, allowed(not for truth of contents) to explain the opinion. {Abbey}

i. See 11-6(1) of BCRC, must provide list of documents, assumptions relied upon in providing expert evidence.

ii. *Opinion be based on some admissible evidence* - there must be some admissible evidence to prove basis of opinion; if mainly based on inadmissible evidence, entitled to no weight.{Abbey}

1. For instance, the abuse suffered by the accused amounting to battered women's syndrome in *Lavallee* was based on inadmissible conversations with accused; abuse was also proven through other evidence (hospital records, etc.) {Lavallee}

iii. *Expert may act on info within expertise* - if an expert acts on information that is within the scope of expertise, which does not emanate from a party in the litigation, the TOF may weigh the opinion even if the information is inadmissible. {P&S} (see also: real evidence -> demonstrative).

1. For instance, expert can refer to an quote authorities so long as the opinions contained therein are adopted - expert opinion is the evidence. {P&S}

2. For instance, international guidelines for DNA testing may form the basis of an opinion without need to call the parties that formulated the guidelines. {B.(S.A.)}

4. Novel forms of expert evidence

a. *Overview* - applies upon the first opportunity of the Courts to determine the admissibility of a new form of expert data. Where literature is inconclusive or highly contradictory regarding the reliability of the science, particularly in a judicial context, it is likely not sufficiently reliable for admission. {Trochym}

b. *Burden* - proffering party must show that new scientific technique or expert relying on such a technique is sufficiently reliable to be put to the TOF. {Trochym}

c. *Requirements*

i. Whether the technique can be and has been tested; {Trochym}

ii. Whether the technique is subject to peer review and publication; {Trochym}

iii. The error rate, whether known or potential; {Trochym}

iv. Whether the technique has been generally accepted in judicial proceedings. {Trochym}

d. Must still meet test for expert evidence set out below.

5. Expert evidence previously considered by the courts

a. *Overview* - applies where evidence is of a type which has already been considered sufficiently reliable to be put to TOF. {Trochym}

b. *Burden* - the party calling an expert witness must establish that the opinions of that expert are admissible. {Abbey}

c. *Requirements*

i. *Precondition phase* - party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. {Abbey}

1. *Necessary* – the trier of fact must need assistance in order to understand the significance of the evidence or draw proper inferences from it. More than helpful, must be likely to be outside experience of TOF. Purpose of necessity is to *preserve role of TOF*, as impressive scientific qualification does not make opinions on ordinary human nature more helpful. {Mohan}

2. *Not usurping TOF* - cannot usurp the function of the jury in determining whether the accused is guilty BRD. Jury is also not compelled to accept the expert's assertions. Extension of necessity. {Lavallee}

3. *Relevant* - the expertise must be both logically relevant and reliable; it must tend to make more or less likely facts which are meaningful to a live issue at trial; {Mohan}

4. *Presented by a qualified witness* - witness tendered must be qualified in the relevant field of expertise; special or peculiar knowledge acquired through study or experience. {Mohan}

5. *Not otherwise subject to exclusion* – evidence which cannot be adduced directly cannot otherwise be adduced indirectly. Therefore, an expert cannot testify concerning the disposition of the accused unless the latter placed his character at issue, for instance. {Mohan}

6. *Expert opinions bolstering credibility of witness* - such evidence is subject to additional limitations (see credibility bolstering evidence). {Marquard}

ii. *Gatekeeper phase* - TJ must be persuaded that the probative value of the evidence is not outweighed by its capacity to cause distortion, confusion, or delay in the trial process. Probative value assessed holistically with costs and benefits of admitting the evidence. {Abbey}

1. *Costs* - consumption of time, prejudice, confusion, and most importantly the danger that a jury will be unable to make an effective and critical assessment of the evidence; will abdicate its fact-finding role. {Abbey} There is a great danger that, due to impressive qualifications, expert evidence will be regarded as virtually infallible. {Mohan}

2. *Benefits* - instil understanding in the TOF regarding an area that would otherwise be inscrutable to the layperson; this increases with the extent to which the evidence allows for evaluation of material evidence in the case. Zero benefit to expert evidence which the jury is capable of understanding on its own. {Abbey}

6. *Explaining expert evidence to the TOF*

a. *Overview* – where testimony is highly technical, the party calling should ask the expert to explain evidence in means that the layman can understand. Judges discouraged from explaining expert

testimony to jury for fear of misstating evidence or usurping TOF. {P&S}

7. *Cross-examination of expert witnesses*

    a. *Overview* - experts can be crossed using third-party data, but only where the expert acknowledges that the works are authoritative; where this is the case, the opinions in the work become part of the evidence. Problematic, as this rewards the expert who is unfamiliar with the authorities in their field. {Marquard}

8. *Examples* - a treating doctor may testify as to the descriptions of injuries observed on the body of the complainant. This would not be opinion evidence, but rather direct testimony as to facts. On the other hand, if the physician were to say that this type of injury is consistent with a sexual assault, for example, then this portion of the evidence would be opinion, and thus subject to admissibility criteria. {*K.(A.)*}

ii. Lay (non-expert) opinions

1. *Purpose* - recognizes that, while not all of the direct observations of the witness are recollected or articulable (eg. the exact shape of someone's eyes or ears in case of identification), the witness, having observed them, was nevertheless *better positioned* than the jury to form opinions based on these perceptions. {Graat}

    a. Nature of the exception requires that the opinion be based on the direct observations of the witness.

2. *Application*

    a. *Discretion* - admissibility of lay opinion evidence is subject to a "large measure" of discretion by the TJ. {Graat}

    b. *Weight* - to be determined by the jury. As the testimony is definitionally non-expert, it is to be given no special regard by the jury. This recognizes the tendency to let the opinion of police witnesses over whelm the opinion evidence of others. {Graat}

    c. *Requirements* - the matter must:

        i. *Lie within common knowledge* - in that it *must not* require expert understanding. {Graat}

            1. For instance, cannot give opinion evidence on a legal issue as, for example, whether or not a person was negligent. {Graat}

        ii. *Be compendious* - in that it is based on a multitude of perceptions that are best communicated compendiously. {Graat}

            1. This arises where the perceptions were too evanescent (fleeting) in their nature to be recollected, or too complicated to be separately and distinctly narrated.

    d. *Examples* - identification of persons, handwriting, objects; apparent age; bodily plight or condition of a person, such as death, illness, intoxication; emotional state of a person; condition of things, such as worn, shabby, used or new; certain questions of value; estimates of speed and distance. {Graat}

3. *Policy*

a. In *Graat*, TJ notes that "if non-expert evidence is excluded the defence may be seriously hampered" because they would be unable to call witnesses to say that the accused was not intoxicated. However, as this is used to justify the admission of non-expert police evidence, which the TJ acknowledges may "over- whelm the opinion evidence of other witnesses," it seems a rather contradictory position.

9. <u>Out-of-court statements</u>

a. *Overview* - prior consistent statements are out of court statements *which are not offered for truth of contents*; while generally, such statements would be admissible where relevant, they are nevertheless subject to additional scrutiny due to the danger of oath helping. Hearsay statements are out of court statements *which are* offered for truth of contents.

b. Prior consistent statements

i. *Overview* - the prior consistent statement of a witness is not admissible to enhance that witness's credibility (subject to exceptions: see credibility-bolstering evidence), but may be admissible for other purposes: see below.

ii. *Purpose of limitation* - the witness may be a consistent liar, the evidence is otherwise minimally probative, and is in any case hearsay; the exceptions for the rule either preclude or obviate the need for these purposes.

iii.Exceptions to the rule against prior consistent statements

1. Statements of the accused

a. Overview - subject to the general prior consistent statement exceptions, and may also be also admissible, notwithstanding the other exceptions, where any of the following conditions are met (inexhaustive): {Edgar}

i. Relevant to accused's state of mind

1. Overview - where a prior consistent statement of the accused is relevant to the accused's state of mind at the time of offence commission, it is admissible. {Edgar}

ii. Mixed inculpatory-exculpatory statements of the accused

1. Overview - where a prior consistent statement of the accused is partly partly inculpatory and partly exculpatory, and the Crown seeks to adduce the inculpatory portion, the exculpatory portion is also admissible out of fairness. The Crown is obligated to admit the entire statement. {Edgar}

iii.Res gestae / part of the charge against the accused

1. Overview - *not* the same as the hearsay exception of the same name; rather, a prior consistent statement of the accused will be admissible where it forms part of the incident that gives rise to the charge (eg. if the charge is conspiracy to traffic firearms, and the

statement is a discussion of a gun sale). {Edgar}

iv. Statements made upon first confrontation between accused and police

1. *Overview* - proposition that spontaneous exculpatory statements made by an accused person when first confronted by the police with an accusation, or upon arrest, are probative and should, therefore, be admitted. Reaction of the accused in such circumstances may yield persuasive evidence of innocence. Also entitled to call police officer to verify that the statement was in fact made. {Edgar}

v. Statement of the accused more probative than prejudicial

1. *Overview* - rule should be applied flexibly; if evidence is relevant, probative value is not *substantially* outweighed by prejudicial effect, and the evidence is not otherwise excluded, the evidence should be received *when proffered by the defence*. {Edgar}

2. This is the rule for *all* post-offence conduct, generally (eg. after being charged, accused agreed to polygraph and was otherwise cooperative, this conduct sought to be adduced by defence, admissible because conduct was inconsistent with actions of a guilty person.) {B. (S.C.)}

2. Rebuttal of recent fabrication allegation

a. *Overview* - where a witness is alleged to have recently concocted a story, evidence of a prior consistent statement which antedates the concoction can be used to rebut the allegation. {Ellard}

b. *Allegation can be implicit or explicit* - enough if in light of the circumstances of the case and the conduct of the trial, the apparent position of the opposing party is that there has been a prior contrivance. This can be as little as an implication that the witness was "influenced by outside sources." {Ellard}

c. *Sequential rather than temporal recency* - the fabrication need only have occurred *after the event in question*, and does not need to be temporally recent. {Ellard}

d. *Statement must predate alleged fabrication* - in order to rebut the recent fabrication allegation, the statement must have been made before the time of concoction; otherwise, it is irrelevant. {Ellard}

e. *Not relevant if fabrication alleged from outset* - prior consistent statements have been ruled inadmissible where the accused suggested that the complainant's evidence was fabricated from the outset (and thus, not recently). {Pangilinan}

3. Evidence necessary to witness' narrative

a. *Overview* - the fact that the statement was made may be significant in ensuring that the TOF understands the sequence of events which led to the trial; for instance, reasons why the accused was not brought to justice earlier.

i. *Limitations* - not admissible for truth of contents, bur rather for the fact of their existence. Defence can explore truth of contents, however. Creates a logical framework for the presentation of *substantive evidence*, but cannot be taken as confirmation of the evidence, and jury must be warned of this. {F.(J.E.)}

ii. *Difficulties with narrative evidence* - must distinguish between using narrative evidence for the *impermissible* purpose of confirming the truthfulness of the sworn allegation and using narrative evidence for the *permissible* purpose of showing the fact and timing of a complaint, which may then *assist* the trier of fact in the assessment of truthfulness or credibility. {Dinardo}

4. Evidence of prior identification

a. *Overview* - evidence that the witness previously identified the accused is admissible to permit both parties to explore the reliability of the identification.

c. Hearsay evidence

i. *Overview* - any out of court statement *offered for truth of content*s. Distinguishable from non-hearsay, which is an out of court statement offered for some purpose other than the truth of its contents. Must immediately determine the truth of the contents of any out of court statements and the purpose for which they are adduced to analyze hearsay.

ii. *Purpose* - not excluded because of lack of relevance. Rather, recognition of difficulty of assessing weight to be given to statements made outside of the jury's observance, and untested by cross-examination. Effectively, to avoid the *hearsay dangers* - evidence given in court is given under oath, under cross-examination, and under observation; these factors are what lend it credibility; hearsay lacks all such factors.

iii. *Distinguishing hearsay and non-hearsay purposes* - this is the first step in the process of considering hearsay admissibility. Central question is whether the statement is adduced for the truth of its contents. Statements adduced for other reasons are admissible. However, an out of court statement might *implicitly* assert facts or belief in facts, and thereby might run afoul of the rule against hearsay. {Wright}

1. *Implied assertions* - difficult area in the law. Arise where an out-of-court statement is adduced not for the explicit truth of its contents, but rather for an assertion which is implied by the truth of its contents (eg. call to a house asking to buy marijuana adduced to show that the owner of the house was a drug dealer). The law is split in this area:

a. *Watt* (dissent) - holds that the telephone call is evidence of conduct in words, regardless of truth of contents. Number of calls received is irrelevant. {Baldree}

b. *Feldman* - holds that the call is hearsay through implied assertion, as the caller is asserting that the accused is a drug dealer. May have allowed for admission via conduct if there were a multitude of calls, as this would render the possibility of a wrong number unlikely. {Baldree}

c. *Blair* - in a close-call scenario, hard and fast hearsay v. non-hearsay analysis should be jettisoned, therefore fall back on principled tools: necessity and reliability, probative v. prejudicial. {Baldree}

2. *Examples*:

a. *Starr* - the statement "gonna go and do an AutoPac scam with Robert" was adduced in order to illustrate the declarant's immediate intention (eg. to go wreck a car for insurance purposes). If the statement had been false, the victim did *not* actually intend to go with Robert, then the inference concerning the victim's intention cannot be drawn.

b. *Subramaniam* - where the statement was adduced to show that the accused was acting under duress, eg. to explain his subsequent actions. *This is a non-hearsay purpose.* However, if the statement had been adduced to prove that the bandits *actually* were communists, or *actually* intended to kill the accused, then it would be inadmissible hearsay.

c. *Wildman* - where the statement was adduced to show how the accused could have learned how the victim was murdered (ie. with an axe). *This is a non-hearsay purpose.* However, if the statement was adduced to show that the accused had in fact been murdered with an axe, it would be inadmissible hearsay.

d. *Wright* - where the statement was adduced to show that the treatment of a testator by his correspondents implied that he was a rational agent. *This is a hearsay purpose.* The issue is that the opinions of the correspondents concerning the rationality of the testator would have been inadmissible as hearsay directly (eg. if they had instead written "you are a rational agent," this would not have been admissible to prove that the testator was a rational agent).

e. *Wysochan* - where the statement was adduced to show that the verbal response of a grievously wounded woman to her husband (eg. asking for help) indicated that he was not her attacker. *This is a non-hearsay purpose*. This decision is at odds with *Wright*, as had the woman said "my husband did not attack me" her statement would not be admissible to prove that he had not shot her.

iv. Exceptions to the rule against hearsay evidence

1. *Overview* - hearsay evidence is admissible where it it satisfies one of the following exceptions. While *Starr* held that evidence meeting an exception may be excluded under the principled approach, the Court resiled from this position in *Khelawon*, holding instead that this is only possible where the *exception itself* is inconsistent with the principled approach.

   a. *Purpose of the exceptions following rationalization* - specific requirements of the individual exceptions have had the useful effect of focussing attention upon the peculiar factors that make it desirable, or undesirable, to admit a particular form of out-of-court statement. Therefore, should be considered first under the exceptions, then under the principled approach. {Starr}

   b. *Evidence to be considered in determining threshold reliability*

      i. *Old rule - restriction to circumstances of statement itself* - TJ should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. {Starr} However, the Court also resiled from this position in *Khelawon.*

      ii. *New rule* - functional approach - No constitutional justification for precluding corroborating evidence from consideration of the question whether a statement is reliable; best way to determine this is to see whether it is corroborated by other evidence. Further, it is difficult and times counterintuitive to limit the admissibility inquiry to the circumstances surrounding the making of the statement. {Khelawon}

2. *Prior testimony*

   a. *Overview* - subject to certain requirements, the testimony of a witness at a prior proceeding is admissible for the truth of its contents. Not a "true" exception to the rule against hearsay, as

evidence has already been subject to cross-examination at the prior proceeding. {Potvin}

b. Requirements - where prior testimony does not satisfy the common law or statutory requirements for admission, may nevertheless be admissible through the principled approach.

i. Common law exception

1. *Witness unavailable* - must not be available to testify at present proceeding, otherwise this would be a means of shielding litigants from cross.

2. *Identity of parties* - the parties or those claiming under the parties must be substantially the same; controversial rule, in that clearly identity only matters as it concerns the party that the evidence is used against.

3. *Identity of issues* - the issues to which the evidence is material must be substantially the same;

4. *Cross-examination* - the party against whom the evidence is proffered must have had an adequate *opportunity* to cross-examine at the earlier proceeding. More than opportunity not necessary.

ii. Statutory exception (BC)

1. *Supreme Court Civil Rules* - provides for a broad exception, as any transcript of any evidence taken in any proceeding, hearing, or inquiry, regardless of whether the same parties are involved, may be admitted.

iii. Statutory exception (Criminal Code s. 715(1))

1. *Witness unavailable* - must refuse to give evidence, or be shown to be dead, insane, unable to travel, unable to testify, or absent from Canada.

   a. Can lead to interesting issues; for instance, *Hawkins* - witness subsequently married D., therefore no longer competent; is this a refusal? SCC said no, disqualified (not refusing), thus her prelim testimony not admissible. {Hawkins}

2. *Identity of issues* - the evidence must have been given at a previous trial on the same charge, or during the investigation or preliminary inquiry concerning the charge. (2)

3. *Presence of the accused* - the evidence must have been taken in the presence of the accused.

   a. Presence and full opportunity will be assumed where the accused is absent by reason of having fled the jurisdiction. (3)

4. *Cross-examination* - the accused must have had "full opportunity" to cross-examine the witness during the previous proceeding; not the fact of cross-examination but the opportunity.

   a. Therefore, if counsel chooses not to cross for tactical reasons, this requirement is fulfilled nonetheless. Rather, must be denied cross entirely, be subject to unreasonable limits by the judge, or be frustrated in pursuit of certain questions. {Potvin}

5. *Unfairness* - in addition to the residual exclusion power, prior testimony may be refused despite fulfilling s. 715(1) where this would cause unfairness (eg. did not cross for tactical purposes, and the credibility of the unavailable witness is critical); left to the discretion of the judge. {Potvin}

3. Adoption of videotaped statement pursuant to CC s. 715.1

a. *Overview* - allows for admission of videotaped statement of complainant. Given nature of offences specified (eg. sex assault), presumably purpose is to prevent trauma of testimony for underage complainants. Not a "true" exception to hearsay, as the out of court statements are adopted as the complainant's evidence (see past recollection recorded).

b. *Requirements*

i. *Offence specific* – offence is one specified for inclusion under the section;

ii. *Age of complainant* – complainant under eighteen at time offence committed;

iii. *Adoption of prior statement* – contents of statement adopted under oath;

iv. *Reasonable time* – tape made within reasonable time after acts;

v. *Statement relevant to charge* – statement describes the acts complained of.

4. Prior convictions in civil proceedings

a. *Overview* - in a civil proceeding, a party may show that the other party was convicted of an offence, in order to show show, *prima facie*, that the person committed the acts alleged (for instance, if D. convicted of assault in criminal trial, this could be used to prove that the D. assaulted the Plf. in a civil trial).

b. *Requirements*

i. *Prima facie standard* - can be proven, depending on jurisdiction, through admission of certificate of conviction, etc. Once this is shown, the party subject to the conviction is presumed to have committed the acts alleged, unless that party can show why it should not.

ii. *Relitigation prohibited* - if the substance of the convicted party's reasoning for why the conviction should be rejected arises out of the same evidence, then this is prohibited as *res judicata.*

iii. *Rebuttal limited* – rebuttal will be permitted where the conviction was tainted by fraud, there is new evidence, or where the stakes between the original and new proceedings are substantially different - for instance, where the original proceedings were minor, but later proceedings involve considerable liability. {Becamon}

iv. *Convictions, not acquittals* - acquittals are not admissible in civil trials due to the differing standards of proof between criminal and civil proceedings.

5. Adoption by silence

a. *Overview* - a statement made by another in the presence of the accused is only admissible against the accused in circumstances where it is expressly adopted, or it is adopted inferentially by words, action, conduct, or demeanour; however, D. must have reasonably been expected to reply in order for an inference of assent to be applied. {Clark}

   i. For instance, where the D. was present at table when others discussing something done "under the nose of the police station" - D. privy, and did not contradict. {Clark}

6. Party admissions

a. *Overview* - any statement *or* act of the opposing party is admissible against that party; includes statements which are adopted (via reasonable inference), statements made by an agent, or statements made in furtherance of a conspiracy. Like prior testimony, not a "true" exception, as the party against whom the statements are offered is not really deprived of the opportunity to cross-examine themselves.

b. *Requirements* - no reliability or necessity analysis required. {Foreman}

   i. *Statement made by a party* - admissions do not refer to the statements of non-parties (which would be covered by KGB and other exceptions) or the statements of the accused (which require voluntariness analysis). However, the following are included:

      1. *Authorized* - statement made by person authorized to speak for the party on that subject;

      2. *Vicarious* - statement made by agent of the party, during the existence of the relationship and within the scope of the agency.

   ii. *Statement made to anyone* - can be made to the outside world, or otherwise; to agent by principal, etc. - for instance, diary entries can be considered admissions.

   iii. *Not necessarily based on personal knowledge* - there is no need for the party making the admission to have direct knowledge of the matters discussed - they may be based on the speculation or inference of the party, where there is an indication of belief. {Streu}

      1. eg. Streu relied on his friend's statement that the tires were stolen, and passed this information on to another party; therefore, admissible for truth of contents to show that the tires were stolen, even though Streu was not sure of this. {Streu}

   iv. *Acceptance or belief* - the party making the admission must in some way indicate acceptance or belief in the truth of the contents of the statement; though this is a threshold requirement left to the TOF. Otherwise, unadopted, cannot be relied on for truth of contents.

   v. *Conduct or statement* - admissions can be either verbal or vested in conduct. For instance, fleeing from the scene of the crime could be a verbal admission of guilt.

      1. eg. D. pays for medical bills for injured neighbour's child (arrow in the eye); this is as likely to be an indication of compassion as one of liability, therefore incapable of advancing inference. {Walmsley}

   vi. *Admission by silence* - where (1) an accusation or statement is made, (2) by a party not in

authority, (3) in circumstances such that the party would be expected to respond, and (4) where the failure to respond could reasonably lead to the inference that the statement was adopted through silence, this inference is allowable.

1. Must not be a party in authority making the statement, as this would violate the right to silence; further, worth noting that right to silence may be invoked selectively. {Turcotte}

7. Co-conspirator's exception (severed trials)

a. *Overview* - separate from party admissions, as these are admitted not against the declarant, but against another party. These statements come with danger relating to reliability, as an accused may wish to downplay own involvement, while passing blame to co-conspirator.

b. *Requirements*

i. *Separate trial* - if the participants are tried separately, then each co-conspirator is competent to testify against any other (perhaps subject to a *Vetrovec* warning). This is despite the danger; the evidence is admissible where it is found to be sufficiently reliable for admission.

ii. *Refusal* - if the co-conspirator refuses to testify, or is otherwise unavailable, the prior statement may be admissible for truth of contents via the principled approach (or as a prior inconsistent statement, etc.)

8. Co-conspirator's exception (single trial)

a. *Overview* - once a partnership is proven to exist by independent evidence, the admission of one partner acting in the scope of the partnership is evidence against all partners. {Barrow}

i. eg. purchaser and seller of drugs were furthering common design of drug trafficking in *R. v. Samuels*, therefore admission of buyer admissible for truth of contents against seller. {Samuels}

b. *Requirements*

i. *Proof of partnership* - party seeking to adduce hearsay statement must establish, through independent evidence, the existence of the common design between partners. {Mapara}

ii. *Course of conspiracy* - only statements made in the course and furtherance of the conspiracy are admissible through this exception; therefore guilty pleas, which are not contemporaneous, are not admissible. {Mapara}

iii. *Difficulty* - arises where the substantive charge is the conspiracy itself; the TOF must review the evidence and determine whether it can be used against conspiracy members through the exception. Requires the following jury instruction: {Mapara}

1. *Existence of conspiracy* - must be satisfied on consideration of all evidence, including the hearsay, that conspiracy existed BRD, otherwise acquittals entered;

a. "All evidence" allowable because not really hearsay - relevant regardless of truth of contents; however, this does not include statements not made in furtherance of conspiracy (eg. confession) which would not be relevant regardless of truth.

2. *Membership in conspiracy* - must review direct evidence to determine whether, BOP, accused is member of conspiracy;

3. *Substantive admission* - if above requirements met, TOF may apply acts and declarations of co-conspirators as proof of guilt BRD.

4. *Limiting instruction* - mere fact that there is enough evidence BOP that the accused was a member of the conspiracy does not make a conviction automatic.

5. *Compatible with the principled approach* - as held by the SCC in *Mapara*; only the rare case where co-conspirator evidence would be ruled inadmissible.

    a. *Necessity* - co-accused are not compellable, it is undesirable to try co-conspirators separately, and such declarations are of substantial evidentiary value. {Mapara}

    b. *Reliability* - conspiracy must be proved BRD, membership BOP, and statements made in furtherance are made contemporaneously, little reason to lie. {Mapara}

9. Declarations against pecuniary interest

a. *Overview* - overarching principle is that statements made against interest are likely to be true, as there would be nothing to be gained in concocting adverse statements.

b. *Requirements*

    i. *Availability* - the witness must be unavailable to testify; satisfies necessity.

    ii. *Knowledge of contents* - the declarant must have had personal knowledge of the fact stated (eg. cannot be merely speculative or based on hearsay); concerns reliability.

    iii. *Knowledge of interest* - while the declarant does not need to be aware that the statement may be *used* against interest, the adverse nature of the statement must be known, otherwise it cannot be said to have contributed to the trustworthiness of the statement.

    iv. *Adverse* - the statement made must be "against" the interest of the declarant. Concerns reliability. While some approaches hold that the statement must, in toto, be adverse, most authorities hold that a statement is adverse where any part of it runs contrary to the declarant's interest; concerns reliability.

    v. *Interest need not be relevant* - the interest which is compromised by the statement need not be relevant to the proceedings; only the statement itself needs to be relevant.

        1. eg. ledger entries of a midwife showing monies received, against interest because it abandons claim for that money, admissible to show the birthdate of a child in proceeding unrelated to money. {Higham}

10. Declarations against penal interest

a. *Overview* - more stringent exception than for statements against pecuniary interest. May now have been eclipsed by the principled exception. Courts have held that the distinction between

statements against penal and pecuniary interests is tenuous, both admissible in the law of Canada. {O'Brien}

b. *Requirements*

i. *Availability* - the witness must be unavailable to testify via death, insanity, illness, etc., but not where merely refusing to testify; however, *Pelletier* is authority that any reason why the declarant cannot be produced to testify should suffice (eg. incapacity). {O'Brien}

1. For instance, in O'Brien the utterer, Jensen, was dead and therefore not available to testify; had made statement to D.'s counsel, however. {O'Brien}

ii. *Within knowledge* - the fact stated must be one that is within the knowledge of the utterer. {O'Brien}

1. For instance, in O'Brien the guilt or innocence of the D. was a matter within the knowledge of someone who was originally co-accused for the crime. {O'Brien}

iii. *Knowledge of interest* - the declarant must have *apprehended* a vulnerability to penal consequences as a result, and these must not be too remote.

1. For instance, if the utterer were only willing to make the statement in circumstances where the CEA would provide protection against self incrimination (s. 5) in future proceedings, while this would indicate awareness. {O'Brien}

2. For instance, covers only acts done by the deceased, not acts told to the deceased by other persons (double hearsay). {Demeter{

iv. *Adverse to the declarant or third party* - the statement, taken upon the whole, must be adverse to the interest of the declarant; this may include considering the evidentiary connection between the declarant and the crime, or between the declarant and the accused. Must be adverse to *present* interest, not contingent upon some future events. {O'Brien}

1. eg. a statement made to an unestranged family member is not penally adverse, as it does not draw a likelihood of penal consequences. {O'Brien}

2. For instance, if the charges against the utterer had been stayed, penal consequences would only arise were the stay lifted, so the statement is not against present interest. {O'Brien}

3. For instance, a statement which admits partial culpability (such as an assault on the deceased) but is partially exculpatory (eg. asserts self defence) is nevertheless against interest. {Pelletier}

v. *But not adverse to the accused* - declarations may only be used to exculpate the accused; it would be unfair to convict an accused based on such evidence, particularly where there has been no opportunity to cross-examine. {Lucier}

1. For instance, statement made by a person which holds that the D. had paid him to burn down a house; while the statement is adverse to the utterer, it is also adverse to the D., and therefore is inadmissible. {Lucier}

11.Dying declarations

a. *Overview* - allows for the dying words of a deceased person to be admitted under very stringent circumstances. Somewhat absurd and outmoded, begging a return to principle. {Sunfield}

b. *Requirements*

i. *Declarant is dead* - satisfies necessity.

ii. *Settled, hopeless expectation* - of almost immediate death; satisfies reliability, as in such solemn circumstances, it is believed that persons will be moved to tell only the truth, as much as a positive oath would.

1. For instance, in *Sunfield*, the settled, hopeless expectation was established when the deceased considered it useless to send for a doctor. {Sunfield}

iii. *Statement concerns death* - the statement concerns the death or its circumstances;

iv. *Statement otherwise admissible* - the statement would have been admissible if the deceased had been able to testify, eg. not double hearsay or propensity evidence.

v. *Offence charged is homicide* - of the deceased; this seems an absurdity, as the statement would therefore not be admissible in a wrongful death civil suit.

12.Business records / declarations made in the course of duty

a. *Overview* – admissibility finds its source in the reliability inherent in the processes designed to collect such information; little reason to fabricate. Further, the collector is under a duty to be accurate under threat of dismissal, and the records are reasonably contemporaneous. (see also real evidence -> documents -> records)

b. *Distinct from party admissions* - while party admissions can only be admitted as evidence against the declarant, business records can be admitted to advance the case of the party that created the records.

c. *Distinct from admissions against interest* - admissions against interest allow for collateral statements accompanying the relevant statement to be admitted (eg. portions of the statement that are not against interest); not so for business records.

d. *Double hearsay* - where the contents of a business record are themselves hearsay, may nonetheless be admissible where *both* declarants were acting under a duty to be accurate. {Martin}

i. For instance, as held in C.L., the person who made the record need not have first hand knowledge of the event recorded; duty to record accurately sufficient. {C.L.}

ii. For instance, established system in a business or other organization produces records which are regarded as reliable and customarily accepted by those affected by them. {C.L.}

e. *Requirements*

i. *Common law exception (now overtaken by statutory exception, below)*

1. *Criteria* - business records are admissible where they are made (1) reasonably contemporaneously (2) in the course of duty (3) by persons having personal knowledge of the matters (4) who are under a duty to make the record, and there is (5) no motive to misrepresent. {Ares}

    a. For instance, contemporaneity required at time of record creation; therefore, printouts of computer records apply under the exception.

    b. For instance, verifying witness need not be a computer expert, merely knowledge as to the workings of the record-keeping system; reliability comes from reliance.

        i. However, see *Gratton* - info from sensory diagnostic module in a vehicle presented by non-expert, unaware of reliability of evidence, therefore inadmissible. {Gratton}

    c. For instance, self-generated records are not subject to any hearsay concerns due to lack of human input, therefore treated as real evidence without need for exception.

2. *Applicable to all conduct* - includes both oral and written statements (statutory exceptions deal only with writings or records).

3. *Witness does not have to be unavailable* - while at common law, the witness had to be dead, this requirement was done away with in *Ares*, in which the nurses who created the records were present in the courtroom; prima facie admissible nonetheless. {Ares}

4. *Personal knowledge* - satisfied if the information was recorded by persons acting under a duty to compile the record; there is no need to specify a specific recorder. {Monkhouse}

ii. *Statutory exception (CEA s. 30)*

1. *Not applicable to all conduct* - confined to writings or records (common law exception also covers oral statements).

    a. Not limited to "original entries", allows for copies to be submitted where necessary.

2. *Must be made in the usual and ordinary course of business* - cannot be made in course of investigation, inquiry, obtaining/giving legal advice, or in contemplation of legal proceedings; applicable whether referring to a principal or auxiliary feature of the business. {Setak}

    a. Does not need to have been made personally by a recorder with knowledge of the thing recorded. {C.L.}

3. *Statements of opinion may be admissible* - while most statutory exceptions refer to "acts, transactions" etc., statements of opinion may be admissible under such exceptions where this falls within the declarant's course of duties (eg. the autopsy report of a deceased coroner).

13.Res gestae statements

a. *Overview* - includes statements of present physical or mental condition, excited utterances, and

present sense impression. Reliability is founded on the spontaneity of the statement, which precludes concoction due to lack of time. Necessity is founded where there is no other satisfactory source of evidence (therefore, unavailability not a prerequisite - *may be admitted even where the declarant is testifying*).

b. *Variations*

i. Statements of present physical condition

1. *Overview* - where a person claims to be experiencing a particular physical condition, the statement containing that claim is admissible; reliability drawn from the spontaneity of the statement, being itself driven by the bodily sensation.

2. *Purpose* - admissible upon the ground that there is no other means possible of proving bodily or mental feelings than by the statements of the person who experiences them. {Youlden}

3. *Requirements*

a. *Experience and duration* - statements can only be used to prove that the person was experiencing the condition at the time and to establish duration.

b. *Contemporaneity* - statements of *past* pain, and presumably future pain, are not admissible through the exception; only present pain.

i. For instance, statement that utterer was afraid he had hurt himself admissible, as does not explicitly state the cause, but rather merely describes sense. {Youlden}

c. *Presence, not cause* - statements concerning the *cause* of the pain are not admissible, even where this was a diagnostic conversation with a physician; these would fall outside of the purpose of the exception, as cause better established through other evidence.

ii. Statements of present sense

1. *Overview* - statements which describe person's perception of an event. Not yet accepted in Canada; based on the idea that persons who are excited may not be prone to concoction, but may be more prone to inaccuracies.

2. *Requirements*

a. *Narrative* - generally, consists of a narrative by the person reporting of events observed.

b. *Contemporaneous* - statement made during or shortly after the event described; strict time requirement.

c. *Cross-examination* – in most cases either the declarant or the receiver of the statement will be available on cross.

iii.Statements of present intention or present state of mind

1. *Overview* - rises when the declarant's statement is adduced in order to demonstrate the intentions, or state of mind, of the declarant at the time when the statement was made. {Starr}

2. *Requirements*

    a. *Explicit, not inferential* - essentially a threshold question concerning hearsay; if the state of mind is to be inferred from the statement, and *does not rely on truth of contents, it is not hearsay, ergo admissible*. Only explicit statements of state of mind concerning truth of contents need fulfill the exception. {P.R.}

    b. *Presence* - statement must be of a *present existing state of mind;* not a prior state, or anticipatory state; exception only allows for understanding of what the declarant thought or felt at the time that the statement was made. {Starr}

    c. *No circumstances of suspicion* – statement and must appear to have been made in a natural manner and not under circumstances of suspicion. Maps roughly onto the "reliability" requirement of the principled exception. {Starr}

        i. In *Starr,* statement made in a "heated context" (not natural manner) to ex-girlfriend; one cannot rule out that victim was lying in order to cover up his association with another woman. {Starr}

    d. *Intent or other mental states* - not merely intention, can allow for statements supporting existence of other mental states *of the declarant* to be adduced substantively. {Starr}

    e. *Supported inference* - where the statement is one of intention, the statement can support an inference that the declarant followed through on the intention where reasonable. {Starr}

        i. For instance, if intention explicitly stated is to break up with romantic partner, then it is reasonable to infer that the utterer did so. {P.R.}

    f. *Declarant only* – statement must only relate the state of mind of the declarant; otherwise, an additional analysis applies (see below). {Starr}

3. *Statements which also relate state of mind of third party*

    a. *Overview* – a statement concerning third party intentions could be based on conversation with the third party (double hearsay) or a fourth party relaying the third party's intentions (triple hearsay), or pure speculation (see lay opinion evidence). Therefore, generally inadmissible, subject to exceptions. {Starr}

    b. Statement tendered to show intention of declarant only

        i. Statements of intention, which refer to intentions of persons other than the declarant, may be admissible if the trial judge clearly restricts their use to proving the declarant's intentions, and if it is more probative than prejudicial.

    c. *Statement tendered to show intention of third party*

i. *Double / triple hearsay* - in the case of multiple levels of hearsay, if an exception can be satisfied at each level, the statement may be admissible; {Starr}

ii. *Declarant qualified to comment* - where the Crown can establish that the declarant was otherwise "qualified" to comment on the appellant's intentions. {Starr}

iii. *Third party aware of statements* - where the third party was aware of the statements sought to be adduced, inference of the third party's state of mind may be drawn (not from the content of the statements, but from the third party's reaction to the statements). {Starr}

iv. Excited utterances

1. *Overview* - statement relating to a startling event may be admitted for truth of contents if the declarant was under the stress of excitement cause by the event at the time of the utterance. Previously suffered from a "transaction" requirement, now focus on whether the possibility of concoction can be disregarded.

   a. eg. 9-11 call admitted for truth of contents as *res gestae* following sexual assault; ten minutes after the attack.

   b. For instance, previous regime excluded a statement made by a woman who ran out of a house shortly after having her throat cut. {Bedingfield}

2. *Requirements*

   a. *Concoction disregarded* - must be satisfied that the statement was made in circumstances of spontaneity such that the possibility of concoction can be disregarded. Temporality, and whether statements made in response to questions are valid considerations.

      i. For instance, a 9-11 call made in a hysterical tone of voice capable of showing that the statement was forced by the pressure of the event it describes. {Ratten}

   b. *Mind dominated* - must be satisfied that the events were such that they would startle or dominate the mind of the victim, leading to utterances which are instinctive and not calculated. {Clark}

      i. For instance, circumstances of stress caused by physical shock may overwhelm the reflective faculties, as where a person yells "I've been stabbed". {Clark}

14. Prior inconsistent statements

a. *Overview* - effectively an articulation of the principled approach, with special requirements concerning necessity and reliability. {KGB}

b. *Sources of prior inconsistent statements* - sworn statements made by the witness to the police or testimony by the witness at a preliminary hearing are useful sources of prior inconsistent statements; in civil cases, transcript of the party's examination for discovery is a useful source.

c. *Requirements*

i. *Threshold requirement* - prior inconsistent statements will only be admissible if they would have been admissible as the witness's sole testimony. That is, if the witness could not have made the statement at trial, it cannot be made through the back door. {KGB}

1. For instance, if the statement was "I saw X fire the gun," admissible; if it was "Y told me that X fired the gun," inadmissible as hearsay; if it was "Y told me that he fired the gun," admissible as hearsay via the party admissions exception. {KGB}

ii. *Reliability* - comparative reliability of the prior statement and the testimony offered at trial, and so additional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured:

1. *Oath* - or other circumstances which impress upon declarant the importance of telling the truth. will not motivate all witnesses to tell the truth, yet may impress on honest witnesses the seriousness of their statements. Also precludes TOF from having to choose between sworn and unsworn testimony. {KGB}

2. *Warning* - declarants must be made aware, through warning, of exposure to prosecution for giving false statement, referring specifically to ss. 137, 139, 140 of the Criminal Code, including elements and sanctions of those offences. Gives meaning to the oath (absent divine retribution). {KGB}

3. *Videotaped in full* - there are many verbal / non-verbal cues which are essential to credibility assessment, which are lost when witness is not on the stand. The audio-visual medium captures these elements, although exceptionally an independent third party could also do so. Therefore, must either be a videotape of prior inconsistent statement, *or sufficient substitute* which fulfills the "presence" hearsay danger. {KGB}

4. *Cross-examination at trial* - easily remedied where there is a full opportunity to cross-examine the witness on the statement at trial; there would often not have been a chance for contemporaneous cross-examination in any case (eg. would not be cross-examining witnesses in a police interview room before the accused has even been charged). {KGB}

iii.*Necessity – in the case of prior inconsistent* statements it is patent that we cannot expect to get evidence of the same value from the recanting witness or other sources; value is different because the statement has radically changed, and therefore the TOF should have the opportunity to weigh both. {KGB}

d. *Procedure for KGB application*

i. *Own witness or other party's witness* – If the party seeking to adduce a prior inconsistent statement of a witness is the party that produced the witness, s. 9 of the *CEA* must be satisfied (see impeaching own witness under credibility-impeaching evidence). {KGB}

ii. *Use of statement* - if the party indicates that it wishes to use the statement only to impeach the credibility of the witness, that is the end of the matter (subject to limitations, see impeaching credibility -> cross-examination) Alternatively, if party gives notice that it will seek to make substantive use of the statement, the trial judge must continue the voir dire to: {KGB}

1. Determine whether the oath and warning will be proved; {KGB}

2. Tender the videotape into evidence, its authenticity being sworn to. {KGB}

iii. *Standard to be met* - TJ must be satisfied that the statement was not the product of coercion of any form: threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other investigatory misconduct. {KGB}

iv. *Burden of proof* - the burden is on the party calling evidence on BOP, except for where the statement reports an admission made by the accused to a person in authority (higher burden for confessions applies). {KGB}

15. Principled exception

a. *Overview* - pigeonhole approach provided a degree of certainty to hearsay, but has frequently proved unduly inflexible. Should be replaced with necessity and reliability requirements. {Khan}

b. *Purpose* - categorical approach to exceptions has the potential to undermine, rather than further, the policy of avoiding the frailties of certain types of evidence.

c. Requirements

i. *Necessity* - reasonably necessary" for a party to prove a fact in issue, as evidence of the same value cannot be gained from the same or other sources. {Smith} Inadmissibility of other evidence, or traumatic experience of having to testify would establish necessity. {Khan}

1. Witness ruled *incompetent to testify,* and so there were no other means of adducing the evidence {Khan}; witness *deceased* {Smith};

2. *Reasonable efforts to secure* – in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party. {Khelawon}

ii. *Reliability* - et where there are circumstantial guarantees of trustworthiness; {Smith} factors might include timing, demeanour, absence of any reason to expect fabrication.{Khan}

1. *Conditions of honesty* – the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed; {Smith}

2. *Danger of detection and punishment* - even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force; {Smith}

3. *Publicity* – the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected. {Smith}

4. *Motive to lie* – absence of this is a relevant factor in admitting evidence under the principled approach. Conversely, the presence of a motive to lie may be grounds for exclusion of evidence under the principled approach. {Starr}

5. *Strikingly similar statements from multiple complainants* – would not reject the possibility

that the presence of a striking similarity between statements from multiple different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case. {Khelawon}

6. *Examples* - in *Khan*, the statement was reliable as it was made without hope of benefit, and doubtful that child would have knowledge of sexual events unless the contents of the statement were true. In *Smith*, one of the phone calls was not reliable as circumstances indicated that the declarant had not verified her statement, and further had a motive to lie.

Is the evidence adduced for an allowable purpose?

10. Accused's right to silence (post-offence)

a. *Overview* - similar to the accused's right not to testify, the *Charter* extends the right to remain silent in the face of state questioning. Therefore, no permissible adverse inference may be drawn from the refusal of the accused to provide information to the police. {Turcotte} (see also competence -> accused's right to silence)

b. *Partial waiver* - right to silence can be selectively waived; merely because some information has been revealed does not mean that D. is required to reveal all information. {Turcotte}

c. *Jury instruction* - where evidence of silence is admitted, juries must be instructed about the proper purpose for which the evidence was admitted, the impermissible inferences which must not be drawn from evidence of silence, the limited probative value of silence, and the dangers of relying on such evidence. {Turcotte}

d. *Cross examination* – it would constitute a violation of section 7 right to silence to cross-examine an accused on the exercise of the right to silence in the face of police questioning. {Singh}

11. Credibility-bolstering evidence

a. *Overview* - while accrediting questions are allowable, party *may not* lead evidence of a witness' credibility where this only shows that the witness is a "truthful person." Similarly, evidence of credibility provided by other witnesses is also not allowed. Such evidence is also called "oath helping." {Kyselka}

b. *Prior consistent statements* - where the credibility-bolstering evidence consists of a prior consistent statement, a separate analysis applies (dealing with rebuttal of recent fabrication). See out of court statements / prior consistent statements below.

c. *Purpose* – issues with oath helping are that no limit could be placed on number of witnesses, and the possibility that this could become a distracting side issue; exceptions allow for evidence to be admitted where these factors can be controlled. {Kyselka}

d. Exceptions to the rule against evidence bolstering credibility

i. Accrediting questions

1. *Overview* - standard introductory questioning is allowable; for instance, how long the accused has lived in the community, been employed, etc. {Kyselka}

ii. Expert evidence for factors beyond common understanding

1. *Overview* – expert evidence concerning credibility may be required where this would not be within the understanding of the ordinary person. This is *subject to the usual requirements of expert evidence* (eg. outside of common understanding: see opinion evidence), as well as additional limitations:

2. *Application*

    a. *Must not usurp TOF or be conclusory* - ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion. This is a danger because expert opinions may be based on information not in evidence, and might be too easily accepted due to the difficulty in assessing credibility. {Marquard}

    b. *Must be limited to psychological or other factors* - expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility is admissible. {Marquard}

    c. *Must be a limiting instruction concerning use of such evidence* - the jury must be carefully instructed as to its function and duty in making the final decision without being unduly influenced by the expert nature of the evidence. {Marquard}

    d. *Must not rebut "recent complaint" allegation* – as s. 275 of the *Criminal Code* precludes adverse inference drawn against sex assault complainants because of delay in disclosure / reporting, *this is a matter of law.* Instead of expert evidence, dealt with through a jury instruction. Expert evidence on legal issues is inadmissible. {D.(D.)}

iii.Defence evidence of accused's good character or reputation for veracity

1. *Overview* – in a criminal trial, the defence can lead evidence of the accused's reputation for veracity and *general good character*, although having put character in issue this allows the Crown to introduce rebuttal evidence of the accused's bad character. {Clarke}

2. *Conclusory statements concerning truth under oath* – the defence cannot adduce witnesses who will testify that they would believe the accused under oath unless other witnesses have testified that they would *not* believe the accused under oath; effectively, this is now a rebuttal of a poor credibility allegation - see below. {Clarke}

3. *Jury instruction* - where reputation evidence as to the credibility of a witness is admitted, the jury instruction must include two points: {Clarke}

    a. Testifying in court under oath is a very different circumstance than reputation in the community; {Clarke}

    b. Character witnesses have not heard all the evidence, and are not sworn to the heavy duty of the juror to render a true verdict. {Clarke}

iv.Rebuttal of poor credibility allegation

1. *Overview* – where the credibility of a witness has been attacked, the party can adduce evidence in rebuttal to establish the witness' good character or reputation for veracity. Such evidence is of limited probative value and is adduced infrequently. {Clarke}

2. *Conclusory statements concerning truth under oath* – in reply, after the witness' credibility has been

attacked by other witnesses testifying that they would not believe the witness under oath, the party calling the witness whose credit has been impeached may call other witnesses to vouch for the oath. {Clarke}

3. *Jury instruction* - where reputation evidence as to the credibility of a witness is admitted, the jury instruction must include two points: {Clarke}

   a. Testifying in court under oath is a very different circumstance than reputation in the community; {Clarke}

   b. Character witnesses have not heard all the evidence, and are not sworn to the heavy duty of the juror to render a true verdict. {Clarke}

12. *Credibility-impeaching evidence*

a. Collateral facts bar

i. *Overview* - on matters not material to triable issues, counsel may be "stuck" with a witness' answer. The general rule is that matters relevant *only* to witness credibility, without any other connection to the facts in issue, are inadmissible. {Melnichuk}

1. For instance, a case of bank robbery: whether the accused was also unfaithful to their spouse (while indicative of dishonesty) is a collateral issue. If counsel knows that the accused had cheated, but the accused denies this on the stand, counsel will be barred from calling evidence concerning whether the accused actually did cheat.

ii. *Exceptions to the rule against collateral facts*

1. *Overview* - counsel may ask witness as to any fact *material to the issue*. If denied it, counsel may prove the fact. However, a witness may only be contradicted on matters capable of being distinctly given in evidence. {Hitchcock}

   a. Material issues

      i. *Overview* - facts relevant to material issues in the case are admissible; they are simply not collateral facts. {Wigmore}

         1. For instance, witness's evidence was capable of advancing the assertion that the niece had mischaracterized the D. as being of a violent temperament. {Prebtani}

   b. Discrediting via testimonial quality

      i. *Overview* - facts relevant to discrediting a witness which would otherwise be receivable for the purpose of impeaching some specific testimonial quality (*criminal record, bias, testimonial factors*). {Wigmore}

   c. Crucial transaction

      i. *Overview* - facts which prove untrue some fact recited by the witness that if he were really there and saw what he claims to have seen, he could not have been mistaken about. {McCormick}

d. Prior inconsistent statements

i. *Overview* – allowable where a proper foundation has been laid (see hearsay->prior inconsistent statements, also cross-examination below).

e. Medical evidence

i. *Overview* – which proves by reason of mental or physical condition that the witness will have reliability issues (see psychological abnormality).

f. *General reputation for untruthfulness*

i. *Overview* - independent evidence that the witness has a reputation of untruthfulness (see bad reputation for veracity).

b. Impeaching credibility of other party's witness

i. Expert evidence of psychological abnormality affecting reliability

1. *Overview* – medical evidence is admissible to show that a witness suffers from some abnormality of mind that affects the reliability of his evidence. Not confined to an opinion of unreliability but also reasons for this opinion, and the extent to which the credibility of the witness is affected. {Toohey}

2. *Purpose* - if a witness purported to give evidence of something which seen at a distance of fifty yards, it must surely be possible to call an oculist to the effect that the witness could not possibly see anything at a greater distance than twenty yards. Ergo, same applicable to defects of mind. {Toohey}

3. *Limitation* - must meet the standards for expert opinion evidence (see opinion evidence). Where the trier of fact would be able to assess the witness's credibility without expert assistance, an expert's evidence is inadmissible. For instance, psychiatrist will not be permitted to testify regarding the reliability of a witness, where he has based his assessment primarily on his observation of her testimony, and acknowledges that her character flaws would be evident to, and assessable by, the trier of fact. {French}

ii. Bad reputation for veracity

1. Overview – Gonzague set out a procedure for adducing evidence of a Crown witness' poor reputation for veracity in the community. However, this has since been modified by ONCA in *Clarke.*

a. The procedure *was* as follows:

i. Do you know the reputation of the witness as to truth and veracity in the community in which the witness resides? If the answer is "yes" the questioning proceeds.

ii. Is that reputation good or bad? If the answer is "bad" a final question is permitted.

iii. From that reputation, would you believe the witness on oath?

1. Prejudicial effect of the answer to the third question (belief on oath) will almost invariably

substantially outweigh its probative value. {Clarke}

b. Limitations - reflect the fact that there is a danger of usurpation of the function of the TOF where evidence of bad credibility is conclusory. {Clarke}

i. First two Gonzague questions - judge has limited discretion to prevent first two questions, though this will be an "extremely rare case." Can also limit the number of witnesses that may be called for this purpose. {Clarke}

ii. Third Gonzague question - however, *only rarely should the third question be permitted.* There is also discretion to exclude a conclusory statement by an expert where the opinion can be framed in less conclusory terms. {Clarke}

iii. Jury instruction - where reputation evidence as to the credibility of a witness is admitted, the jury instruction must include two points: {Clarke}

1. Testifying in court under oath is a very different circumstance than reputation in the community; {Clarke}

2. Character witnesses have not heard all the evidence, and are not sworn to the heavy duty of the juror to render a true verdict. {Clarke}

iii. Cross-examination

1. *Cross-examination on prior statements*

a. *Overview* - if the statement sought is to be adduced for truth of contents, see hearsay exception (if substantively admissible, then witness may of course be cross-examined on it).

b. Statutory allowances

i. *BCEA*

1. *Cross-examination* - s. 13(1) allows for cross-examination on prior statements in writing, without writing being shown to the witness; however, in order to contradict witness, must call attention to the parts of the writing to be used to contradict under s. 13(2). Judge may require production of writing s. 13(3).

2. *Proving statement* - s. 14(1) allows for statement to be proved, whether oral or in writing, where witness does not explicitly admit to making that statement; however, must draw attention to the circumstances of the prior statement, and ask whether it was made, under s. 14(2).

ii. *CEA*

1. Cross-examination - s. 10(1) allows for cross-examination on previous statements in writing or otherwise recorded,or orally under s. 11; attention must be drawn to the statement, portions which are contradictory, etc. Matches BCEA provisions.

2. *Cross-examination of accused on veracity of Crown witnesses*

a. *Overview* - asking the accused about the veracity of a Crown witness has long been considered improper. The accused's opinion is irrelevant and the questioning could prejudice her and render the trial unfair. {Ellard}

b. *Purpose* - Shifts the burden of proof from the Crown to the accused, and could induce the witnesses to wrongly convict as a result; focus must be on whether Crown has met its case. Runs afoul of presumption of innocence (11(d)). {Ellard}

3. *Obligation to cross-examine before impeaching*

a. *Overview* - where it is intended to suggest that a witness is not speaking the truth on a point, the witness' attention must be drawn to that fact by questioning in cross-examination - the rule from *Browne v. Dunn*. Must give a witness an opportunity of making any explanation when impeachment is intended. Where *Browne v. Dunn* is not met (inexhaustive): {McNeill}

i. *Witness able to be recalled* - if the witness is able to be recalled, and the TJ is satisfied that recall is appropriate, the aggrieved party can either take up the opportunity or decline it. if the opportunity is declined, then no special instruction to the jury is required. {McNeill}

ii. *Witness not able to be recalled* - where it is impossible or impractical to have the witness recalled, or TJ holds that recall is inappropriate, the TJ has discretion to determine whether a special instruction should be given to the jury. {McNeill}

1. If the instruction is warranted, the jury should be told that the opposing witness was not given the opportunity to explain evidence which contradicts their testimony; this may also be taken into account in assessing the evidence of the opposing witness. {McNeill}

iv.Prior convictions of witness (including accused if testifying) – s. 12 of the CEA / s. 15 of the BCEA

1. *Overview* - witness's prior convictions are admissible only for the purpose of undermining his or her credibility, on the theory that a person who has committed a criminal offence is less likely to be a truthful person than a person who has not. Governed by s. 12 of the *CEA* (SEE ALSO: s. 666 of the *Criminal Code*, where *character* rather than credibility is at issue, AND prior convictions as exception to rule against hearsay).

2. *Distinction from other forms of impeachment* - cross-examination on prior convictions is inferential, in that it does not directly establish unreliability; unlike cross-examination on prior inconsistent statements, which provides direct indication of witness unreliability. {Morris}

3. *Juvenile convictions* - the accused (and presumably, other witnesses) can be cross-examined on prior juvenile convictions. {Morris}

a. Notwithstanding dissent of Laskin CJC, Dickson, Estey) that juvenile courts at the time had no power to enter convictions under *Juvenile Delinquents Act*. The majority held that there was no reason that the evidence of former juvenile delinquents should go unchallenged, despite Parliamentary intent that such persons be treated non-criminally. {Morris}

4. *Proving a conviction* - under s. 12(2) of the *CEA*, the party seeking to prove a conviction must prove identity (eg. that the record adduced refers is the record of the accused). Further, the conviction may be proved by by:

a. *Indictable offence* - adducing a certificate with the substance and effect (omitting the formal part) of the indictment or conviction, under s. 12(2)(a); or,

b. *Summary conviction* - a copy of the conviction purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction was entered, under s. 12(2)(b).

c. Similarly, see s. 15(1) of the BCEA - questioned as to existence of conviction, then if not admitted, may prove through signed certificate.

5. *Requirements* – s. 12(1) holds that witnesses may be questioned about any prior convictions, *except* for *summary* convictions under the *Contraventions Act* (indictables are *not* exempt, however).

a. *Purpose* - admissible only for the purpose of undermining credibility on the theory that a person who has committed a criminal offence is less likely to be a truthful person than a person who has not. TOF entitled to infer that an accused with a criminal record, like any other witness with a criminal record is, for that reason, less credible than a witness without a criminal record. {*Corbett}*

b. *Convictions of a witness other than the accused* – all witnesses other than the accused are subject to the allowance in s. 12 of the *CEA.*

c. *Convictions of the accused* - the accused is subject to the allowance in s. 12 of the *CEA if he or she chooses to testify*. Can nevertheless be excluded if more prejudicial than probative. {Corbett}

i. Allowable whether the accused is testifying in-chief or on cross. {St Pierre} Subject to limitations:

1. *No details of conviction* – the Crown is entitled to ask for the name of the crime, the substance and effect of the indictment, the place of the conviction and the penalty, but is *not entitled* to cross-examine the accused about the details of the offences. {Laurier}

2. *No discreditable associations or other misconduct* – accused may not be cross-examined with respect to misconduct or discreditable associations unrelated to the charge on which he is being tried, whether to establish "bad character" or unreliability. {Morris}

3. *No questions re: whether accused has testified on own behalf in previous convictions* - accused cannot be cross-examined as to whether he testified on the prior occasion when convicted in order to show that he is one who was not believed by a jury on a previous occasion. {Corbett}

4. *Can cross on conduct introduced in-chief* - s. 12 of the *CEA* was not intended to restrict the scope of cross-examination as to credit or otherwise and ought not therefore to be so construed as to prevent cross-examination on a matter that has been opened up by the examination-in- chief of the witness, be he the accused. {Morris}

5. *Convictions are strictly construed* - there can be no cross-examination where the accused was found guilty and granted a conditional discharge, conditions subsequently having been fulfilled. {Corbett}

ii. *Probative value versus prejudicial effect* - the probative value and prejudicial effect of a previous conviction are directly affected by the nature of that conviction. The touchstone

of all these factors is the fairness of the proceedings (to both the Crown and the accused). {Corbett}^

1. *Relevance to credibility* - acts of deceit are universally regarded as conduct which reflects adversely on honesty. Acts of violence generally have little or no direct bearing on honesty, however. {Corbett}^

    a. Convictions for theft and breaking and entering, though quite remote in time, would appear far more probative of a disposition for dishonesty than a conviction for murder.

2. *Similarity of conduct* - more similar the offence to which the previous conviction relates to the present impugned conduct, the greater the prejudice. For same crime, discretion should be exercised to limit the impeachment by way of a similar crime to a single conviction and then only where circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity. {Corbett}^

3. *Remoteness or nearness of the previous conviction* - also as the court in *Gordon*, *supra*, stated, "a factor of no small importance." As remoteness decreases, probative value increases. {Corbett}^

c. Impeaching credibility of own witness: adverse & hostile witnesses

i. Overview - not uncommonly, the evidence that a witness gives will be unfavourable to the party who called the witness, and the party will have in its possession a prior statement of the witness that is more favourable.

ii. Prior inconsistent statements used to undermine credibility - such statements adduced through s. 9 of the *CEA* or through the common law rule are *not* admissible for the truth of their contents. They would have to also be admitted through an exception to the rule against hearsay to be substantively admissible.

iii.Hostile witnesses: common law rule

1. Overview - witness who is found to be "hostile" to the party calling the witness may be cross-examined with a view to discrediting his or her testimony (in favour of a prior statement which is more beneficial to that party, for instance), though the witness's character may not be attacked.

iv.Adverse witnesses (statutory rule)

1. Meaning of adversity - more comprehensive of hostility; hostile witnesses are always adverse, though adverse witnesses are not always hostile. Adverse means opposition in interest, or unfavourable in the sense of opposite in position. {Wawanesa}

2. Impeaching own witness - s. 9(1) of the CEA

a. Overview - allows the party proffering a witness to contradict that witness through other evidence, or through a prior inconsistent statement where the witness is adverse and other requirements are met. {Milgaard}

b. Requirements

i. General contradictory evidence - notwithstanding adversity, the party producing a witness may

put contradictory evidence (*other than a prior inconsistent statement*) to that witness in order to impeach credibility. {Wawanesa}

ii. Prior inconsistent statements - for a party to prove a prior inconsistent statement of its own witness and put that statement to the witness, requirements must be fulfilled:

1. Finding of adversity;

2. Leave of the court;

3. Description of the circumstances in which the prior statement was given to the witness (presumably, to jog their memory); must also ask whether or not the witness made that statement.

a. See also: s. 16(1),(2) of the BCEA, essentially the same procedure.

iii.Evidence of bad character prohibited - regardless of whether the witness is adverse, the proffering party is prohibited from impeaching that witness through evidence of general bad character.

1. Similarly barred under s. 16(1) of the BCEA.

3. Cross-examining own witness - s. 9(2) of the CEA

a. Overview - allows the party proffering a witness to cross-examine that witness, *notwithstanding whether that witness is adverse*, *on a prior inconsistent statement.* A right which exists independently of the right to impeach credibility of adverse witnesses under s. 9(1). {Milgaard}

b. Requirements

i. Leave required - the Court must grant leave before cross-examination under s. 9(2) is permissible.

ii. Statement must only have been made previously - the section is broad, and allows for statements that have been recorded, written, or otherwise, to be put to the witness on cross.

iii.Statement used in adversity finding - the cross-examination of the witness may be used to determine whether a witness is adverse for the purposes of s. 9(1).

c. Procedure for s. 9(2) voir dire {Milgaard}

i. Application made, jury retired- Counsel should advise the court that he desires to make an application under s. 9(2) of the Canada Evidence Act. When the court is so advised, the court should direct the jury to retire.

ii. Particulars of application heard - upon retirement of the jury, particulars of the application heard, and alleged statement produced in writing, or the writing to which the statement has been reduced.

iii.Reading of statement for inconsistency - TJ should read the statement, and determine whether there is an inconsistency between it and the evidence the witness has given in court. If no

inconsistency, then that ends the matter. Alternatively, TJ should call upon counsel to prove the statement or writing.

iv. Statement proved in writing - this may be done by producing the statement or writing to the witness. If the witness admits the statement, or the statement reduced to writing, such proof would be sufficient. Otherwise, necessary proof provided by other evidence.

v. Right of cross-examination granted - if the witness admits making the statements, counsel for the opposing party should have the right to cross-examine as to the circumstances under which the statement was made. A similar right to cross-examine should be granted if the statement is proved by other witnesses. Opposing counsel may also call evidence as to factors relevant to obtaining the statement, for the purpose of attempting to show that cross-examination should not be permitted.

vi. Ruling rendered - TJ should then decide whether or not he will permit the cross- examination. If so, the jury should be recalled for the cross-examination.

13. <u>Character evidence</u>

a. *Overview* – character is defined as one's propensity or disposition to act in a certain manner.

b. *Distinct from habit* - character relates to deeper behaviour traits; a habit is the person's *regular* practice of responding to a *particular* kind of situation with a *specific* type of conduct; involves a repeated and specific response to a particular situation - *infers conduct from conduct*. Character is the behavioural manifestation of personal traits - *infers conduct from state of mind.* {Watson}

   i. *Admissibility of habit evidence* - where a person's conduct in given circumstances is in issue, evidence that the person repeatedly acted in a certain way when those circumstances arose in the past has been received as circumstantial evidence that the person acted in conformity with past practice on the occasion in question. {Watson}

c. *Character evidence as direct evidence* - there are occasions where character is part of a cause of action – for instance, character is the subject of a dangerous offender application under s. 753 of the *Criminal Code*. Not governed by any special rules of admissibility.

d. *Character evidence as circumstantial evidence* – character evidence is nearly always circumstantial in nature, as it posits a characteristic (eg.dishonesty), and then asks the TOF to infer from that characteristic that the accused carried out the offence charged. Generally inadmissible, but subject to narrow exceptions.

e. *Distinct from prior conviction evidence* - while bad character evidence *may include prior convictions*, this is separate from admission of prior convictions in circumstances where the accused testifies *for the purpose of undermining credibility*, which is allowable in some circumstances (see credibility-undermining evidence).

f. Adducing evidence of character of witnesses other than the accused

   i. *Overview* - ordinary witnesses may be cross-examined on past misconduct in order to show that they are not credible (see credibility-undermining evidence, collateral facts bar). An accused may not be so questioned unless character is put at issue. {McNamara}

   ii. Evidence of alternate suspect's bad character

1. *Overview* - defence is entitled to prove, by direct or circumstantial evidence, that another person committed the crime charged as a full defence to the accusation. Policy reasons concerning character evidence of the accused do not apply to an alternate suspect. Extends to expert evidence as well. {McMillan}

2. *Purpose* - the disposition of a person to do a certain act is relevant to indicate the probability of his having done or not having done the act. While policy precludes this evidence against the accused, it does not do so against third parties. {Scopelitti}

3. *Application*

    a. *Relevancy* - must logically advance some fact material to live issues at trial, eg. whether the alternate suspect was more likely to have committed the crime than the accused. {McMillan}

    b. *Sufficient nexus* – suspect must be connected by other circumstances with the crime charged to give the proffered evidence some probative value - more than speculation. {Grandinetti}

    c. *Probative value* - in order to fulfill the purpose for which it is adduced, the alternate suspect must be sufficiently connected by other circumstances with the crime charged - otherwise the evidence has no probative value. {McMillan}

        i. For example, in *McMillan* the alternate suspect had motive and opportunity to kill her daughter; sufficient independent evidence linking her to the crime. {McMillan}

    d. *Alternate suspect can be a witness* - the alternate suspect can be a defence witness or a Crown witness; neither circumstances precludes tendering evidence of that person's abnormal personality, where relevant. {McMillan}

    e. *Expert evidence allowable* - even where the crime considered is not one which suggests that it only could have been committed by persons with abnormal propensity, expert evidence concerning the abnormality is nevertheless admissible. {McMillan}

    f. *Puts character at issue* – having introduced character evidence to show that it was more probable that the alternate suspect committed the crime *because the accused lacked that suspect's dangerous characteristics*, the accused loses protection against having own mental makeup revealed to the jury. {McMillan}

iii.Evidence of victim's bad character

1. *Overview* - as with evidence concerning third party suspects, disposition of a person to do a certain act is relevant to indicate the probability of his having done or not having done the act. While policy precludes this evidence against the accused, it does not do so against third parties.{Scopelitti}

2. *Not just self-defence* - There is no rule limiting prior misconduct by the deceased to cases in which self-defence is raised. {Watson}

3. *Prejudicial effect* - whether, absent the impugned evidence, the record would not have suggested that the deceased was a person of bad character is a relevant consideration; further, there is a danger that the jury may conclude that the victim got what they deserved if character besmirched. {Watson}

4. *Sexual assault* - s. 276 of the *Criminal Code*, so-called "rape shield", prohibit the use of the sexual history of the complainant by the accused in a sex assault proceeding against "twin myths" (eg. "loose" women more likely to have consented, or less likely to be credible). {Darrach}

    a. *Allowance* - however, the sexual history of the complainant is admissible for any material reason other than the twin myths, though must still have "significant" probative value outweighing its prejudicial effect as per s. 276(2). {Darrach}

5. *Self-defence* - in homicide cases where self-defence is asserted by the accused, evidence of the victim's bad character, specifically relating to the predilection for violence, may be both relevant and probative: {Scopelitti}

    a. *Violent acts and reputation of deceased which are known to the accused* - evidence concerning acts or reputation of which the accused is aware is relevant to the subjective analysis required in self-defence, namely whether the accused reasonably apprehended harm. {Scopelitti}

    b. *Violent acts and reputation of deceased which are not known to the accused* – evidence is relevant to the objective analysis, namely whether the deceased was in fact the aggressor. The reputation for violence is probative to the probabilities of the deceased's actions.

        i. *Precondition to admissibility* - existence of some other appreciable evidence of the deceased's aggression on the occasion in question. This may emanate from the accused. {Scopelitti}

g. Adducing evidence of the accused's character

i. *Overview* – in a criminal proceeding, the prosecution is barred from leading any evidence relating to the propensity of the accused *unless* the accused has *put his character in issue.* If the evidence *of the defence* invites the jury to draw an inference of innocence based on good character, then character is in issue. It is therefore open to the Crown to rebut this with evidence of bad character. {McNamara}

ii. *Overarching principle* - evidence which suggests propensity, but is also relevant to another issue will be must be weighed for probative/prejudicial value. The auto-exclusion rule only applies where the evidence *solely* goes to disposition. {Morris}

1. In dissent, Lamer held that the only relevance of a newspaper clipping concerning heroin trade was to show that traffickers are more likely to be interested and possess such a clipping than non-traffickers; therefore, solely relevant to disposition, and inadmissible. {Morris}

iii. *Purpose of limitation* – to allow the Crown to broach the issue of character without the defence putting this at issue would be to expose the accused's entire life to scrutiny; this could lead to convictions based on prejudice rather than the evidence. {McNamara}

iv. Evidence of accused's good character adduced by defence

1. *Means of adducing character evidence*

    a. Adducing evidence of accused's good reputation through other witnesses (extrinsic)

        i. *Overview* - previously, could only relate to "general reputation in the community." However, this restriction is outmoded. Modern persons live in many isolated spheres, and may have a different reputation for different reasons in each sphere. {Levasseur}

ii. *Purpose* - the law desires an accurate understanding of the accused's reputation from such evidence; if that can be found elsewhere other than within the limitations prescribed by the old rule, then such evidence should be admissible. Therefore, not "general community" but rather any specific group of persons that have intimate knowledge of the accused. {Levasseur}

iii. *Limitations of reputation evidence* - many crimes will be committed and shrouded in secrecy. Therefore, flaws in the character of the perpetrator may not come to light until a conviction has been rendered. Probative value of reputation for morality is circumscribed; should be considered by TOF. {Profit}

b. Testifying as to one's own good character (intrinsic)

i. *Overview* - the accused is entitled to expressly or impliedly assert good character. However, this cannot be disguised as repudiation of guilt. To assert or imply that one is innocent due to one's disposition is to put character in issue. {McNamara}

ii. *Not limited to general reputation* - through own testimony, the accused is entitled to adduce both evidence of general reputation and specific good acts from which an inference of good character can be drawn, unlike extrinsic evidence. {McNamara}

iii. *Requirements*

1. *More than mere denial of guilt* - accused does not put his character in issue by denying guilt or repudiating allegations, or by explaining matters essential to defence. {McNamara}

2. *Introductory questions exempt* - basic questions concerning place of residence, employment, marital status, etc. do not put character into issue. {McNamara}

3. *Assertion of clean record* - stating that one has never been convicted or arrested does put one's character at issue; this projects an image of a "law abiding citizen" who would not be disposed to commit the crime alleged. {McNamara}

4. *Specific "good acts"* - evidence of specific "good acts" may also put character at issue – for instance, recounting instances where one has returned lost property to its owner. {McNamara}

c. Expert evidence concerning character of the accused

i. *Overview* – two types of reasoning at play:

1. *Classic* - abnormal crime could only have been committed by person with certain abnormal characteristics; accused claims not to have those characteristics; {Robertson}

2. *Alternate* - normal crime could not have been committed by person with certain abnormal characteristics; accused claims to have those characteristics; {McMillan}

ii. *Requirements* – whether the case fits the requirements below is a matter for the judge. Whether the crime or the accused is categorized as normal or abnormal will be determined by the judge. {Mohan}

1. *Distinctive features of crime and perpetrator, or accused* - the offence has distinctive features which identify the perpetrator as having unusual personality traits associated with a limited class of persons; {Robertson}

    a. *Ordinary crimes not applicable* – where the crime is an ordinary crime of violence, there are no special traits associated with a limited class of persons linked to the crime. {Robertson}

        i. However, accused may yet have abnormal traits which are incompatible with that normal crime; therefore, this is not an absolute bar to admissibility. {McMillan}

    b. *Brutality not sufficient* - even where the crime is one of great brutality, it cannot be said that it would only be committed by a person with recognizable personality traits belying brutality. {Robertson}

    c. *Scientific data should support distinctiveness* - where there is no scientific data to support the conclusion that the perpetrator is a member of a more limited class, the evidence should not be heard. {Mohan}

2. *Materiality* - a comparison of crime to perpetrator must be of material assistance in determining guilt. {Mohan}

3. *Beyond common understanding* - the group is specialized and extraordinary, their characteristics falling within the realm of the expert (beyond common understanding). {Robertson}

    a. *Mere disposition to violence not applicable* – expert evidence concerning a mere disposition to violence or lack thereof is not admissible; not so uncommon so as to justify admission. {Robertson}

4. *Accused's membership* – the evidence tends to show that the accused is (or is not) a member of that limited class of persons. {Robertson}

5. *Any other pertinent requirement of expert evidence* - (see expert evidence).

v. *Evidence of accused's bad character adduced by prosecution*

1. *Limited use of Crown character evidence* – where the only avenue of admissibility of evidence of bad character (eg. no other exceptions apply) is to rebut the accused's evidence of good character, the evidence has a limited use: to refute the claim of good character. *Cannot be used to show propensity to commit the offence.* {McNamara}

2. *Central requirement* - character *must* be at issue. Also, following *Rowton*, the nature of reply evidence should be tempered by the nature of the good character evidence it serves to rebut - however, this is no longer a strict requirement.

3. *Means of adducing character evidence*

    a. Cross-examination generally (common law)

        i. *Overview* – consider the Crown's cross examination in *McNamara*, in which evidence of a

prior transaction resulting in a conviction was put to the witness, and deemed admissible. {McNamara}

ii. *Limitation* - the Crown cannot lead witnesses, in cross-examination, into giving character evidence concerning the accused notwithstanding the wish of defence counsel to avoid putting character in issue, and then use this as justification for adducing reply evidence.

b. Cross-examination on prior convictions (statutory via Criminal Code s. 666)

i. *Overview* – this section of the *Code* holds that where the accused has put character at issue during in-chief, the Crown may adduce previous convictions of the accused *for any offence*. Not subject to *Corbett* limitations. Accused may also be questioned *about the specifics* underlying the convictions.

c. Reply witnesses, including experts

i. *Overview* - per *Rowton*, the Crown is able to call witnesses to rebut allegations of good character put forth by the defence. {Rowton}

ii. *Includes expert witnesses* - the requirements are essentially the same as with defence experts concerning the character of the accused, but with the requirements that:

1. *Character at issue* - if the evidence is adduced by the Crown, the character of the accused must have been put into issue by the accused, and the accused must be laying claim to or denying membership in the relevant limited class. {Robertson}

2. *Relevance other than propensity* - if expert evidence is relevant to another issue (eg. identity, or to rebut accused's allegation of good character), it must then be determined whether its probative value on that other issue outweighs its prejudicial effect on the propensity question. Probative value increases with the distinctiveness and rarity of the features or tendencies at issue. {*Morin*}

d. Similar fact evidence

i. *Overview* - the Crown may adduce similar fact evidence in rebuttal of evidence of good character; {McNamara} this is separate from the use of similar fact evidence in order to support an inference that the accused is guilty (see similar fact evidence, below).

14. <u>*Similar fact evidence*</u>

a. *Overview* - allows for evidence of accused's prior bad acts to be admissible *only where these acts tend to establish* that the accused is *the very person* who committed the act charged; the evidence *must not merely* establish that the accused is the *type* of person who committed the act charged. The probative value of the former must be weighed against the prejudicial effect of the latter. {Sweitzer}

i. Also admissible in civil cases if logically probative, and not oppressive or unfair, or adduced without notice. {Mood Music}

b. *Distinction from character evidence* - while similar fact evidence may tend to show a disposition, and thereby support the inference that the accused is guilty as a result of that disposition, it is not adduced *solely* for this purpose. This is analogous to the use of character evidence in order to *rebut* an allegation of good character made by the accused. {Straffen}

c. *Rationale underlying admission* - the basis for the exception is that the deficit of probative value weighed against prejudice on which the original exclusionary rule is predicated is reversed. Probative value exceeds prejudice, because the force of similar circumstances defies coincidence or other innocent explanation. For this reason, the Court has moved away from the *Makin* approach to categorical admission of similar fact evidence. {Handy}

d. *Sources of similar facts* - multiple charges on same indictment (where not part of the same transaction), previous convictions, uncharged acts are all generally permissible sources. Stays and acquittals are not permissible, however.

e. Admissibility of similar fact evidence (see also: probative value vs. prejudicial effect)

i. Determination of whether the evidence is discreditable – evidence which does not go to the propensity of the accused is not subject to the analysis; if otherwise relevant, it is admissible.

ii. Burden and standard of proof – must be concluded by the trial judge on a balance of probabilities that the probative value of the sound inferences exceeds any prejudice likely to be created. Burden lies with the Crown. {Handy}

iii. *Not discretionary* - judge has no discretion to admit similar fact evidence whose prejudicial effect outweighs its probative value. Nevertheless, a trial judge's decision to admit similar fact evidence is entitled to substantial deference. {Handy}

iv. *Identification of issue underlying admission* - probative value cannot be assessed in the abstract. Crown must identify the purpose for which the evidence is sought to be adduced; arguments from both sides concerning inferences which could be drawn from the evidence. {Handy}

1. *Must be specific* - not specific to merely state that it is relevant to "complainant credibility." In *Handy*, Court held that while the Crown claimed use was for credibility, real use was to support idea that complainant enjoyed hurtful sex, and therefore would not heed consent of sexual partners. {Handy}

2. *Must be contested issue* - if the issue has ceased to be in dispute, as for example when the fact is admitted by the accused, then the evidence is irrelevant and it must be excluded. {Handy}

3. *Identity versus other issues* - where identity at issue, *something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary.* However unnecessary to impose this restriction when SFE adduced for other reasons. {Arp}

   a. *Standard is the same, inferences different* - admission of similar fact evidence will in all cases rest on the finding that the accused's involvement in the alleged similar acts or counts is unlikely to be the product of coincidence. {Arp}

   b. For example, where the issue is the *animus* of the accused towards the deceased (and not identity), a prior incident of the accused stabbing the victim may be admissible even though the victim was ultimately shot. {Handy}

v. *Nexus connecting the accused to the similar fact evidence*

1. *Where the offence charged and similar acts were committed by an individual* – there must be some evidence connecting the accused to the similar acts alleged in order for these acts to have any probative value

whatsoever. {Handy}

a. For example, in *Arp*, the accused possessed the victim's jewellery and a vehicle linked to the crimes.

2. *Where groups of persons are involved in the offence and similar acts* - two considerations, first (1) whether it is more probable than not that the same group committed the acts. Once this is established, (2) the same consideration must apply to the individual accused, and there must be a connection between the individual and each of the instances alleged. {Perrier}

a. For example, in *Perrier*, group membership was amorphous, and nothing distinct or recognizable about the role of the accused such that involvement recognizable. {Perrier}

vi.Prejudicial effect of similar fact evidence

1. *Overview* - this is evaluation of the strength of the *prohibited use* of the evidence; the risk of an unfocussed trial and a wrongful conviction. Comes in two forms: reasoning prejudice and moral prejudice. {Handy}

2. *Moral prejudice*

a. *Overview* - the potential stigma of bad personhood. For instance, considers the inflammatory nature of the similar acts; are they more reprehensible than the present charge{Handy}

b. *Factors in moral prejudice*

i. *Stigma* - is the similar act alleged of a stigmatic nature? {Handy}

ii. *Inflammatory* - is the similar act alleged more reprehensible than the present charge? {Handy}

3. *Reasoning prejudice*

a. *Overview* - need for the jury to avoid distraction and confusion despite consideration of multiple different incidents. {Handy}

b. *Factors in reasoning prejudice*

i. *Distraction* - focus on other events rather than the evidence directly affirming the charge at hand; {Handy}

ii. *Necessity* - whether the Crown can prove its point with less prejudicial evidence (agreed statement of facts, Corbett style questioning); {Handy}

vii.Probative value of similar fact evidence

1. *Overview* - the strength of the permitted use; the extent to which it tends to prove the issue identified for adducing the evidence. Drawn from the degree of similarity between the prior acts and the current charge. {Handy}

a. For instance, establishing that the accused has a predilection for hurtful sex is so general that it is of little real use; even were it established by other forms of less prejudicial evidence, it does little to

support the allegations charged. {Handy}

2. *Factors in probative value*

   a. *Collusion* - would undermine the similarity that lends the evidence its probative value. Where there is some an air of reality to allegations of collusion, the Crown is required to satisfy TJ on BOP that the evidence of similar facts is *not* tainted with collusion. {Handy}

      i. If merely *opportunity* to collude, without any evidence, then the matter is left to the trier of fact. {Handy}

   b. *Proximity in time* - lapse of time opens up a possibility of character reform or "maturing out." However, repetition over many years and recent manifestation strengthen cogency. {Handy}

   c. *Similarity in detail* - not every dissimilarity is fatal, but for the reasons already mentioned, substantial dissimilarities may dilute probative strength and, by compounding the confusion and distraction, aggravate the prejudice. {Handy}

   d. *Number of occurrences* - alleged pattern of conduct may gain strength in the number of instances that compose it. {Handy}

   e. *Circumstances surrounding or relating to similar acts*; {Handy}

   f. *Distinctive unifying features*; {Handy}

   g. *Intervening events*; {Handy}

   h. *Strength of the evidence that the similar events actually occurred* - too prejudicial to be admitted unless the judge was of the view that it met the threshold of being reasonably capable of belief. {Handy}

   i. *Any other factor* – which would tend to support or rebut the underlying unity of the similar acts; {Handy}

3. *Means of characterizing similarity*

   a. *Cumulative effect* - Number of significant similarities, taken together, may be such that by their cumulative effect, they warrant admission of the evidence.. {Arp}

   b. *Unique trademark* - signature will automatically render the alleged acts "strikingly similar" and therefore highly probative and admissible. {Arp}

   c. *System of crime* – Can include demonstration of a system or modus operandi, thought this is merely the observed pattern of propensity operating in a closely defined and circumscribed context. {Handy}

4. *Membership in abnormal group not sufficient* - not sufficient to establish that the accused is a member of an abnormal group with the same propensities as the perpetrator. there must be some further distinguishing feature (see character evidence). {Arp}

f. Jury instructions with similar fact evidence

i. *Generally*

1. TOF must be warned that they are not to use the similar fact evidence to infer that the accused is a person whose character is such that he or she is likely to have committed the other counts.

2. Must warn of the dangers of collusion, that similarities may be a result of contamination between witnesses.

3. May find from the evidence, though not required to do so, that the manner of commission is so similar that it is likely they were committed by the same person.

4. Judge reviews similarities (problematic, as with corroborative evidence: review of evidence which is specifically prejudicial to the accused draws attention of TOF to that evidence).

ii. On multi-count indictment

1. If TJ decides that the jury should be permitted to use the evidence with respect to one count to establish guilt on the other, and vice versa, a special jury instruction becomes necessary.

2. If TOF concludes it is likely the same person committed more than one of the offences, then the evidence on each of those counts may assist them in deciding whether the accused committed other counts.

3. If TOF does not conclude that it is likely the same person committed the similar offences, they must reach their verdict by considering the evidence related to each count separately.

Was the evidence properly obtained?

15. Third-party records

a. *Overview* - initially established through *O'Connor*. In sexual offences, this is now governed by responding statutes issued following that case, under s. 278.1-9 of the *Criminal Code.* Subject to any claims of privilege, etc. {Mills}

b. *Application*

i. *General application* - question is not *whether* the defence can be limited in its attempts to obtain production, but *how* it can be limited. {O'Connor}^

1. *Production to the Court (likely relevance)* - question is whether the right to make full answer and defence is implicated by information contained in the records; reasonable probability that the information is material to live issue or to competence of witness. {O'Connor}

a. *Grounds not discretely sufficient* - mere existence of the record, or that it relates to treatment, the incident charged, a prior inconsistent statement, reliability, credibility, sexual abuse, sexual activity, or temporal proximity *are not sufficient on their own* to establish likely relevance, under s. 278.3(4).

i. These are merely bases upon which an assertion without some evidence is insufficient, and factors to be taken into account. {Mills}

b. *Necessary in interest of justice* - must be more than mere likely relevance, under s. 278.5(1). Must also consider salutary/deleterious effects on full answer and defence and privacy rights, probative value, social interests, etc, under s. 278.5(2). Must also consider equality rights under s. 278.7(2).

i. However, Court should err on the side of production at this stage of the test. {Mills}

2. *Production to the accused* - weighing of salutary and deleterious effects of production vs. non-production; judge looks at records to determine if they should be produced in whole or in part.

a. *Availability* - production should only be granted when it is shown that the accused cannot obtain the information sought by any other reasonably available means. {O'Connor}^

b. *Proportionality* - proportionality between the right to make full answer and defence as compared with the deleterious effects on the party whose private records are being produced. This is the balancing of *reasonable expectation of privacy* against the necessity of interference from the state. {O'Connor}^

c. *Controlling factors:* {O'Connor}

i. Is it necessary to full answer & defence?

1. *Relevance* - contain information about unfolding of events, use of therapy which influenced witness memory, other information which bears upon testimonial factors, credibility, etc. {O'Connor}

ii. What is the probative value of the record? {O'Connor}

iii. What is the nature & extent of the reasonable expectation of privacy in the record? {O'Connor}

iv. Is production premised on any discriminatory belief or bias? {O'Connor}

v. What is the potential prejudice to the third party's dignity, privacy, or security interests? {O'Connor}

d. *Non-controlling factors applicable to sex offences*: {Mills}

i. Society's interest in encouraging the reporting of sexual offences; {Mills}

ii. Society's interest in encouraging the obtaining of treatment by complainants of sexual offences; {Mills}

iii. The effect of the determination on the integrity of the trial process. {Mills}

ii. Application in sexual offences, s. 278.2(1)

1. Same process as above, but tailored to counter speculative myths and stereotypes about sex assault victims; shifts balancing to the first branch in order to determine whether production should be made to the Court, rather than at the second branch concerning whether production should be made to the accused. {Mills}

iii. *Scoping* - court reviews records, and orders production of only those which have significant probative value that is not substantially outweighed by the danger of prejudice to the administration of justice or harm to the privacy rights of the witness. {O'Connor}^

16. *Confessions of the accused*

a. *Overview* - where the Crown offers in evidence the statement of an accused given to a person in authority, the Crown must establish the voluntariness of the statement beyond a reasonable doubt before using it for any purpose, including impeaching the accused's credibility. Applies regardless of whether the statement was inculpatory or exculpatory.

b. *Purpose* - confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it.

c. *Overarching theme* - Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. {Oickle}

d. Right to silence via s. 7

i. *Overview* - separate from the CLC rule; applies regardless of whether the utterer subjectively believes that the receiver of the statement is a person in authority. {Singh}

ii. *Application* - functionally the same as the CLC, save for the burden of proof (balance of probabilities, accused must show prima facie violation); also, s. 7 only applies once the accused is detained.

1. Further note, as in Hebert, that the right to silence under s. 7 effectively requires that the undercover party be a passive recipient of volunteered conversations, rather than a party actively eliciting statements. {Hebert}

iii. *Limitations* - RTS does not comprise the right not to be spoken to by state authorities. Therefore, a slow and methodical presentation of the evidence, despite protestations of the accused, does not violate RTS where it falls short of an atmosphere of oppression / overbearing the will. {Singh}

e. Common law confessions rule

i. *Threshold* - statement must have been made to a person subjectively believed by utterer to be in authority, otherwise recourse is through right to silence via s. 7 and not the common law confessions rule. *Crown must prove voluntariness BRD*. {Rothman}

1. For instance, a statement made to an undercover agent that the utterer did not believe to be a person in authority is not subject to CLC. {Rothman}

2. As per Estey's dissent, this allows police trickery to undermine the express intention of the accused; however, ultimately this is a consideration for s. 7, not CLC.

ii. *Threats and promises* - particularly where veiled; must be strong enough to raise reasonable doubt about voluntariness of confession; must overbear the will. {Oickle}

1. *Relevant to other factors* - minor inducement may be of great importance where introduced in an atmosphere of oppression, for instance. {Oickle} Also suggests that not any inducement sufficient to overbear will. {Spencer}

    a. For instance, free will not overborne by offer that D. could visit girlfriend in her cell once he had confessed. This does constitute a minor inducement, not sufficient to overbear will. {Spencer}

2. *Benefits of confession* - does not amount to threat or a promise where merely suggesting the benefits of confession; only inappropriate where arising to a true *quid pro quo*. {Oickle}

3. *Savviness or maturity* - the level of sophistication and aggression of the utterer within the criminal justice system will bear on analysis of whether will overborne. {Spencer}

    a. For instance, had numerous previous experiences with CJS, made repeated and aggressive demands, suggests will of savvy mature actor not overborne. {Spencer}

iii. *Oppression* - presence of deprivation of necessities, including food, water, clothing, sleep, medical attention, right to counsel, etc. Aggressive and intimidating questioning for a long period. Can be present even absent violence, or threats and promises. {Hobbins}

1. For instance, nudity renders other party in a situation of advantage, one that may quite disarm an accused of a wholly independent recollection and separate will. {Serack}

iv. *Operating mind* - must be able to comprehend own statements, must not be so impaired via mental disturbance or intoxication to preclude this; know gravity of making statements to the Crown. Does not inquire as to whether accused is capable of making good choice, and inner compulsion (due to schizophrenia) does not displace operating mind. {Whittle}

1. *Relevant to other factors* - can also be a factor relevant to overbearing of will or atmosphere of oppression, as mental condition may make one more susceptible to hope/fear or oppressive conduct. {Ward}

v. *Police trickery* - distinct inquiry, requires consideration as to whether the means used by police would bring the admin. of justice into disrepute. A discrete inquiry, unlike the other three which work together; protects the CJS rather than the defendant from police conduct. {Oickle}

1. *Relevant to other factors* - can also affect operating mind (where trickery affects mental condition), oppression (where aggressive), etc. {Oickle}

2. *Exaggeration and confrontation* - simply confronting the suspect with adverse evidence, like a polygraph test, even exaggerating its accuracy and reliability is not grounds for exclusion. This holds true even for inadmissible evidence (despite tactical disadvantage to the defence) {Oickle}

17. <u>Charter violations</u>

a. *Overview* - while at common law, illegally obtained evidence was admissible. However, with the advent of s. 24(2) of the *Charter*, this is no longer the case; now have *Grant* analysis for weighing admissibility of illegally obtained evidence.

b. Application (Grant analysis)

i. *Threshold issues*

1. *Jurisdiction and standing*

a. *Overview* - application must be made before Court of sufficient authority, eg. trial court, and not at pretrial, arraignment, preliminary inquiry, bail hearings, etc. Under certain rights, such as s. 8, the right infringed must be, as a general rule, the right of the person bringing the challenge. {Edwards}

2. Obtained in a manner (breach)

a. *Overview* - evidence can only be excluded under s. 24(2) where it has been obtained in a manner that breached *Charter* rights. Causal connection is not necessarily required (eg. that an illegal search caused the discovery of evidence) - rather, functional approach is taken, looking at temporal, contextual, and causal factors to *determine whether evidence tainted by the breach*.

b. *Causal connection present, but remote or attenuated* - even where there is a causal connection between the breach and the discovery of evidence, where this is too immaterial, the evidence will not have been tainted by the breach; breach is merely an antecedent of the discovery.

i. For instance, police learn of potential witness during illegal search; therefore, witness testimony became available due to breach by police, yet evidence still admissible, as merely finding out about the existence of the witness does not mean that evidence would be forthcoming. {Goldhart}

c. *Causal connection not present, but same transaction* – where the breach and the discovery are part of the same transaction, the "obtained in a manner" test can still be met. Must merely be part of the same chain of events. To do otherwise would be to create too rigid a test. {Strachan}

i. For instance, police fail to give rights to counsel to accused driver who is subsequently given a breath test; despite that the 10(b) rights were not causal, the violation was part of the same transaction. {Strachan}

d. *Breach need not precede discovery of evidence* – not necessary for breach to precede discovery of evidence; could be in the course of obtaining evidence. To do otherwise would theoretically allow admission of evidence which would bring admin. justice into disrepute. {Therens}

e. *Temporal connection not sufficient* – must be a contextual connection between the breach and the discovery of the evidence. For instance, even where causal, link could be broken by intervening events.

i. For instance, in *Ouellette*, the breach consisted of a failure to read accused his rights properly. However, D. was able to speak to a lawyer before providing a breath sample; this remedied the breach. {Ouellette}

ii. *Analysis*

1. *Overview* - evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. {Cote}

2. *Seriousness of state conduct* - more serious the state conduct constituting the Charter breach, the greater the need for courts to distance themselves from that conduct by excluding evidence linked to the conduct. Casual attitude towards or flouting of Charter rights aggravates seriousness; not the same as a good faith breach. {Cote}

    a. For instance, misconstruing nature of situation to judicial officer in order to obtain warrant after search had already been conducted is an aggravating factor. {Cote}

3. *Impact of the violation on accused's rights* - range from minor technical breach to to profoundly intrusive violation; more serious the impact, more likely that admission of evidence will bring admin. justice into disrepute. {Cote}

    a. *Discoverability* - can be argued that where evidence would inevitably be obtained, that the impact would be minor. On the other hand, availability of alternate means also makes state conduct more egregious. Finding of discoverability is not determinative. {Cote}

    b. For instance, highly invasive search of an area, such as a home, where there is a great expectation of privacy is a serious impact.

4. *Interest in adjudication on the merits* - whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence. Includes reliability, centrality of evidence, and seriousness of crime (double-edged sword). {Cote}

    a. *Reliability* - if breach undermines the reliability of evidence, then it is more likely to be excluded, eg. coerced testimony is highly questionable. Physical evidence highly reliable. {Grant}

        i. Generally, more

    b. *Centrality* - more likely to bring disrepute if disputed evidence constitutes the entirety of the Crown's case. {Grant}

<u>Is the evidence more probative than prejudicial?</u>

18.<u>Probative value versus prejudicial effect</u>

a. *Overview* - power to exclude otherwise admissible evidence on the ground that its prejudicial effect exceeds its probative value. The same piece of evidence may have value to the trial process but bring with it the danger that it may prejudice the fact-finding process on another issue. {Seaboyer}

b. *Overarching principle* - Must compare the prejudicial effect *of the prohibited* use of the evidence overbears its probative value on the *permitted use*. {Starr}

c. *Application*

    i. *Standard*

        1. *Civil proceeding or prosecutorial evidence* – for evidence tendered by either party in a civil case or by the prosecution in a criminal proceeding, the evidence must be excluded where it is more prejudicial than probative. {Seaboyer}

        2. *Defence evidence* – for evidence tendered by the defence in a criminal proceeding, the evidence must be

excluded only where it is substantially more prejudicial than probative. This follows from the caution of restricting an accused's defence, which is a result of the PFJ of presumption of innocence. {Seaboyer}

ii. Probative value

1. Refers to the capacity of the impugned evidence to establish the facts for which it is tendered. {Seaboyer}

iii.Prejudicial effect

1. There are many factors arising from evidence which could potentially prejudice the trier of fact. Examples include the following: {Seaboyer}

   a. *Emotionality* - danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy; {Seaboyer}

   b. *Distraction* - probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the TOF; {Seaboyer}

   c. *Efficiency* - likelihood that the evidence offered and the counter proof will consume an undue amount of time; {Seaboyer}

   d. *Surprise* - danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development, would be unprepared to meet it; {Seaboyer}

   e. *Usurpation* - danger that the evidence will be presented in such a form as to usurp the function of the jury. {Clarke}

How does the evidence fit within the trial process?

19.Trial procedure

a. Witness examination

i. *Examination in chief* - party offering a witness will ask the witness a series of questions intended to elicit evidence helpful to the party's case.

1. *Limitations of examination in chief* - leading questions are not permitted, nor is extensive prompting. A leading question is one which suggests its own answer. Accrediting questions are also admissible (eg. how long have you lived in the community?) {Clarke}

   a. *Leading questions* - prohibited in-chief due to supposition of bias, and possibility of witness honestly assenting to wrongful answer due to a lack of sophistication. {Maves}

   b. *Choice of alternatives* - question is not leading where it offers a witness a choice of alternatives without suggesting the answer. {E.M.W.}

   c. *Introductory questions* - however, leading questions are allowable and correctly used for introductory matters, but not for material matters. {Maves}

d. *Exceptions* - include (1) identifying persons or things, as the witness may be directly pointed to them, (2) witness called to contradict another as to the expressions used by the latter, (3) where witness' memory has failed and means of refreshing are exhausted. {Maves}

e. *Implication of leading questions* - where virtually all of the witness' evidence is adduced through leading questions, and the witness is providing evidence in exchange for consideration from the Crown, this supports an inference that the evidence was not proffered for its truth. {Rose}

ii. *Re-examination*

1. Party who called the witness in chief may re-examine the witness to address any matters arising in cross that were not addressed in chief.

iii. *Cross examination* - opposing party's counsel asks questions intended either to bring out aspects of the case helpful to the opposing party or to discredit the wit- ness's evidence in whole or in part. During cross-examination, leading questions are not only permitted but are almost always used. Most important device for casting doubt on a witness' testimony.

1. Subject-matter limitations on cross-examination

a. *Overview* - questions can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. This follows from the fact that many matters can only be proved through cross-examination, and further, that witnesses often concede suggested facts under cross in the belief that they will emerge in any event. {Lyttle}

b. *Information put to witness*

i. *Overview* - information put to a witness may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. {Lyttle}

c. *Theories pursued in good faith*

i. *Overview* - defence can pursue any theory that is honestly advanced on the strength of reasonable inference, experience or intuition. Process allows wide latitude for unproven assumptions and innuendo in an effort to crack the untruthful witness. {Lyttle}

d. *Wide-latitude given in criminal proceeding*

i. *Overview* - accused in a criminal case has the right of cross- examination in the fullest and widest sense of the word as long as he does not abuse that right. Any improper interference with the right is an error which will result in the conviction being quashed. {Lyttle}

2. Witness-type limitations on cross-examination

a. *Overview* - not limited to matters that have been covered in the examination in chief. Effectively, any relevant area is potentially allowable, subject to the following:

b. *Non-accused witnesses*

i. *Overview* - can be quite wide-ranging: they may be cross-examined not only as to facts relevant to the case but as to matters that might cast doubt on their credibility (eg. discreditable conduct). No distinction need be made between expert and lay witnesses. {Lyttle}

c. *Accused witness*

i. *Overview* - to protect the accused from irrelevant and prejudicial allegations, cross-examination of the accused on discreditable conduct is typically not permitted (see character evidence, credibility evidence), nor is examination about failure to respond to questions from police, failure to advance a defence before trial, or motive to provide exculpatory evidence.

b. Trial procedures concerning evidence

i. Motion for non-suit

1. Overview - in civil proceedings, where at the close of the plaintiff's case, the defendant argues that the plaintiff has not met his or her evidentiary burden. In certain jurisdictions, the decision to call evidence means that the non-suit motion is abandoned, while in others, the judge may reserve judgment on the non-suit motion until all the evidence has been heard.

a. Evidence taken at its highest - Judge must weigh the evidence given, must assign what he conceives to be the most favourable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue. In other words, judge is to assume the evidence to be true, and add to direct proof all such inferences which, assuming reasonable intelligence, the jury would be warranted in drawing from it; then consider whether there is evidence sufficient to support the issue.

i. Under BCSC Rule 12, may file at close of Plf.'s case; if "no evidence" (4) then may file without prejudice to calling defence evidence; if "insufficient evidence" (6) then must first elect not to call evidence (7).

b. Avoidance of a non-suit - means only that the plaintiff has established a case fit to go to the trier of fact; it does not mean that the plaintiff will ultimately be successful in the action. but where the trier of fact is the jury rather than the judge, the case may go to the jury while the trial judge's decision on the motion for a non-suit is under reserve.

c. Procedure - only counsel should bring motion for non-suit; judge should not bring on own volition. Where there is a jury, judgment on the non-suit should be reserved in circumstances where the defence intends to adduce evidence. This ensures that if the issue is appealed, that all relevant facts will be before the appellate body.

ii. Summary judgment

1. Overview - in civil proceedings, refers to judgment made without trial; motion made after the defendant has delivered a statement of defence, with evidence adduced in the form of supporting affidavits. Unlike application to determine a question of law, involves disagreement rather than agreement re: facts.

a. Allowable under 9-6 of BCRC; where no genuine issue for trial, or if only issue remaining is a

question of quantum or law, may proceed on those matters; also under

2. Different from non-suit motion:

   a. *Timing* - occurs *before* the plaintiff has presented its case, unlike a motion for non-suit.

   b. *Assertion* - unlike a motion for non-suit, does not assert that the evidence is incapable of establishing the cause of action, but rather that the case is so frail that it does not merit a trial.

   c. *Evidence* - Not sufficient for the responding party to say that more and better evidence will (or may) be available at trial. the occasion is now. the respondent must set out specific facts and coherent evidence organized to show that there is a genuine issue for trial. *Pizza Pizza Ltd. v. Gillespie,* ONCJ 1990

   d. *Judicial role* - apparent factual conflict in evidence does not end the inquiry. The court may, on a common sense basis, draw inferences from the evidence. The court may look at the overall credibility of the plaintiff's action. Pizza Pizza Ltd. v. Gillespie, ONCJ 1990

iii.Directed verdict

1. *Overview* - criminal analogue of the non-suit, leads to acquittal at the close of the Crown's case where the Crown has not led evidence capable of estab- lishing the elements of the offence. but the accused is not required to elect whether to call evidence before the judge decides the motion.

2. S*tandard* - Where there is before the court any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal. Same as the standard required for committal at preliminary inquiry or for extradition.

iv. *Proof in Charter litigation*

1. *Overview* - requires the party alleging the *Charter* violation to establish, BOP, that a *Charter* right has been infringed. Reasonable doubt would be unduly onerous, and inconsistence, with justifiability, reasonableness, and free/democratic society standards articulated in the *Charter.* {Oakes}

   a. Shouldn't burden also shift for s. 24(2)?

2. *Proof in demonstrable justification under s. 1* - having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Denning, "commensurate with the occasion." Must be cogent and persuasive, and make clear to the court the consequences of imposing or not imposing the limit on the right. {Oakes}

v. *Voir dire*

1. *Overview* - trial within a trial specifically to resolve a question of law, presided over by the judge alone.

c. Standard of proof

i. Balance of probabilities

1. *Overview* - less demanding than beyond a reasonable doubt; more probable than not, a preponderance of probability. While certain judgments have suggested that in grave circumstances, a more stringent standard should apply in civil cases (eg. sexual assault against minors), this has been rejected by the SCC.

ii. Air of reality

1. *Overview* – this is the test required for putting a defence in issue. If defence can raise an AOR concerning a defence, then the Crown is obligated to disprove that defence BRD in order to gain a conviction. This is a question of law which is subject to appellate review. {Cinous}

2. *Judicial role* - Judge cannot engage in weighing; concerned only with the existence or non-existence of evidence of fact. {Pappajohn}

3. *Analysis* - Must consider, assuming that the evidence relied upon by the accused to support a defence is true, whether that evidence is sufficient to justify the putting of the defence. {Pappajohn}

4. *Evidential sources* – must consider the totality of the evidence; can look at evidence adduced by the accused, the Crown, or any other evidential source on the record. {Cinous}

5. *Exceptions* - defence of mental disorder has to be established BOP by the party alleging the defence. *Criminal Code,* s. 16. The defence of automatism, whether sane or insane, also must be proven BOP by the party alleging. *R. v. Stone,* SCC 1999, although this appears to have been overturned (for insane automatism, at least). {Fontaine}

iii. Beyond a reasonable doubt - a common law principle which is not codified in the *Criminal Code*; more than probable guilt, but short of absolute certainty of guilt. The charge to the jury should be cognizant of the following requirements:

1. *Not commonplace reasoning* - jurors should not be invited to apply to the determination of guilt in a criminal trial the same standard of proof that they would apply to the decisions they are required to make in their everyday lives. {Lifchus}

2. *Not moral certainty* - moral certainty may not be equated by jurors with "evidentiary certainty." Else, jurors may think that they are entitled to convict if they feel "certain," even though the Crown has failed to prove its case beyond a reasonable doubt. {Lifchus}

3. *Not synonymic* - qualifications of the word "doubt," other than by way of the adjective "reasonable," should be avoided; instance, instructing the jury that a "reasonable doubt" is a "haunting" doubt, a "substantial" doubt or a "serious" doubt, may have the effect of mislead- ing the jury. {Lifchus}

4. *Not piecemeal* – the jury should be told that the facts are not to be examined separately and in isolation with reference to the criminal standard. TOF must consider the the evidence as a whole and determine whether guilt is established by the prosecution beyond a reasonable doubt. {Morin}

5. *Fundamentals* - brief basic instructions as to the nature of a criminal trial and the fundamental principles that will be applied. Includes presumption of innocence, with which reasonable doubt is fundamentally intertwined.

6. *Importance* - must be clear to the jury that the standard of proof beyond a reasonable doubt is vitally

important. {Lifchus}

7. *Articulation of doubt not necessary* - juror should not be made to feel that the overall, perhaps intangible, effect of a witness's demeanor cannot be taken into consideration in the assessment of credibility. Certain doubts, although reasonable, are simply incapable of articulation. {Lifchus}

8. *Neither sympathy nor prejudice* - reasonable doubt cannot be based on sympathy or prejudice. Further they should be told that a reasonable doubt must not be imaginary or frivolous. {Lifchus}

9. *Difference with BOP* - important that jurors be told that they are not to apply BOP standard in the context of the criminal trial. {Lifchus}

10. *Logical connection with the evidence.* {Lifchus}

11. *Certainty not required* - being "certain" is a conclusion which a juror may reach, but it does not indicate the route the juror should take in order to arrive at the conclusion. {Lifchus}

d. Burden of proof

i. Overview - may be the case that one party has a duty to satisfy an evidentiary burden on a particular issue, but that once the evidentiary burden is satisfied, the other party bears the persuasive burden (eg. defence in a criminal trial raises defence on air of reality (evidentiary) burden, which the prosecution must then disprove beyond a reasonable doubt (persuasive).

ii. Persuasive burden

1. The burden borne by the party who will lose the issue unless he satisfies the tribunal of fact to the appropriate degree of conviction. Plaintiff in a civil trial, prosecution in a criminal trial.

iii. Evidentiary burden

1. The burden of producing sufficient evidence to justify a finding in favour of the party who bears it. Also generally borne by the plaintiff in civil proceedings: must lead evidence capable of supporting facts alleged, then must satisfy the TOF that these facts are true on a BOP.

How should the evidence be evaluated?

20. Evaluation of witness testimony

a. Overview - test of truth must be harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. {Norman} Until challenged, a witness is presumed to be telling the truth.

b. Credibility versus reliability

i. Overview - credibility concerns the honesty of the witness; whether they may be fabricating or concocting their story. Evidence concerning credibility therefore shows whether that person has a reason or tendency to mislead. Reliability on the other hand concerns the accuracy of the evidence. For instance, the accuracy of a witness' perceptions, or the validity of a scientific process.

c. Testimony of the accused

i. Overview - where the accused testifies, a special instruction must be given to the jury; main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt:

ii. First, if you believe the evidence of the accused, obviously you must acquit. {W.(D.)}

iii. Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit. {W.(D.)}

iv. Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reason- able doubt by that evidence of the guilt of the accused. {W.(D.)}

d. Accomplices and unsavoury witnesses

i. Overview - at common law, where the evidence against the accused was provided through accomplice testimony, it was a rule of practice for the judge to warn the jury of the danger of convicting on such evidence where uncorroborated. {Baskerville}

1. This is now abrogated in favour of a less rigid approach; the former approach was unfair to both parties, by causing the judge to repeat corroborative and thus highly prejudicial evidence, and to the Crown by potentially usurping the role of the TOF. {Vetrovec}

ii. Treatment

1. Overview - appropriate to give a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. Unsafe to rely on the unsavoury witness's evidence without some other evidence that confirms or agrees with it. This is delivered by the TJ to the jury where the TJ believes that the witnesses are potentially unsavoury. {Vetrovec}

a. Generally - Evidence of a single witness is sufficient to support a conviction for any offence other than treason, perjury, feigned marriage; however, danger of wrongful conviction where this witness is of doubtful credibility. {Khela}

b. Is a warning necessary?

i. Credibility suspect – in determining whether a warning need to be issue, must determine whether there is a reason to suspect the credibility of the witness based on traditional means (criminal activities, delay in coming forward, dishonesty prior). {Khela}

1. For instance, moral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial, cannot be trusted to tell the truth, took a long time to come forward. {Khela}

ii. Centrality to case – must then assess the importance of the witness to the Crown's case - greater the centrality, the more important the warning becomes, and in some cases, will be mandatory. {Khela}

c. Issue warning

i. Attention – drawing the attention of the jury to the testimonial evidence requiring special scrutiny; {Khela}

ii. Explanation – explaining why this evidence is subject to special scrutiny; {Khela}

iii. Caution – 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; {Khela}

iv. Evidence – 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. {Khela}

1. Evidence which is tainted through its connection to the Vetrovec witness cannot serve as a means for confirming testimony. {Khela}

2. Confirmatory evidence must be capable of restoring the TOF's faith in relevant aspects of that witness' account. {Khela}

e. Child witnesses

i. *Overview* – May be wrong to apply adult tests for credibility to the evidence of children. since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. {W(R)}

ii. *Treatment* - standard of proof is not lower in circumstances of child complainants. Rather, flaws such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. Evidence must be approached "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case. {W(R)}

f. Witness demeanour

i. *Overview* - one of the reasons hearsay is inadmissible is because the TOF cannot observe the declarant making the statement. This reflects the importance of witness demeanour; the TOF must be able to determine whether the witness is in earnest, or reticent and evasive. However, this should not be the *only* means through which evidence is weighed. {KGB}

ii. *Limitations* – credibility should not be determined *solely on demeanour,* particularly where there are significant inconsistencies. Must be tested for coherency with other evidence {Norman}

1. *Cultural differences* – demeanour will not always be a reliable, or sufficient, indicator of credibility. Directness of speech and eye contact may connote honesty in one culture but rudeness in another. {Jeng}

2. *Convinced of account* – witness who has become convinced of a state of facts may be persuasive whether or not the facts are true. Therefore, {Norman}

3. *Arbitrariness* – if TOF finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. {Jeng}

g. Deference of appellate courts to trial credibility findings

i. *Overview* - at trial, TOF hears witnesses directly, observes demeanour, acquires a great deal of information which is not necessarily evident from a written transcript. Therefore, appellate courts are hesitant to interfere with TOF findings. {Buhay}

ii. *Exception* - verdict based on credibility can be overturned where the findings are unreasonable; if the TOF, properly instructed and acting reasonably, could not have convicted the accused, then the finding must be overturned. {W(R)}

h. Testimonial factors

i. *Overview* - to accept or reject a witness's evidence, the trier of fact must make inferences regarding these factors, which are modified through demeanour, the oath, and most importantly by cross-examination.

1. *Language* - what the witness means by the words used in giving evidence.

2. *Sincerity* - whether the witness believes in the evidence testified to.

3. *Memory* - whether witness recall was affected by the nature of events or intervening incidents.

4. *Perception* - whether anything distorted or enhanced the ability of the witness to observe events.

21.<u>Elementary principles</u>

a. *Evidence* - consists of "all the means by which any alleged matter of fact … is established or disproved." The law of evidence determines what data can be considered, how it can be proved, and the use to which it can be put. This is crucial, as most legal agreements hinge on facts and not the law. Information which the TOF uses to resolve factual disputes.

b. Means through which evidence is presented

i. *Witnesses* - with few exceptions, all facts have to be proved or disproved through testimony of witnesses, elicited by questioning by counsel or by the parties themselves.

ii. *Exhibits* - entered through through witnesses as real evidence (photos, surveillance, videos, documents, objects) and demonstrative evidence (drawings, sketches, plans, reenactments).

iii.*Admissions* - also known as concessions, the facts which are conceded by the parties on the basis of agreement (eg. a guilty plea as a formal admission of the elements of the offence)

iv.*Judicial notice* - judge takes notice of issues which are notorious and pervasive in society; for instance, that World War II occurred and ended in 1945.

c. Rules which serve the application of evidence to the substantive law

i. *Overview* - three forms: rules of process, admissibility, and reasoning. Operation of these determined by trier of law.

1. *Rules of process* - outline how evidence is presented to the triers of fact. Includes procedures enhancing

honesty, such as oaths and affirmation, as well as how information is communicated, including the manner in which questions are posed and exhibits are presented.

2. *Rules of admissibility* - determines which evidence can be considered by the trier of fact. Theoretically, role is to ensure access to all information which would assist the trier of fact in making an accurate determination in application of substantive law - principle of "access to evidence."

    a. *Rules of restricted admissibility* - allows information to be considered, but puts limits on the use which can be made of that information by the trier of fact; often achieved through limiting instructions in jury trials.

    b. *Rules of practical exclusion* - rejection of evidence in order to encourage trial efficiency. Includes limiting the number of expert witnesses, for example.

    c. *Rules of subordinated evidence* - ie. the admission of evidence is subordinate to some competing principle - exclude data from consideration because of competing considerations of policy or principle. Includes solicitor-client privilege, for instance.

    d. *Rules of non-evidence* - excludes information which will not assist the trier of fact, information which is not really evidence at all; irrelevant information, for instance, or information which will distort fact finding, such as hearsay.

3. *Rules of reasoning* - rules which guide consideration of evidence for the purposes of weighing. Includes standards and burdens of proof, testimony of children, demeanour of witnesses, and the dangers associated with certain types of evidence. Smallest body of evidentiary rules; generally, left to the good judgment of individual triers of fact.

d. Trends in the law of evidence

i. *Overview* - three trends can be perceived in the law of evidence: contextual/purposiveness, development of exclusionary discretion, and increased admissibility. All of these were aided by increased litigation concerning evidentiary issues, as well as through the reporting of cases which allowed for the development of a body of evidence common law.

1. *Purposive approach* - previously, law attempted to provide clear and predictable rules. These invariably proved overinclusive or underinclusive over time; therefore, purposive and flexible approach adopted in order to account for this. Given life by preponderance of sexual offences and the Charter in the 1980s, as well as by Aboriginal land claims litigation.

    a. *Sexual offences* - previously the law functioned to protect accused against false complaints, but this was entrenched in myths concerning sex assault complainants, therefore undesirable.

    b. *Charter* - allowed for evidence to be adduced or excluded in accordance with overarching principle of trial fairness.

    c. *Aboriginal litigation* - allowed easing technical evidence rules in order to allow for oral histories and other evidence relevant to Aboriginal land claims to be heard (consider Delgamuukw)

2. *Residual exclusion* - judges have a residual power to exclude evidence which would otherwise be admissible where its probative value is outweighed by its prejudicial effect.

3. *Increased admissibility* - for instance, hearsay documents can be used to incarcerate persons who were initially permitted to serve their sentences in the community; there is a reduced evidentiary burden on a country seeking extradition from someone in Canada. Spurred by concerns about efficiency, as well as by partnership with jurisdictions that do not practice exclusion.

e. *Presumptions*

i. *Overview* - legal devices enabling, or requiring, a trier of fact to reach a conclusion about a particular fact either where there is no evidence about that fact, or where a legal rule states that the fact may, or must, be inferred from other facts. Can be rebuttable or irrebuttable, and presume regarding the state of the law, or the state of facts (concerning the latter, "frequently recurring examples of circumstantial evidence").

ii. *Rebuttal* - depending on the nature and source of the presumption, may be rebuttable either by raising a reasonable doubt as to its existence, through an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact, or on legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

iii. *Presumptions without basic facts* - presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved.

iv. *Presumptions with basic facts* - presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact..

1. Permissive - optional as to whether the inference of the presumed fact is drawn following proof of the basic fact.

2. Mandatory - requires that the inference be made.

f. Criminal proceedings

i. *Information* - document sworn by state agents (or individual persons in the case of private prosecutions) laying criminal charges against an individual. Contains a synopsis of the events alleged by the charging party, and specifies the offences charged. Initiates criminal proceedings.

ii. *Disclosure* - process in public prosecutions where the Crown is constitutionally obligated, following Stinchcombe, to disclose all relevant and non-privileged information concerning the prosecution to the defence. There is no reciprocal responsibility of the defence to disclose to the Crown.

iii. *Election* - judge and jury versus judge alone (presuming an indictable offence); in the latter, the judge is both trier and law and trier of fact. In the former, the judge is the trier of law, and the jury is the trier of fact.

iv. *Pleading* - the accused is arraigned, and called upon to plead guilty or not guilty (etc.). A not guilty plea indicates disputation of the Crown's case, thus requiring proof of each element of each offence beyond a reasonable doubt.

v. *Opening instructions*

1. *Voir dire* - a trial within a trial, effectively a hearing on evidentiary or other issues relating to the trial proceedings. In particular, voir dires are held in order to determine whether evidence sought to be adduced by one party or the other is admissible. In a jury trial, the voir dire is not held in the presence

of the trier of fact, except for in limited circumstances (eg. competency of a child to testify - if admissible, the voir dire evidence can be used to attenuate the weight given to the evidence).

a. For instance, in order to adduce a statement by the accused made to a party in authority, the Crown must establish the voluntariness of that statement through a voir dire.

vi. *Case in chief* - Crown must call its case (eg. its witnesses) first, and must establish each element of the offence beyond a reasonable doubt. If this bar has not been met in the eyes of the defence, counsel may bring a motion for a directed verdict; there must be some evidence on each element of the offence upon which a jury, properly instructed, could reasonably convict the accused.

vii. Motion for directed verdict

viii. *Case for the defence* - defence may call witnesses, including the accused, but is not required to do so.

ix. *Reply* - rare circumstances, the prosecution is permitted to call evidence in reply (rebuttal), and in rarer circumstances, the defence can call further evidence to reply (surrebuttal) as well.

x. *Closing submissions* - if the defence calls evidence, counsel for the accused addresses the trier of fact first. Otherwise, the Crown addresses the trier of fact first. If there is a jury, they are then instructed (charged) by the trier of law, retiring thereafter to deliberate.

xi. *Criminal appeals process* - accused can appeal on error in law and for other reasons (eg. palpable and overriding error by trier of fact). Crown can only appeal on error of law under the Criminal Code, however.

1. As evidentiary rulings are questions of law, frequently such rulings are the grounds for Crown appeals. If an appeal is allowed, the court may quash the conviction, substitute a verdict, or order a new trial.

xii. *Fresh evidence* - an appeal is argued on the basis of the record of evidence at the trial, but in an appropriate case, the appellate court has the power to hear additional evidence.

g. Civil proceedings

i. *Statements* - Plf. makes statement of claim, D. responds with statement of defence, marking the beginning of civil proceedings.

ii. *Pleadings* - frame the issues in the action and provide the basis for determining whether evidence is relevant to a material issue. Includes admissions of facts, notice requirements for admission of certain facts, etc.

iii. *Admissions* - admission made in the oral examination for discovery, or in response to a notice to admit, can be read into the record at trial and will dispense with the need for further proof.

iv. *Discovery* - compulsory disclosure of relevant documents referred to by the opposing party in a civil proceeding. Allows each party to assess the strengths and weaknesses of the case, and provides a transcript under oath for impeaching credibility on the basis of inconsistencies in subsequent testimony.

v. *Election* - most civil cases are heard by a judge sitting alone, but jury trials are by no means unusual. the functional division between the judge and the jury in a civil trial is the same as in a criminal trial.

22.Cases

- *R. v. Kyselka, ONCA 1962*

  - Facts - three accused were charged with raping a young girl, who was described by the court as "16 years of age and mentally retarded." Psychiatrist offered evidence that such persons are not "imaginative enough to concoct stories" and therefore are likely to be truthful persons.

  - Issue - is the evidence of the psychiatrist, which appears to be adduced in order to bolster the complainant's credibility, admissible?

  - Rule - not admissible

    - Evidence was led by the Crown with reference to the Crown's *own* witness and while based upon capacity, its primary and only function was to bolster up the credibility of the witness by evidence that she was or was likely to be a truthful person.

    - While the credit of any witness may be *impeached* by the *opposite party,* there is no warrant or authority for oath-helping in this manner by the party profferrng the witness.

    - Issues with oath helping are that no limit could be placed on number of witnesses, and the possibility that this could become a distracting side issue.

- *R. v. Marquard, SCC 1993*

  -Facts - 3.5 year old complainant suffers severe facial burn; grandmother charged. Child stated "my nanna put me on the stove." Accused alleges that child burned self with butane lighter. Child initially tells doctor that she burned herself with a lighter, Crown seeks to adduce opinion of doctor that child was lying.

  -Issue - complainant's unsworn testimony admissible? Doctor's testimony concerning tendency of children to fabricate admissible?

  -Rule - unsworn testimony admissible; trial judge did not err in the inquiry. Doctor's testimony inadmissible, as the witness indicated that she did not believe the child's story.

    -Witness demonstrated that she knew the difference between the truth and a lie; whether it was important or unimportant to tell the truth.

    - The judge indicated that while she did not believe the child capable of understanding an oath, her unsworn evidence should be accepted.

    -Under s. 16(1) of the *CEA*, where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine, among other things, whether the person is able to communicate the evidence.

      -This has now changed; only applies where a person is challenged for mental capacity. Children now governed by s. 16.1;

    -In the case of a child testifying under s. 16 of the *Canada Evidence Act*, testimonial competence is

not presumed. The child is placed in the same position as an adult whose competence has been challenged.

-The judge must satisfy himself or herself that the witness possesses testimonial competence, which comprehends: (1) the capacity to observe (including interpret- ation); (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 assure that it meets the minimum threshold of being receivable.

-The inquiry is into *capacity* to perceive, recollect and communicate, not whether the witness *actually* perceived, recollects and can communicate about the events in question.

-Best gauge of capacity is the witness's performance at the time of trial. The procedure at common law has generally been to allow a witness who demonstrates capacity to testify at trial to testify.

-Defects in ability to perceive or recollect the particular events at issue are left to be explored in the course of giving the evidence, notably by cross-examination.

-If satisfied that this is the case, the judge may then receive the child's evidence, upon the child's promising to tell the truth under s. 16(3).

- The test outlines the basic abilities that individuals need to possess if they are to testify. The threshold is not a high one. What is required is the basic ability to perceive, remember and communicate.

-Large measure of deference is to be accorded to the trial judge's assessment of a child's capacity to testify. Meticulous second- guessing on appeal is to be eschewed.

- Fundamental axiom of our trial process that the ultimate conclusion as to the credibility 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 on the credibility of a witness would be abandoning its duty to itself determine the credibility of the witness. Credibility must always be the product of the judge or jury's view.

- Expert's opinion may be founded on factors which are not in the evidence upon which the judge and juror are duty-bound to render a true verdict.

- Credibility is a notoriously difficult problem, and the expert's opinion may be all too readily accepted by a frustrated jury as a convenient basis upon which to resolve its difficulties.

- There may be features of a witness's evidence which go beyond the ability of a lay person to understand, and hence which may justify expert evidence.

- Ordinary inference from failure to complain promptly about a sexual assault might be that the story is a fabricated, however expert evidence has been properly led to explain the reasons why young victims of sexual abuse often do not com- plain immediately. May be essential to a just verdict.

- Expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact.

- Court must require that the witness be an expert in the par- ticular area of human conduct in question; the evidence must be of the sort that the jury needs because the problem is beyond their ordinary experience; the jury must be carefully in- structed as to its function and duty in making the final decision without being unduly influ- enced by the expert nature of the evidence.

- Cannot cross the line between expert testimony on human behaviour relevant to credibility and assessment of the actual credibility of the witness by the expert.

- Dissent (Dube)

- The doctor was called *by the defence* in order to elicit the child's initial statement concerning having been burned with a lighter, not the stove. By impeaching the witness' credibility in this manner, the Crown was entitled to call evidence to rehabilitate the witness' credibility.

- The information was tendered for the larger purpose of assisting the jury in understanding why a child *might* react in a certain way if he or she were abused. The jury, as trier of fact, was left with the ultimate assessment of the credibility.

- Doctor did not comment at all as to whether contradictory statement at trial was true. Merely stated that she was "suspicious," "surprised" and "concerned" about initial response.

- The jury was explicitly instructed by the trial judge that it remained the sole judge as to the credibility of Debbie-Ann's statement.

- Moreover, the trial judge instructed the jury that they were entitled to draw an inference adverse to the Crown from Debbie-Ann's prior in- consistent statement.

- *R. v. Salituro, SCC 1991*

-Facts - accused forges wife's signature on cheque, caught, convicted based on wife's testimony - TJ found that they were irreconcilably separated at the time that the offence was committed. Accused would not have been convicted without wife's testimony.

-Issue - was the accused's wife incompetent to testify due to the fact that she was his spouse?

-Rule - The common law rule making an irreconcilably separated spouse an incompetent witness for the prosecution against the other spouse is inconsistent with the values in the Charter.

-Judges do have the power to make some changes to the common law, that there are sound policy reasons for making the proposed change in this case. Pattern of legislation does not indicate a contrary parliamentary intention to preserve the common law rule.

-Any policy justification which may at one time have existed in support of the rule has now disappeared in the context of divorced or irreconcilably separated spouses.

-Rule reflects a view of the role of women which is no longer compatible with the importance now given to sexual equality, for instance in the *Charter*. Court's duty to see that the common law

develops in accordance with the values of the Charter.

-The rule that a wife was an incompetent witness for or against her husband followed naturally from the legal position of a wife at the time. On marriage, a woman lost her independent legal identity.

-Most important justification is that the rule protects marital harmony; also "*natural repugnance* to every fair-minded person to compelling a wife or husband to be the means of the other's condemnation."

-The rule, rather than the reflection of a clear-cut fundamental policy decision, appears to be simply a product of history.

-Involves a conflict between the freedom of the individual to choose whether or not to testify and the interests of society in preserving the marriage bond.

-Where spouses are irreconcilably separated, there is no marriage bond to protect and we are faced only with a rule which limits the capacity of the individual to testify.

-To give paramountcy to the marriage bond over the value of individual choice in cases of irreconcilable separation may have been appropriate in Lord Coke's time, but no longer.

-The facts of this case do not raise the issue of whether a spouse who is a competent wit- ness for the prosecution will also be compellable.

-Making a separated spouse a competent witness for the prosecution may ultimately mean that an irreconcilably separated spouse is also compellable at the instance of the prosecution.

-As much a denial of the dignity of an irreconcilably separated spouse to exempt the spouse from the responsibility to testify because of his or her status as it is a denial of the spouse's dignity to deny his or her capacity to testify.

-Concerns were raised before us that making an irreconcilably separated spouse a compe- tent witness would increase the risk of violence to women. Making a spouse compellable may in fact reduce the risk of violence by giving the spouse no choice but to testify.

-The difference between irreconcilable separation and divorce may have significance *de jure*, but it has no significance *de facto*: irreconcilable separation is tantamount to divorce.

-determining if there is a reasonable possibility of recon- ciliation between spouses will be a difficult task for the courts. Since the determination is necessarily entirely subjective, it will be the spouse offered as a witness by the prosecution who will effectively determine if there is in fact a reasonable possibility of reconciliation.

-Courts are daily called upon to make subjective determinations such as the existence of a reasonable possibility of reconciliation.

- *R. v. Hawkins, SCC 1996*

-Facts - D. police officer investigating Satan's Choice MC; suspected of passing information about the investigation to the MC in exchange for bribe. D. strikes up stormy relationship with C. She contacts

police and gives them details of his criminal activity. D. makes inquiries with other police officers to determine whether marrying C. will make her incompetent to testify. C. testifies to D.'s criminal activity at a prelim. However, she later recants her testimony, and thereafter marries D.

-Issues - is C. spousally incompetent to testify against D.?

-Rule - Graham was not a competent witness for the Crown, and, accordingly, her *viva voce* evidence could not be admitted at trial.

-The common law rule is that a spouse is an incompetent witness in criminal proceedings in which the other spouse is an accused, except where the charge involves the person, liberty or health of the witness spouse.

-The spouse of an accused, willing or not, is not competent to testify against the accused at the behest of the Crown.

-Rule of spousal incompetency renders a spouse incapable of testifying in relation to events which occurred both *before* and *during* the marriage. Crown may not call the spouse of an accused as a competent witness to testify in relation to events which occurred prior to the marriage.

-Federal/Provincial Task Force on Uniform Rules of Evidence has also recom- mended the abolition of the traditional rule in favour of a modern rule which makes a spouse a competent but not compellable witness for the prosecution.

-Another possible alternative is that the spouse of an accused could be declared as *both* a competent *and* a compellable witness for the Crown. This would be consistent with the general common law rule that competence implies compellability.

-While such alternative approaches to the rule of spousal incompetency may serve to promote the autonomy and dignity of an individual spouse, it is our opinion that any significant change to the rule should not be made by the courts, but should rather be left to Parliament.

-Complex changes to the law with uncertain ramifications should be left to the legislature.

-A marriage entered into following the swearing of an indictment may be perfectly valid and genuine, and there may indeed be a marital bond worthy of protection.

-A marriage which is motivated by a desire to take advantage of the spousal incompetency rule may nonetheless be a true marriage, deserving of the law's protection.

-Spouse is entitled to rely on the benefits of spousal incompetency even if one of the purposes of the marriage was to preclude testi- mony before a court.

- Crown has conceded that the marriage of Hawkins and Graham is genuine. Making Graham compellable by the Crown would threaten the couple's genuine marital harmony and undermine the purpose of the spousal incompetency rule.

-Absent evi- dence that the marriage was a sham, we fail to see how the court can begin to inquire into the reasons for the marriage.

- Courts and tribunals are permitted to inquire into this most personal of realms only in

specific, limited circum- stances as prescribed by the legislature

-Matter may be different if the evidence clearly established that the only purpose of the marriage was to avoid criminal responsibility by rendering a key witness uncompellable and that the partners had no intention of fulfilling their mutual obligations of care and support.

-Concurring (LaForest)

-A rule prohibiting a spouse from testifying if he or she so wishes raises serious questions about whether it un- reasonably infringes on a person's liberty and equality interests.

- *R. v. McGinty, YTCA 1986*

-Under s. 4(4) of the *Canada Evidence Act* spouses are competent and compellable witnesses against their spouses in cases involving violence against them. The husband in this case was properly required to testify.

- *R. v. Bannerman, MBCA 1966*

-Facts - accused convicted of sexual offences. Thirteen year old complainant states that he "does not know what it is to swear and tell the truth on the Bible," and that he did not know what would happen to him if he did not tell the truth. He was sworn nonetheless.

-Issue - was the complainant's understanding of the oath sufficient such that he was capable of testifying?

-Rule - inquiry was sufficient to show that Frankie Spence understood the nature and consequences of an oath.

- Understood that the consequence of taking an oath to be such that it placed him under a moral obligation to tell the truth, a breach of which moral obligation would be "bad" and "wrong."

-Knew that "on all occasions he should tell the truth and particularly when he swears he shall tell the truth."

-Sufficient base for the judge to exer- cise his judicial discretion and to conclude that it was proper for the boy to be sworn.

-We must avoid appearing to be laying down what and how many questions must be asked. Each case will depend on its own facts, and the impression that the child makes upon the judge will be of great importance.

-The belief as to the spiritual consequences of an oath will necessarily differ according to the theological belief of the witness. No human being can say what the consequences actually are.

-When was asked what would happen to him, said that he did not know, simply giving the answer which any person asked this question must give, however learned and devout.

- *R. v. Fletcher, ONCA 1982*

-For a child to take an oath, all that had to be determined was "whether the child has a sufficient appreciation of the solemnity of the occasion, and the added responsibil- ity to tell the truth, which is involved in taking the oath."

- *R. v. Leonard, ONCA 1990*

-Inquiry did not show that the child appreciated the solemnity of the occasion. it did not show that she understood the added responsibility to tell the truth over and above the duty to tell the truth as part of the ordinary duty of normal social conduct.

- *R. v. Walsh, ONCA 1978*

-Facts - witness aware that he could be prosecuted and punished if he gave false evidence, but does not, as a Satanist, recognize any social duty to tell the truth in Court.

-Issue - does such a witness have the capacity to testify?

-Rule - yes; incompetent to testify under oath, but competent under affirmation.

-Witness suffers from a sociopathic type of personality, but did not suffer from psychosis or insanity. Average or better intelligence, capable of distinguishing truth from falsehood.

-Witness would not have the normal emotional response to wrongdoing in committing a falsehood. Bible would have little meaning in binding his conscience.

-In a hypothetical situation he would be prepared to lie if he perceived no benefit to himself in telling the truth. Nonetheless, stated he would tell the truth in the case before the Court, because he could not live with himself otherwise.

-Witness never refused to affirm under s. 14 of the *Canada Evidence Act* and, indeed was not given the opportunity to affirm.

-Competent mentally to testify, the requirements of s. 14 of the *Canada Evidence Act* were satisfied and he should have been affirmed.

-Do not assent to the proposition that if witness had said that he would tell the truth or not as he pleased with respect to the very matter upon which he was called to give evidence, he would thereby become incompetent to testify.

-To affirm while at the same time asserting that he would not tell the truth would be equivalent to a refusal to affirm.

-Under s. 14(1), where a person called or desiring to give evidence objects, on grounds of conscientious scruples, to take an oath, or is objected to as incompetent to take an oath, such person may make an affirmation; s. 14(2) holds that this has the same effect as an oath.

-s. 14 does not refer to mental incompetency but to incompetency to take an oath on the ground of an absence of religious belief.

- *R. v. Graat, SCC 1982*

-Facts - D. charged with impaired driving, Crown seeks to adduce opinion evidence of police officers, as laymen, concerning whether the D. was impaired by alcohol. The police were not able to obtain a breath

sample within the two hour time limit.

-Issue - is the lay opinion of police officers concerning whether an accused was impaired admissible?

-Rule - admissible as non-expert evidence.

-Lay witnesses may give opinion evidence on the following matters, non-exhaustive:

-identification of handwriting, persons and things;

-apparent age;

-the bodily plight or condition of a person, including death and illness;

-the emotional state of a person;

-the condition of things—e.g. worn, shabby, used or new;

-certain questions of value; and,

-estimates of speed and distance.

-Little, if any, virtue in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.

-Admissible where facts from which a witness received an impression were too evanescent (fleeting) in their nature to be recollected, or too complicated to be separately and distinctly narrated; the witness was better equipped than the jury to form the opinion.

-Non-expert witness may give evidence that someone was intoxicated, just as he may give evidence of age, speed, identity or emotional state. This is because it may be difficult for the witness to narrate his factual observations individually.

-Nor is this a case for the exclusion of non-expert testimony because the matter calls for a specialist. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose.

-If non-expert evidence is excluded the defence may be seriously ham- pered. If an accused is to be denied the right to call persons who were in his company at the time to testify that in their opinion his ability to drive was by no means impaired, the cause of justice would suffer.

-Non-expert witness cannot, of course, give opinion evidence on a legal issue as, for example, whether or not a person was negligent.

-Trial judge must necessarily exercise a large measure of discretion in determining whether an opinion is admissible.

-Unlike expert testimony, there is no special reason for preferring the opinion evidence over the opinion of other witnesses. It is for the trier of fact to give weight to the evidence.

-There may be a tendency for judges and juries to let the opinion of police witnesses over- whelm

the opinion evidence of other witnesses; must be avoided.

- If the persons giving lay evidence (eg. police officers) have been closely associated with the prosecution, such association may affect the weight to be given to such evidence.

- *R. v. Abbey, ONCA 2009*

-Issue - what is the process for the admissibility of expert evidence?

-Rule

-Two step process for determining admissibility

-The party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence; e.g. qualified to give the relevant opinion.

-When discussing relevance as one of the preconditions to admissibility, i refer to logical relevance. i think the evaluation of the probative value of the evidence mandated by the broader concept of legal relevance is best reserved for the "gatekeeper" phase of the admissibility analysis.

-Evidence that is relevant in the sense that it is logically relevant to a fact in issue survives to the "gatekeeper" phase where the probative value can be assessed as part of a holistic consideration of the costs and benefits associated with admitting the evidence.

-TJ must decide whether expert evi- dence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm

- Beneficial to trial process, this is an exercise of judicial discretion. the trial judge must identify and weigh competing considerations to decide whether on balance those considerations favour the admissibility of the evidence.

-Risks inherent in the admissibility of expert opinion evidence, described succinctly by binnie J in *J.-L.J.* at para. 47 as "consumption of time, prejudice and confusion." Clearly, the most important risk is the danger that a jury will be unable to make an effective and critical assessment of the evidence

-jury faced with a well presented firm opinion may abdicate its fact-finding role on the understand- able assumption that a person labelled as an expert by the trial judge knows more about his or her area of expertise than do the individual members of the jury

-expert opinion on an issue that the jury is fully equipped to decide without that opinion is unnecessary and should register a "zero" on the "benefit" side of the cost–benefit scale.

-opinion evidence that is essential to a jury's ability to understand and evaluate material evidence will register high on the "benefit" side of the scale.

- *R. v. Mohan, SCC 1994*

-Issue - under what circumstances is expert evidence admissible?

-Rule

-There are four criteria for determining whether expert evidence is admissible. It must be:

-Relevant - the proffered opinion must be probative to a live issue at trial, and also must be more probative than prejudicial.

-Necessary in assisting the trier of fact;

- If on the proven facts a judge or jury can form their own conclusions without help then the opinion of the expert is unnecessary"

-The word "helpful" is not quite appropriate and sets too low a stan- dard. provide information "which is likely to be out- side the experience and knowledge of a Judge or Jury"

-necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature; area that is not understood by the average person (eg. battered women syndrome)

-assessed in light of its potential to distort the fact-finding process. experts not be permitted to "usurp" the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

-that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful

-Not otherwise subject to an exclusionary rule;

-evidence otherwise com- plied with the criteria for the admission of expert evidence it was excluded by reason of the rule that prevents the Crown from adducing evidence of the accused's disposition unless the latter has placed his or her character in issue.

-Offered by a properly qualified person.

-must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

-The exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule, rather than in as an aspect of legal relevance.

-Probative versus prejudicial factor has special significance in assessing the admissibility of expert

evidence, as there is a danger that expert evidence will be misused and will distort the fact-finding process.

-Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

-Factors for determining whether expert evidence is more prejudicial than probative include whether:

-the evidence is likely to assist the jury in its fact-finding mission, or rather likely to confuse and confound the jury?

-the jury is likely to be overwhelmed by the "mystic infallibility" of the evidence, or whether the jury will be able to keep an open mind and objectively assess the worth of the evidence?

- *R. v. Noble, SCC 1997*

- Facts - accused charged with B&E, among other things. Does not testify at own trial.

- Issue - can the accused's silence be used against the accused by the prosecution?

- Rule - no, although there is a limited exception for alibi evidence

- Inimical to the dignity of the accused to use his or her silence to assist in grounding a belief in guilt beyond a reasonable doubt; otherwise, no matter what the accused does, communicative evidence emanating from the accused is used against him; undermines right to silence.

- If silence may be used against the accused in establishing guilt, part of the burden of proof has shifted to the accused; the Crown need only prove the case to some point short of beyond a reason- able doubt, and the failure to testify takes it over the threshold.

- The presumption of innocence indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty.

- Some reference to the silence of the accused by the trier of fact may not offend the principles of right to silence and presumption of innocence. For instance, in a judge-alone trial, silence of the accused may be referred to as evidence of the absence of an explanation which could raise a reasonable doubt.

- If the Crown has proved the case beyond a reasonable doubt, the accused need not testify, but if he doesn't, the Crown's case prevails and the accused will be convicted. It is only in this sense that the accused "need respond".

- Reference is permitted by a judge trying a case alone to indicate that he need not speculate about possible defences that might have been offered by the accused had he or she testified.

- If silence is simply taken as assuring the trier of fact that it need not speculate about unspoken explanations, then belief in guilt beyond a reasonable doubt is not in part grounded on the silence of the accused, but rather is grounded on the evidence against him or her.

- Where limited to purpose of assurance re: speculation, the silence of the accused is not used as inculpatory evidence, which would be contrary to the right to silence, but simply is not used as exculpatory evidence.

- Three ways in which the silence of the accused might be considered by the trier of fact:

    - Once the Crown has proffered a case to meet, the silence of the accused can be used in determining whether an accused is guilty beyond a reasonable doubt. Violation of both right to silence and presumption of innocence.

    - Inferences of guilt may be drawn from the accused's silence "only where a case to meet has been put forth and the accused is enveloped in a 'cogent network of incul- patory facts.'" Silence used to "bridge" an evidentiary "gap" and thereby violates *Charter* principles.

    - The silence of the accused means that the evidence of the Crown is uncontradicted and therefore must be evaluated on this basis without regard for any explanation of those facts that does not arise from the facts themselves. No inference of guilt is drawn from the silence of the accused; only tenable position.

- The trier of fact, whether judge or jury, cannot treat the silence of the accused as a "make-weight." *Charter* applies equally in either trial scenario; the role of the TOF is the same.

- s. 4(6) of the *CEA* prevents judge from instructing the jury on the impermissibility of using silence to take the case against the accused to one that proves guilt beyond a reasonable doubt.

- Due to s. 4(6) and the lack of reasons provided in a jury trial, it is impossible to prevent a jury from drawing what- ever inference they please from the failure to testify.

- Remains an error of law for the jury to become convinced of guilt beyond a reasonable doubt as the result of the silence of the accused at trial.

- Nothing in s. 4(6) or in the analysis thus far prevents the trial judge from telling the jury that the evidence on a particular issue is uncontradicted; not instructing the jury to consider the failure of the accused to testify *per se,* but rather that TOF need not speculate about possible contradictory evidence which has not been led in evidence.

- Possible that reasoning in the present case indirectly challenges the constitutionality of s. 4(6), but Court will not to decide the matter without the benefit of argument.

- Counsel for the accused is entitled to make an appropriate comment on the issue; stress that there is no duty upon the accused to testify and that, rather, the obligation rests upon the Crown throughout the case to satisfy BRD.

- Narrow exception for alibi defence set out in *Vezeau* - failure of an accused person, who relies upon an alibi, to testify and thus to submit himself to cross-examination is a matter of importance in considering the validity of that thdefence.

- The potential for the fabrication of alibi evidence requires that a negative inference may be drawn against such evidence where the alibi defence is not disclosed in sufficient time to permit investigation.

- Two reasons for the exception - ease with which alibi evidence may be fabricated; and the diversion of the alibi inquiry from the central inquiry at trial.

- *R. v. Lyttle, SCC 2004*

- Facts - victim beaten, claims that this related to theft of gold chain, identifies accused as attacker. Defence holds that the beating related to a drug debt, and that the victim identified the accused in order to protect the real assailants.

- Issue - what basis is required in order for disputed or unproven facts to be put to an evidence in cross examination? Is a good faith basis sufficient?

- Rule - good faith basis is sufficient

    - A question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question.

    - It is not uncommon for counsel to believe what is in fact true, without being able to prove it *otherwise than by cross-examination*.

    - It is not uncommon for reticent witnesses to concede suggested facts—in the mistaken belief that they are already known to the cross-examiner and will therefore, in any event, emerge.

    - "Good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used.

    - Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false.

    - Pursue any hypothesis that is honestly advanced on the strength of reasonable infer- ence, experience or intuition.

    - To suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.

    - Adversarial process allows wide latitude to cross-examiners to resort to unproven assumptions and innuendo in an effort to crack the untruthful witness.

    - TJ will sometimes want to ensure that counsel is not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to generate an unwarranted innuendo.

    - No distinction need be made between expert and lay witnesses within the broad scope of this general principle.

    - An accused in a criminal case has the right of cross- examination in the fullest and widest sense of the word as long as he does not abuse that right. Any improper interference with the right is an error which will result in the conviction being quashed.

- *R. v D. (D.),* SCC 2000

- Facts - 10 year old complainant alleges sex assault by accused at age 5-6, disclosed 2.5 years after the fact. Expert evidence used to rebut allegation that the delay in reporting supported an inference of fabrication.

- Issue - was the expert evidence admissible?

- Rule - no, because the principle should have been expressed as a jury charge by an impartial officer, not as expert evidence. However, evidence was accurate.

    - Common law once contained an absolute requirement that victims of sexual abuse raise an immediate "hue and cry" in order for their appeal to be heard. This was abrogated in the *Criminal Code*.

    - Complainant's failure to make a timely complaint *must not* be the subject of any presumptive adverse inference based upon now assumptions of how persons, particularly children, react to acts of sexual abuse. This is a legal principle, and must be given as a jury instruction.

    - Jury instruction s would have effectively dispelled the possibility that the jury might engage in stereotypical reasoning, it was *not* necessary to admit expert evidence on this matter. Impartial, eliminates prejudicial and superfluous content, more efficient, therefore always preferable.

    - TJ must instruct that there is no inviolable rule on how victims of trauma will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse.

    - Timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.

- *R. v. Dinardo*

    - *Facts* - accused charged with sexual assault; complainant testifies at one point that she may have made up the allegation. TJ notes in reasons that he found complainant credible because her testimony rarely contradicted her previous statement to police.

    - Issue - witness' prior consistent statements admissible for purposes of credibility bolstering?

    - Rule - Complainant's prior consistent statements were not admissible under any of the traditional hearsay exceptions. Thus, the statements could not be used to confirm her in-court testimony.

        - Prior consistent statements may be admissible as part of the narrative. once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed.

        - Must distinguish between using narrative evidence for the impermissible purpose of confirming the truthfulness of the sworn allegation and using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then *assist the trier of fact in the assessment* of truthfulness or credibility.

        - Complainant's prior consistent statements were not admissible under any of the traditional hearsay exceptions. Thus, the statements could not be used to confirm her in-court testimony.

- *Toohey v. Metropolitan Police Commissioner*, HL 1965

  - Facts - accused charged of robbing complainant, who was found distressed, hysterical, dishevelled in company of the accused. Complainant attempted to flee when police arrived. Accused claimed that the complainant was drunk, and accused was merely taking complainant home. Defence sought to adduce evidence that the complainant was suffering from a disease of the mind, and that, therefore, the expert regarded his testimony as unreliable

  - Issue - expert evidence concerning a pre-disposition to hysteria or instability admissible to show that a witness is not credible?

  - Rule - Medical evidence is admissible to show that a witness suffers from some abnormality of mind that affects the reliability of his evidence.

    - It has long been the practice to allow evidence of bad reputation to discredit a witness's testimony. It is perhaps not very logical and not very useful to allow such evidence founded on hearsay.

    - Witness may, through mental trouble, derive a fanciful or untrue picture from events while they are actually occurring, or may have a fanciful recollection which distorts their recounting as testimony.

    - If a witness purported to give evidence of something which seen at a distance of fifty yards, it must surely be possible to call an oculist to the effect that the witness could not possibly see anything at a greater distance than twenty yards.

    - Therefore, it must it be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence. There might be a conflict between the doctors and that there would then be a trial within a trial; but such cases would be rare.

    - Medical evidence is admissible to show that a witness suffers from some abnormality of mind that affects the reliability of his evidence. Not confined to an opinion of unreliability but also reasons for this opinion, and the extent to which the credibility of the witness is affected.

- *R. v. Clarke, ONCA 1998*

  - Facts - confrontation between male and female, culminating in assault charge. D. proposes calling five witnesses concerning the reputation of the complainant and the respondent from Trenton's Caribbean community.

  - Issue - is the evidence of community members concerning the reputation of the accused and the complainant admissible?

  - Rule

    - General rule of evidence is that a party may not bolster the character of his or her witness until the opposite party has attempted to impeach the witness' character. So- called oath-helping evidence is inadmissible.

    - Law has always permitted the defence to call character witnesses to testify to the good character of the accused, whether or not the Crown has expressly attempted to im- peach the

character of the accused

- We were not referred to any authority that permits the accused to lead evidence from character witnesses that they would believe the accused under oath, unless character witnesses have first said that the witness has a bad character for veracity.

- It is only in reply, after the witness' credibility has been attacked by other witnesses testi- fying that they would not believe the witness under oath, that the party calling the witness whose credit has been impeached may call other witnesses to vouch for the oath.

- When the defence seeks to put the character of the accused in issue by cross-examination of prosecution witnesses, or by calling defence witnesses other than the accused it is submitted that the rule should be strictly enforced, that is, *it is confined to evidence of general reputation*. However, when the accused himself puts his character in issue he is not so confined.

- Accordingly, while the defence may lead evidence of the accused's reputation in the community, including the accused's reputation for truthfulness and veracity, it may not ask those witnesses for their opinion whether they would believe the accused under oath.

- Whatever the witness' reputation for veracity in the community, testifying in court under oath is a very different circumstance and the jury will want to bear this in mind.

- The jury may find the reputation evidence helpful in determining the credibility of the witnesses, but they should not automatically defer to that evidence.

- *Gonzague* permits the following line of inquiry of a witness called by the defence to give evidence about the character of a Crown witness:

    - Do you know the reputation of the witness as to truth and veracity in the community in which the witness resides?

        - If the answer is "yes" the questioning proceeds.

    - Is that reputation good or bad?

        - If the answer is "bad" a final question is permitted.

    - 3. From that reputation, would you believe the witness on oath?

- Time to reassess this rule. I would hold that a judge has a limited discretion to prevent counsel from asking the first two questions of a witness, and only rarely should the third question be permitted.

- Four factors that a judge should take into account in determining whether evidence that has some probative value meets the test for legal relevancy:

    - The danger that the evidence will arouse the jury's emotions of prejudice, hostility or sympathy.

    - The danger that the proposed evidence and any evidence in response will create a side issue that will unduly distract the jury from the main issue in the case.

- The likelihood that the evidence will consume an undue amount of time.

- The danger of unfair surprise to the opponent who had no reasonable ground to anticipate the issue and was unprepared to meet it.

- The danger that the evidence will be presented in such a form as to usurp the function of the jury.

- Principles applicable to oath-helping are also applicable to oath-attacking evidence, where it invites one witness to express a personal opinion as to the lack of veracity of another witness.

- Prejudicial effect of the answer to the third question (belief on oath) will almost invariably substantially outweigh its probative value.

- Judge has a discretion to exclude a conclusory statement by an expert where the opinion can be framed in less conclusory terms.

- Where the outcome of the case depends upon the evidence of a single witness, an expression of opinion as to that veracity is a comment on the ultimate issue; risk that the jury will defer.

- The ability of a character witness, who has not heard the evidence in the case, to predict whether another witness has told the truth under oath is very limited.

- Accused does not have the absolute right to ask the third question and that in most cases the trial judge would be justified in refusing to permit that question.

- Concerning the first two questions, would be an extremely rare case where a trial judge would be warranted in excluding such evidence - these do not invite answers that would have the tendency to usurp the jury's function.

- Only serious problem with this defence evidence is whether the evidence will consume an undue amount of time; judge has discretion to limit the number of reputation witnesses in order to counterbalance the potentially prejudicial effect of this.

- General reputation evidence is simply another piece of circumstantial evidence that the jury can use to assess credibility.

- Where reputation evidence as to the credibility of a witness is admitted, the jury instruction must include two points:

    - Testifying in court under oath is a very different circumstance than reputation in the community;

    - Character witnesses have not heard all the evidence, and are not sworn to the heavy duty of the juror to render a true verdict.

- *R. v. Corbett, SCC 1988*

    - Facts - accused charged with murder of associate in cocaine trade; admitted to convictions from the '50s concerning unrelated crimes, and of murder in 1971.

- Issue - are these convictions admissible?

- Rule - Yes. Serious imbalance would have arisen had the jury not been apprised of Corbett's criminal record. quite incorrect impression that while all the Crown witnesses were hardened criminals, the accused had an unblemished past

    - What lies behind s. 12 is a legislative judgment that prior convictions do bear upon the credibility of a witness

    - There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness.

    - Impossible to explain to the jury that one set of rules applies to ordinary witnesses, while another applies to the accused, for the very fact of such an explanation would undermine the purpose of the exclusionary rule.

    - Serious imbalance would have arisen had the jury not been apprised of Corbett's criminal record. quite incorrect impression that while all the Crown witnesses were hardened criminals, the accused had an unblemished past

    - Wrong to make too much of the risk that the jury *might* use the evidence for an improper purpose.

    - Regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information.

    - Fundamental *right* to a jury trial has recently been underscored by s. 11(f) of the Charter. If that right is so important, it is logically incoherent to hold that juries are incapable of following the explicit instructions of a judge.

    - Judicial decisions have carefully circumscribed the extent to which the Crown may use prior convictions.

        - The accused may be examined only as to the fact of the conviction itself and not concerning the conduct which led to that conviction

        - Accused cannot be cross-examined as to whether he testified on the prior occasion when convicted in order to show that he is one who was not believed by a jury on a previous occasion.

        - Crown is not entitled to go beyond prior convictions to cross-examine an accused as to discreditable conduct or association with disreputable individuals to attack his credibility

        - 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.

        - "convictions" strictly construed and that there can be no cross-examination where the

accused was found guilty and granted a conditional discharge, conditions subsequently having been fulfilled:

- Cannot be said that s. 12 of the *Canada Evidence Act* operates in such a way as to deprive the accused of the right to a fair trial.

- If error is to be made it should be on the side of inclusion rather than exclusion.However, trial judge has a discretion to exclude prejudicial evidence of previous convictions in an appropriate case.

- In this case, the accused appellant made a deliberate attack on the credibility of Crown witnesses, largely based upon their prior records. Sole issue was credibility. Therefore, excluding evidence of Corbett's prior criminal record would have created a serious imbalance.

- Dissent (LaForest)

- s. 12 significantly, and often invidiously, circumvents the complex of rules that precludes, in general, the introduction by the Crown of evidence of an accused's "bad character," or disposition for criminal activity or discreditable acts not related to the charge.

- TOF entitled to infer that because the accused committed criminal acts in the past he or she is now more likely to lie, but that same trier of fact is not entitled to infer therefrom that the accused is also more likely to have committed the evil act for which he is now on trial.

- In Canada accused persons will more frequently choose not to testify than in England, where cross-examination on previous convictions is specifically restricted and subject to an overriding judicial discretion to avoid undue prejudice.

- Probative value and prejudicial effect of a previous conviction are directly affected by the nature of that conviction. The touchstone of all these factors is the fairness of the proceedings (to both the Crown and the accused).

    - Acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity.

    - Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity.

        - Convictions for theft and breaking and entering, though quite remote in time, would appear far more probative of a disposition for dishonesty than a conviction for murder.

    - The more similar the offence to which the previous conviction relates to the conduct for which the accused is on trial, the greater the prejudice. For same crime, discretion should be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure and where the conviction directly relates to veracity.

    - Remoteness or nearness of the previous conviction is also, as the court in *Gordon*, *supra*, stated, "a factor of no small importance"

- There may be cases where the interests of not presenting a distorted picture to the jury might require permitting such cross-examination, but I do not think this factor can override the concern for a fair trial.

- *R v. Melnichuk, ONCA 1995*

- Facts - accused convicted of fraud, Crown led evidence that accused had previously falsely held himself out to be a CA. The accused denied having done so.

- Issue - is the the issue of whether the accused held himself out to be a CA, which is not material to the crime charged, subject to the collateral facts bar?

- Rule

- It was no part of the Crown's case that the appellant had represented to Mrs. Hobson or her daughter that he was a chartered accountant, or that any such misrepresentation figured in the loan made to the appellant by Mrs. Hobson

- Question of whether the appellant had ever misrepresented himself to be a chartered accountant was, therefore, relevant only to his credibility. In my view, it was a collateral matter.

- *R. v. Baskerville, UKCA 1916*

- Facts - accused convicted of offences along with two boys, appeals on the basis that he was convicted solely on the testimony of accomplices: there was no corroborative evidence.

- Issue - can one be convicted on the testimony of accomplices in the absence of corroborative evidence?

- Rule - this area of law has been abrogated. However,

- Jury instructed that they must not convict upon the testimony of the accomplices unless satisfied that there was corroboration in some material particular.

- Uncorroborated evidence of an accomplice is admissible; however, rule of common law for judge to warn the jury of the danger of convicting on the uncorroborated testimony of an accomplice, and in discretion of TJ to advise them not to do so.

- Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime.

- *Vetrovec v. the Queen, SCC 1982*

- Facts - charged with heroin trafficking; accomplice testified. TJ provided corroborative warning, but also said that some evidence was capable of corroborating accomplice testimony.

- Issue - is it an error in law to instruct the jury that certain evidence is capable of corroborating accomplice testimony?

- Rule

- The accused is in the unhappy position of hearing the judge draw particular attention to the evidence which tends to confirm the testimony the accomplice has given. Cogent preju- dicial testimony is thus repeated and highlighted.

- Common law rejects the "numerical criterion" and has traditionally held that the testimony of a single witness is a sufficient basis for a criminal conviction.

- The general rule applied equally in the case of accomplices: where the testimony of an accomplice was admissible, it could justify a verdict of guilty

- Credibility of witnesses and the weight of the evidence is, in general, a matter for the trier of fact.

- It is suggested that an accomplice cannot be trusted because he will want to suggest his innocence or minor participation in the crime and to transfer the blame to the shoulders of others. But, where an accomplice openly acknowledges his participation, or where this is uncontested by the accused, there should be no need for a warning.

- Judge is silent as to the evidence which in his opinion is of a corroborative character, the accused and his counsel are in effect deprived of the right to object to the decision of the TJ on a point of law; left in doubt as to whether the jury properly applied the principles of law.

- What was originally a simple, common-sense proposition—an accomplice's testimony should be viewed with caution—becomes transformed into a difficult and highly technical area of law.

- An accomplice is to be treated like any other witness testifying at a criminal trial and the judge's conduct, if he chooses to give his opinion, is governed by the general rules.

- What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support.

- Sufficient for the trial judge simply to have instructed the jury that they should view the testimony of the accomplice with great caution, and that it would be wise to look for other sup- porting evidence before convicting the appellants.

- *Vetrovec warning* - for unsavoury witnesses, l typically include an instruction that it is unsafe to rely on the unsavoury witness's evidence without some other evidence that confirms or agrees with it.

– *Subramaniam v. Public Prosecutor, PC 1956*

- Facts - accused charged with illegally possessing rounds of ammunition; seeks to adduce statement of captor, who claimed to be a communist and threatened accused's life if he didn't comply.

- Issue - Statement of captor, who was not available to testify, is out of court statement, but is it nonetheless admissible if *not* tendered for truth of contents?

- Rule - admissible; not used for hearsay purpose.

- Statement relevant, as, if believed, could have afforded cogent evidence of duress brought to bear upon the appellant; and regardless of whether the contents are true, the D. might have believed

them to be so.

- Hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement.

- Not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made; quite apart from its truth, this fact is frequently relevant in considering the mental state and conduct thereafter of witnesses.

– *R. v. Wildman, ONCA 1981*

- Facts - accused charged of murdering stepdaughter, who was killed by hatchet blows. Defence seeks to adduce evidence that the accused's wife made a telephone call to a neighbour, accusing the neighbour of having murdered the victim with a hatchet. This conversation was related to the appellant. As the accused's knowledge of the weapon used (the police had not released this detail) was strong evidence of his guilt, the conversation was relevant to his defence, as it provided an alternate explanation as to how he acquired this knowledge.

- Issue - is the telephone conversation admissible?

- Rule - evidence was admissible.

- Here the evidence was being adduced not to establish the truth of what was said, but for some other relevant purpose; to show how the appellant had acquired knowledge of the circumstances of the offence and to explain the accused's subsequent conduct

- The truth of the contents of the conversation would be that the *neighbour had in fact* killed the victim, or that the victim was *in fact* killed with a hatchet. The defence was not seeking to prove these facts with the statement, but rather only that the statement was made.

– *Wright v. Tatham, Exch. Ct. 1837*

- Facts - testator wills lands to Wright, his steward. A relative brings action against Wright on the basis that the testator lacked capacity to make a will. Wright seeks to adduce letters sent to the testator by his friends, for the purposes of showing that he did not lack capacity. This would be inferential from the nature of the
communication between the testator and his correspondents, who were all dead at the time of the trial.

- Issue - are the letters admissible?

- Rule - the letters are not admissible.

- The extensive and dangerous consequences of allowing such evidence are too obvious to require observation. In all cases where the judgment of third parties upon any matter in issue is receivable, personal examination upon oath is required.

- All facts which are relevant to the issue may be proved, and all such facts as have not been admitted by the party against whom they are offered, ought to be proved under oath.

- Proof of fact, which is not a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible where such a statement or opinion

not on oath would be inadmissible.

- Truth of the implied statements therein contained were properly rejected as the mere statement or opinion of the writer would certainly have been inadmissible.

- It is not what the third person does, or says, or writes, which furnishes of itself any indication of the state of mind of the party respecting whom the inquiry is made, but what such party himself does, or says, or writes, or how he conducts, or bears himself on the occasion.

- *R. v. Wysochan, SKCA 1930*

- Facts - accused charged with murder of woman by shooting. After being shot, the woman asked for her husband, and asked him for help. These words supported the inference that her husband had not shot her (and therefore the accused had shot her).

- Issue - are the woman's dying words admissible?

- Rule - yes; the utterances contained no facts necessary to be proved.

- To the use of out of court statements circumstantially the hearsay rule makes no opposition because the utterance is not used for the sake of inducing belief in any assertion it may contain.

- *R v McNamara et al., ONCA 1981*

- Facts – accused charged with rigging bids for dredging contracts. The Crown sought to cross-examine the accused on an unrelated matter in which the D. Had pled guilty to tax evasion, on the basis that the accused had put his own character into issue during examination in chief.

- Issue – did the accused put his own character at issue, thereby allowing the Crown to cross-examine him on his character using the prior bad act? Was the cross examination appropriate?

- Rule – Yes.

- Question #1: did the accused put his character at issue?

- Defence contends that the D. Did not put his character at issue, but rather was merely issuing an answer and denial of the allegations against him.

- An accused does not put his character in issue by denying guilt or repudiating allegations, or by explaining matters essential to defence.

- Accused is not entitled to expressly or impliedly assert good character under the guise of repudiation however; to do so puts character in issue.

- Introductory questions concerning place of residence, employment, marital status, etc. Do not put character into issue.

- Stating that one has never been convicted or arrested does put one's character at issue; this projects an image of a "law abiding citizen" who would not be disposed to commit the crime alleged.

- Evidence of specific "good acts" adduced for the purpose of promoting an inference of good character also put character at issue – for instance, recounting instances where one has returned lost property to its owner.

- In the present matter, the accused did not merely describe Rindress' mandate; he stated that the mandate was as it "should" be, and in so doing impliedly asserted that he was a person who operated businesses legally. Also said that he would not exploit connections for business purposes; statements made solely for purpose of showing that he is of good character.

- Question #2 – was the cross-examination on the prior act appropriate?

- The rule that the accused could only adduce, and the Crown only reply with evidence of the accused's general reputation is abrogated.

- The modern rule distinguishes between intrinsic and extrinsic evidence of good character:

- *Extrinsic* - the accused can call other witnesses to provide evidence of good character, but only relating to general reputation.

- *Intrinsic* - the accused can himself adduce evidence of specific acts of good character, in addition to evidence relating to general reputation.

- The Crown may adduce similar fact evidence in rebuttal of evidence of good character.

- Where an accused puts character at issue, and thereby allows for cross-examination on prior conduct, the proof of the previous bad conduct has a dual significance:

- Rebuts claim of good character, thereby implying that the accused is more likely to have committed the offence;

- Shows that the accused may have been untruthful in the witness box, whether in-chief or on cross-examination.

- Ordinary witnesses may be cross-examined on past misconduct in order to show that they are not credible. An accused may not be so questioned unless character is put at issue.

- Where the only avenue of admissibility of evidence of bad character is to rebut the accused's evidence of good character, the evidence has a limited use: to refute the claim of good character. Cannot be used to show propensity to commit the offence.

- R v Rowton, UK 1865

- Facts – schoolmaster charged with indecent assault, calls a number of witnesses concerning his good character. Crown replies by calling witness who testifies as to bad character of the accused.

- Issue – is the Crown's reply evidence admissible?

- Rule – No – Crown entitled to reply, but only within parameters of the accused's evidence, which was limited to general reputation. Evidence of witness' own opinion inadmissible.

- Where the accused raises the issue of character, the Crown is entitled to reply.

- This is in the interest of trial fairness; nothing could be more unjust than allowing the accused to avail himself of character which may be the reverse of what he really deserves.

- The evidence called in reply must be of the same character and confined within the same limits; therefore, must be evidence of *general reputation* (which, at the time, was the limit on the accused's own evidence – self-interested parties were barred from testifying) and not the opinion of the witness.

- *R v Levasseur, ABCA 1987*

- Facts – D. Charged with theft, claims colour of right defence, and adduced evidence of good character to support this contention. The evidence related to what the character witness thought of the accused, did not relate to the accused's general reputation in the community.

- Issue – can the accused adduce evidence of good character beyond mere "general reputation in the community?"

- Rule – yes – old rule outmoded.

- Restriction on the accused's evidence has no place in modern society; reflects that persons live in many isolated spheres, and may have a different reputation for different reasons in each sphere.

- The law desires a trustworthy reputation from such evidence; if that can be found elsewhere other than within the limitations prescribed by the old rule, then such evidence should be admissible.

- *R v Profit, ONCA 1992*

- Facts – school principal charged with sexual assault. Adduces evidence from twenty-two witnesses concerning good character; they state that they never saw him act in a sexually inappropriate manner.

- Issue – is the character evidence admissible?

- Rule – Yes.

- There is a dual significance to good character evidence, each of which should be considered by the TOF:

- Supports the credibility of the accused (see credibility-bolstering evidence).

- Supports an inference that the accused is not the kind of person who would commit the offence.

- Dissent (Griffiths)

- Sexual assaults are incidents which are shrouded in secrecy. The flaws in the character of the perpetrator may not come to light until a conviction has been rendered. Therefore, the probative value of good character evidence is circumscribed.

- There is little data to indicate that good character has any bearing on propensity to commit sex

assault, and abusers may build good character profiles to camouflage their activities (think Gacy – volunteering tirelessly, etc.)

- SCC ruling, (dissent upheld by SCC, 1993)

    - Judge entitled to consider that sexual assault occurs in private in most cases, and therefore will not be reflected in community reputation for morality. Probative value of such evidence thereby limited.

- *R. v. Robertson, ONCA 1975*

    - Facts – D. Charged with murder, sought to adduce evidence that he did not possess the specific characteristics which would be expected of a perpetrator of that type of offence.

    - Issue – expert evidence of accused`s good character admissible?

    - Rule

        - Expert evidence concerning the character of the accused is admissible under narrow circumstances, namely that:

        - The character of the accused has been put into issue by the accused;

        - The offence has distinctive features which identify the perpetrator as having unusual personality traits associated with a limited class of persons;

        - The evidence tends to show that the accused either is not (Defence) or is (Crown, in reply) a member of that group;

        - The group is specialized and extraordinary, their characteristics falling within the realm of the expert (beyond common understanding).

        - For instance, expert evidence that the accused was a member of a small class of persons who would react violently to homosexual behaviour would be pertinent in an offence involving homosexual conduct (such as the long-deprecated "gross indecency").

        - Where the crime is an ordinary crime of violence, there are no special traits associated with a limited class of persons linked to the crime.

        - Psychiatric evidence concerning a mere disposition to violence or lack thereof is not admissible; not so uncommon so as to justify admission.

        - Even where the crime is one of great brutality, it cannot be said that it would only be committed by a person with recognizable personality traits belying brutality.

- *R v Mohan, SCC 1994*

    - Facts – D. Is a doctor accused of sexually assaulting his patients. that the crimes alleged had a distinctive character such that their perpetrator would likely have been a member of a limited class of persons with abnormal traits. Sought to adduce evidence that the accused was not a member of this class.

- Issue – accused's expert evidence admissible?

- Rule – no.

- Expert testified on voir dire that the perpetrator of the first three complaints was one type of sexual deviant (paedophilic), while the fourth complainant was of another type (psychopathic).

- If the same perpetrator was involved in all four crimes, as alleged, then it would follow that each of the crimes was committed by a sexual psychopath, a special or extraordinary class of persons.

- There is great diversity in the persons who commit sexual offences against young women, such that without further distinctiveness in the crime itself, expert evidence of the normalcy of the accused is not likely of assistance to TOF.

- There is no scientific data to warrant a conclusion that doctors who commit sexual assaults are a more limited class of offenders than other persons.

- Evidence of the accused's character is limited to evidence of reputation in the community with respect to the traits relevant to the offence; although the accused may themselves testify as to their own acts of good conduct.

- Expert evidence does not fit the existing categories (witnesses of general good character, accused's own testimony concerning specific or general good character). However, there is a further exception which applies.

- The categorization of crimes as either ordinary or extraordinary for this purpose is a legal question to be determined by the judge.

- The categorization of the accused as either normal or abnormal for this purpose is a legal question to be determined by the judge.

- The judge must be satisfied that either the perpetrator of the crime or the accused is possessed of distinctive characteristics; further, a comparison of crime to perpetrator must be of material assistance in determining guilt.

- Judge must also be satisfied that the expressed opinion is based on a standard profile created by the scientific community, and not the personal opinion of the expert.

- *R. v. Morin*, SCC 1988

-Facts - defence called psychiatric witness, who conceded on cross that aspects of the crime revealed the sort of disorganized and disturbed thinking consistent with schizophrenia.

-Issue - expert evidence concerning accused's character capable of supporting inference of guilt?

-Rule

-Illogical to treat evidence tending to show the accused's propensity to commit the crime differently because such a propensity is introduced by expert evidence rather than by means of past similar conduct

-if in the latter case the evidence is admitted provided its probative value exceeds its prejudicial effect, then the same test of admissibility should apply in the former case.

-Accordingly, when the prosecution tenders expert psychiatric evidence, the trial judge must determine whether it is relevant to an issue in the case, apart from its tendency to show propensity.

-if it is relevant to another issue (e.g., identity), it must then be determined whether its probative value on that other issue outweighs its prejudicial effect on the propensity question.

-For instance, to be relevant on the issue of identity the evidence must tend to show that the accused shared a distinctive unusual behavioural trait with the perpetrator of the crime.

-If the evidence's *sole* relevance or *primary* relevance is to show disposition, then the evidence must be excluded.

-Greater the number of persons in society having these tendencies, the less relevant the evidence on the issue of identity and the more likely that its prejudicial effect predominates over its probative value.

- *R. v. Khan, SCC 1990*

-Facts - young girl tells her mother about sexual molestation by her doctor, Crown seeks to adduce mother's statement for truth of contents.

-Issue - Is the statement admissible for truth of contents?

-Rule - admissible under principled exception.

-Statement was not *res gestae*, being made 15 minutes after leaving the doctor's office and probably one-half hour after the offence was committed. Nor was it made under pressure or emotional intensity which would give it a guarantee of reliability.

-The pigeonhole approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. Should be replaced with necessity and reliability requirements.

-In this case, necessity found as other evidence of the event was inadmissible. Reliability found as the declaration was made without interest, before any suggestion of litigation; further, doubtful that child had means of knowledge concerning events which she said befell her.

-Children of the age with which we are concerned here are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.

-Necessity - interpreted as "reasonably necessary"; inadmissibility of other evidence, or traumatic experience of having to testify would establish necessity.

-Reliability - timing, demeanour, personality, intelligence, understanding of the child, absence of any reason to expect fabrication, among others.

- There may be cases where as a condition of admission, TJ holds it possible and fairto permit cross-examination of the child as the condition of the reception of a hearsay statement.
- However, in most cases the concerns of the accused as to credibility will remain to be addressed by submissions as to the weight to be accorded to the evidence, and submissions as to the quality of any corroborating evidence.

- This does not make out-of-court statements by children generally admissible; the requirement of necessity will probably mean that in most cases children will still be called to give *viva voce* evidence.

- *R. v. Smith, SCC 1992*

- Facts - accused charged with murder; victim went with accused to London, Ont., and on the night of her death, made several phone calls to her mother in Detroit. The Crown seeks to adduce these calls for the truth of their contents. In the first two calls, the victim said that she needed a ride home, as D. had abandoned her. In the third call, the victim said that D. had come back for her, and she would not need a ride home.

- Issue - are the statements admissible as hearsay?

- Rule - first two calls admissible, third call inadmissible.

    - Categorical approach to exceptions to the hearsay rule has the potential to undermine, rather than further, the policy of avoiding the frailties of certain types of evidence. K*han* should not be understood as turning on its particular facts, but, instead, must be seen as a particular expression of the fundamental principles.

    - Necessity - the evidence is required in order for a party to prove a fact in issue, but yet is unavailable. Evidence of the same value cannot be gained from the same or other sources - for instance, where the witness is unavailable to testify, is dead, or has since become incompetent to testify.

        - For example, in *Khan* the infant complainant was found by the trial judge not to be competent to testify herself. In the present case, the declarant is dead.

    - Reliability - met where there are circumstantial guarantees of trustworthiness; where the circumstances in which the statement was made are not such as to give rise to the apprehensions traditionally associated with hearsay evidence, such evidence should be admissible even if cross-examination is impossible.

        - Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

        - Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force;

        - Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

    - Concerning the third call, court apprehensive that the declarant may have been mistaken (eg. that D. had returned) or may have intended to deceive her mother. Odd that she would say that a ride

was no longer needed before speaking to D., particularly as declarant may have wanted to avoid her mother sending Philip to pick her up - Philip had previously assaulted her. Further, was traveling under assumed name and stolen credit card, so capable of deceit.

- The approach that excludes hearsay evidence, even when highly probative, out of the fear that the trier of fact will not understand how to deal with such evidence, is no longer appropriate

- The hearsay evidence of what Ms. King told her mother in the first two telephone calls satisfied the criteria of necessity and reliability. Nixed the third call.

- *R. v. K.G.B., SCC 1993*

- Facts - accused charged with stabbing murder. Accomplices make statements to police in which they assert that the accused had acknowledged that he had wielded the knife, and thought he had killed the victim. The accomplices resile from this position at trial, and the Crown seeks to adduce their previous statements for the truth of their contents.

- Issue - are the accomplices' statements admissible under the principled exception?

- Rule

  - Threshold requirement - prior inconsistent statements will only be admissible if they would have been admissible as the witness's sole testimony. That is, if the witness could not have made the statement at trial, it cannot be made through the back door.

    - Examples - if the prior inconsistent statement was:

      - "I saw X fire the gun" - admissible, as it is a direct observation.

      - "Y told me that X fired the gun" - inadmissible, hearsay.

      - "Y told me that Y fired the gun" - admissible, hearsay subject to the party admission exception to the rule against hearsay.

  - *W*ith the court's decision in this case, prior statements which satisfy the criteria of admissibility will be used as substantive evidence in a subsequent trial.

  - Concerning reliability, focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial, and so additional *indicia* and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured:

    - *Oath* - or other circumstances which impress upon declarant the importance of telling the truth. will not motivate all witnesses to tell the truth, yet may impress on honest witnesses the seriousness of their statements. Also precludes TOF from having to choose between sworn and unsworn testimony.

    - *Warning* - declarants must be made aware, through warning, of exposure to prosecution for giving false statement, referring specifically to ss. 137, 139, 140 of the *Criminal Code*, including elements and sanctions of those offences.

    - *Videotaped in full* - there are many verbal / non-verbal cues which are essential to credibility

assessment, which are lost when witness is not on the stand. The audio-visual medium captures these elements, although exceptionally an independent third party could also do so. Therefore, must either be a videotape of prior inconsistent statement, or sufficient substitute which fulfills the "presence" hearsay danger.

-*Cross-examination at trial* - easily remedied where there is a full opportunity to cross-examine the witness on the statement at trial; there would often not have been a chance for *contemporaneous* cross-examination in any case (eg. would not be cross-examining witnesses in a police interview room before the accused has even been charged).

-Concerning necessity, in the case of prior *inconsistent* statements it is patent that we cannot expect to get evidence of the same value from the recanting witness or other sources; value is different because the statement has radically changed, and therefore the TOF should have the opportunity to weigh both.

-Many established hearsay exceptions do not rely on the unavailability of the witness. Some examples include admissions, present sense impressions and business records. This is because there are very high circumstantial guarantees of reliability attached to such statements

-Warning/oath satisfy the first hearsay danger entirely - in no case will the trier of fact be asked to accept unsworn testimony over sworn testimony, verdicts will not be based on unsworn testimony, and the circumstances which promote truthful trial testimony will have been recreated as fully as is possible.

-Due to oath, statements made to family members or friends would generally not comply, unless the witness then repeats the statement for appropriately authorized persons. This is not a huge issue, as each police station will have JP or commissioner for oaths present.

-There may be situations in which the trial judge concludes that an appropriate substitute for the oath is established and that notwithstanding the absence of an oath the statement is reliable.

-Prior statements share many characteristics with confessions, especially where police investigators are involved; influence on the witness by police may precede the making of the statement and shape its content.

-Procedure

-Calling party invokes s. 9 of the *Canada Evidence Act*, and fulfils its requirements in the *voir dire* held under that section;

-Calling party must then state its intention in tendering the statement:

-If the party indicates that it wishes to use the statement only to impeach the credibility of the witness, that is the end of the matter;

-If party gives notice that it will seek to make substantive use of the statement, the trial judge must continue the *voir dire* to:

-determine whether the oath and warning will be proved;

-tender the videotape into evidence, its authenticity being sworn to.

-TJ must be satisfied that the state- ment was not the product of coercion of any form: threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other investigatory misconduct.

-The burden is on the party calling evidence on BOP, except for where the statement reports an admission made by the accused to a person in authority (higher burden for confessions applies).

-Dissent (Cory)

-Absence of an oath or a warning when the statement was taken was not fatal to admissibility for truth;

-Videotaping not necessary where a complete and comprehensive record of the statement with satisfactory evidence of the circumstances of the interview and the demeanour of the witness were available.

- *R. v. McMillan, ONCA 1975*

- Facts - infant daughter murdered, father charged, seeks to adduce expert evidence that the mother has a psychopathic personality disorder; accused suffers from similar disorder.

- Issue - is expert evidence concerning the character of a third party suspect admissible? Does this allow the Crown to respond with evidence of the accused's psychiatric makeup?

- Rule - admissible.

- The defence is entitled to prove, by direct or circumstantial evidence, that another person committed the crime charged as a full defence to the accusation.
- Evidence that a third person had a motive to commit the murder with which the accused is charged, or had made threats against the deceased, is commonly admitted on this principle.

- Alternate suspect evidence must meet the test of relevancy and must have sufficient probative value to justify its reception. Generally not received unless the third person is sufficiently connected by other circumstances with the crime charged - otherwise no probative value.

- The policy reasons for excluding evidence concerning character evidence of the accused disappear when relating to a person who is not a party to the proceedings; there is no more fear that a conviction will be founded on moral prejudice. Extends to expert evidence as well.

- That the defence called the alternate suspect as a witness does not preclude their adducing of evidence concerning her abnormal personality.

- Despite that the crime under consideration was not one that could only be committed by a person with a special or abnormal propensity, psychiatric evidence with respect to alternate suspect's disposition is nevertheless admissible. There is no policy rule which required the exclusion of the evidence, unlike with the accused.

- Concerning the accused, psychiatric evidence proffered in such circumstances really amounts to an attempt to introduce evidence of the accused's good character, as a

normal person, through a psychiatrist. Such evidence does not fall within the proper sphere of expert evidence.

- Crown counsel was en- titled to show, if he could, that there were two persons present in the house who were psychopaths, not one. Any other conclusion would permit an accused to present an entirely distorted picture to the jury.

- Having introduced character evidence to show that it was more probable that the alternate suspect committed the crime *because the accused lacked that suspect's dangerous characteristics*, the accused lost protection against having own mental makeup revealed to the jury.

- Leave open whether psychiatric evidence is admissible to show that the accused is a member of an abnormal group, possessing characteristics which make it improbable that he committed the offence, e.g., that he is a homosexual with an aversion to heterosexual relations; likely admissible, however.

- Present matter, there is evidence of opportunity and motive to kill the infant connecting the third party to the crime alleged. Therefore, it has sufficient probative value to meet the threshold.

- The sum of Mrs. McMillan's personality traits constituted a disposition of a kind which, in the circumstances of this case, was relevant to the issue as to whether it was more probable that she had inflicted the injuries to the child, than that her husband had inflicted them.

- *R. v. Scopelliti*, ONCA 1981

- Facts - charged with murder of two men in the accused's store. Asserts that men were shot in self-defence. To bolster this, sought to adduce evidence of the disposition of the deceased victims towards violence, including scenarios both known and unknown to the accused.

- Issue - evidence of disposition to violence known to the accused admissible? Admissible also when unknown?

- Rule - admissible whether known or unknown, if relevant.

- Evidence of previous acts of violence by the deceased, not known to the accused, is not relevant to show the reasonableness of the accused's apprehension of an impending attack.

- However, evidence of the deceased's character (i.e., disposition) for violence is admissible to show the probability of the deceased having been the aggressor.

- Where controversy arises *whether the deceased was the aggressor*, the character of the deceased is relevant concerning the probabilities of the deceased's action.

- Communication is unnecessary; the question is what the deceased probably did, not what the defendant thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief.

- Precondition to admissibility of such evidence is existence of some other appreciable evidence of the deceased's aggression on the occasion in question. This may emanate from the accused.

- Otherwise, the deceased's bad character may be put forward improperly as a mere excuse for

the killing under the pretext of evidencing his aggression.

- The disposition of a person to do a certain act is relevant to indicate the probability of his having done or not having done the act. While policy precludes this evidence against the accused, it does not do so against third parties.

- *R. v. Lifchus*, SCC 1997

- Facts - stockbroker convicted of fraud, appeals on the basis that BRD had not been property explained in the charge to the jury.

- Issue - how are juries to be charged concerning the standard of proof required in criminal cases?

- Rule - charge was insufficient, new trial is required.

- Clear understanding of the term is of fundamental importance to our criminal justice system. It is one of the principal safeguards which seeks to ensure that no innocent person is convicted. 13

- There is good authority for the proposition that Canadian juries should be given a definition of "reasonable doubt." 15

- Legal meaning of the words "reasonable doubt" may not correspond precisely to the meaning ordinarily attributed to them. In criminal proceedings, where the liberty of the subject is at stake, it is of fundamental importance that jurors fully understand the nature of the burden of proof. 22

- Jurors should not be invited to apply to the deter- mination of guilt in a criminal trial the same standard of proof that they would apply to the decisions they are required to make in their everyday lives. 23

- Moral certainty" may not be equated by jurors with "evidentiary certainty." Without more, jurors may think that they are entitled to convict if they feel "certain," even though the Crown has failed to prove its case beyond a reasonable doubt. 25

- Qualifications of the word "doubt," other than by way of the adjective "rea- sonable," should be avoided; instance, instructing the jury that a "reasonable doubt" is a "haunting" doubt, a "substantial" doubt or a "serious" doubt, may have the effect of mislead- ing the jury. 26

- *Elements of definition to be provided to jury*:

- *Fundamentals* - brief basic instructions as to the nature of a criminal trial and the fundamental principles that will be applied. Includes presumption of innocence, with which reasonable doubt is fundamentally intertwined. 35

- *Importance* - must be clear to the jury that the standard of proof beyond a reason- able doubt is vitally important. 27

- *Articulation of doubt not necessary* - juror should not be made to feel that the overall, perhaps intangible, effect of a witness's demeanor cannot be taken into consideration in the assessment of credibility. Certain doubts, although reasonable, are simply incapable of articulation. 29

- *Neither sympathy nor prejudice* - reasonable doubt cannot be based on sympathy or prejudice. Further they should be told that a reasonable doubt must not be imaginary or frivolous. 31

- *Difference with BOP* - important that jurors be told that they are not to apply BOP standard in the context of the criminal trial. 32

- *Logical connection with the evidence. 36*

- *Certainty not required* - being "certain" is a conclusion which a juror may reach, but it does not indicate the route the juror should take in order to arrive at the conclusion. 33

- *R. v. Morin*, SCC 1988

- *Facts* - Jury charged with the following:

- You are not obliged to accept any part of the evidence of a witness just because there is no denial of it. If you have a reasonable doubt about any of the evidence, you will give the benefit of that doubt to the accused with respect to such evidence. *Having decided what evidence you consider worthy of belief, you will consider it as a whole, of course, in arriving at your verdict.*

- The accused is entitled to the benefit of reasonable doubt on the whole of the case and on each and every issue in the case. Proof beyond a reasonable doubt does not apply to the individual items of evidence or the separate pieces of evidence in the case, but to the total body of evidence upon which the Crown relies to prove guilt. Before you can convict you must be satisfied beyond a reasonable doubt of his guilt.

- Issue

- Jury would likely have concluded that in examining the evidence they were to give the accused the benefit of the doubt in respect of *any* evidence. This process of examination and elimination would occur during the so-called "fact-finding" stage. The evidence as a whole to which the jury was to apply itself in order to determine guilt or innocence was the residuum after the "fact-finding" stage.

- Rule - the jury is not to examine the evidence piecemeal by reference to the criminal standard. wrong for a trial judge to lay down additional rules for the weighing of the evidence.

- Not possible, therefore, to require the jury to find facts proved beyond a reasonable doubt without identifying *what it is* that they prove beyond a reasonable doubt.

- Since the same fact may give rise to different inferences tending to establish guilt or innocence, the jury might discard such facts on the basis that there is doubt as to what they prove.

- Facts which are essential to a finding of guilt are still doubtful notwithstanding the support of other facts, this will produce a doubt in the mind of the jury that guilt has been proved beyond a reasonable doubt.

- During the process of deliberation the jury or other trier of fact must consider the evidence as a whole and determine whether guilt is established by the prosecution be- yond a reasonable doubt. This of necessity requires that each element of the offence or issue be proved beyond a

reasonable doubt. Beyond this injunction it is for the trier of fact to determine how to proceed.

- Wrong for a trial judge to lay down additional rules for the weighing of the evidence. The jury should be told that the facts are not to be examined separately and in isolation with reference to the criminal standard.

- Dissent, Wilson J. (though concurring in the result)

- Ultimate determination of guilt they could rely only on facts which, when assessed in the context of all the facts, they found to have been proved beyond a reasonable doubt; that they must not make a finding of guilt on doubtful facts; but that facts which might seem doubtful when viewed in isolation might become completely credible against the backdrop of all the other facts.

- *R. v. W. (D.), SCC 1991*

- Rule

- Where the accused testifies, the following instruction must be given to the jury:

- First, if you believe the evidence of the accused, obviously you must acquit.

- Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

- Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reason- able doubt by that evidence of the guilt of the accused.

- Criticism of W. (D.)

- Too simplistic in the direction that it provides; in practice, greater nuance may sometimes be necessary.

- The principle that a jury may believe some, none, or all of the testimony of any witness, including that of an accused, suggests to some critics that the first *W. (D.)* question is something of an oversimplification.

- Some jurors may wonder how, if they believe *none* of the evidence of the accused, such rejected evidence may nevertheless *of itself* raise a reasonable doubt.

- The question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events. The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

- *R. v. Morris*, SCC 1983

- Facts - convicted of having conspired with others to import heroin from Hong Kong and traffic heroin. Appeal on the ground that the trial Judge erred in admitting into evidence an undated newspaper clipping dealing with the heroin trade in Pakistan found in the bottom drawer of a night table in his Morris'

bedroom.

- Issue - is the newspaper clipping relevant, material, and therefore admissible?

- Rule - Admissibility of evidence must not be confused with weight. Admissible, because it is relevant to a material issue at trial.

    - Inference could be drawn from the unexplained presence of the newspaper clipping among the possessions of the appellant, that he had an interest in and had informed himself on the question of sources of supply of heroin, necessarily a subject of vital interest to one concerned with the importing of the narcotic

    - Not a circumstance like *Cloutier*, where the question was whether the fact that the accused uses marijuana creates a logical inference that he knew or ought to have known that the dresser contained a narcotic at the time it was imported.

    - Probative value of such evidence may be low, especially since the newspaper article here concerns the heroin trade in Pakistan rather than in Hong Kong.

    - Admissibility of evidence must not be confused with weight. Admissible, because it is relevant to a material issue at trial.

- Dissent (Lamer)

    - Clipping should not have been admitted in evidence, not due to irrelevance but due to inadmissibility.

    - *Propensity evidence* - the fact that the accused is the sort of person who would be likely to have committed the offence, though relevant, is not admissible. *Evidence adduced solely for the purpose of disposition itself is inadmissible.*

    - *Propensity evidence which is also otherwise material* - not to say that evidence relevant to another issue will be excluded merely because it also goes to disposition. Such evidence must be weighed for probative/prejudicial value. The auto-exclusion rule only applies where the evidence *solely* goes to disposition.

    - Sole relevance of the newspaper clipping is as evidence of disposition; traffickers would be more likely than other people to be interested in and to keep such information than a person who is not a trafficker.

- *R. v. Watson*, ONCA 1996

    - Facts - accused charged with second degree murder; had gone to deceased's place of business with two associates, became material issue as to whether the deceased was in possession of a gun at the time of the shooting. Uninvolved friend Mair stated that the deceased "always carried a gun."

    - Issue - is the evidence that the deceased "always carried a gun" relevant and therefore admissible?

    - Rule

- Number of times the deceased was shot became a prominent issue at the trial. If the deceased was shot seven times, he had to have been shot with two different guns. This would be indicative of an ambush by the accused and his compatriots. Alternatively, if the accused was shot with one weapon, then the theory of a spontaneous gunfight with the accused is strengthened.

- Defence did not suggest that a finding that the deceased was shot five times, and not seven, compelled the conclusion that only Headley shot the deceased and had acted alone. The defence argued only that this finding was capable of supporting the defence theory and putting the Crown theory in doubt.

- TJ refused to admit evidence, accepted the Crown's argument that Mair's evidence was irrelevant and therefore inadmissible, commenting that there was "no viable issue of self-defence.

- Relevance must be assessed in the context of the entire case and the re- spective positions taken by the Crown and the defence. Analysis of relevance of Mair's evidence should *not* have been limited to self-defence. There is no rule limiting prior misconduct by the deceased to cases in which self-defence is raised.

- Question of relevance, in this case, is whether the fact that the deceased always carried a gun made it more likely that he was in possession of a gun when he was shot?

- The absence of a direct connection does not, however, determine relevance. If it did, most circumstantial evidence would be inadmissible. If the deceased's possession of a gun when he was shot triggers a chain of inferences, based on logic or experience, which ultimately makes the appellant's participation in a plan to kill or do harm to the de- ceased less likely, then the second stage of the relevance inquiry is satisfied.

- *Habit evidence* - Where a person's conduct in given circumstances is in issue, evidence that the person repeatedly acted in a certain way when those circumstances arose in the past has been received as circumstantial evidence that the person acted in conformity with past practice on the occasion in question.

    - A person is in the habit of doing a certain thing in a given situation suggests that on a specific occasion in which those circumstances arose the person acted in accordance with established practice.

    - A habit is the person's *regular* practice of responding to a *particular* kind of situation with a *specific* type of conduct; involves a repeated and specific response to a particular situation.

    - Generality in the nature of a habit does not affect its relevance, bur rather, along with other aspects, such as duration and regularity, go to the weight given by the jury.

- *Difference between habit and disposition evidence* - habit evidence is an inference of conduct from conduct. Disposition evidence involves an inference of the existence of a state of mind (disposition) from a person's con- duct on one or more previous occasions and a further inference of conduct on the specific occasion based on the existence of that state of mind.

    - Evidence of habit proceeds on the basis that repeated conduct in a given situation is a reliable predictor of conduct in that situ- ation. Evidence of disposition is premised on the belief that a person's disposition is a reli- able predictor of conduct in a given situation.

- Evidence supporting the inferences that the deceased was armed and used a weapon during the confrontation made the defence position as to the appellant's non-involvement in any plan to kill or do harm to the deceased more viable than it would have been if those infer- ences were not available.

- Evidence suggesting that an accused is a person of bad character is subject to a specific exclusionary rule to which there are exceptions.

- No exclusionary rule in criminal cases where otherwise relevant evidence suggests that the deceased (or some other third party) is a person of bad character. Where such evidence is relevant, it will be received unless the trial judge concludes that its potential to prejudice the jury substantially out- weighs its probative value.

    - *Prejudice* - risk that TOF will misuse the evidence by concluding that the deceased's bad character somehow justified or excused the otherwise criminal conduct of the accused

- Not a case where, absent the impugned evidence, the record would not have suggested that the deceased was a person of bad character; there was considerable evidence, none of which was or could have been objected to, suggested that the deceased had a criminal lifestyle.

- In the typical case (like *Scopelliti*), the accused seeks to justify or at least partially excuse the killing of the deceased usually on the basis of self-defence or provocation. In those cases, the risk that the jury may conclude, because of the deceased's bad character, that the deceased got what was deserved is potentially very high.

- In the present case, the defence did not suggest that the deceased's killing was justified or should be excused. The evidence of his habitual possession of a weapon was offered not to justify Headley's shooting of the deceased, but to extricate the appellant from any involvement in that shooting.

- *R. v. Starr, SCC 2000*

- Facts - accused charged with murder; victim seen by ex-girlfriend in company of accused previous to murder. Made statement that he was going do "do an Autopac scam" with the accused. Crown seeks to adduce this statement for truth of contents.

- Issue - is the statement admissible?

- Rule - No. Does not meet state of mind exception, nor does it meet principled exception.

    - First stage of the analysis is to determine whether the statement is sought to be adduce in order to prove the truth of contents.

        - Purpose of adducing Cook's statement was to illustrate Cook's immediate intention, shortly prior to his death, to go with the appellant to wreck a car for insurance purposes

        - The intention to "go and do an Autopac scam with Robert" is the content of Cook's statement, and the Crown sought to use the statement as proof of its contents.

        - Consider that if the statement had been false, the victim did *not* actually intend to go with Robert, then the inference concerning the victim's intention cannot be drawn.

- State of mind or present intentions exception

    - Overview - rises when the declarant's statement is adduced in order to demonstrate the intentions, or state of mind, of the declarant at the time when the statement was made.

    - Requirements

        - *Presence* - statement must be of a *present existing state of mind;* not a prior state, or anticipatory state; exception only allows for understanding of what the declarant thought or felt at the time that the statement was made.

        - *No circumstances of suspicion* - statement and must appear to have been made in a natural manner and not under circumstances of suspicion. Maps roughly onto the "reliability" requirement of the principled exception.

            - Present matter, statement made in a "heated context" (not natural manner) to ex-girlfriend; one cannot rule out that victim was lying in order to cover up his association with another woman.

        - *Intent or other mental states* - not merely intention, can allow for statements supporting existence of other mental states *of the declarant* to be adduced substantively.

        - *Supported inference* - where the statement is one of intention, the statement can support an inference *that the declarant* followed through on the intention where reasonable.

        - *Contents which relate state of mind of third party* - a statement concerning third party intentions could be based on conversation with the third party (double hearsay) or a fourth party relaying the third party's intentions (triple hearsay), or pure speculation (see lay opinion evidence). Therefore, generally inadmissible, subject to exceptions:

            - *Statement tendered to show intention of third party*

                - *Double / triple hearsay* - in the case of multiple levels of hearsay, if an exception can be satisfied at each level, the statement may be admissible;

                - *Declarant qualified to comment* - where the Crown can establish that the declarant was otherwise "qualified" to comment on the appellant's intentions.

                - *Third party aware of statements* - where the third party was aware of the statements sought to be adduced, inference of the third party's state of mind may be drawn (not from the content of the statements, but from the third party's reaction to the statements).

            - *Statement tendered to show intention of declarant only*

- statements of intention, which refer to intentions of persons other than the declarant, may be admissible if the trial judge clearly restricts their use to proving the declarant's intentions, and if it is more probative than prejudicial.

- Must compare the prejudicial effect of the *prohibited* use of the evidence overbears its probative value on the permitted use.

- Concern for reliability and necessity should be no less present when the hearsay is sought to be introduced under an established exception. Exceptions are simply specific manifestations of general principles.

- Specific requirements of the individual exceptions have had the useful effect of focussing attention upon the peculiar factors that make it desirable, or undesirable, to admit a particular form of out-of-court statement.

- In rare cases, it may also be possible for evidence clearly falling within an otherwise valid exception nonetheless not to meet the principled approach's requirements of necessity and reliability. The evidence would have to be excluded.

- Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Concerned with whether circumstances surrounding the statement itself provide guarantees of trustworthiness.

- Absence of a motive to lie is a relevant factor in admitting evidence under the principled approach. Conversely, the presence of a motive to lie may be grounds for exclusion of evidence under the principled approach.

- TJ should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself.

- *R. v. Khelawon*, SCC 2006

- Facts - D. proprietor of old age facility, charged with assault on residents; none of the complainants were available to testify at trial, however. Crown seeks to adduce three statements of one complainant inculpating the accused, one to an employee of the facility, one to a treating doctor, and one to police.

- Issue - are the statements admissible under the principled approach?

- Rule

- The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant.

- Cross-examination is not an end unto itself. Rather, the adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved

- If the trial judge determines that the evidence falls within one of the traditional common law

exceptions, this finding is conclusive and the evidence is ruled admissible, unless, in a rare case, the exception itself is challenged as described in both those decisions. (compare with finding in *Starr*).

- *Bootstrapping* - circular arguments in which a questionable piece of evidence "picks itself up by its own bootstraps" to fit within an exception. For instance, contents of a hearsay statement relied on to establish the circumstantial guarantees of reliability necessary for the admission of that very statement.

- No constitutional justification for precluding corroborating evidence from consideration of the question whether a statement is reliable; best way to determine this is to see whether it is corroborated by other evidence. Further, it is difficult and times counterintuitive to limit the admissibility inquiry to the circumstances surrounding the making of the statement.

- Departs from *Starr* - relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a functional approach in determining admissibility (eg. entire factual matrix).

- Both the circumstances existing at the time the statements were made and the existence of corroborating evidence indicate, to a greater or lesser degree, whether the statements are reliable.

- In an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party.

- No adequate substitutes for testing the evidence - cannot be compared to previous testimony at prelim (unlike *Hawkins*) or cross-examination (unlike *KGB*).

- Absence of an oath and the simple "yes" in answer to the police officer's question as to whether he understood that it was important to tell the truth do not give much insight on whether he truly understood the consequences.

- Declarant was elderly and frail. His mental capacity was at issue—the medical records contained repeated diagnoses of paranoia and dementia. There was also the possibility that his injuries were caused by a fall rather than an assault.

- Would not reject the possibility that the presence of a striking similarity between statements from multiple different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case.

- *Makin v. Attorney-General for New South Wales, JCPC 1894*

- Facts - accused charged with murdering children in care, burying them on property. Crown adduced evidence that bodies of infants had been found at previous addresses of the accused, and further, that children had previously been placed under the accused's care in similar circumstances of the present victim.

- Issue - is the similar fact evidence admissible in order to show that the accused is guilty?

- Rule - Yes; rebuts the defence of accident.

- Prosecution cannot adduce evidence that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of showing guilt via criminal conduct or character.

- However, mere fact that the evidence adduced shows the commission of other crimes does not render it inadmissible; could be relevant to show that the current acts alleged were not accidental, or to rebut a defence alleged by the accused.

- *R. v. Smith, UKCA 1915*

- Facts - brides in the bath case; accused married three women in sequence, each was later found dead in the bathtub. The accused was charged with the murder of the first, Crown sought to adduce evidence of second and third.

- Issue - Is the similar fact evidence admissible?

- Rule - Yes.

- The similar fact evidence tended to show that the acts were likely to have been committed by design, and therefore rebutted the defence of accident alleged by the accused.

- *R. v. Straffen, UKCA 1952*

- Facts - accused, inmate, charged with murder of young girl after having escaped. Crown seeks to adduce similar fact evidence from two prior murders of which the accused admitted and had been convicted.

- Issue - similar fact evidence admissible?

- Rule - Yes.

- Evidence admitted in order to establish the identity of the person who murdered the victim of the crime currently charged.

- General rule is that evidence should be excluded which tends to show that the accused has been guilty of criminal acts other than those covered by the indictment.

- Further, propensity evidence shall never be admitted; however, similar fact evidence admissible for an alternate purpose - not that accused had propensity to commit the crime charged, but rather that the accused is the very person who committed the crime charged.

- Evidence of other occurrences which merely deepens suspicion is not relevant; evidence of other occurrences which negatives a defence or establishes mens rea through system is relevant.

- Each victim was a young girl, killed by manual strangulation, no sexual interference, no apparent motive, no evidence of struggle, and no attempt made to conceal body.

- *R. v. Arp, SCC 1998*

- Facts - accused charged with murder; Crown seeks to adduce evidence of a prior similar murder in order to establish identity, eg. that the accused is the person who committed the offence charged.

- Issue - is the similar fact evidence admissible?

- Rule

    - Logical relevance does not require that the evidence be decisive on an issue, otherwise circumstantial evidence would rarely be admissible.

    - Disposition evidence is not inadmissible because it is irrelevant; it does, as a matter of common sense, have some probative value with respect to guilt. However, it is nevertheless inadmissible because it is prejudicial and fraught with potential problems.

    - Evidence adduced solely for the purpose of propensity is always inadmissible, because its negligible probative value will always be outweighed by its prejudicial effect. Evidence of similar past misconduct may exceptionally be admitted where the prohibited line of reasoning may be avoided.

    - Where identity is at issue, the reasoning is not whether the accused *is the type of person* who would commit the crime; rather, from the degree of distinctiveness between crime and the similar act the TOF can infer that *the accused is the very person* who committed the crime.

    - Inference from guilt in similar fact evidence is made possible only if the high degree of similarity between the acts renders the likelihood of coincidence objectively improbable.

    - It is not sufficient to establish that the accused is a member of an abnormal group with the same propensities as the perpetrator. there must be some further distinguishing feature (see character evidence).

    - Where identity at issue, *something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary.* However unnecessary to impose this restriction when SFE adduced for other reasons.

    - Admission of similar fact evidence will in all cases rest on the finding that the accused's involvement in the alleged similar acts or counts is unlikely to be the product of coincidence.

    - Relationships in time and circumstances other than these may well be important

    - Unique trademark or signature will automatically render the alleged acts "strikingly similar" and therefore highly probative and admissible.

    - Number of significant similarities, taken together, may be such that by their cumulative effect, they warrant admission of the evidence.

    - If TJ decides that the jury should be permitted to use the evidence with respect to one count to establish guilt on the other, and vice versa, a special jury instruction becomes necessary.

        - May find from the evidence, though not required to do so, that the manner of commission is so similar that it is likely they were committed by the same person.

        - Judge reviews similarities (problematic, as with corroborative evidence: review of evidence which is specifically prejudicial to the accused draws attention of TOF to that evidence).

        - If TOF concludes it is likely the same person committed more than one of the offences,

then the evidence on each of those counts may assist them in deciding whether the accused committed other counts.

- TOF must be warned that they are not to use the evidence on one count to infer that the accused is a person whose character is such that he or she is likely to have committed the other counts.

- If TOF does not conclude that it is likely the same person committed the similar offences, they must reach their verdict by considering the evidence related to each count separately.

- *R .v Handy,* SCC 2002

- Facts - accused charged with sex assault arising out of a one-night stand with complainant. Crown seeks to adduce similar fact evidence from accused's ex-wife concerning previous incidents of sex assault arising out of their marriage.

- Issue - is the ex-wife's similar fact evidence admissible?

- Rule - No - similar fact evidence was *prima facie* inadmissible, burden not met by Crown.

- SFE relates to incidents removed in time, place and circumstances from the charge; usefulness rests entirely on the validity of the inferences it is said to support

- To infer guilt from a knowledge of the mere character of the accused is a "forbidden type of reasoning. Similar fact evidence may be admissible if, *but only if*, it goes beyond showing general propensity

- Must be concluded by the trial judge on a balance of probabilities that the probative value of the sound inferences exceeds any prejudice likely to be created.

- Coincidence, as an explanation, has its limita- tions. As it was put in one American case: "The man who wins the lottery once is envied; the one who wins it twice is investigated."

- Basis for the exception is that the deficit of probative value weighed against prejudice on which the original exclusionary rule is predicated is reversed. Probative value exceeds prejudice, because the force of similar circumstances defies coincidence or other innocent explanation.

- Similar fact evidence is thus presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a 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 prejudice and thereby justifies its reception.

- Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more.

- requirement to identify the material issue "in question" (i.e., the purpose for which the similar fact evidence is proffered) does not detract from the probative value/ prejudice balance, but is in fact essential to it. Probative value cannot be assessed in the abstract.

- Similar fact evidence is presumptively in- admissible. It is for the Crown to establish on a balance of probabilities that the likely probative value will outweigh the potential prejudice.

- A trial judge has no discretion to admit similar fact evidence whose prejudicial effect outweighs its probative value. Nevertheless, a trial judge's decision to admit similar fact evidence is entitled to substantial deference

- Refusal to resolve the issue of collusion as a condition precedent to admissibility was an error of law.

- Process

    - 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 has ceased to be in dispute, as for example when the fact is admitted by the accused, then the evidence is irrelevant and it must be excluded

        - Identification versus other reasons - the point is not that the degree of similarity in such a case must be *higher* or *lower* than in an identification case. The point is that the issue is *different*.

            - For example, where the issue is the *animus* of the accused towards the deceased (and not identity), a prior incident of the accused stabbing the victim may be admissible even though the victim was ultimately shot.

        - Consider arguments from both sides concerning the strengths and weaknesses of the inferences which could potentially be drawn from the evidence.

    - Prejudicial effect

        - The strength of the prohibited use, or the risk of an unfocussed trial and a *wrongful* conviction

        - Moral prejudice - the potential stigma of bad personhood.

            - Inflammatory nature of the similar acts; are they more reprehensible than the present charge?

        - Reasoning prejudice - need for the jury to avoid distraction and confusion despite consideration of multiple different incidents.

            - Distraction of members of the jury from their proper focus on the charge itself aggravated by the consumption of time in dealing with allegations of multiple incidents involving two victims in divergent circumstances rather than the sin- gle offence charged.

            - Whether the Crown can prove its point with less prejudicial evidence (agreed statement of facts, Corbett style questioning);

        - Factors

    - Probative value

- The strength of the permitted use; related to the issue identified. For instance, establishing that the accused has a predilection for hurtful sex is so general that it is of little real use; even were it established by other forms of less prejudicial evidence, it does little to support the allegations charged.

- Principal driver of probative value in a case such as this is the connectedness (or nexus) that is established between the similar fact evidence and the offences alleged, particularly where the connections reveal a "degree of distinctiveness or uniqueness"

- Can include demonstration of a system or modus operandi, thought this is merely the observed pattern of propensity operating in a closely defined and circumscribed context.

- Where, as here, there is some evidence of actual collusion, or at least an "air of reality" to the allegations, the Crown is required to satisfy the trial judge, on a balance of probabilities, that the evidence of similar facts is not tainted with collusion

- Factors

    - Proximity in time; lapse of time opens up a greater possibility of character reform or "maturing out." On the other hand, repetition over many years and recent manifestation strengthen cogency.

    - Similarity in detail; not every dissimilarity is fatal, but for the reasons already mentioned, substantial dissimilarities may dilute probative strength and, by compounding the confu- sion and distraction, aggravate the prejudice.

    - Number of occurrences; alleged pattern of conduct may gain strength in the number of instances that compose it.

    - Circumstances surrounding or relating to similar acts;

    - Distinctive unifying features;

    - Intervening events;

    - Strength of the evidence that the similar events actually occurred; too prejudicial to be admitted unless the judge was of the view that it met the threshold of being reasonably *capable* of belief.

    - Any other factor which would tend to support or rebut the underlying unity of the similar acts.

- *R. v. Hunter*, ONCA 2001

    - Facts - witness overhears conversation between accused and lawyer in OCH, "I had a gun, but I didn't point it." Crown seeks to adduce statement, though context could not be given.

- Issue - is the evidence sufficiently relevant to warrant admission?

- Rule - No - circumstantial, and too speculative.

    - Meaning of the statement cannot be determined without context. Further, so speculative that its tenuous probative value is outweighed by its prejudicial effect.

    - Properly instructed jury could not determine from the utterance the meaning of the whole thought or the overheard words themselves; therefore, not probative of a fact.

    - Concerning spoken words, context plays a critical role in the determination of relevance. Where an overheard utterance has a verbal context but this is unknown, it may be impossible to know the meaning of the overheard words.

    - Where meaning is speculative and probative value is tenuous, yet the prejudicial effect is substantial, the overheard words should be excluded.

    - In the present matter, the words directly preceding the impugned statement could have indicated that the following statement was not true; but this information is not available to the TOF (or the witness), and so may be used to draw inference opposed to the true context of the utterance.

- *R. v. Tuck,* ONSC 2009

    - Facts - charged with murder arising out of nightclub confrontation. D. seeks to adduce evidence that the deceased had drugs in his possession on the night in question, as this could support the inference that the deceased was the party that smuggled the knife into the club.

    - Issue - is the evidence of drugs in the possession of the deceased relevant?

    - Rule - Yes, via propensity reasoning; acceptable where not against the accused, as it can be addressed through a limiting instruction.

        - The evidence is only capable of showing that the deceased was the party that smuggled the weapon into the club through propensity reasoning.

        - The potential prejudice of propensity reasoning that the deceased (not the accused) was a violent person can be addressed by a limiting instruction.

- *R. v. Bell*, ONSC 2004

    - Facts - Crown seeks to adduce evidence that accused is a drug dealer in a sexual assault case; claim of relevance through the fact that the complainant was drugged at the time of the offence.

    - Issue - is the evidence that the accused is a drug dealer relevant?

    - Rule - no, incapable of supporting the conclusions it purports to advance.

        - Evidence is not tendered on the basis of disposition, but rather that the accused's occupation as a drug dealer would allow for better access to drugs used in sex assault.

- Difficult for accused's drug trafficking to support inference that the accused therefore had easier access to date rape drugs. Recreational drugs and date rape drugs are not the same.

- A recreational drug user would have access to the same drugs that a drug trafficker does; there is no logical nexus between the evidence and the proposition that the Crown holds that it supports.

- Regardless of whether the TOF is a judge or jury, it is dangerous to admit evidence then to weigh its admissibility at the end of the case.

- *R. v. Abbey,* ONSC 2006

- Membership of the accused in the "Malvern Crew" gang is factually relevant and material, in that tends to show that the accused may have had a motive to kill the deceased.

- Properly instructed jury would disregard the bad character evidence, and limit its use to the appropriate determination of motive.

- The negative impact is balanced between the accused and the deceased, as the required inference is based on establishing that *both* were members of gangs. Therefore, probative value outweighs prejudicial effect.

- The fact that gang members may carry or have access to guns makes more probable the existence of the fact that the accused had a gun on the relevant day; this is not a strong inference, however, limiting probative value. Prejudicial effect limited through jury instruction.

- *R. v. Rallo*, ONCA 1978

- Crown seeks to adduce evidence that the accused had read a book dealing with a murder trial in Hamilton. Court held that evidence that the accused had read the book or commented on the book are not probative.

- In a spousal murder, evidence that the accused was carrying on an affair with another woman would be relevant to the issue of motive, if it were not too remote from the offence itself.

- *R. v. Ruddick*, ONCA 1980

- Evidence that the accused stole funds from the deceased is relevant to the extent that it tends to show motive. For instance, in the present matter, while this had not yet been discovered, discovery was inevitable.

- *R. v. D.A.I.*, SCC 2012

- Facts - complainant in sex assault case aged 26 with mental capacity of 3-6 year old; accused is mother's spouse. Crown sought to call complainant; TJ held that the complainant was not competent to testify.

- Issue - complainant competent to testify?

- Rule - Yes.

- Sexual assault is an evil. Too frequently, its victims are the vulnerable in our society - children and the mentally handicapped.

- Rules of evidence and criminal procedure, based on the norm of the average witness, may make it difficult for these victims to testify in courts of law.

- Parliament has addressed this challenge by a series of amendments to the *Evidence Act* that modify the normal rules of testimonial capacity for children and adults with mental disabilities.

- Crown's examination of K.B. demonstrated that she understood the difference between telling the truth and lying in concrete situations.

- TJ went beyond this to question K.B. on her understanding of the nature of truth and falsity, of moral and religious duties, and of the legal consequences of lying in court; K.B. was unable to respond adequately to these more abstract questions.

- Expert expressed the view that K.B. had "serious difficulty in differentiating the concept of truth and lie.

- K.B. was held incompetent because she had "not satisfied the prerequisite that she understands the duty to speak the truth", which the TJ took to be required by s. 16(3) of the *Canada Evidence Act*: "she cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies."

- Concepts of (1) the witness's competence to testify; (2) the admissibility of his or her evidence; and (3) the weight of the witness's testimony, are often confused for one another.

- Competence addresses the question of whether a proposed witness has the capacity to provide evidence in a court of law.

- s. 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth.

- It is unnecessary and indeed undesirable to conduct an abstract inquiry into whether the witness generally understands the difference between truth and falsity and the obligation to give true evidence in court.

- Two potentially conflicting policies are in play. The first is the social need to bring to justice those who sexually abuse people of limited mental capacity -- a vulnerable group all too easily exploited. The second is to ensure a fair trial for the accused and to prevent wrongful convictions.

- To reject evidence on the ground that a wtness cannot explain the nature of the obligation to tell the truth in philosophical terms that even those possessed of normal intelligence may find challenging is to exclude reliable and relevant evidence and make it impossible to bring to justice those charged with crimes against the mentally disabled.

- The golden thread uniting these varying and different rules is the principle that the evidence must meet a minimal threshold or reliability as a condition of being heard by a judge or jury.

- The requirement that the witness be able to communicate the evidence and promise to tell the truth satisfies the low threshold for competence in cases such as this.

- V*oir dire* on the competence of a proposed witness is an independent inquiry: it may not be combined with a *voir dire* on other issues, such as the admissibility of the proposed witness's out-

of-court statements.

- Preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. A witness should not be found incompetent too hastily.

- Primary source of evidence for a witness's competence is the witness. Questioning an adult with mental disabilities requires consideration and accommodation for particular needs; questions should be phrased patiently in a clear, simple manner.

- Expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.

- Inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if can differentiate between true and false everyday factual statements.

- *R. v. Norman*, ONCA 1993

- Facts - accused charged with sex assault of thirteen year-old complainant. TJ made finding of credibility entirely based on her demeanour in the witness box, and other than this, undertook no analysis of her evidence.

- Issue - is it lawful for the TJ to base a finding of credibility entirely on a complainant's demeanour?

- Rule

- An assessment of credibility based on demeanour alone is not sufficient in a case suffering from many significant inconsistencies.

- Questions is not only whether the witness believes the evidence to be true, but also whether the evidence is reliable.

- The witness' evidence must be subjected to an examination of consistencies which surround the currently existing conditions. Must be harmonious with the preponderance of probabilities.

- *R. v. Jeng*, BCCA 2004

- If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box.

- Appearance of telling the truth, or demeanour is but one of the elements concerning of a witness. Additionally, should consider opportunities for knowledge, powers of observation, etc. - the testimonial factors.

- To do otherwise would be to allow cultural differences to undermine the credibility of a truthful witness in the eyes of the trier of fact. One factor among many that must be considered.

- *Maves v. Grand Trunk Pacific Railroad Co.,* ABCA 1913

- Prohibition on leading questions in chief is based on the supposition of bias on the part of a witness for the party proffering, that the party calling the witness has an advantage in already knowing what evidence is suspected to be given, and that the witness may honestly assent to a leading question due to a lack of sophistication.

- On merely introductory matters which form no part of the substance of the inquiry, it is allowable for a party to lead own witnesses; but not where dealing with material or proximate circumstances.

- However, leading questions may be allowed to pass through express or tacit consent of the opposing counsel.

- Question is objectionable as leading where it suggests the answer, not where it merely directs the attention of the witness to the subject respecting which the question concerns.

- Exceptions include (1) identifying persons or things, as the witness may be directly pointed to them, (2) witness called to contradict another as to the expressions used by the latter.

- The rule against leading questions should be relaxed where non-leading questions are insufficient to bring to the mind of the witness the evidence which is sought to be adduced, and this arises from a temporary inability to remember.

- The witness should be asked to repeat the portion of the conversation which is subject to failing memory, and only once this method has failed should questions which suggest the answer be allowed.

- *R. v. E.M.W.*, SCC 2011

    - Question which offers a child witness a choice of alternatives, without suggesting the answer, does not cross the threshold concerning leading questions.

- *R. v. Rose*, ONCA 2001

    - Leading questions are allowable on introductory matters, or to the extent that they are necessary to direct the witness to a particular matter or field of inquiry.

    - Where virtually all of the witness' evidence is adduced through leading questions, and the witness is providing evidence in exchange for consideration from the Crown, this supports an inference that the evidence was not proffered for its truth.

- *R. v. Wilks*, MBCA 2005

    - In the case of present memory revived, the aid is not evidence, but rather a facilitative mechanism. In past memory recorded, there is no present memory, so the past recollection becomes evidence.

    - Where the aid genuinely revives the witness' memory, the nature of the aid and its contemporaneity, etc. are not relevant to the admissibility of the evidence. Inadmissible evidence can be used to refresh memory, for instance.

    - Certain requirements for refreshing of memory: memory lapse, stimuli capable of refreshing, states that memory refreshed, testimony proceeds without further aid of the report.

- In the case of past memory recorded, the reliability of the evidence is determined by its contemporaneity, accuracy, etc. Where it is a technical detail (eg. a licence plate number) there is little worry about subjective interpretation, for instance.

- Past memory recorded must be reliably recorded, recording must be "fresh and vivid" via contemporaneity with events, must be adopted as representative of knowledge of witness at the time and the original record must be used where procurable.

- Judge must rule on whether the evidence of a witness can be received as present memory refreshed, or rejected as an attempt to circumvent rules concerning past recollection recorded.

- *R. v. Bengert*, BCSC 1978

- Facts - police informant has series of meeting with the D., handler takes notes after each meeting and ensured that informant was satisfied re: accuracy. Informant did not want to prepare own notes, as did not want record of assistance to police. Informant later creates own notes, seeks to rely on this while giving evidence to refresh memory.

- Issue - is the notebook able to be used as a means of refreshing present recollection, or is it an attempt to avoid previous memory recorded rules?

- Rule

    - Notebook is a record of what the witness was able to recollect on an earlier, though not contemporaneous occasion; however, notebook is not evidence - the recollection of the witness is.

- *R. v. Baldree*, ONCA 2012

- Facts - police officer receives phone call on accused's cell phone during search of apartment. Caller asks for delivery of marijuana. Crown asserts that the statement not sought to be adduced for truth of contents, therefore not hearsay. Even if contents untrue (eg. caller does not actually want to buy marijuana), the statement still relevant to show that the accused is a drug dealer.

- Issue - is the call hearsay?

- Rule

    - Watt (dissent) - not hearsay, admissible

        - Implied assertion is a legalistic backwater; the home of sophistry and the graveyard of common sense.

        - Treating a request of a caller for drugs as implicitly asserting that the D. was a supplier of drugs constitutes an implied assertion.

        - Out of court statements which directly assert a fact are hearsay and are presumptively inadmissible.

        - Preponderance of authority favours the conclusion that drug purchase calls are non-hearsay, circumstantial evidence of the nature of the accused's business.

- Whether evidence of drug purchase calls is non-hearsay or hearsay does not depend on the number of calls of which evidence is given. The evidence is either hearsay or it is not.

- A drug purchase call will be hearsay where it is adduced to prove the truth of its contents, and no opportunity exists for contemporaneous cross-examination of the declarant.

- In this case, the prosecutor did not introduce the drug purchase call to prove the truth of its contents. A telephone call is evidence of conduct in words.

- The caller wanted to buy drugs. The conduct of the buyer was an item of evidence, which, together with other items of evidence, may help to establish the nature of the appellant's business.

    - Of course, as whether the caller wanted to buy drugs is established only through truth of contents of the hearsay statement, the inferences built upon this foundation are also hearsay. Bootstrapping.

- Threshold issue is whether the statement was adduced for a hearsay purpose - the necessity/reliability analysis has nothing to offer concerning this issue.

- Feldman - hearsay via implied assertion, inadmissible

    - The contents of the call were admitted that it was evidence that the appellant was involved in drug dealing; this assertion relies on the truth of the contents of the statement.

    - Admitting the contents of one call into evidence is admitting that evidence for a hearsay purpose. It is the implied assertion of the caller, untested by cross-examination, that the accused is a drug dealer.

    - If there had been more than one call, an additional inference would have been supported, because there would likely have to be a reason for the multitude of errors.

    - The trial judge focused on the truth of whether the caller really wanted to purchase drugs, which was of course, irrelevant, and not on the implied assertion in the request that the appellant is a drug dealer.

- Blair - difficult to determine whether hearsay, but inadmissible in any event

    - Jurists must spend less time focussing on the characterization of evidence into "hearsay" or "non- hearsay" categories in these types of close-call scenarios and to spend more effort focussing on necessity/reliability and prejudice vs. probative value.

    - Not suggesting that the analysis of whether a particular piece of evidence is or is not "hearsay" should be jettisoned in all cases - only close-call scenarios.

    - If the hearsay nature of the prospective testimony is particularly difficult to pinpoint, courts should consider falling back on the newer, more principled tools of reliability and prejudice/probative value assessments.

- *R. v. Grandinetti*, SCC 2005

- Facts - accused charged with murder of his aunt. Accused sought to adduce evidence that third party committed the offence charged.

- Issue - accused's evidence concerning third party suspect admissible?

- Rule - no; link to accused is merely speculative, therefore no probative value or relevancy.

    - Such evidence must meet the test of relevancy and must have sufficient probative value to justify its reception.

    - Third person must be sufficiently connected by other circumstances with the crime charged to give the proffered evidence some probative value; without this link, the evidence is not probative or relevant. This link must be more than speculation.

- *R. v. Darrach*, SCC 2000

    - Facts - accused charged with sexual assault; sought to adduce evidence of complainant's sexual history; denied on voir dire; challenges ss. 276-277 based on *Charter*.

    - Issue - is s. 276(1) unconstitutional?

    - Rule

        - The section prohibits sexual history evidence of the complainant where this would be used to support inference that the complainant is less credible, or is more likely to have consented.

        - The accused is due a fair trial; not the most favourable procedures that could possibly be imagined. The procedures crafted do not only have to take accused's interests into account.

        - Test for admissibility under s. 276(2) requires not only that the evidence be relevant, but also more probative than prejudicial.

        - s. 276(1) only prohibits the use of sexual history of the complainant where used to support the illegitimate inferences identified as the twin myths.

        - Sexual history evidence is admissible for any other inference, although this is still subject to the probative/prejudicial requirement in s. 276(2); must have significant probative value; while a higher threshold than for most defence evidence, this is not unconstitutional.

        - No party in any proceeding has the right to adduce irrelevant evidence, or adduce misleading evidence to support illegitimate inferences. s. 276(1) is merely a recognition of these principles.

- *R. v. Lavallee*, SCC 1990

    - Expert testimony is admissible to assist the fact-finder in drawing inferences in domains where the expert has knowledge or experience beyond the lay person.

    - Expert evidence, properly admissible, cannot usurp the function of the jury in determining whether the accused is guilty BRD. Jury is also not compelled to accept the expert's assertions.

- *R. v. Trochym*, SCC 2007

- Facts - murder of girlfriend; post-hypnosis evidence sought to be adduced.

- Issue - should post-hypnosis evidence be admitted?

- Rule

    - Test for novel scientific evidence applies upon the first opportunity of the Courts to determine the admissibility of a new form of expert data.

    - Gatekeeper function - new scientific technique must be demonstrated by the proffering party to be sufficiently reliable to warrant being put to the TOF. This also applies where the evidence is presented as the opinion of an expert whose conclusions are based on a new scientific technique. Considerations include:

        - Whether the technique can be and has been tested;

        - Whether the technique is subject to peer review and publication;

        - The error rate, whether known or potential;

        - Whether the technique has been generally accepted *in judicial proceedings*.

    - Certain types of scientific evidence become more reliable over time, while others become less so as further studies reveal concerns.

    - Techniques that are sufficiently reliable for therapeutic purposes are not necessarily sufficiently reliable for use as evidence in a criminal proceeding.

    - Where literature is inconclusive or highly contradictory regarding the reliability of the science, particularly in a judicial context, it is likely not sufficiently reliable for admission.

    - There may be a limited use of testimony for witnesses who have undergone hypnosis, for instance relating to topics not covered under hypnosis; however, this evidence may yet be tainted by hypnosis, requiring probative/prejudicial analysis as a result.

- *R. v. Perrier*, SCC 2004

    - Facts - charged with home invasions with gang, Crown seeks to adduce similar fact evidence concerning identification.

    - Issue - SFE admissible?

    - Rule - no - identity cannot be discerned, as there is no way to know whether the D. was a member of the group on each alleged instance of SFE.

        - The use of one incident as evidence of others is only applicable where the similarities are so striking so as to preclude coincidence.

        - While similarities are sufficient to establish that it was the same gang who committed each of offence, there is no similarity which can be served to identify the accused individually.

- The threshold for nexus between the accused and the similar acts is not high; there must be some evidence beyond mere opportunity or possibility.

- Where group membership is not constant, the fact that an individual was a member on one occasion proves no more than a possibility that the individual was a member on any other occasion.

- Two step process where groups of persons are involved. (1) The first consideration must be whether it is more probable than not that the same gang committed the acts. Once this is established, (2) the same consideration must apply to the individual accused, and there must be a connection between the individual and each of the instances alleged.

- The connection between the accused and the group can be established where group membership can be shown to have been static, or otherwise there is a distinctive and recognizable role which can be attributed to the accused.

- *Pritchard v. Ontario (OHRC)*, SCC 2004

- Facts - filed a human rights complaint with the re- spondent Ontario Human Rights Commission, against her former employer Sears Canada Inc., alleging gender discrimination, sexual harassment.

- Issue - is a legal opinion prepared for the OHRC by its in-house counsel protected by solicitor–client privilege, as it would be if prepared by outside counsel?

- Rule - communication between the Ontario Human Rights Commission and its in- house counsel is protected by solicitor–client privilege.

    - Owing to the nature of the work of in-house counsel, having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis.

    - Where solicitor–client privilege is found, broad range of communications covered; applie with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law.

    - The fact that a legal opinion was provided by in-house counsel does not alter the nature of the communication or the privilege.

    - Where legislation specifies that the "whole of the record" must be provided, includes specifically opinions provided to the administrative board, then privilege will not arise as there is no expectation of confidentiality.

- *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, SCC 2008

- Privilege cannot be abrogated by statutory inference.

- Power to review a privileged document was derived from the power to adjudicate disputed claims over legal rights. That power was not within the mandate of the privacy commissioner.

- Unless expressly stated, no statutory right for administrative investigator to review documents even for the limited purpose of determining whether solicitor–client privilege is properly claimed. Applicable to all

statutory administrative investigators.

- *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* SCC 2010

    - Scope of s. 2(b) (freedom of expression) includes a right to access to documents only where necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints.

    - Assertions of particular categories of privilege are in principle open to constitutional challenge. However, in practice, the outlines of these privileges are likely to be well-settled.

- *Smith v. Jones*, SCC 1999

    - Facts - D. charged with sex assault, counsel referred to psychiatrist for assessment. Counsel advised that assessment was privileged. Assessment revealed that D. planned further crime.

    - Issue - is the report admissible, or privileged?

    - Rule - admissible via public safety exception.

        - When the interest in the protection of the innocent accused and the safety of members of the public is engaged, the privilege will have to be balanced against these other compelling public needs.

        - Only a compelling public interest may justify setting aside solicitor–client privilege. Danger to public safety can, in appropriate circumstances, provide the requisite justification.

        - Three considerations: risk of (1) serious bodily harm or death to (2) identifiable persons or group (3) which is imminent; as a general rule, privilege set aside on this basis.

        - To determine whether there is a risk, factors should be considered, including evidence of long-term planning, method to be employed, history of violence, etc.

        - Group threatened may be large (eg. female prostitute in BC) but if it is clearly identifiable, then this does not preclude operation of the exception.

        - Disclosure of planned future crimes without an element of violence would be an insufficient reason to set aside solicitor–client privilege.

        - Imminence defined in context - not necessarily temporality, but certainty which is considered - if delivered with chilling intensity and graphic detail so as to persuade of its imminence.

        - Disclosure of the privileged communication should generally be limited as much as possible. References to other criminal behaviour which does not meet exception requirements would be deleted.

    - Dissent (Major) - limited exception which does not include conscriptive evidence against the accused would address the immediate concern for public safety.

- *R. v. Brown*, SCC 2002

- Facts - Brown is accused of murder. Brown learns that an unrelated suspect, Benson, may have made a confession to his lawyer. The source of Brown's knowledge concerning Benson's confession was Benson's girlfriend.

- Issue - is Benson's confession to his lawyer subject to the innocence at stake exception?

- Rule

    - The occasions where solicitor-client privilege yields are rare, and the test to be met is stringent.

    - Purpose is not to strengthen the evidence the accused has already tendered by imbuing it with the high degree of credibility of privileged communication.

    - McClure test has two parts, accused must establish each element on a balance of probabilities:

        - *Threshold questions* - accused must establish that:

            - *Unavailability* - the information sought is not available from any other source;

                - *Admissible* - if there is alternative information, this will only preclude the exception where it is admissible. However, available evidence is presumed admissible.

                - *Contents* - if there is alternative information, this will only preclude the exception where it concerns the *contents* and not merely the existence of the communications.

            - *Necessary to raise a doubt* - otherwise impossible to raise a reasonable doubt; allow access only where there is no other defence *and* the requested communications would make a positive difference.

                - *Timing* - should await the close of the Crown's case, as *McClure* application not necessary if there is no case to meet.

        - *Innocence at stake test* - applied if threshold met:

            - *Viability* - accused must demonstrate an evidentiary basis to show that a communication exists which *could raise* a reasonable doubt;

            - *Examination* - judge must then examine communication to determine whether it is *likely to raise* a reasonable doubt (stricter standard);

                - *Amplification of the record* - judge may require the solicitor to testify, or provide records with an affidavit of completeness to make determinations at this stage (records avoid fishing expeditions).

                - *Cumulative effect* - if incapable of raising a reasonable doubt on its own, can be considered cumulatively with other evidence only where other evidence would not raise reasonable doubt in absence of the communications.

                - *Quality of evidence* - cannot invade privilege because this will provide

evidence that is more likely to be believed than the evi- dence already available to the accused. The quality of the evidence is not a factor.

- *Scope of disclosure* - only those communications which are relevant to raising the reasonable doubt; must protect disclosure as much as possible.

- *Entitlement to disclosure* - applies only to the accused; Crown cannot use this to gain access to privileged material. Evidence subject to normal disclosure procedures, Crown can cross examine on portions relied upon by accused.

- *Blank v. Canada*, SCC 2006

- Facts - Plf. director of company charged with *Fisheries Act* offences, bringing suit for prosecutorial abuse, requests access to litigation files under *Access Act*, denied under solicitor-client privilege.

- Issue - are the requested documents subject to solicitor-client or litigation privilege?

- Rule

- Solicitor–client privilege has two "branches," one concerned with confidential communications between lawyers and their clients, the other relating to information and materials gathered or created in the litigation context.

- Litigation privilege includes communication with the client, as well as communications with third parties, or, in the case of an unrepresented litigant, between the litigant and third parties; anything created, communicated, collected for the dominant purpose of litigation.

- Broader allowance, applies to communications of a non-confidential nature as well as material of a non-communicative nature.

- Solicitor–client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself.

- Unlike solicitor-client, litigation privilege is not gained at protecting relationship, but rather directly to the process of litigation, the need for a protected area to facilitate investigation and preparation for adversarial process.

- Both serve a common cause: The secure and effective administration of justice according to law - complementary and not competing in their operation.

- Except where such related litigation persists (litigants or related parties remain locked in essentially the same combat), there is no need and no reason to protect info from disclosure.

- Juridicial source - includes separate proceedings with the same or related parties, arising from the same or a related cause of action, or raising common issues and sharing essential purpose.

- ITC, claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution. The current action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution: different juridicial

source.

- Litigation privilege does not apply to evidence of abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

- Prima facie showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed will lead to disclosure.

- Does not allow for disclosure of documents that are also subject to the solicitor-client privilege, even following the cessation of the litigation.

- *R. v. Leipert*, SCC 1997

- Facts - D. requests details of informer tip to Crime Stoppers concerning grow-op. Crown refused on grounds of informer privilege.

- Issue - is the tip covered by informer privilege?

- Rule

- The role of informers in drug-related cases is particularly important and dangerous. In- formers often provide the only means for the police to gain some knowledge of the workings of drug trafficking operations and networks

- Informer privilege belongs to the Crown, but the Crown cannot waive the privilege without the consent of the informer.

- Applies in civil proceedings, and to a witness on the stand, in that a person cannot be compelled to state on the record whether they are an informer.

- Subject only to the "innocence at stake" exception, the Crown and the court are bound not to reveal the undisclosed informant's identity.

- Scope - includes identity, or any information, including small details, which may be sufficient to reveal identity.

- With unknown informant, the Crown cannot determine or consult the informant to determine whether any part of the information would reveal the identity of the informant.

- Concerning agent provocateur or material witness, where such a basis is established, the privilege must yield to the principle that a person is not to be condemned when his or her innocence can be proved.
- To the extent that rules and privileges stand in the way of an innocent person establishing his or her innocence, they must yield to the *Charter* guarantee of a fair trial

- Where the accused seeks to establish that a search warrant was not supported by reasonable grounds, the accused may be entitled to information which may reveal the identity of an informer notwithstanding informer privilege "in circumstances where it is absolutely essential (eg. innocence is at stake).

- Editing may be appropriate where the identity of the informant is known, and the court can ascertain that the edited information will not tend to reveal the identity of the informant.

- *Named Person v. Vancouver Sun*, SCC 2007

- Rule is extremely broad in its application. The rule applies to the identity of every informer: it applies when the informer is not present, where the informer is present, and even where the informer himself or herself is a witness.

- Admits but one exception: it can be abridged if necessary to establish innocence in a criminal trial (there are no exceptions to the rule in civil proceedings) - innocence at stake.

- *R. v. Ahmad*, SCC 2011

- Facts - criminal trial against D., Fed refuses disclosure under s. 38. D. requests stay of proceedings.

- Issue - where s. 38 operates to preclude a fair trial due to lack of disclosure by the Fed, what is the correct remedy?

- Rule - stay of proceedings is applicable where lesser measures will not suffice.

- Where conflict between national interest and trial fairness is irreconcilable, an unfair trial cannot be tolerated. Right of an accused person to make full answer and defence may not be compromised, therefore stay of proceedings may be required.

- Effect of s. 38 is that state secrecy will be protected where the Fed considers it vital to do so, but the result is that the accused will, if denied the means to make a full answer and defence, and if lesser measures will not suffice, walk free.

- s. 38.13 empowers the federal Attorney General to personally issue a certificate that prohibits disclosure even of information whose disclosure has been authorized by the Federal Court judge.

- s. 38.14, which expressly indicates that the fair trial rights of the accused must be protected—not sacrificed—in applying the other provisions of the scheme.

- There will be many instances in which non-disclosure of protected information will have no bearing at all on trial fairness or where alternatives to full disclosure may provide assurances.

- Judges must be provided with a sufficient basis of relevant information on which to exercise their remedial powers and to avoid the collapse of the prosecution.

- Remedies in s. 38.14 include dismissing specific counts of the indictment and complete stay of all proceedings, which would require specific understanding of the impugned information.

- D, is under no obligation to cooperate with the prosecution; if the end result of non- disclosure by the Crown is that a fair trial cannot be had, a stay of proceedings is the lesser evil

- *Babcock v. Canada* (A.G.), SCC 2002

- Facts - Fed set DOJ salary for Toronto lawyers higher than elsewhere, leading to suit by Vancouver office. Plf. seeks to adduce document (affidavit by Fed) concerning the reasons underlying the salary differential.

Fed seeks to invoke s. 39 to protect document, Plf. holds that this is not constitutional.

- Issue - is s. 39 constitutional?

- Rule - yes; however, the documents in this case had already been disclosed, therefore precluding s. 39 application.

    - Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny.

    - Otherwise, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions.

    - Process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.

    - Certification by the Clerk of the Privy Council or by a minister of the Crown, is the trigger by which information becomes protected under s. 39. Courts and tribunals are not able to review the documents.

    - Clerk must answer two questions before certifying information: first, is it a Cabinet confidence within the meaning of ss. 39(1) and 39(2); and second, is it information which the government should protect, with public interest weighing against secrecy?

    - Valid certification must be:

        - (1) by the Clerk of the Privy Council or a minister of the Crown, (2) information must fall within the categories described in s. 39(2), (3) be certified for *bona fide* purpose of protecting Cabinet confidences, and (3) must hitherto confidential.

    - Where a document has already been disclosed, privilege has been waived, and s. 39 no longer applies.

    - Date, title, author, recipient must be disclosed for documents to be identifiable; if this is not disclosed, onus falls on government to establish that this was necessary to avoid disclosure.

    - Where certified, and where the required information has been disclosed, court must accept the determination of the Clerk, unless it can be shown that the Clerk exceeded powers.

    - Disclosure of one document does not constitute a class waiver requiring disclosure of documents protected by s. 39; may be disclosed selectively. However, where this is done as a litigation tactic, exceeds Clerk powers and may be challenged.

- Dissent (L'Heureux-Dube) - unequivocal language of the statute does not mandate consideration of the public interest in disclosure; no competing interests.

- *R. v. Couture*, SCC 2007

    - Facts - D. told Christian counsellor that he had murdered two women, subsequently married. Therefore, incompetent and non-compellable due to valid and subsisting marriage. However, wife had made

statements to police, which police sought to adduce as hearsay.

- Issue - is the communication privileged?

- Rule - no, made prior to the marriage.

  - s. 4(3) creates a spousal privilege in respect of marital communications. The question of privilege was not really an issue at common law because spouses, with few exceptions, were not competent to testify.

  - Privilege is testimonial in nature, giving a right to withhold evidence but the communications themselves are not privileged. Privilege belongs to the spouse receiving the communication and can be waived by him or her.

  - The question of privilege does not arise in this case with respect to the alleged confessions made by Mr. Couture to Darlene in 1989 since these communications were made prior to their marriage on February 14, 1996.

- *Slavutych v. Baker*, SCC 1976

  - Facts - professor asked to give information on colleague for tenure consideration, was given assurances that it would be kept confidential and destroyed.

  - Issue - was this a circumstances where a confidence arose to a privilege?

  - Rule - yes; however, court prefers to apply equitable doctrine of breach of confidence.

    - The communication did originate in a confidence, which was essential to a process of peer evaluation by university staff. This relationship one which should be sedulously fostered, though there are also interests in operation of dismissal procedures.

    - If the two interests were of equal weight surely the greater effect should be to support the confidentiality of a document given upon the firm agreement of both parties that it should remain confidential.

    - Breach of confidence - equitable principle which may operate instead of privilege. Certain procedures create an umbrella of confidence, protection afforded by which extends to all who have a legitimate interest in the proceedings.

      - The effect of this is to ensure that good faith communications ought not to prejudice those who participate.

      - Difference is that the communication could be used against *other* persons, but not against the person whose confidence was breached.

- *R. v. Gruenke,* SCC 1991

  - Facts - D. convicted of murder based on testimony of pastor based on conversations between the two concerning the murder; holds that communications were privileged and inadmissible.

  - Issue - were the conversations between the D. and the pastor privileged?

- Rule - No - they did not originate in a confidential manner.

    - Religious communications, notwithstanding their social importance, are not inextricably linked with the justice system in the way that solicitor–client communications surely are. No class privilege applies.

    - s. 2(a) of the *Charter* embraces not only the freedom of religious thought and belief but also "the right to manifest religious belief by worship and practice or by teaching and dissemination" - favours recognition of a priest-and-penitent privilege.

    - No evidence that the accused Gruenke made her admissions to them in the confident belief that they would be disclosed to no one."

    - While the existence of a formal practice of "confession" may well be a strong indication that the parties expected the communication to be confidential, the lack of such a formal practice is not determinative.

- Dissent (L'Heureux-Dube)

    - There is a human need for a spiritual counsellor, a need which, in a system of religious freedom and freedom of thought and belief, must be recognized; should be a class privilege for religious communications.

    - If our society wishes to encourage the creation and development of spiritual relationships, individuals must have confidence that their religious confessions, given in confidence and for spiritual relief, will not be disclosed.
    - This does not mean that every communication between pastor and penitent *will be protected.*

- *M. (A). v. Ryan,* SCC 1997

- Facts - civil suit arising out of sex assault allegation of patient by psychiatrist. D. admits conduct, but denies causation. Plf. seeks treatment from a different doctor, and D. seeks disclosure of treatment notes and other information.

- Issue - is the treatment information covered by privilege?

- Rule - yes, case-by-case privilege.

    - The law of privilege evolves to reflect social and legal realities: the law's increasing concern with the wrongs perpetrated by sexual abuse, and medical treatment for the physical and mental effects of this abuse.

    - The possibility that a court might order communications to be disclosed at some future date over their objections does not change the fact that the communications were made in confidence.

    - Confidentiality is clearly essential to the maintenance of the relation between a victim of sexual abuse and a psychiatrist providing that person with treatment. Lack of privilege would have a chilling effect on other persons in the same situation, undermining their treatment.

    - For privilege to exist, the benefit that inures from privilege must outweigh the interest in the

correct disposal of the litigation.

- Order for partial privilege will more often be appropriate in civil cases where, as here, the privacy interest is compelling; deletion of non-essential material.

- Open to a judge to conclude that psychiatrist-patient records are privileged where appropriate; once first three requirements met, focus is on balancing.

- *R. v. O'Connor,* SCC 1995

- Rule - disagree with L'Heureux-Dubé J's assertion that therapeutic records will only be relevant to the defence in rare cases.

- When the defence seeks information in the hands of a third party, there is a shifting onus, and a higher threshold of relevance, as the information is not part of the case to meet, nor do third parties have an obligation (unlike the Crown) to assist.

- Likely relevance stage should be confined to a question of whether the right to make full answer and defence is implicated by information contained in the records.

- Defence at a disadvantage in establishing likely relevance, as they will not be privy to existence, much less contents of records.

- Possibility of materiality arises where there is a reasonably close temporal connection between the creation of the records and the date of the alleged commission of the offence.

- Information in third party records may be relevant in showing unfolding of events, use of therapy which influenced memory of the complainant, or other credibility issues; etc.

- Concurring (L'Heureux-Dube)

- Concerning production of third party records, three constitutional rights that are implicated: (1) the right to full answer and defence; (2) the right to privacy; and (3) the right to equality without discrimination.

- Constitution guarantees the accused a fair hearing, it does not guarantee the most favourable procedures imaginable.

- The right to make full answer and defence cannot be so broad as to grant the defence a fishing licence into the personal and private lives of others. The question is not *whether* the defence can be limited in its attempts to obtain production, but *how* it can be limited.

- In third party production, evidence is not possessed by the Crown and so is not part of disclosure obligations; neither is the defence able to determine whether it might be relevant.

- Privacy must be balanced against legitimate societal needs - must assess *reasonable expectation of privacy* against the necessity of interference from the state.

- The greater the reasonable expectation of privacy and the more significant the deleterious effects flowing from its breach, the more compelling must be the state objective, and the salutary effects of that objective, in order to justify interference.

- Unlike virtually every other offence in the *Criminal Code*, sexual assault is a crime which overwhelmingly affects women, children, and the disabled.

- Routine insistence on the exposure of complainants' personal backgrounds has the potential to reflect a built-in bias in the criminal justice system against those most vulnerable to repeat victimization.

- Applicant seeking production of records from third parties is seeking to invoke state power to violate the privacy rights of other individuals. Therefore, applicant must show that the use of the state power to compel production is justified in a free and democratic society.

- Test is as follows:

- *Relevance*

- Accused would have to demonstrate that the records were l*ikely to be relevant* either to an issue in the proceeding or to the competence of the subject to testify.

- Arguments urging production must rest upon permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes.

- *Production*

- Production should only be granted when it is shown that the accused cannot obtain the information sought by any other reasonably available means;

- Proportionality between the right to make full answer and defence as compared with the deleterious effects on the party whose private records are being produced.

- *Scoping* - court reviews records, and orders production of only those which have significant probative value that is not substantially outweighed by the danger of prejudice to the administration of justice or harm to the privacy rights of the witness.

- Production which infringes upon a right to privacy must be as limited as reasonably possible to fulfil the right to make full answer and defence.

- *Juman v. Doucette*, SCC 2008

- Facts - day care worker being sued by parents of injured child; Plf. seeks motion to prohibit discovery transcripts from being released to police.

- Issue - is the transcript barred through implied undertaking?

- Rule - yes. None of the parties bound by the undertaking made an application.

- Implied undertaking rule rests on the statutory compulsion that requires a party to make documentary and oral discovery regardless of privacy concerns and whether or not it tends to self-incriminate.

- The more serious the criminality, the greater would be the reluctance of a party to make disclosure

fully and candidly, and the greater is the need for broad protection to facilitate his or her cooperation in civil litigation.

- There is an "immediate and serious danger" exception to the usual requirement for a court order prior to disclosure.

- Information obtained through discovery is subject to an implied undertaking, cannot be used by other parties except for the purpose of that litigation.

- It includes the wrongdoing of persons other than the examinee and covers innocuous information that is neither confidential nor discloses any wrongdoing at all.

- Applies only to the evidence given at the discovery; there is nothing to stop authorities from obtaining a subpoena or a warrant based on such testimony.

- The root of the undertaking is the statutory compulsion to comply and participate fully in pretrial oral and documentary discovery; even where this tends to self-incriminate.

- Discovery is essential to prevent surprise or "litigation by ambush," to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable.

- Self-incrimination is not a necessary requirement for protection. Disclosed information need not even satisfy the legal requirements of confidentiality.

- Breach of the undertaking may be remedied through stay, dismissal, striking a defence, or contempt proceedings.

- The undertaking may be trumped by a more compelling public interest, and therefore may be modified or varied upon application where this is the case.

- *Common law exceptions*

    - *Interest balancing* - careful weighing of public interest asserted (eg. the prosecution of a serious crime) against the public interest in protecting the right against self-incrimination as well as upholding a litigant's privacy and promoting an efficient civil justice process. Onus on the applicant.

    - *Public safety concerns* – where the test identified in *Smith v. Jones* concerning the public safety exception in matters of privilege applies.

    - *Impeaching inconsistent testimony* - where the deponent has given contradictory testimony about the same matters in successive or different proceeding, the undertaking rule affords no shield to use of prior testimony for use of impeachment.

    - *Suggested crimes* – cannot form a shield from the detection and prosecution of crimes in which the public has an over-riding interest; however, not in all cases sufficient.

- *Statutory exceptions* - where a child needs protection, under the *Child, Family, and Community Service Act* of BC, issues of public safety.

- Undertaking continues to bind beyond litigation; when an adverse party incorporates this into the

court record, the undertaking is spent, however.

- Only parties with a direct interest (not the police, not the media) are entitled to notice of an application varying an undertaking.

- *Use immunity* - while a compelled witness must answer any question, regardless of whether this tends to incriminate, these answers cannot be used in evidence against that person other than in a subsequent trial for perjury under s. 5 of the *CEA*.

- Discovery transcript is not privileged, and not exempt from seizure; therefore, via search warrant, police can gain access to material (though not use it for purposes prohibited under s. 5).

- *R. v. Henry*, SCC 2005

- Facts - D. testified at first trial, convicted, appealed, then testified with different story at second trial. Crown cross-examined using testimony from previous trial, D. sought protection via s. 13 of the *Charter*. Crown holds that this is merely for credibility, not to incriminate, therefore s. 13 inapplicable.

- Issue - does the Crown's use of evidence to cross violate s. 13?

- Rule

- s. 13 holds that a witness who testifies in any proceedings 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.

- Both parties view with scepticism the idea that the trier of fact can truly isolate the purpose of impeaching credibility from the purpose of incrimination.

- Like s. 5, s. 13 is a *quid pro quo*, designed to protect a witness who is compelled to give evidence protection from self-incrimination; no quid pro quo where evidence not compelled.

- Accused in a criminal trial is not compelled nor compellable to give evidence; does so willingly, and therefore no *quid pro quo* is evoked by this situation.

- s. 13 does not need to be invoked; applicable and effective without invocation, and even where the witness in question is unaware of his rights.

- Incriminating evidence means "something 'from which a trier of fact may infer that an accused is guilty of the crime charged.

- Compulsion is determined within the context of the current trial, not the trial at which the evidence was given. Therefore, regardless of whether the accused was initially compelled, if the effect of admitting testimony would be to compel, then s. 13 is available.

- Accused persons who testify at their first trial and then volunteer inconsistent testimony at the retrial on the same charge are in no need of protection from being indirectly *compelled* to incriminate themselves.

- If the use of prior testimony not only impeaches credibility but further gives rise to an inference of guilt, s. 13 does not preclude this inference from being made by the TOF.

- However, where witnesses are *compelled* at the first trial, this evidence is inadmissible at subsequent trial, for credibility or otherwise.

- An accused will lose the *Mannion* advantage in relation to prior *volunteered* testimony but his or her protection against the use of prior *compelled* testimony will be strengthened.

- *Dubois* - at a retrial of the same proceedings, the accused is entitled not to testify; therefore, to allow the Crown to file prior testimony on retrial would amount to compulsion. s. 13 is available.

- *Mannion* - however, where the accused *does* decide to testify at retrial on the same indictment, s. 13 is not available; can be crossed on prior testimony.

- *Kuldip* - correct to allow cross-examination on prior testimony, wrong to limit this to the purposes of credibility only.

- *Noel* - where witnesses are *compelled* at the first trial, this evidence is inadmissible at subsequent trial, for credibility or otherwise.

- *Ward v. The Queen*, SCC 1979

- Facts - D. crashes vehicle, girlfriend dies. Makes inculpatory statement, which Crown sought to adduce.

- Issue - statement voluntary?

- Rule - No. Must consider mental and physical condition to determine whether statement arised from "operating mind"

- Hope of advantage or fear of prejudice not determinative; must also consider the mental condition of the accused to determine whether statements represent "operating mind"

- Determine whether a person in his condition would be subject to hope of advancement or fear of prejudice in making the statements when perhaps a normal person would not;

- Determine whether, due to the mental and physical condition, the words could really be found to be the utterances of an operating mind.

- *R. v. Whittle*, SCC 1994

- Facts - D. suffers from schizophrenia, charged with murder after making inculpatory statements, claims statements were made due to voices in head.

- Issue - statements voluntary?

- Rule - Yes, inner compulsion cannot displace operating mind where capable of understanding proceedings.

- Operating mind test requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused.

- Test is merely whether the accused possessed an operating mind, goes no further, does not inquire as to whether the accused is capable of making a good or wise choice.

- Inner compulsion, due to conscience or otherwise, cannot displace the finding of an operating mind unless, in combination with conduct of a person in authority, a statement is found to be involuntary.

- *Hobbins v. The Queen*, SCC 1982

- Atmosphere of oppression may be created in the circumstances surrounding the taking of a statement, although there be no inducement held out of hope of advantage or fear of prejudice, and absent any threats of violence or actual violence.

- *R. v. Serack,* BCSC 1974

- Facts - Crown wants to adduce statement by the accused; taken when Serack was naked after being held in that condition for eight hours.

- Issue - statement voluntary?

- Rule - No.

- The interview could have taken place before Serack's clothing was taken. Or, if the interview could not have taken place at once, some respectable clothing could have been obtained by the time the interview was held.

- A man's trousers are, in a situation like this, essential to his dignity and his composure.

- Nudity renders other party in a situation of advantage, one that may quite disarm an accused of a wholly independent recollection and separate will.

- *R. v. Oickle,* SCC 2000

- Facts - interrogation of man suspected of multiple arson; lengthy interrogation by multiple parties, includes reenactment late at night, also includes exaggeration involving polygraph results.

- Issue - statement voluntary?

- Rule - Yes.

- Presenting a suspect with entirely fabricated evidence has the potential either to persuade the susceptible suspect that he did indeed commit the crime, or at least to convince the suspect that any protestations of innocence are futile.

- Certain techniques convince a suspect that in spite of the long-term ramifications, it is in his or her best interest in the short- and intermediate-term to confess.

- Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence.

- Understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule discussed above.

- Minor inducement, such as a tissue to wipe one's nose and warmer clothes, may amount to an impermissible inducement if the suspect is deprived of sleep, heat, and clothes for several hours in the middle of the night during an interrogation

- Respondent was fully apprised of his rights at all times; never subjected to harsh, or overbearing interrogation; not deprived of sleep, food, or drink; and never offered improper inducements that undermined the reliability of the confessions.

- *Reduction of culpability* - concern is whether the police suggested that confession will result in the legal consequences being minimal, as through a quid pro quo - this is inapt.

- *Benefits of confession* - distinction here is between the police suggesting the potential benefits of confession, and making offers that are conditional upon receiving a confession; latter is quid pro quo, inapt.

- Police never threatened to bring charges against fiancee; indeed, the police never seriously suggested fiancee as a suspect. The most they did was promise not to polygraph fiancee if the respondent confessed.

- While the re-enactment was admit- tedly done at a time when the respondent had had little sleep, he was already awake when they approached him, and was told that he could stop at any time.

- There was no atmosphere of oppression sufficient to exclude the statements.

- Simply confronting the suspect with adverse evidence, like a polygraph test, even exaggerating its accuracy and reliability is not grounds for exclusion. This holds true even for inadmissible evidence.

- Tactical disadvantage to the defence is not relevant to the voluntariness of the defendant's confession; therefore, when confession follows confrontation with inadmissible evidence, though defence must allow for admission of evidence to explain confrontation, this is not justification for excluding confession.

- *R. v. Edwards,* SCC 1996

- Fact - police conduct illegal search of D.'s girlfriend's apartment, find drugs.

- Issue - evidence admissible?

- Rule - Yes, because it was the third party's s. 8 rights which were infringed, therefore no standing to challenge.

- In any s. 8 challenged, must note that the right infringed must be, as a general rule, the right of the person bringing the challenge.

- Since no personal right of the appellant was affected by the police conduct at the apartment, the appellant could not contest the admissibility of the evidence pursuant to s. 24(2) of the *Charter.*

- Rather the provision is intended to afford protection to all of us to be secure against intrusion by the state or its agents by unreasonable searches or seizures.

- S. 8 is not solely for the protection of criminals even though the most effective inevitably protect the criminal as the price of liberty for all.

- *R. v. Bedingfield*, UK 1879

- Facts - D. cut throat of a woman he had relations with; she stumbled out of the house with her injury, said something while pointing backwards towards the house, and then died.

- Issue - D.'s statement admissible as *res gestae*?

- Rule - No - occurred after the stabbing.

- Not so admissible, for it was not part of anything done, or something said while something was being done, but something said after something done.

- *Ratten v. The Queen,* JCPC 1972

- Facts - D. charged with murdering his wife, held that he had shot her accidentally while cleaning his gun. The deceased had called the police in a hysterical state and had sobbed, and provided address (address is needed via truth of contents, as it shows that the person in the hysterical state was calling from the home of the D.).

- Issue - is the phone call admissible as *res gestae?*

- Rule - Yes - part of the same event, as established by hysteric tone, and the fact that it was an emergency call.

- Possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion.

- That the words and the act which evoked them are part of the same transaction is difficult to show, includes time elapsed, location, etc.

- If the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded, admissible.

- If the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, inadmissible.

- The way in which the statement came to be made (in a call for the police) and the tone of voice used, showed intrinsically that the statement was being forced from the deceased by an overwhelming pressure of contemporary event.

- *R. v. Clark,* ONCA 1983

- Facts - D. charged with killing ex-husband's new wife. Neighbour hears deceased screaming "I've been

murdered, I've been stabbed" before death.

- Issue - admissible for truth of contents as res gestae?

- Rule - yes - circumstances indicate res gestae applies.

- Under certain external circumstances of stress caused by physical shock, control of the reflective faculties may be overwhelmed so that utterances which proceed are a spontaneous and sincere response to the external shock.

- This feature makes statements particularly trustworthy, such that concoction or distortion can be safely discarded.

- *R. v. O'Brien*, SCC 1978

- Facts - D. and Jensen co-accused of P4P. Jensen fled jurisdiction, D. convicted. Charges against Jensen stayed. Jensen returns to Canada and agrees to testify that he alone was guilty. Jensen died before D.'s appeal was heard.

- Issue - Jensen's statement admissible?

- Rule - no - did not apprehend immediate penal consequences.

- Statement tendered for truth of contents, in order to show that Jensen and not the D. had in fact committed the crime alleged.

- Distinction between statements against pecuniary versus penal interest is tenuous and arbitrary, should not be followed.

- Declaration against penal interest is admissible according to the law of Canada; the rule as to absolute exclusion of declarations against penal interest, established in *The Sussex Peerage* case, should not be followed.

- Requirements

- Within knowledge - the fact stated must be one which is within the knowledge of the utterer.

- *Against present interest* - must be against interest at the time when the statement was made. If it is favourable to interest, or only against interest in "certain future events", the exception is not made out.

- For instance, if the charges against the utterer had been stayed, penal consequences would only arise were the stay lifted, so the statement is not against present interest. {O'Brien}
- For instance, if declarations were made to an immediate family member, penal consequences would not be rightfully apprehended. {O'Brien}

- *Aware of adverse interest* - essential that the utterer should have known the fact to be against his interest when he made it.

- For instance, if the utterer were only willing to make the statement in circumstances where the CEA would provide protection against self incrimination (s. 5) in future proceedings, while this would indicate awareness. {O'Brien}

- *R. v. Pelletier*, ONCA 1978

- Facts - David states that he pushed roommate, who fell, in self-defence. Roommate found dead the next morning. Both D. and David charged with the death, separately. David not available at D.'s trial.

- Issue - admissible as utterance against penal interest, despite that it mentions self-defence?

- Rule

- Notwithstanding that David's declaration puts forward self- defence, it is an admission of an assault made to the police when they were investigating manslaughter by assault and it places the deceased's body where it was found by the police.

- Unavailability - any reason why the declarant cannot be brought in at the trial should suffice, such as physical incapacity, absence of the witness from the jurisdiction or inability of the party to find him. Not exhaustive, however.

- *Lucier v. The Queen*, SCC 1982

- Facts - D.'s house was destroyed by fire at a time when he was absent from the locality and shortly after he had increased his fire insurance policy. D.'s friend Dumont had been in house at time of fire, burned, went to hospital, makes statement that he had been paid by D, to burn the house. Subsequently expired.

- Issue - Dumont's statements admissible as against penal interest?

- Rule - No - inculpate the accused

- Wherever such statements have been admitted it will be found that they have an exculpatory effect.Meaningful difference, as such a statement implicating the accused robs the accused of the invaluable weapon of cross-examination.

- *Ares v. Venner*, SCC 1970

- Facts - Plf. broke leg while skiing, came under D.'s medical care, brings suit for medical malpractice, seeks to adduce notes made by nurses.

- Issue - nurses notes admissible as business records?

- Rule - yes.

- Records made contemporaneously by someone having personal knowledge and a duty to make the record are admissible for truth of contents.

- *Youlden v. London Guarantee and Accident Co.*, ONHC 1910

- Facts - Plf. lifting heavy item, stated that he was "afraid he had injured" himself. Next day, wife described

his appearance as "miserable and grey". Ultimately expired, alleges that he injured himself while lifting the item.

- Issue - Plf.'s statement concerning injury admissible?

- Rule - yes.

    - Statements of bodily condition admissible upon the ground that there is no other means possible of proving bodily or mental feelings than by the statements of the person who experiences them.

    - Statement, did not go so far as to indicate that the lifting of the timber was the cause of the injury; but this is an inference which may be drawn from the fact of the injury.

- *R. v. P.(R.),* ONHC 1990

- Facts - D. charged with murder, victim made statements to various other persons sought to be adduced re: state of mind - fear of D., dissatisfaction with relationship with D., intention to end relationship permanently. Crown asserts that these statements establish D.'s motive.

- Issue - are the statements admissible?

- Rule

    - Assuming relevance, evidence of utterances mad which establish state of mind of an individual are admissible.

    - Explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule.

    - Alternatively, merely permit an inference as to the speaker's state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred

    - An utterance indicating that a utterer had a certain intention or design will afford evidence that the utterer acted in accordance with that stated intention or plan where it is reasonable to infer that the deceased did so.

    - Evidence is also not admissible to establish that past acts or events referred to in the utterances occurred.

        - For instance, an utterance showing that the utterer intended to break up with the accused is admissible to prove the intention, but not the abuse which led to the intention.

    - Evidence is not, however, admissible to show the state of mind of persons other than the utterer (unless they were aware of the statements),

    - Not admissible to show that persons other than the utterer acted in accordance with the utterer's stated intentions (although perhaps admissible where this was a joint act).

    - Probative v. prejudicial analysis

        - The judge must determine the probative value of the evidence by assessing its tendency to

prove a fact in issue in the case including the credibility of witnesses.

- For instance, a statement from which state of mind can be inferred, made remotely from the state of mind being described, has limited probative value.

- The judge must determine the prejudicial effect of the evidence because of its tendency to prove matters which are not in issue, or because of the risk that the jury may use the evidence improperly to prove a fact in issue, or due to other prejudice.

    - For instance, utterances concerning utterer's intention to break up with D. might include the maltreatment leading to this intention, and thus negatively affect D's character.

- The judge must balance the probative value against the prejudicial effect

- *R. v. Rothman*, SCC 1981

    - Facts - D. arrested for P4P, placed in cell with undercover, made incriminating remarks to this person which Crown seeks to adduce.

    - Issue - statements made to undercover admissible?

    - Rule - yes; not made to person in authority.

        - Issue to be determined is whether undercover a "person in authority", because, except in the case of a statement made to a person in authority, a statement made by an accused against his own interest is admissible, without needing to establish voluntariness.

        - Person in authority test is subjective; accused must have believed that the person the statement was made to had some degree of authority or power over the accused.

    - Dissent (Estey)

        - In the face of express election by the accused not to make a statement, police employed tricks and lies to obtain a statement instead.

        - To be voluntary, a statement must be part of a conscious intention on the part of the speaker; therefore, where accused has expressed intention not to make a statement, this should be included in voluntariness analysis.

        - To apply the rule otherwise in the circumstances we have here not merely would permit but would encourage the deliberate circumvention by the authority of the accused's announced exercise of his right not to give a statement to the authorities.

- *R. v. Spencer*, SCC 2007

    - Facts - D. arrested with girlfriend for string of robberies. D. asked officer what would happen to his girlfriend, officer said he intended to charge both. D. then made inculpatory statements, which the Crown seeks to adduce.

    - Issue - does the intersection of the intention to charge girlfriend with the statement affect voluntariness?

- Rule

    - No threats or quid pro quo present, at no time did the police offer lenient treatment for girlfriend if D. confessed; police said that such a promise was not possible.

    - However, police said that D. could only visit girlfriend in her cell once he had "cleaned his slate" - this does constitute an inducement, albeit a lesser one.

    - Question is whether the inducement, standing alone or in combination with other factors, is strong enough to raise a reasonable doubt about whether the free will of the accused was overborne.

        - For instance, free will not overborne by offer that D. could visit girlfriend in her cell once he had confessed. This does constitute a minor inducement, however.

    - Oickle does not require that any quid pro quo handed out by a person in authority will necessarily render a statement by the accused involuntary; only where strong enough to overbear the will. Follows from the fact that voluntariness, not quid pro quo, is central to confessions admission.

    - *Savvy participant* - aggressive, mature, savvy participants, therefore less likely to have their will overborne or to submit to an atmosphere of oppression.

- Dissent (Fish)

    - Respondent's relationship with his girlfriend, Tanya, was strong enough to induce a false confession were she threatened with harm; there was a threat, accompanied by a promise of advantageous intervention with the Crown.

- *R. v. Turcotte*, SCC 2005

    - Facts

        - D. requests police car to visit ranch, refused to specify why, officers discover three murder victims, D. charged, Crown seeks to adduce post-offence conduct, namely D.'s silence, as evidence of guilt.

    - Issue

        - Can the D.'s silence be used as evidence of guilt?

    - Rule

        - Post-offence conduct evidence is commonly admitted where consisting of flight (from scene or jurisdiction), resistance of arrest, failure to appear, acts of concealment, or dishonesty, among others.

        - Right to silence is enshrined under s. 7 of the *Charter*, and so a person in the course of the criminal process has the right to choose not to speak with Crown agents.

        - Refusal to assist is nothing more than the exercise of a recognized liberty and, standing alone, says nothing about that person's culpability.
        - Right to silence is effective any time when a person is interacting with authority, regardless of

whether the person is detained; can freely choose extent of cooperation with police.

- Right to silence can be selectively waived; merely because some information has been revealed does not mean that D. is required to reveal all information.

- As there is no duty to speak with police, failure to do so is not relevant; no rational conclusion about culpability can be supported; therefore, not post-offence conduct.

- Where evidence of silence is admitted, juries must be instructed about the proper purpose for which the evidence was admitted, the impermissible inferences which must not be drawn from evidence of silence, the limited probative value of silence, and the dangers of relying on such evidence.

- *R. v. Singh*, SCC 2007

- Facts - charged with nightclub shooting, D. in custody, says on numerous occasions that he did not know anything about the incident, wanted to return to his cell. Eventually made incriminating statements, identifying himself in surveillance images. Asserted right to silence 18 times. However, conceded voluntariness.

- Issue - confession admissible?

- Rule - yes; s. 7 not made out, as D. held to have voluntarily changed mind.

  - Principle against self-incrimination is an overarching and organizing principle of the justice system, having many branches (voluntariness in confessions, s. 5 of the *CEA*, s. 13, etc.)

  - Common law affords greater protection than s. 7, due to the fact that it is judged on a reasonable doubt standard, with the Crown bearing the burden; yet it only protects where D. subjectively aware that the receiver is a person in authority.

  - The right to remain silent does not comprise the right not to be spoken to by state authorities.

  - Section 7 would be violated where the accused was cross-examined on the exercise of right to silence.

  - Section 7 protects the right to silence where an undercover state agent actively elicits a statement from the accused, though CLC would not due to lack of knowledge that the receiver was in authority.

  - Persuasion by an agent in authority, short of denying the suspect the right to choose or deprivation of an operating mind does not breach the right to silence.

  - CLC protects at all times, whereas s. 7 only applies in circumstances where the subject is in detention, and the state assumes responsibility of respecting D.'s rights.

  - Stratagem of presenting Crown case insistently, persistently, in face of refusals to speak, in order to obtain strategy may well run afoul of voluntariness, but this is a matter of degree.

- Dissent (Fish)

- Interrogator systematically disregarded D.'s right to silence; more D. refused, the more the interrogator persisted, message being that resistance is futile.

- CLC purpose is to ensure the reliability of confessions, while s. 7 is to ensure that government agents act in conformity with the justice system.

- Detainees may change their minds, decide to confess in face of Crown questioning, however, this us not valid when brought about by the persistent disregard of choice.

- *R. v. Cote*, SCC 2011

- Facts - D. charged with killing husband. Committed various *Charter* violations in conducting search without warrant, 10(a), 10(b), etc.

- Issue - should the evidence should be admitted despite these violations?

- Rule - no.

- *Grant analysis* - evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

- *Seriousness of state conduct* - more serious the state conduct constituting the *Charter* breach, the greater the need for courts to distance themselves from that conduct by excluding evidence linked to the conduct. Casual attitude towards or flouting of *Charter* rights aggravates seriousness; not the same as a good faith breach.

- For instance, misconstruing nature of situation to judicial officer in order to obtain warrant after search had already been conducted is an aggravating factor.

- *Impact of the violation on accused's rights* - range from minor technical breach to to profoundly intrusive violation; more serious the impact, more likely that admission of evidence will bring admin. justice into disrepute.

- Discoverability - can be argued that where evidence would inevitably be obtained, that the impact would be minor. On the other hand, availability of alternate means also makes state conduct more egregious. Finding of discoverability is not determinative.
- For instance, highly invasive search of an area, such as a home, where there is a great expectation of privacy is a serious impact.

- *Interest in adjudication on the merits* - whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence. Includes reliability, centrality of evidence, and seriousness of crime (double-edged sword).

- Trial judge's findings of fact must be respected unless they are tainted by clear and determinative error.

- *R. v. Castellani*, SCC 1970

- Facts - D. charged with killing wife by poisoning. Seeks to admit facts via s. 562 of the *Criminal Code*,

including that the D. had an extramarital affair. Crown objects to this admission, as the Crown sought to adduce evidence on that point.

- Issue - can the Crown preclude admitting of facts by the D.?

- Rule - yes - facts admitted must first be facts alleged by the Crown.

    - An accused cannot admit a fact alleged against him until the allegation has been made.

    - Under the section, it is for the crown, not for the defence, to state the fact or facts which it alleges against the accused and of which it seeks admission.

- *R. v. Proctor*, MBCA 1992

    - Facts - D. not disputing that he was the person that murdered victim; rather, defence based on sanity. Crown seeks to adduce evidence of subsequent attack on two women as evidence of identity.

    - Issue - evidence admissible, despite that identity not in issue?

    - Rule - no.

        - While Crown must agree to D. admissions of fact, the Crown is not entitled to refuse acceptance in order to keep an issue alive artificially.

        - Crown should not be allowed to gain entry for prejudicial evidence by refusing to accept D.'s admissions of fact.

- *R. v. Korski,* MBCA 2009

    - Facts - agreed statements of fact concerning several Crown witnesses introduced during the trial. At close, jury instructed to weigh agreed statements against viva voce testimony where there are contradictions.

    - Issue - did the judge err in suggesting a weighing process, should the jury have resolved all contradictions in favour of agreed facts?

    - Rule - no; these were informal admissions

        - *Formal admissions* - agreement that the admitted fact is true, cannot be contradicted by the accused once made without leave of the court; amounts to conclusive proof of the admitted fact and prohibition of any further dispute.

            - For instance, an agreement as to what a witness would have said in testimony is informal, versus formal admissions concerning truth of the contents of the testimony.

        - *Informal admissions* - not conclusive, may be contradicted, explained, etc. Merely an item of evidence open to rebuttal, interpretation, weighing.

            - For instance, an agreement as to what a witness would have said in testimony is informal, versus formal admissions concerning truth of the contents of the testimony.

- Some exhibits were formal admissions, others were informal admissions; merely labelling an admission as formal does not make it so.

- Once inconsistencies are found in the evidence of an informal admission, it is prudent for witnesses to be called and give testimony concerning that issue.

- In some cases, even though the accused has consented to an informal admission, where the inconsistency relates to a matter essential to the conviction, viva voce evidence will be necessary.

- *R. v. Andrade*, ONCA 1985

- Facts - murder charge, D. challenges continuity of exhibits re: threshold admissibility.

- Issue - was it an error in law for the TJ to fail to hold a voir dire on continuity of exhibits?

- Rule

- Where the relevance of an item depends on whether it came from a particular source, and there is conflicting evidence concerning the source, the TOF must decide whether the item came from that source.

- For instance, for the jury to decide whether a towel had been contaminated with hairs.

- TJ, unless acting as TOF, does not have authority to weigh conflicting evidence to determine the source or continuity of an item.

- With intercepted communications, the Crown must prove the integrity of the recording, accuracy, continuity, voice identification, and that there has been no alteration; threshold reliability, in other words, as weight is to be assigned by the TOF.

- *R. v. Staniforth*, ONCA 1979

- Complainants could only tentatively identify knife used in ABH, but were able to establish where the knives were on the person and home of D. Therefore, admissible.

- *R. v. MacPherson*, BCSC 2005

- Facts - D. popped in a buy and bust; obtained packet of cocaine from buy, folding knife from D.'s pocket following arrest. Exhibits officer died before trial, leading to continuity issue.

- Issue - does the lack of testimony from exhibit officer break the continuity chain such that the evidence is inadmissible?

- Rule - No.

- Continuity of real evidence in a narcotics case, and whether or not breaks in continuity makes evidence inadmissible are questions of fact for the trier of fact to decide. Breaks in chain go to weight.

- Proof of continuity is not a legal requirement, gaps in continuity are not fatal unless they raise a reasonable doubt about the integrity of the exhibit. No duty to show detailed continuity.

- *R. v. Patterson*, ONCA 2003

    - Facts - Complainant gave a statement to police alleging kidnapping and other crimes against the D. Crown plays entire videotapes statement of the D. for the TOF.

    - Issue - should the Crown have been allowed to play the entire tape in rebutting cross-examination of the complainant?

    - Rule - yes.

        - TJ has discretion to allow Crown to play entire tape; this was properly exercised in the present matter, as the cross-examination had raised the issue of the complainant's demeanour during the taped interview.

        - Without playing the whole videotape, the jury would have had an incomplete, inaccurate, and potentially unfair picture of the complainant's demeanour

        - General practice is to give jury access to all exhibits during deliberation where feasible. Open to the trial judge to permit the videotape to go to the jury room during deliberations. This was a matter within his discretion and there is no basis to suggest he erred in law.

- *R. v. Pitre*, SCC 1933

    - Rule

        - Handwriting need not be proved by expert witness, but rather by any witness where that person has become familiar with the person's handwriting.

            - For instance, two post cards and two letters do not go far enough to constitute a regular correspondence within the meaning intended by the rule.

- *R. v. Adam*, BCSC 2006

    - TOF may make handwriting comparisons on their own, without the need for expert aid; however, this becomes a question for weighing by the jury. Notice must be given to counsel, however, so that counsel may adduce expert evidence or argue for dissimilarities.

- *R. v. Cotroni*, ONCA

    - Facts - D. extorted funds from complainant on threat of death or harm. Only evidence to incriminate the D. arises from tape recordings of conversations. Re-recordings of those submitted as evidence. D. conceded the authenticity of the recordings.

    - Issue - do the re-recordings meet the best evidence rule?

    - Rule - Yes.

        - Strict interpretation of the best evidence rule is obsolete; while there is meaning in relying on originals rather than possibly unsatisfactory copies, modern techniques require a more pragmatic approach.

- Secondary evidence may be given absent better evidence, when a proper explanation is given for the absence of primary evidence.

- If the original has been destroyed by the party offering evidence of its contents, it is not admissible unless the destruction was in good faith, without intention to prevent its use as evidence, etc.

- *R. v. Morgan*, NLPC 2002

- Facts - charged with a *Fisheries Act* offence, D. objects to admissibility of fishing licence.

- Issue - is the licence admissible?

- Rule - yes.

- Copies may be admissible where originals are unavailable due to loss, possessed by third or adverse party, etc.

- *CEA* ss. 31.1, 2 do not authorize admissibility of documentary evidence, but rather state that electronically produced documents are "best evidence" where admissibility criteria are satisfied.

- Process for adducing electronic evidence

- *Authenticity, under s. 31.1* - adducing party must first prove its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

- *Best evidence rule under s. 31.2* - must prove the integrity of the electronic documents system, or fall under exceptions under s. 31.4 (dox with secure electronic signatures), or, absent evidence to the contrary, where printout has been acted upon.

- *R. v. Schaffner*, NSC

- Facts - video surveillance in liquor store detects theft by cashier.

- Issue - video admissible?

- Rule - yes, authenticated.

- A photograph may be authenticated by:

- the photographer; (eyewitness)

- a person present when the photograph was taken; (eyewitness)

- a person qualified to state that the representation is accurate; (non eyewitness)

- an expert witness. (non eyewitness)

- Eyewitnesses testify from memory, and from present vision of the photograph, and perform a comparison of the two. Non-eyewitnesses authenticate photos through familiarity with subject

matter or knowledge of equipment which created it.

- Photographs are admissible where they accurately represent the facts, are not tendered with the intention to mislead, and are verified on oath by a person capable to do so.

- Includes videotapes; authenticated by the person taking the tape, and therefore properly admissible.

- *R. v. Nikolovski*, SCC 1996

- Facts - D. charged with robbery, unable to identify perpetrator in lineup, Crown adduced store surveillance.

- Issue - can video alone provide sufficient evidence of identity?

- Rule

- Video is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Remains a constant, unbiased witness with total recall.

- Video evidence can present such very clear and convincing evidence of identification that triers of fact can use it as the sole basis for the identification of the accused before them as the perpetrator of the crime.

- Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence; both real and testimonial qualities. Video can speak for itself.

- Dissent (Sopinka)

- Unreasonable for the trial judge to convict based on her opinion alone. In order to arrive at this conclusion, it is necessary to review the evidence.

- Conviction was based on evidence that amounted to no more than the untested opinion of the trial judge which was contradicted by other evidence that the trial judge did not reject.

- *R. v. Walizadah*, ONCA 2007

- Facts - murder case; identity at issue; prosecution created reenactment videos to show how shades and shapes of vehicle appeared on surveillance system, in addition to surveillance tape.

- Issue - video reenactments admissible?

- Rule - yes, more probative than prejudicial.

- Overriding principle is a determination of whether the probative value is outweighed by the prejudicial effect. Should consider the relevance, accuracy, fairness, and verification under oath of what the video purports to convey.

- In *MacDonald*, the video was inaccurate in that it differed in detail with the actual events, and highly prejudicial in that it only presented one side of the story. Inadmissible on that basis.

- In *Collins*, it was held that experiment evidence, if relevant to an issue, should generally be admitted subject to residuary discretion to exclude based on prejudicial effect outweighing probative value.

- Relevance of experimental evidence is determined through the degree of similarity between the replication and the original event, thought it is impossible to replicate the original event perfectly.

- New

    - Experimental evidence, if relevant, should generally be admitted, subject to the probative / prejudicial analysis.

- *R. v. Prebtani*, ONCA 2008

- Facts - D. appeals on basis that counsel did not understand collateral fact rule, was incompetent, etc. D.'s niece had testified that she had would never swear at D. in order to avoid setting him off. D.'s cousin contradict this evidence.

- Issue - did the cousin's evidence run afoul of the collateral fact bar?

- Rule - No.

    - The cousin's evidence was capable of advancing the assertion that the niece had mischaracterized the D. as being of a violent temperament.

- R. v. Khela, SCC 2009

- Facts - first degree murder, Crown case rested on testimony of unsavoury witnesses (members of prison gang). *Vetrovec* warning issued but did not say that evidence supporting unsavoury witness testimony had to be independent and material.

- Issue - was the *Vetrovec* warning sufficient?

- Rule

    - Evidence of a single witness is sufficient to support a conviction for any offence other than treason, perjury, feigned marriage.

    - Where guilt rests exclusively or substantially on testimony of single witness of doubtful credibility, danger of wrongful conviction is acute.

    - Witnesses who, because of their amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial, cannot be trusted to tell the truth -- even when they have expressly undertaken by oath or affirmation to do so.

    - Purpose of a Vetrovec warning is 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.

    - Reformed approach in *Vetrovec* was not meant to imply that all evidence is capable of confirming the testimony of an unsavoury witness.

- In determining whether a warning need to be issue, must determine whether there is a reason to suspect the credibility of the witness based on traditional means (criminal activities, delay in coming forward, dishonesty prior).

- Must then assess the importance of the witness to the Crown's case - greater the centrality, the more important the warning becomes, and in some cases, will be mandatory.

- (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.

- Evidence which is tainted through its connection to the *Vetrovec* witness cannot serve as a means for confirming testimony.

- Confirmatory evidence must be capable of restoring the TOF's faith in relevant aspects of that witness' account.

- *R. v. Ellard*, BCCA 2003

- Facts - D. on trial for murder, testified, asked to provide a reason why Crown witnesses would lie.

- Issue - was this questioning improper?

- Rule - Yes.

- Asking the accused about the veracity of a Crown witness has long been considered improper. The accused's opinion is irrelevant and the questioning could prejudice her and render the trial unfair.

- Shifts the burden of proof from the Crown to the accused, and could induce the witnesses to wrongly convict as a result; focus must be on whether Crown has met its case. Runs afoul of presumption of innocence (11(d)).