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Introduction

Role of evidence:

- Law of evidence determines what data can be considered, how it can be proved and the use to which it can be put
- Provides a process for gaining access to the benefits provided substantive rules
    - "Facilitative" role because it serves the application of substantive law

<u>What</u> is the law of evidence?

- **Admissibility:** suite of rules that dictate what info is *made available* to the decision-maker (usually trier of fact, sometimes trier of law) in making decisions
- **Presentation:** shapes the way facts are *presented* to the trier of fact
    - May be some restrictions to achieve goals (mainly the goal of truth), e.g. limitation on the way facts are presented and framed
    - If evidence is presented in an unrestricted way, this may cause more harm than good when determining what happened
- **Use:** rules that limit the ability of the decision-maker to *use* evidence in particular ways
    - In some cases, evidence may be admissible for some purposes but not others (e.g. instruct the jury to infer X but not Y)
        - If a trier of law does not control the evidence in a case appropriately, he/she will have erred in law (gatekeeping function)

- Who is imposing these rules and limitations on the trier of fact?
    - The trier of law
    - The judge, adjudicator, person presiding over the administrative tribunal, etc.
    - In most cases the trier of fact and the trier of law are the same person, but the same principle of rules/limitations applies

<u>When</u> do we use the law of evidence?

- Basically every stage/aspect of legal proceedings - to resolve *any kind of legal question that requires the parties to produce or refer to info that the decision-maker needs to answer the question*

1. Substantive issues:
    - Use evidence to decide substantive issues
    - E.g. Did D breach term of contract? Was D negligent? Etc.
2. Jurisdictional issues:
    - E.g. Does the court have the jurisdiction to decide the issue? Are we in the appropriate forum to decide this particular case?
3. Procedural issues:
    - Resolution of factual disputes, but not the substantive issue
    - E.g. Did P or D adhere to their discovery obligations?
4. Remedies:
    - Disputes over what remedy should be awarded, if any – evidence and proof used to resolve issues re quantum of damages or remedies

Admissibility Summary

1. **Relevance and materiality**
    - Fundamental ***golden rule*** in evidence: relevance and materiality
        - If evidence is both of these, you want to admit it
        - But even if evidence does meet this basic rule it still might be inadmissible (could be caught by an exclusionary rule or rejected through operation of an exclusionary discretion)
    - Overall difference between relevance and materiality:
        - Materiality describes the relationship between evidence and the matters in issue, relevance is about the relationship between evidence and the fact it is offered to prove
    - Basically:
        - If the info is to be helpful, even to a tiny degree, then it is *presumptively admissible* (golden rule of law)
        - If not helpful, then it is always inadmissible – can never admit irrelevant or immaterial evidence

2. **Rules of exclusion**
    - Exceptions to the golden rule where you would not want to admit relevant evidence
    - Serve policy interests
    - More than one exclusionary rule can apply to the same fact
        - Keep the rules in watertight compartments and apply them one by one individually, discretely and separately to the piece of evidence
    - If the evidence is shown to be relevant and material, only option for the party is to show there is an exclusionary rule prohibiting admission of evidence

3. **Restrictions on use** (limited admissibility)
    - Once it is decided that evidence is relevant and material, the next question is whether there are restrictions on use (admissible, but only for limited purposes)
    - E.g. accused's criminal record is admissible, but only for the purposes of impugning the accused's *credibility* (which is only an issue if the accused testifies)
        - If the accused does not testify, the criminal record is not admissible
        - If the accused does testify, the criminal record is admissible but only for the purpose of attacking their credibility

Note: rules of evidence must be applied *practically* and within *context and concerns*

<u>Reasons to exclude (or limit the use of) relevant evidence</u>

- Don't want to artificially limit the scope of information available to the adjudicator, but in some cases there are good reasons to do so
- Main rule is that the more information the better, as long as it is *relevant* – helps us to determine what really happened
- **Why limit?**
    - **(1)** Can show that the evidence is logically relevant, but having access to this info (considering and weighing it) <u>is less likely to lead us to the truth than not having access to the information</u>
    - **(2)** Some exclusionary rules help us get to the truth if we think it will be misapplied, misused or overweighed

1. **Truth**
    - Rules of evidence that result in exclusion of evidence for fear that the information that could help is more likely to <u>distract from the truth or lead away from the truth</u>
        - E.g. hearsay – statement made out of court now being made in court
        - Can't be confident in the truth because what was said hasn't been tested
    - But the fact that evidence is unreliable, inaccurate, etc., is *not in itself* a good reason to exclude it
        - In a perfect world the decision maker would still have access to the info if it is relevant and would give it the amount of weight it deserves
        - So <u>to exclude, shouldn't just be that the evidence is unreliable – need to show the decision-maker will ***misuse*** the evidence</u> (e.g. overweigh or misconstrue, need to address what the *concern* is)
2. **Efficiency**
    - Trivial in its importance to the resolution of key issues in the case that we are not going to concern ourselves with it
    - Would impact the *efficiency* and *cost-effectiveness* – cost-benefit calculation
    - E.g. collateral facts
3. **Other interests**
    - Attempts to get to the truth in less than ethical way can result in the evidence being excluded

    - (A) Civil liberties:
        - E.g. Charter, s 24(2)
        - To help encourage compliance with the Charter
        - To prevent serious misconduct by state actors
    - (B) Special relationships
        - E.g. client-solicitor privilege
        - Transactions outside the context of any particular event (e.g. journalists and sources, healthcare providers and patients, etc.)
        - Essential to preserve the relationship of trust and confidentiality – higher principle than judicial accuracy, so protected
    - (C) Safety and security
        - E.g. confidential informers
        - Want to protect privacy and dignity and encourage the reporting of crimes

Admissibility versus Weight

- Just because we have admitted evidence does not mean that we have to give it significant weight – trier of fact may give it little to no weight
- Judges and lawyers becoming aware of the underlying psychological reasons why humans can't always be relied upon to simply neutrally weigh and come to accurate and fair adjudicative results
    - Think of evidence as mitigation or correction for these cognitive biases or systemic errors in human reasoning

Sources of Law in Evidence

1. **Common law** – *law of evidence is primarily a creature of CL, but it is not a comprehensive code (supplements statute)*
2. **Statutes**
    a. *Canada Evidence Act*
    b. *Criminal Code*
    c. Other fed statutes
    d. Provincial evidence acts and other statutes
    e. Rules of Court
3. **The *Charter***
    a. Presumption of innocence (11(d))
    b. Accused's non-compellability (11(c))
    c. Self-incrimination (7 and 13)
    d. Unconstitutionally obtained evidence (24(2))

Variables across Context

- Law of evidence isn't applied uniformly across different practice areas
- Most rules apply to criminal litigation
- In civil litigation, there are less rules applied than criminal and the rules may be applied differently

Virtues and Flaws

- The trial process has benefits, but also many flaws:
    - Decision-maker bias
    - Resource disparities
    - Witnesses and bias
    - Narrative and theatre
    - Adversarial system (can mitigate some inherent frailties in this system)

Admissibility and Evaluation

The rules of evidence first assist us in determining whether or not a particular piece of information should be considered by the trier of fact – is it admissible?

Overview

1. Relevance & materiality
2. The exclusionary discretion
3. Narration

Admissibility Summary – steps when determining admissibility

1. Step 1: is the information material?
2. Step 2: is the information logically relevant?
3. Step 3: Are there any exclusionary rules that would justify the exclusion of the evidence despite the fact that it is material and relevant
4. Step 4: If the evidence is relevant and no exclusionary rules apply, should the exclusionary discretion be applied?
    a. Should the relevant and material evidence be excluded because:
        i. Its prejudicial effect *substantially outweighs* its probative value in defence evidence in criminal cases?
        ii. Its prejudicial effect exceeds its probative value in civil cases/Crown evidence of crim cases?
    b. Balancing of probative value and prejudice

Relevance and Materiality

GOLDEN RULE: all evidence must be relevant to a material issue in the case

- Relevant evidence is *presumptively admissible* – means BOTH (1) logically relevant and (2) material
    - Information can only be admitted where it is relevant to a material issue in the case
- But note there *is no presumption of relevance*

BASIC RULES

- Relevance and materiality are NECESSARY but not SUFFICIENT conditions for admissibility
- Whether evidence satisfies the basic rule is a matter for the trial judge as an issue of LAW
- Evidence can only be used for the purpose for which it was admitted (otherwise it is an error in law)

Distinguishing between Materiality and Relevance

- ***R v Truscott**:* subsumed materiality in the definition of relevance, noting that "evidence will be irrelevant either (1) if it does not make the fact to which it is directed more or less likely (relevance) or (2) if the fact to which the evidence is directed is not material to the proceedings (materiality)
    - Note: Don't get too hung up on the difference, just understand the basic distinction and be able to apply
- **Relevance:** does the evidence help prove the fact that it is directed towards?
    - Any item of evidence that has a tendency to increase or diminish the probability of the existence of a fact in issue
- **Materiality:** is the evidence directed towards a material issue in the proceeding?
    - If it is not material, it is therefore not relevant

Materiality

- Always asks whether the evidence is **legally significant** to any of the issues in the dispute
    - What are they trying to prove in this case? Is this evidence going to help prove it?
    - Whether the evidence tends to show not just any proposition of fact or logic, but rather **an issue that is actually in dispute** between the parties
        - Does the fact/evidence relate to the legal issue without looking at the strength of the underlying logical inference?
- Ask: "is the fact that the evidence tends to prove or disprove legally significant in establishing an element of the cause of action?
    - Evidence that is not directed at a matter in issue is immaterial
- Two types of materiality:
    - 1. Primary materiality
        - Usually admitted
    - 2. Secondary materiality
        - Often excluded

        - May be useful in some examples, but in many other instances courts find it is not necessarily helpful in determining the truth
        - Can be inefficient to delve into side issues that are of marginal importance in determining the accurate result at trial (takes up time and resources)
    - Note: courts/law doesn't formally distinguish between primary and secondary materiality

Primary Materiality

- *Is the proposition that the party offering the evidence wants to establish actually related to the issues defined by the pleadings, substantive, or procedural law?*
- Evidence about the primary issues that a court or tribunal has to resolve to adjudicate the matter before it
- Determined by looking at:
    - Pleadings
    - Issues in dispute
    - Substantive law – *elements of the offence*
    - Procedural law – *e.g. Charter violation*
- Donald Trump/donkey example:
    - The fact that there is donkey hair on the stable boy is not material to the issue in dispute
    - If Trump was the alleged thief, then the evidence may be material to prove that he was the thief

Secondary Materiality

- Evidence that does not directly affect the issue, but helps the trier of fact assess the quality of primarily material evidence
    - Note: strict limits on the admission of secondarily material evidence
- Usually helps with determining the:
    - Credibility of witnesses
    - Reliability of testimony
- E.g. in a case where the issue is the identity of the perpetrator, it would be useful for the trier of fact to know if the key identification witness was bribed
- E.g. donkey example
    - If there was a witness who purports to have seen the stable boy stealing the donkey, this would be primary material evidence
    - But if the eyewitness was discovered to be a relative or employee of Trump – this relationship is not primarily material evidence, but it is secondary materiality
        - Because it bears on the credibility of testimony, something the trier of fact would want to know

Relevance

- Question of whether, based on **logic and human experience,** the evidence helps prove the fact that the party adducing the evidence wants to prove
    - Question: does the evidence assist in proving the fact that the party calling the evidence is trying to prove?
- Threshold:
    - To be logically relevant, the evidence must simply tend to *increase/diminish the probability of the existence* of the fact in issue
    - Threshold is not high – *no minimum probative value* required for evidence to be relevant
        - Can be any increase in the probability of guilt
- Examples:
    - Evidence an alleged robber downloaded a map of the area where a bank was robbed would be relevant in linking the accused to the robbery; evidence that he had downloaded movies about bank robbers would not be relevant
    - Donkey example: find $500 cash at stable boy's residence and this is the amount one would get for the sale of a donkey would be relevant; find a children's book about a donkey among other books in the stable boy's house is not

Logical Relevance and Context

- ***R v Ferris****:* accused heard saying "I killed David" but the officer who heard it didn't hear what was said before and after
    - Court determined its meaning was so speculative and probative value so minor that it should have been excluded
- Relevance is contextual in that it depends on the facts in issue, the position taken by parties in respect of those facts, and the other evidence adduced in relation to those facts

Direct Evidence

- Evidence that, if believed, *resolves* the matter at issue
    - Establishes a material fact without the need for inferences to be drawn
- Direct evidence is **always going to be considered relevant**
    - Subject to exclusionary rules, any problems with direct evidence will go to weight and not admissibility

- Example: donkey theft
    - Eyewitness testifies that she saw stable boy steal donkey – at this stage, simply look at the fact that this provides a direct link between the alleged perpetrator and the crime in question
    - It will be relevant and admissible, subject to any exclusionary rules

Circumstantial Evidence

- Evidence that helps to prove an issue through inference
    - Have to make a logical assumption or an inference in order to come to the conclusion that the evidence is relevant
- Circumstantial evidence depends on inference
    - May or may not be relevant depending on the nature and strength of the inference that the party proffering the evidence is asking the trier of fact to draw
- Example: donkey theft
    - Fact that donkey's hair is found on Trump doesn't prove in and of itself that Trump stole the donkey – have to examine the nature and strength of the inference that is implied in the evidence
    - If we can't draw the inference that Trump would not have had the hair on his person unless he was somehow implicated in the theft from circumstances and context, then the evidence isn't relevant
- Remember: the fact that evidence is circumstantial does not mean that is it any less "weighty" or probative than direct evidence

Admissibility vs Weight

- When we talk about admissibility we are talking about relevance; weight is different – the basic rule of admissibility requires relevance and materiality, not weight
    - **Relevance:** tendency of evidence to support logical inferences
    - **Weight:** relates to how probative or influential the evidence is – consider believability and informativeness
        - Believability affects weight
- Once evidence is found to be relevant to a material issue it is generally admissible, and the trier of fact is left to determine how much weight to give the particular item of evidence
    - Weight is simply a function of how believable and how informative the trier of fact considers it to be, as a matter of human experience
- E.g. donkey theft
    - Eyewitness testimony was direct, and by definition, always relevant – but this doesn't mean the evidence is "weighty" or probative
    - If it was Trump's daughter, then its weight would be small
- Judges charged with identifying probative value are to consider the credibility and reliability of the evidence, bearing in mind that they are not charged with resolving the factual issues before them
    - Their job is to decide the *threshold question* of whether the evidence is of sufficient quality to meet the admission requirements of the rule being applied

The Exclusionary Discretion

All-encompassing discretion to exclude evidence (even if it is relevant and material) that operates in *every* context on the basis that its prejudicial value outweighs its probative value

- Operates in all trials (civil/criminal)
- Not often exercised because it works at odds with the presumption that relevant evidence is admitted unless concrete policy to exclude
- Applies even where there is a statutory provision that dictates that certain evidence should be admitted in certain conditions
- In criminal cases where defence seeks to deduce evidence there is a *heightened bar for exclusion* – admissible unless the prosecution can show there is a ***substantial*** outweighing
    - At any other trial (civil or Crown evidence in crim), simple balance of probative and prejudicial value is required

2 kinds of exclusionary discretion:

1. To exclude evidence obtained in circumstances such that it would result in unfairness if the evidence was to be admitted at trial (grounded in the Constitution and CL, usually invoked when evidence has been unfairly or illegally obtained)
2. To exclude evidence if the benefits of its admission cannot justify the negative effects its admission will cause
3. **Note:** there is *no inclusionary discretion* – meaning that if the evidence doesn't satisfy the rules of admissibility, the judge can't receive it
    - But exclusionary rules can be applied more leniently in some cases to allow admission where it is necessary to prevent a miscarriage of justice and where danger against which an exclusionary rule aims to safeguard isn't present

The Rule

- Relevance also includes an evaluation of whether the evidence is sufficiently probative to justify its admission despite the prejudice (or costs) that might flow from its admission)
- The trier of law has the **discretion to exclude relevant evidence** (evidence that is both material and logically relevant) **on the basis that its prejudicial effect outweighs its probative value**
    - Evidence can be excluded even when otherwise in compliance with the rules of admissibility
    - This stems from the view that it is better to wrongfully acquit someone than to wrongfully convict them
- A judge must determine the value of the evidence, based on both its believability and the strength of the inferences it leads to, against the costs presented by such evidence including things like practicalities of its presentation, fairness to the parties and the witnesses, and the potentially distorting effect the evidence can have on the outcome of the case
- Ask: "Does the prejudicial effect of the evidence outweigh its probative value? Or in the case of defence evidence, does the evidence substantially outweigh the probative value?
    - For defence evidence the standard is "substantially outweighs" (greater disparity)
    - Crown defence or civil matters: prejudicial effect only has to outweigh – just tip the scale
    - ***R v Clarke**:* protection of the innocent and the right to present full answer and defence depend on the ability to call evidence
    - ***R v Williams**:* a court has the residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice

Probative Value

- Probative value = the believability and informativeness of evidence
    - Judges can affect weight and reliability, but the ultimate determination as to probative value of evidence is left to the trier of fact
- Basic idea is that probative value assesses any potential weakness or strength of the evidence
- Look at:
    - ***Credibility*** (e.g. of the witness offering the evidence)
        - Assess any potential weakness or strength of the evidence
    - ***Reliability*** (i.e. accuracy/how believable the evidence is)
        - E.g. ability of the witness to perceive what happened, communicate, etc.
- Not the ultimate determination, but only a **threshold** of reliability that would permit the evidence to be considered by the trier of fact
    - Because there is a danger that if the discretion is applied too broadly, the trier of law (usually TJ) would usurp the function of trier of fact
    - So long as the TJ is confined to the "threshold" question of whether the evidence is worthy of being heard by the trier of fact, probative value can be properly considered at the admissibility stage while still leaving the trier of fact to determine the ultimate question of whether the evidence will be accepted or acted upon
- Determining legal questions and factual questions
    - Admissibility inquiry is a **legal** question
    - Can still permit relatively *weak* evidence to go forward and be admitted and considered by the trier of fact, as long as there is the threshold level of probative value that will assure us that the trier of fact will be able to access and weigh the evidence sufficiently

Credibility vs Reliability

1. **Credibility** is about the honesty of the witness – evidence relevant to credibility includes evidence showing:
    - Witness has been corrupted
    - Witness has a motive to mislead
    - Witness has a discreditable character
2. **Reliability** describes the accuracy of the evidence – evidence relevant to reliability includes:
    - Inaccurate observations
    - Memory problems
    - Failures by the witness to communicate observations accurately

Prejudice

- **Prejudicial evidence:** any potential evidence with the potential to undermine an accurate result; to complicate, frustrate, or degrade the process, or to assault the dignity of witnesses or parties to agitate in favour of the exclusion of technically admissible evidence
    - Prejudice can describe both the distorting impact that evidence can have on the finding of fact, and broader considerations of fairness in allowing the evidence to be presented such as adverse practical consequences of receiving evidence

- Evidence is *not* prejudicial solely because it *works against the interests* of a party or increases the risk of conviction in a criminal case

- **Reliability concerns:**
  - (1) Placing undue weight on the evidence
  - (2) Unfair surprise to the other party
    - Preventing the other party from property investigating or cross-examining witnesses/evidence
  - (3) Distraction – distracting or confusing the trier of fact
    - Most prominent in jury trials if the jury is led off to side issues that detract from the ability to decide on the case from its merits
- **Efficiency concerns:**
  - Time wasting – issue may not be important enough to justify devoting resources
- **Witness concerns:**
  - Protecting privacy and dignity of witnesses/complainants (usually in sexual assault cases)
- **Not concerned with the *strength* of evidence:**
  - We are not concerned with the strength of the evidence or the possibility of that evidence to incriminate the accused
  - The fact that the evidence is potentially damaging to one side is not prejudicial

Balancing Probative Value vs Prejudice

- Balancing exercise undertaken by the judge – once evidence is determined to be admissible, the *believability* and *informativeness* is weighed against the costs or prejudice of admitting the proof
  - Judge should not speculate but consider the **actual or likely costs presented by such evidence** (e.g. fairness, distorting effect, etc.)
  - Involves exercise in judgment and discretion
- Courts should exercise **restraint** in applying the discretion
  - Emphasis on full answer and defence, basic principles of access to evidence, respect for jury
  - Significant deference provided to the TJ
    - But where a court believes that the discretionary decision has caused unreasonable prejudice, a *reversible error* might be found to have occurred
- The application is **context-based and fact-specific** regardless of the legal realm in which it operates
- **Need to consider:**
  - **Is the trier of fact likely to overweigh?**
  - Consider structural differences – is it a judge alone trial or a jury trial? A jury might struggle more to separate the info and not overweigh the potentially prejudicial evidence
  - Consider how the TJ may have *explained* the evidence to the jury
  - Concern in the thinking associated with human bias/reasoning – may be too great and outweigh the probative value
- ***R v Powell***
  - Person who committed the robbery that Powell was charged with had a handgun that was never discovered; witnesses couldn't describe the gun with any precision
  - Powell found to be in possession of a handgun later
  - Crown wanted to provide circumstantial evidence of identity because even if it could not be shown to be *the* handgun, it at least showed Powell, like the robber, had *access* to handguns
  - TJ held that linking Powell to a possibly unrelated gun would be far too prejudicial to warrant admitting, given the limited probative value of the interference being offered – proof of his possession was excluded

Discretion

- Even though the exclusionary discretion applies to almost all legal proceedings, it is used very rarely (last resort)
- Courts recognize it has to be used with *restraint* because it distracts from:
  - (1) General principle that relevant and material evidence should be admissible, and more information is better than less
  - (2) Threatens to overtake many specific exclusionary rules that impliedly or expressly involve a balancing of probative value and prejudice
    - Want to use *specific rules rather than the general exclusion* (tailored)
- Exclusionary discretion <u>should be employed if:</u>
  - (1) Found evidence is material and relevant
  - (2) Evidence is *not subject* to exclusion through any specific exclusionary rule and
  - (3) Probative value is outweighed by prejudice (or for defence evidence, that prejudice substantially outweighs probative value)

Narration

- When evidence that is neither relevant or material is admitted because the information is necessary to provide proper background or context for describing events to make sense of the theory of the case, or the evidence being presented
    - Most often this type of evidence is not objected to because it is *not particularly prejudicial*, and is *necessary* to fill in the blanks and makes sense of the story a party is trying to tell
- BUT we need to make sure that prejudicial or otherwise inadmissible evidence doesn't get in through the "back door"
    - It is sometimes common for a party to argue, despite their evidence being inadmissible on relevant or material grounds, that it is part of the narrative
    - Must ensure that the narrative principle is not used as an indirect way of admitting inadmissible or prejudicial info
- **When it is allowed:**
    - Only where significant testimony cannot be recounted meaningfully and fairly without its disclosure
    - Even then, testimony should be edited pursuant to the judge's exclusionary discretion to the extent it can be, to minimize any damage that may be done
    - When it does get in, judges must avoid relying on it for *improper purposes*
        - In jury trails if there is any risk that jurors could misuse the evidence, judges must give limiting instructions directing those jurors as to the limitations on the way the evidence can be used

Character Evidence

Introduction

Overview:

1. What is character evidence?
2. How is it presented?
3. What's wrong with it? – *rationale for the rules that limit the use of character evidence*
4. Character vs habit
5. Cases where character is directly in issue

Steps for character evidence:

1. Am I dealing with character evidence not directly in issue? (if directly in issue, character evidence rules don't apply)
2. Are there any specific rules limiting the admissibility of the evidence? There is *no general assumption that it is admissible*
    a. Only certain kinds of character evidence in some contexts are subject to certain rules and presumptions of exclusions

What is character evidence?

- **Character evidence:** any proof presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in particular (good or bad, *not neutral*) behaviour
    - This kind of evidence can lead to primarily material inferences about how likely it is that someone behaved in this fashion alleged, or to secondarily material inferences about how trustworthy the evidence of a witness might be
    - **Ask:** *would the ordinary person approve or disapprove of the conduct or evidence of the character revealed by the evidence?*
- Evidence about a person's disposition
    - Info that purports to show that a person likely behaved in a way that is consistent with their disposition (i.e. character)
- E.g. Evidence that purports to show that Tony is an honest guy – hope is that by presenting this evidence it will lead to the inference that Tony did not defraud investors

How is character evidence presented?

- Character evidence can take a number of forms; presented differently depending on character rules
- (1) Opinion
    - A witness offering an opinion as to the particular character trait of the person involved
        - E.g. Tony testifying that he is an honest guy
        - E.g. A 3rd party confirming that Tony is an honest guy
    - In *limited cases* an expert can testify (e.g. that Tony is not a psychopath)
- (2) Reputation
    - Not offering personal opinion based on personal knowledge of the person's character, but testifying as to awareness and knowledge of the person's reputation in the relevant community
- (3) Previous acts
    - Specific previous acts that speak to the character trait in question

- Establish character circumstantially, by proving the particular acts of a person on other occasion

Problems with character evidence

- Where the character of a person is not a matter directly in issue in a proceeding, there is often insecurity about its relevance and true probative value – this is because character evidence is *general information* about a person that is being presented for the *purposes of leading to specific conclusions* about behaviour on a particular occasion
  - The fact that there is increased tendency for a person to act in a particular way doesn't mean he always acts in that way, nor does it necessarily mean that he acted that way on the occasion in question
  - The probative value of character evidence is often uncertain and the generalizations involved in character typing tend to be pejorative and judgmental
- **Primary problem – *overweighing***
  - Concern that the trier of fact may give the evidence too much weight because it has a lot of emotional or visceral impact
  - May also be inaccurate and difficult to evaluate the *accuracy and truth*
  - Skeptical of probative value
    - E.g. even if Tony was honest in the past, he could have still committed fraud this time
  - May create significant prejudice (moral or reasoning)
- **Moral prejudice:**
  - Describes the human tendency to be influenced by an emotional reaction to the subject's character rather than by the rational strength of the evidence
  - E.g. jury might infer that because Tony defrauded someone 20 years ago, he must have committed this fraud as well
    - While this isn't illogical, the concern is that judging present activities on the basis of past acts may be inaccurate in that the juror and trier of fact may give it more weight than it deserves
- **Reasoning prejudice/distraction:**
  - Refers to the practical challenges that admitting character evidence can present, including (1) distractions from the real issues, (2) complicating the case and increasing the risk of confusion, and (3) adding to the expensive of litigation
    - I.e. concern that having to deal with the side issue of character may distract the trier of fact and potentially lead to inaccuracy, confusion, inefficiency, and/or a waste of resources

Balancing of probative value and unfair prejudice

- Although we look at them as the underlying rationale for the rules, at this point we are <u>not applying the general exclusionary discretion</u> to this type of evidence
  - If we are dealing with *relevant and material evidence,* the next step is to **ask whether any specific character evidence rules apply**
  - These detailed rules and principles are more specific than the general balancing of probative value and prejudice in the exclusionary discretion
- If no rules apply, then <u>as a last resort</u> we can look at whether the evidence should be excluded on the basis that the prejudicial effect outweighs the probative value
  - But remember the character evidence rules themselves incorporate in very detailed and specific ways the prejudice and probative value evaluation
- **Overall:**
  - (1) Check if any of the character evidence rules apply
  - (2) If no rule applies, then we can think about if we want to exclude evidence according to the discretion

Character vs habit

- Need to distinguish between character evidence and habit evidence because:
  - (1) If we define **evidence as relating to habit and not character, then the character evidence rules <u>will not apply</u> and no exclusionary evidence rules apply**
  - (2) If we determine it is character evidence, then we need to look at the character evidence rules to see if they apply so that evidence may be excluded
- Distinction between character and habit:
  - **Habit:** evidence of a pre-disposition to engage in a certain behaviour that is *morally <u>neutral</u>*
    - I.e. the tendency to behave in a way in certain circumstances that is not likely to lead to any inference about a positive or negative character trait
    - Habit has to be neutral info that is somehow relevant to the issues in dispute
    - Admission of evidence about a habit should turn solely on its relevance and on the application of general exclusionary consideration

        - BUT where habit can colour the impression held by others of the kind of person the subject is, the character evidence rules should be used to determine admissibility
        - E.g. an accused's habit of donating money or carrying a gun
    - **Character:** evidence that establishes the personality, psychological state, attitude or general capacity of an individual to engage in good or bad (not neutral) behaviour
        - Character evidence rules are concerned with drawing inferences based on the kind of person the individual in question is
        - Evidence that does not judgmentally 'typecast' is not character evidence
- Examples:
    - Tony is someone who is fond of ingesting large amounts of cocaine
        - A predisposition and pattern of behaviour, but has a negative connotation – bad character evidence, not evidence of habit
    - Tony has a preference for a particular brand of cigarettes
        - Not something that is any more negative of someone who smokes a different brand – evidence of habit

Character Rules Vary with Context

- Rules vary depending on:
    - (1) Whether the evidence is being presented in a criminal or civil case
    - (2) Whether it relates to a party or non-party
    - (3) Whether it is the accused or the Crown calling the character evidence (in crim cases)
    - (4) Whether the character evidence is being adduced as a primarily material issue (what happened) or as a secondarily material issue (to challenge the credibility of the witness)
- If character evidence is admitted as proof of what happened and the person whose character has been proven also testifies, the trier of fact will be free to use that already-admitted character evidence in assessing that person's credibility
    - But the converse is NOT true
        - Character evidence admitted about the credibility of a witness cannot be used to draw inferences about what happened unless that evidence would also have been admissible under the rules that govern purpose
        - Reason: the law tends to be more restrictive with primarily material character evidence – so if evidence can pass the more restrictive primary materiality standards, it should be available for credibility evaluation

Character Directly in Issue

- In a very limited category of cases, character evidence rules will NOT apply (therefore *admissible*) because the issue of character is **directly relevant** to the case; character is the matter to be decided
    - So the nature of the proceedings dictates that we have to receive character evidence because the *purpose of the proceeding is to discern the character/disposition of the party*
- Examples:
    - (1) Dangerous offender hearing:
        - Attempting to predict future dangerousness or behaviour of someone convicted of one or more criminal offences
        - Goes to the character of the offender = character evidence will generally be admissible and the character evidence rules will not apply
    - (2) Mental state of person pleading NCR defence
    - (3) Defamation:
        - Civil context
        - Issue of character (person's reputation or character trait) is directly at issue = character evidence rules won't apply

Accused's Bad Character and "Similar Fact" Evidence Rule

Overview

1. The rules and their rationales
2. The exception: "similar fact" evidence
3. Special case: identity and similar fact
4. Multi-count indictments

Rule and Rationale

Exclusion of General Bad Character about the Accused

- The Crown cannot call general **bad character evidence**: evidence that shows *only* that that the accused is the sort of person likely to commit the offence charged
- This rule of exclusion is bolstered by a **prohibited inference:** even where evidence is admissible for other purposes, if it incidentally exposes the general bad character of the accused, the trier of fact is prohibited by law from inferring that the accused may be guilty because he is the *sort of person* likely to commit the offence charged
- Bad character evidence is determined by asking: <u>whether the ordinary person would disapprove of the conduct or character revealed</u>
    - Doesn't need to be criminal to engage this rule
    - Discreditable evidence includes any conduct or info about the accused that others are likely to find morally objectionable or apt to demonstrate that he has a contemptible/reprehensible character
        - Includes activities such as watching pornographic movies
        - Includes proof of stigmatizing conditions such as mental illness or alcohol abuse
        - Historically extended to same sex preference, but should not fall outside of the bad character evidence rule
- Where the Crown seeks to lead evidence, including by cross-examining the accused, about his extrinsic conduct or character traits, need to ask the **threshold question: is the proposed evidence discreditable to the accused?**
    - If yes – the rule applies
    - If the extrinsic character evidence does more than simply show the general bad character of the accused, it may be admissible by the Crown - **similar fact evidence rule**

- *Example:* evidence that the accused burglar has burgled before
    - Does no more than show that the accused is the sort of person likely to commit the offence charged – *excluded* by the general bad character rule
    - But if the suspect made distinctive lipstick markings on the mirror of the burglarized home, evidence that the accused has done this in the past goes beyond simply showing his general bad character
        - Provides *specific information* that helps identify him as the burglar in this case (admissible)
- ***R v Handy*** (2002)
    - Leading Canadian case on character evidence
    - "Proof of general disposition is a prohibited purpose. Bad character is not an offence known to law. Discreditable disposition of character evidence at large creates nothing but moral prejudice and the Crown is not entitled to ease its burden by stigmatizing the accused as a bad person" (Binnie J)

<u>When</u> does the rule apply?

- The rule **only applies to evidence of the accused's discreditable acts adduced to prove guilt** (anything the ordinary person could disapprove of if the conduct or character of the person was revealed)

- (1) Evidence of the accused's <u>discreditable acts</u>:
    - **Discreditable:** anything that the ordinary person could disapprove of if that character or conduct were revealed
        - Ask: would the ordinary person disapprove of the conduct of character revealed?
        - May include behaviour that many would find immoral or distasteful
    - Does <u>not apply</u> to neutral behaviour (habit) or favourable behaviour
        - Habit does not trigger character evidence rules
        - Good character evidence of the accused also does not trigger the similar fact evidence rule
- (2) Only applies to evidence that is adduced by the Crown to <u>help prove the guilt of the accused</u>
    - Trying to show that the accused, having committed similar acts in the past, is more likely to have committed this act
    - Looking at evidence that is being adduced to help prove a *primarily material issue* (prove the truth of the issue at matter in the trial)

- If adducing character evidence for another purpose, the evidence may be admissible:
    - **E.g. credibility:** admitting discreditable character evidence toward the accused in an attempt to discredit the accused's testimony if the accused takes the stand
    - **E.g. good character in issue:** if the accused has adduced evidence of their *own good character* – opens the door for the Crown to adduce evidence of the accused's bad character, but *only for the limited purpose of rebutting the accused's allegation* (NOT to prove guilt of accused, only a rebuttal)
    - Note: credibility and rebuttal are the two main ways bad character evidence is admitted

- If bad character evidence is admitted and it will show the accused's guilt, there is still a danger of prejudice – trial judge has to instruct the trier of fact that evidence can only be used for very limited purposes
    - E.g. impugning credibility – "must not use the evidence to infer that the accused committed the crime, only to assess credibility"
    - E.g. rebuttal – " …as a counterweight to evidence of the accused's good character"

What does the rule do?

- States that evidence of the accused's bad character is **presumptively inadmissible**
- But this presumption can be rebutted and the evidence is admissible (subject to other exclusionary rules) by the Crown, **if the probative value of the evidence outweighs its prejudicial effect**

Why do we have this rule?

- If we admit bad character evidence there is a danger that the trier of fact may convict not because of the natural strength of this kind of evidence, but as a reaction to the discreditable, contemptable, or stigmatizing character of the accused
    - Consequences of wrongful conviction are so devastating that society would rather deal with the social harms of people not being convicted of crimes
    - "Add more heat than light"
- Concerned not that this is irrelevant, but that the trier of fact will not assess the evidence properly – will *give it too much weight*
    - People are quick to judge and assume guilt

The Exception: Similar Fact Evidence Rule

Similar Fact Evidence Rule and its Rationale

- **The rule:** used to determine whether discreditable evidence being offered by the Crown against the accused has sufficient specific relevance to admit
    - Called the SFE rule because it developed in cases where the Crown was attempting to prove that the accused had committed similar acts before
    - BUT it extends to discreditable acts that don't bear any similarity to the offence in which the accused is charged – don't need a pattern or "hallmark evidence" for admissibility under the SFE rule
- If the Crown is presenting evidence to establish the guilt of the accused, that either directly or indirectly reveals discreditable or stigmatizing character evidence of the accused, the SFE rule must be satisfied
- **Similar fact evidence is presumptively inadmissible**
    - Onus is on the Crown to satisfy the TJ on **balance of probabilities** that in the context of the case, the *probative value of the evidence in relation to a particular issue outweighs its potential prejudice* and therefore justifies admission (***Handy***)
- The rule ensures dangerous evidence is excluded by:
    - (1) SFE is presumptively inadmissible unless the Crown shows on BOP that its probative value outweighs its potential prejudice
        - Strict test – evidence that does no more than prove the general propensity of the accused will not be admitted because it will have greater prejudicial effect than probative value
    - (2) Evidence of a general criminal disposition or bad character evidence will be inadmissible if there is no specific connection with or relation to the issues at trial
        - Crown must identify a *live* issue in the trial to which the evidence of disposition relates
        - If it relates to a material issue, the evidence will go beyond simply demonstrating general propensity
- **Overall:** where no other rule of admissibility applies, the SFE rule is used to determine the admissibility of bad character evidence
    - The Crown may be permitted to call evidence that goes ***beyond* the prohibited general inference**
    - Function is to exclude extrinsic bad character evidence that only invites the prohibited inference, and admit such evidence that does more than this and is otherwise worth hearing (***sufficient specific relevance***)

NOTE: need to differentiate between *reputation evidence* and *evidence of fact* – **reputation evidence is never admissible** for character evidence of the accused

- Can never meet the probative/prejudice value because it is evidence of *general propensity*
- But if there are **acts of violence** towards the victim, there is a discernible pattern that courts are likely to admit (see exceptions)
    - If there is specific evidence that this occurred, not just reputation, this will help inform us if the accused committed the act (especially if there is a past record of this – criminal convictions)

- **Answer**: Admitting evidence of discreditable acts of the accused for the truth of its contents (to prove guilt, put it on the scales)
    - Can never admit unless it meets the SFE rule
    - By definition, reputation evidence only speaks to someone's specific propensity that gives them a certain character trait or disposition (not about specific acts they committed, only a general impression)
    - Can never be possible for reputation evidence to have enough specific probative value to be admissible – categorically it has more prejudicial effect than probative value because it speaks only to someone's general propensity (bright line rule, no exceptions!!) – can't be admitted under this rule – "evidence the accused is a type of person"
    - You CAN point to evidence of specific acts (e.g. accused abused me and give some details)

Rule Steps

1. **<u>Step 1: Assess the probative value of the similar fact evidence</u>**
    - Evidence has probative value if it helps build the chain between the defendant's behaviour and actual guilt
    - **Step 1A: general vs specific propensity**
        i. Determine if the evidence relates to the general propensity of the accused to do something, or if there is a specific concern (if only general propensity = inadmissible)
        ii. Crown has to show there is *something about the past acts that are specifically related to the issues in dispute* so we can reliably infer the accused is more likely to have committed the act
    - **Step 1B: assess the strength of the evidence that the accused committed the discreditable act**
        i. Link between the accused and the existence of some discreditable act that the Crown wishes to adduce to show that the accused is more likely to have committed the act they are charged for
            1. Link the accused to the similar fact – did that fact actually occur? Was the accused responsible for committing it?
        ii. Factors:
            1. <u>Judicially determined: convictions, acquittals and stays</u>
                a. *If convicted*: can presumptively and almost conclusively conclude he did commit that act
                b. *Acquittal:* presumptive proof that the accused did not commit the act
                c. *Stay of proceedings*: if the stay results from the fact that the Crown was unable to meet its case, then the stay is treated as equivalent to an acquittal. Where the stay is issued for procedural reasons, then it will not be treated as equal and might be admissible
            2. <u>Credibility</u>
                a. Where there are separate and independent allegations against the accused that the Crown wants to bring forward to help prove an issue at trial. Crown wants to draw the inference that the complaints are *so similar that the only reasonable conclusion is that the same person committed the acts, and that person was the accused*. Need to be concerned about:
                    i. (1) *Collusion:* determine if there is a reasonable possibility that two or more complainants, actually and deliberately colluded to fabricate the story, or to tailor it more closely to match one another
                    ii. (2) *Contamination:* even if not deliberate, there may be exposure to news or media reports about an allegation, may have complainants come forward who shape their own stories to conform with public stories
                b. To prove: defence has an obligation to bring an air of reality to the possibility of collusion or contamination. Show that there was more than *a mere opportunity*, must be some substance to the allegation. If not – evidence inadmissible
            3. <u>Circumstantial evidence</u>
                a. Where the facts of the case speak to a situation where it is very unlikely that different people could have committed each incident – implication is that the accused must have

- **Step 1C: extent to which the evidence supports the inference that the accused committed the offence**
    i. Even if we assume the accused committed the act, what is the significance of that in attempting to prove the charge we are actually dealing with at trial? (connectedness – look at temporal proximity, details, number of occurrences, distinctive features (or generic features), intervening events, and any other relevant factors
    ii. If the accused did commit, what does this tell us about the current case? Does it tell us something significant to this case?
    iii. Types of cases:
        1. Similarity (***Handy, Shearing***): allegation that because of the inherent similarity between the acts the accused is connected with, it seems unlikely a different person could have committed all those distinctively similar things. Consider:
            a. Improbability of coincidence
            b. Distinctive vs generic features
            c. Collusion and contamination

2. **<u>Step 2: Prejudice</u>**
    - Whether there is prejudice – what is the nature and magnitude of the prejudice?
    - Factors:
        i. *Moral prejudice:* the danger that the trier of fact will look at the previous act and determine that because the person has a disreputable character trait, they are more likely to believe the accused committed the offence
            1. How culpable: if the previous act was very culpable then we will often determine prejudice is high
            2. Effect of editing and limiting instructions: can/should edit to minimize prejudice
        ii. *Reasoning prejudice:* side issues the trier of fact has to delve into – can lead to inefficiency and distraction
        iii. *"Usual suspects:* where similar acts are allegedly committed by the accused, and there is a strong similarity between the previous acts and the current act. Police may end up selecting people who "fit the bill", but if there is not a lot of evidence showing the accused committed the offence this could be highly prejudicial
3. **<u>Step 3: Balancing the probative value against the risk of unfair prejudice</u>**
    - Probative value vs prejudice – note there is *no inverse relationship between probative value and prejudice* (***Handy***)
    - Because this assessment is subjective and difficult, the decision of the TJ is granted considerable deference upon appeal unless there is an error or failure to appreciate how the rules operate conceptually
    - **When admitting evidence, need to issue a mandatory jury direction warning them to:**
        i. Avoid the forbidden inference
        ii. Showing them the proper use of the evidence
        iii. Reviewing the proof of the similar act
        iv. Discussing the frailties of the evidence and dangers of collaboration and
        v. Warning them against extra-legal punishment

Rules in Depth

<u>Step 1A: general vs specific propensity</u>

- Determine if the evidence relates to the general propensity of the accused to do something bad, or if there is a specific concern at hand
- Evidence that *only speaks* to a person's general propensity can *never* have enough probative value to be admissible
    - If all the evidence does is show the accused is a "bad person" and has a tendency to commit crimes, this will not outweigh prejudice
- Crown has to prove that there is *something about the past acts that are specifically related to the issues in dispute* so we can reliably infer that the accused is more likely to have committed this act

<u>Step 1B: assessing the strength of the evidence that accused committed discreditable act</u>

- Here we have to know what type of evidence we are talking about and how it's being presented
- The more **believable** it is that the similar fact event occurred, the more probative value the evidence has
    - ***Hardy:*** probative value of the evidence was diminished by serious questions about the credibility of the similar act witness, including material inconsistencies in her account and her financial and personal motives to mislead
- **Judicially determined: convictions, acquittals and stays**
    - **(1) Conviction:** presumptive proof that the accused did commit the act – **presumptively admissible evidence**
        - If we have evidence that the accused was convicted of a similar act, then we can presumptively and almost conclusively conclude that he did commit that act
        - ***R v Jesse:*** criminal verdicts are presumptively reliable and a judge conducting a voir dire into the admissibility of SFE is not only entitled to rely on that verdict to conclude that the accused committed the

similar act, but absent rare circumstances, should refuse to permit the accused to challenge the accuracy of that verdict
        - If SFE is admitted, the prior conviction can be proved to establish that the similar fact misconduct occurred, but the accused is free to challenge the accuracy of that conviction at trial (rare circumstances, e.g. pleaded guilty to something they say they didn't do)
    - **(2) Acquittal:** presumptive proof the accused did not commit the act – **presumptively inadmissible evidence**
        - Where the accused has been prosecuted for and acquitted of a prior act of misconduct, it will ordinarily be impermissible to use that prior act as SFE
            - This is because an acquittal is a finding of innocence and the Crown is barred from *relitigating* an issue that has been determined in the accused's favour
        - ***Ollis exception:*** if the fact of the prior charge is relevant (whether to the state of mind or any other live issue in the case) the Crown can lead evidence about it even where there has been an acquittal on that charge
            - E.g. something subsequently comes to light, we can use that conviction to assist
        - ***Arp exception:*** where the Crown can rely on evidence about one charge as similar fact evidence in helping to prove another charge
            - Applies to multi-count indictments where the SFE rule is satisfied (cases where the accused is tried at the same time for more than one act of alleged misconduct)
    - **(3) Stay of proceedings:** middle ground between conviction and acquittal
        - If the stay results from the fact that the Crown was *unable to meet its case due to a lack of evidence*, the stay will be treated as equivalent to an acquittal and generally won't be used as evidence
        - If the stay is issued for *purely procedural reasons* (e.g. remedy for police misconduct under the *Charter*) then the stay will not be treated as equivalent to an acquittal and potentially SFE relating to the previous act can still be admissible
- **Credibility of witnesses**
    - A number of separate and independent allegations against the accused, and the Crown wants to bring forward these allegations to help prove the case that is at issue
    - Often these alleged similar facts will focus on the issue of credibility of the complainant
    - The inference the Crown wants to draw is that the allegations are so similar to one another, that the only reasonable conclusion is that the same person committed each of those acts, and that person is the accused
        - The coincidence that they would come up with such similar stories is objectively improbable (note that collusion and contamination may occur here)
- **Intentional and inadvertent collusion and contamination**
    - Collusion can arise both from a deliberate agreement to concoct evidence as well as from communication among witnesses that have the effect (whether consciously or unconsciously) of colouring and tailoring their description of impugned events
        - **Collusion:** where two or more complainants, deliberately and consciously, collude with one another to fabricate allegations or tailor their stories to more closely match one another
        - **Contamination:** where one person who becomes aware of info from a third-party source, tailors their testimony (evidence) consciously or subconsciously to a greater or lesser degree = diverted from the truth
            - Even if not done deliberately, exposure to media reports could still cause tailoring
    - Could limit probative value of these allegedly independent allegations of wrongdoing against the accused
    - **Threshold:** defence has obligation to bring an *air of reality* to the possibility of collusion/contamination
        - **Mere opportunity** or chance for collusion/contamination **is not sufficient** to raise an air of reality – defence has to point to *something more*
            - I.e. defence must show specific evidence of contamination/collusion before it would diminish the probative value – must be *concrete* info (e.g. prior inconsistent statements)
        - If defence can make a credible assertion, the burden shifts to the Crown to prove (on balance) that there was no collusion/contamination – if the Crown can't prove = evidence inadmissible
    - Scenario 1: no air of reality = admissible
    - Scenario 2: air of reality satisfied – Crown can disprove – admissible (question goes to weight of the SFE)
    - Scenario 3: air of reality satisfied – Crown can't disprove – inadmissible
- **Circumstantial evidence**
    - Whether the facts of the case speak to a situation where it is very unlikely that different people could have committed each incident – implication is that the accused must have done so
        - Indirect proof that the accused did it
    - E.g. ***Mankin:***
        - A shallow number of graves were discovered on the Mankins property containing infants/newborns
        - All of the children had at one point been under the care of Mankins
        - Inference was that they all died at the hands of Mankins

Step 1C: connection + extent to which evidence supports the desired inference

- Even if a similar fact event did happen and the accused can be linked to the event, probative value will depend on the extent to which proof of that event supports the desired inference
- Extent to which the SFE supports the desired inference has 2 components:
    - (1) *Connection to the accused* – is the prior conduct linked to the accused?
    - (2*) Connectedness to a properly defined issue* – how informative is the SFE? How connected is the similar act (previous act) to the charge at trial?

- **Connection to the accused:**
    - **Similarity** (***Handy, Shearing***): allegation is that because of the inherent similarity between a number of previous acts that the accused is connected with, it seems unlikely if not impossible that a different person could have committed all those distinctively similar things
        - If there is insufficient evidence to rationally connect the accused to the SFE, it cannot yield a logical inference
        - **Threshold**: evidence will be sufficient if the similar act establishes *more than a mere possibility* that he committed it
            - ***Sweitzer:*** same modus operandi was used in 14 sexual assaults. The Crown wanted to use all events as SFE, but the problem was that there was no evidence linking Sweitzer to any of those events – BUT once he was linked by evidence to 3 of those events, the rest could be relied upon
        - Factors to look at:
            - **Improbability of coincidence –** could independent actors have committed the acts?
                - If there is no evidence to rationally connect accused to event, no logical inference
            - **Distinctive vs generic features** – whether there are distinctive similarities between the similar act and current act, or whether the alleged similarities are generic and common features to crimes of that nature
                - Can never admit evidence of general propensity because prejudice cannot be overcome – need to point to a specific feature of the evidence
                    - ***Shearing:*** even though there were differences between different allegations, could discern distinctive motive of grooming adolescent girls
                    - ***Handy:*** court found too many differences between past allegations and current charge; all similarities were generic and likely to be found in many types of cases of sexual violence
            - **Collusion and contamination**
                - If we have evidence of one or both, will detract from the strength of the inference
                - Question as to whether similarities are genuine or manufactured

- **Connection to the issue:**
    - Even if a similar fact event did happen and the accused can be linked to the event, the probative value of proving that event will depend on the extent which, as a matter of human experience, proof of that event *supports the desired inference* about the matter in issue
        - Means the probative value depends on establishing a connection between the SFE and the offence alleged – this nexus is the **principal driver of probative value** (*Handy*)
    - ***R v Handy:***
        - Complainant alleged that accused sexually assaulted her in a painful and degrading manner
        - Crown wanted to admit testimony of accused's former wife about acts of violence perpetrated against her, saying it was consistent with what the complainant was describing – that the accused derived pleasure from sex that is painful to his partner
            - Crown said the testimony helped establish credibility of the complainant
            - Crown was really trying to use this evidence to prove the actus reus
        - Court identified **7 factors** to assist in assessing whether similarity is sufficient to make it probable that the act occurred:
            - Proximity in time of the similar acts
            - Extent to which the other acts are similar in detail
            - Number of occurrences of the similar acts
            - Circumstances surrounding or relating to the similar acts
            - Any distinctive features unifying the incidents
            - Intervening events
            - Any factor that would support or rebut the underlying unity of the similar acts
        - Court held that the evidence was *not sufficiently connected* to the facts of the offence charged to yield probative value on whether the acts allegedly occurred

- ***R v Shearing:***
  - Shearing was the leader of a cult; two sisters living at the same residence claimed he had sexually touched them, he claimed it was for religious training and consensual
  - Crown relied on other allegations as SFE to prove the actus reus for each allegation
  - Court held that Shearing had a *situation specific propensity* to groom adolescent girls for sexual gratification by exploiting pseudo religious elements of the cult
    - Overall: *Sufficient similarity in modus operandi* to support the double inferences sought by the Crown – prove the act and prove non-consent

Exceptions: Where Probative Value Has Been Found

Type of issue that the Crown is trying to prove – *not all cases deal with similar facts; probative value could be determined in cases dealing with:*

- **(1) Discreditable conduct that is <u>directly relevant</u>**
  - Sometimes discreditable conduct evidence will be "directly relevant" in the sense that the Crown cannot prove the offence charged or narrate its facts without also revealing that the accused has engaged in discreditable conduct other than the crimes charged
    - ***R v G(SG):*** Court noted that "evidence which is directly relevant to the Crown's theory of the case is admissible even though it may also demonstrate the bad character of the accused, as long as the probative value outweighs the prejudicial effect"
  - E.g. charge of robbery where Crown's theory is that the accused was motivated to rob due to his drug addiction
    - Indirectly referring to the fact that he is a drug addict (bad character, prejudicial) but need to be able to show in order to demonstrate the theory
    - Other examples: membership in a gang to show context of offence, joint trials where evidence directly relevant in establishing guilt of one accused happens to show bad character of another
- **(2) Discreditable conduct establishing <u>mens rea</u>**
  - Prior discreditable conduct by an accused can have significant probative value in demonstrating the *mental state* of the accused
  - Can establish the accused committed the crime – used to determine whether the accused intended a consequence or caused it by accident
    - ***R v Francis****:* accused was charged with false pretences for claiming the crystal ring he was selling was a diamond
      - Proof that he had previously sold crystal as diamond weakened his defence of mistake of fact
      - Supported Crown theory that he knowingly used this technique to perpetuate fraud
  - Example:
    - Accused says he thought the drug was flour – evidence that the accused had previously sold drugs and had experience in drug trafficking would negate mistaken fact
    - Doctor accused of sexual assault – previous sexual relations with patients help rebut claim of accidental touching
- **(3) Discreditable conduct relating to the alleged victim: <u>violence towards victim</u>**
  - Courts often permit the Crown to prove the violent or abusive nature of the prior relationship between the accused and alleged victim (**has to be relating to violence against the victim, and the same victim is the subject of previous allegations**)
  - Where such evidence demonstrates a strong disposition to act violently or sexually towards the victim, it is not being used to prove the "bad personhood" of the accused, but to support the specific inferences that the accused is disposed to act violently <u>towards the victim</u> and he had the disposition on the occasion in question
  - This evidence is still **presumptively inadmissible** and will only be admitted if it shows *real insight* into the background and relationship between the accused and victim (attempting to prove the accused's motive or animus)
    - E.g. evidence admissible where an allegation at trial relates to violence against the victim, and the victim is the same subject of the previous allegations/similar act
    - ***R v Johnson****:* prior physical assault related to the victim's "misbehaviour" offered "no real insight in background and relationship between the accused and the victim" that could help prove the accused was the one responsible for her sexual killing

Materiality

- The issue that SFE is tendered to establish must be "live" or material
- If the issue ceased to be in dispute (e.g. the fact is admitted by the accused), then the evidence is immaterial and must be excluded
  - E.g. accused already admitted he assaulted the deceased – TJ would err by admitting prejudicial evidence of the accused previously assaulting the deceased

- *The importance of the issue matters* – if the thing the prejudicial evidence proves is unimportant, exclusion is more likely to occur

Confirmation by other evidence

- The probative value of SFE is *not enhanced by other evidence supporting the same inference* as the SFE is promoting
- ***R v Arp**:* Crown presented SFE – similarities in the modus operandi between the two killings showed the same person committed both killings
    - If Arp could be linked to one killing, the similar fact modus operandi inference would help show he committed both murders
    - Crown had other evidence linking Arp to the killings such as possession the murder victim's jewelry and DNA linking to the second killing
        - While this makes the Crown's case against Arp stronger, this other evidence had *nothing to do with the modus operandi*

Step 2: Prejudice

- **Moral prejudice:**
    - The risk that the evidence will be used to infer guilt/convict the accused because he is a "bad person" rather than based on proof that he committed the offence
        - Danger that the trier of fact will look at the previous act and say that because the accused is violent/a thief etc., they are more likely to believe the accused has committed the offence without any specific inference that would justify coming to that conclusion
    - Where the SFE reveals a "morally repugnant act", its potentially poisonous nature will require a correspondingly high probative value to overcome its impact (***Shearing***, SCC)
    - Can gauge moral prejudice by looking at *how culpable the previous act is*
        - Where the previous act is very culpable the evidence will often be considered to have a high degree of prejudice
        - Where the offence charged is significantly more troubling than the SFE the risk of moral prejudice is diminished
            - (E.g. ***Talbot*** – proof that the accused plied young boys with alcohol without sexually assaulting them caused only a modest risk of prejudice where he was charged with intoxicating and then sexually assaulting other boys)
    - The risk of moral prejudice is considered to be modest where the SFE involves prior acts of aggression against the victim of the crime charged
    - Note: look at the possibility of **mitigating prejudice** by **(1)** editing and **(2)** limiting instructions
        - (1) Editing the evidence to limit prejudice and maximize probative value
        - (2) Issue limiting instructions so the trier of fact may be able to accurately assess the evidence without the danger of having an emotional reaction and overweighing the evidence
- **Reasoning prejudice:**
    - Reasoning prejudice = the practical challenges that admitting character evidence can present
        - The risk associated with character evidence that distracts the trier of fact from its proper focus on the charge itself
        - Includes distractions from real issues, complicating the case and increasing the risk of confusion, undue consumption of time, difficulty disentangling subject matter of the charges from SFE, etc.
    - Similar acts with many side issues that the trier of fact will have to delve into can lead to inefficiency or confusion and distraction from the main issues of trail
        - Risk that the court will be caught up in conflict about the accuracy of the SFE
        - Danger where many separate but similar incidents are being proved that the trier of fact might "mix up matters of consideration (similar facts) with the matters of decision (charges)"
- **Note - usual suspects problem:**
    - This happens when similar acts are allegedly committed by the accused, and there is a strong similarity between the previous acts and the current act. If the police go to their database and look for who has a criminal record for this offence, they can end up selecting only people who "fit the bill", despite there not being a lot of evidence showing the accused committed the offence
        - Can be very prejudicial
        - Trier of fact may look at the similarities and conclude that the same person committed the offence

NOTE: risk of prejudice is considered to be less in a judge alone trial than in a jury trial

Step 3: Balancing

- Involves balancing probative value against prejudicial effect – whether the SFE has been demonstrated to be sufficiently probative to justify running the risks of prejudice presented by the evidence
    - Judges should not speculate but consider the *actual or likely costs* presented by such evidence (e.g. fairness, distorting effect, etc.)
    - Courts should exercise *restraint* in applying the discretion – emphasis on full answer and defence, basic principle of access to evidence
- Presumption that is it **excluded**
- If admitted, there must be **instruction** given to the jury
- There is *no necessary inverse relationship* – could have cases where there is evidence with both strong probative value and strong prejudice
- Decision of TJ is granted considerable deference on appeal

Step 4: **Directions to the Jury**

- If we do decide to admit the SFE, after the balancing a mandatory direction to the jury must be issued:
    - Don't infer that because the accused did bad things in the past, that he committed the offence (the forbidden inference)
    - Don't punish him for his past acts (extra-legal punishment)
    - Do not use the evidence, even if it has been admitted, unless you are satisfied that the act occurred
    - If you are satisfied that the act occurred, you may use the evidence only for the particular purposes that are permitted
    - You may (but are not required to) infer that because he committed the past act, he is more likely to have committed the offence
    - Keep in mind any frailties in the evidence
    - In evaluating the similarities between the past act and the offence, consider the possibility of collusion or contamination

Identity in Issue (*Arp* test)

- Not a different test than the ordinary probative value test, rather a subspecies that provides specific guidance where **identity** is the issue at trial
    - Uses the general ordinary probative value and prejudice balancing test, but with specific guidelines/formalized suggestions for cases where identity is the real issue at trial
- Only applies when we know the crime was committed by someone and the *only* question is whether it was the accused
    - Issue at trial = identity
    - We know from the similar way that two (or more) crimes were committed that they each were committed by the same person, but the identity of that person is unknown
- NOTE: identity is not an issue and the *Arp* test does not apply when the defence alleges that…
    - 1) Allegation was fabricated
    - 2) *Actus reus* element is missing (e.g. consent)
    - 3) *Mens rea* element is missing (e.g. knowledge of a prohibited drug)

Proof of identity test (not the same as general SFE test)

- 1) Were the acts *likely committed* by the same person?
- 2) Is there *some evidence* linking the accused to the similar act?
- If these two are met = the probative value is said to outweigh prejudicial effect and can go to jury to be weighed

Step 1: Degree of similarity

- Determine whether it is *likely* the same person committed the alleged similar facts
- **Higher threshold:** generally a high degree of similarity between the acts is needed in order to generate sufficient probative value in identity cases
- Looking for either:
    - 1) *Trademark:*
        - A unique trademark common to the similar act and current act
        - ***Jesse:*** bizarre act of leaving garbage bags in one case and a wine cork in another, inside the vagina of an unconscious victim was unique enough of a trademark to make it unlikely that different persons would be coincidentally acting in the same fashion
    - 2) *Series of significant (not generic) similarities*
        - ***Arp:*** approximately 3.5 years apart, 2 lone, young and intoxicated women went missing in the early morning hours; each transported to a remote location near Prince George and was killed and left naked.

SCC allowed the TJ's findings that these homicides were sufficiently similar that they were likely committed by the same person

- *Consider only acts themselves, not other evidence of guilt*
    - In assessing similarity, not concerned about linking the accused to the act
    - Simply looking at the two incidents and asking ourselves, based on the similarity between the events, whether it is likely that the same person committed both offences

Step 2: Evidence linking the accused to the similar act

- Only need "*some evidence*" that the accused committed the similar act
    - Anything that is more than a mere possibility
- It is up to the jury to decide whether to use the evidence
    - The jury should be instructed that if they conclude there is sufficient likelihood that the same person committed the alleged similar acts, they may consider all the evidence relating to the similar acts in considering whether the accused is guilty of the act in question
- Gang using a distinct *modus operandi*
    - Where it can be shown that a gang used a distinct or unique *modus operandi* in committing other offences, it can serve as SFE
    - However, similar fact proof that the gang committed the offence is not proof, without more evidence, that a *particular member* of the gang participated (unless that member played such a distinctive role that no other member of the gang could have performed it)

Summary for identity cases

- Strong similarity + no link to accused = excluded
- Weak similarity + strong link to the accused = excluded
- Strong similarity + some link to the accused = admitted

Multi-count Indictments

- **Applies to separate counts arising from separate independent incidents**
    - Separate multiple incidents, different periods of time
    - Dealing with admissibility of evidence on account as it pertains to the other count
    - E.g. don't apply rule when we have info claiming the accused committed both offence of driving over the alcohol level and driving impaired – both counts relate to the same incident
- Multi-count indictments that allege separate incidents immediately raise the risk of prejudice because triers of fact will be learning during the same trial about separate allegations of misconduct by the accused
- **(1) Severance**
    - This rule is referring to separate independent incidents – it does NOT apply where we have info that the accused committed related offences to the same incident
    - Defence will want to obtain a severance order - severing the counts and having separate trials
        - Argument that inevitably the trier of fact will be exposed to evidence from one count that may not be admissible to the other count which would be prejudicial, so an order of severance would be beneficial
    - Severance motion will likely fail if the court rules that the counts can be used as similar fact evidence – this will favour a joint trial since evidence on all incidents would have to be introduced anyways
    - Important for accused to apply for severance of counts rather than just simply objecting admissibility of similar fact evidence because it will prevent the trier of fact from hearing about the other alleged misconduct, and because similar fact evidence has a better chance of being admitted if it were a joint trial
    - If severance not applied for or unsuccessful there are two options:
        - 1) Inadmissible but no severance
        - 2) Admissible
- **(2) Option 1: SFE inadmissible but no severance**
    - Where evidence relating to one or more charged events is not admissible as similar fact evidence relating to one or more of the charged events, but the counts are not severed
    - Rely on jury instructions to ameliorate the risk of prejudice
        - TJ must instruct the trier of fact not to consider the evidence pertaining to one count as proof that the accused committed any of the other offences charged
    - This bar does not apply to credibility determinations

        - Observations about the credibility of a witness made when the witness is testifying about one event can be used by the trier of fact in deciding whether or not to believe what the witness says about a different event charged in the same information/indictment
- **(3) Option 2: SFE admissible**
    - Crown applies for a similar fact ruling – applies to have evidence on one count admitted on the other count and it is admissible as similar fact evidence on other counts
    - If the application is successful there has to be a complex jury direction to minimize prejudice and avoid invoking the prohibited inference

Character Part 2: Accused's Good Character

Overview

- The rule and its rationale
- Modes of presentation
- Rebuttal

The Rule and its Rationale

- **Good character evidence:** proof presented by the accused to suggest that he or she is not the type to have committed the offence
    - Consists of any character trait that may help exculpate the accused
        - E.g. any trait advanced by the defence to show that the accused is *less likely* to have committed the offence charged
        - Example: Tony on trial for a crime of dishonesty and testifies or has someone testify that he is an honest person – as a matter of logic and human experience can see logical link to question of whether or not he has committed the crime charged
            - But this info can be prejudicial because it can be overvalued by the trier of fact and because it's presentation may be inefficient due to scarce resources in the system
- **Relevancy:** Proof of good character evidence is generally considered to be relevant – *exculpatory evidence*
    - Since the trier of fact does not know the character of the accused, the rules of evidence allow this kind of proof
- Less concerned with admitting this type of evidence than admitting bad character evidence about accused by the Crown
    - Recognizes the fact that we have a *tilted playing field* in the criminal justice trial process = **minimize risk of wrongful convictions** and give leg up to the accused (more lenient to defence evidence generally)
    - But still skeptical of the probity of this type of evidence
        - CL permits good character evidence to be presented, but it is guarded about how that evidence is presented because of concerns that it will take an inordinate amount of time
        - When the accused calls this type of evidence he also **puts his character into issue so the Crown becomes entitled to use various techniques to rebut that evidence**
- CIVIL TRIALS:
    - Good character evidence is generally NOT admissible
        - Marginal probative value and in order to address efficiency and scarce resources
        - Unlike civil bad character evidence which is generally admissible
- **Admissibility vs weight:**
    - Just because it is admitted does not mean the evidence will be given a lot of weight – weight that good character evidence carries will vary
    - Example: case involving sexual violence/abuse
        - Nature of crime is that it will likely take part in private or by seeming respectable people who may have a darker side in engaging in such conduct
        - While we may admit evidence of the accused's good character (may see it as having some probative value) it may still hold very minimal weight (since we know from experience that people who have upstanding character may still engage in this kind of behaviour)

Putting Character into Issue

- Accused must be cautious because once they put their own character in issue it will **open the door to proof of bad character**
    - Need to see if there has been a triggering of the right of the Crown to rebut the evidence of the accused's good character
    - Idea that we can put forward good character evidence can backfire – if you inadvertently bring forward good character evidence it may be of limited value but nonetheless present an opportunity for the Crown to bring forward very damning evidence

- **When does this happen?**
    - Character is put into issue when the accused raises the issue by initiating evidence intended to suggest that they are not the type of person to commit the offence charged
        - ***E v H(ED)**:* accused put character into issue by asserting "I did not and would not do that"
        - ***R v M(G):*** accused put character into issue during Crown's cross-examination that he was sexually attracted to the 15-year-old complainant by commenting that he had a 19-year-old daughter
        - ***R v McNamara**:* put character in issue by saying that he ran the company "like any company should be run, legally", effectively affirming his own honesty

- **When is character NOT put into issue?**
    - Accused persons **DO NOT** put their character in issue by simply **denying the allegation, explaining a defence, or repudiating parts of the Crown's case**
        - ***R v P(NA):*** Crown painted accused as a terrible husband and father; accused did not put character in issue when, in his response, his testimony took on the "moral tone" of a loving and caring spouse
    - Accused will also **NOT** have put their character into issue because of **answers furnished by other defence witnesses** during cross-examination
- TJ retains the discretion to prohibit rebuttal evidence if the accused has not made character an important issue
    - ***R v Cedeno**:* accused, border agent charged with knowingly permitting someone to bring illicit drugs into the country, testified that she was proud of her drug seizures – TJ concluded that this did not warrant rebuttal evidence

<u>Modes of Presentation for the Accused</u>

1. **Evidence of reputation/reputation witnesses**
    - Reputation witnesses: witnesses who know the accused and are familiar with her reputation
    - Witness is put on by defence to testify about the accused's reputation – allowed by CL, most common way
        i. Reputation testified must be **relevant**
            1. E.g. morality in a sexual offence case, peacefulness in a violence case, etc.
    - Accused cannot get the witness to say that the accused has engaged in specific acts that demonstrate his good character (to avoid mini trials into those specific claims) – instead the witnesses can testify to the accused's reputation
        i. E.g. witness will testify that "Tony's reputation in the community for honesty is great"

2. **Opinion Evidence**
    - **Lay opinion:**
        i. Personal opinions about the accused's character are generally NOT permitted; confined to the community's perception of the accused
        ii. Exception may be for expert opinion
        iii. Occasionally courts will ignore this limitation
    - **Expert opinion:**
        i. In some cases expert witnesses may be allowed to testify that the accused has some distinctive characteristic that would make it less likely that the accused committed the offence
            1. Reliable expert evidence is admissible if the TJ is satisfied that the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt (***R v Mohan***)
            2. In order to admit this evidence, we have to show sufficient distinctiveness about the character trait in question to draw the inference that this has any probative value
            3. This evidence <u>usually fails</u> because behavioural science tends not to provide reliable correlations between character types and incapacity to commit particular kinds of crimes

        ii. ***R v Mohan:***
            1. Defence attempted to use expert evidence suggesting that the crime in question could only have been committed by someone classified as a pedophile, and that in the expert's opinion the accused was not a pedophile
            2. The SCC said the evidence was not admissible on the basis that the scientific validity of the inference had not been established with sufficient reliability

3. **Accused's testimony**
    - **Own opinion:** admissible because we allow the accused to testify about their own good character as long as it is relevant
    - **Specific acts** that suggest the accused is not the kind of person to commit the offence, that relate to the relevant character trait, are also generally admissible
        i. E.g. "I rescued a kitten" to prove being caring and selfless

- NOTE: if the accused asserts their good character, even in cross examination, they will have put their character in issue

4. **Other evidence of specific acts**
    - Generally won't permit other witnesses to present evidence of specific things the accused has done that reveal the accused's good character UNLESS we can satisfy the version of the similar fact evidence rule
        i. Not applying it in its full force, just saying that *if the act associated with the accused's good character allows us to make a specific inference inconsistent with guilt, we may allow it*
    - Accused can rely on exculpatory similar fact evidence as long as it is sufficiently *situation specific*
        i. If the SFE reveals a **specific disposition** that suggests the accused may have acted innocently on the occasion of question, the accused WILL be permitted to call that proof
        ii. If the similar fact evidence only proves a general character trait such as honesty or passivity, it will NOT be admissible
    - Example: accused charged with voyeurism
        i. If we presented witness evidence from a third party saying that he has seen the accused climbing trees to rescue kittens, we may admit it because it shows an innocent explanation for why he was on the tree at the time
        ii. Not the character trait, but the similarity that is the emphasis here

Crown Rebuttal

- Where the accused places his character in issue in one of the permissible fashions, the Crown may call evidence tending to show that the accused is not of good character
    - But this evidence **may not be used as a basis for determining guilt or innocence** – it can **only negate** all or part of whatever benefit the accused's good character brought
        - E.g. if accused's good character evidence is worth nothing, then no Crown rebuttal is allowed – no boost to the accused's case is given, so the Crown's rebuttal cannot go below zero
- If the defence uses an inadmissible method of presenting good character evidence (like cross examining Crown witnesses to elicit answers reflecting their opinion that the accused is not the type to commit the offence), the Crown cannot rebut the evidence
    - Judge must direct the jury to disregard it
- Idea that you can put forward good character evidence on behalf of the accused can be an advantage, but it can backfire if you inadvertently bring in good character evidence and it opens the door for the Crown to present potentially damaging evidence of bad character
- NOTE: limited nature of rebuttal evidence

Modes of Presentation for Crown Rebuttal Evidence

1. **Contest the statement on cross examination**
    - The Crown can cross-examine the accused, or the witness who has provided the good character evidence, in a fashion that suggests the accused does not possess the particular good character that is claimed
        i. E.g. Tony testifies that he is a caring and selfless guy – the Crown can ask Tony whether or not it is true that he has been known to kick a puppy
        ii. May seem prejudicial, but because the accused opened the door to rebuttal, courts will generally permit this questioning
    - Cross examination of reputation witnesses is especially dangerous for the accused because reputation is the product of what was said about another, and is by its nature hearsay information = hearsay can be used to rebut reputation

2. **Witnesses for the Crown**
    - Crown can call witnesses to suggest that the reputation of the accused for the relevant character is in fact bad
        i. I.e. the Crown gets their own witness to testify about the accused's poor reputation
    - Becomes a contest between the accused's reputation witness and the Crown's reputation witness

3. **Accused's previous convictions – sec 666 of the *Criminal Code***
    - Sec 666 allows previous convictions of the accused to be proved whenever his good character is put into issue
        i. Means witnesses of past crimes can be called
        ii. E.g. Tony testifies that he is an honest guy. The Crown will generally (subject to exclusionary discretion) be permitted under s 12 of the *Canada Evidence Act* to refer to Tony's criminal record to impugn his credibility. Tony hasn't just testified but has put his good character into issue – means the Crown can also rely on sec 666, which allows the **Crown to prove not only his criminal record, but they can also rebut by referring to specific details of his past crimes in question**
    - NOTE: if accused does not testify then s 12 is irrelevant – credibility is not an issue unless the accused testifies
    - Sec 666 is triggered when the accused puts his character in issue

i. Remember: can't use evidence to prove guilt – s 12 only goes to credibility and s 666 only goes to rebuttal
- Difference between s 12 and s 666:
  i. Sec 12: only to impugn credibility by reference to criminal record
  ii. Sec 666: can be used to rebut good character evidence, can ask about specifics of previous acts

4. **Expert opinion testimonial**
   - As long as the standards for admitting expert opinion evidence is met, expert opinion can be used to rebut the good character in issue
     i. E.g. Tony testifies that he is a good guy – Crown brings in expert opinion, who states that "Tony is pathological liar" – presents the idea that Tony lacks a positive character trait or possesses a negative one
   - ***R v Tierney:*** Crown psychiatrist allowed to be called in rebuttal to demonstrate the abnormal disposition of the accused to react violently to rejection by women

5. **Crown can also provide a form of similar fact evidence**
   - Usually if similar fact evidence is admitted, the trier of fact cannot use it to draw conclusions about the general character of the accused – but if the accused puts their good character in issue, admissible SFE can be used both for the specific purpose for which it was admitted, and to neutralize the general suggestion by the accused of good character
     i. Bad character shown by SFE used to rebut the good character
     ii. But the trier of fact cannot used it to convict the accused – *cannot be treated as affirmative weight* to Crown case
   - E.g. Tony says he is an honest guy in the context of a fraud prosecution involving a bogus real estate investment. Even if it is not a prior conviction, can potentially present evidence from a witness that Tony had engaged in dishonest dealings in the past

6. **Prior inconsistent statements**
   - Crown can put forward prior inconsistent statements of the accused that tend to show that the accused does not in fact possess the relevant character trait – an expeditious way of presenting relevant rebuttal evidence
   - E.g. Tony testifies that he has never been anything other than honest to his friend Danny. Crown counsel can cross examine by asking, "Isn't it true that you told Andy that you lied to Danny about that condo investment"

7. **Testimony relating to specific acts not satisfying the similar fact evidence rule**
   - ***R v Brown:***
     i. Accused, charged with aggravated assault in a baby-shaking case, testified that he had saved 2 brothers at risk of drowning and had never abused his own children
     ii. TJ erred by permitting the Crown to call the son of the accused to testify to specific acts of abuse perpetrated by the accused against him, when the accused's good character was not probative to warrant the degree of prejudice this would cause
   - However, where an accused has testified to specific acts of good character and the Crown demonstrates that permissible methods of rebuttal will not suffice to prevent a distorted picture from being created by that testimony, the TJ has the discretion to permit witnesses to be called by the Crown to contradict the accused on those specific assertions

Character of Third Parties & Character Evidence in Civil Cases

Overview

- Character of third parties:
  - The general rule
  - Co-accused
  - Unknown suspects
  - Sexual offence complainants
- Character in civil cases

- Restrictions that apply to the Crown when presenting bad character evidence do not apply when the accused wishes to lead bad character evidence **about another**
  - This is because the accused is the only one who is at risk of moral prejudice – the accused should have every reasonable opportunity to defend themselves
  - So the test is *more permissive* for the defence than when such evidence is tendered by the Crown

Character of Third Parties

The General Rules

- The general rule is that there are NO exclusionary rules (*presumptively admissible*) subject to the following caveats:
    - **(1) Relevant and material evidence**
    - **(2) Exclusionary rules in sexual offence cases**
        - Specific exemption for character evidence of complainants in sexual assault/violence cases
    - **(3) Judicial discretion (probative value vs prejudice)**
        - Different balancing – the accused is at risk of moral prejudice, allow accused to defend him/herself
        - For character evidence of third parties introduced by the accused, the prejudicial effect must *substantially* outweigh the prejudicial value for the evidence to be excluded (because it is defence evidence)

- **Probative value / prejudice:**
    - Character evidence of third parties are applied differently in balancing exclusionary discretion factors of probative value and prejudice
        - E.g. unlike SFE called by the Crown, relevant third party evidence is *prima facie* admissible when called by the accused
    - Keep in mind the general principle:
        - If the **accused** presents evidence, to exclude that evidence under the exclusionary discretion, the prejudicial effect must **substantially** outweigh the probative value
        - If the **Crown** presents evidence, it can be excluded is it simply outweighs
- **Putting character in issue:**
    - Where an accused impugns the character of a third party, especially if that is the victim of the crime in question, this usually opens the door for the Crown to rebut that evidence by introducing evidence of the accused's bad character
        - Only for rebuttal purposes, not for forbidden purpose of suggesting it is more likely for the accused to have committed the offence
- **This body of law developed largely for self-defence cases:**
    - Where there is a foundation to suggest the deceased was the aggressor, it is relevant to the reasonableness of the accused's actions that he was aware the deceased had a reputation for violence
        - So evidence about reputation of the victim for violence has long been admissible
    - Proof that the victim has a violent disposition as demonstrated through specific acts of violence unknown to the accused is also relevant according to the theory that violent people are more likely to react violently – this kind of evidence is *generally permitted* in self-defence cases
- Example:
    - R punches P in the face. R is prosecuted and his defence at trial is that he acted in self-defence. To support this claim, R may want to bring evidence from a **defence** witness suggesting that P has a reputation for violence, or specific evidence of previous acts of violence by P
    - The inference is that P is more likely to have been the aggressor and R's claim becomes more plausible
    - Assuming it is relevant, and its prejudicial effect does not substantially outweigh its probative value, it will be admissible
    - BUT by impugning character of a third party, the accused will have opened the door for the Crown to rebut
        - Note that the Crown's right to rebut, while broad, is limited by general exclusionary discretion

Character Evidence Called by the Accused Against a Co-Accused

- **General rule still applies**
    - The accused is allowed to point to bad character of the co-accused for the purpose of establishing reasonable doubt that the accused committed the offence
    - Ultimately the trier of fact won't be permitted to use that bad character evidence against the co-accused to prove guilt – only to help consider whether the accused is guilty
    - Occurs when multiple defendants are being tried at the same time in the same proceeding
- **This kind of evidence can be excluded under the exclusionary discretion**
    - But remember it is brought by the *accused* so to have it excluded the Crown has to show that the prejudicial effect *substantially* outweighs the probative value
    - TJ must ensure there is a real evidentiary foundation
    - Probative enough to be reasonably capable of assisting the trier of fact in arriving at a verdict
    - Prejudice should be assessed by determining whether the evidence would mislead the trier of fact because it would be given too much weight, would involve an inordinate amount of time, would unduly distract the jury from real issues, or would cause unfair surprise to the co-accused's defence

- **Bringing character into issue**
    - Accused has to keep in mind that by impugning the character of the co-accused, he/she opens up the door for the Crown to rebut by bringing evidence of the accused's own bad character
- **Cut-throat defence strategy**
    - It is even permissible for an accused to rely upon the otherwise prohibited inference that the co-accused is, by reason of his character, the type of person to commit the offence
    - Cut-throat defence: the co-accused did it, and supporting the claim with bad character evidence of the co-accused
    - Limitation: an accused cannot try to establish the propensity of a co-accused by relying on facts for which the co-accused has been acquitted

Similar Fact Evidence about Unknown Suspects

- **Strategy**: say the crime was not committed by the accused, by rather by some unknown person
    - To raise bad character evidence of a third party, don't necessarily have to know who this third party is
    - If there is an *air of reality* to suggest that someone else committed the offence and this person is unknown, we can present this as a form of character evidence
- Typically done where the defence says there is a crime committed that is strikingly similar to the crime that the accused is alleged to have committed
    - Implication is that the same person committed both offences and since it couldn't have been the accused it must have been the unknown third party
    - If we can show **sufficient similarity** to raise an air of reality to this suggestion, then it is admissible as a form of bad character evidence affiliated with the unknown suspect
- ***R v Grant:***
    - Accused charged as a result of DNA testing with a murder that occurred many years ago involving the abduction of a young girl who was later found dead. To defend himself he wanted to present evidence that a strikingly similar abduction had occurred 9 months later, while he was in jail
    - TJ erred by refusing to let the accused present this evidence – an air of reality existed here and the relevance of the evidence, given the striking similarities in the two cases was not substantially outweighed by the prejudice it would cause

Sexual Offence Complainants

- Admissibility applies to two types of evidence:
    - (1) **Sexual history and reputation**
    - (2) **Private records**
- Only true exception to the principle that character of a third party is admissible in a criminal trial

Summary:

- In a sexual offence prosecution, the accused is **prohibited from leading evidence about the sexual experiences** of complainants on other occasions for (1) **the purpose of showing that the complainant is the type of person to consent** or (2) to show that the complainant is of such **discreditable character that she should not be believed**
- Where evidence revealing the sexual experiences of complainants on other occasions invites other ***specifically relevant inferences***, it will be admissible provided it has significant probative value that *substantially* outweighs the prejudice to the proper administration of justice that it could cause, including to the dignity and privacy interest of the complainant
    - **Twin myths:**
        - If a sexually experienced woman demonstrated a propensity to consent, she likely consented on the occasion in question; sexual permissiveness by women was considered to make the complainant discreditable
        - Sexual reputation used to be admissible under common law, but it is no longer admissible
        - *CC* has been amended to limit possibility that the trier of fact may rely on certain myths/stereotypes by placing limits on ability of defence to adduce evidence of complainant's sexual history

(1) Sexual History and Reputation

- Two key provisions:
    - **Sec 276:** places strict **limits on the admissibility** of evidence about specific instances of a complainant's sexual history, other than the sexual activity that forms the subject matter of the charge
        - Includes evidence that refers to specific instances of a complainant's sexual past
    - **Sec 277:** prohibits any evidence of a complainant's **sexual reputation** on the issue of credibility
        - Specifies that in order to adduce any evidence to a complainant's sexual history, the evidence has to consist of specific sexual acts – **reputation is excluded and *never* admissible**

- Sec 276(a) makes sexual reputation evidence inadmissible on the issue of consent as well, since the only sexual experience allowed under the section is evidence of "specific instances of sexual activity"

- **Section 276 – in making a decision of admissibility, need to answer threshold questions:**
  - **(1) Whether you're dealing with a sexual offence**
    - Sexual offence list under s 276(1)
    - ***R v Barton**:* provision may apply to unlisted offences
      - Applies to any proceeding in which the offence has *some connection* to the offence charged, even if no listed offence was particularized in the charging document
  - **(2) Whether the CC rules relating to the admissibility of sexual history apply to Crown-led evidence**
    - Short answer is no – sec 276(2) says the provision will apply only to the accused
    - But in *Barton* the court held that only the CL laws restricting the admissibility of the complainant's sexual history applies equally to Crown evidence
    - The mere fact that the Crown refers to the complainant's sexual history does not mean that the accused is still not bound by s 276 in its own evidence
  - **(3) Whether the evidence that is proposed to be adduced relates to the complainant's "sexual activity"**
    - Sexual activity is not defined in the CC
    - Applies to consensual and non-consensual evidence
    - Expressly includes any sexual activity with the accused or any other individual
    - *Does not apply to*:
      - Evidence that the complainant has engaged in sexual activity other than the sexual activity that forms the subject matter of the charge unless the conditions are met
      - Evidence that the complainant has made false allegations of sexual assault in the past
      - Evidence of an absence of sexual activity (e.g. evidence of virginity or abstinence)
    - Amendment: clarifies that sexual activity includes any communication made for a sexual purpose of whose content is sexual in nature (s 276(4))
  - **(4) What is meant by specific instances of sexual activity – to be admissible, sexual offence evidence must be about "specific instances of sexual activity"**
    - Means that evidence of general propensity for sexual activity, or sexual reputation, is inadmissible
      - Sec 277 expressly states that reputation evidence is inadmissible
    - At CL this evidence was admissible, but the combined effect of 277 and 267 is an absolute bar on reputation evidence as it relates to reputation and consent
    - Accused is not always required to identify discrete incidences of sexual conduct:
      - Specific instances of sexual activity encompass a particular identified relationship, including any previous relationship between the accused and complainant
      - ***Goldfinch**:*
        - Evidence of a relationship that implies sexual activity, such as "friends with benefits" inherently encompasses specific instances of sexual activity
        - Specifying the parties to the relationship, the nature of that relationship and the relevant time period satisfies the purposes of trial fairness

- **After dealing with threshold issues: apply the test for admissibility of sexual history evidence**
  - **(1) Accused has to establish that the sexual history evidence (1) relevant and (2) is not being adduced to support one of the twin myth inferences**
    - Twin myth inferences:
      - That (1) a complainant is more likely to have consented, or (2) is less worthy of belief, because of the previous sexual activity
    - Sexual activity evidence must be relevant for some other legitimate, non-discriminatory purpose before the court will even consider it
    - Note: it does not prohibit *all* sexual experience evidence directed at the issues of consent and credibility, only prohibits *particular inferences* (***Darrach***)
  - **(2) Evidence is potentially admissible, even if it raises issues of consent or credibility, as long as it doesn't raise the issue that *by reason of the sexual nature of that activity,* the complainant is less credible or more likely to have consented**
    - The defence may not rely on inferences that the complainant is, by reason of the sexual nature of her activity, the *kind of person* to consent, or the *kind of person* who cannot be believed
    - Only admissible if it meets the conditions in s 276(2)
      - **(1)** Must be relevant to an issue at trial (not because of one of the twin myths)

        - **(2)** Has significant probative value that is not *substantially outweighed* by the danger of prejudice to the proper administration of justice

    - Where evidence may be admissible:
        - Evidence of a sexual relationship may be relevant when complainants have offered **inconsistent statements** regarding the *very existence* of a sexual relationship with the accused (***Goldfinch***)
        - Bare assertions that evidence will be relevant to context, narrative or credibility will not satisfy s 276(2) – must provide "**detailed particulars**" which will allow a judge to meaningfully engage with the tests (***Goldfinch***)
        - An honest but mistaken belief cannot simply rest on evidence that a person consented at "some point" in the past – the defence must rely upon evidence of **how the complainant previously communicated consent** so that the accused can adequately support a belief that consent was expressed (***Goldfinch***)
        - Evidence of sexual history may be relevant to explain the physical conditions on which the Crown relies to establish intercourse or the use of force such as semen, pregnancy, injury or disease (***Seaboyer***)

- **Factors to consider in weighing prejudice and probative value (s 278.2(3))**
    - Right to make full answer and defence
    - Society's interest in encouraging reporting of sexual offences and minimization of sexual violence
    - Interest in achieving a just determination of the merits, getting at the truth
    - Effort to eliminate discriminatory bias
    - Minimizing the risk of prejudice, sympathy or hostility by the trier of fact
    - Preserve dignity and privacy
    - Preserve right to equal protection under the law
    - Any other factors a judge considers relevant in the circumstances
- **After considering these factors, need to judge on a case-by-case basis**

Summary: s 276(2)

- Evidence can't be adduced that the complainant has engaged in sexual activity other than the sexual activity that forms the subject matter of the charge unless the evidence:
    - (a) is not being adduced for the purpose of supporting one of the twin myths
    - (b) is relevant to an issue at trial
    - (c) is of specific instances of sexual activity; and
    - (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice

2) Private Records

- **Key provision - section 278.92(1):** except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused, and which the accused intends to adduce, shall be admitted in evidence subject to this vetting process
- As of December 2018, private records related to the complainant (even if unrelated to sexual activity) are now subject to judicial vetting
    - Uses the same balancing of interests used for the protection and disclosure regime
- **Steps:**
    - **(1) What constitutes a record?**
        - List in sec 278.1 – records for which there is a reasonable expectation of privacy
            - Includes, e.g., medical, psychiatric, therapeutic, counselling, education, etc.
            - List is non-exhaustive – could be other documents in the possession of the accused that attract a reasonable expectation of privacy
        - Still have to look whether the record adduced by the accused requires a reasonable expectation of privacy *even if* it falls into one of these categories
        - Issue: if texts and other electronic communications qualify as records under this regime
        - If you decide the evidence is a record, it is **presumptively inadmissible,** and the defence must establish that the probative value is not substantially outweighed by prejudice

- **(2) Test**
  - Differs depending on whether the evidence relates to the complainant's sexual activity, or any other evidence
  - **(1) Sexual activity:** under s 276 this type of evidence must be *relevant* to an issue other than one of the twin myths, and it must have *significant probative value* that isn't outweighed by prejudice
  - **(2) Other evidence:** twin myths aren't directly relevant but there is still potential for other kinds of prejudice in relation to the production and disclosure of private records
  - **In either case the court must consider the usual suite of factors – s 278.2(3)**

NOTE:

- The prevalent practice in cases involving proof of a prior sexual history *between the accused and the complainant* is to admit the evidence where the nature of the complainant's claim of non-consent would appear *more likely* than it should as a result of the misleading impression that would otherwise be left that the two were sexual strangers at the time
  - ***R v Rarru*** – proof of a past sexual relationship with one of several men alleged to have sexually assaulted the complainant would do nothing to enlighten the trier of fact about whether she consented or not, even with her former lover
  - ***R v Temertzoglou*** – proof that a man in his 40s and a 17-year-old girl had been intimate in the past may help debunk doubts that such a young woman would have consented to go to a motel room with him for the purpose of sex

Character in Civil Cases

- General proposition: character evidence rules aren't as prominent in the civil process
  - Unless the character of a party to a civil proceeding is ***directly in issue*** or unless the civil case raises ***allegations of a criminal nature***, good character evidence cannot be called
  - Evidence demonstrating bad character of a party that is presented as circumstantial proof of what happened must satisfy the SFE rule to be admissible
    - But the rule operates generally more generously and is subject to different considerations than in criminal cases
- **Evidence of good character of the parties in the lawsuit is *inadmissible* in almost all cases**
  - One potential exception is where the claim goes to conduct that is <u>essentially criminal in nature</u>
    - Here the court may be more liberal in permitting evidence of good character
  - Historical basis of irrelevance: whereas a person of good character would not commit a crime, the same cannot be said of civil wrongs
    - Better rationale is that in criminal cases we allow such proof because of the liberty interest of accused persons, while in civil cases priority is given to keeping litigation manageable, to avoid confusion of issues and to prevent unfair surprise to litigants
  - Example: ***Plester v Wawanesa Mutual Insurance***
    - Arson allegation by an insurance company made against the plaintiff opened the door to general good reputation evidence about the plaintiff – exceptional case for when criminal allegation against plaintiff was made
- **Evidence of bad character may be admissible**
  - To assess: apply a version of the similar fact evidence rule
  - But much more liberal and biased in favour of admission
  - Because the nature of prejudice in civil cases isn't the same as in criminal, we want to admit evidence if it is relevant and probative value is higher than prejudice
- **Character of third parties:**
  - No rules – as long as the evidence is relevant and probative value outweighs prejudice, it is admissible

Hearsay Part 1: Introduction

Overview:

- Definition and rationale
- Truth
- Out of court statements
- Implied statements

<u>Hearsay Steps – Summary</u>

- <u>First step: understand who is who</u> (exceptions may be allowed depending on whether a party makes the statement or a non-party/third party)

    - Is it a party or non-party adducing the evidence?
    - **Witness:** person who is providing the testimony *in court*
    - **Declarant:** person who makes the statement that the party calling the evidence wishes to adduce – *out of court*
- Second step: is it hearsay?
    - (1) What is the party adducing the statement trying to prove?
    - (2) Does that proof require us to believe that the statement is true?
    - (3) Does the "truth" of the statement relate to the statement itself or to its relationship to the world?
        - **Not hearsay** = if the truth of the statement comes from the fact that the statement was made, it's the very words/language that gives us the truth, then it is not hearsay
            - E.g. a statement going towards the state of mind of the accused
        - **Hearsay** = if the statement is reflective of or represents something that has happened in the world (statement itself does not have legal significance)
            - E.g. repeating an out of court statement the declarant made
            - E.g. observation about the world being transferred into the courtroom
- Third step: what is the statement?
    - Ask: why are we admitting this evidence? What is its relevance? (relevance and materiality)
        - What is it attempting to prove? What is its relation to the issues at dispute at trial?

Definition and Rationale

Hearsay: an out of court statement (verbal, written or implied assertion) offered for the truth of its contents

- The essential defining features of hearsay, as stated by the SCC are: (***R v Evans***)
    - (1) An out of court statement adduced **to prove the truth of its contents**; and
    - (2) The absence of a contemporaneous opportunity to **cross examine** the declarant
- **Hearsay is presumptively inadmissible** – have to find an exception to admit hearsay evidence at trial
    - Two exceptions:
        - (1) Principled exception
        - (2) Categorical exception
- **Dangers:**
    - Courts are suspicious of statements made outside of court because the declarant is not in court and cannot be cross-examined
        - Fundamental concern lies in the inherent difficulties in testing the **reliability** of out of court hearsay statements
        - Our adversary system places a premium on the calling of witnesses who give their evidence under oath so that demeanour can be observed, subject to cross examination – these methods are *not available* if the declarant is not the witness
        - Creates the real risk that the trier of fact may be getting *inaccurate information*
    - Four specific concerns from ***R v Baldree:***
        - **(1) Misperception**: the declarant may have misperceived the facts to which the hearsay statement relates
        - **(2) Wrongfully remembered**: the relevant facts may have been remembered inaccurately
        - **(3) Unintentionally misleading manner**: the declarant may have narrated the facts in a misleading way
        - **(4) Knowingly made a false assertion**: defendant may have intentionally made a false statement
    - Example: drunk driving, witness testifies that a passenger in the car driven by the accused stated that "the accused had been drinking and was drunk" and assume the passenger is not called to testify
        - Perception: what did P observe the accused drinking? How did P know it was alcohol? What period of time?
        - Memory: had P been drinking as well? If so, did it affect his ability to recall?
        - Narration: why did P describe the accused as drunk? What actions by the accused led to this conclusion?
        - Sincerity: what is P's relationship with the accused? Does P have a motive or reason to exaggerate or falsely testify against the accused?
- **Overall:** Ability to scrutinize the witness on the basis of what the declarant told him is *very limited* – all we can do is get a sense of if the statement was *actually made or heard correctly* – but can't get behind the statement to assess its truth value

Statements Offered for their Truth

- Hearsay rule is triggered when an out of court statement is admitted for the truth of its contents
    - *But* if we admit the same statement for **some other purpose** than its inherent truth value, it is *not considered hearsay* and the rule of presumptive admissibility doesn't apply
    - Means that hearsay evidence is not identified by the nature of the evidence, but *by the use to which the evidence is put (purpose)*
- What is relevant is not the truth; what is relevant is that the statement was made
    - Goes to show not the truth of the contents of the statement, but the declarant's state of mind
        - E.g. threatening statements were made; documents found in the possession of the accused
    - Becomes a question of **relevancy:** what relevant purpose foes the statement have aside from its truth?
- If the purpose of the out of court statement is for proof that the statement was made, it is not hearsay and admissible as long as it has some probative value
- Example:
    - F goes crazy and beats up his friend J. Assume there is no dispute that he did this, but that he was suffering from a mental disorder so should be found not guilty on NCR defence
    - To help show he was suffering from a disorder, his lawyer puts his wife on the stand, who says F forgot to take his medication (evidence being adduced to prove the truth of its contents – designed to show he may be mentally unstable, so hearsay statement)
    - Then assume testimony from B says F was "hearing alien voices in his head" – actual truth value of the statement is *not relevant, not even material* – instead the fact that the statement was made is what is relevant. It goes to the declarant's "state of mind"
        - E.g. shows F was experiencing symptoms of mental illness
- ***R v Subromanium:***
    - Soldier in Malaysia charged with carrying unlawful ammunition in his possession. His defence was duress, said that the terrorists captured him and forced him to carry the ammunition. He was about to relay the statements of the terrorists but there was an objection that it was hearsay
    - PC correctly acknowledged it was *not hearsay* – not interested in the truth content of the threats that were made, we only care about whether the threats had an effect on the mind of the accused
    - If he perceived they were legitimate and credible, this motivated his compliance and could serve as evidence justifying his actions
- ***R v Collins:***
    - Collins was seated in a pub when she was seized by the throat by a police officer who found her in possession of heroin. The only reason the officer knew was because of what he was told by other officers, not by anything she did
    - Problem was that the objection was groundless – the issue was whether the officer was acting reasonably given the info he had at the time
    - So the important thing was what he was told, not that the info was actually true
    - SCC: statements made to the officer providing him with grounds to conduct the search goes to his *state of mind* and whether his actions were reasonable – his state of mind is the issue, not relevant for the Charter application that the info was inaccurate
- ***R v Black:***
    - Note found in outbuilding where a marijuana grow op was. The note was addressed to Christina and outlined tasks related to the grow op
    - It was admissible, not for the truth of its contents (didn't matter what was on the list) but because it was found in a building to which the accused, Christina, had access
    - This inference of knowledge or complicity was available whether or not the contents of the note were true

Out of Court Statements

- **Hearsay rule applies even if the person who made the statement (the declarant) is in court and available to testify as a witness**
    - Example: B testifies against his friend F, says that he was drunk so he didn't remember how drunk F was, but he did remember telling his wife about it
        - Crown calls wife and says B said F had at least 10 beers – this is a hearsay statement – the statement was made out of court to his wife
        - If B himself relays the testimony that he told his wife F had 10 beers – this is *still hearsay* – he isn't testifying that he saw F consume the alcohol, instead about a statement made out of court
- This is why we need a **contemporaneous cross-examination** to escape the hearsay rule
    - I.e. that cross-examination is occurring as the statement is being made, which can only occur in court

    - In some circumstances the fact that the declarant is available to testify and be cross-examined after the fact may be a reason to admit the statement under one of the exceptions to the hearsay rule
    - Doesn't take away from the fact that such statements are still categorized as hearsay and are still presumptively inadmissible
- The above is to be contrasted to a situation where a witness adopts a previous statement
    - In this case the statement is transformed into actual testimony by the witness
    - If the witness' memory is truly refreshed by looking at the statement and can testify that he has independent recall of the events, then he can testify that he does remember and the statement is adopted
        - This doesn't mean the statement is admitted, just used as a way of refreshing the witnesses' current memory – not testifying about the prior statement

Implied Statements

- **(1) Implied assertions: in addition to written or oral statements, can sometimes see what conduct or behaviour can constitute a statement in its effect and meaning**
    - A gesture like pointing can be just as communicative and trigger the same hearsay concerns as a formal statement
    - Example: a police officer responding at the scene of an accident F may have been involved with and the police officer asks a witness who was driving, and the witness points at F (the equivalent of saying it was him)
- **(2) Cases dealing with statements, written or oral, that are not intended to communicate a direct meaning, but instead can be used as circumstantial evidence for guilt (non-assertive conduct)**
    - This category of cases has been difficult and lacked consensus, but hearsay concerns are engaged
    - Example: police search a drug trafficking spot, the phone rings, police pick it up and the person on the line tries to buy drugs – is the statement an implied assertion?
    - ***R v Baldry:***
        - *SCC held that a pragmatic and functional view must be taken*
        - Ask: what is the purpose for which this evidence is being introduced by the prosecution?
        - In this example the purpose is to show that that caller believed the accused to be a drug dealer
            - Because the caller is not on the witness stand and can't be cross examined as to sincerity, perception, narrative and memory, we can't be confident that the statement means what it purports to mean
            - All we can do is cross examine the police officer and ensure the statement was accurately recorded/recalled
            - Because the real purpose behind the statement is to prove the truth of the assertion that the accused is likely a drug dealer it would be classified as hearsay, and if we are to admit it we would have to find an exception to do so

Assessing Hearsay: Tips

- **Ask:**
    - Is the statement contemporaneous?
    - Does the statement go to state of mind or the truth of contents?
    - Are there any reasons we should question what was said – reliability concerns?
    - Why is the party adducing the statement? What is it attempting to show?
- If a declarant if saying what *they themselves* have done, this doesn't automatically take the statement out of the hearsay rule
- Purchase price/contracts:
    - Think about what was said at the time the contract was being formed – what is the relevant issue the evidence relates to?
    - The statements of the parties when determining a purchase price is what forms the contract. The statements themselves are directly relevant to understanding the purchase price – the underlying truth of the statement is irrelevant
    - **The transaction is based on the statements that were made**. If we can cross examine the people who made those statements, as long as we're convinced that one statement was made and another was not, we can get at the truth of which version is accurate
    - This is all we have to do – don't have to get behind the statement to see if it reflects something else
    - Look at the usefulness of the testimony – question the reliability and credibility of any witness testimony
- To impugn credibility – by definition a non-hearsay purpose because it is not offered for its truth
- If only expressing observations and not relaying specific statements – not hearsay

Hearsay 2: The Principled Exception

Overview:

- Introduction
- Reasonable necessity
- Threshold reliability

Introduction

- **Necessity and reliability** are the foundation for all of the hearsay exceptions – both the principled exception and the categorical exceptions
    - Necessity requirement: satisfied where it is "reasonably necessary" to present the hearsay evidence in order to obtain the declarant's version of events
    - Reliability requirement: refers to "threshold reliability" which is for the TJ
- The hearsay exceptions are governed by the same principles that underlie the hearsay rule
    - Hearsay exceptions are in place to facilitate the search for truth by admitting into evidence hearsay statements that are reliably made or can be adequately tested
    - Improve fact-finding by excluding statements that may be unreliable or cannot be adequately tested
- **In cases where necessity is great, we may allow for slightly less reliability; where necessity is less vital but evidence very reliable can also satisfy the principled exception** (i.e. the greater the necessity, the less the reliability)
    - Still concerned with the dangers of admitting hearsay evidence, but have a pragmatic and flexible tool to allow for admission in cases where (1) we really need the evidence, and (2) we think it is sufficiently reliable (either inherently or because we can assess it accurately through tests)

Principled Exception (*Khelawon*)

- Don't want the hearsay rule to obstruct the search for the truth
    - Principled exception allows hearsay evidence if necessary and reliable
- **Principled exception:** a case-by-case basis that looks at the principles of necessity and reliability
    - **Necessity:** reasonably necessary to present the hearsay evidence in order to obtain the declarant's version of events; criterion of necessity is founded on society's interest in getting at the truth (***Khelawon***)
    - **Reliability:** threshold reliability, for the TJ (substitute for cross-examination)
- The principled exception (necessity and reliability) are now the touchstones for the admissibility of all hearsay evidence
- **History of principled approach:**
    - Timeline: *Khan – Smith – Starr – Khelawan*
        - **(1) *Khan*** – where the principled exception developed
            - Child left alone with doctor who sexually assaulted her. Child told mother
            - The child's out of court statement was being tendered for its truth = hearsay and presumptively inadmissible
            - To be admitted a hearsay exception was needed, but did not fit in existing categorical exceptions
            - Court said that the principles of reliability and necessity allowed for the child's statement to be admissible
        - **(2) *Smith*** – SCC made clear that *Khan*'s principles were of general application
            - "Where the criteria of necessity and reliability are satisfied, the lack of testing by cross-examination goes to weight, not admissibility, and a properly cautioned jury should be able to evaluate the evidence on that basis"
            - *Khan* and *Smith* expanded the admissibility of otherwise inadmissible hearsay evidence
        - **(3) *Starr*** – necessity and reliability now the touchstones for the admissibility of all hearsay evidence
            - Reaffirmed the continued relevance of the existing hearsay exception
            - Iacobucci recognized the important functions served by hearsay exceptions (adds predictability and certainty = efficiency, useful guide to admissibility, assists in reinforcing "necessity" for search of best evidence)
                - *Traditional exceptions are to be tested against the principles of necessity and reliability, and where the exceptions are found to be wanting they will need to be modified or abolished*
        - **(4) *Khelawon* –** based on *Starr* and affirmed by the SCC, the following is a framework for considering the admissibility of hearsay evidence:
            - (1) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place

- (2) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance
- (3) In "rare cases", evidence falling within an existing exception can be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case
- (4) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*

- Note: two additional considerations to the framework
  - (1) Even where the evidence is admissible under an exception to the hearsay rule or under the principled approach, the **judge may still refuse to admit the evidence** if its prejudicial effect outweighs its probative value
  - (2) Admitting evidence under a hearsay exception does **NOT trump other rules of evidence**

Principled versus Categorical Exceptions

What is the relationship between these exceptions?

- Hearsay is presumptively inadmissible, but if evidence fits in a categorical exception, then the evidence becomes presumptively admissible
  - A reason why it is important not to discount the categorical exceptions in favour of the presumptive approach is because we can *lose the benefit of presumptive admissibility*
- Even if we can fit evidence into one of the categorical exceptions, the opposing party may challenge the categorical exception on the basis that it fails to comply with the requirements of the principled exception – necessity and reliability
  - If a categorical hearsay exception doesn't conform to the principled approach, it should be modified where possible to bring it into compliance
- In Canadian law the categorical exceptions have to conform in their basic structure to the principled approach, even though they remain distinct grounds for admissibility
  - Traditional exceptions are to be tested against the principles of necessity and reliability (the principled approach)
  - A hearsay exception can be challenged to determine whether it is supported by the principled approach, and modified as necessary (***Starr***)
- Three things can happen where there is a challenge to the categorical exception:
  - **(1) Complies (and rule is satisfied) = admitted**
    - Judge can find the categorical exception complies with the principles of necessity and reliability, and look to the facts of the case to determine whether or not the evidence within the case fits and meets the requirements
  - **(2) Does not comply but exception modified (and rule satisfied) = admitted**
    - Problems with the categorical exception but there may be an ability, if the exception is CL in origin (most are) for the court to modify the exception so it complies with the principles
    - Once modified, look to see if the evidence of the case fits the categorical exception
  - **(3) Does not comply = excluded**
    - Categorical exception does not comply with the principles and can't be modified
    - Regardless of the facts, the evidence is excluded
- **If there is no categorical exception that applies in the circumstances, use the principled approach to get evidence in**

Hearsay Exception vs Exclusionary Discretion

- We rarely want to exclude evidence under the exclusionary discretion when we've admitted it under a hearsay exception
  - Already balanced the costs and benefits of receiving the evidence in the hearsay analysis
- Possible in limited circumstances that we may still want to exclude evidence that has been admitted under the hearsay exception
  - Only exclude if there is some form of prejudice that arises from the evidence that is not already incorporated into the hearsay exception analysis
- Example: when the party opposing didn't have an opportunity to cross examine the declarant

Hearsay Exception vs Other Exclusionary Rules

- Apply the hearsay rule and if we determine the evidence is admissible, there may be other exclusionary rules that keep the evidence out of trial (e.g. *bad character evidence*)
- Apply the different exclusionary rules separately, keeping in mind there may be alternative bases for exclusion

Hearsay in Criminal and Civil Cases

- **Criminal:**
  - Sometimes said that we don't apply the hearsay rules as strictly when it comes to defence evidence in a criminal case because we give the benefit of the doubt to the accused and want to minimize the risk of wrongful convictions

- But that doesn't mean we change the rules in any way
- Still undertake the same necessity and reliability analysis in the principled approach, but the way we balance the interests may give a *slight nudge* in favour of admitting defence evidence in a close case

- **Civil:**
  - Often also said that we don't apply hearsay rules as stringently in the civil context
  - May be true as a matter of practice and strategy, but the rules are not modified in any substantive way
  - The hearsay rule and exceptions apply equally in civil context with the exception of some statutory changes

Reasonable Necessity

- **Reasonable necessity: unavailability of evidence from a particular witness in the form of courtroom testimony**
  - Necessity is founded on the need to get at the truth – the **key** is the unavailability of the witness's courtroom testimony through the passage of time or a change in their testimony
    - NOT the unavailability of the witness
    - May be cases fitting within the principled exception where the witness is available to testify, but the evidence of the witness or the evidence of the declarant is not available
  - Talking about a situation where *"we cannot expect to get evidence of the same value from the same or other sources"* (Wigmore)
- **Reasonable necessity requires that <u>reasonable efforts</u> be undertaken to obtain direct evidence of the witness**
  - Another requirement of the necessity analysis
  - The party wishing to adduce the evidence/take advantage of the exception has the burden of showing that reasonable efforts have been made to secure the direct evidence of the declarant
  - If you can't show that, then you have a weak case to make in regard to necessity
  - Examples:
    - ***Khelawon:***
      - Necessity requirement met because witness had died, but reasonable efforts requirement not met
      - Declarant had died between the time he had made the statement and the time of the trial
      - Court found that the Crown would have made some effort to preserve his evidence because the Crown knew he was elderly and in ill health – could have taken sworn testimony
      - Court was critical of Crown arguing that necessity was not made out because the Crown did not take reasonable efforts to obtain the evidence
    - ***Baldree:***
      - SCC again critical of police and Crown for failing to try to track down the caller who made the call to the accused drug dealer asking for drugs
      - In determining that this was hearsay, the court said the Crown failed to meet the necessity criteria because reasonable efforts were not made to locate the declarant and have the declarant testify as a witness in court (police never tried to locate, never followed up)

- **Other examples where necessity is an issue:**
  - 1) Death
    - Absent a failure to take reasonable efforts, death will establish necessity
  - 2) Declarant is found incompetent to testify
    - Then we *can't testify* in court by definition (remember *Khan* where child was incompetent so couldn't testify)
  - 3) Lacks sufficient memory
    - Witness is available and competent but lacks sufficient memory of events (again remember *Khan*)
  - 4) Trauma
    - If we can establish a *real possibility that testifying would cause significant trauma to the witness*, then can establish
    - Usually need to present expert evidence to demonstrate
    - Where credible, courts will usually not require testimony
  - 5) Recants prior statement
    - Witness available and competent but recants prior statement
    - Discrete rule in the general framework that recanting witnesses establish necessity

Threshold Reliability

- **Threshold reliability vs ultimate reliability:**
  - **Ultimate:** for the trier of fact to decide and determine whether or not the statement is true
  - **Threshold:** the TJ, as trier of law, gets to determine threshold reliability
    - Not necessarily concerned the evidence isn't reliable or sufficiently probative, as long as we are satisfied the trier of fact will be able to deal with the evidence fairly and accurately
    - E.g. ***Hawkins*** described this as "whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for *evaluating the truth* of the statement"
    - Doesn't have to meet a threshold of ultimate probative value, just about having a fair and accurate basis for evaluating

- In determining threshold reliability and the admissibility of statements, a **functional approach** is used
  - All relevant factors going to the reliability or unreliability of the statement can be looked to
  - E.g. ***Khan*** – saliva and semen on the child's sleeve is strong proof going to the reliability of the child's statement

Overview

- ***Khelawon****:* two ways to establish threshold reliability – may overlap and may rely on both
  - **(1) Inherent reliability**
    - Trustworthiness, substantive reliability
    - Indications that the statement is accurate and truthful
    - Traditional safeguards
    - Any motive to fabricate?
    - Can you corroborate/confirm?
  - **(2) Testability**
    - Procedural reliability
    - Sufficient basis to adequately assess accuracy
    - May not think the statement is probably true, but we believe that the trier of fact will be able to assess the evidence accurately, and that the flaws of the evidence will be apparent because they can be tested adequately at trial

Inherent Reliability (Trustworthiness)

- Features of the statement that tend to give it an aura of reliability or unreliability
  - 1) Spontaneous
  - 2) Natural
    - Made in circumstances before there is time for concoction or deliberation, more likely to be true
    - If made suspiciously, more likely to exclude
  - 3) Without suggestion
    - Not the product of leading questions
    - Not being shaped by the questioner
  - 4) Reasonably contemporaneous
    - Was the statement made close in time to the event in question?
    - No loss in memory, no time for concoction if close in time
  - 5) Motive to fabricate/lie
    - Reason to think the declarant would say something untruthful
  - 6) Sound mental state
  - 7) Against interest
    - Idea that a statement made against a person's interest is more likely to be true
    - Presumption that people normally don't say things that would damage/harm them unless it was true
  - 8) No other knowledge of facts alleged
    - Young, naïve, inexperienced declarant who wouldn't have knowledge of the facts unless it actually happened gives reliability
    - E.g. child describing a sexual act
  - 9) Corroborating evidence
    - Extrinsic evidence or similarity in different statements

Example in ***Khan****:* child's statement made shortly after the incident (contemporaneous), made innocently without prompting (without suggestion), child had no motive to lie and there was a stain on the child's clothing (corroborating evidence)

Traditional Safeguards

- There may be cases where we aren't sure about inherent reliability – e.g. evidence is weak
- Normally, when not dealing with hearsay, we tend to rely on features of in-court testimony and the adversary process in order to test the witnesses' evidence (i.e. safeguards surrounding the making of the statement that would expose inaccuracies or fabrications)
    - Oath – under a duty to record the statements
    - Presence – demeanor
    - Contemporaneous cross-examination (most important!)
    - Accurate record – statement will be recorded and transcribed
- Even though we do not have these safeguards for hearsay evidence, there may be substitutes:
    - Warnings – e.g. given by police when taking a statement of possible consequences
    - Audio/video recording
    - Cross-examination

Motive to Fabricate

- Lack of motive to fabricate is *not equivalent* to proving the absence of a motive to fabricate – evidence is needed
- Take precaution with:
    - **1)** Evidence of malice in the relationship that may taint the reliability of any statements
    - **2)** Relationship between a declarant and the receiver of the communication
- Threshold reliability is concerned with the reliability of the **declarant, not the receiver** – what the receiver hears tells us nothing about the truth of the statement
    - Example: mother worried about teenage daughter who is out with friends. Daughter calls mother to reassure her and says she's getting a ride with her friend R. R is well known to the mother and the mother likes him. The daughter is not actually with R and is with someone less trustworthy and reputable
    - The declarant is simply telling the receiver what the receiver wants to hear

Corroborate/Confirm

- **Extrinsic evidence**
    - Can look outside the statement to extrinsic evidence that tend to corroborate or confirm the truth of the statement
    - ***Khan:*** young child's statement was confirmed by forensic evidence on her clothing
    - ***Khelewon:*** elderly abuse case where the evidence was found to not be sufficiently corroborating
        - Different possible explanations – elderly and frail so could have fallen

- **Similarity in different statements:**
    - Another way to corroborate or confirm is when there are striking similarities between two statements
    - ***FJU:*** daughter alleging sexual abuse by her father
        - Her initial police statement contained detailed descriptions of the acts and when and where they were performed. When initially confronted by police the father confirmed the truth of those statements in giving a detailed account that matched the daughter's account
        - The court looked at the statements and said it was very unlikely that the statements would be so similar in so many details unless they were based on true events and both were accurate descriptions of what happened
    - Ensure no evidence of contamination or collusion

Testability: Substitutes of Traditional Safeguard for Hearsay

- This aspect considers whether there are any substitutes that address the hearsay dangers arising from lack of oath, presence and cross examination
    - "Common sense tells us that we should not lose the benefit of evidence when there are adequate substitutes for testing the evidence" (***Khelawon***)
- Not asking whether the statement is reliable enough – overall assessment is whether it is safe to admit, given the fact that the trier of fact will be able to see what the flaws of the evidence are and then make a reasoned and informed decision on what evidence to accept and what to reject
- **Substitutes include:**
    - **1) Warnings**
        - Substitute for oath
        - E.g. police officer giving a warning when they are taking a statement, warn interviewee of the consequence of lying to police
    - **2) Audio/video recording**

        - Recording allows us to gauge, in an indirect way, the testimonial factors (examine body language and demeanour, etc.) to scrutinize the statement
    - **3) Cross examination** (contemporaneous or at trial)
        - In limited circumstances, can cross examine the defendant when talking about prior testimony and legal proceedings
        - More commonly, can test the witness' testimony at trial
            - Important to have witness available at trial for cross examination when they have made a prior inconsistent statement outside of court
            - Can compare hearsay statement made outside of court with the in-court testimony and cross examine on differences
        - *So even if we think the pre-trial statement is bogus, we may admit it because of faith in ability to scrutinize it accurately*
- Focus less on whether there is a reason to believe the statement is true, and more on whether the trier of fact will be in a position to rationally evaluate the evidence

    - ***Hawkins**:*
        - Witness testified at preliminary inquiry and implicated Hawkins, then recanted much of what she had said
        - By the time it got to trial she was incompetent to testify because she was now married to Hawkins
        - But because much of what she said during the preliminary inquiry was when she was under oath, the Crown was allowed to introduce this testimony

Determining necessity and reliability

- There is NO formula for determining necessity and reliability
- Need to make the best argument on the factors to gauge how necessary and reliable the evidence is
- Where evidence for necessity is great, might allow for weaker evidence for reliability and vice versa
- Keep in mind the presumption of exclusion and dangers with admission
- Very flexible tool to allow for admission where we really need the evidence and it is sufficiently reliable

Hearsay 3: Prior Inconsistent Statements

Overview

- Introduction – prior inconsistent statements part of the general principled exception
- Reasonable necessity
- Threshold reliability
- Otherwise admissible

Introduction

- A potential prior inconsistent statement can be negatived by the witness *adopting* the statement
    - Permissible for counsel to use a PIS to refresh the memory of a witness
    - If the witness genuinely adopts and adjusts testimony to conform to it then the testimony becomes consistent with the statement, we no longer have an inconsistent statement, and the testimony becomes evidence at trial

Credibility and Truth

- **Prior inconsistent statement:**
    - Historically could only be used to impugn credibility, could be adduced for the use of its contents – couldn't be used for a hearsay purpose
        - When admitted for credibility, judge needed to warn trier of fact that it could *only be used for assessing credibility* of witness and witness' testimony – specific instructions required
- Then the SCC, in developing the PIS approach, decided ***KGB:***
    - If a prior inconsistent statement is admitted under *KGB* and general principled exception rules, the **trier of fact *can* consider the statement *both for credibility and for truth***
    - How then do we determine if we can admit a prior inconsistent statement for the truth of its contents?
        - **Rely on same general criteria for principled exception – reasonable necessity and threshold reliability**

Necessity and Reliability

How to determine if a prior inconsistent statement can be admitted

- Since it's a specific example of the general principled exception, we rely on the same general criteria of ***necessity and reliability***
  - (1) Necessity – recanting witness
  - (2) Reliability – inherent reliability; testing

Reasonable Necessity

- In theory, necessity in prior inconsistent statement cases could be established in any of the ways previously discussed
  - But in reality, for PIS inconsistency is always almost based on **recantation** – the witness recants the previous statement, serves as the gateway to admitting the statement for its truth
  - Recantation = necessity

- **Three types of recantation:**
  - **1) Witness admits previous inconsistent statement and offers explanation**
    - The witness is admitting that he made the previous inconsistent statement and denying the statement is true. Typically the witness will go on to provide an explanation for the falsity of the previous statement and/or the truth of the current testimony
  - **2) Witness denies making the prior inconsistent statement**
    - Other party can prove that the statement was made
  - **3) Witness claims they can't remember making the statement**
    - Considered to be recantation for the purposes of the PIS exception

- NOTE:
  - All forms of recantation meet the reasonable necessity threshold
  - But the nature of the type of recantation is important in *deciding whether the statement is sufficiently reliable* or not (second prong of the principled exception analysis)

Threshold Reliability

- Can look at all the same factors examined when applying the general principled exception – inherent reliability & testing (***Khelawon***)

(1) Inherent reliability:

- Spontaneous
- Natural
- Without suggestion
- Contemporaneous
- Motive to fabricate
- Against interest
- No other knowledge of facts alleged
- Corroboration

- **Consider:**
  - **Key:** whether or not we have an **oath** to tell the truth, or a **warning** from the taker of the statement (police officer) that there are (criminal) consequences for failing to tell the truth at the time the statement was made
    - Could also be considered to be an aspect under testing and not inherent reliability
  - Whether the police used any **pressure, coercion, or undue influence** in order to make the statement appear to be something that the police wanted to hear
    - Could be threats or harm or promises of benefits – need to scrutinize the way the statement is taken
    - Statement have to be made in a ***voluntary way*** before it can be admitted for the truth of its contents
      - Full-fledged confessions rule is not applied – more lenient because not a statement of the accused, but of the non-accused
    - If we have reason to believe the statement may be false or unreliable because of undue pressure or influence by the police, we are not going to admit it

        - Similarly, courts have discretion to exclude prior inconsistent statements if it is determined they were made as a product of wrongful or abusive police conduct

(2) <u>Testing:</u>

- Like with the general principled exception we want to look at factors bearing on our ability to test or scrutinize the evidence even if we may not believe the prior inconsistent statement is inherently reliable
- **Traditional safeguards:**
    - (1) Presence of witness in court
    - (2) Accurate recording of testimony
    - (3) Contemporaneous cross examination
- **Can also look for substitutes of traditional safeguards (*KGB*)**
    - **One of the most important is the fact that the statement was made on audio and video recorded**
    - Full recording of the interview/questioning so we are able to assess:
        - Whether there was undue influence; issues on credibility; demeanour and body/language
        - Get a sense of the circumstances under which the statement was obtained
    - Unless there is a good excuse for not being able to record the interview, the Crown will face a heavy burden in establishing reliability where there is no accurate and comprehensive video/audio recording of the interview with the witness
- **Most important aspect of testing – *ability to cross examine the witness at trial***
    - Unlike some instances of the general principled exception, anytime we are dealing with a prior inconsistent statement we are going to have the declarant in court available for cross examination
    - Have to look at the nature and extent of the cross examination
        - Effectiveness of the cross examination in scrutinizing the reliability of the prior statement is going to depend on the nature or type of recantation involved

Scenario 1: witness admits previous inconsistent statement and offers explanation

- Typically, can have effective cross examination by revealing **<u>comparative reliability</u>** of the statement
    - Can scrutinize the prior statement
    - Can scrutinize the circumstances in which the statement was made
    - Can look at current testimony and compare the relevant reliability of those two statements
- In many cases this will give a sound basis for admission even if the other *KGB* factors are missing or diminished in a particular case
- **Comparative reliability:** ability to adequately and comprehensively compare the in-court testimony to the prior statement

Scenario 2: denying the statement was made in the form alleged

- Cross-examination becomes much more limited – can't engage in comparative reliability analysis
- Other reliability factors have to be much stronger to justify admission

Scenario 3: witness does not remember making the statement

- Cross-examination is limited – can't engage in comparative reliability analysis
- Other reliability factors have to be stronger to justify admission

Otherwise Admissible

- Principle that we must ensure any prior inconsistent statement that passes the threshold of necessity and reliability **would otherwise be admissible at trial**
- **How:**
    - Look at the prior inconsistent statement that we want to admit and imagine that the same statement is being offered as in-court testimony
- **Double hearsay:**
    - Look for things like double hearsay (talking about a prior statement that contains a hearsay statement)
    - To admit this, in addition to satisfying the principled exception, also need to find some exception to justify the admission of the statement assuming it had been made in court (e.g. categorical admissions exception to the hearsay rule)

Hearsay 4: Categorical Exceptions 1

Overview

- Introduction
- Prior identifications
- Prior testimony
- Prior convictions
- Party admissions

Introduction

Categorical vs Principled Exceptions to the Hearsay Rule

- Hearsay is presumptively inadmissible
- But if evidence fits a categorical exception, it is presumptively admissible
    - Benefit of presumption and difficult for opposing party to challenge it
- May be challenged on the basis of compliance with the principled exception
    - Can challenge the CL exceptions if they don't adhere to principles of necessity and reliability (***Starr***)
    - Then look to whether we can amend CL rules so that it is in accordance with the principles
- If no exception, use principled approach
- Overall: once you establish that your evidence fits, prima facie, into a categorical exception = advantage (benefit of presumption and often clear rules to apply)

Prior Identifications

- Two potential problems: **(1)** may raise hearsay concerns; and **(2)** may raise the issue of prior inconsistent statements
    - Courts are usually **quite lenient in admitting** prior identifications because *in court identifications are significantly less reliable*
    - Preference for prior identifications – made closer to the event with fairer procedures
- **Three common scenarios:**
    - **<u>1) Prior ID confirms and corroborates the in-court ID – PI ADMISSIBLE</u>**
        - Here because we give greater weight to the lineup ID, we presumptively admit the lineup ID because it confirms and corroborates the lineup ID
        - E.g. questioning by police officer of a witness to the crime, witness identifies perpetrator in a lineup. Then this process is repeated in court
    - **<u>2) Prior ID contradicts in some way the in-court ID – PI NOT ADMISSIBLE</u>**
        - Here we *cannot use* the prior ID exception to admit the hearsay statement
            - It *might* be admissible as a prior inconsistent statement using the *KGB* approach if we can assuage ourselves concerning reliability of prior ID
        - E.g. description of the perpetrator as someone else – now in court when the witness describes, he does so in different terms
    - **<u>3) No in-court ID, only the prior ID – PI NOT ADMISSIBLE (PIS MIGHT BE ADMISSIBLE)</u>**
        - PI not admissible under this exception
        - Have to rely on the principled approach and specifically the prior inconsistent statement example of the principled approach – *might* be admissible as a prior inconsistent statement
            - Will be difficult because there is almost no ability to test or engage in the comparative reliability analysis
            - Unless there is a lot of inherent reliability to the prior identification, it will most likely be inadmissible
        - This situation is the same as the witness having not testified – meaningful cross examination on the making of the alleged identification is not possible, so therefore not admissible
        - The evidence is obviously not going in for consistency, but such evidence is regularly admitted when the identifying witness can testify that they previously made an accurate identification

Prior Testimony

One might assume that all prior testimony ought to be admissible based on general principles of necessity and reliability

- Necessity: grounded in the unavailability of the witness
- Reliability: rests on the fact that at the prior hearing the witness was under oath, available for cross examination, and an accurate transcript of the testimony exists

However, prior testimony is still considered an **out of court statement** from the perspective of the current proceeding – so classified as **hearsay (*Hawkins*)**

(1) Common Law Exception

- Requirements:
    - (1) Declarant must be **unavailable**
    - (2) **Parties** must be substantially the **same** as between the prior proceeding and the current proceeding
    - (3) **Issues** must be substantially the **same**
    - (4) **Opportunity to cross examine** – the party against whom the statement is being offered in the current proceeding must have had an *opportunity* to cross examine the declarant in the previous proceeding
        - Don't have to have actually cross examined them as long as the opportunity was there
        - Authors of textbook criticize CL exception as being too restrictive and argue that as long as the party against whom the evidence is being offered had an opportunity to cross examine that should be sufficient, the party offering the prior testimony need not be the same
            - But courts haven't yet generally accepted this logic
        - If all else fails, can resort to the principled exception and make the same basic argument that there is inherent reliability or the ability to test in the case of the prior testimony having the declarant available for cross examination in the current proceeding

(2) Provincial Rules of Court

- Alberta Rules of Court, section 8.17(3)
- Admissible in **civil proceedings** that are governed by **provincial rules of court**
- Sec 8.17(3): evidence taken in any other action may be presented at trial but only if the party proposing to submit the evidence gives each of the other parties written notice of that party's intention 5 days or more before the trial is scheduled to start and obtains the Court's permission to submit the evidence
- Overall: **allows prior evidence to be admitted in civil cases/any case governed by AB rules of court**

(3) Criminal Code, s 715(1)

- Criminal cases
- Requirements:
    - (1) Dealing with the **same charge**
        - I.e. prior testimony from a previous trial and now we have a re-trial, a preliminary inquiry in the same matter, or an investigation where testimony is bring produced
    - (2) The prior testimony is taken in the **accused's presence**
    - (3) There was a full **opportunity to cross examine**
        - *Reverse onus* – the side contesting the admissibility of prior testimony has the burden to prove that there was not a full opportunity to examine the declarant
        - Whether there was the availability of a full opportunity to cross examine is not determined by the use actually made of the opportunity
            - Lack of full opportunity = witness refuses to answer questions, witness dies or disappears during cross examination or judge curtails the cross examination by imposing improper limitations or restrictions
            - *Not from the accused's ignorance of potentially useful information*
    - (4) Have to show the witness was **unavailable** due to:
        - (a) Refusal – refuses to take the stand or refuses to give evidence
        - (b) Death
        - (c) Insanity
        - (d) Absent from Canada
- **Discretion (*Potvin*)**
    - Even if all the requirements are fulfilled, there is a discretion the SCC recognized in *Potvin* to exclude prior testimony in some circumstances if it would operate unfairly to the accused:
        - **(1) Unfairness**
            - Where the admission of prior testimony would be unfair to the other side

- Can justify exclusion of prior testimony despite fulfilling the formal requirements of s 715(1)
- Examples:
    - *Reasonable efforts* – the Crown failed to make reasonable efforts to make the declarant available as a witness at trial
    - *Non-disclosure* – Crown was aware that the witness would likely be unavailable at the time of the trial but failed to disclose to the defence. Had the defence known, they may have been more likely to engage in a thorough and extensive cross examination of the witness

▪ **(2) Credibility of witness critical**

- Where there is exceptional emphasis on the credibility of the witness and the inability to cross examine the witness would be very unfair because so much hinges on it, it is vital that there is an opportunity to cross examine at *this* testimony, not just at the prior proceeding

- Exercise of this residual discretion brings into play the conflicting concerns of fair treatment of the accused and society's interest in the admissibility of probative evidence in order to get at the truth of the matter

Prior Convictions

- Generally admissible, subject to rebuttal
- **Prior convictions of a criminal offence constitute <u>*prima facie* proof</u> of the subject matter of the events that the conviction supports**
    - E.g. someone convicted of assault, and the victim of assault sues the perpetrator in a civil action – the criminal conviction constitutes prima facie proof that the plaintiff was indeed assaulted by the defendant
- *Prima facie* standard affords a convicted party opportunity to explain why the conviction should be taken as proof of the underlying facts
    - If there is a good explanation the matter can proceed to trial
    - But if no explanation and the convicted party simply wants to relitigate the same issue, it will not be permitted as baseless relitigating due to potential abuse of process and undermining the integrity of the justice system
- ***Alberta Evidence Act*, s 26**
    - This exception can be used offensively or defensively:
        - **Offensively:** use it to help prove a civil claim for the same harm/wrong that was the subject of a criminal prosecution
        - **Defensively:** evidence of a prior conviction may be used defensively to "resist" a claim
            - E.g. insurance company defending against plaintiff alleging non-payment of insurance proceeds, and insurance company argues the insurance policy was for wife and plaintiff convicted of murdering wife, so don't qualify for insurance payments
- **Impeachment & Rebuttal**
    - In rare circumstances, courts will impeach/question the reliability of a previous conviction (reluctant to do so) where:
        - **(1)** There is *fresh evidence* indicating that the basis of the conviction was faulty; or
        - **(2)** Unfairness
            - Where current claim involves higher stakes than the former proceeding – might allow the party to argue that the prior conviction should not be taken as proof of the events in question
            - E.g. previous claim was a very minor regulatory infraction where the stakes weren't very high, but the present action is very serious/high stigma flowing

Party Admissions

- **Admissions = anything the other side every said or did; acts or words of a party offered as evidence against that party**
    - I.e. any statement or conduct by the opposing party in a lawsuit (criminal or civil) is an admission
- Admissions are *presumptively admissible*

<u>Formal vs Informal Admissions</u>

- **Formal:** admission that dispenses with the need to prove a fact in issue; the party is prepared to concede that particular point
    - Usually binding, the court will rarely allow the admission to be withdrawn/disputed/litigated
    - Formal admissions can be made in:
        - Pleadings (civil)
        - Agreed statement of facts (civil)
        - Submissions of counsel (civil)

        - Guilty pleas (criminal)
        - *Criminal Code*, s 655 – accused can admit any fact alleged by the Crown against him (admit to isolated particular facts that aren't an entire issue)
- **Informal:** anything said that is not conclusive proof of an issue; admission that's always open to be contradicted or explained
    - Does not bind the parties
    - E.g. Defendant tends to incriminate himself or the Crown wants to use it for this purpose – they can

Admissions don't need to be based on personal knowledge

- Admission need not be based on personal knowledge – a party may accept what others say, and if so they are deemed to have adopted those statements
    - But the party must in some way indicate an acceptance or belief in the truth of the hearsay statement
- *Multiple hearsay:*
    - Admissions exception is so broad we *ignore any concerns about multiple hearsay* – the statement itself may be based on hearsay, but that is not an issue
    - E.g. "Smokey *told* us this stuff was hot! We'd better run faster!"
    - Declarant (accused) is assumed to have adopted that statement
    - Rationale: people are unlikely to say things that go against their interest unless they are true

- **[1] Admission by conduct:**
    - An accused can effectively be signalling or acknowledging their guilt by fleeing from the scene, or by lying when confronted with accusations
        - E.g. ***Walmsley v Humenick*** – defendants parents pay for the plaintiff's medical bills, defendants try to say this is admission by conduct of the defendant's guilt. But based on the context that the two families were friends, the payments could be a gesture of compassion and not an admission of liability
    - In the proper context, assuming it is relevant and material, we might see this is an admission of responsibility/consciousness of guilt
- **[2] Admission by silence:**
    - This is allowed, but there are strict requirements:
        - (1) Statement must be made in the presence of the declarant
        - (2) In a situation where the declarant would be expected to respond with an explanation
        - (3) In a context where failure to respond strongly infers that the silence is adoption of the truth of the statement/question
        - (4) Also - have to be concerned of the probative value of the silence outweighing the prejudicial effect
    - Potentially very dangerous – there may be other perfectly innocent explanations for the silence
        - Without an evidentiary foundation, the adoptive admission by silence should not be put forward
        - **Unless the accused accepts or adopts the silence, either expressly or by inference, silence is not evidence of an admission**
    - This rule **does not** apply to statements of silence made by an accused to police or persons in authority
        - Would override the right to silence
        - Because this right has been constitutionalized, we can *never infer guilt from silence of an accused in this situation*
- **[3] Vicarious admission:**
    - Conventional view: we cannot take the statement of an agent and attribute that to a principal, unless the principal has given specific authority to the agent to speak on their behalf
        - But no sensible employee would authorize his employee to make damaging statements
    - Alternative view: the agents' statements should be binding on the principal as long as the agent is speaking within the scope of their authority
        - E.g. employee makes a statement within the scope of their responsibilities; that statement should be attributed to the employer/corporation
        - This view is *not widely accepted by the courts* – matter of considerable uncertainty
- **[4] Statements of an accused to persons of authority:**
    - Admission is when an accused makes a statement to **ordinary persons** – not subject to special rules
    - Confession is when an accused makes a statement to **persons of authority** – subject to *special rules*
        - This does not mean they are not admissions – a statement of an accused to a person of authority IS an admission and is an exception to the hearsay rule, and is ordinarily admissible
        - But it is ALSO captured by an additional rule, the confessions rule, where it has to be **proved that the statement was voluntary**
    - Not an exception to the general principle that any statement made to a party is presumptively admissible
        - Think about it as any statement by an accused person used by the Crown is an admission which overcomes the hearsay rule, but then there may be other rules (like the confessions rule) that may exclude the evidence
    - Confessions:

        - Statement made to a person in authority
        - Crown bears the onus of proving voluntariness of the statement BARD
    - Mr. Big Confessions
        - Quasi-confessions made unwittingly to police as part of undercover police operations
        - *Presumptively inadmissible*
        - Crown has to prove probative value of the confession outweighs its prejudicial effect
- **[5] Admissions of parties in furtherance of a common design**
    - If A confesses to the murder and implicates B at the same time, the confession (although implicating both), is evidence *only against A* and the jury has to be instructed of this
        - If A and B were tried *separately:* then it can be used against both because A is a competent witness at B's trial and vice versa
        - But these admissions have questionable *reliability* since it is in the best interests of one criminal to minimize his own involvement and betray his partners in crime
    - **Common design:** once a partnership is proven by independent evidence to exist, the admission of one partner acting in the scope of the partnership is evidence against all partners
        - This exception *only applies to statements made in furtherance of the common design/conspiracy*
        - Cannot use it to admit a statement made that is not in furtherance of the conspiracy
        - A co-conspirator's guilty plea or full confession of a co-conspirator made to the police is NOT admissible
    - **Steps – TJ instructs the jury as follows:**
        - **(1)** Did the conspiracy **exist**? Trier of fact must be satisfied BARD that the conspiracy existed
        - **(2)** Was the accused a **member**? Must prove on balance that the accused was a member of the conspiracy
            - **If yes to both, then we move on**
        - **(3)** Consider co-conspirator statements in deciding the accused's guilt (BARD)
        - **(4)** Warnings – have to warn the trier of fact that even if they have been permitted to consider the co-conspirator's statements in deciding the accused's guilt, they have to still prove all the elements of the event beyond a reasonable doubt

Hearsay 5: Categorical Exceptions 2

Overview
- Declarations against interest by non-parties
- Dying declarations
- Declarations in the course of duty
- Res gestae

Declarations Against Interest by Non-Parties

- **Two distinct and separate types** – have to specify which of the two types when claiming the hearsay exception – NOT CORRECT to claim that hearsay should be admitted because it is a declaration against interest by a non-party
- **Never use this exception for any statement by a party to the litigation** even if we see the statement and it appears to be a declaration against interest
    - Use the *admissions exception*

<u>Exception for Declarations against Interest of a Pecuniary/Financial Nature</u>
- Presumption that people don't say things against their pecuniary interest, unless those statements are true (inherent guarantee of reliability)
- <u>Requirements:</u>
    - **(1)** Declarant must be unavailable
    - **(2)** Statement must go against pecuniary interest of the declarant (*at least in part – can only be slightly*)
        - E.g. acknowledgement of a debt owed
        - E.g. acknowledgement of a debt paid (statement is more favourable than unfavourable) – value attached to the connected portions is a matter of weight for the trier of fact
    - **(3)** Statement must be within the personal knowledge of the declarant
        - *Cannot* have double/multiple hearsay
- Examples:
    - R testifies that B said he wasn't going to pay Y back the $5 he borrowed because Y still owed him $50
        - Statements may be quite favourable to the maker's interest but can still be admitted
        - Here on balance the statement is really in B's own interest – B could only lose $50 while Y could lose $5
            - But the exception will still apply

        - The statement in part goes against B's financial interest, so it fits in the exception and is admissible
    - R testifies "I made a note in my log that Y paid the park entry fee at 2:45pm on March 23rd"
        - Statement can be admitted in its <u>entirety</u> if ANY portion of it is against the declarant's interests
        - This means that the declaration against interest *may be completely irrelevant to the proceeding*, but it is the means through which a relevant collateral fact is admitted into evidence
            - I.e. can admit the statement even if the part that deals with financials is immaterial to the matters at hand
        - Here, assuming the relevance and materiality of this statement relates to placing Y inside the park at the designated time, the time that Y paid the entry fee is incidental
            - Because of the acknowledgement that the debt was paid, we can say that R made a statement against their financial interest because the acknowledgment that an amount owing was paid by Y
            - The entry "against interest" is showing amounts paid – because they can no longer pay, acknowledgment of a financial obligation
- **We can admit the statement even though part of the statement that deals with the pecuniary or financial interest is actually *collateral* to the matters at hand**

<u>Statements against Penal Interest</u> – *can only be used against non-accused (can't be used to incriminate accused)*

- Statement that exposes declarant to potential criminal liability
- Courts are much stricter in dealing with this exception than the first type
- <u>Requirements:</u>
    - **(1)** A real vulnerability to **non-remote** penal consequences
        - Declarant must know that the statement will be held against him – there must be *vulnerability* flowing from the person making the statement
        - Vulnerability has a charitable view – likely to be found whenever a supposed confession is made to anyone
    - **(2)** Statement must be against the declarant's interest **on balance (not just in part)**
    - **(3)** Corroboration has to be properly considered to see whether or not there are circumstances connecting the declarant and the accused
    - **(4)** Unavailability of the declarant due to death, insanity, grave illness or absence from the jurisdiction (unable/unwillingness to testify)
- Even if all conditions are satisfied, still **<u>cannot use the statement to incriminate/inculpate</u>** <u>the accused – always has to be **used against a non-accused**</u>
    - ***Lucier:*** exception could only be used to *exculpate and not inculpate* the accused, who is "robbed" of the opportunity to cross examine the witness
        - Potential lingering concern about the reliability of these statements and that it would be unfair to convict an accused on this evidence
        - Cannot be used to incriminate an accused in criminal proceedings – can only be used to exculpate
- Examples:
    - B is the accused and Y is not a co-defendant (Y is not a party). Y says "Run B! If he catches us with these stole picnic baskets, we're screwed!"
        - On balance the statement goes against Y's penal interest and potentially exposes him to criminal liability
        - Unlikely that the court would find he faced non-remote vulnerability to penal consequences – assuming B is not going to rat out Y for co-conspiring
        - Would not satisfy the vulnerability requirement to non-remote penal consequences requirement and thus not admissible as a statement of penal interest against B
    - If dealing with a civil proceeding and Y says "if he catches us with these stolen picnic baskets we're screwed!"
        - Potentially admissible against B, assuming the statement was made in circumstances where Y perceived true vulnerability to penal consequences

Dying Declarations

- Strict requirements:
    - (1) Settled, hopeless expectation of immediate death
        - Death must be near and certain, the mere likelihood or probability of impending death is not enough
    - (2) Statements must relate to the circumstances of death
        - Usually in homicide cases who did it and how it was done
    - (3) Statements would have been admissible if the deceased had been able to testify
        - Imagine the deceased did not die and would be available to testify in court – if the statement contains inadmissible hearsay/inadmissible character evidence it will not be admissible
    - (4) Only admissible if the offence is the homicide of the deceased

        - Can't use dying declarations for civil cases or criminal cases where the offence is something other than homicide/murder/manslaughter of the deceased
        - Criminal negligence causing death is a recognized form of murder (e.g. driver of a car is charged and passenger involved in the automobile accident is dying; but if the passenger's family brought a wrongful death civil suit it would not be admissible)

- Need to resort to the principled exception if it is not the homicide of the deceased
    - Necessity: the witness is deceased
    - Reliability: derived from the belief that a person who knows that he/she is about to die will be motivated to speak truthfully

Declarations in the Course of Duty

- Two separate and distinct types – have to *specify one of the two types when claiming the hearsay exception*
- The admissibility of declarations made in the course of duty is based on the presumed reliability with their making:
    - **(1)** Prepared as a matter of routine, where there is little reason or motive to fabricate
    - **(2)** The job of the maker is to be accurate since businesses rely on these records
    - **(3)** The entries are prepared reasonably contemporaneously with the events/transactions recorded
- Unlike admissions tendered by the opposing party *against* the party who made the statement, declarations in the course of duty are admitted by the party responsible for the party in order to *support* their own case
- **Rationale:** idea that there are so many different routine record keeping procedures that there is no reason to think either that there was a deliberate concoction or that there is any circumstance that would generate inaccuracy
    - We consider these types of info to be reliable

Common Law Exception

- Declarations, **written or oral**, are admissible for their truth where:
    - (1) Made reasonably contemporaneously
        - Statement has to be made reasonably contemporaneously with the events in question
    - (2) Ordinary course of duty
        - Statement has to be made in the ordinary course of the duty/job of the declarant
    - (3) By persons with personal knowledge
        - Declarant must have personal knowledge of the events (no double/multiple hearsay)
        - Do not need to identify the specific person who made the record; a document will be admissible so long as the court is satisfied that the maker was acting under a duty to record the information
    - (4) Under a duty to make the record
        - Declarant must have had a duty to make the record
    - (5) No motive to misrepresent
        - Declarant must have had no motive to misrepresent
- Note: courts have been flexible in construing these requirements

- Example:
    - Ranger testifies that "the computer log shows Y entered the park at 2:45pm on March 23rd"
    - Does this satisfy the personal knowledge requirement? Yes, probably sufficient because courts have not insisted on any need to identify the specific individual who recorded the statement
        - As long as recorded by someone in the course of duty and had a duty to make the record, don't have to identify the specific person
    - System of recording, circumstantial guarantee of trustworthiness that gives us the confidence the statement is reliable

Statutory Business Records Exception

- In both the *Canada Evidence Act* and the provincial *Evidence Acts* (varies considerably between jurisdictions)
    - These provisions eclipse, but do not replace the CL
    - Only version that applies in AB is the *Canada Evidence Act*
- Although the various statutes have similar purpose, there is no uniformity
    - E.g. under the CL, when a motive to fabricate is found the records are inadmissible. Compare to…
        - *Canada Evidence Act:* records are not admitted when made in the course of an investigation or inquiry, obtaining or giving legal advice, or in contemplation of a legal proceeding
        - *Manitoba/Ontario Evidence Act:* circumstances of the making of any writing or record may affect its weight, but not its admissibility

- **Basic framework:**
  - **(1)** All of the legislative provisions limit their applicability to actual documents or records – does NOT include oral statements
    - Compared to the CL which applies to both oral and written statements
    - If recorded, can use CL or one of the statutory exceptions
  - **(2)** Applies to any kind of record made in the ordinary or usual course of business

- Note: the admissibility of electronically stored information will depend on how it was created and its purpose
  - Electronic info generated *automatically* without human intervention = not hearsay = admitted as real evidence
  - Electronic info created by humans to record their observations/statements = hearsay = could use CL or statute exception
- ***Police officers' notes:**
  - **Common law and statutory business records exceptions both do not apply to police officer notes**
  - Not the kind of situation of inherent reliability of system of routine recording that the exceptions were meant to apply to – source of info isn't necessarily reliable at all
    - There may be strong motive for the person to lie, and so the mere fact that the police officer is making an accurate record of the statements made provides no inherent guarantee of trustworthiness

Res Gestae

- *Res gestae* literally defined means "facts surrounding a transaction", but it is **actually a number of distinct hearsay exceptions**
  - It is a catch-all category that contains within it a number of specific exceptions – have to invoke one of the specific exceptions to get the evidence in (can't say "res gestae" as a category, need to be specific)
  - Better phrase to encompass these statements is a **spontaneous statement** – the CL principle underlying each exception is that the statement is made before there is time for concoction
- Requirements of necessity and reliability are typically satisfied:
  - Necessity: by showing evidence is unavailable in its current form
    - I.e. no other equally satisfactory sources of evidence from the same person or elsewhere
  - Reliability: premised on the notion that statements made spontaneously leave no time for the declarant to fabricate a falsehood

Present Physical Condition Exception

- **Statements of physical condition, experienced at the present time the statements were made, are admissible** – declarant had to have made the statement *at the time he was experiencing the physical condition*
  - E.g. A can testify that he told B at the time that his face was hurting = admissible
  - E.g. Physician saying "A told me that his face hurt immediately after C hit him" = not admissible, statement is not of the physical condition at the present time, but after it happened
- **Statements of *present* physical condition are admissible**
  - E.g. Y says "B, my face hurts!". This statement of pain is admissible under the exception. B testifies in court that Y told him his face was hurting. Y can also testify that he told B at the time that his face was hurting. Can also have Y visit a physician testify "When I touched Y's face during the examination he said 'Ouch that hurts!'"
- **Past pain, past physical condition, and statements as to the cause of the real pain are NOT admissible**
  - E.g. Physician saying, Y told me his face hurt a lot after he was hit – not admissible because not a statement or present condition. Y not suffering from that condition at the time he made the statement
- Ask: *whether the declarant made the statement at the same time he was experiencing the physical condition*

Present Mental State Exception

- Many statements going to a person's state of mind are not hearsay – admissible for the fact they are said
- Only where the **statements as to the state of mind are going in for their truth** is there a need to resort to the hearsay exception
- *Overall: where a person described their present state of mind, the statement is admissible where it is relevant, made in a natural manner and not under circumstances of suspicion*

- **Step 1: is it hearsay – whether the intended use of the evidence requires that the trier of fact accept as true the declaration of mental state?**
  - Yes – if the statements are **explicit statements of a state of mind** then they are admitted as exceptions
  - No – if those statements **permit an inference as to the speaker's state of mind** (relevant for some purpose other than the truth of the statement) they are original testimonial evidence (NOT hearsay) and admitted as circumstantial evidence from which state of mind can be inferred

        - If not hearsay, then don't need to worry about this exception
- **Step 2: if yes (hearsay), must satisfy the requirements**
    - (1) Statement has to be made **naturally/spontaneously** and not in a **manner that raises suspicions**
    - (2) Only admitted to show the **declarant's intention** (not third parties) – can't use the statement of intention of one person to prove the intention of the other
        - Statement can be accepted as going to the deceased's state of mind if it shows motive
        - E.g. deceased wrote in their diary: "John [the accused] intends to kill me" – not admissible as proof of John's intent
    - (3) Not admissible to establish **past** events/intention/state of mind
        - E.g. the deceased had written in her diary: "I tried to kill myself last night but the drugs didn't take effect" – not admissible as evidence that the deceased had tried to kill herself previously

Excited Utterances Exception

- A statement relating to a startling event or condition may be admitted to prove the truth of its contents if it is made while the declarant is under the stress of excitement caused by the event or condition
- **Requirement: must be sufficiently spontaneous** – so closely associated with the event that it can be fairly stated that the mind was still dominated by the event
    - Can admit a statement made before or even after an event has taken place – that event has to be one that invokes or produces a spontaneous statement made in response to some stimulating event before there is any time for concoction or deliberation
        - Doesn't have to be during the event, but while the mind of the declarant is still consumed/dominated by the highly impressionistic event
        - Doesn't have to be immediately after, will be still part of the same "transaction" if it is closely associated with the event enough that the mind of the declarant was still dominated by the event
- The circumstantial guarantee of trustworthiness comes from the declarant being under such stress or pressure from the triggering event that the possibility of concoction or distortion when making the statement can safely be disregarded

Categorical Hearsay Exceptions Overview

Prior Identification
- Corroborate in court ID; or
- No in-court ID but witness recalls prior ID

Against pecuniary interest
- Declarant unavailable
- Against interest (to some degree)
- Personal knowledge

Against penal interest
- Vulnerability; not too remote
- On balance against interest
- Declarant unavailable, not just unwilling
- Not against accused

Dying declarations
- Settled, hopeless expectation of immediate death
- Circumstances of death
- Homicide of deceased

Present physical condition
- *Present* condition and duration

Present mental state/intention
- Natural and not suspicious
- Declarant's (not another's) present (not past) state

Excited utterances
- During or after
- Spontaneity, domination of event, risk of concoction

Prior testimony (common law)
- Unavailable
- Parties substantially the same
- Issues substantially the same
- Opportunity to cross-examine

Prior testimony (s. 715)
- Re-trial, preliminary
- Refusal or unavailable
- Presence of accused
- Full opportunity to cross-examine
- Residual discretion

Prior convictions (AEA, s. 26)
- Appeal exhausted
- Conclusive in defamation
- Otherwise weight decided by trier of fact

Admissions
- Anything said or done by other party
- Includes vicarious & common design

Declarations in the course of duty
- Original
- Contemporaneous
- Routine course of business
- Personal knowledge or system of recording
- Duty to make record
- No motive to misrepresent

Business records
- Record
- Usual and ordinary course of business

Opinion and Expert Evidence

Overview:

- Opinion vs fact
- General rules
- Lay opinion
- Expert opinion

Introduction:

- As a general rule, witnesses are only allowed to testify as to facts within their own knowledge, observation and experience
- Witnesses are not permitted to make inferences/conclusions (therefore offering an opinion) from those facts
    - The inferences are to be made by the trier of fact
    - If it is an opinion = that evidence is *presumptively inadmissible* subject to the exceptions

Opinion versus Fact

- **Fact:** objective observation
    - Facts are *always admissible* – no special rules apply
    - **First ask: is it an OBSERVED FACT?**
        - If yes – admissible
        - If no – it's an opinion – is it admissible under the lay person or expert opinion exception?

- **Opinion:** making an inference based on the observed fact
    - *Presumptively inadmissible*
    - Identification of age, height, weight, speed, emotion, etc., all call for some kind of judgment or assessment based on observation – these are all opinions, not pure facts
    - When evidence is classified as an opinion it will need an exception to be admissible – **lay opinion or expert opinion exception**
        - If all that is required to form the opinion is **ordinary experience** = **lay opinion evidence rule**
        - If **special training or expertise** is needed to form the opinion = **expert evidence rule**
            - Expert witnesses are allowed to offer opinions where triers of fact do not have special training or experience required to make the relevant inferences

- Example: a highly trained and qualified scientist testifies that after examining a gun used in a crime, it had the serial number NCC-2827
    - Her qualifications are irrelevant because she is not testifying about her opinion
    - The serial number is a fact based on an observation – no special rules apply, evidence presumptively admissible
- Example: "The driver of the car that hit me is sitting there!"
    - Sometimes what may seem like a fact is technically an opinion
    - Observations about the identity of someone may be opinions because it calls for some kind of judgment or assessment based on the observation – observation, not pure facts

General Rules Applicable to Lay and Expert Opinion Evidence

- Before ***Graat***, a lay/expert opinion on the ultimate issue at court was not permitted – "**ultimate issue rule"**
    - The concern was that to allow a witness to express her "verdict" on the very issue that the trier of fact had to decide would be "usurping the functions of the jury"
    - Fear that the trier of fact might be influenced unduly by the opinion, accepting it uncritically regardless of actual evidence of the case
- Now: "ultimate issue rule" is gone – even if a lay opinion/expert opinion on the issue before the fact is given, it is ultimately the trier of fact who renders the verdict

- Two rules still apply:
    - **(1) Opinions on pure questions of domestic law**
        - No witness, expert or otherwise, can provide an opinion on a pure question of domestic law
        - Evidence is to be about questions of fact, not law
        - Doesn't apply to foreign law – appropriate for a court to receive expert evidence about foreign law (question of fact)

- E.g. "The contract is not enforceable because it contains unconscionable terms" – inadmissible
    - This is something the court has to determine as a matter of law – cannot have expert witnesses testifying as to Canadian domestic laws
- E.g. "The contract is not enforceable under Article 49(6) of the Bolivian Civil Code – admissible
    - Can, and often do, have experts testifying on foreign law

- **(2) Rule against oath-helping**
    - **Any evidence that speaks directly to the credibility of another witness at trial**
        - A properly qualified witness can provide general information relevant in judging the credibility of a witness, but is prevented from expressing an opinion about whether a particular witness is telling the truth
        - Evidence adduced solely for the purpose of proving that a witness is truthful is *inadmissible* because the trier of fact might simply defer to those opinions rather than assessing credibility and reliability themselves
            - I.e. any evidence that speaks *directly* to the credibility of another witness at trial
            - Can't use witness A to comment on credibility, positively or negatively, of another witness at trial
            - This would usurp the function of the trier of fact, whose job it is to assess credibility
    - **Witnesses may be able to testify about issues that are *generally relevant* to credibility**
        - If all other requirements are met the court may allow the witness to provide background into or another context beyond the ken of the ordinary person to help the trier of fact understand something
        - E.g. research shows that children often recant allegations of sexual abuse – no *direct* commentary, it's a general statement that may be helpful

    - E.g. expert says "I concluded the accused was telling the truth when he denied stealing the donkey"
        - Oath helping = inadmissible
    - E.g. expert says "The accused does not fit the psychological profile of a donkey thief" – oath helping and inadmissible
        - Expert purports to show that the witness is, or is not, part of a distinctive group that exhibits a particular behaviour or capacity – generally considered to be oath helping
        - *Only admissible in very limited circumstances* where it can be shown to a very high degree of certainty the group really is distinctive and the witness really is a member of that group (although these attempts are rarely successful)
    - E.g. "Research shows that children often recant allegations of sexual abuse" – no direct commentary on this particular witness – it is a general statement that may be helpful to the trier of fact
        - Experts *may be* able to testify about issues that are relevant generally to credibility
        - Direct comment on credibility vs evidence that may be helpful to the trier of fact in assessing credibility
        - If all other requirements for admission of expert opinion testimony are met, the court may allow expert witness to provide background into/context beyond kind of an ordinary person that would help that person assess the credibility of that person

Lay Opinion Evidence

- Requirements for getting evidence in under lay opinion exception:
    - (1) Better position than trier of fact
    - (2) Persons of ordinary experience can make the conclusion
    - (3) Experiential capacity to make conclusion
    - (4) Compendious mode

(1) <u>Better position than trier of fact</u>

- *Evidence of the lay witness must reveal the fact that the witness was in a better position to make the inference/draw the conclusion than the trier of fact*
- When assessing whether it is necessary to have the lay witness express an opinion, ask whether the trier of fact is in as good a position as the witness to form the relevant conclusion – if the trier of fact is, then the lay opinion should not be admitted

- Example: lay witness says "I determined from looking at the video that the thief was wearing a white hat", and the video is available to be seen as an exhibit at trial and clearly shows this
  - The witness is in no better position than anyone else in the courtroom, including the trier of fact, to make that observation – testimony NOT admissible
- Example: witness testifies that "based on my relative speed to the defendant's, I estimated that his vehicle was travelling at 165 km/h"
  - An opinion and not a pure fact, but the trier of fact could not come to this conclusion without the benefit of this lay witness's opinion
  - Opinion of the witness is beneficial and necessary – therefore potentially admissible

(2) <u>Persons of ordinary experience can make the conclusion</u>

- Show that persons of ordinary experience can make the conclusion
- To offer lay opinion evidence, no special training or skill is needed – ordinary experience suffices
- If the information requires more than ordinary experience to testify, use the expert evidence standards

- Example: if a police officer made the statement in the last example, this is still something that ordinary experience can conclude (not like the police is testifying as a trained expert in estimating speed)
- Example: "based on experience as a police officer, I concluded that the victim suffered a third-degree tear of her left patellar tendon"
  - Not admissible under lay opinion rule – a person of ordinary experience would not be able to make this type of conclusion

(3) <u>Person must have the experiential capacity to make the conclusion</u>

- Witness must have the experiential capacity to make the conclusion – whether this *particular* witness had the experience to make it
- Example: an adult police officer could estimate that the car was going at 165km/h, but a young child would not be able to do the same because they are lacking experiential capacity

(4) <u>Opinions being expressed are merely a compendious mode of stating facts</u>

- *Have to be able to characterize the evidence as a compendious mode of expressing facts too complicated to be narrated effectively without resorting to inference*
- **Rule from *Graat*:**
  - Lay persons can give opinions where they are merely giving a comprehensive and concise statement of facts that are too subtle or complicated to be narrated effectively without the resort to inference or conclusion
- Basically: an efficient way of conveying basic facts – technically an opinion, but not concerned with usurping function of trier of fact because it is merely a way of summarizing technical facts that would be difficult to relay in an efficient and comprehensive way
  - If it is necessary to resort to "compendious" statements to communicate effectively what has been observed = lay opinion
  - But if the witness can communicate the information adequately by describing with particularity what has been observed, the witness should generally not be permitted to express an opinion

- Example: speed estimation testimony – would be too difficult to frame the same evidence/observation in a way that relies purely on fact – too hard to convey something that is intuitive and based on experience; a purely factual way of conveying this information might not even be possible, let along efficient
- Example: a conclusory opinion that "the defendant's vehicle was being driven erratically" – not a compendious mode of conveying factual information
  - Would NOT admit this under the lay opinion exception; observations more directly factual can give us a more precise idea of what happened
  - Can break it down into more factual elements – if this happened would likely be admitted

Expert Opinion (*White Burgess*)

Remember:

- **Fact vs opinion**
  - Have to make the distinction between **fact vs opinion** – if an expert's testimony relates to the facts, then the expert evidence rules don't apply
    - Have to be very <u>strict</u> about determining if evidence is purely factual and contains *zero* opinion elements to it before discarding the protective rules associated with expert evidence

        - If there is doubt – better to proceed on the basis that it is at least in part opinion evidence and apply the expert evidence rules to ensure that the evidence is carefully scrutinized before it is considered by the trier of fact
    - Be cautious – if we are too quick to conclude its just fact, many of the dangers associated with expert evidence may get in through the back door
- **Expert v lay opinion**
    - Also have to be careful **not to apply expert opinion rules if it is lay opinion** – matters of ordinary experience vs opinions that also require specialized training/expertise
        - E.g. detailed testimony about the nature of a particular injury – want specialized expertise like an orthopedic surgeon
        - E.g. liquor store employee will know the value of the stolen bottles better than most, but this training is not the kind of expertise embraced by expert evidence rules
        - E.g. someone who uses Facebook will know things about the application better than someone who does not – but they are not an expert in terms of the rule because it takes no expertise to explain how Facebook works
        - *Knowledge of things known by persons who have taken the trouble to inform themselves on a topic is not expertise*
    - An expert is someone who has **special knowledge of experience that is beyond the understanding of the average juror**
        - But it is not whether the witness is an expert – it is whether the witness, expert or not, is offering information that *requires* special training or experience to observe
        - **The substance of the evidence matters, not the status of the witness**
- **Presumptively inadmissible**
    - Expert opinion evidence is presumptively inadmissible
    - Danger that the trier of fact will over value the evidence and give undue deference to the credentials and authority of the expert
        - May defer the fact-finding process to the expert as opposed to making an independent judgment based on evidence in the case
        - Also concerns about consuming scarce resources and time – battling of experts hired by opposing parties to present different characterizations of the evidence
    - As a result, expert opinion evidence testimony is carefully scrutinized before being admitted

The *Mohan* test – leading decision from the SCC that sets out the four pre-requisites for admitting any expert opinion testimony

(1) Evidence has to be **necessary**
(2) Evidence has to be **relevant** *always have to find this – not new but built into the test*
(3) **No other exclusionary evidentiary rule applies** *also always have to find this*
(4) A qualified **expert**

(5) Weighing of **cost and** benefits: if the four conditions are met, the TJ as gatekeeper must decide, on a highly contextual basis, whether the expert evidence is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence
    - Judge must assess the costs vs benefits of receiving the evidence, and making an overall determination whether this evidence should be considered by the trier of fact

(1) <u>Necessary</u>

- Information has to be **outside of normal lay experience**; requires specialized knowledge or expertise to understand
    - If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary
- Have to show it is **truly necessary (not merely helpful) for an accurate adjudication**
    - Expert evidence will be "necessary" where the expert deals with a subject matter that ordinary people are unlikely to form a correct judgment about without assistance, where the expert provides information likely outside the experience and knowledge of the judge or jury, or where the technical nature of the information requires an explanation so that a lay trier of fact can understand
- Have to consider if there are **substitutes for expert evidence** that can address the trier of fact's knowledge gap
    - E.g. *Jury directions:* if we have a well-known social or psychological phenomenon, we may not need an expert to teach us about it, but may need a reminder for jurors as to the nature of the phenomenon
        - Judge may be perfectly capable of providing that background/context without the need for expert testimony

- E.g. complainant gave a compelling explanation as to why she had not complained to her mother at the time of the assault, rendering expert evidence about why sexual abuse victims might delay reporting unnecessary
- E.g. don't need a qualified police officer to offer an opinion if the witness is an expert who is able to testify on the matter

(2) <u>Relevant</u>

- Expert evidence must be logically relevant to a material issue
- Logical relevance
  - Will the expert evidence make it more or less likely to prove the issue at trial?
- E.g. expert evidence on an accused's dependent personality disorder would not be relevant if it was not directed at either his intention or to a mental disorder defence

(3) <u>Absence of any other exclusionary rules</u>

- Many other general rules and specific rules may act to make the evidence inadmissible
- General rules:
  - E.g. character evidence = if the expert evidence had the danger of being used solely to show that the accused was, as a result of his character, the kind of person to commit the alleged crime
- Specific rules (see above):
  - (1) Oath helping
  - (2) Pure questions of domestic law

(4) <u>Qualified expert</u>

- **Qualification**
  - Witness must be qualified to offer the opinion in the sense that the expert possesses special knowledge and expertise going beyond that of the trier of fact in the matters testified to
  - Don't need to be a leading expert – just have to show the expert has some systematic learning/training that goes beyond anecdotal observation or ordinary personal experience
- **Standard is not rigorous**
  - Provided real special training or experience has occurred, the standard of expertise is not high
  - The special training/expertise doesn't have to be acquired through formal training or education, so long as there is systematic learning that goes beyond mere anecdotal observation, transient personal experience, or modest study
  - Courts often overestimate the rigour of the qualification requirement – *not supposed to be a rigorous or difficult to meet standard*
  - Purpose is to provide information above and beyond the knowledge and experience that we would expect the ordinary trier of fact to have = as long as they have that status they are qualified
- **Once this threshold is met, any deficiencies or gaps in expertise go to weight, not admissibility**
  - E.g. someone who doesn't have clinical experience, yet has knowledge and accuracy regarding all the issues will be admissible – deficiencies would go to weight
- Note: the question isn't simply whether the witness is an expert; its *whether the witness has the expertise to offer an opinion in the relevant are*
  - The precise area of expertise of the witness is defined at the voir dire
  - Witnesses are not permitted to offer opinion evidence beyond their established expertise
- Important: the expertise must be relevant to a material issue
  - Can't qualify someone generally in a field and then move away from that subject and start testifying on other matters
    - E.g. an orthopaedic surgeon testifies that the plaintiff suffered a severe tear of the rotator cuff – this is fine, but if we go on to ask the witness how the injury was caused, and they answer that it was caused by overtraining – *does the surgeon in the ordinary course of events have any specialized knowledge* as to the particular types of activities that would cause the injury?

(5) <u>Gatekeeping function – costs and benefits</u>

- Even if we meet all four ***Mohan*** requirements – the judge has to exercise a gatekeeping function to ensure that the benefits of receiving the evidence outweigh the costs
- **Options:**
  - Not "all or nothing" – TJ may admit **part** of the testimony, **modify** the nature/scope of the proposed opinion, or **edit** the language used to frame the opinion

- **Benefits (probative value)**
    - Simply an examination of probative value – the more probative the evidence, the greater the benefit of admitting it
        - *Remember:* probative value is a function of how influential the evidence may be if it is accepted, and how believable it is
    - Is the testimony founded on proven facts? – *Extent that the testimony relies on proven facts is important*
        - Opinion must relate to the evidence in the case to have utility
    - Does the conclusion support the inference? – *Does it support the actual objective the party with the expert is attempting to achieve*
        - If it only provides minimal support for the inference sought to be made from it = not probative
    - How important is the issue? – *Does it relate to a vitally important issue? If not, exclude for efficiency reasons*
- **Reliability**
    - Question of reliability – how reliable are the underlying principles and methods associated with the expert testimony, and how reliably did that particular expert apply that knowledge/methods?
        - Becoming increasingly aware that many areas of expertise, especially within forensic science, have very dubious scientific backgrounds
        - Must consider whether the theory/technique used is "reliable" enough to warrant admitting it
    - To help assess reliability:
        - Testing – has the method of the expert been subject to independent testing?
        - Peer review
        - Error rate – high error rate will cause us to question reliability
        - General acceptance – has the method been generally accepted within the expert community? Or is it a relatively novel/unorthodox application?
        - Note: *don't require a scientific method*
    - **Novel and challenged science:** expert evidence where there is no established practice among courts of admitting evidence of that kind, or where the expert is using an established scientific theory/technique for a new purpose
        - **To be admissible, the novel science must:**
            - (i) be essential in that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert
            - (ii) be subject to special scrutiny with respect to its reliability
            - (iii) satisfy an even stricter application of the necessity and reliability inquiries
        - **If the underlying scientific theory or technique is challenged** because of the changes in the base of knowledge or because the theory/technique hasn't been closely scrutinized, the expert evidence should not be admitted without confirming the validity of the underlying assumptions
            - Court must ultimately determine whether the experience and research permit the expert to develop a specialized knowledge that is sufficiently reliable to justify placing it before the trier of fact
- **Costs (prejudice)**
    - Identifying the costs = the negative consequences that admitting the expert evidence are apt to produce
    - Includes:
        - Uncritical acceptance
        - Confusion
        - Inflaming of emotions
        - Inefficiency – undue consumption of time, diversion of attention from real issues, etc.

NOTE: anything less than clear unwillingness or inability to do so should NOT lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence

- Exclusion at the threshold stage should only occur in *very clear cases* in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence

Independence and Impartiality

- Have to make sure the expert evidence is impartial and independent – expected to provide their evidence fairly and without bias
    - Expert evidence may therefore be excluded if the witness is not independent and/or not impartial, but in most cases independence and impartiality are matters of weight, not exclusion
- *Independence* goes to the connection between the expert and the case
    - E.g. if the expert was the father of one of the defence counsels
- *Impartiality* relates to the state of mind of the expert and whether the witness is biased in favour of the party calling the expert

***White Burgess Langille Inman v Abbott and Haliburton Co* (2015 SCC)**

- At two stages of the process we have to consider the independence of the witness – during analysis of the four factors, and at the gatekeeping stage
    - In qualifying the expert, have requirement that they demonstrate a commitment to independence
    - Requires explicit challenge to provide evidence of serious conflict of interest of issue with independence
- The dominant approach in Canadian CL is to treat independence and impartiality as bearing *not just on weight, but also on the admissibility of evidence*
    - Expert evidence should be ruled inadmissible if:
        - The expert is *not impartial* – he or she cannot objectively assess the questions at hand, or
        - The expert is *not independent* - he or she provides evidence that is not the product of his or her independent judgment, uninfluenced by who has retained him or her by the outcome of the litigation
- Expert's independence and impartiality are best addressed first in the "qualified expert" element of the framework on the basis that an expert unable or unwilling to fulfill the duty of independence is not a properly qualified expert
    - But a court must still take into account during the second "gatekeeping" stage
    - Court must be satisfied that the potential helpfulness of the evidence isn't outweighed by the dangers of admitting partisan expert evidence
- If an expert's duty to provide fair, objective, non-partisan evidence is not challenged, then the expert's evidence will be admissible upon attestation or testimony that the expert recognizes and accepts that duty
    - Once the expert has provided this affirmation, the **burden** is on the party opposing the admission of the expert's evidence to show there is **realistic concern that the expert is unable and/or unwilling to comply with his or her duty to provide fair, objective and non-partisan evidence**
    - If the opposing party meets this burden, then the party adducing the evidence has the burden of establishing, on balance, that the expert is able to provide fair, objective, non-partisan evidence
    - If the party adducing the evidence cannot meet this burden, then the expert's evidence (or the parts of the evidence tainted by a lack of independence or impartiality) should be ruled inadmissible

Privilege 1: General Principles, Lawyer-Client & Litigation

Overview

- General principles
- Lawyer-client privilege
    - Rationale and scope
    - Exceptions
        - Crime/fraud
        - Innocence at stake
        - Public safety
- Litigation privilege
    - Rationale and scope
    - Status of copies
    - The implied undertaking rule

General Principles

Rule of Evidence & Procedure

- Initially at CL, privilege was considered to be exclusively a rule of evidence that only applied to exclude certain kinds of evidence at trial
- Now we view privilege as having *some kind of effect outside of legal proceedings*
    - I.e. can find information is privileged and confidential and limit other people's use or ability to obtain that information, even outside of legal proceedings
- NOT AN EVIDENTIARY RULE, BUT A PROCEDURAL RULE THAT PROTECTS INFO OUTSIDE OF COURT

- Example: privilege operating *inside* of court
    - Using privilege during cross-examination
    - "What did your spouse say to you?" – counsel for the witnesses raises an objection as it is privileged spousal communication
- Example: privilege operating *outside* of court
    - Police execute a search warrant at a lawyer's office

- Privileged communications may be revealed, so police are prevented from acquiring or looking at information until the issue of privilege can be resolved

Search for Truth vs Other Social Interests

- Privilege or a "right to confidentiality" is a "substantive rule" giving a person protection from disclosure of communications outside the trial setting
- Unlike other rules of exclusion, privilege is *not designed to facilitate the truth-finding process* – so there must be some overriding social concern or value that warrants the loss of probative evidence
- **Why do we have legal privileges?**
  - Main reason is because we want to protect certain social interests, such as the maintenance and preservation of certain relationships
    - E.g. lawyer-client
  - This has to be balanced against the search for truth and the determination of the merits of the case
  - When we see exceptions to privileges, or when privilege is recognized or not recognized in a certain case, we are *balancing* the search for truth against these other social interests

Class privileges vs case-by-case privileges

- **Class privilege:** has the presumption that the information is protected (privileged) and inadmissible
  - Also known as categorical privilege
  - The party urging admission must show why the communications should *not* be privileged
  - E.g. (1) at common law – lawyer-client privilege (2) under statute – spousal communications (3) litigation privilege
- **Case-by-case privilege:** *prima facie* assumption that communications are not privileged and are admissible
  - The party urging exclusion must show why the communications are privileged
- **Wigmore factors** – underlie class and case-by-case privilege
  - **(1)** Originate in confidence
    - Must show communication originated in circumstance where parties expected confidentiality
  - **(2)** Confidentiality essential to the function of the relationship
  - **(3)** Relationship is socially important
  - **(4)** Cost-benefit
    - Even if the first three are fulfilled, have to show the benefits of protecting the relationship outweigh the costs associated with denying relevant and probative evidence to the trier of fact

Waiver

Applies to all forms of privilege

- **Only the holder of the privilege can waive it**
  - Holder of privilege is entitled to waive that privilege and provide that information to the court
  - I.e. the right to claim or to waive the privilege belongs to its "holder" – for whose benefit the privilege was created
  - E.g. direct examination of Crown witness in a theft prosecution; witness is the spouse of the accused
    - Counsel asks, "what did your spouse say to you?". Opposing counsel objects on the ground of a privileged spousal communication. But if the witness is willing to waive to the witness, they can do so. The privilege belongs to the spouse/witness.
- **Privilege as a sword and a shield**
  - Where a party chooses to disclose only a portion of privileged communication, fairness may dictate that **the entire content** of the communication on that same manner should be disclosed
  - A party cannot use privilege as both a "sword and a shield" – can't waive when advantageous but keep privilege when not

Party Witness vs Ordinary Witness

- **Non-party witness:**
  - When dealing with ordinary/non-party witness, the parties have no right to assert privilege
  - So whether or not privilege is asserted or waived is entirely up to the witness
  - Any harm done to the witness by the erroneous admission of the info that would have been privileged is **not a ground of appeal** because the *parties are not harmed* (privilege belongs to the holder, so the parties can't complain)
- **Party witness:**
  - Parties have a right to the witness' evidence
  - Parties can complain if a claim of privilege by an ordinary witness was erroneously upheld – they have a right to that witness's evidence, no privilege/privilege was recognized erroneously
  - This can form a ground of appeal

Express Waiver vs Implied Waiver

- **Express waiver:**
  - A voluntary and informed waiver of privilege by the holder of the privilege = evidence is simply admitted
  - An express waiver of privilege will occur when the holder:
    - **(1)** Knows of the existence of the privilege; and
    - **(2)** Voluntarily evinces an intention to waive it
- **Implied waiver:**
  - May occur even if the holder of privilege would prefer not to disclose
  - Based on:
    - **(1)** an implied intention on the part of the holder to waive; and
    - **(2)** considerations of fairness and consistency (to avoid an impartial or biased view of what happened)
  - Need some manifestation of a voluntary intention on the part of the holder to waive the privilege at least to a limited extent
    - This may occur even if the holder of the privilege would prefer not to disclose the information
  - **Courts will imply waiver where fairness dictates that the information be disclosed to avoid partial/biased view of what happened**
    - May occur if a party claims privilege over part of a communication that may be detrimental to that party, but freely discloses and waives privilege over the other part of the communication that is favourable to them
    - May lead to distortion of bias in fact finding, so the court will imply a waiver of the whole communication in order to assess the facts in a clear and objective way
  - **Usually arises when a party alleges that they have acted in good faith upon the advice of legal counsel**
    - Court is going to want to know what the legal advice was – requires the disclosure of the advice received
    - Will imply waiver in these circumstances to assess whether claim of good faith reliance was actually genuine

Inadvertent Disclosure

- Traditionally, the disclosure of information protected by privilege would extinguish the privilege for all purposes, even if the disclosure was accidental or inadvertent
- Courts have become much more lenient and have departed from this rule in a variety of situations
  - Now afford greater protection for inadvertently disclosed privileged information
- No firm rule here, can only say that where fairness dictates that the info be protected despite disclosure, the court will do so

Lawyer-Client Privilege

- **A communication between a solicitor and a client, of a confidential nature and related to the seeking, forming or giving of legal advice**
  - **Wigmore:** (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client (6) are at this instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived
- **Anytime you go to a lawyer for the purpose of seeking legal advice, lawyer-client privilege will attach**
  - Privilege protects confidential communications that arise on contact
  - Privilege belongs to the client, and only the client can waive it
- **Rationale:**
  - Very robust privilege that courts are extremely reluctant to depart from, because in order to perform the obligations and duties of a lawyer well, you need full information from the client
    - Preservation of relationship – need to have the client assured that the damaging or incriminating information is not going to be disclosed or available to the other side
    - Incentive for full disclosure so that lawyers can perform their role adequately
  - Clients seeking advice must be able to speak freely to their lawyers, secure in the knowledge that what they say will not be divulged without their consent
    - The privilege is essential if sound legal advice is to be given
    - Without this privilege, clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients

Legal vs Non-Legal Advice

- **Legal advice:**
  - Ask: did the info actually stem from the seeking of legal advice?
  - Courts have interpreted this broadly – no need for a formal retainer, payment or consideration - just need to have consulted for this purpose
  - Anytime you meet with a lawyer for the purpose of seeking legal advice, the privilege will apply
- **Non-legal advice:**
  - Issue: when you have lawyers who advise clients on non-legal matters (e.g. in-house counsel)
  - Many of these lawyers will provide non-legal advice in the course of their duties
    - Info may be *confidential, but not privileged*
  - **Basic rule:** if you are providing non-legal advice there is *no privilege; if you are providing legal advice = privilege*
  - In-house counsel should be cautious of how they frame their advice to maximize their chances that legal advice will be covered
    - E.g. using different letterhead for general advice and legal advice

Confidential

- **Need to ensure that the information that privilege is claimed over is actually confidential**
  - I.e. can't share this info with third parties, or the privilege is extinguished
- **The privilege can be shared by more than one party if they are represented by the same lawyer**
  - E.g. multiple clients on the same matter and same file – the privilege will apply to any communication as long as the clients have a shared and common interest
    - But if those interests diverge then the privilege is extinguished, and the lawyer has an ethical obligation to share any information with all of the clients
- **Privilege vs confidentiality:**
  - Privilege:
    - Privilege is separate from the legal/ethical obligations of confidentiality
    - Privilege is much more powerful – courts very reluctant to find exceptions to privilege
    - Privilege is law
  - Confidentiality:
    - Confidentiality (ethical obligation) is much broader, but does not speak directly to the admissibility of evidence
    - Confidentiality requirements usually in the Code of Conduct
    - Confidentiality more or less superseded by law

Communication

- **Communication is protected, but privilege does *not attach to pure facts***
  - E.g. fact that client seen arriving at her lawyer's office is not protected since arrival is not a communication
  - BUT if the fact is integral to the communication and forms part of the communication between the lawyer and client, it will be protected
    - E.g. fee schedule and a trust account
      - Fee schedule:
        - Contains information on cost and nature of services charged – in almost all cases, protected by lawyer-client privilege because it gives you a picture of the type of advice provided
      - Account of trust funds:
        - Typically will not attract privilege – simply tells you that a client's money went or left a trust account and doesn't give any info on the nature of the relationship between the lawyer and client or the matter for which advice was sought
- **Client identity**
  - A client's identity (name and address) will normally not attract privilege because: (i) not considered to be a communication; and (ii) typically a client will not expect confidentiality in their identity
  - BUT in limited circumstances a client may go to a lawyer for the *purpose* of preserving their identity
  - If it can show that the purpose of seeking advice was to maintain anonymity and not disclose identity, it can be considered protected by lawyer-client privilege
  - E.g. hit and run driver
- **Communication or documents that pre-exist the relationship**
  - Privilege **does not apply** to any communication or document that **pre-existed** the lawyer-client relationship
  - Otherwise, incriminating documents could be insulated from disclosure to authorities
  - E.g. client facing a tax audit cannot send her financial records to a lawyer because these documents pre-existed the solicitor-client relationship

    - E.g. Paul Bernardo case – lawyer took the videotapes that were not privileged because they pre-existed the solicitor-client relationship
- **Non-communicative evidence:**
    - Non-communicative evidence, like physical evidence (e.g. bloody knife) is not communicative and therefore **not privileged**
- **Length of privilege**
    - Lawyer-client privilege survives the death of the client
    - Limited exception in wills, estates and trust cases where it can be clearly demonstrated that it would *be in the client's interest* that the communication be disclosed
    - But once privileged, always privileged

Exceptions

- **All exceptions apply to all of the legal privileges**
- Exceptions include:
    - (1) Crime/fraud
    - (2) Innocence at stake
    - (3) Public safety

Communications in Furtherance of a Crime/Fraud

- **Privilege will not protect communications that are in themselves criminal, or if made with a view to obtaining legal advice to facilitate the commission of a crime**
- Not an "exception", but instead a **negation of solicitor-client privilege** – such communications are not part of the professional relationship
- **Key is the <u>client's intent and purpose</u>**
    - The client's intention is paramount because the law will not discourage clients from seeking legal advice in good faith even regarding transactions that ultimately turn out to be illegal
        - E.g. if a client goes to a lawyer and attempts to obtain info on how to commit a crime, fraud, etc., the law will not protect this – all communications will be available to the authorities and will not be privileged
        - E.g. if a client goes to a lawyer in good faith and asks for advice on something they want to do, and that thing turns out to be criminal, it may not be excepted from the privilege – if the client didn't realize what they wanted to do was criminal in nature, privilege will still attach
- **Exception only applies to "future" crime** – *distinction between "future" and "past" crimes*
    - If the lawyer is consulted about a past crime – privilege will attach
    - If consulted about a future crime, privilege will not attach
        - I.e. privilege will not extend to communications where the client's purpose is to commit a future crime or fraud
        - But privilege will protect communications involving the litigation of past crimes or similarly, the seeking of legal advice to avoid committing future wrongs
- **Rationale:**
    - If you committed a crime you are entitled to seek advice and legal representation without fear that the lawyer will turn against you and provide incriminating information to the state
- **Beyond crime/fraud?**
    - Increasingly courts recognize an exception to lawyer-client privilege where the information reveals some kind of serious wrongdoing (e.g. abuse of process by the state)
    - Anything unlawful or an abuse of process, even if *not technically crime or fraud*, will NOT attract privilege

Innocence at Stake

- Idea is that even though we recognize this protection for lawyer-client communications, the public interest will demand that the privilege be breached where it is essential to get the information to show that the accused may be innocent
    - *Applies only to crim*
    - Textbook: test has been said to be unduly restrictive – fundamental principle is that innocent people ought not to be convicted
- **McClure test (from *Brown*) –** onus is on the accused to establish each element of the test on balance of probabilities
    - **<u>Stage 1: threshold test</u>**
        - (1) No other source
            - Accused has to show that the information he is seeking from solicitor-client communication is not available from any other source
        - (2) No other way to raise reasonable doubt
            - Without that information protected by the privilege, there is no way to raise reasonable doubt

- **<u>Stage 2: innocence at stake</u>**
  - (1) Production ("could raise")
    - Whether or not the protected material should be produced to the court for examination
    - Evidentiary burden to show that the information could raise a reasonable doubt
  - (2) Disclosure ("likely to raise")
    - If (1) is met, information will be produced to the court (not disclosed to the defence), so the judge can examine it and decide whether the information is likely to raise a reasonable doubt
    - This step is stricter than the first step of stage (2)
- If yes – privilege will be breached, and the information will be disclosed to the defence

Public Safety

- **Test:** where there is a clear and imminent risk to public safety, solicitor-client safety can be breached (***Smith v Jones***)
  - **(1)** Is there a clear risk to an identifiable group or person?
    - Not a generic threat, but need some degree of specificity
  - **(2)** Is there a risk of serious bodily harm or death?
  - **(3)** Is the threat imminent?

Litigation Privilege

Communications between a lawyer and third persons are privileged if, at the time of the making of the communication, litigation was commenced or anticipated and the dominant purpose for the communication was to use in, or advise on, the litigation

- **Litigation privilege**
  - Applies to any information obtained by the solicitor from third parties, if the information was made for the purpose of litigation, either commenced or anticipated
    - Also called "work product", "solicitor-3rd party" or "anticipation of litigation" privilege
  - Determine purpose by applying the *dominant purpose test*
- **Dominant purpose test**
  - If the dominant purpose for making the communication or acquiring it was to help prepare for existing or anticipated litigation, the privilege applies
  - If this is not the dominant purpose = no litigation privilege
- **Rationale**
  - **(1)** Incentive for parties to fully prepare for trial **(2)** facilitate adversarial process by ensuring that if people prepare, get experts, etc., this won't come back to haunt them by having the other party learn what you've done to prepare
    - Different from lawyer-client privilege – not about preservation of relationships or providing incentives for disclosure
  - Only arises in the context of actual or contemplated litigation
- **Length & Parameters**
  - Privilege ends when the litigation ends UNLESS it can be demonstrated that subsequent lawsuits are so closely related to the initial litigation that we can characterize it as part of a series of related lawsuits
  - **Litigation privilege will not apply to the material collected for the purposes of criminal litigation that is later sought to be used for civil claims** (SCC in ***Blank***)
    - Difference between crim and civil is so different that it is not a continuation of the same dispute

<u>Litigation Privilege vs Lawyer-Client Privilege</u>

- Separate and distinct privileges
- Lawyer-client privilege is much more protective and robust than litigation privilege
- Have to be careful about distinction when looking at situations where a lawyer communicates with a third party
  - Not necessarily entering the realm of litigation privilege
  - Litigation privilege and solicitor-client privilege can blur at times
  - **Can claim lawyer-client privilege if we can say that the *third party communicated with is an <u>agent</u> of the lawyer or the client,* <u>and</u> the purpose of consultation/communication was <u>to *maintain or further the lawyer-client relationship*</u>**
  - Examples:
    - Courier given privileged documents
    - Translator assisting with translating documents
    - Lawyer retains expert to assist in the consultation with the client
      - ***Smith v Jones***

        - Criminal defence counsel retained psychiatrist to interview the accused for the purposes of preparing for trial
        - In this context the psychiatrist is an agent of the lawyer, and the communications between the psychiatrist and the client (accused) was an extension of the consultation between the lawyer and the client
    - However, a third party who is only authorized to **gather** information from outside sources does NOT fall under the solicitor-client relationship (CAN fall into litigation privilege)
        - E.g. private investigator investigating and interviewing witnesses; a gatherer of information – litigation privilege will protect communications or other material deemed useful by the lawyer in advising the client

	Solicitor-client Privilege	Litigation Privilege
Purpose	Exists to protect the relationship	Exists to facilitate the adversarial process (encourages opposing parties to prepare as best they can)
Scope	Exists any time a client seeks legal advice	Applies only in the context of litigation
Duration	Permanent and survives the termination of the relationship	Temporary and ends with the litigation
Confidence	Meant to protect client confidences	Doesn't require that the communications be made in confidence
Other	Recognized as the "highest" privilege, not lightly overridden	Far more likely to be truncated

Dominant Purpose Test

- Litigation party privilege attaches to information obtained by a solicitor or agent for the solicitor from third persons, if made for the purpose of litigation either commenced or anticipated
- Canada uses a "dominant purpose" test – a document may be prepared with more than one purpose in mind, but the *dominant purpose* must be that of litigation before the privilege will attach

Status of Copies

- Question: if original document/communication is NOT covered by privilege, should the copies be privileged?
    - Normally it would be assumed that any copy also would not be covered – but there are exceptions
- **Professional skill or knowledge vs collector of information**
    - Professional skill or knowledge:
        - If the copy was obtained through the application of professional skill, if there was a selection of material (e.g. legal research – selecting particular cases), the litigation privilege attaches to the selection process and the cases you've collected
            - Cases, by definition, are publicly available – BUT the lawyer is applying their knowledge, judgment and skill to the process in the hopes that it will provide an advantage for preparing for legal proceedings
        - Overall: work products that involve research, skill and knowledge on the part of the lawyer = privilege
    - Collector of information:
        - When the lawyer is acting as a collector of information = no privilege
        - E.g. corporate search records, collected or gathered by the lawyer for potential use in litigation
        - E.g. lawyer speaks to a witness, who immediately after the accident wrote a statement down as a memory aid, and the lawyer copies the statement
- **Always think about purpose**

The Implied Undertaking Rule

- **Rule:** whatever is disclosed in the discovery room stays in the discovery room, unless eventually revealed in the courtroom or disclosed by judicial order
    - Documents disclosed on discovery cannot be used for anything other than the present litigation
- **Rationale:**
    - (1) Discovery is a state-sanctioned invasion of privacy; and
    - (2) By assuring litigants that the information they provide will not be used in collateral matters encourages more complete and candid discovery
- Note: this is more a civil procedure rule than an evidentiary rule
- Example:
    - If a document or communication is **not protected by privilege** and it is disclosed to the other side in civil proceedings, it doesn't mean the other side can use that information for any/all purposes

        - There is an implied undertaking made to the court to use the information only for legitimate purposes in the legal proceedings
        - The other side can **seek leave** of the court to use it for other purposes, where the public interest in that use outweighs any prejudice or harm to any other party
        - If the undertaking is **breached** in any way, the remedy is a contempt sanction (because it is an undertaking made to the court)

***Lizotte v Aviva* (2016 SCC)**

Litigation privilege

- **Characteristics of litigation privilege**
    - Gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation
        - E.g. lawyer's file, oral or written communication between a lawyer and third parties such as witnesses or experts
    - Solicitor-client privilege and litigation privilege are *distinguishable* (***Banks***)
        - The purpose of solicitor-client privilege is to protect a relationship, purpose of litigation privilege is to ensure the efficacy of the adversarial process
        - Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends
        - Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services
        - Litigation privilege applies to non-confidential documents
        - Litigation privilege is not directed at communications between solicitors and clients as such
- **Litigation privilege is a class privilege**
    - It is recognized by CL courts and gives rise to a *presumption of inadmissibility* for a class of communications, namely those whose dominant purpose is preparation for litigation (***Blank***)
    - This means that any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless that case is one to which one of the exceptions to that privilege applies
        - So the **onus** is not on a party asserting litigation privilege to prove on a case by case basis that the privilege should apply in light of the facts of the case and the "public interests" that are at issue
- **Litigation privilege is subject to clearly defined exceptions and not to a case-by-case balancing exercise**
    - Exercise of balancing competing interest is associated with case-by-case privileges, NOT class privileges
        - Concern: a balancing test would lead to unnecessary uncertainty and proliferation of pre-trial motions in civil litigation (***Chrusz***)
    - Deviations from the rule should be dealt with as a clearly defined exception rather than as a new balancing exercise each time a privilege claim is made
    - These include the exceptions relating to public safety, the innocence of the accused, and criminal sanctions
        - Other exceptions may be identified in the future, but they will always be based on narrow clauses that apply in specific circumstances
    - Note: the court did leave open the possibility of additional specific exceptions to litigation privilege, including a possible exception for "urgency and necessity" – but as none of the facts of the case were found to possibly justify such an exception, consideration was left for another day
- **Litigation privilege can be asserted against third parties, including third party investigators who have a duty of confidentiality**
    - Litigation privilege can be asserted against anyone, including administrative or criminal investigators, not just against the other party to the litigation
- **Should not be denied the right to claim litigation privilege without "clear and explicit legislative language to that effect"**
    - Presumption that a legislature doesn't intend to change those fundamental CL rules like litigation privilege, without any clear and explicit provisions saying so
    - Litigation privilege, like solicitor-client privilege, cannot be abrogated by inference and that clear, explicit and unequivocal language is required in order to lift it

Privilege 2: Spousal, Settlement Negotiation & Case-by-Case

Overview:

- Spousal privilege
- Settlement negotiation privilege
- Case-by-case privilege

Spousal Privilege

No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage

- **At common law:**
  - Spouses were <u>not competent</u> to testify because of their interest in the case = issue of spousal privilege never came up
  - Competency relates to whether a witness is entitled to testify at all (may prevent them from testifying), whereas with privilege the person must testify but may refuse to answer certain questions under a claim of privilege
    - E.g. a party calls Mr. Jones to the stand and opposing party objects on the basis that Mr. Jones is the plaintiff's spouse
      - This is an objection, but not to the content of Mr. Jones's testimony – rather to the competence to testify as a witness about anything
      - But **rules against spousal competence was abolished years ago**
  - In the mid/late 1800s, spouses were made competent and compellable by legislation
    - Spousal privilege provided for in the *Canada Evidence Act* s 4(3)
    - The rendering of a spouse competent to testify should not sweep aside the privilege
- **Competence vs privilege:**
  - Competence: relates to whether or not a witness can testify at all
  - Privilege: relates to the actual **content** of the testimony
    - Exclusionary rule that only applies to certain types of evidence, not to the ability of the witness to testify as a general matter
    - E.g. party cross-examines witness asking, "what did your spouse say to you?"
      - Witness's lawyer objects based on the content of the answer - the spousal communication that is alleged to be protected by spousal privilege
- **Today: originates in statute**
  - ***Canada Evidence Act,* s 4(3):**
    - No husband is compellable to disclose any *communication* made to him by his wife *during their marriage,* and no wife is compellable to disclose any communication made to her by her husband during their marriage
  - ***Alberta Evidence Act,* s 8:**
    - A spouse or an *adult interdependent partner* is not compellable to disclose any communication made to him or her by their other spouse or adult interdependent partner during their marriage or adult interdependent relationship
  - Similar acts but main difference is AB includes "adult interdependent partner" – presumably applies to **common law partners**

Jury Instruction

- In **any jury trial,** in any case where spousal privilege is asserted and upheld and challenged, the trial judge **<u>must give an instruction to the jury:</u>**
  - (1) All legally married spouses have a statutory right to assert a privilege;
  - (2) The privilege belongs to the witness, not the accused;
  - (3) The decision whether to assert the privilege belongs to the witness, not the accused.
- This instruction is designed to protect the accused from adverse inferences about the spouses' decision whether or not to convey the spouses' communication

Rationale

1) **Sharing of confidences:** provide an incentive for spouses to be candid and forthcoming in their communications with one another
2) **Preservation of marital harmony:** prevents a situation where one spouse is testifying potentially against the interest of the other
3) **Indelicacy:** would be delicate/unseemly to have one spouse testify about communications made during the marriage

- BUT – these rationales are somewhat questionable in the contemporary setting – as a result many courts seek to confine the scope of spousal privilege as far as they can, given the statutory protection for spousal communications

Limitations

- **Privilege only applies to communications <u>made during the marriage</u>**
  - Doesn't apply to communications made before or after the marriage
  - But, courts have not been clear on whether the dissolution of marriage by death or divorce extinguishes spousal privilege
    - Some courts say because there is no more marital harmony to preserve, privilege does not apply
    - Others say privilege should still extend as an incentive for full and frank communications during marriages
  - Textbook view: privilege ends with marriage
- **Communication**
  - ***Communication <u>doesn't have to be confidential</u>***
    - E.g. ordinary conversations at dinner in front of third parties, with no intention that communication remains confidential
  - ***Observations are <u>not</u> communications***
    - E.g. counsel asks, "what happened next?; spouse replied, "I saw my husband run into the kitchen covered in blood and holding a knife" – privilege does NOT apply here

Settlement Negotiation Privilege

What is it

- A common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute
- Settlement privilege is a class privilege, so it *applies presumptively* and does not need to be invoked by the parties

Rationale

- As a matter of public policy, litigants are encouraged to settle their disputes without the need to go to trial – encourages *honest and frank discussions* between the parties
- Want to encourage parties to settle cases prior to trial – in order to provide that incentive, we want them to be confident that any admissions/confessions they make during the course of negotiations won't come back to haunt them from the other side

Requirements

1) Litigious dispute ongoing or contemplated;
2) Communication intended (expressly or implied) to be kept confidential and not disclosed in the event that negotiations fail;
3) Purpose of the communication must be to effect/facilitate <u>settlement</u> of the litigation

Application

- (1) Applies to the parties involved in the negotiations (preventing one from using admissions made against each other); and also (2) protects communications from being revealed to third parties
- Example:
  - Settlement reached between Plaintiff A and Defendant B, but Co-Defendant C wishes to know what the terms of the settlement are – settlement negotiation privilege prevents co-defendant C from gaining access to that information

Overriding the Privilege (textbook notes)

- **Courts are more willing to disclose matters discussed in settlement negotiations than communications in solicitor-client privilege – less robust**
- Settlement privilege can be overridden if the party seeking to override the privilege shows a <u>competing public interest outweighs the public interest in encouraging settlement</u>
- Key factor 1 - relevance: the **relevance** of and use to be put for the communications sought
  - Public policy basis is to prevent anything said in settlement negotiations being relied upon as an admission against their maker – the privilege protects admissions
- **Where communication sought is not to be used against its maker and there is little or no prejudice:**
  - Compelling public policy purpose is NOT triggered
  - Courts more inclined to override the privilege
- Key factor 2 - necessity: the admission of otherwise privileged communications has to be **necessary,** either to achieve the agreement of the parties to the settlement or to address a compelling or overriding interest of justice
  - E.g. **established exceptions**
    - To show that an agreement apparently concluded should be set aside on the grounds of misrepresentation, fraud or undue influence

        - If the exclusion of evidence would act as a clock for perjury, blackmail or other unambiguous impropriety
        - Where an offer is expressly made "without prejudice except as to costs"
    - One well-recognized exception is to <u>prove the existence or scope of a settlement</u>
- **Guiding factors in finding an exception:**
    - (1) If the settlement or discussions surrounding a settlement are at issue, then presumably the privilege does not apply
    - (2) Relevancy and prejudice need to be considered – where there is potential prejudice to the makers, the courts are more protective of the privilege
    - (3) There needs to be a compelling public interest to override the protection
- Settlement privilege is a CL rule and it is open to parties to contract out of CL rules
    - Parties may strengthen or loosen the common law parameters
    - However any override of the "existence and scope" exception must be clearly stated and will not be presumed simply on the basis of an increased confidentiality clause

General Principles for Exceptions

- Courts will permit disclosure in two circumstances: **admission is necessary to achieve either (1) the *agreement* or (2) *the interests of justice***
    - *Agreement:* determine whether there was an agreement, or the scope of the agreement
    - *Interests of justice:* when it is more important to know what was said in the context of settlement negotiation than it is to protect privilege in those circumstances

Case-By-Case Privilege

- Many situations where a professional or other actor deals with an individual on the basis of an expectation of confidentiality
    - E.g. physician, journalist, counsellor/social worker/psychologist
- **Courts have refused to recognize any new class privileges** – including any of the above relationships
    - Why? Expansion of privilege results in the loss of much valued evidence
    - If new class privileges are created it will be through legislative action
- Instead – courts prefer to deal with them on a case-by-case approach
    - If disclosure is favoured, the court should consider whether or not **full disclosure** is necessary
    - Partial disclosure may achieve justice – court can limit the number of documents disclosed, edit out non-essential material, and impose access conditions

Test: Wigmore Factors

- (1) **Originate in confidence**
    - The communications must originate in a confidence that they will not be disclosed
    - Must show the communications originated in circumstances where confidentiality was expected by the parties
- (2) **Confidentiality essential to the function of the relationship**
    - This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties
- (3) **The relationship must be socially important**
    - The relationship must be one in which the opinion of the community ought to be sedulously fostered
- (4) **Cost-benefit analysis**
    - Even if we fulfill the prior steps, have to show that the benefits of protecting the relationship outweigh the costs associated with denying relevant and probative evidence to the trier of fact

Journalistic Sources: CEA, s 39.1(2)

- Replaces or remits the CL case-by-case test (Wigmore) for journalistic sources
    - "A journalist may object to the disclosure of information or a document before a court, person or body with the authority to compel the disclosure of information on the grounds that the information or document identifies or is likely to identify a journalistic source"
- Modification from CL test:
    - Includes necessity requirement – party has to show that the info cannot be produced by any other reasonable means
- Sec 39.1(9) – important because it reverses the burden of proof
    - No longer on the party seeking to keep the information private
    - Burden of proof is on the party requesting the information
- *Denis v Cote* (2019 SCC)

Self-Incrimination 1: Introduction and Protection for Witnesses

Overview:

- Introduction
- Protection for witnesses (s 13 of *Charter*)
    - (1) Scope
    - (2) How it works

Introduction

- **Case to meet:** As a matter of principle it is believed that a person should not be required to answer an allegation made against him unless and until the Crown has charged him and established a "case to meet" during trial by presenting evidence supporting the allegation – until then, don't have to respond
    - Presumption of innocence
    - Idea of self-incrimination resist on ideas about privacy and the inherent dignity of individuals, as well as abuse of state power and the risk that compelling the accused to answer can produce unreliable information
- **Early protection:**
    - Protection for self-incrimination in Anglo-American common law stemmed from the pre-modern and early modern era of criminal procedure – star chamber, ecclesiastical inquisitions (e.g. Spanish inquisition)
    - In response to these abuses and excesses, the **CL developed two basic rules protecting against self-incrimination:**
        - **(1) Privilege against self-incrimination**
            - The right of any witness in any proceeding to refuse to answer questions that may incriminate them (e.g. "I plead the fifth")
            - This privilege applies to any witness who may say something that is incriminating and could be used against them in later proceedings
        - **(2) Accused is competent but not compellable to testify**
            - Arose indirectly – at CL the accused was not competent to testify at trial
            - In the 19th century, the accused was made competent to testify
            - BUT legislatures specified that the accused *couldn't be compelled by the Crown to testify for the prosecution*
- **Innovation in Canadian statute – s 5 of the *Canada Evidence Act* abrogated the CL privilege against self-incrimination**
    - Means we no longer have privilege in its CL form in Canadian law – s 5(1)
        - Instead, the *CEA* gave an **immunity protection** – s 5(2)
    - **"Use immunity":** protection to those who are forced to reveal information tending to show that they have committed offences; doesn't extend to other testimony witnesses may give
        - A quid pro quo – witness gives her full and frank testimony *in exchange* for protection against the subsequent use of that evidence
        - So the witness is compelled to answer and give potentially incriminating evidence, but at the same time the evidence is protected from use in any future proceedings
    - **S. 5(1):** *No witness shall be excused* from answering any question on the ground that the answer to the question may tend to incriminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person
    - **S. 5(2):** Where with respect to any question a witness *objects* to answer on the ground that his answer may tend to incriminate him and if but for this act the witness would therefore have been excused from answering the question, the answer so given *shall not be used or admissible in evidence* against him in any criminal proceedings against him, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence
- **Limitations**
    - The witness must *invoke* the protection prior to answering the question in order to gain the immunity and protection
        - Invoke = expressly by stating her awareness or fear that the particular answer may tend to incriminate her
    - Because these provisions are only statutory in nature, it has almost been entirely *superseded by s 13 of the Charter*
        - **Sec 13 of the *Charter:*** does not require the witness to invoke the protection – protection is triggered automatically
        - **Sec 7 of the *Charter:*** protects against **derivative use immunity** – evidence derived from or discovered from **compellable testimony**
            - I.e. can't use any evidence derived from testimony – logical "but for" determination to determine whether or not derivative

- **Non-testimonial conscription (e.g. breathalyzer test, documents, standing in police line-up, giving bodily fluids)**
    - No protection in the case of non-testimonial conscription
    - Different from compelling the accused to give testimony because reliability of authentic real evidence is not affected by the manner in which it is obtained
        - When a person speaks about her guilt, she is creating *new, previously unavailable evidence* that will assist the Crown
        - With non-testimonial conscription, she is only required to hand over pre-existing real evidence
- **Governing principles that limit the reach and influence of the self-incrimination principle (textbook)**
    - (1) Aggressive protection
    - (2) Self-incrimination concept does not apply to pre-existing items of real evidence that are capable of being gathered without the participation of the accused
    - (3) Self-incrimination only provides protection against incrimination, *not against other uses of compelled information*
        - E.g. a police officer asking to blow a breath of air so he can smell their breath:
            - Using it as evidence that the accused committed an offence (accused WOULD be protected by the principle of self-incrimination); versus
            - Using it to see whether there is lawful authority to arrest the accused and get the accused to provide a breathalyzer test (NOT protected)

Sec 13 of the *Charter:* Constitutional Use Immunity

*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** – s 13*

Scope: criminal or quasi-criminal regulatory prosecutions

- Sec 13 only provides protection in criminal, or quasi-criminal regulatory prosecutions
- Because of the reference to "incriminating" and "incriminate", can't have a witness insulated from the use of previous testimony in any purely administrative or civil proceeding (e.g. disciplinary proceeding)
    - E.g. first trial is civil, second trial is criminal = s 13 CAN be used to provide protection
    - E.g. first trial is criminal, second trial is civil = s 13 CANNOT be used in the second trial
- Also refers to testimonies taken at previous "**other proceedings**"
    - Includes any previous formal legal proceeding, whether civil or criminal, including even earlier proceedings in the same manner such as an accused's previous trial, preliminary trial, bail hearing, voir dire, etc.
    - Interpreted liberally by the courts

Does NOT protect:

- Accused persons against adverse inferences being drawn from their earlier *refusal* to testify or answer questions
- "Informal" statements made by the accused outside of earlier formal proceedings (e.g. doesn't apply to police questioning)

Exceptions – perjury and contradictory evidence

- Two exceptions to the rule that earlier testimony cannot be used to incriminate a witness:
    - (1) Prosecution for perjury
    - (2) Giving of contradictory evidence
- Rationale:
    - Don't want to insulate offenders who have committed an offence involving the subversion of the truth-seeking function of the legal process to benefit from this protection
    - The exception has been interpreted purposively to allow the Crown to use earlier testimony of an accused to incriminate her in any prosecution against her where her **earlier testimony forms the *actus reus* of the offence he is alleged to have committed**
        - I.e. where the actual testimony itself (false/misleading/contradictory testimony) is the essence of the offence, e.g. obstruction of justice
        - Here the Crown is free to prove his earlier, allegedly criminal testimony

How sec 13 works

- Example: George gets into trouble with the law. In an earlier initial proceeding, George provided a testimony. Now, George is charged with an offence and is going to have his own criminal or quasi-criminal trial. In his later prosecution there are 3 scenarios:
    - (1) George does not testify
    - (2) George testifies (in his own criminal trial), and in the earlier proceeding he was not a compellable witness
    - (3) George testifies and in the earlier proceeding he was a compellable witness

- **Compellable:** someone who could have been compelled regardless of whether or not they decided to testify voluntarily
    - **Any witness other than the accused at his/her own criminal trial is potentially compellable by one of the parties in the litigation**
    - I.e. any situation where George did *not have a right to refuse testimony*
        - Distinguished from situations where there is a *right* not to be compelled as a witness
- In this scenario:
    - Compellable doesn't mean that George was forced to testify at the earlier proceeding under a court order
    - Compellable means that George *could have been compelled* if he was unwilling to testify voluntarily
- ***Nedelcu:*** court held that the fact a witness testified voluntarily without available legal compulsion being exercised does not matter – if the law **could have been used** to force their testimony, they were compellable at the proceedings
- ***NOTE:*** no rule of compellability in civil lawsuits = both parties are compellable

Scenario 1: Does NOT testify

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

- At the earlier trial, George testified, "Yes, I killed by boss, but it was self-defence". This trial ends in in a mistrial or appeal, and there is a legitimate ground for appeal and a new trial is ordered. George is on trial for the 2nd time for the same offence – this time he decides *not to testify*. Defence places the suggestion that George had an alibi, but he was on another planet when his boss was killed.
    - This is a difference story from the first time
    - Prosecution may want to introduce George's testimony from his first trial in this matter
    - **Result:** If there is an objection – **the objection will be sustained – testimony protected** under s 13
- **Rationale (SCC in *Dubois*):**
    - Having decided not to testify at the second trial, introducing the previous testimony would directly compel him to testify at the second trial in order to explain the difference in testimony
    - This would subvert the non-compellability of George at his own criminal trial and take away his right not to testify at that trial
    - Essentially, s 13 says that if an accused person chooses NOT to testify, then any previous testimony they've given in any kind of legal proceeding is going to be inadmissible for *any purpose*

Scenario 2: Does testify and in earlier proceeding NOT compellable

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

- At an earlier trial, George testified "Yes I killed by boss, but it was self-defence". At the second trial he gives a different story in his own testimony and says he couldn't have killed his boss because he was on Pluto
    - Prosecutor wants to cross-examine George on this previous testimony
    - **Result:** An objection would be overruled because the testimony is *not protected by s 13*
- **Rationale (*Henry*):**
    - George was not a compellable witness at either trial – in both cases he testified voluntarily – so it could subvert the truth-seeking function of the trial if the trier of fact was not made aware of the contradictory evidence
    - Not only may the trier of fact use the previous testimony to assess the current testimony (reliability and credibility of evidence), but they can also use the previous testimony as direct evidence of guilt (hearsay, but an **admission** and therefore admissible)
    - Basically: once the accused takes the stand at the subsequent trial, the Crown is free to use that earlier testimony to cross-examine the accused
        - If the earlier testimony contains relevant positive information that helps the Crown prove their case, the Crown is free to use it as evidence of guilt to **incriminate** the accused
        - If the earlier testimony does not contain positive information but it assists logically in showing that the current testimonial of the accused should not be believed, the Crown can use to **impeach**
    - ***Nedelcu:*** the fact that a witness testified voluntarily without available legal compulsion being exercised *does not matter* – if the law **could have been used** to force their testimony, they were compellable
        - Only if the law could not have been used to do so does the law from ***Henry*** apply

Scenario 3: Testifies and WAS previously compellable

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

- At the earlier proceeding (at which George testifies) it was the prosecution of his wife Jane for killing his boss
  - Here George *is* compellable because he is not on trial – doesn't have a right against being compelled
  - So regardless of who calls him (Crown or defence) he is a compellable witness (even if he decides to testify voluntarily)
- He testifies in the initial proceeding that "Jane didn't kill Mr. Spacey, I did". Now assume George is on trial for the same offence. He testifies that "I couldn't have killed my boss because I was on Pluto"
  - Prosecutor wants to cross-examine George on the contradiction
  - **Result:** An objection would be sustained – *testimony protected by s 13*
- Rationale:
  - Because George was compellable at the first trial, there is a **quid pro quo** – the state or the court gives you the benefit of use immunity
    - **Quid pro quo:** immunity from the Crown using incriminating evidence against you in the future in exchange for being able to testify truthfully and freely at the present hearing
    - Court and society gain the benefit of your testimony in exchange for this immunity
  - So to preserve that bargain and provide the incentive to testify truthfully, have to enforce the state side and immunize that testimony from later use
- ***Noel:*** Noel testified as a compellable witness at his brother's murder trial and while he was testifying, implicated himself in the killing. At Noel's subsequent trial for his part in the murder, s 13 was violated when the Crown was allowed to cross-examine Noel using extracts from the testimony Noel had given at his brother's trial
  - The Crown said that the earlier testimony given by Noel was being offered solely to show that the testimony Noel was now giving could not be trusted (impeachment)
  - Since that testimony contained admissions of guilt by Noel, it could incriminate him – therefore could not be used by the Crown

****Exception: Doesn't remember at first testimony, does remember at second testimony**

RULE 4: If the accused does testify at his trial, his testimony from an earlier proceeding where he was a compellable witness **can** be used at his trial to challenge his testimony (impeachment) if that earlier testimony does not have the potential to be used by the Crown as affirmative evidence of the accused's guilt (incrimination). Because an accused saying "I don't remember" is not incriminating, this statement can be used to challenge testimony.

- At Jane's trial, George testifies "I don't remember what happened that night because I was so wasted". At his own trial where he is being prosecuted, he says "I distinctly recall Mr. Spacey picking up a 3-iron and preparing to swing it at my head" (foundation for his self-defence claim).
  - Contradictory statements lead prosecution to cross-examine
  - **Result:** if there is an objection, even though George was compellable at the first hearing, the testimony is **not protected** by s 13
- **Rationale:** s 13 *only protects incriminating* testimony from earlier legal proceedings
  - Idea (***Nedelcu***) is that the earlier statement was not incriminating per se – simply saying you do not remember does not prove any elements of the offence, so the court will allow the trier of fact to consider that previous testimony for the purpose of assessing the accused's credibility
  - Current testimony can be discounted and evaluated in light of the previous contradictory statement
- We define distinction between incriminating and impeaching statements as following:
  - "Evidence given by the witness at the prior proceeding that the Crown could use at the subsequent proceeding, if it were permitted to do so, **to prove guilt, i.e. to prove one of the elements of the offence**" (Moldaver J)
- So George's testimony given at the first proceeding is not inherently incriminating – doesn't help prove any elements of the offence and doesn't contain any admission that George actually killed his boss. It is merely a statement that can be used to assess the credibility of his testimony at the second trial
- ***Nedelcu:*** N was being sued civilly in one proceeding and being prosecuted criminally as a result of a motor vehicle accident. At his criminal trial N explained what happened. Crown was permitted to cross-examine N to impeach him with testimony he gave at the civil discovery proceeding where he said he had no memory of the accident
  - Because his earlier testimony didn't contain any admissions that had the potential to prove what happened, the earlier testimony didn't have the potential to incriminate him – could be used
  - This case rejected the position in *Henry* that where an accused is compellable at earlier proceedings, *no* use can be made by the prosecution of that evidence – *Nedelcu* relied on s 13 existing as a **quid pro quo**: if the accused person

gave incriminating evidence at an earlier proceeding (the "quid"), that evidence would not be used to incriminate them in a later proceeding (the "quo")

- (1) Impossible to know when evidence is being given at earlier proceedings if it will ultimately prove to be incriminating at a later trial, so the time to make that assessment is at the later trial
- (2) Distinction between incrimination and impeachment
  - **Incriminating evidence:** evidence given at the prior proceeding that the Crown *could* use at the subsequent proceeding if permitted to prove guilt (one of the essential elements of the offence being tried for)
  - **Impeaching evidence:** evidence that is innocuous on its face, bearing no potential to be used affirmatively of guilt = Crown permitted to use prior testimony to impeach accused's testimony

Derivative Use Immunity

- **Derivative evidence:**
  - Where testimony of a compellable witness leads to the discovery of other evidence
- **Section 7 of the *Charter* excludes evidence derived from earlier testimony of a compellable witness**
  - Occurs where the authorities are attempting to use evidence against the accused that they would not have found *but for* his earlier compelled testimony
  - Works to "fill the breach" left by s 13
  - What would happen if the state could compel testimony, but something you say reveals physical evidence that might show you committed the crime? Quid pro quo would lose force if we allowed the state to use any evidence derived from compelled testimony that is itself protected
- **Onus – "but for" test**
  - Burden initially on the accused – if the accused can show plausible connection between the testimony and the discovery of the evidence, the court will expect the Crown to prove on balance that the evidence would have been discovered even without the testimony
  - If the Crown cannot do so = derivative evidence is excluded
  - Whenever there is compelled testimony, any evidence that meets the "but for" test and is derivative would be protected
- **Note: s 7 also confers "use immunity" even though the evidence is not being used to incriminate the accused at the proceedings**
  - Will occur if the Crown tries, at a deportation or extradition hearing of an individual, to use testimony or derivative evidence obtained from that individual through an "**investigative hearing**"
    - Basically: sec 7 prevents testimony and derivative evidence obtained from a witness at an investigative hearing from being used at a deportation or extradition hearing against that witness

Sec 5(2) *Canada Evidence Act*

- Regardless of circumstances, give serious consideration to advising clients to invoke the protection of this section
  - Why? Sec 5(2) will provide protection that s 13 will not if it is invoked before testimony
- **Protection:**
  - Sec 13 only prohibits *incriminating use* – very strong argument that having been already convicted at a criminal trial, you can no longer be incriminated
  - Courts have found that adducing compelled evidence that would have been inadmissible at the trial proper would be *inadmissible* at the sentencing because it is no longer about incrimination, rather about the nature of punishment
  - Sec 5(2) says that if you invoke the protection, the answer **shall not be used or admissible in evidence against the accused in any criminal proceedings** (not only for incriminating uses – just says you can't use it completely)

REVIEW – s 13

(1) Is the 2nd proceeding a criminal or regulatory prosecution?
(2) Is the defendant a natural person?
a. No – *no s 13 protection*
b. Yes – **(3) Did this person testify at the second proceeding?**
   i. No – *s 13 protection*
   ii. Yes – **(4) were they compellable at the first proceeding?**
      1. No – *no s 13 protection*
      2. Yes – **(5) Was it incriminating at the second proceeding?**
         a. (a) Helps prove the element of the offence – *s 13 protection*
         b. (b) Does not help prove the element of the offence – *no s 13 protection*

Self-Incrimination 2: Non-Compellability of the Accused

Overview:
- Introduction
- Section 11(c) of the *Charter*
- Section 7 and constitutional exemptions
- Adverse inferences from failing to testify

Introduction

Common law:
- At CL an accused was not competent to testify on his/her own behalf
- **Sec 4(1) of the *CEA:*** makes the accused competent, but only for the defence – s 4(1) says you can testify, but *can't be made compellable*
    - So at CL the accused is still not compellable by the Crown
- If the accused chooses to testify voluntarily at his/her own trial, then they have to answer all proper questions and cannot be selective

Provincial Evidence Acts are different
- ***Alberta Evidence Act*** makes all the parties to an action competent and compellable witnesses for the other party
    - **S 4(1):** The parties to an action & the persons on whose behalf the action is brought, instituted, opposed or defended are, except as otherwise provided in this Act, competent and compellable to give evidence on behalf of themselves or of any other parties
- **Exception:** in any provincial prosecution of a regulatory offence, the accused/defendant is **not compellable**
    - **S 4(3):** Nothing in this section makes the defendant in a prosecution under an Act of the Legislature compellable to give evidence for or against himself or herself
- **Overall:** in ordinary civil proceedings governed by the *Alberta Evidence Act* the parties are compellable, including the defendant. BUT if we have a quasi-criminal or regulatory prosecution under provincial law, the defendant is NOT compellable

Section 11(c)

Sec 11(c): any person charged with an offence has the right…not to be compelled to be a witness in proceedings against that person in respect of the offence

- As with other rights in s 11, 11(c) only applies to **a person charged with an offence** – such a person now has a *constitutionally guaranteed right* not to be compelled to be a witness in proceedings against that person in respect of the offence
- **"Person": 11(c) does not apply to corporations**
    - Even though personhood is normally attributed to corporations at law, because corporations do not have an inherent ability to self-incriminate, 11(c) does not apply to corporations
    - Senior officers of a corporation are compellable against that corporation. BUT if a director or officer is separately charged as an individual, the protection will apply
- **"Charged with an offence": only applies to *penal proceedings***
    - This protection only applies to penal proceedings, including criminal prosecutions, quasi-criminal, or regulatory prosecutions and anything that has significant penal consequences (that punish or stigmatize)
    - If the relevant proceeding has a penal consequence, it will be treated as having been charged with an offence
        - Might include professional discipline, but only in the rare case there is harsh punishment such as incarceration attached to a finding of wrongdoing
    - Not concerned with the *nature* of the act, but the *nature of the proceedings* themselves

Requirements for s. 11(c)
To benefit from protection under self-incrimination under 11(c), the person must be:
- **(1) Compelled to be a witness**
    - Witness = someone who furnishes testimony at a formal proceeding
        - Does not protect against informal admissions or confessions, even if they are compelled
    - Protection applies even with respect to a co-accused or co-defendant
        - This means one co-accused cannot compel another to provide testimony at trial if they are being jointly tried

        - This would result in the compulsion of the accused, which is something the Crown is not entitled to do, so a co-defendant is not entitled to either
- **(2) In proceedings against that person**
    - A proceeding can be against more than one person – it can prevent co-accuseds at a joint trial from forcing each other to testify
- **(3) In respect of the offence**
    - Requires that there be some link between the offence and the proceedings in question
    - Might also extend to related proceedings

Related Proceedings

- In some cases, the right against non-compellability in s 11(c) might also extend to related proceedings – where there is a **direct and substantive link** between, e.g., criminal and civil proceedings
    - E.g. George is arrested. He cannot be compelled by the prosecution to be a witness in his own criminal prosecution. Courts have found that if there is a direct and substantive link to a civil proceeding (e.g. attempt by the state to realize on his property in a civil forfeiture proceeding) then he won't be compelled at that proceeding as well
    - The protection extends to both the criminal prosecution and the civil forfeiture action
- **Courts have interpreted this extension of 11(c) very *narrowly***
    - Civil forfeiture is a classic example, but in many proceedings that are genuinely linked to criminal proceedings, courts have found that 11(c) does not apply and the witness is required to testify, even though he may have been an accused in related criminal proceedings
- **Overall:** the extension of s 11(c) does not mean that a person charged with an offence can rely on it to claim non-compellability at independent proceedings into the same event that comprises the alleged offence
- **Courts have expressly stated that in some cases the extension does not apply:**
    - *Protection of a co-defendant*
        - If instead of having a joint trial of co-defendants there are separate trials - the person who is not the accused in this case, but is the accused in another case is going to be compellable at the co-defendant's separate trial
    - *Civil suit*
        - Civil suit relating to the same incident of subject matter as a criminal prosecution, but compellable to testify by the other party at the civil suit despite this link
    - *Commission of inquiry*
        - Looking at potential criminal wrongdoing in a particular field: courts unwilling to protect witnesses from testifying, even if that person may be an accused or may become an accused in a related criminal proceeding

Section 7 and Constitutional Exemptions

- In limited circumstances, s 7 will **go beyond the protections of 11(c) and allow a non-accused witness to decline to testify**
    - Sec 7 will buttress 11(c) and enable a witness who is a suspect to avoid testifying
    - Why? It is contrary to the principles of fundamental justice to compel a person to testify at a proceeding, even where he is not an accused, if this is being done to obtain incriminating information about them
        - *State power to compel testimony is not to be used as a substitute for a criminal investigation*
- **Rarely permitted**
    - Normally we don't permit this – we require evidence of the non-accused witness, even if that testimony may be incriminating
    - In exchange, we present that witness and we insulate that testimony with the protections of use-immunity, and in some cases derivative use immunity
- **Test: the court *may* give the right to a person to not testify at all, even if the requirements of 11(c) are not met**
    - We do this when we can characterize the predominant purpose of compelling the witness's testimony as being to obtain incriminating information from that witness
- **This test is very difficult to establish**
    - In most cases it is not difficult for the state to establish that there is a legitimate purpose to compelling a witness's testimony that goes beyond seeking self-incriminating information
    - Examples of where it has not been established:
        - *Prosecution of a co-defendant*
            - May desire the witness's testimony in order to prove the guilt of the co-defendant
            - Extend use immunity and derivative use immunity to the witness's testimony, but we don't prohibit the crown from calling the co-accused to testify in the co-accused's separate trial
        - *Civil suit*
            - Most of the time the constitutional exemption from testifying is not granted to a witness in a civil suit, even if that witness may become an accused in a separate criminal proceeding

        - *Commission of inquiry*
            - General public purpose to determine some issue of social policy – state will be justified in compelling the witness's testimony to serve those public purposes
    - **Overall:**
        - Only if we can show bad faith (that this is an attempt to actually conscript a person against themselves and make self-incriminating statement) can we grant a constitutional exemption under s 7

Adverse Inferences from an Accused Failing to Testify

The failure of the accused to testify cannot be used as evidence of his guilt, although where the evidence in the case already shows the accused to be guilty BARD, the trier of fact may use the failure of the accused to testify to conclude that the accused has no explanation that could raise a reasonable doubt

- **Issue:** when, if ever, we can make an adverse inference from the failure of the witness to testify
    - Even though the accused has a constitutional right not to testify, if it often inadvisable for the accused to refrain from doing so – this is because where the crown case calls out for an answer and where common sense suggests that the accused would be able to provide an answer if there was one, jurors are apt to consider the failure of the accused to testify to be additional proof of guilt
    - BUT it is an **error of law** for triers of fact to draw an inference from guilt from the failure of an accused person to testify in a criminal case because it severely *undercuts the right not to testify*
- ***R v Noble:*** the judge incorrectly drew an adverse inference because of the failure of the accused to testify in a trial that arose after a manager apprehended a young man who was attempting to jimmy a car
    - "If adverse effects are permitted, the failure to testify places the accused in the same position as if he had testified and admitted his guilt" (Sopinka J)
    - It is now settled that the failure to testify <u>cannot be used as a factor to assist in proving the guilt of the accused BARD</u>
        - It can be used solely for the purpose of concluding that an accused person, already proven guilty, has no answer to the charge
- **Overall:**
    - Adverse interest violates non-compellability – indirectly forces to testify when an accused has a right not to
    - The court CANNOT use a failure to testify to *make weight* to help the crown prove the case BARD
    - Court CAN use silence in a very limited way – if we have already come to the conclusion that the accused is guilty BARD, then the failure to testify can assuage us of any concern that there might have been an innocent explanation
        - Not using silence as weight, simply using it to confirm that we have reached reasonable doubt
- Example:
    - E is caught trying to break into a car by Mr. S. Mr. S demands E produce his ID and E does so. Many months pass before trial, and Mr. S forgets that E looks like. Mr. S testifies "I don't remember what he looked like, but he gave me his license and it looked exactly like him". The judge looks at the driver's license and confirms it looks exactly like the defendant
    - BUT the TJ made the error of looking at this info and saying that it *provided him with a reason to convict* – TJ says that if the defendant had some innocent explanation as to why someone else who looks remarkably like him has his license, he could have gotten up and testified at trial
    - Because E did not testify, his failure to provide an explanation in testimony adds weight to the crown's case and helps the crown prove the case BARD
    - This adverse interest violated the right of non-compellability in s 11(c) because it would have indirectly forced E to testify when he had a constitutional right not to do so

<u>In limited cases we *can* make adverse inferences from the failure of an accused to testify:</u>

- **(1) Where there is a joint trial with more than one defendant:**
    - One accused can refer to the failure of another accused to testify in an effort to raise reasonable doubt about *his or her own guilt*
    - Court cannot take the further step of using that failure to infer the guilt of the second accused who failed to take the stand
    - Basically: can use another accused's failure to testify as a way of raising a reasonable doubt about the one accused's guilt, but the trier of fact can't use that same fact to help convict the accused who declined to testify

- **(2) Where the accused advances a defence of alibi, but either fails to disclose that alibi within a reasonable period before trial or fails to take the stand and testify as to the details of the alibi**
    - If the accused fails to testify to back up the alibi, the trier of fact can draw an adverse inference that the alibi is false
    - Not mandatory inference, but permitted

- **(3) Failure of the accused to testify on appeal**
    - Prior to ***Noble***:
        - It was common for appellate courts in deciding whether a legal error was so insignificant that it occasioned no substantial wrong or miscarriage of justice, to consider the accused's failure to testify
        - Even though the judge made a legal error, court said it wouldn't have made a difference – as ammunition can point to the accused's failure to testify
    - This same inference often made in cases where the defence argued on appeal that the verdict of the court was unreasonable
        - Appeal courts would point to the accused's failure to testify to provide a reason for this happening, and use this in deciding that the verdict was a reasonable one
        - Argument that there is no longer the presumption of innocence, we have a conviction, and therefore would not violate 11(c) to consider the accused's silence
    - Since ***Noble****:*
        - Appeal courts have been much more reluctant take this approach and invoke these principles in justifying the denial of appeal on the basis of no substantial wrong of injustice, or an unreasonable verdict
    - **Overall:** status of the rule is unclear
        - Can only say that it is *still possible* for an appeal court to consider silence in this context

Section 4(6) of the *Canada Evidence Act*

Sec 4(6): the failure of the person charged…to testify shall not be made the subject of comment by the judge or by counsel for the prosecution

- **Applies only to jury trials**
    - Although the language doesn't confine it to jury trials, it has long been interpreted this way
    - Purpose: to prevent undue emphasis – since judges are less apt to make this mistake, the section can be confined to jury trials only
- **Does not apply to defence counsel**
    - Defence lawyers are free to point out to the court or jury that the accused is not obligated to testify and to warn the court against drawing an adverse inference
    - Common for defence counsel to tell juries about the constitutional right of the accused not to testify (but in the absence of evidence, the defence counsel should not explain why the accused person chose not to take the stand)
        - I.e. Crown and judges cannot comment on the failure of the accused to so do
- **Co-accuseds**
    - Accused can comment on the failure of a co-accused to testify in order to point out that the accused's testimony is not contradicted by the co-accused
    - But an accused person must not suggest that the failure of the co-accused to testify is evidence of the co-accused's guilt – this is prohibited by the right to silence
- **Applies only to adverse comments about the failure to testify**
    - "there is evidence the accused could give that he has failed to give"
- **Does not preclude favourable comments**
    - The court may, if deemed appropriate, warn the jury not to draw an adverse inference from the failure of the accused to testify
        - Novel development – traditionally courts interpreted s 4(6) to preclude even favourable comments
        - Since SCC decision in ***Prokofiew***, courts have this discretion to reiterate to the jury that the accused is not compellable, need not testify, and the failure to testify should not be used against him/her

Tactical Compulsion

- Protections against self-incrimination only happen if it is *legal compulsion, NOT tactical compulsion*
- If an accused feels they have no choice but to testify because of the strength of the evidence against them, this is tactical compulsion and s 11(c) and s 7 will NOT offer protection

Improperly Obtained Evidence: Common Law and s 24(2) of the *Charter*

Overview:

- Common law
- Section 24(2) of the *Charter*
    - Standing
    - Court of competent jurisdiction
    - Obtained in a manner
    - Disrepute

Common Law

- **At common law:**
    - The fact that evidence was obtained by some illegality on the part of the police was not relevant to the question of admissibility
    - Apart from the CL voluntary confessions rule, the court was not concerned with how the evidence was obtained
    - Basically: with the exception of involuntary statements the probative value of the evidence does not change because it was obtained illegally
- **No rule or discretion to exclude evidence on the basis of the way it was obtained**
    - Any wrongdoing would have to be addressed outside the context of the accused's criminal trial (e.g. civil lawsuit, professional discipline, etc.)
- **This rule loosened over time – evidence obtained illegally**
    - Gradually in some CL jurisdiction the rule loosened and liberalized, and a discretion was recognized at some extent to permit evidence to be excluded if it was obtained in illegal ways
    - In the US this evolved into a constitutional rule where most evidence obtained through a violation of one of the rights in the Bill of Rights was automatically excluded
- **Canada's approach before the *Charter***
    - Canada resisted these developments, and before the Charter we were almost alone in the CL world in firmly rejecting any possible exclusion on the basis of illegality or impropriety
    - ***Regina v Wray:***
        - Involuntary confession resulting from abusive interrogation to reveal location of physical evidence (rifle)
        - The confession itself was excluded because it violated the voluntary confessions rule
        - The rifle was admitted because there was no power of the court to exclude illegally obtained evidence
        - SCC said at the trial of the accused that the issue was not whether police acted legally, but whether the accused acted illegally = relevant reliable evidence should be admitted
- **Sec 24(2) *Charter***
    - Lobbying eventually resulted in the enactment of s 24(2) of the *Charter*, Canada's exclusionary rule for unconstitutionally obtained evidence

Sec 24(2) of the *Charter*

S 24(1): anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances

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

- General remedies provision in the *Charter* also applies to a criminal context
- Triggering test for exclusion seems aimed at protecting the reputation of courts by empowering judges to avoid the harm that may occur if they are seen to condone unconstitutional acts by accepting the fruits of Charter violations
    - Test reflects a "condonation theory" for exclusion

Standing

- *Does the person requesting the exclusion of evidence have legal standing to make that claim?*
- **This involves two questions:**
    - **(1) Application of *Charter*/state agency**
        - Whether or not the Charter actually applies to the conduct in question that resulted in the acquisition of the evidence by the state

        - Cannot exclude evidence under s 24(2) unless we can show that a state agent violated a Charter right
    - **(2) Claimant's own right**
        - Has to be a Charter right of the claimant, not just any Charter right
        - Usually the accused in a criminal case
        - The person making the claim has to show on balance that one of their own rights was violated, not that of a third party
        - ***R v Paolitto:*** accused could not rely on s 24(2) to exclude handwriting samples that had been obtained from an accomplice in violation of the accomplice's right to counsel – has to be the accused's *own* Charter right that is violated
- **Common rights that may be violated:**
    - Section 9: right to be free from arbitrary detention
        - Protects liberty interests – look at degree to which the accused's liberty was affected/restricted by the misconduct of the police
    - Section 8: protects privacy interest
        - Look at the extent to which the conduct of police invaded reasonable expectations of privacy
        - If we have a realm where there is a strong expectation of reasonable privacy, going to consider it to be a more serious impact on the accused's area of interest than an area that is only slightly protected by the law
    - Section 10: protecting the accused's right to self-incrimination
- **State agent**
    - Can be a citizen if through the involvement of a state agent (e.g. police requests doctor to take blood sample)
    - A private citizen will also be seen as acting as a state agent if their *primary purpose* in acting is to discover evidence with a view to criminal charges – the private citizen exercises his powers of arrest on behalf of the state
- **Nuance – catch 22 of proprietary/privacy interest**
    - E.g. in sec 8 cases where you are arrested for drug trafficking, saying the police violated your rights by saying the police searched and seized something of yours illegally. But if that something is incriminating (e.g. illegal drugs) then in order to establish standing you have to show you had some kind of proprietary right or privacy interest in that item that was searched or seized
        - If you claim a privacy interest over the gun, this could be a contested issue
        - If you didn't have possessory/private interest then you **don't** have standing
    - Solution - SCC in ***Jones:***
        - If the Crown is going to claim that the incriminating evidence is really yours, then you don't have to admit to that
        - Can simply notionally rely on the fact that this is part of the Crown's theory to claim standing
        - Not admitting or testifying to anything**,** so can't be used against you – compartmentalization

Court of Competent Jurisdiction

- *For any remedy under s 24, it must be before a court of competent jurisdiction*
- Includes:
    - (1) Superior courts
        - Note: in criminal matters the superior court usually defers to the trial court
    - (2) Trial courts
    - (3) Regulatory offence trial courts
    - (4) Extradition hearings
- Does NOT include:
    - (1) Preliminary inquiries
    - (2) Other pre-trial proceedings
    - (3) Bail hearings
    - (4) Parole board panels
- Case by case determination for administrative tribunals (depends on circumstances)

Obtained in a Manner that Violated the *Charter*

- Whether or not the evidence the Crown wishes to adduce was obtained in a manner that violated the *Charter*
- Need to establish a connection between the *Charter* breach and the discovery of the evidence (a generous, flexible approach is taken)
- **Ask:** does the connection exist and if so, what is its strength?
    - Need a sufficiently strong connection between the violation of the *Charter* and the state's acquisition of the evidence
    - This requirement involves an assessment of all the circumstances, including (1) any causal connection, (2) temporal connection and (3) contextual connection

        - Look at whether the connections exist and how strong they are to make a qualitative assessment as to whether or not there is a sufficient connection to satisfy the 'obtained in a manner' requirement
        - Courts usually interpret this requirement *liberally* to allow itself to move onto the disrepute assessment

Causal Connection

- *"But for" the violation, the state would not have acquired the evidence or realized its evidentiary value*
- **Test:**
    - In most cases the presence of a <u>clear, direct and strong causal connection</u> will satisfy the obtained in a manner requirement
    - Example: police unlawfully arrest a suspect and perform a frisk search, then discover illegal drugs. But for the Charter violation the drugs would not have been discovered so there is *no* clear causal connection
- **Courts have not insisted on a showing of causal connection**
    - Why? If we insisted on a causal connection, police might feel free to engage in searches knowing they have nothing to lose
        - Since we want to provide a disincentive, don't want to dismiss the possibility of excluding evidence merely because there is no causal connection between the impropriety and the obtaining of the evidence
    - Example:
        - Imagine police have considerable grounds to search a residence, but they want more information. So they trespass onto the property of the suspect and snoop around the exterior of the home. They find some incriminating evidence. Then they go to the judge and say they have reasonable grounds based on the things they found. If police had reasonable grounds to get the search warrant even if they hadn't conducted an unlawful search of the interior, then we wouldn't be able to establish a causal connection between the breach and the evidence
        - Don't want police to search like this as if they have nothing to lose – they've got other evidence that will either support the obtaining of a search warrant or not, but they won't lose anything by not searching/violating the Charter
    - Example:
        - Police have grounds to conduct a search or make an arrest, but in doing so they use excessive force. If we insisted on a "but for" causal connection and the police say they would have found the drugs or the gun even if we hadn't beaten up the accused, there is no causal connection and the evidence can't be excluded
        - <u>Don't want this</u> – want to maintain the possibility that evidence could be excluded to dissuade police from acting like this
- **The mere fact that we have a causal connection is not always enough to satisfy the requirement (remoteness)**
    - Courts will look at the <u>strength</u> of the causal connection conversely, ask if the connection between the breach and the acquisition of the evidence is **too remote**
        - Perhaps the violation is only a background factor and the more immediate cause of the discovery of the evidence is some other set of factors
    - **Idea:** <u>if the causal connection is weak, tenuous, or remote, we may not find a sufficient causal connection</u>
    - ***R v Goldheart***
        - Police learned of a witness during an unconstitutional search
        - Witness's testimony was evidence that became available as a result of the Charter breach, but no causal connections were found
        - SCC held that the connection was too remote because just finding the witness does not mean the witness will give a testimony – what made the testimony available was the decision of the witness to cooperate
        - Had the witness not agreed to cooperate, his discovery during the search would have led to no evidence

Temporal Connection

- Normally means the violation will *precede* the discovery of evidence BUT courts have not foreclosed the possibility of situations where the evidence is obtained **before** the Charter violation
    - Example: police discover drugs during a lawful and reasonable pat-down of the suspect. They then publicly and needlessly go on to strip search the subject – breach happened after the discovery of the evidence
- **Temporal connection test could be met if the breach preceded, or occurred during the course of, the obtaining of the evidence**
- ***R v Mian***
    - The breach was a 22-minute delay in giving the detained accused his right to counsel
    - But the search that led to the bulk of the evidence (cocaine) happened within 2 minutes of the detention starting, before a reasonable opportunity to give the right to counsel arguably even arose
    - The evidence (obtained before the breach) was excluded
    - This case suggests that perhaps evidence found before the breach *can* be excluded – but still uncertain

Contextual Connection

- There is a sufficient connection if we can say that the violation of the Charter and the acquisition of the evidence occurred in the context of the **same transaction, or a series of related transactions**
    - The "same transaction" theory has been applied in many cases, whether or not there is a causal connection
    - If we can characterize what happened as involving a single, related transaction, the court is *almost always* going to find it was obtained in a manner that violated the Charter
- ***R v Wittiwer***
    - Temporal and contextual factors can make the necessary link
- ***R v Strachan***
    - Police discovered drugs at S's apartment during a properly executed search with a warrant. While the search was going on, the police violated S's right to counsel by refusing to allow him to call a lawyer
    - Argument that even though there was a breach to the right to counsel, that Charter violation had nothing to do with the discovery of drugs
    - SCC held that *so long as the discovery of the evidence is part of the "chain of events during which the Charter violation occurred"* and the connection is not too remote, it can be said that the evidence was obtained in a manner that infringed the Charter
        - Both the 10(b) violation and the discovery of the evidence were part of the same transaction (search of home)
- ***R v Flintoff***
    - A breath sample from a suspected impaired driver was obtained because the man had been needlessly strip-searched during the course of the detention that led to the production of the sample
    - Both the breach (strip search) and the discovery of the evidence (breath sample) were part of the same chain of events (the detention)
- At times, the link is broken because events after the initial breach effectively make the breach immaterial, before the evidence is discovered

Overall Process:

- (1) The obtained in a manner requirement involves an assessment of all the circumstances, including any causal, temporal or contextual connection
- (2) We look at whether the connections exist and how strong they are, then make a qualitative assessment if there is a sufficient connection between the events to satisfy
- (3) Usually courts will interpret this requirement liberally to allow itself to move on and consider if admission of evidence would bring the admin of justice into disrepute

Disrepute

- This is at the heart of the 24(2) analysis – in many cases the courts ignore the previous requirement
- In recent years the court has simplified the framework for determining **whether evidence could bring the administration of justice into disrepute** (*Stillman* factors disregarded, replaced with *Grant*)
    - **Grant factors:**
        - **(1)** Seriousness of violation (** do NOT intermingle the objectively culpable conduct of the police from its **effect** on the claimant's Charter interest)
        - **(2)** Impact on accused's Charter-protected interests
        - **(3)** Adjudication on merits (would it outweigh society's interest in the adjudication of the case on its merits?)
- Whether it would lower long-term interests in maintaining the integrity and public confidence in the justice system, not just the immediate reaction to the individual case
    - ***R v Payette***
        - Crown wanted evidence from unconstitutional sniffer-dog search to be admitted and argued that the search was transitory, and the contraband detected was reliable
        - But these factors pertain to all these types of searches – if this was given too much weight and led to the routine admission of such evidence, it would harm the repute of the administration of justice in the long term

[1] Seriousness of the Violation

- *Assessing the blameworthiness of the conduct - the degree of culpability or blame that we would assign to the state actors who committed the Charter violation (usually the police)*
    - Spectrum ranges from: **inadvertent – negligent - deliberate**
- Focuses on the state of mind of the officer about Charter compliance, as well as systemic or institutional failure in Charter compliance
- **Three clear considerations that will colour the seriousness of the breach:**
    - (1) Blameworthiness of the conduct
    - (2) Degree of departure from Charter standards
    - (3) Presence or absence of "extenuating circumstances"
- **Concept of good faith:**
    - Has a different definition in the context of s 24(2)
    - Does not mean an absence of malice or intent to commit a wrong. It is both an inadvertent mistake and a reasonable mistake. A careless error, even if not deliberate, <u>cannot be classified as a good faith error</u> – it is at *best* a negligent/careless mistake involving an absence of bad faith
        - E.g. inexperienced, unsupervised police officer drafts deficient warrant application = careless = bad faith
- **Factors to consider in culpability:**
    - <u>Police relied reasonably on some legal/policy standard that gave them permission (in their view) to intrude in this way</u>
        - I.e. the law hasn't developed to the point where it is clear that what the police did was a Charter violation (e.g. new surveillance technology)
        - Police *reasonably assumed* based on advice they were given/existing precedent
        - If courts find it was reasonable, tend to give them the benefit of the doubt and *will admit the evidence*
    - <u>There is a governing legal standard, but not clearly defined (***Grant***)</u>
        - Police can make a reasonable error interpreting the legal standard and how to apply it
        - Given how ambiguous the rule was, can't blame for acting how they did
        - Weighs in favour of *admission*
            - E.g. in *Grant* the seriousness of the failure by police to recognize they had effectively detained G was mitigated because the point at which encounters become detentions is not always clear, and the officers did not have the guidance of standards for detention in the context of neighborhood policing
    - <u>Whether the breach was isolated or part of a broader pattern of misconduct</u>
        - If there were multiple Charter violations or multiple actors involved in systemic conduct, the case for *exclusion* is stronger
    - <u>Police can rely on exigent circumstances/circumstances of emergency</u>
        - Mitigates the seriousness of the violation
        - E.g. if they didn't act there would have been a risk to public safety, or evidence would have been lost
        - Weighs in favour of *admission*
- Some authority that courts should focus more narrowly on the motivations and conduct of the actual actors who committed the *Charter* violation – but recent authorities signal the contrary
    - ***R v GRD:*** caution card was blatantly unconstitutional, ABCA said we should not excuse the conduct of the police, there are always some ambiguities in the law
        - There is a difference if there was a decision from the SCC a week ago, versus countless potential Charter violations from the caution card being read over and over again – we shouldn't let that pass

Where Bad Faith has been Found

- If the officer *should have known* about the relevant Charter limit
- Failure to adhere to obvious constitutional limits (*R v Harrison*) constitutes reckless disregard of the Charter
- Careless conduct
- Willful violations (e.g. police requiring an accused to accept a "deal" before their lawyer came)

Note: assessment of blameworthiness is not confined to their time of breach, but applies also to the officer's testimony about their Charter compliance

[2] Impact on Accused

- **Impact of the violation on the *Charter*-protected interests of the accused – what interests were violated in the case at hand?**
  - Section 9**:** right to be free from arbitrary detention
    - Protects liberty interests – look at the degree to which the accused's liberty was affected/restricted by the misconduct of the police
  - Section 8**:** protects privacy interest
    - Look at the extent to which the conduct of the police invaded reasonable expectation of privacy
    - If we have a realm where there is a strong expectation of privacy, going to consider it a more serious impact on the accused's area of interest than an area that is less protected by law
  - Section 10: protects the accused's right against self-incrimination
- **Degree and nature of intrusion will vary between different kinds of proof:**
  - Statements:
    - General degree of intrusion that occurs when statements are unconstitutionally obtained is *high*
      - Significant intrusion into an individual's interest in liberty and autonomy
    - Due to the right of the accused to choose whether to speak to authorities, it is aggressively protected
      - Protection against self-incrimination
    - Unconstitutionally obtained statements are presumptively inadmissible
    - Where significance of the impact can be reduced:
      - Where there is a sound basis for concluding that the accused would have spoken in any event
      - Where the breach is so technical as to have no real effect on the decision to speak (don't prevent the accused from being informed of his choice to speak)
      - Where there is no causal link between the breach and statement
  - Bodily Samples:
    - Wide variation between different kinds of bodily evidence
      - Forcible taking of bodily samples or dental impressions = significant
      - Fingerprinting = not that significant
    - No presumption of inadmissibility, addressed on a case-by-case basis
    - ***R v Taylor***
      - Breach very serious because of the failure to facilitate Taylor's access to counsel at the hospital left him in the very vulnerable position of having to choose between his medical interest (in agreeing to furnish a blood sample) and his constitutional ones without the benefit of legal advice
    - Degree of intrusion depends on the extent to which privacy, bodily integrity and human dignity are compromised
  - Non-Bodily Physical Evidence:
    - Significance turns primarily on the manner of discovery and the degree to which the manner of discovery undermines Charter-protected interests of the accused
      - Serious intrusion = body-cavity searches and strip searches
      - Less serious = pat down or frisk searches
    - Intensity of privacy interests also affected by the nature of the objects searched/seized (i.e. personal documents vs articles of clothing)
  - Derivative Evidence:
    - Where derivative evidence is the product of an unconstitutionally obtained statement, the intrusiveness of the breach will be high
      - Derivative evidence attained through breaching the right to counsel also strongly favours exclusion
    - Degree of intrusion usually high unless:
      - Breach had no real impact on the Charter-protected interest of the accused to make an informed choice about whether to speak to authorities
      - The statement would have been made regardless of the breach
      - Derivative evidence would have been discovered regardless of the violation
- **Discoverability:**
  - **Likelihood that the evidence sought to be excluded would have been obtained even without the Charter breach**
    - This applies to *all* evidence
  - **All else equal, if the Crown can show that the evidence it wants to be admit would have been obtained *despite the Charter violation,* then subject to consideration of all other factors, we will be more likely to admit the evidence**

        - Purpose:
            - Even though we may still say that the Charter violation had a negative impact on the accused's Charter-protected interests, that effect will be mitigated if the state would have been entitled to that evidence even if the violation had not occurred
        - BUT could also increase the chance for exclusion:
            - If the police knew there were constitutionally valid ways to obtain the evidence, it will increase the seriousness of the breach by demonstrating a cavalier or casual attitude about Charter compliance
    - Not determinative, but one aspect of the facts that helps the Crown and weighs in favour of admission

[3] Adjudication on Merits

- Ask: how does the exclusion of the evidence affect our ability to adjudicate the case on its merits?
    - Whether the truth-seeking function of the criminal trial process would be better served by *admission* of the evidence or by its *exclusion*
- Generally**:** if we are going to exclude relevant and reliable evidence it will <u>detract</u> from our ability to get an accurate adjudication on its merits and get to the truth of what happened
    - So this is generally a factor that favours the Crown
    - But this may not be the case if the evidence is **not reliable**
- Factors in examining the impact of exclusion on the truth-seeking function:
    - **(1)** Reliability of the evidence
    - **(2)** Seriousness of the offence
    - **(3)** Importance of the evidence to the Crown's case

- **(1) Reliability of the evidence:**
    - *Evidence is not admissible regardless of how it was obtained (inconsistent with Charter)*
        - If a breach undermines the reliability of the evidence = weighs in favour of exclusion
        - Where the breach is serious enough and its impact significant, the reliability of evidence will not save it from exclusion
    - *Only applies to statements that are obtained through some constitutional violation*
        - E.g. voluntary confessions rule – if there is a s 10 violation and there is a self-incriminating statement/confession from the accused, we will question the reliability of the statement and say we are better off excluding the evidence
    - *Not concerned with the integrity of the evidence, but asking: "<u>Did the Charter violation compromise the reliability of the evidence?"</u>*
        - When it comes to physical evidence, the answer is almost always no
    - Overall: reliability is almost always going to weigh in favour of inclusion (apart from statements exception)
- **(2) Seriousness of offence:**
    - Before ***Stillman***, it was clear that the more serious the offence the accused was charged with, the greater society's interest in having adjudication on the merits = admitting the evidence
    - This is no longer the case because in ***Grant***, the court said the seriousness of the offence has the **ability to cut both ways**
        - Just as it is in society's interest to have an adjudication on merits if we admit reliable evidence, it is <u>also</u> in society's interest to ensure that we protect Charter rights when the accused is faced with a serious charge
    - Hard to say how to look at this factor
        - Since *Grant* some courts still look at it to favour admission, some see it as neutral
- **(3) Importance of evidence to the Crown's case:**
    - The more important the evidence is, the greater the social interest in admitting the evidence
        - If we conclude the evidence is not critically important, we are more likely to exclude it
        - The more crucial the evidence, the more significant or serious the breach must be for exclusion
    - But even in cases where we have reliable evidence and a serious offence and the evidence is critical to the Crown's case, courts will <u>still exclude evidence where there has been a serious violation</u> or profound effect on the accused's Charter protection, or both
        - Need to consider this factor along with all others

Improperly Obtained Evidence 2: Exclusion Apart from s 24(2)

Overview:

- Exclusion in public law litigation (any case where the Crown is a party)
- Exclusion in private litigation (purely civil cases)

- Law in this area is very unclear – not clear on where exclusion is possible apart from s 24(2)
- Power to exclude in civil cases is particularly ambiguous

Exclusion in Public Law Litigation

- Public law litigation = whenever the Crown is a party
- Looking at s 24(2) because we can argue evidence was "obtained in a manner" that violated the Charter
    - I.e. If a state agent obtained evidence in a manner that violated the Charter = 24(2)
    - But if **(1)** a state actor obtained evidence in a way that was *not obtained* in a manner that violated the Charter, or **(2)** dealing with a non-state actor in a public law case, things are different
- Because the state is a party, we can still use the Charter to exclude evidence – **what is the source of this power to exclude?** No clear answer
    - **<u>One option</u> – violation of charter right + 24(1)**
        - If we can find that the admission of the evidence at trial would violate a Charter right, we can use 24(1) and the *remedy of exclusion* to exclude the evidence
        - Basically, find the source of the violation in one of the provisions of the Charter. The allegation is that is not the obtaining of the evidence that violates the Charter but rather the <u>very admission of that evidence at trial</u>. Then use 24(2) as a remedy
            - Because evidence wasn't "obtained in a manner" we don't use 24(2) – instead we see exclusion as an appropriate and just remedy under 24(1)
    - **<u>Second option</u> – define source of exclusionary power in substantive provision (usually s 7 or 11)**
        - In other cases, the SCC has said we don't have to worry about 24(1) – just define the source of this exclusionary power in the relevant substantive provision
        - Result is the same – *discretionary power* to exclude, only difference is the mechanism for exclusion

- **When can a court use this power under the Charter to exclude evidence that was not obtained in a manner that violated the Charter?**
    - Difficult to generalize a theory or test
    - Best to use examples where courts have contemplated the idea of excluding evidence under either a substantive provision of the Charter or a combination of that provision and s 24(1)
- Examples:
    - <u>Failure to disclose evidence</u> (*McJellen* ? case)
        - SCC said that in appropriate circumstances we can order the remedy of exclusion where there has been a violation of the Crown's disclosure obligations under s 7
        - Here, the Charter violation doesn't stem from the way the state acquired the evidence – it stems from the failure of the state to disclose that evidence to the defence
            - One possible remedy is an order for exclusion under s 24(1)
    - <u>Derivative use immunity under s 7</u> (self-incrimination)
        - Recall: while sec 13 grants use immunity for any incriminating use of prior testimony, physical evidence derived from that testimony is not directly excludable under s 13
        - So – courts have used s 7 to bar the admission of that testimony, as it would violate the s 7 self-incrimination principle
        - Idea: courts can exercise their discretion to exclude this evidence under the Charter, even though it wasn't obtained in a manner that violated any Charter right
- **Unfair trial discretion**
    - Courts have also held that we can use s 7, s 11(d) or a combination of these provisions with s 24(1) to exclude evidence that would result in an unfair trial
        - Idea is that the admission of the evidence would somehow operate in a manner that is unfair to the accused
        - Look for something that goes beyond the reliability of the evidence and towards the possibility of a wrongful conviction – we always have the CL <u>discretion to exclude</u> evidence where its prejudicial effect outweighs probative value
            - Concerned here about the *conduct* that resulted in the state's acquisition of evidence
            - Misconduct more than a reliability issue

- How does this work?
  - **(1)** Situations where the court finds the Charter didn't apply in other territories (outside Canada's territories), so when the evidence was obtained the Charter did not apply
    - But if Canadians use torture to obtain – courts have signalled they would exclude this evidence on the basis that it was unfair
    - Not simply because evidence would be unreliable, but also because it is inhumane and cruel
  - **(2)** When the evidence was acquired by a non-state actor
    - E.g. private citizen like a security guard
    - Charter does not apply – but if the conduct of the actor was egregious enough we might still exclude on the basis of fairness
  - **(3)** When evidence was obtained by state actors in situations where a Charter right has been suspended
    - Because of the circumstances the application is superseded by s 1
      - E.g. Police administer roadside sobriety tests. Because you're detailed you would normally have a right to counsel under 10(b), but courts have said for practical concerns we shouldn't permit the right to counsel to be applied here (it is suspended)
    - While police can use info gleaned from these sobriety tests to justify other actions (e.g. requiring you to take a breathalyzer test), the actual evidence from the sobriety testing is *not admissible to prove guilt*
    - This evidence was not obtained in a manner that violated the Charter because s 1 justified the infringement, but it would be unfair and violate the self-incrimination principle to admit this evidence at trial, so we use ss 24(1), 11(d) or 7 keep the evidence out

Exclusion in Private Litigation

- In some cases, even in a private lawsuit, the *state may have been involved in obtaining some of the evidence* that one of the parties wishes to use
  - In theory, as long as it is a court of competent jurisdiction, we could invoke ss 24(1) or 24(2) – very few cases on this but it is possible
  - If the state is not involved in obtaining evidence or is not a party = resort to CL
- Traditional approach:
  - Very rigid stance and almost never excluded evidence on the basis that it was obtained unfairly, improperly or illegally
- New approach:
  - Some signs from the court that there is a discretion at CL that is informed by Charter values
  - Courts willing to at least consider excluding evidence in this way in purely civil cases
  - Example:
    - Where one of the parties has illegally recorded a conversation that shows something wrongful or incriminating on behalf of the other party and seeks to admit that evidence
    - Courts have signalled they may be prepared to exclude that evidence using this semi-constitutionalized CL discretion

Methods of Presenting Evidence 1: Competency & Examination-In-Chief

If a person is competent to testify, the court is entitled to their evidence. If the person does not wish to testify, they can be served with a subpoena, requiring them to attend to give evidence. Failure to attend may result in a warrant for their arrest and being found guilty of contempt of court.

Overview:

- (1) Competency
  - Generally
  - Adults
  - Children
  - Spouses
- (2) Examination-in-chief
  - Methods of questioning
  - Refreshing memory

Competency Generally

Competence = Capacity + Responsibility

- If a witness is not competent to testify, then that witness is simply not permitted to take the stand to give evidence that would be admissible at the trial

- The concept of competence incorporates 2 ideas:
    - **(1) Capacity:** the ability to give evidence
        - Consists of the ability to **observe, recollect,** and **communicate** the evidence
            - Is the witness capable of observing what was happening?
            - Is the witness capable of remembering what they observed?
            - Can the witness communicate what they remember?
    - **(2) Responsibility:** idea that there is an understanding of telling the truth in court
        - Some ability to promise or give assurance that the testimony is truthful
            - Has the witness accepted, and is aware of, the responsibility to testify truthfully?
            - Understanding the nature and consequences of an oath is a special moral obligation that goes beyond an ordinary everyday promise

- **Common law approach:**
    - CL was very suspicious of witness testimony, so developed certain rules that made some witnesses incompetent to testify
    - Those who were deemed incompetent to testify included: **(note – more or less all eliminated today)**
        - Interest: Those with a direct interest in the proceedings
            - E.g. accused in a criminal case
            - E.g. spouse of an accused
        - Crime: Anyone who had been convicted of a felony
        - Infancy: Young people generally not permitted, except for certain discretionary exceptions
        - Insanity: Mental disorder or incompetent
        - Atheist & "no oathers": Those who were not willing to take an oath, possibly because of religious reasons
- Today: over time legislatures have more or less eliminated all of these bars and we have much greater ability to call witness, save for limited exceptions

Competency for Adults

Governed by both federal and provincial legislatures:

- **Provincially – s 17 *Alberta Evidence Act***
    - In AB, the CL approach to competence is largely preserved
    - Focus is on the ability of adult witness to understand the nature and consequences of an oath
    - An understanding that goes beyond an ordinary promise in everyday life – a special obligation to tell the truth in court

- **Federally – s 16 *Canada Evidence Act***
    - Governs the competence of witnesses 14 years or older
        - Presumption of competence for adult witnesses (14 and older)
        - Use actual age, not mental capacity age
    - Burden is on the party challenging capacity to establish there is a lack of capacity
        - Then the court will direct a hearing as to whether the person has competency
    - Section 16 requires:
        - **Capacity:** whether the witness is able to communicate the evidence; and
            - Capacity to perceive, remember and communicate the evidence
            - Ability to give meaningful testimony on past observations
            - If there is a challenge to capacity:
                - **(1)** Gauge whether the person understands the nature of an oath or its equivalent
                - **(2)** Whether the person is able to communicate the evidence
                    - Note: don't necessarily need both – para 2 says if the person shows an understanding of the oath, they can testify under oath or affirmation

        - If no understanding is shown, can STILL testify if the evidence can be communicated – can testify on a promise to tell the truth
    - **Responsibility**: the nature of an oath/affirmation
        - Understanding of the additional moral obligation to speak the truth in court
        - If the witness does not understand the nature of the oath/affirmation, but has the necessary capacity to give evidence, the witness can testify on *promising to tell the truth* (permitted to give unsworn evidence)
- 2015 amendment
    - A person who testifies on a promise to tell the truth cannot be asked any questions regarding their understanding of the nature of a promise to tell the truth
    - Evidence has shown that an ability to convey understanding of what an oath is has little to do with accuracy or reliability of evidence
    - Any other issues of capacity go to weight, not to admissibility of capacity

Note: still have preference for evidence under oath or affirmation, this is the first place we look

- Is the witness willing and able to swear or confirm?
- If yes and they can communicate = they swear or make an affirmation
- If the witness is not able to understand the meaning of an oath they are still permitted to testify – it is when they DON'T want to testify when we assess that they can't understand the oath, etc.

Competency of Children

- The *Canada Evidence Act* was amended to make clear that witnesses under the age of 14 were to be treated differently and distinctly compared to those 14 and older
- A child witness does not need to take an oath/affirmation and will be permitted to testify on promising to tell the truth

- **Provincial – s 19 *Alberta Evidence Act***
    - More restrictive for children's testimony
        - Greater procedural hurdles
    - More closely resembles CL approach
    - Doesn't give a specific age cut-off
        - Reference to CL concept of "child of tender years"
        - May differ from child to child depending on maturity, education, etc.
    - Even if the child does not understand the abstract concept of an oath, if we can show the child has sufficient intelligence and understands the duty of speaking the truth = they can testify
    - **Caveat:**
        - Because this evidence is considered to be unsworn, following the CL, we have a caveat that we cannot rely on this evidence unless it is at least partially corroborated by other material evidence
            - *This is a difference between the AEA and CEA*
        - *Canada Evidence Act* s 16.1(8): no requirement for corroboration for children's evidence – unsworn evidence given on promise to tell the truth is just as reliable inherently as unsworn testimony
    - Statutory theme for AB is the same in that no oath/affirmation is needed, but corroboration of the child's testimony is still required
        - It looks at whether the child possessed sufficient intelligence and understands the duty of speaking the truth

- **Federal – s 16 *Canada Evidence Act***
    - Presumption that young people have the capacity to testify
        - The force of this presumption will vary with age and maturity
    - No oaths or affirmations for those under the age of 14
        - Key: The underlying principle is that *evidence shall be received if that person is able to understand and respond to questions*
        - Ability to communicate is all that is required
    - Burden: lies with the party challenging capacity to show there is an issue, before the court will undertake an examination of the question
        - Hold inquiry and determine if the person is able to understand and respond – if so, permitted to testify simply by promising to tell the truth
        - The younger the child is, the more likely it is to hold an inquiry if they are able to answer and respond to questions

- Cannot ask questions of witnesses regarding their understanding of the nature of a promise to tell the truth
  - Abstract understanding not required – same rationale as for adults
  - The fact that there is merely a promise does not affect the weight – we assume it is as reliable as other evidence (s 16(8))
  - It is the *making* of the promise that is correlated with greater truth-telling than the demonstration of some abstract understanding of what a promise is
- *Issue*: whether some demonstration for child witnesses of the ability to observe and recollect is required
  - Some lower court decisions suggesting that an ability to communicate inherently includes some ability to observe and recollect

Competency of Spouses

- Common law approach:
  - At CL the spouse of an accused was NOT competent or compellable to testify for the Crown
  - Considered to have an interest in the matter, so also not competent to testify for the defence
  - More than 100 years ago spouses were made competent to testify for the defence
  - Legislative developments since then

Canada Evidence Act, s 4

- Both the accused and the spouse of the accused is a competent witness for the defence
- 2015 amendments – abolished the rule of spousal incompetence and non-compellability for the prosecution for any case governed by the *Canada Evidence Act*

Alberta Evidence Act, s 4

- Same as *CEA:* spouse is both competent and compellable to testify for the prosecution, despite the fact that he/she is married to the accused

Examination in Chief

General

- In chief = direct examination
  - In Canada we say "in chief", in US they use "direct examination"
- Most evidence in criminal and civil trials is adduced through oral testimonies of witnesses, which is adduced by questioning by counsel or occasionally by the court
  - Only the answers to the questions constitute the evidence, not the questions themselves
- Rules regarding how questioning of witnesses is conducted differ dramatically between direct examination and cross examination
  - **Examination in chief = questioning your own witness**
  - **Cross examination = questioning the opposing party's witness**
- Biggest difference between the two:
  - In examination in chief generally not permitted to ask leading questions, but in cross almost always going to ask leading questions

Method of Questioning

- **(1) Open ended questions**
  - Questions that enable the witness to tell their own story
  - Reduces influence of the lawyer
  - Answers are often persuasive and credible as they are natural and untainted
  - Open-ended questions should generally be used as opposed to leading questions
  - Example: "what happened next", "when did you first notice that", etc.

- **(2) Leading questions**
  - **General rule:** generally impermissible for the party who has called a witness to ask that witness leading questions
  - **Leading question**: questions that suggest an answer or assume a state of facts that is in dispute
    - These are a matter of degree – a continuum of highly leading to not leading at all
    - Two types of leading questions:
      - (1) Suggests answer – gives the witness a clear hint as to what the answer is expected to be

        - (2) Presupposes fact – question that presupposes a fact that has not yet been proven
- **Type 1: suggests answer**
    - Examples:
        - "You checked your mirror before changing lanes, didn't you?" – highly leading, not permitted
        - "Did you check your mirror?" – less leading but still leads the witness
            - Indirectly suggests the answer – witness may conclude that it would have been a good thing to have checked which can influence the answer
- **Type 2: assuming facts not yet testified to**
    - Examples:
        - Asking "What happened after you put your turn signal on?" would be a leading question if the witness has not provided testimony that they had put their turn signal on
            - Can confuse the trier of fact by potentially leading them to believe that the facts have been testified
            - Can also suggest to the witness that the implied fact actually occurred
        - "Have you stopped beating your wife?"
            - Very egregious – presupposes facts and does not invite comment on the presupposed fact
            - Not even a real question
- **<u>Exceptions to the general rule</u>** – *examples of when leading questions can be asked*
    - **(1)** Introduction of undisputed matters
        - Issue is not contentious, or a background matter
        - E.g. "I understand you are a plumber"
    - **(2)** Identification of persons or things
        - E.g. "Have you seen this gun before?"
    - **(3)** Contradiction of statements made by another
        - Putting to the witness a contradictory statement/evidence, can frame the question in a leading way
        - E.g. "If Ms. J said you were driving the car at 7:00pm, would that be correct?"
    - **(4)** Complexity (complicated or technical matters)
        - If an expert witness is using technical jargon/abstract concepts, it will be permitted within limits for counsel to ask leading questions to simplify the evidence and make it more understandable for the court
        - E.g. "I understand that the DNA has to be extracted from the blood cells before you can begin to analyze it"
    - **(5)** Adverse or hostile
        - Own witness is declared to be adverse in interest or hostile
        - Can cross examine your own witness using leading questions
    - **(6)** Comprehension
        - If the witness has difficulty understanding the question a certain amount of leading may be permitted
        - E.g. if the witness is young, has language barrier or mental challenges
    - **(7)** Refreshing memory
        - If the witness has difficulty remembering, in which case a certain amount of leading may be permitted
- **Binary questions**
    - Those posing alternatives that a witness can select between
    - SCC in ***R v EMW*** did NOT consider binary questions to be leading questions
        - But it is a matter of *degree – continuum*
    - E.g. "less than 10 times?" "more than 5 or less than 5?"
    - Best/safest option is to get them to tell their own story – less likely to be objected to and more credible
- **What if a witness answers a leading question before there is an opportunity to object?**
    - We don't strike the evidence – it does not become inadmissible
    - The fact the evidence was garnered by a leading question will be addressed when assessing the <u>weight</u> of that evidence

Refreshing Memory

- The law enables counsel, subject to limits, to attempt to refresh the memory of a witness
- Refreshing memory rules are intended to ensure that information is not lost because it has been forgotten or overlooked
- Treated differently depending on whether the memory is refreshed *before the trial or during the trial*

- **(1) Before Trial**
    - Witnesses are generally free to use whatever means they choose to refresh their memories prior to trial, although the means chosen can affect the weight that is given to their evidence
    - **General rule:** memory can be refreshed by any method
        - E.g. leading questions, present with prior statements, documentation, etc.
    - **Exception – hypnosis**
        - Hypnosis not permitted as a means to refresh memories = inadmissible
        - ***Trochym:*** hypnosis can generate false memories; not proven to show accurate memories
            - Does not have the kind of reliability needed for novel science
            - If testimony is based, even in part, on hypnosis = inadmissible at trial

- **(2) During Trial**
    - More restrictive
    - Questions alluding to events may stimulate the memory of a witness, or counsel can obtain leave to ask leading questions (one of the exceptions)
    - Two ways:
        - **(1)** Past recollection recorded
        - **(2)** Present recollection revived

(A) Past Recollection Recorded

- Method of bringing in evidence from a witness that the witness currently has no recollection of
    - Not really talking about "refreshing" so they can testify about a memory they *currently* have instead of bringing a past memory up to trial
    - Because of the dangers there are *strict requirements*
- Requirements:
    - (1) Necessity
        - Have to show that there really is not a present memory so the only way to get evidence in is through this manner
        - The refreshing memory rules are not meant to bolster testimony through repetition or to give witnesses a script for their evidence
    - (2) Reliability
        - The past recollection must have been recorded in some reliable way
        - The witness must have had a fresh and vivid memory at the time they made the recording
        - The witness has to give present confirmation (at the present trial) that the recording accurately represented their knowledge and recollection at the time (witness must affirm they "knew it to be true at the time")
        - The original record must be used if it is procurable
    - (3) Incorporation into testimony
        - The information contained in the record does not become evidence in the case UNLESS the witness *incorporates* the information into her testimony or the document is admitted under some other rule of evidence (i.e. busines records exception)
        - Some uncertainty of whether this constitutes an exception to the hearsay rule
            - Most say yes – no current memory so not contemporaneous cross examination of evidence when produced
            - The witness has no personal memory of the details and facts recorded – it is the record supplying those details and facts
        - Prevailing practice – have the witness read the record to themselves so their attention can be drawn to the relevant portions, then asked the relevant questions
            - But still not clear about whether evidence is admitted as an exhibit or whether we admit in the form of the witness reading out the document, then having that viva voce testimony admitted into court

- Evidence is admitted in substance if necessity and reliability are made out
    - No requirement that the witness who views the document actually recalls the event before testifying to it (they knew it at the time to be true and was accurately recorded) (***Fleming v Toronto Ry Co***)
    - This procedure is routinely used to enable police officers to use their police notes – require assistance to recall matters of details of particular investigations

(B) Present Recollection Revived

- Refreshing a witness's memory so we can directly testify from that memory
- Can be a document, transcript, recording etc. as a tool for refreshing the memory, but the <u>testimony comes from the witness</u> and their answers to questions in court
    - Assumes we were successful in reviving the memory
    - Evidence *becomes* the witness's testimony
- Different from past recollection recorded
    - Past recollection = relies on record they authenticated as being an accurate recording
    - Present recollection = having seen the record the witness now professes to recall the matter
- <u>Restrictions:</u>
    - No formal restrictions on how to use this
    - Courts will sometimes prohibit the evidence from going in if there are serious questions about the reliability of the recording, timeliness, etc.
    - Discretion to not permit this method of adducing evidence where the circumstances indicate serious problems with reliability
- Testimony versus record
    - Testimony is the evidence – this is entered into court
        - The witness has her present memory revived and then testifies about the event (the record is only a trigger and not the evidence)
    - Record would NOT be admitted as an exhibit
        - The document/record they are relying on to trigger memory thus does not have to meet the strict requirements that the past recollection recorded does
        - If the document does not trigger the witness's memory, no use will be made of the record unless it is admissible under some other rule of evidence

Methods of Presenting Evidence 2: Cross-Examination

Overview:

- Method of questioning
- Credibility
- Limitations
- Failure to cross
- Collateral facts
- Prior convictions
- Prior inconsistent statements
- Incomplete cross

Method of Questioning

- In contrast with direct examination, leading questions are the preferred way of examining an opposing witness
    - **Exception:** if it becomes apparent than an opposing witness is biased towards the other side (cross-examiner is getting favourable testimony), then leading questions will no longer be permitted and it has to be conducted more as an examination-in-chief
- **Purpose:**
    - (1) Attempt to elicit favourable testimony from an opposing party's witness
    - (2) To impeach that witness's testimony
        - Focus is often to impeach credibility

Credibility

Testimonial Factors

- The four chief subjects of cross examination to help us impeach credibility are known as the testimonial factors:
  - **(1) Narrative** – witness's ability to tell the story accurately and reliably
  - **(2) Sincerity** – if the witness has any motive, bias or reason to not tell the truth
  - **(3) Memory** – witness's ability to recall the events in question
  - **(4) Perception** – witness's capacity to observe the events in question and relay the observations accurately

Impeaching Credibility

- Can discredit the witness or the witness's testimony, or both
- No closed list for methods for impeaching, but most common include:
  - **Bias** – questioning that tries to bring out any bias or conflict (e.g. corruption)
  - **Previous inconsistent statements**
  - **Capacity to perceive** – challenge on capacity to observe, recall and communicate accurately
  - **Presenting contrary evidence**
  - **Contrary to common experience** – suggest that witness's testimony is not inherently plausible or believable
  - **Attacking character of the witness -** through raising prior convictions, prior bad acts or poor reputation

Limitations

General Limitations

- General rule that **applies to all witnesses:**
  - **(1) Can't ask questions that are irrelevant, prolix or abusive**
    - Prolix: repeating the same themes
  - **(2)** Must be relevant and material
  - **(3)** Prejudicial effect cannot outweigh probative value
- If any of these happen the TJ has a discretion to intervene

- **Good faith basis:**
  - Counsel is also prohibited from asking questions that attack the integrity of a witness or suggest contrary facts unless they have a **good faith basis** for the question
  - Cross examiner must believe there is a reasonable prospect that the alternative course of events could possibly be true
    - But a cross examiner does NOT need to adduce evidence to support the suggestions made
  - TJ can enter into a voir dire to seek and obtain counsel's assurance that a good faith basis exists for putting the questions
    - Where Crown's good faith foundation is *challenged* on reasonable grounds, proper course is to seek a voir dire on the propriety and scope of any questions to be asked

Limits on Cross-examination of the Accused

- *Only come into play when the accused takes the stand to testify* - it is improper for Crown counsel to ask the accused as to the veracity of Crown witnesses and it is improper for Crown counsel to question the accused as to otherwise bad act evidence

- **(1) Veracity of crown witnesses**
  - Cannot ask the accused about the **veracity** or truthfulness of the testimony of a **Crown witness**
  - This would ask them to speculate, which is considered unfair and unduly prejudicial
  - Just because the accused cannot offer an explanation as to why the Crown witnesses might be lying or not telling the truth does not mean that those witnesses *are* telling the truth
    - Could be other reasons why they are inaccurate
- **(2) Discreditable conduct**
  - Rules relating to character evidence of the accused
  - We simply apply character evidence rules to cross-examination of the accused
- **(3) Pre-trial silence**
  - Cannot question the accused about his or her failure to speak, because of the *Charter*
  - Remember – right to remain silent before trial
- **(4) Failure to advance defence before trial**
  - Cannot question accused about this because of the *Charter* – right to remain silent before trial
  - E.g. saying this should have been brought to the authorities at an earlier date

Failure to Cross Examine

The rule from ***Browne v Dunn:*** if you intend to impeach a witness, you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him

- Idea: to ensure fairness and prevent unfair surprise
    - If going to use extrinsic evidence to impeach witness's testimony or going to argue to the court that the witness's testimony should not be believed for a particular reason, have to ensure the witness *had an opportunity to respond*
    - I.e. unfair to the witness to adduce evidence that casts doubt on his integrity when they have not been given an opportunity to deal with that evidence
- When is it triggered?
    - Does not require a formal "putting to" of every contradiction or argument, but have to ensure practically that one way or another the witness has a real opportunity to respond
    - Triggered when there is a failure to cross examine on central features or significant matters
    - Question: was the witness given an opportunity to respond to the cross-examiner's contrary position?
- Examples:
    - A crown witness testifies that the accused attacked the victim without provocation and slashed the victim with a broke beer bottle. The accused testifies that he merely pushed the victim, who fell and cut himself on glass. The accused's version of events was never put to the Crown witness

Remedies

- What happens if this rule isn't respected? Several remedies:
    - **(1)** Recall the witness and give the witness an opportunity for explanation
        - If the aggrieved party declines the offer to remedy the failure, then no special instruction needs to be given to the jury regarding the failure of the cross-examination
    - **(2)** Instruction and weight
        - If recalling isn't practical, instruct the jury to regard the contradictory testimony in light of the fact that there was no opportunity to respond, and the weight should be diminished
    - **(3)** In extraordinary circumstances can disregard the contrary evidence altogether

Collateral Facts

Collateral Facts Rule

- **Rule:** no contradiction of opponent's witness on "collateral" matters
    - This means that when a cross-examiner asks a question relating only to credibility, the **witness's answer on the collateral matter is final**

- **Rationale:** we don't want to bog down the court and potentially confuse the trier of fact by delving into issues that have little bearing on the issues in dispute in the trial
    - Don't want to lead to engaging in unimportant side issues, take undue time or unfairly surprise a witness who will not be prepared to answer the collateral evidence

- **This applies to proof, <u>not</u> questioning – ONLY LIMITS OUR ABILITY TO *CALL* EVIDENCE**
    - Applies to the proof of the contraction, proof that the witness is not telling the truth – does not restrict the scope of cross-examination itself
        - I.e. we are free to put it to the witness that they are not telling the truth/put evidence out there that contradicts testimony as long as there is a good basis for the assertion
        - But if the witness sticks to their testimony and denied the contradiction – if the issue was found to be collateral, we cannot attempt to prove that witness is not telling the truth by advancing extrinsic evidence
    - Example:
        - Counsel in cross asks the other party's witness if they were drinking heavily on the night she was identified as the robber. She replies no. Counsel calls Toby, who testifies that he saw the witness drinking on the night in question
        - Elicits an objection on the grounds that it is a collateral fact – issue is whether Toby would be allowed to testify to contradict the opposing witness's answer
        - The assumption is that it is not collateral so the party can call Toby to contradict – but if it was deemed collateral, the evidence would not be allowed

Defining Collateral Matter

- No consensus in cases – 3 approaches

- **(1) Wigmore:** *purpose unrelated to contradiction, including material issues and credibility*
    - We can advance any evidence to contradict the witness that goes to either a substantive issue in the case OR the witness's credibility
    - If the evidence is relevant and material to some issue at trial, other than pure contradiction, then it is admissible (as is any evidence that goes to credibility)
        - *If the only basis for presenting the evidence is that it contradicts the opposing witness* = inadmissible
        - If it assists the trier of fact in some other way = admissible
    - Liberal approach - defines collateral facts quite narrowly

- **(2) Phipson:** *substantive issues only, certain exceptions for credibility*
    - Prohibits proof of contradiction going to credibility
    - Proof may only be given on matters relevant directly to the substantive issues in the case
    - This approach can lead to "pigeonholing" of evidence and if rigidly applies, may *exclude valuable evidence* going to credibility
    - *Can only contradict on substantive issues – generally speaking, credibility is off limits* (with certain categorical exceptions)
    - Broader approach

- **(3) Paciocco & Stuesser:** *balancing (costs v benefits)*
    - Deciding what evidence used to contradict a witness's testimony should be left to the TJ
    - Discretionary balancing approach that looks at the cost associated with advancing extrinsic contradiction evidence and compares it to the benefits
    - Main question: is it worth the court's time to allow the opposing party to advance this evidence to contradict the witness's testimony? (Trial efficiency)
        - Is it important to prove that the witness may not have been telling the complete truth?
    - Common sense, practical approach

"Categorical" Exceptions (Phipson)

- A party cannot call evidence to contradict a witness on a collateral matter *unless* it fits within one of the exceptions
- Categorical exceptions are useful because they capture examples of situations where the benefits of receiving the extrinsic evidence are going to outweigh the costs
- Exceptions include:
    - **(1) Evidence showing bias, interest or corruption**
        - It is accepted that partiality, bias or corruption colours a witness's entire testimony
        - Such evidence is always relevant and is not collateral
    - **(2) Previous convictions**
        - Questioning on prior convictions is allow – if the witness denies or refuses to answer, the cross-examining party may then prove the convictions
        - Now governed by statute
    - **(3) Expert opinion on the reliability of witness**
        - Goes to issues of intellectual capacity, mental illness or condition that induces witness to lie/not be able to tell the truth or relay the evidence accurately
    - **(4) Reputation for trustworthiness/truthfulness**
        - CL exception that relates to reputation of witness for honesty
        - Can impeach witness's credibility by bringing up reputation witnesses to testify on witness's poor reputation for honesty
        - Questions:
            - Do you know the witness's reputation for honesty in the community?
            - Is that reputation good or bad?
            - From that reputation would you believe the witness on oath?
                - Most controversial
                - TJ will often exercise discretion to not permit – unduly prejudicial

Note: ask – is this really important to get at the truth? If the credibility of the witness is central, any evidence that materially impugns that credibility is important to hear and will likely be admitted

- **Does the question really matter to the issue in the case?**

Penney's Suggested Approach:

(1) Determine whether the evidence relates to a primarily material issue (the substantive issues in dispute, such as an element of an offence or cause of action) or a secondarily material issue (e.g. the witnesses' credibility)
    a. If the former = issue is not collateral
    b. If the latter = move to step 2
(2) If the issue relates to the witness's credibility, determine whether it fits into one of Phipson's categorical exceptions
    a. If yes = likely admissible
(3) Whether or not it fits into one of the categorical exceptions, consider the costs and benefits of receiving the evidence (Paciocco approach)

Prior Convictions

- Another way to impeach a witness's credibility is by adducing evidence of their prior convictions
- Governed federally by s 12 of the *Canada Evidence Act*
    - **12(1):** A witness may be questioned as to whether the witness has been convicted of any offence…
    - (1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction

Accused vs Non-Accused

- This provision applies to **both the accused** as a witness and when they choose to testify, as well as **any other kind of witness**
    - But the way the provision is interpreted and applied differs between accused and non-accused witnesses
    - With respect to an accused: court has a discretion to disallow questioning by weighing the probative value of the evidence against its potential prejudice
- **Non-accused witness:** always going to be able to refer to, and adduce evidence of, prior convictions in order to impugn credibility
- **Accused as witness:** has general limitations (but general rule is that prior convictions are *admissible*)
    - Can only be examined as to the fact of the conviction and the sentence imposed, but NOT concerning the conduct or facts that led to the conviction
    - **(1) "Conviction":** does not include any discharges or disciplinary findings of misconduct. Has to be criminal or regulatory conviction
    - **(2) No details of crime:** cannot adduce evidence of the details of the crime – the mere fact of the conviction itself and the sentence imposed is *all* that can be adduced
    - **(3) May be raised by defence:** to soften the blow and reduce the impact or surprise factor of having opposing counsel refer to a witness's previous conviction, it is good practice to raise the previous conviction in direct examination of your *own* witness
    - **(4) Limiting instruction:** always going to be a limiting instruction from the TJ in any jury case to ensure the prior conviction is only used on the question of credibility and not for any bad character purposes

Discretion to Exclude (*Corbett*)

- In *Corbett* the SCC interpreted s 12 to allow the TJ to exercise a discretion to exclude prior convictions
- Done on a conviction-by-conviction basis:
    - If there are a number of offences in a criminal record they are looked at **individually** to determine whether or not they should be admitted for the purposes of impeaching credibility
- Timing:
    - A *Corbett* application is to be made by the defence *before* calling evidence and *after* the close of the Crown's case
    - The defence has a right to know whether or not the accused's prior convictions will be raised in cross-examination should the accused testify
- Presumption of admissibility
    - General rule is that this evidence is admissible, even for an accused
- Prejudice vs probative value
    - Must be a careful assessment of prejudice and probative value in exercising this discretion
    - Look at four factors:
        - **(1) Nature: nature of the previous conviction**
            - Serious crime that paints the accused in a bad light = more prejudicial and more likely to be excluded
            - Offence speaks more directly to capacity for truthfulness or unwillingness to follow the law and obey court orders = more likely to admit
            - Offence that speaks to propensity for dishonesty or unwillingness to tell the truth = more likely to admit (speaks more directly to the question of credibility and truthfulness in testifying)

- Crimes of violence = unlikely to admit (does not speak directly to a question of honesty or credibility)
- E.g. a conviction for perjury or fraud is far more telling about a person's honesty and integrity than a conviction for assault

- **(2) Similarity: similarity of past offences to present offence**
  - **opposite effect of character evidence rule****
    - Character evidence rule: the more similar the previous offence, the more likely we are to admit it
  - Here: the more similar the offences are the <u>more prejudicial</u> it is
    - More likely that the trier of fact is going to infer that because they committed similar crimes in the past, they must have committed this crime
    - But this is not about whether the accused committed the offence, this is purely about credibility
  - More similar = less likely to admit
- **(3) Remoteness: time factor**
  - Further back in time we go, the less relevant the previous conviction is to the accused's present ability to testify truthfully
- **(4) Fairness (credibility of Crown witnesses)**
  - If the defence has attacked Crown witnesses on the basis of their criminal records, the court will often (but not always) find that considerations of fairness dictate that the Crown be able to put the accused's own prior convictions to the accused in an effort to impeach credibility
  - If we're impeaching credibility of Crown witnesses on the basis of previous criminality, we should be able to do the same for the accused

Prior Inconsistent Statements

- Prior inconsistent statements **only go to credibility** and are **not evidence of their truth unless adopted** by the witness
- Before counsel will be allowed to contradict a witness by proving a PIS, fairness demands that the statement be put to the witness

- **Credibility vs truth**
  - <u>Not</u> talking about the hearsay exception under the principled approach for the admission of prior inconsistent statements for their truth (***KGB*** rule)
  - Talking <u>only</u> about the use of prior inconsistent statements in cross-examination to impeach the credibility of the witness
    - Only relevant to credibility, not truth
    - If you want to have it admitted for truth, need to use the principled exception

- **Parties vs Non-parties**
  - ***If dealing with party witness, a prior inconsistent statement is an **<u>admission</u>** – therefore an automatic categorical exception to the hearsay prohibition and the prior inconsistent statement can be admitted for both truth and credibility
    - Do not need to instruct the jury
    - Accused/party does not have to adopt the statements before it can be considered as evidence against them
  - In criminal cases the rule against the Crown splitting its case will generally prevent the Crown from introducing a prior inconsistent statement of the accused for truth during cross-examination
    - If the Crown wishes to adduce a statement of the accused for its truth, it has to do that in its case in chief
      - Not fair for the Crown to hold back certain statements to use when the accused testifies
    - If we introduce a prior inconsistent statement in cross-examining an accused, then generally it is only admissible for the purposes of impeaching credibility
      - Because inculpatory statements should have been tendered as part of the Crown's case
  - If an admission of an accused has been excluded on the basis of s. 24(2) of the *Charter* or the voluntary confessions rule, it is **inadmissible** for all purposes
    - Cannot be used to impugn truth OR credibility
  - In limited circumstances, a prior statement that has been struck because there was a Charter breach will be rendered admissible to impeach the accused's credibility during cross-examination if the accused's new statement contradicts it

How to Use Prior Inconsistent Statements

- Two sets of rules depending on whether you are governed federally by the *Canada Evidence Act* or a provincial Act, although these acts work very similarly
- **Ss 10 and 11 of the *Canada Evidence Act***
    - Need to give the witness notice of the statement (fairness + saves time)
    - S. 10 – deals with written or recorded statements
    - S. 11 - deals with oral statements
- **Ss 22 and 23 of the *Alberta Evidence Act***

Procedure (similar for both acts)

- **(1)** Counsel has the witness *confirm* the present testimony
    - Purpose is to make the testimony clear in order to highlight the inconsistency
    - "Your testimony is that the deceased pulled out a gun?" "Yes"
- **(2)** The witness is then confronted with their prior statement (read the inconsistent statement)
    - "Let me read from your preliminary inquiry testimony"
    - "There you said, at no point did I see any gun. I put it to you that this was the truth and you are now not telling the truth"
- **(3)** Two possibilities from here – (1) witness *adopts* the previous testimony, or (2) witness *sticks* with current testimony
    - UNLESS the witness is a party or an accused – makes the statement admissible for its truth as an admission
        - **Possibility 1**: witness **adopts** the prior inconsistent testimony and modifies her current testimony
            - "Yes, now I remember. It was a bun, not a gun"
            - No longer have a prior inconsistent statement and the prior statement becomes the present testimony, eliminating the consistency
            - Managed to elicit favourable testimony
        - **Possibility 2:** witness **sticks** with current testimony
            - "No, I was not lying about the previous statement, I was mistaken. I now believe I saw a gun"
            - Not able to elicit favourable testimony, but have successfully impeached the witnesses' credibility and it is now out there that the witness's testimony may not be reliable

NOTE: TJ overriding discretion

- Even if s 10 and 11 are complied with, the TJ has an overriding discretion to prohibit the cross-examiner from calling evidence to prove the prior inconsistent statement where the potential prejudice exceeds its prejudicial value

Incomplete Cross-Examination

- If the witness during cross-examination dies or is unable to continue, or simply becomes unresponsive and fails to provide meaningful answers = it is a matter of discretion for the TJ
- In an extreme situation:
    - May result in discretion to disregard the evidence altogether
    - Because there was a fundamental unfairness in not having an opportunity to fully cross-examine, have to take that witness's evidence from examination-in-chief and disregard it
- Other options are decided by looking at three discretion factors:
    - **(1) Reasons –** *why the cross-examination could not be completed*
        - Fault of the witness? (e.g. deliberate conduct to frustrate the cross-examiner?)
        - Fault of the party that called the witness?
        - Fault of the cross-examiner?
    - **(2) Impact -** *impact of failure to complete the cross-examination*
        - Do we get the sense that the witness would have been vulnerable to attack if the cross-examination had continued?
        - How important is this witness's evidence to the case?
        - Is there corroborating evidence?
        - How close were we to completing the cross-examination?
    - **(3) Mitigation –** *remedies we might have available*
        - Will the witness become responsive in the future? (e.g. a child witness may need counselling)
        - Give direction/instruction to the jury to discount the evidence or give it less weight in light of the fact that there was a failure to have a complete and full cross-examination
- Can also allow the examination in chief to be considered, but give a direction to give the evidence less weight in light of the fact of the failure to have a complete and full cross-examination

Methods of Presenting Evidence 3: Real Evidence, Judicial Notice & Special Procedures for Child Witnesses

Overview

- Real Evidence
- Judicial Notice
- Special procedures for child witnesses

Real Evidence

- Real evidence = tangible items exhibited to the trier of fact
- Demonstrative evidence = aids used to help witnesses better illustrate or explain their evidence, not real evidence per se
- **Two types of real evidence:**
    - **(1)** Real evidence – original, physical real evidence
    - **(2)** Demonstrative – a testimonial aid (not real evidence per se)

Original & Physical Real Evidence

- Typically entered as an exhibit (e.g. a bloody glove)
- **Authenticity**
    - Real evidence must be relevant to be admissible and relevant is inextricably linked to authenticity
    - Has to be properly authenticated – will not be admissible until it is authenticated by a witness
    - Witness has to establish continuity of the physical evidence was maintained – that the evidence was not tampered with in any way
        - E.g. Police officer says he found the glove at the scene and gave it to the identification officer. ID officer says she took the glove, marked it, and has maintained custody of it
        - Both officers will be called as witnesses to establish continuity of the evidence
    - Authenticity is a threshold issue
        - There is no onerous standard that the evidence is 100% accurate – the determination is made by the trier of fact
        - If the trier of fact is *reasonably confident* that the evidence is authentic, it will be admissible (not a high bar)
- The trial judge must be satisfied that there is a sufficient basis to support the identification of the exhibit, its continuity and its integrity
    - Once admitted, the trier of fact makes the final determination as to authenticity and determines what *weight* to attach to the evidence
- **When evidence is unduly prejudicial**
    - In some circumstances, representation of the evidence or the evidence itself may be considered unduly prejudicial
        - Then the real evidence will be excluded where its potential to arouse undue prejudice outweighs its probative value
        - For example – a graphic/gory photograph of a crime scene might in limited circumstances be too prejudicial
        - If there is a manner of presenting the same evidence so it retains its probative value in a way that is not as prejudicial, this is preferred
    - E.g. a murder case where there is no issue about the cause of death and the only issue is identification, gruesome autopsy photos of the victim may be excluded because there is no probative value
- If evidence that may have potential prejudicial effects is admitted, the TJ should identify the proper purpose for admitting the photograph and warn the jury against its improper use

Demonstrative Evidence

- A testimonial aid (e.g. a chart, graph or model) and not original evidence of what occurred
- Used to help provide context for a witness's testimony or explain original physical evidence
- Witness has to attest that the demonstrative evidence is *necessary* for explaining the testimony
    - Commonly asked: "would that diagram help you in explaining your testimony to the jury?"
- Counsel must establish a proper foundation that:
    - (1) The expert's testimony is relevant and admissible, and the model relates to that evidence
    - (2) The expert whose testimony the model illustrates is familiar with it
    - (3) The model fairly and accurately reflects the expert's evidence to which it relates; and
    - (4) The model will aid the trier of fact in understanding or evaluating the expert's evidence

Photos & Videos

- Original and real evidence
- Requirements:
  - **(1) Accuracy** – has not been altered or modified
  - **(2) Fairness –** presents events in a fair angle (i.e. neutral camera angle and nothing is missed)
  - **(3) Verification –** can verify that the photo/video was taken in a proper fashion
    - Can be verified by someone who was at the scene when the recording was made, or even after the scene, as long as the authenticity is verified
    - Means that it is a fair and accurate reproduction of the scene as it looked at the time of the incident
- Precondition to admissibility:
  - The proponent must establish that the videotape had not been altered or changed
- Example: ***Regina v Penney***
  - Video taken by animal rights group of seal hunting was proffered as evidence in an animal cruelty case
  - Because the video had been in the possession of an editing studio for 10 months and there were indications that it had been edited and modified, the court did not permit it
  - Too great of an opportunity for the evidence to be *misleading or biased*
  - "The video permitted the prosecution to put before the jury its own version of what occurred, distilled into a neatly packaged, compressed, and easily assimilated sight and sound bite" – MacDonald J
  - Note: videos have visceral impacts on human beings, so can be very biased and misleading
- Courts are resistant to using photos and videos for identification
  - For many years courts were unwilling to accept this information
- **Video evidence for identification**
  - When the court itself is able to make a clear identification we do not need the evidence to be associated with a witness
  - It can stand on its own as a silent witness, but it still needs to be authenticated
  - ***R v Nikolovski:*** accused was charged with offences arising from robbery of a store, judge had "no doubt" the accused was the man on the video tape because it was of "high quality and great clarity"

Views

- View: when the trier of fact/judge actually go to the scene themselves to understand the relationship of the persons and objects
  - Another form of real evidence
  - Distinguished from a video re-enactment of what police believed happened at the scene of the crime
- Problem: considered **very prejudicial** as it presents only one side, and a skewed view of the evidence
  - Courts very reluctant to admit
- TJ has discretion whether or not to undertake a view
  - The value in conducting a view must be weighed against the inconvenience and disruption of moving court participants to the site

Video Re-enactments

- There is little concern when the accused does a re-enactment (a confession by the accused, provided it is done voluntarily)
- When police or parties do a re-enactment there is danger of a **misleading emphasis or unfairness** to the accused and the video can be highly prejudicial
- Need to undergo a case-by-case balancing or the probative value against prejudicial effect
  - The more a video relies on **disputed facts** the less valuable it becomes because it only reflects one side's version of events
- ***R v McDonald:*** police prepared a video re-enactment of a police takedown that went awry, court found it was inaccurate and one-sided, so admitted because of unfair prejudice
- Note: other inadmissible evidence may be introduced by the Crown as video-enactment
  - E.g. may violate the hearsay rule or rule barring prior consistent statements
  - Essentially is visual out of court statement
  - If not allowed to file statements as evidence, shouldn't be able to admit the video (which is a statement)

Documents

- Documentary evidence also needs to be authenticated
  - Typically done by the person who wrote it, someone who signed it, or someone familiar with the handwriting
- Documents may be authenticated in a number of ways:
  - Calling the writer
  - Calling a witness who saw it signed
  - Calling someone who is familiar with the handwriting

    - Comparison of the writing in dispute with a writing proved to the satisfaction of the court to be genuine
    - Calling experts
    - Through admission of opposing party
    - Establish authorship through circumstantial evidence
- Circumstantial evidence may point to the genuineness of the document
    - E.g. Letters received in reply to an earlier correspondence are accepted as being made by the sender
    - Under statute, a wide variety of public and judicial records are admissible without proof of genuineness
- *Evidence Acts* (fed and provincial) also call for routine admission of public records
- **Best evidence rule**
    - Use of documents at trial is guarded by the best evidence rule
    - Rule: requires the original document to be tendered when a party seeks to prove the contents of that document (secondary evidence is inadmissible)
        - Only for cases where a party had the original document and could produce it, but chooses not to
        - The party has to satisfy the court that the original is lost, destroyed or in someone else's possession, and cannot be obtained
    - Exceptions for certain documents under both fed and prov evidence acts
    - The rule has been more flexible because an over-technical and strained application of the rule can hamper the search for the truth

Admission of Computer-Created Documents

- Hearsay concerns exist with these documents if they are created by human beings
    - Can use one of the business records exceptions for these cases (categorical exceptions for documents)
    - Most computer records are admissible under the business records exception
- No exception is required for documents created purely from some sort of computer process/algorithm
    - E.g. call records are automatically generally, no human intervention
- It is the time of input that is critical, not the time of retrieval
- **Key issues:**
    - Accuracy and reliability of the information-generation process
    - ***R v Gratton:*** witness had a printout from the sensing diagnostic module of a truck driven by the accused that was involved in a traffic accident
        - Witness could only tell the court what the printout said, didn't know how it worked
        - Info was inadmissible – good example of the need for reliability
- **Computer-generated models**
    - Can help to explain factual matters to the trier of fact
    - Must comply with rules associated with real evidence
        - The expert must attest to accuracy and show that it will aid the trier of fact in understanding the testimony
        - No need to call the computer programmer if the expert can attest to accuracy
    - Can be subject to challenge under scientific expert evidence rules (***Mohan*** criteria for "novel science")
        - Do not have to assume it is scientifically accurate
        - Can cross examine the expert and potentially find the evidence inadmissible on the basis that it does not meet the standard for threshold reliability for novel science evidence
    - If the evidence fails to provide a sufficient degree of reliability in the reproduction or is too subjective, it can be deemed misleading and too prejudicial = inadmissible

Judicial Notice

- The idea that some matters are so uncontroversial (beyond the scope of reasonable dispute) that we admit them without hearing any evidence
    - A form of "**no evidence**" rule – the court accepts the matter/fact without requiring any proof
    - Do not need to prove by evidence under oath, or test by cross-examination
    - We look to the general knowledge within the "community" where the trial is held
- Rationale:
    - (1) Expedite the trial process
    - (2) Based on the need to protect the credibility of the judicial system
        - Judicial notice only applies to indisputable facts that, if not accepted by the court, would bring the judicial system into disrepute
- Judicial notice is *not compatible with expert evidence*
    - Expert evidence is called precisely because the expert has knowledge beyond that of the ordinary person; judicial notice deals with common knowledge

- Three types of judicial notice for three types of facts:
    - **(1) Adjudicative facts**
    - **(2) Legislative facts**
    - **(3) Social facts**

****Adjudicative and social frameworks facts are used to resolve factual issues in dispute**

- Am I dealing with a factual dispute? – adjudicative or social
- Am I dealing with a purely legal issue – legislative facts

- **(1) Adjudicative Facts**
    - Facts that are in dispute in the litigation
        - Typically involve the who/what/where/when/why/how questions
        - Adhere closely to the traditional CL conception of judicial notice
    - Strict test for admissibility is applied for these types of facts if we are to admit them without any proof
    - Have to show either:
        - **(1)** The fact is so notorious or generally accepted that it is not subject of reasonable debate; OR
            - E.g. facts that have been found to have judicial notice by another court
            - E.g. facts that are common knowledge through human experience
        - **(2)** Capable of immediate and accurate demonstration by an indisputable source
            - E.g. calendar, map or dictionary, authoritative test – something/somewhere you can easily look up and there is no controversy about interpretation or application

- **(2) Legislative Facts**
    - Facts that are relevant to the process of law-making, legal reasoning, or policy making
    - Background considerations that go into the formulation of the policy of the law NOT used for resolving factual disputes
        - Do not use legislative facts to determine the "who/what/where etc."
        - We consider legislative facts when the court is called to rule on the constitutionality of a law, interpret a statute, or is asked to extend or restrict a CL rule
    - Example: determining the constitutionality of a law that gives police the power to stop motorists without suspicion to test for alcohol impairments
        - Would want to look at statistics such as impaired driving rates to determine whether under s 1 it is pressing and substantial objection
    - Use to make a policy decision in interpreting a statue or constitutional decision and NOT for applying the statistics to resolve a factual dispute
    - Asks questions such as:
        - What should the legal rule be? How should I articulate the legal test? Should the relevant legal doctrine consider this test? How should we shape or develop the law? What is the underlying policy of the law?

- **(3) Social Framework Facts**
    - Do not resolve facts directly, but provide a context for helping to resolve facts in dispute
        - Hybrid between adjudicative and legislative facts
        - Involve "social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case"
        - E.g. *Lavallee* – general info on battered women was linked to the accused and to the facts of the case
    - Examples:
        - Expert testimony on the social and psychological context of battered women's syndrome
        - Gladue reports – systemic background factors affecting members of indigenous communities for sentencing
        - Implicit bias or racism in jury selection process
    - The approach is not as strict as for adjudicative facts:
        - Because the information relating to social context is not specific to the parties in the particular case, taking judicial notice of it does not intrude into the adversarial function in the same way that taking judicial notice of adjudicative facts does
    - **Process:**
        - Get a sense of two factors and weigh their relative importance:
            - **(1)** Level of notoriety and indisputability of the fact
            - **(2)** Significance of the fact
        - If it is a more important fact, more critical to the parties, more damaging to a party = we will require a higher level of notoriety and indisputability

- These facts may be **directly admissible**
  - The court may refer to this evidence on its own, but preferable that it is adduced by expert witnesses so it can be more properly subject to scrutiny

SUMMMARY
- Adjudicative facts: purely in the realm of "what happened?"
- Legislative facts: trying to develop the law and in doing so need to look at background knowledge
- Social facts: use that background context to resolve factual issues in dispute

Procedure for Taking Judicial Notice
- It is generally contemplated that the matter will be raised at trial when counsel formally asks the court to take judicial notice of certain facts
  - Counsel has the opportunity to present arguments and if need be, call evidence on the point
- Judges may also on their own initiative take judicial notice with no input from counsel
- Issue:
  - When the TJ through their own independent research finds new info that may be helpful but is not "disputed"
  - Parties must be given the opportunity to deal with the new information by making further submissions
- Judicial notice may be raised for the first time on appeal
  - Appellate court can properly take judicial notice of any matter which the trial court may take notice

Judicial Notice of Laws
- Judicial notice can be taken of laws – all laws in Canada are included
- But foreign law must be proved through witnesses
  - Some exceptions for US/certain commonwealth jurisdictions through provincial Evidence Act
  - But in AB and under the *Canada Evidence Act* there are no such exceptions
- Cannot take judicial notice of subordinate legislation, like municipal bylaws – must be proved by submitting copies

Special Procedures for Child Witnesses

- Where a child is the complainant, testifying in front of one's abuser or alleged abuser can be traumatic and difficult
  - Parliament and prov legislatures have taken steps to allow this testimony to take place in more comfortable and safe circumstances
    - Public may be excluded from courtroom
    - A support person may be admitted
    - Child can testify outside of courtroom or behind a screen
    - Accused will not be permitted to personally cross-examine the child under the TJ allows
    - A publication ban may be imposed to protect identity
    - Child's videotape evidence is admissible
- Several provisions in the *Canada Evidence Act* and *Criminal Code* help to minimize contact with the abuser
  - Sec 486.2 of the *CC* – testifying outside the presence of the accused
  - Sec 715.1 of the *CC* – videotaped evidence
- There is a **discretion** retained by the court for both of these provisions to require the witness to go through the usual face-to-face examination in chief and cross examination IF the special procedures would in some way interfere with the proper administration of justice
  - E.g. prevent the accused from their right to full answer and defence

***Criminal Code* s 486.2: testifying outside the presence of the accused**
- If requested, a child witness testifying in a sexual violence case can do so with a screen in court or in another room via technology
- Will be allowed unless it would interfere with proper admin of justice
- Accused must be able to communicate with counsel while watching testimony

***Criminal Code* s 715.1: videotaped evidence**
- Allows for the admission of a video recording made a reasonable time after the offence is alleged to occur, if the child is competent to testify, gets up on the stand and adopts the statement made in the video recording
- Why?
  - More reliable in capturing the evidence at the time (fresher in memory)
  - Minimize the trauma of having to testify in detail about the incident in court
    - Aids in preservation of evidence and discovery of truth

- Once the child witness adopts the videotape, that evidence becomes part of the in-court testimony and is no longer strictly hearsay
- Child witness still subject to cross-examination as they are competent and available to testify – don't need present memory as long as they can recall making the statement and can assure the court they believed it to be accurate and true at the time
    - Inconsistencies between testimony and video are not inadmissible – will go to weight
    - Video statement could still be admitted under the principled approach
- Cross examination is not the only guarantee of reliability – other indicators of reliability include:
    - The statement is made within a reasonable time
    - The trier of fact can watch the video to assess demeanour, personality and intellect of the child
    - The child is required to attest she was attempting to be truthful when the statement was made
    - The child can be cross-examined as to whether she was being truthful
- Where there is no independent memory, the trier of fact should be given a special warning amount the dangers of convicting based on the video alone

Secondary Materiality & Your Own Witness 1: Rule Against Oath-Helping

Overview

- Introduction: rule against oath-helping
- Exceptions:
    - Accused's good character
    - Expert evidence
    - Prior consistent statements

The Rule Against Oath-Helping

General rule: a party may not ask questions or present evidence solely to bolster the credibility of his own witness

- If this were allowed, there is concern that it would take undue time and create distracting side issues
- So until their credibility has been made an issue by the opposing party, witnesses are <u>assumed to be trustworthy and of good character</u>

Example:

- Counsel calls F to the stand and asks her, "who shot the deceased, you or the accused?" and F says, "the accused". Counsel then puts the police officer on the stand and asks, "why did you arrest the accused and not F?". Officer responds, "because Freda offered to take a polygraph". Opposing counsel objects on the grounds of oath-helping.
    - Judge would sustain the objection and direct jurors to disregard the statement because the party has led inadmissible evidence
    - Counsel here called a second witness to confirm what the original witness said in her initial testimony
        - It was a <u>prior consistent statement</u> – a form of oath-helping done <u>solely to bolster F's credibility</u>

Exceptions to the Rule

<u>[1] Accused's Good Character</u>

- Deals with the admissibility of the accused's own good character when the accused chooses to testify
- Dealt with under the character evidence rules
    - Accused can put forth their good character by testifying themselves or having witnesses testify, but in doing so the Crown is entitled to rebut the claim to good character by cross-examining or by calling other witnesses who will testify to the accused's bad reputation for trustworthiness or sincerity
- If we admit evidence of the accused's own good character, we can admit it for the purpose of:
    - **(1)** Admissible for <u>truth</u>
        - I.e. guilt/innocence – show that the accused did not commit the offence
    - **(2)** Admissible for <u>credibility</u>
        - Violates the rationale against oath-helping, but it is allowed in this case to ensure that there is a minimal possibility of a wrongful conviction
        - Example: Tony is on trial and testifies that he is a caring and selfless guy. We can bolster that by having witnesses who confirm that Tony's reputation for honesty in the community is stellar

[2] Expert Evidence

- A party may call an expert witness to testify about facts relevant to the credibility of one of their witnesses where those facts are likely to be beyond the experience of the trier of fact
    - The rule against oath-helping prevents the expert from going so far as to testify that the witness is likely to be telling the truth
    - Limited exception for admitting expert evidence that is **relevant** to the question of credibility, but is **not actually about credibility**
    - Dealt with under hearsay
- Example:
    - Expert concluded that the accused was probably telling the truth when he denied stealing the donkey through his interview, testing, and application of expert knowledge
        - *Inadmissible – oath-helping*
    - Expert says, "research shows that children often recant allegations of sexual abuse"
        - Helps us to understand credibility issues as background/context but does not speak directly to the credibility of any particular witness and *may be admissible*
        - Not stating that *this particular witness* is truthful, but nevertheless provides context for us to make that assessment

[3] Prior Consistent Statements

Overview

- The rule
- Exceptions:
    - Circumstantial evidence
    - Recent fabrication
    - Recent complainant
    - Hearsay
    - Found in possession
    - On arrest
    - Narrative
- Instructions to the jury

General Rule

- **Rule:** a prior consistent statement is one made by the witness before they take the stand, that is consistent with the testimony they give then they are on the stand = *generally inadmissible*
    - I.e. a witness's prior statements that are consistent with trial testimony are generally inadmissible
        - A specific example of the general principle against oath-helping
    - Example: Freddie, testifying as the accused at trial says that he shot Peggy in self-defence. Then Freddie says he turned to Carlos and said she was coming right at him. Continuing his testimony, Freddie says, "two weeks later I told Billy I should Peggy in self-defence"
        - Counsel for Freddie puts Carlos and Billy on the stand to confirm that Freddie told him he shot Peggy in self-defence
        - This testimony is NOT permitted because it violates the rule
- **Purpose:** because prior consistent statements are self-serving and superfluous
    - Idea is that repetition bears little if any relationship to the truth, and the repetition either by a witness or other who repeat the statement gives an artificial patina of reliability
    - It speaks to the idea that consistency implies truthfulness or reliability when we know there is little relationship
        - If allowed, it can potentially bias the trier of fact and the statements will be given much more weight than they deserve
- **To be admitted:** a prior consistent statement must have *added probative value*
    - (1) Independent value
    - (2) Necessary to correct misimpression

- Prior consistent statements are an amalgam of two elements:
    - **(1) Hearsay:**
        - A prior consistent statement offered as proof of the truth is hearsay
        - Steps:
            - First look at hearsay rule – is it admissible as hearsay?
            - If yes – don't worry about analyzing it as a prior consistent statement

        - If no – may still be admissible as a prior consistent statement but need to find an exception
        - Note: on exam still proceed to prior consistent statement analysis
    - **(2) Declaration:**
        - Law does not allow the reliance on proof of the fact that the witness made a prior statement consistent with the witness's testimony
        - Remaining exclusionary rationales:
            - PCS lack probative value
            - Self-serving (to bolster credibility)
            - Superfluous

Exceptions to Prior Consistent Statements

- When admission of prior consistent statements has significant **probative value that outweighs the prejudice** created by repetition and the potential for the trier of fact to confuse repetition for reliability

[a] Circumstantial Evidence

- Situations where the prior consistent statement is not being adduced in order to show consistency or reliability – instead, it is relevant to some other disputed issue at trial as circumstantial evidence proving that issue
    - Example: ***Edgar*** – the mentally disordered mind of the accused was relevant
        - But the statements that revealed that mentally disordered mind contained the same denials that the accused testified to at trial
        - Still admissible – not because it was consistent/to bolster credibility through consistency, but because it had *independent probative value* relating to the disputed issue of the state of the accused's mind

[b] Rebut Allegation of Recent Fabrication

- Operates where the opposing party suggests that the version being offered by the witness was created after the event the witness is testifying about
    - Proof that the witness had made a statement consistent with his current testimony **before** that version is alleged to have created, rebuts the allegation of recent fabrication and can be admitted
- Example:
    - F testifies in defence on trial that P was coming at him with a knife. In cross, we have counsel suggesting to F that if this is true, why did he never tell authorities? F says that he told K about it right afterwards. K is called to confirm what happened and he says that's right, F did say this
        - Classic example of where we can adduce a prior consistent statement in order to rebut an allegation by the opposing party that you have fabricated your evidence
    - Idea is that we enter this evidence ***not* to bolster credibility,** but simply to **rebut** the suggestion of fabrication
- Where it doesn't apply: **lying from the start**
    - This exception DOES NOT APPLY if the opposite party simply alleges that the witness was "lying from the start"
        - Here there is no allegation of recent fabrication
    - Example: F testifies in defence at trial that P was coming at him with a knife, and counsel says that he is probably lying to avoid conviction
        - This would not trigger F's right to advance a prior consistent statement
        - Opposing counsel is not alleging recent fabrication

[c] Recent Complaint in Sexual Offences

- Previously: there was a sexist rule codified in the CL that required the TJ to warn the jury in any case where a sexual assault complainant failed to report the incident at the first reasonable opportunity
    - For obvious reasons this rule was abrogated (s 275 CC)
    - It is now an *error* to use the failure to complain as a basis for a presumptive adverse inference relating to credibility or consent
- But – the recent complainant rule is still possible under limited circumstances
    - Can be used to cross-examine a sexual assault complainant based on a failure to complain, or as part of the narrative, or pursuant to *res gestae* or other hearsay exceptions
    - If permitted, then the complainant and Crown are entitled to rebut that allegation with evidence that the complainant did make a complaint at an earlier opportunity

[d] Hearsay

- Statement consists of hearsay, but we find it is admissible to an exception to the hearsay rule
    - Can be admitted through **(1)** rules around prior identification, or persons and business records if it meets the requirements of a case-by-case hearsay exception from ***Khan***, OR **(2)** if it meets the *res gestae* hearsay exceptions (excited utterances, statements of present physical condition or mental state)
- In these circumstances, the statement will be admissible for the truth of its contents
    - The trier of fact is also allowed to consider the statement on the question of credibility
- **Hearsay rules trump the prior consistent statement rules**
    - <u>If it is admissible as an exception to hearsay then it will be admissible for *truth and credibility* despite the fact that it is a prior consistent statement</u>
- The fact that hearsay exceptions require a degree of reliability attaching to the statement negates most concerns pertaining to repetition

[e] Found in Possession

- Exception for statements made by an accused who is found in possession of contraband/stolen property/drugs etc.
- We give an indulgence to the accused – if there is a statement made denying possession, it is going to be admitted even if it duplicates testimony given at trial
- Example:
    - Gonzo is confronted by law enforcement and denies he is in possession of a stolen chicken, saying, "I didn't steal this chicken! A friend asked me to look after it"
    - The prior statement will be adduced even if it mirrors his denial at trial

[f] Statements Made on Arrest

- Recognized by ONCA – but not clear how widely this will be accepted in other provinces
- Similar to the found in possession exception, but in this case it is denying responsibility if you are arrested
- We allow testimony to be admitted even though it duplicates the trial testimony

[g] Narrative

- Also looked at previously in the context of the hearsay rule
- Two types of narrative:
    - **(1)** Pure narrative
    - **(2)** Circumstantial evidence narrative
- **[1] Pure narrative**
    - Information that may technically be a prior consistent statement, but is admitted solely as background so the trier of fact can understand the sequence of events/story as it unfolded
    - <u>Not admissible for any inference of truth or credibility</u>, merely background to help understand the issues
    - Only admit details of the statement that are *absolutely necessary*
        - Can edit down the statement to only keep the info that is critical for understanding the story
    - Normally arises in sexual offences
        - Concern that the story without the prior consistent statement is misleading and potentially damaging to the prosecution, e.g. show there was reporting after the event to a friend
- **[2] Circumstantial narrative**
    - Where the fact that a complaint was made is helpful to the trier of fact in assessing the credibility of the complainant on some other basis than the theory that consistency supports credibility, the trier of fact is entitled to take this into account
        - I.e. where narrative may be relevant for reasons of consistency or background
        - Example: the narrative may reveal that the complainant "disclosed" the abuse only after the alleged abuser was removed from her environment
            - The fact and timing of the complaint in such circumstances could assist in rejecting challenges to credibility relating to any delay in reporting
    - Narrative is most likely to be used as circumstantial evidence relevant in assessing the <u>testimony of child witnesses</u>
        - Child sexual assault complaints – the fact and timing of the complaint may support credibility for reasons other than repetition
            - E.g. young child or adult with intellectual disability makes a spontaneous and repetitive complaint of abuse – will support the inference that it actually happened
            - Depends on the circumstances, have to be careful not to equate consistency with credibility
            - In these special circumstances, may find that repetition of the same statement does bear on credibility in a way that would outweigh the prejudicial effect
    - Case-by-case balancing of prejudice and probative value

Instructions to the Jury

- In any case where a prior consistent statement is admitted, we have to issue a very clear limiting instruction to the jury
    - If it is a judge alone trial, should remind themselves

- A limiting instruction should explain the following:
    - **(1)** Cannot enhance credibility
        - Explain that prior consistent evidence cannot be used to enhance the credibility of the persons making the statement, since evidence does not become more credible because it has been repeated
    - **(2)** Cannot use it to corroborate any other evidence
        - Explain that prior consistent statements are not independent, and therefore do not corroborate the testimony
    - **(3)** Cannot be used for the truth of its contents
        - Direct the jury not to use the evidence for its hearsay purpose
    - **(4)** Describe legitimate purpose
        - Have to describe any legitimate purpose for which the statement is being admitted for
        - E.g. recent fabrication – show that the evidence can only be used to rebut or negate the allegation of recent fabrication and not for truth or credibility

- There are also cases where a limiting instruction will not be required. No direction is needed in the following:
    - (1) Where the appropriate, limited use to which the statement should be put would be obvious to the jury
    - (2) Where the contents of the statement would not be helpful to the Crown
    - (3) Where the defence relies on proof of the prior consistent statement

Secondary Materiality & Your Own Witness 2: Rehabilitating and Challenging Credibility

Overview

- Rehabilitating
    - Relevant and methods
    - Softening anticipated blows
- Challenging credibility of your own witness
    - General rule prohibiting challenging your own witness's credibility
    - Exceptions to the rule to permit cross-examination

Rehabilitating

Relevance and Methods

- When the credibility of our witness is attacked by the other side, we can attempt to rehabilitate in a number of limited ways
    - Principle: can only rehabilitate to rebut the **specific** challenges that have been made to our witness's credibility
    - Rehabilitation must be **relevant** to the issues that the other side focused on when impugning our witness's credibility
- Focus on particular permitted methods of rehabilitating credibility
    - (1) Re-examination of the witness who has been attacked
    - (2) Calling evidence about the positive reputation of the witness for trustworthiness
    - (3) Calling witnesses to negate or weaken expert testimony by opposing counsel relating to the hidden defects said to affect the witness
- Can call on **expert witnesses** to rehabilitate your witness
    - E.g. opposing party says they have examined the witness's optometrist records and can say that she would not have seen the accused very clearly despite her nearsightedness
    - Can put on expert witness to say that it is a weak prescription and she would have been able to see the accused clearly
- Can recall the witness in limited circumstances to **clarify any admissions of discreditable conduct** made in cross-examination by the opposing party
    - E.g. counsel recalls the witness and asks, "when you admitted to my friend that you owed a debt to the plaintiff, how much money did you mean? And the response is "$20"
        - If the opposing party had meant for a damaging attack to credibility, this limits the damage that has been done by the other side

- If the credibility of the witness has been attacked, can bring **reputation evidence** to speak to that witness's reputation for the relevant trait
    - E.g. Witness testifies, "Tony's reputation for honesty in the community is stellar"
- **What we CANNOT do:**
    - If our witness has been attacked collaterally on credibility and denied the allegation, the other side is stuck with this
    - We cannot attempt to bolster her testimony by bringing in evidence to support her denial (collateral fact rule)
    - If we tried, would not be permitted – nothing to rebut because the opponent is stuck with the answer given

Softening Blows

- ***Canada Evidence Act:*** permits the other side to challenge credibility of any witness on previous convictions
    - Tactical advantage of raising our own witness's criminal record where that evidence will be admitted on cross
    - This softens the blow and takes away from the "surprise" effect
- This rule is **not confined to criminal record evidence**
    - In any case where you can reasonably anticipate that the other side will use some discreditable fact against your witness during cross examination, you are permitted to anticipate the attack and raise the issue during your direct examination

Challenging the Credibility of Your Own Witness

General rule

- **General rule** prohibits you from challenging your own witness and challenging your own witness's credibility
    - It is said that if you call a witness as party/counsel for a party, you *implicitly vouch* for the credibility of that witness
    - Prohibited from directly challenging that witness's credibility in examination in chief

- This general rule has been codified in the *Canada Evidence Act* and the provincial acts:
    - ***Canada Evidence Act,* s 9(1):** a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character
    - ***Alberta Evidence Act,* s 25(1):** a party producing a witness shall not be allowed to impeach the witness's credit by general evidence of bad character but the party may contradict the witness by other evidence

- While a party is not permitted to challenge the credibility of a *witness* they have called, they can **challenge the credibility or reliability of the evidence that the witness gives**
    - If a previous inconsistent oral statement is proved and the witness adopts it as true, the statement becomes the testimony of the witness and can be relied upon as proof of the facts
    - If a previous consistent oral statement is proved but repudiated by the witness, it can be used solely to show that because of the inconsistency, the witness is unreliable or his evidence is unreliable

Exceptions to the Rule to Permit Cross-Examination

General Exceptions

- **Argument:**
    - Argue to trier of fact that the witness's evidence should not be accepted and provide reasons why
    - Not formally breaking the implicit guarantee of credibility, but simply arguing that the witness's evidence should be put in the context of the trial as a whole
- **Other witnesses or evidence:**
    - If there are other witnesses or evidence that contradicts our witness's testimony, but makes it more favourable to us, we are entitled to emphasize that other evidence as opposed to the evidence our own witness brought
- **Refreshing memory:**
    - Can attempt to refresh the memory of our witness (usually through leading questions) if there is a genuine issue as to memory
    - If there is an uncooperative witness who is giving undesired or unexpected testimony – if we can characterize it as a memory issue (not an issue or hostility or adversity), we can use leading questions and provide the testimony we are expecting

Challenging in Cross-Examination

- Common law: CL declaration of hostility
- Statutory: declaration of adversity
    - S 9(1) *Canada Evidence Act*

- S 9(2) *Canada Evidence Act*
- S 25 *Alberta Evidence Act*

[1] Declaration of hostility

- A witness is "hostile" when (1) they do not wish to tell the truth because of a motive to harm the party who has called them, or; (2) to assist the opposing party
  - If we can show that a witness we called exhibited a ***hostile animus*** toward the party who called them, we can be given **leave by the TJ to cross-examine that witness**
  - Don't need to establish motive – judge must simply be satisfied that some hostile animus exists
- Hostility is assessed through the witness's demeanour, attitude, and the nature of the evidence given in their testimony
  - Can we infer that the witness has a bias against the party calling them in favour of the opposing party?
- Convincing the judge to grant a declaration of hostility means we can cross-examine the witness **at large**
  - Not confined to examining on the basis of a prior inconsistent statement or a particular aspect of the testimony
  - Can cross examine on *any issue*
  - Can use the same proceedings as you would when cross examining an opposing witness
- Hostility sets out a high bar and some court are strict on interpreting real animus
  - If a declaration of hostility cannot be declared, we can resort to statutory alternatives
  - Hostility harder to prove than adversity

[2] Declaration of adversity

- A witness is adverse if the evidence they give is unfavourable, or opposed in interest, to the party who has called them
  - Can be established by *mere inconsistency* alone
  - Easier to obtain than a declaration of hostility, but downside is that cross-examination is **limited to the prior inconsistent statement**
  - Fuzzy area because there is limited case law

- Statutory:
  - **S 9(1) of the *Canada Evidence Act***
    - *9(1): if the witness proves adverse, the party may prove that the witness made at other times a statement inconsistent with his present testimony*
    - Unfavourable:
      - Adversity is not as difficult to meet as hostility – don't have to show animus
      - Merely have to show that the witness's evidence is unfavourable to us (takes a position that opposes our position on the case)
    - Can assess based on the witness's:
      - Demeanour and attitude
      - Credibility of their testimony
      - Inconsistencies
      - Oral or written statements
    - Scope of cross-examination under s 9(1) has not been clarified by the courts
      - Some courts in some provinces see it the same as the CL and can cross-examine "at large"
      - AB and ON has limited scope of cross-examination to the statements itself
        - Making of the statement/how it came about, why it is consistent, which version is true
    - Proof of statement
      - Can also attempt to prove adversity by way of a statement
      - Once we get the declaration of adversity, we can get it entered as evidence to help limit/impugn the credibility of the witness
    - Note: today, s 9(1) is not often used and we typically resort to s 9(2) – if it is a recorded statement

  - **S 9(2) of the *Canada Evidence Act***
    - *9(2): where the party producing a witness alleges that the witness made at other times a recorded statement inconsistent with the witness's present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement*
    - **Does not require adversity**
      - Do not need a declaration of adversity (or hostility)

        - Alternative and easier procedure than s 9(1)
    - Need a **recorded** statement, not just an oral statement
        - Recorded = written verbatim or near verbatim
        - Rough notes or summaries are not sufficient
        - Excludes police notes (unless it's a verbatim recording of what the declarant said)
    - **Use** of the evidence (the prior inconsistent statement)
        - **Adoption:** if the witness adopts the statement, we no longer have the inconsistency, and the testimony becomes the evidence
        - **Credibility:** if the witness does *not* adopt the prior inconsistent statement, we can use it to impugn the credibility of the testimony
        - **Truth:** if it can be admitted under the principled exception to the hearsay rule (KGB rule), we can admit the statement for its truth
    - **Scope** of the cross-examination
        - Cross-examination scope is wider under s 9(2) than 9(1)
        - Can cross-examine on:
            - The making of the statement and the inconsistencies in the statement
            - Any issue that relates to the adversity of the witness
            - Any matter that is relevant to assessing adversity is fair game (although still not as broad as "at large")
        - Think of the scope under s 9(2) as anything that relates to:
            - Direct circumstances of making the statement; and
            - Anything that relates to possible adversity/bias
    - Proof of the statement
        - Same as s 9(1) – can prove the statement if the statement is denied by the witness

- **S 25(2) of the *Alberta Evidence Act***
    - *25(2): if the witness in the opinion of the judge or other person presiding proves adverse, the party producing the witness may by leave of the judge or other person presiding prove that the witness made at some other time a statement inconsistent with the witness's present testimony*
    - Interpreted in the same manner as s 9(1)
        - If we get a declaration of adversity, we can use a prior inconsistent statement to cross-examine the witness and prove the statement if denied as a way of further impugning the credibility of the witness

NOTE: discretion

- There is no automatic rule that we are allowed to cross-examine where we have a declaration of adversity under either evidence act
- The court retains a discretion and can deny the right to cross-examine based on fairness
    - E.g. if a statement was taken in unfair, abusive or coercive circumstances, the court may exercise discretion to prohibit cross-examination or limit its scope

Corroboration

Overview

- Introduction
- Statutory rules involving corroboration
- Common law discretionary warnings
- Identification evidence

Introduction

- Corroboration rules require triers of fact to search for, and in some cases to find, independent evidence that confirms the evidence before it is relied upon
    - Means there must be independent evidence confirming the claim made
- **Not a rule of admissibility, but a rule of use**
    - Regulates how the trier of fact can use the evidence
    - E.g. **s 19(2) of the *AB Evidence Act*** requires corroboration before the trier of fact can rely on unsworn evidence of a minor

        - Not about admissibility, but rather whether or not the trier of fact can use the evidence (that has already been admitted) in a particular way
- Common law and former statutory law had strict rules that completely prohibited the use of certain types of evidence without strict corroboration
    - Interpreted very strictly – evidence only counted as corroborating if it directly provided independent confirmation of the testimony of a witness and directly implicated the accused
    - These rules are less common today

- Modern trend: use **discretionary warnings** and interpret corroboration more **broadly and liberally**
    - Strict corroboration rules being replaced with other rules intended to provide guidance to triers of fact, usually by requiring warnings to be given
- Example:
    - Witness testifying that they analyzed the bodily sample found on the victim's skin and determined through DNA that it belonged to the accused
        - At CL: this was not strictly corroborating because it was possible that the sample could have been deposited in non-criminal circumstances (e.g. if there was an innocent explanation for its presence there)
        - Today: we would view this as corroborating and go on to consider its weight

Statutory Rules

- Remaining statutory rules we have that require corroboration before the trier of fact is entitled to rely on the evidence:
    - Sec 19(2) *Alberta Evidence Act*
    - Sec 133 *Criminal Code*

Sec 133 of the *Criminal Code*

- *133: no person shall be convicted of [perjury] on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused*
- Has been interpreted very broadly so as not to require corroboration unless the entirety of the Crown's case is based on a single witness's testimony
- If there is evidence of perjury from any other evidentiary source (e.g. an out of court statement), we can consider that evidence and potentially convict without any further corroboration
    - I.e. scope of this provision has been tightly narrowed

Common Law Rules: Discretionary Warnings (Vetrovec)

- TJ required to warn jury that it would be dangerous to rely on the testimony of certain kinds of Crown witnesses
    - **Only applies if a jury trial**
    - **Only applies to *Crown* witnesses** (not defence witnesses)
- These CL discretionary warnings are also called "***Vetrovec"*** warnings from SCC leading case
    - Not talking about admissibility- jury is going to be exposed to this evidence
    - There will be a warning about the dangers of this evidence and instructions on how the evidence can be used
- **This is discretionary**
    - The TJ can just all of the relevant factors in the case and come to a decision as to whether or not it is necessary to issue a warning (there are no hard rules demanding a warning)
    - But the more "dangerous" the evidence/testimony is in the particular circumstances of a case, a failure to give an adequate warning to a jury will constitute an error in law
- The more dangerous the evidence, the more likely it is that the appeal court will find that a warning was required
    - So although it is discretionary, judges have to be sensitive to the dangers and frailties associated with the evidence
- When is a warning required?
    - Where in the particular circumstances, **a witness plays more than a minor role in the Crown's case and where, based on an objective assessment, the court should suspect the credibility of that witness**
    - Where a warning is required, its form is not burdened with technical requirements

"Dangerous" Evidence

- Similar to consideration of probative value vs prejudice
    - Prejudice: looking at the possibility of wrongful conviction, but also that the trier of fact may give the evidence more weight than it deserves
    - Same idea as admitting evidence because you don't think the prejudice is so great, but issue a warning about using that evidence in the absence of corroboration

- Frailties and defects of the evidence may not be *apparent* to the trier of fact (something that isn't obvious)
- Choices:
    - Can exclude, or can admit the evidence and then issue a warning about using the evidence in the absence of corroboration

Common Cases Requiring Discretionary Warnings

- **Accomplices**
    - Co-defendant or accomplice of the accused gives testimony, potentially because of a deal with the Crown
    - Potential self-interest to implicate the accused should usually be pointed out to the jury with a warning
- **Jailhouse Informants**
    - Significant because of wrongful convictions, a particularly dangerous form of testimony
    - Essentially mandatory to issue a warning for jailhouse informants (*very dangerous not to*)
    - Incentivized witnesses who give a false testimony in exchange for a deal like bail, getting charged reduced/dropped, etc.
- **Children**
    - Children's evidence is not necessarily unreliable or suspect, but in some instances it may be necessary to issue a warning about the frailties of children's testimony
    - Can't assume children testify in the same manner as adults
- **Witnesses of Unsavoury Character**
    - Generic category for witnesses who have inherent credibility issues that may not be obvious to the trier of fact

The Warning – satisfy four characteristics

- Assuming we decide to exercise discretion and issue a warning, what has to be said to the jury?
- **[1] What evidence? - the specific evidence (i.e. portions of the testimony) that is deserving of the warning**
    - The witness giving the evidence
    - The aspect of the witness's testimony that are of concern
    - Identify the characteristics that bring the evidence into question (explanation of those problems the jury might not be familiar with as laypersons)
- **[2] Why is the evidence subject to special scrutiny?**
    - Explain the history and judicial experience that has shown that this evidence is dangerous and full of frailties
    - Identify the need for special scrutiny
- **[3] Dangerous to convict without corroboration**
    - Explain that it will be dangerous to convict without corroboration – evidence standing alone should be given very limited weight
    - Caution the jury that while it can act on unconfirmed evidence, it is dangerous to do so
- **[4] Look for confirming evidence**
    - Have to tell the trier of fact/jury to look for independent confirming evidence that would help bolster that witness's testimony, but does not need to implicate the accused
    - TJ has the discretion to highlight the evidence that confirms the reliability of the witness's testimony
        - **This is a double-edged sword** – as counsel for the accused, may think that a *Vetrovec* warning is helpful (and it may be), but the other side is that in issuing the warning, the judge *may point out damaging aspects of the case* in order to highlight the corroborating evidence for the trier of fact
    - Modern approach is not to require the confirming evidence to directly implicate the accused – simply needs to confirm the witness's testimony in some material way

Eye-Witness Identification Evidence

- Faulty eye-witness ID is one of the leading causes of wrongful convictions around the world
    - Significant amount of wrongfully convicted individuals are exonerated by DNA evidence
- Have to be careful whether to admit:
    - If admitted, have to issue a clear warning about the dangers of relying too much on eye-witness RD evidence
    - Where this ID is so weak that it would necessarily leave a reasonable doubt in the mind of a reasonable juror, the TJ must remove the case from the jury and direct a verdict of acquittal
- **When we decide to admit identification evidence, have to point out:**
    - **[1] Wrongful convictions**
        - Have to point out to the jury that this evidence is one of the leading causes of wrongful conviction, *especially* if the witness did not know the accused prior to the events in question
    - **[2] Confidence does not equal accuracy**
        - Have to tell jury what science and judicial experience have shown us about the nature of faulty eye-witness identification evidence, information that would not be known by most jurors that is not intuitive

        - One of these features is that the level of confidence exhibited by the eye witness in testifying about the ID has no correlation to the reliability or accuracy of the testimony
    - **[3] Reliability / Frailties**
        - Must highlight the problems of reliability associated with this particular information
            - What are the frailties?
            - What are the problems with the line up?
            - What might have biased or pre-disposed the witness to select the accused as opposed to any other person?
        - Scrutinize the way that the ID was conducted and point out any potential problems with the process
    - **[4] No probative value**
        - In extreme cases, may decide that the ID process was so fraught with problems, that we have to instruct the jury not to give it any probative value
        - Technically the evidence has been admitted the jury exposed, but this is a way of saying it shouldn't have happened, don't give it any weight

Burdens of Proof and Presumptions

Overview

- Standards of proof
- Burdens of proof
- Presumptions

Standards of Proof

- **Burdens of proof:** who has the burden to convince the adjudicator
- **Standard of proof:** the degree needed to discharge the burden
- Describes the degree to which the party must convince the adjudicator on a particular issue that must be proved at trial
    - An estimate of probability
    - Described in qualitative terms – generally no numeric metric attached, but sometimes there is an implicitly quantitative association (i.e. balance of probabilities = more likely than not to be over 50%)

Legal Burden vs Evidentiary Burden

- **Legal burden:** an element of the action that must be proved by one of the parties according to a relevant standard of proof (BOP of BARD)
    - **[1]** proof beyond a reasonable doubt
    - **[2]** balance of probabilities
- **Evidential burden:** party that has the burden must show that there is *some evidence* that raises the issue to allow the issue to go forward
    - If the burden is not met = the issue will not be considered by the trier of fact
    - Does not refer to proof per se, merely a preliminary or *threshold* determination as to whether the issue warrants final determination by the trier of fact

Ultimate Burden vs Tactical Burden

- **Ultimate burden:** burdens that have been assigned directly by rules of law
- **Tactical burden:** burdens that arise simply because of the strength or nature of the opposing litigant's case
    - Not assigned by rules of law
    - Distinguished from the ultimate burden

Legal Burden of Proof

[1] Proof Beyond a Reasonable Doubt

- Application:
    - Crown in criminal cases
    - To regulatory or quasi-criminal offences
- Means that "any reasonable uncertainty results in an acquittal" – SCC in ***Lifchus***
    - We draw this line much closer to absolute mathematical certainty than to the balance of probability standard – it is not absolute certainty, but something very close to that (***Starr***)

- **WD Warnings**
    - A manifestation of the BARD standard – tells the jury how they are to approach the testimony of an accused or other defence evidence in terms of its believability
        - In a criminal case where the credibility or reliability of defence evidence is critical to the resolution of the issue, including the testimony of the accused, we have to issue a WD warning to the jury
    - Purpose: allow the trier of fact (mostly a jury) to understand how to assess credibility and weight of witness testimony in light of the reasonable doubt standard
        - Works to intend mistakes being made, jurors from misunderstanding how to apply the BARD standard
        - Reinforces the idea that *whatever your assessment of any given witness's testimony, you still have to conclude the prosecution has proven all elements BARD*

    - **Three steps:**
        - (1) If you believe the accused, you must acquit
        - (2) Even if you don't believe the accused, if you have a reasonable doubt, you must acquit
        - (3) Even if the accused's evidence does not raise a doubt, you must still assess all the evidence and determine guilt BARD
            - Have to assess all the evidence in the case and determine guilt BARD for *each element* of the offence
            - Could entirely disbelieve the accused, but there is other evidence in the case that raises a reasonable doubt on one or more essential elements = have to acquit

[2] Balance of Probabilities

- Applies in civil cases
- Means "more likely than not"
- Some suggestion that we might want to shift (raise) the standard depending on the severity of the stakes & stigma
    - But in ***McDougall***, the SCC said that BOP is the only standard that applies in civil cases – the standard does not shift according to the nature or consequences of the case
    - The court did hint that where the stakes are high and there is sufficient stigma, we have to look *especially carefully* at the evidence and weigh it to determine whether the BOP standard is met
- Can also be used in limited circumstances in criminal cases
    - E.g. reverse onus – accused has to prove on balance, not BARD

Evidentiary Burden of Proof

[1] Prima Facie

- Refers to the evidentiary burden that applies to the entire case
    - Whether there is sufficient evidence on each element of the offence/cause of action to allow the case to go forward for a full determination on its merits
    - "Evidence in the record upon which a properly instructed jury could rationally conclude that the accused is guilty BARD" (***Fontaine***)
        - Key word = "could" – not assessing the evidence in terms of any final determinations
- **Not permitted to weigh the evidence**
    - Cannot assess the credibility of testimony and cannot weigh the strength or probity of any evidence
    - Whether the evidence is believed is for the trier of fact
    - When trying to determine whether a party has made out a prima facie case, we **assume the evidence is true**
- Example:
    - At a preliminary inquiry the judge does not draw ultimate inferences from facts, nor does she assess credibility
    - Her task is to determine whether, if the Crown's evidence is believed, it would be reasonable for a jury to infer guilt

- **When do we use the prima facie case standard?**
    - [1] Preliminary Inquiry
        - At a prelim inquiry in a criminal case
        - The justice will be asked to determine whether there is enough evidence to justify putting the accused on trial and the prima facie standard is used as the test
    - [2] During the trial – directed verdict
        - Defence can apply for a directed verdict (normally at the close of the Crown's case)
        - TJ will look at the evidence (*not* weigh it) and give it the best interpretation for the Crown, and decide whether there is evidence that a reasonable jury could use to convict
        - If the answer is no – case is over and directed verdict of acquittal without the issue even going to the jury

- [3] Extradition hearing
    - Slightly broader rule because of the stakes involved (want some capacity to weigh evidence)
    - If the court determines the evidence is unreliable, the TJ can elect to give it no weight even though we are applying the prima facie case standard
    - Whereas in prelim hearing and trials judges apply the prima facie case standard as to assume to evidence is accurate and true, in an extradition hearing the judge has the discretion to give no weight to the evidence where it "unreliable"

- When applying the prima facie standard, we are allowed to engage in a <u>limited weighing of the evidence only under two circumstances:</u>
    - [1] When asked to assess the strength of the inference that accompanies circumstantial evidence; and
    - [2] Unreliable identification evidence (would be dangerous to rely on it)
        - An exception to the general rule that we don't weigh direct evidence – can weigh the unreliable ID evidence

Exception 1: Assessment of Circumstantial Evidence

- **Circumstantial evidence:** evidence that requires the trier of fact to make some sort of inference in order to determine weight
    - I.e. no direct evidence of the element of the offence, simply have evidence that requires us to draw an inference that would then help to prove an issue at trial
    - If talking about direct evidence we wouldn't normally be allowed to weigh that evidence even if an unconvincing inference is drawn
        - Under the conventional approach we would have to say that the evidence would have to be considered by the trier of fact
- Circumstantial would be something like a fingerprint
    - E.g. a break and enter occurs and the only evidence of identity is that the accused's fingerprint was found on a window
        - Assume the TJ finds the evidence reliable – even if there are questions surrounding its reliability, we can't consider them because they relate to the reliability of the evidence itself and not to the strength of the inference that the party adducing the evidence is asking us to draw
        - But in assessing whether there is a prima facie case, we **<u>can look to the strength of the inference</u>**
            - Have a fingerprint and assume it belongs to the accused – question becomes: what does the presence of the print actually prove?
            - If we can show the accused was a regular visitor of the premise before, there is an innocent explanation and the inference that this helps us show identity is worthless
            - Can assess that in deciding whether or not we've met the prima facie case standard- **this form of limited weighing of circumstantial evidence is permitted**

Exception 2: Unreliable Identification Evidence

- Identification evidence is direct evidence, and under the traditional approach we would always give this evidence face value support and wouldn't look at its reliability
- But courts are starting to shift on this – ***Regina v Hay* –** SCC suggested that if the procedures that resulted in the identification are <u>so poor and unreliable</u>, in some cases we may have to <u>direct the trier of fact not to rely on this evidence</u>
- TJ can deem the evidence too unreliable

SUMMARY: can engage in a limited weighing of evidence only in two circumstances:

- (1) Where we are asked to assess the strength of the inference that accompanies the circumstantial inference; and
- (2) Exception to the general rule that we don't weigh direct evidence
    - For identification evidence where it is so unreliable it would be dangerous to rely on – can conclude that we cannot rely on it)

<u>[2] Air of Reality Threshold</u>

- Principles and rules are very similar to prima facie standard except for two differences:
    - **(1)** Air of reality used for a single issue (prima facie used for *entire case*); and
    - **(2)** Air of reality used when we put an evidentiary burden on the defence (prima facie imposed on the *Crown*)
- As with the prima facie standard, there is **no weighing of credibility or reliability,** <u>except</u> in the case of an inference associated with circumstantial evidence
    - Also going to <u>assume the evidence is true</u> and witnesses are reliable

- Air of reality test used to determine whether a defence is put into issue, asks "whether there is evidence on the record upon which a properly instructed jury, acting reasonably, could acquit"

Burdens of Proof

- Refers to the party who must prove an issue in dispute according to the applicable standard of proof
- If you fail to meet the standard, you will lose out on that issue
- Tactical burdens:
    - Not a burden or rule of law
    - A matter of common sense that on some issues, even if you do not have the burden of proof, need to present some evidence to avoid having the court find against you

Presumptions of Proof

[1] Presumptions of Law vs Presumptions of Fact

- **Presumption of law =** ALWAYS presume x, unless the contrary is proven according to a specific standard
    - It tells us that we have to presume a certain fact or conclusion unless the other side shows *some evidence* to prove to the contrary according to some specified standard
        - E.g. presumption of innocence
            - Most people who are tried for an offence are in fact guilty, but we have them the presumption of innocence until their guilt is proved
        - E.g. presumption that jurors will abide by their oaths (showing they are not biased)
        - E.g. presumption that judges know the law (when there is a claim the judge made a legal error)

- **Presumption of fact =** IF party proves x, then presume y unless the contrary is shown according to a specified standard
    - A presumption of fact says that IF the party proves a basic fact, then we have a certain presumed fact, unless contrary
        - Initial burden on the party to prove x, then if they are successful, we automatically presume y unless contradicted by the other party according to a specified standard
    - Y, the presumed fact, is typically an element of the offence
        - It provides a shortcut and eases the burden of proof (usually for the Crown) for efficiency or policy reasons
        - If the Crown can prove the basic fact x it will be deemed to automatically have proven y, unless the defendant can adduce evidence to the contrary
    - Does not automatically arise as a matter of law – arises only after a party has proved a fact required by the relevant rule
        - Exist where a CL or statutory rules provides
    - E.g. **sec 252(2) of the *CC:***
        - If the Crown proves the accused left the scene of a motor vehicle accident without leaving his name and offering assistance, it is presumed that he has left to the purpose of avoiding civil or criminal liability
        - Unless there is evidence to the contrary that rebuts the inference that this is why the accused left the scene, this presumption will stand

- **What is deemed evidence to the contrary?**
    - Depends on the type of presumption, which refer to the different standards of proof that would fall upon the party against whom the presumption operates:
        - Mandatory presumption; or
        - Reverse onus

[2] Mandatory Presumption vs Reverse Onus

- **Mandatory presumption =** if the evidence to the contrary casts a reasonable doubt on the presumed fact, the presumption falls aside
    - Can be rebutted more easily – all you have to do it show *some evidence* to the contrary (meet an evidentiary burden)
        - Can be thought of as requiring the party against whom the presumption operates to show an air of reality or raise a reasonable doubt
    - Do not have to prove anything because it is an evidentiary burden – just some evidence
        - Shifts the burden back to the original party (Crown) to prove the issue BARD

- Language to look for: “in the absence of evidence to the contrary”

- **Reverse Onus =** puts a true burden of proof or persuasion on the party that faces the presumption
  - Provisions that impose a legal burden on a party
  - Happens in a criminal trial when you reverse the burden of proof that normally falls on the Crown to the accused, who has to prove the issue on a balance of probabilities
    - Whenever defence/accused has to prove something, it will be on balance of probabilities
  - Language to look for: “unless he or she establish/proves/satisfies that…”
    - “If he establishes”, “where he proves”, “the proof of which lies upon him” or “he satisfies”

- Both mandatory presumptions and reverse onus provisions have been found to violate the presumption of innocence of s 11(d) of the Charter
  - May be infringed in any case where the defence is required to **prove an element of the defence** (e.g. entrapment?)
  - May be saved under justifications under s 1 (reasonable limitations)
  - Easier to save a mandatory presumption because the onus one the accused is only to raise a reasonable doubt, whereas reverse onus requires proving on balance of probabilities